Proceedings on the European Central Bank's Expanded Asset Purchase Programme are Stayed: Referral to the Court of Justice of the European Union

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Order of 18 July 2017
2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15

In an order published today, the Second Senate of the Federal Constitutional Court stayed the proceedings concerning the question whether the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) for the purchase of public sector securities is compatible with the Basic Law, and referred several questions to the Court of Justice of the European Union for a preliminary ruling. In the view of the Senate, significant reasons indicate that the ECB decisions governing the asset purchase programme violate the prohibition of monetary financing and exceed the monetary policy mandate of the European Central Bank, thus encroaching upon the competences of the Member States. The Senate requests an expedited procedure pursuant to Art. 105 of the Rules of Procedure of the Court of Justice as the nature of the case requires that it be dealt with within a short time.

Facts of the Case:

The PSPP is part of the Expanded Asset Purchase Programme (EAPP), a framework programme of the European Central Bank (ECB) for the purchase of financial assets. The PSPP accounts for – by far – the largest share of the EAPP's total volume. As of 12 May 2017, the EAPP had reached a total volume of EUR 1,862.1 billion, of which EUR 1,534.8 billion were allotted to the PSPP alone.

With their constitutional complaints, the complainants claim that, by way of launching the programme for the purchase of public sector securities, the European System of Central Banks (ESCB) violates the prohibition of monetary financing (Art. 123 of the Treaty on the Functioning of the European Union – TFEU) and the principle of conferral (Art. 5 of the Treaty on European Union – TEU, in conjunction with Arts. 119, 127 et seq. TFEU). Accordingly, the complainants submit that the German *Bundesbank* (Federal Central Bank) may not participate in the asset purchase programme and that the German *Bundestag* and the Federal Government are obliged to take suitable measures against the challenged programme.

Key Considerations of the Senate:

1. Art. 38(1) first sentence of the Basic Law (*Grundgesetz* – GG) guarantees, to the extent protected by Art. 79(3) GG, German citizens a right to democratic self-determination; this right can be enforced by way of a constitutional complaint. Due to their responsibility with respect to European integration (*Integrationsverantwortung*), the constitutional organs are obliged to use the means at their disposal to ensure within the scope of their competences that the European integration agenda (*Integrationsprogramm*) is respected. Insofar, it is the task of the Federal Constitutional Court to review whether acts adopted by institutions, bodies, offices, and agencies of the European Union evidently exceed competences, or whether they touch upon the inalienable part of the constitutional identity; as a consequence, German state organs would neither be allowed to participate in the development nor in the implementation of such acts.

2. It is doubtful whether the PSPP decision is compatible with the prohibition of monetary financing.

a) Art. 123(1) TFEU bars the ECB and the central banks of the Member States from purchasing bonds directly from institutions of the European Union or the Member States. It is also not permissible to resort to purchases on the secondary market in order to circumvent the objective pursued by Art. 123 TFEU. Therefore, any programme relating to the purchase of government bonds on the secondary market must provide sufficient guarantees to effectively ensure observance of the prohibition of monetary financing. The Senate presumes that the Court of Justice of the European Union deems the conditions which it developed, and which limit the scope of the ECB policy decision on the Outright Monetary Transactions (OMT) programme of 6 September 2012, to be legally binding criteria. Against that background, the Senate further presumes that contempt of these criteria would amount to a violation of competences also with regard to other programmes relating to the purchases of government bonds.

b) The PSPP concerns government bonds issued by Member States, state-owned enterprises and other state institutions as well as debt securities issued by European institutions. Even though these bonds are purchased exclusively on the

secondary market, several factors indicate that the PSPP decision nevertheless violates Art. 123 AEUV, namely the fact that details of the purchases are announced in a manner that could create a *de facto* certainty on the markets that issued government bonds will, indeed, be purchased by the Eurosystem; that it is not possible to verify compliance with certain minimum periods between the issuing of debt securities on the primary market and the purchase of the relevant securities on the secondary market; that to date all purchased bonds were – without exception – held until maturity; and furthermore that the purchases include bonds that carry a negative yield from the outset.

3. Moreover, it appears that the PSPP decision may not be covered by the ECB's mandate.

a) The wording and systematic concept as well as the spirit and purpose of the Treaties suggest that it is necessary to delineate matters of a monetary policy nature from economic policy matters, the latter being primarily the responsibility of the Member States. In this regard, decisive factors include the aim of a measure which is to be determined objectively, the means chosen with a view to achieving this aim as well as their connection to other provisions.

b) In the view of the Senate, based on an overall assessment of the relevant criteria of delimitation, the PSPP decision can no longer be qualified as a monetary policy measure but instead must be deemed to constitute a measure that is primarily of an economic policy nature. It is true that the PSPP officially pursues a monetary policy objective and that monetary policy instruments are used to achieve this objective; however, the economic policy impacts stemming from the volume of the PSPP and the resulting foreseeability of purchases of government bonds are integral features of the programme which are already inherent in its design. As far as the underlying monetary policy objective is concerned, the PSPP could thus prove to be disproportionate. In addition, the decisions on which the programme is based are lacking comprehensible reasons that would allow for an ongoing review, during the multi-year period envisaged for the implementation of these decisions, as to whether there remains a continued need for the programme.

4. Currently it is not possible to determine with certainty whether, based on the risk sharing between the ECB and the *Bundesbank,* the *Bundestag's* right to decide on the budget (*Budgetrecht*) protected under Art. 20(1) and (2) GG in conjunction with Art. 79(3) GG as well as its overall budgetary responsibility could be affected by the PSPP decision and its implementation in terms of potential losses to be borne by the *Bundesbank*.

a) An unlimited risk sharing within the Eurosystem and the resulting risks for the profit and loss account of the national central banks would amount to a violation of the constitutional identity within the meaning of Art. 79(3) GG if it became necessary to provide recapitalisation for the national central banks through budgetary resources to such extent that approval by the German *Bundestag* would be required in accordance with the principles established by the Senate in the its case-law on the EFSF and the ESM. Therefore, the success of the constitutional complaint at hand is contingent upon whether this form of a risk sharing can be ruled out under primary law.

b) The primary law of the Union provides but little guidance on the decision-making of the ECB Governing Council concerning the manner and scope of risk sharing between the members of the European System of Central Banks. Consequently, the ECB Governing Council may be able to modify the rules on risk sharing within the Eurosystem in a way that would result in risks for the profit and loss accounts of the national central banks and also threaten the overall budgetary responsibility of national parliaments. Against that background, the question arises whether an unlimited distribution of risks between the national central banks of the Eurosystem regarding bonds in default where such bonds were issued by central governments or by issuers of equivalent status would violate Art. 123 and Art. 125 TFEU as well as Art. 4(2) TEU (in conjunction with Art. 79(3) GG).