

Between a Rock and a *Hard Place*

BY OTMAR ISSING

*The European Central
Bank's struggles between
two courts of justice.*

On May 5, 2020, the German Constitutional Court decided that in executing its Public Sector Purchase Programme—quantitative easing—the European Central Bank may have transgressed its mandate by conducting its own economic policy and not respecting the proportionality of the measures taken. The GCC ruled that the contradictory decision taken by the European Court of Justice was incomprehensible and not valid. The ruling concerning the legality of the policy of the ECB has dropped like a bombshell. As expected, there are widely differing opinions on the grounds for the ruling and its consequences.

On one side is the “European view,” expressed by representatives of European institutions such as the European Court of Justice, the Commission, and the European Parliament along with numerous commentators in academia and the media. In a nutshell: as a European institution, the ECB is subject only to the jurisdiction of the European Court of Justice, and the GCC ultimately lacks any authority to pass judgment.

At the other end of the spectrum, the “German view” sees the ruling as a long-awaited success, following previous failed efforts, reflecting (predominantly, but not exclusively) German ideas about stability-oriented monetary policy.

The matter is likely to be debated by the lawyers for a long time to come. From an economic point of view, specifically from the perspective of the ECB as the institution responsible for the single monetary policy in the euro area, there can be no winners in this debate. The conflict between the European

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Court of Justice and the GCC plunges the European Monetary Union into a crisis that could drag on for a considerable time, with the outcome still open.

According to the Treaty of the European Union, the primary objective of the ECB is to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Community. To enable the ECB to carry out its mandate without being influenced by political organs, the Treaty grants the ECB independence.

Ultimately, an independent central bank is not obliged to justify its policy in a legal sense. The only question to be legally clarified is whether an independent central bank is acting within the scope of its legal mandate or exceeding this mandate. Transparency, explanation of monetary policy, yes; justification before the courts, never. As stated above, the ECB, while maintaining price stability, must support the general economic policies in the Community. However, the ECB does not have a mandate for its “own economic policy.”

In the grounds for its ruling, the GCC lists a whole series of consequences of the monetary policy, and specifically of the ECB’s bond purchases, which, in the opinion of the GCC, indicate that the ECB is pursuing its own economic policy. Among the consequences listed is that the ECB’s low interest rate policy has damaged the interests of savers—a particularly sensitive issue in Germany.

This matter alone shows that the GCC ruling gives rise to tricky questions. What is the cause of low interest rates on savings? Is it demographic developments and

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Mr. Whatever It Takes

On July 26, 2012, then-ECB President Mario Draghi declared: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.” With his announcement, he issued a *de facto* guarantee that the ECB would intervene if a country’s bonds came under pressure after losing the confidence of the financial markets—with justification or not.

—O. Issing



*Former ECB President
Mario Draghi*

other factors in the real sector, or the ECB’s monetary policy, or a mixture of these? There are substantial economic arguments with which to criticize the ECB’s expansive monetary policy (the GCC ruling concerns the period before the corona crisis). But has the ECB thereby exceeded its mandate?

It may be assumed that the ECB will comply with the GCC’s demands and justify the required “proportionality” of its actions. However, the constitutional conflict is far from over. The fact that the GCC ruling refers to limits for the ECB to observe when buying bonds is explosive for the ongoing activities of the ECB.

In the end, the fundamental question is this: How far can an independent ECB extend the interpretation of its mandate? To believe it is always sufficient for the ECB to simply claim that a measure of any nature whatsoever is taken within the scope of its mandate, trusting that the legality of this claim will be rubber-stamped by the European Court of Justice, is clearly at odds with an understanding of democratic legitimacy. On July 26, 2012, then-ECB President Mario Draghi declared: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.” With his announcement, he issued a *de facto* guarantee that the ECB would intervene if a country’s bonds came under pressure after losing the confidence of the financial markets—with justification or not. What legitimizes the ECB to safeguard a country’s membership in the monetary union? (The ECB’s pledge of assistance is linked to a program of the European Stability Mechanism with strict conditions that the country in question must meet.)

This conflict between the European Court of Justice and the German Constitutional Court represents a serious problem that cannot be resolved simply by invoking the primacy of European law. The European Union is far from being a state.

Can there really be any doubt that the objective of holding the monetary union together in its present form and providing financial assistance to countries in difficulty is a task for politicians and governments, not the ECB? In a decision that was widely interpreted more as “integration policy” than a legal matter, the European Court of Justice confirmed that the ECB was acting within its mandate when it announced the program in question—which has still never been activated to date. It has since become almost taken for granted that the ECB will use immense resources to protect bondholders from losses, thereby preventing a debt crisis (at least for the time being) and thus ensuring the cohesion of the euro area—and without requiring an European Stability Mechanism program.

When ECB President Christine Lagarde, for example, initially declared in mid-March 2020—in accordance with the mandate—that it was not the ECB’s task to influence spreads, that is, the difference in the bond yields of highly indebted states, the holders of such bonds immediately suffered considerable losses. This announcement was then promptly reversed. So is it the ECB’s responsibility to close spreads due to a lack of market confidence and prevent investor losses? Is this not an act reserved for the governments and parliaments of the member states, which still remain sovereign in principle? Does it

not constitute (indirect) monetary financing, which is forbidden to the ECB?

Neither the European Court of Justice nor the ECB have really taken seriously the concern about the interpretative extension of the ECB’s mandate, which is not unique to Germany. Was a ruling by the GCC therefore not to be expected? In the crisis situations of the last ten years, the ECB has repeatedly been praised as the only institution in the European community capable of action—“the only game in town.” This effectively means that it has jumped into the breach for the failure of those who nominally bear the political responsibility. However, such action does not correspond to the status of independence. Consequently, the ECB is presenting substantial arguments to those who oppose its independence, who are already numerous. As long as the ECB fails to find a way out of its increasingly political role, or even reinforces it, the dispute over the interpretation of its mandate will continue, and is likely to escalate on account of the Pandemic Emergency Purchase Programme.

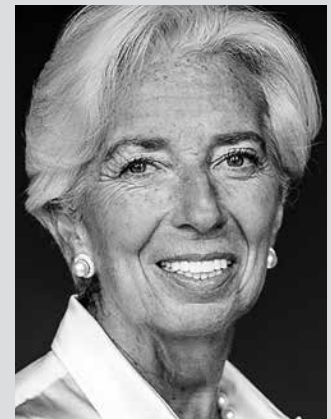
This conflict between the European Court of Justice and the GCC represents a serious problem that cannot be resolved simply by invoking the primacy of European law. The European Union is far from being a state. It is therefore impossible to compare ECB policy with that of the U.S. Federal Reserve, especially when it comes to bond purchases.

For the ECB, this makes it all the more vital to strictly observe the limits of its mandate. Only the conduct of monetary policy within the scope of its limited mandate will protect an independent ECB from having to justify its policy before the courts. The ECB lacks the necessary legitimacy to extend the interpretation of its mandate into areas reserved, in a democracy, for politicians accountable to the electorate. ♦

Hoppla!

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