Developments

Saving Face? The German Federal Constitutional Court Decides *Gauweiler*

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Abstract

The German Federal Constitutional Court has issued its long-awaited judgment in the *Gauweiler Case*. The Court ruled that the policy decision on the Outright Monetary Transactions programme (OMT programme) does not manifestly exceed the competences attributed to the European Central Bank (ECB) and does not manifestly violate the prohibition of monetary financing of the budget, if interpreted in accordance with the preliminary ruling of the European Court of Justice (Court). This article surveys the Court's decision and offers a critical commentary on this important case.

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A. Introduction

The policy decision on the Outright Monetary Transactions programme (OMT programme) does not manifestly exceed the competences attributed to the European Central Bank (ECB) and does not manifestly violate the prohibition of monetary financing of the budget, if interpreted in accordance with the preliminary ruling of the European Court of Justice (Court). This is the essence of the long awaited judgment of the German Federal Constitutional Court (FCC) in *Gauweiler*, which rejected the constitutional complaints against the validity of the OMT programme.[1]

The facts of the case are well known and equally well documented. The legal proceedings before the FCC concerned the legality of the OMT programme announced by the ECB.[2] This programme authorizes the European System of Central Banks (ESCB) to purchase on the secondary market government bonds of the Member States of the euro area, if and so long as these states participate in a reform programme agreed upon with the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM). Although the ECB has not yet implemented this programme, a number of citizens and a fraction of the Bundestag instituted legal proceedings against it before the German FCC. The applicants argued that the programme exceeded the legal mandate of the ECB and violated the prohibition of monetary financing of the Member States pursuant to the Treaty on the Functioning of the European Union (TFEU). The applicants maintained that these violations of the TFEU contravened the constitutional principle of democracy and impaired the national constitutional identity.

In a historic move, the FCC decided to stay the judicial proceedings and to make its first ever preliminary reference to the Court.[3] However, the FCC clearly indicated in its reference that it intended to consider the OMT programme as ultra vires unless the Court gives it a restrictive interpretation that would confirm its supportive nature with regard to the economic policies in the EU and would not undermine the conditionality

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[1] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, June 21, 2016, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rs20160621_2bvr272813.html [hereinafter *Gauweiler*]. For a detailed press release of this judgment in English, see Press Release, Bundesverfassungsgericht, Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful (June 21, 2016), http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html.

[2] The technical features of the programme were announced in a press release available online. *See* Press Release, European Central Bank, Technical Features of Outright Monetary Transactions (Sept. 6, 2012), http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

[3] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, Jan. 14 2014, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html [hereinafter *Gauweiler Reference*]. For more on this case see Mattias Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 EUR. CONST. L. REV. 263 (2014); Ingolf Pernice, *A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU*, 21 MAASTRICHT J. EUR. & COMP. L. 3 (2014); see also *Special Issue - The OMT Decision of the German Federal Constitutional Court*, 15 GERMAN L.J. 108–382 (2014).

of the reform programmes. The FCC also specified in its preliminary request the particular requirements that had to be met in order to rule the contested bonds purchase programme as intra vires.[4] The FCC clarified that it would revisit the alleged violation of the national constitutional identity on the basis of the answers given to its preliminary request.[5]

In its preliminary ruling, the Court confirmed the legality of the contested OMT programme on the basis of substantive arguments and the application of the principle of proportionality.[6] It applied in this respect a teleological interpretation of the bonds purchase scheme that placed confidence in its announced objectives and the submissions of the ECB. The ruling stressed at the same time the wide margin of appreciation possessed by the ECB in the performance of its powers, suggesting that it is not in principle for the judicial institutions to substitute their own choices and assessments for those made by the ECB in the adoption and implementation of monetary policy.

Seen against this background, the FCC attempts in its follow-up judgment to convince that it considers the bonds purchase programme as valid because the Court interpreted it in essence in the restrictive terms that the FCC had requested in its preliminary reference. It will nevertheless be argued that the converse is actually true and that the FCC was reluctantly obliged to accept the submissions of the ECB and the much more generous interpretation of the programme made by the Court in order to save face and to avoid an institutional conflict that it could no longer win. However, it will also be explained that this was ultimately a wise move on the part of the FCC that may well have been facilitated by the reconciliatory tone of the preliminary ruling of the Court and the indirect dialogue that has taken place recently between the two courts in the area of fundamental rights.

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[4] *Gauweiler Reference* at paras. 99–100.

[5] *Id.* at paras. 102–03.

[6] Case C-62/14, Gauweiler v. Deutscher Bundestag, (June 16, 2015), http://curia.europa.eu/ [hereinafter *OMT Ruling*]. For more on this case, see generally Paul Craig & Menelaos Markakis, Gauweiler *and the Legality of Outright Monetary Transactions*, 41 EUR. L. REV. 1 (2016); Georgios Anagnostaras, *In ECB We Trust…The FCC We Dare! The OMT Preliminary Ruling*, 40 EUR. L. REV. 744 (2015); Vestert Borger, *Outright Monetary Transactions and the Stability Mandate of the ECB:* Gauweiler, 53 COMMON MKT. L. REV. 139 (2016); Alicia Hinarejos, Gauweiler *and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union*, 11 EUR. CONST. L. REV. 563 (2015); Monica Claes & Jan-Herman Reestman, *The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the* Gauweiler *Case*, 16 GERMAN L.J. 917 (2015); Heiko Sauer, *Doubtful it Stood...: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment*, 16 GERMAN L.J. 971 (2015); Federico Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16 GERMAN L.J. 1003 (2015); Sven Simon, *Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling*, 16 GERMAN L.J. 1025 (2015); *Special Issue - The European Court of Justice, the European Central Bank and the Supremacy of EU Law*, 23 MAASTRICHT J. EUR. & COMP. L. 1 (2016).

B. The Arbitrary Reading of the Preliminary Ruling and the Criticism against the Court

The judgment of the FCC centers on the argument that the preliminary ruling of the Court took up the issue of the almost unlimited potential of the OMT programme and imposed additional restrictive requirements that preclude its unrestrained extension, making it thus acceptable to consider it as a legally valid act.[7] The FCC attempts in this respect to make a distinction between the adoption of the contested bonds purchase programme by the ECB and the conditions for its implementation, as specified in the preliminary ruling of the Court.[8] The FCC suggests therefore that its judgment is totally consistent with the position that it expressed on the matter in its preliminary reference to the Court. Accordingly, the programme was ultra vires in its original form, but the additional compelling parameters set by the Court as concerns its implementation allow the FCC to conclude that the preliminary ruling has essentially performed the restrictive interpretation that it had required in its preliminary request.[9]

However, closer analysis attests that the FCC purposely misconstrues the content of the preliminary ruling in order to obscure the fact that the Court rejected in essence its request to impose additional restrictions on the bonds purchase programme. It is also apparent that the specific requirements set by the judgment for the participation of the *Bundesbank* in the implementation of the OMT programme result immediately from the press release of the programme and the explanations of the ECB. This suggests in turn that the FCC ultimately adheres to the position put forward by the Court that the announced programme already provides sufficient guarantees to be considered as valid. That being said, it will be explained that this reluctant adherence serves the judicial politics of the FCC and must not be interpreted as an indication that the two courts share the same views about the legal mandate of the ECB and the measure of the judicial review that can be exercised over the policy acts that it adopts in the performance of its powers. All of the above will now be examined in turn.

I. Adoption versus Implementation: The Unconvincing Reasoning of the FCC

According to the FCC, the Court went beyond the framework conditions of the programme indicated in its press release and specified additional compelling requirements stemming particularly from the principle of proportionality that set binding limits to the implementation of the programme.[10] It is nevertheless submitted that the proportionality assessment of the programme made by the Court in the preliminary ruling was not at all intended to have the restrictive effect suggested by the FCC. Furthermore, there is nothing in the preliminary ruling to suggest that the Court made the implementation of the contested programme contingent on requirements

[7] *Gauweiler* at paras. 195–96.

[8] *Id.* at paras. 191, 197.

[9] *Id.* at para. 190.

[10] *Id.* at para. 177.

that were not already apparent from its announced conditions and the explanations provided by the ECB.

Indeed, the preliminary ruling referred to the announced objectives of the programme and concluded that these confirmed its nature as a monetary policy measure.[11] This already implied that the Court would follow the view of the ECB about the legality of the bonds purchase programme, contrary to the allegations of the referring FCC, which had claimed that the immediate objective of the contested scheme was to neutralize spreads of government bonds of selected Member States and to safeguard the composition of the euro currency area and that it therefore clearly fell outside the realm of monetary policy.[12] This approach of the Court becomes even more apparent if one looks at the way the preliminary ruling examines the specific features of the programme and concludes that they constitute concrete evidence of the intention of the ECB to confine its interference within precise limits.

Consider, for example, the selectivity of the programme. For the FCC, this indicated its nature as an economic policy measure since the exercise of monetary policy cannot be targeted at specific Member States of the euro area.[13] By contrast, the preliminary ruling concluded that selectivity actually serves to concentrate the intervention of the ECB only on those parts of the Eurozone where monetary policy transmission is weakened. Selectivity thus prevents the scale of the programme from being needlessly increased. In other words, the Court accepted that selectivity constitutes an act of prudence on the part of the ECB.[14]

The same is the case as concerns the conditionality of the programme. The referring FCC considered that this confirmed the invalidity of the scheme, since it tied its implementation to the operation of the financial assistance measures and their economic policy requirements.[15] The Court thought otherwise. It stressed that conditionality is essential in order to prevent that the implementation of the programme provides an incentive to the Member States concerned to cease carrying out the structural reforms necessary to improve their economic situation. Under this interpretation, conditionality serves the effectiveness of the reform programmes and the economic policies followed by the Member States. It also encourages the impetus of national governments to adopt a sound budgetary policy.[16]

A similar approach was followed as concerns the argument of the FCC that the contested programme violated the prohibition of monetary financing of the budget. The Court

[11] *OMT Ruling* at paras. 47–49.

[12] *Gauweiler Reference* at paras. 70–72.

[13] *Id.* at para. 73.

[14] *OMT Ruling* at paras. 55, 89.

[15] *Gauweiler Reference* at paras. 74–78.

[16] *OMT Ruling* at paras. 60–61.

once again paid attention to the specific features of the programme as announced in its press release and concluded that these effectively exclude the possibility that the programme would lessen the impetus of the Member States to follow a sound budgetary policy. It stressed in this respect that the programme provides for the purchase of government bonds only in so far as is necessary to safeguard the monetary policy transmission mechanism and the singleness of monetary policy and that those purchases will cease as soon as the above mentioned objectives are achieved. It also underlined that the programme is accompanied by a series of specific guarantees that are intended to confine its impact to the extent required in order to attain its monetary policy objectives. The Court made particular reference in this regard to the conditionality of the programme and to the fact that it is confined only to those Member States that have regained access to the bond market.[17]

Furthermore, in several parts of its preliminary ruling the Court relied explicitly on the explanations provided by the ECB in order to support the legality of the contested bonds purchase programme. Very illustrative in this respect is the way the Court established that the implementation of the announced programme would not have a practical effect equivalent to that of the purchase of government bonds on the primary market. The Court noted that the ECB had established sufficient safeguards that prevented the issuance of government bonds from being unduly affected by the certainty that those bonds would be eventually purchased by the ESCB on the secondary market. Indeed, the ECB had clarified that its Governing Council would be responsible to ascertain both the scope and the length of the intervention envisaged by the programme. It had also indicated that it intended to observe a minimum period between the issue of a security and its purchase on the secondary market and that it would not announce in advance its intention to proceed to bond purchases. The Court concluded that these safeguards limit the influence of the programme on the functioning of the market to an extent that is considered acceptable by the Treaties.[18]

It is apparent therefore that the preliminary ruling did not impose additional restrictions on the announced bonds purchase programme and placed confidence in the ECB to implement it in such a way that would respect the limits of its competences. This is also confirmed by the proportionality review of the scheme performed by the Court. The Court employed in this respect the same test that it applies in the exercise of its judicial review over the acts of the EU legislature. This so called "manifestly inappropriate test" aims to respect the complex policy choices that the EU legislature is often obliged to make in the exercise of its rule making powers.[19] Under this test, a violation of proportionality only exists if the act in question is evidently inappropriate in relation to

[17] *Id.* at paras. 111–21.

[18] *Id.* at paras. 105–08.

[19] *See* Wolf Sauter, *Proportionality in EU Law: A Balancing Act?* (Tilburg L. & Econ. Ctr., Discussion Paper No. 2013-003), http://ssrn.com/abstract=2208467; *see also* Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158 (2010).

the objectives pursued.[20] Certainly, this is not to say that a legislative measure can never be considered invalid.[21] However, the odds of successfully contesting the validity of legislative acts are rather slim so long as the contested measure is explicit as to the public interest objectives that it pursues and provides some concrete evidence that the EU legislature took into account methods of confining its interference within reasonable limits.[22]

The preliminary ruling testifies that similar considerations apply also as concerns the judicial review of the acts of the ECB. The Court stressed in this respect that the ECB is required in the performance of its powers to make choices of a technical nature and to undertake forecasts and complex assessments. As a result, it must be allowed a wide margin of appreciation.[23] The Court examined then the appropriateness of the OMT programme, having regard to the information contained in its press release and the explanations provided by the ECB. It concluded that the information placed before it suggested that the analysis by the ECB of the economic situation of the euro area at the time of the announcement of the programme was not vitiated by a manifest error of assessment. The Court underlined that matters of economic policy were usually of a controversial nature and added that nothing more could be required by the ECB than to use its economic expertise and all the necessary technical means in order to carry out its analysis with due care and accuracy. Accordingly, the ECB could legitimately take the view that the programme announced in its press release was appropriate to restore the monetary policy transmission mechanism and to maintain price stability.[24]

The Court concluded then that the contested programme was not going manifestly beyond what was necessary to achieve the objectives of monetary policy. Referring again to the press release of the ECB, it noted that this permitted the purchase of government bonds on the secondary market only within a confined framework. The Court reiterated that the programme is also restricted in volume since it concerns only a limited part of the government bonds issued by the Member States of the euro area. Consequently, the commitments that the ECB is liable to enter into are circumscribed and limited. In those circumstances, the ECB could legitimately adopt the programme

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[20] Case C-380/03, Germany v. Parliament and Council, (Dec. 12, 2006), http://curia.europa.eu/; *see also* Case C-343/09, Afton Chemical Ltd. v. Sec'y of State for Transp., (July 8, 2010), http://curia.europa.eu/.

[21] *See, e.g.,* Joined Cases C-293 & 594/12, Digital Rts. Ireland v. Minister for Comm. Marine & Nat., Kärntner Landesregierung,(Apr. 8, 2014), http://curia.europa.eu/. For more on this ruling, see generally Orla Lynskey, *The Data Retention Directive is Incompatible with the Rights to Privacy and Data Protection and is Invalid in its Entirety:* Digital Rights Ireland, 51 COMMON MKT. L. REV. 1789 (2014). *See also* Marie-Pierre Granger & Kristina Irion, *The Court of Justice and the Data Retention Directive in* Digital Rights Ireland, 39 EUR. L. REV. 835 (2014).

[22] *See, e.g.,* Case C-283/11, Sky Österreich GmbH v. Österreichischer Rundfunk, (Jan. 22, 2013), http://curia.europa.eu/. For more on this case, see generally Georgios Anagnostaras, *Balancing Conflicting Fundamental Rights: The Sky Österreich Paradigm*, 39 EUR. L. REV. 111 (2014; Wouter Hins, *The Freedom to Conduct a Business and the Right to Receive Information for Free: Sky Österreich*, 51 COMMON MKT. L. REV. 665 (2014).

[23] *OMT Ruling* at para. 68.

[24] *Id*. at paras. 72–81.

without setting a quantitative limit prior to its implementation. This was even more so since the imposition of such a limit could potentially reduce its effectiveness.[25]

The above analysis clearly illustrates that the preliminary ruling of the Court accepted the legality of the bonds purchase programme at the time of its adoption, having regard to the specific restrictions and safeguards introduced by its announced conditions and also taking into account the wide margin of appreciation possessed by the ECB in the performance of its competences. Apparently then, the distinction that the FCC attempts to make between the adoption and the implementation of the programme is purely artificial and can only be explained as a pretext intended to facilitate the retreat of the court from the position that it had expressed in its preliminary reference as regards the ultra vires nature of the scheme. This becomes even more evident if one looks at the conditions that the FCC sets in order to allow the participation of the *Bundesbank* in the implementation of the OMT programme.

II. The Conditions for Participating in the Implementation of the Programme: Hiding Retreat behind Verbalism

According to the FCC, since the bonds purchase programme constitutes an ultra vires act if the framework conditions set by the Court are not met, the *Bundesbank* may only participate in its implementation if and to the extent that the following six conditions are satisfied.[26] First, that bond purchases are not announced in advance. Second, that the volume of purchases is limited from the outset. Third, that there is a minimum period between the issue of government bonds and their purchase by the ESCB that is agreed upon from the outset. Fourth, that the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds. Fifth, that purchased bonds are only in exceptional cases held until maturity. Sixth, that purchases are terminated and purchased bonds are remarketed should continuing the intervention becomes unnecessary.

Compared to the conditions that it had set in its preliminary reference in order to regard the programme as valid, the FCC no longer requires that the possibility of a debt cut must be excluded.[27] This certainly reflects the position put forward in the preliminary ruling that even if it were established that the contested programme could indeed expose the ECB to a significant risk of losses, this would in no way weaken the guarantees that are built into the programme in order to ensure that it does not reduce the impetus of the Member States to follow a sound budgetary policy. The Court added in this respect that those guarantees are also likely to reduce the risk of losses that the ECB is exposed to. It also noted in this regard that all central banks are inevitably exposed to similar risks in the performance of their powers. After all, the Treaties authorize the ECB to purchase government bonds on the secondary market even at the

[25] *Id*. at paras. 82–92.

[26] *Gauweiler* at para. 205.

[27] *Gauweiler Reference* at para. 100.

risk of a debt cut decided upon by the other creditors of the Member State concerned without making this operation conditional on the acquisition of a privileged creditor status.[28]

Turning then to the new legality requirements set by the FCC in the light of the preliminary ruling of the Court, it is immediately apparent that three of them simply replicate the framework conditions indicated in the press release of the programme.[29] Indeed, the press release makes it clear that the scope of the announced programme only concerns Member States that have access to the bond purchase market and that transactions will be focused in particular on sovereign bonds with a short maturity between one and three years. It also clarifies that the Governing Council of the ECB will consider outright monetary transactions only to the extent that they are warranted from a monetary policy perspective and will immediately terminate them once their objectives have been achieved. The preliminary ruling has not altered the nature and the magnitude of the legal commitments voluntarily undertaken in this respect by the ECB. On the contrary, it has confirmed that they provide sufficient guarantees that the programme is properly circumscribed and that it could be legitimately adopted as a valid monetary policy measure.[30]

Furthermore, closer analysis reveals that both the prohibition on the prior announcement of bond purchases and the observance of a minimum period between the issue of a security on the primary market and its purchase by the ESCB were not imposed by the Court as additional requirements intended to remedy the alleged illegality of the announced programme. The preliminary ruling rather accepted in this respect the explanations of the ECB that its practical intervention under the OMT programme will be such as to cause the least possible interference with the operation of the primary bond market.[31] By referring thus to the relevant passages of the preliminary ruling, the FCC accepts in essence the validity of the submissions of the ECB and its capacity to impose voluntary restraints on the exercise of its powers. This is certainly not the same as to suggest that the preliminary ruling introduced additional framework conditions as concerns the implementation of the contested bonds purchase programme.

That leaves to examine the requirement that the volume of bond purchases must be limited from the outset. This was one of the conditions that the FCC had explicitly set in its preliminary reference in order to consider the contested programme as valid.[32] However, its reiteration in the final judgment is very puzzling for two principal reasons.

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[28] *OMT Ruling* at paras. 123–26.

[29] *See* Technical Features of Outright Monetary Transactions, *supra* note 2.

[30] For limited coverage and short maturity period of purchased bonds, see *OMT Ruling* at paras. 86–87, 116–19. For purchases linked to the attainment of the objectives of the programme, see *id.* at paras. 82, 112.

[31] *Id.* at para. 106.

[32] *Gauweiler Reference* at para. 100.

First, because the programme makes it clear that no prior quantitative limits are set on the size of outright monetary transactions.[33] Second, because the Court confirmed in its preliminary ruling that the programme already contains sufficient guarantees that limit its volume to an acceptable extent without it being necessary to set a quantitative limit prior to its implementation that can potentially reduce its effectiveness.[34]

Could it be then that the FCC attempts to introduce an additional requirement to the implementation of the bonds purchase programme by reading arbitrarily into the preliminary ruling a restriction that is not actually there? However likely this may seem at first sight, such an interpretation of the judgment nevertheless is not correct.[35] It is important in this respect to examine the reasoning employed by the FCC in order to reach the conclusion that the preliminary ruling requires the imposition of prior quantitative limits on the volume of bond purchases. In the key passage of its judgment the FCC argues that unlike the parameters resulting from the announced programme and the press release of the ECB, the Court rejected the unlimited extension of the OMT programme. According to the FCC, the preliminary ruling requires that the volume of future purchases must be specified in a binding manner in advance and must not go beyond what is necessary to restore the monetary policy transmission mechanism. It also requires that both the intention of the ECB to carry out bond purchases and the volume of the purchases envisaged cannot be announced in advance.[36]

It appears therefore that the FCC infers from the preliminary ruling that the volume of future purchases is specifically limited from the outset because the announced programme provides for the purchase of government bonds only in so far as is necessary to safeguard the policy transmission mechanism. However, it cannot be announced in advance when and to what extent the ECB will proceed to the acquisitions that are required in order to achieve the objectives of the scheme. Seen in this perspective, the requirement of a prior quantitative limit on the volume of purchases reproduces in essence the conditions that the outright monetary transactions carried out by the ECB must be restricted from the outset to what is proportionate to achieve the objectives pursued by that policy, and that they will be terminated as soon as the impaired policy transmission mechanism is restored. Consequently, the inclusion of this requirement in the judgment must be interpreted as a simple verbalism that serves the argument of the FCC that the preliminary ruling imposed additional restrictions on the implementation of the programme that allow to consider it as valid. Practically though, the ECB remains free to ascertain the volume of purchases necessary to restore its monetary policy

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[33] *See* Technical Features of Outright Monetary Transactions, *supra* note 2.

[34] *OMT Ruling* at para. 88.

[35] *See, e.g.,* Lorenzo Pace*, And Indeed It Was a (Failed) Nullification Crisis: The OMT Judgment of the German Federal Constitutional Court and the Winners and Losers of the Final Showdown in the OMT Case*, SIDIBLOG (Italian Society of International Law) (Sept. 1, 2016), http://www.sidiblog.org/2016/09/01/and-indeed-it-was-a-failed-nullification-crisis-the-omt-judgment-of-the-german-federal-constitutional-court-and-the-winners-and-losers-of-the-final-showdown-in-the-omt-case/.

[36] *Gauweiler* at para. 195.

transmission mechanism. It is also free to increase it at a later stage if it considers that its initial intervention on the secondary market failed to attain the pursued objectives of the programme.

The conclusion therefore is that all the requirements that the FCC imposes for the participation of the *Bundesbank* in the implementation of the programme are not actually additional to those indicated in the original press release of the ECB but rather result immediately from the framework conditions of the announced scheme and the explanations provided by the ECB. Just like the artificial distinction made in the judgment between the adoption and the practical implementation of the bonds purchase programme, these conditions attempt to obscure the fact that the outcome of the preliminary ruling obliged the FCC to retreat from the position taken in the preliminary reference regarding the ultra vires nature of the contested scheme. It will now be explained that this retreat was in fact inevitable for the FCC and that its judgment cannot be interpreted as approving the legal methodology employed by the Court in the preliminary ruling and the conclusions that it reached about the measure and intensity of the judicial review of the policy decisions of the ECB.

III. "Yes, But": The Objections of the FCC against the Legal Reasoning of the Court

Although the FCC applies in essence the preliminary ruling of the Court, it expresses at the same time serious objections against its legal reasoning and its interpretation of the mandate of the ECB. This criticism is basically twofold. First, the FCC accuses the Court of accepting uncritically the announced objectives of the programme and the explanations provided by the ECB in order to qualify the contested scheme as an instrument belonging to the field of monetary policy, overlooking completely the factual assumptions that contradict such a conclusion.[37] Second, the FCC criticizes the Court for not providing a convincing answer to the issue that the independence of the ECB leads to a noticeable reduction of the democratic legitimacy of its actions and should therefore give rise to a restrictive interpretation as well as to a particularly strict judicial review of its mandate.[38]

The first criticism does not appear to be justified because in its preliminary reference, the FCC ignored completely the announced objectives of the programme and replaced them with its own understanding of the monthly bulletins of the ECB, reading into them arbitrarily an intention to reduce rising spreads of government bonds of selected Member States and to serve thus an economic policy objective.[39] The FCC arrived at this conclusion without even explaining the reasons why it contested the official motivation

[37] *Id.* at paras. 182–86.

[38] *Id.* at paras. 187–89.

[39] ECB Monthly Bulletin September 2012, Eur. Cent. Bank, (Sept. 2012), https://www.ecb.europa.eu/pub/pdf/mobu/mb201209en.pdf; ECB Monthly Bulletin October 2012, Eur. Cent. Bank, (Oct. 2012), https://www.ecb.europa.eu/pub/pdf/mobu/mb201210en.pdf.

of the programme and without providing any convincing arguments in support of its claims.[40]

Furthermore, the FCC rejected the argument of the ECB that the extreme spreads on the government bonds of certain Member States were partly caused by an unfounded fear of a reversibility of the euro. It relied in this respect on the "convincing expertise of the *Bundesbank*", without considering it necessary to corroborate its conclusions with additional authorities.[41] It did not further explain why this particular interpretation of a single national bank should prevail over that of the majority opinion of the other national banks that participate in the Governing Council of the ECB. This raised in turn suspicions that the FCC was not actually motivated by objective legal reasoning but rather intended to give priority arbitrarily to the economic analysis of the *Bundesbank* over that of the ECB.[42] Seen in this perspective, it seems at least ironic that the FCC now criticizes the Court for the way it established the facts of the case and ignored the indications that cast doubt on the classification of the programme as an act of monetary policy.

Turning then to the second criticism voiced by the FCC, this seems to concern primarily the considerable margin of appreciation that the ECB possesses in the performance of its powers as recognized in the preliminary ruling. In fact, the FCC had clarified in its preliminary request that it considered necessary the exercise of a strict judicial review over the policy acts of the ECB. It had underlined in this respect that the independence of the ECB diverged from constitutional requirements regarding the democratic legitimacy of political decisions. The FCC had therefore held that the mandate of the ECB should be interpreted narrowly, in order to meet those requirements.[43] However, there are several observations that can be made in this respect.

In the first place, this interpretation ignores the fact that the independence of the ECB is expressly embedded in the Treaties and is intended to protect it against external influences which would be likely to interfere with the performance of its powers.[44] It is submitted though that the imposition of a rigorous judicial review over the acts of that institution is liable to circumvent the independence of the ECB in practice. It would oblige the ECB to operate under the constant threat that every single policy choice it makes may potentially be interpreted by the courts as a transgression of its powers. Hence, the refusal to recognize any leeway to the ECB in the performance of its

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[40] In this regard, see Alexander Thiele, *Friendly or Unfriendly Act? The Historic Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, 15 GERMAN L.J. 241, 256–57 (2014); Thomas Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program*, 15 GERMAN L.J. 343, 347–49 (2014); Pernice, *supra* note 3, at 11–12.

[41] *Gauweiler Reference* at para. 71.

[42] To this end, see Carsten Gerner-Beurle, Esin Küçük & Edmund Schuster, *Law Meets Economics in the German Federal Constitutional Court*, 15 GERMAN L.J. 281, 302 (2014).

[43] *Gauweiler Reference* at paras. 58–60.

[44] *OMT Ruling at para. 40.*

competences practically amounts to the exercise of indirect control over it and compels it to adapt its course of action to the monetary policy views of the courts.

This leads to a second point. In the performance of its powers, the ECB is called upon to make complex technical assessments of an economic nature. It cannot be seriously argued that courts possess comparable expertise to adjudicate economics.[45] If they were to exercise a full judicial review over the acts of the ECB, they would normally need to rely on external economic expertise. This would turn their review into a matter of prioritization of one economic expertise over the other. Given the complexity of monetary economics, courts would rarely be in a position to explain convincingly the reasons for their choice. As already explained, this would ultimately raise suspicions about the objectivity of the judicial review carried out by that court.

Furthermore, it is very contestable whether courts possess the necessary legitimacy to intervene extensively in areas that are considered to be politically sensitive. The monetary policy choices made by the ECB affect all Member States of the euro area and their reversal by the courts is likely to upset the stability of the common currency, imperiling the very existence of the euro zone. However, it should not be for the courts to undertake an essentially political role that could affect to such an extent the process of European integration.[46] This would clearly overstep the limits of their mandate and the boundaries of their judicial competence.

Arguably then, the choice made by the Court to extend the application of its classic "manifestly inappropriate test" to the acts of the ECB was indeed correct. Judicial control should be confined only to matters that the courts are objectively capable and politically legitimated to examine. Judges should not in principle substitute their own interpretation of monetary policy for that of the ECB. This is especially so since the ECB is much better equipped than any judicial body to specify the measures that are necessary in order to pursue the monetary policy objectives. Judicial intervention into the acts of the ECB should therefore take place only in exceptional circumstances if there is conclusive evidence that the measure manifestly exceeds the mandate of the ECB and is clearly inappropriate to attain its alleged monetary policy objectives.

IV. Saving Face: The Escape of the FCC from its Own Game of Chicken

The conclusion reached thus far is that the FCC is not particularly content with the answers given to its preliminary request but nevertheless proceeds reluctantly to the application of the ruling, pretending that the Court performed in essence the restrictive interpretation of the programme that it had required in its preliminary reference. The FCC chose therefore to interpret the ruling in a clearly erroneous manner in order to

[45] *See* Matthias Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GERMAN L.J. 266, 271–72 (2014).

[46] *See* Franz Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L.J. 111, 134–36 (2014).

avoid declaring it as ultra vires as one might have expected on the basis of the strong language it had used in its preliminary request. One possible explanation is that the FCC simply conceded to the binding nature of the ruling and respected its obligations under the preliminary reference procedure. After all, it expressly acknowledged in its judgment that the Court still remained within its mandate when finding that the programme is within the bounds of the respective competences of the ECB and does not violate the prohibition of monetary financing of the budget.[47] It is nevertheless submitted that in the same judgment the FCC reiterated emphatically its reserve competence to rule on the invalidity of EU law on the basis of ultra vires and constitutional identity grounds, contesting thus once again the exclusive prerogatives of the Court as the sole arbiter of the legality of EU acts.[48] It is therefore unlikely that the FCC retreated from the legal positions expressed in its preliminary reference simply because it conceded unconditionally to the interpretative authority of the Court.

A much more convincing explanation is that the FCC was eventually trapped into the peculiar game of chicken that it chose to play in order to oblige the Court to give a preliminary ruling that would introduce additional restrictions on the OMT programme.[49] According to this interpretation, the FCC attempted to preconceive the outcome of its preliminary reference by imposing its own interpretation of the bonds purchase programme and by overtly warning with an ultra vires pronouncement in case of an unfavorable ruling. Arguably, the FCC assumed that the Court would eventually swerve away and accept its requirements in order to avoid collision. If that was indeed the intention of the FCC, there are two important considerations that it failed to take into account.

From a legal point of view, the FCC overlooked the fact that the case could not easily meet the strict ultra vires conditions of its famous *Honeywell* case law.[50] According to *Honeywell*, an act of the EU institutions can only be considered as ultra vires if there exists a manifest transgression of powers on the part of the institution concerned that leads to a structurally significant alteration in the arrangement of competences between the EU and its Member States.[51] In its preliminary reference in *Gauweiler*, the FCC

[47] *Gauweiler* at para. 176.

[48] *Id.* at paras. 136–52.

[49] *See* Mattias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of Chicken and What the CJEU Might do About it*, 15 GERMAN L.J. 203, 207 (2014); *see also* Mayer, *supra* note 46.

[50] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 2 BvR 2661/06, July 6, 2010, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html [hereinafter *Honeywell*]. For more information on this case, see generally Asterios Pliakos & Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU Law*, 36 EUR. L. REV. 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 EU*, 48 COMMON MKT. L. REV. 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).

[51] *Honeywell* at paras. 61–66.

seemed to suggest that any violation of the mandate of the ECB and any breach of the prohibition of the monetary financing of the budget constitutes a manifest and structurally significant transgression of powers on the part of the ECB.[52] However, the existence of an ultra vires act cannot be examined in the abstract but only in relation to the specific circumstances of the case at issue.[53] Hence, the real question that the FCC had to ask in its final judgment was whether the specific bonds purchase programme could be interpreted as a manifest and structurally significant breach.[54] In the light of the response given to its preliminary request, this question could only be answered in the negative. Indeed, both the Court and all the national governments that intervened in the legal proceedings considered that the ECB could not be accused of overstepping its mandate as regards the adoption of the contested programme. Even if the FCC arrived at the opposite conclusion, it would still need to ascertain the manifest and structurally significant nature of the breach. This would be an extremely challenging venture, given that the establishment of a blatant infringement logically presupposes that there exists at least a wide consensus around the perpetration of the violation concerned. That was certainly not the case in the *Gauweiler* proceedings.

The FCC also seems to have underestimated the political sensitivity of the case and the enormous economic repercussions that a potential ultra vires pronouncement could possibly entail. Indeed, such a ruling would not only nullify the contested bonds purchase programme. It would also compromise the ability of the ECB to perform its powers in an independent manner and to respond quickly and effectively to the impulses of the markets. This could ultimately lead to the revival of the euro zone crisis, adversely affecting the national economies of the Member States. That risk was clearly underlined in the minority opinions of two of the members of the FCC. For one of those members, the possibility that a few independent national judges might invoke the constitutional interpretation of the principle of democracy in order to make a judicial pronouncement with incalculable economic consequences appeared as an anomaly of questionable democratic character.[55] The democratically accountable political actors should be left free to choose the appropriate course of action against measures that they considered to be politically inadequate.[56]

Seen in this perspective, it is not all surprising that the FCC found itself perfectly isolated in the legal proceedings before the Court and that none of the eleven intervening governments shared its proposed interpretation of the programme. In this political environment, it was not at all easy for the FCC to arrive at an ultra vires ruling against the declared position of so many democratically elected national governments. This

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[52] *Gauweiler Reference* at paras. 36–43.

[53] *Honeywell* at paras. 67–77.

[54] *See* Jürgen Bast, *Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, 15 GERMAN L.J. 167, 179–80 (2014); Thiele, *supra* note 40, at 254–55; Meyer, *supra* note 46, at 137–39.

[55] *Gauweiler Reference* at para. 28 (Lübbe-Wolff, J., dissenting).

[56] *Gauweiler Reference* at para. 23 (Gerhardt, J., dissenting).

would have been particularly ironic, given that its rejection of the bonds purchase programme was based on the principle of democracy. Ultimately then, the attempt of the FCC to adjudicate economics and to influence the outcome of its preliminary request produced an important boomerang effect against it.

Trapped in its own game of chicken, the FCC chose therefore the only available escape route that allowed it to save face without risking a major institutional and economic crisis. It intentionally misread the ruling of the Court and saw in it an implicit confirmation of the restrictive requirements that it had set in its preliminary reference. At the same time, it imposed on the constitutional organs a continuous obligation to monitor the exercise by the EU institutions of their transferred powers and to actively promote respect for the European integration agenda using any legal and political means that they consider as necessary in order to pursue the revocation of EU acts that are not covered by that agenda.[57] As concerns particularly the announced bonds purchase programme, this obligation practically means that the federal government and the parliament are required to closely monitor any future implementation of the scheme. The purpose of this compulsory scrutiny is not only to ascertain that the conditions for the participation of the *Bundesbank* in the programme are indeed met but also to examine whether there is a specific threat to the federal budget resulting in particular from the volume and the risk structure of the purchased bonds.[58] The implication is indeed clear. The responsibility to ensure the correct implementation of the programme is now in the court of the political institutions. The FCC will only intervene if these institutions patently fail to exercise their obligation in an appropriate manner.[59]

C. Facilitating Judicial Dialogue: *Gauweiler* and the Recent Fundamental Rights Case Law

Although the judgment of the FCC can therefore be interpreted as a specious way of avoiding embarrassment, it is nevertheless submitted that its adoption may also have been facilitated by the rather conciliatory tone of the preliminary ruling of the Court. Indeed, the Court chose not to respond to the criticism voiced by its Advocate General against the self-proclaimed capacity of the FCC to exercise ultra vires and identity review control over the acts of the EU institutions.[60] That certainly constituted a conscious political choice, intended to illustrate that the Court would give its ruling in a truly cooperative spirit regardless of the rather offensive language of the preliminary request. In the same vein, the ruling did not expressly criticize the conclusions arrived at by the FCC as to the nature of the contested programme and the need for its restrictive interpretation. It only explained the reasons why the scheme should be considered as a

[57] *Gauweiler* at paras. 163–73.

[58] *Id.* at para. 220.

[59] *Id.* at para. 169.

[60] Opinion of Advocate General Cruz Villalón at paras. 30–61, Case C-62/14, Gauweiler v. Deutscher Bundestag (Jan. 14, 2015), http://curia.europa.eu/.

valid act of monetary policy, on the basis of substantive arguments that purported to prove that the announced programme already provided sufficient safeguards. Rightly then, the preliminary ruling of the Court has been characterized as a model of judicial restraint.[61]

It is also interesting to note that only a couple of months before the follow up judgment of the FCC in *Gauweiler*, the Court gave an important preliminary ruling in *Aranyosi and Căldăraru*. That ruling could be interpreted as an indication that the Court takes particularly seriously the case law of the FCC and that it is not at all insensitive to the concerns that this court expresses about the application of EU law and its effect on the national constitutional requirements.[62]

The case concerned the interpretation of the Framework Decision on the European Arrest Warrant.[63] The crux of the preliminary questions asked by the referring national court was whether the competent judicial authorities of a Member State can refuse the surrender of a requested person on the basis of strong indications that her fundamental rights would be infringed as a result of a systemic flaw in the prison conditions of the issuing Member State, which gives rise to a real risk of inhuman treatment of the individuals concerned.

Recalling its famous *Melloni* case law, the Court confirmed the exhaustive nature of the grounds for the non-execution of a European arrest warrant provided for by the EU legislature.[64] It also stressed in this respect the importance of the principles of mutual confidence and mutual recognition for the creation and maintenance of the area of freedom, security and justice.[65] At the same time though, it underlined the absolute nature of the prohibition of inhuman treatment and its close connection to respect for human dignity that constitutes one of the fundamental values of the EU and of its

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[61] *See* Thomas Beukers & Jan-Herman Reestman, Editorial, *On Courts of Last Resort and Lenders of Last Resort*, 11 EUR. CONST. L. REV. 227 (2015).

[62] Joined Cases C-404 & 609/15 Aranyosi, Căldăraru v. Generalstaatsanwaltschaft Bremen, (Apr. 5, 2015), http://curia.europa.eu/ [hereinafter *Aranyosi & Căldăraru*]. For more on this case, see generally Georgios Anagnostaras, *Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant*, 53 COMMON MKT. L. REV. 1675 (2016).

[63] Council Framework Decision 2009/299/JHA of Feb. 26, 2009, Amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, Thereby Enhancing the Procedural Rights of Persons and Fostering the Application of the Principle of Mutual Recognition to Decisions Rendered in the Absence of the Person Concerned at the Trial, 2009 OJ (L 81) 24.

[64] Case C-399/11, Melloni v. Ministerio Fiscal, (Feb. 26, 2013), http://curia.europa.eu/. This preliminary ruling gave rise to an abundance of academic literature. *See generally* Nik de Boer, *Addressing Rights Divergences Under the Charter*, 50 COMMON MKT. L. REV. 1083 (2013); Maartje de Visser, *Dealing with Divergences in Fundamental Rights Standards*, 20 MAASTRICHT J. 576 (2013); Asteris Pliakos & Georgios Anagnostaras, *Fundamental Rights and the New Battle Over Legal and Judicial Supremacy: Lessons from* Melloni, 35 Y.B. EUR. L. 97 (2015).

[65] *Aranyosi & Căldăraru*, *supra* note 62, at paras. 75–81.

Member States.[66] It concluded therefore that if the executing judicial authorities are in possession of objective and reliable evidence that prisoners in the issuing Member State face a real risk of inhuman treatment, they must postpone the enforcement of the European arrest warrant until they obtain supplementary information that allows them to rule out the existence of this risk as concerns the requested person at issue.[67]

The recognition that the rights that are closely linked to human dignity must be considered as absolute irrespective of the conduct of the individual concerned seems to echo the position of the FCC, as evidenced in its *Identity Review Order*.[68] In that case, the FCC clarified that the protection of fundamental rights can never fall below the minimum standard required by the essential core of these rights. It stressed to this end that the constitutional identity includes the protection of human dignity, as enshrined in the Basic Law.[69] As a consequence, the principle of supremacy of EU law and the *Melloni* case law do not relieve national courts from their obligation to ensure that the right to human dignity – in that case in its manifestation as the principle of individual guilt – is protected in the context of surrender procedures based on the provisions of EU law.[70]

Apparently, there is not an immediate connection between the legal and factual background of *Gauweiler* and that of the legal proceedings in the *Aranyosi and Căldăraru* preliminary ruling. However, a possible interpretation of that latter ruling could be that the Court responded to the criticism raised by the FCC against the absolute understanding of the principle of supremacy expressed in *Melloni*. It therefore introduced a limited exception to the core principles of mutual confidence and mutual recognition in order to prevent the FCC and other national courts from doubting the equivalence of the EU standard of fundamental rights protection to the requirements of the national constitution. Seen in this perspective, *Aranyosi and Căldăraru* could very well be the outcome of an indirect judicial dialogue that took place in a particularly important and sensitive legal area that has been traditionally perceived as part of the core business of constitutional courts. In the same line of reasoning, the ruling provides evidence that the Court recognizes the special legal weight of the FCC and the lead role that it can play in the process of European integration. Coupled with the conciliatory

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[66] *Id.* at paras. 82–87.

[67] *Id.* at paras. 88–104.

[68] Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 2 BvR 2735/14, Dec. 15, 2015, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/12/rs20151215_2bvr273514.html [hereinafter *Identity Review Order*] (available in English at http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html). For more on this case, see generally Georgios Anagnostaras, *Solange III? Fundamental Rights Protection Under National Identity Review*, 42 EUR. L. REV. (forthcoming in April 2017); *see also* Julian Nowag, *EU law, Constitutional Identity, and Human Dignity: A Toxic Mix?*, 53 COMMON MKT. L. REV. 1141 (2016).

[69] *Id.* at paras. 48–49.

[70] *Id.* at paras. 76–83.

tone of the *Gauweiler* ruling, this acknowledgement may have had some positive impact on the final judgment of the FCC.

D. Conclusions

"Today is not a good day for democracy in Europe!" That was the first reaction of one of the main applicants in the *Gauweiler* proceedings to the rejection of his constitutional complaint by the FCC. According to his interpretation of the judgment, the FCC backed down in its first serious conflict with the Court and failed to effectively protect the European allocation of competences and the budgetary autonomy of the parliament as it had originally promised in its preliminary reference.[71] On the contrary, the European Commission expressed its satisfaction and read the judgment as a welcome confirmation in substance of the preliminary ruling of the Court.[72] The judgment must also have come as a relief to the ECB. Although it is not likely that its OMT programme will ever be implemented in practice, this institution has already launched its long awaited Quantitative Easing programme which also provides for the purchase of government bonds on the secondary market.[73] That being so, the outcome of the *Gauweiler* proceedings may also provide an indication as to the position that the FCC is likely to adopt in relation to the constitutional complaints that are currently pending before it against the new bonds purchase programme of the ECB.[74]

Beyond its apparent significance for the operation of the Eurozone and the mandate of the ECB, *Gauweiler* is also important for the institutional relations between the Court and the German FCC. Despite its pretextual reasoning and its criticism against the manner of judicial specification of the Treaty evidenced by the Court, the FCC eventually relied on the preliminary ruling and adopted its interpretation of the contested programme. The Court on its part testified its readiness not to pass up the opportunity to embark on a judicial dialogue with the referring FCC, regardless of the controversial circumstances of the preliminary reference. It is characteristic in this respect that the Court rejected the various inadmissibility objections that were raised by eight national governments and three EU institutions and examined the legality of a programme that had not been implemented yet.[75] Furthermore, the remarkable restraint of its ruling is indicative of its intention to avoid any reference that could be considered as offensive

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[71] *See* Mehreen Kahn, *'Not a Good Day for Democracy' – German Critics Attack ECB Court Ruling*, FIN. TIMES (June 21, 2016), http://www.ft.com/fastft/2016/06/21/critics-hit-out-at-German-ecb-bailout-ruling/.

[72] European Commission Statement 16/2266, Commission statement on judgment of German Constitutional Court (June 21, 2016), http://europa.eu/rapid/press-release_STATEMENT-16-2266_en.htm.

[73] *See* Press Release, European Central Bank, ECB Announces Expanded Asset Purchase Programme (Jan. 22, 2015), https://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html. Purchases were officially started in March 2015. *See Getting the Machines Revving*, ECONOMIST: FREE EXCHANGE (Mar. 9, 2015, 3:26 PM), http://www.economist.com/blogs/freeexchange/2015/03/quantitative-easing-and-euro.

[74] *See* Karin Matussek, *ECB Faces Three Suits Over Quantitative Easing in Germany***,** BLOOMBERG (Nov. 10, 2015, 3:44 AM), https://www.bloomberg.com/news/articles/2015-11-10/ecb-faces-three-suits-over-quantitative-easing-in-german-court.

[75] *See OMT Ruling* at paras. 18–33

by the FCC. Will this experience reinforce then the stimulus of that FCC to avail itself more regularly of the preliminary reference procedure? That still remains to be seen.