Special Issue
The OMT Decision of the German Federal Constitutional Court

Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference

By Franz C. Mayer[*]

"We head for the edge. The first guy who jumps--chicken!"
(Rebel without a Cause, 1957)

A. Introduction

One of the most famous scenes from the 1957 James Dean movie classic "*Rebel Without a Cause"* is the chicken run scene. Two cars are speeding towards an abyss; the one who slows down or jumps out of the car first loses. The chicken run in the movie ends in tragedy; when one of the protagonists finally tries to get out of his car, it is too late—he is caught in the car and dies.

The German Constitutional Court's latest actions in the Euro crisis[1] remind me of this chicken run: A court speeding towards the edge, trapped in its own reasoning, making it increasingly difficult to get out in time. The decision to submit its first preliminary reference ever to the European Court of Justice (ECJ)[2] appears at first to be a decision to get out of the car in time. But looking closer, it turns out that this reference to the ECJ is, in

[*] Professor, Dr. jur., LL.M. (Yale), Chair of Public Law, European Law, Comparative Law, Law and Politics, University of Bielefeld, Faculty of Law. Contact: franz.mayer@uni-bielefeld.de. I wish to thank Imke Decker and Marina Ermes (Bielefeld) and Dr. Mattias Wendel (Berlin) for helpful comments.

[1] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 2728/13, (Jan. 14, 2014). Before the OMT decision, the German Constitutional Court dealt with aspects of the Euro crisis in the *Greece/EFSF* decision, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 987/10, (Sept. 7, 2011); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvE 8/11, (Feb. 28, 2012) ("Committee of Nine" decision); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvE 4/11, (June 19, 2012); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1390/12, (Sept. 12, 2012). Older cases related to the Euro are Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 89, 155, (Oct. 12, 1993) (Maastricht decision); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 97, 350 (Mar. 31, 1998); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 123, 267 (June 30, 2009).

[2] Gauweiler and Others, ECJ Case C-62/14 (pending). Peter Gauweiler is a Member of German Parliament and a vice-chairman of one of the governing parties (CSU); he was also a plaintiff in the Lisbon case at the German Constitutional Court and is considered an EU-skeptic. Other parties in the case are an NGO promoting direct democracy and the Left Party Parliamentary Group in Federal Parliament.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

fact, the right thing done in the wrong way at the wrong time. The one thing it is not is a surrender, as some initial media comments suggested.

Let me first explain the decision and its background—Sections B and C—before I turn to an analysis—Section D.

B. The German Federal Constitutional Court's OMT Reference

On 7 February 2014, the German Federal Constitutional Court published a decision dated 14 January 2014, submitting for the first time in its history a preliminary reference question to the ECJ in Luxemburg.[3] The issue at stake is whether or not the Outright Monetary Transactions (OMT) program announced by European Central Bank (ECB) President Draghi in September 2012 is compatible with the law of the European Union and with German constitutional law. The issue was part of a case pending before the German Federal Constitutional Court that also concerned the legality of the European Stability Mechanism Treaty and the Fiscal Treaty. In September 2012, the Constitutional Court rendered a decision in the case refusing to grant interim measures, effectively giving the go-ahead for the two treaties. The issue of ECB action was not dealt with then, as the OMT program was introduced just one week before the ruling of the Court. The Court ended up splitting the case, announcing that it would issue the final ruling on the two treaties in March 2014, and that it would submit a preliminary reference concerning the OMT program to the ECJ. The decision was taken by six votes to two, with the two senior judges of the Court's Second Senate, Judge Lübbe-Wolff and Judge Gerhardt, dissenting.

C. Frequently Asked Questions (FAQs)

The issues at stake are highly complex. It is therefore helpful to clarify a number of core questions first.

I. What is This All About?

Governments need money. Part of this money is generated by taxes. Governments also attain money by issuing bonds, in return for which they must pay interest rates. Interest rates reflect the investors' (bond holders') level of confidence that they will get their

[3] The decision to separate the OMT issue from the ESM/Fiscal Compact part was made as early as December 2013, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1390/12, (Dec. 17, 2013). The Constitutional Court issued an interim decision on the case on 12 September 2012. *See* BVerfG, 2 BvR 1390/12. *See* Mattias Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, 14 German L.J. 21 (2013). The final judgment on the ESM/Fiscal Compact part of the case was issued on 18 March 2014 and basically confirmed the interim decision, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1390/12, (Mar. 18, 2014).

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

money back. If the interest rates a government must offer to attract investors climb beyond a certain threshold, they become untenable. In the Euro crisis, the solution to this problem was the introduction of the European Stability Mechanism (ESM), an entity that can provide loans and other financial assistance to states in trouble, so long as the states asking for help are willing to submit to strict conditions ("conditionalities").[4] The ESM mainly gets its funds on the financial markets.[5]

On 12 September 2012, the German Constitutional Court refused to grant interim measures in the ESM case, yet allowed German participation in the ESM only under the strict condition that German Parliament remains in control of ESM action at all times. This means that in ESM decision-making bodies, the German government representative's vote on any essential issue must first be cleared by German Parliament.[6]

In a parallel development, also in September 2012, the European Central Bank (ECB) published a statement that it would if necessary relieve the pressure on Euro states in trouble by buying bonds on the secondary market issued by these states if they committed themselves to a European Financial Stability Facility (EFSF)/ESM-program and strict conditions. This is the Decision of the Governing Council of the ECB of 6 September 2012 on Technical Features of Outright Monetary Transactions (OMT).[7] In principle, the OMT program serves the same purpose as the ESM, which is upholding the liquidity of states in trouble—but obviously the German Parliament (*Bundestag*) has no say here. The mere press release on the possibility of the OMT program was sufficient to calm down the markets. However, one can imagine that the German Constitutional Court was not amused to find out that by issuing a mere press release, the ECB had basically sidelined the

[4] *See* http://www.esm.europa.eu/ for details. The ESM replaced the temporary EFSF.

[5] There is also a capital stock funded by the Euro states, though.

[6] See for the details the Act for Financial Participation in the European Stability Mechanism (*Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus*), in short ESM Financing Act, ESMFinG. In the words of the Court:

> . . . it follows from the democratic basis of budget autonomy that the Bundestag may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the Bundestag's control and influence (BVerfGE 129, 124 <179-180>).

Bundesverfassungsgericht [BVerfG – Federal Constitutional Court],,2 BvR 1390, 1421, 1438, 1439, 1440/12, 2 BvE 6/12 at para. 213 (*ESM and Fiscal Treaty*, interim measures).

[7] Available at http://www.ecb.europa.eu/. Details on the ECB action are also explained in the General Court's Order of 10 December 2013 on OMT, Von Storch and Others v. ECB, Case T-492/12 (appeal pending before the ECJ as Case C-64/14 P). The OMT program was a follow-up to the Securities Market Programme (SMP) that already aimed at buying struggling Euro Member States' bonds on the secondary market.

sophisticated construct of extensive *Bundestag* rights the Court had invented to protect the German tax payer from harm. Even worse, ECB action is subject neither to national constitutional court review nor to national parliamentary approval.[8]

The plaintiffs in the pending ESM and Fiscal Treaty case, in which the Court had just refused to grant interim measures in September 2012, introduced the OMT issue to the case. The result was that the oral hearings in the main proceedings in June 2013 turned into a tribunal on the ECB's OMT program.[9]

From a certain perspective, the confrontation between the Constitutional Court and the ECB—both of which are counter-majoritarian institutions—resembles a chicken run, reminiscent of that in "*Rebel Without a Cause"*.

II. Is the ECB's OMT Program Compatible with EU Law?

According to the majority opinion underlying the reference of the German Federal Constitutional Court, the answer is no.[10] The six judges of the Constitutional Court's second senate believe that the OMT program is outside the mandate of the ECB, exceeding the realm of monetary policy.[11] They also believe that the OMT violates the prohibition on monetary financing. They submit to the ECJ the question of how the relevant provisions of EU law[12] are to be interpreted, already suggesting the answer. For them, the only way to "save" the OMT program would be a restrictive interpretation of EU law which would mean e.g. to impose limits on the overall amount of purchases.[13] If the conditions deduced by way of an interpretation of EU law recommend by the six judges to the ECJ in recital 100 of the decision were met (see *infra, VI.,* for details), the OMT program would be compatible with EU law. The problem is that with these restrictions, the OMT would be a different program, crippled and ineffective.

[8] The Court majority clearly spells out that it compares ESM and OMT. *See* BVerfG, 2 BvR 2728/13 at paras. 40, 78.

[9] Observers found the selection of economists heard by the Court to have been quite one-sided anti-ECB. *See* Andreas Wiedemann, *Overview of the Karlsruhe Hearing on OMT*, BRUEGEL (June 13, 2013), http://www.bruegel.org/nc/blog/detail/article/1109-overview-of-the-karlsruhe-hearing-on-omt-summary/.

[10] BVerfG, 2 BvR 2728/13 at paras. 55-98.

[11] Id. at paras. 63, 69. The Court argues that the delimitation depends on the aim of an act, which is to be determined objectively, and they point to the ECJ's arguments in drawing the line between Member State powers and EU powers in the Pringle case. Pringle v. Ireland, Case C-370/12, 2012 E.C.R. I-0000 (Nov. 27, 2012). The majority also displays its bias by referring to "the convincing expertise of the *Bundesbank*." BVerfG, 2 BvR 2728/13 at para. 71.

[12] The provisions are Articles 119, 127(1), (2) Treaty on the Functioning of the European Union [TFEU], and Articles 17–24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank; Articles 123, 130 TFEU also play a role.

[13] BVerfG, 2 BvR 2728/13 at para. 100. See *infra* FAQ VI for the details of the limits suggested.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

The dissenting opinions are more convincing to me, and it is regrettable that the two senior judges dissenting did not speak up in earlier cases where the same issues arose. They emphasize that the ECB's claim that the OMT program is a monetary policy mechanism, and that the objective of the OMT decision is first and foremost the re-establishment of the monetary transmission mechanism, cannot be invalidated. They also stress that the issue belongs to the realm of political questions and that the court should refrain from interfering. This is the better approach. It is quite stunning that the six majority judges believe they are able to decide a question that was—and is—highly controversial, even among economists. As the dissenting opinion of Judge Lübbe-Wolff states,[14] it is, in fact, the Constitutional Court that oversteps the limits and boundaries of its powers and of its expertise.

III. Why Can a Member State Court Actually Scrutinize European Action and Even Declare it Invalid?

Thinking twice, one may wonder why the German Constitutional Court examines the legality of the OMT program under EU law in the first place, as the interpretation and validity of EU law is not the likely business of national constitutional courts.

However, questions relating to the interpretation of EU law are actually quite often an issue in domestic cases at any court level in the EU. In order to ensure a uniform interpretation of EU law, national courts can—and in certain cases even must—submit questions of interpretation to the ECJ by means of the preliminary reference procedure.[15] In that procedure, the ECJ answers questions of interpretation and validity that arise in national cases, sending the answer back to the domestic court, which will render the final judgment based on the EU law interpretation given by the ECJ.

The ECJ has made it very clear that national courts have no right to invalidate EU law or to declare it inapplicable.[16] This is quite plausible because it is the only way to maintain the concept of uniform EU law, preventing the development of potentially 29 versions of EU law—28 Member State versions plus one ECJ version. Such a situation would lead to a high degree of legal uncertainty. The Treaties clearly name the ECJ as the final arbiter on the interpretation and validity of EU law as well as acts emanating from EU institutions. The Treaty on the Functioning of the European Union (TFEU) states, "Member States undertake

[14] BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at para. 2).

[15] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[16] Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, 1987 E.C.R. 4199, 4231 (Oct. 22, 1987).

not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."[17]

The German Constitutional Court never quite accepted the ECJ's role as final arbiter, though.[18] Initially, as early as 1974, the Court insisted on the final word on fundamental rights issues. Meanwhile, however, the German Constitutional Court' jurisprudence has reduced the likelihood of an actual scrutiny of EU acts for their compatibility with German fundamental rights standards to a mere hypothetical option; the Court now accepts that the ECJ is in charge when it comes to fundamental rights protection against EU acts.[19] Therefore, the issue seems to be settled today.

In 1993, however, the Constitutional Court promulgated its "*ultra vires* doctrine" in the Maastricht decision.[20] In that case, the Court established a constitutional law reserve of power over the exercise of competences by the EU. Accordingly, the Court may examine whether acts at the European level conform to the boundaries set for the transfer of public powers to the EU.[21] The Court justifies its right of control over *ultra vires* acts—in the decision, the Court speaks of *ausbrechende Rechtsakte*,[22] literally translated as "acts breaking out"—by pointing to the constraints of German constitutional law. What the Court actually does with the concept of *ausbrechende Rechtsakte* amounts to an

[17] TFEU art. 344.

[18] *See* Karen Kaiser & Isabel Schübel-Pfister, *Der ungeschriebene Verfassungsgrundsatz der Europarechtsfreundlichkeit: Trick or Treat?*, *in* 2 LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS 545-71 (Sigrid Emmenegger & Ariane Wiedmann eds., 2011).

[19] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 37, 271, 282 (May 29, 1974) (*Solange I* decision) (English translation in: *Decisions of the Bundesverfassungsgericht* Vol. 1, Part II, 270 (Federal Constitutional Court ed.,1992),THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW 440 (Andrew Oppenheimer ed., 1994), [1974] 2 CMLR 540); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 73, 339 (Oct. 22, 1986) (*Solange II* decision) (English translation in: *Decisions of the Bundesverfassungsgericht* Vol. 1, Part II, 613 (Federal Constitutional Court ed.,1992), THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW 461 (Andrew Oppenheimer ed., 1994), [1987] 3 *CMLR* 225); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 102, 147 at para. 39.

[20] BVerfGE 89, 155 (Oct. 12, 1993) (*Maastricht* decision). The decision and the proceedings are well documented in Ingo Winkelmann, DAS MAASTRICHT-URTEIL DES BUNDESVERFASSUNGSGERICHTS VOM 12. OKTOBER 1993 (1994). *See also* Franz C. Mayer, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG 98–116 (2000); Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 399-439 (Armin v. Bogdandy & Jürgen Bast eds., 2010).

[21] BVerfGE 89, 155, 188 (Oct. 12, 1993) (*Maastricht* decision).

[22] For the terminology, see the Kloppenburg decision of the German Constitutional Court Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 75, 223 (Apr. 8, 1987). On the distinction between *ultra vires* acts in a narrow sense (i.e., overstepping competences defined according to area) and in a broad sense (i.e., the general illegality of an act), *see* Franz C. Mayer, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG 24-30 (2000).

independent interpretation of European law: According to the Constitutional Court, the plan of integration[23] outlined in the *Bundestag's* Act of Assent (*Zustimmungsgesetz*) and in the EU Treaties cannot be substantially altered later on by European *ultra vires* acts. In such a case, the substantially altered plan of integration would no longer be considered to be empowered by the Act of Assent.

This line of reasoning essentially amounts to a doubling of the relevant standards. European acts have to be compatible with the guarantees of the German Constitution and, of course, with European law. This is the case because the Constitutional Court actually reviews a given European act as to its compatibility with the Act of Assent. The European act is thus reviewed by the standard of a "German version" of European law (the "Constitutional-law-version" of EU law). The alleged limitation on scrutinizing the Act of Assent under a German constitutional law standard, hence, only seems to be a trick: Actually, the compatibility of a European act with German constitutional law depends on its compatibility with European law—that is, the way the Constitutional Court interprets European law.

The legal consequence of deeming a European act to be *ultra vires* is the loss of its binding character on Germany. This amounts to a German constitutional law-based reserve of power over European acts, restricting the primacy of European law. In such a situation, the Constitutional Court takes on the role of the final arbiter.

To make that very clear: Considering the clear wording of the EU treaties and the role attributed to the ECJ as final arbiter, the *ultra vires* doctrine of the German Constitutional Court is not only incompatible with Germany's obligations under EU law (see supra Article 344 TFEU), it is also in contradiction with established principles of Public International Law and of the constitutional law of federal entities.[24]

[23] Strangely enough, the German Constitutional Court also used the idea of an underlying "integration program" in the context of the NATO Treaty. *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 104, 151 (Nov. 22, 2001); *see also* Markus Rau, *NATO's New Strategic Concept*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 545, 570 (2001).

[24] In that sense the former German Constitutional Court Judge, Brun-Otto Bryde, *Transnationale Rechtsstaatlichkeit, in* FESTSCHRIFT FÜR RENATE JÄGER 65, 70 (Christine Hohmann-Dennhardt et al. eds., 2011).

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

IV. Why Did the Six Judges of the Court's Second Senate Submit a Reference to the ECJ Although They Seem Convinced that the OMT Program is Outside the ECB's Mandate?

According to some observers,[25] there is a short answer to this question: The Court was deeply divided into three factions—the dissenting judges, the judges who wanted to declare the OMT program *ultra vires* right away, and the judges who insisted on submitting a preliminary reference first. The result is simply a compromise between the latter two factions, a reference, but in the language and with the undertone of an *ultra vires* verdict.

The more elaborate answer is this: The Constitutional Court's *ultra vires* doctrine has evolved over the years. Without ever having declared an EU act *ultra vires* since 1993, the Court confirmed the *ultra vires* doctrine in its 2009 decision on the Lisbon Treaty,[26] and even reflected on the German legislator changing the Court's statute law in order to codify an *ultra vires* control remedy.[27]

Probably reacting to an overwhelming critique of the *Lisbon* decision,[28] the Constitutional Court recalibrated the *ultra vires* doctrine in its 2010 *Honeywell* decision.[29] Here, the Court ruled that an *ultra vires* decision invalidating EU law in Germany depends on a number of preconditions, making it quite unlikely that the Court would actually declare EU law *ultra vires*. In addition to the general requirement of exercising *ultra vires* control in an "*europarechtsfreundlich*" (EU law-friendly) manner,[30] the EU act in question must exceed EU competences in an obvious manner, amounting to a structural shift in the balance of competences between the EU and Member State level, and the ECJ must have had the possibility to scrutinize the EU act in question. This reasoning implies that the Constitutional Court is required to submit a preliminary reference to the ECJ if it intends to declare an EU act *ultra vires*.

This is exactly the state of affairs: The Constitutional Court considers the OMT program to be an obvious *ultra vires* act which affects the structural balance between the EU and the

[25] Lisa Nienhaus und Christian Siedenbiedel, *Richter Hasenherz*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Feb. 9, 2014, at 19.

[26] BVerfGE 123, 267, 353-355 at para. 240-241.

[27] The legislator did not take any action so far.

[28] See for example the contributions by Schönberger, Möllers & Halberstam, and Tomuschat in the special section of the special issue on the Lisbon Judgment of the Federal Constitutional Court in 10 German L.J. 1209, 1241, 1260 (2009).

[29] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 126, 286, 303-307, paras. 58-66 (July 6, 2010). *See also* Franz C. Mayer and Maja Walter, *Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss*, JURA 532 (2011).

[30] BVerfGE 126, 286, 303 at para. 58.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

Member States. They are simply following the *Honeywell* protocol, ensuring that the ECJ has had the opportunity to declare the act in question illegal, thus rendering further action by the Constitutional Court unnecessary.

V. Will the ECJ Accept a Question That is More of a Diktat *Than a Question?*

It is unclear whether the question submitted by the German Constitutional Court meets the formal preconditions of a preliminary reference under Article 267 TFEU. It is quite difficult to argue that the ECB decision and the ECB press release on possible action in the future—which is basically all there is on the OMT program—produce legal effects on individuals.[31] The OMT program has not been initiated yet, and arguably never will be. The ECJ could easily say that the Constitutional Court can come back with its preliminary reference question once the OMT program has materialized to the level of legal acts implementing the program. At this point, OMT is just a vague announcement of possible ECB action in the undetermined future.

The Constitutional Court anticipates this problem[32] and submits an alternative set of questions to the ECJ, which is based more generally on a decision of the "Euro-system" rather than on the ECB's OMT decision and press release. Here, of course, the problem may arise that in the context of the preliminary reference procedure, the ECJ does not accept hypothetical questions. "The duty assigned to the Court by Article [267] is not that of delivering advisory opinions on general or hypothetical questions," the ECJ says.[33]

One of the dissenting opinions also points to this issue: Is it really a question if you already imply what you consider to be the correct answer?[34] National courts submitting a preliminary reference must be faced with a genuine question of EU law relevant to the pending case.. They are therefore required to explain why the issue of interpretation or validity of EU law is relevant to the outcome of their case. This requirement means that it may be necessary to elaborate on possible interpretations of the EU law in question. Typically, the national courts submitting a reference will explain that interpretation A will lead to outcome X, while interpretation B will lead to outcome Y. Often, the courts will also indicate their preference for interpretation A or B. However, they will regularly emphasize

[31] *See* Von Storch and Others v. ECB, Case T-492/12 (Dec. 10, 2013) (Order of the General Court refusing to grant standing for individuals in that context).

[32] BVerfG, 2 BvR 2728/13 at para. 101.

[33] The ECJ will not answer questions that are submitted to it within the framework of procedural devices arranged by the parties in order to induce the Court to give its views on certain problems of EU law that do not correspond to an objective requirement inherent in the resolution of a dispute. Foglia v. Novello, Case 244/80, 1981 E.C.R. 3045, para. 18.

[34] *Cf*. Judge Lübbe-Wolff in her dissenting opinion to the OMT reference, BVerfG, 2 BvR 2728/13, (Lübbe-Wolff, dissenting at para. 11).

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

that they have doubts as to the correct interpretation. The German Constitutional Court does not show signs of holding doubts.

In addition, pointing to the logic of the German Constitutional Court's *ultra vires* doctrine, the ECJ could argue that if the national court insists on the final word—that is, the final interpretation of EU law —there is no genuine question in the sense of Article 267 TFEU. One could even argue that the ECJ risks endorsing and encouraging national courts' claims to be allowed to submit and reject EU law in an *ultra vires* review if the ECJ simply answers the Constitutional Courts questions without addressing the claim of the German Constitutional Court to have the final say.

Still, because of the importance and the visibility of the case, it appears unlikely that the ECJ will simply send back the file to Germany. Unlikely—but not impossible.

VI. What Are the Conditions Under which the German Constitutional Court Would Consider the OMT Program Legal?

The Constitutional Court enumerates the conditions that would render the OMT program legal in recital 100 of the decision. In a nutshell: OMT must have limits, no "haircuts" (i.e. debt cuts), no distortion of market prices for the bonds. In the words of the Court: the OMT program must "not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism"; it must "only be of a supportive nature with regard to the economic policies in the Union", which "requires, in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded", "that government bonds of selected Member States are not purchased up to unlimited amounts", "and that interferences with price formation on the market are to be avoided where possible".[35]

One interpretation of these remedial conditions is that they render the OMT program ineffective and seriously cripple the ECB.[36] On the other hand, the criteria can be read as open to broad interpretation. Thus, the Constitutional Court's formal criterion of "no unlimited amounts" could be met by setting a very high limit—amounting to hypothetical dimensions—, while leaving the ECB with credibility and sufficient room to maneuver.
The ECJ could also indicate that OMT must indeed have limits, as the program operates within a certain mandate. Yet at the same time, the ECJ could clarify that because of the specific function of the ECB as an independent central bank,[37] it is up to the ECB to define

[35] BVerfG, 2 BvR 2728/13 at para. 100.

[36] Marcel Fratzscher, *Ein Richterspruch mit Risiko*, DIE ZEIT (Feb. 7, 2014), http://www.zeit.de/wirtschaft/2014-02/gastbeitrag-fratzscher-bundesverfassungsgericht-ezb.

[37] *See* TFEU art. 130, May 9, 2008, 2008 O.J. (C 115) 47. The independence of the ECB is even mentioned in Article 88 of the German Constitution (Basic Law).

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

these limits, beyond which only the ECJ can play a role in assessing the limits of ECB action in exceptional cases. In other words, it does not seem unlikely that the ECJ will pay lip service to the conditions laid down in recital 100 without creating actual impediments for the ECB. This would leave the ECB intact and open up a way out for the Constitutional Court, in order to avoid a head-on confrontation—or, to stick with the 1957 movie analogy, the abyss. Maybe the German Constitutional Court needs help to get out of the car. Maybe the Court needs help to realize that they were the only car in the race in the first place.

VII. Will the ECJ Decide within Weeks?

No. Preliminary references can take between a few weeks in matters of life and death and, in less pressing situations, currently 17 months for a response.[38] According to Article 267 (4) TFEU, in cases with regard to a person in custody, the ECJ acts with the minimum amount of delay. According to Articles 105 *et seq.* of the Rules of Procedure of the ECJ, the national court submitting a reference can request an expedited procedure. In the Pringle reference concerning the ESM Treaty, the Irish Supreme Court requested that the ECJ apply an accelerated procedure, which led to a decision of the ECJ within less than four months.[39] Nevertheless, the Federal Constitutional Court did not ask for acceleration. Unless the ECJ decides otherwise—which is still possible—the case will be handled more or less like an ordinary preliminary reference, with a judgment being delivered at some point in 2014 or in 2015.

VIII. Will We See Another Oral Proceedings Battle?

No. Oral proceedings at the ECJ differ from the oral proceedings at the German Constitutional Court. The oral proceedings at the German Constitutional Court in the ESM/Fiscal Treaty case were a two-day media and expert witness battle, involving members of the German government, the President of the *Bundesbank* (German central bank), a member of the ECB board, as well as economists fighting over the Euro's future. At the ECJ, only legal counsel of the parties may intervene. Politicians or expert witnesses are usually not present.

IX. Can the ECB Still Initiate the OMT Program?

Yes, since the Constitutional Court neither tried to order interim measures against the OMT program itself, nor asked the ECJ to order interim measures against the ECB. Legally,

[38] The average duration of preliminary reference procedures was 16.4 months from 2008 to 2012. *See* Annual Report 2012, Court of Justice of the European Union (2013), 104, available at: http://curia.europa.eu/jcms/jcms/Jo2_7000/.

[39] Pringle v. Ireland, Case C-370/12, 2012 E.C.R. I-0000.

nothing hinders the ECB from initiating the program at any time if it believes it is necessary.

X. Is Quantitative Easing also a Problem?

Quantitative easing (QE) is another central bank tool where a central bank buys bonds on the secondary market. Unlike OMT, it would not be limited to certain Member States in trouble. Instead, the ECB would buy significant amounts of bonds from all Euro states.

In the proceedings at the German Constitutional Court, this issue was not discussed. Genuine quantitative easing could be the next measure the ECB has to turn to.[40] Arguably, the criteria established in recital 100 could also apply to new QE programs established by the ECB. To me, it seems more plausible to argue that the case pending is simply a different case, that QE would be a new case if it were brought to the courts. It is quite clear that the usual suspects who have turned to the German Constitutional Court so frequently in the past would also do so to challenge QE. It seems to me that the arguments raised against OMT are even less convincing when it comes to QE. Remember: Article 123 TFEU clearly states that it is prohibited to "purchase *directly*"[41] debt instruments from Member States. The word "directly" would not make sense if there wasn't the possibility to buy debt instruments indirectly on the secondary market. Moreover, even the German Constitutional Court defines monetary policy as relating to the entire Euro currency area and as being non-discriminatory with regard to individual Member States of the Euro system.[42] Both criteria are hallmarks of QE. This seems to indicate that QE would be a different issue from the perspective of the German Constitutional Court, too.

XI. What Will Happen Next—Will the Constitutional Court Accept Any Decision of the ECJ?

Probably not. There are basically three scenarios:

In the first scenario, the ECJ simply gives in to the Germans and follows their interpretation of EU law as suggested in recital 100 of the preliminary reference, which would mean putting the brakes on OMT. This scenario is not very likely as the German Constitutional Court's reasoning is not convincing on legal grounds, given that according to Article 130 TFEU, the ECB is independent and that Article 123 TFEU explicitly provides for ECB action on the secondary market.[43]

---

[40] *See*, *e.g.*, David Oakley, *Bond markets weigh risks of eurozone QE*, FINANCIAL TIMES (Feb 18, 2014), http://www.ft.com/cms/s/0/7bbb007a-97e5-11e3-ab60-00144feab7de.html#axzz2uxn3VsxO.

[41] Emphasis added.

[42] BVerfG, 2 BvR 2728/13 at para. 5.

[43] *See* BVerfG, 2 BvR 2728/13 (dissenting opinions), for the arguments against the reasoning of the majority.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

The other extreme scenario would be that the ECJ sends back the reference as inadmissible[44] without looking at the substance of the questions submitted. Such a reaction is not impossible, but is unlikely as it would be extremely undiplomatic and would fly in the face of the concept of cooperation between the courts.

The most likely scenario is that the ECJ will try to find a compromise between leaving the ECB's independence and leeway untouched and opening up a face-saving door for the German Constitutional Court.

In case of the second or third scenario, the six majority judges will have to decide how to deal with the divergence between their view and the ECJ's answer. The two dissenting judges may both have left the Court by the time the ECJ sends the case back to Germany; Judge Lübbe-Wolff's 12 year term ends in April 2014, and Judge Gerhardt's term ends in July 2015. The judges replacing them will not participate in the continuation of the case in Germany.

From the perspective of EU law, it is quite clear that the decisions of the ECJ under Article 267 TFEU are not merely friendly suggestions that national courts may or may not follow. The case law of the ECJ is unambiguous on this point:

> . . . a judgment in which the Court gives a preliminary ruling on the interpretation or validity of an act of a Community institution conclusively determines a question or questions of Community law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings.[45]

A failure to follow the ECJ would be a violation of EU law.[46] Violations of obligations under the EU Treaties by German authorities are attributed to Germany as a Member State, even in the case of independent court decisions.[47] Germany would face treaty infringement

[44] *See* FAQ no. 4, *supra*.

[45] Wünsche, CJEU Case 69/85, 1986 E.C.R. 948, para. 13 (Mar. 5, 1986).

[46] Article 344 TFEU, Article 19 (1) TEU and Article 4 (3) TEU. *See* on this also Brun-Otto Bryde, *Transnationale Rechtsstaatlichkeit, in* FESTSCHRIFT FÜR RENATE JÄGER 65, 70 (Christine Hohmann-Dennhardt et al. eds., 2011).

[47] European law adopts a public international law approach towards the Member States in that context. *See* Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, 1932 P.C.I.J. (ser. A/B) No. 44, at 24. For a precedent of judicial actions leading to treaty infringement proceedings the Case, see Hendrix ('Pingo-Hähnchen'), preliminary procedure under Article 169 EC Treaty (now Article 258 TFEU), A/90/0406, Reasoned opinion of the Commission SG (90)/D/25672 of 3 August 1990, part V (dealing with the *Bundesgerichtshof (BGH)*, the German Supreme Court). For preliminary proceedings against Sweden, *see also*

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

proceedings if the German Constitutional Court openly disregarded the ECJ ruling. The general principle of *pacta sunt servanda*—i.e., treaty obligations have to be honored—is at stake here. The EU Treaty confirms this principle in Article 4 of the Treaty on European Union (TEU), according to which the Member States shall take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall also refrain from any measure that could jeopardize the attainment of the Union's objectives. In the present context, Article 131 TFEU stresses that the Member States have to make sure that their internal legal order is not incompatible with ECB action.

The German Constitutional Court would probably turn to the trick they use in their *ultra vires* reasoning and insist that by declaring an act of the EU—here: of the ECB—*ultra vires*, they only make a statement on German constitutional law and the reach of powers transferred by Germany to the EU. If the ECJ confirms the EU act in question as being compatible with EU law, the German Constitutional Court would simply consider such a judgment *ultra vires*, too. In addition, the Court would probably try to argue that the obligations under Article 4 TEU find their limits in the constitutional identity of a Member State.[48]

It is quite obvious, though, that open conflict between the courts would at the end of the day damage the reputations of both by undermining the community of law in the EU. Therefore, such a scenario of another round of chicken run involving the German Constitutional Court and the ECJ will hopefully not happen.

XII. What Would be the Consequences of the German Constitutional Court Declaring an EU Act ultra vires*?*

The 1993 Maastricht judgment makes the following statement on the consequences of declaring EU action to be *ultra vires*:[49]

Edgar Lenski & Franz C. Mayer, *Vertragsverletzung wegen Nichtvorlage durch oberste Gerichte?,* EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 225 (2005).

[48] *See* FAQ 13, *infra*.

[49] The German original:

> Würden etwa europäische Einrichtungen oder Organe den Unions-Vertrag in einer Weise handhaben oder fortbilden, die von dem Vertrag, wie er dem deutschen Zustimmungsgesetz zugrunde liegt, nicht mehr gedeckt wäre, so wären die daraus hervorgehenden Rechtsakte im deutschen Hoheitsbereich nicht verbindlich. Die deutschen Staatsorgane wären aus verfassungsrechtlichen Gründen gehindert, diese Rechtsakte in Deutschland anzuwenden.

> Thus, if European institutions or entities were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that was the basis for the ratification statute, the resulting legal acts would not be legally binding within the sphere of German sovereignty. German public authorities would be prevented, for constitutional reasons, from applying them in Germany. Accordingly, the Federal Constitutional Court reviews legal acts of European institutions and entities to see whether they remain within the limits of the sovereign rights conferred on them or whether they break out of those limits (BVerfGE 58, 1 at 30 et seq.; BVerfGE 75, 223 at 235, 242).[50]

BVerfGE 89, 155, 188. As a consequence, the German Constitutional Court arrogates a right to control EU action in the next sentence of the judgment:

> Dementsprechend prüft das Bundesverfassungsgericht, ob Rechtsakte der europäischen Einrichtungen und Organe sich in den Grenzen der ihnen eingeräumten Hoheitsrechte halten oder aus ihnen ausbrechen (BVerfGE 58, 1 [30 f.]; 75, 223 [235, 242]).

BVerfG, BVerfGE 58, 1 [30 f.]; BVerfG, BVerfGE 75, 223 (*Kloppenburg* decision).

[50] This translation is adapted from the translation suggested by Winkelmann, *supra* note 18 at 779-780 (*see also* 751-799 for a French translation and 800-802 for a Spanish translation of the head notes). There, "*Rechtsakte*" is translated with "legislation," which is too narrow. "*Rechtsakte*" means acts having legal effects. There are other translations in 33 I.L.M. 388, 422 *et seq* (1994) and in COMMON MARKET LAW REPORTS 57 (1994), reprinted in THE RELATIONSHIP BETWEEN EUROPEAN COMMUNITY LAW AND NATIONAL LAW 526 (Andrew Oppenheimer ed., 1994). *See also* the English translation of the relevant part of the Honeywell decision, BVerfGE 126, 286, 302, at paras. 54-55, published by the German Constitutional Court:

> Unlike the primacy of application of federal law, as provided for by Article 31 of the Basic Law for the German legal system, the primacy of application of Union law cannot be comprehensive (see BVerfGE 73, 339 <375>; 123, 267 <398>). As autonomous law, Union law remains dependent on assignment and empowerment in a Treaty. For the expansion of their powers, the Union bodies remain dependent on amendments to the Treaties which are carried out by the Member States in the framework of the respective constitutional provisions which apply to them and for which they take responsibility (see BVerfGE 75, 223 <242>; 89, 155 <187-188, 192, 199>; 123, 267 <349>; see also BVerfGE 58, 1 <37>; 68, 1 <102>; 77, 170 <231>; 104, 151 <195>; 118, 244 <260>). The applicable principle is that of conferral (Article 5.1 sentence 1 and Article 5.2 sentence 1 TEU). The Federal Constitutional Court is hence empowered and obliged to review acts on the part of the European bodies and institutions with regard to whether they take place on the basis of manifest

The complainants and the applicant in the OMT case refer to this *ultra vires* control and argue that the Federal Government and the German Bundestag are obliged to work towards a repeal of the *ultra vires* act in question, i.e. the OMT Decision, or at least to prevent its implementation. It is unclear how the German Constitutional Court could make this suggestion operational. Clearly, the Court cannot order the government to drop out of the Euro, as leaving the Euro is not a legal option in the Treaties. In addition, the Court imposing a duty on government and Parliament to work towards a repeal of the OMT program appears quite odd. A national government and a national parliament are unable to impose anything on the ECB.

Dissenting Judge Lübbe-Wolff is more than skeptical about this aspect of the case. In her words:

> It remains unclear, however, what further steps can be claimed (exit from the monetary union, too?) and how they have to be taken (alternatively? cumulatively? successively? in which order?). This is only too understandable in view of the lack of legal sources from which answers to these questions might flow. But then one ought to refuse being sent on grand desert tours that will not lead to any spring.[51]

From that perspective, at the end of the day the case may boil down to the Constitutional Court imposing a duty on German Parliament to hold a debate on the OMT issue.[52] It could be interesting to test the German Constitutional Court's construct in a different context—can individuals now ask the German Court to order the government or Parliament to take action against U.S. National Security Agency (NSA) activities[53] in Germany?

> transgressions of competence or on the basis of the exercise of competence in the area of constitutional identity which is not assignable (Article 79.3 in conjunction with Article 1 and Article 20 of the Basic Law) (see BVerfGE 75, 223 <235, 242>; 89, 155 <188>; 113, 273 <296>; 123, 267 <353-354>), and where appropriate to declare the inapplicability of acts for the German legal system which exceed competences.

[51] BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at para. 23).

[52] BVerfG, 2 BvR 2728/13 at para. 53.

[53] *See* Franz C. Mayer, *Mit Europarecht gegen Abhöraktionen?*, VERFASSUNGSBLOG (Nov. 18, 2013), http://www.verfassungsblog.de/de/mit-europarecht-gegen-die-amerikanischen-und-britischen-abhoeraktionen-teil-1-nsa.

At the same time, the point dissenting Judge Gerhardt makes in this context must not be underestimated: "Via the possibility of demanding preventive legal protection […] individuals entitled to vote can 'bring into play' the Federal Constitutional Court at a time when the political process is still ongoing."[54]

There is yet another potential consequence of the German Constitutional Court declaring OMT to be *ultra vires*, which is not mentioned in the dissenting opinions and just briefly discussed in the decision itself,[55] as if the judges shied away from opening this Pandora's box. The complainants and the applicant in the OMT case raise the point, though[56]: If an *ultra vires* act emanating from an EU institution "would not be legally binding within the sphere of German sovereignty" and "German public authorities would be prevented, for constitutional reasons, from applying them in Germany,"[57] the one German institution playing a role in OMT could be crucial. That is the German central bank, the *Bundesbank*, because the purchase of bonds on the secondary market under the OMT program is technically implemented by the national central banks as part of the Euro system.

The *Bundesbank* may decide, or even be[58] or feel obliged, to not take part in the implementation of the OMT program once the program is declared *ultra vires* by the German Constitutional Court. The legal assessment of which legal rules—EU or German—the *Bundesbank* as an agent of the ECB has to observe if the two conflict with each other, is not easy. The *Bundesbank* is an independent central bank and is not subject to orders of the Constitutional Court in the first place. Article 130 TFEU states that when national central banks exercise the powers and carry out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB—such as implementing an OMT program—they shall not take instructions from any government of a Member State or from any other body. There is the established principle that EU law trumps national law,[59] even national constitutional law,[60] and Article 131 TFEU requests Member States to make sure that the internal legal order corresponds to the requirements of the Treaties, which would be a justification for the *Bundesbank* to participate in the implementation of the OMT program. If the *Bundesbank* refused to participate in OMT, it would arguably constitute a treaty infringement and a breach of EU law from the perspective of the

[54] BVerfG, 2 BvR 2728/13 (Gerhardt, dissenting at para. 7).

[55] BVerfG, 2 BvR 2728/13 at para. 1.

[56] Id. at para. 5.

[57] BVerfGE 89, 155, 188 (*Maastricht* decision), following the translation suggested by Winkelmann, *supra* note 18 at 779-780.

[58] BVerfG, 2 BvR 2728/13 at para. 45.

[59] Costa v. E.N.E.L., Case 6/64, 1964 E.C.R. 585, para. 594.

[60] Internationale Handelsgesellschaft, Case 11/70, 1970 E.C.R. 1125, para. 1134.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

European legal order. According to Article 35(6) of the European System of Central Banks (ESCB)/European Central Bank (ECB) Statute, the ECB could take the matter to the ECJ.

Beyond the legal questions, one would probably simply expect another central bank to take over the role attributed to the German central bank, in case the *Bundesbank* refuses to implement OMT. Germany's liability in the Euro System would not be affected, though. Yet there is probably a perspective beyond the law here. So far, OMT has had the desired effect without implementation because of the psychology of the markets, which indicates that there are issues at stake that do not function along the lines of formalist legal arguments. Therefore, the psychological fallout of a member of the European System of Central Banks refusing to follow the ECB should not be underestimated, regardless of the legal solutions to such a conflict between ECB and national central bank.

Again, the scenario of an open conflict, only this time involving the courts and the central banks, would have the potential to damage the credibility and the functioning of all institutions involved, which makes this a rather unlikely scenario.

XIII. What has the OMT Program to do with German Constitutional Identity?

At the very end of its reference decision, the Constitutional Court mentions "national constitutional identity."[61] This concept and its relevance to OMT will probably appear rather opaque to most readers. However, it is quite likely that this is the argument the majority would rely on if the ECJ refuses to declare the ECB's OMT program to be *ultra vires*.

This is the background: In its 2009 decision on the Lisbon Treaty, the German Constitutional Court introduced a new approach to review EU law, in addition to the *ultra vires* review established in the *Maastricht* decision of 1993. They call it "*Identitätskontrolle*," identity review. Headnote 4 of the *Lisbon* decision summarizes identity review as follows:

> [T]he Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in conjunction with Article 79.3 of the Basic Law is respected (see BVerfGE 113, 273 <296>). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (Europarechtsfreundlichkeit), and it therefore also

[61] BVerfG, 2 BvR 2728/13, para. 102.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

> does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand.

And:

> The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 [human dignity] and Article 20 [core principles such as democracy, rule of law etc] of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.[62]

According to Article 4 (2) TEU, the European Union shall respect the national identities of the Member including their "fundamental structures, political and constitutional." This makes clear that national identity includes constitutional identity. That may indeed serve as a starting point on the European level to revoke the claim of unconditional primacy of European law over Member States' constitutional identity.

It is hardly surprising that it was an Irish academic contribution that developed further the idea—inherent to Article 4 (2) TEU of protecting fundamental (constitutional) national choices— of attributing to national courts of last instance the role of determining the content of such choices, as recognized and protected by European law.[63] It was the Irish

[62] BVerfGE 123, 267, 253-255, para. 240.

[63] Diarmuid Rossa, REVOLT OR REVOLUTION: THE CONSTITUTIONAL BOUNDARIES OF THE EUROPEAN COMMUNITY 416 (1997). In order to avoid a revolt or a (legal) revolution and to maintain the legitimacy of the national legal orders, Phelan suggests an amendment to the Treaties which would give primacy (over European law) to basic principles of the Member States' constitutions relating to life, liberty, religion, and the family, which are predicated on visions of personhood and morality (not of the market or the proper distribution of goods) peculiar to each Member State. The rights through which these principles find expression would be regarded as superior to European law within their sphere of application. The exact range of this reservation would be established by the respective national courts or other institutions of last resort, ibid, 416, 417 et seq. Critical of Phelan Miguel Maduro, *The Heteronyms of European Law*, 5 E.L.J. 160 (1999), and Neil MacCormick, *Risking Constitutional Collision in Europe?*,18 O.J.L.S.

protocol annexed to the Maastricht Treaty 1992[64] that conceptualized for the first time the idea of preserving the sacrosanctity of national constitutional provisions that are of particular importance to the respective constitution. In the Irish case, the provision at issue concerned the prohibition of abortion. The protocol served as a kind of blueprint: The identity clause of the current EU Treaty takes the approach of the Irish protocol and generalizes the concept. It may be read more broadly as a revocation of European law's claim to primacy in respect of specific Member State interests, which are of particular importance in a given case.[65] Member State courts began to use the idea of national constitutional identity to build a bridge between European and national constitutional law before the Lisbon Treaty already. The French *Conseil Constitutionnel* stated implicitly in 2004 and explicitly in 2006[66] that national constitutional identity is a limit to the primacy of European law. A similar approach can also be found in a 2004 decision of the Spanish constitutional court.[67] Even the ECJ in 2010 began to turn to the concept of constitutional identity and to accept it as a limit to EU law.[68]

Note the fundamental difference between the categories of an *ultra vires* act on the one hand and an act infringing upon national constitutional identity on the other hand. To uphold, in principle, national constitutional identity does not necessarily imply an encroachment on the European level; it does not go beyond the bipolar relationship between, e.g., the German and European legal orders. This is different in the case of an *ultra vires* act: There is no leeway for a relationship of co-operation between the Constitutional Court and ECJ as far as the question of the limits of European competences is concerned. Declaring an act to be *ultra vires* always implies a defect in the act. It would

517 (1998); *see also* DR Phelan, *The Right to Life of the Unborn v the Promotion of Trade in Services*, 55 M.L.R. 670 (1992).

[64] Protocol 17 to the Treaty of Maastricht.

[65] See on this idea prior to the Lisbon decision, Franz C. Mayer, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG 341 (2000); Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 424, 425 (Armin v. Bogdandy & Jürgen Bast eds., 2010); *see also* Armin von Bogdandy & Stephan Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011); Mattias Wendel, PERMEABILITÄT IM EUROPÄISCHEN VERFASSUNGSRECHT 572-574 (2011); Monica Claes, *Negotiating Constitutional Identity or Whose Identity is it Anyway?*, *in* CONSTITUTIONAL CONVERSATIONS IN EUROPE 205 (Monica Claes et al. eds., 2012); Claudio Franzius, *Art. 4 EUV*, *in* EUV/AEUV para. 31, 42 (Nowak et al. eds., forthcoming).

[66] *Traité établissant une Constitution pour l'Europe* 2004 O.J. (C 310) 1; Loi 2006-961 du 3 août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information (1) [Law 2006-961 of August 3, 2006 on copyright and related rights in the information society], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 3, 2006, p. 11529..

[67] *Tribunal Constitucional*, DTC 1/2004 (Dec. 13, 2004).

[68] Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, CJEU Case 208/09, 2010 E.C.R. I-13693 (Dec. 22, 2010).

also imply an encroachment on the European level and especially on the ECJ. Moreover, the encroaching effect of declaring an act to be *ultra vires* would also concern the validity and/or application of European law in all other Member States, as an act cannot be *ultra vires* only in the bipolar relationship between one Member State and the EU. Still, the determination of what is part of national constitutional identity and thus a stop sign for EU law cannot be done unilaterally; it must be a joint effort of national and European courts.[69]

The six judges supporting the majority opinion seem to be thinking along these lines as they mention the ECJ in the OMT reference in the identity context. Looking closer, there is not much talk of cooperation, though. They say that the Constitutional Court will take the ECJ's interpretation of the relevant EU law in its preliminary ruling as a basis, and will then "determine the inviolable core content of German constitutional identity, in order to review whether the act (as interpreted by the Court of Justice) interferes with this core."[70]

Even worse, the six judges make a visible effort to explain why "the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 (2) sentence 1 TEU by the Court of Justice of the European Union."[71] This is neither helpful nor convincing. The German Constitutional Court should have emphasized the Courts' joint responsibility instead of insisting on difference.

But what has the OMT program to do with all this?

If they do not succeed with their *ultra vires* review, the judges representing the majority opinion will probably use identity review in order to declare the OMT program invalid in Germany. That would explain why identity review is brought up in the reference. They claim that the budgetary autonomy of the German *Bundestag* is part of German constitutional identity. They consider it possible that German budgetary autonomy and the overall budgetary responsibility of German Parliament can be affected by OMT with regard to possible losses of the *Bundesbank*. In their words:

> The OMT Decision could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail consequences

[69] *See* Franz C. Mayer & Mattias Wendel, *Die verfassungsrechtlichen Grundlagen des Europarechts*, *in* 1 ENZYKLOPÄDIE DES EUROPARECHTS VOL 1 (Armin Hatje & Peter-Christian Müller-Graff eds., 2014); Franz C. Mayer & Mattias Wendel, *Multilevel Constitutionalism and Constitutional Pluralism – querelle allemande or querelle d'Allemand?*, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 127 (Matej Avbelj & Jan Komárek eds., 2012); Mattias Wendel, PERMEABILITÄT IM EUROPÄISCHEN VERFASSUNGSRECHT 573-575 (2011).

[70] BVerfG, 2 BvR 2728/13 at para. 27.

[71] *Id.* at para. 29.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

> that are difficult to calculate (cf. BVerfGE 129, 124 <179 et seq.>), so that, due to this mechanism, the German Bundestag would not remain the "master of its decisions" and could no longer exercise its budgetary autonomy under its own responsibility (cf. BVerfGE 129, 124 <177>; 132, 195 <239>).[72]

They also state:

> At present, it is not foreseeable whether in addition to this, through individual implementation measures of the OMT Decision and with regard to possible losses of the *Bundesbank* and ensuing effects on the federal budget, consequences for the budgetary autonomy of the German *Bundestag* could arise in a way that affects Art. 79 sec. 3 GG.[73]

So the argument appears to be that the OMT program could lead to significant losses of the *Bundesbank*, which in turn could cripple the federal budget. This would render elections to Parliament meaningless to German voters, since a crippled budget deprives Parliament of any room for maneuver. This in turn affects democracy in Germany at its core, which means that OMT may affect German constitutional identity.

If you ever need an example for a far-fetched argument, here you have it.

Whereas this line of argument is probably too absurd to discuss, the procedural remark the six judges make in this context is rather alarming:

> If necessary, the Senate would have to examine this on the basis of the Court of Justice's interpretation of the OMT Decision without another question referred for a preliminary ruling, and it would have to determine the inapplicability of the respective act of implementation in Germany, because the identity review is not to be assessed according to Union law but exclusively according to German constitutional law.[74]

---

[72] *Id.* at para. 102.

[73] This is the article that defines German constitutional identity, according to the Court. *Id.* at para. 103.

[74] *Id.*

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

Here, the majority judges' misunderstanding of the function of the concept of "constitutional identity" becomes manifest: They clearly do not accept that in the national constitutional identity context, a preliminary reference to the ECJ would be necessary in order to make sure that the legal argument in question falls under Article 4 (2) TEU. A preliminary reference in the context of an "identity review" effectuated by a national court would aim at the interpretation of Article 4 (2) TEU by the ECJ. They seem to insist on unilaterally determining the meaning of Article 4 (2) in a given case from their Member State point of view. Establishing national identity and national constitutional identity as a limit of EU law unilaterally is extremely dangerous for legal unity in the EU and open to abuse.[75]

Article 4 (2) TEU and national constitutional identity as a limit of EU law can only work in a genuine spirit of co-operation. As far as the Constitutional Court's OMT reference is concerned, one wonders whether the motivation for raising the issue was not exactly the opposite.

D. Inconsistencies, Contradictions, Continuity Errors and Plot Holes in the EU Narrative of the German Constitutional Court

From an analytical point of view, the most striking feature of the German Constitutional Court's first reference is the amount of inconsistencies that are on display in the decision.

I. Errors in Perception

A test for the soundness of an EU related national court ruling could be whether it is conceivable that all other courts in the EU adopted the same reasoning. This is clearly not the case with the *ultra vires* approach of the German Constitutional Court. If all other supreme or constitutional courts in the EU took the same stance, the unity of EU law and the authority of the ECJ would be destroyed. EU law would become a pick-and-chose legal order. The six judges forming the majority opinion in the OMT reference seem to think differently. They try to depict their position as a position that is shared by many other courts in the EU and seem to encourage other courts to join them.

The error in perception here is twofold. First, there is an erroneous assessment of the danger that increasing numbers of national courts claiming to be the final arbiter on EU law entails. There is also an error of perception as to the company the German Constitutional Court has on its *ultra vires* path. In recital 30,[76] the six judges point to

[75] The next thing that may happen is that some German court declares Volkswagen or Opel to be part of German national identity, thus removing subsidies to core German industries from EU state aid control.

[76] BVerfG, 2 BvR 2728/13 at para. 30.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

Danish, Estonian, French, Irish, Italian, Latvian, Polish, Swedish, Spanish and Czech cases, implying that the German approach is not isolated. This is not accurate. First, 10 out of 28 Member State legal orders would not even constitute a majority. Secondly, the Court is mixing different types of decisions that are motivated by all kinds of arguments. Looking closer, it is only the Czech Constitutional Court with its Landtova ruling that openly endorses the German *ultra vires* approach and comes close to actually applying an *ultra vires* review. And arguably, this is due to a specific domestic court dispute in the Czech republic.[77] All other courts remain at the level of principle and theory.

Again, the way the six judges present other Member State courts as presumed "allies" is not in line with a rhetoric of cooperation and dialogue; it appears much more as though the Court is building front lines against the ECJ.

II. The Confusion of Law and Politics—Imperial Overstretch?

The core argument of Judge Lübbe-Wolff's dissenting opinion is that the majority opinion goes beyond the limits of law by attempting to apply a legal regime that does not fit.[78] For some time now, the Constitutional Court has been intervening in the Euro crisis, insisting that its argument is purely legal, causing a reaction and a debate that is highly political. To accuse a Constitutional Court of being too active and too political in its decisions is of course a recurring critique. But there are at least two points that indicate that at least some judges cross the line.

First, it is the role the Court has adopted in the Euro crisis. Worldwide attention is given to the rulings of the German Constitutional Court in the crisis. The Court seems to have the power to unsettle the world economy: If it had followed the plaintiffs' arguments in Euro cases, e.g., prohibiting Germany to participate in the ESM, the result would have been an unprecedented turmoil. No court should have the power to bring down world economy. Something is terribly wrong if one single court in one nation state finds itself in this role.

Judge Lübbe-Wolff correctly points to mechanisms courts may turn to in such a situation, such as the political question doctrine or judicial self-restraint.[79] The German Constitutional Court has not done this in the Euro crisis so far, and with the OMT reference, it is further away from such a step than ever: The Court is trying to play in the playing field of central banks and economists. This endeavor is bound to fail, especially if

[77] *See* Jan Komarek, *Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution*, VERFASSUNGSBLOG (Feb. 22, 2012), http://www.verfassungsblog.de/de/playing-with-matches-the-czech-constitutional-courts-ultra-vires-revolution.

[78] BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at paras. 3-9).

[79] BVerfG, 2 BvR 2728/13 at paras. 4, 7, 9.

reality is not allowed to be an argument. In the words of the Court majority, "The (economic) accuracy or plausibility of the reasons for the OMT Decision are irrelevant in this respect."[80]

The reasonable thing to do would be to clearly state that in the Euro crisis, we have reached the limits of what law and lawyers can do and that the decisions have to be taken by those who are democratically elected and who will be held accountable. If a national parliament chooses not to oppose the central bank, so be it. It is not the task of the Constitutional Court to tell directly elected politicians that they should do something, without being able to specify what this something could be.[81]

The way some of the judges make extrajudicial statements also raises questions about the line between law and politics. On the one hand, it can be helpful if judges explain judgments of the German Constitutional Court in order to prevent misunderstandings. But some observers believe that if judges of the German Constitutional Court consult with the President of the European Commission the way politicians consult with each other,[82] something is wrong. Judges of the German Constitutional Court taking part in the *Bundespressekonferenz* (national press conference in Berlin), the way members of the government do, has also triggered critique.[83] Even those who find this critique unjustified will admit that this kind of critique goes beyond the standard critique of judicial activism; it has a different dimension, concerning judges acting like politicians.[84]

The flip side is that politicians increasingly try to anticipate sensitivities of the German Constitutional Court. Naturally, this is not to say that there is anything wrong with politicians trying to respect the framework of the constitution. However, the reality of the

---

[80] *Id.* at para. 96.

[81] BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at paras. 18, 22).

[82] "José Manuel Barroso, President of the EC, and Maroš Šefčovič, Vice-President of the EC in charge of Inter-Institutional Relations and Administration, received Andreas Voßkuhle, Chairman of the Federal Constitutional Court of Germany. Discussions focused on how to best ensure the respect of democracy and the rule of law in the EU and its Member States." *Visit of Andreas Voßkuhle, Chairman of the Federal Constitutional Court of Germany, to the European Commission*, EUROPEAN COMMISSION AUDIOVISUAL SERVICES, http://ec.europa.eu/avservices/photo/photoByReportage.cfm?ref=023108&sitelang=en.

[83] Hugo Müller Vogg, *Voßkuhle spricht nicht nur durch seine Urteile*, BAYERNKURIER (Mar. 9, 2013), http://www.bayernkurier.de/zeitung/artikel/ansicht/8522-voskuhle-spricht-nicht-nur-durch-seine-urteile.html; Heinrich Wefing, *Gefährlicher Flirt - Warum Verfassungsrichter Sicherheitsabstand zur Politik halten sollten*, DIE ZEIT (Mar. 7, 2013), http://www.zeit.de/2013/11/Verfassungsrichter-Politik-Abstand.

[84] Consider in this context the outburst of the then Interior Minister Friedrich in early 2013: "If constitutional court judges want to make policy, then they should run as a candidate for parliament." Susanne Höll, *Innenminister Friedrich rügt obersten Verfassungsrichter*, SÜDDEUTSCHE ZEITUNG (Apr. 23, 2013), http://www.sueddeutsche.de/politik/sicherheitsdebatte-innenminister-friedrich-ruegt-obersten-verfassungsrichter-1.1657163.

Euro crisis is that constitutional law arguments replace political arguments, which goes far beyond an attempt to respect the constitutional framework. The Federal government is not entirely innocent in this development, as they do play the "Karlsruhe-card" domestically and in negotiations in Brussels. A possible argument along these lines might be, "Good idea, but you know, the German Constitutional Court will probably not like [banking resolution being based on Art. 114 TFEU/direct banking recapitalisation by the ESM/etc., etc.]."[85] Clearly, some government bureaucrats have no sense of the potential damage to the community of law that comes with kind of reasoning.

The result may be an inverse world: Politicians behaving like lawyers and trying to argue in a constitutional law mode, constitutional law judges acting like politicians. Again, such a situation is not entirely unheard of, but the dimensions may be new.

III. The Admissibility Inconsistency

In the *Lisbon* decision, the German Constitutional Court brings up the possibility of introducing an explicit provision on *ultra vires* and identity control as new legal remedies.[86] The legislator considered doing this and decided against it. The Court should have taken this decision as a warning sign that the judge-made remedy ("originally bold")[87] the Court created in the *Maastricht* decision, which it confirmed in the *Lisbon* decision, rested on shaky ground as far as legitimacy is concerned. Nevertheless, the German Constitutional Court kept loosening the criteria for the admissibility of constitutional complaints in the context of European integration. Thus, more than 40,000 plaintiffs joined the present case. Remarkably, the OMT reference loosens the criteria even more;[88] now basically anybody can go to the German Constitutional Court and claim that an EU act is *ultra vires*. In the words of Judge Gerhardt, dissenting, "the door is opened to a general right to have the laws enforced (*allgemeiner Gesetzesvollziehungsanspruch*)," to an "*actio popularis*."[89] He also points to a possible conflict with the system of legal remedies at the EU level[90] regarding actions brought against acts of European institutions.[91]

---

[85] Franz C. Mayer and Daniel Kollmeyer, *Sinnlose Gesetzgebung? Die Europäische Bankenunion im Bundestag*, DEUTSCHES VERWALTUNGSBLATT, 1158 (2013).

[86] BVerfGE 123, 267, 353-55 at para. 241.

[87] BVerfG, 2 BvR 2728/13 (Lübbe-Wolff dissenting at para. 15). The remedy takes Article 38 German Constitution as a starting point and creates a fundamental right to a German Parliament that still has something meaningful to decide, which can be invoked by means of a constitutional complaint.

[88] *Cf.* BVerfG, 2 BvR 2728/13 (Lübbe-Wolff dissenting at para. 16).

[89] BVerfG, 2 BvR 2728/13 (Gerhardt dissenting at paras. 6-7).

[90] *See* TFEU art. 263, May 9, 2008, 2008 O.J. (C 115) 47..

[91] *Id.* See in that context the General Court's Order of 10 December 2013 on OMT, Von Storch and Others v. ECB, Case T-492/12 (appeal pending before the ECJ as Case C-64/14 P).

It is hard to believe that this will not be understood as an invitation to ask the German Constitutional Court to review all kinds of unpopular EU acts. This development is also striking because on a different level, the German Constitutional Court keeps complaining about the general workload—more than 6,600 cases in 2013—and the Court actively lobbies the legislator to introduce further limits to Court access.[92]

In the words of Judge Lübbe-Wolff, dissenting:

> The otherwise notorious tendency of the overburdened, relief-seeking Federal Constitutional Court to cultivate and extend admissibility hurdles in constitutional complaint cases is generally absent in matters of European integration. However, the Senate's readiness to hear complaints in this field has never been extended as far as in the present case.[93]

This comment is self-explanatory. Clearly, the judges supporting the majority opinion want to keep their grip on EU matters, at almost all costs.

IV. The Ultra Vires *Paradox and the* Honeywell *Inconsistency*

First of all, it would be a genuine error to declare the ECB's OMT program to be an *ultra vires* act. The OMT program is no such act.[94] Nevertheless, even if for the sake of the argument we accept the assessment that the ECB acts outside its mandate, the German Constitutional Court still departs from its own *Honeywell* logic. According to *Honeywell*, the transgression of competence limits has to be obvious, and it has to lead to a structurally significant shift in the structure of competences to the detriment of the Member States.[95]

Neither condition is met. The Court majority uses a trick here,[96] as they only ask whether economic policy is obviously outside the EU's powers. The test should be whether it is

[92] *See Karlsruhe klagt über gestiegene Arbeitsbelastung*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 14, 2014, at 4. Of course the 40,000 plaintiffs here are not equivalent to 40,000 cases. But there is still the question of a sensible allocation of court resources. For statistical details see http://www.bundesverfassungsgericht.de/organisation/statistik_2013.html

[93] BVerfG, 2 BvR 2728/13 (Lübbe-Wolff dissenting at para. 14).

[94] *Cf*. FAQs *supra*.

[95] BVerfG, BVerfGE 126, 286 at Headnote 1. In German: "Das setzt voraus, dass das kompetenzwidrige Handeln der Unionsgewalt *offensichtlich* ist und der angegriffene Akt im Kompetenzgefüge zu einer *strukturell bedeutsamen Verschiebung* zulasten der Mitgliedstaaten führt" (emphasis added).

[96] BVerfG, 2 BvR 2728/13 at para. 37.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

obvious that the act at stake is an economic policy act. How can an act be obviously *ultra vires*, if the Court takes months and months to decide,[97] if the two senior judges dissent and if the economics and central bank specialists are unable to find a consensus? Moreover, how can the presumed *ultra vires* act shift the balance of competences in a realm where there are no national competences? Nothing is taken away from national institutions here, as there is simply no national body that could take the action that the ECB takes, which is a Europe wide effort to stabilize the common currency.

Something else raises doubts as to whether the *Honeywell* criteria are still valid. Judge Landau wrote an angry dissenting opinion to *Honeywell*, arguing that the majority in *Honeywell* departed from the *Lisbon* decision by introducing "excessive requirements on the finding of an *ultra vires* act,"[98] thus making the Court's *ultra vires* review a mere hypothetical option.[99] Now he is part of the majority without getting back to his dissent. Either he has changed his opinion and has made peace with the standard of *ultra vires* review of the Second Senate that he found too soft before, or the other judges in the majority have changed their opinions. In that case, the standard established in *Honeywell* is not valid anymore and the Court majority is siding with Judge Landau, who is not "shying away"[100] from declaring an act *ultra vires*. This is a problem to the extent that notions of "shying away" or "all bark and no bite"[101] imply a confrontational view of the issue, which is detrimental to the *Rechtsgemeinschaft* in the EU, the community of law.

Judge Gerhardt identifies another novelty in the *ultra vires* approach of the German Constitutional Court. In his dissenting opinion, he stresses that the majority of the Court will effectuate an *ultra vires* review even if no fundamental rights or constitutional identity elements are at stake.[102]

The problem is that it may well be that *ultra vires* conflicts about the question of who is to be the final arbiter ultimately cannot be solved by law.[103] Comparative constitutional law

[97] BVerfG, 2 BvR 2728/13 (Gerhardt dissenting at paras. 16-17).

[98] BVerfGE 126, 286, 303-307 at para. 95 (Landau, dissenting).

[99] *Id.* at para. 104 (Landau, dissenting), Judge Landau considers the *ultra vires* control to exist only "on paper."

[100] *Id.*

[101] Christian Hillgruber, *Nicht nur Zähne zeigen – beißen!*, 8 NEUE JURISTISCHE WOCHENSCHRIFT 3 (2014).

[102] BVerfG, 2 BvR 2728/13 (Gerhardt dissenting at para. 5).

[103] Alfred Verdross coined the term *Grenzorgane* (borderline institutions) in that context; that is, institutions bound by law, but not subject to any legal control, so that the resolution of a conflict is merely a political or sociological matter. Alfred Verdross, VÖLKERRECHT 24 (1950) (referring to Hans Kelsen).

and experiences with "nullification doctrines" teach this lesson, too.[104] That is why the claim of an *ultra vires* review can only have a stabilizing effect as long as it remains a mere threat. As soon as it is activated, the players on both sides are bound to lose. In the words of Judge Voßkuhle, writing extra-judicially, i.a. on the *ultra vires* review:[105] "'Emergency brake mechanisms' are most effective if they do not have to be applied." Voßkuhle develops a concept of "Multilevel Cooperation of the European Constitutional Courts" in that context, with the core idea revolving around dialogue, cooperation, openness, harmony between the ECJ and national courts. The proof of this constitutional theory pudding is in the eating.

The irony here is, as Judge Lübbe-Wolff stresses in her dissenting opinion, that the Court's majority confronts other institutions with an *ultra vires* reproach, while it oversteps the limits of its own competences and its own expertise at the same time—thus acting *ultra vires* itself. This can be turned into a legal argument, in the context of treaty infringement proceedings against Germany.

V. The Democracy Paradox

From the perspective of democracy theory, constitutional courts are a conceptual problem. The fact that a few appointed judges can thwart the directly elected many is a difficult one to explain. This makes the relationship between Parliament and a Constitutional Court entitled to judicial review a special one. When it comes to European integration, the relationship between the German Constitutional Court and the *Bundestag* is not only special, it is also complicated.

On the one hand, the Court has been strengthening the role of Parliament in European integration against an ever reluctant government that prefers to keep Parliament at a certain distance from information and decision-making in Brussels in order to have more leeway in its negotiations there. The Court's core argument for strengthening Parliament's role is democracy: Only if German Parliament controls German action in the EU context can the democratic legitimacy of an ensuing EU act—an imperative of German constitutional law—be assured. *Bundestag* in control equals democracy; that is the equation.

[104] There is an interesting parallel in US constitutional history with the 19th century conflicts between state supreme courts and the US Supreme Court which concerned the same issue, i.e. who is to be the final arbiter on the competences of the overarching polity. *See* Franz C. Mayer, KOMPETENZÜBERSCHREITUNG UND LETZTENTSCHEIDUNG 290-315 (2000). For an example, *see* Hunter v. Martin, 14 Munf. 1 (1815), *rev'd sub nom.* Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

[105] Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts*, 6 EUROPEAN CONSTITUTIONAL L. REV. 175, 195 (2010).

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

In principle, there is nothing wrong with empowering national parliaments in EU matters. Involving national parliaments makes sure that there is a feedback on EU developments from the electorate, from the voters that members of parliament have to face in their constituencies, which is not the case for government bureaucrats.

There are at least three problems, though, with the German Constitutional Court's equation of "Bundestag in control means democracy in EU matters is safeguarded." First, the possibility that democratic legitimacy could also be provided by the European Parliament is not particularly relevant in the German Constitutional Court's vision of European democracy. Repeatedly, their rulings concerning the German electoral law for EP elections have been perceived as diminishing the authority of the EP.[106] In their world, democracy can only come from the *Völker* of the nation states. The scholarly critique of this German *Volksdemokratie* has been growing since the 1993 *Maastricht* decision,[107] but the Court remains unimpressed.

The second problem is that although German Parliament has made considerable progress in terms of "fitness" in EU matters, typically the German Constitutional Court will tell parliamentarians that once again, they unfortunately did not quite meet the high standards of parliamentary EU awareness requested by the Court, and will find something unconstitutional in Parliament's action. Sometimes, the Court's critique is more justified,[108] sometimes less so. Increasingly, the parliamentarians' perception here may be that they are being patronized.[109] The irony is that the guidance given to Parliament is done in the name of democracy, by a body that is neither directly elected nor democratically

[106] Arguably that is not the intention of the Court, as judges keep repeating extra-judicially, but the perception is still there. *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvE 2/13 (Feb. 26, 2014) (the latest ruling on the three-percent electoral threshold and its media echo).

[107] *See*, *e.g.*, Brun-Otto Bryde, DIE BUNDESREPUBLIKANISCHE VOLKSDEMOKRATIE ALS IRRWEG DER DEMOKRATIETHEORIE, STAATSWISSENSCHAFTEN UND STAATSPRAXIS 305 (1994); J.H.H. Weiler, *The State "über alles". Demos, Telos and the German Maastricht Decision*, *in* 2 FESTSCHRIFT ULRICH EVERLING 1651 (1995). See for a more recent analysis Claudio Franzius, *Demokratisierung der Europäischen Union*, EUROPARECHT 655 (2013).

[108] BVerfG, 2 BvE 8/11 ("Committee of 9" decision).

[109] Some rather technical matters play a role here, e.g., the fact that the Court repeatedly scheduled oral hearings where the attendance of parliamentarians was more or less expected right on the days of important plenary debates. Some extrajudicial incidents are seen as paradigmatic by some observers and parliamentarians, such as a public debate between the President of the Constitutional Court and the Speaker of Parliament in early 2013 where the judge described the relationship between Court and legislator in EU matters as *Fördern und fordern* (Support and challenge), a slogan associated with the rather controversial Hartz 4-welfare program. At the same event, the President of the Court, trying to say something nice about the Speaker of Parliament said that he would actually 'adopt him, if he wasn't a sociologist by training'. *See* Robert Roßmann, *Spitzen der Präsidenten*, SÜDDEUTSCHE ZEITUNG (Mar. 1, 2013). Let me stress that there are unfair Court-bashing twists and elements in these reports, too. *See* Katja Gelinsky, *Voßkuhle und die Presse: Stimmungsumschwung oder Manipulation?,* VERFASSUNGS BLOG (Mar. 24, 2014) http://www.verfassungsblog.de/de/voskuhle-und-die-presse-stimmungsumschwung-oder-manipulation (analyzing the media coverage).

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

accountable. From time to time one cannot help thinking that the Constitutional Court's view of Parliament is a romantic one of a fireside chat where honorable men—and some women—engage in an enlightened discourse on the right path of the polity, taking all the time necessary[110] to deliberate and to find a reasonable solution—within the framework of the constitution, of course. This vision of Parliament is simply not the German reality, where an ever-accelerating 80 million inhabitants' society struggles with the effects of globalization and worldwide interdependence of the 21st century.

Third and finally, what if empowering Parliament reaches its limits? On the one hand, there is probably no point in having a Parliament struggling to do things that the executive branch is simply better at. In urgent matters, where a decision has to be made within a few hours, it is almost impossible to get more than 600 parliamentarians together.[111] Negotiations that require flexibility are ill-served if each and every development in the negotiation process required approval in a plenary session of Parliament.

On the other hand, there are situations where empowering Parliament is no meaningful option. This is the case with ECB action: An independent central bank is by definition out of reach of parliamentary oversight;[112] it could not work properly otherwise. In the words of the German Constitutional Court: "an independent central bank disconnects the exercise of governmental authority from direct governmental or supranational parliamentary responsibility, in order to free the monetary system from the access of interest groups and holders of political office who are concerned about their re-election."[113] This is why a central bank constitutes the same kind of democracy-anomaly as a constitutional court, a counter-majoritarian institution that can be justified only with regard to its function.

It is quite ironic that the OMT case can be read as a confrontation of two counter-majoritarian institutions, the German Constitutional Court and the ECB, reminiscent of a chicken run—and all this in the context of, and even in the name of, democracy. There is

[110] Note that judges of the German Constitutional Court often emphasize that they have the privilege that they can take all the time that is necessary to discuss an issue and to find a decision.

[111] That was part of the issue when Parliament tried to delegate oversight powers to an opaque committee, BVerfG, 2 BvE 8/11 ("Committee of 9" decision).

[112] There is one indirect link between German Parliament and the ECB in the OMT case, though. The ECB created it by limiting access to the OMT program to Member States who subscribe to an ESM program. There, nothing happens without the consent of the *Bundestag.* Thus, the German Constitutional Court could order German Parliament to approve ESM programs only if the ECB has committed to respect certain OMT limits for the state in question.

[113] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 89, 155, 208 (Oct. 12, 1993) (Maastricht decision).

another irony in the fact that six non-accountable judges commandeer[114] the legislature to "do something," thus limiting the discretion of the democratically elected and democratically accountable legislator.

It may well be that the majority judges feel entitled to speak for some kind of silent majority in Germany, as an "opposition to the mainstream."[115] But reliance on the assumption of a silent majority can be misinformed and should not be justification for decisions of a constitutional court. In the words of Judge Gerhardt, dissenting:

> If – to keep to the present case – the Federal Government approves the OMT programme and makes it one of the foundations of its own acts, and if the German Bundestag accepts all this with open eyes – against the backdrop of an intensive public debate, after having heard the President of the European Central Bank, and, according to the information provided by a member of the Budget Committee in the oral hearing, on the basis of the Bundestag's observation and assessment of the acts of the European Central Bank – this is the exercise of its democratic responsibility. The Bundestag could readily have criticised the OMT Decision by political means, threatened, if necessary, to bring proceedings for annulment before the Court of Justice of the European Union, waited for the reactions of the European Central Bank and the financial markets and then taken further steps. The fact that it did none of this does not indicate a democratic deficit, but is an expression of its majority decision for a certain policy when handling the sovereign debt crisis in the euro currency area.[116]

[114] Normally, the concept is used in the context of federalism and federal-state relations. *See e.g.*, Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, *in* THE FEDERAL VISION 213 (Kalypso Nicolaidis & Robert Howse eds., 2001).

[115] Judge rapporteur Huber in a public appearance at the University of Jena, 20 June 2013.

[116] BVerfG, 2 BvR 2728/13 (Gerhardt, dissenting at para. 23).

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

VI. The German Interest Paradox

There is a world outside Germany, and the German Constitutional Court judges do know that—otherwise, they wouldn't bother publishing their decisions in English. Nevertheless, the perspective of the German Constitutional Court could be described as very German, as a 'them'-versus-'us' logic. The economic and social turmoil in other Member States due to the Euro crisis does not figure prominently in the German Constitutional Court's decisions, nor does the economic interdependency in the Euro area or the fact that German exports benefitted from the liquidity of certain Member States in the "south." Apparently, there is not much room for a concept such as solidarity beyond the borders of the nation-state in the German Constitutional Court's worldview. Some would even detect a lack of constitutional empathy here, considering the fact that concepts the German Constitutional Court invokes quite naturally such as self-determination, budgetary autonomy, etc., are not available to all other Member States anymore. What is actually left of self-determination or the free will of a people in a country that had to join an ESM program and the harsh "conditionalities" attached to it? And not even the potential effect of—maybe even damage caused by—the German Constitutional Court's Euro decision in other Member States, let alone the issue of legitimacy of the German Court impacting on other polities,[117] is an issue for the judges of the Court majority.

The easy answer here is that this kind of reflection is simply not the German Constitutional Court's business. The Court is in charge of protecting the German constitution, and that's it. Although the perception outside Germany may be that there is a new kind of German hegemony developing, a hegemony created by Constitutional Court rulings, the Court would probably insist that this is merely a side-effect, as the Court is only inward-looking. This perspective may be another element of the problem. The underlying rationale of the German Constitutional Court's reasoning in all of the Euro cases has been the protection of German interests. When the Court requires that no ESM action shall be taken without German Parliament's consent, the assumption is clearly that Parliament will not act against the interest of the German people it represents. But what if it is German national interest that German action is not perceived as selfishly serving German interest first?

One answer to this question is that this is exactly why politics, and not a national Constitutional Court must have the final say in matters of European integration, as the inbuilt institutional preference of the Court will always be to protect the national. It is not that easy, though, because the founders knew about this German interest paradox, which is reflected in the fact that the German Constitution does embrace European integration, in the 1949 Preamble to begin with.[118] In other words, the Constitution actually does

[117] Judge Lübbe-Wolff raises this point. BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at para. 28).

[118] To give another example of the Constitution's openness, in Article 24 it subscribes to a general, comprehensive and compulsory international arbitration—without any *ultra vires* or constitutional identity reservation.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

capture the German interest paradox: It is in the German interest that German interests are not perceived as German interests, but as European interests. And by acknowledging a constitutional law principle of openness towards European Law (*Europarechtsfreundlichkeit*), the German Constitutional Court has accepted this reality already.[119] They simply have to put this insight into Constitutional Court practice.

E. Summary and Conclusion

"What are we doing this for?"
"We got to do something. Don't we?"
(Rebel without a cause, 1957)

> That some few independent German judges—invoking the German interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq.TFEU—make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it appears as an anomaly of questionable democratic character.[120]

There is not much to add to this conclusion of Judge Lübbe-Wolff's dissenting opinion. Hard cases make bad law, the saying goes,[121] and inconsistencies and contradictions in a ruling do not indicate good law either. With the two senior judges dissenting, the OMT reference of the German Constitutional Court is a weak decision of a divided Court. This is regrettable. The first preliminary reference of the German Constitutional Court to the ECJ should have been a better case.

The Court should have done what it did in 2011 in the first Euro case concerning the assistance accorded to Greece and the EFSF: There, the ECB's Securities Market Programme (SMP), a predecessor to the OMT program, was challenged. The Constitutional Court simply declared this case to be inadmissible, as it was not directed against acts of German public authority.[122]

Rebels without a cause or with a cause—what could be the cause of the six majority judges? The critics suspect all kind of motivations, from anti-Europeanism to judicial ego.

[119] BVerfGE 123, 267 at Headnote 4.

[120] BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at para. 28).

[121] *See*, *e.g.*, Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

[122] BVerfG, 2 BvR 987/10 7 at para. 116.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press

Simplistic answers are not helpful, though. I do not see anti-Europeans on the bench, and it appears to me that the judges truly believe that they do the right thing. They truly believe that they are the last stand to defend and uphold the Constitution. The path of Germany in European integration is no antagonism to that Constitution, though, it is part of its legacy since 1949, and the Court has no monopoly on defining this path. If this needs to be clarified by Constitutional amendment, so be it.

The German Constitutional Court is a venerable institution that has served the Federal Republic well over more than 60 years. It has helped establish a culture of democracy, rule of law and fundamental rights protection in post-war Germany and it has fostered a concept of values enshrined in the Constitution, with human dignity as the most important value of all. Not least, it has brought the Weimar debate on the appropriate guardian of the Constitution to an end, proving Carl Schmitt, who opted for a president as guardian and warned that a constitutional court would always end up doing politics,[123] wrong, and Hans Kelsen, who opposed Schmitt on this,[124] right.

Yet Hans Kelsen would probably not approve of the Court's approach to EU matters. The six judges' majority opinion supporting the OMT reference represents a Constitutional Court moving into the wrong direction. It is a direction that has the potential for damaging the Court's authority,[125] its legacy and its achievements and to divert it from the realm of domestic fundamental rights protection that it should focus on.

It may well be that the entire OMT saga ends without a bang, with the ECB simply declaring the program void or with the German Constitutional Court simply following an ECJ decision that basically leaves things unaltered. Some of the majority judges of the German Constitutional Court, clearly in an effort to de-dramatize the case, try to give that impression speaking extra-judicially in the aftermath of the decision.[126] The unspectacular and sober confirmation of the September 2012 interim decision in March 2014 [127] – the ESM Treaty and the Fiscal Treaty are compatible with the German constitution – is in line with this.

---

[123] Carl Schmitt, DER HÜTER DER VERFASSUNG 48 (1931).

[124] Hans Kelsen, *Wer soll Hüter der Verfassung sein?*, 6 DIE JUSTIZ 5 (1931).

[125] See Judge Lübbe-Wolff's dissent on this. BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at para. 8).

[126] Judge Voßkuhle and Judge Huber both used similar wording in public appearances in Berlin in March 2014 stating that the German Constitutional Court would "accept" ("akzeptieren") a (sound) ECJ decision. This wording still leaves everything open and of course, two judges cannot speak for the other judges on that matter. The events took place Mar. 6 at the Berlin-Brandenburgische Akademie der Wissenschaften and Mar. 10 at the German Foreign Office, see on that M. Steinbeis, *OMT-Vorlage: Richter Huber signalisiert Demut gegenüber dem EuGH*, VERFASSUNGSBLOG (Mar. 10, 2014), http://www.verfassungsblog.de/de/omt-vorlage-richter-huber-signalisiert-demut-gegenueber-dem-eugh.

[127] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1390/12, (Mar. 18, 2014).

Otherwise, the possibilities to prevent the German Constitutional Court from going down a slippery slope in that context are limited.[128] There is the option to change the Constitution in order to clarify things, of course. Beyond that, one may still hope for reason to prevail. The German title of *Rebel Without a Cause* is "*…denn sie wissen nicht, was sie tun,*" which literally translates to "...for they know not what they do."[129]

Let us hope that at the end of the day all those involved, be it as members of courts or central banks, know what they are doing and that they will do the right thing.

[128] On 'court-packing' as the most dramatic measure and its limits, see Franz C. Mayer, *Kompetenzverschiebungen als Krisenfolge? Die US-Verfassungsentwicklung seit dem New Deal und Lehren für die Euro-Krise*, JURISTENZEITUNG (2014, forthcoming).

[129] The full quote is, "Father, forgive them; for they know not what they do." *Luke* 23:34.

https://doi.org/10.1017/S207183220000287X Published online by Cambridge University Press