UNIVERSITÀ DEGLI STUDI DI MILANO

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Centro di ricerca Interdisciplinare sul Diritto delle Amministrazioni Pubbliche

Dipartimento Diritto pubblico italiano e sovranazionale
Prof. Diana-Urania Galetta LL.M. (Osnabrück)
Full Professor of Administrative Law and EU Administrative Law - Director of CERIDAP: https://ceridap.eu

URI-AFCO: Hearing of July 14th, 2020 on the Consequences of the Judgment of German Constitutional Court

Prof.ssa Diana-Urania GALETTA, University of Milan

The judgment of 5th May 2020 of the *zweiter Senat* of the *Bundesverfassungsgerich* is more than questionable from a legal point of view.

1) First of all, according to Art. 5 TUE the principle of proportionality concerns "*the content and form of Union action*" and, as such, has nothing to do with the question whether the actions falls or not within the limits of the EU competences. Therefore, an act could not be 'ultra vires' for violation of the principle of proportionality.

2) Secondly, even if the principle of proportionality did apply here (which is not the case), it would still certainly not be in the form of the German model of judicial review of the principle of proportionality.

General principles of EU Law, such as the principle of proportionality, are autonomous with respect to those of the National legal systems. Only the CJEU can define their content and how to use them in its judicial review. No national judge whatsoever can claim to 'know better', by making reference to its national model of judicial review (of proportionality).

3) Checking whether or not there was a lack of reasons-giving in the acts adopted by the ECB is certainly an (exclusive) task of the Court of Justice, pursuant to art. 263 TFEU. Therefore, the claim of the judges of the *zweiter Senat* to replace the CJEU in assessing the lack of motivation of the acts of the ECB is totally contrary to the Treaties.

4) The *zweiter Senat* concludes that, without a convincing reasons-giving by the ECB regarding the compliance of its decisions with the principle of proportionality, these decisions are not applicable in the territory of the Federal Republic of Germany (only). This is a violation of the principle of uniformity of application of EU law. Unless, in fact, there is an explicit derogation, secondary EU law acts apply in all Member States and must be applied everywhere in the same way.

5) There is also a violation of art. 267 paragraph 3 TFEU: given the doubts that emerged during the judicial trial, the *Bundesverfassungsgericht* would have had to make a second preliminary reference to the Court of Justice, for the interpretation of the *Weiss* judgment of December 2018. Rather than trying to give its own interpretation of EU law and thus violating also art. 19 TFEU.

6) Last but not least, the *BVerfG* decision constitutes a violation of the principle of sincere cooperation, as laid down in art. 4 paragraph 3 TEU, also in relation to the last part of the provision which expressly refers to the duty to "*refrain from any measure which could jeopardise the attainment of the Union's objectives*".