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# **The Decision of the German Constitutional Court on the Public Sector Purchase Programme of the European Central Bank: Preliminary Observations**

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## **The Decision of the German Constitutional Court on the Public Sector Purchase Programme of the European Central Bank: Preliminary Observations**

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On 5 May 2020, the German Constitutional Court (GCC) issued a long-awaited judgment in which it jointly addressed several constitutional complaints linked to the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB). In this decision, the GCC chastises the ECB for inadequately justifying its interventions and sharply criticizes the European Court of Justice (ECJ) for providing a flawed interpretation of EU Law. Yet, it does not conclude definitively that the PSPP is illegitimate.

1) In 2015, four constitutional complaints were lodged with the GCC. The complainants submitted that both the German Parliament and Government had violated the German Federal Constitution (*Grundgesetz*) by failing to challenge the ECB in its adoption and implementation of the PSPP. Specifically, the argument advanced was that the ECB Governing Council's Decisions enacting the PSPP were *ultra vires*, as they fell afoul of the EU law principle of proportionality. In 2017, pursuant to Art 272 TFEU, the GCC referred multiple questions to the ECJ, asking the Luxembourg court to clarify whether the ECB's conduct had been consistent with EU Law. In 2018, the ECJ answered these queries, holding that the ECB did not exceed its mandate in deploying the PSPP and that its Decisions were consistent with the EU law principle of proportionality. In its 5 May 2020 decision, the GCC openly disregards the ECJ's 2018 ruling and proffers its own views regarding the conduct of the ECB and ultimately the legitimacy of the PSPP.

2) The GCC has not been hesitant to criticize the ECJ in the past, most recently in its Outright Monetary Transactions (OMT) decision. But it had never gone so far as to state that the ECJ had manifestly exceeded its competence. In its 5 May 2020 decision, while acknowledging that the ECJ may interpret EU law pursuant to canons of interpretation that differ from its own, the GCC holds that the ECJ's 2018

ruling, which found that the ECB's actions were consistent with the EU law principle of proportionality, is not based on any acceptable interpretation methodology. Notably, the GCC remarks that the ECJ failed in its 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) by neglecting to examine the PSPP from the perspective of its effects. Describing this as a manifest and grave error, the GCC draws the conclusion that it is not required to abide by the 2018 ruling of the ECJ as it is *ultra vires*.

3) In spite of this conclusion, the GCC does not automatically extend the same *ultra vires* reproach to the ECB's Decisions that adopted and implemented the PSPP. Rather, it states that it cannot make a definitive ruling on the issues until the ECB conducts a proportionality assessment of its programme. Accordingly, it has granted a period of three months to the ECB to substantiate that the monetary policy objectives pursued by the PSPP are not disproportionate to the economic policy effects it will engender. Lastly, the GCC has issued a stark warning. It states that if the ECB were not to provide the required proportionality assessment, the Bundesbank would have to withdraw its participation from the PSPP, as German constitutional organs and administrative authorities cannot partake in EU programmes that are *ultra vires*.

4) *Ultra vires* control over European Union acts is not new to GCC decisions. It was already stated in the Maastricht judgment of 1992 and was reiterated by the German Court in subsequent judgments, most recently that in the OMT case. Moreover, a similar control is also practiced by the supreme courts of other countries, including the Italian Constitutional Court, and this on the basis of the well-known counter-limits doctrine. What is new in this case is that the *ultra vires* control has been concretely applied for the first time, beyond the mere reservations and doubts previously expressed. Now, the GCC has noted the existence of a serious and manifest violation of the competencies attributed to the European Union; and what is more, the accusation concerns fellow judges in Luxembourg. It is to be expected that serious tensions will arise between the two courts, in contrast to the spirit of effective collaboration that should shape their relationship.

5) Note that the GCC decision does not affect the validity and effectiveness of the contested acts in EU law. The GCC can only prevent them from producing effects in Germany. It follows that the criticized ECJ ruling continues to be binding on all the authorities of the Member States and that its disavowal by the German Court constitutes a violation of EU law. A similar infringement would arise if the Bundesbank were to stop implementing the PSPP programme. In both respects, Germany may be subject to an infringement procedure pursuant to articles 258-260 TFEU.

6) The GCC decision has no retroactive effect. This means that it does not affect the previous implementation of the PSPP programme in Germany and should not prevent its continuation in the future, once the ECB provides adequate clarification on the proportionality issue. The GCC also wishes to clarify that its ruling does not apply to measures taken by the European Union and the ECB in the context of the current pandemic.

7) Apparently, it can be concluded that the ruling in question has two different sides: one that is conflicting and controversial with respect to the ECJ; and one that is more conciliatory towards the ECB and aware of the importance of the PSPP in the functioning of the eurozone. It is to be hoped that the conflict between the GCC and the ECJ will be duly overcome, because the mandatory nature of the latter's rulings and its exclusive competence to decide on the validity of the European Union's acts constitute a fundamental element of the European constitutional framework.