

DGAP POLICY BRIEF

Pushing the EU to a Hamiltonian Moment

Germany's Court Ruling and the Need to Build a Fiscal Capacity Force a Constitutional Debate



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The recent ruling of the German Constitutional Court on the ECB was an economic and political bombshell. The deep controversy that resulted – within Germany and on a European scale – illustrates that the ambiguity surrounding the euro area's legal order and architecture may have reached its limit. The ruling, combined with the plan to build a fiscal capacity to address the economic consequences of the coronavirus crisis, presents the EU with an important opportunity to complete and solidify the euro area.

- The gradual expansion of the ECB's role to include supervision, macroprudential policy, financial stability, and others means that it needs a stronger legal footing for its actions, a clarification of its independence, and enhanced accountability to European institutions.
- Because the European treaties prevent monetary financing and fiscal transfers, the possibility for the ECB to undertake policies that imply – even indirectly – such transfers needs to be clarified.
- The question of whether the EU is a construct of international public law in which member states retain ultimate supremacy or whether it is a legal and political order of a constitutional nature that binds its member states needs to be answered without ambiguity.
- The recent Franco-German initiative for the European Recovery Fund, while so far falling short of a Hamiltonian moment, potentially raises important treaty issues. New fiscal instruments created to counter the current economic downturn should indeed be part of a sustainable legal and institutional package that underpins the integration of the EU and the euro area.

On May 5, 2020, the German Constitutional Court (Bundesverfassungsgericht, BVerfG) ruled that decisions by the European Central Bank (ECB) on the Public Sector Purchase Program (PSPP) exceed the competences of the European Union. The ruling was a bombshell for several reasons.

First, the court questioned the lack of control exercised by Germany's government and parliament, the Bundestag, over the ECB's operations, thereby raising a fundamental question about the central bank's independence and threatening the Bundesbank's participation in the PSPP.

Second, while the BVerfG did not rule that PSPP violated the prohibition of monetary financing (Article 123 TFEU) or the no-bail out clause (Article 125 TFEU), it raised questions about the proportionality assessment of the measures and whether this program conformed to the narrow price stability mandate of the ECB.

Third, the ruling fundamentally upended the agreement over the supremacy of EU law over national law and, therefore, of the European Court of Justice over national constitutional courts – a departure with potentially significant consequences because it questions the fundamental nature of the EU's legal and political order.

Because the BVerfG's ruling adds to the controversy that has surrounded the architecture of the EU's Economic and Monetary Union (EMU) since the crises in the euro area, it will certainly test the slightly reformed settlement that emerged after 2012, when then-president Mario Draghi announced that the ECB would do "whatever it takes" to save the euro and the EU adjusted its fiscal rules, rescue mechanisms, and financial supervisory architecture. Coinciding with the coronavirus pandemic, the ruling reopens the fundamental debate around transfers and mutualization that had been brushed under the carpet since the previous crisis.

There are, therefore, two main scenarios for how the EU and Germany can react to the ruling.

Scenario I: Muddling Through

Despite the importance of the ruling, muddling through in legal, economic, and financial terms is al-

ways possible. The European Union is, in fact, used to responding to crises in such a way and it can do it again here.

Legally speaking, the European Commission could formally launch an infringement procedure against Germany in response to the ruling, and the Bundesbank could try to answer the proportionality requests of the BVerfG. Doing so would allow the dance of the judges between Luxembourg and Karlsruhe to carry on.

Economically, despite Germany's objections, the ruling may have only limited impact because the ECB could very well carry on with its purchase program without the participation of the Bundesbank. Other national central banks or the ECB itself could intervene in PSPP in its stead. Thus, in the short term, the BVerfG's decision would not fundamentally undermine the operation of the European System of Central Banks (ESCB) and the functioning of the euro area. If, however, the Bundesbank were to eventually end its participation in PSPP, it would be a terrible sign of isolation for Germany and would raise legitimate questions about the long-term sustainability of the euro.¹

Scenario II: A Political Response

The decision of the German Constitutional Court raises fundamental questions that touch upon the political nature of the euro area and its institutional setup. While the court has been heavily criticized in pro-European circles, posing these challenges is no act of anti-Europeanness as such. The BVerfG may well have a political agenda, but it raises issues that have been evaded for too long.

It is now important to seize the momentum and respond politically by exploring the ways in which to implement two things: a change to the EU's primary law and, potentially, a change to the German Constitution. Indeed, while treaty (and constitutional) reforms are often presented as being beyond reach, a number of elements of a constitutional dimension have, in fact, been added to the incomplete governance of the euro area since the euro was created by the Maastricht Treaty in 1999. As a result of crises in the euro area, several elements – such as reform of the EU's fiscal rules and the creation of common financial supervision – were introduced via second-

¹ It would only challenge the future integrity of the euro area if Berlin were to raise questions about its future participation or if the Bundesbank were to take more active steps to prepare for a possible end of the EMU, for instance by demanding that Target 2 balances be contained or collateralized.

ary law. The European Stability Mechanism (ESM) and the Fiscal Stability Treaty (TSCG) were, for example, created on the basis of intergovernmental treaties outside the EU's institutional setup as well as limited treaty revision including the modification of Article 136 of the Treaty on the Functioning of the European Union (TFEU). This simplified revision procedure not only allowed for the politically complex ordinary procedure to be circumvented, resulting in fairly rapid implementation, but it also proved that changes of a constitutional nature (i.e. to TSCG) as well as revisions of EU Treaties (i.e. to Article 136 TFEU) are entirely possible.

The BVerfG's recent ruling suggests that some issues can only be solved through a broader European conversation that could lead to a new institutional and constitutional settlement for the euro area. These are the three main questions that need answering:

1. Is the independence of the Central Bank so absolute that it is truly beyond the control and outside the democratic accountability of both national and European institutions?
2. If the European treaties specifically prevent monetary financing (Article 123 TFEU) and fiscal transfers through the assumption of debt issued by a member state (Article 125 TFEU), can the monetary authority undertake policies that amount – even if indirectly – to such transfers?
3. Perhaps most importantly, is the EU a construct of international public law in which member states retain ultimate supremacy, or is it a legal and political order of a constitutional nature that, therefore, binds all its member states?

A NEW PERSPECTIVE ON CENTRAL BANK INDEPENDENCE

The BVerfG argues that the Bundestag and the German government have failed to control the ECB's actions sufficiently:

“Based on their responsibility with regard to European integration (Integrationsverantwortung), the Federal Government and the German Bundestag have a duty to take active steps against the PSPP in its current form. ... Specifically, this means that, based on their

responsibility with regard to European integration (Integrationsverantwortung), the Federal Government and the Bundestag are required to take steps seeking to ensure that the ECB conducts a proportionality assessment. This applies accordingly with regard to the reinvestments under the PSPP that began on 1 January 2019 and the restart of the programme as of 1 November 2019. In this respect, the Federal Government and the Bundestag also have a duty to continue monitoring the decisions of the Eurosystem on the purchases of government bonds under the PSPP and use the means at their disposal to ensure that the ESCB stays within its mandate.”²

The German Constitutional Court's claim that German institutions should hold the ECB accountable seems to run against two fundamental principles that define the European Central Bank's position in the EU system. First, Article 130 TFEU created possibly one of the most independent central banks in history. Second, Article 248 (3) TFEU established that the ECB is accountable to the European Parliament and Council – to which the president of the ECB addresses an annual report on the activities of the ESCB and monetary policy, on the basis of which they may hold a general debate; it is not, however, accountable to national parliaments or the governments of individual member states.

Consequently, the natural response of the ECB and European institutions is to consider central bank independence to be unquestionable. Nevertheless, the increasing role that the ECB plays in policies with distributional consequences has created a growing and valid debate about accountability. Over the past ten years, the ESCB has grown to play a central role in macroprudential policy, which clearly expanded its impact beyond its original price stability mandate. In regard to banking supervision, the Single Supervisory Mechanism created in 2013 added – on the basis of the fairly slim provisions of Article 127 (6) TFEU – an implicit financial stability mandate to its responsibilities. Moreover, the ECB is de facto playing a growing role in credit allocation through its long-term refinancing operation (LTRO), targeted longer-term refinancing operations (TLTRO), and asset purchases programs, which were launched starting in 2011 to stabilize financial markets in the course of the sovereign debt and banking crises. While these moves were accompanied by growing – albeit insufficient – efforts by the ECB to improve the trans-

² Bundesverfassungsgericht, “ECB decisions on the Public Sector Purchase Programme exceed EU competences,” Press Release No. 32/2020 of May 2, 2020: <<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html>> (accessed May 19, 2020).

parency of its decisions, accountability has not improved proportionally.

Now, the ECB is already a key player in the EU's response to the COVID-19 crisis. In addition, it might eventually play an important role in supporting a green transition to address climate change as part of the ongoing revision of its operational framework. While probably justified, the policies that central banks are currently undertaking in response to such developments are, in fact, merely a return to the role central banks played until the great monetarist revolution of the late 1970s. Then, central bank policy was under the control of more accountable institutions and, ultimately, governments. In recent years, growing financialization has given central banks a more critical role in backstopping the financial system. Central banks have not only remained lenders of last resort to banks, but they have also become dealers of last resort to stabilize the flow of collateral – the new lifeblood of the whole financial system.

With its ruling, the German Constitutional Court is possibly inadvertently, but potentially very aptly, questioning whether modern central banking requires a whole new set of democratic checks and balances, something economic historian Adam Tooze refers to as a new “financial constitution.”³ In this sense, and rather ironically, if Berlin were to follow this ruling, it might start an important conversation about central banking and accountability that has been avoided for years.

Such a conversation could eventually lead to calls for revising Article 130 TFEU, which establishes the ECB's absolute independence. It could also bring about other changes in the treaty, including provisions to offer a more solid legal basis for ECB action in financial supervision and resolution – something the ECB has proposed, for example, to justify its role in the supervision of non-bank actors for which it currently has no mandate. In addition, the conversation could lead to amendments to the ECB's mandate and statutes that could provide more solid footing for its growing role in economic policy, financial stability, supervision, climate change, and, possibly, employment.

The key question is whether these changes should be enshrined in primary law or whether they could actually take place through changes in the doctrine

alone. Indeed, the mandate can be interpreted in a way that is sufficiently flexible to allow for the ECB to introduce new responsibilities gradually. Accountability could also be greatly enhanced by two measures. First, by improving transparency, for example, by making the votes of members of ECB's governing council public. And second, by turning the toothless and cordial “monetary policy dialogues” currently held by the European Parliament into proper and more frequent formal hearings – possibly not only of the ECB's president, but also of other board members in areas pertaining to financial supervision, macroprudential policy, and monetary policy implementation. A more active European Parliament and a more collaborative ECB could create the framework for greater transparency and accountability.

Berlin might start an important conversation about central banking and accountability

Still, there are also clear advantages to pushing for changes to the TFEU. Such changes would enshrine the expanded competence of the ECB in law that would be politically and unanimously sanctioned. The new legal basis would, therefore, answer and put to rest the concerns expressed by the German Constitutional Court, which largely result from its narrow definition of proportionality and the ECB's mandate. Changing the TFEU, though, requires political consensus that might be very difficult and protracted to obtain. All 27 EU member states – even those that are not part of the euro area – would have to accept the treaty change and ratify it, which in some cases may require national referenda. Consequently, a change to the doctrine rather than to the TFEU may seem to be the preferable solution although it does not provide the legal certainty upon which the euro area should be operating.

³ Adam Tooze, “The Death of the Central Bank Myth,” *Foreign Policy*, May 13, 2020: <<https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/#>> (accessed May 20, 2020).

THE MAASTRICHT CONUNDRUM

The Maastricht Treaty of 1992 set the goal of creating a European Monetary Union and prescribes its basic architecture. Its provisions for setting up such a union are a compromise among competing visions, in particular with regard to the respective roles of monetary and budgetary policy and risk sharing. The treaty specifically rules out bail-outs for EU member states and, by extension, excludes debt mutualization and transfers, but it does so ambiguously.

The German Constitutional Court did not rule that PSPP violates Article 123 TFEU, which prohibits monetary financing. Its argument about proportionality, however, rightly questions – although in a somewhat oblique manner – whether the ECB’s purchase program amounts to economic policy. The ECB not only has no mandate to create such policy, but doing so would, in fact, violate principles that have been enshrined in the EU Treaty since Maastricht.

The BVerfG’s concern about the principle of proportionality is formal in that the court suggests that PSPP does not respect the limits of EU competencies as laid out in Article 5 TEU and possibly violates the separation of competencies between the EU level and that of its member states. But the BVerfG’s concern is also substantive in that it suggests that PSPP, by possibly indirectly encroaching on member states’ economic policies, could in effect allow governments mutualization and transfers by stealth, causing them to essentially violate the Maastricht settlement.

While it can be upsetting from an economic and political perspective that the German Constitutional Court does not comprehend that there is no clear line in proportionality and no absolute separation between monetary policy and other distributional policies, it is nonetheless legitimate for the court to ask whether these operations and their consequences are fully in line with European treaties. But it is problematic that, time and again, European governments have deliberately accepted that the ECB underwrites policies that they were not prepared to undertake or sanction politically themselves – for example, the transfers embedded in the operations of the Emergency Liquidity Assistance (ELA), the financial support provided to the Irish government with the

issuance of a promissory note, and the credit allocation incentives embedded in LTRO and TLTRO.

The ruling is a warning that the euro area architecture is inadequate

The ruling of Germany’s Constitutional Court should indeed be read as an unmistakably clear warning that the architecture of the European Monetary Union is inadequate. In order for the euro area to continue to exist, it has two options. The European Central Bank could expand its reach to compensate for the lack of budgetary and economic policy tools at the European level. Alternatively, the EU could revise the TFEU so that structures of fiscal federalism could be set up that allow for more fiscal risk sharing in order to underpin the monetary union. It is improbable that the euro area will thrive if neither of these two options is chosen. Therefore, the most reasonable and consequential response to the BVerfG’s questions about the ECB’s proportionality assessment would be to pick up the project of strengthening the architecture of the euro area where it was left. Important contributions have already been made, for example the Four Presidents Report “Towards a Genuine Economic and Monetary Union”⁴ and the Five Presidents Report on “Completing Europe’s Economic and Monetary Union”⁵ that were published in 2012 and 2015, respectively.

The debate was not shelved because the economic, legal, and political fragilities of the euro area’s set-up had gone away. Rather, progress was impeded by a lack of political will to genuinely address its architectural weaknesses that the financial, sovereign debt, and banking crises had revealed.

In essence, the judges of the BVerfG in Karlsruhe might have offered the EU the strongest possible political push for a real Hamiltonian moment – the explicit acknowledgement that monetary union

⁴ European Council, “Towards a Genuine Economic and Monetary Union: Report by President of the European Council Herman Van Rompuy,” June 26, 2012: <<https://www.consilium.europa.eu/media/33785/131201.pdf>> (accessed May 19, 2020).

⁵ European Commission, “The Five Presidents Report: Completing Europe’s Economic and Monetary Union,” June 22, 2015: <https://ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en> (accessed May 19, 2020).

requires common taxation, common spending, and common borrowing so as to effect, transparently and democratically, the transfers that are needed and that are now taking place in the cracks and shadows of ECB's operations. In an interesting twist of fate, this echoes debates within Germany about the operations of its own fiscal federalism, in particular those concerning the constitutional settlement of 2009 that enshrined the national *schuldenbremse* ("debt brake") but have proven unable to end transfers between the federal government and the country's states and municipalities.⁶

The intensely debated Franco-German initiative for the European Recovery Fund of May 18⁷ is clearly important. It does not, however, constitute a Hamiltonian moment for the EU as it does not clearly foresee a common European tax that would back common borrowing. Germany's Federal Minister of Finance, Olaf Scholz, has, however, already suggested that a response might require not only own resources, but also, more probably, some modification of Article 311 TFEU.⁸ Although encouraging, Germany's approach has faced substantial resistance by its traditional allies – Sweden, Denmark, Austria, and the Netherlands – who will test Berlin's ability to move the lines of the debate in those countries.

This can, however, be a first move toward a far bigger project that would indeed be Europe's Hamiltonian moment: the creation of an EU tax capacity with permission for the European Commission to issue debt. Undoubtedly, if the EU raises taxes and issues debt, national governments would first need to sanction this sharing of fiscal competence – possibly by way of ratifying the necessary simplified treaty revision. Because taxing power requires stronger representation and democratic accountability, this step would need to be accompanied by a stronger role for the European Parliament based upon a clear legal foundation.

Alexander Hamilton: First Secretary of the Treasury of the United States

A member of the Constitutional Convention and a close ally of George Washington, Alexander Hamilton is widely credited with kick-starting American monetary union by launching the First National Bank of the United States, the precursor of an American Central Bank that helped unify America's financial system. In reality, the United States only established a unified central bank in 1913 – more than 120 years after Hamilton led the Treasury.

Hamilton is certainly responsible for the first essential steps in **fiscal integration that empowered the federal government and eventually led to the economic, monetary, and political integration** of the nascent federation. Two steps were arguably the most critical: First, the establishment of a customs force, called the "Cutters," which allowed taxes and duties on imports to be levied at a time when they were the central source of revenue for the government. And, second, the very first tariff bill, which, in January 1790, established a tax on whiskey. Although highly controversial, it became the first source of income for the federal government. It was only on the basis of these revenues that Hamilton was able to convince state representatives of the need for issuing national (i.e. federal) debt and assuming the war debt of individual states. In only the few months between January and April 1790, when the assumption of war debt was put to a vote, Hamilton convinced the federation to mutualize the costs of the Revolutionary War incurred by the states. This successful vote not only established the foundation of American fiscal integration, but also the core of the federal government.

⁶ Shahin Vallée, "Living a Lie," Berlin Policy Journal, November/December 2019: <<https://berlinpolicyjournal.com/living-a-lie/>> (accessed May 19, 2020).

⁷ Presse- und Informationsamt der Bundesregierung, "A French-German Initiative for the European Recovery from the Coronavirus Crisis," Press Release Number 173/20, May 18, 2020: <<https://www.bundesregierung.de/resource/blob/973812/1753772/414a4b5a1ca91d4f7146eeb2b39ee72b/2020-05-18-deutsch-franzoesischer-erklaerung-eng-data.pdf?download=1>> (accessed May 19, 2020).

⁸ Peter Dausend and Mark Schieritz, Interview with Olaf Scholz "Someone Has to Take the Lead" [in German], Die Zeit, May 19, 2020.

THE EUROPEAN CONSTITUTIONAL ORDER

Most fundamentally, the German Constitutional Court is asking whether the EU, at its core, is an association of sovereign states bound by treaties of international public law that organizes the sharing of certain competences, or whether it is a nascent supranational constitutional, legal, and political order that frames the transnationalization of democracy. The BVerfG has responded to this question in the past, most importantly with its ruling on the Maastricht and Lisbon Treaties. With those rulings, it built high obstacles to further integration by elevating its interpretation of both the budgetary competence of the Bundestag and the principles of democracy. Doing so has allowed the German court to set the stage for an elaborate dance between Karlsruhe and Luxembourg⁹ that has been going on for 30 years and has, so far, carefully avoided turning into a war of the judges.

For many years, it was assumed that the German Constitutional Court would only need to rule against the European Court of Justice in exceptional cases, for example in order to preserve fundamental rights enshrined in the German Constitution. Instead, under the guise of protecting German democracy, the BVerfG has created a broad pathway for legal challenges to European integration. It did so by combining the individual right of citizens to vote in a democratic election with the principles of democracy established in the national constitution to create the means to limit and control the scope and extent of European integration. The court, for example, allows any plaintiff to consider that any action taken by the EU infringes on his or her basic democratic rights¹⁰ – especially since its ruling of June 30, 2009, on the Lisbon Treaty that posited that the treaty, which had only come into force at the beginning of that year, had important democratic shortcomings. The BVerfG, therefore, considerably limited the expansion of EU competences, in particular in the fiscal realm.

In sum, the principle of the supremacy of EU law raises fundamental questions from a German consti-

tutional perspective, which the constitutional court has now made explicit. By challenging the supremacy of EU law, the court has invited others to follow suit with the risk of unravelling the entire legal fabric of the EU.¹¹ The BVerfG has, thus, opened Pandora's box;¹² now the question is how the risk of such unravelling, including the undermining of the euro, can be contained.

One possible response could be that the European Commission launches a formal infringement procedure against the German Government. If successful, it could force corrective action, possibly making it necessary for Germany to change its constitution, the so-called Basic Law.

An alternative, or possibly an additional step following an infringement procedure, could be a reform of the EU Treaties. Treaty change would not only clarify the legal order and primacy of EU law and the European Court of Justice over national legal systems; but it would also clarify the political settlement underpinning the EU and its federal nature. Together, such clarification would contribute to undoing the arsenal of constraints on further EU integration introduced by the BVerfG¹³ over the last decades, thereby clarifying the political and legal core of the EU. Such treaty changes could also bring about amendments to Germany's Constitution (and possibly those of other countries as well). If the German government uses the BVerfG's May 2020 ruling, its upcoming Council presidency, and the impending Conference on the Future of Europe to launch a real agenda of European institutional reforms, it would provide the best possible response to a ruling that – if not answered properly – could fester and rot the foundations of both the EU and euro area.

ATLAS, HERACLES, PERSEUS – AND HAMILTON

The German Constitutional Court might be independent, but it helps shape political developments significantly. Over the last 30 years, it has framed

⁹ Stefan Kornelius, "Dance of the Judges" [in German], *Süddeutsche Zeitung*, May 6, 2020: <<https://www.sueddeutsche.de/politik/europa-tanz-der-gerichte-1.4899062>> (accessed May 19, 2020).

¹⁰ Maximilian Steinbeis, "We Super-Europeans," *Verfassungsblog*, May 8, 2020: <<https://verfassungsblog.de/we-super-europeans/>> (accessed May 19, 2020).

¹¹ As Peter Meier-Beck, a presiding judge at the German Federal Court of Justice (Bundesgerichtshof), argued: "The judgement of the Federal Constitutional Court of 5 May 2020, passed by seven votes to one, is an attack on the European Union as a legally constituted community of European democracies." See: Peter Meier-Beck, "Ultra Vires?," *D'Kart*, May 11, 2020: <<https://www.d-kart.de/en/blog/2020/05/11/ultra-vires/>> (accessed May 19, 2020).

¹² Katharina Pistor, "Germany's Constitutional Court Goes Rogue," *Project Syndicate*, May 8, 2020: <<https://www.project-syndicate.org/commentary/german-constitutional-court-ecb-ruling-may-threaten-euro-by-katharina-pistor-2020-05>> (accessed May 19, 2020).

¹³ Through its Maastricht Urteil, Lisbon Urteil, and judgments on the composition of the EP, the ESM Treaty, and the ECB action, among others, the BVerfG significantly limited the ability of Germany to participate in the EU. Of particular importance here is the judges' reading of the Basic Law's right to vote clause. See: Federico Fabbrini, "Suing the BVerfG," *Verfassungsblog*, May 13, 2020: <<https://verfassungsblog.de/suing-the-bverfg/>> (accessed May 19, 2020).

European integration in such a way that it has assumed the role of a *primus inter pares* – first among equals – among Europe’s constitutional courts. This is not sustainable in the long run.

Yet if it were seen in a forward-looking and determined way, the BVerfG’s recent ruling may have positive consequences, in particular because it could help promote force a change in public opinion and political attitude in Germany. Since its creation, especially since the financial crisis hit more than a decade ago, the monetary union has been gradually transformed. The need for stabilization and transfers has been exposed, but it has been resisted and minimized by European governments. This has, in turn, forced the European Central Bank to play a greater role – through indirect mutualization and monetization. These measures were necessary to reduce acute fiscal distress and profound economic divergence, as well as to avoid a possible break-up of the single currency. Under Mario Draghi’s leadership, the ECB played an extraordinary role in ending the crises in the euro area. But, as a result, European governments were allowed to stop short of engaging in stronger fiscal risk-sharing.

This situation has put the ECB in the mythological role of Atlas, condemned by Zeus to hold up the celestial heavens for eternity at the edge of the earth. Atlas argues with Heracles – in this case, European governments – in order to enlist his support to hold the skies. Tellingly, Heracles comes to Atlas and they play a game of chicken in which each of them, in turn, cheats the other into holding the celestial sphere momentarily. As the BVerfG’s judgement makes clear, the time has now come for Heracles to liberate Atlas from his ordeal. It is economically, politically, and legally necessary that the architecture of the euro area is finally completed, including filling the need for stronger fiscal integration and the provision of democratic legitimacy at the EU level.

In the Greek myth, Perseus comes to Atlas and reveals the beheaded Medusa, freezing Atlas into a chain of mountains that touches the skies at the edge of the earth. The BVerfG is our Perseus and risks freezing into stone the European Central Bank with its beheaded Medusa ruling.

Unfortunately, Greek myth did not allow for Heracles to come to the rescue of Atlas. Doing so requires a different sort of hero in the manner of Alexander Hamilton, who pushed forward the assumption of the debt accumulated by individual states during the Revolutionary War by a federal government – a real leap for common debt, but, first and foremost, for allowing common fiscal revenues and common spending. The German Constitutional Court, for all its faults, might successfully tip the German debate, which has, for years, refused to face the reality that the monetary union can only operate on the basis of the federalization not only of its monetary policy, but also a portion of its fiscal policy. Such federalization will bring about difficult institutional and constitutional changes, but – because muddling through has become economically, politically, and legally toxic – they have become necessary.

May 18’s Franco-German agreement¹⁴ certainly falls short of a real Hamiltonian moment in that it does not allow for the creation of a common tax to back common borrowing. It also does not force the subsequent political changes in representation and democratic accountability that come with taxing power and that normally come with minting money. But, possibly, the agreement is a down payment on forcing a real institutional and constitutional debate that will provoke a new settlement. If this is where we are headed, contrary to some of the certainly legally valid criticisms addressed to the BVerfG and its judges, the ruling would serve a useful purpose for Europe.

¹⁴ Presse- und Informationsamt der Bundesregierung, “A French-German Initiative for the European Recovery from the Coronavirus Crisis,” Press Release Number 173/20, May 18, 2020: <<https://www.bundesregierung.de/resource/blob/973812/1753772/414a4b5a1ca91d4f7146eeb2b39ee72b/2020-05-18-deutsch-franzoesischer-erklaerung-eng-data.pdf?download=1>> (accessed May 19, 2020).



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