

**The German Constitutional Court's PSPP judgement:
Legal, Economic and Political consequences**

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By Boniface de Champris,

On 5 May 2020, the German Federal Constitutional Court (FCC) found the European Central Bank's (ECB) [Public Sector Purchase Programme](#) (PSPP) to be partially unconstitutional. The [decision](#) could have severe legal and economic consequences at time when Europe enters a major economic crisis amid the covid-19 pandemic.

The judgment risks creating legal uncertainty in the preliminary ruling procedure enshrined in [Article 267](#) of the Treaty on the Functioning of the European Union (TFEU), and challenges the principle of primacy of EU law. At the same time, it could bring the participation of Germany's National Central Bank (NBC), the Bundesbank, in the ECB's PSPP program to an end, undermining the entire programme.

The FCC ruling contradicts the Court of Justice of the European Union's (CJEU) [Weiss](#) ruling, which confirmed the validity of the PSPP with EU law. The decision is the outcome of proceedings between the FCC and the European Commission dating back to 2017 when the FCC asked the CJEU for a preliminary ruling on whether the ECB's PSPP was compatible with EU law and whether it falls within the ECB's mandate.

The Role of the PSPP in the EU economic stability

The PSPP contributes to the stability of financial markets in the Eurozone and is a policy pursued following the 2012 'Sovereign Debt Crisis', when ECB President Mario Draghi famously [declared](#) that the ECB would do "whatever it takes" to preserve the euro. The ECB and National Central Banks¹ (such as the Bundesbank), conducted net purchases of public sector securities under the PSPP from 9 March 2015 to 19 December 2018, and again since 1 November 2019. The PSPP is by far the largest programme under the ECB's wider [Asset Purchase Programme](#) (APP). As of 22 May 2020, the total value of securities purchased under the PSPP amounted to EUR 2.2 trillion. The role of the PSPP is critical for the future stability of the euro particularly as the European Union enters an economic crisis as a result of covid-19.

¹ Together, the European Central Bank and the National Central Banks of the Eurozone countries constitute the [Eurosystem](#).



The Effects of the Constitutional Court's Ruling on PSPP

The FCC's decision is directed towards the German Federal Government, including the Bundesbank, and not towards the PSPP *as such*. The FCC has no jurisdiction over the action of the ECB and yet, it held that the ECB exceeded its monetary policy mandate on the ground that the ECB's decisions on the PSPP do not sufficiently balance the programme's monetary policy with its fiscal and economic effects.

Against this background, the FCC has left a door open to the participation of the Bundesbank to the PSPP by requiring a substantiated proportionality assessment by the ECB within three months following the decision.

Indeed, the FCC's decision could impact the ECB's new [Pandemic Emergency Purchase Programme](#) (PEPP), hindering the economic recovery of the European Union.² The FCC does not specifically mention the PEPP in its decision. Yet, the safeguards in place for the PEPP are far less stringent than those under the scrutiny of the FCC as regards the PSPP. Given the crisis the FCC may see the emergency programme in a more favorable light, provided it remains temporary.

What are the Policy Options to Resolve the Issues?

German and European institutions face three options. First, the ECB could adopt a new decision on the PSPP, addressing the FCC's concerns and finding a balance between the PSPP's monetary policy objectives and its fiscal and economic policy effects. Provided it is released within three months after the FCC's decision, the Bundesbank would be able to continue to participate in the PSPP. In this situation, it is to be expected that the ECB's decision would be challenged, giving the FCC the possibility to assess again the proportionality of the measures. This option is particularly time-consuming and could take several years.

Second, the ECB could refuse to take any new decision, which it is neither obliged to do under EU law, nor under German law. This option would be justified by the fact that the ECB is independent and that the PSPP has been validated by the CJEU, a decision which is binding on EU Member States. However, this option will pressure German authorities to face an uneasy choice of either violating EU law or German constitutional law. As German authorities are bound by the FCC's judgement and would, in this configuration, violate EU law, the European Commission would likely launch infringement proceedings against Germany. Yet, these proceedings would address German authorities, not the FCC, making the German government responsible for a decision they cannot escape.

Finally, an alternative solution could be that the EU Member States set a new framework for the ECB to operate, thus deepening the existing Monetary Union. German Chancellor Angela Merkel has [signaled](#) that this decision should serve as an opportunity to deepen the European Monetary Union (EMU), which she described as incomplete. However, modifying the ECB's mandate would require a revision of EU Treaties, which would require the unanimous vote of the EU Council.

² Decision ECB/2020/17 of 24 March 2020

The primacy of EU law threatened

The CJEU has long held that European Union law has primacy over national law. But this is limited to areas where the Member States have ceded competencies to the European Union. It is not the first time that the CJEU has conflicted with national jurisdictions on constitutional matters. As recently as 2010, the FCC held in its [Honeywell](#) decision, that it retained the right to review acts of European Union bodies, including the CJEU, in order to determine whether they constitute *ultra vires* acts, i.e. constitute a breach of European Union competences. Similarly, the Supreme Court of Denmark decided to disregard the CJEU's preliminary ruling in the [Dansk Industry](#) case.³

This most recent decision raises numerous concerns as to the authority of the CJEU and the primacy of EU law, and undermines the stability of the preliminary ruling procedure, in which the CJEU ultimately has the last say as regards the interpretation of EU law. A decision not to apply the CJEU's jurisprudence by a Court as highly recognized as the FCC has the potential to set a precedent for other jurisdictions, fostering an atmosphere of legal uncertainty and unpredictability.

Towards enhanced Political dialogue

The FCC's ruling on the constitutionality of the ECB's PSPP is a significant hurdle for the EU to overcome. The effects of the decision extend far beyond legal debates and could have a direct impact on the future of the European Union, particularly as Europe tackles the crisis that COVID-19 has brought.

In the aftermath of the FCC's PSPP decision, a political solution is likely needed at the European level and the recent [Franco-German proposal for a European Recovery Fund](#) shows signs that a political solution may be on the horizon. Indeed, Germany has radically changed its position regarding the possibility of joint issuance of European debt, an important part of the common proposal. The setting of a new framework for the ECB would strengthen this institution and provide economic stability in times in which it is most needed.

³ Judgement of the Supreme Court of 6 December 2016, *Ajos*, Case 15/2014.