

The Karlsruhe ruling: implications and the way forward?

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SUERF Webinar Report

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Klaus Wiener, Managing Director and Chief Economist, German Insurance Association and SUERF

Speakers:

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The ruling by the German Federal Constitutional Court (GFCC) on the ECB's Public Sector Purchase Programme (PSPP) has triggered debates at various levels: Who rules whether EU institutions act within the powers transferred to them by EU member states' legislators? Is such judgement the ultimate prerogative of the ECJ? How to prove that the Eurosystem's PSPP is proportionate in relation to the mandate and needs of euro area monetary policy? Who needs to provide such proof? Is the Eurosystem's - notably the Bundesbank's - leeway in pursuing the PSPP - de iure or de facto - limited by the GFCC's ruling? What are potential implications for the credibility of the ECB's further policy scope?

Klaus Wiener introduced the topic:

- Some aspects of the ruling by the GFCC need further discussion, such as the required "proportionality check". So far, the ECJ has never undergone any analysis of the appropriateness of the economic consequences of the ECB's monetary decisions. This raises the questions, (i) whether the German Constitutional Court has the legitimacy to require such a check, (ii) how a solid decision can be determined, and (iii) what the consequences for the ECB may be.

¹ The views expressed in this webinar report are the authors' only and need not represent those of the Oesterreichische Nationalbank, the Eurosystem, the ECB or SUERF.

Helmut Siekmann gave the first presentation:

- The ECB's independence depends on the definition of its competence, as the independence is only guaranteed within the limits of its competence. Any action transgressing the ECB's competences would transgress its independence.
- A court or institution at the highest central level has the final say. So far, the GFCC has always followed this principle. Some decisions that were out of line with the ECJ have been made by courts in the Czech Republic and in the UK, but so far not in Germany.
- Undertaking proportionality tests is "highly questionable" and no proportionality test was asked when the OMT was introduced ("competence and proportionality are different").
- Overall, the judgement did not come as a surprise as there was an increasing level of dissatisfaction in Germany regarding German concerns at the EU level.
- The asset purchases under the PSPP are no infringement ("not yet") of Art. 123 (monetary financing of governments) as Art. 123 only prohibits the purchase on primary markets. However, there are simple ways to circumvent Art. 123.
- The ECB's review of its monetary policy strategy might be a way to keep the GFCC content.

Alberto De Gregorio Merino raised the following points:

1. Critical assessment of the judgement of the GFCC:
 - The judgement was "one of the most serious shocks for the EU legal basis" as it puts into question three elements: (i) the primacy and autonomy of the ECJ; (ii) the monopoly of the ECJ defining what constitutes EU law and the exclusivity to say what's within the EU ruling; (iii) the independence of the ECB and the ESCB.
 - The judgement thus shuttered the essence of EU law, the rule of law, and is itself "ultra vires". It is mixing up the notions of proportionality and competences and is therefore incomprehensible.
2. Consequences of the judgement of the GFCC:
 - The judgment can have a detrimental effect on and propagate to other European jurisdictions, as can be seen by the positive reactions from Poland and Hungary only a few hours after the judgement.
 - The ECB is expected to talk to the Bundesbank and allow it to present major German concerns.
 - The role of the ECB has dramatically expanded in recent years, due to the creation of the SSM and the ESRB, but also by undertaking unconventional monetary policy measures. Whether these measures are in line with the mandate of the ECB remains a controversy. The mandate of the ECB should be updated to better correspond to its changing role, and the ECB will have to share its motivation and justification on its unconventional policy measures.
 - The ruling has recognized the primacy of European law over national law.
 - An infringement procedure by the European Commission against Germany is rather unlikely (and possibly limited to principles but not to the economic aspects).

Takis Tridimas presented these arguments:

- The starting point is difficult, as the EU legally separates the competences for monetary policy and economic policy, while in fact they are tightly connected. It's for the ECB to decide what's monetary policy and what's not.
- The judgement means moving from a dialogue of conflict (OMT case) to actual conflict or, to put it metaphorically, "from barking to biting". It is the first time that the German Constitutional Court finds an EU measure to be "ultra vires".
- The disagreement is qualitatively different from previous disagreements between national supreme courts and the ECJ: it goes to the heart of the integration project and is particularly important for its future.
- It is incorrect to state, as the GFCC does, that the standard applied by the ECJ in judging the legality of the ECB's PSPP 'contradicts the methodological approach by the ECJ in virtually all other areas of EU law.'
- The distinction between economic and monetary policy is extremely difficult to make. The ECJ is correct in stating that the Treaty did not intend to make an absolute separation.
- It is not correct to claim that the ECJ's interpretation disregards the general principles common to the laws of the Member States as there is simply no common tradition in Europe of strict judicial scrutiny over monetary and economic policy decisions. By contrast, this is an area where discretion prevails.
- The GFCC has picked the wrong fight. The question of proportionality is not useful. It would be more appropriate to question the ECJ on issues pertaining to the rights of the individuals in concrete situations, e.g. pertaining to asylum or the European Arrest Warrants.
- The GFCC correctly identifies an accountability gap in the EMU structure and exposes the design of EMU. The accountability mechanisms are few and fall short of democratic legitimization; it is questionable whether the current model is viable. In the absence of effective accountability mechanisms, it is to be expected that other institutional actors or political constituencies will seek to fill the gap.
- The ruling of the GFCC comes at an unfortunate time. It will influence financial assistance programs and economic policy responses to the current Covid-19 crisis and, more generally, the future direction of EMU. This signaling function of the judgment outweighs its effects on the PSPP.
- The GFCC occupies a leading position among constitutional tribunals and has been influential in Europe and beyond, especially so in CESEE. Thus, the ruling may also have a negative export value.
- The case illustrates the unresolvable problem of competence-competence. Both the ECJ and the GFCC are correct in that they consistently build a reasoning albeit on the basis of irreconcilable starting points. Inter-judicial competition is a healthy aspect of constitutional pluralism.

After a brief Q&A session, Klaus Wiener concluded:

- There is a concern that the ruling could undermine the ECJ, although the GFCC stated it intended the ECJ to expand its powers, to exert more control, not less.
- Maybe the judgement might be a chance to make the ECB's policy more visible and understandable to the general public as well as getting support from reluctant politicians. As former ECB President Draghi often said, "We cannot do this alone".