Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court

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This is a first reaction (usual caveats for quick reactions apply...) to yesterday's decision of the German Constitutional Court on the ECB's Public Sector Purchase Program. This is part of the ECB broader Asset Purchase Program and it was a (the) crucial piece of the famous "whatever it takes" approach adopted by the ECB, under Draghi, to prevent further fragmentation of the Euro financial markets and (arguably) save the common European currency.

The Judgment, as the Court explicitly states, is not about the new Assets Purchases Program (the Pandemic Emergency Purchase Program) adopted by the ECB to provide financial assistance in addressing the economic crisis generated by Covid19. This program had not been adopted at the time the case was brought to the Court and therefore it's not the object of the case. But the decision is bound to have an impact on such Program too. It is likely to question its credibility. The judgment will also shape Germany's position in the context of the current discussions on the EU economic response to the crisis. In fact, I would argue that the decision is way more relevant for the future role of the ECB, in the context of the financial assistance decisions to be taken by the European Union to address the Covid 19 crisis, than with respect to the actual decisions that are the object of the Court's judgment.

The decision is equally of great importance with respect to the principle of supremacy of EU law and the relationship between national constitutional and supreme courts and the European Court of Justice. It may open the doors for open revolt by other Courts and also national governments. This will be particularly the case in Eurosceptic countries that are currently involved in legal and political battles on the rule of law with the European Union.

1.

The focus of the initial media coverage has been on the fact that the German Constitutional Court considered the program to violate the principle of proportionality while giving the ECB three months to present a stronger justification for why the program, and decisions implementing it, are proportional. In my view, this will be the less relevant and easier to dispose of all legal aspects of the judgment:

- The ECB is not under the jurisdiction of the German Constitutional Court (and even declined to appear in the case, probably fearing legitimating the idea of such jurisdiction and to open a precedent for all similar requests by courts of all Member States). The Court therefore targets its judgment at German public organs (notably government, parliament, central bank – the Bundesbank – and courts) requiring them to take all possible measures to reverse the policy of the ECB and not to take any implementing acts. The Court states that the "*ultra vires* act is not to be applied in Germany" and has no binding effect on those organs. In the case of the central bank this will mean for example that it ought not to buy German bonds under such program. This is limited in its legal reach, as it does not set aside the program and the decisions implementing it. However, it will partially hinder the credibility of the program and puts those German bodies in the difficult position of having to choose between its constitutional and EU commitments. And, with Germany being required by its Constitutional Court to actively work to undermine the program, the credibility of the later will suffer a serious blow. There is, however, a

possible solution for everybody to safe face. In fact, the Court does not exclude that the measure can be proportional. It simply considers that the ECB failed to put forward any arguments demonstrating that (and that the ECJ failed to require that from it in its own review of the decision in *Gauweiler*). To some extent, more than proportionality it seems that the ECB starts, in the view of the German Court, by failing on its duty to give reasons. I don't think the ECB can and will directly comply with the German Court's judgment. To do so would open the door to multiple national legal challenges, placing it under the jurisdiction of all national high courts, with disastrous consequences for the ECB and its role under the Treaties. But, without directly addressing the German Constitutional Court demand, the ECB may adopt a new decision with a more in depth justification of the program. This justification will likely mostly pay lip service to the arguments on proportionality raised by the Constitutional Court. But that may be sufficient to provide the justification needed by German authorities, that are the actual addressees of the judgment, to say that the requirement the Court has imposed has been fulfilled by the ECB and the problem is therefore solve. Naturally, those that brought this case will argue otherwise but that will have to be done through a new case: time will be gained (and the composition of the Court will also partly change).

- This will also allow the Commission to avoid the hot potato of what to do regarding the challenge brought by the German Constitutional Court not only to the ECB but also to the ECJ and EU law supremacy. If, within these three months, German authorities will assess the new decisions of the ECB and determine that they provide a satisfactory support for their proportionality, they can continue to implement the ECB policy and, particularly, so can the Bundesbank. If so, there is no EU law infringement. In themselves, the statements of the German Constitutional Court with regard to the ECJ role are not an infringement if the judgment will no longer produce any effects contrary to EU law and its supremacy. The Commission could, in this way, continue to claim the supremacy of EU law without having to actually pursue an infringement against Germany.
- I foresee therefore that this decision will not be hard to address as to its actual legal outcome, contrary to what might seem at first instance. But its market effects may be highly problematic. The uncertainty the decision will generate in the short term and the constraints arising from the obiter dicta of the Court for Germany's participation in the EU response to the Coronavirus situation will likely have some serious negative effects. In addition, such obiter dicta are also likely, as I will try to explain below, to open up a dangerous path to be explored by illiberal regimes in the EU.

2.

On the substance of the proportionality assessment by the German Court I will be brief. The Court is very critical of what it calls the methodological flaws of the ECJ reasoning in the European's court decision (Gauweiler) that "validated" the ECB program. But the German Court bases its own approach on a substantially flawed reasoning too.

The German Court starting point is that the ECB can only adopt such a program in order to pursue monetary policy objectives. In this case, the objective – that is recognized as legitimate in the decision- is the inflation target (the argument, put forward by Draghi, in its presentation of this program, that this was also necessary to secure the stability of the Euro currency is ignored). For the German Court, as well as for the ECJ, the ECB cannot adopt the program in order to pursue economic and fiscal objectives. Both courts converge, moreover, in the assessment that, while there are monetary objectives pursued by the program, and that are these are what legitimates it, the program also has economic effects.

Having said this, the German Court goes on to require the ECB to balance the monetary policy objec-

tive with what it presents as a variety of economic, fiscal and political costs resulting from the program. From undermining the independence of the ECB and the budgetary discipline of the Member States to imposing losses on private savings or creating real estate and stock market bubbles. There is a paradox in this. Basically the Court argues that the ECB can only guide its action, and the decision to intervene, by the monetary policy objectives but then requires it to incorporate into its analysis the possible economic, fiscal and political costs. But, if that is so, shouldn't the economic, fiscal and political benefits of the monetary oriented decisions also be taken into account in such balance? No appropriate proportionality analysis can be done by limiting the scope of the benefits to be taken into account but not the scope of the costs... Instead, the German Court's decision seems to say that the ECB cannot take into account the economic and fiscal benefits that may arise from its monetary oriented decisions but must take into account all the potential economic, political and fiscal costs. This is profoundly inconsistent.

3.

The most problematic aspect of the decision for the European Union at the moment is, however, and ironically, in the point of law where the judgment actually upholds the Public Sector Purchase Program of the ECB and the decision of the ECJ.

This regards the compatibility of the Program with Article 123 (prohibition of monetary financing). The German Constitutional Court agrees with the Court of Justice that this program does not necessarily circumvent Article 123. However, it reads the European Court's judgment as imposing as necessary conditions for such compatibility a set of requirements that are in the initial purchasing program but are no longer in the one recently adopted to provide emergency assistance in the context of the pandemic.

The European Court of Justice does indeed mentions in *Gauweiler* several conditions that are part of the original program as justifying such program. They serve to demonstrate that the program does not violate Article 123 and it's crafted in such a way as to still impose budgetary sounds policies on Member States by preserving market discipline. But the European Court is not explicit in saying that they are necessary conditions, absent of which the program will violate the Treaty. There might be other alternative conditions that would equally preserve the Treaty objectives of sound fiscal and budgetary policies of the Member States. The German Constitutional Court, however, reads the judgment of the Court of Justice so as to make those conditions, not simply sufficient to prove compatibility with Article 123, but necessary for such compatibility. In fact, it appears to make this reading its own condition to endorse this part of the judgment of the ECJ. The conditions are explicitly restated in an almost list form by the German Constitutional Court and include: volume of purchases limited in advance; purchase limit set at 33%; purchases carried out according to the capital key of the ECB etc.

The problem this raises is that these conditions are no longer met by the new Pandemic Purchasing Program of the ECB. While the German Court states that this judgment does not apply to the new program (because, as stated, it did not existed at the time and was not the object of the challenge brought before the Court), the final part of the judgment seems to be drafted so as to make clear that the German Court believes that this new program violates Article 123 and is even contrary to the judgment of the European Court Justice interpreting such provision. This is bound to bring new challenges and raise a high degree of legal uncertainty with respect to the new ECB program, with likely consequences in the markets and for the interest rates of the sovereign debt of Member States.

4.

Overall the judgment stresses the extent to which the German Constitutional Court interpretation of the German Basic Law limits forms of debt mutualisation in the EU (either direct or indirect, through the ECB). This will further constrain the ongoing discussions on the model that the EU economic response to the Covid19 crisis should take.

At the core of it is the link made, already in past decisions, by the German Constitutional Court,

between democracy and fiscal autonomy and responsibility. The German Court sees forms of debt mutualisation as an encroachment on German democracy. This is so because they make the German people responsible for decisions taken by others and can limit their freedom of democratic deliberation by reason of liabilities incurred by others. This leads the German Court to impose strict limits both on what Germany can be liable for and regarding the forms through which even such limited liability may take place (requiring parliament involvement and strict conditionality). It's easy to see how this constraints Germany's involvement in risking sharing in the Union. Moreover, since these are constitutional limits, they restrict the possibility for these issues to be addressed by Treaty amendments (eg on the role of the ECB).

There is, however, a silver lining. This may be the final wake up call for the importance to deal with risk sharing through genuine EU own resources (as I've been arguing for long). The only way to avoid the debt mutualisation constitutional and political trap is to move to a genuinely European approach to risk sharing. One where such risk is shared on the basis of limited liabilities that are guaranteed by resources that do not depend on the States but are genuinely European. In this case the liabilities of the different European's peoples will not go beyond what they may be required to pay for those own resources as citizens of the Union. Their democracies will not be liable for the other European peoples decisions. This judgment demonstrates again the soundness of the call for new genuine own resources as the basis on which to support whatever EU action may be necessary and to define in that way how – and to what extent – risk is shared in the EU. This may provide a solution to the ongoing discussions in the EU, one that will also be compatible with the German's Constitutional Court requirements.

5.

Finally, in spite of what I say in 1, we should not ignore the risks of the challenge to the ECJ and EU law that this judgment includes. After having for long threatened to put a break on what some conceive as a too deferential ECJ approach to EU competences, the German Constitutional Court seems to finally have acted on it. On should not exclude, given the human nature of courts, that the German Court might have succumbed to the appeal to show that it could "bite" instead of simply "barking". This might have been reinforced by the, partially, unfortunate style of the ECJ ruling that did not show much willingness to engage, at a deeper level, with the arguments raised by the Constitutional Court in its reference to the ECJ. This said, it is the wrong decision at the wrong moment. It is bound to legitimate similar actions by other supreme and constitutional courts. It will also legitimate challenges by national governments (the Polish government reaction to the decision demonstrates that). This will be particularly problematic in the case of countries where the rule of law is under severe challenge. For the German Constitutional Court to ignore this current context is particularly troublesome.

It is true that the heart of the approach of the German Court is not new. It is also true that this parochial approach to the relationship with EU law is not unique to this Court. I've defended a form of constitutional pluralism that leaves margin for dissent and promotes dialogue with the ECJ. But I've always argued that this dialogue must take place in the context of an agreement on a common set of principles to guide it. One crucial aspect is the need for constitutional courts not to loose sight, when they engage with EU law, that they are part of a system with other legal orders, with different needs, and must try to accommodate these needs and interpret their national constitutions in that light. That is not the case with an approach that, under the cover of protecting national democracy, makes a limited reading of what democracy means today, in a context of increased interdependence. This parochial approach is, unfortunately, taking hold in other constitutional courts. For example, Portugal's Constitutional Court has adopted a similar approach during the adjustment program years. The same hermeneutic model to interpret the relation with EU law but reaching totally opposite conclusions to those of the German Constitutional court as to the character of the adjustment programs

and conditions for financial assistance. The reason for this paradox highlights the problem with the parochial approach: to see the relationship with EU law as if it was not part of an engagement of our legal order with other national legal orders, that have different constitutional needs that are equally deserving of accommodation.

The current rule of law problems in several Member States make the timing of this decision particularly problematic. And it is sad that one of Europe's most respected highest courts did not take that into account. Ironically, it's also likely to lead, not only to increased tensions between national constitutional courts and the ECJ, but between those national constitutional courts themselves (as they will feel equally tempted to become active participants in the "negotiation" of the European grand bargaining on how to answer the current crisis).

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