



JURISDICTIONAL CONFLICTS

FCC v ECJ in PSPP

2nd Virtual Workshop Session

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I. Chronology of events in PSPP

- Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10)
- FCC, Decision of 18.7.2017 - initiation of preliminary ruling
 - Breach of Art. 123(1) TFEU?
 - Ultra-vires because the program is not monetary policy, but economic policy?
In particular, observation of principle of proportionality and proper reasoning?
 - Breach of Art. 125 TFEU?
- ECJ, Case C-493/17, judgment of 11.12.2018 → no violation of the Treaties
- FCC, Decision of 5.5.2020
 - No breach of Art. 123(1) and 125 TFEU
 - **But PSPP is ultra-vires → infringement of principle of proportionality**
 - **Judgment of ECJ is ultra-vires → simply not comprehensible, thus arbitrary**

II. The bigger picture

1. Basic Law and admissibility

Why can an individual challenge acts of the ECB before a national court?

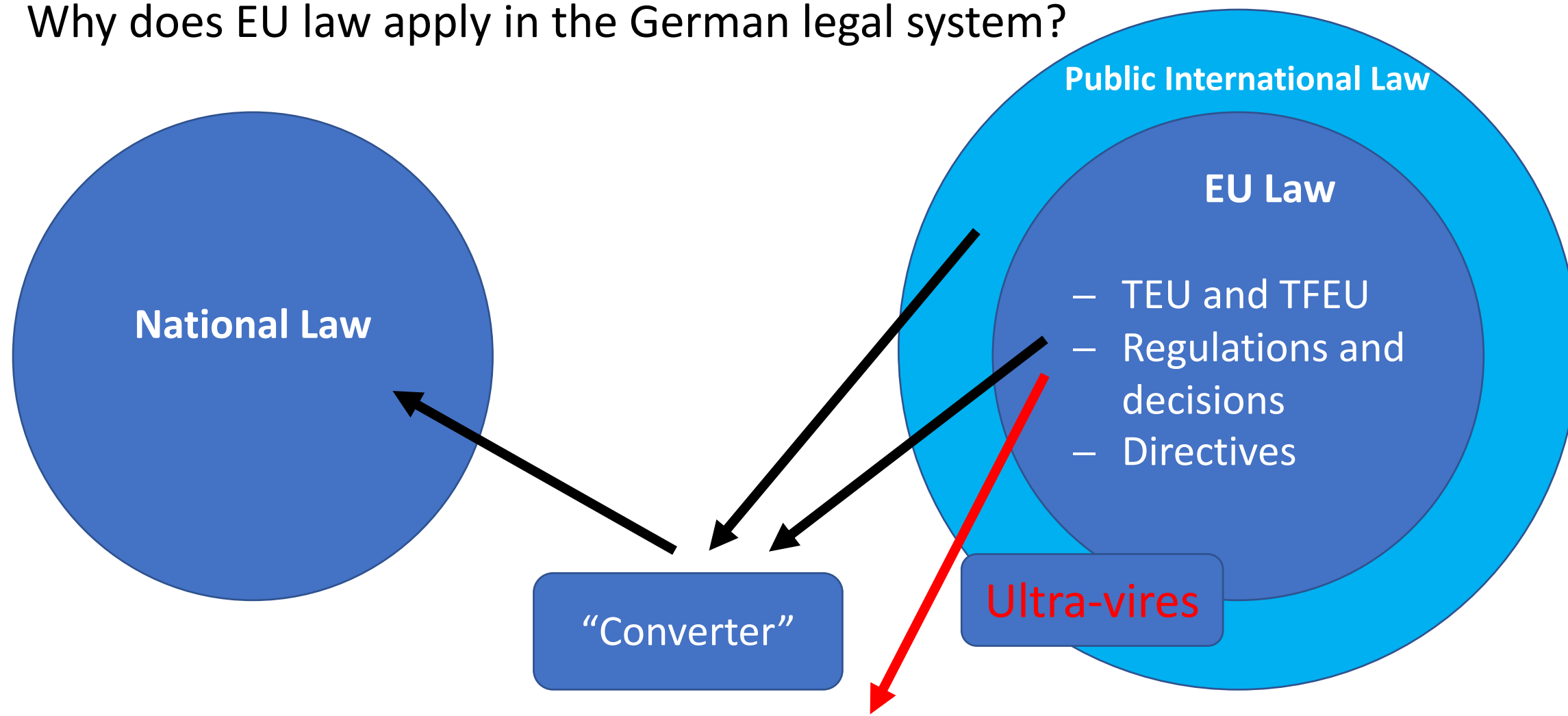
- Subject matter
 - ~~Decision of the ECB and judgment of the ECJ~~
 - Omission of the German state to interfere
- Legal standing
 - Limit to European integration → eternity-cause
 - Eternity-clause is unchangeable
 - Principle of democracy is protected under eternity-clause
 - Principle of democracy includes right to vote
 - Right to vote = **“Right to democracy”**



II. The bigger picture

2. Applicability and primacy of EU law

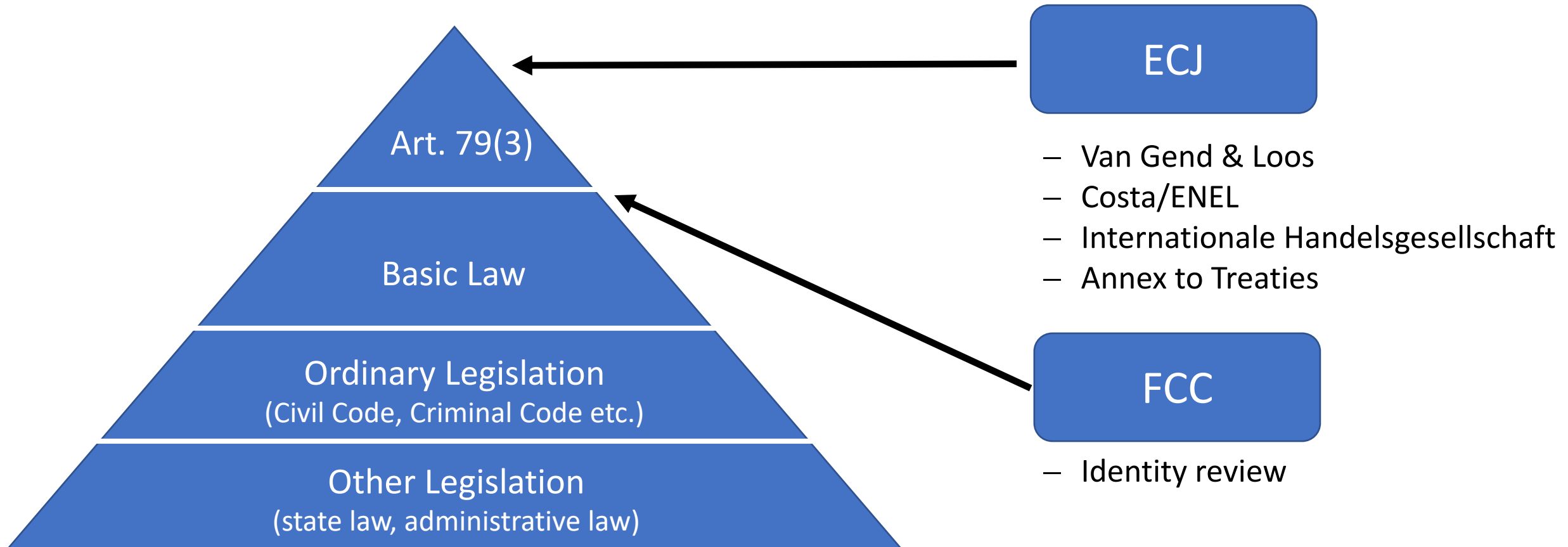
Why does EU law apply in the German legal system?



II. The bigger picture

2. Applicability and primacy of EU law

How does EU law rank within national law?



II. The bigger picture

3. Jurisdictional conflicts

a) National law v EU law – Case law of the FCC

FCC Decision:

- Solange I, 1974
- Solange II, 1986
- Maastricht-Treaty, 1993
- Euro, 1998
- Market in Bananas, 2000
- European arrest warrant, 2005
- Greenhouse Gas Emission Allowances, 2007
- Lisbon-Treaty, 2009
- Honeywell/Mangold, 2010
- ESFS-Treaty, 2011
- StabMechG, 2011
- ESM-Treaty, 2012
- Sentence in the absence of the accused, 2015
- OMT/Gauweiler, 2016
- Egenberger, 2018 and pending
- Banking Union, 2019
- EU Patent Court, 2020
- PSPP/Weiss, 2020

II. The bigger picture

3. Jurisdictional conflicts

a) National law v EU law – Case law of the FCC

FCC Decision:

Category:

– Solange I, 1974	1
– Solange II, 1986	1
– Maastricht-Treaty, 1993	1, 3
– Market in Bananas, 2000	1
– European arrest warrant, 2005	2
– Lisbon-Treaty, 2009	2, 3
– Honeywell/Mangold, 2010	3
– OMT/Gauweiler, 2016	2,3
– Egenberger, 2018 (pending)	2
– PSPP/Weiss, 2020	2, 3

Legend of categories:

1	=	Fundamental rights review
2	=	Identity review
3	=	Ultra-vires review

II. The bigger picture

3. Jurisdictional conflicts

b) National law v public international law

- Perspective of public international law
 - Absolute primacy of international law over national law, Art. 27 VCLT
- Perspective of national law
 - International treaties = rank of “ordinary” legislation such as Civil Code (Art. 59(2) Basic Law)
 - Treaty-override decision by FCC
 - Lex-posterior rule applies
 - General rules of international law = ranking over ordinary legislation and below the Basic Law (Art. 25 Basic Law)

II. The bigger picture

3. Jurisdictional conflicts

b) EU law v public international law

– Conflicts with ECtHR

- ECtHR, *Bosphorus Hava Yollari Turizim Ve Ticaret Anonim Sirketi ./. Ireland*
- EU as part of the ECHR?
 - Art. 6(2) TEU → should be
 - But ECJ stepped in: ECJ, Opinion 2/13 of the Court → fear?

– Conflicts with WTO

- Art. 216(2) and 218(11) TFEU – rank over secondary, but under primary law
- ECJ, Case C-21/72 and others, *International Fruit Company*
- ECJ, Case C-280/93, *Market in bananas*
- ECJ, Case C-53/96, *Hermès International*
- ECJ, Case C-300/98 and others, *Dior*
- ECJ, Case C-377/02, *van Parys*

II. The bigger picture

4. How to live with jurisdictional conflicts?

- Jurisdictional conflicts cannot be eradicated, but minimised
 - ECJ needs to step up his judicial control of EU institutions (Pringle, Banking Union, OMT, PSPP, ...)
 - Preliminary rulings must be a requirement, but at the same time the ECJ needs to take national arguments more into account
 - National courts must restrain themselves in the conclusion of ultra-vires
- How to deal with remaining conflicts?
 - In case of identity review: Accept them → Art. 4(2) TEU
 - In case of ultra-vires review: Live with and put a price tag on them?

III. Criticism of the judgment - A defence

Rude language: “The Court of Justice [...] exceeds its judicial mandate [...] where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective.” – **PSPP, 2020**

- The FCC only complains of the interpretation and application [...] if, [...], they no longer appear to be comprehensible and are manifestly untenable. This standard for what is considered arbitrary [...] – **Honeywell, 2010**

Change criteria as developed in Honeywell

- Lowering standards will completely destroy uniformity of EU law

III. Criticism of the judgment - A defence

Headless of the political consequences for Europe and Germany

- Crisis for the monetary Union
- Crisis for the Union as a Union of law
- Bad example for Poland, Hungary and others

- Rule of law prohibits political trade-offs in the centre of judgments
- Breach of principle of proportionality as peace offer

III. Criticism of the judgment - A defence

Sudden questioning the supremacy of EU law will destroy the EU as a Union of law

- Questioning of supremacy over the last 45 years
- Not just the FCC (eg Czech Republic and Denmark)
- Questioning as stimulation of ECJ case law
- Sovereignty demands that Member States have the “final say”

III. Criticism of the judgment - A defence

If ultra-vires, at least not in this case because proportionality is not a clear line

- FCC **did not** find PSPP to be disproportionate (!)
- History of the judgment
 - Pringle, Art. 125 TFEU
 - Banking Union, Art. 127(6)
 - OMT, Art. 123(1) TFEU
- Necessity of reforms or potential effectiveness does not trump democracy
- Lesson learned for future reforms

III. Criticism of the judgment - A defence

“Quis custodiet ipsos custodes?” or Who governs the governors?

- Legality of ECB actions → controlled by ECJ
- Applied standard → EU Treaties

-
- Applicability of ECB actions in Germany → controlled by FCC
 - Involvement of German state organs → controlled by FCC
 - Applied standard → Basic Law

= Different standards of review

III. Criticism of the judgment

- A defence

FCC killed central bank independence → ECB is politicized by the proportionality test

- Forced to do economic policy contra to Art 127(1) TFEU?
- Weighing of interests of savers v house prices v unemployment rate v inflation rate?

- Proportionality test as **compensation** for missing demarcation → therefore part of demarcation process → not covered by independence
- **Monetary objectives > economic consequences**
 - **Indifferent** of specific economic consequences (!)
 - If economic consequences outweigh → lack of competence for the act
 - Eg: inflation rate will rise from 1.6 % to 1.7 % v house prices skyrocket, interest on savings decreases → economic consequences outweigh monetary policy → no competence

Criticism of the judgment

- A defence

How to differentiate monetary from economic policy?

ECJ

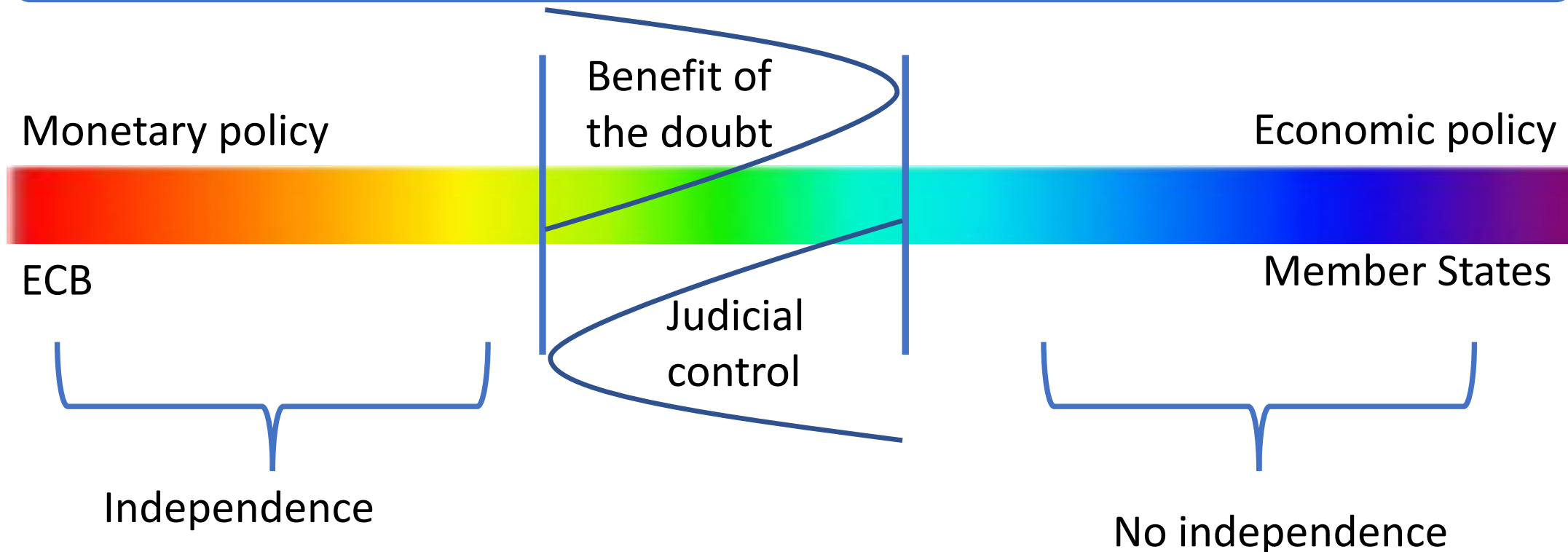
1. Objectives of ECB
 - Wide margin of discretion
 - Little judicial scrutiny
2. Instrument used

FCC

1. Objectives of ECB
 - → insufficient because neither questioning of assumptions nor checked for comprehensibility
2. Instrument used
 - → too wide
3. Proportionality test

Criticism of the judgment - A defence

FCC killed central bank independence



IV. Conclusion

- Jurisdictional conflicts are nothing exceptional
- It is possible to handle jurisdictional conflicts without eradicating them
- The judgment of the FCC is a warning shot and a peace offer at the same time
 - A warning shot because it sets clear limits to the supremacy of the ECJ
 - A peace offer because no breaches of Art. 123 and 125 TFEU have been found
- The judgment is not a new development but a consistent continuation of more than 40 years of case law
- The judgment can be interpreted as strengthening **democracy, the rule of law and the cooperation/dialogue between the courts**

Thank you
for your
attention!

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