Special Issue
The OMT Decision of the German Federal Constitutional Court

ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014

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A. Introductory Remarks

The European Central Bank's (ECB) program of purchasing government bonds, the OMT program (Outright Monetary Transactions Program), which was announced on 6 September 2012, is illegal. With this program, the ECB transgresses its powers. This is the central message of the Federal Constitutional Court's decision from 14 January 2014.[1] However, the decision is not final. The Federal Constitutional Court has suspended the trial and has referred the matter to the European Court of Justice (ECJ) for a preliminary ruling. Only after the ECJ has examined the compatibility of the OMT program with European law will the Federal Constitutional Court pronounce its final judgment.

The decision of the Federal Constitutional Court is of great importance in many respects. It illuminates the role of the central bank and develops criteria for the concretization of its competences (see Section B). In doing so, the Federal Constitutional Court makes use of its claimed right to an *ultra vires* review and, for the first time, determines a transgression of powers by an EU institution (see Section C). The right of every citizen to initiate such proceedings before the Federal Constitutional Court through his or her constitutional complaint has been strengthened (see Section D).

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[1] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13 (Jan. 14, 2014), http://www.bundesverfassungsgericht.de/en/index.html [hereinafter *ECB referral decision*].

B. Euro Crisis, Selective Purchases of Government Bonds, Competence of the Central Bank, and Democracy

I. Background of the ECB's OMT Program

In order to understand why the ECB's program of purchasing government bonds, the OMT program, raises problems of constitutional and European law, it is necessary to recall the background of this program. The ECB decided on this program in the summer of 2012, at the height of the euro crisis. Several euro states were so highly indebted that they were considered in danger of insolvency. As a result, the prices of these states' government bonds plummeted, while their yields rose steeply. Thus, these states could only, if at all, raise new capital on the capital markets at high risk premiums. This intensified the crisis and the threat of insolvency. The euro states tried to counteract this by installing the European Stability Mechanism (ESM). The ESM is a financial institution which was created by an international treaty[2] and endowed with an authorized capital stock of 700 billion euros by the euro states. The purpose of the ESM is to provide "stability support"—e.g. in the form of loans—under strict conditionality to the benefit of ESM Members who are experiencing, or are threatened by, severe financing problems "if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States."[3]

In the European monetary union, every Member State is essentially responsible for its own finances. Every State decides on its economic, financial, and social policies by itself—that is, its revenues and, above all, its expenditures. Consequently, it cannot rely on the fact that the European Union or its Member States will provide financial assistance if it encounters financial difficulties. The Treaty on the Functioning of the European Union (TFEU) explicitly contains a no bailout clause in Article 125(1), which states essentially that no Member State is obliged to employ the money of its taxpayers to rescue another Member State from financial problems for which the latter itself is responsible.[4] During the euro crisis, the euro states have decided to deviate from this principle and support euro states threatened by bankruptcy with financial assistance if necessary to safeguard the financial stability of the whole euro zone. Any ESM Member who receives stability support

[2] Treaty Establishing the European Stability Mechanism (ESMT), Feb. 2, 2012, 2011 O.J. (L 91) 1 [hereinafter ESMT]. See also Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus [Act to the Treaty of 2 February 2012 Establishing the European Stability Mechanism], Sep. 27, 2012, BUNDESGESETZBLATT TEIL II [BGBL. II] at 1086, for the German ratification of the ESMT.

[3] ESMT art. 3.

[4] According to the prevailing view in the German literature, which in my opinion is correct, the no bailout clause does not limit itself to the clarification that Member States are not obliged to provide assistance, but rather it prohibits the provision of financial assistance. The ECJ saw this differently in the Pringle judgment: Pringle v. Ireland, CJEU Case C-370/12 (Nov. 27 2012), http://curia.europa.eu/juris/recherche.jsf?language=en. This shall not be discussed at length here, since it is not relevant for the subject of this paper.

must subject itself to a macroeconomic adjustment program that serves the purpose of permanently restoring the respective State's capacity to self-finance.[5] Besides the granting of loans, one financial assistance instrument which the ESM can employ is the "secondary market support facility." That means, the ESM can assist a Member who has financing problems by intervening on the secondary market and purchasing government bonds there in order to lower the interest level and thus improve the terms and conditions for financing received by this State.[6]

In the summer of 2012, the euro crisis escalated, even though the entry into force of the ESMT was imminent. Faced with this situation, ECB President Mario Draghi proclaimed that the ECB would do "whatever it takes to preserve the euro."[7] This was followed by the announcement of the OMT program on 6 September 2012.[8] According to this program, the ECB will purchase government bonds of crisis-ridden states as long as these states have previously subjected themselves to a macroeconomic adjustment program or at least a precautionary program of the ESM.[9] The OMT program explicitly has no quantitative limit.

What the ECB wants to do via the OMT program is exactly the same as what the ESM can do with its secondary market facility, except that the volume of purchases of government bonds by the ESM is limited by the ESM's financial endowment,[10] while the ECB can buy unlimitedly. Ultimately, in both cases, the taxpayers of the euro States bear the default risk. The difference is that the ESM funds have been approved by the parliaments of the Member States. In contrast, regarding the OMT program, the ECB makes decisions which burden the budgets of the Member States with risks in the high billions without asking their parliaments beforehand.

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[5] ESMT arts. 12(1), 13(3).

[6] ESMT art. 18.

[7] Mario Draghi, President, European Cent. Bank, Speech at the Global Investment Conference in London (July 26, 2012), *available at* http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html (last visited Feb. 18, 2014) (stating that, "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.").

[8] Press Release, European Cent. Bank, Technical Features of Outright Monetary Transactions (Sept. 6, 2012), *available at* http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html (last visited Sept. 21, 2012). This press release is cited word for word in the ECB referral decision *supra* note 1, at para. 3.

[9] Or of the EFSF (European Financial Stabilization Facility), the preliminary mechanism to save the euro, which could provide assistance loans until mid-2013.

[10] Currently, the ESM can employ a maximum of 500 billion euros for stability support (*cf.* ESMT Preamble Recital 6, art. 39). Some 450 billion euros are still available after the appropriation of assistance to Spain and Cyprus. Adjustments to the maximum lending volume and the authorized capital stock are possible (*cf.* ESMT art. 10).

II. Differences Between the Purchase of Government Bonds by the ECB and by the Fed

In other regions of the world, central banks also purchase government bonds, and that is not considered a legal problem. Is that which the ECB has announced with the OMT program not the same as what the Fed has been doing for a long time in the US, without it being constitutionally challenged?

There exist two important differences. One concerns the basis of the competence. The other concerns the concrete conduct of the central bank. The competence of the ECB is limited to monetary policy. The ECB has no competence to make its own economic and fiscal policy. Its primary goal is ensuring price level stability. It is only allowed to support economic policy goals of the EU if in doing so it does not threaten this primary goal.[11] On the other hand, ensuring price stability is only one of several goals of the Fed. In contrast to the ECB, the Fed is also in charge of effectively promoting the goals of maximum employment and moderate long-term interest rates.[12]

The second difference is that the Fed is the central bank of a sovereign State, while the ECB is the central bank of a monetary union, which consists of various sovereign States. When the Fed purchases US bonds, this does not lead to redistributional effects among the individual states of the US. In contrast, the ECB does not purchase eurobonds—these do not even exist—nor a representative bundle of government bonds of all (or, in any event, all big) euro States. Rather, within the framework of the OMT program, it purchases only government bonds of individual States who are having financial difficulties. The consequence of this is that the risks of these especially risky government bonds are shifted from the creditors of the crisis-ridden States to the taxpayers of the solidly-financed States. In this manner, the taxpayers of the solidly-financed States are indirectly burdened by the outcomes of other States' policies. They are not responsible for these policies, and they cannot influence these policies with their vote. In a simplified and exaggerated sense, the governments of some States make debt-financed expenditures and distribute largesse to their voters, while the taxpayers of other States have to pay for this. Thus, based on the purpose and the impacts, the OMT program of the ECB fundamentally distinguishes itself from the purchases of government bonds by the Fed, which—as far as I understand—never buys the government bonds of individual US states and least of all comes to the aid of individual states, which are have financing difficulties, through targeted purchases of their government bonds.

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[11] See *ECB referral decision*, *supra* note 1, at para. 39, which references the Consolidated Version of the Treaty on the Functioning of the European Union arts. 119(1), 119(2), 127(1) May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU] and Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art. 2, 2012 O.J. (C 326) 230.

[12] Federal Reserve Act § 2A, 12 U.S.C. § 225a (2000).

III. Selective Purchases of Government Bonds as Transgressions of Powers

With selective purchases of government bonds of individual euro States, the ECB wants to lower the interest to be paid on the capital markets for new government bonds by the benefiting Member State. It wants to allay the creditors' fears of sovereign default and thereby stabilize the euro zone. Whether this is within the competence of the ECB depends upon whether one can still classify this as monetary policy, or whether the ECB is pursuing economic policy. As stated, the ECB only has a monetary mandate, not an economic and fiscal mandate.

The Federal Constitutional Court determined that the ECB is transgressing its monetary mandate and illegally encroaching into the economic policy competence of the Member States. The court extensively, meticulously, and, in my opinion, very convincingly substantiated its opinion.[13] I would not like to repeat this reasoning in detail here, but only address several aspects, which to me seem especially important.

With respect to the abstract demarcation between monetary and economic policy, the Federal Constitutional Court assumed that the mandate of the ECB must be narrowly interpreted. According to the Court, the independence of the ECB, which is guaranteed in the TFEU, is a divergence from the constitutional requirements with regard to the democratic legitimation of political decisions. This independence can only be justified for primarily stability-oriented monetary policy and cannot be transferred to other policy areas.[14] The Federal Constitutional Court then considered it to be crucial whether the act under scrutiny directly pursues economic policy objectives. It cannot depend upon whether the act also indirectly pursues monetary policy objectives.[15] Besides the objective, the instruments selected for reaching the objective and their effects are relevant. The granting of financial assistance does not fall within monetary policy,[16] just as little as the control of budgetary policy.[17]

On the basis of these standards, the Federal Constitutional Court stated that the OMT decision is to be qualified as predominantly an economic policy act. According to the Court, the ECB, with its OMT program, wants to level interest spreads on government bonds of

[13] *ECB referral decision*, *supra* note 1, paras. 56–83.

[14] *ECB referral decision*, *supra* note 1, paras. 58–59.

[15] *ECB referral decision*, *supra* note 1, para. 64.

[16] *ECB referral decision*, *supra* note 1, para. 65.

[17] *ECB referral decision*, *supra* note 1, para. 67.

selected Member States[18] and safeguard the current composition of the euro area, namely by avoiding the exit of individual euro States[19] on account of sovereign default. It stated that this is not a task of monetary policy, but of economic policy. The Federal Constitutional Court correctly pointed out that the Member States created the ESM especially for this purpose.[20] The employment of taxpayers' money for the rescue of other States from bankruptcy requires political legitimation. At best, this indirectly has to do with the central bank's task of ensuring the stability of the monetary value. That the OMT program is functionally equivalent to the assistance measures of the ESM and thus has to be classified under economic policy also arises, in the view of the Federal Constitutional Court, from the fact that the ECB wants to make the purchases of government bonds dependent on whether the benefiting State fulfills the conditions that were determined in a macroeconomic adjustment program of the ESM. The court stated that the ECB thereby wants to influence the economic, social, and budgetary policy of the respective States. If the purchases of government bonds were monetarily motivated, then it would not be understandable why the ECB wants to stop the purchase of government bonds as soon as the respective State no longer fulfills the economic policy conditions.[21]

Furthermore, the ECB, with its OMT decision, violates the prohibition of monetary financing of the budget, which is enshrined in Article 123 TFEU. This provision indeed only prohibits *expressis verbis* the "direct" purchase of government bonds by the central bank; however, this prohibition may not be circumvented through purchases on the secondary market. Notably, the Federal Constitutional Court classified the OMT program as a circumvention of this prohibition with convincing reasoning.[22]

IV. The Possibility of an Interpretation in Conformity with Union Law and its Problems

1. The Proposal of an Interpretation in Conformity with Union Law

After determining that the ECB transgressed its powers with the OMT decision, the Federal Constitutional Court considered an interpretation of the OMT decision that conforms with Union law.[23]

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[18] *ECB referral decision*, *supra* note 1, paras. 70, 73.

[19] *Cf. ECB referral decision*, *supra* note 1, para. 72.

[20] *ECB referral decision*, *supra* note 1, para. 72.

[21] *ECB referral decision*, *supra* note 1, paras. 74–78.

[22] *ECB referral decision*, *supra* note 1, paras. 84–94.

[23] *ECB referral decision*, *supra* note 1, paras. 99–100.

By interpretation "in conformity with the constitution" or "in conformity with Union law," one understands the interpretation of a norm in light of a superior norm. For example, one might consider a law in light of the constitution or a provision of secondary EU law in light of primary EU law, *i.e.* in light of the Treaties, which function as the constitution of the European Union. If the provision which is to be examined allows several possible interpretations, of which one is incompatible with a superior norm but another is compatible, then the provision is—and is only—valid in the interpretation which is compatible with the superior norm. An interpretation in conformity with the constitution avoids the annulment of the examined norm; this norm stays valid, even if only in one of the different possible interpretations. In this manner, the controlling court respects the authority of the legislature.

However, in the case of the OMT program, the interpretation in conformity with Union law, considered by the Federal Constitutional Court, does not refer to a norm (a law or a delegated legislation), but to an executive act without the character of a norm. The OMT decision of the ECB has no external binding force—neither with respect to market participants nor with respect to Member States. Since it does not generate any legal effects at all, but "only" political and factual effects, it cannot be void, in contrast to a norm in the case of incompatibility with superior law. A court can only determine its illegality. In this respect, the interpretation of such an executive act in conformity with Union law is very unusual. It is, however, not methodically impossible. Nevertheless, one can ask oneself what the point is. With respect to the ECB and with respect to the public, an interpretation in conformity with Union law appears less harsh than the determination of illegality, even though it implies that other interpretations are illegal.

The Federal Constitutional Court considered it conceivable that the OMT decision could be upheld by way of an interpretation in conformity with Union law, but itself did not undertake this interpretation, leaving it to the ECJ to examine whether the OMT decision can be rescued through an interpretation in conformity with Union law. At the same time, the Federal Constitutional Court clarified under which conditions it could "possibly" accept an interpretation in conformity with Union law:[24]

> (1) The OMT decision would have to be "interpreted or limited in its validity in such a way" that it would not undermine the conditionality of the assistance programs of the EFSF and the ESM
>
> (2) and that with regard to the economic policies in the Union it would be only of supportive nature.

[24] *ECB referral decision*, *supra* note 1, para. 100.

> (3) This implies that the purchases of government bonds are clearly and bindingly limited by volume.[25]
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> (4) The purchases would have to be approved on the merits and legitimized by the Member States.[26]
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> (5) The possibility of a debt cut must be excluded.
>
> (6) Interferences with price formation on the market are to be avoided as much as possible.

The Federal Constitutional Court thought that an interpretation which corresponds to these conditions may be compatible with the meaning and purpose of the OMT decision. This, however, is highly questionable. Upon closer examination, the OMT program is dead if one limits it according to the formulated conditions of the Federal Constitutional Court. The intended effect of the OMT program is precisely the assurance that government bonds of crisis-ridden states will be purchased in unlimited volume in case of emergency.

That the ECB lets the purchases of government bonds be approved beforehand by the Member States is incompatible with the independence of the ECB.[27] This condition is not adequate to ensure that the OMT program stays within the framework of its monetary mandate. Within the monetary mandate, the ECB does not need legitimation from the Member States; outside of its mandate, the approval of the Member States cannot heal the lack of competence. Consequently, the OMT decision does not envisage that the Member States be asked for their approval. An interpretation in conformity with Union law, which envisages the opposite, is not possible, since such an interpretation would be incompatible with the meaning and purpose of the decision, and would not conform with Union law.

The exclusion of the ECB's participation in a debt cut with respect to the government bonds purchased by it under the OMT program also does not conform to the OMT decision, since this decision explicitly states that the ECB does not want to claim a preferred creditor status.

And, with respect to the sixth condition, if the ECB were to purchase government bonds only in such a volume that would have no effect or only a slight effect on price formation on the market, then the OMT program would fall short of its purpose. This is because the

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[25] *ECB referral decision*, *supra* note 1, para. 83.

[26] *Id*.

[27] TFEU arts. 130, 282(3).

purpose of this program is precisely to impact the price formation on the market in a massive way, namely to lower the yields on government bonds and thus also the interest for newly issued bonds. With the announcement of the OMT program, the ECB has already achieved this purpose.

2. Would the Interpretation in Conformity with Union Law Really be a Solution?

The Federal Constitutional Court has carefully formulated that, from its point of view, the OMT decision is "possibly" not objectionable if it is interpreted in conformity with Union law according to the criteria cited above. The determination whether the decision, based on meaning and purpose, is open to such an interpretation—which, as said above, seems highly questionable—is left by the Senate to the ECJ. However, one can hardly doubt that the Federal Constitutional Court will accept the ECJ determination if the latter interprets the OMT decision in conformity with Union law in the sense of the order for referral.

The question is whether such an interpretation truly ensures that the ECB does not transgress its powers with the OMT program. The following could speak against this:

> (1) Even if it were ensured that the conditionality of the assistance programs of the EFSF and the ESM would not be undermined by the ECB's purchases of government bonds, the ECB conducts an independent rescue policy with the OMT program.
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> (2) Especially, even in the proposed interpretation, the OMT program would specifically serve to improve (through reduction of the interest level) the terms and conditions for financing received by individual euro States.
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> (3) Even under adherence to the conditions for an interpretation in conformity with Union law formulated by the Federal Constitutional Court, the OMT program would have redistributional effects.

3. Summary

The interpretation in conformity with Union law, which was considered by the Federal Constitutional Court, would not be adequate to fully resolve the legal deficiencies of the OMT program. It could, however, factually solve the problem, since the ECB could no longer reach its objectives with such a cropped government bond purchasing program.

C. ECB, Democracy, and the Competence to Review of the Federal Constitutional Court

Why can the Federal Constitutional Court even adjudge the legality of the ECB's actions? The ECB is bound solely by European law, not by the constitutions of the Member States, and as the German constitutional court, the Federal Constitutional Court can solely administer justice according to the German Constitution, the Basic Law.

I. The ECB's OMT Decision as an Indirect Subject of a Decision of the Federal Constitutional Court

Whether actions of EU institutions could be the subject of a proceeding before the Federal Constitutional Court was controversial. That a national constitutional court cannot make provisions for EU institutions speaks against this. It can, however, determine that acts of an EU institution within its territory have no legal effects and that national authorities are not allowed to participate in the execution of an EU act. Earlier case law of the Federal Constitutional Court had assumed that only acts of German public authority could be the subject of a constitutional complaint—with the consequence that "transgressing legal acts" of EU institutions could only be implicitly reviewed in the context of a constitutional complaint against a German act of execution.[28] However, in the *Maastricht* judgment, the Federal Constitutional Court then explicitly abandoned this case law and argued in the following way: Acts of the European Union also "affect those persons protected by fundamental rights in Germany. Thereby, they affect the guarantees of the Basic Law and the tasks of the Federal Constitutional Court, which consist of the protection of fundamental rights in Germany, and not only with respect to German authorities."[29] According to the provisions of the Basic Law and of constitutional procedural law, acts of public authority are the subject of a constitutional complaint, and "public authority"—states the Federal Constitutional Court in the *Maastricht* judgment—is not only the German public authority, but also the European public authority as far as it unfolds legal effects in Germany.[30] From this, it was able to be concluded that henceforth the Federal Constitutional Court would view constitutional complaints which were directed against an act of an EU institution as admissible. Accordingly, a chamber of the Second Senate explicitly determined that acts of EU institutions could also be challenged with the constitutional complaint.[31] The Chamber even spoke of the "principle of the

[28] *Cf.* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1107/77, 58 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 27 (June 23, 1981).

[29] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 175 (Oct. 12, 1993) [hereinafter *Maastricht*] (including the note: "Divergence from 58 BVerfGE 1 at 27").

[30] *Maastricht*, *supra* note 29.

[31] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1848/07, para. 12 et seq. (Apr. 27, 2010), http://www.bundesverfassungsgericht.de/en/index.html.

challengeability of supranational sovereign acts with the constitutional complaint."[32] That is why all the experts were astonished[33] when the Federal Constitutional Court, in its judgment from 7 September 2011, rejected corresponding challenges on grounds of inadmissability because the challenged legal acts of the EU were not acts of German public authority and thus not suitable subjects of the complaint.[34]

In the present case, the Federal Constitutional Court did not explicitly decide this question, but viewed the conduct of German authorities, namely their failure to defend themselves against the transgression of powers by the ECB, as the subject of proceedings of the constitutional complaint.[35] According to the Basic Law, German government authorities have the obligation to ensure that the integration program is observed by the EU institutions—the Federal Constitutional Court speaks of an "integration responsibility."[36] This particularly means that they are not allowed to "simply let a manifest and structurally significant usurpation of sovereign rights by organs of the European Union occur," but must actively stand against them.[37] In order to answer the question whether the Federal Government and the Bundestag have violated this obligation, the Federal Constitutional Court must answer the preliminary question of whether an EU institution—in this case the ECB—has transgressed its powers.

II. Ultra Vires *Review and Review of Identity by the Federal Constitutional Court*

In view of the primacy of the application of EU law before national law, the question arises whether a national constitutional court is even entitled to review the acts of an EU institution according to the requirements of the national constitution. The Federal Constitutional Court claims the competence to conduct an "*ultra vires* review" and a "review of identity" for itself. In the context of an *ultra vires* review, the Federal Constitutional Court examines whether the act of an EU institution manifestly and in a structurally significant way transgresses the powers of the European Union and encroaches on the competences of the Member States—that is whether it is a "transgressing legal act"

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[32] *ECB referral decision*, *supra* note 1, at para. 15.

[33] *Cf.* Daniel Thym, *Anmerkung zum Urteil vom 7.9.2011*, 2011 JURISTENZEITUNG 1011; Matthias Ruffert, *Die europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011*, 2011 EUROPARECHT 842, 847.

[34] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 987/10, 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 124, 175–76, para. 116 (Sept. 7, 2011) [hereinafter *EFSF*].

[35] *See ECB referral decision*, *supra* note 1, at paras. 44–53.

[36] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267, 351–53, 356 (June 30, 2009) [hereinafter *Lisbon*].

[37] *See ECB referral decision*, *supra* note 1, at paras. 45–46, 53.

or an "*ultra vires* act."[38] This is justifiable because the European Union cannot invoke the primacy of EU law when it takes measures that cannot be buttressed by a competence which has been transferred to it by the Member States. Here the jurisdiction of the Member States reigns. It is not a matter for the European Union to independently change or extend the treaty foundations.[39]

For the Federal Constitutional Court, the point of the "review of identity" is to preserve the identity of the Constitution.[40] The German Basic Law has an unchangeable constitutional core. Certain fundamental constitutional principles may not even be touched by a constitutional change. Two of the most significant of these unchangeable principles are the legal state principle and the democracy principle.[41] Therefore, German authorities are explicitly barred from transferring sovereign rights to the European Union, the exercise of which would impair the unchangeable constitutional principles in Germany.[42] An act of an EU body which has an impairing effect on the constitutional identity in Germany is thus, according to the Federal Constitutional Court, inapplicable in Germany.[43]

III. The Democracy Principle as Yardstick for Constitutional Examination

In the context of both the *ultra vires* review and the review of identity, the democracy principle of the Basic Law was the yardstick for the Federal Constitutional Court's decision. But why, then, did the Federal Constitutional Court examine the ECB's OMT decision with respect to its compatibility with the TFEU? The answer is that this is a preliminary question for answering the question of whether the Federal Government violated the democracy principle by failing to take action against the transgression of powers.

The relationship between the transgression of powers and the democracy principle is the following: The competences of the EU arise out of primary Union law, that is, out of the two EU Treaties (TEU and TFEU) which function as the constitution of the European Union. The limits of the Union competences are governed by the principle of conferral,[44] which

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[38] *See Maastricht*, *supra* note 29, at 187–88; *Lisbon*, *supra* note 36, at 357–58; Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286, 303–04 (July 6, 2010) [hereinafter *Honeywell*].

[39] *See ECB referral decision*, *supra* note 1, at para. 26.

[40] *See Lisbon*, *supra* note 36, at 353–54.

[41] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, arts. 79(3), 20.

[42] *Id.* art. 23(1), cl. 3.

[43] *See ECB referral decision*, *supra* note 1, at para. 27.

[44] Treaty on European Union (TEU) arts. 5(1), 5(2).

holds that the European Union is only competent in regards to those matters which the Member States have explicitly transferred to it via the Treaties. If an EU institution transgresses its powers, then in regards to the transgression act it lacks democratic legitimation, since this legitimation is derived from the peoples of the Member States and ultimately also rests upon the approval of the Member States' parliaments (or of the people directly through plebiscite) of the transfer of sovereign rights to the European Union. If an EU institution acts without a treaty-based competence, then it encroaches on the sovereignty of the Member States and thereby claims sovereign power, to which solely the democratically legitimated authorities of the respective Member State are entitled. Therefore, infringements on the Member States' jurisdictions by EU institutions also violate the democracy principle on the national level, and are incompatible with the constitution of the affected state.[45] If the ECB transgresses its powers with the OMT program, then it thereby violates not only the TFEU, but also the democracy principle of the German Basic Law.

It is also conceivable that an EU institution, which acts within its treaty-given competences,[46] violates the democracy principle in one or more Member States with this act. This would be the case if the act of the EU institution impacts the affected Member State in such a way that the democratic legitimation of its state authorities is impaired. In this respect, one of the unchangeable core elements of the democracy principle in Germany is that the parliament decides on revenues and expenditures of the state.[47] The parliament is endowed with the legal budget authority.[48] It would therefore be incompatible with the democracy principle, under the German Basic Law, if an EU institution could make decisions that significantly burden the German federal budget without previously receiving the constitutive approval of the German parliament, the Bundestag.[49]

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[45] *See Maastricht*, *supra* note 29, at 187–88.

[46] However, in the ECB proceedings, the Federal Constitutional Court states that it is impossible that an act, which touches the identity of the Constitution, is based on a primary legal foundation because the power for such acts, pursuant to Article 23(1) cl. 3 of the Basic Law, could not have been transferred to the EU in the first place. *See ECB referral decision*, *supra* note 1, at para. 27. However, it is conceivable that an unconstitutional transfer of powers has occurred, e.g. because, at the time of the transfer, one did not realize how a treaty norm could later be interpreted. In the *Lisbon* judgment, the Federal Constitutional Court still stated that it would have to determine the inapplicability of an EU act in Germany if the act violates the identity of the Constitution "within or outside the framework of the transferred sovereign rights." *See Lisbon*, *supra* note 36, at 400.

[47] *See EFSF*, *supra* note 34, at 177; Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1390/12, 132 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 195, 239, para. 106 (Sept. 12, 2012) [hereinafter *ESM temporary decision*].

[48] *See EFSF*, *supra* note 34, at 177–78; *ESM temporary decision*, *supra* note 47, at 239, para. 106.

[49] *See ECB referral decision*, *supra* note 1, at para. 28; *ESM temporary decision*, *supra* note 47, at 239, 240–41, paras. 106, 109–10.

IV. Federal Constitutional Court and the ECJ: Who Has the Last Word?

In the media, the referral to the ECJ has been understood partly as a weakness of the Federal Constitutional Court, or as a lack of courage to make its own decision. This is not correct. The ECJ is primarily responsible for the interpretation of European law and for determining the validity of acts conducted by EU institutions. If the decision of a national court depends on the interpretation of European law, then the court is obliged to refer the matter to the ECJ.[50] This does not mean that the Federal Constitutional Court unconditionally submits itself to the ECJ. Rather, the Federal Constitutional Court emphasizes that it itself has the last word if an EU institution manifestly transgresses its powers. Even with respect to the ECJ, the Federal Constitutional Court claims the *ultra vires* review, i.e. the competence to adjudge transgressions of powers by the EU. The referral does not change anything about this. Within the "relationship of cooperation"[51] between the ECJ and the Federal Constitutional Court, the Court initially gives the ECJ the opportunity to interpret European law and to examine the compatibility of the challenged act with European law. The referral to the ECJ is a component of the *ultra vires* review. In its *Honeywell* decision, the Federal Constitutional Court already clarified that it may not qualify an act of an EU institution as an *ultra vires* act and on these grounds deny its applicability in Germany before the ECJ has decided on the questions of Union law.[52] With the ECB case, for the first time in its history the Federal Constitutional Court has referred a case to the ECJ.

Thus, the Federal Constitutional Court does not waive the final word. When the ECJ has decided, the matter returns to the Federal Constitutional Court. The latter then decides whether the challenged act—here the OMT program—in light of the interpretation of this act and of the Treaties' yardstick norms by the ECJ, is inapplicable in Germany due to transgression of powers. This determination requires, as the Federal Constitutional Court stated in the *Honeywell* decision, that the transgression of powers is manifest and carries considerable weight in the arrangement of competences between the Member States and the EU.[53]

[50] TFEU art. 267.

[51] *See ECB referral decision*, *supra* note 1, para 27; *cf*. *Honeywell*, *supra* note 38, at 303, para. 57.

[52] *See Honeywell*, *supra* note 38, at 304, para. 60.

[53] *See Honeywell*, *supra* note 38, at 304, para. 61.

V. Decision Scenarios

What will happen next in the ECB case? Many observers believe that the ECJ will decide that the OMT program is within the Treaty-based competences. After all, the ECJ is known for regularly strengthening the power of the European Union in relation to the Member States. However, it is not inconceivable that the ECJ will use the opportunity to distinguish itself as a neutral guardian of the Treaties.

The proposal to rescue the OMT program with the help of an "interpretation in conformity with Union law"[54] seems like a compromise that the Federal Constitutional Court (which is bound by the national Constitution but whose interpretations are friendly towards Union law) offered to the ECJ (which aims for progress in the continuing process of European integration).

In highly politicized proceedings that concerned the European integration, the Federal Constitutional Court has regularly made "yes-but" decisions. For example, the judges did not block an international treaty that was approved by a large parliamentary majority, but did make restrictive interpretations or adopted conditions which would have to be fulfilled by German government authorities in order to remedy violations of the Constitution.[55] Such a yes-but decision was actually not possible in the case at hand, because the Federal Constitutional Court can only prescribe restrictive conditions for German authorities, not for the ECB.[56] The ECJ, in contrast, can do so.[57]

The following scenarios are possible for the further course of the proceedings:

> (1) The ECJ determines without reservations that the ECB has transgressed its mandate with the OMT program. Then, the ECB is not allowed to execute the OMT program. The Federal Constitutional Court will sustain the constitutional complaints in their entirety.
>
> (2) The ECJ undertakes the interpretation in conformity with Union law that was proposed by the Federal Constitutional Court. Then, the ECB is obliged to observe the limitations formulated by the ECJ when it

[54] *See ECB referral decision*, *supra* note 1, paras. 99–100.

[55] *See Lisbon*, *supra* note 36, at 353 et seq., 359 et seq., 369 et seq., 432 et seq.; *EFSF*, *supra* note 34, at 179 et seq., 185–86.

[56] *Cf*. TFEU arts. 273, 263(1).

[57] *Cf*. TFEU art. 263(1).

executes the OMT program. The Federal Constitutional Court will accept the decision of the ECJ and reject the constitutional complaints as unsubstantiated.

(3) The ECJ unreservedly declares that the OMT program is in conformity with Union law. This would be a full-frontal collision with the Federal Constitutional Court. The Federal Constitutional Court has rather clearly committed itself with respect to its interpretation of the TFEU. It will no longer be able to go back behind its determinations. Most likely, the Federal Constitutional Court will determine that the ECB has manifestly and in a structurally significant way transgressed its powers. Thus, the Court will determine that the German Bundesbank is not entitled to participate in the execution of the OMT program, and that the Federal Government is obliged to conduct negotiations with other EU States about a more precise and limiting concretization of the ECB mandate. It is certainly also conceivable that the Federal Constitutional Court will be hesitant to reproach the ECJ for an *evidently* wrong decision. Hence, the Federal Constitutional Court could reach the conclusion that the decision of the ECJ was wrong, however not evidently wrong, but rather still methodically justifiable. Then, the constitutional complaints would be unsubstantiated, even though the Federal Constitutional Court shares the material view of the complainants.

(4) The ECJ undertakes an interpretation in conformity with Union law without fully complying with the conditions of the Federal Constitutional Court. In this case, it would be even more difficult for the Federal Constitutional Court to reproach the ECJ for an evident violation of the TFEU. The probability would be high that the Federal Constitutional Court would reject the constitutional complaints as unsubstantiated, even though it considers the contentions of the complainants correct with regards to content.

Even if, in the case of variants 3 and 4, the Federal Constitutional Court is afraid of alleging a manifest transgression of powers by the ECJ and refuses the *ultra vires* challenge as

unsubstantiated due to a lack of apparentness, the constitutional complaints could still be successful. Namely, the Federal Constitutional Court could view the identity challenge as substantiated even if there exists no manifest violation of powers.

With the identity challenge, the complainants assert that the ECB, with OMT purchases of government bonds, burdens the German federal budget with multi-billion dollar risks without the approval of the parliament. The Federal Constitutional Court has not considered this accusation in its order for referral. However, it will examine this question after the ECJ has made its decision.[58] And, with respect to its hitherto existing case law,[59] it will have to concede to the complainants if the ECJ does not clearly limit the volume of ECB's purchases of government bonds, and if it is not ensured that the ECB may not purchase as long as the national parliaments have not approved the OMT program beforehand.

D. Individual Standing for the Enforcement of Democracy

The complainants in the ECB proceeding are citizens whose individual freedoms are not affected by the ECB's purchases of government bonds. Why do they even have standing?

Article 38(1) of the Basic Law guarantees the right to elect the Bundestag. Since the judgment concerning the Treaty of Maastricht, the Federal Constitutional Court, in unchanging case law, interprets this provision such that it contains, beyond the right to elect, a general right of the citizen to participate in the democratic legitimation of state authority.[60] This right especially protects against injury to the domestic democracy in the course of European integration, which could occur, for example, when the shifting of tasks and competences from the Bundestag to the EU erodes the legitimation of state authority brought about by the election.[61] In the ECB case, this right is strengthened by the Federal Constitutional Court's clarification that citizens can also challenge transgressions of powers by EU institutions.[62] This is consistent. It is not compatible with the principle of sovereignty of the people[63] that public authority, which is neither legitimated by the people directly or indirectly by the parliament nor rests upon a transfer of sovereign rights that is allowed by

[58] *See ECB referral decision*, *supra* note 1, paras. 102–03.

[59] *See EFSF*, *supra* note 34, at 177, 179–80; *ESM temporary decision*, *supra* note 47, at 239–41.

[60] *See Maastricht*, *supra* note 29, at 171–72; *Lisbon*, *supra* note 36, at 330 et seq., 340 et seq.; *EFSF*, *supra* note 34, at 167 et seq.

[61] *See Maastricht*, *supra* note 29, at 172.

[62] *See ECB referral decision*, *supra* note 1, paras. 44, 53.

[63] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 20(2).

the Basic Law and approved by parliament, is exercised in Germany. The individual right to participate in the democratic legitimation of public authority is thus impaired if, instead of democratically legitimated government bodies, non-legitimated EU bodies usurpingly exercise public authority in Germany.[64]

E. Conclusion

The Federal Constitutional Court's order for referral with respect to the ECB from 14 January 2014 is one of the most important decisions that the Federal Constitutional Court has made. The decision already deserves special attention due to its great economic importance—the ECB's program to purchase government bonds stands in the center of the efforts to calm the financial markets in the euro crisis. With regard to European and constitutional law, the decision is a guiding one in multiple respects. For the first time, the competences of the central bank are analyzed by a constitutional court and limited in view of the democracy principle. For the first time, the Federal Constitutional Court declares within the framework of an *ultra vires* review—subject to an interpretation in conformity with Union law by the ECJ—a manifest and structurally significant transgression of powers by an EU institution.

In the judgment to the Treaty of Lisbon, the Federal Constitutional Court had given the *ultra vires* review a strategic importance. That proceeding concerned the question of whether the line that the Basic Law draws for the transfer of sovereign powers to the European Union had been crossed.[65] This would then be the case if the institutions of the EU could ignore the principle of conferral—for example, through very extensive interpretations of competences—without it being possible for the Member States to hinder them. That the Federal Constitutional Court could accept the Treaty of Lisbon as constitutional thus depended on the Federal Constitutional Court's entitlement to be competent for the *ultra vires* review.[66] However, the Federal Constitutional Court left open the issues of which proceeding the *ultra vires* review could even be conducted in, and whether a special proceeding had to be created by the legislature,[67] which did not occur.

[64] The critique in Judge Lübbe-Wolff's dissenting opinion (para. 16) is therefore not convincing, the more so since, in contrast to her view, every not democratically legitimated exercise of public authority is incompatible with the unchangeable democracy principle and thus in any case impairs the structural significance of the constitutional identity (at least, if it cannot—like the independence of the central bank within its narrowly-understood monetary mandate—be justified by special material reasons, and provided that this exception itself rests upon a democratically legitimated decision of the parliament).

[65] *See Lisbon, supra* note 36.

[66] *Id.* at 353.

[67] *Id.* at 354–55.

The Federal Constitutional Court can, however, only exercise the *ultra vires* review if there are complainants who can initiate a corresponding proceeding. By granting every citizen the right to bring forth an *ultra vires* challenge, the Federal Constitutional Court has helped the instrument of the *ultra vires* review to actually be able to play the part which it was assigned in the context of the European integration by the *Lisbon* judgment.

14 January 2014 was thus a good day for democracy in Europe: The Federal Constitutional Court limited the competence of the not democratically legitimated ECB, and protected the national parliaments from not democratically legitimated encroachments on the budgetary sovereignty, thereby also protecting the democratic participation rights of all citizens and giving them the right to defend their democratic participation rights against assumptions of power by non-legitimated EU institutions.