Special Issue
***The OMT Decision of the German Federal Constitutional* Court**

Karlsruhe Makes a Referral

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On 7 February 2014 in the *OMT Case*,[1] the German Constitutional Court in Karlsruhe referred a question about the interpretation of Treaty law to the European Court of Justice for the first time. The question was whether the European Central Bank exceeded its mandate when it declared, in September 2012, that it was prepared to make emergency, unlimited purchases of specific states' bonds. Some view the referral as a genuflection acknowledging the judicial superiority of European Union jurisprudence. Has the Karlsruhe Court relinquished its role as "the final arbiter" and thereby surreptitiously bid farewell to the German sovereignty that the same Senate of the Constitutional Court so vigorously endorsed in the *Lisbon Treaty Case*[2] in 2009?

Those who answer "yes" to this question give symbolism greater weight than actions. After all, a referral to the European Court was already anticipated in the *Lisbon Treaty Case*[3] in 2009. The Federal Constitutional Court made this referral only because, as a court of a sovereign state, it decides exactly which elements of state authority Germany has surrendered to the European Union and its institutions. Do the Treaties empower the European Central Bank to pursue a program of monetary state-financing through the purchase of states' bonds? The Constitutional Court clearly answered this question in 2012 in the *ESM Temporary Injunction Case*.[4] In that case, the Court concluded that the European Central Bank's purchase of states' bonds in the secondary market was a forbidden detour around the "prohibition against monetary budgetary financing." With its OMT referral decision, the Court reaffirmed this view and went one step further. The Karlsruhe ultra vires challenge process cannot be expected to successfully combat every instance when European institutions overstep their competences. The Constitutional Court has retained the "last word" only for those rare cases when the European institutions

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[1] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], 2 BvR 2728/13 (Jan. 24, 2014), https://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html [hereinafter OTM Case].

[2] Lisbon case, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/08 (Jun. 30, 2009) https://www.bundesverfassungsgericht.de/en/decisions/es20090630_2bve000208en.html.

[3] *See id.*

[4] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1390/12 (Sept. 12, 2014).

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"blatantly" and in a "structurally meaningful manner" move beyond their competences established in the Treaties.

Some critics of the Court have argued that the standard set for an ultra vires challenge is so onerous that no one will be able to fulfill it. That criticism is clearly refuted in the Court's *OMT Case*[5]. The Court's judgment is unequivocal. The European Central Bank's intent, to make unlimited emergency purchases of states' bonds in the financial markets when those states cannot obtain sustainable interest rates, is not permitted by the European Central Bank's mandate. The Bank's declaration in September 2012 calmed the financial markets. But the Constitutional Court characterized that action as a "blatant" violation of the rules necessary for maintaining a stable currency union. In this sense, the Constitutional Court viewed the possible bond purchases as a "structurally meaningful" shift in the burdens borne by the Member States. In other words, the Constitutional Court has not only made its first referral to the European Court of Justice; but also, found the high standards for an ultra vires complaint to be satisfied for the first time.

That the court of a Member State has called upon the European Court of Justice to determine whether an exercise of authority by one of the European institutions has a basis in the Treaties will be seen by critics of the Constitutional Court as an effort to aggrandize itself. This makes sense as a political argument. How did we arrive at the place where the high court of each of the 28 Member States of the Union can take it upon itself to insist that the Commission, European Parliament, Council or European Central Bank observe the limits on their competences? Two years ago, the Constitutional Court in in Brünn declared applicable Union law unenforceable in the Czech Republic on the basis of an ultra vires challenge. These domestic ultra vires proceedings are an irritation. After all, the Union depends on legal unity and should not be a patchwork rug. But that does not seem likely in practice. There are compelling reasons for the ultra vires review process carried out by Member States' courts, including the Court in Karlsruhe. That will be true at least as long as the Basic Law provides the authority, and the obligation, for Germany's participation in the European Union.

The critics of the Constitutional Court should also have to answer the question: How would it be if the national courts submissively ignored European institutions' clear transgressions of their competences, even though the Member States remain the masters of the Treaties? What would happen if an EU regulation was issued that required Germany to double its defense budget or extend the election-period of the Bundestag to five years? Should the Constitutional Court conclude that this regulation is applicable because Union law enjoys categorical priority? Any one who soberly grapples with such fictional "hard cases" will have to concede that the Constitutional Court's jurisprudence is neither pursuing a form of timid see-saw politics, nor seeking to advance its own interests at the expense of European

[5] OTM Case.

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unity. The Constitutional Court is enforcing exactly that version of the European project that politics have managed to achieve by way of international law. And what is that version of the European Project? It is a close association of independent and sovereign states that have resisted the pressure to become a federal state. The ambiguity of a politically difficult-to-balance association is truly not the work of a constitutional court judge. Constitutional court judges can only pay heed to the political will embodied in the Treaties.

The Constitutional Court's referral is no submissive genuflection. It is also not a coercive imposition. It is an example of the openness towards Europe mandated by the Basic Law. The Constitutional Court should not confirm an ultra vires challenge without first giving the European Court of Justice the opportunity to offer an opinion or to take corrective action. No one knows how the European Court of Justice will decide. If it gives the European Central Bank an unlimited blank-check, then the Constitutional Court will have to stand by its ultra vires conclusion in the *OTM Case*.[6] The European Court of Justice must not behave in the manner of a political institution, especially not with the notable curiosity that the European Court's president is Greek. The European Court's interpretation of the Treaties has always shown great generosity towards the Union, often with rather limited understanding for the interests of the Member States. But the European Court of Justice should remain just that: A court. It fulfilled this role recently in the *Pringle* Case[7] when it underscored the exceptional nature of financial burden sharing between the Member States—exactly as the Constitutional Court has done.

The European Court of Justice will recognize what is really at stake. This is not about competition and jealousy between important courts. This is about hewing to the rule of law in the face of a crisis, a crisis that, in the first instance, was largely caused by massive violations of the law. Some pragmatists among the crisis managers see only the speculators working against the common currency, taking the form of the crudely calculating financial markets, which are determined to test the strength of the currency union by testing the weakest link in the chain. The European Stability Mechanism was a necessary reaction to the crisis, but it was a reaction that was not particularly well-aligned with the spirit of the European Treaties. After all, it suggests that the currency union can only function if the controlling principle, which insists on the budgetary autonomy of each and every Member State, is circumvented.

No parliament in the capitals of Europe can burden other states with debt without doing harm to the principle of democracy. For this reason, any state that seeks to solve its budgetary emergency with the taxes of the citizens must tolerate fiscal and economic-policy restrictions. The foundation for these unpleasant obligations of debtor and creditor

[6] *Id*.

[7] Thomas Pringle v. Government of Ireland, CJEU Case C-370/12 (Nov. 27 2012), http://curia.europa.eu/juris/recherche.jsf?language=en.

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lay, first and foremost, in the violations of the stability criteria and in the illusion that continuous, self-sustaining economic growth can be achieved with borrowed money. The speculative market is reacting to the solvency problems created by promiscuous policies cooked up at home by the Member States. There should, and there must, be a helping hand to promote self-empowerment. But a return to individual responsibility and stability criteria established and enforced by European law must be the ultimate goal.

The European Central Bank is not a monetary policy detour to be implemented when the political forces are faced with uncomfortable choices as a result of the Fiscal Compact. No doubt, it would be grand for the political forces if all states' bonds were selling like hotcakes because the buyers can expect that the European Central Bank will snatch-up every solvency risk to ensure a happy ending. The bold—but equally counterfactual—Basel Banking Regulations have been pointing in this fantastical direction for some time. According to these regulations states' bonds are paper without risk. Such state-serving decisions circumvent the will of the Treaties that created the currency union. The fiscal discipline of the participants in the common currency is a decisive prerequisite for the success of this fascinating European project. The truly "bad Europeans" were those who fudged their budgetary numbers or watered down, sometimes even disregarded, the stability criteria. Not even Germany's debt-ratio limit is aligned with the stability criteria.
Indeed, perhaps even the European Central Bank would be thankful if its mandate as monetary policy maker were clearly delimited. There is no reason to doubt its fealty to the law any more than its wisdom in monetary policy and macroeconomics. Why would that not be possible through the cooperative collaboration of courts that have been empowered by a European *legal* community?

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