Special Issue
The OMT Decision of the German Federal Constitutional Court

Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review

By Jürgen Bast[*]

A. Introduction

On 26 July 2012, the European Central Bank (ECB) issued a new currency, the "Draghi." A country where the Draghi has the status of legal tender must be fabulously wealthy—a single coin gives unlimited purchasing power to its owner. This is one way to characterize ECB President Mario Draghi's pledge to do "whatever it takes" to save the Euro.[1] It is widely believed that the move prevented the common currency from breaking apart.[2] Yet, the ECB's resolve caused severe conflict within the European System of Central Banks (ESCB). A few weeks later, when the Governing Council of the ECB formally adopted the Outright Monetary Transactions (OMT) program to pave the way for the implementation of Draghi's rescue policy, the representative of the German *Bundesbank* was outvoted.[3] Subsequently—in a maneuver quite unusual among central bankers—he appealed to the public to stir up support for his opposition to the policy.[4]

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[1] Mario Draghi, President, European Cent. Bank, Global Inv. Conference in London (July 26, 2012), *available at* http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html; *see* Jeff Black & Jana Randow, *Draghi Says ECB Will Do What's Needed To Preserve Euro*, BLOOMBERG-ONLINE (July 26, 2012), http://www.bloomberg.com/news/2012-07-26/draghi-says-ecb-to-do-whatever-needed-as-yields-threaten-europe.html.

[2] Simon Kennedy & Jeff Black, *Draghi's 'Whatever It Takes' Still Works As Euro Revives*, BLOOMBERG-ONLINE (Jan. 9, 2014), http://www.bloomberg.com/news/2014-01-10/draghi-s-whatever-it-takes-still-works-as-euro-revives.html.

[3] Press Release, European Cent. Bank, Technical Features of Outright Monetary Transactions (Sept. 6, 2012), *available at* http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html; *Unlimited Bond Purchases: ECB Head Draghi Backs Up Pledge To Save Euro*, SPIEGEL-ONLINE (Sept. 6, 2012), http://www.spiegel.de/international/europe/ecb-president-draghi-announces-unlimited-bond-buying-program-a-854374.html.

[4] Gerald Braunberger & Stefan Ruhkamp, *Bundesbank kritisiert Beschluss offen*, FRANKFURTER ALLGEMEINE ZEITUNG (Sept. 6, 2012).

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Eighteen months later the Euro is still around, and so is the conflict. Did the ECB exceed its mandate when it expressed its willingness to buy, under certain conditions, government bonds of selected Member States? Meanwhile the conflict has moved on from the central bankers to another famous counter-majoritarian institution, the *Bundesverfassungsgericht* (German Federal Constitutional Court). In its *OMT Case* decision of 14 January 2014, the Constitutional Court concurred with the *Bundesbank* and found the OMT policy to be unlawful.[5] The Court suspended the proceedings and referred the matter to the European Court of Justice (CJEU) for a preliminary ruling on the validity of the ECB's OMT Decision.

In this paper I will discuss the legal context of the Constitutional Court's first-ever reference to the CJEU. I will particularly focus on the Constitutional Court remedy out of which the referral arose, namely, the *ultra vires review* (UVR). I will demonstrate that UVR is an ill-conceived and potentially dangerous instrument. In the framework of a UVR the preliminary ruling procedure transforms from an instrument of cooperation between the Court of Justice and national courts to little more than a prelude of the imminent intransigence of the referring court. The UVR's structural problems are made all the more acute by the fact that, in its Referral Order, the Constitutional Court has applied a version of UVR that cannot be characterized as "reserved" or "modest"—which is the way the Constitutional Court promised to implement the remedy in the *Honeywell Case* (2010).[6]

B. A New Remedy of German Constitutional Law: Ultra Vires Review (UVR)

In recent years the Constitutional Court has developed two distinct remedies that aim at protecting the integrity of the German constitutional order against potential harm caused by the institutions of the EU. These remedies are the *ultra vires* review (UVR) and the basic structure review (BSR).[7] The latter is usually called "review of identity" (*Identitätskontrolle*), which refers to the constitutional identity defined by the non-amendable parts of the German constitution, the Basic Law (*Grundgesetz*). BSR serves to protect essential features of the Basic Law from being damaged or destroyed by way of transfers of power to the European Union. UVR, on the other hand, targets Union acts that violate the principle of conferral, that is, the principle that recognizes the limits of the

[5] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13 (Jan. 14, 2014), http://www.bundesverfassungsgericht.de/en/index.html [hereinafter *OMT Case].*

[6] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 286, 303 (July 6, 2010) [hereinafter *Honeywell*].

[7] For the development of *ultra vires* review, see 58 BVERFGE 1, 30 (*Eurocontrol I)*; 75 BVERFGE 223, 235, 242 (*Kloppenburg*); 89 BVERFGE 155, 188 (*Maastricht*); 123 BVERFGE 267, 354 (*Lissabon*). On BSR, see *inter alia* 75 BVERFGE 223, 235, 242 (*Kloppenburg*); 89 BVERFGE 155, 188 (*Maastricht*); 113 BVERFGE 273, 296 (*Europäischer Haftbefehl*); 123 BVERFGE 267, 353–54 (*Lissabon*); *Honeywell* at 306; BVerfG, Case No. 1 BvR 1215/07 (Apr. 24, 2013), http://www.bundesverfassungsgericht.de/en/index.html, at para. 91 (*Antiterrordatei*).

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powers transferred to the EU. Neither of these remedies has an explicit basis in the Basic Law or the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*), the statute that defines the actions and procedures before the Constitutional Court. By establishing these remedies the Court imposed limits on Germany's participation in the EU and provided itself with the means to guard them.

Much could be said about the constitutional politics of the Constitutional Court as an actor in the multilevel constitutional order of Europe. After all, that is the context of this evolving jurisprudence.[8] Among the aspects that could be mentioned it is clear that the courtroom in Karlsruhe provides a forum for Eurosceptic voices that are usually underrepresented in the German political discourse. It is fair to say that the proceeding of the Constitutional Court in these cases serve as a functional equivalent to antagonisms in European affairs that are elsewhere channeled through parliaments and referenda.[9] Moreover, the increasingly defensive approach of the Constitutional Court is part of a larger picture that accounts for the Court's changing role in the German political system generally.[10]

Technically speaking, neither UVR nor BSR establish a distinct constitutional action or complaint. Rather, they constitute pleas in law that can be made in any proceeding before the Constitutional Court, but are most likely to be brought either by way of an action concerning the conflict between constitutional organs (*Organstreitverfahren*)[11] or by way of the individual complaint of a person claiming a violation of his or her fundamental rights (*Verfassungsbeschwerde*).[12] Given the very lenient conditions for admissibility of such complaints in the present context, the Court's conception effectively entails an *actio popularis* empowering every single German voter to defend the European order of competences or the essential features of the Basic Law, respectively.[13]

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[8] *See, e.g.*, Stefan Oeter, *Rechtsprechungskonkurrenz zwischen nationalen Verfassungsgerichten, EuGH und EGMR*, *in* 66 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER, 361, 362–91 (Stefan Kadelbach et al. eds., 2007); on the historical context, see Christoph Schönberger, *Anmerkungen zu Karlsruhe*, *in* DAS ENTGRENZTE GERICHT, 9, 62–63 (Matthias Jestaedt et al. eds., 2011).

[9] For an insider's perspective, see Andreas Voßkuhle, *The Cooperation Between European Courts: The Verbund of European Courts and its Legal Toolbox*, *in* THE COURT OF JUSTICE AND THE CONSTRUCTION OF EUROPE, 81 (Allan Rosas, Egils Levits, & Yves Bot eds., 2013).

[10] On the increasingly fragile legitimacy of the Constitutional Court, see Christoph Möllers, *Legalität, Legitimität und Legitimation des Bundesverfassungsgericht, in* DAS ENTGRENZTE GERICHT, 281 (Matthias Jestaedt et al. eds., 2011).

[11] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [BASIC LAW], May 23, 1949, BGBl. I, art. 93(1) cl. 1; Gesetz über das Bundesverfassungsgericht [Law on the Federal Constitutional Court], Bundesgesetz Blatt I [BGBL. I] [Federal Law Gazette] §§ 13(1) cl. 5, 63–67, *available at* http://www.iuscomp.org/gla/statutes/BVerfGG.htm.

[12] BASIC LAW art. 93 (1) cl. 4a; Law on the Federal Constitutional Court §§ 13 (1) cl. 8a, 90–95.

[13] The Constitutional Court leverages the right to vote in federal elections, laid down in Article 38 of the Basic Law. This conception has attracted forceful scholarly critique. *See, e.g.,* Christoph Schönberger, *Die Europäische Union zwischen "Demokratiedefizit" und Bundesstaatsverbot*, 48 DER STAAT, 535, 539–42 (2009). The Order in the *OMT*

In the remainder of the paper, I shall provide a legal analysis of the functioning and effects of UVR as applied in the Referral Order issued by the Constitutional Court on 14 January 2014. The origins of UVR date back to the Constitutional Court's *Maastricht* judgment (1993) in which the Constitutional Court claimed for itself the right to check Union institutions for their compliance with the principle of conferral.[14] In the *Lisbon* judgment (2009) the Constitutional Court specified the remedy further. It reserved the right to exercise UVR exclusively for itself rather than permitting ordinary German courts to consider UVR challenges.[15] The conditions for such a claim were summarized in the *Honeywell* judgment (2010) in which the Constitutional Court conducted a review of a decision of the CJEU for the first time (the claim was eventually dismissed).[16]

According to the Constitutional Court a successful claim for UVR has to meet both procedural and substantive requirements. Procedurally, before declaring a Union act to be *ultra vires*, the European Court of Justice is to be afforded the opportunity to invalidate the contested act, and the CJEU must have declined to do so.[17] Substantively, the contested act must constitute a sufficiently qualified breach of the principle of conferral. This condition has three elements. First, the contested act must be "a violation of the integration programme" laid down in the EU Treaties. In other words, this must be a "transgression of powers" (*Kompetenzüberschreitung*). Second, the act of authority must "manifestly" transgress the conferred powers. Third, the act must be "highly significant" in view of the principle of conferral, either for the balance of powers between the EU and the Member States or for the observance of the rule of law.[18]

The type of legal defects that would qualify for a "transgression of powers" is not entirely clear. It is safe to say that it includes any infringement of the principle of conferral as defined in Article 5(2) TEU,[19] but it is not limited to the lack of competence in the strict sense. Other violations of the Treaties, such as infringements of the principle of

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Case has lowered the hurdle even further. For convincing arguments against the admissibility of the actions, see the *OMT Case* (Lübbe-Wolf, J., dissenting), (Gerhard, J., dissenting).

[14] 89 BVERFGE 155, 188 (*Maastricht*).

[15] 123 BVERFGE 267, 353–54 (*Lissabon*).

[16] *Honeywell* at 303–04.

[17] *Id*.

[18] For a summary of the condition of UVR, see Heiko Sauer, *Europas Richter Hand in Hand? Das Kooperationsverhältnis zwischen BVerfG und EuGH nach Honeywell*, EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 94, 95–96 (2009).

[19] *Honeywell* at 303–04.

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subsidiarity[20] or even of substantive standards, e.g. the prohibition of monetary financing of the budget (see below), could also amount to a transgression of powers.[21] It is clear, however, that the standards of legality for testing whether the contested act is *ultra vires* are derived from EU law.[22]

To summarize, a UVR claim is well founded if a manifest transgression of powers has occurred and the challenged act is structurally significant.

C. The CJEU's View: The *Foto-Frost* Doctrine and its Recognized Limits

The Constitutional Court's claimed authority to conduct *ultra vires* review conflicts with the centralized model of judicial review exercised by the CJEU. According to the European Court's settled case law, the adoption of a Union act is accompanied by a presumption of its validity, that is to say that acts of the EU institutions are, in principle, regarded as lawful.[23] Even an act that is tainted by irregularities is presumed to be valid and, accordingly, produces legal effects until it has been properly repealed or withdrawn by the institution that adopted it. The Court of Justice has claimed for itself the sole right to rebut this presumption and to annul an act of EU law or declare it invalid following a reference for a preliminary ruling or a plea of illegality. Other institutions, both national or European, have no jurisdiction to declare a Union act invalid (this is the so-called *Foto-Frost* doctrine).[24] This doctrine applies regardless of the legal defect involved.[25] The lack of competence does not play a special role among the grounds for judicial review laid down in Article 263(2) TFEU. An act that transgresses the powers conferred upon the acting institution benefits from the presumption as to its validity.[26] The EU has thus opted for a strictly centralized system of judicial review of the exercise of Union competences. This is a typical feature of a federal polity.[27]

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[20] 123 BVERFGE 267, 353 (*Lissabon*).

[21] *Id*. at 392–96.

[22] Franz C. Mayer, *Multilevel Constitutional Jurisdiction*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 399, 412 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed. 2010) ("doubling of the relevant standards"); Daniel Thym, *Europäische Integration im Schatten souveräner Staatlichkeit*, 48 DER STAAT, 559, 573 (2009).

[23] *See* Algera v. Common Assembly of the European Coal & Steel Community, CJEU Cases 7/56, 3/57–7/57, 1957 E.C.R. English special ed. 39, 61.

[24] Foto-Frost v. Hauptzollamt Lübeck, CJEU Case 314/85, 1987 E.C.R 4199, paras. 14 et seq.

[25] Les Verts v. Parliament, CJEU Case 294/83, 1986 E.C.R. 1339, para. 23.

[26] *See* Armin von Bogdandy & Jürgen Bast, *The Federal Order of Competences*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 275, 280 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed. 2010).

[27] Franz C. Mayer, *Die drei Dimensionen der Europäischen Kompetenzdebatte*, 61 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT, 577, 602 (2001); Thomas von Danwitz, *Vertikale Kompetenzkontrolle in förderalen Systemen*, 131 ARCHIV DES ÖFFENTLICHEN RECHTS, 510 (2006).

But the presumption of validity is not without limits, even if the relevant jurisprudence is less prominent than the *Foto-Frost* doctrine itself. By way of exception, certain legal defects render an act non-existent without the need for a declaration of invalidity. By definition, a non-existent act does not produce any legal effects, not even temporarily. The conditions for such *ipso iure* nullity were first established in the *Consorzio Cooperative d'Abruzzo* case.[28] A Union act, the CJEU explained, must be regarded as legally non-existent if it exhibits "particularly serious and manifest defects."[29] In other words, a non-existent act is tainted by an irregularity "whose gravity is so obvious that it cannot be tolerated,"[30] including but not limited to grave and obvious irregularities resulting from a lack of competence. Still, the CJEU concluded that this would occur only in "quite extreme situations."[31] In practice the Union Courts have almost never been willing to accept a plea alleging the non-existence of the contested act.[32] A crucial factor seems to be that, for a Union act to be treated as non-existent, the irregularities should be immediately obvious to its addressees.[33]

Applying the *Consorzio* doctrine to the issue of the Union's adherence to its competences, Union law leaves some room for a national review, provided that two elements are present: the lack of competence is "manifest" and the resulting legal defect is "particularly serious" in nature.

[28] Consorzio Cooperative d'Abruzzo v Comm'n, CJEU Case 15/85, 1987 E.C.R. 1005, para 10; *confirmed in* Comm'n v. BASF, CJEU Case C-137/92 P, 1994 E.C.R. I-2555, paras. 48–50. For a more recent case concerning a directive, see Comm'n v. Greece, CJEU Case C-475/01, 2004 E.C.R. I-8923, paras. 18–20. For a scholarly account, see CLAUDIA ANNACKER, DER FEHLERHAFTE RECHTSAKT IM GEMEINSCHAFTS- UND UNIONSRECHT, 81 et. seq. (1998).

[29] *Consorzio Cooperative d'Abruzzo*, CJEU Case 15/85 at para. 10.

[30] *Comm'n*, CJEU Case C-137/92 P at para. 48; *Comm'n*, CJEU Case C-475/01 at para. 19.

[31] *Comm'n*, CJEU Case C-137/92 P at para. 49; *Comm'n*, CJEU Case C-475/01 at para. 20.

[32] For a rare example, see dm-drogerie markt v. OHIM, CJEU Case T-36/09, 2011 E.C.R. II-6079, para. 92.

[33] *Cf.* MATTHIAS VOGT, DIE ENTSCHEIDUNG ALS HANDLUNGSFORM DES EUROPÄISCHEN GEMEINSCHAFTSRECHTS 214 (2005).

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D. Putting UVR to the Test: The Constitutional Court's Referral to the CJEU

There is a surprising parallel between the *Consorzio* doctrine and the conditions the Constitutional Court has applied to UVR. On closer inspection, however, the practical application of the standards is quite different. The following analysis of the German Court's application of its UVR standards in its Referral Order will shed light on the nature of this remedy. It will not be a flattering portrayal.

I. Admissibility of the Request for a Preliminary Ruling

With its referral to the CJEU, calling for a preliminary ruling on the validity of the ECB's OMT Decision, the Constitutional Court has taken the first step towards a complete UVR. Yet the Constitutional Court seems quite concerned about the admissibility of its own reference, in particular with a view to the—arguably hypothetical—nature of the questions that concern an internal decision that has not been put into effect.[34] In my view, this concern is somewhat overdone. The Luxembourg Court will not pass on this opportunity to engage in what appears to be an invitation to a judicial dialogue. The CJEU will probably apply a lenient admissibility test, as it often does, and accept the referring court's opinion as to whether a decision on the question is necessary to enable it to give a judgment.[35]

While practical reason counsels that the CJEU answer the Constitutional Court's questions, there would be good legal reasons for not doing so. These reasons are related to the very nature of UVR. The CJEU could refuse to answer the questions citing an abuse of the right to request a preliminary ruling. The CJEU has always stressed the binding nature of its judgments to be an essential feature of the EU's judicial system; challenging the binding effect of interpretations given by the Court of Justice touches upon the very foundations of the Union.[36] In the instant case, the Court of Justice might choose not to overlook the fact that this reference is an intermediate step in a domestic remedy that the EU does not consider lawful. This would be particularly true when the referring court has explicitly stated that it does not feel bound to comply with the ruling.[37] That sentiment runs afoul of the system of direct cooperation between the Court of Justice and national courts established by the EU Treaties. That system of cooperation aims to ensure the correct application and uniform interpretation of EU law, which the national courts have to apply.[38]

[34] *OMT Case* at paras. 34–35, 101.

[35] *Cf., e.g., Queen v. Sec'y of State*, CJEU Case C-491/01, 2002 E.C.R. 2002 I-11453, para. 37.

[36] Opinion 1/91, 1991 E.C.R. I-06079, paras. 61–64, 71 (*European Economic Area I*).

[37] *OMT Case* at para. 103.

[38] Opinion 1/09, *European and Community Patents Court*, 2011 E.C.R. I-1137, paras. 83–84.

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II. The Constitutional Court's Method of Determining a Transgression of Powers

In substance, UVR requires the lawfulness of a Union act to be measured against the yardstick of the EU Treaties, including the protocols attached to them. The Protocol on the Statute of the European System of Central Banks and the European Central Bank (ESCB Statute) is included in this body of law. The methods the Constitutional Court applied to determining that there had been a transgression of powers seems quite disconnected from the relevant doctrines of EU law. The Constitutional Court's Referral Order reveals the challenges of decentralized judicial review of the exercise of EU competences, not least because such review requires a national court to operate in a field with which it is not familiar.

In the following paragraphs, I will not conduct a full analysis of whether the ECB has, in my view, exceeded the powers conferred upon it by the EU Treaties. I also will not scrutinize the Constitutional Court's conclusion that the OMT Decision has circumvented the prohibition (established in Article 123 TFEU) to "directly purchase" government bonds. I confine myself to raising some critical questions about the methods the Constitutional Court applied in answering the difficult questions of EU law involved in the case.

1. The Constitutional Court's Approach to Interpreting and Delineating EU Competences

The point of departure for any proper analysis of Union competences is the legal basis chosen by the acting institution. In this case the legal basis is provided in Article 18.1 of the ESCB Statute, which addresses the Bank's open market and credit operations.[39] According to general doctrine of EU competences, the Bank could be regarded as having exceeded its authority only by reference to the powers conferred in this particular provision; the scope of power provided by other provisions would be irrelevant.[40] In the instant case it is decisive whether the contested market operations authorized by the Bank's OMT Decision serve "to achieve the objectives of the ESCB and to carry out its tasks."[41] These objectives and tasks are listed in Article 127 TFEU and include the task of "defining and implementing the monetary policy of the Union" as well as the objective to "support the general economic policies in the Union." I do not intend to give a definitive opinion as to whether the OMT Decision is a legitimate part of the "monetary policy" defined by the ECB and/or "supports the general economic policies" as defined by the competent political

[39] Cf. *OMT Case* at para. 11.

[40] For explanations, see Jürgen Bast, *Legal Instruments and Judicial Protection*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW, 345, 378–79 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed, 2010).

[41] Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art. 18.1, 2012 O.J. (C 326) 230.

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institutions. My argument here is methodological. I argue that focusing on these questions is the proper way of defining the legal issue with which the Constitutional Court was confronted in the *OMT Case*.

But the Constitutional Court chose a different method. According to the Constitutional Court the relevant question was whether the Bank's OMT Decision is to be qualified as "an independent act of economic policy."[42] Quite remarkably, the Constitutional Court does not even mention the legal basis of the contested ECB Decision. Instead, the Constitutional Court makes the point that the Bank's OMT Decision constitutes an act of economic policy.[43] The EU Treaties, however, do not use the concept of "economic policy" to negatively define the powers of the ECB, neither by carving out a reserved domain of the Member States nor by exclusively defining the scope of powers conferred on other EU institutions. To the contrary, the ECB is expected to support the general economic policies in the Union, *inter alia*, by buying or selling government bonds on the open market in accordance with Article 18.1 of the ESCB Statute.[44] The Constitutional Court's statement that "the responsibility for economic policy lies clearly with the Member States" is somewhat misleading.[45] That proposition might prevail only if the following important qualifier is added: "unless a measure falls within the scope of a legal basis provided in the EU Treaties." Despite the absence of a general clause to this effect, there exists a myriad of EU competences to implement economic policies, including the internal market powers laid down in the TFEU and Article 18.1 of the ESCB Statute.

The Constitutional Court's flawed method reveals a fundamental problem in dealing with functional competences, that is, competences based on aims (*zielbezogene Kompetenzen*) as opposed to competences based on fields (*sachbezogene Kompetenzen*). The cognitive problem is well known from the functional competences in the context of harmonization of the internal market.[46] The mere fact that a measure that is based on a functional competence at the same time falls within the scope of a particular field does not necessarily indicate a transgression of powers.[47] In fact, by their very nature, functional competences tend to overlap with other competences. Reacting to this situation, a

[42] *OMT Case* at para. 39.

[43] *OMT Case* at paras. 63–78.

[44] It is only necessary that these measures do not conflict with the primary objective to maintain price stability. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 127(1), May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[45] *OMT Case* at para. 39.

[46] TFEU art. 114(1).

[47] *Cf.* Germany v. Parliament, CJEU Case C-376/98, 2000 E.C.R. I-08419, at para. 88.

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complex jurisprudence has developed concerning the choice of legal basis,[48] a jurisprudence completely neglected by the Constitutional Court.

In fact, the Constitutional Court repeatedly refers to the *Pringle* judgment.[49] But in *Pringle*, the Court of Justice did not have to judge the exercise of Union competences. The *Pringle* decision was concerned with collective Member States' actions authorized by the new Article 136(3) TFEU. In that context it made perfect sense to ask whether these actions of economic policy would touch upon another field (monetary policy) in which the Union has exclusive competence. The mere existence of a Union competence can preempt the Member State from taking action within that field.[50] This is not the case the other way round. The mere existence of Member States competences does not preempt the Union from exercising its competence, unless a specific provision in the Treaties provides for such a carve-out. In fact, the Treaties rarely do so, and certainly not with regard to the entire field of economic policy. This asymmetric feature of the European order of competences is a necessary implication of the choice of the Treaty drafters to confer powers on the Union but not on the Member States.[51]

2. The Constitutional Court's Approach to Determining the Scope of ECB Powers

Further observations concern, more specifically, the determination of the scope of the ECB's powers with regard to the contested OMT program. The Constitutional Court's Referral Order includes quite a range of disputable statements on the role of the ECB in the Economic and Monetary Union.

Some of the Constitutional Court's statements are based on legal assumptions that draw on insights about which courts can claim superior expertise. Other statements, however, involve empirical assumptions on the economic effects of central bank interventions. In this context the Constitutional Court should have reflected on the limits of its own expertise, an exercise that should have led it to accept a broad margin of discretion on the part of the ECB to make these judgments. Instead, the Constitutional Court's Referral Order gives the impression of merely having sided with one camp of the economic argument, represented by the German *Bundesbank* and the professors of economics

[48] See Martin Nettesheim, *Kompetenzen*, *in* EUROPÄISCHES VERFASSSUNGSRECHT, 389, 434–39 (Armin von Bogdandy & Jürgen Bast eds., 2nd ed. 2009).

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

[50] TFEU art. 2(1).

[51] von Bogdandy & Bast, *supra* note 26, at 286 (no bipolar order of competences). It is more than a minor terminological error when the Constitutional Court fails to recognize that the EU Treaties do not confer any "powers" on the ESCB but only assigns to it certain "tasks," while "powers" are actually conferred on the ECB, i.e., a Union institution (*cf. OMT Case* at paras. 57–59).

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among the applicants.[52] At the center of the economic debate is the point made by the ECB that the OMT program served to restore regular monetary policy transmission mechanisms by neutralizing unjustified interest spreads on government bonds.[53] The Constitutional Court's discussion of this crucial point is surprisingly brief,[54] but still heavily loaded with claims to economic expertise.[55] For example, what methods did the Constitutional Court use to determine that a meaningful distinction between "rational" and "irrational" interest spreads on government bonds cannot be operationalized?[56] Did the Governing Council of the ECB really exceed the limits of its discretion when it arrived at a conclusion different from the view advocated by the German *Bundesbank*? I doubt that the Constitutional Court is in a good position (no court of law would be) to substitute its judgment for that of the ECB with respect to the techniques of central banking.

Two further examples should suffice to make the point that the Constitutional Court's views on the methods to construe the limits of the ECB's powers are, to say the least, disputable.

First, the Constitutional Court argues that the ECB must not safeguard the current composition of the Euro currency area, that is to say, it has no mandate to fight the breakup of the Eurozone. In the Constitutional Court's view, safeguarding the composition of the currency area "obviously" is a task of economic policy and therefore remains a responsibility of the Member States.[57] This is a surprising statement. It is true that the ECB neither has the power to admit new Member States to the Eurozone nor the power to expel existing Member States. But the Member States also lack the authority to do these things. The power of admission is conferred upon the Council of the EU under Article 140(2) TFEU. The Member States—with the exception of the UK and Denmark—are under a legal obligation to work towards fulfilling the admission criteria. With this in mind it is highly plausible to assume that the *current* composition of the currency area forms the basis of the monetary policy of the Union, which, consequentially, should be defended by the means at the ECB's disposal. The EU Treaties operate on the premise that the common currency, once established, is irreversible.[58] This surely cannot fool history. Still, it arguably

[52] *OMT Case* at paras. 13–15, 71.

[53] *OMT Case* at para. 7.

[54] *OMT Case* at paras. 95–98.

[55] See, in particular, *OMT Case* at paras. 71, 98, on the existence and meaning of unjustified interest rate hikes.

[56] *OMT Case* at para. 98.

[57] *OMT Case* at para. 72.

[58] *See* TFEU art. 140(3).

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gives the ECB a mandate to actively fight the breakup of the currency whose stability it is obliged to maintain as its primary objective.[59]

The second example of a controversial legal argument relates to the fact that the Bank's OMT Decision links the indirect purchase of bonds to preconditions defined by the Member States within the framework of the EFSF or the ESM. For the Constitutional Court this is yet another piece of evidence demonstrating a dalliance in the field of economic policy.[60] But the Constitutional Court seems to overlook the fact that the ECB has deliberately refrained from establishing its *own* preconditions, which would certainly have entailed crucial policy choices. Arguably this omission indicates that the ECB did *not* pursue an independent economic policy. Precisely the fact that the OMT program is linked to preconditions for which political bodies can be held accountable lends credence to the Bank's claim that it merely aims to achieve goals of monetary policy while supporting the economic policies defined by those bodies.[61] Again, the Constitutional Court fails to provide convincing reasoning for its contrary construction, which is anything but self-evident.

III. The Constitutional Court's Test: Is the Transgression of Powers "Manifest"?

In *Honeywell* the Constitutional Court explained at some length why UVR has to be exercised in a manner that is respectful of the functional needs of EU law, including its legitimate claim to primacy over national law.[62] A crucial tool for implementing a deferential approach is the requirement that the contested act *manifestly* exceeds the powers attributed to the acting institution.

Such caution is notably absent in the Constitutional Court's Referral Order. The requirement that insists that only obvious breaches of law could give rise to a UVR was applied in practice for the first time in this case. Yet it is difficult to see how the Constitutional Court heeded this condition in even the remotest way. Observing what the Court actually did, it seems that it tacitly replaced that test with a new standard. Assuming a violation of the EU Treaties, the Constitutional Court's new test sought to determine whether such violation would obviously constitute a transgression of powers.[63] In other words, a concrete test related to the contested act was substituted by an abstract test in

[59] See TFEU art. 127(1).

[60] *OMT Case* at paras. 74–78.

[61] On conditionalities as a means of exercising public authority, see Michael Ioannidis, *EU Financial Assistance Conditionality after "Two Pack,"* 74 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 61 (2014), *available at* http://ssrn.com/abstract=2398914.

[62] *Honeywell* at 301–03.

[63] *OMT Case* at paras. 39, 43.

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which the determination is a matter of interpretation of the relevant provisions of the Treaties. In this new analysis the facts of the case are immaterial. This shift significantly broadens the range of acts that are potentially subject to UVR. It is telling that the Constitutional Court did not recall the reasons, given in *Honeywell*, for restricting UVR to exceptional cases. Any considerations on a possible "right to tolerance of error" on the part of the EU institutions are missing.[64] The deviations from *Honeywell* are dramatic and meaningful.

We can only speculate why the Constitutional Court emptied the criterion to such an extent. Maybe the reason is that in the given case the transgression of powers is a matter on which reasonable people can disagree and, therefore, does *not* qualify as "manifest" under any other standard.[65] In an indirect fashion this is even confirmed by the Constitutional Court, which admits that an interpretation in conformity with EU law may be possible in order to avoid a violation of law.[66] But where such an interpretation is possible, it is difficult to speak of a "manifest" violation.[67]

This is bad news for any future exercise of UVR by the Constitutional Court. Should the *OMT Case* define the standard for testing the manifest character of a violation, this criterion does nothing to restrict the scope of the remedy. This only deepens the gap between UVR, as defined by the Constitutional Court, and the accepted standards for decentralized review of legality of Union acts established by the CJEU's *Consorzio* jurisprudence.

IV. The Constitutional Court's Test: Is the Transgression of Powers "Structurally Significant"?

As regards the criterion of structural significance, it is adequate to note that the Constitutional Court applies an abstract test here as well. It asks whether the type of act, which alledgly violates the order of competences, entails structurally signficant consequences.[68] This is not the same thing as inquiring whether the actual violation has entailed structurally significant consequences. Reading the Constitutional Court's very brief reasoning on this point, I had the impression that *any* acts of economic policy pursued by the ECB and *any* instance of monetary financing of the budget would constitute a

[64] *Honeywell* at 307.

[65] *See OMT Case* (Gerhard, J., dissenting) at paras. 16–17.

[66] *OMT Case* at para. 100.

[67] *See* Ingolf Pernice, *Karlsruhe wagt den Schritt nach Luxemburg*, VERFASSUNGSBLOG (Feb. 10, 2014), http://www.verfassungsblog.de/karlsruhe-wagt-den-schritt-nach-luxemburg/#.UweyvIUr3Vk.

[68] *OMT Case* at paras. 40, 43.

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transgression of powers that is structurally significant. The degree of the violation and the particular circumstances of the case seem to be irrelevant. This differs from the CJEU's *Consorzio* jurisprudence in which the actual gravity of the violation is decisive. Unfortunately, the Constitutional Court offered no justification for its approach.

E. Evaluation of UVR in Light of the Constitutional Court's Referral

The above analysis of the Constitutional Court's Referral Order has revealed two main points. First, the Court's reasoning as to whether a breach of EU law has occurred is susceptible to methodological and substantive critique. Second, the Court's approach to determining whether the alleged breach is sufficiently qualified is characterized by a low degree of deference to the European Court of Justice.

This unfortunate premiere of UVR demonstrates the remedy's structural problems, problems that exist independent of the flaws evident in any particular decision. The first, and maybe the most important structural problem, is that UVR damages the preliminary ruling procedure because the Constitutional Court denies the binding nature of the CJEU's ensuing judgment on the validity of the Union act. The findings of the CJEU are seen as an opinion with which the Constitutional Court merely "must comply … in principle."[69] At the very heart of UVR is the expectation that the CJEU may fail to properly apply the relevant standards of EU law, or in other words, that the CJEU might give a wrongful judgment. The Constitutional Court claims for itself the right to revise such a CJEU judgment and thus places itself in the position of having the final say on a matter of EU law.[70] In the context of UVR, any reference to the Court of Justice is not a pledge of allegiance, but rather a direct challenge to its authority. The Constitutional Court demands obedience from the CJEU when it should be the other way around.

A second structural problem concerns the effects of the conditions that qualify the alleged violation of the principle of conferral. In EU law the condition that the legal defect must be "particularly serious and manifest" creates room for maneuver for courts and bodies other than the CJEU and thus eases the tensions caused by the strict *Foto-Frost* doctrine. By contrast, in the context of UVR as applied by the Constitutional Court, the requirement that the legal defect must be manifest aggravates the conflict between the courts. Whenever the CJEU does not wish to comply with the demand to invalidate the contested act, it has to uphold an act that the Constitutional Court had previously found to be manifestly unlawful. UVR thus operates on the assumption that the CJEU may give a *manifestly wrongful judgment*. Unless the CJEU follows the legal opinion of the Constitutional Court, it is hard to see how such a situation can be handled so that neither party loses face.

[69] *Honeywell* at 304.

[70] For a critical account, see Mayer, *supra* note 22, at 412–13.

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To conclude, the review of federal competences is hardly amenable to judicial dialogue and cooperation. In the complex world of cooperative federalism, competences are things about which two reasonable courts can disagree.[71] At the end of the day, the powers of the "upper" level of a composite polity have to be construed in a uniform manner since they affect all members of the polity. That is why a centralized system of judicial review is standard in federal polities. The future of UVR deserves to be discussed fundamentally, rather than merely focusing on the attitude in which it is exercised. German constitutional jurisprudence should resort to its traditional virtues and rediscover the "principle of open statehood" enshrined in the Basic Law as a fundamental constitutional choice.[72] If anything, this principle enables Germany to be a member of supranational organizations in which a supranational court has exclusive jurisdiction to review the actions of supranational political bodies. The European Union has operated on that basis since the founding of the European Coal and Steel Community.

This is not to say that the component members of such a polity would have to accept any usurpation of competences that, for whatever reasons, was not remedied by the competent court. EU law itself has developed a doctrine that allows for Union acts to be set aside by national authorities in extreme situations. As explained above, this doctrine permits an act that is tainted by particularly serious and manifest defects to be regarded as legally non-existent without the need for a declaration of invalidity by the CJEU. Thus, the fear that a system of centralized judicial control of competences necessarily entails a "transfer of sovereign powers to decide on its own powers"[73] is not founded. The question of the allocation of the constituent power in a composite polity must not be confused with the more confined issue of the allocation of the power to exercise judicial review.

In sum, the Constitutional Court's Referral Order demonstrates in an exemplary manner the structural problems caused by UVR, which is a remedy designed to permit judicial control of EU competences at the national level. Save for quite extreme situations, the CJEU has exclusive jurisdiction to determine *ultra vires* actions of Union institutions and bodies. The way in which the Constitutional Court reserves for itself the right to conduct a review of Union acts has no legal basis in the EU Treaties and, for this very reason, is at odds with the German constitution properly understood.

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[71] *See* ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM 349 (2009).

[72] See, in particular, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, Preamble and arts. 23–26.

[73] Famously called "*Kompetenz-Kompetenz.*" *See OMT Case* at para. 48.

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