Special Issue – Preliminary References to the CJEU
Part Three

# The German Constitutional Court and Preliminary References—Still a Match not Made in Heaven?

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## A. Introduction

So far, the German Constitutional Court (*Bundesverfassungsgericht*, henceforth: *BVerfG*) has only made a single preliminary reference to the (now) Court of Justice of the European Union (CJEU), despite frequent rulings on matters connected with European Union (EU) Law. Its apparent reluctance seemed odd considering the atmosphere of dialogue and cooperation[1] which prevails between the non-constitutional courts and the EU courts. This situation might, however, have changed with the preliminary reference from January 2014,[2] proving predictions on the perceived "most powerful constitutional court" and its relationship to the EU partly wrong. The legal effects of its preliminary reference on the interpretation of Articles 119, 123, 127 ff. of the Treaty on the Functioning of the European Union (TFEU) and the validity of Outright Monetary Transactions (OMT) by the European Central Bank (ECB) under EU Law are as yet unclear; although the Opinion of the Advocate General Cruz Villalón was delivered in the beginning of 2015, which did not confirm the doubts expressed by the *BVerfG* about the conformity of the OMT programme with EU law. Nonetheless, the interpretative scheme and the normative questions as to the reluctance of the *BVerfG* remain the same after this single referral and offer explanations as to why the *BVerfG* had for nearly sixty years not referred a question to the former European Court of Justice (ECJ).

On a political level, there might be a simple answer, often claimed by the media: a fear of loss of influence.[3] One might assume that the *BVerfG* considers itself as the keeper of

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[1] *See also* Jörg Ukrow, *Von Luxemburg lernen heißt Integrationsgrenzen bestimmen*, ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 119, 122–23 (2014).

[2] 134 BVERFGE 366 [hereinafter *OMT*].

[3] See also—while denying this to be the case—Ulrich Everling, *Vorlagerecht und Vorlagepflicht nationaler Gerichte nach Art 177 EGV*, *in* VORABENTSCHEIDUNGSVERFAHREN VOR DEM GERICHTSHOF DER EUROPÄISCHEN GEMEINSCHAFT 11, 14 (Reichelt ed., 1998); Jan Bergmann, *Das Bundesverfassungsgericht in Europa,* EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 620, 627 (2004).

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German fundamental rights and as a court too powerful to follow the interpretation of the Court of Justice of the European Union (CJEU) on constitutional matters. One might state that this denial impedes a true cooperation and communication between "constitutional" courts, and reduces cooperation to mere visits and academic discussions.[4] On a closer look, though, the situation is multifaceted:[5] a normative analysis of the case law allows three presumptions on the relationship between constitutional control by the *BVerfG* and its readiness for preliminary references. The pivot is a requirement of EU Law: in order to refer a question to the CJEU, the national court must consider the answer necessary to enable the national court to give judgment (Article 267(1) TFEU). This leaves a subjective margin of discretion for the national courts,[6] which they can use in order not to refer a question out of "political" reasons. It is also an objective criterion (C. I.), which is hardly reached before the *BVerfG* due to the specific structure and requirements of constitutional procedural law (B). However, the *OMT* decision shows that the requirements can be met and that the peculiarities of constitutional law may only be used as an "excuse" not to refer a question to the CJEU.

One can deduce the following three aspects that need to be considered by the *BVerfG* in the course of its deliberation: the use of preliminary rulings by non-constitutional courts on specific questions of Union Law (C. II.), the means for safeguarding the idea of cooperation between courts in the course of *ultra-vires*-control, and the so-called constitutional "identity" control (C. III.), and the (maybe futile) attempt to shield fundamental rights in the *Grundgesetz* (Basic Law, henceforth: GG) from EU influence, especially the EU Charter of Fundamental Rights (EChFR) (C.IV.).

## B. A Restricted Standard of Review: Requirements of German Constitutional Procedure Under the Influence of European Law

One of the reasons that is claimed to underlie the reluctance of the *BVerfG* to refer are the particularities of the German system of constitutional review. The comparative constitutional lawyer may, however, doubt that the requirements and setting are so peculiar compared to other continental systems of constitutional review.[7]

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[4] *See* Jacques Ziller, *Le dialogue judiciare et la Cour de Karlsruhe*, REVUE TRIMESTRIELLE DE DROITEUROPÉEN 93, 95 (2010); Maya Walter, *Integrationsgrenze Verfassungsidentität—Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive*, ZEITSCHRIFT FÜR AUSLÄNDISCHES RECHT UNDVÖLKERRECHT 177, 197 (2012); Ukrow, *supra* note 1, at 123.

[5] *See also* Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 399, 407 (Armin v. Bogdandy & Jürgen Bast eds., 2010).

[6] Burkhard Heß, *Die Einwirkungen des Vorabentscheidungsverfahrens nach Art. 177 EGV auf das deutsche Zivilprozeßrecht* 108 ZEITSCHRIFT FÜR ZIVILPROZESSRECHT 59, 75 (1995).

[7] For an overview, *see* BERND WIESER, VERGLEICHENDES VERFASSUNGSRECHT 120, 125 (2005).

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The German system is that of a separate constitutional court entrusted with the review of all aspects of state action against the *Grundgesetz*. In this sense, it is a comprehensive review. Yet, it naturally means restricting the jurisdiction of the *BVerfG* to the interpretation of the German constitution. Questions of the interpretation and application of German statutory law are left to non-constitutional courts, and the interpretation of primary and secondary EU law is exclusively assigned to the CJEU according to Article 19 of the Treaty on the European Union (TEU). This attribution of competences seems clear and common for most constitutional courts following the Kelsenian model of constitutional review. However, *in concreto*, the spheres cannot be separated so easily. Hence it is important to understand in which situations the need for a preliminary reference arises. It is argued that a situation in which a referral was admissible and even necessary under the conditions of German procedural law had arisen prior to the preliminary reference in *OMT*, adding a particular political connotation to this first preliminary reference.

The main procedures leading to a review of German state action against the standard of the *Grundgesetz* and raising questions of EU law at the same time are the *Verfassungsbeschwerde* (individual constitutional complaint), the *abstrakteNormenkontrolle* (abstract review of legislation), *konkreteNormenkontrolle* (judicial review of legislation in form of a referral by a German court), and *Organstreitverfahren* (court proceedings between state organs).

(1) *Verfassungsbeschwerde*: an individual may claim the violation of his or her fundamental rights under the *Grundgesetz* (but not under the EChFR or the European Convention on Human Rights (ECHR)[8]) by state action, that is, by a statute, a court decision, or an administrative act. Contrary to those Member States which have incorporated the ECHR as directly applicable constitutional law (e.g., Austria) the German fundamental rights remain separate from their European counterparts. A *Verfassungsbeschwerde* is only admissible after all other remedies have been exhausted, therefore the non-constitutional courts are the prevailing interpreters of the GG and can also make references to the CJEU in matters of EU law. Yet, in rare circumstances, EU law may become relevant for the *BVerfG*.[9]

This may involve, first, a violation of a German fundamental right by a German statute transposing EU secondary law. In such circumstances, the *BVerfG* has to determine whether the Member States had a margin of implementation, as only national law not determined by EU law is bound by German fundamental rights.[10]

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[8] 110 BVERFGE 141, 154–55 [hereinafter *Kampfhunde*]; 115 BVERFGE 276, 299 [hereinafter *Winner Wetten*].

[9] *See also* Konrad Feige, *Bundesverfassungsgericht und Vorabentscheidungskompetenz des Gerichtshofs der Europäischen Gemeinschaften*, 100 ARCHIV FÜR ÖFFENTLICHES RECHT 530, 539–50 (1975).

[10] Thorsten Kingreen, *GRCh Art. 51 in* EUV/AEUV KOMMENTAR margin no. 12(Christian Calliess& Matthias Ruffert eds., 4th ed. 2011).

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A second circumstance in which EU law may become relevant is where the EU act is *ultra vires* or harms the immutable core of the *Grundgesetz* (Article 79(3) GG) and must therefore not be applied by German state actors. The *BVerfG* has accepted, in the context of EU integration, that a violation of the right to vote (Article 38(1) GG) can be claimed when the German parliament limits its sovereignty by transferring excessive competences to the EU. Every citizen can therefore assert that the limits of European integration as stated in Articles 23(1) and 79(3) GG are to be respected in any legislative act yielding sovereignty to the EU.[11]

Third, EU law may become relevant where the German legislature could not transfer powers to the EU due to the immutable core of the German constitution.

In the latter two situations, the *BVerfG* needs to ask the CJEU either whether EU law is valid or how the provision of EU law is to be interpreted.

As a *Verfassungsbeschwerde* can be raised not only against Acts of Parliament but against any state action, as long as a violation of fundamental rights is at stake, it offers the widest possibility to initiate a referral to the CJEU. Therefore, especially in connection with Article 38(1) GG, which informally allows a review of the principle of democracy and of the safeguarding of other fundamental principles of the *Grundgesetz*, it has been the basis of some of the most famous decisions of the *BVerfG* on the relationship between the CJEU and the *BVerfG* as well as the *Grundgesetz* and EU law (*Solange II,*[12] *Maastricht,*[13] *Lissabon,*[14] *Honeywell,*[15] *Vorratsdatenspeicherung,*[16] *Antiterrordatei,*[17] *ESM,*[18] and lately *OMT)*.

(2) *AbstrakteNormenkontrolle:* an abstract judicial review can only ask the question of whether a German statute conforms to the *Grundgesetz*. Contrary to the practice in some other Member States, international treaties are neither subject of an

[11] Christian Hillgruber, *Die verfassungsprozessuale Dimension des Outright Monetary Transactions (OMT)-Beschluss des Bundesverfassungsgerichts*, JURISTISCHE ARBEITSBLÄTTER 635, 636 (2014).

[12] 73 BVERFGE 339.

[13] 89 BVERFGE 155.

[14] 123 BVERFGE 267 [hereinafter *Lissabon*].

[15] 126 BVERFGE 286 [hereinafter *Honeywell*].

[16] 125 BVERFGE 260 [hereinafter *Vorratsdatenspeicherung*].

[17] 133 BVERFGE 277 [hereinafter *Antiterrordatei*].

[18] Bundesverfassungsgericht (Federal Constitutional Court) [BVERFG], Mar. 18, 2014, 2 BvR 1390/12, http://www.bverfg.de/entscheidungen/rs20140318_2bvr139012.html.

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*abstrakteNormenkontrolle* nor can they be used as a standard of review.[19] A connection to EU law is, however, possible when the statute transposes EU secondary law and either its validity or the margin of discretion for the transposing state is disputed and needs to be clarified in an Article 267 AEUV procedure. Another possibility is the control of an act approving an EU treaty. In this case, the CJEU may be asked to interpret provisions of the TEU or the TFEU under Article 267 AEUV, in order to decide whether the *Bundestag* has transferred too much sovereignty to the EU, rendering the German approval act void.

(3) *KonkreteNormenkontrolle:* a concrete judicial review may be raised by a German court if it considers a German statute unconstitutional and therefore void, and if this unconstitutionality is relevant for the outcome of the case. EU law is at stake if the margin of discretion needs to be determined or if the EU secondary legislation is considered *ultra vires* and therefore not applicable within the EU. It might also influence the standard of review, if the *Grundgesetz* would have to be interpreted in accordance with EU law.

(4) Finally, court proceedings can be filed between governmental bodies (*Organstreit*), either against Acts of Parliament approving an EU treaty or against acts of governmental bodies like the German Central Bank, which participate in actions on an EU level that might be *ultra vires.* In most cases concerning possible referrals, like *Maastricht, ESM,* and *OMT*, an *Organstreit* had been initiated by a part of the *Bundestag*, demanding increased participation by the parliament in order to hinder its "disempowerment," filing for injunctive relief[20] or for political action of the government in EU matters.[21]

As can be seen, in most cases German statutes are reviewed for their compatibility with German fundamental rights and other fundamental state principles like the principle of democracy. The *BVerfG* itself is not competent to decide on matters other than the *Grundgesetz* and acts issued by German state organs. In order to have a situation where a preliminary ruling might become relevant, these actions by German state organs must in some way be determined by EU law. This is the case either when they implement EU law or when they approve the transfer of power to the EU. In the first case, the *BVerfG* needs to know whether the German state actors act within the margin of discretion left by the EU instrument and are therefore still bound by German constitutional law, or whether the EU act is *ultra vires* and must not be applied. In the second case, it needs to know what the EU provisions mean in order to be able to decide whether the *Grundgesetz* allows this transfer of power. In the last resort, however, it only decides on constitutional matters; it does not decide on EU law, nor on questions of statutory law or facts.

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[19] This is the case in Austria and Poland, and Poland, Slovenia and Slovakia respectively. *See* WIESER, *supra* note7, 136–37.

[20] *OMT* at para. 1, para. 45; *Lissabon* at para. 336.

[21] *OMT* at para. 1, para. 46.

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**C. Discretion of National Courts: The Impact of the Question on the Outcome of the Case**

*I."Relevance to the case" (Article 267(1) TFEU)*

From the point of view of EU law, the *BVerfG*, like any other court, can refer questions to the CJEU "if it considers that a decision on the question is necessary to enable it to give judgment" (Article 267(1) TFEU). It is argued that for three reasons this criterion is the key to why and how the *BVerfG* could, for so long, not refer a question to the CJEU.

(1) First, it lies in the discretion of the national courts whether they deem the decision of the CJEU necessary for their own decision. This means, however, that either they can cooperate by using their discretion in an "EU-friendly" way, or that they may consider the question not relevant for the outcome in order to protect their own competence over interpretation. The *BVerfG* has explicitly used this argument in its decision on the Data Retention Directive (*Vorratsdatenspeicherung*).[22] In *OMT* it takes quite a lot of space in order to justify the reference to the CJEU, although the relevance of the question is less than obvious.[23]

(2) Second, the criterion of "relevance" is hardly defined under law or in an objective way.[24] Only when a valid definition has been found will it be possible to state whether the *BVerfG* has in the past misused its discretion. In the *OMT* case it can be argued that the questions were irrelevant because German state organs could not act no matter what the answer by the CJEU was. Even if the CJEU had found a violation of the Treaties there was nothing German state organs could have done to prevent this.[25] Yet, the CJEU, following

[22] *Vorratsdatenspeicherung* at para. 308. *See also Kampfhunde* at para. 156. If the statute did not conform to EU law, it would be inapplicable within Germany. Hence, a constitutional complaint would be inadmissible, as the statue was non-existent. However, as the statute might violate constitutional law and could therefore be void, a decision by the CJEU on the conformity with EU law would not be necessary (Art. 267(1) TFEU) for the outcome of the case. On the other hand, if the statute conforms to constitutional law, the *BVerfG*—due to its restricted standard of review—cannot rule on the merits of the case as far as the conformity with EU law is concerned, as it does not apply EU law and does therefore not have to answer a question concerning the interpretation of EU law. So, notwithstanding whether the statute conforms to EU law or not, the *BVerfG* cannot make a preliminary reference.

[23] *OMT* at para. 33. *See also* dissenting opinion by judge Lübbe-Wolff, at paras. 11–14.

[24] For a further analysis, see Eva Julia Lohse, *Die "Entscheidungserheblichkeit" gemäß Art. 267 Abs. 1 AEUV als Instrument des Bundesverfassungsgerichts zur Steuerung von Vorabentscheidungsersuchen*, 4 DER STAAT 633,647–52 (2014).

[25] *See* dissenting opinion by judge Lübbe-Wolff, *OMT* at para.12. Similarly, see Franz C. Mayer, *Zurück zur Rechtsgemeinschaft: Das OMT-Urteil des EuGH*, NJW 1999, 2002 (2015).

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the Opinion of the Advocate General, has not chosen the way of inadmissibility, stating that the question was not purely fictitious or hypothetical.[26]

As the CJEU claims that preliminary rulings are not tools to raise hypothetical or theoretical questions,[27] and as it does not rule on the requirements of national law, the determination of "relevance" lies solely in the hands of the national courts.

"Relevance" must therefore be defined from the point of view of the pertinent national provisions. Under German constitutional law, the question about the validity of a provision is relevant to the outcome when the case would have been decided differently depending on whether the provision was valid or not. As in the Article 267 TFEU proceedings, the CJEU also adjudicates on the interpretation of primary and secondary EU law, "relevance" needs to be defined more widely: it has to take into account whether the outcome of the case depends on the interpretation of the EU provision in question.

(3) Third, the use or misuse of discretion can hardly be controlled, either from the domestic level or from the Union level. For example, within Germany, the *BVerfG* is the highest court. Unlike rulings by non-constitutional courts, its rulings cannot be reviewed. Control by the CJEU is reduced to "misuse" and to the situation of "wrong referral" (that is, the CJEU can reject a preliminary reference when its decision is not necessary).[28] By contrast, in the situation of a non-referral by a national court, the European Commission would need to initiate an infringement procedure, a measure admissible under EU law, but not used so far given the assumption that enforcement of Article 267(3) TFEU would stunt cooperative behavior by domestic courts.[29]

For the *BVerfG,* the decision of the CJEU is thus relevant either when it directly or indirectly influences the interpretation of a provision in the *Grundgesetz* in accordance with EU law,[30] or when the *BVerfG* needs the CJEU to decide whether the statute brought before the *BVerfG* is determined by EU law in a way that the *Grundgesetz* may not serve as a standard of review. The first situation concerns *ultra vires* acts and such provisions harming

[26] Case C–62/14, Gauweiler v. Deutcher Bundestag, paras. 18–31 (June 16, 2015), http://cura.europa.eu [hereinafter *OMT Decision*].

[27] *See* LUIGI MALFERRARI, ZURÜCKWEISUNG VON VORABENTSCHEIDUNGSERSUCHEN DURCH DEN EUGH 163 (2002).

[28] PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 488 (2011); Bernhard Wegener, *Art. 267*, *in* EUV/AEUV KOMMENTAR mar. no. 23 (Christian Calliess & Matthias Rufferteds., 4th ed. 2011; BERNHARD SCHIMA, DAS VORABENTSCHEIDUNGSVERFAHREN VOR DEM EUGH 75 (2004).

[29] *See also* Wegener, *supra* note 28, at mar. no. 34.

[30] *See also* Rainer Störmer, *Vorabentscheidungsersuchen nach Art. 177 EGV durch Landesverfassungsgerichte*, 52 NEUE JUSTIZ 337, 339 (1998) (on the identical question about the restricted standard of review of the constitutional courts of the Lander).

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the constitutional identity of the *Grundgesetz*; the second situation concerns constitutional complaints about the violation of German fundamental rights by statutes determined by EU law. All other questions of interpretation, concerning specific questions of EU law, must have been raised by the non-constitutional courts and referred to the CJEU by them. This means that these questions either cannot come before the *BVerfG* or cannot be reviewed by the *BVerfG,* due to its limited standard of review.

*II. Preliminary Rulings as a Primary Task of Non-Constitutional Courts*

*1. Exhaustion of all Remedies Before a Constitutional Complaint*

The most commonly used action before the *BVerfG* is the individual constitutional complaint: in 2013 alone, 6477 of 6686 proceedings were *Verfassungsbeschwerden*.[31] This explains why there are so few opportunities for a preliminary reference by the *BVerfG*. Aside from the nature of cases concerning the interpretation or validity of EU law and the restricted jurisdiction of the *BVerfG* in general, under German law all remedies before the non-constitutional courts must be exhausted before an individual constitutional complaint can be filed (§ 90(2) *Bundesverfassungsgerichtsgesetz* (Statute on the organization of the Constitutional Court, henceforth: BVerfGG)). Other than the *ultra vires* and "identity" review, the *BVerfG* only reviews German statutory law transposing EU secondary law as a court in the meaning of Article 276(3) TFEU.[32] And even in the case of *ultra vires* review, where the *BVerfG* maintains that a preliminary reference is necessary,[33] usually a non-constitutional court will already have referred the question concerning the validity of the EU law as the basis for its decision to the CJEU.[34] This conforms to the attribution of competences between the *BVerfG* and non-constitutional courts.[35]

Preliminary references are thus left to the courts deciding on non-constitutional matters (*Fachgerichtsbarkeit*). This seems wise, as they will be confronted by specific questions on the interpretation and application of EU law, whereas the *BVerfG* can only rule on the interpretation of the *Grundgesetz*. However, it does not explain why the *BVerfG* did not refer questions about the validity of the *Data Retention Directive* to the (then) ECJ, as in

[31] *See* http://www.bverfg.de/organisation/gb2013/A-I-4.html.

[32] *See* Lohse, *supra* note 24, at 6.

[33] *Lissabon* at para. 353; *Honeywell* at 304; *Vorratsdatenspeicherung* at 308; *OMT* at paras. 27–29.

[34] This was the case in *Honeywell* at para. 308, where the *BVerfG* cites Case C–144/04, Mangold, 2005 E.C.R. I–9981, paras. 77–78.

[35] Gabriele Britz, *Verfassungsrechtliche Effektuierung des Vorabentscheidungsverfahrens*, NEUE JURISTISCHE WOCHENSCHRIFT 1313, 1317 (2012).

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this rare case a direct constitutional complaint concerning statutory law had been admissible under Section 90(2) 1 BVerfGG.[36]

*2. Control of the Non-Constitutional Courts by the BVerfG*

Still, the *BVerfG* obviously considers preliminary rulings to be a useful instrument of European integration and a safeguard of EU fundamental rights,[37] as it protects the efficient use of Article 267 TFEU by non-constitutional courts as part of its "cooperation" with the CJEU[38] by a very effective mechanism. First, the CJEU is considered "lawful judge" under Article 101(1) GG (guarantee of the "lawful judge" for every citizen): if a court in the meaning of Article 267(3) TFEU does not refer to the CJEU, the claimant can exact a preliminary ruling by the means of a constitutional complaint.[39] Second, the *BVerfG* only hears references in concrete judicial review (Article 100 GG) about the validity of a German statute implementing EU law if the referring non-constitutional court had referred the questions about the margin of implementation and the goals of the directive, the interpretation of conflicting EU primary law, or the validity of the EU directive to the CJEU.[40]

This keeps the dialogue between courts alive, apart from specifically constitutional questions. At the same time, this may lead to tension whenever the implementation of the preliminary ruling by the non-constitutional court does not conform to German fundamental rights.[41] The unsuccessful party might file a constitutional complaint, claiming that the German court had disregarded his or her fundamental rights. The *BVerfG* would then, save a case of *ultra vires*, have to decide on the EU-consistent interpretation of the *Grundgesetz* and be in a situation where it might refer the question on the interpretation of the pertinent provision in EU law to the CJEU. It can be claimed that constitutional courts should not indirectly review statutory law against the standard of EU law by means

[36] The same can be said about other proceedings: the prohibition of an "unconstitutional" political party (NPD), while it does also run for elections for the European Parliament (104 BVERFGE 214 (218)). *See* Franz C. Mayer, *Das Bundesverfassungsgericht und die Verpflichtung zur Vorlage an den Europäischen Gerichtshof*, EUROPARECHT 239, 254 (2002); a constitutional complaint concerning a German statute on the prohibition of the trade with dangerous dog breeds (*Kampfhunde* at para. 154), see Bergmann, *supra* note 3, at 626; a statute establishing a state monopoly on gambling premises, see *Winner Wetten*.

[37] Britz, *supra n*ote 35, at 1316.

[38] *See also* Bergmann, *supra* note3, at 626.

[39] For example, 82 BVerfGE 159 (195–96); BVerfG, EuGRZ 520 (2004).

[40] Bundesverfassungsgericht (Federal Constitutional Court) [BVERFG], Oct. 4, 2011, Case No. 1 BvL 3/08; *see also* 85 BVerfGE 191, (203–04) (the non-constitutional court has to decide whether a German statute is inapplicable due to its non-conformity with EU law. If it is not sure, it has to refer the question to the CJEU).

[41] Similarly, GUISEPPE MARTINICO & ORESTE POLLICINO, THE INTERACTION BETWEEN EUROPE'S LEGAL SYSTEMS 80–81 (2012).

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of EU-law-consistent interpretation, as it is not their standard of review.[42] Yet, on the other hand, the constitutional court must not apply its domestic standard of review in a way that violates EU law.

In *Winner Wetten,*[43] in any case, the *BVerfG* would have been able to raise the question of whether a transitional period for the nullity of a statute under Section 78 BVerfGG was in conformity with Article 4(3) TEU. However, it maintained—formally correct, but not pertinent in this case—that it does not rule on the conformity of statutory law with EU law, and did not even discuss a preliminary reference. It thus required a referral by an administrative court in order to clarify that a transitional period violates EU law.[44]

*III. Preliminary References and Ultra Vires Acts*

*1. A Relationship of Cooperation with the CJEU*

Preliminary references are connected to the *ultra vires* control of EU law. Dating back to the decisions *Solange II* and *Bananenmarktordnung,* and confirmed in *Maastricht*, the *BVerfG* does not hear constitutional complaints on violations of German fundamental rights by secondary EU law as long as the standard of protection within EU law is comparable to that under German law and as long as those acts are not *ultra vires*, meaning that the EU has respected their attribution of competences in the Treaties. More recent case law confirms that an *ultra vires* act does not need to be applied by German public bodies, as do such acts violating the "identity" of the *Grundgesetz*, that is, the "immutable" and hence "integration-safe" core of the German constitution as guaranteed by Article 23(1) in connection with Article 79(3) GG.[45]

The assumed competence of a domestic court to review EU law against the standard of Article 5(1) TEU ("limited attribution of powers") or the immutable core of the domestic constitution (Article 79(3) GG) poses legal problems: the supremacy of EU law, its uniform application, and the exclusive competence of the CJEU to set aside secondary law, a competence stemming from Articles 263 and 267 TFEU. Stressing its "friendliness" towards EU law (*Europarechtsfreundlichkeit*), the *BVerfG* uses the tool of preliminary references to protect the cooperation with the CJEU, which is vested with a capacity to interpret EU law in the last resort (Article 19 TEU and Article 267 TFEU). An EU act can only be declared *ultra*

[42] *See* Störmer, *supra* note 30, at 340.

[43] *Winner Wetten* at 298.

[44] Case C–409/06, Winner Wetten, 2010 E.C.R. I–8015, paras. 59–61.

[45] *Lissabon* at 353; *Honeywell* at 301–03; *Vorratsdatenspeicherung* at 307; *OMT* at para. 22.

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*vires*, or a violation of the "identity" of the *Grundgesetz* be stated by the *BVerfG,*[46] if a preliminary ruling on the question has been sought.[47] The latter can, obviously, be effectuated by the *BVerfG* or—according to the attribution of powers—by a non-constitutional court.

*2. Non-Determination of Implementing Domestic Law by Ultra Vires Acts*

As the claim of *ultra vires* can be used by individual complainants to obtain a decision on the conformity of implementation acts with the *Grundgesetz*, it offers judicial protection against German statutes determined by EU law.[48] Commonly, the *BVerfG* does not review statutory law implementing EU secondary law, as it would otherwise indirectly render EU law subject to the *Grundgesetz.* If the secondary act is *ultra vires*, though, supreme EU law no longer determines German statutory law, which can therefore be measured against the standard of the *Grundgesetz.* This requires a preliminary reference, which, surprisingly, the *BVerfG* rejected in the decision on the Data Retention Directive. It considered the question of the validity of the Directive to be irrelevant to the issue, because the Directive allowed for a margin of implementation, which could have been used in conformity with the *Grundgesetz*.[49]

Apparently, the *BVerfG* did not want to initiate a preliminary reference, as one could very well argue that it had no capacity to decide on the limits of the margin, and on whether an implementation in accordance with fundamental rights would also conform to the goals of the Directive. Unlike the decision in *Honeywell,*[50] which concerned litigation between private parties before the labor courts, in the case of the Data Retention Directive and its implementation by the *Telekommunikationsgesetz* (Act on Telecommunication), a diffuse review of EU law by a non-constitutional court[51] had not been effectuated, as there are no remedies against acts of Parliament before the non-constitutional courts. Consequently, whereas the denial of another reference in *Honeywell* was correct, in the case of the Data

[46] Walter, *supra* note 4, at 184. Jurisdiction in these matters lies solely with the *BVerfG*. *See* Günter Hirsch, *Europäischer Gerichtshof und Bundesverfassungsgericht – Kooperation oder Konfrontation?*, NJW 2457, 2461 (1996).

[47] *Honeywell* at 303; *Lissabon* at 354 (about the "EU-friendliness" and—simultaneously—the power of the *BVerfG* to decide in the last resort on *ultra-vires*-acts and on safeguarding the "identity" of the *Grundgesetz* in the course of European integration). "Identity-control" also requires a preliminary reference. *See OMT* at para. 27; *see also* Franz C. Mayer & Maya Walter, *Die Europarechtsfreundlichkeit des BVerfG nach dem Honeywell-Beschluss*, JURA 532, 540–41 (2011).

[48] *Vorratsdatenspeicherung* at 306–07*; Honeywell* at 299.

[49] *Vorratsdatenspeicherung* at 308–09.

[50] *Honeywell* at 304.

[51] For the term of "diffuse control of norms" (*diffuse Normenkontrolle*), *see* WIESER, *supra* note 7, at 121–24.

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Retention Directive it appears that extra-legal and political reasons have presumably played a role in the reluctance of the *BVerfG* to refer.

*IV. Shielding Fundamental Rights from European Influences?*

According to *Solange II, Bananenmarktordnung,* and *Maastricht*, the *BVerfG* accepts the EU standard of protection of fundamental rights and sees no need to review EU secondary law or German statutes determined by EU law as long as the standard of protection in general is equivalent to that of the *Grundgesetz*. Yet, *in concreto* it does not seem to trust this standard of protection. In cases concerning fundamental rights, the *BVerfG* seemingly tries to shield the fundamental rights of the *Grundgesetz* and their (assumed) higher level of protection from the influences of the EChFR.

Formally, German fundamental rights apply as a standard of review[52] when either the statute is not determined by EU law or when the determining EU act is void. As only the CJEU can define the scope and validity of EU law,[53] in both cases the *BVerfG* would have to make a preliminary reference and would not be able to decide on these questions autonomously.

Likewise, the *BVerfG* cannot review statutory law against the standard of the EChFR. However, when Article 51(1) EChFR applies, it means that all state bodies are bound by supreme EU law and that even fundamental rights in the domestic constitutions have to be interpreted in accordance with the EChFR. Although Article 53 EChFR safeguards a higher standard of protection in the Member States, thus far it remains unclear how the CJEU would interpret this provision when the correct implementation of a directive is at stake.[54] The *BVerfG* seems not to want to take the risk of a prevailing duty to implement drawn from Article 288 TFEU or other treaty provisions. Unlike constitutional courts like the

[52] Similarly, Bergmann, *supra* note 3, at 626; Mayer, *supra* note 36, at 245.

[53] The standards in *CILFIT* (Case 283/81, 1982 E.C.R. 3415), *ZuckerfabrikSüderdithmarschen* (Case C–143/88, 1991 E.C.R. I–415), and *Foto Frost* (Case 314/85, 1987 E.C.R. 4199, para. 11) do also apply to the *BVerfG*. It has, however, never made clear whether it considers itself as a court of last instance in the meaning of Art. 267(3) TFEU or as a court simply permitted, but not obliged to refer, as it does not perceive itself as a court of instance, but a specialized constitutional court (see Mayer, *supra* note 36, at 250–51). As, on the other hand, it has recurred to the principles laid down in *CILFIT* (*id*. at para. 16) and to the doctrine of *acte clair* in BVerfG, 2 BvR 2/13 et al., Decision of 26 February 2014 (*3%-Threshold*), www.bverfg.de/entscheidungen, paras. 40–44, and *Antiterrordatei* at para. 90, it seems to justify a deviation from the obligation to refer under TFEU Article 267(3). *See also* Feige, *supra* note 9, at 534.

[54] *But see* Case C–399/11,Melloni, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EuZW) 305, 308 (2013), paras. 55 ff., which gives rise to doubts, whether higher national standards can persist against supreme EU law despite the wording of Art. 53 EChFR.

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Austrian *Verfassungsgerichtshof* (Constitutional Court)[55] the *BVerfG* thus does not try to mold the European legal order by preliminary rulings on Article 52(4) EChFR or specific European fundamental rights, but rather declares the question to be outside the scope of EU law. In order to do so, it uses two different causes: the "non-relevance" of EU law for the outcome of the case, implicitly stating that German constitutional law suffices to resolve the case, and the use of "*acte clair*," saying that the interpretation of EU law is so obvious that a referral is not needed.

*1.The Verdict of "Non-Relevance" of EU Law*

The most prominent example of this approach is the decision on the Data Retention Directive, where a reference concerning the validity of the Directive seemed to be called for considering the unsatisfying ruling in *Ireland v. European Parliament*[56] and given that it was one of the rare cases where there was no non-constitutional court able to refer. The claimants had explicitly asked for a preliminary reference in order to quash the directive and obtain a full review of the statute under the *Grundgesetz*.[57] The *BVerfG* simply declared the validity of the Directive as not "relevant" to the case, as the directive allowed for an implementation in conformity with the *Grundgesetz* and it was only the German Parliament that had chosen the "wrong" implementation.[58] It could therefore easily apply its perceived higher standard of Articles 2(1), 1(1) GG on "informational self-determination" and "data protection". Now that the decision in the *Seitlinger* case has been rendered, one may doubt whether the perception of higher domestic standards was correct: whereas the *BVerfG* only found the concrete implementation by the *Bundestag* to be in breach of Articles 2(1), 1(1) GG, the CJEU declared data retention in general to be illegal.[59] A reference would have clarified this at an earlier stage, and would have contributed to the protection of fundamental rights at the EU level.

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[55] Case C–594/12, Seitlinger, 2013 7–8OJ C 79, preliminary question 2.4. The AG has determined these questions as being unimportant, as long as a breach of EU fundamental rights can be stated (Opinion of Advocate General Cruz Villalón at para.29, Joint Cases C–293/12 and C–594/12, Digital Rights Ireland Ltd./Minister for Communications, Marine and Natural Resources and Seitlinger, (Apr. 8, 2014), http://curia.europa.eu/). In its ruling on 8 April 2014, the CJEU likewise did not answer these questions as it found the directive to be in non-conformity with the EChFR (*Digital Rights Ireland*, Joint Cases C–293/12 and C–594/12, at para. 72).

[56] Case C–301/06, Ireland/Parliament and Council, 2009 E.C.R. I–593, para. 57.

[57] *Vorratsdatenspeicherung* at 307.

[58] *Id.* at 309.

[59] *See also* Alexander Roßnagel, *Neue Maßstäbe für den Datenschutz in Europa – Folgerungen aus dem EuGH-Urteil zur Vorratsdatenspeicherung*, MULTIMEDIA UND RECHT 372, 375 (2014); Jürgen Kühling, Der Fall der Vorratsdatenspeicherungsrichtlinie und der Aufstieg des EuGH zum Grundrechtsgericht, NVwZ 681, 685 (2014); Heinrich Amadeus Wolff, Anmerkung zum Urteil des Europäischen Gerichtshofs vom 8.4.2014 zur Vorratsdatenspeicherung, DIE ÖFFENTLICHE VERWALTUNG 608, 609 (2014).

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Nonetheless, this reluctance in matters of fundamental rights also becomes evident in other cases. For example, in the decision on trade with dangerous dog breeds,[60] the *BVerfG* shielded its favored interpretation of the freedom to own property (Article 14 GG) and of profession (Article 12 GG) and the principle of equality (Article 3 GG) from an interpretation in the light of the EU freedom of movement of goods under Article 34 TFEU by implicitly declaring the question to be irrelevant to the outcome of the case. And in *Winner Wetten*, it ruled that even if state monopolies for lotteries breached EU fundamental freedoms, and would therefore be inapplicable due to the supremacy of EU law, the *BVerfG* may exclusively rule on the conformity of state monopolies with the *Grundgesetz*.[61] An inapplicable statute is still a lawful restriction of domestic fundamental rights, and an answer of the CJEU was, once again, not necessary.

*2. Interpretation of EU Law as Acte Clair*

In the most recent case on the thresholds required for the entry of political parties into the European Parliament, the *BVerfG* refers to the doctrine of *acte clair* in order to refrain from making a preliminary reference in the context of a restriction on the freedom to vote and the equality of political parties (Articles 38(1) and 3 GG) in favor of the functioning of the European Parliament.[62]

Finally, in *Antiterrordatei,* the *BVerfG* had to determine whether a German statute on the collection of data of terror suspects would fall under the scope of Article 51(1) EChFR. The *BVerfG* considered it *acte clair* that the German statute did not "implement" EU law, because it neither transposed a directive, nor was there any other obligation under EU law demanding or prohibiting such a database.[63] Considering the excessive interpretation of "implementation" in *Åkerberg Fransson,*[64] the *BVerfG* clearly protects the exclusive applicability of German fundamental rights. Furthermore, it refrains from making a preliminary reference, because – according to its own case-law – it would only have to refer if it was an *ultra vires* act or a violation of the identity of the *Grundgesetz*. By not referring, it insinuates that the CJEU did not mean what it decided in *Åkerberg Fransson.* At the same time, cooperation between courts is identified as separation of the realms of domestic and EU fundamental rights.[65] Implicitly, again, it claims the question of EU fundamental rights not to be relevant to the decision, as they are not applicable anyway.

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[60] *Kampfhunde* at 156.

[61] *Winner Wetten* at 299.

[62] *3%-Threshold* at paras. 40–44.

[63] *Antiterrordatei* para. 90.

[64] Case C–617/10, Åkerberg Fransson, NVwZ 561, 562–63 (2013), para. 20.

[65] Tobias Kubicki, *Akerberg Fransson*, DELUXE 4–5 (2013).

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### 2.1 *OMT—A Special Situation?*

After the referral in *OMT,* the situation seemed to have changed. The reasons for non-referrals seemed to have vanished into thin air, and the *BVerfG* was apparently willing to refer and to seek advice from the CJEU. Nonetheless, some aspects shed doubt on the initial euphoria about this "historical decision."[66]

#### *a) The Facts of the Case*

The *OMT* case was a constitutional complaint as well as an *Organstreit* between the *Bundestag* (Parliament) and the parliamentary group *Die LINKE,* concerning the question of whether the approving act of the Bundestag for government bonds bought by the ECB in secondary sovereign bond markets would be void, as well as whether the government and/or the *Bundestag* had breached their duties under the constitution by not preventing the decision of the Council of Ministers of the EU on OMT. The legal problem was that:

(1) The EU has no competence to regulate questions of financial and economic policy of the Member States, and the ECB is therefore restricted to actions on monetary policy by Articles 119, 123, and 127 ff. TFEU. As the purchase of government bonds on the secondary market in order to stabilize the domestic economies of those Euro Countries in crisis could be interpreted as a means of economic policy, the claimants argued that there had been an unlawful transfer of sovereign power to the EU by the German government and an act *ultra vires*.

(2) As the risk of Germany's liability could not be excluded if the bonds failed, the OMTs were also *ultra vires* as they amounted to a "union of liabilities" not provided for by the monetary union of Euro Countries. The *BVerfG* should therefore establish a violation of Article 38(1) GG as well as of Article 23(1) in connection with Article 79(3) GG, thus a breach of the identity of the *Grundgesetz* and an unlawful transfer of competences to the EU, leading to a duty on German state organs to refrain from such actions and, furthermore, to an obligation to act in favor of an abolition of the Council Decisions on OMT at EU level, for example by filing an action of nullity (Article 263 TFEU).

#### *b) The Reasoning Behind the Referral*

The *BVerfG* referred the question primarily not because the interpretation of Union law was relevant for its own interpretation of the *Grundgesetz*. Rather, it was true to its own standards as set out in *Honeywell* and other decisions. It asked the question on the competences of the ECB for Outright Monetary Transactions and on the interpretation of

[66] Christoph Herrmann, *Luxemburg, wir haben ein Problem!*, EuZW 161 (2014); Ukrow, *supra* note 1, at 121–22; rather skeptical Udo Di Fabio, *Karlsruhe Makes a Referral*, 15 GERMAN L.J. 107 (2014).

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Articles 119, 123, and 127 ff. TFEU by the CJEU, with this being the first time when a transgression of competences by an EU body other than the CJEU appeared clearly palpable and had not been subject to a ruling by a non-constitutional court. For the first time, the seemingly high barrier to assume an *ultra vires* act (the transgression of competences being "blatant" and "structurally important", in the words of the *BVerfG*) had been overstepped in the (reasoned) opinion of the *BVerfG*.[67] Whether or not there will be a second time remains to be seen.

Thus, unlike in the above-mentioned situations, the *BVerfG* considered a decision by the CJEU to be relevant to its own decision; for if the ECB had acted *ultra vires*, the Bundestag and the Bundesbank were to be inhibited from participating in such actions and were to take political measures to prevent such acts in the future.[68] The *BVerfG* maintained that it had the power to adjudicate both on the legal consequences of an action *ultra vires* for German governmental bodies, and on whether the identity of the *Grundgesetz* had been breached by the transfer of powers that enabled such an act by the ECB, even though it had not acted *ultra vires*.[69] Still, the question remains of whether there had not been better occasions in the past for making a referral, which would have strengthened the aspects of "cooperation" and "unity of EU law".[70] This considered, there may be no "wind of change" in the halls of Karlsruhe.

Nonetheless one must remark that on the one hand, the *BVerfG* has no capacity to rule on the political consequences for governmental bodies, and, on the other hand, a constitutional complaint is only an instrument to claim positive state action, where the *Grundgesetz* positively and concretely mandates such action.[71] The *BVerfG* would have had good reason to declare the complaints inadmissible,[72] and the fact that it did not do so can only be interpreted as a political action taken to exact a decision from the CJEU to show that fundamental principles, not only of national constitutional law but also of EU law, matter, even in times of financial crisis.[73]

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[67] Di Fabio, *supra* note 66, at 108.

[68] *OMT* at para. 44. Thereby the situation sketched in MAYER & WALTER, *supra* note 47, at 541 has apparently materialized.

[69] *OMT* at paras. 102–03, 39.

[70] Similar Di Fabio, *supra* note 66, at 107; René Brosius-Linke, *Die Vorlageentscheidung des Bundesverfassungsgerichts*, DÖV 612, 613 (2014); Matthias Wendel, *Kompetenzrechtliche Grenzgänge: Karlsruhes Ultra-vires-Vorlage an den EuGH,* ZaöRV 615, 618 (2014); Herrmann, *supra* note 66, at 161.

[71] *See* dissenting opinion by Judge Lübbe-Wolff, *OMT* at paras. 17–24.

[72] *See also* Matthias Ruffert, *Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm*, JURISTISCHE SCHULUNG 373, 374 (2014); Hillgruber, *supra* note 11, at 638.

[73] Sebastian Müller-Franken, *Anmerkung zu Vereinbarkeit des Ankaufs von Staatsanleihen durch EZB mit EU-Recht—Vorlage an den EuGH*, NVwZ 514, 515 (2014); from the point of view of domestic law, see Hillgruber,

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It is interesting to see that the CJEU does not reject the preliminary reference by using a "strict" standard[74] and claiming a hypothetical question, because the *BVerfG* cannot decide on the merits of the case.[75] A hypothetical question is posed when the answer does not contribute to the decision. This was claimed by several other Member States in the oral proceedings, but the CJEU maintains that there is a presumption of relevance of the case which had not been rebutted.[76]

The consequences for German constitutional law and procedure of the CJEU's decision on the merits of the case remain unclear. Still, the *BVerfG* is not entitled under German procedural law to directly oblige German state organs to act or to refrain from acting. It may only, in the course of a *Verfassungsbeschwerde,* declare a violation of a fundamental right. Therefore, it needs an "exit strategy" for the case at hand that the CJEU does not follow its interpretation of Union Law.[77] So far, the *BVerfG* has not enunciated the inevitable in case of an *ultra vires* act or a violation of the identity of the *Grundgesetz*: it would be either a modification of the EU Treaties in order to allow for such action by the ECB thereby eliminating the perceived lack of competence by the EU, or a modification of the *Grundgesetz* in the limits of Article 79(3) GG in order to accommodate the "new" competences of the ECB, or—as a last resort if neither of the above can be done and thus the *ultra vires* act persists—exit from the EU or at least the Eurogroup.[78] Maybe the *BVerfG* will also modify its standard of review for *ultra vires* acts, using the claim simply as a possibility for individual claimants to exact a preliminary ruling before the CJEU.[79]

Irrespective of the reaction of the CJEU in this particular case, both the difficulties of constitutional procedural law and the apparent willingness of the *BVerfG* to overcome them for the sake of safeguarding fundamental principles of German constitutional law,

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*supra* note 11, at 638. Whether this will be successful can be doubted looking at the Opinion of Advocate General Pedro Cruz Villalón, Case C–62/14, Peter Gauweiler v. Deutscher Bundestag (Jan. 14, 2015), http://curia.europa.eu/. He does not state a breach of the TFEU as long as the ECB manages to perform OMTs under conditions where the ECB respects the requirement of transparent reasoning and of proportionality and finds mechanisms to safeguard the conditions of free markets even when purchasing bonds on a secondary market.

[74] *See* MALFERRARI, *supra* note 27, at 182; SCHIMA, *supra* note 28, at 76 (general or hypothetical question or no connection to the issue at stake).

[75] Differently Ruffert, *supra* note 72, at 374.

[76] *OMT Decision* at paras. 18–31.

[77] Wendel, *supra* note 70, at 668; Ruffert, *supra* note 72, at 375; Herrmann, *supra* note 66, at 162.

[78] See on a similar decision by the Polish constitutional court Ziller, *supra* note 4, at 97. Very clearly, Ukrow, *supra* note 1, at 135–39.

[79] This is suggested by Mayer, *supra* note 25, at 2002.

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like the principle of democracy, show that there may only be a second time when the high threshold of *ultra vires* is again reached by a special measure in special times of crisis. It is valuable that a constitutional court shoulders the control of legality of acts by EU organs where governments and parliaments were apparently unable to do so out of various reasons and does not remain silent. But it must also be stated that the referral is not necessarily meant to contribute to the "unity of Union law" as envisaged by Article 267 TFEU.

**C. Conclusions**

To conclude, it seems safe to state that the *BVerfG* remains reluctant to refer. Although Germany is often said to have no doctrines of "judicial activism" and "judicial self-restraint" in political matters, this is not true when it comes to the decisions of the *BVerfG* in matters pertaining to the EU. Whereas there are clearly many situations where a reference by a non-constitutional court has been necessary due to procedural law, there remain specific instances in which only the *BVerfG* could have referred the question, but instead interpreted "relevance to the case" in a way that enabled non-referral for extra-legal reasons. This could also be named "judicial passivity". The only referral so far shows that the *BVerfG* can also interpret the criterion of "relevance" very widely, in order to ask questions on EU competences where this is politically intended. Neither situation represents a contribution to the development of European law and integration.

Nonetheless, one can legitimately ask whether references by constitutional courts are crucial in reaching the goals of preliminary rulings: Neither the unity of European law nor effective legal protection of the individual against violations of his or her fundamental rights seem to be in danger, as most of the relevant cases come before non-constitutional courts in any case. Yet, as the saga of the Data Protection Directive illustrates, it is just those few other cases that could make history—if there was a true cooperation between the courts.

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