

German Supreme Court Affirms National Law Against EU Super-State

by Claudio Celani

May 10—In a historic ruling May 5, the German Federal Constitutional Court in Karlsruhe initiated the most serious crisis faced by the European Union (EU) since its inception, by affirming supremacy of national law above EU law. The Federal Constitutional Court (Bundesverfassungsgericht or BVerfG) has invalidated a ruling by the Court of Justice of the European Union (CJEU), by which the CJEU had rejected complaints raised against the European Central Bank (ECB), which was accused of violating its mandate. The German high court declared that the CJEU had acted *ultra vires*, i.e., beyond its powers. Furthermore, the German Court criticized the ECB's policy on its merits, stating that the monetary policy of that supranational central bank has had more negative effects than positive results, thus violating the principle of "proportionality."

The BVerfG issued a [press release](#) that included a three-month ultimatum to the ECB to argue its case, or Germany shall pull out of its programs. The ruling was a response to a complaint filed by former Christian Social Union vice-president Peter Gauweiler and a group of economists, including former Alternative für Deutschland members Bernd Lücke and Hans-Olaf Henkel.

The BVerfG, by its ruling, has struck a blow against two holy cows of the European Union system: the supremacy of so-called European Law over the national law of member states, and the so-called independence of central banks.

The Court of Justice of the European Union (CJEU) is a body that interprets EU law to make sure

it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions. The so-called "integrationist" school of thought, whose aim is the establishment of a European Federal State, insists that member states cannot challenge CJEU rulings; but although this has been customary so far, the sources of EU Law are treaties among states (the Lisbon Treaty) and not a Constitutional Charter of a European State.

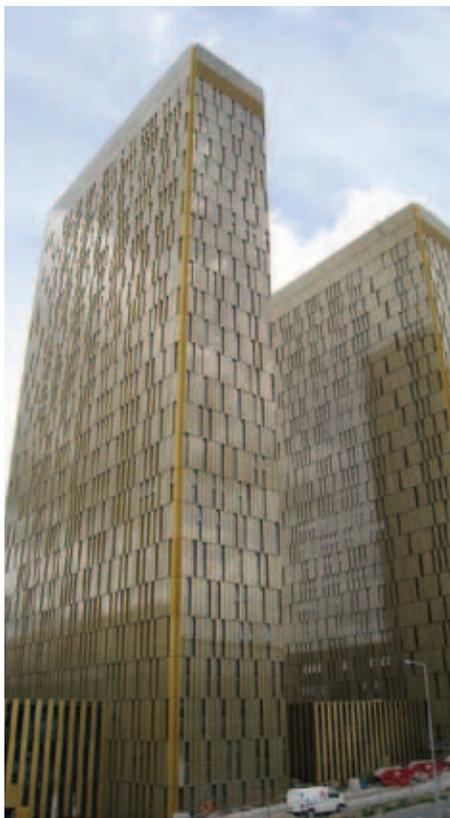
The BVerfG therefore recalled that "even under the Lisbon Treaty, the Member States remain the 'Masters of the Treaties' and the EU has not evolved into a federal state.... The European Union ... is based on the multi-level cooperation of sovereign states, constitutions, administrations and courts...."

The BVerfG is therefore entitled to judge that the CJEU, which had earlier rejected the same complaint, has failed "to give consideration to the importance and scope of the principle of proportionality."

Getting Germany Out of Bank Bailouts

Going into the merit of the complaint, the Court found that the Public Sector Purchase Program (PSPP) of the European Central Bank, a very large quantitative easing (QE) scheme, has failed to achieve its target (raising inflation) but has produced a series of negative effects on the economy and on the population.

The PSPP was started in March 2015 and was terminated in December 2018. Since then, it has kept on refinancing those securities, which constitute a large chunk



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Court of Justice of the European Union, in Kirchberg, Luxembourg City, Luxembourg.

of the total €5.4 trillion assets listed in the ECB balance sheet as of May 1, 2020. As the BVerfG correctly points out, the PSPP has failed to achieve inflation targets but, by eliminating the “moral hazard” factor and compressing government bond yields and consequently the general cost of money, it has distorted the market and produced devastating effects on the banking sectors, on savers and investors. The Court reports:

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.

According to the Court’s report, the ECB has furthermore put the European Monetary Union itself at risk:

[T]he longer the program 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 program without jeopardizing the stability of the monetary union.

The BVerfG then scolds German government institutions for having failed to see the problem:

The Court found that the Federal Government and the German Parliament, the Bundestag, vio-



European Central Bank headquarters, Frankfurt am Main, Germany.

lated 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) 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 conclusion, it said, the ECB must present a complete and convincing justification of its program within three months, or the German central bank, the Bundesbank, will cease to participate to the PSPP program.

The Federal Government and the Bundestag are required to take steps seeking to ensure that the ECB conducts a proportionality assessment. This applies

accordingly regarding the reinvestments under the PSPP that began on 1 January 2019 and the restart of the program as of 1 November 2019.

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 program. 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.

The House Always Wins

Let us explain something here.

ECB purchases of public sector assets (government

bonds) is seen by many as an aid to some member states, as it supports the value of their sovereign debt and allows them to keep their borrowing costs low. However, the main purpose of such programs is not to bail out states, but to bail out banks. In fact, the ECB does not buy government bonds at emission, but on the so-called secondary market; i.e., from the banks. So, contrary to those who claim that the PSPP and other programs are a way of indirect financing of government debt, these programs are, in fact, a direct financing of megabanks. The banks buy government debt which they then give to the ECB, getting fresh money in exchange.

It does not end there.

Whereas banks are bailed out and get rid of assets—including junk corporate assets covered by other QE programs—governments become debtors to the ECB! In fact, the PSPP and similar programs work like this: The ECB orders the central bank of nation A to buy a certain amount of sovereign debt from banks of nation A, and writes the corresponding bill as a debt of that central bank to the ECB. In case a central bank of nation A buys sovereign bonds of nation B from banks of nation A, the central bank of nation A gets a credit at the ECB. This complex system is regulated through a clearing board called “Target B,” where central banks of the Eurosystem are listed as debtors or creditors.

The net effect of such a system is the same as a classic “debt monetization,” with the difference that while liquidity is injected in the system in the same way, the debt does not disappear. To extinguish the debt, national governments must borrow Euros, as if they borrowed a foreign currency!

Implications of the Ruling

The Karlsruhe Court ruling concerns only the PSPP, but it will have indirect effects on other ECB programs, including the newest ECB bailout operation, called PELTRO (Pandemic Emergency Longer-Term Refinancing Operation), which offers loans to banks at a record negative rate of -1% (*minus* one percent), laying the basis for future successful complaints against it.

At its virtual board meeting on April 30, the ECB also lowered the rate for the existing TLTRO III (Targeted Long-Term Refinancing Operations) by 50 points, to -1% , retroactive to 1 March 2020.

This comes on top of the easing of ratings for assets eligible for the Assets Purchase Program (APP) the week before, allowing the ECB to buy junk assets, and the beginning of the PEPP (Pandemic Emergency Purchase Program) at the end of March. The PEPP allows



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Udo Di Fabio, a former judge of Germany's Federal Constitutional Court.

the ECB to buy up to €750 billion assets until the board “judges that the coronavirus crisis phase is over, but in any case until the end of this year.” Under this new program, the ECB has been purchasing banks’ assets to the tune of €7 billion daily during the week ending April 15, printing almost €5 million every minute! Not one cent of all these programs will go to the real economy, but will be used by banks to speculate in new bubbles as they have done throughout the past years.

With its ruling, the Karlsruhe Court has put a big wrench in this perverse game, doing what governments and parliaments should have done long ago.

Reactions from Germany

Reactions in Germany, France, Italy and Poland show that the ground-breaking implications of the German Constitutional Court ruling on the ECB and the European Court of Justice have not gone unnoticed.

In Germany, Udo di Fabio, a former member of the Federal Constitutional Court of Germany, in an interview dated May 5 with *Capital* magazine, said:

The ECB judgment is making legal history. For the first time, the Federal Constitutional Court has determined that an act of Union law does not apply in Germany. The Federal Constitutional Court accuses the CJEU [European Court of Justice] of exceeding its mandate with its decision on the ECB’s bond purchase program at the end of 2018.

Whereas immediate serious consequences for the ECB are not to be expected, they may come into play in the future, Di Fabio said, hinting that for instance, the



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Bruno Le Maire, France's Minister of Economy and Finance.



CC/Institut Jacques Delors

François Villeroy de Galhau, Governor of the Bank of France.

seems to me not only unnecessary but also dangerous.”

And a panicked leading architect of the Eurosystem, Jacques Attali, tweeted: “The German constitutional court decision this morning is of vital importance for the future of the Euro, the European economy and jobs in Europe. May European leaders react quickly and in a unified way, starting today!”

In Italy, Prime Minister Giuseppe Conte criticized the ruling, whereas opposition leader Matteo Salvini, in a May 6 interview with Sky TG24, called for re-founding the EU

German Court ruling may compel the German government to go against the ECB's bond purchasing policy and insist on its termination. The German Court ruling provides a model also for the other EU member countries, in that sense the “unity” of Europe that has so far been practiced, may suffer, he said, calling for a “clearly defined exit program” to end countries' participation in the ECB purchasing approach. For the time being, the German Bundesbank is prevented from taking part in the ECB program, as a consequence of the court ruling, Di Fabio assessed.

Former German Finance Minister Wolfgang Schäuble (CDU), who is now President of the Bundestag, raised his concern for the future of the Euro. “It may well be that the existence of the Euro is now being called into question also by other EU member states, because indeed every national constitutional court could have its own ruling,” Schäuble told the Redaktionsnetzwerk Deutschland news chain. He assessed that it would not be easy to counter the Court's ruling, because “independent institutions [like the ECB—ed.] that are not legitimized and controlled democratically, are obliged to stick to their mandate and must not extend it too much.”

In France and Italy

In France, Finance Minister Bruno Le Maire said that the ruling “does not help stability” and that “European Treaties guarantee the independence of the ECB.” Banque de France Governor François Villeroy de Galhau stated that “criticizing ECB independence and its concern for price stability, the two pillars of the central bank,

on new principles and for regaining national monetary sovereignty:

Not accidentally, those who are reacting better in Europe and losing less jobs are countries that can issue more liquidity, more money into the economic system and into citizens' pockets. It is clear that we must re-think the entire European system, including the right to issue currency, because jobs, welfare and healthcare come before European criteria and economic constraints.... We should also reflect on whether money is in



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Matteo Salvini, former Deputy Prime Minister of Italy.

the service of man or whether man is at the service of money. In recent years, European rules told us that man is at the service of money and money must be issued with a dropper. I believe that in an emergency such as this one, we should turn the issue around, not because of sovereignty but because of common sense. If it is necessary to print money so people can eat, we should print money.

But I repeat: If only 19 countries [of the Euro area] among the 193 UN member countries do not have their own currencies, while everybody else does, from Japan to Great Britain to the United States to Sweden, something must evidently be radically reviewed in the European context.

And Italy's former Economy Minister, Giulio Tremonti, in an interview with *Il Sole 24 Ore*, blasted the ECB policy and said that with the German court ruling, the ECB QE policy is dead:

[The German Court] ruling reflects the letter as well as the spirit of both the German Constitution and the German people. Its merit is questionable and in that it says that the ECB does not illegally monetize debt, but it does illegitimize economic policy. This, however, is meaningless. The essential point is that we had economic Picassos at the ECB and the U.S. Federal Reserve, who replaced solids with liquids, capital with debt, put rates below zero, pursued inflation as an (unreachable) friend, and replaced reality with magic tricks. And all this apparatus, which started as a necessary exception and became a continued praxis,



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Giulio Tremonti, former Italian Minister of Economy and Finance.

goes against the German idea of good government.

Whereas we [Italians], have put the Union above Constitution, Germany has put its Constitution above the Union ... For Italy, this means that the illusion of an unlimited access to ECB funds is dead. Notwithstanding the technical nature of the ruling, it is evident that nothing will be the way it was before, and nothing will be as it was announced and hoped for. Certainly, having the ECB announce

that it would accept junk bonds as collateral, has not helped.

Tremonti suggested that Italy take its own course and use national savings for national credit.

‘A Declaration of War’

In Poland, Prime Minister Mateusz Morawiecki wrote to the German Sunday newspaper, *Frankfurter Allgemeine Sonntagszeitung*, about the Karlsruhe court ruling:

[It is] one of the most important rulings in the history of the European Union. [For the first time it has been clearly stated that] treaties are made by member states and the latter decide what are the limits of competencies of the organs of the European Union.

The pro-EU faction has seen the Karlsruhe ruling as a declaration of war, in the words of one of its attorneys, Franz Mayer. Mayer has represented the Bundestag in all legal cases against EU institutions in the Federal Constitutional Court, and in a May 6 interview he said:



MSC/Barth

Mateusz Morawiecki, Prime Minister of Poland.

Even if the ruling is officially against the ECB, which is the object of the complaint, it really goes against the CJEU. It is an open declaration of war.... When the legal binding force [of the CJEU] is directly challenged, the whole project [the European Union—ed.] is immediately threatened.

The EU must answer; it cannot leave it at that. It would be opportune for the EU Commission to start a legal proceeding for violation of the treaties.

Mayer's proposal was picked up by the head of the German Green Party faction in the European Parliament, Sven Giegold, and endorsed by EU Commission President, Ursula von der Leyen. In a written reply to Giegold, von der Leyen said that the Commission is analyzing the ruling and "on the basis of our assessment, we will explore further steps, including a proceeding for violation of the treaties."

What Next?

European patriots should stand behind the Karlsruhe Court's ruling and mobilize their nations to move in a similar direction. The European Union is a dinosaur doomed to extinction. Similar to the Soviet system, it is not reformable, as was proven once again by its lack of adequate response to the pandemic and economic crisis.

The EU left the member states to fend for themselves in this COVID-19 health emergency, and then reacted with a fake program "to respond to the socio-economic consequences of the pandemic." The program is too late and too little. Whereas, in the short term, large amounts of liquidity (grants) are needed to support families and businesses during months-long lockdowns, and investment programs in the order of trillions of euros are needed for the recovery, the EU came out with loan programs that only minimally depart from its now standard fiscal austerity policies.

In endless meetings during the months of April and May, the EU Council and the Eurogroup of finance ministers approved a package composed of: (1) unemployment money from a program called SURE; (2) a scheme called "Recovery Fund" to finance reconstruction; and (3) the activation of a "Pandemic Crisis Support" facility at the European Stabilization Mechanism (ESM) for member states.

Whereas the SURE program is entirely insufficient to cover unemployment costs and is financed by member states anyway, and the Recovery Fund is up in the air

and will probably never materialize, the issue on the EU agenda is the approval of a reformed European Stability Mechanism, a treaty that should have been signed last December 12-13, when the Italian government asked for a postponement. With the reform, the ESM is to become a "backstop" to the bank bailout fund called SRF (Single Resolution Fund), a fund established by the EU for resolving failing banks in the context of the Banking Union. As anyone can read on the European Commission website, "In the event that the SRF is depleted, the ESM can act as a backstop and lend the necessary funds to the SRF to finance a resolution."

Since the SRF has only €33 billion (as of July 2019) and in the end is supposed to have only 1% of the amount of covered deposits of all credit institutions within the Banking Union by December 31, 2023, it is clear that in case of a bank crisis, the activation of the ESM is certain.

If activated as a backstop, the ESM can demand that member states pay up to a collective amount of €700 billion in one week to bail out a bank. And this, in total legal immunity and with secret proceedings.

In the event of a bank crisis, the ESM will first bail in, i.e., confiscate the funds of shareholders, investors, and depositors, and eventually bail the bank out with those funds. Facing a systemic crisis worse than 2008, which cost the Federal Reserve alone \$28 trillion, €700 billion is a joke.

As to the "Pandemic Crisis Support" facility, member countries could draw up to 2% of their GDP and use it only for expenses directly or indirectly related to the health system. Such a program would bear 1-2% rates and would not have conditionalities, at least at the beginning. However, the draft proposal, which must still be approved by the EU Council of heads of state and government, has a clear reference to the ESM statutes, which tie any aid to "strict conditionalities." Furthermore, the EU Commission has already stated that once the pandemic crisis is over, deficit rules will be enforced again, forcing debt-ridden states to accept painful austerity programs. All this explains why the EU must be replaced by a viable system in which nation-states regain monetary and budgetary sovereignty.

While support for exiting the euro monetary strait-jacket grows stronger every day, what is lacking is a strategic plan of what to do with the physical economy. Former Italian government official Michele Geraci underscored that question of the need for a real physical-economic program on April 25 at the international Schiller Institute conference.