Who said that Germans have no sense of irony?

On 5 May, Germany's Constitutional Court ruled that the European Central Bank's Public Asset Purchasing Programme could be incompatible with the German Constitution. **Waltraud Schelkle** *writes there is a deep sense of irony in the ruling: the German Court questions the legal foundations of the ECB's independence but is actually prevented from succeeding by the constitutional fortifications of the ECB's independence on which the German government always insisted.*

The ruling of the German Constitutional Court on the ECB's bond purchasing programme on 5 May 2020 has been largely received with shock, not awe. Even inside Germany, senior judges expressed their 'horror' when contemplating the precedent that it sets. Even the usual critics have come to the rescue of the ECB's policy mandate because whatever one thinks about its lack of accountability, this is not the issue here.

The Federal Constitutional Court (FCC) ruled that the European Court of Justice has not properly applied judicial reasoning to the FCC's request to consider the legality of the ECB's Public Asset Purchasing Programme, also known as Quantitative Easing. Therefore, the ECB must justify in judicial terms why it had to do Quantitative Easing. The Court ordered a proportionality test in which the ECB should explain why the detrimental economic effects, for instance on interest earnings of savers, do not outweigh the intended effect on price stability. If the ECB fails to do this within three months of the ruling, the Bundesbank may have to stop participating in any further Quantitative Easing.

Outside observers were understandably alarmed by the rejoicing of the claimants, among them inevitably Peter Gauweiler and Bernd Lucke from the euro-sceptic *Alternative für Deutschland* (AfD): apparently they had not expected such a clear ruling in their favour. The right of these claimants to bring this case to a constitutional court is itself contested. Two of the eight federal judges had argued in 2014 that the complaint should have been dismissed by the FCC, as those complaining are not individually affected and have other, democratic-political, means to make themselves heard. Katharina Pistor alleges that with this ruling the Federal Constitutional Court (FCC) expands its own judicial competence to the point where any German voter can challenge an ECB policy decision in the Constitutional Court if the German parliament has not explicitly endorsed it. And if Germany wants to exercise this prerogative, why not all other 18 euro area members? Following this logic, the ECB would have less policy autonomy than any European central bank before the introduction of the euro.

But the claimants have arguably rejoiced too early and those who laugh last may laugh longest. First of all, the verdict from Karlsruhe did not support the claimants' main challenge that the bond buying programme circumvented the prohibition of monetary financing of government budgets. Bundesbank President Weidmann had argued in an earlier hearing relevant to this bond purchasing programme, in June 2013, that the ECB's Outright Monetary Transactions may constitute exactly such a taboo break. After this Court ruling, he could be forced to toe the line of the ECB much more closely than he did before, in order to stay in the game of doing his job as a central bank governor.

Moreover, the Court ruling challenges ECB independence in three ways but is very unlikely to succeed. First, the German Court questioned the ECB's independence in choosing its policy instruments. Bond buying or open market policy is a textbook instrument of monetary policy. The Court acknowledges that the ECB does not buy bonds directly from issuing governments, which is the only legal limit to the ECB's policy autonomy. It just has a problem with the volume of it that may have not just indirect, but direct economic consequences. How the Court draws this distinction is anybody's guess because well-seasoned economists would find it difficult. The extraordinary situation will justify the extraordinary volume, just as it has done everywhere else (with diminishing effect, it has to be said).

Second, the Court ruled that the ECB cannot primarily pursue its price stability mandate, even though, according to Article 127(1) of the Treaty, 'the primary objective' of the European System of Central Banks (ESCB) is to maintain price stability. As long as this primary objective is pursued, the ESCB can support the Union's general economic policies. We owe it above all to the German government in the Maastricht process that these 'lexicographic preferences' are in the ECB's statute: just as A comes before B, so price stability must come before all other economic policies.

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The European Court therefore applied only a weak proportionality test but argued that the ECB has not 'manifestly' impaired other economic policy goals with its QE programme. This is extensively documented in the FCC ruling (in para's 71-99). However, the German judges (para. 136) now conclude that 'the necessity of interpreting the ECB's mandate in a restrictive manner [..], given that it *de facto* affords the ECB a (limited) competence to decide on its own competences.' In other words, we are no longer in the world of de jure but de facto and it is a German court who draws the line. Should the EU start an infringement action against the German Court, as EU President von der Leyen indicated, the judges will have to eat their words.

Thirdly, the Court argues that if the ECB cannot show that its bond purchasing programme is necessary and appropriate to achieve price stability as well as the least intrusive, it will be acting *ultra vires (*exceeding its competences). This would mean that 'the *Bundesbank* may thus no longer participate in the implementation and execution of the ECB decisions at issue'. The German Court thus challenges the unity and hierarchy of the European System of Central Banks. It was, again, German lawmakers who insisted that national central banks cannot make autonomous decisions. For instance, the Bank of Italy cannot refuse to participate in a programme of monetary restraint because it fears unemployment in Italy. How it could be otherwise is the secret of these lawyers in red robes.

There is a deep irony in this ruling, in the precise meaning of the term as the Cambridge English Dictionary defines it: 'a situation in which something which was intended to have a particular result has the opposite or a very different result.' The irony is that the German Court questions the legal foundations of the ECB's independence but is actually prevented from succeeding by the constitutional fortifications of the ECB's independence on which the German government always insisted (Harold James showed the latter in detail).

The ECB cannot and must not provide the proportionality test as set by a German Court because Article 130 of the Treaty does not allow it to 'seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body'. Bundesbank President Weidmann can choose to provide the full justification of any ECB decision if he likes, reversing some of his criticism of ECB policy in the past. He can thank the FCC for his predicament. If the FCC insists, the limits of its own mandate may become apparent, through an infringement procedure. The irony would be complete.

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