Special Issue
The OMT Decision of the German Federal Constitutional Court

Questions and Answers: Karlsruhe's Referral for a Preliminary Ruling to the Court of Justice of the European Union

*By Karsten Schneider**

A. Introduction

In the environment of ongoing endeavors to "rescue" the Euro,[1] the Second Senate of the Federal Constitutional Court (FCC) is meanwhile dealing with several constitutional complaints[2] challenging matters that could be described as "the future of the German Bundesbank" and "the present and the past of the German Federal Government and the German Bundestag." Or, to be more specific, the complainants currently challenge the prospective participation of the German Bundesbank in possible future implementations of the so called "OMT Framework" of 6 September 2012.[3] They also argue that the German

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[1] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 987/10, 129 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 124 (Sept. 7, 2011), http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710.html [hereinafter "Greece bailout Case"]; Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 987/10, 125 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 385 (May 7, 2010), http://www.bverfg.de/entscheidungen/rs20100507_2bvr098710.html (reporting a temporary injunction in the Greece bailout case); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1099/10, 126 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 158 (June 9, 2010), http://www.bverfg.de/entscheidungen/rs20100609_2bvr109910.html (reporting a second temporary injunction in the Greece bailout case); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 8/11, 129 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 284 (Oct. 27, 2011), http://www.bverfg.de/entscheidungen/es20111027_2bve000811.html (reporting a temporary injunction in the European Financial Stability Facility Case); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 8/11, 130 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 318 (Feb. 28, 2012), http://www.bverfg.de/entscheidungen/es20120228_2bve000811.html; Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 4/11, 131 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 152 (June 19, 2012), http://www.bverfg.de/entscheidungen/es20120619_2bve000411.html (reporting the Bundestag Participation ESM Treaty Case).

[2] The decision relates to the constitutional complaints of more than 11,000 complainants as well as to an application for a ruling in Organstreit proceedings (proceedings relating to disputes between constitutional organs).

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Federal Government and the German Bundestag "failed to act" regarding this OMT framework.

The Court's ruling on 14 January 2014[4] has cleared the path for the admissibility of such complaints through use of the ultra-vires pattern.[5] The ultra-vires pattern is the German Constitution's generic exception handling mechanism that includes particular powers of review to examine whether acts of European institutions and agencies are based on "manifest transgressions of powers."[6] The Court held that the mere existence of an ultra-vires act creates an obligation on German authorities to refrain from implementing it and a duty to challenge it.[7] These duties can, the Senate points out, be enforced before the Constitutional Court at least insofar as they refer to constitutional organs.[8]

Longest-serving Justice Lübbe-Wolff and Justice Gerhardt both dissented and delivered separate opinions. They deny support—either in the text of the constitution or in the case-law interpreting it—yielding the kind of duties and obligations the Second Senate holds in this case. The dissenters argued that, in an effort to secure the rule of law against (alleged) manifest transgressions of power, the Senate had exceeded its judicial competence.[9]

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[3] *See Press Release, 6 September 2012: Technical Features of Outright Monetary Transactions*, EUROPEAN CENTRAL BANK (Sept. 6, 2012), http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html; EUROPEAN CENTRAL BANK, MONTHLY BULLETIN SEPTEMBER 7–12 (2012), *available at* http://www.ecb.europa.eu/pub/pdf/mobu/mb201209en.pdf.

[4] Bundesverfassungsgericht [BVerfGE – Federal Constitutional Court], Case No. 2 BvR 2728/13, (Jan. 14, 2014), http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813.html [hereinafter "OMT Case"].

[5] *See* Udo Di Fabio, *Geleitwort*, *in* DER VERTRAG VON LISSABON VOR DEM BUNDESVERFASSUNGSGERICHT: DOKUMENTATION DES VERFAHRENS VII (Karen Kaiser ed. 2013); Peter M. Huber, *Das Verständnis des Bundesverfassungsgerichts vom Kompetenzgefüge zwischen der EU und den Mitgliedstaaten. Konsequenzen für die Bewältigung der Finanzkrise*, *in* EUROPA ALS RECHTSGEMEINSCHAFT—WÄHRUNGSUNION UND SCHULDENKRISE 229 (Thomas M. J. Möllers & Franz-Christoph Zeitler eds., 2013); Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 339 (Armin von Bogdandy & Jürgen Bast eds., 2010); Karsten Schneider, *Der Ultra-vires-Maßstab des Außenverfassungsrechts*, ARCHIV DES ÖFFENTLICHEN RECHTS (forthcoming 2014).

[6] OMT Case, Case No. 2 BvR 2728/13 at para. 22.

[7] *See id.* at paras. 44–49.

[8] *See id.* at paras. 50–54.

[9] *See id.* at paras. 1, 13, 16 (Lübbe-Wolff, dissenting); *id.*at paras. 5, 7, 14 (Gerhardt, dissenting).

B. The Two Layers of the Ruling—Will it Blend?

The Second Senate's ruling created two layers of assumptions. First, the ultra-vires pattern of the German Constitution must create concrete obligations of German authorities that (this is the crucial point) *can be asserted through constitutional complaints*[10] if there was an ultra-vires act.[11] Second, the existence of an ultra-vires act would have to be assumed if the OMT framework violated the European Central Bank's monetary policy mandate or the prohibition of monetary financing of the budget.[12]

The relevance of layer two (the presumption of an ultra-vires act) to the decision depends entirely on the correctness of layer one (the presumed shape of duties and obligations emerging from ultra-vires patterns) that is contested by the two dissenting Justices. In fact both dissenters solely discuss layer one. The Second Senate majority, however, does not carefully assess the correctness of layer one. Instead, the Court describes the full-fledged concept—the "procedural element" of the ultra-vires pattern—in a single laconic paragraph:

> Vis-à-vis manifest and structurally significant transgressions of the mandate by the European institutions, this safeguard against an erosion of the legislature's substantial scope of action consists . . . also of a *procedural element*. In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right, deriving from Art. 38 sec. 1 sentence 1 GG, to have a transfer of sovereign powers only take place in the ways envisaged in Art. 23 sec. 1 sentences 2 and 3, Art. 79 sec. 2 GG. The democratic decision-making process, which these regulations guarantee . . . , is undermined when there is a unilateral usurpation of powers by institutions and other agencies of the European Union. A citizen can therefore demand that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be

[10] *See id.* at para. 50 (noting that the obligations can also be a subject of Organstreit proceedings).

[11] *See id.* at paras. 44–54.

[12] *See id.* at paras. 36–43 and at paras. 55–100.

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> restored, and that they decide which options they want to use to pursue this goal.[13]

While the ruling substantially expands on layer two[14] and basically offers deafening silence on layer one,[15] the two dissenting opinions present the issues the other way around.

I. Layer One: The Ultra-Vires Pattern (And, Finally: Karlsruhe's First Referral for a Preliminary Ruling)

The majority's opinion presumes that the ultra-vires pattern of the German Constitution would have to create concrete obligations on German authorities that can be asserted through constitutional complaints and Organstreit proceedings if there was an ultra-vires act.[16]

1. The Ultra-Vires Pattern: It is Not a Rule

The single most important problem with the ultra-vires pattern is that it is not a rule. There is no particular article in the German Constitution nor is there a single leading case containing "the" ultra-vires pattern in a nutshell. The ultra-vires pattern is instead a "brownfield"[17] of intermingled legal problems emerging from multi-layered interactions between domestic constitutional law and international processes of integration, including the process of European integration.[18]

The Second Senate has plowed through this brownfield since the Eurocontrol case of 1981,[19] followed by the Pershing-2 case of 1984[20] and the Out-of-Area case of 1994.[21] The

[13] *Id.* at para. 53 (emphasis added).

[14] *See id.* at paras. 36–43 and at paras. 55–100.

[15] *See id.* at paras. 44–54.

[16] *See id.*

[17] *See* Part. I.2.

[18] *See* Schneider, *supra* note 5.

[19] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1107/77, 58 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (June 23, 1981), http://www.zaoerv.de/42_1982/42_1982_3_b_596_631.pdf.

[20] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 13/83, 68 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (Dec. 18, 1984).

[21] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 3/92, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286 (July 12, 1994).

NATO-Strategic-Concept case of 2001[22] and Tornado case of 2007[23] consolidated several aspects of the ultra-vires pattern in the context of international law.

With regard to the process of European integration, the Second Senate has specialized the generic ultra-vires pattern as part of the Maastricht[24], Lisbon,[25] and Honeywell[26] cases in some respects since 1993. The OMT decision outlines the FCC's specialized ultra-vires framework as "Jurisprudence of the Federal Constitutional Court."[27] The Senate reaffirms the core of the Maastricht line of reasoning even quoting three full paragraphs,[28] corroborates Lisbon[29] at length (interpretive approaches could sense some strong signals towards academic critics in Germany) and, of course, relies on Honeywell.[30]

This consolidated ultra-vires framework, however, had not been implemented ever before to create obligations on German authorities *that can be asserted with constitutional complaints*.[31] Indeed the idea of duties and obligations, in particular the so-called responsibility with respect to integration (dauerhafte Integrationsverantwortung) was developed and expanded in Lisbon,[32] and is quite well-known. Constitutional complaints,

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[22] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 6/99, 104 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 151 (Nov. 22, 2001), http://www.bverfg.de/entscheidungen/es20011122_2bve000699.html.

[23] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/07, 118 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 244 (July 3, 2007), http://www.bverfg.de/entscheidungen/es20070703_2bve000207.html.

[24] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (Oct. 12, 1993).

[25] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (June 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html; *see* DER VERTRAG VON LISSABON VOR DEM BUNDESVERFASSUNGSGERICHT—DOKUMENTATION DES VERFAHRENS (Karen Kaiser ed. 2013).

[26] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286 (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html.

[27] OMT Case, Case No. 2 BvR 2728/13 at paras. 17–32.

[28] *See id.* at paras. 17, 21, and 32.

[29] *See id.* at paras. 26, 27, 29, and 31.

[30] *See id.* at paras. 24, 25, and 26.

[31] The new obligations can also be a subject of Organstreit proceedings. *See id.* at paras. 50 and 54.

[32] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267, at para. 245 (June 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html; *see* Heinrich Amadeus Wolff, *Das*

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however, had never before been admissible without (at least) some genuine link to the individual claimant.

Therefore the path of ultra-vires review seems more than questionable in the first place. One other obvious obstacle was created in the Greece bailout case.[33] In this judgment from 7 September 2011, the Second Senate treated an identical ultra-vires objection against nearly identical European Central Bank's (ECB) rescue measures as inadmissible.[34]

But regardless of this leading case, the question at hand has a much more fundamental character. The German Constitutional Court has never before treated a so-called "principal ultra-vires objection" ("prinzipale ultra-vires Rüge") as admissible. The idea of such a principal ultra-vires objection supposes that the FCC generally watches over European acts transgressing the framework of authorization established by the German Acts of assent to the European Union Treaties without the need for sufficient substantiation that the complainants are presently and directly affected by a violation of a fundamental right or similar right. The Honeywell Case of 6 July 2010, the first ultra-vires review by the German Constitutional Court, does not answer the question whether principal ultra-vires reviews would be admissible.[35] In the Honeywell case, other fundamental rights were directly affected, so the decisions did not depend on this question.[36]

2. A New "Procedural Element": Greenfields are often Brownfields in Disguise.

OMT's new "procedural element"[37] comes without normative derivation and without distinction against the Greece bailout ruling.[38] Indeed the Court's reasoning boils down to the assertion:

> The democratic decision-making process . . . is undermined when there is a unilateral usurpation of

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Bundesverfassungsgericht als Hüter der Integrationsverantwortung, *in* INTEGRATIONSVERANTWORTUNG 151, 154 (Matthias Pechstein ed. 2012).

[33] Greece Bailout Case, Case No. 2 BvR 987/10.

[34] *See id.* at para. 113; ECB MONTHLY BULLETIN, *supra* note 3 at 38–43.

[35] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286 (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html.

[36] *See id.* The complainant in the Honeywell Case asserted a violation of its rights under Article 2.1 and Article 12.1 in conjunction with Article 20.3 and Article 101.1 sentence 2 of the Basic Law. *Id.* at para. 39.

[37] OMT Case, Case No. 2 BvR 2728/13 at para. 53.

[38] *See* Greece Bailout Case, Case No. 2 BvR 987/10 at para. 113 and para. 118.

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> powers by . . . the European Union. A citizen can therefore demand that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored.[39]

Compared against Karlsruhe's best practice, this argument is as evidently elementary as it is foggy. Considering that the ultra-vires pattern in general (let alone its procedural element) is a legal system-wide concern, it is not possible to implement it in an ad-hoc way, for example with some aspects of the current activities of the ECB. Instead status modifications with regard to the ultra-vires pattern always affect the German Constitution's generic exception handling mechanism. The examination of whether acts of European institutions and agencies are based on "manifest transgressions of powers" is affected as well as the German Constitution's responses to such "exceptions."

With good reason the Second Senate's review of Maastricht,[40] Lisbon,[41] and Honeywell[42] is a history of carefully considering when and how to handle exceptions. The ultra-vires pattern is not a minute annex of some peculiar or special cases but a high level strategy. With a high level strategy things just become easier. Focusing exception-handling to just a few circumstances and clear concepts makes it easy to communicate (to the ECJ) and easy to apply consistently (for the FCC). It goes without saying that the Second Senate knows that the (new) formula of "unilateral usurpation of powers"[43] is meaningless[44] in the general context of exception handling and can in any case not be sufficiently operationalized.[45]

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[39] OMT Case, Case No. 2 BvR 2728/13 at para. 53.

[40] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (Oct. 12, 1993), at para. 106.

[41] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (June 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html, at paras. 240–41.

[42] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286 (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html, at paras. 53–66.

[43] OMT Case, Case No. 2 BvR 2728/13 at para. 53.

[44] It is even hard to see how "unilateral usurpation of powers" is not just another name for "acting ultra-vires." The FCC uses this expression considering the ECB's concept to be "meaningless and in any case not sufficiently workable." *See id.* at para. 98.

[45] The Second Senate has never before unanimously decided on the question of whether acts of European institutions and agencies are based on "manifest transgressions of powers". Even *Honeywell* was handed down with 6-2 votes (no ultra-vires act). Justice Landau delivered a separate opinion pointing out: "The Senate majority places excessive requirements on the finding of an ultra-vires act on the part of the Community or Union bodies

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In particular, Justice Lübbe-Wolff criticizes the Senate's foamy foundation as an "airy basis."[46] For now, the new "procedural element" of the ultra-vires pattern is by all means a rough draft. The dissenting Justices do not believe in the possibility of providing a clear and applicable example of this "procedural element."[47] The Senate should, at least, clarify this position.

Professionals in property construction are acquainted with the terms "Greenfield Project" and "Brownfield Project." The distinction is what kind of land the construction is located upon. A Greenfield Project relates to constructions being done on brand new, untouched land. A Brownfield Project means construction is being done on redeveloped, touched land, and complicated requirements have to be considered carefully. Even though one might assume, that adding some "procedural elements" to the ultra-vires pattern should be an easy Greenfield Project without pre-existing requirements, in the light of the previous ultra-vires cases this is against all odds. Greenfields are often Brownfields in disguise.

Requirements that the Senate will have to comply with, inter alia, stem from Article 23.1[48] and Article 59.2[49] of the Basic Law. Therefore in the final judgment the Second Senate will need to carefully consider the Deutsche Bundestag's responsibility with regard to integration (Integrationsverantwortung), which is threatened by ultra-vires pattern based

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by the Federal Constitutional Court, and in this respect deviates from the Senate's judgment on the Treaty of Lisbon without any convincing reasons. It wrongly denies the existence of a transgression of competence on the part of the Court of Justice in the case of Mangold." BVerfG, Case No. 2 BvR 2661/06 at para. 95 (Landau, dissenting).

[46] OMT Case, Case No. 2 BvR 2728/13 at para. 13 (Lübbe-Wolff, dissenting).

[47] *See id.* at para. 17 (Lübbe-Wolff, dissenting); *id*. at para. 7 (Gerhardt, dissenting).

[48] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], Dec. 25, 1992, BGBI. I at 2086, art. 23.1 (Ger.). "With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to sections (2) and (3) of Article 79." *Id.*

[49] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBI. I, art. 59.2 (Ger.). "Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis." *Id.*

FCC's micro-managing of the European process of Integration, as well as the constitutionally protected viability of the European Union's legal order.[50]

3. Referral for a Preliminary Ruling: Implementing Lisbon *and* Honeywell

Although the FCC will face a serious difficulty when clarifying the new "procedural element," many aspects of the ultra-vires pattern have already been settled, in particular in Lisbon[51] and Honeywell.[52] Among these requirements are the constitutional rules of procedure with regard to the European Court of Justice (ECJ). The standard rules of procedure laid down in Honeywell[53] require cooperation with the ECJ prior to the acceptance of ultra-vires acts. The ECJ is "to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU, insofar as it has not yet clarified the questions which have arisen."[54]

Therefore, Karlsruhe's referral for a preliminary ruling to the ECJ from 14 January 2014 comes as no real surprise, although some German Newspapers were caught flat-footed.[55] Disregarding whether the first layer of the ruling is correct (the question whether there is a "procedural element" in the ultra-vires pattern), it has been very clear since the Lisbon and Honeywell decisions that there would be referrals "prior to the acceptance of an ultra-vires act" by the Second Senate.[56] Accepting the procedural element (layer one) and considering the OMT framework incompatible with primary law (layer two), the Second Senate's referral is logically consistent.[57] Implementing the Honeywell formula,[58] the Second Senate

[50] *See* Greece Bailout Case, Case No. 2 BvR 987/10 at para. 109; Schneider, *supra* note 5.

[51] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, 123 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 267 (June 30, 2009), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html, at paras. 240–41.

[52] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286 (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html, at paras. 53–66.

[53] *See id.*

[54] *Id.* at 1.b (Leitsatz), para. 60.

[55] *See, e.g.*, *Richter Hasenherz*, FRANKFURTER ALLGEMEINE SONNTAGSZEITUNG, Feb. 9, 2014, at 20 ("Justice Milksop").

[56] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286 (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html, at paras. 53–66.

[57] An obiter dictum in the OMT Case expands on the Second Senate's options concerning the identity review (Identitätsrüge). OMT Case, Case No. 2 BvR 987/10 at paras. 102–03.

referred several questions to the Court of Justice of the European Union for a preliminary ruling. The two subjects of the questions are whether the OMT decision is compatible with the primary law of the European Union and questions on the interpretation of Articles 119, 123, and 127 TFEU (in combination with the Statute of the European System of Central Banks and of the European Central Bank).

II. Layer Two: The OMT Framework

The existence of an ultra-vires act would have to be assumed if the OMT framework violated the European Central Bank's monetary policy mandate or the prohibition of monetary financing of the budget.[59] Subject to the interpretation by the ECJ, the FCC did not believe the OMT framework to be covered by the ECB mandate[60] and believed it to be incompatible with the prohibition of monetary financing of the budget enshrined in Article 123 TFEU.[61]

1. The OMT Framework is Also Not a Rule

The OMT framework is an interesting subject matter. "OMT" is a three letter acronym for Outright Monetary Transactions. "Outright Monetary Transactions" refer to the Eurosystem's outright transactions in secondary sovereign bond markets (e.g., buying sovereign bonds held by private investors such as banks). The OMT framework is by no means an outright transaction. Instead, the OMT framework is what the ECB's "decisions on a number of technical features regarding the Eurosystems's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy" are known as.[62]

No Outright Monetary Transactions have been conducted yet.[63] Even so the OMT framework envisages that Outright Monetary Transactions (OMTs) will be conducted

[58] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 286 (July 6, 2010), http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106.html, at para. 60.

[59] *See* OMT Case, Case No. 2 BvR 987/10 at paras. 55–100.

[60] *See id.* at paras. 56–83.

[61] *See id.* at paras. 84–98.

[62] *See id.* at para. 3.

[63] *See id.* at para. 4.

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"within"[64] the published OMT Framework.[65] In other words, although there is an OMT framework, there are no OMTs yet. But where there is smoke, there is fire, right?

On the contrary, the FCC struggles with the fact that the OMT framework only contains decisions on what is *not* going to happen, rather than announcing anything that will happen with regard to the secondary sovereign bond markets. The information published so far, everything the OMT framework consists of, is negative, a kind of "no." There is no announcement of conducting OMTs, but:

> - There will be no OMTs without an EFSF/ESM program for the particular country (macroeconomic adjustment program or precautionary program);[66]
> - there will be no OMTs without the possibility of EFSF/ESM primary market purchases;[67]
> - there will be no OMTs without compliance with the program;[68]
> - there will be no OMTs without a thorough assessment and acting in accordance with the ECB's monetary policy mandate;[69]
> - there will be no OMTs for past cases of EFSF/ESM programs, unless the countries will be regaining bond market access;[70]
> - there will be (in general) no OMTs with regard to sovereign bonds with maturity of more than three years;[71]
> - there will be no OMTs with ex ante quantitative limits set on the size of OMTs;[72]

[64] *See id*. at para. 3 "These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework."

[65] *See id.*

[66] *See id.* ("Conditionality").

[67] *See id*.

[68] *See id*.

[69] *See id*.

[70] *See id*. ("Coverage").

[71] *See id*.

[72] *See id*.

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> - there will be no OMTs without pari passu treatment (i.e. the ECB accepting the same treatment as private or other creditors with respect to bonds issued by euro area countries);[73]
> - there will be no OMTs without sterilization (i.e. the "extra money in the market" will be absorbed);[74]
> - there will be no OMTs without transparency (market value, average duration and breakdown by country).[75]

From an economic point of view, the OMT Framework's announcement not to engage in some types of OMTs is a brilliant little piece of communication. The ECB is sending a message to some market players, who might be tempted to speculate against certain member states ("bully some weak member states"). The OMT message to the would-be bully is: "We are watching you. Women and children will *not* be harmed," and in subtext: "Bullies might be harmed."

The constitutional viewpoint is far more complicated, because how could the ECB's OMT framework announcement *not* to do something be some kind of a problem at all? After all the FCC does not consider the OMT framework to be covered by the ECB mandate[76] and believes it to be incompatible with the prohibition of monetary financing of the budget enshrined in Article 123 TFEU.[77]

A closer look at the legal aspects of the announcement recommends considering Sir Arthur Conan Doyle's insight "When you have eliminated the impossible, whatever remains, however improbable, must be the truth." So what exactly remains, if the ECB eliminates some types of OMTs? And why could the remains be unlawful?

It turns out, it remains possible, that there will be no OMTs at all. Under normal conditions of German Constitutional law, the assessment of the OMT framework could be finished.[78] The OMT framework can obviously be applied without raising any constitutional concerns.

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[73] *See id*. ("Creditor treatment").

[74] *See id*. ("Sterilization").

[75] *See id*. ("Transparency").

[76] *See id*. at paras. 56–83.

[77] *See id*. at paras. 84–98.

[78] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 220/51, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 97, 102–03 (Dec. 19, 1951); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 874/77, 58 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 81, 104–05 (July 1, 1981); Bundesverfassungsgericht [BVerfG – Federal

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However, the FCC's questions referred to the ECJ for a preliminary ruling do not take this possibility into account. On the contrary, they imply information that the OMT framework does not contain. The FCC's first question, for example, asks:

> Does a transgression of the European Central Bank's mandate follow in particular from the ***fact*** that the Decision of the Governing Council of the European Central Bank of 6 September 2012 . . .
> bb) ***envisages the purchase*** of government bonds only of selected Member States (selectivity)?[79]

The question can be understood in a meaningful way, but it nevertheless asserts information the OMT framework simply does not imply. As the OMT framework does *not* envisage to purchase government bonds. This language may seem unimportant, but the FCC wants to build a case against the OMT framework.

The FCC's uphill battle against the OMT framework's announcements of what is *not* going to happen results in even more peculiar questions. The structure of questions 1b) is worth a closer look, too:

> Is the ***compatibility*** with Article 123 of the Treaty on the Functioning of the European Union ***precluded*** in particular **by the fact** that the Decision of the Governing Council of the European Central Bank of 6 September 2012
> aa) ***does not envisage*** quantitative limits . . . ?
> bb) ***does not envisage*** a certain time lag . . . ?
> cc) ***allows that*** . . . ?
> dd) ***contains no*** specific requirements for . . . ?
> ee) ***envisages*** equal treatment . . . ?[80]

Except for question ee), which repeats the "FCC asserts wrong information" mistake mentioned above, the four other questions are particularly interesting. The Second Senate considers the OMT framework to be incompatible with Article 123 TFEU, because some information is *not* contained in the OMT framework. The ECJ might consider the question:

Constitutional Court], Case No. 1 BvR 700/83, 68 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 376, 379–80 (Jan. 8, 1985).

[79] OMT Case, Case No. 2 BvR 2728/13 at II.1.a.bb (emphasis added).

[80] *Id.* at II.1.b (emphasis added).

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How can the announcement of *not* doing something be unlawful just because something else is *not* forbidden as well? Could the announcement to refrain from drinking and driving really be unlawful just because an announcement not to steal is lacking?

The whole question seems ill-structured, considering what the result of an invalidity might be: If the Second Senate was right, i.e. the OMT framework was incompatible with Article 123 TFEU and therefore invalid, the ECB's announcement that some kind of OMTs should not happen would simply vanish. That does not mean, that financial operations that were possible before would be impossible afterwards. On the contrary, a decision finding the OMT framework to be invalid would offer more rather than less opportunities, such as OMTs without sterilization or OMTs without transparency, etc.

2. The FCC's "Possibility of an Interpretation in Conformity with Union Law": A Requirement Analysis

The Second Senate believes that there is a way to save the OMT framework. This idea is discussed within two spectacular paragraphs at the end of the ruling under the headline "Possibility of an Interpretation in Conformity with Union Law."[81]

What the Senate does is nothing less than undermine its reasoning to that point. The FCC explicitly argues, that its concerns regarding the validity of the OMT framework "could be met by an interpretation in conformity with Union law."[82] In other words, under certain conditions, the OMT framework can be applied without any problems. This is not surprising considering the content of the framework, but it still debunks the FCC's efforts to explain the OMT framework's incompatibility with Union law.

The Second Senate weakens its argument even further by formulating five requirements that would have to be fulfilled. If the FCC's requirements were fulfilled, the OMT framework might not be objectionable. "This would require that the content of the OMT Decision, when comprehensively assessed and evaluated, essentially complies with the above-mentioned conditions."[83]

In the view of the FCC, the OMT framework might not be objectionable if it could be interpreted or limited in such a way that it:

[81] *Id.* at paras. 99–100.

[82] *Id.* at para. 99.

[83] *Id.*

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> (1.) [W]ould not undermine the conditionality of the assistance programs of the European Financial Stability Facility and the European Stability Mechanism;
> (2.) would only be of a supportive nature with regard to the economic policies in the Union.
> (3.) This requires that the possibility of a debt cut must be excluded;
> (4.) that government bonds of selected Member States are not purchased up to unlimited amounts;
> (5.) and that interferences with price formation on the market are to be avoided where possible.[84]

Not mentioning the fact, that it is hard to see how the announcement of something not going to happen could be interpreted in a way that something else is not going to happen either, and also setting aside the fact, that each legal assertion contained in these five requirements could be judged differently, the instructive detail is the FCC's requirement itself.

Requirement engineering's best practice requires a requirement analysis, i.e. an assessment of the FCC's (text-based) requirements and their relationship to the legal and economic environment. [85] So what is the status of the FCC's requirements? Requirement analysis is generally a two-step procedure. The first step requires building suitable test cases so that that the requirements may be evaluated in the second step. A good test case is a useful tool for verifying whether or not some implementation (e.g., the requested ECJ's "interpretation in conformity with Union law") satisfies a requirement (compliance). And besides a test case also is useful for guaranteeing the requirement's quality (quality management). Roughly speaking the most serious mistake that can be made while communicating requirements is a lack of test cases. The callee/agent (in this case the ECJ) would be unable to assert that her answer satisfies the requirement given. And the caller/principal (in this case the FCC) would be unable to verify that the answer satisfies the requirement given.

Unfortunately four out of five requirements (requirements 1, 2, 4, and 5) are hardly to be seen as testable.

What would happen, if the ECB would say "So be it."?[86] Which outright monetary transactions would be ruled out under the FCC's requirements? What about e.g.

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

[85] *Id.*

[86] The ECB has declared its willingness to comply in the proceedings before the FCC.

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purchasing Ruritania's government bonds worth 30 billion euros next March? Would the requirement "not to undermine the conditionality"[87] be satisfied? Or would the requirement "being only of a supportive nature"[88] not be satisfied? Who wants to decide such questions based on the FCC's requirements? Would the purchase worth 30 billion euros "be up to an unlimited amount"?[89] Of course not, because no purchase is "up to an unlimited amount." Would the "interference with price formation be avoided where possible"?[90] What about the same questions considering 50 billion euros next August, and what about another 60 billion euros before Christmas?

The problem with the FCC's "requirements" is not that they do not touch on difficult and important topics. Of course they do. The problem is that they are not requirements in the narrow sense of the word. Whatever the ECJ will answer, the FCC will have the opportunity to decide on the question of "requirement satisfaction" at its own discretion. It seems questionable whether the preliminary ruling procedure is really the right forum for this activity. Considering the ECJ's capacity to know about the FCC's camouflaged "requirements" for an interpretation in conformity with Union law, it seems questionable, whether paragraph 100 of the ruling is a seasonable gift.

Be that as it may, there is one more requirement left that has not been discussed yet: The FCC urges for an interpretation in conformity with EU law that "requires that the possibility of a debt cut must be excluded."[91] This request is the only requirement in the narrow sense of the word,[92] because the test case would be whether the ECB negotiates some kind of treaty with each member state concerned. The ECB would have to negotiate a "debt cut exclusion" with Ruritania, i.e. a treaty assuring government bonds held by the ECB would not be depreciated by debt cuts, before purchasing any of Ruritania's government bonds on the secondary markets.

In the "no"-terms of the OMT framework, the FCC's requirement could be phrased:

> There will be no OMTs ***with pari passu*** treatment (i.e. the ECB does not accept the same treatment as private or other creditors with respect to bonds issued by euro area countries).

[87] OMT Case, Case No. 2 BvR 2728/13 at para. 100 (requirement 1).

[88] *See id.* (requirement 2).

[89] *See id.* (requirement 4).

[90] *See id.* (requirement 5).

[91] *See id.* (requirement 3).

[92] Differing from OMT Case, Case No. 2 BvR 2728/13 at para. 100 (requirements 1, 2, 4, and 5).

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If this new "no"-term is combined with the OMT framework given (after all the FCC believes in an "interpretation" of the OMT framework), it is particularly fruitful to read the new requirement in the context of this requirement, already mentioned above:[93]

> There will be no OMTs ***without pari passu*** treatment (i.e. the ECB accepting the same treatment as private or other creditors with respect to bonds issued by euro area countries).[94]

The gentle reader might sense some contradiction between an announcement of "no OMTs with pari passu" and an announcement of "no OMTs without pari passu." This is not a contradiction in the strict sense of logic, because as long as there are no OMTs at all, there would be no problem complying with both conditions. If this was what the FCC wanted to say, it would have been easier to ask for an "interpretation of the OMT framework" in the sense that there will not be any OMTs.[95]

If the FCC wanted to interpret the OMT framework in a way that the ECB simply abandons the acceptance of pari passu treatment, that would make more sense from an economic point of view. Analyzed legally, however, interpreting the "pari passu" clause as a "no pari passu" clause seems odd.[96]

At any rate the FCC's very idea of a "no pari passu" requirement would thwart the conceptual integrity of the entire OMT framework not in a small way but in a big way. The

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[93] *See* Part B. II. 1.

[94] OMT Case, Case No. 2 BvR 2728/13 at para. 3 ("Creditor treatment").

[95] This "interpretation" would be in conflict with the Statute of the European System of Central Banks and of the European Central Bank, Article 18.1, *available at* http://www.ecb.europa.eu/ecb/legal/pdf/en_statute_2.pdf; the ESCB/ECB Statute forms an integral part of the primary law, *see* Article 51 and Article 1.3 TEU: "Open market and credit operations. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

> — operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
>
> — conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral."

[96] Although there are famous "interpretations" to be found in the FCC's case law, e.g. "give notice not later than 48 hours before" has to be interpreted meaning "not in the case of spontaneous assemblies" Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 850/88, 85 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 69, 75 (Oct. 23, 1991).

Eurosystem's outright transactions in secondary sovereign bond markets aim at, as the ECB puts it, "safeguarding an appropriate monetary policy."[97] An intervention in secondary sovereign bond markets without pari passu treatment results in increased risk exposures for the remaining private creditors. The larger the share of the privileged creditors becomes (protected against losses in case of a debt cut), the higher the default risks for the underprivileged (private) creditors rise. A massive intervention in secondary markets without pari passu treatment would therefore destroy the private creditors' conditions of investment.

C. Judge a Man by His Questions

Sometimes the question is the answer. Sometimes there are questions that are beside the question. Beyond any question the exact wording of the FCC's questions are worth a short review, because these questions are the operative part of the decision.

I. A Matter of Grammar

The alert reader might for example come across question 2 b) bb):

> Regarding the prohibition of monetary financing: Is Article 123 of the Treaty on the Functioning of the European Union to be interpreted in such a way that the Eurosystem is allowed – alternatively or cumulatively – . . .
> bb) to purchase government bonds without a minimum time lag after their emission on the primary market (market pricing)?[98]

This official (although not authoritative[99]) translation is well-intentioned, but as a matter of fact, the authoritative German ruling is somehow different, or more specifically, ungrammatical. The FCC's authoritative question is:

> Ist Artikel 123 des Vertrages über die Arbeitsweise der Europäischen Union mit Blick auf das Verbot monetärer Haushaltsfinanzierung so auszulegen, dass

[97] OMT Case, Case No. 2 BvR 2728/13 at para. 3.

[98] OMT Case, Case No. 2 BvR 2728/13 at II.2.b.bb.; it is an important detail that this translation is provided by the FCC, *available at* http://www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

[99] *See id.*

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> es dem Eurosystem – alternativ oder kumulativ – erlaubt ist, . . .
> bb) Staatsanleihen ohne zeitlichen Mindestabstand ***zu ihrer*** Emission ***von Staatsanleihen*** am Primärmarkt anzukaufen (Marktpreisbildung)?[100]

The emphasized words "von Staatsanleihen" make no sense grammatically to readers capable of reading the German language. So what has happened here? A first working hypothesis might be that some kind of boilerplate had been forgotten in the document. But this is hardly probable, because highly trained law enforcement officers inside the FCC are assigned to verify—among other technicalities—the syntactic and orthographic correctness of the FCC's rulings. So some other cause for the ungrammatical question must at least be considered. The FCC's original draft could have been:

> Ist Artikel 123 des Vertrages über die Arbeitsweise der Europäischen Union mit Blick auf das Verbot monetärer Haushaltsfinanzierung so auszulegen, dass es dem Eurosystem - alternativ oder kumulativ - erlaubt ist, . . .
> bb) Staatsanleihen ohne zeitlichen Mindestabstand ***zur*** Emission von Staatsanleihen am Primärmarkt anzukaufen (Marktpreisbildung)?[101]

The German word "zur" is a compound association of the two German words "zu ihrer" (English: "their") which can be found in the ruling. Indeed the same word "zur" is actually also a compound association of two other German words, i.e. "zu einer" (English "a"), which results in a different meaning of the question. It is possible that the German word "zur" was corrected incorrectly at some time by changing "zur" to "zu ihrer" instead of "zu einer" and was forgotten afterwards. The correct question in English would therefore be:

> Regarding the prohibition of monetary financing: Is Article 123 of the Treaty on the Functioning of the European Union to be interpreted in such a way that the Eurosystem is allowed – alternatively or cumulatively – . . .
> bb) to purchase government bonds without a minimum time lag ***before and*** after ***an*** emission ***of government bonds*** on the primary market (market pricing)?[102]

[100] *See id.* (emphasis added).

[101] *Id.* (modified part emphasized).

[102] *Id.* (corrected parts emphasized).

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This question certainly does make more sense as to the economic mechanisms involved. The economic effect connected with the purchase of government bonds on the secondary markets is that these purchases affect the formation of prices in the primary markets (the governments selling their government bonds). Therefore, the time lag the FCC asks for does not only concern the period between the emission of government bonds and bond purchases on the secondary markets, but also the necessary length of time between secondary market purchases and "an emission of government bonds" *afterwards*. The legally interesting effect would be the ECB massively intervening in the secondary markets for government bonds of Ruritania, stabilizing the prices, and Ruritania selling fresh bonds a short time *later* at much better conditions. That maneuver could be called (indirect) "monetary financing of the budget."

Corrections of the operative parts of a judgment are extremely seldom, but they are possible.[103] The FCC might consider a clarification of question 2 b) bb).

II. Channels of Control: Don't Bypass the Bypass?

The FCC's question 2 a) dd) is:

> Are ***Article 119 and Article 127*** of the Treaty on the Functioning of the European Union and Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank to be interpreted in such a way that they — alternatively or cumulatively — ***allow*** the Eurosystem –
> . . .
> dd) ***to undermine the terms and conditions of the assistance programs*** of the European Financial Stability Facility or of the European Stability Mechanism (bypassing)?[104]

The ECJ might consider the question, whether a prohibition of "undermining the terms and conditions" of some assistance programs (which are no part of the European law) is based in Article 119 and 127 TFEU. Maybe the requested prohibition of undermining terms and conditions of these programs would fit more naturally in the terms and conditions of these programs. Within these programs the member states could easily include a "fail safe/exit condition" to end programs as soon as the ECB purchased governmental bonds, if they

[103] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvQ 48/00, 104 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 42 (June 18, 2001), BGBl. I. at 1592.

[104] OMT Case, Case No. 2 BvR 2728/13 at II.2.a.dd (emphasis added).

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want to include such clauses. Within the assistance programs would also be the perfect place for specifying what "undermining terms and conditions" means exactly.

III. Interference with (Market) Logic

Question 2 b) cc) is a short one:

> Regarding the prohibition of monetary financing: Is Article 123 of the Treaty on the Functioning of the European Union to be interpreted in such a way that the Eurosystem is allowed – alternatively or cumulatively . . .
> cc) to hold all purchased government bonds to maturity (interference with market logic)?[105]

This question is equivalent to: "Does the Eurosystem have to sell at least one purchased government bond before maturity?" Readers familiar with bond purchases might notice the irony.

IV. The Compliance Shark

The last question worth taking a closer look at is question 2 b) aa):

> Regarding the prohibition of monetary financing: Is Article 123 of the Treaty on the Functioning of the European Union to be interpreted in such a way that the Eurosystem is allowed—alternatively or cumulatively—
> aa) to purchase government bonds ***without quantitative limits*** (volume)?[106]

What is purchasing government bonds without quantitative limits? Is there such a purchase at all? The ECB could buy government bonds of Ruritania worth 20 billion euros, but would this purchase be with or without limits? One might say that a purchase worth 20 billion euros is not unlimited, but limited to 20 billion euros. And what would ECB's next purchase of Ruritania's bonds, worth 25 billion euros, have to be classified as? Would the 25 billion euros be a purchase without quantitative limits? It is hard to see. The secondary markets' domain does not discriminate between purchases with and purchases without

[105] *Id.* at II.2.b.cc.

[106] *Id.* at II.2.b.aa (emphasis added).

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quantitative limits. A deal of 20 billion euros of government bonds is just a deal of 20 billion euros of government bonds.

What the FCC might want to ask (although it does not ask this supposed question) is whether the ECB must *tell* the markets about its plans with regard to the amount of its future purchases. If this was right, question 2 b) aa) would be:

> Is the Eurosystem allowed to purchase government bonds ***without publishing ex ante quantitative limits*** set on the size of the whole program?[107]

In terms of secondary bond markets this question makes sense, because from the perspective of an private investor (e.g. a massive hedge fund) there is a huge difference between the ECB purchasing with and purchasing without publishing ex ante quantitative limits set on the whole program. As St. Elmo Lewis put it: "You generally hear that what a man doesn't know doesn't hurt him, but in business what a man doesn't know does hurt." So the important difference between getting this piece of information and not being able to gain it is whether you can leverage the ECB's intervention—or risk your investment being crunched by the ECB's intervention. Keeping simple things simple: If you want to crunch the ECB's intervention, you have to know how much money the ECB will be able to touch.

Hedge funds build businesses on information like this. The ECB knows this, and the hedge funds, of course, also know that the ECB knows.

The ECB's OMT announcement, "that there will be no OMTs with ex ante quantitative limits set on the size of OMTs,"[108] is by no means the announcement of granting endless purchasing power.[109] As mentioned above: The ECB does not announce a single purchase at all.[110] The ECB's OMT framework announcement not to buy with ex ante quantitative limits set on the volume is just professional communication to the hedge funds, "Don't catch a falling knife."

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[107] *Id.* (corrected parts emphasized).

[108] *Id.* at para. 3 ("Coverage"); *see* ECB MONTHLY BULLETIN, *supra* note 3.

[109] The first sentence of the ruling is therefore not entirely correct, the FCC states: "The OMT Decision envisages that government bonds of selected Member States can be purchased up to an unlimited amount"; what the OMT framework envisages is *not* a purchase but the *non*-publication of an ex ante quantitative limit. *See* OMT Case, Case No. 2 BvR 2728/13 at para. 2.

[110] *See* Part B.II.1.

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D. Conclusions

The OMT ruling is no landmark decision with regard to the ultra-vires pattern of the German constitution. The Second Senate will have to refinish the ultra-vires pattern's new "procedural element" in the forthcoming final judgment.[111] Without clarification the legal uncertainties induced by complaints against parliamentary and governmental failures to act would challenge the constitutional balance of power. The FCC also encumbers the working relationship with the ECJ, because the terms and conditions for ultra-vires interventions ("The democratic decision-making process . . . is undermined when there is a unilateral usurpation of powers by institutions and other agencies of the European Union."[112]) are bloodless in this context and can in any case not be operationalized easily. The ultra-vires pattern is adrift and may result in the FCC micro-managing the European process of integration. The referral to the ECJ, however, is interesting, because the ECJ's willingness to accept even unconventional questions under unconventional circumstances is now under close scrutiny.

At first glance, the actual surprise is the FCC's willingness to experiment with untested components of the ultra-vires pattern just when the currency Union seems to be at stake. But the imperceptible market reactions to the OMT ruling reveal that time for constitutional containment is winding down anyway. In the face of an estimated 15 months-waiting period until the ECJ will answer, the ECB's OMT framework becomes less important every day. The markets indicate that 2014 is different from 2012. The markets' artful question regarding the member states' commitment to "save" the Euro seems to be answered and unquestionable.

[111] Probably without both longest serving dissenting Justices, who might have left the court after twelve years in office. *See* BUNDESVERFASSUNGSGERICHTSGESETZ [BVerfGG] [Federal Constitutional Court Act], Aug. 11, 1993, BGBI I. at 1473, § 4.1 (Ger.).

[112] OMT Case, Case No. 2 BvR 2728/13 at para. 53.

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