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On May 5, 2020, the Second Senate of the BVerfG announced its final decision on the constitutional complaints pending against the ECB's bond purchase program “PSPP” since 2015.

They found that the ECB's PSPP program violated the Basic Law. More specifically, they found that the PSPP is not compatible with the German Basic Law because it is incompatible with European Union law because European competencies are exceeded.

In this respect, the mainstay of the judgment is that the Federal Government and the Bundestag have violated the Basic Law (principle of democracy) by failing to take appropriate measures to prevent the ECB from examining and stating that the PSPP program complies with European law (principle of proportionality). The constitutional complaints remain unsuccessful on all other points.

Anyone who already is confused will become even more: the European Court of Justice had already checked the compatibility of the PSPP with European law in 2018 on presentation of the BVerfG and state it is compliant with European law. (Rs. Weiss et al., C-493/17).

Anyway the BVerfG complains about the lack of a European law proportionality check for the ECB's PSPP program. In order to be able to make this statement itself, it first had to get the opposite ECJ judgment out of the way.

In order to understand how this could work, you have to go back a little.

I. History

The European Court of Justice is the last resort – according to Union law – for questions of interpretation and validity regarding Union law according to Art. 19 TEU, 267 (3) TFEU. Who else could? In Article 344 TFEU, the Member States even promised the following: "The Member States undertake not to settle disputes about the interpretation or application of the contracts differently from what is provided for here."

Since the Maastricht ruling in 1993, the BVerfG has nevertheless claimed the power to determine that the European institutions and bodies have exceeded their powers and to declare corresponding European legal acts to be inapplicable in Germany. This was initially negotiated under the label "outbreaking legal acts", later under the keyword "ultra vires file". The BVerfG uses a trick: it claims to actually only interpret the Basic Law and how far the Basic Law carries participation in the EU. Through this back door, however, it also comes to interpret European law - which is actually ultimately binding on the ECJ under the contracts - and thus creates a kind of parallel version of European law through the Karlsruhe glasses.

This approach cannot work well in the long run and was also incompatible with the Treaties from start; particularly with a view to Article 344 TFEU (see above). Ironically, the ultra vires control claim of the BVerfG proves to be ultra vires. In the words of Gertrude Lübbe-

Wolff in her OMT minority vote : "In an effort to secure the rule of law, a court can cross the limits of judicial competence."

But it has never been a plausible concept, especially when it comes to the functionality of a supranational legal system: if every member state comes up with such final decision claims, one could as well leave everything to the national legal systems to be settled.

The criticism of the Lisbon judgment was correspondingly harsh. In 2009, after many years, it pulled “ultra vires control” out of the moth box and even tightened it. In response to criticism, the Second Senate backtracked back significantly in 2010 with the Honeywell decision and, with a fundamental insistence on the possibility of an ultra vires control, provided it with conditions and criteria that made its activation seem rather unlikely. Thus, the BVerfG promised to refer the preliminary question to the ECJ in any case, before making an “ultra vires” finding – as the BVerfG had never done at the time. In addition, not every violation of competency should be considered an ultra vires act, but only those that cause a structural shift in the competency order.

In this configuration, it was even possible to integrate ultra-vires control as a stabilizing procedure for the overall structure of law: a kind of preparation towards European competence management. This, however, provided that the sword of Damocles is never used. I discussed this in my constitutional law lectures a few years ago; but held the point that if there is any place for member state control elements from the perspective of European law, this can at most affect identity control. When examining whether the national constitutional identity stands in the way of European law, it is always only a question of a bilateral relationship between a member state legal system and the EU legal system. However, the charge of exceeding competences cannot be limited to this two-pronged relationship: it has an all-round effect, even for Union law in relation to all other member states.

II. The judgment of 5.5.2020

It has now happened with the PSPP judgment: The BVerfG declares to the ECJ in a fairly schoolmasterly manner ("interpretation of the Treaties no longer understandable", "objectively arbitrary") that it had not properly checked the exercise of competence by the ECB and, in turn, exceeded its own competencies. This clears the way for a review of the ECB by the BVerfG. Here, at the latest, the reader who has not been trained in the thoughts of the Second Senate will wrestle for composure. But it is actually the case that the German constitutional court is on the way to put the independent (!) European (!!) central bank in its place. The legal approach is the proportionality principle in Art. 5 Para. 1 Clause 2 and Para. 4 TEU as the principle of exercising competence.

In view of the "*significant economic policy effects of the PSPP, the ECB should have compared these with the forecast benefits for achieving the monetary policy goal it had defined, and weighed them against the principle of proportionality*."

And further:

"*As far as can be seen, such a balancing was neither carried out at the beginning of the program nor at a later point in time, so that a check as to whether the acceptance of the economically and politically problematic effects of the PSPP is still proportionate or since when it has no longer been proportionate, It also does not result from press releases and other public statements by decision-makers of the ECB. The decisions in question therefore violate Art. 5 Para. 1 Clause 2 and Para. 4 TEU with a corresponding failure to weigh up and explain Consequence that they are not covered by the monetary policy competence of the ECB from Article 127 paragraph 1 sentence 1 TFEU. "*

This is how the BVerfG solves the basic dispute question, which also led economists and lawyers to ask each other whether is the PSPP still monetary policy (allowed), or it is already economic policy (prohibited). The conclusion should be that if the ECB clearly takes into account the proportionality, then it's still monetary policy.

The assessment of the BVerfG is that the ECB has unfortunately not documented sufficiently that it is considering the consequences of its program. The program then has no basis in European law and neither does the ECJ judgment, which does not object to this, then “This means that neither the judgment nor the PSPP program are binding for Germany”.

The question of the disguised – forbidden – monetary funding of member states by the PSPP is still being examined, but here the ECJ verdict applies despite the "considerable concerns".

III. The immediate consequences

The BVerfG cannot give instructions to the ECB. The tenor of the judgment is limited to the finding that the Federal Government and the Bundestag have failed to provide "suitable measures" that are not specified in more detail. Further back, the Bundestag and the federal government – regardless of the independence of the central bank or not – are obliged to work towards a proportionality check by the ECB. They would have to "make their legal view" - what is meant rather: that of the Second Senate - "clear to the ECB". Corresponding letters should be written quickly.

As the most immediate consequence of the determination of an exceedance of competence, at the end of the judgment only the Bundesbank, which is assumed to be in the BVerfG's area of access, is "forbidden" to participate in the bond purchase program. But only after three months. In that time, the considerations of proportionality could be replenished. Thus the immediate consequences of the judgment seem to be manageable, whereby the repeated "currently" and "not yet" phrases should not be completely ignored.

But the judgment goes far beyond the concrete dispute over an ECB bond purchase program from 2015.

IV. Classification and outlook in 10 theses

1. The verdict is not a surprise.

For years, interested circles have been fueling the idea at the Second Senate that you also have to bite, not always only bark. Anyone who experienced the hearing in which the bad mood of the judge's bench was palpable could develop a premonition. Anger mixed over the fact that the economic questions and the categories of the economists in general could not be dealt with, the bad mood about the allegedly condescending tonality of the ECJ submission decision and possibly also about the absence of the ECB, which - rightly so - had preferred not to be drawn to a nose ring again by the ring of a constitutional judge at a member state court, as in the OMT procedure.

2. The verdict is a surprise.

It was not entirely certain that the Second Senate would dare to enter the highly sensitive field of action of the ECB. Many had relied on the judges' reason in advance not to underestimate the dangers to the euro from an attack on the ECB. For the activation of the Ultra vires control against the ECJ, the case pending at the Second Senate, Egenberger (church labor law), seemed more suitable, with less far-reaching effects and nevertheless a certain symbolic content. However, it is surprising and also worrying that the ECB case has now been chosen for a first Ultra vires verdict. Ultimately, this only leads to the conclusion that one specifically wanted the increased, especially international, visibility and the greater practical effects.

3. The judgment is a disappointment.

"The verdict" is also a cipher for the people behind the judgment. In the present case, the judgment was 7 to 1. Unfortunately, this "1" did not submit a special vote, so we do not know who was the one person who – presumably – would have judged Europe-friendly. This is very unfortunate because since a long time the special votes on European issues have been helpful as evidence to uncover the contradictions in the majority positions; and to show the way for a better case law.

President Voßkuhle, professor in Freiburg, rapporteur Huber, professor in Munich, former Saarland prime minister Müller, the former federal judges Kessal-Wulf and Hermanns, the former federal judge Maidowski and the professors König (Hamburg) and Langenfeld (Göttingen) participated in the judgment of May 5. And only one person from this group was unwilling to support the verdict – that was disappointing. The last three members, as well as the last elected members of the Senate, recently opposed the EPCC decision, which was also problematic from various aspects, in a special vote addressing these problems. This fueled hopes of a change to a moderate European line in the Second Senate. Nothing remains of it.

4. Continuation threatens.

This judgment invites you to continue to sue the PSPP and to take action against the PEPP (Corona). The fact that the BVerfG, with its extremely bold admissibility structure, always offers the same anti-European plaintiffs a forum who are expressly concerned with the abolition of the common currency - AfD founder Lucke, for example - is one of the strange aspects of this case law.

In addition, there are already pending proceedings that have been explicitly filed as Ultra vires lawsuits. This applies in particular to the Egenberger process, which deals with church labor law. Here too there is a risk of a confrontation with the ECJ. It is therefore to be feared that the judgment of 5.5.2020 will not remain the exception.

5. Corona - The Second Senate has a timing problem.

The appointment was visibly uncomfortable for the President of the Court, Voßkuhle. The announcement had already been postponed by 3 weeks, on the grounds of the corona-related contact block. In the corona crisis, the judgment looks particularly clear as if it were taken out of time. With its PEPP program, the ECB is one of the few visible and powerful European institutions. Although Voßkuhle hastened to emphasize that today's judgment contains no statement about the ECB's Corona program - which is a matter of course on the one hand, but then irritated again as a statement - the parallels between PSPP and PEPP are obvious. And if you apply the provisions of the judgment to PEPP, it is clear that the next constitutional complaint will be against PEPP. After all, Art. 122 TFEU will be able to play a role

6. The BVerfG does not do what it is supposed to do: ensure stability.

Even before Corona, there was a general perception that the world was getting out of hand and that the law as a bold idea of legal obligations beyond the nation state was to be pushed back. The legal idea of European integration persistently stands in the way of corresponding forces on both sides of the Atlantic. In a world out of joint, law offers stability and ensures stability. In Germany, this is beyond the EU context, the case law of the BVerfG on fundamental rights, that is also its task. This will be much more important in the Corona crisis. The BVerfG attack on the ECJ and ECB counteracts this, it destabilizes.

7. The judgment is not coherent and does not convince even on the basis of the previous case law.

Some of the judgment is irritating. Here is a selection:

The BVerfG building is a very transparent building, a glass house to a certain extent. From this glass house, the proportionality test is requested by the BVerfG, in particular vis-à-vis the ECJ, in a completely disproportionate form. There is talk of arbitrariness and a decision that is no longer understandable. This ties in with established dogmatic figures. Nevertheless: There were arbitrary courts in German history. The ECJ is far from that. And of course the reasoning of the ECJ is understandable for the objective recipient horizon of an average European lawyer, everyone can read that. It simply doesn't fit the BVerfG. Then there is the accusation that the CJEU judgments "are no longer methodologically justifiable". This is what seven German lawyers say about the 15 eJurists of the Grand Chamber of the ECJ. No one in the literature noticed the ECJ judgment as methodologically unjustifiable. Although there are a lot of evidence-fog candles, the BVerfG does not come up with literature on the methodological incompatibility of the ECJ line in terms of PSPP - which is actually no longer methodologically justifiable.

Furthermore, the shaky construction of admissibility (Art. 38 GG) of the constitutional complaints against the ECB ultimately demands democracy - vis-à-vis a central bank, where the constitutional court and the central bank are both equally democratically precarious (" countermajoritarian institutions"). Such institutions bear functional legitimacy - and the lawyers from the glass house of the Constitutional Court of the Central Bank want to explain how the central bank has to function properly in a democratic manner? In general, democracy is simply the wrong hook for the independent central bank that Germany so wanted. This can be seen particularly well in the demand that the Bundestag should somehow “work” towards the ECB - that should not be the case: that any deputies call the central bank and put political pressure on is another central bank model. Incidentally, the independence of the European Central Bank was a German requirement. The CJEU is incidentally the court in the Rimšēvičs case has already demonstrated in 2019 that it is resolutely defending this independence.

By the way, the democracy argument still comes from the older layer of the euro rescue case law on the EFSF and ESM, where the BVerfG has always been able to push the Bundestag forward, which, for reasons of democracy, must always give the green light before the European institutions can act. With the democracy argument, it was always practical to ensure the admissibility of constitutional complaints under Article 38 of the Basic Law, although, to be honest, this admissibility construction is actually no longer methodologically justifiable. However, the Bundestag cannot do anything about the ECB because it is independent. And yet the old text modules are dragged along and, out of old habit, the Bundestag is ultimately instructed to act somehow. You feel reminded of the old Tom & Jerry comics, in which the protagonist races over an abyss and just keeps running in the air in empty space for a while, only by looking down does he realize that there is really nothing there. Perhaps the majority of the Senate should look down.

Overall, various things are wrong at the level of argument. Even in the categories that the BVerfG has built itself - fretwork, as Bernhard Wegener aptly called it - a structural shift in competence away from the Member States to the EU would be necessary after the Honeywell decision by an act at European level. That should be the case here, when it is only a question of a rule of competence that can only be checked for its application in individual cases? When the court itself assumes that you can "cure" it, as it were, within three months? And what exactly does the member states lose in terms of competence in terms of structure?

8. The judgment is very German in the ominous sense. And thus harms German European politics.

You can't put it any other way: the legal hybrids that flow from a number of passages of the judgment, the self-overestimation that every lawyer is familiar with, and so confidently disregarding the limits of their own skill - here with regard to the economic context - and the instructive attitude ("We explain to the ECJ how that goes with the proportionality ”) to the occasional brutality in the language (“ arbitrariness ”) will be perceived in the rest of Europe as very German.

This will damage Germany's interests in the European Union very much, because Germany has been suspected of hegemony after all of the prehistory of the last century. In a nutshell:

the German occupiers were not fought off and the war against Germany won, and afterwards the Germans were allowed to rebuild their state under certain conditions of obligation for European cooperation and peacefulness, so that the Germans could then dictate how to do it to live wherever you direct your government spending, etc.

The German perspective is also very specifically a methodological-manual core problem of the entire argumentation of the BVerfG: The core question is the insufficient proportionality test of the ECB, incidentally in a context in which the German constitutional order would normally never consider proportionality. Under the Basic Law, proportionality involves interference with fundamental rights. You then simply do the proportionality test yourself. Of course, only the things that are in sight from the Karlsruhe frog's perspective are included in the necessary weighing of the weighing goods in question. But elsewhere, you may have other concerns than the savings and property prices that the judges bring into play. And of course it's a grotesquely absurd idea that the ECB is not considering the possible consequences of its measures. But it is the European perspective with many different aspects and interests and ultimately the orientation towards a European common good that are decisive for the ECB.

9. The champagne corks pop in Poland.

One of the most devastating consequences of the judgment is that it provides a lot of "text modules" (so Stephan DetjenIt formulates), which should be used gratefully wherever one wants to escape the obligations under EU law. In its first guiding principle, the Senate is still weakly trying to insure the fundamental link to European law in the interpretation by the ECJ. But the text modules that will be used in Poland, Hungary and elsewhere are those that deal with the last word of the national constitution and in particular with the final decision on the ECJ. You don't have to follow ECJ judgments, that's the message. Now, the corresponding text modules are mostly not entirely new (see above, decades of fretwork) and have been cited diligently and selectively in Warsaw and elsewhere.

This is precisely why the Second Senate can be accused of knowing exactly how this decision would be exploited. From the point of view of the democratic and constitutional forces, especially their colleagues, in all these countries they have been stabbed in the back with their eyesight.

10. The judgment is directed primarily against the Court of Justice of the European Union. The war of the judges is taking place now.

The consequences for the PSPP are manageable, and the ECB could turn back to the actual questions with a shrug. Ultimately, the BVerfG does not reach the ECB.

But the judgment is extremely dangerous for the ECJ and the ECJ is also the actual addressee of the decision. There is only one adjective left of the cooperation relationship with the ECJ, a big word from the Maastricht judgment. And in fact it is a declaration of war on the ECJ. With the invitation to other national courts to do the same. This has been an irritating component of Ultra vires fretwork in the past: the BVerfG has repeatedly insinuated that the majority of the Ultra vires reservation also exists in other Member States. And that's not true.

Correspondingly, faults threaten not only in the relationship of the ECJ member states, but also horizontally, between the national supreme courts.

It is difficult to grasp exactly what this anger and aggression against the ECJ, which is palpable between the lines of the judgment and tangible at the hearing, is difficult to grasp. Certainly the ECJ's answer to the question was scarce in some places, but that is the ECJ style. You actually know each other. The president of the BVerfG Voßkuhle is even a member of the body according to Art. 255 TFEU, which reviews applications for ECJ judge positions. What happens atmospherically and interpersonal in the occasional encounters of the courts is not known. Perhaps it was simply the case that the Second Senate was angry that the ECJ did not answer the questions regarding the OMT in the historically first question referred to the ECJ as the BVerfG would have liked and actually dictated in its questions. So you asked more or less the same questions in the PSPP template again, but the CJEU was not put off and gave its own answers again. They wanted to punish that now. If it was, it would be kindergarten. The judgment of 5.5.2020 is also an expression of great judicial egos. Probably in different places.

La guerre des juges aura lieu: The ECJ will have to respond to this declaration of war. Of course, this presupposes that there is a corresponding procedure. The sober European law analysis shows that the BVerfG, with its judgment of 5.5.2020, violated the obligations under Art. 267 (3) TFEU and Art. 19 TEU, even if the tenor of the judgment conceals this. A violation of the rules to ensure the independence of the ECB is also possible, as the BVerfG calls on the Federal Government and the Bundestag to influence the ECB. Accordingly, the European Commission will examine the initiation of infringement proceedings. If the preliminary proceedings do not lead to clarification, Germany could face a conviction for breach of contract. The argument that the courts are independent does not matter. It used to prevent the Commission from pursuing breaches of contract by the courts right up to the end, and it has been left with warning letters. For some time now, even large member states have been sued if their courts violate European law. A more recent example is France's conviction in 2018 for a judgment of the Conseil d'Etat (Case C-416/17 , Accor).

If the breach of contract continues, for example by confirming the case law, a penalty payment can be imposed. For example, the breach of contract could be remedied in such a way that the BVerfG, by changing the BVerfGG or even Art. 88 GG, is explicitly prohibited from jurisdiction over the ECB or, more generally, the self-evident obligation to comply with judgments of the ECJ is expressly anchored in German law . Then it would still be possible to move beyond the eternity clause of Article 79.3 of the Basic Law, but a lot would have been done to remedy the breach of contract. In addition, the proceedings that bring the whole thing to the ECJ also include state liability proceedings before the German civil courts, which are used to

The infringement procedure would be the calm, civilized and therefore correct way in the legal community: The BVerfG breaks the rules, then we have to follow the procedure provided for it. Ultimately, there is no way around the cooperation of the courts, as all experience with comparable power struggles between courts shows, for example in the USA in the 19th century.

What is at stake is the European legal community . It is still an extremely fragile construct because it is not underpinned by a nation state that creates additional binding forces. Its central components are the CJEU as a supranational court that is unique in historical and worldwide comparison and the mutual trust of all courts in the European Union in that judgments under European law are followed in particular by the courts.

If that breaks down, then there is a risk of falling into a kind of judicial rule of thumb: the right of a stronger judge. This will be based on the parameters of size, power, political influence and economic weight of the respective member state. And then the central idea of European integration, peacefulness in Europe through equality law, would be destroyed. -