

Germany's Federal Constitutional Court opposes the ECB and the Court of Justice of the European Union

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On 5 May, Germany's Federal Constitutional Court (BVerfG) ruled that the Public Sector Purchase Programme (PSPP) run by the European Central Bank (ECB) is in partial violation of the German constitution and EU law. In this respect, the court undermined the previous judgement of the Court of Justice of the European Union (CJEU). According to the BVerfG, the German government and parliament violated the constitution by failing to ensure that the purchase of government bonds from euro area member states stays within the legal limits

In the framework of the PSPP's programme, each national central bank purchases eligible securities from central, regional or local public issuers of its own jurisdiction; such purchases are distributed in accordance with the key for subscription of the ECB's capital. Constitutional complaints against the ECB's decisions regulating the operation of this programme were brought to the BVerfG in 2015. During the proceedings, the judges in Karlsruhe submitted a request for a preliminary ruling to the CJEU in 2017 which included a range of queries about the ECB's activities. In a judgement issued on 11 December 2018, the CJEU stated that the ECB's operations did comply with EU law (case C-493/17).

Issuing their final verdict in this case, the BVerfG's judges challenged the judgement of the CJEU and declared that they were not to be bound by it due to the ECB's failure to review the compliance with the principle of proportionality. Furthermore, the BVerfG decided that the purchase of bonds under the PSPP violated EU law because the ECB's decisions regulating the programme did not show whether the actions taken were proportional to the intended purpose. According to the judges in Karlsruhe, it was necessary to thoroughly balance the impact of the measures undertaken, taking into consideration inter alia the economic impact on savers and the impact on real estate prices. In the BVerfG's opinion, unconditionally focusing on the monetary policy objective (i.e. keeping inflation below, but close to, 2%) while ignoring the programme's broader impact, is in "manifest" disregard of the principle of proportionality.

Consequently, the German Federal Bank (*Bundesbank*) can no longer participate in the implementation of the ECB's decisions, unless the Governing Council adopts a new decision within three months justifying the proportionality of the measures. If this does not happen, the Federal Bank must withdraw from the programme.

On the other hand, the court did not agree with the complainants' challenge that the PSPP programme violated the ban on monetary financing of member states' budgets as set out in

article 123 (1) of the Treaty on the Functioning of the European Union. Seven of the eight adjudicating judges were in favour of this decision, and no dissenting opinion was presented.

Commentary

- Despite the sceptical attitude which the BVerfG had previously expressed towards the ECB's non-standard policy measures, the ruling did not call the bond purchase programme itself into question. The German government and the Bundestag are required to take action to adapt the ECB's decisions governing the programme so that the proportionality of the measures used would be justified. In addition, the government and parliament are to monitor the programme's implementation to ensure that any risk of violating the Bundestag's budgetary powers is ruled out. The main burden associated with implementing the ruling will most likely fall on the Federal Bank. The reaction of European institutions to the BVerfG's decision remains an open issue. They may choose a path of pragmatic compromise, or they may actively defend their own position. Commenting on the ruling, the European Commission spokesman pointed to the primacy of European law over national law, the binding nature of the CJEU's judgements, and the ECB's independence in conducting monetary policy. In turn, the ECB referred in a press release to the CJEU's judgment of 2018 confirming that the actions taken were in compliance with the bank's mandate.
- The ruling formally does not concern any financial assistance measures taken by the ECB in the context of the current coronavirus crisis. Nevertheless, the BVerfG's formulation of the conditions which must be met by the ECB's programme may also force adjustments to the emergency purchase of assets under the Pandemic Emergency Purchase Programme (PEPP), launched in March this year. The restrictions resulting from such an adjustment may make the €750bn instrument less effective. Further complaints to the BVerfG about the ECB's actions should be expected, both with regard to the possible extended reasoning of the PSPP and the legality of the PEPP.
- Restricting the ECB's room for manoeuvre in using non-standard monetary policy measures may affect the debate on the further development of the euro-area, strengthening those voices which have been demanding a treaty change, the conduct of a common economic and financial policy, and more support for the most heavily indebted countries. However, Germany's position in this debate will be subject to the constitutional restrictions indicated in the BVerfG's subsequent decisions.
- The BVerfG's latest decision may have far-reaching consequences for the EU's legal system. For the first time, German judges have decided to qualify the activities of EU institutions as exceeding the competences delegated to the treaty in a manifest and structurally significant way (*ultra vires*), and have consequently refused acceptance for these actions to take effect in Germany.
- The judgement may contribute to the further weakening of the ECB's image in Germany, where the bank has been criticised both for the nature of the instruments it has used to manage the crisis and for its interest rate policy. With regard to German domestic

politics, one beneficiary of the judgment may turn out to be the weakened AfD, which has called for the ECB to stop buying treasury bonds.

- The verdict in the long-running case arrived at an unfavourable time from the perspective of the German government. Germany will take over the Presidency of the EU Council on 1 July during a period of growing economic problems caused by the pandemic, and of tensions within the European Union, including questions concerning the rule of law. If the activities of the ECB and the CJEU are undermined, in these circumstances this could weaken the stability of the euro-area and the EU as a whole. In the long run, however, the ruling may - just like the BVerfG's previous judgements concerning European policy - serve as an argument against those initiatives which Berlin sees as unfavourable to it, or which supports German demands for changes to the ECB's legal framework.