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Legal and political significance of decisions of the Karlsruhe Court • The EU in search of its legitimacy

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The Karlsruhe Court's decision of 5th May 2020 had the effect of an earthquake, as it not only concerns the independence of the ECB, but even more and above all, the primacy of European law and of the court in charge of monitoring its application, the ECJ. On 13rd February, a decision on the European patent, which went unnoticed, was already moving in the same direction. The significance of these two rulings, which were handed down in quick succession, is not only legal. It is fundamentally political. It raises the question that has remained unanswered for more than 60 years: that of the lack of legitimacy of the European institutions.

In the midst of the multifaceted crisis caused by the Covid-19 pandemic, , a legal event managed not to go too unnoticed. Certainly the health effects of the "Chinese virus", the incalculable consequences to date that the general lockdown decided upon in many countries will have in the economic and social areas, and the modalities of decontainment, not to mention even a return to “normal", naturally, if not legitimately, hold all the attention of decision-makers and commentators.

However, among the latter, and throughout Europe, one aspect received some attention: the weakness of the response of the European Union (EU) institutions to the situation. At best, commentators and specialists saw it as insufficient, if not belated; at worst, they saw it as non-existent and spectacularly revealing of the absence of that "European solidarity" so often proclaimed, but ineffective. Thus, for example, amid the pandemic, the judgment of the Court of Justice of the European Union (CJEU), condemning Italy to financial penalties for failing to recover subsidies deemed illegally granted to the hotel sector in Sardinia, and the decision of the Council of the European Union, on the recommendation of the Commission, to pursue the enlargement of the Union, in this case to Albania and Northern Macedonia, were taken as signals that were at the very least... inappropriate!

We can't miss the fact that the EU failed in its mission and, doing so, weakened itself to the eyes of several of the Member States, for the public opinion as much as for those in power. Here again, there are nuances of degree in the diagnosis that can be made of "evil" from a temporary illness to an incurable and fatal disease, but there is a form of unanimity on its pathological nature. The remedies also differ significantly, ranging from the legal reinforcement of EU's competences, whose modesty would be the cause of the insufficient response and which Angela Merkel and Emmanuel Macron **(1)** unsurprisingly proposed jointly on 18th May, to the affirmation of the pre-eminence of States whose crisis management would have proved that they are, in fact, the key political and decision-making actors when it comes to "making quick and strong decisions".

It is therefore in the midst of this umpteenth existential crisis that significant support has, indirectly and involuntarily, come for the second remedy. On last 5th May, the German Federal Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*), commonly known as the Karlsruhe Court, handed down a decision in proceedings concerning the legality of the European quantitative easing programme set up by the European Central Bank (ECB) in 2015. The German court had itself referred the matter to the Court of Justice of the European Union (CJEU) for a ruling, but found the latter's opinion of 11th December 2018 incomprehensible and an abuse of authority. According to the German judges, the ECB's action is not proportionate, the monetary authority cannot afford to do everything to fulfil its mission, as Mario Draghi's now famous *"whatever it takes"* could have implied in 2012. In this judgment, it is not only the independence of the ECB that is at stake, but even more so, and above all, the primacy of European law and of the court in charge of monitoring its application, the ECJ. While it is still too early to judge the political and legal effects of this decision, it contributes to undermining the EU's already fragile legal-institutional edifice.

A few weeks earlier, the Karlsruhe Court already issued a far reaching opinion that was much less commented on as it was very technical. On 13rd February, the Court published a decision against the ratification by Germany of the Agreement on the unified jurisdiction of the European patent. The request concerned in particular the loss of sovereign rights caused by the international agreement, and its adoption by an unqualified majority in the Bundestag: conferring on the future court judicial functions instead of German courts would significantly amend the German constitutional provisions relating to the judiciary. However, according to the Basic Law, and in particular its Article 79(2), any law likely to constitute such an amendment requires a two-thirds majority in the Bundestag and the Bundesrat in order to be passed. Behind these legal and procedural considerations, which could appear to be new Byzantine quarrels, lies a major institutional obstacle to the complex and laborious project of establishing a single European patent. But beyond this single dossier, it is above all a big stone in the "ever-closer" Union's shoe. We will explain why further on.

The arguments of the Karlsruhe Court in these two cases, in accordance with its settled case-law, are not only valuable in their juridical aspect. They also have considerable political significance, by placing the EU in front of its main weakness, which years of ECJ case law have not been enough to hide: its lack of legitimacy.

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(1) Presidency of the French Republic, Initiative franco-allemande pour la relance européenne face à la crise du coronavirus, 18 May 2020, available here (in French).

Karlsruhe Court decision of 5th May reveals **the conflict of legitimacy between the European Union and the Member States**

At the heart of its decision of 5th May, which had the effect of an earthquake with many aftershocks both in the German and European political landscape, the grounds of the Constitutional Court touch on the very functioning of the ECB, but also call into question, even more frontally, a decision of the ECJ and, in a way, its role **(1)**. The president of the court himself admitted that this ruling was "not easy to swallow".

In 2015, academics, economists, politicians and 35,000 German citizens brought issues relating to the ECB's monetary policies before the Karlsruhe Court. Their complaints focused on the compliance of the ECB's monetary policies with EU law. It should be noted that the judges in Karlsruhe have a limited understanding of the principle of the primacy of Union law and its direct applicability, recognising their competence to monitor its implementation in Germany: *"It follows that, prior to a decision declaring a legal act of the Union inapplicable in Germany, the Federal Constitutional Court refers a question to the Court of Justice of the European Union* (ECJ) *for a preliminary ruling so that the latter may rule on the interpretation and validity of the contested legal act. When deciding on the merits of the case that gave rise to the preliminary question, the Constitutional Court bases its examination of the act in question on the interpretation of Union law given by the ECJ"* **(2)**. This is the procedure that was followed in this case, and the judgment of the Constitutional Court is certainly a response to the complaints of the appellants, but also appears to be a reaction to the answer given by the European Court to the German preliminary question.

Without going into the technical details of the monetary policies concerned, it should be noted that the CJEU, in its reply of 11 December 2018 **(3)**, deemed "proportionate" and therefore validated the ECB action contested by the complainants. As Nicolas Goetzmann, head of research and macroeconomic strategy at La Financière de la Cité, explains, *"it is this analysis of the CJEU that is directly attacked by the German constitutional court, considering on the one hand that the CJEU has rendered a decision that is 'incomprehensible' and which also represents 'an abuse of authority'. In the present case, the Court considers that the ECB's action is not "proportionate" because it considers that the monetary authority cannot "allow itself everything" to fulfil its mandate of 'inflation close to but below 2%' because it must also take into account the consequences of this monetary stimulus programme, in particular and principally on savers. The underlying idea is that the ECB's debt*

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(1) BVerfG, Judgment of the Second Senate - 2 BvR 859/15 -, paras. (1-237), 5th May 2020, available here. See also: BVerfG, *ECB decisions on the Public Sector Purchase Programme exceed EU competences*, Press Release No. 32/2020, 5th May 2020, available here.
(2) Christine Langenfeld, Judge at the German Federal Constitutional Court, "La jurisprudence récente de la Cour constitutionnelle allemande relative au droit de l'Union européenne",Constitutional Coucil (France), *Les Cahiers du Conseil constitutionnel*, April 2019, available here (in French).
(3) CJEU, *"The ECB's PSPP programme on the acquisition of sovereign bonds in secondary markets does not infringe EU law"*, Press Release No 192/18, 11 December 2018, available here.

repurchase programme would be at the origin of the low rates, which would result in penalising savers. This corresponds to a deep concern of the population in Germany, which is being voiced by the Federal Court" **(1)**.

The Constitutional Court therefore takes the opposite view to Mario Draghi's "*whatever it takes*", when the new President of the ECB, Christine Lagarde, had already taken great care to insist in her interventions and decisions on the measures to be taken to deal with the economic and monetary effects of the Covid-19 pandemic, to place them within the strict framework of the mandate and missions of the ECB **(2)**. Going to the end of its legal reasoning and its case-law, the Court asks the ECB to demonstrate, within three months, that its action was proportionate, failing which the Bundesbank will cease its participation in the quantitative easing programme, the German Central Bank thus finding itself in the extremely uncomfortable situation of being placed between the decisions taken, within the ECB and its subordination to the German constitutional order.

A legal formula states that "the accessory follows the principal": the question here is not only, or at least not primarily, monetary, but above all legal and institutional – and if it were not from a jurisdiction as rigorous and respected in Germany as the Federal Constitutional Court, one might add, political. And indeed, in this case, the Court is dealing with two pillars of European construction: the euro and the CJEU.

Looking at the euro, it is the symbol desired and defended at all costs by European leaders, but it is ontologically fragile and must be constantly saved. Its *"creation was probably the most ambitious global economic project of the last fifty years. It is also the fullest of contradictions. Europeans have put in place a single currency to crown a single market for goods and services, while allowing tax and social competition to continue within the same monetary area. At the same time, they have eradicated all forms of economic flexibility in favour of a rigid and overly dogmatic system. They have reversed the order of priorities, starting with the single currency when it should have completed years, if not decades, of fiscal and social convergence* [...]. *The creation of Monetary Union was born of the idea that this union would bring political union to Europe. The monetary and financial fabric of the European project is faltering; the current monetary policy of the ECB appears to be ineffective and to have reached an impasse, while the existence of the euro could be threatened by the end of the next decade*" **(3)**. However, in the dominant vision of European construction, the symbols represented by this currency and the claimed independence of the ECB are too essential to tolerate that they are, or appear to be questioned, at the risk of jeopardising the whole edifice.

Regarding the second, the ECJ, there is clearly a conflict of legitimacy. The Court in Luxembourg is one of the institutions created and established by the first European Community Treaties. However, in a founding judgment dating back more than fifty years, it itself considered that *"by contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply* [...]. *By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the*

(1) Nicolas Goetzmann, "L'Allemagne cherche à germaniser le droit européen", FigaroVox, 6 May 2020, available here (in French).
(2) Andrew Rettman, *ECB promises (almost) whatever it takes*, EU Observer, 19 march 2020, available here.
(3) Sébastien Laye, *Pour une autre politique monétaire : flexibiliser l'euro et réformer la BCE*, Thomas More Institute, Note 33, May 2019, available here (in French).

international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves [...]. *The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity"* **(1)**.

From this reasoning, the Court of Luxembourg drew a legal conclusion that is destined to become the basis of a consistent case law with far-reaching political consequences: *"the transfer by States, from their domestic legal order to the Community legal order, of the rights and obligations corresponding to the provisions of the Treaty thus entails a definitive limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail"* **(2)**.

By this simple formula, the ECJ has established a Community legal order distinct from national legal orders, which the authorities of the Member States should apply to all their national acts, including constitutional acts, whether adopted before or after a European act with binding force, which may derive from primary or secondary law.

The Karlsruhe Court was established by Articles 92 to 94 of the German Basic Law **(3)**, which entered into force on 24th May 1949. The specific law organising it was signed on 12th March 1951 **(4)**. It ensures respect for the Constitution and *"the free and democratic fundamental order of Germany"* **(5)**. On the occasion of its fundamental case-law in the "Lisbon" judgment of 30th June 2009, it stresses that *"in the wake of the experience of devastating wars, precisely also between the peoples of Europe, the Preamble of the Basic Law underlines not only the moral basis of responsible self-determination, but also the will to serve world peace as an equal member in rights in a united Europe* [...]. *It follows from the continuity of the sovereignty of the people anchored in the Member States and from the fact that the Member States remain the masters of the Treaties – at least until the formal establishment of a European federal state and the explicit change of the subject matter that is the source of democratic legitimacy that must then take place - that the Member States may not be deprived of the right to verify that the integration programme is being complied with* [...]. *The Federal Republic of Germany contributes to the development of a European Union which is conceived as a grouping of States and to which sovereign rights are transferred. The concept of "grouping" refers to a close and permanent association of States which remain sovereign and which exercise public authority based on treaties. However, the fundamental rules of this association are at the exclusive disposal of the Member States and the peoples, i.e. the citizens, of the Member States remain the subjects conferring democratic legitimacy"* **(6)**.

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(1) Court of Justice of the European Communities, Case 6/64 Flaminio Costa v ENEL, 15 July 1964, available here.
(2) *Ibid.*
(3) Basic Law for the Federal Republic of Germany, Article 92 to 94, 24 May 1949, available here.
(4) Act on the Federal Constitutional Court, 12 March 1951, available here.
(5) BVerfG, *The Court's Duties*, available available here.
(6) BVerfG, Joint judgment in cases 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, 30 June 2009, available here.

Based on this view of its role and after a long technical and legal reasoning, the Court concluded in its judgment of 5th May that it *"is not bound by the decision of the Court of Justice of the European Union, but must carry out its own examination to determine whether the decisions of the European Central Bank concerning the adoption and implementation of the CSPP remain within the limits of the powers conferred on it under the primary law of the European Union. Such decisions do not take sufficient account of proportionality and therefore exceed the ECB's powers"* **(1)**.

The importance of this ruling has not escaped anyone's notice. Not so much because of its possible effects on ECB policies (although such case-law could extend to other measures decided by the ECB, notably in the context of the current Covid-19 pandemic), but because of its institutional dimension. Indeed, if the Karlsruhe judges have renewed a constant case-law (namely the willingness of the Constitutional Court to legitimately assume its role as defined by the German constituent), they have done so in terms that mark a deep mistrust of the ECB's policies but, even worse, of the judgments of the ECJ.

And the reactions were not long in coming. The ECB, which was the first to be affected, wisely *"took note of today's ruling by the German Federal Constitutional Court on the public sector procurement programme"*, but stressed that *"the Court of Justice of the European Union ruled in December 2018 that the ECB had acted within its mandate of price stability"* **(2)**.

More curtly, the ECJ *"recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. That is the only way of ensuring the equality of Member States in the Union they created"* **(3)**.

The President of the European Commission also made a statement, recalling that *"the European Commission upholds three basic principles: that the Union's monetary policy is a matter of exclusive competence; that EU law has primacy over national law and that rulings of the European Court of Justice are binding on all national courts The final word on EU law is always spoken in Luxembourg. Nowhere else"*. Then she made a more threatening statement by announcing that the Commission is *"now analysing the ruling of the German Constitutional Court in detail, and will look into possible next steps, which may include the option of infringement proceedings"* **(4)**. For the record, the latter, referred to in Article 258 of the Treaty on the Functioning of the European Union, provides that *"if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period*

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(1) BVerfG, *"ECB decisions on the Public Sector Purchase Programme exceed EU competences"*, *op. cit.*
(2) ECB, *"ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate"*, Press Release No. 58/20, 8 May 2020, available here.
(3) EUCJ, *"Press Conference following the judgment of the German Constitutional Court of 5 May 2020"*, 8 May 2020, available here.
(4) European Commission, *"Statement by President von der Leyen"*, 10 May 2020, available here.

laid down by the Commission, the Commission may bring the matter before the Court of Justice of the European Union". Nothing less, therefore, than a legal action envisaged by the European Commission against the German 'good pupil', but which several European capitals were quick to downplay because the subject is even more politically sensitive than it is legally.

In any case, the dossier is far from being closed and will undoubtedly influence the six-month German Presidency of the Council of the European Union, which begins on 1st July. It will be necessary to owning the talents of a tightrope walker, or even a magician, to emerge from this situation without winners or losers. Indeed, either the ECB justifies within three months as requested by the Constitutional Court, and the judges in Karlsruhe whether or not they are then convinced by this new decision, will have created a constitutional case-law to the detriment of the ECB, and even more so of the ECJ and its "spirit of the Treaties". Either the ECB drapes itself in its "independence" and sides with the "primacy" of European law and the European judge in order not to respond to the ultimatum. Then, it is the German Basic Law and its guardians that are disavowed. One of the two institutions will come out the loser, or at least lessened, of this duel at the top. Angela Merkel has apparently already chosen her side by expressly speaking out in favour of a deeper integration of the eurozone, quoting Jacques Delors, who believed that a monetary union is not enough, a political union is needed. But there is a long way to go and it is unlikely that the latter, even if it were to see the light of day, would constitute *"the formal creation of a European federal state and (the) explicit change of the subject that is the source of democratic legitimacy"*, which alone can bring the Karlsruhe Court to its knees.

The Karlsruhe Court's decision of 13th February, **again, denies the absolute nature of the primacy of European law**

After the historic decision of 5th May by the German Court, let us look for a moment at the decision of 13th February, which went largely unnoticed but was nevertheless significant. The plan to create a European patent was the ambition of the European Patent Organisation, an intergovernmental organisation created on the 7th October 1977 on the basis of the European Patent Convention (EPC), signed on the 5th October 1973 in Munich, the city where it has its headquarters. Its founders intended to strengthen cooperation between European States in the field of the protection of inventions by means of a single procedure for granting patents and by establishing certain uniform rules governing the patents thus granted. The Organisation currently has thirty-eight members **(1)** Its task is to grant European patents in accordance with the EPC through its executive body, the European Patent Office.

(1) All EU Member States, as well as Albania, Northern Macedonia, Iceland, Liechtenstein, the Principality of Monaco, Norway, the Republic of San Marino, Serbia, Switzerland and Turkey.

After years of discussions between the Member States, in December 2012 the Council of the European Union and the European Parliament agreed on the Regulation establishing unitary patent protection in the Union, with the unitary patent being valid in all participating States, in contrast to the previous situation of a common bundle of nationally applicable patents **(1)**. This new system was intended to reduce translation and maintenance costs and to lead to an international agreement between Member States, establishing a single specialised patent jurisdiction. Once granted, the unitary patent is intended to provide uniform protection for inventions and to have equivalent effect in all participating countries. This system would allow holders or interested parties to challenge and/or to defend unitary patents by means of a single judicial remedy before a single body, the Unified Patent Jurisdiction (UPJ), an international judicial system competent to deal with patents registered by the Office, but only for applications from those Member States of the Union which have ratified the agreement establishing it **(2)**.

It was the act of ratification by Germany of the Agreement of 19th February 2013 **(3)** establishing this unified jurisdiction that was the subject of an appeal to the German Constitutional Court and of its decision (case 2BvR739/17). As a reminder, in 2009, the "Lisbon" ruling of the German Constitutional Court stressed that as long as *"no unified European people, as a source of legitimacy, can express a majority will by effective political means, taking into account equality in the context of the foundation of a federal European state, the peoples of the Union, constituted in the member states, remain the exclusive holders of public authority"*. In doing so, it maintained the spirit of its "So lange" ("as long as", in German) case-law, in its versions I of 1974 and II of 1986, in which, summarily, it retained a right of control in matters of fundamental rights, controlling European standards in relation to German fundamental rights only "as long as" European law offers a protection of fundamental rights that is globally equivalent to that of the German fundamental law. It thus retains the principle of the primacy of European law, dear to the European institutions and in the first place to the CJEU, for whom this supremacy applies even to constitutional texts **(4)**, but at the same time, if the judges in Karlsruhe consider that there is a conflict to the detriment of one or more of the most important provisions of German constitutional law, they thus reserve the power to reject a European norm.

In the present case, it is the combination of Articles 20 (Foundations of the State Order, Law and Resistance), 23 (The European Union) and 38§1 (Elections) of the German Basic Law that is at stake. They protect the German people against a transfer of their sovereign rights by granting them, among other things, a right to expect from their executive and legislative bodies to ensure that the integration programme planned in the EU Accession Act is fully respected. The EU institutions and bodies must thus respect the limits of the integration programme detailed in the Approval Act. This is what the Federal Constitutional Court examines in the context of the *ultra vires* control.

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(1) European Parliament and Council of the European Union, *"Regulation (EU) No 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ EPO 2013, 111)"*, 17th December 2012, available here.
(2) Unified Patent Court, *"A single patent court covering 25 countries"*, available here.
(3) *Agreement on Unified Patent Jurisdiction*, 19 February 2013, available here.
(4) See Thomas More Institute, *Principes, institutions, compétences : recentrer l'Union européenne*, Report 19, May 2019, p.17, available here (in French).

Thus, for the Second Senate of the Court of Karlsruhe (one of its ruling formations), the act of ratification of the agreement on a unified patent jurisdiction which confers sovereign powers on the latter is legally "null and void" **(1)**. The transfer to this jurisdiction of judicial functions that replace the German courts, is akin to an important amendment of the German Constitution, and in particular of the judicial power as established in its Article 92 (Judicial Organisation). However, under Article 79§2 (Amendments to the Basic Law), any law that could constitute such an amendment requires a two-thirds majority in the Bundestag and the Bundesrat to be passed.

The Federal Court therefore emphasises that, in order to safeguard the right of citizens to influence the process of European integration by democratic means, the Basic Law provides that a transfer of sovereign powers may be made only in the manner provided for in its relevant provisions. In the present case, the requirement of a two-thirds majority makes it possible, according to the constitutional text, to legitimise a decision which fundamentally weakens the rights and powers of the legislature and, through it, of the German people, even to the extent of affecting the essential democratic guarantees of the Basic Law which are the basis and protection of Germany's constitutional identity.

Fundamentally, in the eyes of the judges of Karlsruhe, and this since the first 'So lange' ruling in 1974, there can be no "spirit" of the Treaties considered as the "constitutional charter" of the Union and sources of an absolute "primacy" of its law **(2)**, but a membership of the European construction and its policies under German Constitutional court's control when the law and policies of the Union touch, even in details, on the essential foundations of German democracy.

At the heart of the debate, **the legitimacy, necessarily derived, of the European Union**

It is clear that, following this analysis, the debate relaunched by the position of the Karlsruhe Court in these two cases, which is a constant case-law, will be quite difficult to settle as it is, as things stand at present, insoluble. Indeed, what lies behind its legal arguments is a fundamental political question: that of legitimacy.

We have already mentioned that two legitimacies clash here. But it must be stressed first and foremost that they are not on an equal footing, and that one is fundamentally, naturally, ontologically superior to the other, firstly because it predates it, but that is not enough, because above all one derives from the other. The Karlsruhe Court is well aware of this and, in its various rulings, it has made this point several times: at least until the formal creation of a European federal State and the explicit change of the subject matter that is the source of democratic legitimacy, and as long as no unified European people, as a source of legitimacy, can express a majority will by

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(1) BVerfG, *"Guiding principles to the decision of the Second Senate of February 13, 2020"* 2 BvR 739/17, available here (in German). See also BVerfG, "*Act of Approval to the Agreement on a Unified Patent Court is void"*, Press Release No. 20/2020, available here.
(2) Thomas More Institute, *Principes, institutions, compétences : recentrer l'Union européenne*, *op. cit.*, p. 19.

effective political means, taking into account equality in the context of the foundation of a federal European State, the peoples of the Union, constituted in the Member States, remain the exclusive holders of public authority.

In this duel, it therefore seems that we rather have a "legitimacy" which remains embodied by national democracies, delegating some of their competences to what then creates a "legality" of the European institutions. As former ambassador Gabriel Robin masterfully wrote, *"the nation-state does not belong to the decor of the world, it is part of its structure. Beyond the framework it provides for the people, there is no solid basis for the legitimacy of the rulers, the loyalty of the governed, the rule of law or the solidarity of the citizens [...]. Individually, each nation-state guarantees the order of its internal sphere; it serves as its framework. Collectively, they assume responsibility for the universal order; they are its framework"* **(1)**.

The EU, as the most complete model of international organisation, is thus too often forgetting, or even denying, that it is only ever the result of cooperation between its Member States. Yet, in our democratic societies, and despite the imperfection of their organisation and sometimes the faults of their leaders, the Member States remain the only existing frameworks for a truly democratic life and the primary means of taking into account the common good of a community. Most of these States are not the consequence of a unilateral decision taken a long time ago by a solitary monarch, but the fruit of a long cultural, linguistic and political process that has led to the creation of a living organism expressing the will, despite all the differences and difficulties, to build together.

The chances of a successful conclusion to the endless process of creating a "European people" *ex-nihilo* remain highly hypothetical, inversely proportional to the European institutions' constantly reaffirmed willingness to bring it about at all costs, *"whatever it takes"*. Many contemporary intellectuals today rightly denounce what is called "post-truth": let us beware of any temptation of "post-democracy". The legitimacy of the European institutions is second and can only be second – stemming from that of its members.

In order to emerge from this conflict of legitimacy at the top, it will no doubt be necessary, after the unprecedented period that we are experiencing, to deeply redefine the roles of each one. And, drawing the lessons both from the origins of the health crisis that we are going through and from the fair and solid reasoning of the German constitutional judges, we must return to the reality of the peoples and forget the chimeras of a "happy globalisation" and an "ever closer" European construction. On this last chapter, the Thomas More Institute made some proposals in May 2019 to nourish reflection on a reform of the European Union **(2)**.

Now that we have reached a high distrust of the people and of many national political and judicial institutions, it seems essential to fundamentally rethink the construction of Europe. And to rethink it on both a modest and a solid basis, by proclaiming the end of all federalist temptation, by acknowledging the intergovernmental nature of European cooperation and by concentrating the European Union on missions where its added value is objectively indisputable. It is therefore on a basis that can be described as "confederal" and which strictly applies the principle of subsidiarity that

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(1) Gabriel Robin, *Entre empire et nations. Penser la politique étrangère*, Paris, Odile Jacob, 2004.
(2) Thomas More Institute, *Principes, institutions, compétences : recentrer l'Union européenne, op. cit.*

it must be re-founded. For, *"with all due respect for voluntarists, it is finally the national democratic requirement – respect for the* vox populi *in the United Kingdom and respect for the German constitution – that has twice shaken up the project of European construction"* **(1)**…

(1) Cédric Meiller and Vincent Chapuis, *Sale temps pour la juridiction unifiée du brevet*, Dalloz news, 8 April 2020, available here (in French).

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The *Living Europe* Programm analyses the deep crisis in the European Union and makes proposals for a clearly confederal Europe, proud of its roots and respectful of the principle of subsidiarity. The European Union and its members must prepare for a re-foundation and seek the means of genuine patriotism of civilization.

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