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Oops!... We Do It Again. Attack on the Banking Union in the German Constitutional Court

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Tobias Tröger: Even ardent Europeans may learn a (limited) lesson as the court is willing to take a deeper look into the machine room of central banks' operations

Conventional wisdom suggests that the U.S. are the “litigation nation“. However, when it comes to disputes concerning euro area integration, Germans also seem to be very gung ho to slug it out in the courthouse. The long line of cases that ascertains the role of the German constitutional court

(“Bundesverfassungsgericht”, BVerfG) as a bulwark against grave European infringements of fundamental rights granted in the German constitution (“Grundgesetz”, GG) or violations of the German “constitutional identity”, provide fertile soil for this type of legal attack (for a recent analysis of the doctrine see Mehrdad

Payandeh, 'The OMT Judgement of the German Federal Constitutional Court' (2017) 13 EuConst 400). E.U. measures that press ahead on the route towards an ever closer union can easily be represented as curtailing democratic participation on the level of member states, in particular the suffrage (GG, art. 38 para. 1).

The latest push in this direction targets the two existing pillars of the European banking union, the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM). The constitutional complaint ("Verfassungsbeschwerde") seeks to strike down both the SSM-Regulation 2013/1024/EU and the SRM-Regulation 2014/806/EU as ultra vires acts, in other words, as a transfer of sovereign rights that goes beyond what would be permissible under the German constitution. As always in the instances of "close cooperation" between the German constitutional court and the Court of Justice of the European Union (CJEU), one may wonder what it would mean for the other 27 member states if the German constitutional court would hand down a judgement that indeed concurs with the complaint and "voids" E.U. legislation based on German constitutional law. Yet, the case provides another feature that warrants special attention.

The attack on the SSM-regulation is rather indirect. It stipulates that the new responsibility of the European Central Bank (ECB) for the prudential supervision of the euro area's largest banks compromises the ECB's monetary policy mandate, according to which safeguarding price stability is paramount (TFEU, art. 127 para. 1). The alleged meddling of the ECB's supervisory tasks with its monetary policy objective is relevant insofar as the German legislature cannot transfer the competence for monetary policy to the ECB if that supranational institution is not primarily bound to ensure price stability (GG, art. 88 sentence 2). The German constitutional court does not see the complaint to be without merits and therefore ordered an oral hearing on November 27 (https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-073.html;jsessionid=425D6B8F4506898464BC3BBE5A99A23E.1_cid394). Whatever the attitude towards the substance of the complaint, this should be seen as a positive signal! The German constitutional court reveals that it will not take a legalist position when it comes to adjudication matters of central bank law and financial regulation but wants to look deeper into the machine room of central banks' and supervisors' operations. On a superficial level, the German constitutional court could have dismissed the complaint immediately. After all, the law on the books with the clear definition of the ECB's overriding monetary policy objective in primary legislation has not changed and recital 65 of the SSM Regulation confirms it explicitly. What has changed, however, is the context of the law in action.

There is a broad line of literature that shows how supervisory motives can indeed affect monetary policy decisions if a single institution is tasked with the two functions (key contributions are Charles Goodhard and Dirk Schoenmaker, 'Should the Functions of Monetary Policy and Banking Supervision Be Separated?' (1995) 47 Oxford Econ Papers 539; Alan S. Blinder, 'How Central Should the Central Bank Be?' (2010) 48 JEL 123): the central bank cum supervisor can avoid or at least postpone hard supervisory decisions, or even paper over its own deficient oversight, by easing monetary policy, thereby de facto modifying the focus on inflation targets. To be sure, how much momentum such confounding incentives ultimately receive is highly context dependent. It hinges, for instance, on the specific institutional design, especially the organizational separation of monetary policy and supervisory functions at the central bank (for a skeptical analysis of the ECB in this regard see Gerrit Tönningsen, 'Trying to Square the Circle: The ECB's Janus-Faced Character post SSM and its Implications for Effective Banking Supervision' (2018) European Banking Institute Working Paper No. 27 (https://papers.ssrn.com/sol3/papers.cfm?

abstract_id=3206523)). And even if the perils prove real, it is yet another question that requires a normative judgement, if they reach a proportion that warrants the assessment that price stability is no longer the primary objective of the ECB within the meaning of the law.

Be that as it may (for an in depth discussion of the issue and an innovative proposal to solve the alleged frictions see Matthias Goldmann, 'United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union' (2018) 14 EuConst 283, 296-305 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2975998)), the positive aspect should be seen in the fact, that the German constitutional court seems to be willing to engage in such a fully contextualized, functional analysis. If it indeed proceeded along these lines, it would be much better attuned to the challenges of adjudicating central bank law and financial regulation than some European courts (see Tobias H. Tröger, 'How Not To Do Banking Law in the 21st Century - The Judgement of the European General Court (EGC) in the Case T-122/15 – Landeskreditbank Baden-Württemberg – Förderbank v European Central Bank (ECB)' (2017) SAFE Policy Letter No. 56 (https://safe-frankfurt.de/fileadmin/user_upload/editor_common/Policy_Center/SAFE_Policy_Letter__56.pdf)).

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