The OMT Judgment of the German Federal Constitutional Court

Repositioning the Court within the European Constitutional Architecture

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INTRODUCTION

On 21 June 2016 the Federal Constitutional Court of Germany delivered its judgment in the case regarding the Outright Monetary Transactions program of the European System of Central Banks and of the European Central Bank.[1] The Court held, in essence, that the Outright Monetary Transactions program did not violate the German Constitution, that neither the German Federal Parliament (the *Bundestag*) nor the German Federal Government (the *Bundesregierung*) were under a constitutional obligation to take measures against the Outright Monetary Transactions program, and that the German Federal Bank (the *Bundesbank*) was allowed to participate in the program, as long as the program complied with the conditions under EU law, as pronounced by the European Court of Justice.

The Outright Monetary Transactions judgment of the Constitutional Court is the last of a series of decisions dealing with the program. In January 2014 the Constitutional Court decided to refer the question of the compatibility of the program with EU law to the Court of Justice for a preliminary ruling.[2] In June 2015 the Court of Justice delivered its judgment, holding that the Outright Monetary Transactions decision neither exceeded the mandate of the European Central Bank, nor violated the prohibition of monetary financing under Article 123 TFEU.[3] The Constitutional

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[1] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13. The Court has not provided an English translation of the judgment, but only of the press release summarising the decision, *see* <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html>, visited 23 March 2017.

[2] FCC, Order of 14 January 2014, Case 2 BvR 2728/13.

[3] ECJ 16 June 2015, Case C-62/14, *Gauweiler et al.* v *Deutscher Bundestag*. In previous proceedings, the General Court had held challenges against the Outright Monetary Transactions program brought

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Court's judgment of June 2016 ended the proceedings, with the Constitutional Court in principle following the ruling of the Court of Justice and dismissing the constitutional challenges to the Outright Monetary Transactions program.

Beyond the question of the legality of the Outright Monetary Transactions program under constitutional law and EU law, the judgment constitutes yet another building block in the complex and not too consistent jurisprudence of the Constitutional Court regarding the constitutional framework for the participation of Germany within the process of European integration. It therefore has to be regarded within the wider context of the Court's claim to review whether EU law complies with the German Constitution, a jurisprudence that is traditionally associated with the famous *Solange I*[4] and *Solange II*[5] decisions of the Court but has since then evolved into a multifaceted system of self-proclaimed competences of the Court to review the legality of acts of EU organs.[6] Within the context of the Euro crisis, the Constitutional Court has used its review competences to scrutinise the different measures resorted to by EU organs and member states in order to preserve financial stability in Europe and to financially assist members of the Eurozone. The Outright Monetary Transactions judgment is, for the time being, the final decision of the Constitutional Court in a line of jurisprudence that started in 2011 with the judgment concerning the financial aid provided to Greece,[7] and continued with the 2012[8] and 2014[9] judgments regarding the European Stability Mechanism.

Challenging the legality of the Outright Monetary Transactions Program before the Constitutional Court

At the centre of the legal dispute lies the Outright Monetary Transactions program of the European System of Central Banks. Following the promise by Mario Draghi, European Central Bank President, in July 2012 that the Bank would,

through a direct action of annulment to be inadmissible, *see* EGC 10 December 2013, Case T-492/12, *von Storch et al.* v *ECB*. The ECJ dismissed the appeal against this decision as manifestly unfounded, *see* ECJ 29 April 2015, Case C-64/14 P, *von Storch et al.* v *ECB*.

[4] FCC, Order of 29 May 1974, Case BvL 52/71.

[5] FCC, Order of 22 October 1986, Case 2 BvR 197/83.

[6] For an overview *see* H. Sauer, *Staatsrecht III*, 4th edn. (C.H. Beck 2016) p. 176-228.

[7] FCC, Judgment of 7 September 2011, Case 2 BvR 987/10; on this decision *see*, e.g., A. von Ungern-Sternberg, 'Parliaments – Fig Leaf or Heartbeat of Democracy? German Federal Constitutional Court Judgment of 7 September 2011 – Euro Rescue Package', 8 *EuConst* (2012) p. 304.

[8] FCC, Judgment of 12 September 2012, Case 2 BvR 1390/12 et al.; on this decision *see*, e.g., M. Wendel 'Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012', 14 *German Law Journal* (2013) p. 21.

[9] FCC, Judgment of 18 March 2014, Case 2 BvE 6/12 et al.

within its mandate, do 'whatever it takes to preserve the euro',[10] and the announcement at a press conference in August 2012, that the Bank 'may undertake outright open market operations of a size adequate to reach its objective',[11] the Governing Council of the Bank took a decision in September 2012 approving the main parameters of the Outright Monetary Transactions program.[12] Under this program, the European Central Bank, as well as the national banks, would undertake outright monetary transactions in secondary bond markets, with no quantitative limits set out front. According to the press release, sovereign bonds purchases under the program would only be carried out in conjunction with 'strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism programme'. As of today, the Outright Monetary Transactions program has not been activated, and it is widely held that the mere announcement of the program had a significant impact on the financial market, thereby contributing to financial stability.[13]

The compatibility of the Outright Monetary Transactions program with EU law was cast into doubt immediately.[14] First it was argued that the European Central Bank had transgressed its mandate, since its competences were limited to monetary policy[15] and the program would constitute an exercise of economic policy, for which there was no EU competence and in particular no competence of the European Central Bank. Second the intended purchase of sovereign bonds was criticised as a violation of the prohibition of monetary financing under Article 123 TFEU.

The Constitutional Court's reference for a preliminary ruling

Numerous individuals as well as the parliamentary group of the Left Party in the German Bundestag therefore challenged the Outright Monetary Transactions

[10] Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, <www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>, visited 23 March 2017.

[11] Press Conference of the European Central Bank, Frankfurt am Main, 2 August 2012, <www.ecb.europa.eu/press/pressconf/2012/html/is120802.en.html>, visited 23 March 2017.

[12] Minutes of the 340th meeting of the Governing Council of the European Central Bank, 5 and 6 September 2012, cited after FCC, Order of 14 January 2014, Case 2 BvR 2728/13, para. 2; Press Release of the European Central Bank, 6 September 2012, Technical features of Outright Monetary Transactions, <www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>, visited 23 March 2017.

[13] *See* ECJ 16 June 2015, Case C-62/14, *Gauweiler et al.* v *Deutscher Bundestag*, para. 79; C. Gerner-Beuerle *et al.*, 'Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial', 15 *German Law Journal* (2014) p. 281 at p. 282.

[14] *See*, e.g., H.-W. Forkel, 'Euro-Rettung, Demokratie und Rechtsstaat, Zur Frage des Rechtsschutzes für jedermann gegen die Geldpolitik der EZB', 8 *Zeitschrift für Rechtspolitik* (2012) p. 240.

[15] *See* Arts. 119, 123, 127 TFEU; Arts. 17-24 Protocol on the European System of Central Banks and the European Central Bank.

program before the German Constitutional Court, arguing that the program was unconstitutional.[16] These complaints and applications raise difficult procedural questions. Is it possible to challenge European Central Bank measures in front of the Constitutional Court? Can the Court review the compatibility of the Outright Monetary Transactions program with EU law? What could the Court do if it found the Bank's decision to be in violation of EU law or constitutional law? In its decision of January 2014, with which the Constitutional Court requested a preliminary ruling of the Court of Justice, the Court evaded most of these questions. It interpreted the applications, on the basis of a 'reasonable assessment',[17] as challenging not the Outright Monetary Transactions decision directly but only parliamentary and governmental inaction with regard to the program.[18] It also held that – if the program were unconstitutional – the Government as well as Parliament were under an obligation to omit and actively prevent infringements of the constitutional identity, without, however, further specifying what exactly this obligation would entail and in how far the Constitutional Court would order the political actors to resort to concrete measures.[19] It also held that if the program violated EU law, the Constitutional Court would be obliged to activate its ultra vires review competence and declare the European Central Bank's decision to be in violation of constitutional law.[20]

Having expressed its willingness to declare the Outright Monetary Transactions program ultra vires, the Court then voiced its doubts with regard to the compatibility of the program with EU law: On the basis of an analysis of the objective, the means and the effects of the program, the Court concluded that the program does not constitute an instrument of monetary policy but rather of economic policy, thereby transgressing the competences of the European Central Bank.[21] It furthermore expressed its opinion that the program violates the prohibition of monetary financing under Article 123 TFEU, in particular due to its openness towards a debt cut and its interference with the market for sovereign bonds.[22] The Court, however, hinted at the possibility of a restrictive

[16] FCC, Order of 14 January 2014, Case 2 BvR 2728/13, para. 5; FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, paras. 10-42.

[17] FCC, Order of 14 January 2014, Case 2 BvR 2728/13, para. 1.

[18] This aspect is criticised by the Dissenting Opinion of Justice Lübbe-Wolff on the Order of 14 January 2014, Case 2 BvR 2728/13, para. 2.

[19] *See* FCC, Order of 14 January 2014, Case 2 BvR 2728/13, paras. 44-49; for a harsh critique in this regard *see* W. Heun, 'Eine verfassungswidrige Verfassungsgerichtsentscheidung – der Vorlagebeschluss des BVerfG vom 14. 1. 2014', *Juristenzeitung* (2014) p. 331; for a more nuanced view *see* M. Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', 10 *EuConst* (2014) p. 263.

[20] FCC, Order of 14 January 2014, Case 2 BvR 2728/13, paras. 36-43.

[21] *Cf.* paras. 63-83.

[22] *Cf.* paras. 84-94.

interpretation of the Outright Monetary Transactions decision in conformity with EU law,[23] expressed its willingness to take into account a decision of the Court of Justice on the interpretation and conformity of the program with EU law,[24] and requested a preliminary ruling of the Court of Justice.

The shortcomings and inconsistencies of the Constitutional Court's decision on the preliminary reference have already been pointed out.[25] From an institutional perspective, the decision has to be interpreted as an offer of cooperation as well as an open threat towards the Court of Justice: the Constitutional Court makes use of the preliminary reference procedure and indicates that it will attribute considerable weight to the holding of the European Court. At the same time, the Court expresses its concerns regarding the legality of the Outright Monetary Transactions decision and announces its willingness to declare it unconstitutional as an ultra vires act violating the constitutional identity of the German Constitution.

The Judgment of the Court of Justice

With the possibility of an open conflict of jurisdiction between the Court of Justice and the German Constitutional Court looming, the answer of the Luxemburg Court to the preliminary reference from Karlsruhe was highly anticipated. Seventeen months after the referral, the Court of Justice issued a decision that can only be characterised as sober and level-headed.[26] The Court did not address the possible conflict but only pointed out, in a rather passing mention, that a preliminary ruling of the Court is binding on the national court that referred the procedure to the Court of Justice, 'as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings'.[27] The Court then concluded that the Outright Monetary Transactions program neither overstepped the competences of the European System of Central Banks and the European Central Bank,[28] nor constituted a violation of the prohibition of monetary financing.[29]

[23] *Cf.* paras. 99-100.

[24] *Cf.* paras. 27, 39, 55.

[25] For extensive discussion of the decision *see*, e.g., 15 *German Law Journal* (2014) p. 107-382.

[26] ECJ 16 June 2015, Case C-62/14, *Gauweiler et al.* v *Deutscher Bundestag*; *see* on this A. Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union', 11 *EuConst* (2015) p. 563; for a more sceptical view, *see* M. Nettesheim, 'Europarechtskonformität des Europäischen Stabilitätsmechanismus', *Neue Juristische Wochenschrift* (2013) p. 14.

[27] *Cf.* para. 16.

[28] *Cf.* paras. 33-92.

[29] *Cf.* paras. 93-127.

The Court of Justice held that the European Central Bank was generally limited to measures on the field of monetary policy. The TFEU, however, did not contain a definition but rather defined the objectives and instruments of monetary policy.[30] While the primary objective of the Union's monetary policy was to maintain price stability, the European System of Central Banks was also to support the general economic policies in the Union, according to Article 127(1) and Article 282(2) of the TFEU.[31] With regard to the objectives of the program the Court held that safeguarding the singleness of the monetary policy as well as an appropriate transmission of monetary policy were legitimate aims.[32] That the measure also contributed to the stability of the euro area was irrelevant.[33] With regard to the means, the Court emphasised that the selective nature of the program was justified since it was intended to rectify the disruption of the monetary policy transmission with a view to the specific situation of particular member states.[34] That the implementation of the program was conditional upon compliance with the European Financial Stability Facility or the European Stability Mechanism did not transform the Outright Monetary Transactions program into a measure of economic policy, since effects of such conditionality on economic-policy objectives were only of an indirect nature and conditionality was necessary to guarantee that the program neither tampered with the economic policies of the member states, nor with the objectives of the European Stability Mechanism.[35] The Court furthermore held that the measures were proportionate,[36] strongly emphasising the broad discretion of the European System of Central Banks and refraining from fully scrutinising its economic assessments.[37]

Turning to the question of the prohibition of monetary financing, the Court held that while the European System of Central Banks was not prohibited from operating on the financial market, including the purchase of government bonds, the prohibition of Article 123(1) TFEU barred it from purchasing bonds directly from the member states.[38] Accordingly, purchases of government bonds on the secondary market were not allowed if they undermined the effectiveness of the prohibition or circumvented the objective of the prohibition on monetary financing.[39] In light of the explanations provided by the European Central Bank, the Court was, however,

[30] *Cf.* para. 42.
[31] *Cf.* para. 43.
[32] *Cf.* paras. 47-50.
[33] *Cf.* paras. 51-52.
[34] *Cf.* para. 55.
[35] *Cf.* paras. 57-65.
[36] *Cf.* para. 66.
[37] *Cf.* paras. 68-75.
[38] *Cf.* paras. 94-96.
[39] *Cf.* paras. 97-102.

satisfied that the program had implemented sufficient safeguards to prevent that the purchase of government bonds on the secondary market was equivalent in effect to measures prohibited under Article 123(1) TFEU.[40] The Court in particular referred to the limited and conditional nature of the program, the omission of a prior announcement of the purchase of bonds which could increase primary market purchases, as well as the observance of a minimum period between the issue of securities on the primary market and its purchase on the secondary market. Due to its conditionality, the program would also not interfere with the impetus of the member states to follow a sound budgetary policy and therefore not circumvent the objective of the prohibition on monetary financing.

The final judgment of the Constitutional Court

Against the background of the rather definite pronouncement of the Constitutional Court in its preliminary reference that the Outright Monetary Transactions program was incompatible with EU law, some commentators expected that the Constitutional Court would disregard the decision of the Court of Justice, leading to the first case in which the Constitutional Court would actually defy the European Court of Justice.[41] Others were convinced that the Constitutional Court would not overrule the Court of Justice and avoid a direct conflict between EU law and German constitutional law.[42] The judgment of the Constitutional Court proved the optimists right.

Decision on admissibility

The Court first dealt with the admissibility of the constitutional challenges against the Outright Monetary Transactions program. In contrast to its preliminary reference, the Court acknowledged that the applicants challenged the European Central Bank's OMT decision directly and found this claim to be inadmissible.[43] It emphasised that under Article 93(1) No. 4a of the German Constitution and paragraph 90(1) of the Law on the Federal Constitutional Court, constitutional complaints could only be lodged against acts of *German* public authority. Direct challenges against acts of EU organs are therefore inadmissible before the Constitutional Court. This pronouncement comes as a surprise in so far as the

[40] *Cf.* paras. 105-127.

[41] *See*, e.g., F. Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States', 16 *German Law Journal* (2015) p. 1003 at p. 1012-1013.

[42] *See*, e.g., S. Simon, 'Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling', 16 *German Law Journal* (2015) p. 1025 at p. 1046-1048.

[43] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, paras. 95-100.

Court had held in its Maastricht decision that acts of the supranational EU affect persons protected by fundamental rights in Germany and therefore trigger the duty of the Constitutional Court to protect the fundamental rights in Germany not only in respect of German governmental institutions.[44] This holding has been widely understood as empowering individuals to challenge acts of EU organs directly in front of the Constitutional Court.[45] The clear pronouncement by the Court that EU acts could not be challenged directly, is, however, diluted by its following statement – citing the Maastricht holding – that acts of an EU organ could be scrutinised by the Constitutional Court indirectly as 'preliminary questions', either when they constitute the basis for acts of German state organs or in so far as they could trigger the responsibility for integration (*Integrationsverantwortung*). While the Constitutional Court will therefore continue to scrutinise acts of EU organs, its pronouncement that such acts cannot be challenged directly raises questions, for example with regard to challenges against EU regulations that directly affect persons in Germany without any transforming act of German state organs.

The Court, however, declared admissible the constitutional complaints against the German Federal Government's omission to challenge the Outright Monetary Transactions decision of the European Central Bank. The Court held that Article 38(1) sentence 1 of the German Constitution – the right to vote in federal parliamentary elections – not only granted a right to participate in elections but also a right to influence the political process.[46] In the context of European integration it encompassed the right that a transfer of powers to organs of the EU only takes place in the constitutionally envisaged forms, that is through a law of parliament with the consent of the Federal Council of Germany (*Bundesrat*).[47] If EU organs acted outside their competences, such acts would lack democratic legitimacy, thereby potentially violating the principle of sovereignty of the people as part of the constitutional identity of the German Constitution.[48] Article 38(1) sentence 1 of the German Constitution would therefore also grant a right against ultra vires acts of the EU where the transgression of competences is sufficiently serious.[49] With regard to the Outright Monetary Transactions program the

[44] FCC, Judgment of 12 October 1993, Case 2 BvR 2134/92, para. 70.

[45] *See* FCC, Order of 27 April 2010, Case 2 BvR 1848/07, paras. 13-15; Sauer, *supra* n. 6, p. 221.

[46] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 81. The Court thereby follows and extends an approach it had already proclaimed in its Maastricht (FCC, Judgment of 12 October 1993, Case 2 BvR 2134/92) and Lisbon (FCC, Judgment of 30 June 2009, Case 2 BvE 2/08) decisions.

[47] *See* Art. 23(1) sentences 2 and 3 and Art. 79(2) of the German Constitution. Such a law regularly requires a majority of two thirds of the Members of the Federal Parliament and two thirds of the votes of the Federal Council.

[48] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 81.

[49] *Cf.* paras. 83-88.

constitutional claim could be aimed at obliging the Federal Government to take action against the European Central Bank's decision.[50] Since the program potentially impaired the budgetary responsibility of parliament, the constitutional application of the parliamentary group of the Left Party against the Federal Parliament was also declared to be admissible based on the claim that the parliament was under an obligation to take action against erosions of its powers through potential ultra vires acts of organs of the EU.[51]

Decision on the merits

While the Court held the constitutional complaints as well as the constitutional applications to be unfounded on the merits, it seized the opportunity to develop its standards of judicial review. The Court first outlined its constitutional identity review function:[52] Article 79(3) of the German Constitution declares the principles laid down in Articles 1 and 20 – that is the guarantee of human dignity as well as basic constitutional principles, including the principle of democracy – to be immune from constitutional amendment. They therefore form part of the constitutional identity. With a view to the Outright Monetary Transactions program it is in particular the budgetary responsibility of parliament that is at stake and that forms part of the constitutional identity due to its connection with the principle of democracy. Apart from identity review the Court scrutinises whether measures of EU organs remain within the limits of the competences of the EU or are ultra vires.[53] The Court builds upon the standards developed in the case of *Honeywell*[54] but emphasises more strongly the connection of ultra vires review with the principle of democracy: since the Court bases the existence of the law of the EU on the delegation of powers through the treaties and, from a constitutional perspective, on the laws allowing for such a transfer, measures of the EU organs that exceed the competences of the EU lack democratic legitimacy and violate the right of the individual not to be subjected to a power that it cannot legitimise and influence. In accordance with the standards developed in the *Honeywell* decision[55] the Court confirms that it will only exercise its ultra vires review competence with regard to sufficiently serious transgressions of EU competences, that is when a measure manifestly exceeds the competences transferred to the EU and leads to a structurally significant shift in the allocation of competences. The Court highlights, however, that it will exercise its ultra vires as well as identity review

[50] *Cf.* para. 86.
[51] *Cf.* paras. 105-113.
[52] *Cf.* paras. 136-142.
[53] *Cf.* paras. 143-152.
[54] FCC, Order of 6 July 2010, Case 2 BvR 2661/06.
[55] *Cf.* para. 61.

competences in an EU-friendly manner: the exercise of the review functions will only come in play in exceptional cases, they are only to be exercised by the Constitutional Court and not by other domestic courts, and the Court will only activate them after the Court of Justice has had the opportunity to scrutinise the EU measure and with consideration of the decision of the Court of Justice,[56] granting the Court of Justice a certain leeway with regard to the interpretation of EU law and the methods it applies.[57]

Against this standard of review, the Constitutional Court did not find that the Outright Monetary Transactions program violated constitutional law. It accepts the finding of the Luxemburg Court that the program did not transgress the competences of the EU in general and of the European System of Central Banks in particular, although it expresses its scepticism with regard to the reasoning of the Court of Justice.[58] The Constitutional Court criticises the Court of Justice for not scrutinising the assertion that the program pursued objectives of monetary policy as well as the restrictive standard of review with regard to the limits of the European Central Bank's competences, in particular in light of the limited democratic legitimacy of the Bank.[59]

Nevertheless, in light of the at least plausible interpretation of the Court of Justice, as well as the restrictive conditions the Court of Justice establishes in order for the program to be in accordance with EU law, the Constitutional Court does not find that the program transgresses the competences of the EU in an obvious manner.[60] Similarly, the Court does not find that the program violates the prohibition of monetary financing under Article 123 TFEU if seen in light of the restrictive criteria developed by the Court of Justice.[61] However, in case the implementation of the OMT program does not comply with these criteria, the Constitutional Court considers the program to be ultra vires.[62] In that case the German Federal Bank would be prohibited from participating in the implementation of the program, and the Federal Government as well as the Federal Parliament would be under an obligation – stemming from their responsibility with respect to European integration, and in particular the parliamentary budgetary responsibility as part of the constitutional identity – to take measures against the program and to restrict its implications for the domestic sphere.[63]

[56] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, paras. 154-157.
[57] *Cf.* paras. 159-161.
[58] *Cf.* paras. 181-189.
[59] *Cf.* para. 189.
[60] *Cf.* paras. 190-196.
[61] *Cf.* paras. 197-204.
[62] *Cf.* para. 205.
[63] *Cf.* paras. 206-219.

Evaluation of the judgment

The substantial arguments regarding the legality of the Outright Monetary Transactions program had already been exchanged well in advance of the judgment. The Constitutional Court's scrutiny of the program is not only problematic due to the impossibility of strictly separating monetary policy from fiscal or economic policy,[64] but also and foremost because the Court questions the political economy expertise of the European Central Bank, thereby running the risk of exceeding the competences of the judiciary.[65] Moreover, the Court's understanding of the concept of democracy as applied to the Bank is highly problematic. The Court not only neglects that the independence of the Bank is embedded in EU Constitutional Law (Article 130 TFEU) as well as in Article 88 sentence 2 of the German Constitution, provisions the Court acknowledges but apparently does not allocate much significance to. It also diminishes the deliberate decision of the EU member states to create an institution that is supposed to act upon its expertise in political economy shielded off from the political influence of other actors. There is a certain irony in the fact that an independent institution such as the Constitutional Court, which itself is often charged with overstepping its competences and its judicial function, regards the independence of the European Central Bank as a reason for more stringent scrutiny. Just as it is short-sighted to see the independence of the Court as grounds for a restrictive reading of its competences and functions, it is short-sighted to apply this reasoning to the Bank.

Against this background, it is to be welcomed that the Constitutional Court eventually followed the lead of the Court of Justice – albeit not without voicing its criticism – and thereby avoided a conflict between the German and the European legal orders. The long-range significance of the Outright Monetary Transactions judgment, however, goes well beyond the program and the European sovereign debt policy in general, since the Constitutional Court uses the judgment to recalibrate its competences with regard to the review of EU law.

Revitalising ultra vires review: the criterion of a 'manifest' transgression of competences

Since the *Honeywell* decision the Court limits its ultra vires review competence to 'sufficiently qualified violations', meaning manifest violations that entail a structurally significant shift in the allocation of powers to the detriment of the member states.[66]

[64] *See*, e.g., Simon, *supra* n. 42, p. 1029.

[65] *See*, e.g., H. Sauer, 'Doubtful it Stood...: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment', 16 *German Law Journal* (2015) p. 971 at p. 979-980; J. Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review', 15 *German Law Journal* (2014) p. 167 at p. 177; Wendel, *supra* n. 19, p. 263.

[66] FCC, Order of 6 July 2010, Case 2 BvR 2661/06, para. 61.

The Court's application of the criterion of a 'manifest' violation of competences is, however, rather problematic. In the decision on the preliminary reference the Court expressed the view that if the Outright Monetary Transactions program transgressed the competences of the European Central Bank, this transgression would also be 'manifest'. Since it was – and still is – subject to fierce debate whether the European Central Bank's Outright Monetary Transactions decision was in compliance with EU law, and since the Constitutional Court itself continues to analyse this question over the next nine pages of its decision, it is hardly convincing to assume that either a transgression of competences or a violation of the prohibition of monetary financing by the European Central Bank would in any way be 'manifest'.[67] In the judgment the Court then held, against the background of the European Court of Justice's interpretation, that the program does not transgress the competences of the European Central Bank in a manifest manner. However, the general holding of the Court with regard to the standard of review is far from clear. The Court holds that a transgression is only manifest if a competence of the EU cannot be established under any methodologically sound legal point of view.[68] This statement indicates a rather restrictive approach, limiting ultra vires review to gross violations of the competences of the EU. In the next paragraph, however, the Court holds that a transgression can even be manifest if divergent views concerning the question of competences exist and even if it is the result of a 'thorough and well-reasoned interpretation'.[69] This holding is rather contradictory since it is difficult to imagine how a 'thorough and well-reasoned interpretation' of the competences of the EU can be 'manifestly' wrong.[70] Even after the judgment it is therefore far from clear when a transgression of competences is 'manifest' in a manner that is constitutionally relevant and triggers the ultra vires review competence of the Constitutional Court. With the requirement of a 'manifest' transgression of competences the Court has established a vague criterion for judicial review giving itself a far-reaching leeway in its practical operation and making the handling of cases of alleged transgression of competences through the Constitutional Court hard to predict.

Expanding ultra vires review beyond the transgression of competences

The handling of the ultra vires review in the Outright Monetary Transactions judgment moreover exhibits some conceptual ambiguity. In its initial understanding, ultra vires review is meant as a judicial mechanism to scrutinise

[67] *See* Dissenting Opinion of Justice Gerhardt on the Order of 14 January 2014, Case 2 BvR 2728/13, para. 17.

[68] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 149.

[69] *Cf.* FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 150.

[70] See C.D. Classen, 'Europäische Rechtsgemeinschaft á l'allemande?', 5 *Europarecht* (2016) p. 529 at p. 539.

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whether acts of the EU organs remain within the competences transferred to the Union by the member states, thereby ensuring that they abide by the foundational principle of conferral. In the judgment the Constitutional Court does strictly limit ultra vires review to alleged transgressions of competences – the restriction of the European Central Bank to measures of monetary policy – but expands its ultra vires review function to the question of a violation of the prohibition of monetary financing according to Article 123 TFEU.[71] While the Court does not explicitly state that it analyses Article 123 TFEU from the perspective of ultra vires review, it uses the ultra vires review standard when it holds that the Outright Monetary Transactions program does not 'manifestly' infringe Article 123 TFEU and it follows its analysis of Article 123 TFEU with the holding that 'against this background', the program would only then not be ultra vires, when the conditions developed by the Court of Justice are met.[72] A violation of the substantive standard of Article 123 TFEU can, however, not be equated with a transgression of competences. In the judgment, the Constitutional Court blurs the distinction between transgressions of competences and the violation of substantive standards of EU law, thereby also blurring the contours of its ultra vires review function.

Expanding the legal consequences of ultra vires review

While ultra vires review as a concept developed by the Court aims at declaring legal acts of the EU to be without legal effect within the German legal order, this approach failed with regard to the Outright Monetary Transactions program. The decision of the European Central Bank is not a legal act that had any immediate legal consequences within the German legal order. Declaring the Bank's decision to be without legal effect within the German legal order would have been a futile endeavour. The claimants and applicants therefore aimed not primarily at the Bank's decision but at the German state organs and tried to hinder the German Federal Bank from participating in the program and to obligate the German Government and Parliament to actively counteract the European Central Bank. While the Constitutional Court eventually dismissed those claims, it nevertheless followed their direction in principle. It held that the German Federal Bank was prohibited from participating in the program when the conditions established by the Court of Justice were not met,[73] and it held that in principle Government and Parliament were under an obligation to monitor whether acts of the EU are ultra vires and, if necessary, to resort to the appropriate measures to avoid such transgressions.[74] From a separation of powers perspective, such a holding is

[71] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, paras. 197-204.
[72] *Cf.* para. 205.
[73] *Cf.* paras. 205-209.
[74] *Cf.* paras. 162-173 and paras. 210-220.

highly problematic.[75] The Constitutional Court not only controls specific acts of the political organs but obliges them to act in a specific manner under the rather vague constitutional topos of responsibility for integration. While the Court strongly emphasises that it grants the Government as well as Parliament a wide margin of discretion with regard to their political assessments as well as with regard to the measures they want to resort to, it nevertheless lists possible measures such as action for annulment under Article 263 TFEU, the exercise of veto rights within the political bodies of the EU, even going so far as mentioning the possibility of activating the Luxembourg Accord.[76] While the Court shies away from declaring more concrete obligations of Government and Parliament with regard to the European Central Bank, it nevertheless strongly signals that it expects the political organs to more closely monitor the European sovereign debt policy and its implications for the budgetary responsibility of the German Parliament.

Loosening the admissibility requirements for ultra vires review

The Court not only widens the scope of its ultra vires review function but also loosens the admissibility requirements according to which individual complainants can claim that an act of the EU is ultra vires. While until the OMT proceedings it was commonly understood that an individual has standing only when he or she is specifically affected by the respective EU measure, the Court now applies its broad understanding of the constitutional right to vote also to ultra vires review. Since Article 38(1) sentence 1 of the German Constitution encompassed an individual right to democratic participation and legitimation of public authority, the argument goes, this right could be violated if EU organs acted beyond the powers transferred to them in accordance with the constitutional mechanisms for such a transfer. As a result, any individual can claim that an act of the EU is ultra vires, regardless of whether and how far he or she is directly affected by that act. The approach further alienates Article 38(1) sentence 1 of the German Constitution from its initial meaning, the right to vote in federal elections. It furthermore neglects that the constitutional complaints procedure is designed as a judicial remedy for the concrete violation of individual rights,[77] further transforming it into a mechanism for objective legal review. This approach is

[75] *See* Dissenting Opinion of Justice Lübbe-Wolff on the Order of 14 January 2014, Case 2 BvR 2728/13, para. 5 ff; Dissenting Opinion of Justice Gerhardt on the Order of 14 January 2014, Case 2 BvR 2728/13, para. 2; F.C. Mayer,'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference', 15 *German Law Journal* (2014) p. 111 at p. 139; for a less critical view in this regard *see*, e.g., W. Kahl, 'Bewältigung der Staatsschuldenkrise unter Kontrolle des Bundesverfassungsgerichts – ein Lehrstück zur horizontalen und vertikalen Gewaltenteilung', *Deutsches Verwaltungsblatt* (2013) p. 197.

[76] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 171.

[77] *See* Dissenting Opinion of Justice Gerhardt on the Order of 14 January 2014, Case 2 BvR 2728/13, para. 5 ff.

unconvincing, since the Court derives its legitimacy from the Constitution as well as from the Law on the Federal Constitutional Court, which construe the constitutional complaint procedure as an individual rights mechanism. It also raises the question why this extensive reading of the right to vote should be limited to the field of European integration.[78]

Blending ultra vires review and constitutional identity review

Against the background of the Court's extensive understanding of ultra vires review, this review function is not easily distinguished from constitutional identity review. According to the reasoning of the Court, the Outright Monetary Transactions program is problematic both from the perspective of a transgression of competences (ultra vires review) as well as from the perspective of a possible infringement of the identity of the Constitution (constitutional identity review). The Court emphasises that ultra vires review and identity review are two separate review functions, with different standards of review.[79] However, since, according to the Court, every qualified transgression of competences touches upon the identity of the Constitution, the Court understands ultra vires review as a sub-category of identity review, with a different angle. While ultra vires review is *formally* focussed on the adherence of powers that have been transferred to the EU, constitutional identity review *substantively* aims at protecting the core content of the German Constitution as it is enshrined in Article 79(3) of the Constitution. Constitutional identity review is primarily concerned with powers that may not be transferred to the EU level but also scrutinises whether acts of the EU infringe these core contents, regardless of whether they transgress EU competences or not. While the judgment thereby to a certain degree clarifies the concept of constitutional identity review, it nevertheless leaves the Court with a wide margin of appreciation in deciding what exactly constitutes the identity of the German Constitution and can therefore trigger the Court's constitutional identity review function. That the Court at the same time extends the scope of application of its ultra vires review function does not contribute to a clear delimitation of the different review functions of the Court.

Doubtful Attempt at Legitimising Constitutional Review of EU Law

Finally, the Court not only proclaims its review functions but tries to justify them with reference to Article 4(2) sentence 1 TEU. Since EU law recognised, through this provision, that the EU shall respect the national identities of its member states, the Court argues that constitutional identity review is in accordance with EU law, in

[78] *See* Classen, *supra* n. 70, p. 531.
[79] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 153.

particular with the principle of sincere cooperation in Article 4(3) TEU.[80] It is, however, rather far-fetched to argue that Article 4(2) sentence 1 TEU justifies a member state's deviation from EU law when it deems that EU law runs counter to its national identity. The supremacy of EU law, the character of the Union as a community based on law, and the institutional position of the Court of Justice as the only judicial institution competent to declare measures of EU organs incompatible with EU law, calls this interpretation into question.[81] In any case, since the Constitutional Court interprets a provision of EU law in a manner that is far from being an acte clair, the Court would have had to submit the question of the interpretation of Article 4(2) sentence 1 TEU to the Court of Justice through the preliminary reference procedure.[82] The rather eclectic - and in no way substantiated - reference to the fact that other member states also recognised limits to EU integration with a view to protecting their constitutional identities[83] cannot compensate for this deficit.

Repositioning the Constitutional Court within the European Constitutional Architecture

With the Outright Monetary Transactions judgment, the Constitutional Court has recalibrated its institutional position within the European constitutional legal order and its relationship with the Court of Justice. In comparison with the preliminary reference, in which the Constitutional Court not only tried to dictate the Court of Justice how it should interpret EU law and assess the Outright Monetary Transactions program, but openly threatened to disobey its decision, the judgment has a much more conciliatory tone. The Constitutional Court emphasises that it is in principle the role of the Court of Justice to interpret EU law and follows its interpretation even in light of diverging opinions with regard to the approach to and the result of said interpretation. The Constitutional Court nevertheless seizes the opportunity to criticise the Court of Justice, and it also slightly deviates from the criteria developed by the Luxembourg Court[84] when it holds that purchased bonds can only in exceptional cases be held until maturity,[85]

[80] *Cf.* para. 140; *see* on this M. Claes and J.-H. Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case', 16 *German Law Journal* (2015) p. 917.

[81] *See* on this A. von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *Common Market Law Review* (2011) p. 1417.

[82] *See* Mayer, *supra* n. 75, p. 496-499.

[83] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 142; for a critique of this form of 'comparative constitutionalism' *see* Classen, *supra* n. 70, p. 533-534.

[84] This has also been pointed out already by Classen, *supra* n. 70, p. 541.

[85] FCC, Judgment of 21 June 2016, Case 2 BvR 2728/13, para. 199 and para. 206.

referencing the Court of Justice, which had held that the European System of Central Banks actually had this option, albeit within the frame of what is necessary.[86]

With regard to its review competences, the Constitutional Court shows that it does not follow a principled approach or a clear route in its jurisprudence, but rather prefers case-by-case decision-making. Conceptually, the Court overloads its review functions with foundational principles such as democracy, human dignity and the rule of law and almost mythological notions of sovereignty and identity. On the operational level, the scope of application, the standards of review and the legal consequences associated with the different review functions are far from clear. Conceptions of more or less linear developments of the judicial review functions of the Court[87] are called into question by the proceedings in the Outright Monetary Transactions case.

In retrospect, the challenges of the Constitutional Court to the Outright Monetary Transactions program did no harm, but they also did not advance the role of the Constitutional Court as an authoritative actor within the European institutional framework. The legitimacy of the Constitutional Court's criticism of the European Central Bank's decision on the program is called into question, not only by the lack of constitutional standards and the Court's willingness to question the Bank's political economy assessments, but also by the claim to adjudicate questions of EU law with effects for all member states[88] and in a manner that challenges the position of the Court of Justice as the final and authoritative arbitrator in EU law. The open threat directed towards the Court of Justice does not exactly exude an attitude of cooperation. It is, moreover, debatable whether the constantly maintained but never brought into action announcement that the Constitutional Court might declare an EU legal act to be without legal effect within the German legal order, or might instruct German state organs to not follow or even actively oppose EU legal acts, adds to the credibility of the Court. Within a legal community such as the EU, the threat to not abide by a decision of a court should, in any case, be handled with the utmost care.

[86] ECJ 16 June 2015, Case C-62/14, *Gauweiler et al.* v *Deutscher Bundestag*, paras. 177-178.

[87] For an attempt to find patterns and stages in the development of the jurisprudence *see* M. Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice', 48 *Common Market Law Review* (2011) p. 9 at p. 27-32.

[88] See C. Schönberger, 'Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot', 48 *Der Staat* (2009) p. 535 at p. 537-538.