PROSPECT LAW

LEGAL | ENGINEERING | FINANCE

THE JUDGMENT OF THE GERMAN CONSTITUTIONAL COURT OF 5TH MAY: MANNA FROM HEAVEN OR A MERE STORM IN A TEACUP, PART II

The CJEU Versus the BVFG

Prior to commenting on the Ruling of the EUCJ of 11 December 2018 and the reaction of the BvfG which followed on 5th May 2020, it is appropriate to discuss the basis of their mutual relationship and the roles the two play in relation to each other. These are at the heart of the narrative. Once the relationship is understood, the contrary judgement given by the BvFG as a reaction to the Preliminary Ruling is no longer so contrary and the excitement surrounding its 'revolutionary act of disobedience' should soon disappear.

The Respective Roles of both courts

The EUCJ

The application and interpretation of EU law, including the application of the methodological standards, is conferred upon the CJEU by mandate of the European Treaties. Article 19(1) of the Treaty of the European Union (TEU) provides that the CJEU observes the law when interpreting the Treaties. It is to ensure conformity and coherence of EU law. The application by the CJEU of the methods and principles cannot and need not completely correspond to the practice of domestic courts. The CJEU may not entirely disregard such practice. Yet, the mandate conferred in Article 19(1) is exceeded where the traditional European methods of interpretation or, more generally, the general legal principles common to the laws of all Member States are manifestly disregarded. As long as the CJEU applies recognised methodological principles and its decision is not arbitrary from an objective perspective, a court of a Member State must respect its decision even if it holds a view against which 'weighty arguments' could be levelled. Generally, provided the CJEU honours those safequards, its rulings have precedence over the judgments of the national courts.

The BvfG

The BvfG's duty is to ensure that the Constitution of the Federal Republic is obeyed. It helps to secure respect for and the effectiveness of the German democratic order. This applies particularly to enforcement of the fundamental rights. The BvfG's decisions are final and all other government institutions are bound by its case law. The work of the BvfG may also have political effect which occurs when the Court declares a law to be unconstitutional. Within the EU context, its role is to test substantiated *ultra vires* challenges regarding acts of institutions, bodies, offices and agencies of the European Union. Whether Germany has effectively transferred a mandate to a European body can only be determined by the BvfG and not by the CJEU. According to the BvfG's own case law it helps to ensure that both courts' mandates are excercised in a 'coherent' and co-operative manner in keeping with the spirit of European integration. One Court does not toe the line to the other but they cooperate. At least that is the intention.

The Preliminary Ruling of the European Court of Justice

In its Judgment of 11th December 2018 (*ECLI:EU:2018:1000*), the CJEU held that the Decision of the ECB Governing Council on the PSPP and its subsequent decisions were *within* the ambit of the ECB's competences, were not *ultra vires* and did not infringe the principle of proportionality. The answers to three of the five questions which the BvfG had raised in their request for a Preliminary Ruling are discussed below:

The EUCJ first ruled that the statements of reasons (behind the initiation of the PSPP) given by the ECB fulfilled the safequard measures in place to ensure a review of procedural steps taken and a careful and impartial examination of all the relevant elements and possible (side)effects of the Decisions. It did however, admit that " *in the* case *of a measure intended to have general application, which makes clear the essential objective pursued by the institutions, a specific statement of reasons for each of the technical choices made by the institutions cannot be required"*. Nevertheless, it ruled that the ECB had published sufficient information at the time of the initiation of the PSPP and the intervening years, that its Decision 2015/774 was not invalidated by any defect in the statement of reasons so as to render the Decision invalid.

Secondly, going back to 2003 when the ECB adopted the specific objective of maintaining price stability and the maintenance of inflation rates at levels below but close to 2% over the medium term, it determined that this monetary policy contained no manifest error of assessment and did not go beyond the framework of the TFEU. Thus it attached the specific objective of the ECB's Decision(s) to the primary objective of the ECB's monetary policy. Here also, the Court made an admission: *"In the present case it is undisputed that, by virtue of its underlying principle and procedures, the PSPP is capable of having an impact both on the balance sheets of commercial banks and on the financing conditions of the public deficit of the Member States covered by the programme and that such effects might possibly be sought through economic policy measures".*

Thirdly, the Court addressed proportionality in relation to objectives of monetary policy.

As regards compliance with this principle, the CJEU began by allowing the ECB considerable leeway, stating that when preparing and operating open market operations of the kind provided for in Decison 2015/774, the ECB had to make choices of a technical nature and undertake complex forcasts and assesements :"….*it must be allowed a broad discretion".* From the CJEU's extensive and praising review of the economic policies of the ECB and the mechanics generally for assisting the Member States' economies, it is clear that the Court never seriously considered inviting a discussion of the importance, scope and legality of the subject 'proportionality' with the BvfG.

In this respect a necessary review of the division of competences between the ECB and the Member States was also conveniently overlooked. Instead, the ECJ limited the scope of its review to whether there was a '*manifest error of judgement*' on the part of the ECB when initiating the PSPP, whether the PSPP had *manifestly* gone beyond what was necessary to achieve it's objective and whether the disadvantages were *manifestly* disproportionate to the objectives persued.

It concluded unequivocally that the questions put to it by the BvfG had not '*disclosed a factor of such a kind as to affect the validity of Decision (EU) 2015/774 of the European Central Bank of 4th March 2015 on a secondary markets public sector asset purchase programme, as amended by Decision (EU) 2017/100 of the European Central Bank of 11th January 2017'.*

Clearly, the ECB's objective to stabilise the European economy is not obviously wrong in itself but by introducing the concept of a '*manifest'* (in law defined as *'completely obvious* or *evident*') wrong, the CJEU deftly side stepped the central question: In introducing the PSPP did the ECB manage to step outside and beyond its remit - which is limited to monetary policy - thus subtly expanding its own field of influence in matters of economic policy and without sufficient clarification of the basis for its first and subsequent decisions?

In legal circles the EUCJ's Preliminary Ruling was generally accepted. Nevertheless, the Claimants in the joined actions, unabashed by losing this battle, did not leave matters at that but returned to the BvfG for a final interim award in what was later to be described by legal commentators as the '*War of the Courts*'.

In the next article in this series, we will discuss the Judgement of the BvFG which gave rise to the storm in European legal and political circles.

About the Author

Reina Maria van Pallandt is a senior disputes resolution lawyer with dual British and Dutch nationality. After obtaining an LLB Honors degree in Dutch Law and Public International Law at the University of Amsterdam (UvA), Reina Maria studied International Law of the Sea at London School of Economics (LSE). She was admitted as a Solicitor of the Senior Courts of England & Wales in 1979 and of the Law Society of Ireland in 2019. Reina Maria originally practised as a solicitor at Holman, Fenwick & Willan in London and Paris and thereafter at Clifford Chance where she specialised in marine and general commercial arbitration and litigation representing shipowners, P&I Clubs, shipbuilders, repair yards and charterers such as oil and gas companies and commodity traders.

Prospect Law is a multi-disciplinary practice with specialist expertise in the energy, infrastructure and natural resources sectors with particular experience in the low carbon energy sector. The firm is made up of lawyers, engineers, surveyors and other technical experts.

This article is not intended to constitute legal or other professional advice and it should not be relied on in any way.

For more information or assistance with a particular query, please in the first instance contact Adam Mikula on 020 7947 5354 or by email on adm@prospectlaw.co.uk.