Project Syndicate

Germany's Constitution and European Sovereignty

May 15, 2020 | **HANS-WERNER SINN**

MUNICH – In addition to the euro crisis, Brexit, and COVID-19, Europe now faces a constitutional crisis, as the Court of Justice of the European Union (CJEU) and Germany's Federal Constitutional Court (GCC) fight over the policies of the European Central Bank. Although this latest crisis has erupted at an inopportune moment, it had been presaged by a series of earlier rulings and opinions on the ECB's policies and thus should not have surprised anyone.
In its latest ruling, the GCC accused the CJEU of exceeding its mandate and employing arbitrary reasoning in a December 2018 judgment in favor of the ECB. But the widespread outcry over the GCC's decision points to a disconnect between what many commentators might wish and legal reality.

Although a hierarchy of authority between the two courts clearly exists on matters of monetary policy, it does not in other policy areas, especially when it comes to the comprehensive and unconventional fiscal rescue policies that the ECB has pursued in recent years with money from the printing press. The ECB should have been specifically authorized to carry out such measures under Article 5 of the EU Treaty. But this authorization was not granted.

Furthermore, the EU and its institutions do not have the status of an absolute sovereign, as some observers seem to believe. Under its current treaties, Europe is far removed from the perhaps desirable statehood that would grant the ECB and the CJEU powers comparable to those of similar institutions in nation-states or confederations. For now, Europe's nation-states are the masters of the EU treaties, and under these treaties, the highest courts in Denmark and the Czech Republic have been able, in other cases, to pronounce and enforce *ultra vires* judgments against the CJEU's rulings.

Regarding the dispute over the ECB's purchases of government securities, consider this: even in the United States, the Federal Reserve has not bought the public debt of individual states, a matter that has become a bone of contention in Europe. When California, Minnesota, and Illinois were on the brink of bankruptcy, the Fed did not come to these states' rescue by buying their bonds.

In the eurozone, however, the ECB has already allowed eurozone members' central banks to buy a third of member states' outstanding government securities (issuer limit). These purchases have protected bondholders from losses and kept interest rates low despite high levels of public debt, thus encouraging governments to borrow even more. In so doing, the ECB has not supported economic policy, as it is allowed to do, but has directly countered it by undermining the various EU fiscal and debt compacts that aim to prevent national debt from escalating.
Even with a two-thirds majority in favor, the German Bundestag could not approve EU treaty provisions that would allow the ECB to pursue a policy of state bailouts entailing major foreseeable risks for eurozone taxpayers. Instead, the Federal Republic would first have to be refounded and a new constitution adopted by referendum.

Moreover, the EU and the CJEU do not have the legal means to enforce such a policy. True, the EU could initiate infringement proceedings against Germany. But that would not help, because the German government would not be permitted to pay an EU fine for disobeying a CJEU ruling that the GCC has deemed illegal. The CJEU could not rule on the issue itself, because it is the object of the infringement procedure (*nemo judex in causa sua*). The resulting conflict over competencies would have devastating consequences for the EU.

Sign up to our Weekly Newsletter
your@email.com
Our best content in your inbox.
Select Newsletters

The GCC's ruling was a necessary reminder that the EU is a community based on the rule of law, and that only its sovereign member states can develop it further. It cannot be developed arbitrarily by expanding the CJEU's jurisdiction or through the decisions of a technocratic body such as the ECB Governing Council.

To be sure, the EU's sovereign states should stand together and help those hit hardest by the crisis – above all Italy, which was the first European country to be affected by the pandemic and has suffered 31,000 COVID-19 deaths, the highest number in the EU. In addition to unilateral transfers, which each national government can freely decide on, member states should increase the EU budget to provide special aid for Italy's people and hospitals.

If that is not enough, then a debt moratorium for Italy could be introduced under the rules of the Paris Club of creditor countries. This would have to be combined, as in the case of Greece, with capital controls to stop the huge capital flight from Italy to Germany and the United States that has been occurring since March.

Notwithstanding all this, EU member states should come together to form a political union that will in fact enable the bloc to achieve its desired sovereignty. Such a union should not primarily involve the communitization of the purse. A political union's claim to sovereignty depends first and foremost on the establishment of a European army, with everything that this entails. A mere fiscal union would, in fact, block the road to political union, because some member states would provide the money while others would hold the military trump cards.

HANS-WERNER SINN

Hans-Werner Sinn, Professor of Economics at the University of Munich, was President of the Ifo Institute for Economic Research and serves on the German economy ministry's Advisory Council. He is the author, most recently, of *The Euro Trap: On Bursting Bubbles, Budgets, and Beliefs*.

https://prosyn.org/a2ihc1l;

© Project Syndicate - 2020