

PRIMACY OF APPLICATION



While some have praised the €800bn NextGenerationEU (NGEU) recovery plan as the starting point for a European fiscal union, others criticise it for exactly this reason, calling it a de-facto communitisation of debts, disincentivising overindebted countries to apply any austerity measures whatsoever. As is so often the case, courts will rule on the legality of this measure. But what if European and national laws come into conflict – which will take precedence? **Dr. Alpay Soytürk, Chief Regulatory Officer at Spectrum Markets** helps bring clarity to this thorny topic.

Alpay, the German Federal Constitutional Court¹ (BVerfG) is currently in proceedings over two complaints against the €800bn NGEU recovery fund. Didn't the court already decide in favour of the programme over one and a half years ago?

In 2021, there was a preliminary injunction against the German president's final ratification of the recovery programme. This injunction was rejected by the court. As it explained in its reasoning for the judgement², waiting for a decision in the main proceedings would have meant preventing the president from ratifying the fund for an indefinite, disproportionately long time, thereby leading to devastating consequences. A public loss of confidence in the EU's ability to act and a sharp increase of debt servicing costs were two of the potential threats cited. However, this has to be formally separated from a decision in the main proceedings.

One year earlier, the BVerfG took a diametrically opposed decision on the ECB's³ bond purchase programme.

In May 2020, the court found that the ECB had acted beyond its mandate in that it refrained from documenting the proportionality of the Public Sector Purchase Programme (PSPP)⁴. Plus, it had qualified the European Court of Justice's (ECJ) decision to legitimise the PSPP as ultra vires⁵. Being the constitutional court of Europe's largest economy, this decision had significant repercussions at the time, since independent of the subject matter, it was perceived as questioning the primacy of application of law within an agreed-upon hierarchy of norms.

How is this hierarchy structured?

In general, a country's constitution always ranks highest. That is, no other law thereunder can supplant it. This is followed by federal law and regulations associated with it. The following hierarchy depends on a country's federal structure, there can be federal state law, regional or municipal statutes and so on.

By signing European Treaties, thereby creating primary EU law, European governments have agreed to accept the primacy of application of EU law over their national constitutions. If national law contradicts EU law, it remains in force, but it must not be applied.

How is the NGEU case different from the PSPP case?

In the PSPP case, the German constitutional court concluded that the ECJ had decided upon the legality of the purchase programme in an objectively arbitrary manner and that the German federal government and the German parliament had unlawfully failed to oppose the PSPP in advance. So, from a legal perspective, the PSPP proceedings case can be seen as being about an infringement of processes, i.e., as discussed, as a case of ultra vires.

In the case of the NGEU, one complaint is similar to the PSPP case in that it argues that the German parliament's agreement to the NGEU was beyond its mandate. The second complaint is about whether the set-up of the recovery fund constitutes a violation of EU primary law in the first place. In the view of the plaintiffs the funding and liability mechanism of the NGEU is not in accordance with article 311 TFEU⁶ – as they derive from that article a prohibition for the EU to indebt itself.

What is the political difference between the cases – aren't both about whether or not they mark the entry point of the EU into a fiscal union?

Politically, the lawsuits' motivation may be very similar. Institutions like a federal constitutional court or the ECJ shouldn't be the place to draw political conclusions though. So, technically, and based on its own legal interpretation from the PSPP case, the BVerfG will accept a decision by the ECJ unless it considers the decision methodologically arbitrary. It will accept it even if it had judged differently after considering the arguments put forward. Transferred to the alleged TFEU infringement within the NGEU case, the BVerfG would hence to have to ask the ECJ whether the European Parliament, by adopting the NGEU, exceeded its competencies. It will look into the respective judgement of the ECJ and, only if this appears methodologically arbitrary to the BVerfG, it will declare it not applicable in Germany. Only then it will rule that the German parliament was not entitled to adopt the NGEU.

However, since the NGEU is not intended to be permanent, but designed as temporarily limited special-purpose debt, for the plaintiffs, putting forward evidence that its creation was violating EU Treaties will become difficult. In other words, it is highly unlikely that a constitutional court, be it at national or supranational level, will decide on any EU act according to a political opinion over whether adopting it was a good idea or not.

But still, this is a political lawsuit, isn't it?

For the credibility and the functioning of Europe it is very important that its institutions keep working in a cooperative operational mode. In general, for any democratic state or community of states it is important that they try to strictly abide by the separation of legislative, judicial and executive powers. In recent years, we've repeatedly seen this not really working well at an EU level.

But the problem has not been that, for example, the ECB was overambitious when it said it will do whatever it takes to save the euro. The problem is rather that political agreements on how to react to extraordinary circumstances cannot be reached in reasonable time. What we should have learnt as Europeans in the meantime is that whatever crisis is ante portas, it will affect all of us similarly sooner or later. Thus, it would be much more efficient and credible to aim at straightforward changes to EU Treaties where this is or is very likely to become relevant. Thinking of the EU's SGP⁷ becoming applicable again at the end of 2023, it will become relevant quite soon.

Thank you very much!

¹ Bundesverfassungsgericht

² https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/04/rs20210415_2bvr054721.html

³ European Central Bank

⁴ Largest of four ECB asset purchase programmes under which it can buy European government bonds, bonds issued by recognised agencies, regional and local governments, international organisations and multilateral development banks located in the euro area

⁵ Acting beyond one's legal power or authority

⁶ Treaty on the Functioning of the European Union

⁷ The Stability Growth Pact (the EU's deficit rules) had been suspended in response to COVID-19; the suspension has been extended to cushion the ramifications of the Russian invasion into Ukraine

today to discuss how the seamless market access that our venue provides, can help to grow your retail client business.

Please don't hesitate to get in touch if you wish to receive further detail.

By phone
+49 69 4272991 80

By email
info@spectrum-markets.com

Spectrum is the trading name of Spectrum MTF Operator GmbH. Headquartered in Frankfurt, Germany, we offer a new way of dealing in securitised derivatives for the European retail market; introducing a purpose built 24/5 lit trading venue, with complete transparency, increased choice and maximum control.