Special Issue
The OMT Decision of the German Federal Constitutional Court

Karlsruhe Not Only Barks, But Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court

By Niels Petersen[*]

A. Context

On 6 September 2012, the European Central Bank (ECB) published a press release on "Technical features of Outright Monetary Transactions."[1] In this press release, the ECB announced that it would purchase bonds of Member States participating in the European Financial Stability Facility (EFSF)/European Stability Mechanism (ESM) program on the secondary sovereign bond markets under certain conditions. Furthermore, it gave notice that there were no ex ante quantitative limits on the size of these outright monetary transactions (OMT). This OMT announcement of the ECB was challenged before the German Constitutional Court. In a 6:2 decision, the Court raised doubts with regards to the compatibility of the actions announced in the OMT press release with the rules governing the mandate of the ECB in the Treaty for the Functioning of the European Union (TFEU), and referred the case to the European Court of Justice (ECJ) for a preliminary ruling.

The relationship between the German Constitutional Court and the European Court of Justice has a long history. Karlsruhe has never fully accepted the absolute supremacy of the ECJ in matters of EU law. Instead, the German judges have always tried to influence the course of the European integration. This started with the *Solange* judgments of the Federal Constitutional Court, which initiated the development of a fundamental rights jurisprudence by the ECJ.[2] In its judgments on the treaties of Maastricht and Lisbon,

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[1] For the text of the press release, see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2728/13, para. 3 (Jan. 14, 2014), http://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html [hereinafter OMT Ruling].

[2] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvL 52/71, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271 (May 29, 1974); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 197/83, 73 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 339 (Oct. 22, 1986).

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Karlsruhe tried to impose limits on the European integration project.[3] In many respects, the OMT decision of the German Constitutional Court is a continuation of these previous developments.[4] Karlsruhe claimed to have jurisdiction to review the actions of an EU institution, and the line of reasoning follows, to a considerable extent, the path of the established jurisprudence.

In two dimensions, however, the decision is revolutionary. First, the Court did not only bark, but it actually bit.[5] For the first time, it not only corrected the implementation of European norms by domestic institutions, but it also found that an EU institution, the European Central Bank, transgressed its mandate by announcing the OMT policy. Second, Karlsruhe initiated a preliminary reference procedure before the European Court of Justice for the first time ever, and implicitly accepted that Luxemburg will have the ultimate word on whether or not the OMT policy violates EU primary law.

At its core, the judgment rests on three considerations. First, the Court returned to its *ultra vires* doctrine, which was initially developed in the *Maastricht* judgment. It argued that German citizens have standing before the German Constitutional Court if an EU institution acts outside its competencies. Second, it held that such a potential *ultra vires* action imposed obligations on all German institutions not to follow the OMT policy and to take active steps to challenge it. Finally, the Court explained why it considered the OMT announcement to be inconsistent with the TFEU, and deemed it necessary to refer the case to the ECJ.

B. The Right to Elect a Representative and the *Ultra Vires* Requirement

The basis for the Court's ability to review decisions of EU institutions is the right of every German to elect his or her representatives, as guaranteed by Article 38 of the German Constitution. In the Maastricht judgment, the Court established that this right would be violated if an EU institution acted outside of its mandate.[6] In such a case, the exercise of sovereign power by the EU would not be covered by the ratification of the EU treaties by the German parliament, and thus would lack democratic legitimacy.

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[3] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2134/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (Oct. 12, 1993) [hereinafter Maastricht]; Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvE 2/08, 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 267 (June 30, 2009).

[4] *See* OMT Ruling.

[5] *See* Joseph H.H. Weiler, *The "Lisbon Urteil" and the Fast Food Culture*, 20 EUR. J. INT'L L. 505, 505 (2009) (stating that "in its internationally-related case law, the German Constitutional Court has a well-earned reputation of the Dog that Barks but does not Bite").

[6] Maastricht at paras. 187–88.

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The concept of *ultra vires* review is not without problems. If every action of an EU institution could be reviewed by the German Constitutional Court regarding its consistency with EU primary law, the Court would open the floodgates for an *actio popularis*. To avoid this consequence, the Court qualified the *ultra vires* requirement in its subsequent jurisprudence. The most important decision in this respect is the *Honeywell* decision, in which the Court was asked to review whether the European Court of Justice had transgressed its competencies in its *Mangold* judgment.[7] The Court held that a violation of the EU treaties could only be considered as *ultra vires* if it was manifest and of structural significance.[8]

In the OMT decision, the Court held that these conditions were fulfilled.[9] The central consideration seemed to be that the OMT measures would violate the budgetary sovereignty of the German Bundestag and lead to a financial redistribution among the Member States.[10] One may criticize this argument, with good reason. However, it is consistent with the previous jurisprudence of the Court. In particular, in its judgment on the European Financial Stability Facility, the Constitutional Court held that the German parliament could not transfer unlimited budgetary responsibilities to the European level.[11] Because the OMT policy implies significant financial risks for the German budget, it requires a sovereign decision of the German parliament according to this conception. This decision can be the ratification of the TFEU—but only if the OMT policy is indeed covered by the treaty.

C. The Positive Duty to Act of the German Government

The German Constitutional Court cannot declare an action of an EU institution immediately void. Instead, it has to address domestic institutions. The Court thus explained that the inconsistency of the OMT policy with EU primary law would have immediate consequences for German institutions. For one, the German Central Bank would be obliged to refrain from buying bonds of Member States under the OMT framework.[12] Furthermore, the

[7] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286 (July 6, 2010).

[8] *Id.* at 304.

[9] *See* OMT Ruling at paras. 39–43.

[10] *Id.* at paras. 41, 43.

[11] Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1485/10, 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 124, paras. 179–80 (Sept. 7, 2011) [hereinafter European Financial Stability Facility].

[12] *See* OMT Ruling at para. 45.

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German government would be obliged to take measures to challenge the OMT policy.[13] However, the Court did not specify the nature of these measures.

In her dissenting opinion, Judge Lübbe-Wolff pointed out that this lack of specification was inconsistent with the Court's previous jurisprudence.[14] In the EFSF judgment, the Court had demanded that a positive action of the German government and the German parliament could only be stipulated if such an action was explicitly circumscribed by the German Constitution.[15] However, the German Constitution not only lacks an explicit provision requiring a positive action—the required action is not even specified in the judgment. If the OMT policy were considered to be *ultra vires*, the Court would require the German government to take measures to effectuate a change of the policy.[16] As Judge Lübbe-Wolff pointed out, the spectrum of possible reactions could range from a mere communication of discontent to the exit of the monetary union.[17] In this respect, the OMT decision introduces a significant change to the jurisprudence, to say the least.

D. The Validity of the OMT Policy Under EU Law

Finally, the Court reviewed whether the OMT policy was consistent with the TFEU. It held that the OMT policy violated the treaty in several respects. According to Article 127 (1) TFEU, the primary objective of the European System of Central Banks (ESCB) is the maintenance of price stability. Furthermore, the ESCB has the competence to "support the general economic policies in the Union." The German Constitutional Court stated that the OMT announcement could not be qualified as monetary policy.[18] In essence, it relied on the *Pringle* judgment of the ECJ.[19] In *Pringle*, the ECJ had qualified the ESM treaty as an economic policy measure and expressly rejected the notion that it should be regarded as a monetary policy instrument.[20] Because the objectives of the ESM treaty and the OMT announcement are, in principle, the same, Karlsruhe held that the latter could only be regarded as an economic policy measure.[21] Considering the precedent in *Pringle*, it is

[13] *See id*. at para. 49.

[14] *Id.* at paras. 17–19.

[15] *See* European Financial Stability Facility at para. 176.

[16] *See* OMT Ruling at para. 49.

[17] *Id.* at para. 20.

[18] *Id.* at paras. 63–79.

[19] *See* Pringle v. Ireland, CJEU Case C-370/12 (Nov. 27 2012), http://curia.europa.eu/juris/recherche.jsf?language=en.

[20] *Id.* at para. 56.

[21] *See* OMT Ruling at para. 64.

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unlikely that Luxemburg will come to a different evaluation in the preliminary reference procedure.

However, the ECJ might disagree with Karlsruhe regarding whether the OMT announcement can be qualified as a supportive measure of the Union's economic policy. The German Constitutional Court advanced two arguments for why it did not consider the OMT policy to be a mere auxiliary instrument.[22] On the one hand, it argued that the lack of any limitation regarding the size of the OMT program could circumvent the express limitation for financial support of Member States under the EFSF/ESM.[23] On the other hand, the Court highlighted that the implementation of the OMT policy required an independent judgment of the ECB.[24] In the Court's view, this discretion prevented the OMT measures from being qualified as merely supportive.[25] Both arguments leave room for disagreement, however, and it is not unlikely that the ECJ will come to a different evaluation. The German Constitutional Court identified room for a potential compromise in suggesting that it could accept the supportive nature of the OMT policy if the total volume of the program was expressly limited.[26] However, Karlsruhe's proposition has little appeal because an express limitation would seriously impair the effectiveness of the OMT policy.

Finally, the Constitutional Court found that the OMT policy violated the prohibition to purchase bonds directly from the Member States, which is contained in Article 123 (1) TFEU.[27] It suggested a functional interpretation of the provision—an interpretation that captured not only direct purchases from the Member States, but also any measures that could contradict the purpose of Article 123 (1) TFEU. The Court argued that the main purpose of the provision was the prohibition of a monetary financing of national budgets.[28] The Court then advanced several explanations as to why the OMT policy would violate such a functional understanding of Article 123 (1) TFEU. It will be interesting to see to what extent the ECJ will share this functional interpretation. One of the main concerns of the German Constitutional Court seemed to be that the prohibition contained in Article 123 (1) TFEU could be circumvented by certain national central banks purchasing bonds on the secondary market from straw men of the respective government.[29] A possible compromise

[22] *Id.* at paras. 80–83.

[23] *Id.* at para. 81.

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

[25] *Id.*

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

[27] *Id.* at paras. 84–94.

[28] *Id.* at para. 85.

[29] This was suggested by Judge Peter Michael Huber at a panel discussion at a conference of young public law scholars in Graz on 13 February 2014.

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might thus be the establishment of certain express conditions under which bonds can be purchased on the secondary market in order to ease Karlsruhe's concerns.[30]

D. Conclusion

The main line of argumentation of the OMT decision is consistent with the Constitutional Court's previous jurisprudence in matters of EU integration.[31] However, the Court avoids to address a central concern—the question of legitimacy. Is the Constitutional Court the right institution to determine the accuracy of monetary and economic policies of such enormous impact? Both dissenting judges argued that the responsibility should rather lie with the democratically elected institutions. In particular, Judge Gerhardt pointed out that the German government could have challenged the OMT policy by exercising its political influence on the European level.[32] According to Gerhardt, the German government is accountable to the German electorate for its inaction. If the German electorate considered the OMT policy to be erroneous, it could punish the government in subsequent regional or national elections. Consequently, Gerhardt argued that it was inconsistent to force a reaction of the German government by legal means in the name of democracy if the question could be left to the democratic process.[33]

Whatever one might think of the quality of the reasoning in the OMT decision, strategically it was a bold move. Karlsruhe has always been a prominent actor on the European stage. However, to avoid the impression of the dog that barks but does not bite, the Court had to find ways not only to correct the national legislature, but also to review the conduct of European institutions. Going it alone would have overstrained the Court's legitimacy. The German Constitutional Court is a strong court, but it is not strong enough to take on the responsibility for such an important decision for the course of the economic policy by itself. For this reason, it seeks the cooperation of the European Court of Justice.

Consequently, it is unlikely that Karlsruhe will disregard the ruling of the ECJ even if the latter should back the ECB. The language of the judgment expresses respect for Luxemburg's opinion.[34] This impression was confirmed by Judge Huber, the principal author of the decision, during a panel discussion at a conference for young public law

[30] *See* OMT Ruling at 99–100.

[31] *But see* Karsten Schneider, *Der Ultra-vires-Maßstab im Außenverfassungsrecht*, 139 ARCHIV DES ÖFFENTLICHEN RECHTS (forthcoming 2014) (arguing that the question of whether an action of an EU institution is *ultra vires* is an exclusive question of German Constitutional law, which does not depend on the interpretation of the EU primary law by the European Court of Justice).

[32] *See* OMT Ruling at para. 23.

[33] *Id.* at para. 11.

[34] *Id.* at paras. 55, 58.

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scholars in Graz on 13 February 2014. Huber acknowledged that it would be difficult for the Court to disregard the opinion of the ECJ. The Court would only consider this option if the ECJ held the preliminary reference to be inadmissible or in the unlikely case that the reasoning was irrational or incomprehensible. In any case, it will be interesting to observe how the ECJ will react to Karlsruhe's cooperation proposition.

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