

Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg!

By Asteris Pliakos* & Georgios Anagnostaras**

A. Introduction

Preliminary references by national constitutional courts are not an everyday occurrence in Union law.¹ No surprise, therefore, that they attract considerable publicity and give rise to a significant amount of academic comment.² However, the recent preliminary request of the German Federal Constitutional Court (GFCC) in *Gauweiler* constitutes undoubtedly the most important and historic preliminary reference made thus far by a constitutional court.³ This is not only because it is the very first preliminary request of this particular court, inaugurating potentially a whole new era in its institutional relationships with the Court of Justice and paving the way for other national constitutional courts to make more regular recourse to the preliminary reference procedure; but also because it relates to an issue of central importance for the process of European integration with far reaching economic and political repercussions.

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¹ For a very recent contribution on the matter, see Jan Komarek, *The Place of Constitutional Courts in the EU*, 9 EUConst 420 (2013). See also Giuseppe Martinico, *Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?*, Tilburg Institute of Comparative and Transnational Law Working Paper 2009/10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483664. See generally MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE (2014).

² See, i.e., Aida Torres Perez, *Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door*, 8 EUConst 105 (2012); Filippo Fontanelli and Giuseppe Martinico, *Between Procedural Impermeability and Constitutional Openness: The Italian Constitutional Court and Preliminary References to the European Court of Justice*, 16 ELJ 345 (2010); Franck Laffaille, *Il y a toujours une première fois. A propos de l'application de l'article 234 TCE par la Cour constitutionnelle italienne*, 45 REVUE TRIMESTRIELLE DE DROIT EUROPEEN [RTDE] 459 (2009).

³ Bundesverfassungsgericht [BVerfG - The Federal Constitutional Court], Case No. 2 BvR 2728/13, (Feb. 7, 2014), available at https://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html. A detailed press release is available at <https://www.bundesverfassungsgericht.de/en/press/bvg14-009en.html>.

The preliminary request concerns the compatibility with primary Union law regarding the European Central Bank's bond purchases program.⁴ This program envisions that the European System of Central Banks can purchase government bonds of certain Member States on the secondary market to an unlimited extent, if and so long as these Member States participate in a reform program agreed upon with the European Financial Stability Facility and the European Stability Mechanism. The objective of this program is to safeguard the monetary policy transmission mechanism in the euro area, preserving the singleness of monetary policy.⁵

According to the GFCC, this program amounts to an ultra vires act and national authorities are obliged to refrain from its implementation. This is for two basic reasons. First, because the program is not covered by the mandate of the European Central Bank but constitutes in essence an independent act of economic rather than monetary policy that falls within the competence of the Member States.⁶ Second, because the program infringes the prohibition of monetary financing of the budget by means of functionally equivalent measures.⁷ Both of these violations are sufficiently qualified and amount to a manifest and structurally significant shift in the allocation of powers to the detriment of the Member States. However, the program might not be objectionable if it could be interpreted restrictively by the Court of Justice in the light of the Treaties so as to guarantee that it would only be of a supportive nature to the economic policies of the Union. This requires in the first place that the acceptance of a debt cut must be excluded and that government bonds of selected Member States are not purchased up to unlimited amounts. It also presupposes that interferences with price formation on the market are to be avoided where possible.⁸

This paper is structured as follows. It starts by assessing why the GFCC opted to make a preliminary request on this particular occasion. It then examines the importance of this preliminary reference and what this implies in terms of judicial politics and inter-institutional relationships. It concludes that while the request constitutes a welcome and long awaited development, the language of the GFCC ultimately suggests an attempt to impose its own interpretation of Union law on the Court of Justice that is clearly outside the spirit and the legal framework of the preliminary reference procedure. In its last

⁴ Technical Features of the Outright Monetary Transactions (OMT Decision), Governing Council of the European Central Bank of (Sept. 6, 2012). A press release is available at http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

⁵ See also Press Conference of 6 September 2012, available at <http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html>.

⁶ BVerfG, Case No. 2 BvR 2728/13 at paras. 56-83.

⁷ *Id.* at paras. 84-98.

⁸ *Id.* at paras. 99-100.

section, the paper attempts to predict the outcome of this case. It argues that most probably the Court of Justice will not consider the program invalid. However, it is likely that it will give an equivocal ruling that will allow the GFCC to avoid an ultra vires pronouncement without being accused of surrendering its judicial prerogatives and its capacity to operate as an ultimate ratio against the violation of the principle of conferral by the Union institutions. This may provide an incentive to the GFCC to make more regular recourse to the preliminary reference procedure, ensuring thus a closer and more fruitful cooperation with the Court of Justice.

B. The Decision to Refer: Conscious Legal Choice or Political Maneuver?

Why did the GFCC decide to resort to the preliminary reference mechanism now, whereas it consistently avoided it under various pretexts in previous case law? A possible answer could be that the matter was too politically sensitive and complicated to tackle on its own and the GFCC chose therefore to transfer the burden to the shoulders of the Court of Justice, finding in essence an easy way out for itself.⁹ Suffice it to consider, in this respect, the consequences of a potential ultra vires ruling. This would preclude the participation of the *Bundesbank* in the purchase of government bonds from the secondary market, creating a significant economic gap that might need to be covered by the other central banks. It would also give rise to political reactions in the other Member States, while more constitutional courts might follow suit contesting the validity of the program. This would undermine the credibility of the bond purchases program, making it impossible in practice to attain its pursued objectives.

However, there are two basic problems with this interpretation. The first is that the GFCC could have found an even easier way out, by considering the constitutional proceedings inadmissible. According to the minority opinion of two of its judges, the GFCC exceeded its judicial competence and violated core constitutional principles by allowing individuals to judicially challenge the failure of the parliament and the government to take specific action against the bond purchases program.¹⁰ It was for the political institutions to select from a variety of possible reactions and to ascertain the need to take action at the political level. By considering the constitutional complaint admissible, the GFCC allowed citizens to influence the way and the objectives of the political process beyond the current constitutional framework by granting them in essence a general right to have the laws enforced.

⁹ See, for example, the statement of Michael Hüther from the Cologne Institute for Economic Research. Michael Hüther, *Europe or Democracy? What German Court Ruling Means for the Euro*, DER SPIEGEL ONLINE, Feb. 10, 2014, available at <http://www.spiegel.de/international/europe/german-court-calls-ecb-bond-buying-into-question-a-952556.html>.

¹⁰ Dissenting Opinions of Justice Lübke-Wolff and Justice Gerhardt, BVerfG, Case No. 2 BvR 2728/13.

The second problem is that the GFCC makes it clear that it reserves the right to consider the program as ultra vires, if it is not satisfied by the outcome of the preliminary ruling. If the GFCC was really looking for an easy way out of the constitutional proceedings, it would be expected to make the reference without stating in express terms its expectations on the matter and without imposing specific conditions that need to be met in order to avoid an ultra vires pronouncement.¹¹ The fact that it chose otherwise is clearly indicative of its intention to reserve for itself the last word on the validity of the program, even if this requires it to ignore the outcome of its own preliminary request.

Another possible explanation could be that the GFCC was influenced by the fact that other constitutional courts, that until recently avoided the preliminary reference procedure, resorted eventually to its mechanism, in the context of particularly important constitutional proceedings.¹² Under this interpretation, the GFCC realized that it could soon find itself perfectly isolated and that this might imperil the legitimacy of its judgments on matters of Union law and its proclaimed institutional status as the ultimate protector of constitutionality against potential transgressions of powers by the Union institutions. It chose therefore to make a preliminary request, attempting at the same time to place it under its close control by communicating explicitly its thoughts on the matter and by addressing an express warning that it would not be necessarily bound by the interpretation given by the Court of Justice.

Arguably though, the main reason that the GFCC made this reference lies in its celebrated *Honeywell* case law.¹³ *Honeywell* involved a constitutional complaint against the ruling of the federal labor court, which concluded that the national legislation on fixed term contracts as concerns older employees constituted illegal discrimination on grounds of age

¹¹ BVerfG, Case No. 2 BvR 2728/13 at paras. 99-100.

¹² See, particularly in this respect, the preliminary reference of the Spanish Constitutional Court in *Stefano Melloni v. Ministerio Fiscal*, Case C-399/11 (Feb. 26, 2013). On this reference, see Aida Torres Perez, *supra* note 2. See also the preliminary request made by the French Conseil Constitutionnel in *Jeremy F v. Premier Ministre*, Case C-168/13 PPU (May 30, 2013). On this reference, see Henri Labayle and Mehdi Rostane, *Le Conseil constitutionnel, le mandat d'arrêt européen et le renvoi préjudiciel à la Cour de justice*, 29 RFDA 461 (2013); Marie Gautier, *L'entrée timide du Conseil constitutionnel dans le système juridictionnel européen*, 69 AJDA 1086 (2013); Anne Levade, *Anatomie d'une première: renvoi préjudiciel du Conseil constitutionnel à la Cour de justice!*, LA SEMAINE JURIDIQUE—ÉDITION GÉNÉRALE 1111 (2013).

¹³ *Honeywell Bremsbelag GmbH*, Bundesverfassungsgericht [BVerfG - The Federal Constitutional Court], Case No. 2 BvR 2661/06 (July 6, 2010), available at http://www.bverfg.de/en/decisions/rs20100706_2bvr266106en.html. For more information on this case, see Asteris Pliakos & Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU Law*, 36 ELREV 109 (2011); Mehrdad Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualising the Relationship Between the German Constitutional Court and the Court of Justice of the European Union*, 48 CMLREV 9 (2011); Matthias Mahlmann, *The Politics of Constitutional Identity and its Legal Frame—The Ultra Vires Decision of the German Federal Constitutional Court*, 11 GERMAN L.J. 1407 (2010); Christoph Möllers, *Constitutional Review of European Acts Only Under Exceptional Circumstances*, 7 EUCONST 161 (2011).

and was thus inapplicable by virtue of the relevant Union case law.¹⁴ The applicant claimed in essence that this ruling violated its contractual freedom of action under the national constitution, since it was based on an ultra vires interpretation of Union law by the Court of Justice that was invalid at national level and which was erroneously relied upon by the federal labor court.

Honeywell reiterated the competence of the GFCC to exercise ultra vires review over the acts of the Union institutions. However, it accepted that the principle of supremacy and the uniform application of Union law would be compromised if every national court could claim the right to rule on the validity of these acts. It concluded thus that ultra vires must be exercised in accordance with the openness of the national constitution towards Union law, that is in a European friendly way.¹⁵ When reviewing the acts of the Union institutions, the GFCC must in principle comply with the rulings of the Court of Justice as providing a binding interpretation of Union law. Prior to the acceptance of an ultra vires act, it must also give the Court of Justice the opportunity to rule on the validity and interpretation of the contested measure.¹⁶

Ultimately then, the GFCC was bound by its previous case law to make the reference from the moment that it was confronted with an allegedly ultra vires Union act. Otherwise, it would be inconsistent with its own judicial pronouncements and would be certainly accused of evading the obligations arising from the openness of the national constitution towards Union law. This could also be interpreted as an attempt to protect its acclaimed institutional prerogatives by refusing to engage in a judicial intercourse with the Court of Justice. However, it now will be explained that the *Gauweiler* reference is not actually compatible with the spirit of the *Honeywell* judgment. It will also be argued that its language cannot be reconciled with the regulatory rationale of the preliminary reference procedure.

C. *Gauweiler v. Honeywell*: Undermining the Objective of Fruitful Cooperation?

I. Compliance on the Surface

There are several important observations that can be made with regard to this first preliminary request of the GFCC. On the positive side, the GFCC recognizes the legitimacy of the preliminary reference procedure and its importance as concerns the uniform interpretation and application of Union law. In this respect, It joins the club of supreme national courts that resort to the institutional mechanisms of the Treaties and establishes

¹⁴ Werner Mangold v. Rüdiger Helm, CJEU Case C-144/04, 2005 E.C.R. I-9981.

¹⁵ BVerfG, Case No. 2 BvR 2661/06 at paras. 56-59.

¹⁶ *Id.* at para. 60.

an express communication channel with the Court of Justice. This cannot be underestimated. For the first time, the two courts engage in an intercourse without intermediaries that takes place within the institutional framework of Union law and uses the communication tools provided by the latter. For the GFCC, this means that it can ask exactly the kind of the questions that it wants the Court of Justice to consider. For the Court of Justice, it means that it can finally provide answers to the questions that the GFCC always wanted to pose. If this communication passage is maintained, it will certainly boost the spirit of mutual trust and respect that must exist in the institutional relationships of these courts. This will ultimately be in the interest of the process of European integration.

Gauweiler will probably encourage other national constitutional courts to more regularly take recourse to the preliminary reference procedure. It is indeed well known that the judicial pronouncements of the GFCC inspire the case law of other constitutional courts, especially as concerns the existence of ultra vires acts.¹⁷ Following *Gauweiler*, it is no longer conceivable that a national court will ever proceed to a unilateral pronouncement of ultra vires without previously asking for interpretative guidance under the preliminary reference mechanism. Hopefully, this will prevent judicial accidents similar to the one that occurred two years ago in the *Slovak Pensions* case.¹⁸ On that occasion, the Czech Constitutional Court considered as ultra vires a judicial interpretation of Union law made in the context of the preliminary reference procedure.¹⁹ The Czech court senselessly ignored the legal framework of the Treaties and concluded that there existed a violation of the principle of conferral without giving the Court of Justice the opportunity to clarify its position on the matter. It was a decision that was not based on legal logic. Rather, the court was driven by judicial egoism and the wish to protect, at all costs, its own institutional prerogatives and its position in the apex of the national judicial pyramid.

¹⁷ See, particularly in this respect, Spanish Constitutional Court, Declaration 1/2004 (Dec. 13, 2004) (European Constitution), annotated by Camilo Schutte, *Tribunal Constitucional on the European Constitution: Declaration of 13 December 2004*, 1 EUConst 281 (2005) and Ricardo Alonso García, *The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy*, 6 GERMAN L.J. 1001 (2005); *Accession Treaty*, Judgment K 18/04, Polish Constitutional Court (May 11, 2005), annotated by Krystyna Kowalik-Banczyk, *Should We Poish it Up?*, 6 GERMAN L.J. 1355 (2005); *Treaty of Lisbon I*, Czech Constitutional Court, Decision Pl. ÚS 19/08 (Nov. 26, 2008), annotated by Petr Briza, *The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 5 EUConst 143 (2009).

¹⁸ *Slovak Pensions*, Pl. ÚS 5/12, Czech Constitutional Court (Jan. 31, 2012), available at <http://www.concourt.cz/view/pl-05-12>. See, particularly in this respect, Robert Zbiral, *A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires*, 49 CMLREV 1475 (2012); Jan Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires*, 8 EUConst 323 (2012); Georgios Anagnostaras, *Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court*, 14 GERMAN L.J. 959 (2013).

¹⁹ Marie Landtová v. Česká správa sociálního zabezpečení, CJEU Case C-399/09, 2011 E.C.R. I-5573.

Luckily, that case never really escalated to a large scale crisis.²⁰ However, it gave a clear warning sign that the existence of an express communication channel between the national constitutional courts and the Court of Justice is necessary in order to guarantee the smooth application of Union law at national level.

Also of interest is the fact that the GFCC examines the validity of the contested Union act in the light of the provisions of Union law relating to the mandate of the European Central Bank and the prohibition of monetary financing of the budget.²¹ This already implies that this is an issue that needs to be ascertained in the context of Union law, making recourse to the institutional mechanisms that this law provides.²² Logically, this also suggests the recognition of the interpretative authority of the Court of Justice under the preliminary reference procedure. It is principally for Union law to guarantee that Union institutions act within the limits of their conferred powers. It is for the Court of Justice to ascertain whether the adoption of a Union act violates the principle of conferral. This legality assessment will be based accordingly on the provisions of Union law, regardless of the national constitutional arrangements.

At first glance, the GFCC seems to be in line with its *Honeywell* case law. Just like it promised, it made a reference when it was confronted with an allegedly ultra vires act in order to protect the supremacy and uniform application of Union law. In accordance with its earlier pronouncements, it accepted the priority that should be given in principle to the institutional procedures provided by the Treaties and the association of the ultra vires review with the provisions of primary Union law. It gave therefore the Court of Justice the opportunity to examine the compatibility of the contested act in the context of Union law, conceding to its interpretative authority. However, a closer inspection of the case immediately reveals that the above understanding of *Gauweiler* is not actually correct.

II. Defiance in Substance

Indeed, the GFCC is not actually asking for interpretative guidance from the Court of Justice. It is dictating in essence the preliminary ruling that the latter must give, setting the precise conditions that need to be met in order for the principle of conferral to be respected.²³ The implication is clear. If the ruling fails to adopt the suggestions of the GFCC,

²⁰ See, in this respect, Robert Zbíral, *Nuclear War Between the Czech Constitutional Court and the Court of Justice (Hopefully) Averted*, VERFASSUNGSBLOG (Jan. 9, 2013), available at http://www.verfassungsblog.de/de/czech-constitutional-court-war-averted/#.UxH5AvI_uoN.

²¹ Articles 119 and 127 et seq. TFEU and Articles 17 et seq. ESBC Statute (mandate of the ECB); Article 123 TFEU (prohibition of monetary financing of the budget).

²² See, particularly in this respect, Daniel Thym, *A Spring in the Desert: The German ECJ Reference on the ECB Bond Purchases*, available at http://www.verfassungsblog.de/en/eine-quelle-in-der-wueste/#.UxIMfPI_uoM.

²³ BVerfG, Case No. 2 BvR 2728/13 at para. 100.

this will not be bound by its outcome and it will proceed to an ultra vires pronouncement.²⁴ One could be excused for thinking that this looks like as if the GFCC is attempting to substitute its own legality assessment for that of the Court of Justice, annulling the operation of the preliminary reference procedure. While it finally enters into the game, it refuses to play by the rules but rather purports to change them to its own benefit.

At the same time, the GFCC is addressing another explicit warning in this respect. It stresses that it is not clearly foreseeable at present whether the bond purchases program affects the budgetary autonomy and the overall budgetary responsibility of the national parliament. This program could violate the national constitutional identity, if it created a mechanism that would prevent the parliament from exercising its budgetary autonomy under its own responsibility. Whether this is indeed the case will be ascertained on the basis of the answers given to the questions referred for a preliminary ruling on the content and scope of the contested Union act.²⁵

Are the above statements really compatible with the objectives and the regulatory rationale of the preliminary reference procedure? Evidently, they are in stark contrast with the way the Court of Justice understands its role under this institutional mechanism. According to its case law, preliminary rulings are binding on the referring national courts as concerns the interpretation given to the referred point of law.²⁶ Furthermore, national courts are obliged to make a reference when they consider that a Union act is invalid.²⁷ Apparently, they are also required to respect the outcome of the ruling and to ascertain the validity issue in accordance with the instructions given to them. The obligations of the courts under the preliminary reference procedure cannot be affected by the various constitutional arrangements, since this would compromise the principle of legal certainty and imperil the effectiveness and the uniform application of Union law.²⁸

²⁴ See also, in this respect, Russell Miller, *The "Rumble in Karlsruhe: The German Federal Constitutional Court's Historic OMT Case*, available at <http://www.iconnectblog.com/2014/02/the-rumble-in-karlsruhe-the-german-federal-constitutional-courts-historic-omt-case-february-7-2014/>.

²⁵ BVerfG, Case No. 2 BvR 2728/13 at paras. 102-103.

²⁶ *Fazenda Pública v. Câmara Municipal do Porto*, CJEU Case C-446/98, 2000 E.C.R. I-11435, para. 49.

²⁷ *Firma Foto-Frost v. Hauptzollamt Lübeck-Ost*, CJEU Case C-314/85, 1987 E.C.R. 4199, paras. 15-20; *International Air Transport Association and European Low Fares Airline Association v Department for Transport*, CJEU C-344/04, 2006 E.C.R. I-403, para. 27; *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, CJEU C-119/05, 2007 E.C.R. I-6199, para. 53.

²⁸ *Mecanarte - Metalúrgica da Lagoa Lda v. Chefe do Serviço da Conferência Final da Alfândega do Porto*, CJEU Case C-348/89, 1991 E.C.R. I-3277, paras. 43-46.

That the Court of Justice considers itself as the sole competent institution to pronounce the invalidity of Union law is also exemplified by the *Melki* ruling.²⁹ This case concerned the obligation that French law imposed on the national courts to rule as a matter of priority on the submission to the constitutional court of the constitutionality issues arising in legal proceedings before them. Commenting on the legality of this national law, the Court of Justice asserted that the nature of an interlocutory procedure for the review of constitutionality may not impair its exclusive privileges to rule on the invalidity of the acts of the Union institutions. Before the interlocutory review of the constitutionality of national implementing legislation could be carried out on the same grounds that contest the validity of the Union act that constitutes the source of the national law at issue, the Court of Justice should be given the opportunity to review the legality of the Union measure concerned in relation to the requirements of primary Union law. It is precisely in this respect that the ruling reminds the constitutional courts of their obligation as judicial authorities of last instance to refer preliminary questions on the validity of secondary Union law and to apply its conclusions in the legal proceedings before them.³⁰ The implication is impressively clear. National constitutional courts are invited to cooperate with the Court of Justice, so as to allow it to settle the legality issue in the institutional context of the Union legal order in accordance with the provisions and principles of primary Union law to the exclusion of national constitutional law. They are not granted any special privileges as concerns their involvement in the interpretation and application of Union law. They are rather warned not to impede in any way the exercise of the exclusive prerogatives that the Court of Justice possesses to ascertain the invalidity of Union measures.

Certainly, one could argue that the Court of Justice is also motivated in this respect by aspirations closely associated with the protection of its own institutional status against rival national courts. However, the centralized assessment of the validity of Union law seems to be the only workable solution in a legal order that is now comprising no less than twenty-eight Member States. Otherwise, there would often be variable judicial interpretations at a national level that would effectively compromise the uniform application of Union law.³¹ Hence, it is not actually an alternative to allow constitutional courts to interpret autonomously the legality of Union measures and to choose whether and to what extent they will comply with the relevant case law of the Court of Justice. The

²⁹ Aziz Melki and Sélim Abdeli, CJEU Joined Cases C-188/10 and C-189/10, 2010 E.C.R. I-5667. See on this ruling Toon Moonen, *Proceedings Against Aziz Melki and Selim Abdeli or How the Last Shall Be the First: The Court of Justice Rules on Priority Constitutional Review*, 17 COLUMJEUURL 129 (2010/2011); Asteris Pliakos, *Le contrôle de constitutionnalité et le droit de l'Union européenne: la réaffirmation du principe de primauté*, CDE 487 (2010); Alessandro Ianniello Saliceti, *Constitution et primauté: un bilan jusqu'à l'arrêt Melki et Abdeli*, RUE 583 (2010).

³⁰ *Id.* at paras. 54-55.

³¹ See also the interview of Professor Franz Mayer, available at http://www.bertelsmannstiftung.de/cps/rde/xchg/SID-0BD8A7DD-D95FA988/bst_engl/hs.xsl/nachrichten_119997.htm.

only real alternative is to involve them more actively in the preliminary reference procedure, on the understanding that their observations will be taken seriously into account and that their intercourse with the Court of Justice will be based on mutual trust and respect.

Seen in this perspective, *Gauweiler* is manifestly incompatible with the institutional framework of the preliminary reference procedure and the objective of fruitful cooperation between the national courts and the Court of Justice. At the same time, it sits rather uncomfortably with the spirit of *Honeywell*. In that case, the GFCC seemed to accept in principle the efficacy of the current validity review procedures prescribed by the Treaties.³² On the contrary, it now implies that they are practically inoperative and that this makes it necessary for it to state clearly its position on the matter. *Honeywell* seemed to recognize the interpretative authority of the Court of Justice and the importance of the preliminary reference procedure as concerns the uniform interpretation of Union law and the protection of its supremacy. Certainly, the GFCC never said that it could not assert the invalidity of the contested Union act if the Court of Justice concluded that there was no violation of the principle of conferral. It suggested though that it would make the preliminary request in good faith, supposedly with the intention to apply it to the constitutional proceedings before it. On the contrary, *Gauweiler* reverses the regulatory rationale of the preliminary reference procedure. It is the GFCC that interprets the provisions of Union law and explains the necessity of a restrictive reading of the contested program. The Court of Justice is simply called upon to validate these conclusions, in order to avoid an ultra vires pronouncement.

The reference in *Gauweiler* seems thus to be one step forward, two steps back. The GFCC avails itself of the preliminary reference procedure and accepts at the same time that the legality of the contested act needs to be ascertained in the light of the provisions of Union law. However, it proceeds to this judicial intercourse with the apparent intention to impose on the Court of Justice its own interpretation of these same legal requirements. It is also implying that it will not recognize the authority of the preliminary ruling, unless this is given exactly in the way suggested by it.

D. *Gauweiler* in Luxembourg: Will They Live Happily Ever After?

How will the Court of Justice respond then to the challenge of this preliminary reference?³³ Will it interpret it as a friendly gesture that needs to be encouraged? Will it rather consider it as an aggressive act that must be retaliated? The worst case scenario is easy to imagine: The Court of Justice gives a preliminary ruling that accepts the legality of the bond purchases program and rejects categorically any possibility of a restrictive interpretation in

³² Pliakos & Anagnostaras, *supra* note 13, at 122.

³³ Case C-62/14 *Gauweiler and Others*.

the lines suggested by the referring court. The latter stresses then that it is not bound by this preliminary ruling and proceeds to an ultra vires pronouncement. Naturally, this is applauded by the various Eurosceptic circles and is interpreted as a proud act of national sovereignty and as a victory of the constitutional provisions over Union law and its institutions. The crisis soon escalates and spreads to the real economy. The credibility of the bonds purchase program is permanently impaired and this immediately reflects on the markets. As for the institutional relationship between the GFCC and the Court of Justice, this reminds of the cold war period. Inevitably, this also affects the other constitutional courts and make them adopt a more cautious stance towards the preliminary reference procedure.

The million euro question is then whether the Court of Justice is indeed likely to give a ruling that would most likely lead to an ultra vires pronouncement of the bond purchases program with the above mentioned consequences. Past experience suggests that the Court of Justice is not easily inhibited by the institution of judicial proceedings in the national constitutional courts alleging a violation of the principle of conferral. The ruling in *Kücükdeveci* is very illustrative in this respect.³⁴ In that case, it was categorically confirmed that there exists in Union law a general principle of equal treatment on grounds of age.³⁵ The ruling took no account of the widespread criticism voiced against the original introduction of this principle in the earlier *Mangold* case.³⁶ Even more importantly, it paid no attention to the legal proceedings that were pending at that time before the German Constitutional Court against the application of the *Mangold* case law at national level.³⁷ The core of that constitutional complaint was that the interpretation of Union law by the Court of Justice amounted to the recognition of an imaginary general principle of equal treatment on grounds of age, which called into question the allocation of competences between the Union and its Member States as well as the attribution of powers under the Treaties in general. This constituted an ultra vires act that lacked legal validity and which could not be applied by the national courts in proceedings before them.

The ruling was given only a few months after the eminent *Lisbon* ruling of the GFCC, in which the latter reaffirmed with particular vigor its capacity to review the validity of the

³⁴ *Seda Küçükdeveci v Swedex GmbH & Co. KG*, CJEU Case C-555/07, 2010 E.C.R. I-365. For more on this ruling, see its annotation by Anja Wiesbrock, *Case Note – Case C-555/07, Küçükdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010*, 11 GERMAN L.J. 539 (2010). See also the case note by Gregor Thüsing & Sally Horler, *Case C-555/07, Seda Küçükdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010*, 47 CMLREV 1161 (2010).

³⁵ *Id.* at paras. 18-27.

³⁶ *Werner Mangold v. Rüdiger Helm*, CJEU Case C-144/04, 2005 E.C.R. I-9981, paras. 74-78.

³⁷ BVerfG, Case No. 2 BvR 2661/06 .

acts of the Union institutions.³⁸ However, even this categorical reiteration by the GFCC of its intention to scrutinize more closely the application of the principle of conferral and its actual involvement in a pending constitutional complaint alleging the invalidity of the mangold case law proved of little practical impact to the Court of Justice. This insisted on the accuracy of its legal reasoning, sending a clear message that it would continue to exercise its powers in the way that it considered appropriate regardless of any constitutional reactions at national level. Arguably, this message was well taken into account by the GFCC which ruled a couple of months later that the *Mangold* case law could not be considered as ultra vires.³⁹

However, one can easily see that in many respects *Gauweiler* is not actually comparable to *Küçükdeveci*. To start with, this time the preliminary ruling is sought by the GFCC and not by an ordinary national court. As already explained, it will certainly serve the process of European integration to maintain the communication passage that was just opened between this court and the Court of Justice. This will not be easy, if the ruling confirms unconditionally the validity of the contested Union act ignoring completely the clear warning signs sent by the GFCC. Furthermore, this case is not contesting the legality of a previous preliminary ruling but rather the validity of the bond purchases program. Certainly, it also challenges incidentally the exclusive institutional prerogatives of the Court of Justice to rule on the invalidity of Union law. However, these privileges will not be imperiled if the ruling manages to reconcile the requirements of the bond purchases program with the objections raised to its application by the GFCC.

Finally, it cannot escape the attention that the Court of Justice is confronted this time with a very concrete and present ultra vires warning. More than ever, the GFCC seems ready to bite and to stop being an erratic nuisance source that only barks from the sidelines in order to gain some more influence by means of continuously repeated threats that are never

³⁸ *Gauweiler Die Linke v. Act of Approval of the Lisbon Treaty (Lisbon)*, Bundesverfassungsgericht [BVerfG - The Federal Constitutional Court], Case No. 2 BvE 2/08 (June 30, 2009), available at http://www.bverfg.de/en/decisions/es20090630_2bve000208en.html. This ruling gave rise to an immense amount of academic literature. See amongst others Dimitrios Doukas, *The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty but Don't Do it Again*, 34 ELREV 866 (2009); Jacques Ziller, *The German Constitutional Court's Friendliness Towards European Law*, 16 EPL 53 (2010); Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 CMLREV 1795 (2009); Dieter Grimm, *Defending Sovereign Statehood Against Transforming the European Union into a State*, 5 EUCONST 353 (2009); Ronald Bieber, *An Association of Sovereign States*, 5 EUCONST 391 (2009); Tobias Lock, *Why the European Union is Not a State*, 5 EUCONST 407 (2009); Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, 10 GERMAN L.J. 1201 (2009); Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!"*, 10 GERMAN L.J. 1241 (2009).

³⁹ BVerfG, Case No. 2 BvR 2661/06 at paras. 67-79 .

implemented in practice.⁴⁰ In one sense, *Gauweiler* constitutes the opposite reflected image of *Honeywell*. In *Honeywell*, the GFCC was aware of the *Mangold* and *Kücükdeveci* case law and the question was whether it would go on to consider it as ultra vires. In *Gauweiler*, the Court of Justice is clearly informed about the position of the GFCC on the bond purchases program and the question is whether it will risk the activation of its ultra vires threat.

This is not to say of course that the preliminary ruling will consider the contested act invalid, especially given the serious economic and political consequences that this pronouncement would entail. The most likely outcome of the reference is that the Court of Justice will confirm the legality of the program, subject to certain general restrictions and conditions that will intend to alleviate the concerns and the objections of the GFCC.⁴¹ Certainly, this will not be an easy task since the ruling will also need to take into account controversial political and economic considerations that arguably exceed the limits of judicial review. However, the preliminary ruling in *Pringle* could possibly serve as a judicial model in this respect.⁴² In that case, the Court of Justice ruled on the compatibility of the European Stability Mechanism explaining that in the light of its wording and purpose the Treaty establishing this emergency assistance mechanism complied with the provisions of primary law.⁴³ If a similar line of reasoning is followed in *Gauweiler*, this will allow the GFCC to argue that on the basis of this restrictive interpretation of its scope the bond purchases program can be read in conformity with the provisions of primary law and is not thus amounting to a violation of the principle of conferral.

E. Conclusion: Blind Date in Luxembourg

For almost six decades, the GFCC and the Court of Justice were making their strategic moves on the chessboard of European integration preferring sometimes to pretend that they ignored the existence of one another. They were in essence familiar strangers that never established an express communication channel between them, although they were

⁴⁰ See also Peter Lindseth, *Barking v. Biting: Understanding the German Constitutional Court's OMT Reference*, available at <http://eutopialaw.com/2014/02/10/barking-vs-biting-understanding-the-german-constitutional-courts-omt-reference-and-its-implications-for-eu-reform/>.

⁴¹ See also Daniel Thym, *supra* note 22.

⁴² Thomas Pringle v. Government of Ireland and Others, CJEU Case C-370/12 (Nov. 27, 2012). See, on this ruling, Paul Craig, *Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, 9 *EUConst* 263 (2013); Adam Stanislas, Mena Parras & Francisco Javier, *The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle*, 38 *ELREV* 848 (2013); Chris Koedooder, *The Pringle Judgment: Economic and/or Monetary Union?*, 37 *FORDHAM INT'L L.J.* 111 (2013).

⁴³ Treaty Establishing the European Stability Mechanism (ESM), Feb. 2, 2012, available at <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf>.

closely monitoring the case law of each other and adapted their strategy accordingly. Inevitably then, when the time finally came to arrange a meeting, their encounter naturally looks like a blind date that nobody can really guarantee whether it will work out well for both them.

As a matter of principle, the preliminary reference in *Gauweiler* certainly constitutes a welcome and long awaited event with significant practical and symbolical importance. Hopefully, it will inaugurate a new era in the institutional relationships of the two courts and will encourage other constitutional courts to resort more regularly to the preliminary reference procedure. However, it is apparent that the GFCC proceeds to this intercourse with mistrust and suspicion. Rather than asking for authoritative guidance by the Court of Justice, it attempts to impose its own interpretation of Union law and warns that it will launch its ultra vires missile if it is not satisfied by the preliminary ruling. This is certainly incompatible with the objectives and the regulatory rationale of the preliminary reference procedure. Furthermore, it cannot be easily reconciled with the legal spirit of *Honeywell*. Arguably, the Court of Justice will be sensible enough to give a ruling that will allow the GFCC to appreciate the benefits of the preliminary reference procedure and will encourage it to play next time with the actual rules of the game. After all, life is full of examples of successful relationships that started from a simple blind date.