Oswald, Tim:

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Bachelorarbeit, Wintersemester 2023

Sozialwissenschaftliche Fakultät

Ludwig-Maximilians-Universität München

https://doi.org/10.5282/ubm/epub.94489

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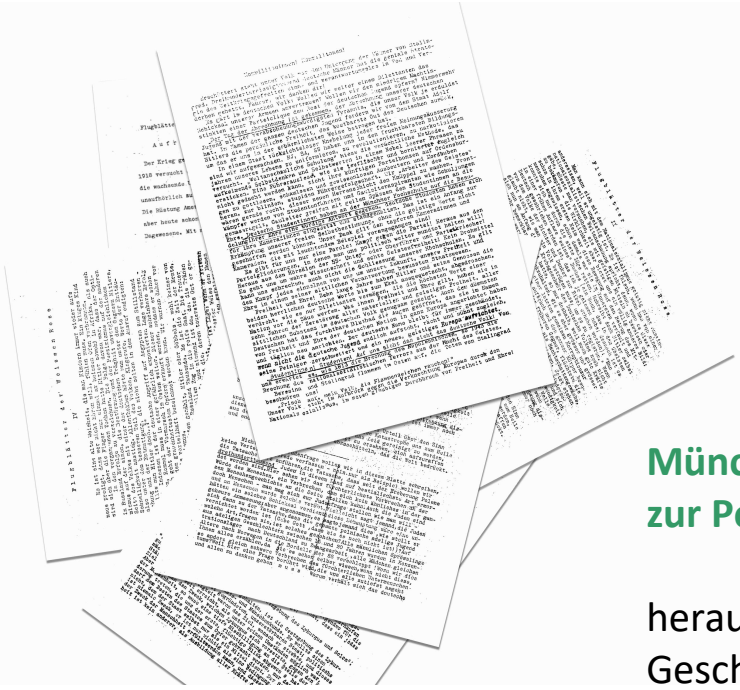

Münchener Beiträge zur Politikwissenschaft

herausgegeben vom
Geschwister-Scholl-Institut
für Politikwissenschaft

2023

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Bachelorarbeit bei
Dr. Michael Neureiter
2023

Abstract

Throughout the decades the cooperation between national courts and the European Court of Justice (ECJ) through the preliminary reference procedure according to Art. 267 TFEU has developed into a powerful tool for an ever-deepening European integration. Yet, while references to the ECJ by national courts have consistently increased over time, most constitutional courts as guardians of the national legal orders are still wary of an increasingly powerful ECJ. To limit its powers and assert their own positions the national constitutional courts have developed tools such as the "ultra-vires" review, which allow them to declare ECJ-rulings non-binding. However, there are only four instances where an ECJ ruling has been declared "ultra-vires" and national courts have challenged the ECJs position as *court of last resort*. The most prominent in recent history is the *PSPP* judgement of the Federal German Constitutional Court (GFCC) in May 2020. This study employs a process-tracing approach to enhance our understanding of the causal mechanisms which lead to the GFCC's judgement. I find that the judge-rapporteur, as "master of the proceedings" (Kranenpohl 2015, 432) held considerable influence in decision-making-process and was able to shape the judgement according to his EU-critical policy and legal preferences, which were shared by various other justices at the GFCC. At the same time, I find that these justices had a very close relationship to judges at the ECJ and the formal and informal dialogue eventually contributed to the legal fallout between the two courts by creating incompatible expectations about its outcome. Lastly, I find that the causal mechanism developed for the *PSPP* judgement may help explain the recent Danish *Ajos* (2016) judgement, while another recent "ultra-vires" judgement in the Czech Republic (2012) shows its own particular dynamics that invite further research to deepen our understanding of national court's motivations to declare ECJ rulings "ultra-vires".

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1. Introduction: Challenging the European Court of Justice

Ironically enough, it was a case on the *lender of last resort*, the European Central Bank (ECB), which provided the basis for a fiery dispute on who shall hold the powerful role of the *court of last resort* in the EU's multi-level legal system. Is it the European Court of Justice (ECJ), as held in *stare decisis* by the court itself[1] or the member states' highest courts, as held by some of them? May 5, 2020 may mark a historically significant day, not only for this battle between courts but also for the European Union as a whole. On that day, the German Federal Constitutional Court (GFCC)[2] ruled that the European Court of Justice's (ECJ) judgment on the PSP-program of the European Central Bank violated the authority granted to the court by the European treaties and thus constituted an "ultra-vires" act. Why – one might ask – is this singular ruling of such great importance to the European Union? The GFCC's ruling challenges the most fundamental element of the EU's legal order – the supremacy of EU law, which the ECJ has developed progressively over time.[3] Additionally, it undermines the ECJ's standing in relation to the national courts of member states and jeopardizes its place in the legal hierarchy as the final interpreter of EU law – or in other words: the *court of last resort*. On the policy level, the consequences of what may be seen as a singular outlier, should not be downplayed. Immediately after Karslruhe's[4] judgment, academics have warned and worried about the encouraging sign this decision may sent to the governments in Poland or Hungary, who like to apply EU law at their whim (Mayer 2020b, 732). Only a couple of days after, the Polish Prime Minister Morawiecki congratulated Karlsruhe on its decision and called it "one of the most important judgments in the history of the European Union".[5] Underlining the special policy importance this question of encouragement by Karlsruhe holds is the fact that the then-President of the GFCC Andreas Voßkuhle deemed it necessary to defend the court against any such allegations in an article which is fittingly called "*Applaus von der falschen Seite*".[6]

Surprisingly, all this is happening against the backdrop of a multi-level legal system that usually seems to work quite effectively and fosters and encourages cooperation between national courts and the ECJ. The most important tool for this is the preliminary reference procedure according to Art. 267 TFEU[7], which allows national courts to submit questions pertaining to a specific

[1] ECJ, Judgment of 14 December 2000, *Fazenda Pública*, C-446/98, par. 49.
[2] Judgements of the GFCC will be cited with the German abbreviation [BVerfG] as it continues to be the most widely used one for citations, including in English literature on the GFCC.
[3] Most importantly in the ECJ cases *van Gend en Loos,* C-26/62, *Costa*, C-6/64 and *Simmentahl*, C-106/77.
[4] Karlsruhe is the GFCC's seat.
[5] Schuller (2020).
[6] Voßkuhle (2021).
[7] Treaty on the Functioning of the European Union.

case to the ECJ in order to ensure a consistent and uniform interpretation and application of EU law. Yet hardly any preliminary reference procedures end with the national court declaring the ECJ's ruling "ultra-vires". Last year (2021) alone, 567 questions were referred to the ECJ by national courts.[8] On the other hand, the GFCC's ruling marks only the fourth „ultra-vires" decision in the history of the European court.[9] The first one was a ruling by the French *Conseil d'État* in 1978 and the two most recent instances stem from the Czech Constitutional Court 2012 and the Highest Danish Court in 2016.[10] The idea of „ultra-vires" acts has been mentioned and dogmatically developed by various other national courts in the EU, yet none of these other courts have drawn this sharp sword in the face of Luxembourg's[11] rulings.

This anomaly of „ultra-vires" decisions inevitably raises the question of how we can resolve the puzzle that, in a very small number of instances, national courts do not only step out of line vis-à-vis the ECJ but also directly cross swords with the court ruling its acts "ultra-vires", thereby challenging the supremacy of EU law and the position of the ECJ. This paper seeks to explain why the GFCC engaged in this by employing an explaining-outcome process-tracing method as developed by Beach and Pedersen (Beach 2016; Beach and Pedersen 2019) on its *PSPP* ruling. The goal of this study is to trace and explain the specific causal mechanism that can account for the „ultra-vires" decision in the *PSPP* case. So far, this particular development of „ultra-vires" rulings by national courts in the European multi-level legal system has hardly been explored by political science researchers, despite a noticeable increase in attention to courts as important actors in the European polity and shapers of Europeanisation (Alter 2001). Hence, this thesis will provide a valuable addition to the growing body of research on how courts behave in multi-level legal systems, exploring in detail the mechanisms present and at play in court decision-making with a particular focus on the contested relationship between the GFCC and ECJ.

To create a solid base to build on, I will briefly explain necessary background on the unit of analysis, the *PSPP* ruling of the GFCC, including what it is about, its historical context and the dogmatic figure of "ultra-vires". Then I will assess how relevant literature in both political science and law can help us explain the case this paper pertains itself with. Using the insights gained from this, I will proceed to build a theoretical-model in form of a causal mechanism

[8] CJEU (2022).
[9] It is disputed, whether the *Conseil d'Etat's* judgment in *Cohn-Bendit* (1978) can be seen as an „ultra-vires" decision.
[10] Conseil d'État (1978); Constitutional Court of the Czech Republic (2012); Supreme Court of the Kingdom of Denmark (2016).
[11] Luxembourg is the ECJ's seat.

specific to the *PSPP* ruling, which will link a cause (X) through the steps of the mechanism (F) to the outcome of the „ultra-vires" decision (Y). I believe this causal mechanism to provide a minimally sufficient explanation for the outcome we have seen in the *PSPP* ruling, namely the „ultra-vires" decision. Afterwards, I will outline my process-tracing research design, which will then be used to test the validity of our model using a Bayesian logic approach. To answer the research question at hand, I have conducted 11 expert interviews with judges at the GFCC and ECJ, scientific assistants at the GFCC and the German parliament, members of the German *Bundestag* and a journalist focusing on constitutional law. Using the empirical material provided by these interviews, court documents, and publicly available sources such as newspapers and scientific journals, I will critically assess whether the devised theoretical model actually presents a minimally sufficient explanation for the GFCC's „ultra-vires" decision. Eventually, I will widen the geographical scope of this paper and turn our attention to other European countries and see if my findings can provide valuable insights into the "ultra-vires" cases beyond Germany.

2. Background: OMT, PSPP and explaining "ultra-vires"

To better understand what the GFCC's ruling is about, a brief look at its background and history is indispensable. Here three things will be of particular importance: the *OMT* case (1), the PSPP and the role of the ECB in it (2) and what constitutes an "ultra-vires" act (3).

The GFCC's ECB saga started with the *OMT* case. In the height of the Eurozone crisis in the summer of 2012, the then-President of the ECB, Mario Draghi, gave his famous "whatever it takes" speech in order to calm markets in the Eurozone (Hufeld 2021). Shortly after, in September 2012, the ECB passed the Outright Monetary Transactions (OMT) program, which allows the ECB to purchase an unlimited amount of short-term government bonds issued by Eurocountries to facilitate a unitary European monetary policy. So far, no purchases have been made under the OMT program (Hufeld 2021). The ECB's decisive action was not uncontroversial. Soon after its announcement, a group of (ultra-)conservative academics and politicians, among them the former vice-president of *Christlich-Soziale Union* (CSU), Peter Gauweiler, launched a constitutional complaint (*Verfassungsbeschwerde*) against the OMT program and the German federal government's omission to bring legal action against the OMT program according to Art. 263 TFEU.[12] At the heart of the proceeding was the question of whether the ECB had illegally overstepped its mandate for monetary policy and engaged in economic policy-making (which

[12] Budras (2016).

it is not allowed to do) with the OMT program. To answer this question the GFCC submitted its first reference to the ECJ according to Art. 267 TFEU. On May 16, 2015 the ECJ ruled in *Gauweiler*[13] that the OMT program did not exceed the ECB's competences according to Art. 119 TFEU, Art. 123 § 1 TFEU and Art. 127 §§ 1 and 2 TFEU (Hufeld 2021). While the GFCC seemed rather unhappy with this ruling, it accepted the ECJ's position "despite grave concerns."[14] Consequently, it saw no violation of German constitutional law.[15]

At the same time, however, the court fully developed the dogmatic figure of an "ultra-vires" act. The Latin "ultra-vires" literally translates to "beyond one's powers" and refers to any such acts of EU bodies that are not covered by the powers explicitly or implicitly conferred upon the European Union by its member states according to Art. 5 TEU[16] (principle of conferral of powers). A historical tradition of this dogmatic figure can be traced back until 1993, when the GFCC decided in the *Maastricht* case that it would reserve for itself the right to check any legal act by EU organs for their accordance with the powers conferred upon the EU (Mayer 2020b, 728). This instrument however, was not employed by the court, until it was "reanimated" (Mayer 2020b, 727) in the *Lissabon* case in 2010 and introduced as a special sub-case of the so-called "identity control" (*Identitätskontrolle*) in which the GFCC checks whether an act of an EU body violates the German constitutional identity, enshrined into Art. 79 GG[17] (Fischer 2021). The full development then became manifest in the *OMT* case. In the words of the court:

> "With this instrument the Federal Constitutional Court examines whether acts of institutions, bodies, offices, and agencies of the European Union exceed the European integration agenda in a sufficiently qualified way and therefore lack democratic legitimation in Germany (bb). This also serves to ensure the rule of law (cc.)."[18]

The threshold for the "ultra-vires" review is elevated, as the EU organs must "manifestly exceed their transferred powers"[19] which is the case when a competence for the European Union cannot be justified under any legal standpoint, applying common methodological standards. This requirement of a "manifest excess" of power serves to restrain the use of the "ultra-vires" review and allow for a "right to tolerance of error" for the ECJ.[20] The "ultra-vires"-control is not a

[13] ECJ, Judgment of 16 June 2015, *Gauweiler*, C-62/14.
[14] „trotz gewichtiger Bedenken" in the German original: BVerfG, Judgment of the Second Senate of 21 June 2016 (*OMT),* 2 BvR 2728/13.
[15] Ibid.
[16] Treaty on European Union.
[17] Grundgesetz = Basic Law of the Federal Republic of Germany
[18] BVerfG, Judgment of the Second Senate of 21 June 2016 (*OMT),* 2 BvR 2728/13, par. 143.
[19] Ibid. par. 148.
[20] BVerfG, Judgment of the Second Senate of 21 June 2016 (*OMT*), 2 BvR 2728/13, par. 149.

dogmatic figure unique to the GFCC. It has been – either explicitly or implicitly – been invoked by other European courts as well. Most notably by the French *Conseil d'État*, the Danish *Højesteret* and by the Czech Constitutional Court (Lang 2020, 495), which will be discussed at the end of this study.

In light of the macro-economic developments in the Eurozone following the "Euro crisis", the ECB passed the Public Sector Purchase Program (PSPP) on March 4, 2015, which provides the content for a case that will be studied in depth in this thesis. The PSPP allows both the national central banks as well as the ECB to purchase marketable assets of national, regional, and local public entities as well as debt instruments from selected international and multilateral organizations on the secondary market[21] (ECJ 2018b). The amount of purchases per country is determined by the ECB's relative capital key, which is influenced by a country's GDP and population according to Art. 28 and 29 Protocol on the statue of the European System of Central Banks and of the European Central Bank (ECSB).[22] According to the ECB, the PSPP allows the Eurosystem to fight the risk of deflation and to keep the annual inflation rate at around 2 % as mandated for the ECB, by stimulating the Eurozone economy through increased borrowing.[23] Following the PSPP's implementation, a group of politically engaged individuals, among them many that already filed the unsuccessful constitutional complaint against the OMT program, including the already-mentioned CSU-politician Peter Gauweiler, launched another constitutional complaint against the PSPP in Karlsruhe.[24] The GFCC referred the case to the ECJ, which again saw no violation of EU law. Karlsruhe disagreed. On May 5, 2020, Germany's guardians of the constitution sent shockwaves through Germany, Brussels, and the European capitals by ruling that ECJ's decision as well as the PSPP were both "ultra-vires" acts as the ECB council did not conduct a necessary "proportionality test" (*Verhältnismäßigkeitsprüfung*) and the ECJ failed to criticize this. The reactions were stark. Franz Mayer, a well-known professor of EU law, interpreted the ruling as a "nuclear bomb". Peter Maier-Beck, then judge at the Federal Court of Justice (*Bundesgerichtshof*) called it an "attack on the European Union as constitutionalized community of democracies," and President of the EU-Commission Ursula von der Leyen threatened to commence an infringement procedure against Germany due to a violation of EU law.[25] While the right-wing Polish government cheered, the ECJ saw itself obligated to publish a press release, commenting on the GFCC's decision – which itself is already very

[21] As opposed to the primary market.
[22] Scheller (2006).
[23] ECJ (2018b).
[24] Budras and Siedenbiedel (2020).
[25] Hempel (2020).

surprising – and reiterated its long-held position that its judgments are binding for member states, as well as their courts.[26] Considering this and the surprising anomality this case presents in European multi-level court cooperation, the GFCC's decision in the *PSPP* case provides an excellent puzzle, that this thesis seeks to shed light on from a political science perspective.

3. Theorizing the relationship between ECJ and GFCC

This thesis employs a process-tracing method to uncover mechanisms that lead to the GFCC's „ultra-vires" ruling in the *PSPP* case. Process-tracing is "a distinct case-study methodology […] that involves tracing causal mechanisms that link causes (X) with their effects (i.e. outcomes) (Y)" (Beach 2016, 463). More precisely, I will employ what resembles best what Beach and Pedersen denominate deductive "explaining-outcome process-tracing" (Beach and Pedersen 2016, 18). Deductive explaining-outcome process-tracing focuses on explaining a particular interesting and puzzling outcome but uses most of the research design of theory-testing process-tracing (Beach and Pedersen 2016, 18–20). In theory-testing process-tracing both X and Y are known or – for explaining-outcome process-tracing – at least a strong connection between them can be assumed (Beach and Pedersen 2016, 14). Additionally, logical reasoning can be used to formulate a causal mechanism between X and Y from existing theorization (Beach and Pedersen 2016, 14). As a first step thus the causal condition X must be identified using existing literature before turning to formulate the causal mechanism, F, using both logical reasoning and existing literature.

3.1 Uncovering X

Researchers who study Europeanisation have long been interested in the relationship between national courts and the ECJ in the political system of the EU. It is commonly recognized that the involvement of national courts through the preliminary reference procedure plays a crucial role in the legal push for Europe and the possibility of the ECJ to enforce a coherent union-wide legal integration (Alter 1996; Davies 2012; Mattli and Slaughter 1998; Weiler 1994; Witte, Mayoral, and Jaremba 2016). On how the national courts would operate under the EU's legislative framework, there is, nevertheless, considerable dispute. The scholarly discourse can be divided into two main camps: On the one hand, the neo-functionalist supporters of the logic of *empowerment,* who believe that national courts will support further legal integration, as through the preliminary reference procedure, they are able to expand their powers (Burley and Mattli 1993; Mattli and Slaughter 1998; Weiler 1991; Weiler 1994). On the other hand, those

[26] ECJ (2020).

who believe in the logic of what Pollack calls "*sustained resistance*" (Pollack 2013, 1271). They disagree and expect national courts to resist further legal integration through the ECJ as they worry about domestic legal coherence and member state sovereignty (Dehousse 1998; Golub 1996; Wind, Martinsen, and Rotger 2009).

Karin Alter refines the *empowerment* argument and suggests that it is mainly lower courts who will make use of the preliminary reference procedure, as it allows them to gain power by delivering rulings that will have to be accepted by the highest domestic courts (Alter 2001). An empirical analysis carried out by Karin Leijon indeed shows that lower courts tend to express considerably more support for EU law in their references then the highest domestic courts (Leijon 2021, 520–21), which makes sense if we follow Alter's argument since this empowers them to overrule the highest domestic court(s). Alter's argument, however, has also been met with strong criticism. Arthur Dyevre et al. make the point that this does not imply that highest courts are shy to use the preliminary reference procedure anymore. Quite to the contrary, they were able to show an increasing participation of highest courts starting in the 2000's, which soon overtook the number of references by courts of first instance in some member states (Dyevre, Glavina, and Atanasova 2020, 925). Dyevre et al. see the reason for this in the greater focus on law-finding of highest courts that is paired with an increasing institutionalization of the preliminary reference procedure, which increases the pressure of highest courts to accept ECJ jurisprudence (Dyevre, Glavina, and Atanasova 2020, 927–28). This idea of an increasing institutionalization is supported by Tomasso Pavone and R. Daniel Kelemen, who show how the French and German Supreme Administrative Courts tried to regain control of the dialogue with the ECJ and dissuaded – together with the ECJ – lower courts from engaging in the preliminary reference procedure (Pavone and Kelemen 2019). For the ECJ, this has the benefit of increasing the attention and impact on national legal orders, while for the highest courts, it offers them the opportunity to reference strategically in order to use EU-law to shape the national legal order according to their preferred understanding (Pavone and Kelemen 2019, 372).

Neo-functionalists such as Alec Stone Sweet had initially believed that it is the level of integration of a state's economy into the EU which determines how much this state's courts will make use of the preliminary reference procedure (Stone Sweet and Brunell 1998). Wind, Martinsen and Rotger however, show that it is not the integration of a state's economy into the EU but rather whether the state is a majoritarian or constitutional democracy that influences its usage of the preliminary reference procedure and thereby supports EU legal integration (Wind, Martinsen, and Rotger 2009). Furthermore, Dyevre et al. and Pavone and Kelemen have shown that

other factors can explain why national courts increasingly make use of the preliminary reference, mainly its high level of institutionalization. As Germany is both a constitutional democracy and well-integrated into the EU economy, as well as an engaging partner for the ECJ, the expectation should be that the GFCC likes to make plenty use of the preliminary reference procedure. However, as with most other constitutional courts in the EU, the opposite is true (Dyevre, Glavina, and Atanasova 2020, 927). The *PSPP* case not only represented the second and last instance in which the GFCC used the preliminary reference procedure according to Article 267 TFEU (Lang 2020, 534), but it also resulted in a "ultra-vires" decision. Unfortunately, the jurisprudence of the GFCC vis-à-vis the ECJ has received little attention from political scientists so far, yet it has been debated widely in legal literature. In this discourse, two main positions can be made out: On the one hand, the position that is best represented by Christian van Ooyen, who traces a history of EU-skepticism, especially in regard to the power of the ECJ to take decisions of last resort (*Letztentscheidungsbefugnis*) in the GFCC jurisprudence, most notably in the *Solange I, II, EU-Haftbefehl* and *Maastricht* cases decided by the court (van Ooyen 2015, 129–46). He would probably put the GFCC firmly into the box of *sustained resistance*. On the other hand, there is the more nuanced position, perhaps best represented by the Professor of European Union Law Ulrich Haltern, who agrees with van Ooyen that Karlsruhe is in disagreement with Luxembourg on who ought to take decisions of last resort. Yet, comparing this to the positions taken by other national constitutional or highest courts, this comes as little surprise to him. He also makes it a point to stress that Karlsruhe, while disagreeing with ECJ's justices on the question of *Letztentscheidungsbefugnis*, always held European integration and a universal application of EU law by the ECJ to be essential, important and something worth supporting (Haltern 2021). No matter what nuance turns out to be true, it is evident given how little Karlsruhe has made use of Art. 267 TFEU, it much rather follows the logic of *sustained resistance* than the *logic of empowerment*, which in large part may be due to the fact, that Germany's highest courts, it primarily seeks to protect national law[27] and is threatened by the ECJ as a second court that possesses the power to *de-facto* invalidate national laws.[28]

As explained, the first-ever GFCC's reference to the ECJ was made in the *OMT* case. In its reference, the GFCC explicitly tried to nudge the ECJ in its direction (Lang 2020, 534). The ECJ, however, only partly complied. While the standards the ECJ set for the ECB in order to please the GFCC were borderline unacceptable from Luxembourg's perspective, for Karlsruhe,

[27] For a general overview of this argument, refer back to Leijon (2021).
[28] This is nothing the other highest courts such as the *Bundesgerichtshof* or *Bundesverwaltungsgericht,* must be afraid of, because they do not possess the power to invalidate laws. In constitutional court systems this power is solely vested in the constitutional court, which is placed outside the regular appeals stages (*Instanzenzug*).

it was only a first step in the right direction (Lang 2021, 109). The court ultimately grudgingly concurred with the ECJ verdict despite "serious concerns".[29] Whilst the crisis was averted in the *OMT* case, the different positions were clarified. As Luxembourg then did not rule in the sense of Karlsruhe in the *PSPP* case, the following fall-out was predictable. The law professor and former judge at the GFCC Dieter Grimm sees the *PSPP* case in a long tradition of disappointments of the GFCC that are fueled by a lack of willingness in Luxembourg to take the GFCC's concerns for national sovereignty and national legal traditions seriously (Grimm 2021). This is crucial in light of the widespread perception that the ECJ is not an impartial arbiter between legitimate national and EU interests (Grimm 2015; Scharpf 2009). Haltern very clearly and successfully dissects these macro-trends and speaks of "real contradictions" between the GFCC and the ECJ. On one side of this spectacle are the national courts, who locate the ultimate source of legal authority in the national constitutions (Haltern 2021, 223). On the other is the ECJ, who believes the authority of EU law comes from its "special and original nature"[30] and developed a jurisprudence of hierarchy with itself on top (Haltern 2021, 227). Furthermore, which ties into Grimm's and Scharpf's argument, there is a serious – and probably well-founded – concern among national courts about competence creep legitimized through ECJ jurisprudence (Haltern 2021, 218–19). Yet, it doesn't stop at the

> "old question of ultimate authority in the European Union, but it goes deeper. Beyond authority and power lies the question of imagining communities and belonging to them. The legitimacy of authority and power depends on our imagination of political community and our loyalty to it." (Haltern 2021, 230)

That is where the ideas of "thick" and "thin" constitutionalism collide. One, represented by the national courts who interpret a constitution with feelings, "belonging, loyalty, and memory" (Haltern 2021, 236), and the other, the ECJ, representing a thin constitutionalism founded upon rationality and enlightenment (Haltern 2021, 235–36). Those two positions are pitted against each other in a way that forms a "real contradiction" which can hardly be resolved, but instead has to be allowed to move around until it can resolve itself (Haltern 2021, 238–39). While one may view Haltern's argument as overly philosophical and loaden with pathos, he makes an important point – which is echoed throughout literature as shown – that there exists a – potentially even merited and well-argued skepticism – towards the EU and its expansion and the feeling of not being heard by the ECJ in the GFCC. This is also (at least) partly present among

[29] „trotz gewichtiger Bedenken" in the German original: BVerfG, Judgment of the Second Senate of 21 June 2016 (*OMT*), 2 BvR 2728/13, par. 175.
[30] ECJ, Judgment of 15 July 1964, *Costa*, C-6/64.

other constitutional courts (Lang 2020, 527–29). Hence, I expect this very factor to be cause (X) for the GFCC's „ultra-vires" decision.

3.2 Theorizing the causal mechanism (F)

In line with the model developed by Beach and Pedersen the next step is to formulate theoretical expectations for the causal mechanisms that provide the function, F, which translates X into the outcome, Y. These mechanisms consist of entities (actors, organizations or structures) that engage in activities, thereby transmitting causal forces from cause to outcome, which we must define for each single step of the mechanism (Beach 2016, 465).

3.2.1 Relevant case, resourceful plaintiffs and permissive legal structure

Courts, especially constitutional courts, cannot act on their own behalf. They always need a case, which puts them in a passive position vis-à-vis the other constitutional powers (Schmidt 2016, 230). In the case of the GFCC, cases may reach the court in different ways, which are set out in Art. 93 GG. There are concrete and abstract review of statue(s) proceedings, referred to the court either by lower courts or brought to the GFCC by other constitutional institutions or the states (*Bundesländer*). In these cases, the plaintiffs or the referring court usually possess sufficient legal expertise to bring forward an admissible appeal. This however is far from trivial. The vast majority of proceedings before the court are constitutional complaints (*Verfassungsbeschwerden*) by individual citizens (Schlaich and Korioth 2021, par. 78). It is possible that they or their attorneys do not always have the necessary understanding of constitutional law to present a permissible case. Research on the U.S. Supreme Court has shown that the resources and standing of the attorneys in the legal community matter for the outcome of a case and that more renowned and academic attorneys are perceived as more trusted and competent by justices, which in turn positively influences their decisions (Johnson, Wahlbeck, and Spriggs 2006). The outcome of a ruling is not only influenced by the attorneys chosen but also by the way a petition to the court is framed, as the framing allows for pre-structuring of the debate occurring at court (Wedeking 2010). While this research focuses on the U.S. Supreme Court, it can be assumed that the general ideas of this research apply to the GFCC as well.

Put concretely to the case at hand, theoretically required is a legal order that allows the plaintiff direct legal remedies against actions taken by EU institutions in the national court system. In this legal order, I expect a *resourceful plaintiff*, meaning they have the necessary monetary resources available to hire well-educated attorneys, *to bring* a relevant and admissible case before the court as the first step in the causal mechanism. I also expect that this plaintiff has a

political motivation to limit EU integration and will frame its complaint to the court accordingly, which serves as the argumentative starting point for the court's deliberations, allowing the justices to eventually consider an „ultra-vires" decision.

3.2.2 The judge-rapporteur identifies the case as relevant for the limits of European integration and admits it for decision

Once the complaint has reached the court, it is sifted through by administrative staff and then – according to the content of the case – forwarded to a responsible judge-rapporteur (*Berichterstatter*) (Kranenpohl 2015, 432). Kranenpohl calls the judge-rapporteur the "master of the proceeding" (Kranenpohl 2015, 432), showing the great importance they hold for the further unfolding of the proceeding. He/she is also responsible for deciding whether the criteria set out in § 93a BVerfGG[31] are met, and the constitutional complaint can be admitted for decision. Legally, however, he is only allowed to make a recommendation to the senate, who can agree or disagree. In court practice this is procedure is not carried out, which leaves it up to the judge-rapporteur to make an informed decision on whether a case is admissible or not (Graßhof 2021, par. 22-23). Once the judge-rapporteur has decided to admit a case, he/she and his/her office are responsible for drafting a tentative verdict, thereby pre-structuring the debate among the other judges in the eight-people senate (Kranenpohl 2015, 432–33). The importance of the judge-rapporteur is also corroborated by judges at the GFCC (Lübbe-Wolff 2022, 402). This makes it obvious that the judge-rapporteur as an entity will play a key role in the causal mechanism. Research on the U.S. Supreme Court shows that justices are more likely to accept a case for decision when they believe that the outcome of the case will be better aligned with their policy preferences than the status quo (Black and Owens 2009, 1063). If the judge-rapporteur was staunchly pro-EU and happy about ECJ-jurisprudence as well as ECB-policies, it would be very likely that they would have not had accepted any case challenging the status quo for decision in the first place. In the present case I therefore expect the judge-rapporteur to have a personal policy preference to limit EU-integration as in order to reach an „ultra-vires" decision the *judge-rapporteur has to identify* the case as relevant for the limits of European integration and *admit* it for decision.

3.2.3 The court refers the case to the ECJ and engages in dialogue

In a multi-level, international legal order such as the EU, courts need to relate and define their position to each other. The most common perspective taken among international and

[31] Bundesverfassungsgerichtsgesetz = Law on the Federal Constitutional Court.

comparative legal scholars is that of judicial pluralism (Bogdandy 2008; Krisch 2012; Paulus 2007; Petersen 2016; Stone Sweet 2012). In judicial pluralism, the ultimate judicial authority is undefined, which leads to a hierarchical equilibrium with strategic interaction between the courts, reacting to and respecting the authority of the respective other court (Petersen 2020, 996–97). Such a strategic interaction depends on dialogue.

National courts generally have two ways to engage in dialogue with the ECJ. One way is to initiate a preliminary reference procedure according to Art. 267 TFEU which allows the national court to ask the ECJ a question about the interpretation of EU law. This is the most structured way of engaging with the ECJ for a court as it is done through the primary language of courts: the law. Nevertheless, some highest courts of member states refuse to make use of this or just have not engaged in a dialogue through preliminary reference so far (Lang 2020, 531–33). While "[t]o not refer any cases to the ECJ is arguably still the most efficient way for a national court to avoid further legal integration" (Leijon 2021, 524), this seems unlikely. It is well established that judges act as strategic actors on the bench (Epstein and Jacobi 2010). As such, they take into account the preferences and likely actions of other relevant actors – in this case the ECJ (Epstein and Jacobi 2010, 342). Giving Luxembourg the chance to articulate their opinion first acknowledges their self-image as the ultimate legal authority in the EU. Furthermore, it vice versa provides the ECJ with the opportunity to preemptively adjust its judgments in the sense of the GFCC in order to avoid a potential „ultra-vires" decision in Karlsruhe. This has also been established in the GFCC's case law. In its famous *Honeywell*-ruling the Second Senate has held that it will not declare a European Union's legal act "ultra-vires" unless the ECJ had the chance to check the act for its compatibility with Union law.[32] Therefore I expect the GFCC to submit a reference according to Art. 267 TFEU to the ECJ.

In this process, once again, a lot of power falls to the judge-rapporteur. He/she is the one who takes the original decision on whether to propose a referral to the ECJ or not and proposes the question that Luxembourg will be asked. Researchers on the U.S. Supreme Court argue that individual judges hold policy preferences that may motivate their decisions – also referred to as the attitudinal model claim (Bailey and Maltzman 2011, 4; Baum 1994, 754–760; Segal and Spaeth 1993; 2002). However, this position has not been left without criticism: According to the legal model claim, a judge's decision is influenced by legal doctrine and constraints such as *stare decisis*[33] or judicial restraint (Bailey and Maltzman 2011, 7; Kahn 1999; Smith 1988).

[32] BVerfG, Order of the Second Senate of 6 July 2010 (*Honeywell*), 2 BvR 2661/06.
[33] Literally "to stand by things decided", referring to case law/precedence.

According to empirical research on the U.S. Supreme Court, both matter to varying degrees, depending on the judge (Bailey and Maltzman 2011, 143). I, therefore, anticipate that the judge-rapporteur will exercise his power to *frame* the referral in accordance with their own legal and/or policy preferences, which we already assume to be critical of (further) EU integration. This powerful task allows the judge-rapporteur to pre-structure whether the following dialogue between the ECJ and GFCC will take a confrontative or cooperative turn (Nyikos 2006). Given the judge-rapporteur's assumed position, which is critical to the EU, a confrontative turn seems rather likely. This is further exacerbated by how little both GFCC and ECJ have engaged in the official dialogue according to Art. 267 TFEU, which makes misunderstandings more likely.

A second way for national courts to engage in dialogue with the ECJ is through personal contacts and exchanges, which allows for a more informal way of dialogue. This is what former judge at the GFCC Lübbe-Wolff calls "diplomatization of judicial decision-making" (Lübbe-Wolff 2019). While this diplomatic approach to dialogue should generally be welcomed, it comes with the danger of diluting conflicts in the often-friendly personal dialogue, which may then be solved with surprisingly hard words in the legal reality, which can in turn cause misunderstanding among the actors. In the theoretical model, I expect the GFCC *to engage* in both forms of dialogue, first to *submit* a reference according to Art. 267 TFEU, in which it *states* a clear preference for an interpretation of EU law, influenced by the judge-rapporteur, and second, to *seek dialogue* with the ECJ through personal contacts and meetings. This dialogue, however, I expect to lead to incompatible expectations about each other actions, as the ECJ is likely to perceive a reference by the GFCC as a chance to cooperate with the GFCC, whereas the GFCC will feel like it has expressed its favored and "only" legal standpoint sufficiently (see 3.1).

3.2.4 Unsuccessful dialogue

Eventually, the ECJ must reach a decision on the question the GFCC submitted to Luxembourg through Art. 267 TFEU. Broadly speaking, this decision can take two forms: Either the court agrees with the preferred interpretation of EU law by the referring court, hence not creating any reason for dissatisfaction, or the ECJ disagrees with the referring court's interpretation and rebukes them, thereby creating conflict and leading to an unsuccessful dialogue. Reasons for either can may be manyfold: Recalling Baily and Maltzman, it is understood that judges' decisions are informed by the law but also by policy preferences. Not only does the law (especially case law) differ on the EU level from the national level, but coming from wide variety of member states, judges may also have views on such contentious issues as central bank policy that

differ from those at the referring court. Giandomenico Majone makes the interesting observation that ECJ and ECB do not drastically differ as non-majoritarian institutions in constant need to fight for their legitimization in the governance system (Majone 2005, 38), which may provoke the ECJ to be more supportive of the ECB. Furthermore, the ECJ generally tends to interpret the EU's power broadly (Majone 2005, 67–71), which would yet be another reason for it to side with the ECB. Additionally, there is strong evidence that signaling effects by member states about their policy preferences have a considerable impact on ECJ rulings (Carruba 2015; Carruba, Gabel, and Hankla 2008; Larsson and Naurin 2016). This suggests that if there were strong signaling effects on part of important member states toward favoring a ruling that rebukes the GFCC's position, such an outcome would be likelier. Furthermore, research on judges as strategic actors, which has been developed in the context of the U.S. Supreme Court, argues that judges will not take into account the preferences of lower courts, but that of their colleagues and their judicial superiors (Epstein and Jacobi 2010). Officially, the ECJ considers the GFCC as below them in the legal hierarchy, yet, it is still very likely the justices at the ECJ take the presumed actions and preferences of important national courts into account. In a system marked by judicial pluralism, they are – just like constitutional courts are dependent on the willingness of the other branches of government to comply with their rulings (Vanberg 2015) – dependent on national court's goodwill towards them. In the present case however, I expect the ECJ to *disagree* with the GFCC and rebuke its arguments. This decision I do not only expect to be founded on the differing legal and policy preferences to be expected but also by a misjudgment of the likely actions of the GFCC, which is caused by the incompatible expectations created in the prior dialogue. Lastly, I expect this rebuke to be so clear that a further (informal) dialogue *does not yield* acceptable results for the GFCC.

3.2.5 Unfavorable political environment

Existing research on the use of the preliminary reference procedure by Danish courts shows that Danish courts are subjected to political pressure by the executive to refrain from references to the ECJ if it hurts Danish interests (Wind, Martinsen, and Rotger 2009, 75–76). As there is a tradition of judicial review in Germany, unlike in Denmark, the GFCC that carries out this review is, in general, much more confident vis-à-vis the government (Kneip 2013). Nevertheless, the "ultra-vires" decision by the court ended up hurting the interests of the German government as the European Commission opened a foreseeable infringement proceeding against Germany (European Commission 2021). Whilst direct political influence by the German government seems unlikely, it still is legally allowed to submit its opinion in the proceedings at the ECJ as well as the GFCC. Hence, my expectation is that *German government made it clear* that

they *do not agree* with the legal interpretation of the GFCC, but the *court* was *unbothered* by this unfavorable political environment and potential legal consequences.

3.2.6 The judge-rapporteur proposes to declare the ruling "ultra-vires" and the Senate agrees

Next, it is up to the GFCC to weigh its options. If it rules the ECJ decision "ultra-vires", essentially crossing swords with Luxembourg, it risks a legal fallout. If it does not, it is forced to admit defeat (Petersen 2020, 1002–3). Here, considerable power once again falls to the judge-rapporteur who may act according to his or her own policy and/or legal preferences (see 3.2.2). Therefore, judge-rapporteur's suggestion of an „ultra-vires" ruling only makes sense if he himself is opposed to European integration and seeks to limit its scope. If supporting greater European integration were their preferred course of action, this would be the last opportunity to avoid confrontation with the ECJ. The judge-rapporteur's proposition alone is insufficient, though. Additionally, it is required that his or her proposition receives support from the majority of the judges in the senate. It is safe to presume that national court judges are fully aware of the possible repercussions an "ultra-vires" ruling of an ECJ judgment can have. Thus – taking a rational-choice-influenced perspective –, this ruling can only be reached if the judges concur that the benefits of sending a signal to the ECJ outweigh the cost of potential repercussions (Petersen 2020, 1002–3). It is also likely that – anticipating opposition from other branches of government (see 3.2.5) the court will engage in self-protection methods, such as drafting a vague opinion which gives the implementors an "easy way out" (Staton and Vanberg 2008). Accordingly, the expectation is that the *judge-rapporteur proposes* the „ultra-vires" ruling, and the *Senate agrees*, as in the understanding of the court, the benefits of the ruling outweigh the costs.

3.3 Y and theoretical model

Eventually, this causal mechanism will lead to the already known Y, the GFCC's "ultra-vires" decision of May 5, 2020, targeting the ECB and ECJ. Accordingly, our theorized causal mechanism is the following:

Causal condition (X)	Causal mechanism (F)						Outcome (Y)
	Relevant case	Identification and admittance	Referral and dialogue	Unsuccessful dialogue	Unfavorable political environment	"*ultra-vires*" proposal	
The GFCC feels not being heard with its concerns about EU-Integration by the ECJ. →	A resourceful plaintiff *brings* a relevant case to the GFCC since the legal order allows for it. →	The judge-rapporteur *identifies* the case as relevant for the limits of EU integration and *admits* it for decision. →	The Senate *refers* the case to the ECJ *stating* a clear preference for a limit of EU competences and *engages* in unsuccessful (informal) dialogue, which leads to incompatible expectations. The judge-rapporteur *holds considerable influence* in this process. →	The ECJ *does not accommodate* to the GFCC in its decision. →	The federal government *disagrees* with the GFCC's legal interpretation, but the GFCC is *unbothered* by an unfavorable political environment. →	The judge-rapporteur *proposes* to declare the ECJ ruling "ultra-vires" and the Senate *agrees*. →	"ultra-vires" decision of May 5, 2020

Figure 1: Theorized causal mechanism (by the author).

4. Research design

The goal of this study is to identify and test a causal mechanism helping to explain the GFCC "ultra-vires" decision in the *PSPP* case, which – given the great success of court dialogue through the preliminary reference procedure – seems rather puzzling. Legal scholars tend to take what Ulrich Haltern calls a "black-letter point of view" (Haltern 2021, 233). While for some, the law may be clear, black letter, so to speak, and the only conceivable explanation for such an outcome, researchers should be well aware this is not the whole picture. But even when reflecting on power dynamics and the politics of courts (see uncovering X), the specific mechanisms at work are often black-boxed. Process-tracing methodological approaches seek to raise the lid on these black boxes and uncover the mechanisms present, which are essential to producing a certain outcome (Beach and Pedersen 2016, 39–40; Capano et al. 2019, 17–19; Falleti and Lynch 2009, 1146).

For studying the *PSPP* case I will employ a deductive explaining-outcome process-tracing research design. This means, that to check the validity of the devised theorized causal mechanism, an operationalization is necessary that allows for an assessment of the theorized model using empirical evidence (Beach 2016, 471). In order to do this, inferences must be made, to be more precise, within-case inferences, where empirical evidence from one single case is used to assess whether the causal mechanism was present or not (Beach and Pedersen 2016, 69). In alignment with Beach's and Pedersen's argument, I will use a Bayesian updating approach, that allows to both increase and decrease our confidence in the validity of the theorized causal mechanism if a part of the causal mechanism is present or not (Beach and Pedersen 2016, 83–88). If, in interviews with lawmakers and judges, for example, both concur that there were attempts by the government to persuade the court to refrain from an "ultra-vires" verdict, this would increase the confidence in the part of the mechanism that there was political influence, but the court was able to fend it off and at the same time decrease our confidence in the possible alternative explanation that no such political influence was present. The same naturally is true vice-versa. Taking a Bayesian logic approach also means that unlikely observations will more strongly increase the confidence in the explanatory power of parts of the mechanism. To put it in the words of Beach and Pedersen: "Given its unlikelihood, a man-bites-dog story, if found, has stronger inferential weight than a more typical dog-bites-man story." (Beach and Pedersen 2016, 96–97). This directly follows from the (simplified) Bayesian theorem, which reads:

$$p(h|e) = \frac{p(e|h)\ x\ p\ (h)}{p(e)}$$

Here it is evident that a low probability of the evidence itself (low p(e)) will strongly increase the likelihood of the hypothesis being true given the evidence found (p(h|e)) as it is in the denominator of the equation (Beach and Pedersen 2016, 96). Nevertheless, given the constraints of social science research, those highly unique observations are usually not (easily) observable. This is why it is necessary to strike a balance between the certainty (disconformity power) and uniqueness (conformity power) of the observable manifestation on the one hand and the realistic feasibility of its measurement on the other hand (Beach and Pedersen 2016, 110). Beach and Pedersen (2016, 102–4), using a categorization refined by Bennett (2010, 210), who builds on categories formulated by Van Evera (1997, 31–32), distinguish four different types of tests, ranked from weakest to strongest, which can be used to confirm and/or disconfirm hypotheses:

1. *Straw-in-the-Wind*: Passing affirms the relevance of the hypothesis but does not confirm it. Failure does not eliminate it, but slightly weakens it. → Neither necessary, nor sufficient condition to affirm causal inference.
2. *Hoop*: Passing affirms the relevance of the hypothesis but does not confirm it. Failing eliminates the hypothesis. → Necessary but not sufficient to affirm causal inference.
3. *Smoking-gun*: Passing confirms the hypothesis. Failing does not eliminate it but somewhat weakens it. → Sufficient but not necessary to affirm causal inference.
4. *Doubly decisive*: Passing confirms the hypothesis and eliminates alternative hypotheses. Failure eliminates the hypothesis. → Necessary and sufficient to affirm causal inference.

They note that these tests represent ideal types, which operate on continuums, and must be used in a rather pragmatic fashion for explaining-outcome process-tracing (Beach and Pedersen 2016, 107), as in these analytical studies a mechanistic application of these tests may not be possible. Nevertheless, I attempt to reference which tests the theorized parts of the causal mechanism passed to allow for some assessment of the inferential value of the evidence gathered.

To test the theorized mechanism, a set of observable manifestations must be crafted, which allow to judge whether a certain element of the causal mechanism is present, which is also deemed predicted evidence (Beach and Pedersen 2016, 95). In the next step, these observable manifestations need to be matched with the potential types of evidence that can be used to measure the prediction (Beach and Pedersen 2016, 112). Generally, there are four types of potential evidence that can be used in a process-tracing study: Pattern (1), sequence (2), account (3), and trace (4) evidence (Beach and Pedersen 2016, 99). For the purpose of this study a focus on account and trace evidence is indicated, as both statistical patterns and spatial sequences will

help little to confirm or deny the existence of the respective steps of this specific causal mechanism, and the focus will be on the existence and content of the hypothesized activities. In the case of trace evidence, the mere existence of something proves that a part of the theorized causal mechanism exists (Beach and Pedersen 2016, 100). Account evidence on the other hand, deals with the content of empirical material (Beach and Pedersen 2016, 100). Both can help to assess whether the theorized parts of the causal mechanism exist or not, which then can be used to assess if an adequate explanation for the puzzling result has been crafted (Beach and Pedersen 2016, 19).

Applied to the theorized causal mechanism, I predict the following evidence:

Theorized part of the mechanism	**Predicted evidence**	**Type of evidence used to measure prediction**
The GFCC feels not being heard with its concerns about EU-Integration by the ECJ (X).	Expect to see prior expressed dissatisfaction of the GFCC with the ECJ in rulings, judges' scholarly articles, and extrajudicial statements.	Measured using account evidence based on interviews (judges, scientific assistants, experts), as well as primary and secondary sources (especially rulings and scholarly literature).
A resourceful plaintiff *brings* a relevant case to the GFCC since the legal order allows for it.	Expect to see a plaintiff with extensive financial and legal resources, and a clear motivation to limit EU integration. Expect to see a legal order that offers a legal remedy against actions taken by EU institutions.	Measured using trace evidence using primary and secondary sources (court documents and newspapers). Measured using trace evidence from scholarly articles/jurisprudence.
The judge-rapporteur *identifies* the case as relevant for the limits of EU integration and *admits* it for decision.	Expect to see a prior interest of the judge-rapporteur in limiting the scope of EU	Measured using account evidence coming from primary and secondary sources (statements by the judge-

	integration and them admitting the case for decision.	rapporteur, former scholarly articles, interviews with people familiar with the case).
The Senate *refers* the case to the ECJ *stating* a clear preference for a limit of EU competences and *engages* in unsuccessful (informal) dialogue, which leads to incompatible expectations. The judge-rapporteur *holds considerable influence* in this process.	Expect to see a referral to the ECJ with a clear positioning to limit European integration and informal contacts between the judges of the GFCC and the ECJ, where they discuss the case (or its legal questions). Expect the judge-rapporteur to influence the dialogue (referral and informal) in such a way that it reflects their policy/legal preferences of limiting EU integration.	Measured using account evidence of the referral and trace evidence of meetings, supported by account evidence on the content of these meetings. Measured using account evidence coming from primary and secondary sources (statements by the judge-rapporteur, former scholarly articles, interviews with people familiar with the case, the referral itself).
The ECJ *does not accommodate* to the GFCC.	Expect to see a ruling that does not accommodate to the concerns raised by the GFCC in its referral and informal dialogue.	Measured using account evidence from primary and secondary sources (legal documents, scholarly literature, interviews).
The federal government *disagrees* with the GFCC's legal interpretation, but the GFCC is *unbothered* by an unfavorable political environment.	Expect to see the government/lawmakers to express their disagreement with the legal interpretation of the GFCC. Expect to see the GFCC to be unbothered by this.	Measured using trace evidence of meetings between the court and government officials using primary and secondary sources (press statements, newspapers) and – if there were any meetings (spatially before the ruling

		was announced) – account evidence of participants.
The judge-rapporteur *proposes* to declare the ECJ ruling "ultra-vires" and the Senate *agrees*.	Expect to see a strong advocation by the judge-rapporteur to stand up to the ECJ and declare its ruling "ultra-vires". Expect to see no or little opposition in the Senate despite careful deliberation. Expect to see a vague judgment to protect the court.	Measured using account evidence from primary and secondary sources (public statements by the judge-rapporteur, interviews with people familiar with the case) – much of this evidence may be similar to the part on "dialogue".
„ultra-vires" decision of May 5, 2020 (Y)	/	/

Table 1: Predicted evidence (by the author, modelled after Beach and Pedersen 2016, 112–13)

Having operationalized the theorized parts of the mechanism and the type of evidence used to make inferences, special attention should be given to some parts of the research design. First, availability of and access to information. The consultations of the GFCC are secret according to § 30 (1) BVerfGG, leading to a black box regarding the positions of different judges and the arguments exchanged that did not make it into the final decision. Expert interviews might help to raise the lid on this black box by a little, while it is expected they may only do this to a certain point. One potential way to shed some light on the inner working of the court are the scientific assistants (*Wissenschaftlicher Mitarbeiter)*, who are assumed to have considerable influence on and insights into the workings of the court (Zuck 2015). Each member of the court employs three hand-selected scientific assistants who are especially important for assisting the judge-rapporteur in drafting the tentative verdicts and formulating their legal opinion on matters of the court (Graßhof 2021, par. 11-13).

For this empirical study, I have conducted 11 semi-structured expert interviews with 12 people familiar with the *PSPP* case between September and October 2022. The following people were interviewed:

- 4 scientific assistants (*Wissenschaftliche Mitarbeiter*) at the GFCC (WM1, WM2, WM3, WM4)
- 1 judge at the GFCC (JU)

- 1 journalist with a focus on constitutional law (JO)
- 1 Member of Parliament (*Mitglied des Bundestags*) for the CDU (*Christlich-Demokratische Union Deutschlands*)/CSU parliamentary group (MP1)
- 1 Member of Parliament (*Mitglied des Bundestags*) for the SPD (*Sozialdemokratische Partei Deutschlands*) parliamentary group (MP2)
- 2 scientific assistants (*Wissenschaftliche Mitarbeiter*) at the SPD parliamentary group tasked with matters of constitutional law (PG)
- 1 judge at the ECJ (EJU)
- 1 legal officer at the ECJ (ECJ)

In the appendix, further information on the interviews (including the individual questionnaires) is provided. All of the interviewees spoke under the condition of anonymity. These interviews will be additionally supplemented by publicly available resources, such as court rulings, press releases, newspaper articles, and scholarly articles. This wide variety of sources does not only have practical reasons – as courts tend to be hard to access and untransparent organizations – but serves to *triangulate* the evidence gathered. *Triangulation* refers to the collection of evidence from different sources of the same type or across different types of sources in order to increase the reliability of the tests that will be carried out in the next chapter to judge whether the theorized parts of the mechanism are present or not (Beach and Pedersen 2016, 128).

5. Testing the mechanism

5.1 Causal condition: dissatisfaction and deaf ears

The GFCC *feels* not being heard with its concerns about EU-Integration by the ECJ.

Existing literature assumes a strong causal relationship between the GFCC's dissatisfaction with the ECJ as it does not feel heard by Luxemburg with its concerns regarding EU integration and the „ultra-vires" decision in the *PSPP* case. This assumption is widely undisputed. It is furthermore supported by my interview partners who agree with the assessment that this decision has been long in the making.[34] According to one of the judges at the court, they checked the number of times the ECJ had ruled not in favor of an EU competence, and they claimed this number does not even amount of a handful.[35] This to them, was a clear sign that the ECJ is heavily biased towards the EU and its institutions and does not take the concerns of member

[34] JU, JO, WM1-4.
[35] JU.

states adequately into account.[36] Furthermore, they agree with relevant literature that this sentiment is not only present among the GFCC but also many, if not all, other national constitutional and/or highest courts. Furthermore, various people I spoke to saw this dissatisfaction in light of a power struggle: on the one hand, the ECJ, which gains with every further inch of an ever-closer Union, and on the other hand, national courts for which only the left-overs remain and which are not even heard when it comes to their concerns.[37] All this shows, that this causal relationship assumed by existing literature is also perceived by the relevant actors, which increases our already strong confidence that this causal condition is actually present and further strongly weakens alternative explanations. Hence this hypothesized causal relationship has passed what nears a doubly decisive test.

5.2 Plaintiff and legal order

"A resourceful plaintiff *brings* a relevant case to the GFCC since the legal order allows for it."

Strategic litigation is a common phenomenon which employs the means of the law to create broad-scale societal change (Kaleck 2019). One thing required for strategic litigation are sufficient funds. Proceedings at the GFCC require the plaintiff to be represented – at least in the oral hearing – by legal counsel as set out by § 22 (1) BVerfGG. Since constitutional law is a highly complex area of law, not every attorney is sufficiently qualified to represent their client in front of the GFCC. Given the fact that most experts of constitutional law will be found in academia, § 22 (1) BVerfGG explicitly allows professors to represent plaintiffs before the court. While client fees of course remain secret, it is very likely professors will charge high hourly rates, considering their expertise. Something not every plaintiff can afford. The *PSPP* case was no different. The list of plaintiffs reads itself like a "who's who" of the German business and political elite. Most prominently features Peter Gauweiler, a practicing attorney holding a Ph.D. in law and former MP as well as Vice-President of the CSU,[38] who has a long history of bringing cases against European integration. Equally as well-known is his co-plaintiff Bernd Lucke, Professor of Economics and former Member of the European Parliament (MEP) as well as original founder of the *Alternative für Deutschland* (AfD) and eventually *Liberal-Konservative-Reformer* (LKR), whose goal it is to be bring down the Euro as a common currency.[39] Heinrich Weiss, who lent his name to the case before the ECJ, is a wealthy businessman with strong political connections being a long-time member of the *Christlich Demokratische Union* (CDU)

[36] JU.
[37] JU, WM2.
[38] Gauweiler (2022).
[39] Lucke (2022).

and also early AfD-supporter.[40] Further co-plaintiffs include Jürgen Heraeus another German businessman, who also served on the board of the influential Federal Association of German Industry (*Bundesverband der deutschen Industrie*), Patrick Adenauer – a grandson of former German chancellor Adenauer and chief lobbyist for German family businesses –, former IBM-manager Hans-Olaf Hekel and the law professor Markus C. Kerber who publishes regularly in the right-wing news-outlet "*Achse des Guten*".[41] While this list is by no means exhaustive, we see a common pattern among the plaintiffs: (1) All of them are skeptical of European integration, especially monetary and fiscal integration and (2) all of them possess exhaustive monetary and political resources. It is especially the last point that probably allowed the plaintiffs to hire the well-known Professor Dietrich Murswiek, Chair emeritus for Constitutional and Administrative Law at the University of Freiburg, as their legal representative.[42]

In their legal argument, the plaintiffs put forward the argument that *PSPP* is an "ultra-vires" act and thus violates their right to democracy according to Art. 38 (1) GG.[43] That this law confers upon individual citizens a right to democracy, which they can use to find a legal remedy against acts of the European Union for through a constitutional complaint, is by no means trivial. This legal remedy against acts of the European Union has only been established by the GFCC in the 2009 *Lissabon* judgment, where it dealt with how further European integration affects the democracy principle of the German Constitution and concluded that,

> "because the Federal Republic of Germany may, pursuant to Article 23.1 first sentence of the Basic Law, only participate in a European Union which is committed to democratic principles, a legitimising connection must exist in particular between those entitled to vote and European public authority, *a connection to which the citizen has a claim according to the original constitutional concept (emphasis by the author)*, which continues to apply, set out in Article 38.1 first sentence of the Basic Law in conjunction with Article 20.1 and 20.2 of the Basic Law."[44]

This jurisprudence has consistently been further "subjectivized" and extended in its rulings on the *Europäische Bankenunion* (2019)[45] and the *Einheitliches Europäisches Patengericht* (2020)[46] (Trute 2021, par. 16-18). For the GFCC this Art. 38 GG jurisprudence mainly serves

[40] Jahn, Löhr, and Sturbeck (2014).
[41] Achse des Guten (2022).
[42] Rath (2020).
[43] BVerfG, Judgment of the Second Senate of 5 May 2020 (*PSPP*), 2 BVR 859/15, par. 31, 34, 55.
[44] BVerfG, Judgment of the Second Senate of 30 June 2009 (*Lissabon*), 2 BvE 2/08, par. 177.
[45] BVerfG, Judgment of the Second Senate of 30 July 2019 (*Europäische Bankenunion*), 2 BvR 1685/14.
[46] BVerfG, Order of the Second Senate of 13 February 2020 (*Europäisches Patentgericht*), 2 BvR 739/17.

to allow it to exercise judicial control over the processes of European integration (Trute 2021, par. 19), which is exactly what can be seen in the *PSPP* case.

As seen, there is strong evidence that confirms our belief in the presence of the first part of the theorized causal mechanism, which at the same time also eliminates alternatives hypotheses (doubly decisive). Gauweiler et al. represent a group of resourceful plaintiffs who brought a relevant case, directly arguing for an "ultra-vires"-act to the GFCC according to their own policy preferences. This all happened in a legal order which – thanks to the Art. 38 GG jurisprudence of the GFCC – allows for direct legal action of individual citizens against acts of the European Union they believe to be "ultra-vires".

5.3 Is there even something to talk about?

"The judge-rapporteur *identifies* the case as relevant for the limits of EU integration and admits it for decision"

As previously established, much power falls onto the judge-rapporteur, who is also the justice who *de facto* decides whether a case is admitted or not. As seen in the previous chapter, the plaintiff's case is admissible according to the jurisprudence the Second Senate has progressively developed over time in regard to Art. 38 GG. This jurisprudence, however, is not undisputed. In the prior *OMT* ruling, which further expended the Art. 38 GG jurisprudence and opened it up to "ultra-vires" acts, then-judge Lübbe-Wolff published a much-cited dissenting opinion, in which she claimed the court had overstepped its competences by treating constitutional complaints against the European Central Bank as admissible.[47] The same is true for Judge Gerhardt.[48] If he or she had been judge-rapporteur in the *PSPP* case, it would have been nearly certain to see them fight for inadmissibility of the cases. Yet, both were not judge-rapporteur. Given the admission for decision, I expect this to be done by a judge-rapporteur who has shown a prior interest in limiting the scope of European integration, in order to use the case to further their agenda. Who is the judge-rapporteur for a specific case is decided by the judges themselves and laid out each year in the *Geschäftsverteilungsplan* (distribution of competences). This mostly corresponds with the judge's personal interests. The *PSPP* case was assigned to Judge Peter M. Huber.[49] Judge Huber, before his time at the court, was not only Minister of the Interior for the CDU in Thuringia, but also a high-achieving academic. His prior interest in European

[47] BVerfG, Order of the Second Senate of 14 January 2014 (*OMT*), 2 BvR 2728/13, Dissenting Opinion of Justice Lübbe-Wolff on the Order of the Second Senate of 14 January 2014, par. 1-28.
[48] BVerfG, Order of the Second Senate of 14 January 2014 (*OMT*),2 BvR 2728/13, Dissenting Opinion of Justice Gerhardt on the Order of the Second Senate of 14 January 2014, par. 1-24.
[49] BVerfG (2018, 1).

integration can be seen by him also being judge-rapporteur in the *OMT* case,[50] where he clearly sought to limit the scope of European integration, and in his double position at the University of Munich, where he servers as both Chair for Public Law and Legal Philosophy and as head of the Research Center on European Integration. In his academic career Huber has published widely on matters of European integration.[51] Many of these publications are at least somewhat critical towards the European Union. In a very recent publication, Huber directly criticizes the ECJ for not taking member state's concerns into account as much as necessary and advocates for a stronger control over Luxembourg by national courts.[52] In 2012 the GFCC was tasked with deciding a constitutional complaint against the European Stability Mechanism (ESM) and the European Fiscal Compact brought to the court by the German *Verein* "*Mehr Demokratie e.V.*".[53] This lead to an unsuccessful motion to dismiss Huber from the case due to conflict of interest, as Huber has been a long-time, at-times even ranking, member of "*Mehr Demokratie e.V.*".[54] Hubers skepticism against technocratic institutions, especially those at the supra/super-national level, without – according to his belief – sufficient democratic legitimization is well-documented.[55] Just one year prior to the fateful May 5, 2020, Huber argued for more freedom of national institutions to develop their own interpretations of EU law in a lengthy article, which was published in the *Frankfurter Allgemeine Zeitung*.[56] All this provides plenty of evidence that judge-rapporteur Huber has shown a prior interest in limiting the scope of European integration, which has been deemed the predicted evidence. At the same time the evidence found strongly decreases the confidence in potential alternative hypotheses (~h), which could assume that Huber admitted the case to support EU integration or for any other reasons that are unrelated to the ECJ and EU-integration, meaning the theorized hypothesis has passed what nears a doubly decisive test.[57] We therefore can reasonably believe that he has identified the *PSPP* case as relevant for the limits of European integration and accordingly admitted it for decision, which then allowed the court to deliberate whether the ECB violated EU law or not.[58]

[50] BVerfG (2013, 2).
[51] His extensive list of publications provides a good point of reference: Huber (2022a).
[52] Huber (2022b).
[53] "Mehr Demokratie" literally translates to "more democracy"; Jahn (2012).
[54] Emphasized by JO; see also: Jahn (2012).
[55] Jahn (2013).
[56] Huber (2019).
[57] Technically, it may still be a smoking-gun test, as alternative explanations cannot be fully eliminated, yet the greater context that becomes apparent in the course of this study, especially judge-rapporteur Huber's statements, make any such alternative explanations extremely unlikely.
[58] The admittance for decision is documented in the judgment itself.

5.4 Dear Luxembourg, we need to talk

"The Senate *refers* the case to the ECJ *stating* a clear preference for a limit of EU competences and *engages* in unsuccessful (informal) dialogue, which leads to incompatible expectations.

The judge-rapporteur *holds considerable influence* in this process."

It has been established that courts in multi-level systems communicate with each other. One way to do so is the formal dialogue initiated by preliminary reference procedure according to Art. 267 TFEU. The theoretical model expects the Senate to refer as only this allows it to meet its own prerequisites for declaring an EU act "ultra-vires". The Second Senate indeed decided to refer on July 18, 2018.[59] Not only literature but also various people familiar with the court concurred that the questions themselves were already framed in such a way that they will be perceived as confrontative in Luxembourg. One legal journalist put it this way:

> "I understood the referral of the GFCC as a challenge to the ECJ. It had a very specific sub-tone, namely: 'If you are serious about the criteria you developed in *Gauweiler,* you will have to side with us and declare PSPP incompatible with EU law'"[60]

A similar sentiment was voiced by two scientific assistants and the judge.[61] They [the judge] argued that the way the referral was framed, or more broadly how the court should communicate with the ECJ, is debated within court and some judges advocate for a more diplomatic approach.[62] Yet, it was judge-rapporteurs Huber's line to communicate with the ECJ in clear terms, that eventually won over the Senate.[63] The prior expectation is that it is rather unlikely that we will find evidence of judges debating whether they should frame the referral in more diplomatic terms and the judge-rapporteur eventually winning the dispute with the confrontative position. Hence, the fact that people familiar with the court actually stated that this happened increases our confidence in the validity of the hypothesized influence of Huber.

While two of the scientific assistants I talked to took some issue with the term confrontative and preferred to put the focus on the fact that the interpretation the GFCC submitted to Luxemburg was simply the legal interpretation they believed to be correct, it was exactly this

[59] ECJ, Judgment of 11 December 2018, *Weiss,* C-493/17.
[60] JO, all direct quotes by interview partners have been translated from German into English by the author.
[61] JU, WM4, WM1.
[62] JU.
[63] Ibid.

confrontative position that was being perceived in the ECJ chambers. As one judge at the ECJ put it:

> "The questions submitted by the GFCC were not a real referral. Usually, national courts ask us how they should interpret EU law when they make a reference. Sometimes they tell us their preferred interpretation, but they still ask us a question. If you don't ask us a question, but just tell us your interpretation and essentially force us to side with you, there is no room for dialogue."[64]

As the formal dialogue was already heading down the route of judicial saber-rattling, with the GFCC making it clear they believed the ECB's actions to be unlawful, much attention should be given to the informal dialogue between the courts, which may provide a setting to develop solutions. Theoretically, I expect this informal dialogue to take place, but to lead to incompatible expectations, thus proving unsuccessful. That this dialogue took place can be assumed with certainty, as all my sources have confirmed.[65] Especially judge-rapporteur Huber, then-President of the GFCC Voßkuhle and the President of the ECJ Koen Lenaerts are said to have a close and friendly relationship that is marked by mutual academic respect.[66] President Lenaerts even spoke at Huber's 60th birthday in 2019.[67] It is also certain that they exchanged their positions on the legality of ECB programs in this informal dialogue, and that the ECJ – especially after *OMT* and *Gauweiler* – was aware of Karlsruhe's continuous concerns.[68] Yet, it seemed to not have yielded the desired results. In a FAZ-interview, judge-rapporteur Huber said the following, asked why the dialogue with the ECJ proved to be unsuccessful:

> "I would like to know this as well. All I can say is that the president of the ECJ [Koen Lenearts] called me after our reference to congratulate us. That is why I thought we could continue down a successful and constructive route. We do not always have to agree, and we would have followed the ECJ, if its judgment had been fairly consistent. That is why we were so surprised by the ECJ's judgment. It was at least possible to interpret it in a way that makes it clear that the ECJ is not interested in cooperation."[69]

Naturally, it is hard to decipher what eventually led to the dialogue creating such incompatible expectations, as it only involved a handful of people. But there are some contextual factors that

[64] EJU.
[65] JU, EJU, WM1-4, JO.
[66] Ibid.
[67] For reference see: Storr, Unger, and Wollenschläger (2021).
[68] JU, EJU.
[69] Müller (2020).

can help find an explanation. One is a fundamental misunderstanding in the moment judge-rapporteur Huber described, in which President Lenaerts calls to congratulate him on the reference. The ECJ had always been rather skeptical of the GFCC insistence to not refer cases to the ECJ compared to the other German highest courts.[70] Hence, of course, the ECJ was happy about the referral.[71] Yet, from the perspective of the ECJ a *real* referral also means the likely possibility of the ECJ not siding with the legal interpretation of the referring court.[72] For Huber however, it seems like this positive dialogue was perceived as a sign that the ECJ would eventually side with its interpretation of EU law. That expectation is further reinforced by the fact that the court saw its reference merely as a request to the ECJ to apply the criteria the ECJ had developed itself in the *Gauweiler* ruling.[73] Furthermore, a journalist familiar with both courts said the following about the GFCC's perspective on the informal dialogue:

> "In Karlsruhe, the impression was repeatedly confirmed that Luxemburg is not seriously interested in their arguments and is showing Karlsruhe a cold shoulder. Maybe it even escalated things more quickly that there was not only a reference but also many informal conversations where two incompatible legal opinions clashed with each other over the years. "[74]

This leads to two incompatible expectations: On the one hand the GFCC who – from their perspective – does not ask for much and interprets friendly signs by the ECJ as a signal that the ECJ will side with their position. On the other hand, the ECJ who interprets the reference as the readiness in Karlsruhe to accept whatever the ECJ decides on or in the worst case announces another "yes, but"-judgment.[75] This is further aggravated by both arguing from a position of maximum demands: The ECJ is obviously dedicated to the preservation of the EU, for which the common currency provides an important foundation.[76] The GFCC on the other hand, had apparently *discovered* (in the enlightened sense of the word) the illegality of the ECB's acts and after *OMT* was more than adamant about imposing limits on the central bank (or enforcing current ones).[77] This evidence found for one decreases our belief in alternative hypotheses, such as a successful dialogue due to mutual understanding. The prior probability of discovering

[70] EJU; Of course the Highest German Courts have an incentive to refer to the ECJ in order to circumvent the GFCC, see: Alter (2001).
[71] EJU.
[72] Ibid.
[73] JU, WM2.
[74] JO.
[75] EJU, ECJ, WM2. The term "yes, but"-judgment refers to the fact that in *OMT*/*Weiss* the GFCC sided with the ECJ but established some further requisites.
[76] EJU, ECJ.
[77] JU, WM1-4.

specific evidence on the manner of the dialogue is rather low, not only because such an extensive informal dialogue between the ECJ and a national court is rather unlikely considering the high number of cases the ECJ handles but also given how secretive courts tend to behave and how unlikely justices are to share insights into how they perceived informal contacts. Due its uniqueness the evidence found therefore also increases our confidence in the hypothesis that GFCC and ECJ engaged in dialogue, after a very clear referral, but this dialogue created incompatible expectations, which I expect to eventually lead to a further escalation of the conflict. This is a classic example of smoking-gun evidence, as it clearly confirms the hypothesis, not having found the evidence, however, would have not allowed for a full elimination of the hypothesis, as one must assume judges may not talk openly about their impressions of the dialogue.

5.5 I don't care what you say

The ECJ *does not accommodate* to the GFCC.

On December 11, 2018, the Grand Chamber[78] in Luxembourg decided that Decision (EU) 2015/774 of the European Central Bank did not violate EU treatises and therefore the ECB could continue the Public Sector Purchase Program.[79] Prior to the judgment, all the participating parties could submit written statements to the court and appear during an oral hearing on July 10, 2018. In this phase, the ECJ heard various opinions. Not only from the plaintiffs (see above) but also from the German Federal Reserve Bank, the German Federal Government, the Greek government, the French government, the Italian government, the Portuguese government, the Finnish government, the European Commission and the European Central Bank. In its judgment the ECJ rebutted any and all of the GFCC arguments and even refused to answer question No. 5, which dealt with a hypothetical communization of debt.[80] Having established that the ECJ decided the case against the GFCC and did not accommodate to its position, it makes sense to try to shed some light on the "why". I would like to offer a potential explanation compromising both institutional and case-specific factors: At the institutional level, ECJ judges are expected to be more EU-integration friendly by the simple fact that they work for a European institution. A long-serving and high-ranking member in the court's administration has put it this way:

> "Everyone who works for the ECJ naturally is committed to the European Union since they work for a European institution. There may be some judges that have been sent to

[78] The fact that the case was heard in the Grand Chamber highlights its political importance.
[79] ECJ, Judgment of 11 December 2018, *Weiss,* C-493/17.
[80] See supranote 159-167 in ECJ, Judgment of 11 December 2018, *Weiss,* C-493/17.

> Luxembourg by EU-skeptical national governments, but the special and pleasant environment of the ECJ quickly changes that and eventually softens their sharp edges."[81]

This assessment is in line with current research on judges at the ECJ, which assumes a certain amount of "insulation" (from member state's political influence) at the ECJ due to institutional factors such as collegiate decision-making at the ECJ, the selection process which strongly favors candidates with advanced French skills and a deep knowledge of EU law as well as the influence of pro-EU, often times French-educated, judicial clerks (Kelemen 2012; Zhang 2016). Yet, some influence of the member state's positions on the individual jurisprudence of certain judges can be noticeable, but it is unclear how reliable this correlation is and what its causes are (Frankenreiter 2017; Malecki 2012). The *Weiss*-case provides a great example of what happens when institutional preferences and member states' preferences coincide. As one judge at the ECJ made very clear to me in our conversation:

> "At the ECJ, we are interpreting EU law for *all* 27 member states. One cannot think of our dialogue with the German Federal Constitutional Court without seeing it as a conversation with 26 other member states at the same time. Now with *PSPP* we saw the situation that *every* participating government and institution [in the proceedings] disagreed with the interpretation of the German Federal Constitutional Court, even their own government. If we truly are interpreting EU law for all member states, we cannot ignore that."[82]

This alignment of preferences, which already tilts the scale against the GFCC, is further reinforced by the fact that the ECJ was very aware of the potential implications declaring the *PSPP* even partly illegal would have. As already mentioned, in the Kirchberg chambers, a very real fear existed that this might seriously endanger the unity of the Eurozone and eventually damage a cornerstone of European integration.[83] Additionally, the ECJ judge also made it very clear that for Luxemburg, Karlsruhe's reference is only one out of around 600 referrals to answer each year and each referring court has a right to be treated with the same professionality as any other.[84] While this may not adequately represent Karlsruhe's self-image, it provides another valid explanation for the fact that accommodating to the GFCC's demands did not seem very high on the ECJ's agenda. Finding evidence where justices at the ECJ "put" national courts "in their place" seems rather unlikely, which increases the confidence that Luxembourg's

[81] ECJ.
[82] EJU.
[83] EJU, ECJ, WM.
[84] EJU.

perception of Karlsruhe as one court out of many did play a role. Furthermore, an alignment of member states preferences as clearly as in *Weiss* is also rather unlikely. Assuming in accordance with literature that courts take the preferences other branches into account in their decision-making process (Epstein and Jacobi 2010, 342), this highlights the probable importance these preferences had for the ECJ when deciding *Weiss*. All these factors taken together provide a solid explanation in form of smoking-gun evidence as to why the ECJ decided *Weiss* against the GFCC's favored interpretation and did not accommodate to its demands. That it did not accommodate to the GFCC can be said with certainty, meaning the general hypothesis has passed a doubly decisive test.

5.6 We are judges, not politicians

The federal government *disagrees* with the GFCC's legal interpretation, but the GFCC is *unbothered* by an unfavorable political environment.

The independence of the GFCC is fairly strong. Nevertheless, even the court itself openly shares informal exchanges with the federal government and lawmakers in Berlin.[85] Both members of parliament from the then-governing parties (CDU/CSU and SPD) I talked to confirmed that this dialogue between Karlsruhe and the federal government is accompanied by a similar dialogue with lawmakers in parliament (including all parties with the governing parties holding most sway).[86] Yet, they also made it a point that in these large roundtable discussions, a strong emphasis is placed on not discussing current cases but rather focusing on general political and legal developments, which includes European integration, according to their statements.[87] This, however, may be different for more personal one-on-one discussions, especially between those lawmakers who also have a legal background and know judges at the GFCC from other encounters and therefore have built a strong personal, potentially even friendly connection with them.[88] So while everyone, including the judge at the GFCC, agreed no one in Berlin picked up the phone and told Karlsruhe how to decide, it is certain to assume that the judges in Karlsruhe were very well aware of the disagreement they faced in the governing political circles.[89] This disagreement is mainly due to the German government's strong commitment to the Euro and the fact that it did not see the Public Sector Purchase Program as an illegal act by the ECB but

[85] For the infamous dinner of the court with Angela Merkel to discuss public health policies see: BVerfG (2021).
[86] MP1, MP2.
[87] Ibid.
[88] MP 1.
[89] Another important piece of background information is the fact that 21 % of all MPs in the Bundestag possess a legal qualification. Considering the social importance law graduates hold in Germany and the strong networking effects between them, the descriptions of MP1 about personal relationships between government officials/lawmakers and judges seems highly believable. See: Bork (2021).

rather as a program which helped to hold the Eurozone together.[90] While this disagreement was also voiced in more personal channels of conversation, the *Bundesregierung* and *Bundestag* had plenty of opportunities to express their disagreements formally. For one, the *Bundesregierung*, alongside the *Bundesbank* (German Federal Bank of Reserve), was a party to the *Weiss* proceedings at the ECJ and expressed its opinion that it saw no violation of EU law.[91] Second, the *Bundesregierung* also participated in the written and oral hearing at the GFCC arguing the position that the plaintiffs' case was not admissible and even if it was there clearly was no violation of German constitutional law.[92] This argument was closely coordinated with the *Bundestag*, who decided not to participate in the proceedings before the GFCC. According to staff of a parliamentary group the reasons for this were manyfold: First, the *Bundestag* does not necessarily possess the capacity to be present at every case that it is a party of, simply because the Art. 38 GG jurisprudence (see above) indirectly confers party status on the *Bundestag* for every case concerning EU integration. Second, in this specific case, the *Bundestag* felt adequately represented by the federal government. Lastly, the participation of the Bundestag in a proceeding at the GFCC means the need to formulate one, joint (legal) opinion for a parliament consisting of various parties with various positions. Undoubtedly, the position is dominated by the governing coalition (in this case: CDU/CSU and SPD) but according to the staff working on bringing about an agreement, it was especially hard to formulate a joint opinion with the Bavarian CSU, which has somewhat of a tradition of being skeptical towards the EU and its institutions such as the ECB, ECJ and the Commission.[93] Among the other reasons mentioned this was one of the reasons why the *Bundestag* only informally made its opinion heard. Nevertheless, I do not believe this to have any influence on how Karlsruhe perceived the political environment. While one journalist familiar with the court said he thought the court was shocked by the amount of backlash its decision created,[94] one judge, who was heavily involved with the case, stated they were "very aware of the potential consequences" but added "once you have discovered the true legal interpretation, you cannot be guided by political constraints".[95] Such a statement seems counterintuitive to the theoretical assumption that courts are strategic actors, who do take the preferences of other actors into account, especially those of the government as they depend on its compliance (Epstein and Jacobi 2010; Vanberg 2015). Accordingly, evidence, in which a judge explicitly states they did disregard the opinions of the other branches

[90] MP1, MP2, PG, ECJ.
[91] MP1.
[92] BVerfG, Judgment of the Second Senate of 5 May 2020 (*PSPP*), 2 BVR 859/15, par. 62-79.
[93] PG and see the policy of the CSU in matters of EU: CSU (2019).
[94] JO.
[95] JU.

of government, is unique and unlikely. Given the judgement was eventually taken with a 7:1 vote in favor of the "ultra-vires"-ruling, the evidence that the court was unbothered by countering political opinions in government and parliament also has a high certainty, as the majority in the Second Senate could have easily reached another verdict had it cared about the political pressure. It therefore decreases the confidence in alternative hypotheses such as that the ruling had been in the interest of the government and the court was pressured into it. Furthermore, due to its high certainty and uniqueness, it also confirms the hypothesis that the court indeed, was unbothered by the unfavorable political environment. This makes this test come close to being doubly decisive.

Given some of judge-rapporteurs Huber's prior statements such as him writing that the GFCC fulfills a role of "democratic compensation"[96] or publicly claiming to speak for some sort of silent majority in matters EU integration, it appears unconvincing that the court was guided by a legal interpretation of the law only (Mayer 2014; Wendel 2020). Furthermore, various people I spoke to have either overtly or at least implicitly expressed the sentiment that they are under the impression that judge-rapporteur Huber, who is leaving the court as this paper is being submitted (end of 2022), wanted to use this final opportunity to explicitly state what he had always believed in.[97] This, however, is already establishing a link with the last part of the causal mechanism being studied. Hence, a quick conclusion of our findings for this part is merited. The court indeed, as expected, found itself in an unfavorable political environment with everyone in the national, but also European political elites disagreeing with its legal standpoint. The court was very aware of the hostility of this political environment. Eventually, however, it was unbothered by this and explicitly – that at least is my interpretation – tried to set a counterexample to current political elite opinion.

5.7 The nuclear device

"The judge-rapporteur *proposes* to declare the ECJ ruling "ultra-vires" and the Senate *agrees"*

On May 5, 2020, the Second Senate declared the ECJ ruling *Weiss* "ultra-vires". The decision was taken with a 7:1 majority and no dissenting opinions expressed. In the theoretical model, I expect the judge-rapporteur to hold considerable influence on the final judgment, as he is the judge who can anchor the discussion by either proposing to rule in favor or against the plaintiff

[96] "demokratiespezifische Ventil- oder Kompensationsfunktion" in German.
[97] WM3, JO, ECJ.

(or, in this case, refer the question to the ECJ once more). One of the judges at the court told me, that whether a judge's initial proposal makes it to an official ruling of the senate is both heavily dependent on the senate and the judge's personality.[98] Everyone at the court agreed however, that in this case – due to its utmost political importance – every judge in the Second Senate was heavily involved in the decision-making process.[99] Given the outcome and how obvious judge-rapporteur Huber expressed his prior stance on EU-integration, it can be assumed with certainty that in the *PSPP* ruling he got his way and initially proposed to declare the *Weiss* decision "ultra-vires". What is particularly interesting however, is the question of "why", especially given the fact that judges were aware of the possible consequences of their decision and carefully considered their options.[100] The evidence gathered during the interviews point to the following factors that matter for the explanation:

First is the choice of expert witnesses, who were exclusively German economists, mostly working in the German banking and insurance sector (Mayer 2020a). Academics heavily criticized this selection for bias and it was perceived as anti-European by my interview partners at the ECJ.[101] People familiar with the court told me that they are not aware of a formal process to determine the expert witnesses, yet said the judge-rapporteur held considerable influence.[102] Nevertheless, they also stated they expect the other judges to at least have the opportunity to dissent with the judge-rapporteur's choice of expert witnesses.[103] So, as the expert witnesses were representing a clearly one-sided position, the court had little countering input. That is further aggravated by the fact that the ECB was not present in the hearing, as they did not believe they had to justify themselves in front of national German court, which further upset the court.[104]

Second, the court was faced with the question of whether they should submit a second reference to the ECJ according to Art. 267 TFEU. As one judge at the ECJ put it:

> "If the GFCC really had such big problems understanding our legal argument, they should have posed a second reference. Everyone understands it. The Italian *Corte Costituzionale* even did it. Yet, if President Voßkuhle tells us 'If we don't do it [standing

[98] JU.
[99] WM1-4.
[100] For the careful consideration: JU, WM1, WM2, WM3.
[101] EJU, ECJ.
[102] WM2, WM3
[103] Ibid.
[104] WM4.

> up to the ECB and ECJ], we cannot expect the Italians to do it', he is essentially saying that political considerations were not alien to the judgment."[105]

The judges in the Second Senate were well aware they could have simply posed a second reference.[106] They however, believed that the *Weiss* reference could already be considered a second reference after the similar *Gauweiler* reference.[107] While the voices at the court framed this as a legal question, I find this little convincing. *OMT* (*Gauweiler*) and *PSPP* (*Weiss*) are two separate cases with distinct legal questions. It is true that politically both cases deal with a very similar contentious issue, yet this is an inherently political question and not a question of law. From the perspective of the German court the ECJ developed guidelines in *Gauweiler* that it did not adhere to in *Weiss.*[108] Sending a second referral would have helped little, given both courts had made their positions clear already. Furthermore, another referral would have had severely jeopardized the GFCC's ability to save face in the dispute, as it would have been forced to either accept the second ECJ ruling or declare both rulings "ultra-vires." The last option would have potentially created an even stronger backlash. All in all, while framed in legal terms by the people I spoke to, I find it more convincing that the decision not to refer a second time was mainly motivated by the political desire to send a signal to the ECJ. The GFCC – understandably, from their perspective – did not feel heard in the dialogue with the ECJ. One judge at the GFCC I talked to put it this way, quite obviously highlighting the political signaling effect the Second Senate expected:

> "Jean Bodin once said something to the likes of, 'The sovereign does not need to employ the baton every day. But he must use the baton once, so that the people know its there.' Well, that's how we felt about "ultra-vires" after people were writing for years that "ultra-vires" is dead. Obviously, this was not the legal basis for our decision but one of the positive side-effects."[109]

German justices tend to be more reserved expressing their political opinions compared to their American counterparts. This makes such a strong statement about the positive policy-implications of a ruling rather unlikely and therefore unique. The fact that in the context of the *PSPP* case such statements could be observed frequently, greatly increases the confidence that policy

[105] EJU.
[106] JU.
[107] JU, WM2.
[108] WM2.
[109] JU.

preferences[110] of the majority of the Second Senate and especially those of judge-rapporteur Huber indeed played a large part in the ruling.

This intended political signaling effect became further apparent in the legal foundation of the ruling. Judge-rapporteur Huber publicly stated that the court had to call the ECJ's decision the now-infamous terms "arbitrary" and "simply not comprehensible" to even enter an "ultra-vires"-review as this is the barrier-to-entry the court had set for itself.[111] What ended up being "arbitrary" and "simply not comprehensible" however, was nothing more than the fact that the ECJ did not conduct an extensive proportionality review, where it took into account the "actual effects of the PSPP".[112] It is interesting to note that this idea of centering the judgment around the concept of proportionality was not introduced by judge-rapporteur Huber.[113] While the focus of the judgement has been criticized heavily,[114] this legally contained criticism allowed the court to navigate the peculiar situation and unfavorable environment it was in. Much like the concept of a "vague opinion" (Staton and Vanberg 2008), it provided the GFCC with a legal basis for the „ultra-vires" ruling without having to suffer the potential consequences of making a definite judgment on the *PSPP*. Such a definite judgment would have potentially had severe political and economic consequences such as the shake-up of the Eurozone, something not even the GFCC could potentially want.[115] The focus on the question of proportionality allowed the court, who was – as already stated – very much aware of potential consequences, to avoid any such fallout. In the end, the ECB explicitly explained the proportionality review it had conducted and provided additional documents to the German *Bundestag*, which decided on July 2, 2020, only two months after the *PSPP* ruling, that the proportionality review conducted by the ECB met the criteria set forth by the GFCC in the *PSPP* ruling.[116] Any "direct" implications of the ruling hence were non-existent after this and the danger of non-compliance close to nil. What was and is left, however, is a strong signaling effect: The ECB has become aware that – if not the German government – the GFCC is ready to stand up for perceived German interests. The ECJ has learned that Karlsruhe is not afraid to pull the *"baton"* of "ultra-vires" if it feels

[110] It is hard to safely distinguish between policy and legal preferences in this case. Wanting the "ultra-vires" doctrine to stay active is first and foremost a legal preference. Yet, legal concepts always serve a purpose, which in this case is to control EU integration. This in turn is a policy preference.
[111] Müller (2020).
[112] BVerfG (2020b).
[113] WM2.
[114] Mayer expressing the common sentiment, that the GFCC used a very German understanding of proportionality: Mayer (2020a); WM4 telling me they believed the judgment to be right, but proportionality to be the wrong legal foundation.
[115] JO.
[116] Deutscher Bundestag (2020).

like the ECJ is treating the delimitation of competences too laxly and favoring EU-institutions over strong (particular) national interests.

In summary, judge-rapporteur Huber's considerable influence has become apparent, not only by being able to anchor the debate with his first proposal for the judgment and his influence on the selection of expert-witnesses but also the fact that in the end, with the *PSPP* judgment, he achieved something he was working towards for years. I have further stated why I believe that the judgment was mainly motivated by political reasons, most notably desired signaling effects to both the ECJ and ECB. My belief in this interpretation is further strengthened by several interview members stating they expect GFCC's Second Senate jurisprudence to become more ECJ and EU-friendly with the already happened or soon to follow departure of the judges Voßkuhle, Huber and Müller[117] from the court.[118] Unfortunately, due to the aforementioned secrecy of courts, this evidence only weakens any potential rival hypotheses and does not allow for a full elimination of them, as other potential motives of the court cannot be discarded with full certainty. In conclusion, the hypothesis that the EU-skeptical policy preferences of the GFCC's justices played an important role in reaching the court's judgement passed a smoking-gun test, which allows for a confirmation of the last part of the theorized causal mechanism.

6. Looking beyond Germany

„Ultra-vires" judgments and questioning the ECJ's power to take binding of last resort are not uniquely German. Depending on one's definition of „ultra-vires" judgments, up to three other such judgments can be observed in the EU's legal history: The French *Conseil d'Etat* in *Ministre de l'Intérieur v. Sieur Cohn-Bendit* (1978)[119], the Danish *Højesteret's Ajos*-judgment (2016)[120] and the Czech Republic's Constitutional Court judgment in *Holubec* (2012)[121] (Lang 2020, 487–96). Whether the French decision in *Cohn-Bendit* can be considered following the "ultra-vires"-doctrine is not entirely clear, whereas the Danish and Czech cases evidently are comparable to the *PSPP* judgment. Looking beyond Germany essentially means looking beyond this case study and thinking about how the findings on the *PSPP* judgment can (or cannot)

[117] In public Müller has not featured very prominently in *PSPP*, yet he expressed a noteworthy dissenting opinion in the Judgment of 6 December 2022 (2 BvR 547/21) concerning the EU Recovery Package in which he lamented that the Senate had abandoned its responsibility to control EU integration by not employing the "ultra-vires" review on the EU Recovery Package thoroughly enough. This showed that he should be counted as one of the EU-critical voices at the court.
[118] EJU, WM4, JO.
[119] Conseil d'État (1978).
[120] Supreme Court of the Kingdom of Denmark (2016).
[121] Constitutional Court of the Czech Republic (2012).

be used to help explain other „ultra-vires“ decisions or at least motivate further research on those decisions.

Assessing the *Cohn-Bendit* decision, which is also the oldest among the three, Lang points out that this decision was taken during a time where the *Conseil d'État* was very skeptical towards EU law (Lang 2020, 488). In the meantime, the court's position on EU has shifted tremendously and it is now pursuing a pro-EU jurisprudence, making any "ultra-vires"-judgments highly unlikely, given that the causal condition (X) of dissatisfaction with the ECJ is missing (Claasen 2010). Furthermore, the *Conseil d'État* did not itself refer the question on the interpretation of the relevant EU directive in *Cohn-Bendit* to the ECJ (Lang 2020, 488–89), which makes most of the causal mechanism inapplicable to this case. The Danish *Ajos* case shows a different picture. The court explicitly opposes a deepening EU-integration through ECJ case law (Lang 2020, 492), which shows that the same X as in the *PSPP*-case is likely to be present. Furthermore, existing legal research on the *Ajos* case notes that the reference and the following dialogue are the key to understanding the „ultra-vires“ judgment by the *Højesteret*:

> "In *Ajos*, that procedure was used in a way that gradually built up tensions and ended in a clear clash. Going through the main steps in the *Ajos* dialogue, both courts could be blamed for failing to communicate in that spirit of good faith, which is the foundation of the preliminary reference procedure" (Holdgaard, Elkan, and Schaldemose 2018, 53).

A study conducted by Peter Pagh concluded that up until 2004, all preliminary reference procedures initiated by Danish Courts ran through the Danish government's judicial committee, which is also responsible for advising the government's implementation of EU law (Pagh 2004; Rytter and Wind 2011; Wind, Martinsen, and Rotger 2009). This means the interests of the Danish government need to be accounted for, just as in the causal mechanism of the *PSPP* judgment. Furthermore, the *Højesteret* operates with a judge-rapporteur system as well. However, it has the particularity of assigning this duty to the youngest member of the court, who is tasked with fulfilling this challenging job for more than 300 cases each year (Lübbe-Wolff 2022, 313–14). If and if so, how, this special feature of the *Højesteret* changes the role of the judge-rapporteur cannot be studied without going beyond the scope of this thesis. Nevertheless, the causal mechanism developed for the *PSPP* judgment seems fit to provide a solid template for further research on the *Højesteret*'s „ultra-vires“ judgment in *Ajos*.

Looking at the Czech *Slovak Pensions* case, a different picture emerges: The „ultra-vires" ruling of the ECJ's *Landtova* decision[122] has to be understood as the feud between the *Nejvyšší správní soud*, the Czech Supreme Administrative Court, and the *Ústavní soud*, the Czech Constitutional Court. Both clashed over the issue of how pension claims acquired during the existence of Czechoslovakia should be distributed to Czech pensioners, an issue that had continuously been escalating ever since the dissolution of Czechoslovakia on December 31, 1992 (Bobek 2014). This domestic legal conflict was eventually taken to the European level, where it lead to the *Ústavní soud's* „ultra-vires" judgment (Bobek 2014; Zbíral 2013). Given this very specific background of the *Slovak Pensions* case, the present study on the *PSPP* judgment only provides rudimentary guidance (if any) for further research on the Czech "ultra-vires" ruling. Nevertheless, the *Slovak Pension's* particular nature provides a great motivation for further research exploring how conflicts between national courts are taken to the European level through Art. 267 TFEU and how the ECJ may be forced to suffer collateral damages due to this "Europeanisation" of domestic legal conflicts. Considering that with the *Egenberger* saga, a very similar issue is looming in Germany between the GFCC and the *Bundesarbeitsgericht* (Federal Labor Court) (Sauer 2019; van den Brink 2020), additional attention of researchers to this phenomenon is well-merited.

7. Conclusion: Understanding national courts and real contradictions

Why do national courts challenge Luxembourg's authority when it comes to interpreting European Union law? The short answer is simple: Usually they do not and the preliminary reference procedure according to Art. 267 TFEU provides a tested platform for fruitful dialogue in the European legal community. Yet, in some very rare cases, they do. One of the most prominent of these is the GFCC's „ultra-vires" judgment in *PSPP*. In this study I tried to understand what motivated the German Federal Constitutional Court to such a drastic move. Many legal scholars and politicians have raised their voices shortly after the fateful May 5, 2020. Some in favor of Karlsruhe's argument but even more articulating their opposition and dissatisfaction in what they perceive to be a staunchly anti-European judgment. In political science there is a considerable body of literature on how national courts are expected to behave in the EU's legal system. Yet, none of these theories can fully explain why – in these very rare instances such as *PSPP*, *Ajos* or *Slovak Pensions* – national courts will outright challenge the ECJ and claim for themselves the ultimate authority to interpret EU law. By employing a deductive explaining-outcome process-tracing approach this study tried to raise the black-box between the much written about

[122] ECJ, Judgment of 22 June 2011, *Landtova*, C-399/09.

causal condition (X) of dissatisfaction with the ECJ's pro-EU-jurisprudence in Karlsruhe and the „ultra-vires" judgment in *PSPP* (Y). Hereby, I understand courts and their judges as political actors, looking beyond the "black letter" law that legal scholars tend to focus on, thereby providing a unique perspective on national courts and the ECJ as important shapers of the European polity. In order to raise the black-box and to test the causal mechanism developed from existing literature, this thesis has combined evidence from various court documents, academic writings and public statements of the relevant actors as well as the insights gained in 11 personal interviews with people directly involved or very familiar with the *PSPP* judgment. For the *PSPP* case there is very strong evidence that this judgment has been long in the making and dissatisfaction with the ECJ was widespread in Karlsruhe prior to the start of the proceedings. Moreover, one important finding is the outsized role judge-rapporteur Huber played in the proceedings, clearly shaping the process starting with the reference to the ECJ to the selection of expert witnesses according to his own ECJ and ECB-skeptical policy and legal agenda and eventually drafting the tentative verdict. It is especially notable that it is likely that it was the close personal contact between ECJ judges and prominent German judges such as Huber and Voßkuhle that eventually lead to incompatible expectations as to how each court would react to one another. While the ECJ thought it had no choice but to take the pro-ECB route, the GFCC felt like it was once again not being heard, despite articulating itself very clearly. Perceiving *PSPP* as an *OMT 2.0.* they opted for the nuclear option of "ultra-vires". The judges in Karlsruhe were aware of their actions and knew from the start they would not win the hearts of their government or that of other member states. Shielding the ECB and *Deutsche Bundesbank* from any real consequences, they nevertheless let the "real contradicitions" (Haltern 2021) out into the open. Ultimately, I was able to find confirming evidence for every part of the theorized causal mechanism. Unfortunately, certain parts were only able to pass a smoking-gun test, as alternative hypotheses cannot be fully eliminated based on the evidence gathered, which is mostly caused by the secrecy of judicial decision-making. Nevertheless, given the strong confirmatory power of the evidence collected and analyzed, I can conclude to have found a minimally sufficient explanation for the GFCC's "ultra-vires" decision.

Is it worrisome if the governments of Poland or Hungary applaud the GFCC for its "ultra-vires"-dictum? Any convinced democrat must think so. It is valid to wonder if this will embolden courts in these countries to use the legal figure of "ultra-vires" to circumvent any "rule of law" safeguarding mechanisms the ECJ employs in light of recent developments. Yet, there is also another side to Karlsruhe's attack on Luxembourg. The "real contradictions" are there: "Legally, the FCC will not, and cannot, abandon its decade-long jurisprudence which locates the

source of ultimate legal authority in the German Constitution" (Haltern 2021, 237). With Voßkuhle gone and Huber departing soon, many voices expect a more EU-friendly Second Senate. The jurisprudence and hence the "real contradiction", however, stay the same. The only way to move forward is dialogue. Dialogue requires understanding. This includes understanding why an institution or its members have (re)acted in a certain way. By raising the black box on the *PSPP* judgment this thesis tried to do exactly this. Thereby it became obvious that the causal mechanism specifically developed for *PSPP* may also serve as a template for further research on the Danish *Højesteret's* „ultra-vires" judgment in *Ajos*. Unfortunately, this match does not seem to be the case for the other two prominent "ultra-vires" judgments *Cohn-Bendit* and *Slovak Pensions.* Nevertheless, it is obvious that further research on the causal mechanisms present in these cases would greatly enhance our understanding of how national courts are at times the ECJ's best friend, a necessary constraint and occasionally its worst enemy (Pollack 2013). Eventually being able to compare the results of these case studies could allow researchers to develop a theoretical framework of national courts challenging the ECJ. These results could then even inspire policy-solutions to avoid future "ultra-vires" rulings. While one such potential fallout was avoided in the ruling on the EU Recovery Package[123], another one may be in the making in the *Egenberger* case, which makes research even more pressing. Until a solution to these "real contradictions" is found, we must hope that for the sake of the European legal order the musketeers who roam it use their "ultra-vires" swords carefully.

[123] BVerfG, Judgment of 6 December 2022, 2 BvR 547/21.

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9. Appendix

In this appendix you will find further information on all the interviews conducted, including the questions asked.

9.1 Wissenschaftlicher Mitarbeiter 1 (WM1)

WM1 is a former scientific assistant (*Wissenschaftlicher Mitarbeiter*) at the GFCC.

The interview was conducted on September 30, 2022, via Zoom for approx. 51 minutes.

Questions asked:

1. In your opinion, what are the most important reasons that made the court rule the ECJ *Weiss* case and the ECB's PSPP "ultra-vires"? Did the court not feel heard by the ECJ with its concerns regarding European integration and ECJ jurisprudence?
2. You just mentioned Art. 38 GG case law. How important is this for understanding the *PSPP* case?
3. Many legal scholars believe that the court already took a confrontative stance vis-à-vis the ECJ by the way it framed the referral in the *Weiss* case. Do you agree with this?
4. Given the referral was framed the way it was framed, do you think the ECJ could have done a better job at catering to the concerns the court expressed in regard to the actions of the ECB? If you put yourself in the perspective of the ECJ, also knowing the *Gauweiler* case law, do you think they realistically could have reached a decision in favor of the GFCC's arguments?
5. So were political concerns a driver for the ECJ's decision?
6. It is commonly known that the Judges at the European Court of Justice and the German Federal Constitutional Court have some sort of informal dialogue with each other, be it only the "*Sechser-Treffen*" of the German-speaking constitutional courts with the ECJ and ECHR[124]. Was this informal dialogue used to exchange positions regarding the *PSPP* case or the policies of the ECB in general?
7. In political science literature the judge-rapporteur is also referred to as the "master of the proceeding". We know that both judge-rapporteur Huber and President Voßkuhle talked to the media extensively after the case was decided. Is this an accurate reflection of the role they played in the proceeding? Did the judge-rapporteur take this elevated position? If so, do you think he was able to influence the case in a meaningful way?
8. Is this skepticism about whether the ECJ provides sufficient judicial checking of EU acts shared by the whole Second Senate?
9. Is there a political cleavage within the Second Senate?
10. What exactly do you mean by saying "it depends on the personality of individual judges"?
11. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. At the same time, we know that there are frequent meetings between government officials and the Judges. Did the government officials raise any of their concerns regarding a potential „ultra-vires" decision and the potential consequences for Germany and the EU to the court?

[124] European Court of Human Rights.

9.2 Wissenschaftlicher Mitarbeiter 2 (WM2)

WM2 is a former scientific assistant (*Wissenschaftlicher Mitarbeiter*) at the GFCC.

The interview was conducted on October 2, 2022, via Zoom for approx. 2 hours 10 minutes.

Questions asked:

1. In your opinion, what are the most important reasons that made the court rule the ECJ *Weiss* case and the ECB's PSPP "ultra-vires"? Did the court not feel heard by the ECJ with its concerns regarding European integration and ECJ jurisprudence?
2. What are the prerequisites for an expedited process at the ECJ?
3. How does the GFCC decide on a reference according to Art. 267 TFEU?
4. Many legal scholars believe that the court already took a confrontative stance vis-à-vis the ECJ by the way it framed the referral in the *Weiss* case. Do you agree with this?
5. Given the referral was framed the way it was framed, do you think the ECJ could have done a better job at catering to the concerns the court expressed in regard to the actions of the ECB?
6. If you put yourself in the perspective of the ECJ, also knowing the *Gauweiler* case law, do you think they realistically could have reached a decision in favor of the GFCC's arguments?
7. It is commonly known that the Judges at the European Court of Justice and the German Federal Constitutional Court have some sort of informal dialogue with each other, be it only the "*Sechser-Treffen*" of the German-speaking constitutional courts with the ECJ and ECHR. Was this informal dialogue used to exchange positions regarding the *PSPP*-case or the policies of the ECB in general?
8. In political science literature the judge-rapporteur is also referred to as the "master of the proceeding". We know that both judge-rapporteur Huber and President Voßkuhle talked to the media extensively after the case was decided. Is this an accurate reflection of the role they played in the proceeding? Did the judge-rapporteur take this elevated position? If so, do you think he was able to influence the case in a meaningful way?
9. Are there any other judges that had an important influence in the *PSPP* proceedings?
10. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. At the same time, we know that there are frequent meetings between government officials and the Judges. Did the government officials raise any of their concerns regarding a potential „ultra-vires" decision and the potential consequences for Germany and the EU to the court?
11. Critics argue that the expert witness had a very German perspective. Who decides which experts will be invited to the oral proceedings?
12. Is there anything you would like to add that we have not talked about yet?

9.3 Wissenschaftlicher Mitarbeiter 3 (WM3)

WM3 is a former scientific assistant (*Wissenschaftlicher Mitarbeiter*) at the GFCC.

The interview was conducted on October 5, 2022, via Zoom for approx. 25 minutes.

Questions asked:

1. In your opinion, what are the most important reasons that made the court rule the ECJ *Weiss* case and the ECB's PSPP "ultra-vires"? Did the court not feel heard by the ECJ with its concerns regarding European integration and ECJ jurisprudence?

2. Many legal scholars believe that the court already took a confrontative stance vis-à-vis the ECJ by the way it framed the referral in the *Weiss* case. Do you agree with this?
3. Were the referral questions sufficiently clear?
4. Given the referral was framed the way it was framed, do you think the ECJ could have done a better job at catering to the concerns the court expressed in regard to the actions of the ECB? If you put yourself in the perspective of the ECJ, also knowing the *Gauweiler* case law, do you think they realistically could have reached a decision in favor of the GFCC's arguments?
5. It is commonly known that the Judges at the European Court of Justice and the German Federal Constitutional Court have some sort of informal dialogue with each other, be it only the "*Sechser-Treffen*" of the German-speaking constitutional courts with the ECJ and ECHR. Was this informal dialogue used to exchange positions regarding the *PSPP* case or the policies of the ECB in general?
6. In political science literature the judge-rapporteur is also referred to as the "master of the proceeding". We know that both judge-rapporteur Huber and President Voßkuhle talked to the media extensively after the case was decided. Is this an accurate reflection of the role they played in the proceeding? Did the judge-rapporteur take this elevated position? If so, do you think he was able to influence the case in a meaningful way?
7. Are there any other judges that had an important influence in the *PSPP* proceedings?
8. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. At the same time, we know that there are frequent meetings between government officials and the Judges. Did the government officials raise any of their concerns regarding a potential „ultra-vires" decision and the potential consequences for Germany and the EU to the court?
9. Critics argue that the expert witness had a very German perspective. Who decides which experts will be invited to the oral proceedings?
10. Is Germany the only country where a legal remedy such as Art. 38 GG exists?
11. Some say, the ECJ cannot be seen as a monolith. Do you agree?

9.4 Wissenschaftlicher Mitarbeiter 4 (WM4)

WM4 is a former scientific assistant (*Wissenschaftlicher Mitarbeiter*) at the GFCC.

The interview was conducted on October 13, 2022, in person for approx. 20 minutes.

Questions asked:

1. In your opinion, what are the most important reasons that made the court rule the ECJ *Weiss* case and the ECB's PSPP "ultra-vires"? Did the court not feel heard by the ECJ with its concerns regarding European integration and ECJ jurisprudence?
2. Many legal scholars believe that the court already took a confrontative stance vis-à-vis the ECJ by the way it framed the referral in the *Weiss* case. Do you agree with this?
3. Given the referral was framed the way it was framed, do you think the ECJ could have done a better job at catering to the concerns the court expressed in regard to the actions of the ECB? If you put yourself in the perspective of the ECJ, also knowing the *Gauweiler* case law, do you think they realistically could have reached a decision in favor of the GFCC's arguments?
4. It is commonly known that the Judges at the European Court of Justice and the German Federal Constitutional Court have some sort of informal dialogue with each other, be it only the "*Sechser-Treffen*" of the German-speaking constitutional courts with the ECJ

and ECHR. Was this informal dialogue used to exchange positions regarding the *PSPP*-case or the policies of the ECB in general?

5. In political science literature the judge-rapporteur is also referred to as the "master of the proceeding". We know that both judge-rapporteur Huber and President Voßkuhle talked to the media extensively after the case was decided. Is this an accurate reflection of the role they played in the proceeding? Did the judge-rapporteur take this elevated position? If so, do you think he was able to influence the case in a meaningful way?
6. Are there any other judges that had an important influence in the *PSPP* proceedings?
7. Do you think the FGCC's decision was politically motivated?
8. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. At the same time, we know that there are frequent meetings between government officials and the Judges. Did the government officials raise any of their concerns regarding a potential „ultra-vires" decision and the potential consequences for Germany and the EU to the court?
9. Why was the ECB not present during the proceedings?
10. Was making a second reference something that was being considered?

9.5 Judge at the GFCC (JU)

JU is a judge at the GFCC.

The interview was conducted on October 4, 2022, in person for approx. 31 minutes.

Questions asked:

1. In your opinion, what are the most important reasons that made the court rule the ECJ *Weiss* case and the ECB's PSPP "ultra-vires"? Did the court not feel heard by the ECJ with its concerns regarding European integration and ECJ jurisprudence?
2. Many legal scholars believe that the court already took a confrontative stance vis-à-vis the ECJ by the way it framed the referral in the *Weiss* case. Do you agree with this?
3. When you were drafting the referral did you believe that the ECJ would cater to your concerns? Is it correct to believe that given *OMT* (Gauweiler), the Second Senate already saw *PSPP* as a second reference?
4. How can you explain that President Lenearts at first seems happy about the reference and then the Grand Chamber turns around and metaphorically slaps Karlsruhe in the face?
5. The German judicial branch is very independent compared to other European countries, which is also due to a distinct political culture in Germany. Do you think such cultural notions, e.g., what it means to be a judge, influence the decision-making of the ECJ?
6. You just mentioned the hierarchical order between ECJ and national highest courts and constitutional courts. It is obvious that the ECJ sees itself at the top of this hierarchy. Did I understand correctly that this position is not shared by the national highest or constitutional courts?
7. It is commonly known that the Judges at the European Court of Justice and the German Federal Constitutional Court have some sort of informal dialogue with each other, be it only the "*Sechser-Treffen*" of the German-speaking constitutional courts with the ECJ and ECHR. Was this informal dialogue used to exchange positions regarding the *PSPP*-case or the policies of the ECB in general?
8. Did you exchange these positions even before the ruling was published?

9. In political science literature the judge-rapporteur is also referred to as the "master of the proceeding". We know that both judge-rapporteur Huber and President Voßkuhle talked to the media extensively after the case was decided. Is this an accurate reflection of the role they played in the proceeding? Did the judge-rapporteur take this elevated position? If so, do you think he was able to influence the case in a meaningful way?
10. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. At the same time, we know that there are frequent meetings between government officials and the Judges. Did the government officials raise any of their concerns regarding a potential „ultra-vires" decision and the potential consequences for Germany and the EU to the court?
11. Were you surprised by the consequences of your ruling?

9.6 Judge at the ECJ (EUJ)

EUJ is a judge at the ECJ.

The interview was conducted on October 20, 2022, via WebEx for approx. 96 minutes.

1. Which role does the dialogue with national courts play for the ECJ's jurisprudence?
2. You just talked about the interpretation of EU-competences. Is there any reason for conflict with national courts?
3. Did you expect the GFCC's ruling on PSPP?

9.7 Legal officer (ECJ)

ECJ is a senior legal officer at the ECJ:

The interview was conducted on October 24, 2022, via WebEx for approx. 54 minutes.

1. Which role does the dialogue with national courts play for the ECJ's jurisprudence?
2. Is there also a dialogue between the Advocate Generals and the GFCCC?
3. What do you mean by relying on "acceptance"?
4. How do you see the relationship between Judge Huber and President Lenaerts?
5. In what way do member states participate in proceedings before the ECJ?
6. What role do the legal opinions of member states play for the ECJ's jurisprudence?
7. Was the ECJ aware of the concerns the GFCC had regarding EU-integration?
8. The GFCC and its judges often talk about a "*Kooperationsverhältnis*" (cooperation relationship) between them and the ECJ. Did Karlsruhe cancel this with the *PSPP*-judgment?
9. The Italian *Corte Constituzionale* decided to submit a second reference to the ECJ in the *Taricco* proceedings, which lead to an outcome they were contended with. Do you think it would have helped the relationship between ECJ and GFCC had Karlsruhe done that?
10. How does the ECJ adopt to the fact that courts – such as the GFCC – repeatedly seek to impose limits on the supremacy of European Union Law?
11. Is it a valid criticism to argue the ECJ sometimes follows a curt, French style in its judgments?
12. Are you afraid that we will see similar judgments in the future?

9.8 Journalist (JO)

JO is a journalist with a focus on constitutional law.

The interview was conducted on September 26, 2022 via Zoom for approx. 47 minutes.

1. In your opinion, what are the most important reasons that made the court rule the ECJ *Weiss* case and the ECB's PSPP "ultra-vires"? Did the court not feel heard by the ECJ with its concerns regarding European integration and ECJ jurisprudence?
2. Did the whole court the assessment regarding "the last word" that you just described?
3. Did I understand correctly that you are under the impression that the GFCC was content with the *Gauweiler* ruling?
4. Many legal scholars believe that the court already took a confrontative stance vis-à-vis the ECJ by the way it framed the referral in the *Weiss* case. Do you agree with this?
5. Given the referral was framed the way it was framed, do you think the ECJ could have done a better job at catering to the concerns the court expressed in regard to the actions of the ECB? If you put yourself in the perspective of the ECJ, also knowing the *Gauweiler* case law, do you think they realistically could have reached a decision in favor of the GFCC's arguments?
6. It is commonly known that the Judges at the European Court of Justice and the German Federal Constitutional Court have some sort of informal dialogue with each other, be it only the "*Sechser-Treffen*" of the German-speaking constitutional courts with the ECJ and ECHR. Was this informal dialogue used to exchange positions regarding the *PSPP* case or the policies of the ECB in general?
7. Does the fact that the judges know each other so well lead to the fact that they feel like they have to prove something to each other?
8. In political science literature the judge-rapporteur is also referred to as the "master of the proceeding". We know that both judge-rapporteur Huber and President Voßkuhle talked to the media extensively after the case was decided. Is this an accurate reflection of the role they played in the proceeding? Did the judge-rapporteur take this elevated position? If so, do you think he was able to influence the case in a meaningful way?
9. You just spoke of meta-questions. Democracy is one such meta-questions, economic and monetary policy is another one. One MP told me that Huber and Voßkuhle represent a very German position when it comes to economic and monetary policy. May that be part of the reason for the dispute between the GFCC and the ECJ?
10. Did I understand correctly that you are under the impression the judges were surprised by the harsh backlash their ruling received?
11. Are you under the impression the Judges were aware of the possible consequences, or did they just accept them?
12. Were there any other Judges that took a very prominent position in the proceedings?
13. You just mentioned Lübbe-Wolff and her dissenting opinion in *OMT*. Shortly after, she left the 2nd Senate. Do you think this made the Senate more skeptical towards the EU?
14. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. At the same time, we know that there are frequent meetings between government officials and the Judges. Did the government officials raise any of their concerns regarding a potential „ultra-vires" decision and the potential consequences for Germany and the EU to the court?
15. Would we have seen a different ruling if the case had been assigned to a different judge-rapporteur?
16. Is the opinion Lübbe-Wolff expressed in her dissenting opinion in *OMT* one that is hardly shared by anyone?
17. Is there anything else that you would like to add?

9.9 Member of parliament (MP1)

MP1 is former member of parliament (*Mitglied des Bundestages*) with a focus on constitutional law for for the CDU/CSU parliamentary group.

The interview was conducted on September 10, 2022 via Zoom for approx. 32 minutes.

1. The GFCC's *PSPP* decision was heavily criticized not only by legal scholars but also politicians and journalists. Do you think, it was right of the court to take this decision, or should they have left it up to parliament or the executive to make this policy decision?
2. We know that there are frequent meetings between government officials/lawmakers and Judges. Are you/your colleagues able to voice your/their positions on current proceedings in these meetings?
3. Did you expect this ruling?
4. Was the government able to raise any of their concerns regarding a potential „ultra-vires" decision and the potential consequences for Germany and the EU to the court before the decision was reached?
5. You just said it was not surprising but now you are calling the ruling a "bomb". How can you explain that?
6. Did you ever mention to the court that the Government or the Bundestag would support a second reference?
7. In the answer to the infringement proceedings by the EU commission your report mentioned that you advocate for a stronger dialogue between the ECJ and the GFCC. Is this dialogue not already happening?
8. Were you under the impression that the selection of expert witnesses was biased?
9. You just talked about the tendencies of institutions to strengthen their power. Do you think this dynamic was also at play here?

9.10 Member of parliament (MP2)

MP2 is a member of parliament (*Mitglied des Bundestages*) with a focus on constitutional law for the SPD parliamentary group.

The interview was conducted on September 30, 2022 via WebEx for approx. 14 minutes.

1. The GFCC's *PSPP* decision was heavily criticized not only by legal scholars but also politicians and journalists. Do you think, it was right of the court to take this decision, or should they have left it up to parliament or the executive to make this policy decision?
2. We know that there are frequent meetings between government officials/lawmakers and Judges. Are you/your colleagues able to voice your/their positions on current proceedings in these meetings?
3. When you say you are only talking about abstract legal questions with the GFCC's judges what exactly do you mean by this? Do the limits of European integration ever come up?
4. Did you expect this ruling?
5. How does the Bundestag decide who represents it in Karlsruhe?
6. Did you ever mention to the court that the government or the *Bundestag* would support a second reference?
7. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. In the answer to the European Commission, you are advocating for a stronger dialogue

between ECJ and GFCC. Is this dialogue not already happening? And do you believe that a better dialogue would have avoided such a ruling?
8. Do you agree with the critics who argue that the GFCC views the question in *PSPP* through a German lens whereas the ECJ takes a truly European perspective?
9. Am I right to be under the impression that you believe this decision helped to make positions clear but will not have a long-lasting negative impact into the future?

9.11 Parliamentary group (PG)

PG are two scientific assistants (*Referent:innen*) the SPD parliamentary group with a focus on constitutional and European Union law.

The interview was conducted on 07/10/2022 via WebEx for approx. 73 minutes.

1. Can you please explain in what way parliamentary groups participate in and accompany cases at the GFCC?
2. How do you select legal representatives?
3. Why did you decide not to participate in the *PSPP* proceeding?
4. The GFCC's *PSPP* decision was heavily criticized not only by legal scholars but also politicians and journalists. Do you think, it was right of the court to take this decision, or should they have left it up to parliament or the executive to make this policy decision?
5. Voices at the court old me that the Federal Government and the governing parties never have articulated clear enough their position on current ECB policy. Was the position on the ECB-policy ever discussed in the parliamentary group?
6. We know that there are frequent meetings between government officials/lawmakers and Judges. Are you/your colleagues able to voice your/their positions on current proceedings in these meetings?
7. Did you expect this ruling?
8. The court's decision put the German government in an awkward position. The European Commission opened a foreseeable infringement procedure against the German government, despite the German government formally having no influence over the court. In the answer to the European Commission the Federal Government is advocating for a stronger dialogue between ECJ and GFCC. Is this dialogue not already happening? And do you believe that a better dialogue would have avoided such a ruling?