

ARTICLE

Special Section: ‘The German Federal Constitutional Court’s PSPP Judgment’

The German Constitutional Court’s PSPP Judgment: Impediment and Impetus for the Democratization of Europe

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Abstract

The article explores the understandings of democracy underlying the judgment and its implications for the democratization of Europe. I read the judgement, critically, as impediment and, constructively, as impetus for the democratization of money and society. Firstly, I recount how the Federal Constitutional Court (FCC) through the construction of a “right to democracy” and the concepts of “ultra vires act” and “integration responsibility” asserted its jurisdiction over the limits of European integration. The court’s reasoning prompts me to understand the judgment not as a defense of democracy, but rather as an instance of upholding a “rule of law” that impedes the democratization of society. Secondly, I turn to the pronouncements on the demarcation of monetary from economic competences by the Court of Justice of the European Union (CJEU) and the FCC. I explain what I hold to be the weaknesses in the FCC’s critique of the CJEU from a doctrinal perspective. I then propose to read the PSPP judgment constructively as introducing a procedural requirement that may democratize monetary policy. Thirdly, I situate my reading of the judgment in the larger debate on the democratization of society and, more specifically, money.

Keywords: democratization; European Monetary Union; European Central Bank; complementary currency; Federal Constitutional Court of Germany

On May 5, 2020, the Federal Constitutional Court of Germany (FCC) issued its judgment in the proceedings on the European Central Bank’s (ECB) Public Sector Purchase Programme (PSPP).¹ For the first time, the FCC in this judgment rules that EU institutions—the Court of Justice of the European Union (CJEU) and the ECB—had exceeded their powers and that the resulting *ultra vires* acts were not binding in Germany. The judgment only addresses the ECB’s PSPP, a quantitative easing program under which the ECB and national central banks purchase government bonds to bring up inflation rates in the euro area. The FCC finds this program to be outside the competence of the ECB, yet holds that the program’s *ultra vires* character can be remedied if the ECB conducts a proportionality review and substantiates that the bond purchases do not have disproportionate economic effects. It orders the federal government and parliament to “take steps seeking to ensure that the European Central Bank conducts a proportionality assessment in

¹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 5, 2020, Case No. 2 BvR 859/15, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html [hereinafter PSPP].

relation to the PSPP.”² The judgment does not rule on the Pandemic Emergency Purchase Programme (PEPP) that the ECB announced on March 18, 2020 to address the effects of the COVID-19 pandemic. Nonetheless, it calls into question also the legality of this program and makes further constitutional complaints against the PEPP more likely.³

The judgment triggered a flood of commentary, critique, and institutional proposals. A large part of the criticism is directed against the FCC’s posture towards the CJEU, its disregard for the primacy of EU law, and the threat this may pose for European unity. Commentators do *not* expect that the judgment will result in a significant change of monetary policy. Presumably, the ECB will compile a set of existing documents—including Governing Council minutes and analyses—to document that it adequately weighed the economic effects of its asset purchases, send it via the Bundesbank to the federal government and parliament, and thus satisfy the court’s demand for a proportionality analysis. What I am concerned with in this comment are the understandings of democracy underlying the judgment and its implications for democratization. The ruling comes at a time when inequality in Europe makes itself most acutely felt, when solidarity, albeit constantly invoked, is not a given. When the FCC at this moment tells the highest court of the European Union that its reasoning is incomprehensible and orders the German government to work on the ECB so that it will duly take into account its policies’ effects on German savings accounts, it is hard to understand this as a defense of democracy. On the contrary, the judgment may be perceived as obstructing a further democratization of Europe. Nonetheless, I see scope for a constructive reading of the court’s reasoning as an impetus for the democratization of money.

Firstly, I recount how the FCC through the construction of a “right to democracy” and the concepts of “ultra vires act” and “integration responsibility” asserted its jurisdiction over the limits of European integration. The court’s reasoning prompts me to ask whether the judgment is better understood as an instance of upholding a “rule of law” that only has tenuous grounding in the written constitution rather than as a defense of democracy (A). Secondly, I turn to the CJEU’s and FCC’s pronouncements on the demarcation of monetary from economic competences. I explain what I hold to be the weaknesses in the FCC’s critique of the CJEU from a doctrinal perspective. Returning to my main concern, I then propose to read the FCC’s judgment constructively as introducing a procedural requirement that may serve to democratize monetary policy (B). Thirdly, I end by situating my reading of the judgment in the larger debate on the democratization of society and, more specifically, money (C).

A. The Right to Democracy and the Limits of European Democratization

In its *PSPP* judgment, the FCC finds a violation of the individual constitutional right to democracy. In this section, I lay out how the FCC in its case law has constructed this individual right to democracy and, on this basis, has expanded its jurisdiction to control the limits of European integration. I use the term “constructed” purposefully here. I propose that with Helmut Ridder we can read *PSPP* as an instance of public law jurisprudence that potentially works to obstruct democratization in the name of a rule of law that has no or only very limited grounding in the written constitution.

German constitutional law allows individuals, who can substantiate that their individual rights under the constitution (Basic Law/GG) are violated by acts of state power, to bring constitutional complaints before the FCC. In a series of earlier judgments on European integration starting with its judgment on the Maastricht Treaty, the FCC has interpreted the Basic Law to contain an

²*PSPP*, at para. 232.

³For a more detailed account of the judgment and preliminary thoughts on its implications for the PEPP, see Isabel Feichtner, *In the Name of the People? The German Constitutional Court’s Judgment on the European Central Bank’s Public Sector Purchase Programme*, JUST MONEY (May 13, 2020), <https://justmoney.org/in-the-name-of-the-people-the-german-constitutional-courts-judgment-on-the-european-central-banks-public-sector-purchase-programme/>.

individual right to democracy that goes beyond the formal right to participate in elections.⁴ According to the FCC, this right is violated either when too much power is transferred to the European Union—thus hollowing out the powers of the German parliament (Bundestag)—or when EU institutions manifestly exceed their competences (act *ultra vires*). The FCC’s reasoning is as follows: The Basic Law, when it sets out in its Art. 38 that each person has the right to participate in general, direct, free, equal, and secret elections of the members of the German Bundestag, also protects “the basic democratic contents of the right to vote.” By demanding that all state power derives from the people,⁵ the Basic Law requires that “any act of public authority exercised in Germany can be traced back to its citizens.”⁶ At the same time, the Basic Law allows for European integration through a transfer of sovereign powers to the European Union and the FCC consistently stresses the Europe-friendliness of the German constitution. To ensure that such transfer of powers—and their exercise—can be traced back to German voters, it requires an “act of approval” by the democratically elected state organs.⁷ The law that ratifies the EU treaties constitutes this act of approval. When EU institutions act outside the powers transferred to them—when they act *ultra vires*—this link between the will of the citizens as expressed in the act of approval and the exercise of power by the EU is interrupted. The individual right to democracy is affected. According to the FCC, not *any* illegal act by EU institutions qualifies as an *ultra vires* act. Rather, the determination that EU institutions act *ultra vires*, and thus affect the material right to democracy, requires a “manifest and structurally significant exceeding of EU competences.”⁸

Transfer of powers to the EU, moreover, faces limits according to the FCC: “Indispensable elements of the constitutional principle of democracy”⁹ must be retained at the national level as required by the Basic Law’s so-called eternity clause.¹⁰ In order to protect a core of democracy in Germany, the EU may only be granted specific competences, not a general competence to determine its own competences (no *Kompetenz-Kompetenz*). Moreover, the FCC has found that the budgetary responsibility of the Bundestag belongs to the core democratic powers that may not be hollowed out by a transfer of powers to the EU. If a transfer of powers to the EU or the exercise of powers by EU organs detracts from this core and thus affects the “constitutional identity,” the FCC also holds the right to democracy to be violated.

The *PSPP* proceedings centered on the *ultra vires* doctrine—the question whether the ECB manifestly and in a structurally significant way exceeded its competences. As explained above, an *ultra vires* act, according to the FCC, affects the right to democracy. Yet, the finding of an *ultra vires* act alone would be insufficient for a constitutional complaint to be successful. European institutions are not bound by the Basic Law and constitutional complaints only provide redress for a violation of individual rights by German state institutions. The FCC takes this hurdle by reasoning that the constitutional organs, in particular the federal government and parliament, have an obligation to “continuously monitor the execution of the European integration agenda” (*Integrationsprogramm*) for violations by EU institutions.¹¹ They have a legal “responsibility with regard to European integration” (*Integrationsverantwortung*)¹² to take action when EU institutions act *ultra vires*. Their inaction may result in a violation of the individual right to democracy.

Thus, the court in its judgments on European integration incrementally has created for itself a way to control—in the name of popular sovereignty of the German people—the bounds of European

⁴Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 174.

⁵Grundgesetz [GG] [Basic Law], art. 20(2) [hereinafter GG].

⁶*PSPP*, at para. 99.

⁷GG, at art. 23(1).

⁸*PSPP*, at para. 105.

⁹*Id.*, at para. 104.

¹⁰GG, at art. 79(3).

¹¹*PSPP*, at para. 108.

¹²*Id.*

integration. It has made popular sovereignty in this realm actionable as an individual right. This construction enables the court to enforce the limits of integration even in situations when the German parliament itself agrees with a transfer of powers or the action by EU institutions.

In *PSPP*, as in *OMT*, the right to democracy is invoked against measures by the ECB—an institution which by design shall be removed from influence by democratically elected officials. The Basic Law in Art. 88 cl. 2 provides for the transfer of central bank powers to the European Central Bank, “which is independent and committed to the overriding goal of assuming price stability” and EU law includes various provisions to establish and safeguard the ECB’s “independence.”¹³ According to the FCC, the ECB’s independence shall enhance the responsibility for integration of the Bundestag and federal government.¹⁴ This finding of enhanced integration responsibility with respect to the ECB, which is supposed to be independent from democratic politics, requires a bit of further explanation. In *Maastricht*, the FCC clarified that the insulation of monetary policy from democratic politics does not violate the principle of democracy. It found that central bank independence was a derogation from the principle of democracy, but that this derogation was justified. Indeed, that it was required to safeguard democracy. The court has remained true to this finding in subsequent case law. Whenever addressing the justification of central bank independence, it employs this formula:

“[T]he transfer of monetary policy competences to an independent European Central Bank, and the resulting drops in influence (*Einflussknicke*) [of the popular sovereign via democratically elected officials (IF)], are still compatible with democratic principles on the grounds that it takes into account the proven and scientifically supported particularity of monetary policy, which is that an independent central bank is a better guarantor for monetary stability, and thus for the general economic foundation of the budgetary state policy, than organs whose activities are contingent upon monetary supply and monetary value, and which rely on the short-term approval of political actors.”¹⁵

This case law, read together with German public law scholarship on the monetary constitution, reveals a particular conception of money.¹⁶ Money is regarded as an institution that originates outside the state from the exchange of goods in society. A stable money/currency is viewed as essential for the exercise of individual freedom in society/the market as well as for the generation of public finance by the state, mainly through taxation. Stability of the currency is entrusted to an institution, the central bank, which, even though it is a public institution that exercises public authority, is removed from the control of the democratically elected government and parliament. Its insulation from democratic politics—its independence—is seen as crucial to ensure that currency stability does not fall prey to short term interests of officials preoccupied with reelection. The central bank, thus, is conceptualized as performing an essential service to democracy—safeguarding currency stability for the sake of individual freedom and public finance—which it can only do effectively if itself it is removed from democratic politics.

This view is called into question by a wealth of scholarship on money, which I address below. Yet, it explains how money can be seen at once as crucial to democracy and in need of protection from democracy. It also explains the FCC’s insistence on the restrictive interpretation of the ECB’s mandate, which the German government shall monitor to comply with its integration responsibility.

¹³GG, at art. 88, cl. 2.

¹⁴*PSPP*, at para. 108.

¹⁵Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 18, 2017, Case No. 2 BvR 859/15, para. 103, http://www.bverfg.de/e/rs20170718_2bvr085915.html.

¹⁶For a more elaborate exposition, see Isabel Feichtner, *Public Law’s Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become?*, 17 GERMAN L.J. 875 (2016).

From this perspective, the protection of the European “order of competences” and governmental and judicial control that the ECB does not exceed its competences become matters of democracy.

I now wish to change perspective. With German public law scholar Helmut Ridder, I raise the question whether the FCC’s case law on European integration is not a defense of democracy, but rather a manifestation of an antidemocratic German obsession with the rule of law. Helmut Ridder was a harsh critic of this obsession.¹⁷ Frequently, he pointed out how German legal scholarship and courts interpreted the written constitution in light of a rule of law (*Rechtsstaat*) above the written constitution and thus undermined efforts at democratization. Democratization for Ridder was a constitutional obligation that extended not only to the institutions of the state. He read the constitutional commitment to the social state¹⁸ as a mandate to democratize society as a whole, including the economy. In his view, legal scholarship and the courts regularly undermined the constitution’s progressive potential to dismantle power imbalances and democratize society.

One of his examples on how democracy is being obstructed in the name of “the rule of law” fits particularly well the context of the *PSPP* judgment. In his monograph “*Die soziale Ordnung des Grundgesetzes*” he describes how in 1924 justices in the Weimar Republic announced that they would not comply with a legislative act that prohibited the judicial reevaluation of mortgages to compensate for losses from inflation. The judges justified their announcement of disobedience on the basis of a higher moral law. This higher law that, in view of the justices, mandated reevaluation, obviously benefited creditors. The legislative act prohibiting reevaluation, by contrast, would have had the effect that debtors only owed the face value of their obligations, now lightened by depreciation of the currency. It is such judicial practice and supporting legal scholarship that prompted Helmut Ridder to formulate his critique that jurisprudence and scholarship in the name of a rule of law above the legal order continuously consolidated power structures and undermined the progressive, democratizing potential of the written constitution.¹⁹

With Ridder, the *PSPP* ruling can be read as yet another instance of constitutional law jurisprudence working against democratization despite its framing as a defense of democracy. First, reading an individual right to democracy into the constitution allows the court not only to sidestep parliament’s acceptance of EU actions, but also to order parliament to take action to comply with its “integration responsibility.” The court, thus, expands its powers of control over the elected government. Second, its expansive reading of the constitution—its construction of an individual right to democracy and governmental responsibility for integration—in this particular case allows it to declare a legal nullity a policy measure—the *PSPP*—that *inter alia* aims to address European imbalances to the benefit of structurally disadvantaged member states.²⁰ The judgment thus can be situated in a tradition of defenses of the rule of law that effect a consolidation rather than a dismantling of power imbalances. Third, the FCC’s conceptualization of democracy reflects what Ridder and others have criticized as the ideology of the separation of state and society.²¹ According to the court, the principle of democracy requires democratic legitimation of state institutions and their exercises of power. While it recognizes that the exercise of power by EU institutions must be democratically legitimated, it is skeptical of the possibility of genuine European democracy.²² Not only does it locate the main source of democratic legitimation of

¹⁷HELMUT RIDDER, *DIE SOZIALE ORDNUNG DES GRUNDGESETZES* (1975). For my view on the continuing relevance of Ridder’s scholarship, see Isabel Feichtner, *Riddern in der Pandemie. Zugleich ein verspäteter Beitrag zu Wiethölter’s 90. Geburtstag*, 53 KRITISCHE JUSTIZ 200 (2020).

¹⁸GG, at art. 20(1).

¹⁹RIDDER, *supra* note 17, at 42–43.

²⁰For an analysis of the European imbalances created, *inter alia*, by Germany’s trade surplus and the wage policy that supports this trade surplus, see HEINER FLASSBECK & COSTAS LAPAVITSAS, *AGAINST THE TROIKA. CRISIS AND AUSTERITY IN THE EUROZONE* ch. 3 (2015).

²¹See also RUDOLF WIETHÖLTER, *RECHTSWISSENSCHAFT* (1968).

²²Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, Case No. 2 BvE 2/08, http://www.bverfg.de/efes20090630_2bve000208en.html.

EU acts in the will of the peoples of the member states, it also places limits on a democratization of the EU through its reading of the Basic Law's "eternity clause." A core of democratic competences, according to the court, must remain with the German state, thus limiting the scope for further political integration within the EU. Most importantly, given the concerns motivating this comment, the FCC does *not* see democracy as a constitutional demand that extends beyond institutions of government to societal spheres such as the economy. That the FCC regards money as a societal institution and perceives the role of the ECB mainly as a guarantor of this societal institution further explains, why it does not subject monetary policy to democratization demands.

B. Safeguarding the European Order of Competences or Democratization of Monetary Policy?

Once the FCC has asserted its jurisdiction on the basis of the right to democracy, democracy recedes into the background. The *PSPP* judgment then is mainly concerned with the question whether the European order of competences is safeguarded. In the last part of this section, I suggest reading its reasoning on competences constructively as giving an impetus to the democratization of monetary policy—even though this reading appears to run counter to the FCC's own conception of money and monetary policy. Before I get there, I briefly outline the CJEU's reasoning on whether the ECB with the *PSPP* remained within its competences, to then turn to the FCC's critique. Much more could be said, for example on the CJEU's understanding of the scope and standard of judicial review, and I do not address at all the courts' treatment of the prohibition of monetary financing. I focus on the issue of competence and proportionality review, as it is here that I see democratization potential beyond rule of law/competence defense.

I. Did the ESCB Exceed Its Competence to Conduct Monetary Policy?—The View of the CJEU

With its order of July 18, 2017, the FCC had stayed the *PSPP* proceedings and referred several questions of EU Law to the CJEU for a preliminary ruling²³—not without expressing its serious doubts as to the compatibility of the *PSPP* with EU law.²⁴ Among them was the question whether the ECB acted within its powers to conduct monetary policy when adopting the decisions on the *PSPP*.

Under EU law, the European System of Central Banks (ESCB)—consisting of the ECB and the central banks of the Member States whose currency is the euro—has the exclusive power to conduct monetary policy.²⁵ In conducting monetary policy, the ESCB must pursue price stability as its primary objective. Without prejudice to this aim, the ESCB must also "support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union."²⁶ EU primary law does not define price stability. The ECB Governing Council specified this aim as an inflation rate below, but close to, 2% in the medium term.

In determining whether the ESCB, with the adoption and implementation of the *PSPP*, remains within its competence to conduct monetary policy, the CJEU looks to the program's objective—does it pursue price stability?—as well as to the instruments employed—are they included in the arsenal of monetary policy instruments set out in the ESCB and ECB's statute?—an approach the

²³Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

²⁴Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jul. 18, 2017, Case No. 2 BvR 859/15 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html. The CJEU answered with its *Weiss* judgment, see ECJ, Case C-493/17, Heinrich Weiss and Others, ECLI:EU:C:2018:1000 (Dec. 11, 2018), <http://curia.europa.eu/juris/liste.jsf?num=C-493/17> [hereinafter *Weiss*].

²⁵TFEU, at arts. 3(1)(c) & 127(2).

²⁶*Id.*, at art. 127(1).

CJEU developed in earlier judgments.²⁷ The CJEU finds that the ESCB with the PSPP pursues price stability, seeking to bring the inflation rate up. With the purchase of government bonds and bonds of international organizations, it uses the instrument of open market transactions explicitly provided for in Art. 18.1 ESCB/ECB Statute.

The CJEU clarifies, in a way that will alarm the FCC, that the mere fact that the program has foreseeable effects on commercial banks and the costs for Member States in financing their deficits, does not turn the PSPP into an economic policy measure not covered by the ESCB's competence. Economic and monetary policy are not absolutely separate, according to the CJEU. In order to achieve the desired inflationary effects, the ESCB has to adopt measures that "may entail an impact on the interest rates of government bonds, because, inter alia, those interest rates play a decisive role in the setting of the interest rates applicable to the various economic actors."²⁸

While the effects on Member States' refinancing costs, according to the CJEU, do not negate the monetary policy character of the PSPP, the CJEU recognizes proportionality as a limit to the ESCB's exercise of monetary policy. Art. 5(1) TEU postulates proportionality as a principle governing the use of Union competences and Art. 5(4) TEU clarifies that "[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." Art. 282(4) TFEU specifically addresses the European Central Bank who "shall adopt such measures as are necessary to carry out its tasks."

The CJEU consequently asks whether the measures in question are (1) suitable to promote their objective and (2) do not go beyond what is necessary. Regarding the standard of review, the CJEU notes that the ESCB must be allowed broad discretion regarding the choice of suitable and necessary action. The CJEU does not find any manifest error on the side of the ESCB in adopting the PSPP in order to promote investment activities and thus inflation in the euro area. It refers *inter alia* to the fact that, before the PSPP was adopted, inflation was at -0.2%. The CJEU further finds that the PSPP does not go beyond what is manifestly necessary to attain the ESCB's inflation target. Relevant here is the fact that, before adopting the PSPP, the ESCB had already implemented a program of private sector asset purchases that had not shown the desired effect in raising inflation. The CJEU agrees with the ECB that there was "no more limited action available to the ESCB" in order to attain its price stability objective. The CJEU then—still as part of its necessity review—looks at the PSPP's design and finds that it includes safeguards to limit its effects and circumscribe the risk of losses to the ESCB. These safeguards include eligibility requirements—from which exceptions can be and have been granted for Greece—to ensure that no high risk bonds are purchased, as well as purchase limits, compliance with both being monitored by the ECB.

II. Critique of the FCC

The FCC declares this reasoning by the CJEU on the ECB's competence to be "simply not comprehensible," "objectively arbitrary," "not tenable from a methodological perspective." In short, the FCC finds the CJEU to have acted *ultra vires* with the consequence that its ruling lacks the democratic legitimation of the act of approval and is not binding on the FCC.

According to the FCC, the CJEU did not properly apply the principle of proportionality. The CJEU failed to focus on what, for the FCC, is the third stage of proportionality review—appropriateness or proportionality in the strict sense. It requires that the CJEU "give[s] consideration to the economic and social policy effects of the PSPP"; that it ascertains that the ESCB takes into account "the effects that a programme for the purchase of government bonds has on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping

²⁷ECJ, Case C-370/12, Thomas Pringle v. Ireland, ECLI:EU:C:2012:756 (Nov. 27, 2012), <http://curia.europa.eu/juris/liste.jsf?num=C-370/12>; ECJ, Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag, ECLI:EU:C:2015:400 (June 16, 2015), <http://curia.europa.eu/juris/liste.jsf?num=C-62/14>.

²⁸Weiss, at para. 66.

afloat of economically unviable companies, and—in an overall assessment and appraisal—weigh[s] these effects against the monetary policy objective that the programme aims to achieve and is capable of achieving.”²⁹

The CJEU, in its proportionality review, had focused instead on the question of suitability and necessity. It did not weigh the benefits for price stability against general effects on the economy as the FCC would have wanted. Rather, when the CJEU agrees with the Advocate General that “the ESCB weighed up the various interests involved so as effectively to prevent disadvantages which are manifestly disproportionate to the PSPP’s objective,”³⁰ it seems to have been concerned with a weighing of the effects on price stability against the risk of loss for the ESCB and consequent fiscal losses for the Member States.

The FCC’s proposed proportionality review is doctrinally problematic.³¹ It is problematic not only for the reason that while, in German public law jurisprudence, “proportionality in the strict sense” or weighing and balancing is of particular importance, it does not enjoy the same standing in EU law. After all, neither the wording of Art. 5 TEU nor of Art. 282(4) TFEU speak of a balancing test beyond the examination of necessity. Further difficulties in applying proportionality review as proposed by the FCC in order to demarcate EU competences from Member State competences become clear in comparison with the realm of fundamental freedoms and individual rights. Here, proportionality review by CJEU and FCC is routine: A measure that restricts fundamental freedoms and individual rights must pursue a legitimate regulatory objective and the measure must be such that it can contribute to the attainment of this objective (suitability); no measure may be reasonably available that is as effective in attaining the objective, but less restrictive on the right or freedom in question (necessity); the restrictions on the right or freedom may not outweigh the benefits pursued by the measure (balancing test/proportionality in the FCC’s “strict sense”). In this constellation, we see clearly what is to be put into proportion with or weighed against what—the pursuit of the public policy objective against infringement of a freedom or right.

The constellation in the *PSPP* proceedings is different, however. Here, proportionality is to be employed to delimit the scope, according to the FCC, or the exercise, according to the CJEU, of a competence. When applying proportionality to demarcate competences, it is less clear how a least restrictive measure test is to be applied, and how balancing shall proceed, i.e.—in our case—what is to be weighed against the pursuit of price stability. The CJEU appears to have opted for “risk of loss to the ECB and national central banks” or—as the FCC interprets the CJEU’s necessity test—“the budgetary autonomy of Member States.”³² The FCC, by contrast, wants the monetary policy objective (price stability) to be balanced against the effects of the measure on the competences of Member States to conduct economic policy. It then appears to equate effects on Member State competences with effects on the economy, including real estate prices, interest on savings accounts, and viability of corporations. It thus implies that a damaging impact to a Member State’s economy detracts from the competence of the Member State to conduct economic policy. It is true that monetary policy has economic effects and that these economic effects may affect the scope of possible economic policy measures available to Member States—in international economic law we might say they affect the “right to regulate.” Yet, different from the constellations in international economic law, when the “right to regulate” is invoked, the FCC does not point to particular types of measures that Member States can no longer adopt due to the ESCB’s implementation of the *PSPP*. It is therefore difficult to comprehend—to say the least—how a proportionality test, that shall take into account potential impacts of monetary policy on unspecified policy options, might be operationalized in order to determine the scope of the ESCB’s competence.

²⁹*PSPP*, at para. 139.

³⁰Weiss, at para. 93.

³¹For an incisive critique, see Toni Marzal, *Is the BVerfG PSPP Decision “simply not comprehensible”?*, VERFASSUNGSBLOG (May 9, 2020), <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/>.

³²Weiss, at para. 133.

The FCC does not answer this question when it, having concluded that it is not bound by the CJEU's *ultra vires* finding of proportionality, goes ahead with its own assessment. The court does not engage in a weighing and balancing exercise itself—this according to the FCC is the ESCB's task. It simply makes “the point [. . .] that such effects, which are created or at least amplified by the PSPP, must not be completely ignored,”³³ and lists economic effects that the ESCB *should* take into account when conducting the required proportionality review. The FCC's list³⁴ includes: Improvement of Member States' refinancing conditions and of the economic situation of banks, risk of real estate and stock market bubbles, risks of losses for private savings and reduced income on pension schemes, increased real estate prices, allowing unviable economic companies to stay in the market, and finally “risk that the ESCB becomes dependent on Member State politics as it can no longer simply terminate and undo the programme without jeopardizing the stability of the monetary union.”³⁵

Many commentators have pointed out that the ECB is far from ignoring these effects, as demonstrated by the manifold publications available via the ECB's website. The FCC, however, holds a different view: “It is not ascertainable that any such balancing [of these effects against the expected positive contributions to achieving the ECB's monetary policy objective] was conducted, neither when the programme was first launched nor at any point during its implementation [. . .]. Neither the ECB's press releases nor other public statements by ECB officials hint at any such balancing having taken place.”³⁶

As explained above, proportionality, according to the FCC, is to protect Member States' competence to conduct economic policy. Yet, it remains obscure how, for example, improved refinancing conditions for Italy—a major worry for the FCC—detract from Germany's power to make economic policy and how such encroachment should be weighed exactly. Moreover, what may appear as a reduction of economic policy space for one Member State, may expand another Member State's policy options. The FCC's preoccupation with refinancing conditions for other Member States indicates that the main concern may be fiscal discipline rather than economic policy space. When the FCC singles out the improving of refinancing conditions for certain Member States and the consequent “risk . . . that necessary consolidation and reform measures will either not be implemented or discontinued,”³⁷ as effects that need to be included in the balancing exercise, its focus seems motivated by the worry that fiscal discipline is under threat. Fiscal discipline is imposed on Member States by various EU law instruments and has significantly reduced Member States' economic policy space. In this legal framework ensuring fiscal discipline, monetary policy instruments such as the PSPP constitute an expansion of fiscal policy space for Italy rather than a restriction of economic policy competences for Germany.

III. Reading PSPP as Impetus for the Democratization of Monetary Policy

I do *not* find the FCC's employment of a “weighing and balancing test” to demarcate monetary policy from economic policy, and thus to decide whether a particular instrument falls within the competence of the ESCB or not, convincing. Yet, I propose—provocatively—that the FCC, with its pronouncements on proportionality, has pointed towards a democratization of monetary policy.

The FCC may have aimed at putting the monster that monetary policy has become back into its box; at containing monetary policy instruments and their distributive effects. It may, thus, have sought to better align central bank activity with the conception of money as an institution that belongs to the realm of society, where it functions as a neutral means of exchange and enables the exercise of individual freedom. The FCC's concern with the far-reaching distributive effects of a monetary policy, conducted

³³PSPP, at para. 173.

³⁴PSPP, at paras. 170–175.

³⁵PSPP, at para. 175.

³⁶PSPP, at para. 176.

³⁷PSPP, at para. 170.

by an undemocratic institution, is justified. Monetary policy, however—like the design of money itself—has always had distributive effects. This was the case even in what claimants and FCC justices may remember as the golden age of the Bundesbank before monetary union. It is these distributive effects—inherent in money and monetary policy—that support the case for democratization.

An increasing wealth of scholarship engages in unpacking the “black box” as which money figures in many accounts; in understanding its institutional design and how it shapes and is shaped by political economy.³⁸ German conceptions of central bank independence which have significantly influenced the design of European monetary union are also being scrutinized. Here, I simply wish to point to two scholarly demystifications of the conception of money and monetary policy that informs FCC case law. Simon Mee, in a recent study, details how a “monetary mythology” of central bank independence was co-constructed by various actors including the Bundesbank and German media with reference to the two inflations of 1922-23 and 1936-45.³⁹ This mythology was so effective it resulted in what Mee calls “the ‘paradox’ of West German democracy: the popular belief, carefully crafted in the post-war era, that an independent central bank was a crucial pillar of a successful democratic state.”⁴⁰ A belief that was maintained even at times when governments, from right and left, wished to enhance political control over monetary policy. Twenty years ago, Jeremy Leaman had placed this paradox within the context of German liberalism and political economy. In his monograph “The Bundesbank Myth” he opens a chapter on “Autonomy and German Traditions of Liberalism” with this quote by ordoliberal economist Wilhelm Röpke: “Market democracy, in its silent precision surpasses the most perfect political democracy.”⁴¹ The market as the true locus of democracy and a stable money as the means to realize choice and individual freedom in the market. This is the conception underlying the FCC’s case law. Leaman not only draws attention to the suspicion with which German liberalism regards parliamentary democracy and socialization of the economy, but also to the distributive effects of monetary policy. To select only two examples: In relation to distributive effects *within* society, Leaman clarifies how, in the 1970s, deflationary monetary policies not only impacted larger companies less than medium-sized and small enterprises, which did not in the same way have access to foreign credit, but also affected wage settlements to the detriment of labor and the benefit of capital.⁴² Leaman further stresses how monetarism and monetary institutions like the Bundesbank contributed to debt crises and poverty in the Third World. He notes *inter alia* how from 1987 on the Bundesbank no longer included central bank discount rates of ten non-European developing countries, which he holds to be “symptomatic of the doctrinaire blindness of an institution which asserts the primary domestic focus of its monetary policy instruments.”⁴³

At the time when Leaman formulated his critique of central bank independence, based on the political nature and significant distributive effects of monetary policy, quantitative easing had not become the widely used monetary policy instrument that it is now. Today, quantitative easing makes the distributive effects of monetary policy even more apparent. The implications of quantitative easing for societal inequality, the concentration of capital, financialization, and the reduction of greenhouse gas emissions, to name just a few, are being widely discussed. Moreover, the ECB regularly calls on governments to adopt economic policy measures in order to ensure the

³⁸For a particularly instructive work of legal scholarship, see CHRISTINE DESAN, *COIN, CURRENCY, AND THE COMING OF CAPITALISM* (2014).

³⁹SIMON MEE, *CENTRAL BANK INDEPENDENCE AND THE LEGACY OF THE GERMAN PAST* (2019).

⁴⁰*Id.*, at 25.

⁴¹JEREMY LEAMAN, *THE BUNDESBANK MYTH. TOWARDS A CRITIQUE OF CENTRAL BANK INDEPENDENCE* 49 (2001) (quoting WILHELM RÖPKE, *THE SOCIAL CRISIS OF OUR TIME* 103 (1942)).

⁴²*Id.*, at ch. 5.

⁴³*Id.*, at 180.

effectiveness of its measures as well as to mitigate their potentially harmful side effects, for example on financial stability or the income of institutional investors such as pension funds. The ECB, thus, itself draws attention to the potential of monetary policy to trigger a far-reaching reordering of political economy.

In brief: Money and monetary policy have significant distributive effects and are therefore always political. Central banks may be insulated from parliamentary politics, but that makes them and their policies neither a-political nor independent. There is no way to demarcate “technocratic” monetary policy, to be conducted by an independent ECB, from “political” economic policy, to be left to Member State governments. In this context, democratization of monetary politics appears as a way to address distributional concerns and to limit distributive effects that increase power imbalances and inequalities.

The *PSPP* judgment may be read as proposing a step in this direction. As indicated, the FCC demands that the objectives of monetary policy be weighed and balanced against its economic effects. While proportionality review, generally, is understood to be a matter of judicial review with higher or lower levels of scrutiny, the FCC sees the ESCB under an obligation to assess, weigh, and document the distributive effects of monetary policy instruments and their implementation. The FCC thus formulates a procedural requirement for the ESCB’s conduct of monetary policy. Holding proportionality review to constitute a procedural obligation of the ESCB, has allowed the court to leave unanswered the question whether the *PSPP* is or is not proportional—and consequently whether the *PSPP* is to be qualified as a monetary policy measure or not. Conceptualizing proportionality as a procedural requirement allows me, in turn, to read it as a step towards the democratization of monetary policy.

The FCC asks that the ESCB consider, weigh, and balance a wide range of economic and social effects when adopting and implementing monetary policy and that it document this process in a way that is accessible to the public. Admittedly, the effects that the FCC primarily wants to see taken into consideration, reflect a preoccupation with fiscal discipline. Yet, taking the FCC by its word would support the claim that the ESCB should take into account *all* significant distributive effects, including effects on (gender) inequality, labor, biodiversity conservation, and climate change mitigation efforts.

It may be argued that existing legal reporting obligations and consultation rights already require assessment and allow for a questioning of the economic effects of monetary policy. Yet, I do see added value in a more formalized and concentrated evaluation of the distributive effects of each monetary policy instrument that I—provocatively—read the *PSPP* judgment to require. It would not only facilitate external scrutiny, for example, by parliament. More importantly, it may—contrary to an *ex post* rationalization in a report—affect the way monetary policy is conducted and consequently change the content of monetary policy. Taking it seriously would require addressing the question of relevant expertise and public communication. The obligation to assess, weigh, and document distributive effects calls for a diversification of perspectives and consequently a diversification of central bank staff in the making of monetary policy. Engagement with the European public(s) would be required not only to communicate results, but also to better understand the effects of monetary policies.

Thus interpreted, the *PSPP* judgment expresses concerns and demands that have received growing attention since the financial and euro-crisis, and renewed significance with increasingly frequent and severe climate events and the socially disparate impacts of the COVID-19 pandemic. In 2010, then ECB president Claude Trichet already had called for “input from various theoretical perspectives and from a range of empirical approaches” and formulated the view that an “open debate and a diversity of views must be cultivated—admittedly not always an easy task in an institution such as the ECB.”⁴⁴ Increased interaction between central bank policy-makers and the

⁴⁴Jean-Claude Trichet, *Reflections on the Nature of Monetary Policy Non-Standard Measures and Finance Theory*, EUROPEAN CENTRAL BANK (Nov. 18 2020), <https://www.ecb.europa.eu/press/key/date/2010/html/sp101118.en.html>.

public is what Annelise Riles proposes to forge “financial citizenship” and bring about more legitimate monetary policy.⁴⁵

C. The Democratization of Society and Money

With my constructive reading, I seek to situate the *PSPP* judgment in the larger debate on the democratization of society. Democratization of society was central to the works of German critical legal scholars such as Helmut Ridder in the 1960s and 1970s. Today, the democratization of society once more is being debated widely. This spring, for example, Isabelle Ferreras, Dominique Méda, and Julie Battilana wrote and distributed the manifesto “Work: Democratize, Decommodify, Remediate” which to date has been signed by several thousand researchers across the globe. It calls for the democratization and decommmodification of work with the aim to address inequality and ultimately to “preserve our life together on this planet.”⁴⁶

Democratization here—in the manifesto but also in this article—is understood as establishing the conditions for social relations that are based on solidarity and not on commodification and exploitation. The need to find ways for human beings and other species to cohabitate on a “damaged planet”⁴⁷ gives contemporary scholarship on democratization a new urgency. Increasingly, it is informed also by a realization of our deep entanglements with other “critters”—to use Donna Haraway’s expression.⁴⁸ As far as legal scholarship is concerned, in particular, more and more research clarifies implications of law in a political economy built on exploitation, and thus discredits many proposals for quick regulatory “fixes.”

Given this urgency and insights into the implications of law in our current condition of increasing inequality and existential threat, it might seem highly naïve even to consider the changes to monetary policy set out in the previous section as a step towards democratization. It may seem less so when placed in the context of scholarly and political endeavors that aim at a more fundamental rethinking and redesign of money and monetary institutions, in order to transform value production and social relations. Such endeavors include, *inter alia*, conceptualizing money as a public infrastructure and redesigning money creation, banking, and payment systems accordingly,⁴⁹ as well as the creation of parallel and complementary currencies to foster equality and access to money for socially productive projects.⁵⁰

To conclude, I wish to indicate how the redesign of money relates to the proceduralization and diversification of monetary policy, proposed in this article, and how—together—they may further the democratization of society. I do so by reference to the institutional experiment of the Sardinian complementary currency Sardex. The Sardex is a complementary currency that was created in the course of the 2008 financial crisis by five Sardinians. More specifically, it is a mutual credit system,

⁴⁵ANNELISE RILES, FINANCIAL CITIZENSHIP (2018).

⁴⁶Isabelle Ferreras, Dominique Méda & Julie Battilana, *Work: Democratize, Decommodify, Remediate*, DEMOCRATIZINGWORK.ORG, <https://democratizingwork.org/>.

⁴⁷ANNA LOWENHAUPT TSING, THE MUSHROOM AT THE END OF THE WORLD: ON THE POSSIBILITY OF LIFE IN CAPITAL RUINS (2015).

⁴⁸DONNA HARAWAY, STAYING WITH THE TROUBLE: MAKING KIN IN THE CHTHULUCENE (2016).

⁴⁹See Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1142 (2017); Morgan Ricks, *Money as Infrastructure*, COLUMBIA BUS. L. REV. 757 (2018); Robert Hockett, *The Democratic Digital Dollar. A “Treasury Direct” Option*, JUST MONEY (March 25, 2020), <https://justmoney.org/r-hockett-the-democratic-digital-dollar-a-treasury-direct-option/>; Morgan Ricks, John Crawford, Lev Menand, *FedAccounts: Digital Dollars*, GEO. WASH. L. REV. (forthcoming 2020); STEPHANIE KELTON, MODERN MONETARY THEORY AND HOW TO BUILD A BETTER ECONOMY (2020).

⁵⁰*European New Deal*, DiEM25, <https://diem25.org/wp-content/uploads/2017/03/European-New-Deal-Complete-Policy-Paper.pdf>; Christian Gelleri, *The Phenomenon of Complementary Currencies*, JUST MONEY (June 2020), <https://justmoney.org/the-phenomenon-of-complementary-currencies/>.

modelled on the Swiss WIR already founded in 1934, and aimed at providing local small and medium-sized enterprises with credit. Businesses pay a subscription fee to participate and commit to accept payments for their goods and services up to a certain amount in Sardex credits. In exchange, they can buy goods and services from other participating businesses and “pay” using the Sardex credits. The Sardex is a pure credit money; its unit of account is the euro. No euro reserves must be held by the Sardex organization (originally a limited liability company, today a joint stock company), as Sardex credits cannot be exchanged for euros and the organization—unlike the WIR—does not operate as a bank. Its main function is to match supply and demand of the participating businesses that are willing to exchange their goods and services for Sardex credits. While, originally, participation was limited to businesses, over time employees and consumers were included into the system. Participating businesses can pay part of their employees’ salaries in Sardex. This has allowed small enterprises to keep employees they otherwise would have had to lay off for lack of liquidity. Consumers can obtain Sardex credits by making purchases in euro from participating businesses. The latter, in turn, offer Sardex credits which can be spent at any of the participating businesses. This is, broadly sketched, the Sardex’ current institutional design.⁵¹ Even though the Sardex is run by an organization based on private law, this institutional design may be understood as strengthening the public infrastructure dimension of money. It ensures access of local businesses to credit—the Sardex complementary currency—who might not be able to access credit if subjected to a profitability assessment by commercial banks.

The COVID-19 pandemic and the hardship it has caused for the Sardinian population and their businesses may result in a further development of the Sardex through, what we may call with Roberto Unger, institutional experimentation.⁵² The regional government and municipalities in Sardinia currently consider to supplement financial aid to Sardinians—businesses and residents—with Sardex credits. Businesses, for example in the tourism industry, could spend these credits to replenish their stocks from local suppliers. Individuals could spend theirs, *inter alia*, to pay for a vacation in the region. To make this scheme work and for the Sardex organization to agree to extend Sardex credits to the public administration to supplement its financial aid and fiscal stimulus package, one condition in particular must be met: Holders of Sardex credits must be allowed, at a later stage, to use their Sardex credits to make tax payments. Ability to use Sardex credits to discharge future tax obligations would greatly enhance businesses’ willingness to accept payments in Sardex credits. This scheme, if implemented, might not only aid economic recovery, prevent job losses, and alleviate poverty. It might also counteract capital concentration, as Sardex credits can only be spent to pay local businesses, and promote sustainability, through local sourcing and consumption. As indicated above, this is not a singular experiment, but one of many institutional proposals worldwide to use complementary currencies, parallel currencies, or central bank digital currencies to distribute access to money more equitably and to steer it to where it is employed to create—in Marxian terminology—use value.⁵³

How do these institutional experiments relate to what I read as the *PSPP* judgment’s impetus to democratize monetary policy? Remember, I read the judgment, provocatively, as demanding the ECB to introduce different perspectives into monetary policy-making, to diversify what counts as monetary expertise, and to engage the public in the assessment of distributive effects of monetary policy. In the multiperspectival dialogue, I propose, the ECB would explore experiments like the

⁵¹For more detail, see Laura Sartori & Paolo Dini, *From Complementary Currency to Institution. A Micro-macro Study of the Sardex Mutual Credit System*, STATO E MERCATO 273 (2016).

⁵²ROBERTO UNGER, FALSE NECESSITY. ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY (2004); my description of the Sardex’ institutional experiment is based on Giuseppe Littera’s account during the webinar “Complementary Currencies Sardex and WIR during the COVID-19 Pandemic” on July 3, 2020 (recording on file with the author).

⁵³*Supra* note 49; see also Katharina Pistor, *The Case for Free Money (a real Libra)*, JUST MONEY (March 20, 2020), <https://justmoney.org/k-pistor-the-case-for-free-money-a-real-libra/>.

Sardex experiment. Consequently, it might decide to support such private public partnerships and to enhance their effectiveness. It might do so because these experiments work towards the ECB's aim of price stability through increasing liquidity, while at the same time counteracting many of the socially undesirable effects of indiscriminate quantitative easing, such as growing inequality and support for ecologically unsustainable industries. The resulting cooperative relationships between central banks and complementary currency experiments would have the potential of opening up space and opportunities, not only for government politics, but for ever more institutional experiments to democratize society.