Bundesverfassungsgericht

ECB decisions on the Public Sector Purchase Programme exceed EU competences

Press Release No. 32/2020 of 05 May 2020

Judgment of 05 May 2020
2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15

In its judgment pronounced today, the Second Senate of the Federal Constitutional Court granted several constitutional complaints directed against the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB). The Court found that the Federal Government and the German *Bundestag* violated the complainants' rights under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2), and Art. 79(3) of the Basic Law (*Grundgesetz* – GG) by failing to take steps challenging that the ECB, in its decisions on the adoption and implementation of the PSPP, neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality. In its Judgment of 11 December 2018, the Court of Justice of the European Union (CJEU) has taken a different stance in response to the request for a preliminary ruling from the Federal Constitutional Court; however, this does not merit a different conclusion in the present proceedings. The review undertaken by the CJEU with regard to whether the ECB's decisions on the PSPP satisfy the principle of proportionality is not comprehensible; to this extent, the judgment was thus rendered *ultra vires*. As regards the complainants' challenge that the PSPP effectively circumvents Art. 123 TFEU, the Federal Constitutional Court did not find a violation of the prohibition of monetary financing of Member State budgets. The decision published today does not concern any financial assistance measures taken by the European Union or the ECB in the context of the current coronavirus crisis.

Facts of the case:

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. As set out in the reasoning communicated by the ECB, the EAPP is meant to increase money supply and intended to support consumption and investment spending in the euro area and ultimately contribute to achieving an inflation target of levels 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 Eurosystem amounted to EUR 2,557,800 million, including purchases under the PSPP in the amount of EUR 2,088,100 million.

With their constitutional complaints, the complainants claim 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). In its Order of 18 July 2017, the Second Senate referred several questions to the CJEU for a preliminary ruling. In particular, these 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 its Judgment of 11 December 2018, the CJEU held that the PSPP neither exceeded the ECB's mandate nor violated the prohibition of monetary financing. Following this, the Federal Constitutional Court conducted an oral hearing in Karlsruhe on 30 and 31 July 2019 (cf. press release no. 43/2019).

Key considerations of the Senate:

I. In light of Art. 119 and Art. 127 *et seq*. TFEU as well as Art. 17 *et seq*. 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 qualified as *ultra vires* acts, despite the CJEU's judgment to the contrary.

1. While the Federal Constitutional Court must review substantiated *ultra vires* challenges regarding acts of institutions, bodies, offices and agencies of the European Union, the Treaties confer upon the CJEU the mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law (cf. Art. 19(1) subpara. 2 TEU, Art. 267 TFEU). According to the Federal Constitutional Court's established case-law, it is imperative that the respective judicial mandates be exercised in a coordinated manner (Decisions of the Federal Constitutional Court, *Entscheidungen des*

Bundesverfassungsgericht – BVerfGE 126, 286 <302 *et seq*.>; 134, 366 <382 *et seq*. para. 22 *et seq*. >; 142, 123 <198 *et seq*. para. 143 *et seq*.>; Federal Constitutional Court, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, 2 BvR 2631/14 -, para. 140 *et seq*.). If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences. Though cases where EU institutions exceed their competences are exceptionally possible, it is to be expected that these instances remain rare due to the institutional and procedural safeguards enshrined in EU law. Nevertheless, where they do occur, the constitutional perspective might not perfectly match the perspective of EU law given that, even under the Lisbon Treaty, the Member States remain the 'Masters of the Treaties' and the EU has not evolved into a federal state (cf. BVerfGE 123, 267 <370 and 371>). In principle, certain tensions are thus inherent in the design of the European Union; they must be resolved in a cooperative manner, in keeping with the spirit of European integration, and mitigated through mutual respect and understanding. This reflects the nature of the European Union, which is based on the multi-level cooperation of sovereign states, constitutions, administrations and courts (*Staaten-, Verfassungs-, Verwaltungs- und Rechtsprechungsverbund*) (BVerfGE 140, 317 <338 para. 44).

The interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls to the CJEU, which in Art. 19(1) second sentence TEU is called upon to ensure that the law is observed when interpreting and applying the Treaties. The methodological standards recognised by the CJEU for the judicial development of the law are based on the (constitutional) legal traditions common to the Member States (cf. also Art. 6(3) TEU, Art. 340(2) TFEU), which are notably reflected in the case-law of the Member States' constitutional and apex courts and of the European Court of Human Rights. The application of these methods and principles by the CJEU cannot and need not completely correspond to the practice of domestic courts; yet the CJEU also cannot simply disregard such practice. The particularities of EU law give rise to considerable differences with regard to the importance and weight accorded to the various means of interpretation. However, the mandate conferred in Art. 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. Against this backdrop, it is not for the Federal Constitutional Court to substitute the CJEU's interpretation with its own when faced with questions of interpreting EU law, even if the application of accepted methodology, within the established bounds of legal debate, would allow for different views (BVerfGE 126, 286 <307>). Rather, as long as the CJEU applies recognised methodological principles and the decision it renders is not arbitrary from an objective perspective, the Federal Constitutional Court must respect the decision of the CJEU even when it adopts a view against which weighty arguments could be made.

2. 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. 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 simply untenable from a methodological perspective given that it completely disregards the actual economic policy effects of the programme.

The CJEU's approach to disregard the actual 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 European System of Central Banks (ESCB) and the ECB observe the limits of their monetary policy mandate. Applied in this manner, the principle of proportionality (Art. 5(1) second sentence and Art. 5(4) TEU) cannot fulfil its corrective function for the purposes of safeguarding the competences of the Member States, which renders meaningless the principle of conferral (Art. 5(1) first sentence and Art. 5(2) TEU).

Moreover, by completely disregarding all economic policy effects arising from the programme, the Judgment of 11 December 2018 contradicts the methodological approach taken by the CJEU in virtually all other areas of EU law. It fails to give effect to the function of the principle of conferral as a key determinant in the division of competences, and to the methodological consequences this entails for the review as to whether that principle is observed.

3. Therefore, the interpretation of the principle of proportionality undertaken by the CJEU, and the determination of the ESCB's mandate based thereon, exceed the judicial mandate conferred upon the CJEU in Art. 19(1) second sentence TEU. With self-imposed restraint, the CJEU limits its judicial review to whether there is a "manifest" error of assessment on the part of the ECB, whether the PSPP "manifestly" goes beyond what is necessary to achieve its objective, and whether its disadvantages are "manifestly" disproportionate to the objectives pursued. 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. Yet for safeguarding the principle of democracy und upholding the legal bases of the European Union, it is imperative that the division of competences be respected.

II. In light of the aforementioned considerations, the Federal Constitutional Court is not bound by the CJEU's decision but 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 lack sufficient

proportionality considerations, they amount to an exceeding of the ECB's competences.

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 fails 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 Art. 5(1) second sentence and Art. 5(4) TEU and, in consequence, exceed the monetary policy mandate of the ECB.

The decisions at issue merely assert that the inflation target of levels below, but close to, 2% sought by the ECB has not yet been achieved and that less intrusive means are not available. They contain neither a prognosis as to the PSPP's economic policy effects nor an assessment of whether any such effects were proportionate to the intended advantages in the area of monetary policy. It is not ascertainable that the ECB Governing Council did in fact consider and balance the effects that are inherent in and direct consequences of the PSPP, as these effects invariably result from the programme's volume of more than two trillion euros and its duration of now more than three years. Given that the PSPP's negative effects increase the more it grows in volume and the longer it is continued, a longer programme duration gives rise to stricter requirements as to the necessary balancing of interests.

The PSPP improves the refinancing conditions of the Member States as it allows them to obtain financing on the capital markets at considerably better conditions than would otherwise be the case; it thus has a significant impact on the fiscal policy terms under which the Member States operate. In particular, the PSPP could have the same effects as financial assistance instruments pursuant to Art. 12 *et seq*. ESM Treaty. The volume and duration of the PSPP may render the effects of the programme disproportionate, even where these effects are initially in conformity with primary law. The PSPP also affects the commercial banking sector by transferring large quantities of high-risk government bonds to the balance sheets of the Eurosystem, which significantly improves the economic situation of the relevant banks and increases their credit rating. The economic policy effects of the PSPP furthermore include its economic and social impact on virtually all citizens, who are at least indirectly affected, *inter alia* as shareholders, tenants, real estate owners, savers or insurance policy holders. For instance, there are considerable losses for private savings. Moreover, as the PSPP lowers general interest rates, it allows economically unviable companies to stay on the market. Finally, the longer the programme continues and the more its total volume increases, the greater the risk that the Eurosystem becomes dependent on Member State politics as it can no longer simply terminate and undo the programme without jeopardising the stability of the monetary union.

It would have been incumbent upon the ECB to weigh these and other 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.

III. The Federal Constitutional Court at present cannot definitely determine whether the Federal Government and the *Bundestag* did actually violate their responsibility with regard to European integration (*Integrationsverantwortung*) by failing to actively advocate for the termination of the PSPP. This determination is contingent upon the proportionality assessment by the Governing Council of the ECB, which must be substantiated with comprehensible reasons. In the absence of such an assessment, it is not possible to reach a conclusive decision as to whether the PSPP, in substance, is compatible with Art. 127(1) TFEU.

IV. To the extent that the CJEU concludes in its Judgment of 11 December 2018 that the PSPP does not violate Art. 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 accepts the CJEU's findings as binding in this respect, given the real possibility that the ECB observed the "safeguards" set out by the CJEU, which means that, for now, a manifest violation of Art. 123(1) TFEU is not ascertainable.

The approach taken by the CJEU may render some of these "safeguards" largely ineffective in practice; this is true, for instance, with regard to the prohibition of prior announcements, the blackout period, the holding of bonds until maturity and the requirement to decide on an exit strategy. Nonetheless, the determination whether a programme like the PSPP manifestly circumvents the prohibition in Art. 123(1) TFEU is not contingent on a single criterion; rather, it requires an overall assessment and appraisal of the relevant circumstances. Ultimately, a manifest circumvention of the prohibition of monetary financing is not ascertainable, especially because:

- the volume of the purchases is limited from the outset;

- only aggregate information on the purchases carried out by the Eurosystem is published;

- the purchase limit of 33% per international securities identification number (ISIN) is observed;

- purchases are carried out according to the ECB's capital key;

- bonds of public authorities may only be purchased if the issuer has a minimum credit quality assessment that provides access to the bond markets; and

- purchases must be restricted or discontinued, and purchased securities sold on the markets, if continuing the intervention on the markets is no longer necessary to achieve the inflation target.

V. It is not ascertainable that the PSPP violates the constitutional identity of the Basic Law in general or the overall budgetary responsibility of the German *Bundestag* in particular. In light of the volume of bond purchases under the PSPP, which amounts to more than two trillion euros, a risk-sharing regime between the ECB and the national central banks, at least if it were subject to (retroactive) changes, would affect the limits set by the overall budgetary responsibility of the German *Bundestag*, as recognised by the Federal Constitutional Court's case-law, and be incompatible with Art. 79(3) GG. However, the PSPP does not provide for such a risk-sharing regime – which would also be impermissible under primary law – in relation to bonds of the Member States purchased by the national central banks.

VI. Based on their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Government and the German *Bundestag* have a duty to take active steps against the PSPP in its current form.

1. In the event of a manifest and structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union, the 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 domestic impact of such acts to the greatest extent possible.

2. Specifically, this means that, 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.

3. German constitutional organs, administrative authorities and courts may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts. Following a transitional period of no more than three months allowing for the necessary coordination with the Eurosystem, the *Bundesbank* may thus 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. On the same condition, 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.
