



OVERVIEWS

OPENNESS TOWARDS EUROPEAN LAW AND COOPERATION WITH THE COURT OF JUSTICE REVISITED: THE *BUNDESVERFASSUNGSGERICHT* JUDGMENT OF 21 JUNE 2016 ON THE OMT PROGRAMME

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I. The intensity, and the very conditions, of the *ultra vires* review of EU acts by the German Federal Constitutional Court (FCC) have greatly changed along the course of its case law. The FCC has swung from a cooperative approach, which has featured the first phase of the case law, to a less friendly model, only recently adopted, in the face of the Euro crisis, with its first 2014 OMT decision. Whilst under the first approach, the FCC was inclined to fully respect the CJEU's role as a "guardian" of the legality of the system established by the founding Treaties, and reserved for itself the nominal role of external reviewing of EU acts, under the second model, its function as an external reviewer has acquired a more peremptory tone.

Against this backdrop the judgment of 21 June 2016 of the FCC in the *OMT* case has to be assessed.¹ It is the latest decision in a judicial saga on the question of whether the policy decision of the European Central Bank (ECB) of 6 September 2012, launching the Eurosystem's Outright Monetary Transactions in the secondary sovereign bond markets (OMT) programme, manifestly exceeded the monetary mandate of the ECB and/or was incompatible with the prohibition of monetary financing public deficits in the Euro Area set forth by Art. 123, para. 1, TFEU. With its judgment of 21 June 2016 the FCC rejected constitutional complaints and an application for *Organstreit* proceedings challenging the OMT programme of the ECB and seeking to enforce the duty of the German *Bundestag* and Federal Government to refrain from implementing this programme.²

¹ German Federal Constitutional Court, judgment of 21 June 2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13.

² As the FCC clarified in its previous jurisprudence, these duties are derived from the responsibility of the German national authorities with respect to European integration. In case of manifest and structurally significant transgressions of powers by European Union organs, they are to not only refrain from any participation and implementation, but to actively pursue the goal to reach compliance with the integration programme. German Federal Constitutional Court, order of 14 January 2014, 2 BvR 2728/13, para. 49.

As an analytical summary is provided for in a press release available on the FCC's website,³ it is sufficient to recall here the following fundamental aspects of the judgment. After declaring the complaints and the *Organstreit* proceedings partially inadmissible to the extent that they *directly* challenged acts of the ECB, the Second Senate of the FCC held that complaints and proceedings directed against the behaviour of German authorities were unfounded.

The Senate based its decision on the CJEU's *Gauweiler* preliminary ruling of 16 June 2015,⁴ which held, as a response to the FCC referral of 2014, that the ECB's programme is covered by the powers of the ECB, as defined by primary law, and does not infringe the principle of proportionality nor Art. 123, para. 1, TFEU. According to the Senate, if interpreted in accordance with the conditions formulated by the CJEU in *Gauweiler*, the OMT programme does not manifestly exceed the competence attributed to the ECB and does not present major constitutional threats to the German *Bundestag*'s right to decide on the budget.

Yet, far from being a submissive agreement with the CJEU ruling, this judgment is the reaffirmation of the latest, less cooperative, approach of the FCC towards the CJEU in the *ultra vires* review procedure. In this regard, two aspects of the judgment deserve attention and will thereby be examined here. First, although the FCC finds that the *Gauweiler* judgment is "acceptable", it rigorously criticizes the legal reasoning followed by the CJEU therein. This first aspect will be analyzed in section III. Secondly, the FCC attributes broad legal effects to *Gauweiler*, but, in so doing, it strengthens its prerogatives towards the CJEU. This apparent paradox will be clarified in section IV. However, a preliminary account of the oscillations in the FCC case law concerning the relationship with the CJEU will be concisely given (section II).

II. For anyone who has followed the saga of "warnings" fired by the FCC at the CJEU since *Solange II*, the solution found in this judgment was, in its essence, foreseeable. It is a very well established strategy of the FCC to reaffirm its ultimate jurisdiction to review whether acts of institutions, as interpreted by the CJEU, remain within the limits of their competences, and at the same time to hold that the solution found by the CJEU constitutes an acceptable reading of the founding Treaties. This strategy serves the purpose of balancing the FCC mandate to protect the fundamental rights of the Basic Law with the principle of openness towards European law, which is also constitutionally protected. This particularly applies to the *ultra vires* review, which, since *Lisbon*, is "only exercised in a manner which is open towards European law".⁵

³ Bundesverfassungsgericht.de.

⁴ Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler*.

⁵ German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, para. 240. See also German Federal Constitutional Court, order of 6 July 2010, 2 BvR 2661/06, para. 58 (*Honeywell*).

Furthermore, in the *OMT* case, a “yes..., but” shaped judgment⁶ seemed likely to be delivered considering the particular risks for the euro that were at issue. Christian Joerges, for example, considered “as unlikely as ever that Karlsruhe will shoulder the responsibility for the destruction of the common currency” and predicted “what we can hence expect is the search for some face-saving compromise formula”.⁷

However, under a “yes..., but” strategy a number of different solutions can be conceived. Furthermore, the *ultra vires* review has been developing through the FCC case law and the principles of relationship with the CJEU designed by the FCC have not been steady over time. After introducing this review in *Maastricht*,⁸ with no clarification on its scope and on the mechanisms to be followed, the FCC recognized in *Lisbon*⁹ that, according to the principle of openness towards European law, it would consider *ultra vires* complaints “only if it is manifest that acts of the European bodies and institutions have taken place outside the transferred competences”. Moreover, “prior to the acceptance of an *ultra vires* act on the part of the European bodies and institutions, the CJEU is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Art. 267 TFEU”. Then, in *Honeywell*,¹⁰ the FCC appeared to conceive its role in an even more cooperative way. First, it construed the notion of “acts manifestly in violation of competences” as encompassing not only acts which obviously transgress the boundaries of conferred competences, but also “highly significant in the structure of competences between the Member State and the Union with regard to the principle of conferral”. To make its friendly intentions clear, the FCC sought to clarify this principle, by borrowing from the CJEU the concept of “sufficiently qualified” violations. Secondly, the FCC expressly attributed ample scope for manoeuvre to the CJEU in refining the EU law “by means of methodically bound case-law”. In other words, *Lisbon* and *Honeywell* show a clear trend towards a restrictive interpretation of the FCC powers under the *ultra vires* review and the establishment of a cooperative paradigm in its relationship with the CJEU.¹¹

The 2014 FCC reference for a preliminary ruling to the CJEU in *OMT* represented a shift in this line of development. Indeed, the Karlsruhe referral was accompanied by a

⁶ See P. LINDSETH, *Meanwhile, in Germany... The OMT Ruling on the German Constitutional Court*, 23 June 2016, eutopialaw.com.

⁷ C. JOERGES, *A Disintegration of European Studies?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 8 et seq., pp. 9-10.

⁸ German Federal Constitutional Court, judgment of 12 October 1993, 2 BvR 2134/92, 2 BvR 2159/92.

⁹ German Federal Constitutional Court, judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.

¹⁰ German Federal Constitutional Court, order of 6 July 2010, cit.

¹¹ See M. PAYANDEH, *Constitutional Review of EU Law After Honeywell: Contextualising the Relationship Between the German Constitutional Court and the EU Court of Justice*, in *Common Market Law Review*, 2011, p. 9 et seq.

careful reading of the TFEU under which the OMT decision was expressly considered as incompatible with EU primary law (in particular with a number of rules of the TFEU of the European System of Central Banks Statute regulating the mandate of the ECB, and with the prohibition on monetary financing of the budget enshrined in Art. 123, para. 2, TFEU). It is true that the FCC left open the possibility for the CJEU of an alternative interpretation of the OMT programme in conformity with the Treaties. But, in so doing, the FCC specified a number of conditions for this interpretation to be acceptable under the German Constitution. In particular, the OMT decision could not undermine the conditionality of assistance programmes and it would only be of a supportive nature with regard to the economic policies of the Union.

Legal scholarship has promptly highlighted this turn in the Court's strategy. M. Goldmann, for example, argued that the FCC "understands the cooperative relationship as a one-way street or at least as an asymmetrical relationship".¹² According to M. Everson, "the FCC deferred to the CJEU, but did so by posing a question to the European Court, which contained its own preemptive answer: should the CJEU not accord with the limitations to the reach of the OMT Decision proposed by the FCC [...] the constitutional justices will assert their own sovereign competence to judge upon the compatibility of European law with the German Constitution".¹³

III. In its judgment of 21 June 2016 the FCC confirmed its recent turn in judicial policy. The first reason justifying such a reading of the judgment can be seen in the FCC's assumption of a role of external control over the CJEU's legal reasoning. The Senate considered the CJEU's findings merely acceptable and harshly criticized "the manner of judicial specification of the Treaty evidenced in the judgment of 16 June 2015".

It is true that already in *Honeywell* the FCC did not miss the opportunity to affirm that a CJEU statement "was reasoned with two arguments whose interrelationship remains unclear".¹⁴ However, in the 2016 *OMT* judgment criticism is conceived on a grand scale. It is a constellation of arguments covering concerns both on the CJEU's overall legal reasoning and on the fact-finding process followed by the CJEU.

As far as the CJEU's legal reasoning is concerned, the objections of the Senate focused mainly on two factors. First, it was affirmed that teleological interpretation, taking into account the objectives of the OMT programme as indicated by the ECB and the

¹² M. GOLDMANN, *Friend or Foe? The General Federal Constitutional Court's Request for a Preliminary Ruling on the ECB's OMT Program*, in *SIDIBlog*, 19 February 2014, www.sidiblog.org.

¹³ M. EVERSON, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht*, in *European Law Review*, 2015, p. 474 et seq., p. 475. However, for a completely different view, under which the FCC 2014 OMT decision is seen as the "surrender of the German Constitutional proviso" see G. BECK, *The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning during the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon*, in *European Public Law*, 2014, p. 539 et seq.

¹⁴ German Federal Constitutional Court, order of 6 July 2010, cit., para. 69.

means employed to achieve those objectives, bore excessively on the CJEU's ruling.¹⁵ Secondly, the Senate maintained that, as the independence granted to the ECB leads to a noticeable reduction of democratic legitimacy of its action, a restrictive interpretation of the ECB's mandate was needed. Yet the CJEU failed to adopt this restrictive approach.¹⁶

However, the FCC's objections also concern "the way the facts of the case were established". The Senate here refers to "the underlying factual assumptions" of the assertion that the OMT programme pursues a monetary policy objective. According to the Senate, the CJEU accepted this assertion "without questioning or at least discussing and individually reviewing the soundness" of those underlying factual assumptions.¹⁷

In brief, by submitting the legal reasoning of the CJEU to close scrutiny, the FCC reaffirms its residual right to ultimately review EU law and the CJEU's decisions under the *ultra vires* procedure. This part of the judgment is worthy of attention also because it seems to be more an exercise in doctrinal review than the "mere" work of a judge (albeit a constitutional one). Furthermore, one can also quite clearly distinguish the legal theories influencing this FCC's scholarly-shaped criticism, which seems to be developed under a theoretical framework made up mainly of elements drawn from legal realism.¹⁸

One could say that, by expressing these "realist" concerns, the FCC served the cause of developing the doctrinal and – although to a lesser extent – also the public debate on legality and legitimacy of ECB decisions aiming at saving the Euro.¹⁹ Yet it must be highlighted that these concerns introduce in the debate not only doubts on the respect by the ECB of the principle of conferral, but also more general doubts on the credibility of the CJEU as a Court guaranteeing the principle of legal certainty. This holds all the more if one focuses on the "fact uncertainty" side of the FCC's concerns, i.e. on the objections expressed by the FCC on the way the facts of the case were established. Indeed, as the history of American legal realism tells us, skepticism about facts has been often ex-

¹⁵ German Federal Constitutional Court, judgment of 21 June 2016, cit., paras 183-186.

¹⁶ *Ivi*, paras 187-189.

¹⁷ *Ivi*, para. 182. The underlying question is the scope of the discretion that the ECB has to be allowed. According to the CJEU this has to be broad "since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments". Thus, according to the CJEU, the judicial review of the underlying facts on which the ECB decision was based, and particularly the analysis of the economic situation of the Euro Area, is limited to assessing if it is vitiated by a manifest error of assessment" (*Gauweiler*, cit., paras 68, 74).

¹⁸ However, because of the interrelatedness of the judgment under review and the OMT order of 14 January 2014, the judgment is partly dependent on economic theory. For a discussion of the 2014 OMT order as a decision "burrowing deeply into economic theory" and the consideration of "the dependence of the FCC upon a grammar of economics" see M. EVERSON, *An Exercise in Legal Honesty*, cit., p. 475.

¹⁹ For a discussion of the deliberative values of judicial review see C.F. ZURN, *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge: Cambridge University Press, 2007.

pressed by scholars who sought to disclose the “mythological” nature of the principle of legal certainty.²⁰

IV. The second mechanism whereby the FCC reinterprets to its own advantage the principles of “openness towards EU law” and “cooperation with the CJEU” under the *ultra vires* review is more insidious because it is concealed under an apparent policy of deference towards the CJEU. Indeed, the effect of strengthening the FCC’s prerogatives is pursued by attaching broader consequences to the *Gauweiler* judgment than those granted to preliminary rulings under EU law.

The FCC enhances the differentiation made by the CJEU between the “policy decision” of 6 September 2012 on the one hand and “the implementation of the programme” on the other. Admittedly, on 6 September 2012, the ECB approved the main parameters of OMT, but the implementation of the announced program was possible only after the adoption of further legal acts, as was acknowledged in *Gauweiler*. The FCC exploitation of the difference made by the CJEU between the ECB’s policy decision and the implementation of the programme leads to the affirmation of the “automatic” *ultra vires* character of any future ECB implementing measure that will not abide by a number of conditions of validity that the FCC draws from *Gauweiler*.

This automatic process unfolds along a three-step argument.

First, according to the FCC the CJEU did not merely come to the conclusion that the ECB decision should not be declared invalid, but “with a view to the proportionality of the OMT programme and the fulfilment of the obligations to state reasons, it specifies additional compelling restrictions that apply to any implementation of the OMT programme and exceed the framework conditions indicated in the policy decisions”.²¹

Secondly, the FCC states that it must be assumed that the Court of Justice considers the conditions it specified to be legally binding (*rechtsverbindliche Kriterien*) and that the violation of those conditions by the ECB entails a lack of competence (*Kompetenzverstoß*). The CJEU thereby considers – the FCC continues – that the implementing acts of the OMT program “must fulfill further conditions in order for the purchase program not to violate Union law”.²²

Thirdly, the FCC concludes that “the OMT programme constitutes an *ultra vires* act if the framework conditions defined by the CJEU are not met”. Any violation of these conditions will entail for the German authorities a number of consequences that the FCC

²⁰ J. FRANCK, *Courts on Trial*, Princeton: Princeton University Press, 1949. See, for a recent discussion, in EU legal doctrine, of fact uncertainty as a “great source of judicial discretion besides rule and conceptual uncertainty”, G. BECK, *The Legal Reasoning of the Court of Justice of the EU*, Oxford: Hart Publishing, 2012, p. 49.

²¹ German Federal Constitutional Court, judgment of 21 June 2016, cit., para. 191.

²² *Ivi*, para. 192.

had already enumerated, in its 2014 OMT decision, as descending from an *ultra vires* act.²³ On the one side, an act of this kind creates a duty not to act of the German *Bundesbank*, which may only participate in the programme implementation if and to the extent to which the preconditions defined by the CJEU are met”.²⁴ On the other side, the Federal Government and the *Bundestag* will be under a duty to monitor closely any implementation of the OMT programme. This compulsory monitoring shall determine not only whether the abovementioned conditions are met, but also “whether there is a specific threat to the federal budget – deriving from the volume and the risk structure of the purchased bonds”.²⁵

Two objections can be made to this part of the FCC’s reasoning. One relates to its first two steps. The FCC’s acknowledgment that *Gauweiler* can have broad legal effects (broader than those normally attached to preliminary rulings of the CJEU acknowledging the validity of EU acts) is not convincing. The FCC seems to consider the *Gauweiler* decision more as an interpretative decision of a Constitutional Court than as a declaration of validity under Art. 264 TFEU. However, preliminary rulings on the validity of an act of the European Union have to be clearly distinguished from preliminary rulings on the interpretation of European law. In particular, in the prevailing view among scholars, two consequences flow from the finding of invalidity of a EU act in preliminary rulings. The CJEU ruling is binding for the national judge who referred to the Court and every other national judge has “sufficient reason to regard that act as void for the purposes of a judgment which it has to give”.²⁶ This, however, does not preclude other national judges from referring to the CJEU other issues concerning the validity of the same act. Albeit rarely, the Court has sometimes pointed out that the finding of invalidity of a EU act imposes to the European institutions the duty to adopt “such measures as might be appropriate”,²⁷ thus establishing a sort of parallelism between the action for annulment and the proceedings for preliminary rulings on the validity of EU acts. In no case, however, a preliminary ruling finding that a certain EU act is valid has been meant to impose to the European institutions a duty to do act. This appears to be perfectly logic since, in order to comply with the ruling, the institution would be required to have regard not to the operative part of it, but to the grounds which underlie the declaration of validity and may be seen as constituting its essential basis. Whereas the CJEU attaches binding effects to the specific “essential” reasons which led to a declaration of invalidity of an EU

²³ German Federal Constitutional Court, order of 14 January 2014, cit., para. 44 *et seq.*

²⁴ German Federal Constitutional Court, judgment of 21 June 2016, cit., para. 205.

²⁵ *Ivi*, para. 208 *et seq.*

²⁶ Court of Justice, judgment of 13 May 1981, case 66/80, *International Chemical Corporation*, para. 13.

²⁷ Court of Justice, judgment of 19 October 1977, cases 124/76 and 20/77, *Moulin et Huileries de Pont-à-Mousson*, para. 28.

act, under Art. 264 TFEU,²⁸ it would be unreasonable to assume that the same principle also determines the effects of declarations of validity delivered under the preliminary ruling proceedings.²⁹ By so doing, the FCC not only seems to assume that the CJEU preliminary rulings do have *erga omnes* effect, but also that this *erga omnes* effect extends to decisions which found that a certain EU act is valid and determines a duty for the European Institution to act in accordance with the parts of the judgment which determine the conditions under which that act has been considered to be valid.

The second point concerns the third step in the FCC's reasoning, summarized above. One could safely assume that the *OMT* judgment can be considered as continuing the recent trend embarked on by the FCC in revising the relationship between the CJEU, on the one side, and German authorities (not only the judiciary) on the other, to the detriment of the first one. Admittedly, the broadening of the *erga omnes* effect of preliminary rulings in *Gauweiler* may prove an illusory strengthening of the CJEU prerogatives. In particular, this will occur if – as it seems from a first reading of the *OMT* judgment – the German national authorities regard themselves as having the legitimate right to ascertain the violation of the criteria provided by the CJEU, and consequently the *ultra vires* character of the implementing act, on their own, that is without giving the CJEU the opportunity to review the implementing act in question. Moreover, respect for these criteria is ultimately guaranteed by the FCC, which would have the power to determine – under the *ultra vires* review – whether the duties of the German authorities are duly fulfilled with regards to the process of implementation of the ruling of the CJEU. It is difficult to accept the FCC argument that this solution flows from the judgment rendered in *Gauweiler*. It is true that the CJEU affirmed that “in accordance with the principle of conferral of powers set out in Art. 5, para. 2 TEU, the ESCB must act within the limits of the powers conferred upon it by primary law and it cannot therefore validly *adopt and implement* a programme which is outside the area assigned to monetary policy by primary law”.³⁰ Yet nothing in the judgment can be interpreted as empowering the national courts to survey the conduct of the ECB with regard to its compliance with the ruling of the CJEU.

Moreover, the solution found by the Senate seems to challenge the principle of the CJEU's exclusive competence of declaring invalidity of EU acts, a competence that FCC Court had hitherto scrupulously acknowledged. This observation prompts the question whether the FCC intended to attach broad *erga omnes* effects to preliminary rulings in general or only to *Gauweiler*. In the first scenario the 2016 *OMT* judgment seriously en-

²⁸ See, for example, Court of Justice, judgment of 12 November 1998, case C-415/96, *Spain v. Commission*, para. 31.

²⁹ However, “essential” reasons may guide the national judges in determining the meaning and the scope of declarations of invalidity under Art. 267 TFEU, to the extent that they shed light on the operative part of CJEU judgments.

³⁰ *Gauweiler*, cit., para. 41, italic added.

croaches upon the competences of the CJEU, as established in the Treaty, because national authorities could assess the *ultra vires* character of any EU implementing measures as long as the CJEU has ruled on the validity of the EU implemented act, in the context of preliminary ruling proceedings.

In the second scenario the 2016 *OMT* judgment is as an exceptional response to exceptional developments in EU law. The ultimate justification of these developments and, in particular, the crisis-led actions of the ECB is preventing the euro from collapsing. But the independence of the ECB generates tensions between its action and the principle of democracy (and other principles governing the EU legal system) and in the FCC's eyes, the CJEU's blessing bestowed on the dynamism shown by the ECB fails to answer this democratic problem. These considerations could weigh in assessing the authority of *OMT* for the future case law. One could be led to believe that this judgment does not establish a general principle of relationship with the CJEU, but a unique solution applicable to the specific circumstances of the case.

Massimo Starita*

* Associate Professor of International Law, University of Palermo, massimo.starita@unipa.it.

