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# THE JUDGMENT OF THE GERMAN FEDERAL CONSTITUTIONAL COURT ON THE PUBLIC SECTOR PURCHASE PROGRAMME (PSPP) OF THE EUROPEAN CENTRAL BANK (ECB): HAS THE COURT GONE TOO FAR?

On 5 May 2020, the Second Senate of the German Federal Constitutional Court (*Bundesverfassungsgericht*) delivered the long-awaited judgment in the case raised by several constitutional complaints directed against the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB).

The PSPP is part of the Expanded Asset Purchase Programme (EAPP), a framework programme of the Eurosystem for the purchase of assets on financial markets. The EAPP is meant to increase money supply, support consumption and investment spending in the euro area and ultimately contribute to achieving an inflation target of below, but close to, 2%. The ECB launched the PSPP with its decision of 4 March 2015, which was later amended by five subsequent decisions. Under the PSPP, the Eurosystem central banks – subject to the framework set out in detail in the ECB decisions – purchase government bonds or other marketable debt securities issued by central governments of euro area Member States, by 'recognised agencies' and international organisations or by multilateral development banks located in the euro area. The PSPP accounts for the largest share of the EAPP's total volume. As of 8 November 2019, the total value of the securities purchased under the EAPP by the

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Eurosystem amounted to EUR 2,557,800 million, including purchases under the PSPP in the amount of EUR 2,088,100 million.

The complainants argued that the PSPP violates the prohibition of monetary financing (Art. 123 TFEU) and the principle of conferral (Art. 5(1) TEU in conjunction with Art. 119, Art. 127 *et seq*. TFEU). As a consequence of that, the democratic principle stated in the German Basic Law was violated.

To solve the case, the Federal Constitutional Court referred a request for a preliminary ruling to the CJEU, under Article 267 TFUE. In particular, the questions submitted to the CJEU concerned the prohibition of monetary financing of Member State budgets, the monetary policy mandate of the ECB, and a potential encroachment upon the Members States' competences and sovereignty in budget matters.

In the judgment delivered on 11 December 2018 (*Weiss and Others*, C-493/17), the CJEU maintained that the PSPP neither exceeded the ECB's mandate nor violated the prohibition on monetary financing, so confirming the validity of Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, as amended by Decision (EU) 2017/100. Following the CJEU ruling, the Federal Constitutional Court held an oral hearing in Karlsruhe on 30 and 31 July 2019.

Despite the green light given by the CJEU, however, the Federal Constitutional Court found that, in light of Article 119 and Article 127 *et seq*. TFEU as well as Article 17 *et seq*. of the European System of Central Banks (ESCB) Statute, the ECB Governing Council's Decision of 4 March 2015 (EU) 2015/774 and the subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702 and (EU) 2017/100 must be in principle qualified as *ultra vires* acts.

The Court acknowledged that the interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls under the CJEU's jurisdiction, which in Article 19(1) second sentence TEU is called upon to ensure that the law is observed when interpreting and applying the Treaties. However, the Court held that the mandate conferred on the CJEU in Article 19(1) second sentence TEU is exceeded where the traditional European methods of interpretation or, more broadly, the general legal principles that are common to the laws of Member States are manifestly disregarded.

This is exactly what happened in this case.

In its judgment of 11 December 2018, the CJEU held that the Decision of the ECB Governing Council on the PSPP and its subsequent amendments were still within the ambit of the ECB's competences. The Federal Constitutional Court's judgment is that this view manifestly fails to give consideration to the importance and scope of the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU) – which applies to the division of competences between the European Union and the Member States – and is untenable from a methodological perspective given that it completely disregards the actual economic policy effects of the programme.

However, in the Federal Constitutional Court's opinion, the CJEU's alleged approach to disregard the actual economic policy effects of the PSPP in its assessment of the programme's proportionality, and to refrain from conducting an overall assessment and appraisal in this regard, does not satisfy the requirements of a comprehensible review as to whether the ESCB and the ECB observe the limits of their monetary policy mandate. This standard of review is by no means conducive to restricting the scope of the competences conferred upon the ECB, which are limited to monetary policy. Rather, it allows the ECB to gradually expand its competences on its own authority; at the very least, it largely or completely exempts such action on the part of the ECB from judicial review. In order to safeguard the principle of democracy and upholding the legal bases of the European Union, it is imperative that the division of competences be respected.

In light of the aforementioned considerations, the Federal Constitutional Court found that it is not bound by the CJEU's decision. As a consequence, it must conduct its own review to determine whether the Eurosystem's decisions on the adoption and implementation of the PSPP remain within the competences conferred upon it under EU primary law. As these decisions were made on the basis of insufficient proportionality considerations, they exceeded the ECB's competences. In the Court's opinion, a programme for the purchase of government bonds, such as the PSPP that has significant economic policy effects, requires that the programme's monetary policy objective and economic policy effects be identified, weighed and balanced against one another. By unconditionally pursuing the PSPP's monetary policy objective – to achieve inflation rates below, but close to, 2% – while ignoring its economic policy effects, the

ECB manifestly disregards the principle of proportionality. In the decisions at issue, the ECB failed to conduct the necessary balancing of the monetary policy objective against the economic policy effects arising from the programme. Therefore, the decisions at issue violate Article 5(1) second sentence and Article 5(4) TEU and, in consequence, in principle exceeded the monetary policy mandate of the ECB.

It would have been incumbent upon the ECB to weigh the considerable economic policy effects and balance them, based on proportionality considerations, against the expected positive contributions to achieving the monetary policy objective the ECB itself has set. It is not ascertainable that any such balancing was conducted, neither when the programme was first launched nor at any point during its implementation. Unless the ECB provides documentation demonstrating that such balancing took place, and in what form, it is not possible to carry out an effective judicial review as to whether the ECB stayed within its mandate.

To the extent that the CJEU concludes in its judgment of 11 December 2018 that the PSPP does not violate Article 123(1) TFEU, the manner in which it applies the "safeguards" developed in its Gauweiler judgment raises considerable concerns because it neither subjects these "safeguards" to closer scrutiny nor does it test them against counter indications.

Nevertheless, the Federal Constitutional Court accepted the abstract possibility that the ECB observed the "safeguards" set out by the CJEU. As a consequence, a manifest violation of Article 123(1) TFEU is not ascertainable yet. As a matter of fact, the determination whether a programme like the PSPP manifestly circumvents the prohibition in Article 123(1) TFEU is not contingent on a single criterion; rather, it requires an overall assessment and appraisal of the relevant circumstances. This explains why judgment delivered by the Court is not the end of the story.

Based on their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Constitutional Court argued that the Federal Government and the German *Bundestag* have a duty to take action. In particular, in the event of a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union, the German constitutional organs must, within the scope of their competences and the means at their disposal, actively take steps seeking to ensure adherence to the European

integration agenda (*Integrationsprogramm*) and respect for its limits, work towards the rescission of acts not covered by the integration agenda and – as long as these acts continue to have effect – take suitable action to limit the German domestic impact of such acts to the greatest extent possible.

In addition, 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.

Finally, following the transitional period of no more than three months assigned to the ECB, the *Bundesbank* may no longer participate in the implementation and execution of the ECB decisions at issue, unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the PSPP are not disproportionate to the economic and fiscal policy effects resulting from the programme. For the same reason, the *Bundesbank* must ensure that the bonds already purchased and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the Eurosystem.

The judgment of the Court raised considerable concern among all European institutions.

On 5 May, the same day of the publication of the German Federal Constitutional Court's judgment, by means of a press release, the ECB stated that the Institution "takes note" of that judgment regarding the PSPP and that the Governing Council remains fully committed to doing everything necessary within its mandate to ensure that inflation rises to levels consistent with its medium-term aim and that the monetary policy action taken in pursuit of the objective of maintaining price stability is transmitted to all parts of the economy and to all jurisdictions of the euro area. The ECB also pointed out that the Court of Justice of the European Union ruled in December 2018 that the ECB is acting within its price stability mandate

On 8 May, the Court of Justice of the European Union issued a press release.

Although pointing out that it does not usually comment on a judgment of a national court, the CJEU restates that its preliminary rulings are binding on national courts, as well as on all national institutions and bodies. In order to ensure the uniform application of EU law, the CJEU alone – which was created for that purpose by the Member States – is entitled to rule on the validity of acts adopted by EU institutions. Divergences between national courts 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". The Court concludes pointing out that the Institution will refrain from communicating further on the matter.

On 10 May the President of the EU Commission, Ursula von der Leyen, in a press release, highlighted three points: (a) «that the Union's monetary policy is a matter of exclusive competence»; (b) «that EU law has primacy over national law and that rulings of the European Court of Justice are binding on all national courts»; (c) that «the final word on EU law is always spoken in Luxembourg. Nowhere else». Significantly, the President added a conclusive remark that sounds as a clear warning message: «We are now analysing the ruling of the German Constitutional Court in detail. And we will look into possible next steps, which may include the option of infringement proceedings. The European Union is a community of values and of law, which must be upheld and defended at all times. This is what keeps us together. This is what we stand for».

Even if unprecedented in its direct attack against the European Court of Justice, the decision of the Court can be seen as the last stage of a judicial path that began a long time ago. As a matter of fact, the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) started its assessment on the legitimacy of EU Treaties and acts that strengthened the integration between Member States since the Nineties, ruling on the compatibility amongst EU Law, international treaties signed by the Member States and national constitutional principles. Just to remind, it ruled with reference to the Treaty of Maastricht (BVerfG 89, 155, 12 October 1993) and to the Treaty of Lisbon (BVerfG 123, 267, 30 June 2009). Afterwards, it ruled on several different matters, such as: the financial aid to Greece (BVerfG 129, 124, 7 September

2011), the Parliament involvement in the ESM preparation process (BVerfG 2BvE 4/11, 19 June 2012), the ESM participation (2 BvR 1390/12, 18 March 2014), the legitimacy of the Central Bank's OMT Program (2 BvR 2728/13, 21 June 2016).

Some critical remarks made upon precedent cases can be applied to this recent case. Differently from all other Member States' approach, the German Federal Constitutional Court actually rules on matters that are beyond the German legal system, through decisions that end up assuming a political rather than a judicial value. In this way, the Court claims to have, even if only indirectly, the power to ascertain the lawfulness of the EU institutions acts.

However, this case is significantly different from the previous ones, because for the first time the BVerfG sets a three-month term within which the German Constitutional Authorities must try to remedy the proportionality defects in the ECB decisions and those "mistakes" contained in the CJEU judgment, highlighted by the German decision. The Karlsruhe Court had already dealt with the ECB's first programme (the OMT, which remained on paper) and censored the overlap of economic policy and monetary policy. In the case of the OMT, however, the initial assessment of unconstitutionality was then translated into a substantial green light for the programme, following the preliminary opinion of the CJEU and the clarifications offered by the ECB. Therefore, while the German Court could have been expected to reiterate once again the need for a rigorous assessment of compliance with the limits of the ECB's mandate, the German Court was not expected to be so aggressive and to go so far as to expressly censure the CJEU's actions by reprimanding it for its shallow control of the ECB's decisions, to the point of declaring the CJEU's judgment to be *ultra vires* and thus *'tamquam non esset'*. No matter if the assessment made by the CJEU was persuasive or not. The point is that the German Court assumes to be entitled to "teach" the CJEU how to apply the proportionality test.

This time, in conclusion, the Court really seems to have gone too far.

Legal comparison supports this impression. Let's take the case of Italy. Since the very first steps of the European integration process, the Italian legal system proved to be very sensitive to the protection of its constitutional identity (since *Costa v. Enel* on). However, in Italy, the so called counter-limits "(*Contro-limiti*)" activation towards the implementation of EU law was focused on the protection of human fundamental

rights. In the famous "*Taricco saga*", the CJEU argued that Italian criminal law rules providing for time limitations for the prosecution of certain criminal offenses due to their conflict with EU rules and interests. The Italian Constitutional Court, however, in that case denied the primacy of EU Law in order to safeguard the fundamental right to crimes prosecution limitation time (in Italy it is a right, not a procedural rule) as well as the right to know the criminal consequences of its own actions before committing illegal acts, safeguarded by Article 25 of the Italian Constitution (Italian Constitutional Court, order n. 24/2017; more recently, judgement n. 115/2018). On the contrary, the German Constitutional Court seems to be concerned more with institutional architecture features, especially when mechanisms of financial solidarity are at stake. Even if the judgement of 5 May does not concern the more recent decisions of the ECB, it is well evident the attempt to influence future measures to face the economic crisis due to the Covid-19 pandemic.

Another argument supports the idea that the Court went too far. The Federal Constitutional Court always highlighted the need to protect the democratic principle (Arts. 38, 20 of the Basic Law, *Grundgesetz*). Accordingly, should the German Parliament not be involved in the most relevant and controversial EU decisions, any EU action potentially ultra vires could result into a violation of the citizens' right to vote. In this case, however, even more than in previous judgments, the feeling is that the BVerfG judgment of 5 May 2020 is not addressed to "the inside", but to "the outside". The most important purpose seems to grant Germany a dominant position in the European space in relation when fundamental decisions on financial and economy matters are at stake. When the EU has to face challenges that should be tackled by all Member States together, the Federal Constitutional Court reminds us that Germany can prevent the process to go forward, even when all other Member States (and in principle also the German government) consider such a process to be strongly desirable and even proportionate, by claiming that EU institutions' decisions are *ultra vires*. The position adopted by the German Constitutional Court could even represent a challenge to the constitutional provisions of other Member States: for instance, «Italy agrees, *on conditions of equality with other States*, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations» (Art. 11 of the Italian Constitution).

Exactly because the German Constitutional Court went too far, in its press release, the CJEU highlighted the need to uniformly apply EU law in order to grant «the equality of Member States in the Union they create» and the European Commission made reference to the eventuality of an infringement procedure against Germany. Coherently, the ECB should not provide any formal reply to the Federal Constitutional Court. Any additional effort to explain and disclose the economic and strategic assessments at the basis of its decisions should be welcomed. But it should be clear that the ECB is only accountable before the European Parliament and citizens.