EUROPÄISCHE KOMMISSION

GENERALSEKRETARIAT

Brüssel, den

SG-Greffe(JAHR)D/

STÄNDIGE VERTRETUNG DER
BUNDESREPUBLIK DEUTSCHLAND
BEI DER EUROPÄISCHEN UNION
Rue Jacques de Lalaing, 8-14
1040 BRUXELLES
BELGIQUE

MD 258 TFUE / andere Fälle als Nichtmitteilung **03**

Betreff: **Aufforderungsschreiben – Vertragsverletzung Nr. [Nummer der Vertragsverletzung einfügen]**

Hiermit gestattet sich das Generalsekretariat, Sie zu bitten, beigefügtes Schreiben an den Bundesminister des Auswärtigen weiterzuleiten.

Für den Generalsekretär,

Anlage: C(JAHR)…. Final

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EUROPÄISCHE KOMMISSION

Brüssel, den

[Nummer der Vertragsverletzung einfügen]
C(JAHR)…. final

Dear Minister,

I would draw your attention to the judgment of the German Constitutional Court of 5 May 2020 concerning the joined constitutional complaints 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16 ('the judgment of the German Constitutional Court').[1]

In point 3 of the operative part of that judgment, the German Constitutional Court held, in substance, that the German federal government and the German Bundestag breached the German Basic Law by failing to take suitable steps challenging that, with its Decision (EU) 2015/774 of 4 March 2015 on a secondary markets public sector asset purchase programme (Public Sector Asset Purchase Programme, ECB/2015/10, OJ L 121 of 14 May 2015, p. 20; 'PSPP Decision'), as amended, the European Central Bank neither assessed nor substantiated that the measures provided for in that decision, as amended, satisfy the principle of proportionality.

The grounds of point 3 of the operative part of the judgment, which are binding on German institutions pursuant to Article 31 of the Act on the Federal Constitutional Court,[2] are found in the relevant sections on the effects of the findings of the German Constitutional Court on German institutions (sections C.II.5 and C.II.6 of the judgment, paragraphs 229 to 235). In turn, these sections are based on the German Constitutional Court's holding that the judgment of the Court of Justice ('Court of Justice') of 11 December 2018 in Case C-493/17, *Weiss and others* (EU:C:2018:1000) ('the *Weiss* judgment of the Court of Justice'), is *ultra vires* (section C.II.1.a of the judgment of the

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1 DE:BVerfG:2020:rs20200505.2bvr085915, available at http://www.bverfg.de/e/rs20200505_2bvr085915.html

2 *Bundesverfassungsgerichtsgesetz* (Federal Constitutional Court Act) as published on 11 August 1993 (Federal Law Gazette I p. 1473), as last amended by Article 2 of the Act of 8 October 2017 (Federal Law Gazette I p. 3546).

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German Constitutional Court, paragraphs 118 to 163), and that the PSPP decision is also *ultra vires* (section C.II.1.b of that judgment, paragraphs 164 to 178).

Accordingly, in paragraph 163 of that judgment, the German Constitutional Court first holds that the *Weiss* judgment of the Court of Justice "*has no binding force in Germany*" (emphasis added by the Commission).

Secondly, in paragraph 178 of that judgment, the German Constitutional Court holds that the PSPP Decision "*amount[s] to an ultra vires act*". In paragraph 235 of that judgment, it holds: "*To the extent that the Federal Constitutional Court finds an act of institutions, bodies, offices and agencies of the European Union to exceed the limits set by the European integration agenda (Integrationsprogramm) in conjunction with Art. 23(1) second sentence and Art. 20(2) first sentence GG, this ultra vires act does not partake in the precedence of application of EU law (Anwendungsvorrang). As a result, the ultra vires act is not to be applied in Germany, and has no binding effect in relation to German constitutional organs, administrative authorities and courts.*" (emphasis added by the Commission).

After the judgement of the German Constitutional Court, the European Central Bank adopted on 3 and 4 June 2020 certain decisions and subsequently released further information regarding the PSPP. As a result, both the *Bundestag* and the German government, based on an analysis of the *Bundesbank*, have confirmed that they consider the PSPP to be in line with the principle of proportionality.

By applications lodged in August 2020, two applicants sought an order for the execution of the *Weiss* judgement. They took the view that the actions described in the previous paragraph were insufficient to comply with the judgment of the German Constitutional Court. Therefore, they sought an order of execution that would oblige the German government and the *Bundestag* to take action in order to ensure that the Bundesbank refrains from further participating in the PSPP. The German Constitutional Court rejected that request as inadmissible, or in the alternative unfounded, by order of 29 April 2021, published on 18 May 2021.

It is standing case-law of the Court of Justice that as regards its obligations arising from Union law, a Member State constitutes a single entity and is as such responsible under Union law, irrespective of whether the relevant act is attributable to the legislature, the judiciary or the executive.[3] As regards the judiciary, this is particularly important in order to prevent the development of a line of national case-law that could be incompatible of Union law.[4] Rather, the Union Treaties bind all organs of the State, including the judiciary.[5]

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3 Cf. judgments in *Commission* v *France*, C-416/17, EU:C:2018:811, paragraphs 106 and 107; and in *Commission* v *Spain*, C-154/08, EU:C:2009:695, paragraphs 124 to 127; see also judgment in *Köbler*, C-224/01, EU:C:2003:513, paragraph 32.

4 Cf. judgments in *Ferreira da Silva*, C-160/14, EU:C:2015:565, paragraphs 36 to 45; in *Commission* v *Spain*, C-154/08, EU:C:2009:695, paragraphs 124 to 127; and in *Commission* v *Italy*, C-129/00, EU:C:2003:656, paragraph 30 to 35.

5 See references in footnote 3 above.

In particular, the judgment of the German Constitutional Court raises serious issues in regard of Union law. Consequently, the Commission services have entered into a dialogue with the German authorities about these legal issues. Following that dialogue, by letter of 23 February 2021, the German authorities took the view that these issues should be addressed by an informal dialogue between the German Constitutional Court and the Court of Justice with a view to exploring lines of "future judicial cooperation", including the possibility of a wider use of the reference procedure under Article 267 TFEU in future proceedings. Besides the fact that the suggestion made by the German authorities has not been followed-up in practice, the proposed informal dialogue could not repair the legal situation created by the judgement of the German Constitutional Court insofar as the issues raised in this letter of formal notice are concerned.

In addition, following the order of 29 April 2021 of the German Constitutional Court, published on 18 May 2021, the German authorities have informed the Commission services that, in their opinion, the PSPP proceeding before the German Constitutional Court is fully concluded without triggering any actual consequences and that the order is an important and positive signal on the way forward and for upcoming procedures. Nevertheless, the Commission considers that this development does not reverse the legal situation created by the judgement of the German Constitutional Court insofar as the issues raised in this letter of formal notice are concerned. The judgment of the Court of Justice and the grounds on which it is based continue to be deprived, in Germany, of the legal effects granted by virtue of the Union Treaties. The same applies to the original PSPP Decision. The developments after the judgement of the German Constitutional Court have avoided an actual disruption of the implementation of the PSPP Decision by virtue of acts taken by German authorities, in the light of the monetary policy decisions of the European Central Bank of 3 and 4 April 2021. However, the breaches set out in this letter of formal notice remain unaffected by those developments.

The present letter of formal notice concerns the general principles of autonomy, primacy, effectiveness, and uniform application of Union law, and those relating to Article 267 TFEU (preliminary rulings procedure) and Article 4(3) TEU (principle of sincere cooperation. Without disregarding those fundamental structural principles of Union law, the German Constitutional Court could not have found that the PSPP decision was ultra vires.

First account: General principles of autonomy, primacy, effectiveness and uniform application of Union law.

According to settled case-law of the Court of Justice, Union law is an autonomous legal order with respect both to the law of the Member States and to international law. Autonomy of Union law is justified by the essential characteristics of the Union and its law, relating in particular to the constitutional structure of the EU and the very nature of that law. Union law is characterised by the fact that it stems from an independent source of law, the Union Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of its provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured

network of principles, rules and mutually interdependent legal relations binding the Union and its Member States reciprocally and binding its Member States to each other.[6]

Union law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for Union law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.[7]

It is furthermore settled case-law that, by virtue of the principle of primacy of Union law, which is an essential feature of the Union legal order,[8] "the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called into question".[9] In consequence, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of Union law on the territory of that State.

In order to ensure that the specific characteristics and the autonomy of the Union legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of Union law.[10]

Finally, it is settled case-law that national courts do not have the power to declare acts of the Union institutions invalid. The main purpose of the jurisdiction conferred on the Court by Article 267 TFEU is to ensure that Union law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of a Union act is in question. Differences between courts of the Member States as to the validity of Union acts would be liable to jeopardise the very unity of the Union legal order and

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6 Judgment in *Achmea*, C-284/16, EU:C:2018:158, paragraph 33; see, to that effect, also Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited.

7 Judgment in *Achmea*, C-284/16, EU:C:2018:158, paragraph 34; Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited.

8 Opinion 1/91 (EEA Agreement I), EU:C:1991:490, paragraph 21, and Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, paragraph 65.

9 Judgments in *Costa/ENEL*, 6/64, EU:C:1964:66, page 1145 ; *Internationale Handelsgesellschaft*, 11/70, EU:C:1970:114, paragraph 3; *Dow Chemical Ibérica/Commission*, 97/87, 98/87 and 99/87, EU:C:1989:380, paragraph 38, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 61 and *Melloni*, C-399/11, EU:C:2013:107, paragraph 59.

10 Judgment in *Achmea*, C-284/16, EU:C:2018:158, paragraph 35; Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 174

undermine the fundamental requirement of legal certainty.[11] The Court of Justice alone therefore has jurisdiction to declare a Union act invalid.[12]

For the Commission, the judgment of the German Constitutional Court is incompatible with the fundamental principle of autonomy of the Union legal order. The German Constitutional Court first declares that the *Weiss* judgment of the Court of Justice is *ultra vires* and has no binding effect in Germany. After doing so, it sets out its own interpretation of Union law and assesses the legality of the PSPP Decision on the basis of that own interpretation, declaring it *ultra vires* as well.[13] In relation to the judgment of the Court of Justice and to the PSPP decision, the German Constitutional Court thus disregards the autonomy of the Union legal order, subjecting it to an external judicial review, and putting in question the mutual trust between the Member States that the law of the Union will be respected.

In the same way, the judgment of the German Constitutional Court appears incompatible with the principle of primacy of Union law and jeopardises the effectiveness of Union law in Germany. Indeed, the German Constitutional Court explicitly holds that the PSPP Decision "*does not partake in the precedence of application of EU law*" and "*has no binding effect in relation to German constitutional organs, administrative authorities and courts*". In that context, the German Constitutional Court applies rules of its national legal order in a way that also puts in question the effectiveness of Union law in Germany. By doing so, the judgment of the German Constitutional Court also sets aside the authoritative and final interpretation of Union law by the Court of Justice, which is a particular expression of the primacy of Union law, and is essential for the consistency and uniformity of interpretation and application of Union law.

Finally, the judgment of the German Constitutional Court puts in question the exclusive competence of the Court of Justice to declare acts of Union law invalid. Indeed, while not formally declaring the PSPP Decision invalid, the judgment of the German Constitutional Court subjects the continued binding force of the PSPP Decision in Germany to the condition that within three months, "*the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme*".[14] This finding does not appear to have a mere preliminary character as is demonstrated by the fact that, to come to that finding, the German Constitutional Court definitively declares ultra vires the *Weiss* judgment of the Court of Justice. By doing so, the German Constitutional Court has created a legal situation equivalent to that which the case-law of the Court of Justice seeks to avoid and has taken a decision that runs counter the PSPP Decision.

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11 Judgments in *Foto-Frost*, 314/85, EU:C:1987:452, paragraphs 15 and 20; *IATA*, C-344/04, EU:C:2006:10, paragraph 27 and *OTIS*, C-199/11, EU:C:2012:684, paragraphs 53 and 54.

12 Judgments in *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, EU:C:1991:65, paragraph 17; and in *Greenpeace France and Others*, C-6/99, EU:C:2000:148, paragraph 54.

13 Judgment of the German Constitutional Court, paragraphs 168 to 179.

14 Judgment of the German Constitutional Court, paragraph 235.

An informal dialogue between the German Constitutional Court and the Court of Justice with a view to exploring lines of "future judicial cooperation", as suggested in the abovementioned letter of 23 February 2021, could not alter this conclusion. Indeed, the persisting violation of fundamental principles of EU law created by the judgement of the German Constitutional Court would remain unaddressed by such an informal dialogue.

Second account: The binding force of judgments handed down pursuant to Article 267 TFEU and of the duty of loyal cooperation pursuant to Article 4(3) TEU

In accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of Union law in all Member States and to ensure judicial protection of the rights of individuals under that law.[15]

In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of Union law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.[16]

Consequently, under the judicial system of the Union Treaties, a judgment in which the Court of Justice gives a preliminary ruling on the interpretation or validity of an act of a Union institution conclusively determines a question or questions of Union law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings.[17]

By holding that the *Weiss* judgment of the Court of Justice has "*no binding force in Germany*",[18] the judgment disrespects a final and binding judgment of the Court of Justice.

The Commission takes the view that any differences of view between a referring national court and the Court of Justice have to be resolved through dialogue in the preliminary rulings procedure, which can be, if needed, an iterative process (or "repeated dialogue").[19] In accordance with settled case law, the authority of a preliminary ruling does not preclude the national court to which it is addressed from properly taking the view that it is necessary to make a further reference to the Court of Justice before giving judgment in the main proceedings. According to the case law, such a procedure may be

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15 Judgment in *Achmea*, C-284/16, EU:C:2018:158, paragraph 36; Opinion 1/09 (Agreement creating a unified patent litigation system), EU:C:2011:123, paragraph 68; Opinion 2/13 (Accession of the Union to the ECHR), EU:C:2014:2454, paragraph 175; and Judgment in *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 33.

16 Judgment in *Achmea*, C-284/16, EU:C:2018:158, paragraph 37; Opinion 2/13 (Accession of the EU to the ECHR), EU:C:2014:2454, paragraph 176 and the case-law cited.

17 Judgments in *Benedetti*, 52/76, EU:C:1977:16, paragraph 26, in *Fazenda Pública*, C-446/98, EU:C:2000:691, paragraph 49, and in *Gauweiler*, C-62/14, EU:C:2015:400, paragraph 16, and order in *Wünsche*, 69/85, EU:C:1986:104, paragraph 13.

18 Judgment of the German Constitutional Court, paragraph 163.

19 See, for example, judgment in *M.A.S. and M.B.*, C-42/17, EU:C:2017:936.

justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier.[20] The obligation to continue judicial dialogue and refer again follows from Article 267 TFEU, interpreted in the light of the principle of sincere cooperation enshrined in Article 4(3) TEU. An informal dialogue between the German Constitutional Court and the Court of Justice with a view to exploring lines of "future judicial cooperation", as suggested in the abovementioned letter of 23 February 2021, could not alter or even replace the mechanism of judicial dialogue established by the Treaties.

Consequently, due to the fact that the German Constitutional Court found that the Weiss judgment of the Court of Justice had no binding force in Germany, the Commission considers that Germany has failed to comply with Article 267 TFEU, because judgments rendered pursuant to this provision are binding and final. In addition, since the German Constitutional Court declared the judgment of the Court of Justice ultra vires instead of referring the matter again to the Court of Justice in view of the difficulties it had with the judgment of the Court of Justice, Germany has also disregarded its obligations under Article 267 TFEU, interpreted in the light of the principle of sincere cooperation set out in Article 4(3) TEU.

Conclusion

The European Commission consequently takes the view that Germany has failed to fulfil its obligations under the general principles of autonomy, primacy, effectiveness and uniform application of Union law, and under Article 267 TFEU, interpreted in the light of the principle of sincere cooperation set out in Article 4(3) TEU.

The Commission invites your Government, in accordance with Article 258 of the Treaty on the Functioning of the European Union, to submit its observations on the foregoing within two months of receipt of this letter.

After examining these observations, or if no observations have been submitted within the prescribed time-limit, the Commission may, if appropriate, issue a Reasoned Opinion as provided for in the same Article.

Yours faithfully,

For the Commission

Ursula von der Leyen

President of the Commission

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[20] Judgment in *Pretore di Salò*, 14/86, EU:C:1987:275, paragraph 12, and order in *Wünsche*, 69/85, EU:C:1986:104, paragraph 15. In the same paragraph, the Court adds: *"However, it is not permissible to use the right to refer further questions to the Court as a means of contesting the validity of the judgment delivered previously, as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice under Article 177 of the Treaty [Article 267 TFEU]*".