

EU MUST ACT AGAINST GERMAN COURT THREAT

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The ruling by Germany's constitutional court last week casting doubt on the legality of bond-buying by the European Central Bank is of such monumental significance for the integrity of the EU that it cannot be left unchallenged. The court in Karlsruhe in effect declared null and void a 2018 judgment by the European Court of Justice, the EU's highest legal instance, that ECB asset purchases were lawful. The German judges said the ECJ had not considered the proportionality of the central bank's policy and so had acted *ultra vires*, or beyond its authority.

The German judges chose to disregard treaty obligations, which state that only the ECJ can adjudicate on whether an EU body has broken EU law. Their judgment amounts to a unilateral declaration of constitutional independence from the EU legal order. Some have already compared it to South Carolina's nullification of federal law in pre-civil war America. The EU is a community of law. It is a formidable achievement. Integration has created European rights and obligations that can be enforced in national and European courts. The ECJ exists to ensure the law is applied uniformly. The German court has been spoiling for a fight for almost three decades, gradually building an argument that it has the right to police the boundaries between EU and national competences. Its explosive judgment in the ECB case puts the entire EU legal order in jeopardy. For this reason alone infringement proceedings by the European Commission are merited.

What makes the Karlsruhe court's decision especially dangerous is the encouragement it gives to other countries looking to defy the ECJ as they unpick democratic checks and balances and the rule of law. The Polish government was quick to applaud the German ruling. Warsaw has already lost two cases with the ECJ over its attempts to cow its judiciary. Now it is trying to use new rules to install a pliant head of the supreme court. It's hard to see how the European Commission, the guardian of the EU treaties, can act against Warsaw if it fails to act against Berlin. It should launch infringement proceedings against both. Its credibility is at stake as is that of Ursula von der Leyen, its German president.

There are no clear cut solutions to this judicial imbroglio. The independence of courts and central banks makes them hard to push around. The Karlsruhe court has taken up complaints against bond-buying on the grounds that it is protecting the plaintiffs' democratic rights. This is something of a stretch, but it means its jurisdiction is well protected by the constitution.

The best outcome would be for Germany's central bank to satisfy the Karlsruhe court with a detailed justification of the ECB's prepandemic bond-buying.

The German ruling might then be consigned to oblivion as a judicial aberration. It is unlikely to be so simple. The Bundesbank has never been an enthusiastic supporter of QE. The court may object to the arguments provided. The ECB's critics will almost certainly pursue litigation.

An infringement action has downsides too. It must be brought against the German government even though Berlin has mostly supported QE. It might inflame Eurosceptic sentiment. Worst of all, it could lead to another ECJ judgment that the Karlsruhe court simply refuses to accept. Still, an infringement action is indispensable. It would be a long process and a chance for dialogue between the EU and Berlin. Ultimately, Germany's political leaders need to take ownership of the problem and find a solution, even if it means, in the long term, changing the basic law or the EU treaties.