

Dr Ulrich Maidowski, Justice of the Federal Constitutional Court of Germany, explains:

“Unlike the Polish government, the Federal Constitutional Court wants more control by the European Court of Justice, not less.”

An article by Wolfgang Ehm

Wolfgang Ehm is a judge at the Regional Court of Halle (Saale), Germany. He is a member of the Working Group on International Affairs of the German Judges Association (Deutscher Richterbund, DRB).

In its much-noted judgement of 5 May 2020, the German Federal Constitutional Court (Bundesverfassungsgericht) qualified several decisions of the European Central Bank (ECB) on the Public Sector Purchase Programme (PSPP) as ultra vires. In order to be able to do so, the Bundesverfassungsgericht also considered the preliminary ruling of the European Court of Justice of 11 December 2018 to be ultra vires. In the reasons of its judgement the Bundesverfassungsgericht stated that it did not consider itself bound by the differing opinion of the European Court of Justice. While the Bundesverfassungsgericht generally acknowledged that it was bound by the interpretation of European law by the European Court of Justice, this did not apply in the present case because the European Court of Justice's reasoning regarding the examination of proportionality of these programmes was "virtually incomprehensible" and "objectively arbitrary" and thus ultra vires.

On the very day this judgement had been pronounced, the Polish government proclaimed in a hastily convened press conference that the judgement of the Federal Constitutional Court was of enormous importance for the dispute between Poland and the European Commission over judicial reform in Poland. When the Polish Constitutional Court had ruled in April 2020 that the European Union would have no power to question the status of judges in Poland, the European Commission had emphasized the supremacy of EU law. The Polish government was curious whether the European Commission would comment on the decision of the Bundesverfassungsgericht in the same way.

Reason enough to take a closer look.

On 14 May 2020, the chairman of the German-Polish Judges' Association, Thomas Guddat, had the opportunity to question Dr Ulrich Maidowski, Justice of the Federal Constitutional Court, about the background, the key statements and the effects of this decision in which he himself had been involved.

Responding to the question whether the Federal Constitutional Court had been aware of the effects it might have on our European neighbours, including Poland, and whether the time for the decision had not been particularly unfavourable in view of the developments in some neighbouring countries, Justice Maidowski explained:

The possibility of misunderstandings has played a major role in the deliberations, generally the question of the consequences of such a decision. Nevertheless, it remains a decision of a legal question in accordance with legal standards. On the other hand, the proceedings before the Bundesverfassungsgericht had already lasted for almost 6 years. This had been preceded by the OMT submission to the ECJ and the submission in the current proceedings – and the decision on the second submission, which did not satisfy us, was clearly not an "inadvertence". There was no reason to wait for a decision any longer. We would also have considered it irresponsible to withhold a decision on the European Court of Justice's course of action at a time when the ECB is in the process of launching new programmes.

According to Justice Maidowski, it would be entirely wrong to interpret the judgement as a general, comprehensive criticism of the work of the European Court of Justice:

On the contrary, our decision-making practice clearly shows that there are numerous areas in which the European Court of Justice does exactly what it is supposed to do under the European Treaties, and does so in an excellent way. In all these areas, our work as a constitutional court is naturally based on the European Court of Justice's findings on how EU law should be interpreted and applied.

Justice Maidowski pointed out that the Bundesverfassungsgericht did not question the competence of the European Court of Justice for the interpretation of European law and the binding effect of those decisions in general. Rather, the present case was a blatant exception. For this reason, it was also a misunderstanding to interpret the clear words that the Bundesverfassungsgericht had found in the decision as harsh criticism of the European Court of Justice. According to Justice Maidowski, the opposite was correct:

The word "arbitrariness" is often understood as a personal accusation. Even if it sounds ironic, the opposite is true: in fact, it is a technical term used to express that the decisions of the European Court of Justice are of course binding even if the national courts disagree: Below the threshold of "arbitrariness", the decisions of the European Court of Justice are to be accepted and implemented by the member states. That can be different only in very extreme, utterly rare and exceptional cases. This is what the Bundesverfassungsgericht intended to make clear by the extreme choice of words. Its aim is to set the threshold for exceptional cases very, very high, i.e. to provide protection against national constitutional courts being able to decide at their discretion whether or not to follow the European Court of Justice.

Justice Maidowski described the reasons for which the Bundesverfassungsgericht came to the conclusion that such an exceptional case existed here as follows:

The core of the accusation is that the European Court of Justice had not sufficiently clarified the facts of the case. The preliminary ruling procedure referred to the question of whether the ECB based its decisions for the government bond purchase programme on accurate factual assumptions - for example, regarding the economic policy implications - and what considerations it had made in the run-up to its decisions. However, as we understand it, the European Court of Justice has failed to clarify these factual bases itself sufficiently thoroughly; it has failed to verify whether the facts put forward by the ECB are correct at all; and it has failed to ask the ECB in what way it weighed the possible benefits of these programmes against their possible damages. The Bundesverfassungsgericht considered it "methodologically simply no longer justifiable" to refrain from clarifying these facts and instead to accept the ECB's statements on its conduct without further ado. For this explanation, it is perhaps also important to note that this was not only a matter of an interpretative submission, but also of a validity submission.

Now the Polish government refers to the decision of the Bundesverfassungsgericht of 5 May 2020 in order to justify that the decisions of the European Court of Justice issued in relation to Poland also would not have any binding effect on the Polish government and the Polish courts. However, according to Justice Maidowski, this conclusion is in no way justified:

*Yes, we have reproached the European Court of Justice with acting outside its competences (ultra vires). But not because it would have done things it was not allowed to do - outside its competences - but because it did not do things it should have done using its competences to the full extent. **That is the core of the reproach: We want not less, but more European Court of Justice** - serious looks into serious issues.*

That is the core of our concern, and of course the Polish Government does not want to understand it: However, it is not at all the case that we "no longer follow the European Court of Justice ", but in fact we ask the European Court of Justice to take an even closer look.

This was precisely what the European Court of Justice had done in the decisions issued with regard to the so-called Polish judicial reform:

If those decisions of the European Court of Justice are measured against the benchmark of the ECB judgement, the examination shows that those [i. e. the decisions regarding the Polish judicial reforms] are certainly no ultra vires decisions. Regarding the rule of law dialogue with Poland there is absolutely no question that the European Court of Justice has our full backing.

If the Polish Government thinks it could rely on us if it no longer wants to follow the European Court of Justice, it is wrong. The Bundesverfassungsgericht does not question the authority of the European Court of Justice. On the contrary, the German judgment even calls on the European Court of Justice to exercise a more, and more intensive, control. Perhaps the decision of 5th of May 2020 can - without too much excitement - be rather understood as an appeal to think less hierarchically within the European court system, to argue less about the authority of the "last word". What is needed is a dialogue at eye level, serious, pugnacious and constructive. The big questions of European integration in the relationship between the Member States as the "Masters of the Treaties" and the Union as the embodiment of the great European project are seeking answers that are the result of the cooperation of many participants: The binding authority of the European Court of Justice for the interpretation of Union law, which we do not question, but also the view of the Member States' constitutional courts on the limits of this law are two sides of the same coin.