



# SPOTLIGHT

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## German Constitutional Court Undermines ECB Policy and Criticizes CJEU Judgment

Sebastian Płóciennik, Szymon Zaręba

In a judgment issued on 5 May, the German Federal Constitutional Court (CC) questioned the procedures in decisions by the European Central Bank (ECB) regarding the purchase of eurozone bonds. The judgment, however, concerns not only monetary policy—crucial to combating the current economic crisis—but also the division of competences between the EU and its Member States.

### What was the case about?

The CC jointly examined several constitutional complaints from 2015 and 2016, initiated by Bernd Lucke, the founder of AfD (Alternative für Deutschland), Peter Gauweiler, the former CSU vice-president, and others. They accused the German government, parliament, and central bank of not responding to the decisions of the ECB of 2015-2018, which established the Public Sector Purchase Programme (PSPP) to buy bonds of eurozone countries worth €2.2 trillion in total. According to the complainants, the decisions violated the German constitution and EU law, including the prohibition of hidden financing of countries by the ECB. The complainants also questioned Germany's obligation to comply with the judgment of the Court of Justice of the EU (CJEU) in 2018 in the *Weiss* case in which the CJEU found some of the ECB's decisions on the PSPP compliant with EU law.

### What did the CC say?

The court accused the CJEU of merely examining whether the ECB had made “manifest” errors in assessing whether the effects of the PSPP were proportionate to the objectives pursued. By doing this, the German court claims the CJEU accepted ECB activities that went beyond the treaty role of the bank. In the opinion of the CC, the EU court exceeded its judicial mandate derived from Art. 19 of the Treaty on EU (TEU) and violated, among others, principles of the separation of powers and democracy spelled out in the German constitution. Based on these conclusions, the CC refused to respect the CJEU judgment and assessed the ECB's decisions by itself. It concluded that while issuing them, the bank violated the principles of conferral and proportionality under Art. 5 TEU. It stated that German state organs cannot implement acts of EU bodies when the latter exceed the limits of their competence. It called on the German government, parliament, and central bank to persuade the ECB to adopt within three months a decision justifying the

proportionality of the PSPP in light of its economic and fiscal effects. If the deadline is not met, the Bundesbank should withdraw from participation in the programme. If this happens, the German institution will find itself in a difficult legal situation—a conflict with EU standards and a possible violation of the principle of independence of the central bank.

### **What are the legal consequences of the judgment?**

The CC judgment does not affect the binding force of the CJEU judgment from the point of view of EU law and, therefore, does not bind the ECB. Although one can expect Germany's pressure on the ECB to make a decision in line with the expectations of the CC, the bank is not obliged to give way. Also, the judgment does not affect the assessment of the CJEU's decisions in other cases. However, it raises controversy as to compliance with the principle of the primacy of EU law, as already signalled by the European Commission. However, due to the circumstances of the case, Germany is not threatened by infringement proceedings—it can simply withdraw from the PSPP. The judgment is also in line with the current trend in the practice of the constitutional courts of some EU countries (e.g., Czechia, Poland, Hungary) to assess whether the activities of EU bodies fall within the scope of treaty competences and comply with the basic principles of national constitutions. They seek to strengthen control over the exercise of powers by EU institutions.

### **Will the judgment limit the ECB's scope of activity?**

Open market operations, including the purchase of government bonds, have become a key tool in providing the euro-area economy with access to cheap money and, at the same time, reducing the cost of public debt issuance. If the Bundesbank—the largest shareholder of the ECB—withdraws from the PSPP, this would seriously limit the intervention potential. It is, however, worth emphasizing that the CC ruling did not undermine the very idea of buying bonds. It also did not refer directly to the rescue bond purchase programme (PEPP) launched in March 2020 in response to COVID-19 and totalling €750 billion. One cannot rule out that subsequent constitutional complaints in Germany will focus on this too. The ECB must therefore prepare good arguments for the proportionality of its action and defend against, for example, the abolition of previously existing quota restrictions on the purchase of individual country's bonds. The legal experience of the bank's president, Christine Lagarde, may prove to be an important asset in this situation.

### **Can the judgment affect the orientation of anti-crisis policy in the EU?**

The judgment can be read as an expression of doubt in Germany regarding the ECB's unorthodox monetary policy initiated in 2012 by Mario Draghi. If it does have permanent institutional effects, they will not necessarily be in line with the intentions of supporters of conservative financial policy. Limiting the ECB's room for manoeuvre in monetary policy may force the governments of the Member States to devote more attention to creating common fiscal policy tools. The growing uncertainty about the actual ECB space for action opens the door for eurobonds, a bigger budget mechanism for the euro area (BICC), and a significant increase in transfer funds within the new multiannual financial framework for 2021–2027. The judgment may also strengthen supporters of radical steps, such as debt restructuring.

### **Who loses and who gains from the CC judgment?**

The ruling should bother those euro-area countries that, due to high public debt and low credit rating, would have had much more difficult access to capital without ECB support, in particular Italy, whose financial stability can be shaken by even a small change in bond yields. The judgment can hardly be regarded as unambiguously favourable to the EU "north" countries—including Germany—because the pressure on them to make concessions regarding new fiscal tools will increase. On the other hand, banks can be satisfied with the judgment, especially those that have been complaining for years about the negative impact of low interest rates on profitability and those that have discouraged companies and households from saving. However, the banking sector must also consider the risk of lowering the financial credibility of the "southern" countries because it will directly hit banks that hold on their balance sheets many bonds issued by these economies. So, both a debt and banking crisis could result from this nexus.