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El Constitucional alemán considera que el BCE se extralimitó con su programa de compra de deuda pública

[BVerfG, Judgment of the Second Senate of 05 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15](#)

Objeto de la decisión – Contexto de la decisión – Garantías democráticas fundamentales y su alcance en el contexto de la integración europea – Responsabilidad de los órganos estatales alemanes con respecto a la integración europea y la revisión de ultra vires (sinopsis de Fernando Zunzunegui y Antonio Gutiérrez).

Objeto de la decisión: “[...] [T]he complainants essentially challenge the Public Sector Asset Purchase Programme [...] furthermore challenge the Corporate Sector Purchase Programme (CSPP). Both programmes are components of the Expanded Asset Purchase Programme (EAPP) of the European System of Central Banks (ESCB). The complainants contend that the decisions of the European Central Bank (ECB) on which the programmes are based constitute *ultra vires* acts. They argue that the programmes violate the prohibition of monetary financing [...] and the principle of conferral [...] They also assert a violation of the constitutional identity enshrined in the Basic Law to the extent that the programmes infringe the budgetary powers of the German *Bundestag*”.

Contexto de la decisión: “[...] The EAPP is a framework programme comprising four sub-programmes [...] In the [...] decision of 22 January 2015, the ECB Governing Council consolidated the first two programmes, [...]; moreover, it announced the PSPP and defined certain technical features of the programme design. In March 2016, the ECB Governing Council decided to launch the CSPP. As of 10 March 2016, the overall programme is referred to as EAPP. Since then, the EAPP has undergone various modifications. [...] [T]he EAPP serves to increase money supply and thereby ease monetary conditions [...] seeking to increase inflation rates [...] It aims to ease borrowing conditions of households and firms. [...] The volume of monthly asset purchases under the EAPP was initially limited to EUR 60 billion. [...] The ECB Governing Council reserved the right “to increase the programme in terms of size and/or duration” [...] In April 2016, it was decided to increase the purchase volume to a monthly pace of EUR 80 billion [...] On 8 December 2016, the ECB Governing Council decided to continue the EAPP, [...] The purchases continued at a monthly pace of EUR 60 billion from April 2017 to December 2017 [...] and at a monthly pace of EUR 30 billion on average from January 2018 to September 2018 [...] The ECB Governing Council justified its decision to reduce the purchase volume by stating that confidence in the gradual convergence of inflation rates towards its inflation aim of rates below, but close to, 2% has grown [...] On 13 December 2018, the ECB Governing Council decided to end the net purchases under the asset purchase programme by 31 December 2018 [...] At the same time, it decided to continue reinvesting, in full, the principal payments from maturing securities purchased under the asset purchase programme without a specified end date in order to maintain favourable liquidity conditions and an ample degree of monetary accommodation [...] On 12 September 2019, the ECB Governing Council decided to restart net purchases [...] As of 8 November 2019, the total value

of the securities purchased under the EAPP by the Eurosystem, [...] amounted to EUR 2,557,800 million, with purchases under the PSPP accounting for EUR 2,088,100 million (81.63%) [...] Under the PSPP, the Eurosystem central banks purchase government bonds or other euro-denominated marketable debt securities issued by central governments of a Member State [...] Under the current ECB capital key, which is adjusted periodically, with the most recent adjustment effected on 1 January 2019, the Bundesbank's share is 26.4% [...] According to the ECB, the distribution of purchases under the PSPP between the ECB on the one hand and the national central banks on the other hand implies a risk-sharing regime [...] with regard to "hypothetical losses" resulting from certain securities [...] In unpublished ECB decisions, it is asserted that 20% of purchases are subject to such a risk-sharing regime, namely the 10% of securities purchased by the ECB itself and the 10% of securities issued by European institutions and purchased by the national central Banks [...] The remaining purchases by the national central banks are not subject to any loss sharing [...] However, none of the ECB decisions expressly address the question of liability for losses.

Garantías democráticas fundamentales y su alcance en el contexto de la integración europea: "[...] The constitutional complaints of the complainants in proceedings I to III are wellfounded to the extent that they challenge the omission on the part of the Federal Government and the Bundestag to take suitable steps to ensure that the ECB, by means of purchasing securities under the PSPP, does not exceed its monetary Policy competence and encroach upon the economic policy competence of the Member States. [...] The right to vote in elections to the German Bundestag, [...] is not limited to the formal legitimation of (federal) state power but also protects the basic democratic contents of the right to vote. These contents include the principle of the sovereignty of the people [...] as well as the corresponding right of citizens to be subjected only to such public authority as they can legitimate and influence [...] This prohibits subjecting citizens to a political authority they cannot escape and in regard of which they cannot in principle influence, on free and equal terms, decisions on the persons in power and on substantive issues [...] [H]owever, confer a right upon citizens to subject democratic majority decisions to a review of lawfulness that goes beyond what is necessary to safeguard the **right to democratic self-determination** [...] [T]he right to democratic self-determination [...] applies, in principle, also with regard to European integration. The **democratic legitimation** by the people of public authority exercised in Germany belongs to the essential contents of the principle of the sovereignty of the people and thus forms part of the Basic Law's constitutional identity [...] It follows that the Basic Law does not authorise German state organs to transfer sovereign powers to the European Union in such a way that the European Union were authorised, in the independent exercise of its powers, to create new competences for itself [...] The manner and scope of the transfer of sovereign powers must satisfy democratic principles. The substantive leeway to design afforded the Bundestag – especially in the form of its budgetary powers – must be preserved [...] It falls to the Bundestag to determine the overall financial burden imposed on citizens and to decide on essential expenditure of the state [...] Thus, **a transfer of sovereign powers violates the principle of democracy** at least in cases where the type and level of public spending are, to a significant extent, determined at the supranational level, depriving the Bundestag of its decision-making prerogative [...]" [Énfasis añadido]

Responsabilidad de los órganos estatales alemanes con respecto a la integración europea y la revisión de ultra vires: "[...] GG affords voters a right vis-à-vis the Federal Government, the Bundestag and, as the case may be, the Bundesrat, compelling these constitutional organs to monitor whether institutions, [...] of the European Union adhere to the European integration agenda [...], to refrain from participating in the adoption and implementation of measures that exceed the limits of the integration agenda [...], and, where such measures constitute a manifest and structurally significant exceeding of EU competences, to actively take steps to ensure conformity with the integration agenda [...] The Federal Constitutional Court conducts an ultra vires review to assess whether these standards are met [...] [I]t is incumbent upon the Federal Government and the Bundestag to actively address the question how the order of competences can be restored and to make a positive determination as to which course of action to pursue [...] They may retroactively legitimate an exceeding of

competences by initiating [...] an amendment of EU primary law [...] and, by way of the procedure set out in Art. 23(1) second and third sentence GG, formally transfer the sovereign powers that were exercised **ultra vires**. [...] The Court may only hold that an act violates the principle of conferral where institutions, [...] of the European Union have exceeded the limits of their competences in a manner that specifically runs counter to the principle of conferral [...]; in other words, it must be established that the violation of competences is sufficiently qualified. This requires that the act manifestly exceeds EU competences, resulting in a structurally significant shift in the division of competences to the detriment of the Member States. [...] [T]he Treaties confer upon the CJEU the mandate to interpret and apply the Treaties and to ensure uniformity and coherence of EU law [...] et if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences. [...] The ultra vires review must be exercised with restraint, [...] The interpretation and application of EU law, including the determination of the applicable methodological standards, primarily falls to the CJEU, [...] Yet [...] [i]f the CJEU crosses the limit set out above, its actions are no longer covered by the mandate conferred in Art. 19(1) second sentence TEU in conjunction with the domestic Act of Approval; at least in relation to Germany, its decision then lacks the minimum of democratic legitimation necessary [...] [I]t must inter alia be ensured that the German Bundestag retain for itself functions and **powers of substantial political significance** [...] and that it remain capable of exercising its overall **budgetary responsibility** [...]”. [Énfasis añadido]

Respuesta a las cuestiones constitucionales: “[...] Based on these standards, the Federal Government and the German Bundestag violated the rights of the complainants in proceedings I to III [...] by failing to take suitable steps challenging that the ECB, in Decision (EU) 2015/774 [...] neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality. In light of this, Decision (EU) 2015/774 [...] constitute a qualified, i.e. manifest and structurally significant, exceeding of the competences assigned to the ECB [...] In light of Art. 119 and Art. 127 et seq. TFEU [...] the ECB Governing Council’s Decision of 4 March 2015 (EU) 2015/774 [...] must be qualified as ultra vires acts. [...] [T]he CJEU expressed a different view [...] In its Judgment of 11 December 2018, the CJEU held that the Decision of the ECB Governing Council on the PSPP and its subsequent amendments were still within the ambit of the ECB’s competences [...] To this extent, the CJEU Judgment itself constitutes an ultra vires act and thus has **no binding effect** [...] The CJEU’s approach to disregard the actual effects of the PSPP for the purposes of assessing the measure’s **proportionality** [...] and to refrain from conducting an overall assessment and appraisal in this regard [...] does not satisfy the requirements of a comprehensible review as to whether the ESCB and the ECB observe the limits of their monetary policy mandate [...] The interpretation undertaken by the CJEU essentially renders meaningless the **principle of conferral** [...] The principle of proportionality is a general principle of EU law [...] In applying the principle of proportionality, German law distinguishes between the elements of suitability [...] necessity [...] and appropriateness [...] The specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless for the purposes of distinguishing, in relation to the PSPP, between **monetary policy** and **economic policy**, i.e. between the exclusive monetary policy competence conferred [...] and the limited conferral upon the EU of the competence to coordinate general economic policies, with the Member States retaining the competence for economic policy at large [...] Following the finding that the ESCB must be afforded broad discretion [...] [t]he CJEU concludes that there is no “manifest error of assessment” on the part of the ESCB with regard to the PSPP’s suitability [...] In a second step, the CJEU assesses the necessity of the PSPP. [...] [T]he CJEU states that it would not have been possible to counter the risk of deflation, [...] by other means, [...] [T]he Judgment of the CJEU of 11 December 2018 manifestly exceeds the mandate conferred [...] the CJEU limits its review to whether there is a “manifest error of assessment” on the part of the ECB [...] whether the PSPP “manifestly” goes beyond what is necessary to achieve its objective [...] and whether its disadvantages are “manifestly” disproportionate to the objectives pursued [...] this standard of review is by no means conducive to restricting the scope of the

competences conferred upon the ECB, which are limited to monetary policy. Rather, it allows the ECB to expand [...] its competences on its own Authority [...] **The CJEU thus acted ultra vires**, which is why, in that respect, **its Judgment has no binding force in Germany**. [...] This violation of the principle of proportionality is structurally significant so that the actions of the ECB constitute an ultra vires act. [...] The violation of the principle of proportionality is structurally significant. [...] At present, it cannot yet be determined whether the Federal Government and the Bundestag did actually violate their responsibility with regard to European integration [...] This determination is contingent upon a proportionality assessment by the [...] ECB [...] In the absence of such an assessment, it is not possible to reach a conclusive decision as to whether the PSPP in its specific form is compatible with Art. 127(1) TFEU. [...] Ultimately, based on a proper application of the criteria set out by the CJEU in its Judgment of 11 December 2018, it is not ascertainable that the purchases under the PSPP manifestly circumvent the prohibition of monetary financing. In an overall assessment, the “safeguards” built into the PSPP still suffice to rule out a manifest circumvention of Art. 123(1) TFEU. [...] Against this backdrop, it can be ruled out that the PSPP affects the constitutional identity of the Basic Law [...] in general and the overall budgetary responsibility of the German Bundestag in particular. Based on their responsibility with regard to European integration [...] constitutional organs have a duty to take active steps against the PSPP given that it constitutes an ultra vires act [...] In certain legal and factual circumstances, the responsibility with regard to European integration (Integrationsverantwortung) may indeed give rise to a specific obligation to act. As **the PSPP constitutes an ultra vires act**, given the ECB’s failure to substantiate that the programme is proportionate, their responsibility with regard to European integration [...] requires the Federal Government and the Bundestag to take steps seeking to ensure that the ECB conducts a **proportionality** assessment in relation to the PSPP. [...] As a result, **the ultra vires act is not to be applied in Germany**, and has no binding effect in relation to German constitutional organs, administrative authorities and courts. These organs, courts and authorities may participate neither in the development nor in the implementation, execution or operationalisation of ultra vires acts [...] This generally also applies to the Bundesbank [...] Following a transitional period of no more than three months allowing for the necessary coordination with the ESCB, the **Bundesbank may thus no longer participate** in the implementation and execution of Decision (EU) 2015/774, [...] neither by carrying out any further purchases of bonds nor by contributing to another increase of the monthly purchase volume, 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 ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme. On the same condition, the Bundesbank must ensure that the bonds already purchased [...] are sold based on a [...] strategy coordinated with the ESCB. [Énfasis añadido]

[Texto completo de la sentencia](#)
