JUDICIAL DIALOGUE ON THE ECB’S OMT DECISION: FROM AUTOPOIETIC DISCOURSE TO LEGAL LEVERAGING

(Summary)

The present contribution looks into selected aspects of the Bundesverfassungsgericht’s request for a preliminary ruling regarding the European Central Bank’s OMT Decision of September 2012 and the subsequent ruling in that regard by the Court of Justice of the EU (CJEU). The author focuses not exclusively on the legal and economic ramifications of the judicial dialogue between the German court and the CJEU on the ECB’s OMT programme, but attempts to foreground political and societal anchoring behind the argumentation developed by both Courts. The main contention of this paper is that the instances of legal leveraging eminent in the CJUE’s jurisprudence stem from the mismatch between the ‘conventional’ legal reading of relevant provisions on the economic and monetary union on the one hand and most recent developments in EU/Eurozone economic governance, notably in response to the economic crisis, on the other. The author also points out that by its OMT Decision the ECB effected a qualitative change in the function it has vis-à-vis bondholders, namely, given the restraints of EU law, that of shadowing a lender of last resort.

Keywords: ECB’s OMT decision; interpretation of EU law; the CJEU; preliminary ruling; Bundesverfassungsgericht

1. Introduction

On 14 January 2014 the Bundesverfassungsgericht, the German Federal Constitutional Court for the first time in history used the institution of a request for a preliminary ruling (i.e. a procedure exercised before the Court of Justice of the European Union which enables national courts to pose a legal question to the former on the interpretation or validity of EU law) to question the Court of
Justice of the European Union (henceforth the CJEU) on the validity of European Central Bank’s decisions concerning outright monetary transactions (OMT). The said reference for a preliminary ruling made by the order of the Bundesverfassungsgericht of 14 January 2014 is worthwhile to be closely looked at for three reasons. Firstly, the German Constitutional Court has played a leading role amongst national constitutional courts in the development of the national legal narrative on the European integration process and its alleged limits. Secondly, due attention should be given to the very form of Bundesverfassungsgericht’s request for a preliminary ruling, which is by no means a simple legal question and has the potential not only to determine the possible implementation of the ECB’s OMT decisions, but also to have a direct impact on the stability of financial markets. Finally, the judicial exchange between the German Constitutional Court and the CJEU is pertinent in so far as it embodies the inevitable dialogue and cooperation between the courts and tribunals of the EU Member States and the CJEU, the absence of which would immediately and unfavourably affect the European integration process at large.

2. Legal Basis and Objectives of Preliminary Ruling Procedure

A request for a preliminary ruling by a national court or tribunal is made under Article 19(3)(b) of the Treaty on European Union (TEU) and Article 267 of the Treaty on the Functioning of the European Union (TFEU). Pursuant to the cited provisions the Court of Justice of the EU (the CJEU) has jurisdiction to give preliminary rulings on the interpretation of Union law and on the validity of acts adopted by the institutions, bodies, offices or agencies of the Union. In other words, there are two types of reference for a preliminary ruling:

- a reference for a ruling on the interpretation of EU primary and secondary law whereby a national court refers to the ECJ for clarification of EU law so as to be able to apply it correctly (here by way of giving judgment);
- a reference for a ruling on the validity of EU secondary law whereby a national court refers to the ECJ for verification of the validity of an act of EU law.

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In principle courts and tribunals of the Member States are not obliged to submit a reference for a preliminary ruling to the CJEU even if such a referral is requested by one or more of the parties involved in the dispute (cf. Article 267 TFEU). *A contrario*, a referral must be brought before the CJEU where a case is pending before a national court or tribunal against decisions of which there is no judicial remedy under national law, unless the interpretation of the provision in question is obvious or the CJEU has already ruled on that point and, in the absence of any new context or issues of fact, there is no serious doubt as to whether that case-law is of relevance in that instance.

It should be emphasised here that generally national courts are expected to exercise the reference for a preliminary ruling in cases of doubt regarding i) the interpretation of EU law provisions and ii) the validity of an act adopted by the Union institutions, bodies, offices or agencies. Whether and to which extent this presumed obligation is materialised in practice by the courts and tribunals of EU Member States, however, remains a different matter.

As to the contents of the request for a preliminary ruling, pursuant to Article 94 of the CJEU’s Rules of Procedure, in addition to the text of the questions referred to the Court, the request for a preliminary ruling must also contain:

a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

The lodging of a request for a preliminary ruling calls for the national proceedings to be stayed until the CJEU has given its ruling. Moreover,

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5 See point 29 of the *Recommendations to national courts...,* cited *supra* note 2.
if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it⁶.

It should be borne in mind, however, that the CJEU’s role is limited to the interpretation of EU law or ruling on its validity, and not applying that law to the factual situation underlying the proceedings before the referring national court or tribunal. Thus it is for the referring court or tribunal to draw specific conclusions from that CJEU’s reply and to correspondingly decide on issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law, if needed even by not applying the pertinent rule of national law⁷.

As a fundamental mechanism of EU law, the reference for a preliminary ruling is aimed at enabling the national courts and tribunals to safeguard uniform interpretation and application of that law within the Union. Given that the preliminary ruling procedure is based on cooperation between the CJEU and the national courts, the good will of national courts and that of the EU Court is crucial for the proper functioning of this mechanism as well as for the aforementioned uniform application of EU law within the Union.

3. The German Referral Concerning the OMT Decision

A brief analysis of the reference for a preliminary ruling by the Bundesverfassungsgericht (BVerfG) of 14 January 2014 allows for the statement that it does not really fit into the above outlined frame of a mechanism for judicial cooperation seeking to safeguard uniform interpretation and application of Union law. This fact flows on the one hand from the very language of the German referral which is assumptive in tone and seems to leave the CJEU not much room for other interpretation of the OMT Decision than that provided by the BVerfG itself. On the other hand, it is by and large consistent with the jurisprudence of the BVerfG to date which opposes any measure having the potential to encroach on the German constitutional identity through substantially shrinking Bundestag’s legislative competences, thus limiting Germany’s capacity to democratically re-shape itself⁸. This stance of BVerfG is nevertheless not purely dogmatic in nature. Arguably, the preliminary ruling in question is just a single round in the real power game, the stakes of which

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⁶ Ibid., point 17.
⁷ Ibid., points 7 and 8.
⁸ See in this respect e.g. Case 2 BvE 2/08 of 30 June 2009 (the Lisbon judgment), notably its paragraph 252.
are who should ultimately decide on the interpretation and validity of Union law. In this regard the BVerfG neither fully recognises the monopoly of the CJEU’s interpretation competence, nor does it accept the autonomy of the EU’s legal order. For the above reasons, it seems pertinent to analyse the German OMT reference not exclusively with a view to its legal and economic implications, but also from a broader, political/societal perspective.

3.1. The BVerfG’s Interpretation of the OMT Programme

In legal/economic terms, the reference in question concerns the validity of the decisions of the ECB’s Governing Council of 6 September 2012 on a number of technical features regarding the Eurosystem’s outright monetary transactions (OMT) in secondary sovereign bond markets and the interpretation of relevant treaty provisions as well as those of Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank. In concrete terms, in its reference the BVerfG raised the question of the incompatibility of the ECB’s Governing Council OMT decision with:

1. Articles 119 and 127 para 1 and 2 TFEU, as well as with Articles 17 to 24 of the Protocol on the ESCB and the ECB on grounds that the decision in question exceeds the monetary policy mandate of the ECB laid down in the abovementioned provisions and encroaches upon the competence of the EU Member States.

2. The prohibition of monetary financing enshrined in Article 123 TFEU.

In its elaborations on the OMT programme, the BVerfG presumes that the breach of the ECB mandate may in particular result from the following OMT’s objectives:

i) conditionality, i.e. the OMT is linked to the EFSF\(^9\) or the ESM\(^{10}\) economic assistance programmes,

\(^9\) European Financial Stability Facility – a temporary crisis resolution mechanism established by the euro area Member States in June 2010 which has provided financial assistance through the issuance of bonds and other debt instruments on capital markets to Ireland, Portugal and Greece (the programme for the latter country expired on 30 June 2015). Whilst the EFSF continues to operate (one of its tasks is to receive loan repayments from beneficiary countries), the financial assistance has been taken over by the ESM (see: http://www.efsf.europa.eu/about/index.htm; access: 20.09.2015).

\(^{10}\) European Stability Mechanism – a permanent crisis resolution mechanism established by means of an intergovernmental treaty (ESM Treaty) concluded by the euro area Member States on 2 February 2012 the objective of which is to issue debt instruments in order to finance loans and other forms of financial assistance to euro area Member States (see: http://www.esm.europa.eu/index.htm; access: 20.09.2015).
ii) selectivity, i.e. it provides for the purchase of government bonds of only selected EU Member States,

iii) parallelism, i.e. it provides for the purchase of government bonds of programme countries in addition to the EFSF or the ESM assistance programmes,

iv) bypassing/circumvention, i.e. it could undermine the limits and conditions laid down by the EFSF or the ESM assistance programmes.

Regarding the OMT decision’s compatibility with Article 123 TFEU, according to the BVerfG it could be precluded in particular due to the following OMT programme features:

i) lack of a fixed volume or quantitative limits for government bond purchases,

ii) no provision for a time gap between the issue of government bonds on the primary market and their purchase by the ESCB on the secondary market (market pricing),

iii) interference with market logic by way of allowing all purchased government bonds to be held to maturity,

iv) lack of any specific requirements for the credit standing of the government bonds to be purchased (default risk),

v) the same treatment of the ESCB as private or other holders of government bonds (debt cut).

In addition, the German Court raises concerns regarding the possibility that the Eurosystem, by mere communicating the intention to purchase which coincides with the emission of government bonds by Eurozone states, will influence pricing and purchase of newly issued bonds.

Interestingly, the German Court holds that the concerns regarding the validity of the OMT Decision could be met by an interpretation in conformity with Union law, but on the condition that the OMT be interpreted or limited in its validity to the effect that:

– it would not undermine the conditionality of the EFSF and the ESM assistance programmes,

– it would only be of a supportive nature regarding the economic policies in the Union,

– the possibility of a debt cut would be excluded in the light of Article 123 TFEU\footnote{As argued by the BVerfG (see note 89), a purchase of government bonds that carry an increased risk of failure or even the necessity of a debt cut is likely to violate the prohibition of monetary financing.},

– government bonds of selected Member States would not be purchased up to unlimited amounts, and
interferences with price formation on the market would be avoided where possible. In its very tone and substance, the BVerfG’s reference on ECB’s OMT decision is nothing but “an (offensive) invitation to the ECJ to restrict the implications of the OMT programme by means of interpretation”.

3.2. A broader context of the German OMT reference

Whilst the heavy weight of BVerfG’s reference lies in legal and economic concerns regarding the OMT programme (possible breach of the ECB mandate and circumvention of Article 123 TFEU), the political and societal background of this reference should not be underestimated. It is not quite exaggerated to state that since the signing of the Treaty of Maastricht every major development in EU law enhancing and deepening the European integration process was challenged through a constitutional complaint before the German Constitutional Court which, while generally ruling in congruence with the principle of ‘openness towards European law’ (Europarechtsfreundlichkeit), it has continued to make the best of its ‘last word’ regarding the ultra vires review of secondary EU law and did not abstain from formulating a strong position regarding the limits of European integration resulting from the German Basic Law (Grundgesetz). Such limits to further European integration are seen in the German constitutional identity (the respect of national constitutional identity of EU Member States is provided for under Article 4(2) TEU) and Germany’s sovereign statehood, of which Par-

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12 See note 100 of the BVerfG’s reference cited supra note 1.
14 Constitutional complaints before BVerfG were raised both against EU primary law (most recent Judgment of 30 June 2009 – 2 BvE 2/08 on the Treaty of Lisbon) and secondary law, recently notably regarding crisis management measures such as the financial aid to Greece and the EFSF (Judgment of 07 September 2011 – 2 BvR 987/10), and German participation in EFSF and ESM (Judgment of 28 February 2012 – 2 BvE 8/11, Judgment of 12 September 2012 – 2 BvR 1390/12).
15 See in this regard M. Claes, J.-H. Reestman, The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case, German Law Journal 2015/16/04, notably p. 927 f. As stated by the BVerfG, “[i]f an act of an institution or other agency of the European Union has consequences which affect the constitutional identity protected by Art. 79 sec. 3 GG, it is, from the outset, inapplicable in Germany (BVerfG, 2 BvR 1390/12 at para 27 in the Eng. Transl.). It should be noted here that the concept of national constitutional identity is also emphasised in the jurisprudence of the Polish Trybunals Konstytucyjny (Lisbon decision of 24 November 2010 – K 32/09, n. 2.1. et seq.), of which the BVerfG takes note of in its OMT Reference.
liament’s budgetary powers are a constitutive element. It is noteworthy that in the cited case law the BVerfG specified requirements for the German participation in euro rescue packages and fiscal stability mechanisms, which basically forbid transfer of Bundestag’s budgetary powers to an international mechanism and safeguard the parliament’s influence on both the volume and manner of spending funds. BVerfG is of the view that it follows from the democratic basis of budget autonomy that the Bundestag may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the Bundestag’s control and influence16.

The concept of *ultra vires* review, i.e. review whether EU law remains within the limits of Union competences17 is by no means evident, as it touches upon a very sensitive issue of relationship between EU law and national constitutional law. This instrument tends to be also differently interpreted from national and EU perspectives. Its very foundation may be seen in the undisputable principle of conferral of competences from Member States to the Union level (Article 5 paragraphs 1 and 2 TEU) which constitutes the basis for the exercise of public authority at the EU level. In turn, the legal basis for the judicial review of the legality of EU legislative acts and other acts of EU institutions, bodies, offices and agencies is laid down in Article 263 TFEU (direct action for annulment) and Article 267 TFEU (indirect review effected by national courts through the preliminary reference procedure18. As for the BVerfG’s stance on its own role in *ultra vires* review, it may only be considered if an EU act is “manifestly in violation of competences and that the impugned act is highly significant in the structure of competences between the Member States and the Union” (emphasis added)19. In its OMT Reference, the BVerfG takes also note of the Polish Constitutional Court’s *locus standi* regarding the CJEU’s role in interpretation of EU law, which the Polish Court construes as the primary, but not the sole depositary of powers as regards the application of

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17 Cf, in this regard BVerfG 89, 155 *Maastricht* judgement of 12 October 1993.


treaties in the European Union\textsuperscript{20}. The Polish Court views the interpretation of EU law by the CJEU as subject to constraints flowing from the functions and powers delegated to the Union by the Member States, including the requirement to comply with the principle of subsidiarity (Article 5(3)EU) which determines activities of the Union institutions. As emphasised by the Polish Court, such interpretation must also be based on “the assumption of mutual loyalty” between the Union institutions and Member States\textsuperscript{21}.

Awareness of political and societal context allows for more insight not only with regard to the German reference and the constitutional complaint which inspired it, but also into why some euro area states (namely Ireland, Greece, Spain, France, Italy, Netherlands, Portugal and Finland), the European Parliament, the European Commission and the ECB on various grounds challenged the admissibility of the request for a preliminary ruling or of certain of the questions it includes\textsuperscript{22}. The EU institutions as well as all governments mentioned above except for the Finnish one maintained inadmissibility of the reference in question on grounds that a question concerning validity cannot be directed at an act which, as is the case of the OMT decisions, is preparatory or does not have legal effects\textsuperscript{23}. Despite the seriousness of such procedural arguments drawn from relevant case-law, the CJEU declared the request for a preliminary ruling admissible. Any evasion of a direct confrontation with the assumptive discourse of the referral would have been a no way out of the challenge posed by the BVerfG, and left the financial markets with the insecurity raised by it. The European Court rightly recognized the need for legal relief and thereby picked up the gauntlet\textsuperscript{24} thrown by the German Court, albeit only to a limited extent.

4. The Substantive Approach of the Court of Justice

The aspect which is evident and is recognised in relevant literature concerning the CJEU’s OMT judgement is its strong reliance on the force of substantive arguments in support of the validity of ECB’s OMT decision, while leaving aside the conceptually and institutionally sensitive issues of primacy and autonomy

\textsuperscript{21} Ibid.
\textsuperscript{22} See para 18 of the CJEU’s judgment cited infra note 26.
\textsuperscript{23} Ibid., paragraph 23. The ECB decision of 5 and 6 Sept. 2012 concerning the “main parameters” of OMTs was communicated merely by way of a press release.
\textsuperscript{24} For an opposite view, see M. Claes, J.-H. Reestman, On Courts of Last Resort..., p. 918.
of EU law\textsuperscript{25}. The CJEU basically rules in \textit{Gauweiler}\textsuperscript{26} that Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank is to be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, and thus is not a forbidden circumvention of Article 123 TFEU. In the literature it is argued that this Article not only prohibits the purchase of bonds on the primary market, but also on the secondary one insofar as such purchase were to result in bypassing of the rationale of the provisions in question\textsuperscript{27}. In other words, such purchasing on the secondary markets is only prohibited if it is aimed at financing national economies independent from the capital markets\textsuperscript{28}. In order that the ESCB’s intervention on secondary markets does not produce an effect equivalent to that of a direct purchase of government bonds on the primary market, in the view of the CJEU it must:

\begin{itemize}
  \item ensure that a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market and,
  \item refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged\textsuperscript{29}.
\end{itemize}

Moreover, the CJEU rightly contends that making the implementation of the OMT programme conditional upon full compliance with the EFSF or ESM macroeconomic adjustment programmes constitutes a guarantee that ESCB’s policy measures will not work against the effectiveness of the economic policies followed by the Member States, which consequently does not allow the programme in question to be interpreted as lessening the impetus of the Member States concerned to follow a sound budgetary policy\textsuperscript{30}. At the same time, the very participation of a Member State in the EFSF or ESM adjustment programme does not determine whether its bonds will be purchased by the ECB\textsuperscript{31}, which means that Member States cannot actually fully rely on the ECB’s intervention.

\textsuperscript{25} Ibid.
\textsuperscript{27} See e.g. \textit{M. Wedel, Exceeding Judicial Competence…}, p. 300.
\textsuperscript{29} Para 106 of the \textit{Gauweiler Case} (cited \textit{supra} note 25) where the Court makes a reference to the ECB’s statement in the proceedings.
\textsuperscript{30} Ibid., paras 60 and 121.
\textsuperscript{31} \textit{P. Panfil, Polityka monetarna a rynek rządownych papierów dłużnych w strefie euro}, Annales Universitatis Mariae Curie-Skłodowska. Sectio H, Oeconomia 2013/47/3, p. 484.
It should be noted here that the CJEU’s shrewd shift regarding the interpretation of the programmes conditionality does not, however, address another central question posed by the German Court, namely that of a possible encroachment by the ECB on the competences of Member States in the area of economic policy. BVerfG assumes namely that the ECB’s intentions to engage in an activity which both the EFSF and ESM perform and which by virtue of their objectives and mechanisms belongs to the field of economic policy speak against compatibility of the OMT Decision with the ECB’s mandate.

5. The distinction between economic or monetary policy

Since the delimitation of economic and monetary policy was also central in Pringle case concerning the validity of ESM, the CJEU frequently simply restates arguments formulated at the occasion of that judgment. Pursuant to Article 282(1)TFEU, the ECB and the central banks of the EU Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union, whereas the conduct of the economic policy remains with the Member States. This is why the central question that was to be answered by the CJEU is whether the OMT programme constitutes predominantly economic or monetary policy. Pursuant to Articles 127(1) and 282(2) TFEU, the primary objective of the EU’s monetary policy is to maintain price stability. The CJEU brings to the attention, however, that the cited provisions further stipulate that, „without prejudice to that objective, the ESCB is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU“. Moreover, under Article 282(4) TFEU, the ECB is to adopt such measures as are necessary to carry out its tasks.

Regarding the delimitation of monetary policy, the Court observes that whilst the EU Treaties contain no precise definition of monetary policy, both the objectives of monetary policy and the instruments which the ESCB has at its disposal

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33 To that effect the Court cites in para 43 its judgment in Pringle, para 54.

34 It is noteworthy that under Art. 18.1 of the Statue of ESCB (https://www.ecb.europa.eu/ecb/legal/pdf/en_statute_2.pdf; access: 14.10.2015), the ECB is authorized to apply necessary instruments, which are neither qualified as measures of economic nor monetary policy. Instead, the said provisions entitle the ECB to conduct open market operations aimed at achieving the objectives of the ESCB and carrying out its tasks.
to implement that policy are defined in the TFEU. Therefore the Court holds that objectives of a given measure as well as instruments it employs in order to attain those objectives are central for the purpose of determining whether such measure falls within the area of monetary policy.\footnote{Paras 42 and 46 of the judgment respectively.}

In the ECB Monthly Bulletin of October 2012, p. 7\footnote{https://www.ecb.europa.eu/pub/pdf/mobu/mobu_mb201210en.pdf; access: 12.10.2015.}, the OMTs are defined as “monetary policy instrument” with the aim of “ensuring an effective transmission of the Eurosystem’s monetary policy and, thereby, at securing the conditions for an effective conduct of the single monetary policy within the euro area, with a view to achieving its primary objective of maintaining price stability.” The objectives of a programme such as that announced in the press release are devised with a view to safeguarding both “an appropriate monetary policy transmission and the singleness of the monetary policy”. Whilst this statement was not convincing enough for the German Court, the CJEU defends the position taken by the ECB\footnote{See para 47 of the judgment.}. The CJEU maintains that the ability of the ESCB to influence price developments by means of its monetary policy decisions rely to a great extent on “the transmission of the ‘impulses’ which the ESCB sends out across the money market to the various sectors of the economy”\footnote{Ibid., para 50.}. The Court further argues that the disruption of the monetary policy transmission mechanism may render the ESCB’s decisions ineffective in a part of the Eurozone, thus undermining the singleness of monetary policy and adversely affecting the ESCB’s ability to guarantee price stability. On those grounds the CJEU regards measures intended to preserve the transmission mechanism as pertaining to the primary objective (i.e. that of maintaining price stability) laid down in Article 127(1) TFEU. Finally, according to the Court even if the OMT programme has the potential to contribute to the stability of the Eurozone, which falls in the field of economic policy, it may not be regarded as „equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area”\footnote{Ibid., para 52, where the Court refers by analogy to the judgment in \textit{Pringle}, para 56.}.

It may not be denied, however, that the delimitation of economic and monetary policy, when it comes to substantial aspects, is all but convincing. As aptly put by Beukers and Reestman, both \textit{Pringle} and \textit{Gauweiler} epitomise
the mismatch between framing of important Treaty provisions on the economic and monetary union on the one hand, and the details of the legal interpretation of these provisions given by the member states and institutions, and taken over by the Court of Justice, on the other\textsuperscript{40}.

In other words, given that the Maastricht macroeconomic constitution did not provide for any crisis resolution mechanism (with the provisions on emergency assistance under Article 122(2) being unfit to serve that purpose)\textsuperscript{41}, and in the light of the difficulty to rapidly amend the EU Treaties, there has been a tendency to stretch the scope of the EU enabling provisions by means of legal interpretation. Such “legal leveraging” bears some resemblance to emergency-law thinking well expressed by the Latin: 

\textit{Necessitas not habet legem}\textsuperscript{42}. However, as argued by V. Borger, at the height of the crisis which threatened not only the single currency, but the Union as a whole, “[s]triking down the very measure that has proved essential to preserve the European contract on the basis of which the ECJ itself functions, would […] exceed the Court’s authority”\textsuperscript{43}. This gives food for thought and inspires reflection upon merely relative independence of courts from the political and socio-economic reality\textsuperscript{44}. Or perhaps it is more accurate to speak of the historical dimension of any legal interpretation and the societal responsibility that the courts, or even more precisely the judges acting in their institutional capacity must constantly be aware of. Legal concepts which have initially been framed in national contexts may well upon time become problematic and require a renewed understanding when transposed to the transnational (European) level. As regards the CJEU, it has been tirelessly contributing to the proper functioning of the European legal order and to the advance of the integration process by means of legal hermeneutics. Also in the case concerning OMT programme, the Court’s judgment may be assumed as yet another instance of legal leveraging\textsuperscript{45} in the euro crisis management.


\textsuperscript{42} Cf. ibid., p. 136.

\textsuperscript{43} V. Borger, Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler, Common Market Law Review 2016/53/1, p. 139.

\textsuperscript{44} See in this regard e.g. M. Jestaedt et al., Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht, Berlin 2011.

\textsuperscript{45} On instances of legal and monetary leveraging in the context of euro-crisis, see J.-H. Reestman, W.T. Eijsbouts, Watching Karlsruhe..., p. 374.
6. Concluding remarks

The CJEU *intra vires* judgment comes as a fully foreseeable finding on the lawfulness of the OMT programme. The Court’s ruling is of course binding on the *BVerfG* which referred the question for a preliminary ruling, but also on any other court of a Member State as expressly established by the CJEU in its judgment of 24 June 1969\(^46\). In this context the manner in which the German Court had expressed its request for a preliminary ruling may be seen as somewhat “abusive” insofar as it gave rise to doubts as to Karlsruhe’s willingness to accept Luxembourg’s monopoly of interpretation of EU law\(^47\). Indeed the preliminary reference procedure is effective inasmuch as the exclusive competence of the CJEU to interpret EU law is recognised and respected by national courts, thus allowing for uniform application of EU law within the Union. As rightly pointed out by Advocate General Cruz Villalón in his Opinion of 14 January 2015,

> a national court should not be able to request a preliminary ruling from the Court of Justice if its request already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received. The national court should not be able to proceed in that way because Article 267 TFEU cannot be regarded as providing for such a possibility\(^48\).

Furthermore, in the relevant literature a possible nullification of the OMT program by the German Court is perceived as unlawful and on grounds of the principle of the primacy of EU law, which warrants the equality of the Member States before the law, thus preventing individual EU states from singling out which provisions of the Union law it wishes to comply with or not\(^49\).

In this context it is not quite surprising that the *BVerfG* and the CJEU find themselves in a relationship of cooperation under the threat of potential conflict since *Solange I* where the German Court for the first time put into question the primacy of Community law claiming for itself the right to review EU law’s com-

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ppliance with the fundamental rights under German Basic Law as long as equivalent rights were not recognized at the level of the European Communities. While this concern has subsequently been settled in Solange II, the BVerfG at a later stage developed two additional categories of potential review, namely ultra vires and constitutional identity check. While up to now the BVerfG never rejected on such grounds a measure taken at the transnational level, the positions taken by it exercised concrete influence on the developments at the European scene, thus establishing the Court’s role as a political actor in the European integration process and in the EU/Eurozone multi-level governance through judicial autopoiesis. It is still to be seen whether in the Gauweiler main proceedings the BVerfG will decide in accordance with the settled case-law, i.e. respecting the binding force of the CJEU’s preliminary ruling in respect of the interpretation and the validity of ECB’s OMT Decision. Were the German Constitutional Court ultimately declare the ECB’s OMT decision as ultra vires and thus depart from the CJEU’s ruling on its validity, this would not only provoke an open conflict between the two courts but also significant insecurity for the Eurozone and a situation extremely difficult to manage for the German political authorities. Since to date the court was following a pragmatic line qualified by and large “all barks and no bite”, it is to be expected that its ruling in the Gauweiler proceedings will not substantially divert from the spirit of sincere cooperation (Article 4(3) TEU) which is binding also for national courts. If, however, this prognosis proves too optimistic, it is ultimately for the German Sovereign to decide whether in implementing the judgment it would run the risk of a major disruption in the European Monetary

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50 BVerfGE 37,271 of 29 May 1974.
51 BVerfGE, 73, 339 of 22 October 1986.
53 BVerfGE, 123, p. 353f – Lissabon.
54 In this sense e.g. M. Payandeh, Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice, Common Market Law Review 2011/48/1, pp. 9–38. The author provides a comprehensive account of the BVerfG’s claim to exercise residual competence to review constitutionality of EU legal acts. It is noteworthy that judicial autopoiesis may also easily be traced in the jurisprudence of the CJEU, notably with regard to its opinion 2/13 of 18 December 2014 on the compatibility of the draft agreement on the accession of the EU to the ECHR with the EU and FEU Treaties, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=160929&lang=EN&mode=lst&dir=&occ=first&part=1&cid=837708; access: 7.04.2016. See in that regard e.g. C. Tomuschat, Der Streit um die Auslegungshoheit: Die Autonomie der EU als Heiliger Gral, Europäische Grundrechte Zeitschrift (EuGRZ) 2015/5–8, pp. 133–139.
Union or rather create the constitutional requirements for its representatives to continue to participate in the OMT programme.

Even if not immediately evident, the stakes of the judiciary dialogue on the ECB’s OMT programme are much higher than that of power ambitions of either of the two courts\textsuperscript{57}. The decisive factor is ultimately the qualitative change in the role of the ECB. Following its decision of 6 September 2012, the ECB appears as if it were prepared to buy government obligations of troubled Eurozone states on the secondary markets \textit{ad infinitum} if need there is\textsuperscript{58}. Were indeed the ECB develop to a \textit{de facto} lender of last resort for sovereigns\textsuperscript{59}, a hypothesis which is not fully absurd given the absence of an \textit{ex ante} quantitative limit to bond purchase, it would mean the establishment of a “constitutional leverage”\textsuperscript{60} which would be hardly defensible even under the most skillful legal hermeneutics. Still, limits to the ECB’s assuming a lender of last resort function are posed by the current reading of the EU law and expressly recognized by the ECB itself, which insists, however, that its intervention in the markets must not be quantified \textit{ex ante} in order to ensure its effectiveness, a view endorsed by the CJEU\textsuperscript{61}. This is also confirmed by political circumstance as demonstrated by the recent developments in the Greek crisis\textsuperscript{62}. A likely scenario for the ECB is that in the perception of bondholders it will, within limits defined in its own autonomy, assume the function of a \textit{shadow} lender of last resort\textsuperscript{63}.

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\textsuperscript{57} On the prominent role of the ECB in the crisis management, see e.g. \textbf{M. Pronobis}, \textit{Czy Europejski Bank Centralny uratuje strefę euro?}, Analiza natolińska 2013/9(68), pp. 1–14.


\textsuperscript{60} The concept borrowed from \textbf{J.-H. Reestman, W.T. Eijsbouts}, \textit{Watching Karlsruhe…}, p. 374.

\textsuperscript{61} See Case C-62/14, \textit{Gauweiler}, cited supra note 26, para 88.


\textsuperscript{63} Cf. \textit{ibid.}, p. 236.


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Judicial Dialogue on the ECB’s OMT Decision: From Autopoietic Discourse to Legal Leveraging

Izabela JĘDRZEJOWSKA-SCHIFFAUER

ORZECZNICTWO DOTYCZĄCE DECYZJI EBC W SPRAWIE OMT: MIĘDZY AUTOPOEZĄ A ZASTOSOWANIEM DŹWIGNI PRAWNEJ

(Streszczenie)

Niniejszy artykuł przybliża wybrane aspekty pytania prejudycjального skierowanego do Trybunału Sprawiedliwości UE (TSUE) przez Niemiecki Trybunał Konstytucyjny (Bundesverfassungsgericht) dotyczącego decyzji Europejskiego Banku Centralnego z września 2012 roku w sprawie bezwarunkowych transakcji monetarnych Eurosystemu na wtórnych rynkach obligacji skarbowych (decyzja w sprawie OMT), jak też późniejsze orzeczenie TSUE w tym zakresie. Autorka omawia prawno-ekonomiczne aspekty dialogu między niemieckim sądem i TSUE w sprawie programu OMT, zwracając jednocześnie uwagę na polityczno-społeczne uwarunkowania wykładni prawa sformułowanej w argumentacji obydwu sądów. Główną tezą artykułu jest twierdzenie, iż zastosowanie dźwigni prawnej (legal leveraging) w argumentacji sformułowanej przez TSUE wynika z rozbieżności pomiędzy „tradycyjną” wykładnią przepisów dotyczących unii gospodarczej i walutowej a stale zmieniających się realiów zarządzania gospodarczego w UE/strefie euro, w szczególności w odpowiedzi na kryzys gospodarczy. Autorka akcentuje ponadto jakościową zmianę w funkcji EBC wobec posiadaczy obligacji skarbowych w efekcie decyzji OMT. W percepcji tych ostatnich EBC będzie funkcjonował jako de facto pożyczkodawca ostatniej instancji, jednakże, zważywszy na ograniczenia wynikające z obecnie obowiązującego prawa UE, EBC będzie pełnił tę funkcję jedynie nieoficjalnie.

Słowa kluczowe: decyzja EBC w sprawie OMT; wykładnia prawa UE; TSUE; orzeczenie w trybie prejudycjальнym; Bundesverfassungsgericht