

The German Federal Constitutional Court on bond buying by European Central Bank and EU law supremacy

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On 5 May 2020, the German Federal Constitutional Court ([BVerfG](#)) held that the European Court of Justice (ECJ) had exceeded its jurisdiction by handing down the 2018 [judgment](#) in Case C-493/17 *Weiss*. As the ECJ judgment was *ultra vires*, the German Court concluded that it was not binding in Germany. This is the first time that a German court refuses to apply the principle of supremacy of EU law.

The factual context

The *BVerfG* judgment was about the Public Sector Purchase Programme (PSPP) in which the European Central Bank (ECB) had engaged since March 2015 under [Decision 2015/774](#) and five subsequent measures. This programme of quantitative easing amounted to purchase of sovereign bonds and was viewed as essential for maintaining price stability and achieving inflation rates below, but close to, 2%. The relevant ECB Decisions were challenged by a large number of individuals in Germany.

The *BVerfG* referred the case to the European Court of Justice under the preliminary reference procedure. The case was about the compatibility of the ECB's policy with the EU Treaties, in particular

- the division of competences between the EU and the Member States (under Articles [119](#) and [127](#) TFEU and Articles 17 to 24 of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank), and
- the prohibition on monetary financing laid down in Article [123](#) TFEU

In a [judgment](#), handed down on 11 December 2018, the Grand Chamber of the ECJ held that the ECB's policy was legal: the underlying policy choices were consistent with the EU's primary rules and the PSPP programme did not go manifestly beyond what was necessary in order to achieve its objectives. It was

this judgment that the *BVerfG* found *ultra vires*.

The *BVerfG* judgment

The objection to the ECJ judgment was about proportionality review: it had failed, according to the *BVerfG*, to consider the economic effects of the ECB's bond buying programme, including the Member States' refinancing conditions, the risk on private investors, and the risk of creating real estate and stock market bubbles. The German Court held that the ECJ's judgment 'manifestly fails to give consideration to the importance and scope of the principle of proportionality ... which also applies to the division of competences, and is no longer tenable from a methodological perspective'.

As the application of the principle of proportionality by the ECJ 'cannot fulfil its purpose, given that its key element – the balancing of conflicting interests – is missing ..., the review of proportionality is rendered meaningless'.

Following from the above, it was held that the ECJ judgment 'manifestly exceeds the mandate conferred upon it in Art. 19(1) second sentence TEU, resulting in a structurally significant shift in the order of competences to the detriment of the Member States'.

The *BVerfG* did not hold that the ECB Decisions on PSPP were contrary to EU law, in particular Article 123(1) TFEU. In fact, it held that, on the basis of the information available, a manifest violation was not ascertainable. Instead, the *BVerfG* held that the ECB had three months to adopt a new decision which would demonstrate 'in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme'. If no such decision were adopted within three months, the Bundesbank should no longer participate in the PSPP programme and should sell the bonds already purchased and held in its portfolio.

Rejecting supremacy for the first time

The PSPP judgment marks the first time the *BVerfG* finds an ECJ judgment *ultra vires* and non-binding. In order to appreciate its significance, it is worth placing it in the context of the long and difficult relationship that German courts and the ECJ have developed over the years in relation to EU law supremacy.

Supremacy is at the core of the EU legal order: any EU law rule takes precedence over any domestic rule, including constitutional law (Case 11/70 *Internationale Handelsgesellschaft*). This principle has specific practical implications. On the one hand, domestic courts are under a duty to set aside any domestic rule that clashes with EU law (Case 106/77 *Simmenthal*). On the other hand, it is solely

for the European Court of Justice to declare a measure adopted by the EU institutions illegal (Case 314/85 *Firma Foto-Frost*).

German courts have been challenging the scope and implications of the principle of supremacy since the 1970s. They have been doing so by subjecting supremacy to certain conditions. These were about the following issues:

- *Human rights compliance*: supremacy is accepted so long as the level of protection of human rights under EU law is equivalent to that under the German Constitution (*Solange II*, 1986). In doing so, German courts relaxed the position previously taken by the German Administrative Court which had reserved for the German judiciary the power to determine on a case by case basis whether EU law respected the protection of human rights afforded by the German Constitution and, therefore, whether it took precedent over German law (*Solange I*, 1974).
- *The principle of conferral*: the European Court of Justice should not interpret the scope of EU competence so widely as to violate the principle of conferral (Brunner, 1993), according to which the EU may only exercise the limited competences granted to it by the Member States in the EU Treaties.
- *Germany's constitutional identity*: EU law should not clash with the provisions of the Basic Law, that is the German Constitution, which are about the very core of the German constitutional order (in areas such as the use of force, taxation, and criminal law (*Lisbon Treaty* judgment, 2009).

If the above conditions were not met, German courts would reserve the right to find EU law *ultra vires*, as it would involve the exercise of a power that the EU institutions did not have. In order to appreciate the significance of the BVerfG ruling, two points are worth making. First, the threshold for such an intervention by German courts was set high: the BVerfG made it clear that *ultra vires* review required that the EU would have exceeded its competence in a manifest manner and that the measure in question would be highly significant for the overall division of competence between the EU and the Member States (*Honeywell*, 2010). Second, whilst articulated, at times forcefully, this power had never been exercised by German Courts. Until 5 May 2020, that is.

Comment on the BVerfG judgment

The BVerfG judgment is significant for both what it does and does not do. First, its wording is strong. In fact, it is very strong. Whilst it points out the spirit of cooperation that governs the relationship between the domestic courts and the ECJ, the BVerfG went on to refer to the latter's approach (in a Grand Chamber judgment) as 'simply untenable', 'objectively arbitrary' and 'simply not comprehensible'.

Second, the emphasis on 'comprehensible review' illustrates a hands-on approach to judicial review. While it concluded that it did not have sufficient information to decide on the matter, the judgment set out a number of reasons which might suggest that the ECB had acted beyond its mandate. These raise questions: is the distinction between economic and monetary policy as clear-cut as the judgment suggests? What methodological tools should courts apply in order to review the complex assessments that underpin policy choices such as quantitative easing? And to what extent may judges examine the economic considerations to which the BVerfG referred without substituting their views for those of decision-makers?

Third, the reason for rejecting supremacy is noteworthy for its implications. Proportionality review is no science. It is a malleable instrument that may be used in different ways in different contexts. EU lawyers hardly need reminding of this, given the lively episodes to which the application of the principle has given rise over the years (a case in point being the *Sunday Trading* litigation originating in UK courts). This point may shed some light on the BVerfG judgment. Had it relied on substantive grounds, the BVerfG would have challenged directly policy choices made by the EU institutions and may have entailed a policy change. By focusing, instead, on proportionality review, the judgment gives both the ECB and the German Government sufficient leeway to reaffirm their original policy choice, albeit by requiring that they shed more light on the process leading to it and its rationale. It also provides the German Court itself with flexibility when the time comes to review the practical implications of its challenge to supremacy. In other words, the judgment makes a constitutional point without necessarily impinging on the policy choices under review.

Finally, the above is not to suggest that the judgment would not have policy implications. In terms of ECB policy, for instance, controversial decisions would not become easier to adopt and their drafting would need to take into account the BVerfG's approach. Litigation against related ECB initiatives will by no means decrease. It is recalled that, in response to the COVID 19 crisis, the ECB has recently adopted a Pandemic Emergency Purchase Programme. The German Court did not review that programme but its judgment is bound to raise questions about the ECB's policy.

The wider significance of the BVerfG judgment is also not to be underestimated. A threshold has been crossed and the legal nuances of this specific episode may not necessarily characterise other attempts to challenge the supremacy of EU law and the authority of the European Court of Justice. There is, for instance, developing case-law about the independence of the judiciary in Poland. Its implications for its specific legal context notwithstanding, the BVerfG judgment may whet the appetite of other domestic courts to challenge the carefully balanced and constantly recalibrated relationship that the Court of Justice and domestic courts had maintained over the years.

The judgment in English is available [here](#).

The Court's press release in English is available [here](#).

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