Special Issue
The OMT Decision of the German Federal Constitutional Court

Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program

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A. Introduction

The boundaries of European integration and especially the relationship between European and German Constitutional Law have occupied the German Constitutional Court—the Bundesverfassungsgericht in Karlsruhe—time and again since its first *Solange I* Judgment of 1974.[1] Practically all of these decisions—*Solange II*,[2] *Maastricht*,[3] *Lisbon*,[4] and *Honeywell*[5] to name just a few—have had a major impact not only on the national, but also on the European discourse regarding the future of the European Union. 14 January 2014 now marks the date of another "historic" decision in this sense, which, unsurprisingly, has already led to major discussions not only in Germany, but all over Europe.[6] For the first time ever the Constitutional Court has initiated a referral to the European Court of Justice[7]

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[1] Bundesverwaltungsgericht [BVERWG - Federal Administrative Court], Case No. 2 BvL 52/71, 37 BVERWGE 271 (May 29, 1986).

[2] Bundesverwaltungsgericht [BVERWG - Federal Administrative Court], Case No. 2 BvR 197/83, 73 BVERWGE 339 (Oct. 22, 1986).

[3] Bundesverwaltungsgericht [BVERWG - Federal Administrative Court], Case No. 2 BvR 2134/92, 89 BVERWGE 155 (Oct. 12, 1993) [hereinafter Maastrich decision].

[4] Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BvE 2/08, 123 BVERFGE 267 (June 30, 2009) [hereinafter Lissabon decision]. For more on this, see Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!"*, 10 German L.J. 1241–58 (2009).

[5] Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BvE 2661/06, 126 BVERFGE 286 (July 6, 2010) [hereinafter Honeywell decision].

[6] The decision was delivered on 7 February 2014.

[7] TFEU art. 267. For details on the preliminary ruling procedure according to Art. 267 TFEU, see MATTHIAS PECHSTEIN, EU-PROZESSRECHT 366 ff. (4th ed. 2011); ALEXANDER THIELE, EUROPÄISCHES PROZESSRECHT 134 ff. (2007); Andreas Middeke, *Vorabentscheidungsverfahren*, *in* HANDBUCH DES RECHTSSCHUTZES IN DER EUROPÄISCHEN UNION 222 (Hans-Werner Rengeling, Andreas Middeke & Martin Gellermann eds., 3rd ed. 2014).

asking questions about the conformity of some of the highly disputed[8] measures of the ECB taken to fight the crisis with Primary European Law.[9] The reluctance of the Constitutional Court to comply with its duties under the TFEU and to accept the role of the ECJ as the final interpreter of European Law had been criticized for many years, not only after the *Lisbon* Decision of 2009.[10] However, the Constitutional Court reacted to these critics in its *Honeywell* Decision of 2010 and, so it seemed, started to redefine its understanding of its relationship with the European judicial system. This redefining process has now found its temporary endpoint with this first referral, which therefore truly stands for a new era in the relationship between the Constitutional Court and the ECJ within the "European Network of Constitutional Courts."[11]

Though this development appears positive, a closer look reveals several problematic—or even dangerous—aspects of this referral. First of all, it is not clear whether it actually is an expression of a new openness towards the ECJ, or rather a confirmation of the restrictive judgments of previous years and in fact the first step to an "*ultra vires* decision" that could seriously harm the European integration (C). These doubts are confirmed when one examines whether a referral was actually necessary in this special case (D) and how the Constitutional Court positions itself regarding the relevant legal questions (E). However, before discussing these aspects in detail, one should at first take a closer look at the "historic" referral decision itself (B).

B. The Referral Decision

Compared to other "Karlsruhe Judgments" the referral appears fairly short. The downloadable version contains only 35 pages including the dissenting opinions by two of the judges.[12] However, this should obviously not lead to the impression that this referral was of minor importance to the Constitutional Court. Referrals are generally a lot shorter than final judgments, as they concentrate on specific relevant questions that are brought before the ECJ. According to Article 94 of the new procedural rules of the ECJ, a request for preliminary ruling therefore only has to consist of the following:

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[8] *See* ALEXANDER THIELE, DAS MANDAT DER EZB UND DIE KRISE DES EURO 57 ff. (2013).

[9] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13 (Jan. 14, 2012) [hereinafter BVerfG, 2 BvR 2728/13].

[10] *See*, *e.g.*, MARKUS WARNKE, DIE VORLAGEPFLICHT NACH ART. 234 ABS. 3 EGV IN DER RECHTSPRECHUNGSPRAXIS DES BVERFG (2004).

[11] "Europäischer Verfassungsgerichtsverbund." *See* Andreas Voßkuhle, *Der europäische Verfassungsgerichtsverbund*, 29 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1–8 (2010).

[12] In comparison, the Lisbon decision was more than 150 pages long without any dissenting opinion.

- a short summary of the subject matter in order to give the ECJ an impression of the pending case and the relevant legal matters;
- the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case law;
- a statement of the reasons which prompted the referring court to inquire about the interpretation or validity of certain provisions of European Law.

The referral of the German Constitutional Court is arranged in exactly this order. After formulating the questions regarding the validity of the OMT Program, the subsequent 32 paragraphs summarize the pending national case—including the statements of the involved parties, an overview of the relevant national provisions of the Basic Law,[13] and explanations of former judgments of the Constitutional Court with respect to the boundaries of European integration. With regard to possible *ultra vires* acts of the European Union the Court thereby specially quotes its recent *Honeywell* Decision of 2010[14] where it had held that acts of the European Union are not applicable in Germany if they are "evidently" not in accordance with the European competence order and lead to a significant structural shift within the competencial arrangement in favor of the EU.[15]

In paragraphs 33–100 the Constitutional Court points out "what prompted it to inquire about the validity of European Law," or in other words, why it believes that the OMT Program does not comply with the treaties. Yet before going into the details of the OMT Program, the Constitutional Court first explains why the validity of the OMT Program is actually relevant for the decision in the national case.[16] These comments are not essential for a referral in a strict sense. However, Art. 267 (2) TFEU states that a national court can initiate a preliminary ruling if it believes that a "decision on the question is necessary for it to give judgment." Though the ECJ generally leaves it to the national court to decide whether the questions asked are relevant in this way,[17] it has made clear that it will not answer questions that obviously do not have any connection to the national pending

[13] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. arts. 20, 23, 38, 79.

[14] BVerfG, 2 BvR 2728/13 at para. 24.

[15] Honeywell decision at 304 f.

[16] BVerfG, 2 BvR 2728/13 at paras. 33–54.

[17] PECHSTEIN, *supra* note 7, at 404; ALEXANDER THIELE, EUROPARECHT 186 (11th ed. 2014).

case.[18] To avoid dismissal by the ECJ, referring national courts should therefore always give at least a short explanation regarding the necessity of the referral.

In this context the Constitutional Court first remarks briefly on the standing of the applicants. Standing is required for the Constitutional Court to decide the matter at all and for this reason is also necessary for a referral to the ECJ, which is supposed to prepare the national decision and is therefore only needed if the national Court cannot dismiss the claim anyway. The Constitutional Court thereby sees no problem in the general claim of the applicants, which is directed against an act of the ECB which is strongly and rightly criticized by the two dissenting opinions.[19] Instead it simply makes clear that the standing of the applicants does not depend on whether the OMT Program has already been executed, as this could happen any time and with very short notice.[20] It then argues that the OMT Program would be an *ultra vires* act in the sense of the *Honeywell* judgment if it either violated the mandate of the ECB or the prohibition of monetary budget financing, as in such a case the violation would be evident and lead to a structural shift in the competencial order.[21] This "*Honeywell* violation" would result in certain duties of the German government bodies and these duties could be brought in front of the Constitutional Court by the applicants.[22] The German governmental bodies, including the German central bank, would for example not be allowed to participate in the implementation of these acts. In particular the German government and the German Parliament would be obliged "to actively work towards the adherence of the integrational program."[23] This section regarding the quality of the possible breach may seem surprising at first, yet it is indeed necessary from the perspective of the Constitutional Court for the following reason: According to its *Honeywell* Decision, only a qualified breach would make the attacked legal act inapplicable in the national legal system. In other words, a "simple" breach of the treaties would not result in the aforementioned duties of the German government bodies and the applicants would lose their case just as if there was no breach at all. However, it should be noted that the Court does not conclude that the OMT Program definitely violates the treaties in such a qualified way. Instead it points out that the breach would be qualified in this sense if one came to the—obviously not evident—conclusion

[18] ECJ Case C-415/93, Bosman, 1995 E.C.R. I-4921 at para. 59; Case C-318/00, Bacardi-Martini, 2003 E.C.R. I-905 at para. 42.

[19] See dissenting opinions of Judge Lübbe-Wolf, para 11 ff. and Judge Gerhardt, para 5 ff.

[20] BVerfG, 2 BvR 2728/13 at paras. 33–35.

[21] *Id.* at paras. 36–44.

[22] *Id.* Again, the two dissenting opinions explicitly oppose the statements of the senate regarding the duties of the German government bodies. They both believe that the actions brought before the Court are all in all not admissible as they deal with highly political questions (see further under C. I.).

[23] BVerfG, 2 BvR 2728/13 at para. 49.

that it actually was a breach of the treaties.[24] As we will see later, this is hardly a convincing statement.[25]

In the last section the Court finally lays down in detail why in its opinion the OMT Program violates the treaties.[26] It first argues that the program is not covered by the mandate of the ECB because it would have to be qualified as economic and not as monetary policy,[27] which according to the treaties,[28] resides in the exclusive competence of the member states.[29] Because of the potential amount of government bonds that could be bought by the ECB, the program could also not be qualified as a simple support of the general economic policies in the Union in the sense of Art. 127 TFEU[30] as it might undermine the conditions set for the financial aids by the member states within the EFSF. Decisions of this kind would not be possible without independent—but obviously prohibited—economic assessments by the ECB.[31] Above this, the Court also sees a violation of Art. 123 (1) TFEU. In its opinion, this article not only prohibits the direct purchase of government bonds, but furthermore is "the expression of a broader prohibition of monetary budget-financing" through the ECB.[32] The ECB thereby cannot claim to simply be curing a disturbance in the monetary

[24] *Id.* at paras. 36, 42.

[25] See under C. II., and also the dissenting opinion of Judge Gerhardt, para. 16.

[26] BVerfG, 2 BvR 2728/13 at paras. 55–100.

[27] In this context the Court states in paragraph 70 that the OMT Program aims to neutralize the interest increases on government bonds of certain member states of the monetary union, that have emerged on the markets and that are a burden on the refinancing of these member states. The reference to the monthly bulletin of the ECB of September 2012, p. 7 and of October 2012, p. 7 f. in para 70 however cannot prove this alleged aim of the OMT Program. In fact, the ECB here makes clear, as she has always emphasized, that the OMT Program was initiated to restore the disturbed monetary transmission mechanism.

[28] *See* TFEU art. 120 ff.

[29] BVerfG, 2 BvR 2728/13 at paras. 56–79.

[30] *Id.* at paras. 80–83.

[31] *Id.* at para. 82

[32] *Id.* at para. 85. This statement, by the way, is the only one in the whole decision that refers to three opinions in the judicial literature. Vestert Borger, *The ESM and the European Court's Predicament in Pringle*, 14 GERMAN L.J., 113, 119, 134 (2013); Alberto de Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance*, 49 COMMON MKT. L. REV. 1613, 1625, fns. 36 & 1627 (2012); Koen Lenaerts & Piet Van Nuffel, *No Bail Out, in* CONSTITUTIONAL LAW OF THE EUROPEAN UNION 11-037 (Robert Bray and Nathan Cambien, eds., 2011). However, none of these opinions actually contain the indeed daring and hardly convincing statement of the Court. It remains more than remarkable that the Court obviously prefers to give false references instead of rethinking its own statement. In any case it would have been fairly easy to find statements in the literature that have exact the opposite opinion. Above this: Why the Court in the whole decision does not take a single German commentary of the European Treaties into account (such as the ones edited by Calliess & Ruffert, Streinz or Schwarze) or any relevant (economic) monograph where the problems regarding Art. 123 TFEU would be laid down in detail, remains absolutely unclear. See further under E.

transmission mechanism (paras 95–99). As every deficit crisis of a member state in some way would result in a worsening of the transmission mechanism, accepting such a possibility would mean nothing other than accepting the complete suspension of the prohibition of monetary budget financing, which is why it would be irrelevant whether such an argument was of any economic value.[33] For this reason, it could not be accepted even if the ECB tried to restrict its interference in the interest rates to those interest increases that are "irrational" as a distinction between "rational" and "irrational" would not be operable and therefore arbitrary.

However, in paragraph 100 the Constitutional Court illustrates how the OMT Program might be held consistent with European law, despite the reasons given in the preceding paragraphs. According to this, necessary but sufficient would be a restrictive interpretation of the OMT Program so that it does not undermine the conditionality of the aid programs offered under the EFSF by the member states. With regard to Art. 123 (1) TFEU, this would mean that a "deficit-haircut" including the government bonds held by the ECB would have to be excluded, that government bonds of member states were not purchased in a limitless amount and that any interference into the price-building mechanism through the purchases would be avoided as much as possible.

In the last paragraphs the Constitutional Court again takes a stricter view and makes clear that the OMT Program might not only be a "normal" *ultra vires* act, but could also violate the "Constitutional Identity of the Basic Law."[34] This would be the case if it established a mechanism that could lead to an assumption of liability for acts of third parties, so that the German Parliament would not be able to execute its financial powers in its own responsibility. Whether this was the case, however, depended on the acceptance of its mandate by the ECB and the content and the range of the OMT decision interpreted in the light of the Primary European Law. The Constitutional Court will finally decide on this question on the basis of the reply by the ECJ.[35]

C. Referral as Acceptance of the ECJ's Last Word?

"Finally a referral by the German Constitutional Court," one might feel urged to say. At last what is probably the most powerful constitutional court in the European Union has come

[33] BVerfG, 2 BvR 2728/13 at para. 96.

[34] In its *Lisbon* decision, the Constitutional Court made clear that it had the competence to examine whether a European act violated the "Constitutional Identity of the Basic Law." What this is supposed to mean, however, remains unclear and has thus rightly been criticized in the German literature. *See* CHRISTIAN CALLIESS, DIE NEUE EUROPÄISCHE UNION NACH DEM VERTRAG VON LISSABON 267 ff. (2010); Christian Calliess, "*In Vielfalt geeint" – Wie viel Solidarität? Wie viel nationale Identität?*, *in* CHRISTIAN CALLIESS, EUROPÄISCHE SOLIDARITÄT UND NATIONALE IDENTITÄT 5 FF. (2013).

[35] BVerfG, 2 BvR 2728/13 at para. 102.

to peace with its role within the European judicial system and has accepted that it is the ECJ and the ECJ alone that has the last word when it comes to interpreting European law. And indeed, it is possible that the Constitutional Court intended to prove exactly such a renewed and friendly relationship with the ECJ. However, looking into the Court's judgments so far the referral could also be interpreted in the exact opposite direction: Not as an act of friendliness, but as the first step towards a more than unfriendly "*ultra vires* decision" resulting in an open conflict with the ECJ that in the end could seriously harm the European integration process altogether. The grounds for such an interpretation can again be found in the *Honeywell* Decision, in which the Court not only gave a definition of an *ultra vires* act but also held that the ECJ has to be given the opportunity to interpret the relevant European provisions before the Constitutional Court can declare these inapplicable in Germany. In other words, this "historic" referral could be exactly the final opportunity for the ECJ to decide in the sense suggested by the Constitutional Court if it wants to prevent an "*ultra vires* decision" by the Constitutional Court. And if this were the case, one could obviously not say that the Constitutional Court has acted particularly friendly and has accepted the ECJ as the final interpreter of European law.

However, whether the friendly or unfriendly interpretation of the referral is the correct reading cannot be definitively answered at this point in the procedure. Rather, it depends on the answers given by the ECJ and the reaction of the Constitutional Court to these answers in its final decision. In principle, three different answers of the ECJ seem possible:

> (1) The ECJ could hold that the OMT Program is in violation with the European treaties and declare it void altogether;
> (2) The ECJ could hold that the OMT Program is valid as long as it is interpreted in the restrictive sense that the Constitutional Court suggested in its referral;
> (3) The ECJ could hold that the OMT Program does not violate the European treaties and that no restrictive interpretation is necessary for this.

In the first two cases it is clear that the Constitutional Court would accept the decision of the ECJ without further objections, as they both correspond to the opinion of the Constitutional Court brought forward in its referral. The OMT Program is either completely void (1) or interpreted in the restrictive sense proposed by the Court itself (2). In both cases, however, it would also remain impossible to decide whether the referral itself was a friendly or an unfriendly act in the above mentioned sense: It could have been friendly, taking into account that the Court in the end fully accepts the decision of the ECJ. On the other hand it might have been unfriendly in the sense that this acceptance of the ECJ's judgment was only due to the fact that this judgment completely followed the Court's

proposals and that any other decision of the ECJ would have led to an "*ultra vires* decision."

It is therefore only the third case constellation that will definitely allow an answer to the question where the Constitutional Court positions itself within the European judicial system. As the judgment of the ECJ and the proposals expressed in the Court's referral differ, the Court will have to decide whether it will accept the judgment of the ECJ or take the next step, and for this reason, unfortunately, this third constellation is not only the most dangerous from a European perspective; it also seems to be the most probable of the three. This is not simply because the ECJ tends to hold in favor of the European institutions, but especially because the arguments presented in favor of a qualified breach of the treaties by the Constitutional Court are hardly convincing.[36]

Which of the two options the Constitutional Court will finally pick, if the ECJ decides in the sense of the third constellation, is difficult to predict. The referral itself allows it to be interpreted in both ways, though there might be a slight overweight towards the "unfriendly" reading. On the one hand the Court does not say that the OMT Program is a definite and qualified breach in the Honeywell sense. As pointed out above, the Court instead gives the impression that it believes that it is arguable to come to the conclusion that the ECB is acting within its mandate and that Art. 123 (1) TFEU is not violated. This could mean that the Court would also be willing to accept a "no breach at all" decision by the ECJ, as long as the arguments presented by the ECJ seem somewhat justifiable. On the other hand, however, paragraph 102 of the referral sounds more like a clear warning to the ECJ to decide in the Court's favor and also leaves practically no doubt that it is the Court and not the ECJ that has the final word in this respect.

In any case, the amount of uncertainty that is provoked by the referral with regard to the reaction of the Constitutional Court is obviously not very fortunate, especially if one takes a closer look at the possible consequences an "unfriendly" option might result in.

First of all such a decision would itself be a breach of the European treaties. The referring national court is bound by the decision of the ECJ. The option to declare an act of the EU as *ultra vires* through a national court is not included in the treaties as such an opportunity could obviously seriously harm European integration. Such a breach would therefore legitimate the European Commission to initiate a treaty violation proceeding according to Art. 258 TFEU that could end in a conviction of the German government, which formally stands responsible for the actions of its Constitutional Court. The Commission usually does not initiate proceedings of this kind when the relevant breach is committed by a national court due to its independence. Yet, whether this would be the case here seems questionable. It is obviously a different situation if some minor national court violates

[36] See under E. and in detail, THIELE, *supra* note 8, at 58 ff.

European Law in an individual national case rather than if the most powerful Constitutional Court within the Union disrespects the position of the ECJ and thereby endangers the whole process of European integration; that the Commission cannot accept the latter seems evident.

It is mainly unclear how the German government and other national bodies should react to such a decision. According to the Constitutional Court the German central bank (Bundesbank) would have to stop any assistance in the implementation of the OMT Program. However, the ECB is an independent body and could therefore go through with the OMT Program nevertheless. Assistance by the Bundesbank is not generally needed and where the ECB asks the Bundesbank to assist, then within the ESCB the Bundesbank is obliged to do so and would therefore again breach the treaties if it refused.[37] The Bundesbank can thus only decide to either follow its European duties or the verdict of the Constitutional Court—*tertium non datur*. At least the president of the Bundesbank has the possibility to vote against the OMT Program in the ECB Council, but he has apparently been doing this anyway. As for the German Government and Parliament, they are obviously not involved in the implementation of the OMT Program. But how should they "actively work towards the adherence of the integrational program" as the Court demands? The ECB is independent and any attempt to influence its decisions is prohibited by the treaties. So what else? To bring the OMT Program to the ECJ by filing an action for annulment according to Art. 263 (2) TFEU is obviously useless, as the ECJ has already rendered its decision decided. In the end this could mean that the German government has to leave the monetary union, but is this really what the Court expects? Again it seems that the Government and the Parliament can only decide to either comply with the judgment or with European Law; clearly not a position anyone would like to be in.

As a consequence it is also unclear how the ECB will react. The ruling of the Constitutional Court is not formally binding for the ECB, but it will hardly be able to simply continue as if nothing has happened. It is more than probable that the whole OMT Program will lose much of its effect, as the financial markets will realize that they cannot be sure that the ECB will continue to "do whatever it takes to preserve the Euro" as Mario Draghi stated in his renowned speech in London in 2012. Even though the situation within the Eurozone currently seems far less dramatic than to that time, it is hard to predict what impact this kind of uncertainty will have on the stability of the monetary union. The turbulences might start all over again, this time however without the possibility of the ECB coming for a rescue. In other words, if the worst comes to the worst, the whole monetary union is at stake because one Constitutional Court—and not a single member state!—has doubts regarding the OMT Program. In the end, the whole integration program might be at risk.

[37] The ECB could, for this reason, initiate a special treaty violation proceeding according to Art. 271 lit.d) TFEU against the Bundesbank before the ECJ.

Citing a statement of the German Chancellor Angela Merkel: "It the Euro fails, Europe fails."

So, all in all, one might ask, does it really seem appropriate that the German Constitutional Court, rather than the European and national political bodies, has the power to decide on the future of European integration? In any case one would assume and demand that this could only, if at all, be the case under extreme conditions. And why should the German Constitutional Court have an interest in risking the above mentioned dangerous consequences if not under such extreme conditions; a position the Constitutional Court rightly pointed out in its *Honeywell* Decision. Yet, a closer look reveals, that by the Court's own standards it should never have assumed that the OMT Program was such a case. A referral was simply not necessary (D) and the breach of the ECB more than questionable, but by all means not qualified in this sense (E). That the Court initiated its first referral even so makes the whole judgment more than incomprehensible and it therefore appears even more plausible that the Court is seriously considering deciding in favor of the unfriendly option. Otherwise it could have simply dismissed all the claims as inadmissible, without putting itself into any conflict with its former *Honeywell* decision.

D. (Lacking) Relevance of the Asked Questions

As mentioned above, a referral has to be necessary for the referring court to give judgment according to Art. 267 (2) TFEU.[38] Regarding the referral of the Constitutional Court, such a necessity seems questionable for two reasons. First of all it is more than problematic to assume that the applicants have standing to bring their claim against the ECB before the Constitutional Court (I). And second of all, a referral would only be necessary if the Court itself came to the conclusion that the breach was to be interpreted as qualified in the sense of the *Honeywell* Judgment. That, however, is not the case (II).

I. Standing of the Applicants?

Private applicants can initiate a constitutional complaint only when they can prove a possible violation of their subjective rights guaranteed by the Basic Law through a sovereign act.[39] As the German Basic Law only binds the German governmental bodies such a sovereign act generally has to be the act of such a German governmental body.[40] Acts of the European Union should therefore not be able to violate subjective rights of the

[38] *See* PECHSTEIN, *supra* note 7, at 404 ff.; Middeke, *supra* note 7, at 249 ff.; Bernhard Wegener, *Art. 230 EGV*, *in* EUV/EGV KOMMENTAR, paras. 21 ff. (Christian Calliess & Mattias Ruffert, eds., 4th ed. 2011).

[39] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl., art. 93 (a) No. 4a. For details on the constitutional complaint, see KLAUS SCHLAICH & STEFAN KORIOTH, DAS BUNDESVERFASSUNGSGERICHT 142 ff. (9th ed. 2012).

[40] SCHLAICH & KORIOTH, *supra* note 39, at 151.

German individual, which then should make it impossible for such an individual to file a constitutional complaint against such an act before the Constitutional Court. And in general this lacking possibility to initiate proceedings against European acts before national courts seems coherent and especially does not lead to a gap in the legal protection of the individual citizen. Responsible for the necessary legal protection in these cases is in fact not the national, but the European level. According to Art. 263 (4) TFEU, private applicants could therefore file an action for annulment under the condition of direct and individual concern. This condition may not be fulfilled regarding the OMT Program considering the restrictive approach of the ECJ in this respect.[41] However, this does not mean that it would now be the national level that is obliged to step in. The European level has decided to make it possible for individuals to file an action against the ECB only under very restrictive circumstances and there is no visible reason why this should be any problem from the perspective of the individual citizen.[42] As there are no national fundamental rights directly affected by the OMT Program, it would have been easy for the Constitutional Court to dismiss the claims as inadmissible—a fact that both dissenting opinions rightly emphasize.[43]

The Court, however, decided differently and preferred to construct a new "subjective right to competencial behavior of the EU" that is legally founded in the right to vote.[44] This new subjective right therefore makes it possible for every German citizen to file a constitutional claim before the Constitutional Court against practically any act of any European institution as long as the applicant can prove that it is at least possible that the relevant act violates the European competencial order. This construction is no doubt surprising, even though its roots are founded in the earlier *Maastricht* Decision of the Constitutional Court (1). However, for various reasons the extensive interpretation of this "subjective right" within the referral decision does not seem convincing (2).

1. The Maastricht *Construction*

According to the Constitutional Court the Basic Law sets boundaries to European integration when it comes to the transfer of competences. And these boundaries can also be claimed by any individual with a constitutional complaint against the national law

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[41] *See* ALEXANDER THIELE, INDIVIDUALRECHTSSCHUTZ VOR DEM EUROPÄISCHEN GERICHTSHOF DURCH DIE NICHTIGKEITSKLAGE 199 ff. (2006).

[42] German citizens could also not file an action against the German Bundesbank if it acted as the ECB under the OMT Program.

[43] See the dissenting opinion of Judge Lübbe-Wolff in para. 16 f. and dissenting opinion of Judge Gerhardt in para. 6 ff.

[44] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND, [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl., art. 38 (1).

transferring these competences to the EU. To make such a claim admissible, however, the Court had to construct a subjective right that would be violated if the national transferring law should possibly not respect these boundaries, and it finally founded this right in the right to vote of Art. 38 (1) BL. It insofar held in its *Maastricht* decision of 1993:

> Art. 38 does not only guarantee that a citizen shall have the right to vote in the German Federal Parliament and that the constitutional principles of the right to vote are observed in an election. Such guarantee is also extended to the fundamental democratic content of this right: Any German citizen with the right to vote is guaranteed the individual right to participate in the election of the German Federal Parliament, and thereby to co-operate in the legitimation of State power by the people at a federal level, and to influence the implementation thereof. . . . Art. 38 of the GG forbids the weakening, within the scope of Art. 23 of the GG, of the legitimation of State power gained through an election, and of the influence on the exercise of such power, by means of a transfer of duties and responsibilities of the Federal Parliament, to the extent that the principle of democracy, declared as inviolable in Art. 79, para. 3 in conjunction with Art. 20, paras. 1 and 2 of the GG, is violated.[45]

In other words, the right to vote would be useless if the body voted had practically no influence and competences. Art. 38 (1) BL as a subjective right therefore sets limits to the transfer of competences to the European Union in order to secure the necessary competences of the German Parliament and it is for the Constitutional Court to review whether these limits are followed when competences are actually transferred to the European Union. The Constitutional Court has since stuck to this construction[46] and even though it was highly disputed within the literature,[47] it has meanwhile been more or less accepted. The matters in dispute in these cases, however, were always the national acts transferring the competences and not the European Treaties or a single European act without any specific relevance to fundamental rights. The last bigger decision therefore

[45] *See* Maastricht decision at 171 f.

[46] *See* Lisbon decision at 330 ff.; 129, 124 (167 ff.).

[47] For further references, see CALLIESS, *supra* note 34, at 238 ff.; SCHLAICH & KORIOTH, *supra* note 39, at 260 f.

dealt with the German law giving its consent to the Treaty of Lisbon: The renowned and controversial *Lisbon* decision.[48]

2. Extensive Referral Interpretation

Yet, the constitutional complaints that were the initial points of this first referral decision are not directed at a German transferring act but directly at the OMT Program of the ECB. The applicants thereby do not claim a violation of specific fundamental rights, but simply argue that this Program might not respect the European competential order. If the Constitutional Court obviously deems such a claim admissible under reference to Art. 38 (1) BL it has therefore, for the first time, transferred its *Maastricht* construction to such a constellation. This indeed massive expansion is rightly criticized by the two dissenting opinions, as its consequences are highly problematic for at least two reasons.[49]

First of all, such a possibility practically introduces a popular action against any form of competential violations of the EU. The fact that the Constitutional Court formally demands a qualified breach does not change this, especially if the qualified breach is defined as in this referral decision.[50] Such a plain "legal execution claim" (*Gesetzesvollziehungsanspruch*)[51] is unknown to German law and especially German constitutional law. Therefore—at least up to now—it would not have been possible for an individual to file an action against the German central bank if it had bought Government bonds just as the ECB announced with its OMT Program. But why should Art. 38 (1) BL, that secures the competences of the German Parliament, only be violated in the case of the ECB and not the German central bank acting out of range of its mandate? Or any other constitutional organ as long as competences of the German Parliament are concerned? Such a major change in the procedural system can hardly have been intended by the court, yet it should be the consequence if the judgment is taken seriously. However, this thought demonstrates that the Court has simply overstretched Art. 38 (1) BL by opening the door for such all-embracing individual claims. Why it felt obliged to do so remains a mystery.

Secondly, this extension also appears problematic from a European perspective, as Judge Gerhardt rightly points out. By opening the door for every (German) individual to file claims against any (proclaimed) violation of competences of the European Union, the Constitutional Court also undermines the legal requirements for legal protection on the European level—here the requirement of direct and individual concern in Art. 263 (4)

[48] *See* Lisbon decision.

[49] See the dissenting opinion of Judge Lübbe-Wolff in para. 16 f. and dissenting opinion of Judge Gerhardt in para. 6 ff.

[50] See under D. II.

[51] See dissenting opinion of Judge Gerhardt in para. 6.

TFEU. Individuals can now reach the ECJ by simply applying to the Constitutional Court. Again it is unclear why the Constitutional Court ignores these consequences completely even though they were obviously precisely articulated by some of the judges.

All in all therefore this expansion of the *Maastricht* construction seems exceptionally fabricated, hardly convincing and simply unnecessary. Why the Constitutional Court obviously wanted to decide this case no matter what, remains unclear—especially when one considers that the whole question is indeed highly political[52]—and has been broadly discussed on the political level and that the Court stands in opposition not only to all other German constitutional organs but also practically every European institution.

II. Qualified Breach?

As pointed out before, a referral to the ECJ would only be necessary from the perspective of the Basic Law if the Constitutional Court came to the conclusion that the ECB had breached its competences in a qualified way, as this is the necessary requirement for an *ultra vires* decision. A "simple" breach would not suffice, which is why in this case the constitutional complaints would have to be dismissed. In other words, without a qualified breach, the Constitutional Court could simply dismiss the complaints without having to decide whether there was a "simple" breach or not, and there would therefore be no need to ask for the opinion of the ECJ on these questions.[53] Especially when taking the above noted possible consequences of such an *ultra vires* decision into account, one would therefore have expected that the Constitutional Court considers a referral only when it is absolutely convinced not only of a breach, but also that the respective breach is indeed qualified in this way.

However, within this "historic" referral there is no such passage where the Court definitely positions itself in this way. Instead the Constitutional Court states that the breach *would be* qualified in this sense *if* the ECB acted out of the range of its mandate or *if* the OMT Program violated the prohibition of monetary budget financing.[54] The Court does not say that the ECB *is* definitely violating the treaties and that this violation *is* evident and structurally relevant. Instead it only states that a violation would have to be interpreted as qualified, if one came to the conclusion that there was a violation. With these statements the Court seems to delink the breach from its qualification; the breach can be disputed but still be evident and structurally relevant if considered a breach. From a logical point of

[52] See dissenting opinion of Judge Lübbe-Wolff in para. 12.

[53] In a strict sense, a referral would not be necessary even in the case of a qualified breach, as the applicants' complaint would have to be granted no matter how the ECJ decides. However, the Constitutional Court has made clear that it would not deliver an *ultra vires* decision without asking the ECJ before. From a national perspective—and this is the relevant perspective—the referral is therefore necessary in this case.

[54] BVerfG, 2 BvR 2728/13 at paras. 39, 42.

view, however, it seems difficult to understand how a breach can be disputed and evident at the same time. It is simply not possible to completely decide on the qualification before completely deciding on the breach. This whole passage therefore makes clear that the Court was obviously quite aware of the fact that it would be indeed justifiable to argue that the OMT Program is consistent with European Law. In this case, however, according to its own *Honeywell* requirements it should have come to the conclusion that there is no evident breach and dismissed the claims. Under these circumstances a referral would only have been possible by dissenting from its own *Honeywell* Decision and giving up the "evident requirement"—a step the Court obviously did not want to take. To make a referral nevertheless possible it came up with this "controversial but evident breach" construction that seems more than questionable, if not to say indefensible. Again, it remains absolutely unclear why the Court obviously wanted to decide this case no matter what and to initiate its first referral. Looking at the discussions that have been going on for the last two years regarding the measures taken by the ECB, it would have been a lot easier—and definitely far more convincing—to deny an evident breach and dismiss the claims, than leaving this question open and referring anyway.

However at least one slight positive aspect of this construction remains: It could open the door for the Court to take the friendly option and accept the decision of the ECJ even if the ECJ does not follow any of the arguments presented in the referral. If the Court had definitely positioned itself regarding the qualified breach, it could obviously hardly accept that the ECJ denies any form of a breach. But with its "controversial but evident breach" construction this is indeed possible. As the breach, but not its qualification, is disputed, the Court makes it possible to accept that the ECJ denies a breach altogether. That the Court indeed has not made up its mind completely regarding this "qualified breach" question is also confirmed in paragraph 102 when the Court states that it will decide whether the OMT Program might violate the "Constitutional Identity of the Basic Law" after the reply of the ECJ, it makes clear that it has not finally decided on a "qualified breach." Again, however, this should have led the Court to omit the referral altogether.

E. Arguments in Favor of the Breach

The Constitutional Court clearly positions itself regarding the breach of European Law through the OMT Program. According to Karlsruhe it violates the mandate of the ECB (I) as well as the prohibition of monetary budget financing (II) and cannot be justified with a disturbance of the monetary transaction mechanism (III). The Program, however, could possibly be held if it were interpreted in a restrictive way (IV). As will be shown in the following section, practically all of the arguments presented by the Court are at least highly disputable. The Court itself, however, does not take any of these counterarguments into consideration and its whole presentation totally neglects the discourse that has been going

on for the last two years. Not a single German lawyer[55] or commentary[56] is quoted, which is extremely unusual when taking into account the Court's former decisions, especially in such a disputed area. Even worse is that some of the central assumptions of the Court refer to sources that actually do not verify these assumptions, especially paragraphs 70, 72 and 85. Despite the questionable position of the Court, such formal mistakes are obviously hardly acceptable in a decision that could have a major impact on the future of the monetary union, or even beyond.

I. The Mandate of the ECB

1. Monetary Policy?

According to Art. 127 (1) TFEU, the paramount function of the ESCB is to safeguard price-stability.[57] On the other hand, economic policy lies in the competence of the member states. The Constitutional Court believes that the OMT Program would have to be interpreted as being economic policy and it could therefore not be covered by the mandate of the ECB. To prove this opinion, the Court points out four aspects of the OMT Program in particular.

The Court looks first to the OMT Program's objective. In paragraph 70 the Court states that the OMT Program intends to neutralize interest increases on government bonds of certain member states that have emerged on the markets and that complicate the refinancing of these member states. It thereby refers to the monthly bulletin of the ECB of September and October 2012. However, such an objective of the OMT Program is not mentioned in these bulletins. Indeed the ECB has always officially made clear that the whole program is intended to eliminate disturbances in the monetary transaction mechanism that have occurred through a fragmentation of interest rates along national borders, looking at the economic literature a general legitimate monetary objective regarding the relevance of the

[55] *See*, *e.g.,* Helmut Siekmann, *Missachtung rechtlicher Vorgaben des AEUV durch die Mitgliedstaaten und die EZB in der Schuldenkrise*, *in* EUROPA ALS RECHTSGEMEINSCHAFT: WÄHRUNGSUNION UND SCHULDENKRISE 101 ff. (Thomas Möllers & Franz-Cristoph Zeitler eds., 2013); Martin Seidel, *Der Ankauf nicht markt- und börsengängiger Staatsanleihen, namentlich Griechenlands, durch die Europäische Zentralbank und durch nationale Zentralbanken – rechtlich nur fragwürdig oder Rechtsverstoß?*, 21 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 521 (2010); Christoph Herrmann, *EZB-Programm für die Kapitalmärkte verstößt nicht gegen die Verträge: eine Erwiderung auf Martin Seidel, EuZW 2010,* 21 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 645 ff. (2010); THIELE, *supra* note 8, at 58 ff.; Peter Sester, *Die Rolle der EZB in der europäischen Staatsschuldenkrise*, 23 EUROPÄISCHES WIRTSCHAFTS- UND STEUERRECHT 80 ff. (2012); Matthias Ruffert, *The European Debt Crisis and European Law*, 48 COMMON MKT. L. REV. 1777 ff. (2011).

[56] *See*, *e.g.*, Christian Calliess & Matthias Ruffert, THE GERMAN COMMENTARIES OF THE EUROPEAN TREATIES (4th ed. 2011); Jürgen Schwarze, EU-KOMMENTAR (3rd ed. 2012); CARL-OTTO LENZ & KLAUS-DIETER BORCHARDT, EU-VERTRÄGE (6th ed. 2012). Helmut Siekmann also published a special commentary on the Monetary Union in 2013.

[57] For a definition of price stability, see THIELE, *supra* note 8, at 27 ff.

transmission mechanism.[58] And it is exactly this objective that is again listed in both of the quoted bulletins. The Constitutional Court may not believe the ECB in this respect, but it obviously cannot simply change or reinterpret the official objective without making clear that it is doing so.[59] In paragraph 72 the Court then holds that the ECB could also not claim to be safeguarding the current composition of the monetary union as this would clearly be economic policy. But again, it remains unclear where the ECB is supposed to have done so. The Court refers to a press release of 26 July 2012, but the only press release of this date is of a technical nature and concerns monetary developments in the Euro area.[60] In fact the Constitutional Court is probably referring to the renowned speech of Mario Draghi that was also published on this date, but the statement the Constitutional Court objects to is, again, not to be found. The ECB President did indeed point out, that the ECB, within their mandate, is ready, "to do whatever it takes to preserve the Euro." However, this is obviously something different.

Second of all, the Court points to the selectivity of the possible measures taken under the OMT Program. Under normal circumstances monetary policy generally sets conditions for the whole of a monetary area. However, when criticizing the selectivity of the OMT Program the Constitutional Court does not take into account the distinctive features of the European monetary union, which currently consists of 18 member states.[61] Before the crisis of the euro, monetary policy transmitted homogenously across the whole monetary union. There was therefore no reason for the ECB to reach for selective measures. The crisis, however, led to a sudden fragmentation of monetary policy along national borders.[62] A single policy rate set in Frankfurt translates into different costs of borrowing across the Eurozone,[63] and this fragmentation presented a huge challenge for the ECB: "How can monetary authority credibly commit to keeping inflation stable when its policy rate is

[58] For the relevance of the transmission mechanism for monetary policy in general and the special problems within the EMU, see EGON GÖRGENS, KARLHEINZ RUCKRIEGEL & FRANZ SEITZ, EUROPÄISCHE GELDPOLITIK 287 ff. (5th ed. 2008).

[59] In fact, the Court seems simply to be confusing the objective (restoring the transmission mechanism) and the instruments with which the ECB intends to reach this objective (purchasing of government bonds to influence the interest increases). Both, however, have to be strictly separated.

[60] Press Release, Monetary Developments in the Euro Area: June 2012 (July 26, 2012), *available at* http://www.ecb.europa.eu/press/pdf/md/md1206.pdf.

[61] *See* Görgens, Ruckriegel & Seitz, *supra* note 58, at 327 ff. (regarding the special transmission problems within the EMU).

[62] These problems were a result of certain "construction deficits" of the EMU. MARC BLYTH, AUSTERITY (2013) speaks of "glaring holes in its institutional design." For an overview of these deficits, see THIELE, *supra* note 8, at 1 ff.

[63] Lucrezia Reichlin & Richard Baldwin, *Introduction*, *in* IS INFLATION TARGETING DEAD? CENTRAL BANKING AFTER THE CRISIS 10, 16 (Lucrezia Reichlin & Richard Baldwin eds., 2013).

transmitted differently across the currency area?"[64] The answer of the ECB was to fight the transmission problems directly where they occurred and this necessarily led to selective measures.[65] The simple and generally non-controversial statement of the Court that "different effects of monetary policy are a result of the open market economy of the Union"[66] therefore does not adequately reflect the complexity of the problems arising for the ECB under the special conditions during the Eurocrisis.

Third, the Court points out that the link between the OMT Program and the economic conditions formulated by the member states within their financial aid programs under the EFSF/ESM would speak in favor of the economic character of the ECB measures.[67] This statement seems unconvincing for several reasons. First of all it would obviously be undesirable for the ECB to completely undermine the actions taken by the member states and did not at least try to assist the member states in their effort to try to save the Eurozone, at least as long as this is comparable with their monetary aims of restoring the transaction mechanism. And this is indeed the case because such a link makes clear that the measures taken are of a time-limited nature and the conditions demanded help to generally calm the financial markets and thereby hinder (new) financial speculation against other member states that might lead to further problems in the transfer mechanism. That the linkage is founded on monetary reasons therefore at least seems justifiable.

Finally the Court argues that the OMT Program may undermine the normative conditions set for secondary government purchases under the two Euro bailout funds.[68] Indeed the conditions set for such a purchase in this case are relatively strict. But at this point it is necessary to recall the different objectives of the OMT Program and the bailout funds. Monetary reasons—here the restoring of the transmission mechanism—can obviously demand the purchase of government bonds under completely different conditions than the member states agreed upon when it comes to their financial aids, as monetary policy is independent. In any case, however, one should note the contrariness of the third statement of the Court, where the OMT Program is explicitly criticized for being linked to the conditions of the aid program. Why should this suddenly be different here?

The arguments of the Constitutional Court therefore are overall not convincing and if one wanted to find a simple reason for this, it would have to be following: The Court seems to

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[64] Reichlin & Baldwin, *supra* note 63, at 16.

[65] THIELE, *supra* note 8, at 17, 69. The ECB in fact was not the only central bank worldwide that felt it necessary to take "unorthodox" measures to fight the consequences of the financial crisis. *See* THIELE, *supra* note 8, at 12 ff.

[66] BVerfG, 2 BvR 2728/13 at para. 73.

[67] BVerfG, 2 BvR 2728/13 at para. 74.

[68] *Id.* at para. 79.

be of the opinion that it is possible to draw a distinct line between monetary and economic policy and to clearly assign any measure taken by any institution either to the one or the other "political box." Yet such a clear distinction is neither possible nor desirable. Both fields are linked in various and complex ways and therefore practically every monetary action taken by the ECB will have economic effects and consequences for the economic policy of the member states. And apart from the different objectives of the measures themselves, they may even be constructed in a very similar way. It is therefore not at all inconsistent to interpret the purchase of government bonds as economic policy in the one case and as monetary policy in the other. It simply depends on who purchases and why. As long as there are justifiable monetary reasons for a certain measure taken by the ECB, then it has to be qualified as monetary policy and therefore generally falls within its mandate even though the member states may have taken similar measures.[69] This is also the reason why it is not convincing when the Constitutional Court constantly refers to the *Pringle* decision of the ECJ.[70] See, for example, paragraph 76 where the ECJ had decided that the measures taken by the member states had to be interpreted as economic policy as of their objectives. Because the objective of the ECB is a different one, the *Pringle* decision cannot serve as an indicator for the quality of the OMT Program. The fact that the Constitutional Court in paragraph 70 simply pretends that the motives of the ECB and the member states are identical in this context is obviously illegitimate.

2. Support of the General Economic Policies in the Union?

Economic policy is not generally prohibited for the ECB. According to Art. 127 (1) TFEU, it is in fact obliged to support the general economic policies in the Union as long as the price stability is secured. As it is undisputed that price stability is currently secured,[71] the measures taken by the ECB would therefore fall into their mandate even if interpreted as economic as long as they were to be classified as such a support. Yet the Constitutional Court believes this is not the case for two reasons. First, the volume of the possible financial aid, which is a major consideration for the decisions taken under the ESM, could be largely expanded by parallel purchases of government bonds by the ECB. These purchases could therefore completely undermine the restriction of the financial aid to a

[69] In fact, if one wanted to follow the Court in the opinion that a measure taken is either economic or monetary policy, then one would have to come to the conclusion that it was the member states who acted out of their mandate when empowering the ESM to buy government bonds. Buying government bonds—at least up to now—has always been an instrument used by central banks and in this sense would have to be interpreted as monetary and not economic policy. The Court, however, obviously sees no reason to discuss this question.

[70] ECJ, Judgment of 27.11.2012, Case C-370/12, Pringle, 2012 E.C.R. I-0000.

[71] *See*, *e.g.*, Sachverständigenrat, Stabile Architektur für Europa: Handlungsbedarf im Inland, Jahresgutachten 2012/2013 at para 143 ff. (2012), *available at* http://www.sachverstaendigenrat-wirtschaft.de/fileadmin/dateiablage/gutachten/ga201213/ga12_ges.pdf.

certain volume and this could not be interpreted as a simple "support."[72] Secondly, due to its independence, the Council of the ECB would have to decide whether and to what extent to purchase bonds autonomously. This would necessarily involve independent economic assessments that again would exceed a pure "support."[73]

The second of these arguments seems hardly convincing. With respect to its support of the economic policy within the Union, the ECB will always have to undertake independent economic assessments, as the ECB is independent in all its actions taken. But if this is the case, the treaties obviously assume that the ECB is not only allowed to undertake such independent economic assessments, but is also perfectly capable of doing so. How should an independent support be possible without independent assessments?

The first argument seems more conclusive at first sight. If the member states agree to a certain amount of financial aid then "more money" could be indeed interpreted as undermining such a decision. However, one must be aware that the ECB does not directly lend any money to the relevant member state. The ECB only purchases the bonds on the secondary market and these purchases therefore have no direct effect on the financial situation of the relevant member state. The money paid for the government bonds is paid to individual market players. A purchase of 20 billion Euro worth of bonds by the ECB is therefore not the same as a direct loan of 20 billion Euro by the other member states. Yet, the purchases by the ECB obviously have a positive effect on the refinancing situation of the relevant member state. As the ECB increases the demand for the relevant government bonds on the secondary market, the price to place these bonds on the primary markets should fall. In other words, it should become cheaper for the member state to place government bonds on the primary market and to borrow money. As long as the member state does not place any new bonds, the purchases of the ECB therefore have no effect at all on its financial situation. The impression given by the Constitutional Court that the ECB can directly undermine any financial threshold decided by the lending member states is therefore incorrect. The ECB can, if at all, indirectly influence the height of the interest rates and only the margin between interest rates before the intervention and after the intervention can be assigned to the ECB. This, if at all, may only be different in the exceptional case that the ESM decides to grant a secondary market support facility. In other words, to help also by purchasing government bonds on the secondary market.[74] Then any additional purchases by the ECB would indeed expand the defined threshold. However, whether it remains justified to deny the support character of the OMT Program in general seems questionable, especially since the member states have an interest that

[72] BVerfG, 2 BvR 2728/13 at para. 81.

[73] *Id.* at para. 82.

[74] Again, from its own perspective the Court should have asked whether the member states actually act economically when purchasing government bonds in the secondary market.

the helped member state is able to refinance itself independently as soon as possible. In actual fact there is probably not a single member state that would deny that the measures taken by the ECB have indeed supported their economic policy. Again, this is only relevant if one completely denies the monetary character of the whole OMT Program.

II. Prohibition of Monetary Budget Financing

According to Art. 123 (1) TFEU, the ECB is prohibited from purchasing government bonds directly. However, an indirect purchase is not prohibited and from an economic perspective such indirect purchases are a not only useful, but necessary instrument for a modern central bank.[75] The Constitutional Court does not reflect this economic position, but simply states that Art. 123 (1) TFEU is the "expression of a broader prohibition of monetary budget financing." According to the Court, this seems to mean that any monetary measure taken, and especially the purchase of government bonds, has to avoid any direct or indirect positive effect on the budget of a member state, as this would have to be seen as an evasion of Art. 123 (1) TFEU. For this reason the Court proceeds to list possible scenarios in which such a positive effect for the budgets might occur with respect to the OMT Program.[76] These scenarios include a possible "haircut" including the government bonds held by the ECB, the higher risk of such a haircut in the relevant member states, the holding of the government bonds until the end of their maturity, a possible intervention in the price fixing of the markets through purchases to soon after the emission of the bonds, and finally the announcement of the ECB to possibly purchase bonds which could provoke private market participants to directly purchase these bonds from the relevant member states. And indeed in these cases it seems at least possible that the purchases of the ECB have some sort of positive effect on the budget of the member state, even though it remains unclear why this should be the case if the bonds are held until the end of their maturity. However, the whole assumption of the Court that Art. 123 (1) TFEU includes such broader prohibition of any positive effect seems more than questionable. Additionally, the fact that all the references quoted by the Court in paragraph 85 do not include the statement the Court thereby wants to prove therefore seems hardly surprising,[77] even though it is indeed astonishing as this interpretation is one of the essential arguments of the Court. Monetary policy is never neutral in this sense but can always have positive or negative effects on the member states budgets.[78] That, in fact, was the whole idea why central banks were given their independent status; not because monetary policy in this case would never have any positive effects on the financial situation of the member states, but to ensure that it is not the member states themselves

[75] *See* Herrmann, *supra* note 55, at 810 ("tradiertes geldpolitisches Instrument").

[76] BVerfG, 2 BvR 2728/13 at para. 87 ff.

[77] However, such formal mistakes are obviously hardly acceptable regarding the relevance of the whole referral.

[78] *See also* Sester, *supra* note 55, at 85.

that decide on these unavoidable positive effects. A central bank is simply supposed to ensure price stability no matter whether the measures taken have positive or negative effects in the member states. And indeed effects of this kind are linked to practically every monetary measure taken, the setting of the interest rates being the best example. But as long as the measures taken are founded in monetary reasons these positive or negative effects are simply irrelevant from the perspective of the central bank. Art. 123 (1) TFEU therefore only seeks to prohibit the indeed problematic direct purchase of government bonds but cannot be interpreted in a way that would practically make any purchase of government bonds through the ECB more or less impossible, as such a purchase is a necessary instrument of any modern central bank. Even the German central bank, the Bundesbank, has reverted to this instrument from time to time. Bond purchases by the ECB on the secondary market could therefore only then be seen as in violation with Art. 123 (1) TFEU if they had practically the identical effect as direct purchases. And in fact this is exactly what the Constitutional Court had pointed out in its first ESM decision of 12 September 2012: "A purchase of government bonds on the secondary market by the ECB that ensured a financing of the member states budgets *independently from the financial markets* would be an evasion of the prohibition of monetary budget financing and therefore also prohibited."[79] Why this central passage of its own decision is not quoted in the referral is not understandable. However, of all the scenarios presented by the Court in the referral such an "independent financing" could—if at all—only occur if the ECB purchased without a significant time-period between the emission and the purchase or where the ECB provokes private market participants to purchase directly from the member states. Yet, regarding the first case, the ECB has made clear that it will generally respect the prize-setting process and in the second case this would only be problematic if the ECB had given a broad guarantee to purchase all offered government bonds, as private market participants could only then dispense from their own risk assessment completely.[80] This, however, is not the case, so that the opinion that assumes a violation of Art. 123 (1) TFEU does not seem altogether convincing.

III. Irrelevance of the Disturbance of the Monetary Transmission Mechanism

According to the Constitutional Court, the ECB cannot claim to be trying to restore the disturbed monetary transmission mechanism. As every national debt crisis would lead to such disturbances, this would mean nothing else than suspending the prohibition of monetary budget financing altogether.[81] This is the first time that the Constitutional Court finally refers to the official objective of the OMT Program, which indeed seems surprising. Why was this official position of the ECB not at least mentioned when the Court claimed a

[79] BVerfG, 2 BvR 1390/12 at para 174.

[80] THIELE, *supra* note 8, at 73 f.

[81] BVerfG, 2 BvR 2728/13 at para. 97.

completely different objective in paragraph 70? However, the statement of the Court again seems unconvincing, as it is obviously founded on the assessment that monetary policy is not allowed to have any positive effects on the budgets of the member states. It therefore may be true that debt problems practically always result in disturbances of the monetary transmission mechanism, but it is also true that the ECB cannot accept such disturbances if it wants to effectively secure price stability. For this reason it seems necessary—or at least justifiable—from a monetary standpoint to buy government bonds of the relevant member state, then the ECB is allowed to do so even if the member state should profit. How else should the ECB be able to fulfil its mandate? Again whether a member state profits or not is simply insignificant for the ECB when safeguarding price stability. That the Constitutional Court states in this context that the "(economic) correctness or plausibility" of the reasons given is irrelevant[82] is in any case absolutely incomprehensible.

IV. Restrictive Interpretation

The Constitutional Court's proposals regarding the restrictive interpretation rightly try to eliminate the problems identified by the Court in the paragraphs before.[83] However, as these problems generally seem unconvincing and are mostly founded on the "no positive effects" argument, it is hardly surprising that the proposals themselves also seem difficult to uphold. Above this, at least some of the proposals could also seriously harm the effectiveness of the whole OMT Program if they were to be introduced. If the Court demands, for example, not to allow "limitless purchases" then it remains absolutely unclear what amount of purchases should be possible for the ECB. Is the ECJ now supposed to decide on the maximum amount of government bonds? For each country? And based on what normative basis? And it is clear that such an arbitrary threshold would immediately lead to speculations against any member state if the purchases of the ECB should come anywhere close to this maximum amount. The Constitutional Court also demands that the ECB should avoid interference with the price setting procedure "as much as possible." However, the ECB buying governmental bonds obviously interferes with the price setting procedure and in fact this is the whole idea of the OMT Program. Where to draw the line between allowed and prohibited interference[84] remains just as unclear as how the ECJ is supposed to decide this.

[82] *Id.* at para. 96.

[83] *Id.* at para. 100.

[84] If the Constitutional Court for example demands to leave an appropriate interval between the emission of the bonds and the purchase of these bonds by the ECB then what does "appropriate" mean? An hour, two hours, a day, a week or a month? And is this period always the same or does it depend on other circumstances as well? Without any normative basis these questions seem impossible to answer for the ECJ.

V. Summary

The arguments presented by the Constitutional Court in favor of a breach seem hardly convincing. At the very least the Court should have taken into account that it would have been justified to decide otherwise and to come to the conclusion that the ECB acted within its mandate and also did not breach Art. 123 (1) TFEU. In the absence of an evident and structurally relevant breach according to its own standards, the Court should never have initiated this referral.

F. Conclusion

All in all, this "historic" first referral by the Constitutional Court to the ECJ can hardly be interpreted as a "friendly act." It should never have occurred, as the applicants' claims could have been dismissed directly and the questions asked were therefore of no relevance for the national case. The Constitutional Court obviously wanted this referral no matter what and for this reason was willing to push away any argument that might have hindered it from doing so. This one-sided position is also reflected in the way the Court presents its arguments in favor of the breach, where it does not take any counter-arguments into account and even gives incorrect references. Ironically, it has been especially the Constitutional Court that always criticized the ECJ for its insufficient reasoning. When receiving this first referral by the Court, the ECJ may indeed be surprised why this ever was the case.