How Europe's Legal Equilibrium Unravelled

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By Arthur Dyevre May 28, 2020

Two weeks on since the German Constitutional Court issued its momentous ruling on the ECB's quantitative easing programme, commentators are still wondering what kind of bomb has been detonated by the German Court. Will the blast bring down the Euro along with the European Union? Or will a makeshift arrangement of some sort allow the EU to kick the can down the road and muddle through, at least until the next crisis flares up? Whether the ruling ends up triggering a much-feared thermonuclear chain reaction marking the end of the European project will depend in large part on the response of other EU and German institutions and their ability to persuade the judges in Karlsruhe that the PSPP meet their exacting proportionality test.

But even before the dust has fully settled on the ruling, one thing is clear. By pronouncing the *Weiss* ruling of the Court of Justice a *ultra vires* act, the German Court has already caused considerable, and possibly irreversible, damage to the authority of supranational law in Europe. This holds irrespective of whether central bankers manage to find a way out of the hole dug by the ruling or whether public relation efforts by EU institutions and others succeed in containing the perception that EU law supremacy is now merely notional.

Together with the European Court of Justice, the German Constitutional Court is Europe's only judicial superpower. Unrivalled at home, its legal pronouncements carry the weight of Germany's economic and political clout abroad. The influence of the German Court beyond its borders is attested by the fact that several apex courts, from the Danish *Supreme Court* to the Czech Constitutional Court, have imported its doctrines, including the *ultra vires* doctrine it first spelled out in its *Maastricht* judgment, into their own case law. So a domino effect, with devastating consequences for the effectiveness of EU policies, is a real possibility.

Shifting signals and increasing Euroscepticism

While the international and constitutional court commentariat has focused more on the consequences of the ruling or the weaknesses in the Court's argumentation (see e.g. the posts by Pavlos Eleftheriadis and Marco Dani et al. on the *Verfassungsblog*), one question that promises to attract a great deal of academic attention in the coming months is what may have spurred the German Court to make such a move? Legal formalists may point to the Court's 40 000-word opinion as the best summary of the Court's motives. But, without even considering the holes in the constitutional judges' argument – crucial claims, such as the Court of Justice's reasoning being "incomprehensible" and "arbitrary", are bizarrely unsubstantiated – there are obvious reasons to believe that this cannot be the full story.

Since the 1960s, the German Court has ruled on the place of EU law in the German legal system on many occasions, alternating EU-friendly rulings and warning shots. From the mid-2000s onwards, there has been discernible trend towards increasing defiance. In 2014, the Court submitted its first-ever request for a preliminary ruling to the Court of Justice regarding another ECB's bond-buying scheme – the Outright Monetary Programme (OMT). Although this would normally be interpreted as a peace offering, the language of the reference was itself emphatically defiant, foreshadowing the 5 May 2020 ruling.

While it borrows much of the state-centric sovereignty rhetoric of the Court's Eurosceptic rulings on the Maastricht and Lisbon treaties, the Court's *ultra vires* holding also emphasises what the economist and *Financial Times* columnist Martin Wolf has characterised as a "litany of conservative concerns": public debt, personal savings and pension and retirement schemes. These are themes that indubitably find a strong echo in large sections of the German public, in a country known for its high saving rate, quasi-religious fear of inflation and staunch adherence to rigid monetary policy.

Change in judicial ideology or breakdown in judicial dialogue?

One way to rationalise the trajectory and occasionally abrupt shifts in the German Court's shifting case law has been to conceptualise its relation with the Court of Justice in terms of a pacific coexistence equilibrium in which the two courts accommodate each other's red lines by trading issues across time. In this view, the Eurosceptic rhetoric and non-compliance threats served to signal the importance the German Court attached to an issue, inviting the judges in Luxembourg to exert greater restraint. The prospect of mutually assured constitutional destruction acted as a strong incentive to seek judicial dialogue, thereby guaranteeing the non-compliance threat would never be put to execution.

Although some scholars dismissed the German Court as a dog that barks but never bites, there was anecdotal evidence that the Court of Justice paid attention to the warning shots coming from Karlsruhe. It articulated new EU fundamental rights in response to the first *Solange* judgment and seemed to hold back its activist impulse after the *Maastricht* ruling. While actively bargaining with the Court of Justice over the terms of further integration, the Karlsruhe judges made sure, by announcing (in its 1987 *Kloppenburg* ruling) a constitutionally enforceable right to one's "natural judge", that other German courts behaved as rule sticklers when it came to referring questions to the European Court. As statistics attest, German courts, including its five supreme courts, effectively became the most reliable purveyors of preliminary references. As integration deepened, the warning shots turned more frequent. But all this could be viewed as part of the same implicit on-going negotiation process. The German Court was the Court of Justice's best friend as well as its best enemy.

However, there were conditions for this equilibrium to be sustainable which may point to possible explanations for the constitutional crisis that the German judges decided to trigger. One condition was that the two courts would attach greater benefits to long-term cooperation than to an escalated conflict in the short run. One possibility is that the

judges sitting on the Court have become more sceptic of the long-term benefits of European integration. Both Gertrude Lübbe-Wolff and Michael Gerhardt, who wrote pro-integration dissents in the OMT case, left the Court in 2014. These departures may have affected the Court's ideological centre of gravity. Or, maybe, it has less to do with an alteration in the composition of an already Eurosceptic bench and more with growing public disaffection with the EU in Germany. Dwindling enthusiasm for the EU and trepidation that fiscally irresponsible governments in the south are turning the EU into a "transfer union" may have lowered the costs of an escalated war with EU judges. The Court's rhetoric purports to vindicate the interests of German savers and tax payers. This renders it more difficult for German politicians to evade the consequences of its ruling. At the same time, by leaving a door open for the ECB to demonstrate the proportionality of its quantitative easing programme, the Karlsruhe Court has lowered its immediate impact on the Eurozone and mitigated the prospect of an aggressive political reaction. In any case, the German judges are well aware that public support matters in this battle, as shown by the interviews they've given in German newspapers to defend their decision.

Yet there was another important condition for the equilibrium that formed the basis for the effective operation of the EU legal system. This was the belief that the German Court would be willing to press the big red button in case the Court of Justice were to unilaterally deviate from the equilibrium path. As in the Cold War, deterrence credibility guaranteed that peace would prevail. It could be that, at some point, the Court of Justice started to doubt this belief. There were reasons to expect that, when responding to the German Court's reference in the *OMT* case in 2015, EU judges would make some concessions, difficult as this was on a high-stake, systemic ECB policy. The fact that they did not may indicate that it is when EU judges started to treat the warning shots as mere bluff. That the German judges wanted to send a strong signal was not only clear from the defiantly Eurosceptic language of the *OMT* reference. But in *Honeywell* the German judges had expressly indicated that they would offer the Court of Justice a chance to come clean before following through on a *ultra vires* challenge. Three years after *OMT*, the Court of Justice announced its judgment on the German Court's second request for a preliminary ruling in *Weiss*. Again, the judgment offered little tangible concession to the German judges, confirming the diminished credibility of their threats.

If so, then the Court of Justice may have been the first to deviate from the normal equilibrium path of play. This, in turn, suggests that the bomb that the German Court dropped on the EU legal order in the midst of the Covid-19 crisis reflects a breakdown in judicial dialogue, rather than a shift in judicial ideology or in German attitudes towards EU membership.

If that is what happened, then there might be hope that a form of judicial dialogue can be restored at some point in the near future. Such hope is not unreasonable. But such is the damage that has been inflicted on the collective beliefs and expectations sustaining the EU legal order that if judicial dialogue is restored, it will most probably be under terms and in an equilibrium much less favourable to the Court of Justice and to the authority of supranational rule-makers.