Special Section
The CJEU's OMT Decision

Doubtful it Stood…: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment

By Heiko Sauer[*]

Abstract

Quite unsurprisingly, the CJEU has held that the ECB's OMT program does not violate EU law. In accordance with this holding, I argue in the first part of this note that the OMT program does not transgress the ECB's mandate under the Treaty, which is often interpreted too narrowly, in particular by German legal scholars. Furthermore, I argue that a violation of the prohibition of monetary financing of the member States as enshrined in article 123, para 1 TFEU cannot be inferred from the ECB's announcement of a program, which has never been implemented. In any case, there is clearly no manifest and grave transgression of EU competences which, according to the German Federal Constitutional Court's (FCC) *Honeywell* doctrine, is required for an ultra vires finding. The second part of this note shows that the FCC's doctrine regarding transgressions of competences by EU organs (ultra vires review) is not only unconvincing as a matter of principle but also and worse (as on premises we can always reasonably disagree) not consistently applied to the OMT program. The note also objects to the Court's somewhat trendy blending of ultra vires and constitutional identity review of EU law through which it increasingly conceals its approach of applying the so-called constitutional constraints of European integration to the EU organs' conduct. The forthcoming FCC judgment is therefore less important as regards the quite foreseeable finding on the lawfulness of the OMT program but – hopefully – of vital importance as it might embody a more coherent relaunch of the FCC's standards of judicial review with regard to EU law.

The judgment of the Court of Justice of the European Union (CJEU) on the European Central Bank's (ECB) 2012 announcement of future Outright Monetary Transactions (OMT)[1] comes as no surprise. It had not been expected that the CJEU would interpret the

[*] Professor of Public Law, Rheinische Friedrich-Wilhelms-Universität Bonn. I am grateful to Julian Krüper, Mehrdad Payandeh, and Sven Simon for valuable comments, to Christian Bayer and Marc Resinek for important background information on political economy, and to Martin Schäfer for his research assistance.

[1] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 2014, Case No. 2 BvR 2728/13, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html [hereinafter OMT Decision].

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

European Economic and Monetary Union's (EMU) Treaty provisions the way the FCC had "suggested."[2] Neither had it seemed conceivable that the CJEU would reject the FCC's request for a preliminary ruling holding that a legally non-binding assessment of the EU action's lawfulness could not be requested under Article 267 TFEU.[3] The judgment had nevertheless been awaited for with tension for two reasons: First, in the vigorous and in part very critical[4] debate about the ECB's competences under the TFEU[5] and its alleged ultra vires action a judgment by the CJEU was necessary to settle the fundamental European law issues at stake. This is all the more important with regard to the ECB's current Expanded Asset Purchase Program (EAPP)[6] as well as its interconnection with the European Stability Mechanism's (ESM) financial assistance programs.[7] The CJEU's holdings on the ECB's competences within the EMU framework are discussed in the first part of this note regarding the distinction between monetary and economic policy (infra section A.I.) and the interpretation of Article 123, paragraph 1 TFEU which prohibits monetary financing of the member States by the ECB (infra section A.II.). Second, it was clear that the judgment would shape the new stage in the changing and sometimes explosive on-off relationship between the CJEU and the FCC, the stage entered into by Karlsruhe's first ever request for a preliminary ruling. The FCC had fortified its ultra vires doctrine and clearly indicated its readiness not to follow the CJEU but to insist on the notorious "last word" of

[2] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 416 *et seq.*.

[3] The FCC's ultra vires assumption entails that an EU action might be, even after its validation by the CJEU, declared unlawful and thus not binding on Germany from a constitutional law perspective; the FCC therefore denies or at least questions the binding force of the CJEU's preliminary ruling. In this regard, see the other member States' objections, Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag, para. 18 *et seq*. (June 16, 2015), http://curia.europa.eu/.; the Advocate General's cautious criticism, Opinion of Advocate General Cruz Villalón at para. 30 *et seq*., Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag (Jan. 14, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=161370&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid= (which are—from a European law perspective—of course correct).

[4] *See, e.g.*, Wolfgang Kahl, *Bewältigung der Staatsschuldenkrise unter Kontrolle des Bundesverfassungsgerichts – ein Lehrstück zur horizontalen und vertikalen Gewaltenteilung*, 128 DEUTSCHES VERWALTUNGSBLATT (DVBl.) 197, 205 *et seq*. (2013) (with a trenchant guess on a potential CJEU OMT judgment); Reiner Schmidt, *Die entfesselte EZB*, 70 JURISTENZEITUNG 317 (2015); Werner Heun, *Eine verfassungswidrige Verfassungsgerichtsentscheidung – der Vorlagebeschluss des BVerfG vom 14.1.2014*, 69 JURISTENZEITUNG 331 (2014).

[5] On the ECB's new approach in the European debt crisis in general, see Thomas Beukers, *The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention*, 50 COMMON MKT. L. REV. 1579, 1579 *et seq*. (2013).

[6] It is known as "quantitative easing"; see, in this regard, Franz C. Mayer, *Zurück zur Rechtsgemeinschaft: Das OMT-Urteil des EuGH*, 68 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1999, 2003 (2015).

[7] *Cf*. Opinion of Advocate General, *supra* note 3, at paras. 140 *et seq.*.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

the German Constitution instead.[8] Thus, the second part of this note discusses the constitutional legal premises of the FCC's approach and the procedural and substantial manner in which the FCC tries to scrutinize the ECB's OMT program (infra sections B.I. and B.II.). In this context, possible scenarios for the upcoming judgment (infra section C.I.) and consequences for European multi-level constitutionalism (infra section C.II.) will be discussed.

A. European Monetary Constitutional Law and the ECB's Mandate after the OMT Judgment

I. The OMT Program Between Monetary and Economic Policy: The ECB's Mandate and Legitimation under the EMU

The major objection of the FCC's referral lies in the alleged transgression of the ECB's monetary policy mandate: According to the FCC, the OMT sovereign bonds purchase program aims at complementing the member States' and subsequently the ESM's financial assistance for over-indebted member States of the Eurozone. Such measure fell into the ambit of general economic policy and was ultra vires. It has thus to be examined how the EMU's Treaty provisions generally shape the ECB's mandate (infra subsection 1.). Subsequently, the question of how monetary and economic policy can be distinguished is to be addressed (infra subsection 2.).

1. Competences and Legitimation of the ECB under the EMU

1.1 The Overrated Accuracy of the Distinction Between Monetary and Economic Policy

The asymmetry of competences within the EMU has often been characterized as its decisive birth defect. The member States of the Eurozone have transferred their monetary sovereignties entirely[9]: The monetary policy lies in the exclusive competence of the EU.[10] In contrast, the economic policy is not even a shared competence of the EU and its member States.[11] Is merely subject to coordination,[12] i.e. the member States adjust their national economic policies with a view to achieving the requisite objectives of the

[8] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 14, 2004, 111 ENTSCHEIDUNGENG DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 307, 319; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, 123 ENTSCHEIDUNGENG DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267, 400.

[9] *See* CHRISTOPH HERRMANN, WÄHRUNGSHOHEIT, WÄHRUNGSVERFASSUNG UND SUBJEKTIVE RECHTE, 116 *et seq.* (2010).

[10] Consolidated Version of the Treaty on the Functioning of the European Union art. 2 para 2., art. 3 para. 1 lit. c), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[11] TEFU art. 2 para. 2, art. 4 para 2.

[12] TEFU art. 5 para. 1, art. 119 para. 1.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

Treaties.[13] It has long been questioned whether and how it is possible for a monetary union to operate under the condition of distinct and fundamentally diverse national economic policies; and it has often been deplored that the ongoing European debt crisis is partly a consequence of the lack of political courage to endow the EU with economic competences. However, *de constitutione lata* the allocation of competences within the EMU requires a differentiation between monetary and economic policy: The former is assigned to the EU and the latter to its member States. The FCC is of the opinion that the ECB left its field of activity, which according to Article 127 TFEU is basically monetary policy, and unlawfully encroached on economic policy.

Thus, the allegation only at first sight concerns the ECB's competences as an EU organ; substantially, it is about the ECB making use of competences which have not been transferred to the EU by its member States. Regrettably, there are several factors rendering the requisite delimitation quite intricate:[14] First, the Treaties do not provide for any criteria for the delimitation between monetary and economic policy. Second, in political economy the idea that a single political action can unquestionably be assigned to either of the two domains is increasingly cast into doubt. Third, the EMU provisions considerably blur the boundary by vesting the ESCB—and thereby, implicitly and above all, the EU—with the competence or rather the obligation "to support the general economic policies in the Union", without prejudice to the objective of price stability.[15] The ECB[16] is thus not only entitled to take actions of monetary character which have an impact on economic policy, as long as price stability is not affected. It is also authorized to take measures of economic character as long as these support the member States coordinated economic policies.[17] Thereby, the EMU's underlying differentiation between monetary policy on the one hand and economic policy on the other hand is considerably loosened:[18]

[13] TEFU art. 3 paras. 3 & 4, art. 119 para. 1.

[14] *See also* Alexander Thiele, *Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, 15 GERMAN L.J. 241, 258 *et seq*. (2014); Mattias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of Chicken and What the CJEU Might do About It*, 15 GERMAN L.J. 203, 214 (2014); Jürgen Bast, *Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's* Ultra Vires *Review*, 15 GERMAN L.J. 167, 175 (2015); Frank Schorkopf, *Krisensymptome supranationaler Leitbilder. Zur Notwendigkeit intergouvernementaler Integration*, 11 ZEITSCHRIFT FÜR STAATS-UND EUROPAWISSENSCHAFTEN (ZSE) 189, 193 (2013); Daniel Thym, *Case Note on Pringle*, 68 JURISTENZEITUNG (JZ) 259, 260 (2013). *See* Simon, in this issue.

[15] TEFU art. 127 para. 1(2); compare in this regard also Bundesbankgesetz [German Central Bank Statute] § 12.

[16] The ESCB itself is neither vested with legal capacity nor with capacity to act, so it must be referred to the ECB, see in detail Florian Becker, *Art. 129 TFEU*, *in* KOMMENTAR ZUR EUROPÄISCHEN WÄHRUNGSUNION margin number 4 *et seq*. (Helmut Siekmann ed., 2013).

[17] This important aspect is played down by the FCC, see OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 366, 403 *et seq*.; see, in contrast, HEUN, *supra* note 4, at 333.

[18] *See* Opinion of Advocate General Cruz Villalón, *supra* note 3, at para. 128 et seq.; ALEXANDER THIELE, DAS MANDAT DER EZB UND DIE KRISE DES EURO 33 *et seq*. (2013).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

Whereas the competences between the EU and its member States are divided along the line of either monetary or economic policy, such clarity is abandoned with regard to the ECB: It is vested not only with the mandate to conduct the monetary policy of the EU, together with the national central banks of the Eurozone,[19] but also with additional capacities of economic policy. Though the ECB as an organ cannot be endued with powers that have not been transferred to the EU as an organization, there is no contradiction: Article 5, paragraph 1(2) TFEU establishing the merely coordinating EU competence in the field of economic policy expressly states that special principles apply for the member States of the Eurozone. Thus, Article 127, paragraph 1(2) TFEU vesting the ECB with a supportive economic policy competence embodies, in terms of organ powers, an additional but concealed EU competence. Albeit the exercise of this competence has to be strictly geared to the member States coordinated economic policies, i.e. the EU is prevented from a self-contained economic policy approach, it is too simplistic to contend that the EMU provisions vest the EU with monetary but not with economic powers.[20]

1.2. Independence, Legitimation, and Mandate of the ECB

The assumption that the ECB's competences are to be narrowly interpreted and are thus limited to monetary policy for democratic reasons cannot be endorsed. The ECB, as well as the national central banks, is independent according to article 130 TFEU.[21] Therefore, political influence by other EU organs or by the member States' Governments is specifically prohibited. Seen from the German understanding of the constitutional principle of democracy, this is problematic: Pursuant to Article 20, paragraph 2(1) of the Basic Law, all State authority emanates from the people. In a representative democratic system, the necessary link between the people and a State organ must, according to prevailing doctrine in Germany, be established substantially as well as personally.[22] The correspondent problem with the German Central Bank's (*Bundesbank*) independence, as it has long been discussed,[23] is the inability of the directly elected Bundestag or the democratically accountable Federal Government to govern or at least control the

[19] TEFU art. 282 para. 1(2).

[20] This is, however, a widespread understanding in German literature, compare, e.g., Martin Seidel, *Der Ankauf nicht markt- und börsengämgiger Staatsanleihen, namentlich Griechenlands, durch die Europäische Zentralbank und durch nationale Zentralbanken – rechtlich nur fragwürdig oder Rechtsverstoß?*, 21 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 512 (2010); SCHMIDT, *supra* at note 4, 320; Helmut Siekmann & Volker Wieland, *The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany*, INSTITUTE FOR MONETARY AND FINANCIAL STABILITY WORKING PAPER No. 71, 8 (2013).

[21] See in detail THIELE, *supra* note 18, at 51 *et seq*. with further references.

[22] *See, e.g.*, Horst Dreier, *Art. 20 (Democracy)*, *in* 2 GRUNDGESETZ-KOMMENTAR, margin number 104 *et seq*. (Horst Dreier ed., 2006).

[23] See FRAUKE BROSIUS-GERSDORF, DEUTSCHE BUNDESBANK UND DEMOKRATIEPRINZIP 127 *et seq*. (1997); MATTHIAS JESTAEDT, DEMOKRATIEPRINZIP UND KONDOMINIALVERWALTUNG 427 *et seq*. (1993); REINER SCHMIDT, ÖFFENTLICHES WIRTSCHAFTSRECHT: ALLGEMEINER TEIL 362 *et seq*. (1990).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

monetary policy decisions of the *Bundesbank*; such policy also evades, by its very nature, a tight statutory guidance. This lack of influence is conceived of as a democratic abnormality which might be justified for price stability reasons,[24] but is not directly covered by article 88 of the Basic Law.[25]

On the basis of this constitutional peculiarity, some argue for a restrictive approach to the competences of the ECB: Due to the democratic problem inherent in the ECB's independence, its mandate under the TFEU had to be strictly limited to monetary policy.[26] Such a legal transplant of German constitutional ideas to the European level is however erroneous for two reasons: First, democratic requirements under the Treaties do not necessarily correspond to democratic requirements under the Basic Law. In other words, it had to be explored, as a first step, how democratic legitimation is to be conceived of in the EU, which is a highly difficult and controversial issue; as a second step, one would have to ask whether in that regard the ECB's independence constitutes a democratic problem comparable to the situation under German constitutional law.[27] I cannot see that this path has been taken by any of the exponents of the democracy related argument including the FCC.[28] Second, even if the ECB's independence constituted a problem with regard to democracy in the EU, such problem would be outweighed by both the constitutional coverage of the ECB's independence stemming from Article 130 TFEU and most notably the ECB's supportive economic policy competence enshrined in Article 127, paragraph 1(2) TFEU:[29] No appeal to a narrow interpretation of the ECB's mandate based on whatever important constitutional principle can be used for overriding its explicitly stipulated competences.

[24] With regard to the ECB's independence see OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at para. 55.

[25] See in detail BROSIUS-GERSDORF, *supra* note 23, at 377 *et seq*.; *cf*. Reiner *Schmidt, Die Gefährdung der Europäischen Zentralbank*, 31 ZEITSCHRIFT FÜR RECHTSPOLITIK (ZRP) 161 *et seq*. (1998).

[26] *See* SCHMIDT, *supra* note 4, at 318.

[27] See in detail, CHARLOTTE GAITANIDES, DAS RECHT DER EUROPÄISCHEN ZENTRALBANK 211 *et seq*. (2005); correctly differentiating between european and national democratic requirements, HUGO J. HAHN & ULRICH HÄDE, WÄHRUNGSRECHT 232 *et seq*. (2010); CHRISTOPH OHLER, BANKENAUFSICHT UND GELDPOLITIK IN DER WÄHRUNGSUNION, § 2 para. 49 (2015); towards a generalization of the democracy related problem, Sven Simon, *Whatever it takes: Selbsterfüllende Prophezeiungen am Rande des Unionsrechts? Eine unionsrechtliche Bewertung der OMT-Entscheidung der EZB*, 50 EUROPARECHT (EuR) 107, 123 (2015).

[28] It is significant that the FCC concludes its democratic argument with references to its own jurisprudence, adding "relating to the German Constitution," see OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at 366 & 400.

[29] *See* also OHLER, *supra* note 27, at § 2 para. 49; Jan Henrik Klement, *Der Euro und seine Demokratie*, 29 ZEITSCHRIFT FÜR GESETZGEBUNG (ZG) 169, 191 (2014).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

2. The Differentiation Between Monetary and Economic Policy: Criteria and Standard of Review

1.1. The persuasiveness of the CJEU's Strictly Subjective Approach

In the absence of any Treaty-based clue,[30] there are at most three feasible criteria for the distinction between measures of monetary and economic policy: their purpose, their type or legal character, and their effect.[31] To start with the latter, it is hardly imaginable that a specific ECB action might *a priori* have an affect only for one of the areas in question. The same applies, *mutatis mutandis*, for the type or legal character of a potential ECB action.[32] For example, neither a sovereign bonds purchase nor any other open market operation is as such a measure of monetary or economic policy. Otherwise one had to argue that any ECB action of the kind provided for in the ESCB Statute automatically lies within its mandate. It cannot therefore be inferred from the CJEU's *Pringle* finding that sovereign bonds purchases carried out by the ESM fall into the member States' economic policy competences that such purchases if carried out by the ECB exceed its monetary policy mandate.[33] The purpose and context of such purchase differ so categorically that the comparison is misleading. At the most, one might object the conditionality of the OMT program in this regard.[34] According to the conditions set out by the OMT press release, a sovereign bonds purchase by the ECB must be strictly conditional – in the sense that there must be a current ESM financial assistance program including the possibility of primary market purchases. But this is an ambiguous if not perfidious argument: If only conditionality, as will be set out below,[35] ensures compliance of the ECB with the prohibition of monetary financing stemming from Article 123, paragraph 1 TFEU, conditionality cannot simultaneously trigger the exceeding of the ECB's monetary policy mandate. In other words, conditionality is crucial as regards the substantive aspect of the ECB's action, not its competences. The substantially necessary conditionality therefore does not turn a lawful monetary into an unlawful economic measure.[36]

---

[30] *See* OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at para. 42 ("It must be pointed out in this regard that the FEU Treaty contains no precise definition of monetary policy. . . .").

[31] See, in detail, Alexander Thiele, *Die EZB als fiskal- und wirtschaftspolitischer Akteur?*, 23 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 694 *et seq*. (2014).

[32] *Contra* HEUN, *supra* note 4, at 333.

[33] Veering toward such an argument, see OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at paras. 366, 407 *et seq*.; Mattias Wendel, *Kompetenzrechtliche Grenzgänge: Karlsruhes* Ultra-vires-*Vorlage an den EuGH*, 74 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 615, 653 *et seq*. (2014).

[34] OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at paras. 366, 407.

[35] *See infra* A.II.

[36] This is convincingly exposed by OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at paras. 63, 99–100.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

As a consequence, the requisite distinction can, ultimately, only be geared to the purpose of the conduct in question.[37] This is however disputed by the FCC, and its concern cannot be lightheartedly dismissed: Would such a subjective approach not inevitably enable the ECB to determine the limits of its own mandate and thereby vest it with *Kompetenz-Kompetenz*, for every monetary purpose justifies every possible measure? Of course the ECB must be effectively precluded from just pretending monetary purposes with a view to establishing its competence.[38] In my opinion, this can be achieved, and thus a purely subjective approach does not amount to vesting the ECB with *Kompetenz-Kompetenz*: Since the purpose is decisive for the legality of a measure, the ECB is under a procedural obligation to give reasons for its actions;[39] the less evident the monetary policy character of a single measure is, the higher is the standard for its substantiation. Such substantiation enables judicial review by the CJEU. From an insufficient substantiation, and this means from an ECB's infringement of its procedural obligation, the CJEU might infer the unlawfulness of an action; otherwise it would be due to the ECB to preclude its action being judicially reviewed. Most notably, it can and must be reviewed whether an ECB action first pursues a monetary policy objective[40] and second is a suitable instrument with reference to this objective.[41] What considerably complicates such review is that there are necessarily certain economic policy assumptions underlying the ECB's purposes: When deciding on the OMT program, the ECB was of the opinion that the so-called monetary transmission mechanism was interrupted. As interest rates in the EU were widely differing, the ECB worried that it would forfeit its capacity to act and thus, ultimately, to maintain price stability. The ECB conceived this diversity as an expression of somewhat irrational surcharges induced by unjustified fears of a reversibility of the Euro. By means of its OMT program, it intended to purchase sovereign bonds of certain member States of the Eurozone with particularly high interest rates. It thereby wanted to adjust the interest level, and, as a result, to restore the monetary transmission in a way enabling it to perform its tasks under the EMU. The suitability of a particular measure of monetary policy to

[37] The CJEU regards the measures taken as subsidiary criteria. *See* OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at para. 46. Indirect effects are seen as irrelevant. *See* Case C-370/12, Pringle v. Government of Ireland, Ireland and the Attorney General, paras. 56, 97 (Nov. 27, 2012), http://curia.europa.eu/; *Gauweiler*, Case C-62/14 at para. 51. In contrast, the FCC is of the opinion that the character and the effect of a particular action have to be taken into consideration too. *See* OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 402.

[38] *Cf*. *Id*. at paras. 366, 400.

[39] *See id*. at paras. 69 *et seq*..

[40] Or rather aims at supporting the member States' economic policies without affecting price stability.

[41] I doubt whether the principle of proportionality as enshrined in TEFU article 5, paragraph 4 fully applies in the area of delimitation of competences. For such an approach, see Opinion of Advocate General Cruz Villalón, *supra* note 3, at para. 159 et seq., *Gauweiler*, Case C-62/14; OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 66 *et seq*..

pursue a certain objective, mostly price stability being the ECB's paramount objective,[42] cannot be assessed without political economy expertise. This apparently raises the question of the standard of judicial review[43]: Is the CJEU allowed or even obligated to make its proper observations on monetary or economic policy and to deny the ECB's assumptions? Or does the ECB, in contrast, dispose of a wide margin of appreciation in monetary and economic policy matters so that only the tenability of its assumptions can be inquired?

1.2. Judicial Expertise in Political Economy and the Standard of Review

The FCC is of the former opinion which it regrettably does not substantiate: It objectifies the purpose of an ECB's action, which already entails a concealed element of intensified review,[44] and above all it vigorously disagrees with the ECB's assumptions. On the one hand, the distinction between rational and irrational interest surcharges was assailable and could in any case not be operationalized.[45] On the other hand, virtually every debt crisis entailed an interruption of the monetary transmission mechanism, more precisely a disruption of the state-bank-nexus; this however could not turn the improvement of a State's solvency by an ECB's sovereign debts purchase into a measure of monetary policy.[46] Unmaskingly, the FCC further describes the assumptions of the *Bundesbank*—which is highly critical towards the OMT program, its President having voted against it in the ECB Governing Council—as "convincing expertise"[47] where it deviates from the ECB position.[48] This implies that the ECB provides unconvincing expertise as regards the controversial issues.[49] But what is the basis for the FCC to exhaustively question the ECB's political economy assumptions and to decide which bank's assessment is correct and which one's is mistaken? What the FCC exposes on economic policy might not be incorrect, it might even be convincing; but this is insignificant, as there are at least two points clearly indicating a

[42] TEFU art. 127 para. 1(1).

[43] *See* Matthias Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GERMAN L.J. 265, 269 *et seq*. (2014).

[44] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 401; *see* SCHMIDT, *supra* note 4, at 320.

[45] Oddly, the FCC uses the pretty vague term "*aussagelos*," but it obviously rather means "*verfehlt*," see OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 416.

[46] *Id*. at para. 416.

[47] *Id*. at para. 405.

[48] BAST, *supra* note 14, at 177 ("The Constitutional Court's discussion of this crucial point is surprisingly brief, but still heavily loaded with claims to economic expertise.").

[49] See, particularly critical, HEUN, *supra* note 4, at 334.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

wide margin of appreciation in political economy matters.[50] First and most evident, the FCC cannot claim to have the requisite expertise.[51] This could neither be altered if it availed itself of experts, as in case they disputed the ECB's assumptions the FCC would have to decide on preferability. Second, the fact that the EMU's provisions do not provide for applicable criteria to distinguish monetary from economic policy and at the same time vest the ECB with an additional supportive economic policy competence entails a legitimate discretion on part of the ECB when shaping its mandate.[52] After all, the standard of review for both the monetary purpose of an ECB' action and its suitability to pursue its objective is tenability. It seems undeniable that the assumptions that the monetary transmission mechanism was interrupted[53] and that a selective[54] sovereign bonds purchase would be convenient for its restoration were tenable,[55] at least not obviously mistaken.[56] One might still deplore that the adequate standard of review leaves considerable leeway to the ECB. This is however primarily a political concern: The EMU's Treaty provisions do not provide for any more precise distinction and they do not fence the ECB's activities more narrowly, especially taking into consideration the crucial provision of Article 127, paragraph 1(2) TFEU. The CJEU should thus not be criticized for not having more effectively enchained the ECB—apart from the question if this would have been desirable from a legal policy point of view.

---

[50] *Cf*. THIELE, *supra* note 18, at 39 *et seq*.; Christoph Herrmann, *Die Bewältigung der Euro-Staatsschuldenkrise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts*, 23 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW) 805, 810 *et seq*. (2012); THYM, *supra* note 14, at 263; KUMM, *supra* note 14, at 214. *See* Simon, in this issue.

[51] The CJEU rightly induces a margin of appreciation from the technical and complex nature of the requisite ECB's assumptions and forecasts, see *Gauweiler*, Case C-62/14 at para. 68.

[52] There is, additionally, a controversy as to whether the preservation of the Euro is some kind of meta-goal of the ECB. For a critical statement, see OMT Decision, BVerfG, Case No. 2 BvR 2728/1 paras. 366, 405. In the affirmative, see, e.g., Peter Sester*, Plädoyer für die Rechtmäßigkeit der EZB-Rettungspolitik*, RECHT DER INTERNATIONALEN WIRTSCHAFT (RIW), 451, 453 (2013); HEUN, *supra* note 4, at 334.

[53] This is not even contested by the FCC.

[54] According to the FCC, the OMT program's selectivity contradicts its monetary policy purpose as monetary actions are usually irrespective of the situation in particular member States. *See* OMT Decision, BVerfG, Case No. 2 BvR 2728/1 366, 406 *et seq*.. The CJEU however convincingly highlights that there is no EMU Treaty provision prescribing universality and thus prohibiting selectivity of ECB operations. *See id.* at para. 55.

[55] See, in detail, OMT Decision, BVerfG, Case No. 2 BvR 2728/1 paras. 47 *et seq*., paras. 72 *et seq*.; *see* THIELE, *supra* note 18, at 38.

[56] In this regard, it might without insinuating monocausal connections be mentioned that the sole announcement of the OMT program spared its execution and that the desired development of the interest rates was achieved to a considerable extent.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

II. The OMT Program and the Prohibition of Monetary Financing Pursuant to Article 123 Paragraph 1 TFEU

The second major EU law objection to the OMT program put forward by the FCC is the alleged infringement of Article 123, paragraph 1 TFEU prohibiting monetary financing of the member States by, among others, the ECB.[57] At face value, however, this provision prohibits only the primary market purchase of sovereign bonds, meaning the purchase directly from the emitting Member State. Article 18.1 of the ESCB statute, on the other hand, in principle permits sovereign bonds purchases. But, the CJEU convincingly seized the FCC's suggestion to teleologically construe the prohibition in Article 123, paragraph 1 TFEU: According to both courts, a circumvention of the prohibited primary market purchase by a secondary market purchase amounting equally to monetary financing must be precluded.[58] There is however disaccord on the required safeguards. In part, the CJEU follows the FCC: As regards the omission of a prior concrete announcement which could motivate primary market purchases ultimately amounting to stooge operations, and as regards the prerequisite of a period of standstill after the primary market purchase to allow a formation of market prices, the CJEU follows the FCC[59] in general; but it estimates the conditions set out in the ECB's press release as being sufficient.[60] As to two other criteria, the CJEU departs from the FCC's suggestions: The latter had inferred its objection that the OMT program amounted to unlawful monetary financing especially from the lack of a privileged creditor status entailing the risk of an involuntary participation in a debt cut and from the increased default risk of the bonds concerned.[61] According to the CJEU, the risk of a debt cut decided upon by the other creditors of the member State concerned is inherent in a purchase of bonds on the secondary market – an operation which is authorized by the Statute without being conditional upon the ECB having privileged creditor status.[62] As to the increased default risk of the sovereign bonds potentially covered by the OMT program, the CJEU is of the opinion that the restrictions of this

[57] *See, e.g.*, SCHMIDT, *supra* note 4, at 323 *et seq.*. For the assumption of such infringement regarding the SMP program, see, e.g., SEIDEL, *supra* note 20, at 512; Matthias Ruffert, *Der rechtliche Rahmen für die gegenseitige Nothilfe innerhalb des Euro-Raums*, BITBURGER GESPRÄCHE JAHRBUCH 2011/I 15, 23 (2012) (regarding the SMP program).

[58] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 paras. 97 *et seq*..

[59] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 paras. 366, 414 *et seq*., paras. 104 *et seq*..

[60] However, the CJEU does regrettably not respond to the FCC's apprehension that the OMT announcement had suggested the ECB ultimately turning into a "lender of last resort," see OMT Decision, BVerfG, Case No. 2 BvR 2728/1 366, 415; *cf.* MAYER, *supra* note 6, at 2001 *et seq*.

[61] See, in detail, OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 412 *et seq*.; the additional argument inferred from the possibility of holding the bonds until maturity is convincingly estimated as not being of pivotal importance, OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 118.

[62] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 126; see also OHLER, *supra* note 27, at § 4, para. 75.

program sufficiently ensure that the purchases are limited to the restoration of the transmission mechanism.[63] Additionally, according to the CJEU the strict conditionality of the program avoids that the impetus of the member States concerned to follow a sound budgetary policy might be lessened.[64] It is not easy to say which of the positions is ultimately more convincing given the unwritten prohibition of circumventing the primary market purchase ban enshrined in Article 123, paragraph 1 TFEU, the more so as the future program's conditions have only been scarcely set out in a press release and the program has not been started. I am of the opinion that it cannot be inferred from the existing preliminary information of the OMT program with sufficient certainty that it would have violated the prohibition of monetary financing had it been performed. This assumption is not equivalent to denying the FCC's objections' accuracy. Rather, I doubt whether the time for a substantial judicial review of the merely announced OMT program had already been ripe.

III. Conclusion: The Absence of an Evident Transgression of EU Competences

One might of course not agree with all of these assumptions and be of the opinion that the ECB has exceeded its mandate under European constitutional law and that it has infringed upon Article 123, paragraph 1 TFEU. But, departing from the FCC's ultra vires approach, this is not sufficient, as a manifest and grave transgression of EU competences is required according to *Honeywell* as I will expound below.[65] Taking into consideration all the difficulties shown above, it seems not arguable that the ECB has *evidently* exceeded its mandate.[66] By the same token, the infringement of the prohibition of monetary financing which is not even directly provided for in Article 123, paragraph 1 TFEU is far from being evident. With this reference alone the FCC could have dealt with the OMT proceedings:[67] Applying the *Honeywell* standard, they are at least ill-founded due to the lack of a manifest exceeding of its competences by the EU. To make things more delicate, as regards the prohibition of monetary financing an ultra vires action does not *a priori* come into consideration for the following reason: An alleged substantive violation of EU law must be clearly distinguished from a transgression of EU competences. The EU can of course violate the Treaties by legal actions whose competence is unquestionable. A legal concept of

[63] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 112.

[64] *Id.* at paras. 116, 121.

[65] *See infra* at B.I.1.1.

[66] *See* KUMM, *supra* note 14, at 214 ("But whatever the case may be, it is clearly and evidently implausible to claim that the ECB's policies are clearly and evidently in violation of the EU's competencies."); BAST, *supra* note 14, at 179; Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L.J. 111, 136 (2014); *but see* SIEKMANN & WIELAND, *supra* note 20, at 9 ("Looking at the overall syystem of the distribution of competences, the transgression gets close to the line the court has drawn in its previous decisions.").

[67] The Organstreit proceeding is not further addressed here.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

competence encompassing lawfulness and thus regarding any unlawful action as being substantially ultra vires might be conceivable but is useless: It would broaden the ultra vires approach beyond recognition. Therefore, the alleged infringement by the ECB of the prohibition enshrined in Article 123, paragraph 1 TFEU is not covered and thus not approachable by the FCC's ultra vires review of EU actions.[68] This might elucidate why the FCC has associated its ultra vires review with its constitutional identity review of EU actions—and thereby I pass on to the second part of this note.

B. The FCC's Constitutional Review of EU Law in the Light of the OMT Case

I. Critical Assessment of the FCC's Procedural and Substantial Assumptions Concerning Ultra Vires Review of EU Law

1. The FCC's Conception of Ultra Vires Review and its Inherent Inconsistencies

The FCC's concept of ultra vires review of EU actions is based on the premise that EU law derives its legal force from the member States: The FCC therefore denies the constitutional nature of European integration as well as the autonomy of the EU legal order.[69] Therefore, the member States' consent to the founding Treaties is and remains the source for the legal force of any EU organs' action – and that entails that ultra vires actions are not binding on the member States. It is this premise which enables the FCC to scrutinize EU actions against the benchmark of the treaties' competences, thereby marginalizing the founding treaties' assignment of ultra vires review to the CJEU alone.[70] The persuasiveness of the FCC's premises on the legal force of EU law and its application in Germany has long and often been challenged.[71] In my view, the decisive inconsistencies are the underhand intermixture of monism and dualism, the misconception of the anticipation of the application order regarding supranational actions contained in the legislative consents to the founding Treaties, the contradiction between the ultra vires conception and the *Honeywell* prerequisite of a manifest and grave transgression of EU competences,[72] and the implicit equation of unlawfulness and invalidity which is unfamiliar to EU law.

---

[68] See also WENDEL, *supra* note 33, at 630 *et seq*.

[69] As to the diverging notions of autonomy in this regard, see ANNE PETERS, ELEMENTE EINER THEORIE DER VERFASSUNG EUROPAS 242 *et seq*. (2001).

[70] TEFU art. 19 para. 1(2) & art. 263 para. 4.

[71] For a concise overview and critique, see generally Mehrdad Payandeh, *Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice*, 48 COMMON MKT. L. REV. 9 (2011); Erich Vranes, *German Constitutional Foundations of, and limits to, EU Integration: A Systematic Analysis*, 14 GERMAN L.J. 75 (2013); *compare with further references*, HEIKO SAUER, STAATSRECHT III, § 9 para. 18 et seq. (2015).

[72] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 6, 2010, Case No. 2 BvR 2661/06, paras. 286, 304 *et seq*.,

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

1.1. Legal Force, Monism and Dualism, and Domestic Application Order

The FCC's concept of ultra vires review contains three inherent contradictions regarding the application of EU law in the domestic legal orders of the member States. First, the relationship between EU law and municipal law can be explained either by a monist or by a dualist approach. The FCC traditionally follows a dualist approach, acting on the assumption that there are two distinct – however not unconnected – legal orders.[73] But, pluralism of legal orders stands for a plurality of basic norms in a *Kelsenian* understanding.[74] The legal force of norms of distinct legal orders emanates inevitably from different sources—otherwise there would simply be no distinct legal orders! The FCC in contrast starts from a dualist approach and coincidentally assumes that the legal force of EU law flows invariably from domestic law. I do not want to comment on whether a dualist or a monist approach is adequate, instead my point is that the FCC either deviates from its dualist conception or even follows a monist approach in fact.

Second, following a dualist approach, it is coherent to require an application order (*Rechtsanwendungsbefehl*) for EU actions. Without such an order, those actions would not be applicable in domestic law—only the *Rechtsanwendungsbefehl* thus bridges the gap between the distinct legal orders.[75] Yet, the EU can make use of supranational actions not depending on any implementation or execution by the member States: Notably EU regulations "shall be directly applicable in all member States" pursuant to Article 288, paragraph 2 TFEU. Such direct application means nothing else than an application not necessitating a specific domestic application order. But, under a dualist regime, the requirement of an application order is indispensable. The application order for supranational actions must therefore be conceived of as an *anticipated* application order inherent in the consent to the EU's supranational capacities.[76] This anticipation of the application order entails an automatic take-over of all supranational EU actions. In contrast, the FCC assumes that an EU action is relevant and thus applicable in the domestic legal order only under condition that the EU competences have not been exceeded. The anticipated and thus necessarily unconditional application order is thereby turned into a

---

http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html.

[73] See, explicitly, BVerfG, Case No. 2 BvR 1481/04 at paras. 307, 318.

[74] See, above all, HANS KELSEN, REINE RECHTSLEHRE 62 *et seq.* (1934).

[75] See, in commendable clarity, Matthias Jestaedt, *Der Europäische Verfassungsverbund – verfassungstheoretischer Charme und rechtstheoretische Insuffizienz einer Unschärferelation*, *in* RECHT DER WIRTSCHAFT UND DER ARBEIT IN EUROPA 637, 657 *et seq*. (Rüdiger Krause, Winfried Veelken & Klaus Vieweg eds., 2004).

[76] See SAUER, *supra* note 71, at § 6 para. 30 and § 8 para. 17.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

situational and conditional case-by-case adoption. This profoundly misunderstands the character of supranational actions and their domestic application.

Third, if one shares the FCC's understanding of the member States' consents as the normative basis for the legal force of EU actions, the reservation brought about by the FCC's *Honeywell* decision in 2010 according to which ultra vires actions are binding on Germany and thus form parts of the domestic legal order unless the transgression of EU competences is manifest and grave[77] is—as desirable as it may be as an act of constitutional appeasement—simply illogical: If the application order bridges the gap between the two distinct legal orders and if the application order only comprehends EU actions which are based on competences transferred by the member States, it remains unclear how a "regular" (i.e. not manifest and grave) ultra vires action becomes part of the domestic legal order.[78] Apparently, the FCC has in mind some kind of balancing. On the one hand, there is the explicit constitutional commitment for a German participation in European integration in Article 23, paragraph 1 of the Basic Law. On the other hand, there is the apprehension that Germany might, by an at least factual usurpation of the *Kompetenz-Kompetenz* by the EU, lose its statehood.[79] It is however highly questionable if such balancing is at all feasible[80] and, if so, what are the standards to be applied.[81]

1.2. The Equation of Unlawfulness and Invalidity Under EU Law

Lastly, the FCC's premise that only EU actions within the limits of the EU's competences are encompassed by the application order and thus effective in the German legal order presupposes a premise which has never been explicitly addressed and perhaps not even apprehended: The equation of unlawfulness and invalidity. Only under the condition of such equation can it be argued that the *Rechtsanwendungsbefehl* does not bridge the gap between the distinct legal orders, as the ultra vires action is void under EU law and cannot therefore be the object of an application order. Indeed, for German law this equation is, at least as far as legislative action is concerned, widely assumed (but regrettably scarcely

[77] Bundesverfassungsgericht, [BVerfG] [Federal Constitutional Court], June 22, 2011, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286, 304.

[78] *See* Josef Isensee, *Der Selbstand der Verfassung in ihren Verweisungen und Öffnungen*, 138 ARCHIV DES ÖFFENTLICHEN RECHTS (AÖR) 325, 353 *et seq*. (2013).

[79] *Cf*. BVerfGE Case No. 2 BvE 2/08 at paras. 267, 352.

[80] Legal force is, at least from a positivist approach, nothing which could be balanced or graduated.

[81] *See* Andreas Funke, *Virtuelle verfassungsgerichtliche Kontrolle von EU-Rechtsakten: der Schlussstein?*, 26 ZEITSCHRIFT FÜR GESETZGEBUNG 166, 178 *et seq*. (2011); Heiko Sauer, *Europas Richter Hand in Hand? – Das Kooperationsverhältnis zwischen BVerfG und EuGH nach Honeywell*, 22 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 94, 97 (2011).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

scrutinized). Yet, under EU law it is unanimously presumed by the CJEU[82] and legal scholars[83] that unlawfulness does not lead to invalidity. Therefore, even ultra vires actions remain in force until their annulment—and this means that a transgression of EU competences does prevent neither legal force under EU law nor application in domestic law following a dualist approach.[84]

1.3. Standard and Exclusivity of the FCC's Ultra Vires Review

In the aftermath of the *Maastricht* judgment, it had been unclear whether any German court was competent for an ultra vires review and a possible declaration of an EU action being ineffective in Germany.[85] This is the implication of the assumption that the legislative consent to the founding Treaties originates the domestic legal force of EU law. Hence, the standard for ultra vires review is not constitutional but subconstitutional,[86] and the interpretation of statutes is the everyday business of ordinary courts in Germany. In contrast, the FCC has, in its *Lisbon* judgment, expressly stated that ultra vires review of EU actions lies in its exclusive competence.[87] From a constitutional policy perspective this is of course to be welcomed: Only the FCC, and this only after a referral to the CJEU,[88] can decree a disregard of an EU action in Germany. No other court is entitled to instigate the grave constitutional conflict such declaration would inevitably evoke for the EU. But, from a constitutional law perspective this approach is hardly explicable, as it is not the FCC's task to intervene in statutory interpretation by the ordinary courts: The analogy to Article 100, paragraph 1 of the Basic Law which might be envisaged by the FCC is out of the question,[89] and the ordinary courts' competences cannot be convincingly curtailed only pointing to Germany's constitutional *Europarechtsfreundlichkeit*.

---

[82] *See, e.g.*, joined Cases 15-33 et al./73, Kortner, 1974 E.C.R 177, para. 33; and Case C-137/92 P, Comm'n v. BASF, 1994 E.C.R. I-2555, para. 50.

[83] See, in detail, Claudia Annacker, *Die Inexistenz als Angriffs- und Verteidigungsmittel vor dem EuGH und dem EuG*, 16 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 755 *et seq*. (1995).

[84] *See* FUNKE, *supra* note 81, at 180; *cf*. BAST, *supra* note 14, at 171.

[85] *See*, with further references, HEIKO SAUER, JURISDIKTIONSKONFLIKTE IN MEHREBENENSYSTEMEN 190 (2008).

[86] *Cf*. WENDEL, *supra* note 33, at 628 *et seq*..

[87] It has been recommended to the legislature the establishment of a new constitutional proceeding, obviously understanding that there is no procedural way to realize the claimed monopoly de lege lata, see BVerfGE Case No. 2 BvE 2/08, at 267, 354 et seq..

[88] BVerfGE Case No. 2 BvR 2661/06, at paras. 286, 204 *et seq*..

[89] *See* more in detail, FUNKE, *supra* note 81, at 176 et seq.; Heiko Sauer, *Kompetenz- und Identitätskontrolle von Europarecht nach dem Lissabon-Urteil – ein neues Verfahren vor dem Bundesverfassungsgericht?*, 52 ZEITSCHRIFT FÜR RECHTSPOLITIK 195, 197 (2009); *see also* Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 37 BVerfGE 271, 291 et seq. (1974 – Solange I, dissenting opinion of Judges Martin Hirsch, Hans Rupp & Walter Rudi Wand).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

2. The FCC's Ultra Vires Review of the OMT Program: Elements of Confusion

In sum, it is, as a matter of principle, highly questionable whether the underlying premises of the FCC's concept of ultra vires review can be endorsed. Admittedly, this has long been more than controversial; so it is improbable that the positions in this dispute can be altered or even reconciled.[90] It is all the more important whether the premises are at least consequently pursued in the FCC's OMT referral. This is to answer in the negative.

1.1. Domestic Legal Relevance as a Disregarded Prerequisite of the FFC's Ultra Vires Conception

Commentators to the OMT case have in part pointed to the mere existence of an ECB's press release and thereby questioned the legal character of the OMT program which has in fact never been implemented.[91] This observation is of relevance because the ultra vires construction—at least in its initial form—encompasses only legal acts: Only legal acts can be declared to have no legal force within the domestic legal orders of the member States. The ECB's Governing Council has taken an—internal—decision on technical features of outright monetary transaction the core elements of which have been communicated to the public by means of a press release. The legal nature of this decision cannot be denied, even if one might question the existence of external legal consequences of such decision-making. Be it as it may: What is crucial is not only the legal nature of the decision on OMT, but the question whether the alleged ultra vires act is capable of producing legal effects within the domestic legal orders of the member States.[92] The assumption that ultra vires actions are not encompassed by the domestic application order, be it convincing or not, is in any case irrelevant for EU actions that are not aimed at producing such effects. The decision on a future program of sovereign bonds purchases is such an action neither

[90] Regarding the irreconcilable premises of the CJEU and the FCC as to the character of the EU legal order and its primacy, see, above all Josef Isensee, *Vorrang des Europarechts und deutsche Verfassungsvorbehalte – offener Dissens*, *in* VERFASSUNGSSTAATLICHKEIT, FESTSCHRIFT KLAUS STERN 1239 (Joachim Burmeister, Michael Nierhaus, Günter Püttner & Michael Sachs eds., 1997); JESTAEDT, *supra* note 75, at 657 *et seq*.; Reiner Wahl, *Die Schwebelage im Verhältnis von Europäischer Union und Mitgliedstaaten. Zum Lissabon-Urteil des Bundesverfassungsgerichts*, 48 DER STAAT 587 (2009).

[91] *See, e.g*., MAYER, *supra* note 66, at 119 *et seq*.; *cf.* KLEMENT, *supra* note 29, at 189.

[92] *Cf*. Jörg Peterek, *Rechtschutz vor dem Bundesverfassungsgericht im Zusammenhang mit der "Euro-Rettung," in* 3 LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS – ERÖRTERT VON DEN WISSENSCHAFTLICHEN MITARBEITERINNEN UND MITARBEITERN 553, 558 *et seq*. (Yvonne Becker & Friederike Lange eds., 2014), with further references. Interestingly, Peterek estimates this being the background of the FCC's statement regarding the inadmissibility of the complaints directed against the ECB's SMP program in its previous jurisprudence, Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 124, 175 [2011 – Financial assistance for Greece and EFSF] (see additionally *infra* note 121), while the FCC regrettably not touches this decisive point as to the OMT program.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

producing nor requiring domestic effects.[93] I neither question the economic effects of the program nor the feasibility of the ECB acting ultra vires when launching such program. But, a transgression of EU competences of such action is domestically irrelevant as it does not call for domestic application. For this reason alone, the ultra vires doctrine does not apply to the ECB's OMT program.

The only conceivable ECB action with domestic relevance within the OMT framework would be an instruction of the national central banks pursuant to Article 14.3 of the ESCB Statute to take part in the sovereign bonds purchase. Such instruction could be considered legally irrelevant from the *Bundesbank's* perspective if it constituted a manifest and grave transgression of competences. The *Bundesbank* would then be obliged under constitutional law—at least in its interpretation by the FCC—to refuse acting in accordance with the ECB instruction notwithstanding the breach of EU law thereby entailed. Apart from the question whether the ECB could reasonably refrain from bringing such an unlawful denial[94] before the CJEU in the special violation proceeding provided for in article 35.6 of the ESCB Statute, the potential conflict of diverging legal obligations under EU and domestic law[95] can easily be evaded: Although the ECB open market operations are usually carried out by the national central banks according to the key for capital subscription, this procedure is not mandatory under Article 12.1 ESCB Statute, as the implementation is decentral "to the extent deemed necessary and appropriate."[96] In other words, the ECB and its OMT or other sovereign bonds purchase programs do not depend on the German Federal Central Bank's contribution.[97] This is important to note as a possible FCC dictum obliging the Federal Central Bank not to take part in the OMT program would ultimately be of little avail.

[93] This is in my view disregarded by Henner Gött, *Die ultra vires-Rüge nach dem OMT-Vorlagebeschluss des Bundesverfassungsgerichts*, 49 EUROPARECHT (EUR) 514, 522 *et seq.* (2014).

[94] Even if the ECB instruction was in fact ultra vires it would nevertheless be binding unless annulled by the ECJ; such proceeding could be instituted by the Federal Government (compare article 35.1 of the ESCB Statute).

[95] *See* in detail, but in my opinion not convincing as far as the denied Bundesbank's obligation to follow an eventual FCC prohibition to take part in the implementation of the OMT program is concerned, MAYER, *supra* note 66, at 127.

[96] *See* in detail GAITANIDES, *supra* note 27, at 115; OHLER, *supra* note 27, at § 2 para 41; Christine Steven, *Art. 12 ESCB Statute*, *in* KOMMENTAR ZUR EUROPÄISCHEN WÄHRUNGSUNION margin number 39 *et seq.* (Helmut Siekmann ed., 2013).

[97] *See* also MAYER, *supra* note 66, at 127 et seq.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

1.2. The Option of Directly Challenging EU Ultra Vires Actions before the FCC and the Relevance of Potential OMT Losses for the German Federal Budget

I move on to the constitutional complaints' purpose and object. Before the OMT case, the question whether a potential ultra vires action can be directly challenged before the FCC had not been raised explicitly. In *Honeywell*, the only constitutional proceeding regarding an ultra vires action (and not only general observations on the FCC's EU law review within the framework of amendments of the founding Treaties[98]), the plaintiff had considered the CJEU's *Mangold* judgment as being ultra vires but had challenged a judgment of the Federal Labor Court which had relied on it; so the FCC's jurisdiction was clear-cut in that case and allowed for an indirect review of EU law.[99] But, can the ECB's OMT announcement itself be challenged before the FCC? What makes the FCC's referral extremely difficult to fathom is its jumbling of three different potential objects of constitutional review: the alleged EU ultra vires action itself (i.e. the ECB's OMT announcement), a further ultra vires action that might be based on it in future (i.e. a possible execution of the announced program of sovereign debts purchases), and unlawful omissions of German State organs to oppose or challenge the OMT announcement. To review the alleged EU ultra vires action is not as implausible as it may seem: Indeed it is, taking general international law into consideration, quite certain that, originally, the FCC's jurisdiction exclusively corresponded to acts of German State organs.[100] But, according to the FCC's famous *Maastricht* approach,[101] supranational EU actions[102] can, as a matter of principle, be themselves challenged as they may affect German citizens and their fundamental rights no less than the exercise of German public authority.[103] There are of course considerable reasons

[98] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 7, 1992, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 187 et seq.; Bundesverfassungsgericht, [BVerfG] [Federal Constitutional Court], Feb. 7, 1992, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267, 351 et seq.

[99] *See* Bundesverfassungsgericht, [BVerfG] [Federal Constitutional Court], July 6, 2010, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286, 298 et seq.; the origin of the FCC's ultra vires review is its Kloppenburg decision whose object, however, was an German courts' decision as well (which had disregarded a previous CJEU judgment allegedly ultra vires). *See* Bundesverfassungsgericht, [BVerfG] [Federal Constitutional Court], Apr. 8, 1987, 75 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 223, 243.

[100] Initially, this was the clearly expressed view of the FCC, see Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 22 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 293, 295.

[101] 89 BVERFGE, 155 (175).

[102] The same is true as regards supranational actions by other international organizations as for example the European Patent Organization. For the requisite constitutional jurisprudence see, e.g., Christian Walter, *Grundrechtsschutz gegen Hoheitsakte internationaler Organisationen*, 129 ARCHIV DES ÖFFENTLICHEN RECHTS 39, 50 *et seq*. (2004); SAUER*, supra* note 71, at § 6 para. 30.

[103] Thus, the public authority envisaged in Article 93, paragraph 1, number 4 lit. a) of the Basic Law encompasses, in a teleological interpretation, acts of State organs as well as supranational EU actions; this is however not undisputed, see, e.g., Klaus Ferdinand Gärditz & Christian Hillgruber, *Volkssouveränität und Demokratie ernst genommen – zum Lissabon-Urteil des BVerfG*, 64 JURISTENZEITUNG (JZ) 872, 874 (2009) with further references.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

against this premise; yet as it is a well-established constitutional premise is to be discussed whether it is pertinent: not only for the FCC's fundamental rights' review of EU law but also for its ultra vires review of EU law.

Acting on the FCC's former *Maastricht* premise, EU ultra vires actions can be challenged by means of an individual constitutional complaint provided that an appellant's constitutional right is affected. This depends on the nature and the outcome of the challenged EU action and is certainly possible, especially for regulations or supranational decisions by EU organs. However, the ECB's OMT announcement does not affect or even infringe on the Basic Law's fundamental rights, and this quite apparently: Even if one presumed that Article 14 of the Basic Law protecting property encompassed currency stability,[104] this guarantee would not be affected as there is to date no palpable reason to assume that the ECB's sovereign bond purchase programs might result in a significant devaluation of the Euro.[105] Therefore, the only right that might be affected is the citizens' right to take part in parliamentary elections according to Article 38, paragraph 1(1) of the Basic Law. This guarantee, in principle rather unsuspicious to furnish a benchmark for the FCC's review of EU law, has since the *Maastricht* judgment successively been enhanced and understood as leverage for individual complaints against European integration in constitutional jurisprudence.[106]

The original premise lied in an individual right to prohibit excessive transfers of powers to the EU which might result in the German Bundestag degenerating to an ultimately fictitious forum of democracy.[107] This right, *nota bene* initially aimed not at the EU but only at the German legislation transferring powers to the EU under Article 23, paragraph 1(2) of the Basic Law, was developed into a constitutional right to the EU fulfilling democratic requirements and to Germany not forfeiting its Statehood by the *Lisbon* judgment[108] and finally into an individual right not to have the *Bundestag*'s budgetary sovereignty curtailed in the framework of bilateral, EU and ESM action fighting the European debt crisis. The individual thus acts as a kind of trustee or even custodian of constitutional concerns which have not been (and hardly could have been) assigned to individual enforcement; thus, the recent supercharge of the FCC's competences to attend European integration has not without cause been challenged as establishing a bluntly off-system constitutional *actio*

[104] The FCC has always left this open, see Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 97 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 350, 372 *et seq*.; Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 124, 173 *et seq*.; *see* HERRMANN, *supra* note 50, at 338 *et seq*..

[105] *See also* SIEKMANN & WIELAND, *supra* note 20, at 6.

[106] *See, e.g*., SAUER, *supra* note 71, at § 9 paras. 47 et seq..

[107] *See* 89 BVERFGE 155 (171 *et seq*.).

[108] *See* 123 BVERFGE 267 (329 *et seq*.).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

popularis in EU matters.[109] Generally, is must be questioned whether Article 38, paragraph 1(1) of the Basic Law, if at all boosted substantially and thereby applicable to European integration, can reasonably have another addressee than the German Bundestag: Even assuming that other organs or organizations might through their conduct erode the Bundestag's democratic vigor—this does not automatically turn a *procedural* guarantee that refers to the *Bundestag's* creation and is intended to set the preconditions for such vigor in a *substantive* guarantee directed against any possible endangerment of German democracy. A claim of excessive transfer of powers by the Bundestag might still be in line with Article 38, paragraph 1(1) of the Basic Law, and it might even be argued that there is an individualized prohibition of devolving the famous *Kompetenz-Kompetenz* to the EU. But an allegation of an EU organ acting ultra vires is quite far from any arguable substantive content of this individual right,[110] particularly as there is a clear difference between the EU generally usurping *Kompetenz-Kompetenz*, a problem to be addressed only under Article 23, paragraph 1(1) of the Basic Law and thus left to the political organs, and the EU acting beyond its competences in a single case. Challenging an alleged EU ultra vires action under Article 38, paragraph 1(1) of the Basic Law is therefore in my view mistaken.[111]

But I do not want to elaborate more on the arguments that can raised against this substantive upgrading of the foremost procedural guarantee in Article 38, paragraph 1(1) of the Basic Law.[112] I prefer to analyze whether, following all these assumptions and particularly the one regarding budgetary sovereignty, the ECB's OMT announcement might be conceived of as affecting Article 38, paragraph 1(1) of the Basic Law. The answer is no, and this explains why the FCC suggests that it follows another path. Foremost, two of the major concerns regarding the ECB's sovereign bond purchases continuously voiced must be rejected: Neither is there any legal or *de facto* obligation for the German Bundestag to take steps of recapitalization of the Federal Central Bank and/or the ECB that could have been foreseeably triggered by an execution of the OMT program, nor might such an execution

[109] *See, e.g.*, Christoph Schönberger, *Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatverbot*, 48 DER STAAT 535, 539 (2009); Martin Nettesheim, *"Euro-Rettung" und Grundgesetz*, 46 EUROPARECHT (EuR) 765, 768 (2011); Klaus Ferdinand Gärditz, *Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court*, 15 GERMAN L.J. 183, 190 (2014); BAST, *supra* note 14, at 169; MAYER, *supra* note 66, at 136; SAUER, *supra* note 71**Error! Unknown switch argument.**, at § 9 para. 50 with further references; defending the FCC's position among others KAHL, *supra* note 4, at 208; GÖTT, *supra* note 93, at 534 *et seq*..

[110] *See* GÄRDITZ, *supra* note 109, at 191 *et seq*.

[111] *Id*. at 200. In my view, this is right in regretting that the "concept of ultra vires control will decay into a permanent angry citizens' complaint"; in contrast advocating a "principal" ultra vires complaint, Karsten Schneider, *Der Ultra-vires-Maßstab im Außenverfassungsrecht*, 139 ARCHIV DES ÖFFENTLICHEN RECHTS (AöR) 196, 253 *et seq*. (2014).

[112] Remarkably, the FCC itself adverts to this criticism. *See* 129 BVERFGE 124 (169 *et seq*.).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

ultimately lead to relevant losses for the Federal budget that could question the *Bundestag*'s democratically essential capacity to act. The perception that losses incurred through the OMT (or any other sovereign bond purchase) program must necessarily be compensated with injections of fresh capital ultimately stemming from the member States is based on a misunderstanding of the functioning and peculiarities of central banks:[113] In general, losses can be recorded in the balances even for a long time without necessarily having to be compensated,[114] as long as the general confidence in the central bank's functioning is not put into question.[115] Moreover, notwithstanding the necessary appearance on the balance sheet, central banks can increase the amount of available money without necessitating incoming payments.[116] Both reactions to eventual losses incurred by a sovereign bonds purchase program which exceed the reserve fund and the currency reserves would lead to a reduction or even drop out of the ECB's payouts for the national central banks according to Article 32.5 of the ESCB Statute which, on its part, could consume the German Central Bank's annual distribution in favor of the Federal budget. But, the concern that the ECB by means of its sovereign bond purchase programs might virtually grasp into the member States' purses is incorrect: There is no *legal* automatism of money being transferred from Berlin to Frankfurt, neither to the ECB nor to the Federal Central Bank.[117] Scenarios in which the ESCB incurs losses of an amount that the confidence in its functioning is put in to question, as a result of which it might become unavoidable for the *Bundestag* to vest the *Bundesbank* with fresh capital to keep the system running, are highly speculative at present; thus, there is, to date, neither any kind of factual obligation that could question the *Bundestag*'s budgetary autonomy.[118] The risk

---

[113] For the differences between central banks and commercial banks, see Jens-Hinrich Binder, *Drohende Zentrabankinsolvenz?*, 70 JURISTENZEITUNG 328, 330 *et seq.* (2015).

[114] For the national central banks in the Eurozone this is in dispute, see Julian Langner, *Preliminary Notes to Art. 28-33 ESCB Statute*, *in* KOMMENTAR ZUR EUROPÄISCHEN WÄHRUNGSUNION at margin number 11 *et seq*. (Helmut Siekmann ed., 2013).

[115] Compare in this regard, Willem Buiter, *Can Central Banks Go Broke?*, CENTRE FOR ECONOMIC POLICY RESEARCH POLICY INSIGHT NO. 24 (2008).

[116] This does not refer to the increase of capital stock pursuant to article 28.1 of the ESCB Statute—apart from the fact that such increase is equally not relevant for the Federal Budget. *See* LANGNER, *supra* note 114, at margin no. 8; BINDER, *supra* note 113, at 331.

[117] The details which cannot be elaborated on here are in dispute. *See, e.g.*, HERRMANN, *supra* note 50, at 811; MAYER, *supra* note 6, at 2002; Roland Ismer & Dominika Wiesner, *Die OMT-Vorlage des Bundesverfassungsgerichts – Eine dogmatische Kritik auf Grundlage juristisch-ökonomischer Analyse*, 68 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 81 *et seq*. (2015); BINDER, *supra* note 113, at 333 *et seq*. (assuming that there is a legal obligation of the member States to recapitalize their central banks if the functioning of the ESCB is seriously put into question); Peter Sester, *The ECB's Controversial Securities Market Programme (SMP) and its role in the relation to the modified EFSF and the future ESM*, 9 EURO. CO. & FIN. L. REV. 156, 164 *et seq*. (2012); LANGNER, *supra* note 114, at margin number 9 *et seq*.; and Simon, in this issue.

[118] OHLER, *supra* note 27, at § 4 para. 75; Simon, in this issue; Wolfgang Weiß, *Das deutsche Bundesverfassungsgericht und der ESM: Verfassungsjustiz an den Grenzen der Justiziabilität*, *in* NEUE EUROPÄISCHE

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

which foreseeably remains for the Federal budget is a long-term shortfall of the Federal Bank's payouts which are at present usually scheduled at 2.5 billion Euros per annum. Such shortfall, currently amounting to roughly just under one percent of the entire budget, can hardly be conceived of as affecting the democratic capacity to act; apart from that, the Euro System might generally incur (and has in past incurred) losses through open market operations.[119] For these reasons, the assumption that the ECB's OMT announcement affects or infringes the petitioners' rights under Article 38, paragraph 1(1) of the Basic Law is refuted even on the basis of the FCC's substantive understanding of this right.

1.3. The Option of Indirectly Challenging EU Ultra Vires Actions before the FCC

This elucidates why the FCC has chosen another path of tackling alleged ultra vires actions by the ECB. Already in its 2011 judgment on the German participation in financial assistance for Greece, the Court had held that the ECB's purchases of sovereign bonds could not be challenged in a constitutional complaint: Such actions fell without the scope of its jurisdiction, because Article 93, paragraph 1, number 4, lit. a) of the Basic Law encompassed only actions of the *German* public authority.[120] In its OMT referral, the FCC retains this remarkable overruling of the *Maastricht* jurisprudence[121] which should have been elaborated on or at least clarified. If the FCC is to be understood as stating that in future no EU[122] action can be directly challenged in front of it, this would constitute a revocation of the long standing *Solange II*-jurisprudence according to which—albeit under the condition that a sufficient level of fundamental rights' protection within the EU is generally no longer maintained—EU actions can, as well as German acts of implementation or execution,[123] be subject to constitutional review.[124] It seems however highly improbable

FINANZARCHITEKTUR, 113, 133 (Peter Hilpold & Walter Steinmair eds., 2014). For a more critical view, see SESTER, *supra* note 117, at 164 *et seq*., ISMER & WIESNER, *supra* note 117, at 86 (questioning with good cause whether factual constraints are at all legally relevant).

[119] WEIß, *supra* note 118, at 136 (convincingly expressing the view that the original *Bundestag's* consent to the EMU covers eventual ESCB losses by means of open market operations); *see also* OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 413.

[120] 129 BVERFGE 124 (175).

[121] Peterek suggests that there is no overruling of the Maastricht approach as the challenged acts did not have supranational character. PETEREK, *supra* note 92, at 558. This is of course right, and the FCC might have reasoned that way, but it did not—what the FCC expressed is in my opinion not mistakable, as Peterek deems, but rather clear even if perhaps not convincing.

[122] The same would be true for supranational actions of other international organizations. *Cf.* the texts cited, *supra* note 102.

[123] *See* Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 118 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 79, 95 et seq..

[124] 73 BVerfGE 339 (378 *et seq*.); Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 102 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 147, 161.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

that the FCC by a surprise coup wanted to irrevocably[125] do away with its fundamental rights review of EU law just in a moment of major excitement[126] surrounding the CJEU's *Åkerberg Fransson* judgment[127] which, at least when one takes into consideration the simultaneous *Melloni* judgment[128], seriously calls into question the scope of application and the assertiveness of the member States' fundamental rights guarantees.

The FCC refers not to the OMT announcement itself but to possible omissions of German State organs to oppose or challenge this announcement. This grasp is clearly intended to put the FCC's jurisdiction out of the question—it covers without a doubt any unconstitutional omission of German State organs. But the FCC's new omission related ultra vires construction cannot evenly work out for three reasons: From the outset, the idea of an opposition of whatever kind by German State organs against an alleged EU ultra vires action contravenes the initial premise of the German *Rechtsanwendungsbefehl* as the source of legal force of EU law actions in the domestic legal order: If this *Rechtsanwendungsbefehl*, for the reasons set out by the FCC, does not encompass ultra vires actions, they attain no legal force in Germany.[129] If therefore at least serious ultra vires actions do not arrive in the German legal order—why oppose? The lack of an application order makes such intervention unnecessary, so that there is no reason for a German State organ to complain about something which, from the perspective of the domestic legal order under the FCC's assumptions, does not exist and therefore must not be observed or even applied. The omission related ultra vires construction is therefore incoherent from the outset.

Second, assuming with the FCC that the OMT announcement is illegal under EU law and assuming that a constitutional obligation to oppose to ultra vires actions is in general conceivable, the complaints are about current and not future infringements of the Basic Law, about omissions which can already be qualified as unlawful. The unlawfulness of these omissions could at best be substantiated if the ultra vires action in question constituted a violation of German fundamental rights itself[130]—in other words: The

[125] The fundamental rights review might however be revitalized as part of the new constitutional identity review, see SAUER, *supra* note 81, at 96 *et seq*.

[126] *See* Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], 133 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 277, 313.

[127] Case C-617/10, Åkerberg Fransson (Feb. 26, 2013), http://curia.europa.eu/.

[128] Case C-399/11, Melloni v. Ministerio Fiscal (Feb. 26, 2013), http://curia.europa.eu/.

[129] As regards the modification of this premise by the *Honeywell* criteria of a manifest and grave transgression of EU competences, see *supra* B.I.1.1.

[130] The idea is plainly that the fundamental right violated by the EU ultra vires action virtually defends itself triggering an obligation to work towards the cessation of the infringement by opposing in whatever fashion to the transgression of competences.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

concept which aims at German omissions is nothing but the other side of the coin compared with the direct ultra vires review of EU actions. If the ultra vires action as such, and this has been shown above with regard to the OMT announcement, does not affect fundamental rights under the Basic Law, this is equally true for the omission of opposing to this announcement. The lack of a fundamental rights' relevance of the OMT announcement can thus not be bypassed by the exchange of the review's object—the omission related ultra vires construction is thus old wine in new skins.

We should furthermore, and this is my third objection, not be tricked by the FCC's pretended recourse to preventive constitutional protection.[131] A *preventive* protection of a right is never directed against a *present* omission allegedly unlawful as is the case here—rather it is invariably directed against a *prospective* action that would be unlawful and can for this reason be precluded under certain enhanced conditions. The FCC feigns the lacking difference between the action and the omission related ultra vires construction shown above by the simultaneous differentiation between repressive and preventive legal protection, the latter having quite exceptional character in the German legal order. The advantage of the preventive construction is obvious: In contrast to the regular repressive (or retrospective) complaints, the preventive (or prospective) complaint does not require a current infringement of rights—it is satisfied with suspected future unlawful conduct. But again, complaints that target current omissions of German State organs are repressive in nature and thus require existing infringements of rights which are absent in the case at hand. Eventual preventive complaints would in contrast aim at future ECB actions resting upon its OMT announcement, i.e. potential measures of execution of this program. If, according to the FCC's new approach, EU actions allegedly ultra vires cannot directly be challenged before it, this must be *a fortiori* true for future EU action, apart from the problems inherent in measuring future EU actions against the benchmark of its competences. Should the FCC therefore have concentrated on proper preventive legal protection against the execution of the OMT program? After all, it is apparent that such execution with the possible participation of the German Federal Bank is the Courts' major economic policy concern. This construction might have been more convincing as a starting point, but it would not have rendered the complaints admissible either: The execution of the OMT program would have affected fundamental rights of German citizens just as little as the program's announcement for the reasons set out above. In other words, the omission related ultra vires construction does not render dispensable the lacking infringement of German fundamental rights by the alleged ultra vires action.

Apart from these objections, it has been rightly criticized that the FCC neither elucidates who might have opposed nor how such intervention might have taken place.[132] What

[131] *Contra* GÖTT, *supra* note 93, at 518 *et seq*. (2014) (opining that the recourse is consequential).

[132] *See* OMT Decision, BVerfG, Case No. 2 BvR 2728/1 366,424 *et seq*. (dissenting opinion of Judge Gertrude Lübbe-Wolff).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

comes into consideration must quite clearly be dismissed: The Federal Government could have raised an action for annulment before the CJEU under Article 263 TFEU[133]—but is a constitutional obligation to file a suit against a potential ultra vires action conceivable and reasonably enforceable, apart from the question of the Government's legitimate political margin of appreciation, as long as the potential applicant considers the EU action in question being lawful? The Federal Central Bank's President could have voted against the OMT program in the ECB Governing Council—and he has, so the question of a requisite constitutional obligation can be subordinated.[134] What ultimately remains are various forms of expressions of displeasure by different State organs, ahead the Bundestag — but I am not convinced of construing legal obligations without clear substance aimed at a conduct that is not legally binding.[135] In sum, it should be apparent that the new FCC's omission related ultra vires construction is a dead end.

II. The OMT Program and the FCC's Constitutional Identity Review of EU Law

As is well known, this FCC's hitherto vague standard of constitutional identity control,[136] again based on Article 38, paragraph 1(1) of the Basic Law, is as assailable as its ultra vires doctrine. Of course, Article 23, paragraph 1(3) and Article 79, paragraph 3 of the Basic Law delimit a boundary of the legislation transferring powers to the EU: The *pouvoirs constitués* are prevented from circumventing their constitutional limits by means of a transfer of powers. Does this however necessarily mean that an EU action touching upon those limits and thereby the German constitutional identity, if such eventuality is at all conceivable,[137] is legally not existent from a domestic law perspective? What might, as a matter of principle, work out even in the area of competences cannot reasonably be translated into the area of substantive limits: While it might be feasible to complain that the EU exercises powers that the member States have not assigned to it, it is not equally feasible to complain that there is no act of transfer for certain legal actions in EU competence that violate a member States constitutional identity. This approach would be conceivable only referring to the ancient principle *nemo plus iuris transferre postest quam ipse habet*, the precondition of which would however be a rather inappropriate conception of the EU public authority as an simple aggregation of the member States' public authorities—an

[133] *Cf*. Opinion of Advocate General Cruz Villalón, *supra* note 3, at paras. 70 *et seq*..

[134] Such a constitutional obligation is feasible only under condition that the Governors of the member States' Central Banks still act as State organs bound by their requisite constitutional laws when they take part in decisions of the ECB's Governing Council—this is not without any doubt.

[135] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 425 et seq. (dissenting opinion of Judge Gertrude Lübbe-Wolff).

[136] For an overview, see, e.g., CHRISTIAN CALLIESS, STAATSRECHT III 330 *et seq*. (2014); and SAUER, *supra* note 71, at § 9 paras. 43 *et seq*..

[137] For a convincingly skeptical view, see FUNKE, *supra* note 81, at 169.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

aggregation *ab initio* bound by the sum of the constitutional limits of all of its member States. It is much more convincing not to exchange the addressee of Article 23, paragraph 1(3) and Article 79, paragraph 3 of the Basic Law and thus to be of the opinion that only German State organs and in the EU context particularly the legislative transfer of powers can violate Germany's constitutional identity and are therefore to be reviewed by the FCC in line with its *Lisbon* judgment.[138] On the basis of this assumption, possible EU interference with the constitutional identity is by no means legally irrelevant. On the one hand, a non-respect by the EU for the national identities of their member States is unlawful under EU law.[139] On the other hand, the German Constitution is not without any defense against an alleged EU intrusion in its identity: This problem is addressed by Article 23, paragraph 1(1) of the Basic Law, ultimately calling into question Germany's ongoing participation in the European integration if the essential structural preconditions such as democracy, rule of law—including of course the respect for the member States' national identities—and fundamental rights' protection in the EU are no longer fulfilled. I am therefore of the opinion that a constitutional identity review of single EU actions by the FCC is not arguable *de constitutione lata*. But this is, of course, contested, and I might therefore briefly argue why, even on the basis of the FCC's premises, the ECB'S OMT announcement does not touch upon the German constitutional identity. As set out above,[140] the OMT program is neither at risk of producing legal or factual obligations of the Bundestag to provide fresh capital, thus the budgetary sovereignty is not endangered, nor does it entail relevant losses for the Federal budget that might question the *Bundestag*'s democratically essential capacity to act. In sum, the FCC's identity control of EU actions is unconvincing as a matter of principle and incorrectly applied in the OMT referral.

C. European Constitutional Balance after the CJEU's OMT Judgment

I. Attempting an Outlook for the Ongoing FCC proceedings

1. The Inherent Jeopardy of the "Honeywell" Approach

In sum, the FCC has deliberately confounded the doctrines of ultra vires review and of constitutional identity review, the review of EU measures and of domestic actions, the review of positive actions and of omissions, as well as of repressive and of preventive legal protection[141] in order to disguise that it primarily addresses constitutional policy concerns. There may of course be many economic and political reasons against the selective purchase of sovereign bonds of over-indebted member States of the Eurozone. On the

[138] *See* 123 BVERFGE 267 (356 *et seq.*).

[139] *See* OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 386 *et seq*..

[140] *See supra* B.I.2.2.

[141] *But see* KUMM, *supra* note 14, at 214.

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

other hand, it is widely assumed that most notably the ECB President's famous proclamation on 26 July 2012 that the ECB was ready to do whatever it took—within its mandate—to preserve the Euro[142] and the following Governing Council's OMT announcement were the cornerstones of the common currencies continuity. The mandate of the ECB thus is and will be in the future highly controversial; but as has been shown, most of these issues cannot be translated into legal arguments under present European constitutional law. With regard to the OMT program, the FCC's *Honeywell* approach has proved to be double-edged and inherently explosive: The prerequisite of a manifest and grave transgression of EU competences was intended to reconcile the contradicting premises of the two interconnected constitutions and its courts at least to a certain extent: speaking of *Europarechtsfreundlichkeit*, i.e. the principle of friendliness towards EU law, illuminating in principle the persuasiveness of the primacy of EU law, and establishing the mandatory consultation of the CJEU through the referral procedure.[143] But the FCC has perhaps outmaneuvered itself: It is always forced to assert a manifest and grave transgression of competences already in its referral—otherwise the question of whether the EU has exceeded its competences is not ultimately relevant for the outcome of the FCC proceeding and the referral is inadmissible.[144] Thus, what was intended to be an act of institutional cooperation inevitably amounts to a severe conflict.[145] The CJEU is put under pressure,[146] as the referral implies the possibility of the FCC executing its ultra vires reservation which could, from the EU perspective, of course not be accepted. The FCC itself is *a priori* in an uncomfortable position: As a result of a validation of the EU action in question, the FCC is stuck between a rock and a hard place as the OMT referral reveals: Either it backpedals or it finally bites, the latter having repeatedly been demanded by German scholars.[147] But the consequences of such an exit from the European

[142] *See* Verbatim of the Remarks made by Mario Draghi, Speech by Mario Draghi, President of the European Central Bank, *available at* https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[143] *See* Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court], ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286, 303 *et seq*..

[144] This problem is inherent in the conception of challenging EU actions being ultra vires not on the basis of a substantive guarantee but on Article 38, paragraph 1(1) of the Basic Law: Such a constitutional complaint is without success even if the CJEU assumes a transgression of EU competences, thus it can from the outset be successful only under condition of a manifest and grave transgression which is therefore required for the admissibility of a referral by the FCC. *Cf.* Wendel, *supra* note 33, at 633 *et seq*..

[145] *See* Gabriele Britz, *Grundrechtsschutz durch das Bundesverfassungsgericht und den Europäischen Gerichtshof*, 42 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT (EuGRZ) 275, 281 (2015); KUMM, *supra* note 14, at 203.

[146] *See* GÄRDITZ, *supra* note 109, at 199 ("Uttering barely concealed threats is a questionable method of communication between the courts. . . ."); *contra* Udo Di Fabio, *Karlsruhe Makes a Referral*, 15 GERMAN L.J. 107, 109 (2015).

[147] *Cf.* Christian Hillgruber, *Nicht nur Zähne zeigen – beißen!*, NEUE JURISTISCHE WOCHENSCHRIFT (NJW), Editorial to issue 8 (2014); Niels Petersen, *Karlsruhe Not Only Barks, But Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court*, 15 GERMAN L.J. 321 (2014).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

constitutional consent are perhaps as incalculable as those of other forms of exits permanently discussed. In sum, it appears as if the doctrine of ultra vires review after *Honeywell* amounts to a no-win situation.

2. Possible Paths of the Upcoming Judgment

One can only hope, and this also seems probable, that the FCC is not going to hold that the OMT announcement constitutes a manifest and grave transgression of EU competences. An important aspect in disfavor of this outcome is that an EU action validated by the CJEU can only be conceived of as a manifest and grave transgression of competences if the CJEU has by the same token manifestly and gravely exceeded its competences[148]—a conclusion which the FCC is well advised to evade. There is at least one arguable and convincing way to avoid this without the loss of face—and many commentators would inevitably highlight such loss with pleasure if the FCC came around to the CJEU's findings: The FCC might concede that the CJEU's position is at least arguable and does therefore not constitute a manifest transgression of competences.[149] This appears to be a convincing solution which would simultaneously be acceptable to both courts, as the CJEU's interpretations are not challenged without the FCC having to follow it. It is, however, not to forecast if the FCC will take that line. But, there are not many alternatives, as the somewhat classical approaches, such as trying to inflict restrictions on the EU from a constitutional law perspective[150] or strengthening the German State organs' influence within the European institutional setting do not seem to come into consideration after the CJEU has already had its say. Additionally, will the FCC really obligate the Federal Government to bring an action for annulment against every possible ultra vires EU action? Finally, what might seem as a congenial solution for the lack of political harm due to the outdated nature of the OMT program, namely prohibiting the *Bundesbank* from taking part in the program, will not gain relevance for any of the current or future programs: As set out above, the ECB is not dependent on the national central banks' participation. Such interdiction would from the balance sheet perspective ultimately be irrelevant.[151] The range of possible outcomes of the forthcoming FCC decision is thus wide—and perhaps there are still new concepts being developed in Karlsruhe. But whatever solution the FCC is going to prefer, it should keep an eye on its mandate under the Basic Law. After the CJEU has, even if not largely following

[148] *See also* FUNKE, *supra* note 81, at 184; MAYER, *supra* note 6, at 2002.

[149] *Cf.* KLEMENT, *supra* note 29, at 19; THYM, *supra* note 14, at 263. Moreover, according to Honeywell, the CJEU disposes of *Fehlertoleranz*. *See* 126 BVERFGE 286 (307).

[150] See OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 417 (suggesting an interpretation of the OMT program which would fulfill German constitutional requirements which is, however, largely not followed by the CJEU).

[151] *See* Article 32 of the ESCB Statute; OHLER, *supra* note 27, at § 2 para 20; Julian Langner, *Art. 32 ESCB Statute*, *in* KOMMENTAR ZUR EUROPÄISCHEN WÄHRUNGSUNION margin number 41 *et seq* (Helmut Siekmann ed., 2013).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

the FCC's suggestions for restrictive Treaty interpretation, refrained from any teasing, provocation, or flamboyancy[152] and thereby apparently attempted to evade the final showdown in the notorious last word saga (which some are longing for), it should be feasible for the FCC to find a proper answer.

3. The Future of the FCC's EU law Review in a More General Perspective

It is of course improbable that the FCC seizes the suggestions that have been exposed above and by many other commentators and cuts back its ultra vires review as a matter of principle.[153] But beyond the details of the ultra vires review, the OMT case also affords the opportunity for a more general clarification of the future of the FCC's doctrines of review of EU law. Particularly, the FCC should illustrate whether it really wants to abandon its former *Maastricht* approach of EU actions being in principal challengeable before it and thereby to finally retire from a fundamental rights review of EU law as a theoretical reserve option. It should also shape in more detail the hitherto quite cryptic constitutional identity review of EU law: The time has come to put the cards on the table and to elucidate the substance of this approach and not least its relations with ultra vires review and fundamental rights review.[154] If there are constitutional limits to the primacy of EU law, these limits must be discernable. It is thus more probable that there will be interesting findings on the future of the FCC's EU law review in general than that the FCC really instigates the ultimate constitutional conflict which would in any case not be favorable to either of the sides — and least of all for European integration altogether.

[152] As regards the "spirit of cooperation," see also Simon, in this issue.

[153] For example, it seems worth considering to associate the *Honeywell* criteria of a manifest and grave transgression of competences with the requirements for an EU organ's action being exceptionally void.

[154] I am of the opinion that there is at least a categorical difference between the ultra vires review aiming at competences and therefore at the EU Treaties, and the constitutional identity review aiming at substantive law and therefore at the German Constitution, while the fundamental rights review could be conceived of as a subset of the constitutional identity review. There is a broad range of opinions on that issue. *See, e.g.*, Hans-Georg Dederer, *Die Grenzen des Vorrangs des Unionsrechts – Zur Vereinheitlichung von Grundrechts-, Ultra-vires- und Identitätskontrolle*, 69 JURISTENZEITUNG 313 (2014); Angela Schwerdtfeger, *Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts – Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem*, 50 EUROPARECHT (EuR) 290 (2015); PAYANDEH, *supra* note 71, at 9; MAYER, *supra* note 66, at 128 (2014).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

II. The Inevitable Fading out of Sovereignty in European Constitutional Law

This leads to my last point: the future of the European multi-level constitutionalism between the extremes of a theoretical conception of shared sovereignty and the insisting on the last word of the member States' constitutions.[155] Whereas many member States assume that the public authority of the EU is inevitably derived from the member States, which it was of course as a starting point, the CJEU has since *van Gend & Loos* been referring to a new legal order of international law whose subjects are not only the member States but also their citizens.[156] Without determining the essence and the basis of such autonomization, the CJEU thus assumes autonomy of the EU legal order in terms of autonomy of legal force. The original dissent is therefore precisely on there being only one or rather several *Grundnormen* in a *Kelsenian* understanding underlying the interconnected constitutions in the EU legal order: The premise of the national constitutions being endowed with the last word[157] is correct if there is only one and the same *Grundnorm*, whereas the imagination of shared sovereignty — an oxymoron which cannot conceal the disappearance of conventional sovereignty — inherently presupposes distinct paths of precluding legal force. What is and has always been standing doubtful is the source of EU law and, therefore, no less than the fate of sovereignty: Sovereignty and power are less shared than in abeyance.[158] But, the peculiarity of European constitutionalism, and its particular force, has ever been the synchrony of incrementally progressing though standing doubtful: Said abeyance therefore has not led the European Constitution and the constitutions of the member States[159] (nor the CJEU and the FCC) to be conceived of as two spent swimmers, clinging together and struggling, unable to move like *Macbeth's* and *Macdonwald's* soldiers.[160] Rather, European integration has been successfully living with the uncertainty on the autonomy of EU law for decades, and it is

[155] This position is represented by the FCC and several other constitutional courts. Whereas the FCC specifies ten other constitutional courts with a comparable jurisprudence on EU law (OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at paras. 366, 387), MAYER, *supra* note 66, at 133 *et seq*. states that only the Czech Constitutional Court openly endorses the German ultra vires approach.

[156] Case 26/62, van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 7, 25.

[157] Critically as regards the notion of the last word, see Peter Häberle, *Das retrospektive Lissabon-Urteil als versteinernde Maastricht II-Entscheidung*, 58 JAHRBUCH DES ÖFFENTLICHEN RECHTS (JöR) 317, 329 (2010).

[158] ISENSEE, *supra* note 90, at 1239 *et seq*.; WAHL, *supra* note 90, at 587 *et seq*..

[159] Whatever term seems adequate to describe its interconnection—on the not only notional controversy regarding "Staatenverbund" or "Verfassungsverbund," see CHRISTIAN CALLIESS, DIE NEUE EUROPÄISCHE UNION NACH DEM VERTRAG VON LISSABON 63 *et seq*. (2010); Heiko Sauer, *Von Weimar nach Lissabon? Zur Aktualität des Methoden- und Richtungsstreits der Weimarer Staatsrechtslehre bei der Bewältigung von Europäisierung und Internationalisierung des öffentlichen Rechts*, *in* ZUR AKTUALITÄT DER WEIMARER STAATSRECHTSLEHRE 237, 246 *et seq*., 252 *et seq*. (Ulrich Jan Schröder & Antje von Ungern-Sternberg eds., 2011).

[160] See WILLIAM SHAKESPEARE'S MACBETH, act 1, sc. 2 (referring to "the revolt newest state") ("Doubtful it stood, as two spent swimmers that do cling together and choke their art.").

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press

insecure whether this problem can be overcome or even addressed endogenously within law.[161] When the FCC, in 1974, first implicitly claimed the last word with its famous *Solange I* decision, there was considerable excitement; this excitement has continuously gone along with its whole jurisprudence regarding EU law. But, this jurisprudence has, notwithstanding its critique, undeniably had positive effects on European integration, to name only the development of fundamental rights in the EU.[162] And the FCC has scrupulously paid attention to never crossing the red line: It has always been well versed in the art of claiming the last word without ever vocalizing it. This might have become considerably more difficult with its OMT referral—but in the absence of a political determination, standing doubtful as to the fate of sovereignty it is still of vital importance and ultimately without alternative in the EU.

[161] *See* JESTAEDT, *supra* note 75, at 670 *et seq*.; *see also* Philipp Reimer, *L'Ètat c'est le droit! Zur Aktualität der Staatslehre Hans Kelsens im Angesicht sich wandelnder Staatsgewalt*, *in* L'ÉTAT C'EST QUOI? STAATSGEWALT IM WANDEL 37, 49 *et seq*. (Lisa Heschl et al. eds., 2015).

[162] Joseph H. H. Weiler, *The Reform of European Constitutionalism*, 35 J. COMMON MKT. STUDS. 97, 125 (1997) (comparing this influence with the cold war's logic of mutually assured destruction).

https://doi.org/10.1017/S2071832200019969 Published online by Cambridge University Press