Headnotes

to the Judgment of the Second Senate of 5 May 2020

- 2 BvR 859/15 -

- 2 BvR 1651/15 -

- 2 BvR 2006/15 -

- 2 BvR 980/16 -

1. 1. Where an *ultra vires* review or an identity review raises questions regarding the validity or the interpretation of a measure taken by institutions, bodies, offices and agencies of the European Union, the Federal Constitutional Court, in principle, bases its review on the understanding and the assessment of such a measure as put forward by the Court of Justice of the European Union.

2. 2. The Court of Justice of the European Union exceeds its judicial mandate, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. If the Court of Justice of the European Union crosses that limit, its decisions are no longer covered by Article 19(1) second sentence of the Treaty on European Union in conjunction with the domestic Act of Approval; at least in relation to Germany, these decisions lack the minimum of democratic legitimation necessary under Article 23(1) second sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law.

3. 3. Where fundamental interests of the Member States are affected, as is generally the case when interpreting the competences conferred upon the European Union as such and its democratically legitimated European integration agenda (*Integrationsprogramm*), judicial review may not simply accept positions asserted by the European Central Bank without closer scrutiny.

4. 4. The combination of the broad discretion afforded the institution in question together with the limited standard of review applied by the Court of Justice of the European Union clearly fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of Member State competences.

5. 5. For safeguarding the principle of democracy, it is imperative that the bases for the division of competences in the European Union be respected. The finality of the European integration agenda (*Integrationsprogramm*) must not undermine the principle of conferral, one of the fundamental principles of the European Union.

6. 6. a) In the context of delimiting the competences between the European Union and the Member States, the principle of proportionality and the overall assessment and appraisal it entails are of great importance with regard to the principles of democracy and the sovereignty of the people. Disregarding these requirements potentially shifts the bases for the division of competences in the European Union, undermining the principle of conferral.

7. 6. b) A programme for the purchase of government bonds only satisfies the principle of proportionality if it constitutes a suitable and necessary means for achieving the aim pursued;

the principle of proportionality requires that the programme's monetary policy objective and the economic policy effects be identified, weighed and balanced against one another. Where a programme's monetary policy objective is pursued unconditionally and its economic policy effects are ignored, it manifestly disregards the principle of proportionality enshrined in Article 5(1) second sentence and Article 5(4) of the Treaty on European Union.

8. 6. c) The fact that the European System of Central Banks has no mandate for economic or social policy decisions does not rule out that effects of a programme for the purchase of government bonds on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies are taken into account in the proportionality assessment pursuant to Article 5(1) second sentence and Article 5(4) of the Treaty on European Union and – in an overall assessment and appraisal – weighed against the monetary policy objective that the programme aims to achieve and is capable of achieving.

9. 7. The determination whether a programme like the Public Sector Purchase Programme manifestly circumvents the prohibition in Article 123(1) of the Treaty on the Functioning of the European Union does not hinge on a single criterion; rather, it requires an overall assessment and appraisal of the relevant circumstances. In particular, the purchase limit of 33% and the distribution of purchases according to the European Central Bank's capital key prevent selective measures being taken under the Public Sector Purchase Programme for the benefit of individual Member States and the Eurosystem becoming the majority creditor of one Member State.

10. 8. If the risk-sharing regime for bond purchases under the Public Sector Purchase Programme were subject to (retroactive) changes, this would affect the limits set by the overall budgetary responsibility of the German *Bundestag* and be incompatible with Article 79(3) of the Basic Law. It would essentially amount to an assumption of liability for decisions taken by third parties with potentially unforeseeable consequences, which is impermissible under the Basic Law.

11. 9. Based on their responsibility with regard to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are required to take steps seeking to ensure that the European Central Bank conducts a proportionality assessment. They must clearly communicate their legal view to the European Central Bank or take other steps to ensure that conformity with the Treaties is restored.

12. 10. German constitutional organs, administrative bodies and courts may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts. This generally also applies to the *Bundesbank.*

Pronounced

on 5 May 2020

Fischböck

Amtsinspektorin

as Registrar

of the Court Registry

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 859/15 -

Judgment

1. The proceedings 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16 are combined for joint decision.

2. The constitutional complaints of the complainants in proceedings I regarding challenges nos. 2 and 3, the constitutional complaints of the complainants in proceedings II regarding challenge no. 1 as well as the constitutional complaints of the complainants in proceedings IV are dismissed as inadmissible.

3. The Federal Government and – in relation to the complainants in proceedings I and II – the German *Bundestag* violated the rights under Article 38(1) first sentence in conjunction with Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law of the complainants in proceedings I, II and III by failing to take suitable steps challenging that

1. in Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (Public Sector Asset Purchase Programme, ECB/2015/10, OJ EU L 121 of 14 May 2015, p. 20),

2. amended by Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/33, OJ EU L 303 of 20 November 2015, p. 106), Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/48, OJ EU L 344 of 30 December 2015, p. 1), Decision (EU) 2016/702 of the European Central Bank of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2016/8, OJ EU L 121 of 11 May 2016, p. 24) and Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2017/1, OJ EU L 16 of 20 January 2017, p. 51),

2. the Governing Council of the European Central Bank neither assessed nor substantiated that the measures provided for in these decisions satisfy the principle of proportionality.

4. For the rest, the constitutional complaints are rejected as unfounded.