

With one court decision, Germany may be plunging Europe into a constitutional crisis

If you add fights over court power to money issues, coronavirus and democratic collapse, expect explosive consequences

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Germany's Federal Constitutional Court in Karlsruhe on April 16, 2019. (Ronald Wittek/EPA-EFE/Shutterstock)

By Federico Fabbrini and R. Daniel Kelemen
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Germany's Federal Constitutional Court has been barking at the European Union's high court — the European Court of Justice — for years. This week, it finally bit.

On May 5, the [German court](#) issued a ruling on the [legality of the European Central Bank's bond buying program](#) — and this ruling endangers a pillar of the ECB's response to the euro-zone crisis. That's actually the less important consequence of the ruling. The court's decision may undermine the very foundations of the E.U. legal order.

The German court invalidated an earlier ECJ ruling upholding the ECB's action, saying that it does not have effects in Germany. This is perhaps the most serious defiance of the ECJ's authority in the European Union's history. By rejecting the ECJ's ruling, the German court in effect asserted that it is the ultimate interpreter of E.U. law in Germany.

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This decision will encourage other national courts to challenge the ECJ's authority. The politically captured courts of increasingly authoritarian member states such as Poland or Hungary will probably use the highly respected German court's ruling to justify ignoring the ECJ and declare that they have the last word on E.U. law.

From this perspective, the German court's decision didn't just open [Pandora's box](#), it ripped the lid off and smashed it to bits.

The decision concerned central bank policymaking

The case before the German court involved the ECB's monetary strategy of quantitative easing, which has seen it purchase over 2 trillion euros of government bonds and other debt securities. The legality of the ECB's QE program had been challenged by ultraconservative members of the Alternative for Germany (AfD) party, and rejected by the ECJ in a December 2018 judgment.

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Unhappy with that, the German court decided to take the matter into its own hands and review the ECJ judgment, to assess whether the ECB had acted within the limits of the mandate set by the E.U. treaties.

In its sweeping judgment the German court ruled that the ECJ was wrong, and declared that the German Central Bank (the Bundesbank) would have to cease participating in the ECB's QE program in three months, unless the ECB's Governing Council adopted a new decision demonstrating "in a comprehensible and substantiated manner" that the monetary policy goals pursued by QE were "not disproportionate to the economic and fiscal policy effects."

The ruling could create a constitutional crisis

The German court and the ECJ have been engaged in a judicial version of guerrilla warfare for decades, fighting over the supremacy of E.U. law and the very nature of the European Union as a polity. As in national federal systems such as the U.S. system, there are laws at the E.U. level, and laws at the national level of the E.U.'s individual member nations. Both courts accept that E.U. law is supreme over national law within its sphere of competences, and that the ECJ is the ultimate interpreter of E.U. law.

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Where they disagree is over what happens if there is a question about whether the E.U. has acted beyond the competences conferred on it, so that it perhaps strays onto terrain reserved to its member states? Who should be the judge of such boundary disputes — the ECJ or national constitutional courts?

The ECJ has maintained that it has the ultimate say, while the German court and a few other national constitutional courts have asserted that they must retain the last word. The ECJ and the German court had managed to avoid direct conflict — until this week.

With this ruling, the German court crossed the Rubicon and for the first time nullified an action by a E.U. institution (the ECB) that had been declared fully legal by the ECJ. Just like the nullification crisis in pre-Civil War America, where South Carolina declared a federal law null and void within its state boundaries, this threatens to create a constitutional crisis for the E.U.

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The political ramifications are very serious

Over the next three months, the ECB may try to calm things down by offering a better justification of its program, so that the institutions of European monetary union can still wobble along. However, it is not clear that the ECB can offer a more convincing justification than the detailed one it already provided the ECJ to justify QE. Furthermore, if the German court's problem is that QE has fiscal consequences, it is unlikely that any justification can address its concerns.

The ECB could still undertake QE without the Bundesbank, but this would probably generate massive uncertainty and market turmoil. And although the German court says its judgment has nothing to do with the emergency measures that the ECB is taking to respond to covid-19, it's hard to see how these emergency measures could be justified given the German court's analysis.

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The judgment may lead to an immediate constitutional crisis in Germany, if elected politicians dissent from a court decision that potentially unravels the European monetary union that successive governments have backed for decades. However, the more important implications of the ruling will be felt outside Germany.

Increasingly autocratic governments — such as those in Poland and Hungary — could use this decision, and violate E.U. law and ignore the ECJ. If the esteemed constitutional court of a robust democracy such as Germany bluntly rejects the authority of the ECJ, then so can the captured constitutional courts in Hungary and Poland. Poland's deputy justice minister has already signaled that the country will use the ruling to justify ignoring pending ECJ rulings concerning the Polish government's ongoing attacks on judicial independence in Poland. A seemingly technical ruling may undermine the legal order that holds the entire European Union together.

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