Ultra vires? Courtesy of the Courts between Court of Justice of the European Union and Bundesverfassungsgericht

Dian Schefold*

Summary: 1. The judgment of the Bundesverfassungsgericht of 5-5-2020 and its precedents. – 2. The actual developments: a) Constitutional complaint against OMT, preliminary questions and final judgment. – b) Constitutional complaint against PSPP, preliminary questions and final judgment ultra vires. – 3. The new elements: a) The use of preliminary questions. – b) The control of ultra vires. – c) Judgment ultra vires? – d) Binding answer to preliminary questions. – e) Outbreaking methods? – 4. The conflict: Ways out?

1. The judgement of the Bundesverfassungsgericht of 5-5-2020 and its precedents

The judgment of the German Bundesverfassungsgericht of 5 May 2020[1] concerning the purchase of public loans by the European Central Bank has received a lot of attention on the German, European and international, on the political, legal and economic levels. While many observers, especially Eurosceptic ones, want to find an end of the supremacy of the European law and a way to re-nationalization, others relativize the importance of the judgment, underlining the exceptional situation of the lack of motivation by the European Central Bank and they regard the judgment only as a demand for better motivation.

But the conflict behind this difference is old. In the 1970ies and 1980ies, the Bundesverfassungsgericht has developed the protection of citizen's rights against measures based on European law from a task to be exercised by the Karlsruhe Court, as long as ("solange I") protection of rights by the European Courts was not sufficiently established, to a task to be left to the European protection system, as long as ("solange II") protection of rights was satisfying on European level.[2] With the Maastricht Treaty of 1992, the conflict became extremer, because, on the one side, the powers of the European Community increased, on the other side, the control of the transfer of powers to the European institutions was completed, by the amendment of the Basic Law (BL, art. 23) of 1992 and the following judgment of the

* Emeritus, Publlic and Constitutional Law, University of Bremen.

1 Judgement of 5-5-2020, 2 BvR 859/15 and others, see www.bundesverfassungsgericht.de (in German and in English).

2 See BVerfGE 37,271 ff. (Solange I) and then BVerfGE 73,339 ff. (Solange II).

Bundesverfassungsgericht on the Maastricht Treaty.[3] Since then, the Court has developed its jurisprudence in European matters, based on an access to the Court to protect the electoral law of citizens to the Parliament (art. 38.1 BL) which, according to the jurisprudence, guarantees the democratic function of the German Parliament and excludes an extension of powers by the European authorities. Their powers, transferred on the European Union in a limited way by the member States, must not be extended, and the Bundesverfassungsgericht pretends to control these limits. The German electoral law, as expression of the democratic principle (art. 20.1 BL), legitimates, but restricts as well the possible powers of the European Union and guarantees, in this way, national sovereignty as a principle which, according to art. 79.3 BL, cannot be modified. The European Union, an "Union of States" (Staatenverbund) and their peoples, but not the work of an European people, is limited by the Treaties. Respecting the independent character of European law and its interpretation and application by the European powers, the Bundesverfassungsgericht nevertheless must not accept an interpretation which enlarges the European powers beyond the transfer decided by the member States in the Treaties. If European acts don't respect these limits, "breaking out" of them, the Bundesverfassungsgericht may decide that, with the consequence that these acts are not binding for the German authorities: they are "ultra vires".[4]

The jurisprudence has to be seen in the context that the Bundesverfassungsgericht, until 2014,[5] never has submitted preliminary questions in the sense of article 19.1, 19.3 b) TEU, article 267 TFEU regarding the interpretation of European Treaties to the Court of Justice of the European Union, although the German Court is obviously one of the judicial authorities mentioned in article 267.3 TFEU. However, the Court underlines the importance and the duty of all judicial authorities to submit, if the conditions are fulfilled, preliminary questions to the European Court, because otherwise the guarantee of the legally provided judge would be violated.[6] But for its own jurisdiction, Karlsruhe avoided asking for interpretations and help from Luxemburg, emphasizing that interpretation of German and European non-constitutional law was the task of other judicial authorities.[7]

---

[3] See the amendment of the Grundgesetz of 21-12-1992 (BGBl. I, p. 2086), esp. art. 23, and subsequently BVerfGE 89,155 ff.

[4] BVerfGE 89,155 (188).

[5] First judgment in this sense BVerfGE 134,366 ff. (14-1-2014), but as an exception, cf. recently BVerfGE 151,201 (372 f.).

[6] See art. 101.1, 2nd phrase BL, e.g. BVerfGE 142,74 (114 ff.), with numerous references. Cf. Gabriele Britz (Judge of the Karlsruhe Court), Verfassungsrechtliche Effektuierung des Vorabentscheidungsverfahrens, Neue Juristische Wochenschrift 2013, p. 1313 ff.

[7] Britz, p. 1317.

2. The actual developments

This abstention has been reduced with the two recent judgments submitting questions to the Court of Justice of the European Union.

a) The first regarded the conformity of the Outright Monetary Transactions (OMT) with the European Treaties.[8] In the consequence of a constitutional complaint, the Bundesverfassungsgericht has submitted the preliminary question of the conformity of the purchase policies of the European Central Bank with European law to the Court of Justice. It has motivated the questions with a detailed presentation of the mentioned jurisprudence which excludes the binding force of ultra vires-acts and, as a consequence, pretends the duty of all German authorities to disobey to these acts. According to the judgement of the Bundesverfassungsgericht, the unconformity had to be judged by the European Court of Justice. Nevertheless, two judges of the Karlsruhe Court denied in dissenting opinions the admissibility of the complaints of unconstitutionality and therefore of the preliminary questions.[9]

The Luxemburg Court, in his judgment of 16-6-2015,[10] declared the conformity of the purchase policies of the European Central Bank with the European Treaties, underlining the powers of the Bank and interpreting the currency politics in a large sense. The proportionality of the measures was affirmed.

Therefore the result of the case seemed clear, and as a matter of fact, the Bundesverfassungsgericht, in its final judgment of 21-6-2016,[11] rejected the complaint of unconstitutionality. But the very large motivation of the judgment made evident that there were problems. The motivation starts with a large discussion of the priority of application of the law of the Union and its limits, especially the discussion of the ultra vires-theory,[12] and continues with a decision ending with the conformity of the measures, but with many reserves and open questions.[13] So it seemed obvious that the answer to the questions was not definitive.

b) As a matter of fact, the continuation of purchase of assets by the European Central Bank soon provoked other constitutional complaints addressed to the

---

[8] BVerfGE 134,366 ff.

[9] See the dissenting votes of the judges Lübbe-Wolff and Gerhardt, BVerfGE 134, 366 (419 ff., 430 ff.).

[10] C-62/14, EU: C 2015:400, Judgment of 16-6-2015 (Gauweiler); the essentials of the judgment are reproduced in BVerfGE 142,123 (154-170).

[11] BVerfGE 142,123 ff. See, especially, the decision (p. 126) and the ratio decidendi (p. 185).

[12] BVerfGE 142,186-213.

[13] BVerfGE 142,213-234. Cf. Udo Di Fabio, Europas Verfassungskrise, Frankfurter Allgemeine Zeitung 8-6-2020.

Karlsruhe Court. As these were based on new programmes and decisions of the European Central Bank, the object of the new case was, although similar, different from that decided before. Therefore the Bundesverfassungsgericht had to treat the new case. With judgment of 18-7-2017 it decided again to submit the preliminary question of conformity of the purchase with the European Treaties to the Court of Justice of the European Union.[14] Again, with mentioning the constitutional rules relevant for the case, the possibility of acts of the Union ultra vires with the consequence of being not binding for German authorities, was brought into the discussion, and the interpretation of the articles of the Treaty on the Functioning of the European Union, esp. art. 123 under the conditions of the concretizing decision (EU) 2015/774 of the European Central Bank, furthermore art. 119, 127, 125 TFEU was presented with a critical approach.

Nevertheless, the judgment of the Luxemburg Court, decided on 11-12-2018,[15] affirmed again the conformity of the Purchase Programme with the Treaties. The motivation of the decision of purchase was declared sufficient; the powers of the European Central Bank in the field of monetary politics, necessarily with consequences for the economic politics, were underlined and largely interpreted, due to the independency of the European (like the German) Central Bank which excludes a detailed control by the Court. Therefore the proportionality of the decision was affirmed and largely motivated. An indirect financing of States, violating art. 123 TFEU, was rejected.

According to that judgment, the complaints of unconstitutionality could not win. But the Karlsruhe Court, in the consequence of it, continued with a large public hearing. The final judgment of 5-5-2020,[16] based again on the democratic rights according to art. 38.1, 20, 79.3 BL as limits of the transfer of powers to the European Union, declared the judgment of the Court of Justice of the European Union and the decision of the European Central Bank and its Council partly ultra vires and therefore not binding for German authorities. It opposed a large exam of proportionality, with the result of violation. The conformity with art. 123 TFUE was largely examined and criticized as well, but not qualified violated. So the result of the detailed exam was the declaration of a partial unconformity of the purchase programme with the European Treaties, the qualification of the judgment of the Court of Justice as partially ultra vires, and therefore the statement of a violation of the art. 38.1, 20, 79.3 BL caused by the inactivity of the German Government and Parliament to control the proportionality of the measures of the European Central Bank.

---

[14] BVerfGE 146,236 ff.; this time, there were no dissenting opinions, as the two dissenters had, in the meantime, left the Court.

[15] Court of Justice of the European Union, judgment of 11-12-2018, Weiss and others, C-493/17, EU:C:2018:1000, reproduced in the Bundesverfassungsgericht-judgment of 5-5-2020 (see above, note 1), par. 81.

[16] See above, note 1.

Instead, the Bundesverfassungsgericht added its own judgment, largely motivated, on the decisions of the European Central Bank and its Council.[17] The purpose of monetary politics according to art. 127 TFEU was, in principle, recognized, but the proportionality of the Purchase Programme was examined with a method different from that of the Court of Justice, because the balancing with effects on the finance of the Member States, the banking sector, the private financing and the enterprises was added and gave lead to the statement of obvious un-proportionality. Therefore the Programme, obviously un-proportional, was ultra vires and with no binding force for Germany and its authorities. The question of a violation of art. 123.1 TFEU was largely discussed as well, but without the result of an obvious result and therefore without stating an ultra vires illegality. However, from the result of the criticism of the lack of proportionality follows that the Purchase Programme is ultra vires, therefore not binding for the German authorities, and these are obligated to take the appropriate measures against it.

3. The new elements

Taking together the judgments on the Purchase Programmes of the European Central Bank, it is obvious that a new chapter of discussion between German and European authorities has been opened, although it has been prepared by the anterior Karlsruhe jurisprudence.

a) An essentially new aspect is the use of the possibilities of art. 19.1 phrase 2, art. 19.3 b) TEU, art. 267 TFEU. While, until 2014, the jurisprudence of the Court of Justice of the European Union and of the Bundesverfassungsgericht were not coordinated, although the Treaties, in their actual as in their earlier versions,[18] prescribed the tools for it, the use of preliminary questions and their responses is an important step on the way to a coordination of supreme jurisdictions, in the sense of what the President of the Bundesverfassungsgericht had proposed.[19] One may consider this development as a step to the constitutional dialogue between Courts in

[17] See judgment of 5-5-2020 (above, note 1), par. 184-235.

[18] It has to be noted that art. 267 TFEU corresponds art. 177 EEC in the version valid since 1957.

[19] Andreas Voßkuhle, Der europäische Verfassungsgerichtsverbund, Neue Zeitschrift für Verwaltungsrecht 2010, p. 1 ff.

Europe and therefore as a symptom of judicial pluralism.[20] This justifies submitting these considerations to the attention of Roberto Toniatti.

b) On the other hand, this use of preliminary questions has worked with a reserve of the control of acts of the European authorities under the aspect of excess of powers: If acts of European authorities obviously exceed the limited detailed powers of the Union, they are ultra vires and therefore not binding for national – in the concrete cases: German – authorities. This reserve, discussed in the German constitutional jurisprudence since the Maastricht case,[21] and elaborated, as the Court underlines, to a standing jurisprudence of the Bundesverfassungsgericht,[22] may appear as a rather theoretical reserve of national competences in case of "outbreaking" European acts. This meaning has been supported by the conditions of the Court for the use of the ultra vires-control and by the up to now moderate use of it. Therefore the importance of the judgment of 5-5-2020 must not be exaggerated.

Nevertheless, for the first time, this control has been exercised with the result of the statement of an ultra vires-act. The Public Sector Purchase Programme shall not be binding for Germany and for German authorities. The German Federal Government and Parliament have been condemned for violation of their constitutional duties, based on the democratic principle,[23] and German representatives in the European Central Bank have to insist on a control of proportionality of the acts in question; otherwise, they must not participate on the execution of the Programme.[24]

From that judgment follows that Germany and its authorities come into a conflict. As decided by the European authorities, they are bound by the Programmes and the relative decisions. As decided by the Bundesverfassungsgericht, they must not be bound, and they are hindered in the participation of their functions. The prevalence of application must not determine the solution, but Germany – through the Bundesverfassungsgericht – opposes to a harmonious solution, based on national sovereignty. There is no solution to this conflict.

---

[20] See Maria Daniela Poli, Der justitielle Pluralismus der europäischen Verfassungsgemeinschaft, Der Staat 2016, p. 373 ff., with large bibliography. – If Dieter Grimm, Jetzt war es soweit, Frankfurter Allgemeine Zeitung 18-5-2020, criticizes an insufficient discussion of the objections contained in the preliminary questions, Gesine Schwan, Der Weg aus der Falle, Frankfurter Allgemeine Zeitung 5-6-2020, could answer relativizing the role of national Constitutional Courts. In the same sense, Christine Landfried, Verfassungsgerichte sind nicht da zur Korrektur der Europapolitik, Neue Zürcher Zeitung 18-6-2020.

[21] BVerfGE 89,155 (maxime 5, p. 188, 210).

[22] See the long list of quotations in the judgement of 5-5-2020, par. 110, esp. the Honeywell-case, BVerfGE 126,286 (302 ff.) and recently the judgment on the Eurpean Banking Union, BVerfGE 151,202 (300 ff.).

[23] The judgment mentions art. 38.1 BL (opening the remedy of constitutional complaint to the Bundesverfassungsgericht) combined with art. 20.1, 20.2, 79.3 BL.

[24] Judgment of 5-5-2020, par. 229 ff.

c) Besides this general problematic of the ultra vires-jurisprudence, it has to be noted that, in the judgment of 5-5-2020, the European act declared ultra vires is a judgment of the Court of Justice of the European Union. Since 1957, all judicial authorities in the European Community and Union are connected together and with the European level by a functional unity, with the preliminary questions submitted to the European Court and the judgments answering them as tools. The judicial pluralism is guaranteed in the Union, because the member States maintain their own traditional judicial systems. They decide all cases according to their national law and, as far as European law is relevant, they may apply it as well. The European jurisdiction only has the limited powers ruled by the Treaties, especially art. 19 TEU, art. 251-281 TFEU, for the interpretation and application of European law. There are no legal remedies to appeal from a national judgment to the European level.

Therefore conflicts cannot be excluded. As far as national courts have decided, their judgments are binding, with the only possibility of a process before the Court of Justice on the invocation of the European Commission (art. 258 TFEU) regarding the legal situation; however, even in a case of this kind, the legal force of the national judgment remains. Though for the case of uncertainty of the interpretation and application of the European law, especially the validity of European acts, the Treaties provide for the instrument of preliminary questions to the Court of Justice of the Union: The judging national authority submits the question, relevant for its decision, to the Luxemburg Court, and the decision of this Court, as a part of the national process, decides this question in the framework of the process. Decision of the process and answer to the preliminary question are necessarily connected. The situation reminds of the decision of a higher court on legal remedies, if the final decision has to be taken by the first deciding judicial authority. In cases of this kind, it is necessary that the judgment of the higher court, deciding a question of the process, is binding for the final judgment. In the case of preliminary questions, the situation cannot be different.[25] The process before the national judicial authority is extended by the preliminary questions, and the answer to them completes and determines the judgment to be pronounced by the submitting judicial authority.

Therefore the judgment answering the preliminary questions is necessarily binding for the final judgment on the case. May be that the answer is not complete and leaves questions without solution. In such cases the pluralist dialogue between the courts may continue, and an additional preliminary question may ask for a more

[25] So expressly par. 16 of the Gauweiler-judgment of 16-6-2015 (supra, note 10), referring to a continuous jurisprudence of the Court of Justice. For my own argumentation, I can quote my study elaborated 50 years ago: Dian Schefold, Zweifel des erkennenden Gerichts, Berlin 1971, esp. p. 17 f., 25 ff.

complete answer.[26] But the answer as such is binding.[27] Not respecting it, even with the argument of ultra vires, puts into question the mutual respect, the "courtesy" of the courts and the unity of the legal order, with other words the principle of the rule of law.

d) Operating, instead, with the ultra vires-theory, denies the difference between political and legal acts on the one hand and judgments on the other hand. The purchase programmes of the European Central Bank may raise questions of legal conformity, and there are legal remedies against it, e.g. the constitutional complaint to the Bundesverfassungsgericht, and this may discuss a character ultra vires of the programme. It may as well, as European law is concerned, submit the preliminary question to the Court of Justice of the European Union, who has to control the conformity with the European legal order. But to oppose the qualification of ultra vires not only to the decisions of the European Central Bank, but also to the Court of Justice, abandons the ideas and principles of the rule of law.

Certainly, if the Bundesverfassungsgericht argues with the "not comprehensible" and "arbitrary from an objective perspective" character of the European judgment, this shall motivate an ultra vires-qualification of the judgment as well. But it has to be considered that qualifications of this kind touch the fundaments of the European Union with their constituent values (art. 2 TEU). Arguing with the limits of the task of the Court of Justice according to art. 19.1. sentence 2 TEU means doubts regarding the Court and his Judges, including the Judge proposed by the German Government. It exceeds the dialogue between judicial authorities.

If the Bundesverfayssungsgericht mentions the danger of widening the powers of the Union beyond the limited powers transferred by the Treaties, this may justify a qualification as ultra vires and serve as instrument of judicial control. But in regard of the Court of Justice, this argument is not conclusive. The Court of Justice, together with the national Courts and judicial authorities, controls the conformity of the exercise of powers of the Union, and the distribution of powers on European and national jurisdictions is regulated by the Treaties. Declaring ultra vires judgments

[26] That could have been a possibility to ask for a more complete motivation of the proportionality, instead of qualifying the arguments of the Court of Justice as ultra vires. See Hans-Jürgen Hellwig, Das Bundesverfassungsgericht hätte vorlegen müssen, Frankfurter Allgemeine Zeitung 12-5-2020.

[27] If Paul Kirchhof, Chance für Europa, Frankfurter Allgemeine Zeitung 20-5-2020, and the group around Claus-Wilhelm Canaris and others, Auf die europäischen Grundlagen besinnen, Frankfurter Allgemeine Zeitung 4-6-2020, suggest a continuous cooperation through dialogue between the Courts, the principle seems convincing (see supra, note 19, 20), but it has to respect the competences and procedural rules: the binding force of decisions of preliminary questions excludes to qualify them as ultra vires; the same, the legal force of a national judgment would exclude its abrogation by the Court of Justice of the European Union.

pronounced in exercise of these powers violates the well equilibrated system of judicial protection by the Treaties.[28]

e) The practical importance of this difference is obvious in the case of the judgment of 5-5-2020. If the judgment criticizes the method of the judgment of the Court of Justice (par. 123 ff.), it has to be considered that this judgment is nothing else but a continuation of the judgment of 16-6-2015 in the Gauweiler case before, using no outbreaking method, and that it continues the Luxemburg jurisprudence on the powers of the European Central Bank, with respect of its independence, guaranteed by art. 130 TFEU (and, indirectly, art. 88 BL). Certainly the delimitation of monetary politics and economic politics is highly controversial, between economists and lawyers,[29] and a different solution from that motivated in the judgment of the Court of Justice of 11-12-2018 is possible. But the Bundesverfassungsgericht has submitted its preliminary questions to the Court of Justice, and according to art. 19.1, 19.3 b) TEU, art. 267 TFEU it is the competence of the Court of Justice to decide these questions, binding for the Bundesverfassungsgericht. Its judgment is largely motivated. There is no space for a reserve of ultra vires.

Especially for the exam of proportionality, the Court of Justice founds the judgment on art. 5.1 sentence 2, art. 5.4 TEU and gives a large motivation.[30] It is true that this argumentation does not include the complete discussion of all the impacts the Bundesverfassungsgericht treats in his argumentation with the balancing, and that the German concretization of the proportionality contains these arguments as well. But proportionality in European and German law must not be identical. The text of art. 5.4 TEU asks for the instruments necessary for the aims of a measure, and whether the balancing with other effects is part of the exam of proportionality is a discussed problem in German doctrine as well.[31] Even if a criticism of the position of the Court of Justice has to be considered, that does not allow to state an "obvious"

---

[28] This has to be objected against criticisms of the Court of Justice, following the argumentation of the Bundesverfassungsgericht, e.g. Dieter Grimm, Jetzt war es soweit, Frankfurter Allgemeine Zeitung 18-5-2020.

[29] See Jürgen Stark, Geldpolitik ist eine Kunst, Die Welt 20-6-2020, referring tot he controversy between Peter Bofinger and Bernd Lucke.

[30] Judgment of 11-12-2018, C 493/17, par. 71-101.

[31] See the objections of Bernhard Schlink, Abwägung im Verfassungsrecht, Berlin 1976; for the actual state of the controversy,see Michael/ Morlok, Grundrechte, 2nd ed., Baden-Baden 2010, p. 302 ff. For the ECB-Programme, many German authors, like Paul Kirchhof, Chance für Europa, Frankfurter Allgemeine Zeitung 20-5-2020; Claus-Wilhelm Canaris and others, Auf die europäischen Grundlagen besinnen, Frankfurter Allgemeine Zeitung 4-6-2020, insist on a control of proportionality in strong sense, while Christine Landfried, Verfassungsgerichte sind nicht da zur Korrektur der Europapolitik, Neue Zürcher Zeitung 18-6-2020, distinguishes between limitations of fundamental rights with necessary control of proportionality in strong sense and monetary politics without a control of this kind.

violation of the principle of proportionality, and certainly not a qualification of ultra vires and a violation of the binding force of the judgment.

Arguing with an unforeseen method, on the contrary, rather may be considered regarding the argumentation of the Bundesverfassungsgericht. Extending the control exercised on constitutional complaints regarding the right to vote (art. 38 BL) on the powers of the German Parliament and as instrument to control the transfer of powers to the European Union is a creation of the jurisprudence, in no way founded in the text of the constitution. The fact that the first raising of a preliminary question was criticized by dissenting votes for lack of relevance for the decision[32] illustrates the possible opposed arguments and alternatives. – The argumentation with the democratic principle in favor of the German influence on the – independent – European Central Bank, combined with the negation of democratic legitimation of the European powers seems problematic and is very controversial. – If German democracy shall guarantee the sovereignty according to art. 79.3 BL, the objections based on the preamble of the Basic Law, the character of the Federal State with distribution of powers on different levels and, above all, the text of art. 79.3 which in no way mentions sovereignty are obvious.

This criticism will not be read as a total and general opposition to all these creations of the Karlsruhe jurisprudence. But it illustrates the creative character of constitutional jurisprudence and therefore raises the problem of harmonization with other factors of the legal doctrine. One of these problems is the relationship between national – here: German – and European jurisprudence. If the European Treaties – since 1957 – respect the national jurisdictions for national law and permit the interpretation and application of European law, but with the possibility and in certain cases duty of preliminary questions regarding interpretation and application of European law to the Court of Justice of the European Union, this distribution of powers in a legal system guarantees pluralism and a dialogue between the judicial authorities according to clear criteria. Judgments overruling these criteria and contesting the binding force of the judgments of the Court of Justice on behalf of a theory "ultra vires" violate the rule of law and the judicial cooperation, the "courtesy" of courts in Europe.

4. The conflict: Ways out?

There is no direct legal way to get out of this situation. The German judgment of 5-5-2020 is, according to par. 31 Bundesverfassungsgerichtsgesetz, binding for all German constitutionally provided organs, judicial and other authorities. A rule of this kind does not exist in European law. But anyway, the judgment of the Court of Justice of the European Union is binding in the concrete case, and furthermore, the

[32] See the votes of the judges Lübbe-Wolff and Gerhardt to BVerfGE 134,366, p. 419 ff., 430 ff.

jurisprudence of an European Court of Justice, although not legally binding, has a large prejudicial influence. As the German judgement violates, as demonstrated above, fundamental principles of European Law, decided and agreed by the Federal Republic of Germany as well, it creates a bias. The judgment of 5-5-2020 may influence, as decided in the judgment, the positions of all the German representatives, e.g. for demanding a more comprehensive motivation of proportionality, but it brings them into conflict, as far as their position is determined by European law, above all the independence of the European Central Bank, because they must not accept directives by national authorities.[33] So the practical importance of the judgment may remain limited. Nevertheless, it creates a conflict for the values which constitute the European Union,[34] and therefore for the Union itself. Even a process against Germany and a condemnation for violation of the Treaties cannot correct the situation, because the German judgment remains in force. So the need for a political solution increases,[35] and one may hope that the "always stronger Union of the peoples of Europe" (art. 1.2. TEU) opens the way to a democratic decision making on European level.

[33] See the controversy between Peter Bofinger and Bernd Lucke, Frankfurter Allgemeine Zeitung 29-5-2020 and16-6-2020.

[34] See Agostino Carrino, Il suicidio dell'Europa, Modena 2016, and my criticism in: Lo Stato IV 7, 2016, p.341-352.

[35] In that sense Christine Landfried, Verfassungsgerichte sind nicht da zur Korrektur der Europapolitik, Neue Zürcher Zeitung 18—6-2020.