

To Resolve The Impasse Created By The Karlsruhe Court's ECB Judgment You Need To Address What The Court Has Actually Done

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Our [client alert](#) dated 5 May explored some implications of the German Federal Constitutional Court's decision the same day to prohibit the Bundesbank from participating in the European Central Bank's (ECB) Public Sector Asset Purchase Programme (PSPP). A great deal of reaction and commentary since has focused on whether the Federal Constitutional Court's admittedly very direct dismissal of the European Court of Justice (ECJ) Judgment of 11 December 2018 on the legitimacy of the PSPP was out of order. The President of the European Commission and the ECJ itself have been at the forefront of the reaction.

The argument runs: The EU Treaties are clear: only the ECJ can judge whether a European institution (including the ECJ itself) has behaved in accordance with the EU Treaties; the EU Treaties subordinate national law to EU law; so once the ECJ has cleared the PSPP, no national court can call that judgment into question. So the ECB can ignore the German court's decision because the ECJ has cleared the PSPP. End of story. Well, not quite.

This reaction misunderstands what the Karlsruhe court has actually done. Those who have reacted in this way may therefore be thinking of ways to resolve the resulting impasse (which needs to be resolved, or the Bundesbank would run the risk of an injunction later in the year to force it to unwind its participation in PSPP – not a palatable prospect in the current economic climate) which could exacerbate the situation, not resolve it.

The Federal Constitutional Court's judgment concerns whether the German Government and Parliament have acted in accordance with the German Constitution – something which is squarely the Federal Constitutional Court's remit – in their scrutiny of the Bundesbank's participation in the PSPP, and specifically whether they have adequately ensured that the effect of the PSPP is not disproportionate to the consequences for economic and fiscal policy. Karlsruhe's dismissal of the Luxembourg Court concerns the ECJ's treatment of the principle of proportionality in this matter in light of the German Parliament's overall control of the German budget, which it finds incomprehensible. Since the case before the Federal Constitutional Court concerned proportionality, it therefore dismissed the ECJ Judgment as irrelevant. The crucial issue of the Federal Constitutional

Court in this respect was the “competence-competence” (the competence to decide who has competence) it reserved for itself to judge whether any EU institution is acting within or outside (“*ultra-vires*”) the competences and powers which have been transferred by Germany to the EU. The case law of the Federal Constitutional Court on this ultra-vires issue is longstanding and ranges from its Maastricht Judgement of 1993, to its Monetary Union Judgment of 1998, the Lisbon Treaty Judgment of 2009, the OMT Judgment of 2016 and the SSM Judgment of 2019.

So the way out could be for the ECB Council to produce a better account of the proportionality of the PSPP? There isn’t much enthusiasm in Brussels or Frankfurt to do that. It would be tacit admission that a national court *could* override the ECJ – something that would be seen as a highly damaging precedent (you have only to look at the tussle between Brussels, Luxembourg and Warsaw over the appointment of the Polish judiciary to see where it could lead). Alternatively, could the European Commission initiate infraction proceedings against Germany to force the German Parliament to change the offending provision of the German Constitution? That also looks problematic because the Federal Constitutional Court – which actually has a good track record of upholding the primacy of EU law – has based its judgment on Article 20 of the German Basic Law (Constitution) which, according to Article 79 (3) of the Constitution cannot be changed. Any attempt to change the German Constitution or to change the EU Treaties to get round the effect of Article 79 (3) of the German Constitution could result into turmoil which would make the current constitutional quagmire look mild.

The heart of the Karlsruhe judgment is that Article 20 (the principles of which cannot be changed because of the barrier under Article 79 (3)) places German sovereignty with the German people exercised through Parliament, and that a disproportionate PSPP programme would so reduce the Parliament’s ability to direct economic and fiscal policy that it would compromise the Parliament’s ability to exercise sovereignty on behalf of the people.

As set out above, the Article 20, 79 (3) issue is not new. The Federal Constitutional Court and the ECJ have been dancing around it – and leaving it unresolved – for decades. Trying to resolve it now, in either direction, could considerably add to the current constitutional quagmire and be political dynamite. So a delicate compromise which allows both sides of the debate to assert that their side has not been repudiated needs to be found, and quickly: the Karlsruhe judgment starts to bite in early August. It should not be assumed or hoped that the Federal Constitutional Court will give up in August since the 5 May 2020 Judgement on ECB is not the first and is not only a “one-off” judgment of the Federal Constitutional Court where it enforced Art 79 of the German Constitution in the European sphere. Actually on 13 February 2020 the Federal Constitutional Court had already declared the German Act for the Ratification of the Unified Patent Court (UPC) Agreement entered into between a number of Member States of the EU to be in breach of Art 79 (2) of the Constitution with the effect that that Germany has not (yet) joined the UPC.

That leaves two rather glaring questions: Can such a delicate compromise be found at all? And what are the implications for the EU’s ability and tools available to put together the scale of post-Coronavirus support package the countries most affected will need?

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