Walking a Tightrope – Looking Back on Risky Position of German Federal Constitutional Court in OMT Preliminary Question*

Ondrej Hamuľák, David Kopal & Tanel Kerikmäe**

Summary: The paper analyzes the relevant parts of the OMT ruling 2014 of the German Federal Constitutional Court (FCC) with regard to the question whether FCC acted in conflict with its prior case law, respectively with its powers. Emphasis is placed first on issues relating to the concept of a constitutional complaint, which was accepted in the decision. The paper also analyzes the extent to which the previously defined criteria for *ultra vires* review were met in the decision. This is related to the issue of a preliminary reference and to the question of manifest exceeding of the competences by the EU. The article also deals with the issue of possible ordering of the constitutional organs by the Constitutional Court and with the concept of constitutional identity from the perspective of FCC.

Keywords: Federal Constitutional Court, European law, constitutional law, European Union, Outright Monetary Transactions, financial crisis, Court of Justice of the European Union

1. Introduction

Financial and economic crisis, which broke out in 2008, had a significant impact on European Union and its currency and cause significant economic troubles for some of the Member States and EU itself. In reaction to these events, many different measures were adopted, both on the supranational as well as on the intergovernmental level in order to stabilize the whole situation. Germany became the most active

* Ondrej Hamuľák participated in the work on this paper on behalf of Jean Monnet Centre of Excellence at the Faculty of Law, Palacký University Olomouc, which is sponsored by the Jean Monnet Programme (Project No. 565445-EPP-1-2015-1-CZ-EPPJMO-CoE). David Kopal participated in the work on this paper with the support of the grant project IGA UP no. PF_2015_017 (Evropská unie a finanční krize: Jak se změnil vztah mezi právním řádem EU a právními řády členských států?).

** JUDr. Ondrej Hamuľák, Ph.D. is senior lecturer at Faculty of Law, Palacký University Olomouc, Czech Republic. Mgr. David Kopal is a Ph.D. student at Faculty of Law, Palacký University Olomouc, Czech Republic. Prof. Tanel Kerikmäe, Ph.D. is a professor of EU law at Tallinn Law School, TTU, Estonia. Contacts: ondrej.hamulak@upol.cz; tanel.kerikmae@ttu.ee.

country as far as the creation of new measures was concerned. The reason why Germany played the most important role in this process was not only the position of the country within the EU, but also the fact that the whole crisis did not have such a massive impact upon this member state compared to the other states within the Union. Thanks to the power and volume of its economy Germany became one of the most generous contributors to the common European rescue package.

For these reasons, decisions of the Federal Government and of the Bundestag as well as the decisions of the German Federal Constitutional Court (further recalled as 'FCC'), were crucial for a successful battle against the crisis. While the Parliament and the Government were participating in the process of negotiations, passing and approving of specific crisis austerity measures, the FCC reviewed some of these measures in its rulings. This was also the reason why the attention of the all EU Member States focused on the FCC whe e.g. it was making a decision upon the compatibility of tne European Stabilization Mechanism (ESM) and Basic Law (further recalled as 'BL'). Even though the crisis measures were subject to judicial reviews in many other Member States[1], it was specifically the rulings of the FCC whose impact on EU as a whole could well be defined as the most significant generally.

In all its upt to date rullings on the crisis and austerity measures, FCC, notwithstanding of its critical and euro-sceprical rhetoric, did not find any dirrect contradiction between these measures and requirements of Basic Law. Thus, these rulings did not have any negative impact on the situation in the EU so far. However, the possibility of such negative impacts in reality occurred when FCC within its rulling on the legality of Outright Monetary Transactions programme of the European Central Bank[2], decided to ask the Court of Justice of the European Union (CJEU) a preliminary question. In the argumentation attached to the preliminary question, FCC (apart from other things) raised the suggestion that the European Central Bank (ECB) could have to certain extent acted ultra vires by launching the OMT programme.

Even though the CJEU had already answered this question[3] and it came to the conclusion that OMT programme is in fact in harmony with the law of the EU, it did not comment on most of the issues analyzed in this paper. Thus the subject of this paper is to find the answer to the question whether it was the FCC which in its OMT ruling 2014 acted ultra vires, i.e. in other words whether or not it acted contrary to its powers and its settled approach to EU law.

---

1 See e.g.. FASONE, Christina. Constitutional Courts Facing the Euro Crisis. Italy, Portugal and Spain in a Comparative Perspective. *EUI Working Paper,* 2014, vol. 25, pp. 1–51.

2 Decision of FCC from 14th January 2014, 2 BvR 2728/13, OMT (further recalled as "OMT ruling 2014").

3 Decision of CJEU form 16th June 2015, C-62/14 – Gauweiler and Others, ECLI:EU:C:2015:400.

In the following paragraphs the OMT programme itself will be described, i.e. the ECB measures which were reviewed by the FCC in the ruling analyzed in this paper. Consequently we will focus on the relations between the FCC and the law of the EU, CJEU respectively. In this respect there are mainly two types of reviews, which had been defined by the FCC before: ultra vires test and the constitutional identity test. Next, the contemporary judicial decisions of the FCC and other courts covering the austerity crisis measures will be analyzed as well. Thus the critical assessment of the historically first preliminary question asked by the FCC will be gradually carried out. We will also deal with the conception of the constitutional complaint received by the FCC in this ruling. It will also be very important to deal with the question how the FCC set tasks to other constitutional bodies. Next, the issues connected to the protection of constitutional identity will also be touched upon.

2. Outright Monetary Transactions programme or how to save euro currency

The financial and economic crisis which broke out in the USA in 2008 and gradually spread across a globe sped up the whole process of European integration especially as far as economic integration is concerned. This crisis pointed out to the structural inefficiencies in the economic, financial, fiscal, macroeconomic, political and constitutional area of the European Union. The Union had not been prepared for such a crisis and it was specifically the Eurozone which had to cope with the consequences of this crisis. While the Eurozone was established the authors of the Treaties failed to create machanisms[4], which would have enabled the EU institutions to react to the crisis more flexibly and promptly, or even prevent the crisis and thus to substantially eliminate the consequences of the crisis itself, i.e. those consequences which caused significant problems in many Member States. In this way it can be said that it is the EU which shares part of the responsibility for the expansion of the financial crisis in Europe[5]. There are visible serious consequences of the crisis in everyday lifes of Europeans. One could mention those such as e.g. the increase in unemployment numbers, small or almost no economic growth, respectively, problems of many financial

[4] On development of EMU see further: LASTRA, M. Rosa, LOUIS, Jean-Victor. European Economic and Monetary Union: History, Trend, and prospects. *Yearbook of European Law*, 2013, pp. 1–150.

[5] MENÉNDEZ, José Augustín. The Existential Crisis of the European Union. *German Law Journal*, 2013, vol. 14, no. 5, p. 466.

institutions and especially the growth of the public debt endangering the solvency of the individual Member States.

As a reaction to this financial situation many Member States adopted a whole number of austerity measures[6] with the aim to eliminate the negative impact of the crisis both on the Eurozone as well as on the Eropean Union as a whole. It was specifically in Europe where the crisis manifested itself through the so-called debt crisis. This specific sort of crisis severely hit the economies of some EU Member States. To cover the crisis first a specific temporary tool was launched in the form of European financial stability facility (EFSF). And consequently a permanent European stabilization mechanism was introduced in order to secure the financial stability within the Eurozone. It was thanks to this specific mechanism that those Member States which were experiencing finacial difficulties were allowed to receive the financial assistence, i.e. those which participated in the mechanism decsribed above under condition that they agreed to fulfill the settings and requirements entailing strict economic measures and reforms.

However, these mechanisms proved to be inefficient as the risk premiums of the governmental bonds sharply increased their value in several Member States of the EU during the year 2012. Thus in reaction to these events the president of the ECB Mario Draghi in his speech of July 26, 2012 conveyed the message containing the words which can now be considered as legendary when he said that he will do everything possile in order to save the euro currency[7].

A few weeks later the Governing Council of the ECB passed an internal decision containing the Fundamental rules and conditions of the so-called outright monetary transactions programme, i.e. the programme of buying the governmental dluhopis through secondary markets. Thus the ECB intended to provide help for some Member States which found themselves in the state of economic trouble. However, the states intending to receive such help would have to meet certain conditions and requirements contained in assistence programmes, i.e. EFSF, or ESM respectively.

The aim of the OMT programme is, in fact, identical with the aim of the ESM programme, i.e. the keeping of the liquidity of the states which find themselves in economic trouble. However, there is a considerable difference in the way of on one side buying of government bonds through the ESM where the budget is limited by the volume of finances contained in the mechanism and buying through OMT programme where the budget is practically unlimited, on the other

[6] See DEGRYSE, Christophe. The New European Economic Governance. *European Trade Union Institute Working Paper*, 2012, no. 14, pp. 19–66

[7] *Speech of Mario Draghi, ECB president at the Global Investment Conference in London*. 26th June 2012. [online]. Available at < https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

side. The fact that the finances for the ESM must always be approved by the national parliaments of the Member States can be considered as another difference of considerable importance. Thus the only way to express disagreement on the part of the Member States in the case of OMT programme is to absent in voting for the programme in the Governing Council during the process of approval of the programme itself. This was what the president of Bundesbank tried to do, however, he was overruled by the other members.

On the 6th of September the ECB subsequently published a report[8] which contained the fundamental characteristic features of the OMT programme[9]. Even though this was merely a press report, this document is of a great significance in the context of the OMT programme because it served as the basis for the plaintiffs in their complaints to the FCC as well as for the the considerations and opinion of the FCC in its OMT ruling 2014.. This is so as the press report is the only official document which was in connection with the OMT programme published as the programme itself has not been put into practice yet. Moreover, it is not very likely that the programme will be set in motion in the future at all. The mere delivery of the public declaration proved to be a sufficient impulse for calming down of the situation in financial markets. Many professionals believe that it was specifically the Draghi's declaration along with the announcement of the launching of the OMT programme which actually prevented the break up of the Euro currency.[10]

3. The Federal Costitutional Court and Court of Justice of the EU: Friends or Foes?

The hierarchy of legal orders is a typical sign of the federal states where the federal law has priority over the law of the individual members of the federation. However, this matrix demonstrates significant cavities when it comes to

[8] ECB Press Release *Technical features of Outright Monetary Transactions*. 6 September 2012 [online]. Available at <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>

[9] According to this report, the programme shall ensure the proper transmission and consistency of monetary policy. a necessary condition for its realization is strict conditionality in relation to the EFSF and ESM respectively. All other potential transactions will focus on government bonds with maturities between one and three years. There are no ex ante quantitative limits provided for these transactions. The Eurosystem shall not have a privileged position among the other creditors, but their position shall be *pari passu*. According to press release the value of bonds will be publised on regualar basis.

[10] KENNEDY, Simon, BLACK, Jeff. *Draghi's 'Whatever It Takes' Still Works as Euro Revives*.10. January 2014. [online]. Available at <http://www.bloomberg.com/news/articles/2014-01-10/draghi-s-whatever-it-takes-still-works-as-euro-revives>

the relation between the law of EU and the the law of Member States. The developments of the legal system accompanning the European integration (which consists of the legal order of the EU and the legal orders of the Member States[11]) proved that the atmosphere of mutual conflicts among the individual legal orders prevails over the overall effort to cooperate. In this sense some constitutional courts and supreme courts of the Member States even reserve the right of the last word for themselves with respect to the interpretation and resolutions of the potential conflicts between EU law and their national law. The most priviliged position within these courts is undoubtedly held by the FCC.

The relationship between the FCC and CJEU or the EU law respectively had been of an ambivalent nature since the very beginning of the European integration[12]. This fact was based on the contradicting views on the relations between national legal orders and the law of the EU with both parties employing the opposte view. According to the CJEU the law of the EU forms an autonomous legal order[13] and thus it has a priority over the constitutional law[14] of the Member States[15]. In order to keep the autonomy as well as the uniformity of the law of the EU the article 267 of the TFEU stipulates that all the national courts should have the possibility or even an obligation[16] to file a preliminary question to CJEU in case it is the primary law that needs to be interpreted or even when the secondary law needs to be analyzed as to the validity and interpretation as well. Thus the national courts themselves do not have the right to declare the Union acts as null and void[17].

According to the law of the EU and the judicial decisions of the CJEU it is the EU court which has the last word in the issues relating to the EU Law.

---

[11] MADURO, Miguel P. Three Claims of Constitutional Pluralism. In: AVBELJ, Matej, KOMÁREK, Jan (ed). Constitutional Pluralism in the EU and Beyond. Oxford: Hart Publishing, 2012, p. 70.

[12] DAVIES, Bill. *Resisting the European Court of Justice: West Germany's Confrontation with European Law, 1949–1979*. New York: Cambridge University Press, 2012, 248 p.

[13] ECJ judgement from 3rd June 1964 Costa vs. ENEL, 6/64, ECLI:EU:C:1964:66, ECJ judgemt from 9th March 1978 Simmenthal, 106/77, ECLI:EU:C:1978:49.

[14] ECJ judgement from 17th December 1970 Internationale Handelsgesellschaft, 11/70, ECLI:EU:C:1970:114.

[15] The discussed limit to the principle of primacy is inclued in art. 4/2 TEU, according to which the EU shall respect the national identity of Member States. But it is worth to mention here that CJEU never accepted or expressly acknowledged this provision as legal exception from this principle. See further ZBÍRAL, Robert. Koncept národní identity jako nový prvek ve vztahu vnitrostátního a unijního práva: Poznatky z teorie a praxe. *Právník*, 2014, vol. 153, no. 2, pp. 125, 126.

[16] In situation when case is pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.

[17] ECJ judgement from 22th October 1987, Foto-Frost, 314/85, ECLI:EU:C:1987:452, p. 15.

This is expressly stated even in the article 344 of the TFEU[18]. Thus the EU has a centralised system of the judicial review mechanism in order to deal with the matters involving the execution of the powers of the EU itself[19]..

However, the FCC never totally identified itself with this conception of the EU Law.[20] According to the FCC the principle of the transfer of the powers can be explained as the expression of the fact that the Union powers have their foundation in the Constitutional law of the Member States[21]. Thus in comparison with CJEU the FCC does not put down the priority of the law of the EU to its autonomous nature but to the authorization which is provided by the BL[22] along with the other constitutions of the Member States.

In the case of Germany this authorization was carried out through the ratification law, i.e. through the consent of the Bundestag with the transfer of powers to the EU the contents of which is made up of the integration programme. Thus FCC remains as the protector of the German sovereign rights and of the constitutional identity in order to thwart the interventions of the EU law and the European authorities in cases of overusing their mandate defined in the integration programme. However, as far as this approach is concerned the FCC is not the only one[23] as there are many other national constitutional courts which never accepted absolute priority of the EU law[24].

---

[18] This provision oblige Member States not to resorve their mutual disputes concerning the interpretation or application of the Treaties by submission to any external body of institution.

[19] BAST, Jürgen. Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review. *German Law Journal,* 2014, vol. 15, no. 2, p. 171.

[20] Evidently, FCC speaks about the European constitution in material, functional sense only. See FCC decision from 30th June 2009, 2 BvE 2/08 Lissabon-Urteil, p. 231 (further recalled as "Lisbon ruling").

[21] Lisbon ruling, p. 234.

[22] For evolution of relation between European and German law see KOKOTT, Juliane. The Basic Law at 60 – From 1949 to 2009: The Basic Law and Supranational Integration. *German Law Journal*. 2010, vol. 11, no. 1, pp. 99–114.

[23] This attitude towards the primacy of EU law may not be surprising given the fact that many of Member States, including Germany, became a fully sovereign only in the early nineties in connection with the fall of the Iron Curtain in Central and Eastern Europe (see further HAMUĽÁK, Ondrej. *National Sovereignty in the European Union. View from the Czech Perspective.* Cham: Springer, International Publishing AG, 2016, 89 p). In the case of Germany it's connected with the unificatio of the eastern and western parts. These states have a strong desire to preserve a unique element of their statehood (eg. the constitutional identity). See further MAYER, C. Franz. Rashomon in Karlsruhe: a Reflection on Democracy and Identity in the European Union. *International Journal of Constitutional Law*, 2011, vol. 9, no. 3–4, p. 783.

[24] For example decision of the Czech Constitutional Court Treaty of Lisbon I, Pl. ÚS 19/08, ECLI:CZ:US:2008:Pl.US.19.08.1, decision of Italian Constitutional Court 183/73 Frontini v. Ministero delle Finanze, decision of Irish Supreme Court from 19th December 1989 Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan.

FCC carries out its protective function through two types of judicial review[25] of the European Law: *ultra vires* and so called *Identitätskontrolle*, i.e. through the judicial control of the constitutional identity[26]. These two mechanisms define the mutual relation between the legal system and the law of Germany and the the law of the EU[27]. While the second review and its purpose consists in finding out of the answer to the question of the protection of the imperishable core of the BL defined in the article 79/3 of the BL against the intervention through the transfer of powers to the EU, the review of *ultra vires* is focused on the European Acts violating the principle of transfer of powers or the fact whether or not the EU intervenes into the areas which fall within the scope of the Member States' mandate.

While the process of the execution of the judicial review is, in both cases, practically the same, the real impact on the relation between the legal orders varies. The intervention into the constitutional identity does not necessary imply, that the EU law is generally wrong or unvalid. However, the declaration of the act of *ultra vires* always indicates that the act is wrongfull in general terms. Moreover, this wrongfullness goes beyond the twofold relation between Germany and the EU as the EU act which was declared *ultra vires* is not suitable even for other Member States. The intervention into the constitutional identity, on the other hand, only involves the constitutional identity of the specific state. Moreover, the constitutional identity and its determination cannot be established merely by the state itself, but it has to be the result of common and mutual efforts of the CJEU and the national courts.[28]

---

[25] There is also third type of review – the oldest one interconnected with the famous 'Solange saga'. Because it is not relevant in connection to OMT ruling we won't deal with in further on in the main text of this paper. In 'Solange saga' FCC primarily rejected the possibilityof unlimited application of Community law within the national legal practice by the argument that supranational law showed serious deficiencies in the field of protection of individuals. It stated that as long as Community system will show the deficiencies (in comparison with German level) it will not accept its general internal effects (case Solange I). Once the Community system improved and the doctrine of fundamental rights was introduced FCC changed its opinion and accepted the application of Community rules (case Solange II) but once more with the objection that It will serve as the ultima ratio guardian of the structural quality of this reached level. In case when serious structural discrepancies will appear within the supranational system the German court reserves itself the right not to accept the internal applicability of the certain rules of EU law within the German system. See cases Solange I–Internationale Handelsgesellschaft von Einfuhr–und Vorratsstelle für Getreide und Futtermittel, decision of 29 May 1974, FCCE 37, 271 and Solange II–Wünsche Handelsgesellschaft decision of 22 October 1986, FCCE 73, 339.

[26] For review of constitutional identity in the context of OMT ruling see chapter 5.5.

[27] Similar mechanisms were introduced also by Czech Constitutional Court, see further KOPAL, David. Ústavní soud ČR a kontrapunktní principy: Jaké je naladění ústavního ochránce vůči evropskému právu? *Právník*, 2014, vol. 153, no. 7, p. 581.

[28] MAYER, C. Franz. Rebel Without a Cause? a Critical Analysis of the German Constitutional Court's OMT Reference. *German Law Journal*, 2014, vol. 15, no. 2, pp. 130, 131.

Neither the first nor the second way of judicial review of the EU acts is explicitly prescribed by the German legal order and thus both of them are merely the result of the judicial decisions of FCC. Thus FCC through its interpretation of the BL defined the limits of the European integration and obliged itself to review these limits.

3.1. The conditions for application of the ultra vires review

This type of review was first defined by the FCC in the ruling concerning the constitutional review of the Maastricht Treaty[29]. The review *ultra vires* consists in the capacity of the FCC to review whether or not the EU in the specific case analyzed went beyond the limits of its powers which were delegated to the Union by the individual states. The justification of this judicial review consists in the fact that the intergration programme contained in the ratification law cannot be, according to the FCC, subsequently amended one sidedly and significantly through the European Acts which go beyond the powers of the Union. The integration programme amended in this way would not be covered by the consent of the Bundestag through which this authority expressed its consent with the ratification law. This is the reason why the amendments and changes would not be accepted and binding for Germany as they would be contradicting with the Ratification Law. And the national authorities would not be bound to apply these changes and amendments in practice[30] in case the EU institutions developed the EU law in a way which is contrary to the Treaties.

The content of the integration programme is primarily determined by the law of the EU. FCC thus reviews the law of the EU through the criteria of the ratification law which in material sense represents the "German version" of the law of the EU which, however, does not always have to be identical with the interpretation of the CJEU. Thus, the FCC finally reviews the harmony between the act of the EU and the BL, but also the harmony between the act of the EU and the primary law of the EU[31]. In fact FCC thus established the power to independently interpret the law of the EU.

---

[29] FCC decision of 12th October 1993, FCCE 89, 155 Maastricht-Urteil (further recalled as Maastricht ruling). For the critic of this decision see e.g. WEILER, Joseph Halevi Horowitz. Does Europe Need a Constitution? Demos, Telos and German Maastricht Decision. *European Law Journal*, 1995, vol. 1, no. 3, pp. 219–258. For positive analysis of the decision see e.g. MACCORMICK, Neil. The Maastricht-Urteil: Sovereignty Now. *European Law Journal*, 1995, vol. 1, no. 3, pp. 259–266.

[30] Maastricht ruling.

[31] MAYER*: Rebel Without a Cause*…, s. 117.

FCC further developed this kind of review in the Lisbon ruling[32], where, inter alia, it stated that the review of *ultra vires* can be performed in the framework of the German judiciary only by the FCC itself[33]. Thus it decreased the likelihood of the application of this review. Subsequently, this issue was dealt with in the ruling in Honeywell case[34], where the rhetoric was defind even more strictly and stringent conditions were set for the review[35], and therefore it was highly unlikely that the FCC would ever actually declare an act of the EU *ultra vires*.

The conditions formulated in the decision of the Honeywell were referred to by the FCC in its OMT ruling 2014[36]. These conditions include the fact that the review of *ultra vires* must be coordinated with the powers of CJEU arising out of Treaties in order to preserve the unity and coherence of EU law. This approach is an expression of the friendly relationship to EU law (so-called Europarechtsfreundlichkeit). CJEU must have the possibility, in preliminary ruling proceedings, to interpret the Treaties and to comment on the validity and interpretation of EU legal acts, before the FCC can rule on their inapplicability. In order to declare the act *ultra vires* it is further necessary that an EU act should clearly violate delegated powers and at the same time have a singificant structural impact on the division of powers between the Member States and the EU. The purpose of this review is according to the FCC to prevent the misuse of the powers of the EU which could lead to changes in Treaties or to the expansion of EU powers. However, the FCC further mentions that such conflicting cases will only be exceptional due to the existence of institutional and procedural mechanisms in EU law.[37]

The aboventioned conditions for the application of the review of *ultra vires* had arised from the case law of the FCC predating the preliminary question in OMT ruling 2014. But after filling the preliminary question, many of these conditions and their future applicability remained uncertain.[38]

---

[32] For *ultra vires* review see further BECK, Gunnar. The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Kompetenz-Kompetenz: a Conflict between Right and Right in Which Law and the Problem of There is No Praetor. *European Law Journal,* 2011, vol. 17, no. 4, pp. 470–494.

[33] Lisbon ruling, pp. 353, 354.

[34] FCC decision of 6th July 2010, 2 BvR 2661/06, Honeywell (further recalled as Honeywell ruling).

[35] OMT ruling, p. 24.

[36] This fact was discussed also by dissenting judge Landau in Honeywell ruling, p. 102.

[37] Honeywell ruling, pp. 56–61.

[38] See further chapters 5.1 a 5.3.

4. European crisis measures before FCC and CJEU

The OMT ruling 2014 is not the first case in which the FCC reviewed the rescue measures of the EU. FCC has already previously expressed its view on the constitutionality of the consent of Germany, with bilateral financial assistance for Greece and EFSF.[39] In other rulings, it also expressed its view on the issues of parliamentary involvement[40] and issues relating to the right of parliament to the access to information[41] in the context of European assistance programmes.[42]

The question of the legality of the OMT programme was originally part of a broader management, which covered even the review of the amendment to the article 136 of SEFU and the legality of the ESM and the Treaty on stability, coordination and governance in the economic and monetary union (fiscal compact). FCC expressed itself on the following three key issues on September 12, 2012, i.e. at a time when the attention of the whole of Europe was focused on the FCC, because the feasibility and effectiveness of the major crisis measures of the EU depended on its decision. FCC in its, so far only preliminary ruling[43], refused to file a preliminary measure, which would prevent the participation of Germany in the ESM and the fiscal compact, and, conversely, allowed Germany to ratify the amendments to the article 136 TFEU, the ESM Treaty and the fiscal compact. However, in the case of the ESM FCC set conditions that had to be met, so that the participation of Germany in it was in accordance with the BL. The most essential condition was the fact that the German parliament must have the operation of the ESM de facto always under control. These requirements were subsequently satisfied in the interpretative declaration of the ESM.[44]

Although the FCC in that interim decision dealt with many important issues, several other questions remained still unanswered. FCC, for example, did not deal with the legal analysis of the crisis measures of the ECB and several constitutional issues relating to, for example, parliament's participation in the rescue mechanisms. While issues related to the ECB, which FCC separated from the

[39] FCC decision of 7th September 2011, 2 BvR 987/10, Greece & EFSF (further recalled as Greece & EFSF ruling).

[40] FCC decision of 28th January 2012, 2 BvE 8/11, Special Parliamentary Committee.

[41] FCC decision of 19th July 2012, 2 BvE 4/11, Right to Information (ESM & Euro Plus Pact).

[42] Further to decision predecesing the OMT ruling see FABBRINI, Frederico. The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective. *Berkeley Journal of International Law*, 2014, vol. 32, no. 1, pp. 86–95.

[43] FCC decision of 12th September 2012, 2 BvR 1390/12, ESM & TSCG, preliminary decision.

[44] Declaration on the European Stability Mechanism, 27th September 2012. [online]. Dostupná na <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/132615.pdf>

main proceedings[45], resulted in filing of preliminary question, the remaining issues are touched upon in the main ruling of March 18, 2014[46]. Here, FCC dealt with the matters mentioned above, often in a greater detail than in a preliminary ruling. In the final analysis here, however, nothing unexpected was expressed.

Similar issues were touched upon by the CJEU in the decision of Pringle case[47]. Here the CJEU stated that both, the amendment to the article 136 TFEU, adopted on the basis of a simplified legislative procedure, as well as the conclusion and ratification of the ESM Treaty by the Member States of the Eurozone are in accordance with the EU law[48]. The reasoning used in this ruling, was subsequently used by the FCC in the review of the OMT programme, paradoxically, to call into question its legality.

It was the General Court (GC) which has dealt with the crisis measures of the ECB several times before. In December 2011, the GC refused an individual lawsuit requesting the cancellation of the ECB's measures regarding the Securities Markets Programme[49], which was the predecessor to the OMT programme. In December 2013, the GC also refused the individual action[50] directly on the cancellation of the OMT programme filed by more than 5000 complainants.[51] Most of them attacked the OMT programme at the same time, even before the FCC. According to the GC, however, these individuals failed to prove that they were affected by the OMT programme directly and thus their rights were not violated as the programme itself had not been implemented by the ECB at that time. The GC moreover pointed out in its ruling to the posibility of individuals to challenge the future implementation acts at national courts and also to the fact that they can in such a procedure seek to file a preliminary question to the CJEU.[52]

---

45 FCC decision of 17th December 2013, 2 BvR 1390/12, ESM & TSCG – exclusion from OMT programme.

46 FCC decision of 18th March 2014, 2 BvR 1390/12, ESM & TSCG – main proceedings.

47 Judgment of CJEU of 27th November 2012, C-370/12 Pringle, ECLI:EU:C:2012:756.

48 See further LHONEUX, Etienne, VASSILOPOULOS, A. Christos. *The European Stability Mechanism Before the Court of Justice of the European Union Comments on the Pringle Case*. Springer, 2014, 74 p.

49 Judgement of General Court of 16th December 2011, T-532/11 Städter v ECB, not published; further confirmed by CJEU judgement of 15th November 2012, C-102/12 P Städter v ECB, ECLI:EU:C:2012:723.

50 Judgement of General Court of 10th December 2013, T-492/12 von Storch and Others v ECB, ECLI:EU:T:2013:702. (further recalled as von Storch and Others).

51 WENDEL, Mattias. Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference. *European Constitutional Law Review,* vol. 10, no. 2, p. 269.

52 von Storch and Others, p. 47.

5. OMT ruling 2014 of the Federal Constitutional Court

The legality of the OMT programme (or buying government bonds by the ECB on the secondary markets without a predetermined amount) was called into question from two directions. From one side it was attacked by a group of individuals through constitutional complaints, through which the claimants sought protection of their fundamental rights in connection with the fact that the German federal government did not file an action at the CJEU, the purpose of which would be the cancellation of the OMT programme, and also fought against the OMT programme itself. From the other side the programme was attacked at the same time by the parliamentary party DIE LINKE in proceedings concerning a dispute between constitutional bodies (the so-called Organstreit) and sought that the FCC ordered the Bundestag to seek cancellation of the OMT programme.

The main question of the proceedings before the FCC therefore was whether the OMT programme is compatible with the BL and with the EU law, or whether the ECB did not exceed its powers when it declared that it is ready, under certain conditions, to buy without any limits the government bonds of certain Eurozone Member States. The complainants in this sense, argued that the OMT programme does not fall within the mandate of the ECB, as the EU law gives the ECB the powers relating especially to the monetary policy. The OMT programme however, according to them, in fact, represents a general measure of economic policy that belongs exclusively to Member States, and the ECB acted *ultra vires*. The federal government and the *Bundestag* have, therefore, according to the complainants, the obligation to seek a cancellation of the OMT programme, or at least prevent its implementation. This second obligation applies according to them, even for the *Bundesbank*.[53]

5.1. Preliminary question and the condition of 'apparentness'

By the majority ruling of January 14, 2014 the second senate of FCC filed historically the first preliminary question on the basis of the article 267 TFEU, to the CJEU concerning the interpration of primary law. FCC, through this question, not only inquired about the interpretation of the relevant provisions of EU law, but at the same time it outlined its own answer, which, however, due to strict interpretation of EU law[54] would transform the OMT programme into such an

[53] OMT ruling, p. 5.
[54] Ibid, p. 100.

inefficient means that it would lose its original purpose. Two of the judges, who did not agree with the majority decision, wrote dissenting opinions in which they stated that the court should refrain from deciding in the matter, because according to them, inter alia, this was a sensitive political issue, which should not be solved by the courts.[55]

By the decision to refer the preliminary question to the CJEU, FCC accepted to a certain extent it's position as the national court having a duty (as the court which decisions cannot be challenged by any further remedies) to start the preliminary question proceedings under article 267 TFEU. Strictly speaking FCC just accepted it's Honeywell[56] condition, which requires that FCC shall turn on the CJEU and offer it a space for comment on the issue concerned always before it could possibly declare an EU act *ultra vires*.[57] Hovever, the simple reffering of the preliminary question cannot be seen as acceptance of the hierarchical nature of the European judicial system. In fact, the mere nature of the original national proceedings (*ultra vires* review) undermined the authority of the decision of the CJEU. Additionaly one must consider the wording and FCC suggestions included in its decision on preliminary request. FCC in fact asked CJEU only to confirm its own interpretation of EU law. Although the FCC had full right to express its view on the issues dealt with, the question was whether in a wake of cooperative relationship between the two courts it could not rather refrain from stating, that the OMT programme was de facto *ultra vires*[58] and that there was a risk of encroachment to the German constitutional identity in the case if the CJEU would not have confirmed the interpretation of the FCC. The question could be so easily understood at the same time as a threat: 'Accept my interpretation, or you will face a constitutional conflict'.[59] Although the FCC therefore offered the CJEU the opportunity to express its view, through its

[55] OMT ruling, dissenting opinions of judges Lübbe-Wolff and Gerhardt.

[56] Previously mentioned by the FCC in its decision of 2nd March 2010, 1 BvR 256/08, Data Retention, pp. 185, 186. It's worth to mention here that in cases related to the revisions of primary law there is no duty to sent preliminary question cause intrepretatio of the treaties chamging primary law, which are not valid, is out of the CJEU competence; see further KUMM, Mattias. Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It. *German Law Journal*, 2014, vol. 15, no. 2, p. 205.

[57] Honeywell ruling, p. 60.

[58] According to FCC the violation (*ultra vires* act) would have been structurally significant in case if OMT programme would breach the explicit prohibition of monetary financing of the budget (art. 123/1 TFEU) or allow ECB to exceed its monetary competence, see OMT ruling, pp. 39, 43.

[59] KUMM: *Rebel Without a Good Cause*…, p. 206. For opposite (rather untanable) opinion see MURSWIEK, Dietrich. ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014. *German Law Journal*, 2014, vol. 15, no. 2, p. 153.

strict argumentation it already suggested its intent to have the last word in the interpretation of EU law.

From the interpretation of the OMT programme made by the FCC it arises that the OMT programme should not undermine the conditionality of the assistance programmes of the EFSF or the ESM. Furthermore, it must have only a supporting role in the field of economic policy. This means that the possibility of a debt write-off must be excluded, the purchase of government bonds can not be unlimited and the distortion of market pricing must be as low as possible.[60] The consequence of this interpration is, however, irreversible "cutting" of the OMT programme, which goes against its meaning and idea, which, at the time of the debt crisis, gave birth to the programme itself.

What would happen, then, if the CJEU in its ruling would not have complied with the interpretation of the FCC and this court would in turn declare the OMT programme *ultra vires*? According to the case law of the CJEU, the ruling, in which the European court responded to the question about the interpration or the validity of EU law, is binding for the national court in the original proceedings.[61] The states are also bound by the principle of loyalty cooperation, as provided for in art. 4 TFEU, according to which Member States must take all appropriate measures to ensure fulfilment of the obligations arising from the Treaties or from acts of the institutions of the EU. States have also an obligation to refrain from any measure which could jeopardise the attainment of the objectives of the Union. Article 131 of the TFEU further provides that each member state shall ensure that its national legislation was compatible not only with the Treaties, but also with the Statute of the European system of central banks and of the ECB.[62] Disregarding of the decision of CJEU would therefore be a clear violation of the EU law and Germany could have ultimately faced proceedings for breach of Treaty.

The question remains, why FCC at all drawed attention to the *ultra vires* nature of the reviewed act, if in another paragraph of the decision it accepted the possible interpretation of the OMT programme in a manner compatible with EU law?[63] Could thus an act, which could be interpreted in accordance with EU law, be at the same time the apparent exceeding of competences by the EU? The answer is negative; as such an act could not clearly violate the principle of transfer of powers, which is the main condition for declaring the act *ultra vires*.

The question of apparentness was commented on even by the disenting judge Gerhardt, who pointed out that it must be an infringement of powers, which is

[60] OMT ruling, p. 100.
[61] ECJ decision of 4th March 1986, 69/85 Wünsche v Germany, ECLI:EU:C:1986:104, p. 12.
[62] MAYER: *Rebel Without a Cause*…, p. 123, 124.
[63] OMT ruling, p. 99.

apparent immediately, and which can be recognized without further legal analysis.[64] Such apparentness, therefore, means that it should be a clear consensus among all the judges and there should be no need for a deeper analysis. However, this is not the case of OMT ruling 2014, in which two senior judges argued convincingly the other way than the majority and the FCC moreover came to its conclusion only after a long and detailed legal analysis.

The condition of apparentness and the institute of preliminary question plays in the review of *ultra vires* an important role not only because of the preservation of the unity of the EU law, but also because it reduces the likelihood of potential conflicts between the FCC and the CJEU. In the OMT ruling 2014 FCC, however,did not respect the purpose of these mechanisms.

5.2. What si the scope of subjective individual right?

In this chapter we look at the legitimacy of the complainants to submit a constitutional complaint, or whether procedural criteria were complied with or not. Answering this question is important in particular with regard to the fact that the contested act of the EU has not yet been implemented, and cannot have, therefore, any impacts on the rights of the individual.

According to the article 93/1/4a BL FCC rules on the constitutional complaints of individuals who claim a breach of any of their fundamental rights by public authorities. Among these protected rights are included a general right of the citizens to elect their representatives to the Bundestag based on the article 38/1 BL. This right is a procedural instrument, which implements the constitutional principles defined in article 20 BL, and in particular the principle that all public power comes from the people.[65] Citizens using their rights in the general elections legitimise the Bundestag as the representative body, which passes laws and establishes a government that is in turn responsible to it. Thus the guarantee of the subjective rights of voters to participate in elections and thereby contribute to the legitimization of state power and influencing its performance is the democratic content of the voters' right.[66]

In this respect, article 38 BL according to the FCC, prohibits, within the field of application of article 23 BL[67], the exhaustion of the electoral rights of

[64] OMT ruling, dissenting opinion of judge Gerhardt, p. 16.

[65] GÄRDITZ, Klaus Ferdinand. Beyond Symbolism: Towards a Constitutional *Actio Popularis* in EU Affairs? a Commentary on the *OMT* Decision of the Federal Constitutional Court. *German Law Journal*, 2014, vol. 15, no. 2, p. 186.

[66] OMT ruling, p. 17.

[67] Art. 23 of Basic Law which includes so called 'Integrationshebel' regulating the position of Germany vis-á-vis European integration processes.

the individual through the transmission of powers of the Bundestag to the EU to the extent that there would be a violation of the democratic principle, which is, according to the article 79/3 BL in connection with the article 20 BL unbreakable.[68] Violation of the electoral right will always occur, if it should happen in the field, which it is necessary for political self-determination of citizens, i.e. that there will be limits on the powers of the Bundestag to the extent where significant political decisions could not be made independently.[69] Individuals thus can by means of a constitutional complaint fight against the transfer of powers to the EU, if they can prove that this transfer can significantly affect the functioning of the democratic process.

Article 38 BL is, therefore, a means, which helps to implement the basic democratic principles of the article 79/3 through constitutional complaints. It is an expression of the right of every citizen to participate on the democratic functioning of the state. The right to vote, as well as any fundamental right can therefore be put even against the decision of the parliamentary democratic majority, which is legitimated by all the citizens. This presumption results from the equal status of all citizens in a democratic state.

From what was said above it results that the violation of the electoral rights is, therefore, possible in the context of the transfer of competences to the EU, which is typically represented by a change of the Treaties. This is confirmed by the FCC in the OMT ruling 2014.[70] a consequence of such a transfer can be a substantial disruption of the democratic process of legitimization, because as soon as the amendment of the Treaties becomes effective, the competencies are transferred to EU and their re-transfer at the state level is rather complicated.[71] The transfer of powers to the EU may have an impact on every German citizen, as it may lead to a violation of his/her right to participate in democratic governance.

The OMT rulling 2014 however had a different nature than other previous FCC decisions considering the primary law changes and reviewing the limits of transfer of competences to the EU. Here the transfer of competence in connection with the establishment of the independent ECB had occurred long ago and it had never been directly the subject of constitutional complaints. The OMT programme however, cannot be considered as an act of secondary law either, where the review of *ultra vires* cannot be excluded. Although the OMT programme is meant to represent a secondary law, as it is a measure taken by the ECB as

[68] Maastricht ruling.

[69] OMT ruling, pp. 19, 52.

[70] Ibid, p. 53.

[71] See further ZBÍRAL, Robert. *Přenos pravomocí členských států na Evropskou unii: cesta bez zpátečního lístku?* Praha: Leges, 2013, 224 p.

a European institution according to the valid EU law[72], its absence of form as well as no legal effects make it an act *sui generis* currently.

Due to the specific characteristics of the OMT programme it seems unlikely that this act could interfere within the electoral rights of the complainants, as such a conclusion could lead to a quite broad interpretation of this law, when the protection of an individual at the FCC could be sought in cases of any activity or inaction on the part of the EU. FCC, however, came to a different conclusion.

5.3. Was Constitutional Complaint *ultra vires*?

FCC in the OMT ruling 2014 links the right of the individual to vote with the violation of powers by an EU institution, as it stated that the obligation to ensure compliance with the integration programme and that, in the case of manifest and structurally significant abuse of power by the institutions of the EU the German authorities must avoid not only the implementation of such acts, but try to achieve the accordance of these acts with the integration programme[73]. This statement by the FCC admitted each citizen an individual right consisting in the fact that democratically elected authorities actively protect the political self-determination of citizens against the harmful acts of the EU.[74] If the German authorities do not fulfill this obligation, then the citizen can object to the interference into the right to vote at the FCC.

FCC actually argues that the *ultra vires* act is a violation of the democratic process, in which individuals have the right to participate in, and that's just legitimizes the submission of the constitutional complaint, without real prejudice to their individual rights.[75] FCC, justifies this approach by the fact that the citizens with the right to vote have the right to make sure that the transfer of sovereign powers to the EU is always in accordance with the integration clause, therefore, with article 23 BL, and also they have to right to make sure that this transfer is approved by a 2/3 majority of the Bundestag. This right of the individual is, according to the FCC, violated in the case of a unilateral usurpation of powers from the EU and its institutions.[76]

By this argument, FCC created a new type of constitutional complaint. The complaint here is sufficiently admissible even if it's based on the mere assertion that EU acted *ultra vires*. But according to the article 93 of BL a real intervention

[72] GÄRDITZ: *Beyond Symbolism*…, pp. 190, 191.
[73] OMT ruling, p. 49.
[74] GÄRDITZ: *Beyond Symbolism*…, p. 193.
[75] This fact was confirmed by the General court in its von Storch decision.
[76] OMT ruling, p. 53.

into fundamental rights stands as a condition for admisibility of constitutional complaints. The *ultra wires* question on the other hand is only the form of review methodology. Individuals may post the *ultra vires* argument within the review of their constitutional complaint but the simple *ultra vires* assertion is not a legal reason for filing the constitutional complaint. The fact that the act of the EU can potentially be *ultra vires* does not replace this rule. The FCC itself furthermore, in its Lisbon ruling stated that for the review of *ultra vires* there are no statutory procedural rules.[77] The fact that these rules have not been adopted so far by the legislator, does not allow the FCC to establish the rules by itself.

This new concept of constitutional complaints contrasts sharply with an earlier decision of the FCC in which it dismissed as inadmissible the complaint directed against the already completed purchase of government bonds by the ECB under its Securities Markets Programme.[78] The question then arises, why FCC found the complaint admissible in the case, when the complaint was directed against a mere notice of intention to buy government bonds by the ECB?

One of the reasons for the change in attitude is probably the fact that FCC interpreted the constitutional complaint so that it is not directed only against the participation of the Bundesbank in the potential implementation of the OMT programme, but also against the unconstitutional inactivity of the parliament and the government.[79] FCC stated that an individual can seek that the Bundestag and the federal government should actively deal with the issue of division of powers, and also to decide how they should achieve this goal.[80]

Even if we however accept that the complaint is actually directed against the aforementioned passivity of the German authorities, then, the reasoning of FCC is once again at odds with its recent statement. FCC previously stated that a constitutional complaint requesting that the German state authorities are active in a certain way, is inadmissible.[81] In the OMT ruling 2014, however, FCC set new conditions for the admissibility of constitutional complaints, ignored its previous case-law and came to the fact that the citizens may demand the court to make the Bundestag and the federal government behave actively in a certain way[82], without any previous infringement of the individual rights of the complainants.[83]

The importance of this change consisting in the extension of the admissibility of the constitutional complaints is confirmed by the views of some authors, who

[77] Lisabon ruling, p. 241.
[78] Greece & EFSF ruling, p. 116.
[79] WENDEL: *Exceeding Judicial Competence*…, p. 280.
[80] OMT ruling, p. 53.
[81] Greece & EFSF ruling, pp. 114–116.
[82] OMT ruling, p. 53.
[83] Criticised by judge Lübbe-Wolff, OMT ruling, dissenting opinion, p. 22.

have called this fact the change of paradigm.[84] On the basis of the right to vote every citizen will be able to rely on compliance with the procedural terms of the provisions of the BL relating to the EU by sole argument that EU had acted *ultra vires*.[85] Thus it would no longer be necessary to prove by the complainants, the connection between *ultra vires* act and the intervention into individual rights, but it would be enough to simply claim that the EU has exceeded its competence through the act in question. Such a concept of constitutional complaint, moreover, does not require full compliance with the strict conditions for the review of *ultra vires* set out in the Honeywell ruling.[86]

Thus the intervention into the right to vote became too abstract, as the individual could seek the right practically in every particular case, when the Union is active or inactive in some way. Consequently, the defining element disappears from the concept of constitutional complaint. Such an approach could lead, as it was noted by the dissenting judge Gerhardt, to a situation where everyone can claim his rights through constitutional complaints, without being affected as far as his rights are concerned in any way.[87]

Although it may thus seem that FCC protects the individual, or his right to vote, this is a rather paternalistic approach, whose goal is the preservation of the BL. This position ultimately undermines the autonomy of the Bundestag and the principle of separation of powers by unduly empowering the individual.[88] Paradoxically, the FCC itself refused the existence of an actio popularis in its recent ruling, when it stated that if there is no interference with the fundamental rights of the individual through an act or omission, then such a person is not entitled to legal protection.[89]

Based on what was said above it results, that FCC in the OMT ruling 2014 created a new broad procedural rules of the constitutional complaints, which have no constitutional backing and are also in conflict with the terms of the application of the review of *ultra vires*, used and applied by the court itself in the past.[90]

---

84 WENDEL: *Exceeding Judicial Competence*…, p. 278.

85 Ibid.

86 OMT ruling, dissenting opinion of judge Gerhardt, p. 7.

87 OMT ruling, dissenting opinion of judge Gerhardt, p. 6.

88 WILKINSON, Michael. Economic and Constitutional Power in a 'German Europe': All Courts are Equal, but Some Courts are More Equal than Others. *LSE Law, Society and Economy Working Papers*, 2014, no. 26, p. 16.

89 FCC decision of 12th September 2012, 2 BvR 1390/12, ESM & TSCG, preliminary decision, p. 199.

90 OMT ruling, pp. 24–26.

5.4. Could FCC order the tasks to other political powers?

As it has already been mentioned above, the complainants in the constitutional complaint argued that the OMT programme is an act *ultra vires*, and, therefore, the federal government and the Bundestag have a obligation to commit to its repeal, or at least prevent its implementation. It also claimed that the Bundesbank must refrain from its participation in that programme in case of its implementation. FCC confirmed this possibility of citizens to "instruct" the German authorities and stated that in the case when acts of the EU institutions of the EU are *ultra vires*, the authorities mentioned above (including the courts and the Bundesbank) cannot take part in the decision-making process or the process of implementation of this act. The German Bundestag and the federal government are also obliged to disallow the EU to usurpate the sovereign powers in structurally significant manner. If this has already occurred, then these authorities must actively try to achieve the accordance of these acts with the integration programme. This is according to FCC possible either by changing the primary law in respect of the article 79/3 BL, or by changing the incoherent act of the EU through legal or political steps and by ensuring that the potential national impacts should be minimized.[91]

The German central bank has in this respect an important position, because it is the institution, which would, in practice, buy government bonds on the secondary market, because the OMT programme is implemented mainly through the national central banks that form part of the Eurosystem. The Bundesbank is an independent central bank outside the division of powers. The executive, the legislature and even the judiciary power therefore cannot impose any instructions on it. At European level, in addition, there are standards that further confirm its independence.[92] Article 130 of the TFEU says that the ECB or any national central bank shall not take instructions from anyone when exercising the powers and performing the tasks and duties conferred upon it by the Treaties and the Statute of the ESCB and of the ECB. Each member state has in addition, according to the article 131 of the TFEU, the obligation to ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.

From this point of view therefore the arguments of the FCC, according to which the Bundesbank can participate in the decision-making process or the implementation of the act *ultra vires*[93], is being problematic with regard not only to the independence of the central bank, but also on the precedence of EU law

[91] OMT ruling, pp. 47–49.
[92] MAYER: *Rebel Without a Cause*…, pp. 127, 128.
[93] OMT ruling, p. 45.

over national law. FCC is, moreover, in this case, unique in the world, because there are not many courts that would deal with the practices of central banks with regard to their competence.[94]

However, even if the Bundesbank wanted to comply with the decision of FCC, which would declare the OMT programme *ultra vires*, it would have limited options, because its role in the purchase of government bonds could be replaced by other central banks.[95] If in addition, the central bank decided not to participate in its implementation, then the ECB could turn to the CJEU according to the article 35 paragraph 6 of the Statute of the ESCB and of the ECB. The Bundesbank has no statutory means through which it could oppose the OMT programme. The only possibility of defiance was the vote of the president of the Bundesbank on the ECB Governing Council when approving the OMT programme, where he was, however, outvoted.

It is also not clear what the Bundestag or the German government would have to do in practice, to meet the expectations of FCC. Exit the EMU is more than unlikely with regard to unimaginable consequences both for Germany itself and for the whole of the EU. None of these authorities can, at the same time, impose any instructions on the independent Bundesbank as stated above. This is true even in the case of the ECB, as it is a European institution, which is bound exclusively by the EU law, and thus cannot in any case proceed on the basis of the request of one member state. Its independence is, moreover, enshrined not only in EU law (art. 130 TFEU) and in the BL (art. 88/2 BL), but also the FCC in its case law emphasizes the independence of the central bank of the parliament.[96]

It is apparent that the FCC does not have any effective means which could be used in the case of declaring the OMT programme *ultra vires*. "Tasking" the independent Bundesbank seems very problematic. And at the same time, the parliament, the federal government or the central bank have no means in their discretion, which could oppose the OMT programme, or force the ECB not to implement the programme. The absence of such a means is also evident from the vague reasoning of FCC, which proposes, for example, the retroactive modification of Treaties, or the use of unspecified legal and political instruments.[97]

Strange is the fact that these vague procedures could be claimed by every citizen on the basis of a constitutional complaint, or a political party in the proceedings Organstreit, with a statement challenging the inaction of the

[94] KUMM: *Rebel Without a Good Cause*…, p. 214.
[95] WENDEL: *Exceeding Judicial Competence*…, p. 281.
[96] Maastricht ruling.
[97] WENDEL: *Exceeding Judicial Competence*…, p. 282.

German constitutional authorities. Both of these cases are in contradiction with the settled case-law of the BVrfG, as it is recalled by the dissenting judge Lübbe-Wolff.[98]

In a recent decision, which also concerned the measures related to the crisis, FCC stated that the omission of the legislature may be the subject of a constitutional complaint only if it follows from the express provisions of the Basic law, which defines the content of this obligation.[99] In the present situation, however, the choice of possible governmental and parliamentary procedures falls within the discretionary powers of the German authorities which are not explicity expressed in the German constitution.[100] Thus, neither the citizens nor the political parties according to the existing case law can "assign tasks" to the authorities through the FCC in this particular case.

Judge Gerhardt in addition, noted that if a citizen had the right to seek through the FCC particular procedure at the Bundestag in matters where he has a wide discretion, it would be in contradiction with the principle of representative democracy according to the BL. The German constitution gives people other options to influence the political process, e.g. the right of petition or membership in political parties.[101]

5.5. OMT programme and the question of constitutional identity

Ultra vires review is not the only mean of scutinizing the EU law acts by the FCC. In its Lisbon ruling FCC added also new instrument in the form of protection of German constitutional identity vis-á-vis EU law acts.[102] Here it was stated that the court will review whether the inviolable core of constitutional identity of the Basic law according to article 79/3 BL was preserved. This power of review is derived from the EU law and is related to the principle of openness of the BL to the EU law, and is therefore not in contradiction with the principle of loyal cooperation enshrined in article 4/3 of the TFEU. According to FCC, it is not possible with the advancing integration to protect the political and constitutional structure of sovereign Member States, recognized by article 4/2 TFEU, in other

[98] OMT ruling, dissenting opinion of judge Lübbe-Wolff, p. 18.

[99] Greece & EFSF ruling, p. 118. FCC reached the same findings also in decision *Organstreit*, decision of 17th September 2013, 2 BvE 6/08.

[100] WENDEL: *Exceeding Judicial Competence*…, p. 282.

[101] OMT ruling, dissenting opinion of judge Gerhardt, p. 21.

[102] The protection of constitutional identity was indirectly mentioned by FCC already in Solange I ruling, where FCC pointed out that core of the Basis Law forms the part of German constitutional identity.

ways.[103] In the ruling described above FCC further stated that the protection of national constitutional identity in constitutional and european law goes hand in hand.[104] In the case that the act of the EU really collides with the constitutional identity, it is not applicable in Germany. Such an act cannot be based on primary law, as the legislature according to the BL cannot pass on to the EU those powers, which would concern constitutional identity.[105]

In its OMT ruling 2014 FCC significantly developed its up-to-date case law on the question of protection of constitutional identity at European and national level. As mentioned above, the FCC previously stated that the protection of constitutional identity at both levels goes hand in hand. But in OMT ruling 2014, however, FCC makes a difference between these concepts stating that constitutional (national) review of identity is fundamentally different from review under Article 4/2 TEU performed by CJEU. The constitutional core of the Basic Law contained in Art. 79/3 according to view of FCC can not be balanced by the other legal interests, because this nucleus is absolute in nature, and thus falls under the exclusive jurisdiction of the FCC. Respect of the national identity of the Member States provided for in EU law is contrary to that a relative concept, and could be therefore counterbalanced against other interest in line with the proportionality test requirements.[106]

This approach of FCC is, however, in conflict with uniformity and effectiveness of the EU law. The obligation to respect the national identities cannot mean that the identity will always take precedence over the EU law. It would mean the existence of the 28 potential exceptions to uniformity of the EU law, which would be in conflict with this basic principle. The concept of national identity, in fact, only allows certain national constitutional principles to penetrate into the EU law, thus creating a certain connection between constitutional law and the EU law. This is probably the way how the national identity is viewed by other European courts.[107]

The idea of the protection of constitutional identity is the preservation of a particular element of diversity within the largely uniform rights of the EU, which in itself gives the national courts certain autonomy in defining the constitutional identity of the state. National courts can play a crucial role in its

[103] Even art. 4/2 TEU states explicitly only national indentity, there is a general accord that this concept includes also constitutional identity as its key feature. See further ZBÍRAL: *Koncept národní identity…,* p. 127.

[104] Lisabonské ruling, p. 240.

[105] OMT ruling, p. 27.

[106] OMT ruling, p. 29.

[107] E.g. decision of French Constitutional Council of 27th July 2006, 2006-540 DC, Copyright and related rights in the information Society; or decision of Polish Constitutional Tribunal of 16th November 2011, SK 45/09.

protection. Thus, while these courts define the content of the constitutional identity it is the CJEU which decides to what extent these national principles take precedence over the EU law, or it applies a test of proportionality.[108] The CJEU in several rulings proved that national identity can take precedence over the interests arising from the EU law.[109] Thus the CJEU has managed to prove to certain extent that it respects the constitutional identity of the Member States and that the article 4/2 TFEU is not a mere rhetoric.[110]

From the reasoning of FCC in both these points it results that the FCC does not consider the protection provided to the constitutional identity within the EU system as sufficient. Here one may compare its position with its approach to the protection of fundamental rights at the EU level as it was formulated in the ruling Solange I. The problem with this comparison is, however, the fact that while in Solange decision the position of the FCC was from certain point of view justifiable, since the protection of fundamental rights at the European level actually showed the structural weaknesses and sufficient attention was not paid to it by the CJEU[111], in the case of the constitutional identity the protection of the EU is clearer and more efficient, as evidenced by the several decisions of the CJEU.

Of course, it is possible to discuss the issues of how sufficient this protection at the EU level is, however its possible deficiencies do not justify the approach of FCC, which might have seriously jeopardised the functioning the the EU legal order.

6. Conclusion

At the beginning of the this paper we expressed some doubts, whether it was not just the FCC which acted *ultra vires* in the OMT ruling 2014, that is, whether it acted contrary to its powers and its existing case-law.

It should be noted that the FCC ignored its earlier case-law, or its constitutional mandate, in several places in the OMT ruling 2014. The ruling pervades

[108] WENDEL: *Exceeding Judicial Competence*…, pp. 286, 287.

[109] For example ECJ decision of 14th October 2004 Omega Spielhalen, C-36/02, ECLI:EU:C:2004:614; CJEU decision of 22nd December 2010 Ilonka Sayn-Wittgenstein, C-208/09, ECLI:EU:C:2010:806; CJEU decision of 12th May 2011 Runevič-Vardyn, C-391/09, ECLI:EU:C:2011:291; CJEU decision of 12th June 2014, C-156/13 Digibet a Albers, ECLI:EU:C:2014:1756.

[110] It's case-law in this respect is quite fragmented, see ZBÍRAL: *Koncept národní identity…,* pp. 125, 126.

[111] KOKOTT, Juliane. Report on Germany. In: SLAUGHTER, Anne-Marie, STONE SWEET, Alec, WEILER, Joseph Halevi Horowitz (eds). *The European Courts and National Courts: Doctrine and Jurisprudence*. Oxford: Hart Publishing, 1998, p. 118.

the undisguised desire of FCC to prove that the OMT programme is potentially an act of *ultra vires*.

It was obvious from the fact that the FCC found the constitutional complaint challenging the OMT programme permissible. FCC in this regard made great efforts to justify the fact that the fundamental rights of individuals might have been actually affected through the examined act. FCC thus effectively created a new kind of constitutional complaint, when it is only sufficient to argue that the EU has acted beyond its scope of powers, regardless of the direct violation of individual rights. a considerable weakening of the strict conditions for the application of the review of *ultra vires* itself, which were previously defined by the FCC itself, is the consequence of the approach.

Thus, FCC set aside its past case-law in cases where there is a risk of destabilisation of relationship between national and EU law. Additionally, the individuals were given a powerful tool that enables them (in 'cooperation' with Eurosceptic national court) to influence the democratic processes with the distinct impact on the shaping of European policy. Originally it was the limited admissibility of a constitutional complaint what prevented individuals to interfere disproportionately within the competence of the executive and legislative powers. The understanding of a constitutional complaint offerd by the FCC in OMT decision somehow touched this limited concept and therefore infringed the principle of separation of powers.[112]

FCC acted problematically at the moment when it stated that in the case of declaration of the OMT programme *ultra vires* it can order the government, the parliament or the central bank certain procedures. The paradox is that FCC in fact does not possess any effective means, which could have been used in the case of the declaring of the OMT programme *ultra vires*. Under the current case law of FCC, moreover, neither citizens nor political parties could "instruct" the German authorities through the FCC.

Through the line of its reasoning FCC thus created a special situation. If hypothetically in the final ruling it would have stated that the OMT programme is *ultra vires*, and the German authorities would have failed to comply with this decision then the German authorities would have, through their activity or inaction, intervened into the German constitutional identity. Hovever these authorities could have argued, that it was the FCC itself which had acted *ultra vires* arguing that it was the court itself which had gone beyond the scope of its powers. This whole unfortunate situation would have been the consequence of the legal structure created by the FCC in relation to the EU law.[113]

[112] GÄRDITZ: *Beyond Symbolism*…, p. 195.
[113] KUMM: *Rebel Without a Good Cause*…, p. 208, 209.

Some problems might be seen also in the Courts' approach to the review of constitutional identity that the OMT ruling 2014 developed substantially. FCC newly made a distinction between the protection of constitutional identity by the Basic Law and under the Treaties, when first concept has, unlike the latter, absolute character and must in any case take precedence. The problem is that if this approach is adopted by all European constitutional and supreme courts, then EU law would not work properly, because there would be 28 absolute exemptions from the requirement of uniform application of EU law. In this regard we may agree with the opinion of Franz Mayer, who several years ago pointed out that the national identity can become a Pandora's box once it will attain the significant legal effects. This could lead to the situation when Member States will try to include many of their own interests under this concept, to protect them from the effects of EU law.[114] It seems that it had happened, because the FCC had appropriated not only the decision-making about the content of constitutional identity, but also deciding about when the content of the constitutional identity had been violated.[115]

FCC also overturned its approach towards *ultra vires* review. In fact and surprisingly it failed to meet the conditions of *ultra vires* test previously formulated by itself. One of them was a condition of express violation of the principle of the transfer of powers by the EU action. Although FCC alleged that this condition was fulfilled, yet in another part of its decision it stated that the OMT programme could have been interpreted in a manner consistent with EU law. And here the contradiction occurred. It is disputable to claim the *ultra vires* act and simultaneously state, that act could have been interpreted in line with the Tretaies.

The purpose of defining the conditions for the review of *ultra vires* was (among other things) to avoid frequent interventions into the unity of EU law and to diminish possible conflict with the CJEU. The failure to comply with the requirements of *ultra vires* test by the FCC significantly reduced its functionality.

By all of these points, FCC (contrary to its previous case-law and exceeding its constitutional mandate) could have brought ultimately serious consequences for the judicial dialogue in the whole EU, and could have also served as a dangerous precedent for other national courts that could have been inspired by the jurisprudence of FCC.[116]

---

[114] MAYER: *Rashomon in Karlsruhe*…, p. 784.

[115] *MAYER: Rebel Without a Cause*…, p. 123, 124.

[116] E.g. decision of Polish Constitutional Tribunal of 16th November 2011, SK 45/09; or decision of Czech Constitutional Court of 31st January 2012, sp. zn. PL. ÚS 5/12 Slovak pensions XVII.