
A. – I. – The German Federal Constitutional Court (FCC) recently ruled on the admissibility of the European Central Bank’s Outright Monetary Transactions programme (OMT). The decision must be considered a landmark ruling: For the first time ever, the FCC announced that it would suspend its proceedings in order for the European Court of Justice to interpret the European law that is relevant to the constitutional case in question\(^1\). The ruling is the first in which the FCC requested a preliminary ruling according to art. 267 TFEU; it is therefore quite remarkable. Simultaneously, however, it considered the European Central Bank’s “Outright Monetary Transactions” program (OMT)\(^2\) illegal. The case in question legally evaluated Mario Draghi’s assurance of 2008 that the ECB would buy unlimited member state bonds. The comment and


\(^2\) ECB decision of 6.9.2010 (ECB/2010/5).
subsequent ECB decision reduced interest rates on government bonds and allowed the crisis-stricken states to raise new credits. The FCC assumes this program to be transgressing the boundaries of European law and thus trespassing in a field that is reserved to the member states. It dictates terms of interpretation which would allow saving the ECB’s decision.

The OMT ruling is not the first to draft what, in the FCC’s opinion, is the sole admissible path for the EU. Generally, the EU complied. Thus, the Constitutional Court shaped European law; one can almost call it a European lawmaker.

This article will first introduce some of the FCC’s most important European decisions, often quoting the rulings in order to offer direct insight to non-German-speaking readers (B.). It will then critically examine the boundaries of extending the law and take a closer look at the EU competences influenced by the Constitutional Court (C.).

II. – By definition, a court decides cases and, in the particular case of the Federal Constitutional Court, judges the constitutionality of laws if asked to do so. It is not, however, charged with law-making itself. As early as the 18th century, experiences with oppressive governments led French Baron de Montesquieu to the conclusion that the legislative, executive and judiciary powers must be separated; a principle that became fundamental to democracies worldwide. In order to ensure the citizens’ liberty, the powers must be given to separate entities. In the words of Montesquieu, “... there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator”.

The judge can only effectively control the legislator if he is of a different entity. Vice versa, the judge is not authorized to make laws, as he enjoys no democratic legitimacy by election.

The idea that the legislative, executive and judicial branches be separated is complemented by what is called the principle of “checks and balances” in constitutional law. The concept of checks and balances actually decreases the separation of powers in that it requires them not to stand alone, but to interact: to monitor and possibly restrict the actions taken by the other branches of government.

The degree of interaction varies: In U.S. law, the “political questions doctrine” provides that the Supreme Court must reject cases which address a question of policy rather than law. This concept enforces the separation of (legislative and judicial) powers, as it considers certain questions nonjusticiable. The German Constitutional Court has always regarded its role differently

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3 Art. 93 para. 1 No. 2 Basic Law (GG), Sec. 13 No. 6 Federal Constitutional Court Act (BVerfGG).
and has been meant to play a more political role (e.g. by being authorized to decide the constitutionality of laws without reference to a particular case). When the Court considers a case to be “too political” to be decided by the judiciary, it declares the case inadmissible or limits the degree of judicial review.

In another aspect, the Constitutional Court prevails over the legislature: Contrary to all other German courts, the FCC’s judgments are generally binding to everyone: This *erga omnes* effect is laid down in the Federal Constitutional Court Act (BVerfGG). Both the judgments’ operative parts and *ratio decidendi* bind all federal and state government entities, including the legislative (sec. 31 para. 1 BVerfGG), and, in case of sec. 31 para. 2 BVerfGG, the general public.

**III.** – The Constitutional Court has given itself vast competences to adjudicate and shape European law by emphasizing its responsibility to integration (art. 23 Basic Law) and extending the scope of Art. 38 Basic Law (*Grundgesetz*, *GG*) to include a substantive right of participation in the exercise of state power through election. Every transferral of power to a supranational entity (such as the EU) potentially infringes the citizens’ Art. 38 right.

In its Maastricht decision, the FCC assumes a violation of art. 38 Basic Law if basic democratic requirements (art. 20 para. 1, 2 and art. 79 para. 3 Basic Law) are not met by the sovereign public authority. In particular, the right to vote would be mocked if the legitimately elected entity was robbed of its basic competences. The Court therefore reserves its right to declare such national actions unconstitutional and void.

In other decisions, the FCC presented in detail the circumstances under which it may assess the legality of EU actions: It considers itself competent to monitor actions by Union entities since EU competence is based on a transferal of power by the member states. The Court an-

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8 Abstract Judicial Review according to Art. Art. 93 I No. 2 GG, para. 13 Nr. 6 BVerfGG.
9 For the OMT decision, see Lübbe-Wolf, dissent to FCC, dec. of Jan. 14, 2014, 2 BvR 2728/13, marginal no. 4 – ECB (see fn. 1).
10 Sec. 31 BVerfGG reads: “(1) The decisions of the Federal Constitutional Court shall be binding upon Federal and Land constitutional organs as well as on all courts and authorities. (2) In cases pursuant to Article 13 (6), (11), (12) and (14) above decisions of the Federal Constitutional Court shall have the force of law. This shall also apply in cases pursuant to Article 13 (8a) above if the Federal Constitutional Court declares a law to be compatible or incompatible with the Basic Law or to be null and void. (...)” (English version available at: http://www.iuscomp.org/gla/statutes/BVerfGG.htm; emphasis added).
11 Herbert Bethge, *para. 31*, in *Bundesverfassungsgerichtsgesetz*, marginal no. 103 (Theodor Maunz et al. eds., 42nd ed. 2013).
nounced in its Lisbon decision that it would declare all EU actions void that are based on an apparent violation of competence rules (‘‘ultra vires’’). In the OMT ruling, the Constitutional Court further extended its jurisdiction: It accepts a constitutional complaint directed at a national failure to act. Whereas the previous cases challenged Germany’s consenting acts to various EU treaties, the OMT complainants argued that Germany’s failure to act regarding the ECB’s OMT decision violated their art. 38 right. Thus, the above-described criteria for ‘‘ultra vires’’ decisions no longer include a (alleged) breach of material fundamental rights. Opponents fear that this jurisprudence allows for unlimited complaints by citizens who seek legislative action.

B. I. 1. – Some of the earliest decisions of the German Constitutional Court involving European Law were two judgments named ‘‘Solange’’ I and II – ‘‘As long as’’ I and II. These decisions show how the Court stimulated European integration. The ‘‘Solange I’’ judgment of May 29, 1974 explicitly demanded a written code of basic rights and freedoms. The headnotes read:

“As long as the integration process has not progressed so far that Community law receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Basic Law, a reference by a court of the Federal Republic of Germany to the Federal Constitutional Court in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights of the Basic Law.”

2. – Only a few days before the FCC’s ‘‘Solange I’’ decision, the ECJ decision ‘‘Nold’’ had developed European fundamental rights ‘‘from the constitutional traditions common to the

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17 Critically and thus assuming inadmissibility of the case: Lübbe-Wolf, Dissent to FCC, dec of. Jan. 14, 2014, 2 BvR 2728/13 (Margin No. 22) – ECB (see fn. 1).

18 Gerhardt, Dissent to FCC, dec. of Jan. 14, 2014, 2 BvR 2728/13 (Margin No. 5 et seq.) – ECB (see fn. 1).


Member States”. The ECJ also referred to the ECHR. Naturally, the remarks were still vague.

In the following years, the ECJ defined the protection of fundamental rights in more detail. The “Solange II” decision constituted a 180° turn by the FCC: The Court assessed that European fundamental rights protection had become comparable to German protection in terms of conception, content and mode of operation. Consequently, the Constitutional Court no longer considered itself competent to examine if Community acts were in accordance with fundamental rights.

“As long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safe-guard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law; references to the Court under Article 100 (1) Basic Law for those purpose are therefore inadmissible”.

Seemingly, the Court distanced itself from demanding a codified catalogue of fundamental

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22 ECJ, dec. of May 14, 1974, Case 4/73, Nold v. CEC, 1974 E.C.R. 491, Margin No. 13. Art. F TEU (Maastricht) and Art. 6 TEU adopted this wording.
23 ECJ, dec. of May 14, 1974, Case 4/73, Nold v. CEC, 1974 E.C.R. 491 (Margin No. 12-13).
rights and accepted the ECJ’s *unwritten* rights. Previously, the European Parliament, the Council and the Commission had explicitly recognized these rights. The farther-reaching insistence for a written catalogue was adopted by the European Parliament. The Maastricht Treaty of 1992 introduced the EU Treaty, which clarified in Art. F that the Union respected the ECHR’s fundamental rights and those common to the Member States’ constitutional traditions. Another ten years passed before a codified catalogue materialized: In 1999, the European Charter of Fundamental Rights was initiated in the course of preparing a European Constitution. It was solemnly proclaimed in 2000. Since the Treaty of Lisbon entered into force in December 2009, the Charter finally is of the same legal value as the treaties, cf. Art. 6 para. 1 TEU.

II. 1. – The Constitutional Court recurrently emphasized the role of the European Parliament. In its “Solange I” judgment, the Court criticized that the European Economic Community did not have a parliament which is directly democratically legitimized and directly elected, has legislative powers and to whom all Community organs are responsible. The Court did not consider the Parliament, then called the Assembly, a sufficient representation of the people.

In some ways, the FCC still considers the European Parliament minor to other parliaments: In a 2011 decision, it voided the German 5% – threshold for EP elections, arguing that stable majorities (which are said to be put in jeopardy without a threshold) are not necessary for the functioning of the European Parliament. Recently, the Court held the same for a 3% threshold. It appeared unimpressed by the fact that, from 2014 onward, the EU Commission President candidates will be chosen by the Parliament, which also elects the president according to art. 17 para. 7 S. 2 TEU, and the intended strengthening of the EP’s role.
2. – Only two years after the “Solange I” decision, the Direct Elections Act was passed, followed by the first direct parliamentary elections in 1979. The Single European Act of 1986 extended parliamentary rights and established cooperation procedures. Additionally, the European Parliament’s participation rights continued to be extended to the point where the co-decision procedure became the ordinary legislative procedure according to art. 294 TFEU. In its Lisbon decision, the German Constitutional Court admitted that the Union’s democratic legitimacy is growing even though it has not yet reached a level comparable to that of Germany.

III. 1. – Another topic which is important to the Constitutional Court’s EU decisions is the alleged democratic deficit in terms of conferring competences to the European Community or Union, respectively. The Maastricht decision discussed the problem of an original competence for the Community (called “Kompetenz-Kompetenz” in German, pointing out the competence to decide upon competences) and clearly warned:

“Whereas a dynamic extension of the existing Treaties has so far been supported on the basis of an open-handed treatment of Article 235 of the EEC Treaty as a ‘competence to round-off the Treaty’ as a whole, and on the basis of considerations relating to the ‘implied powers’ of the Communities, and of Treaty interpretation as allowing maximum exploitation of Community powers (’effet utile’), in future it will have to be noted as regards interpretation of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.”

The FCC emphasized the principle of subsidiarity and assigned specific tasks to the German administration and parliament:
“How far the subsidiarity principle will counteract an erosion of the jurisdictions of the member-states, and therefore an exhaustion of the functions and powers of the Bundestag, depends to an important extent (apart from the case law of the European Court relating to the subsidiarity principle) on the practice of the Council as the Community’s real legislative body. It is there that the Federal Government has to assert its influence in favour of a strict treatment of Article 3b(2) of the E.C. Treaty and so fulfil the constitutional duty imposed on it by Article 23(1), first sentence, of the Constitution. The Bundestag for its part has the opportunity, by using its right of co-operation in the formation of Germany’s internal political intentions established by Article 23(3) of the Constitution, to have an effect on the Council’s practices and to exercise an influence on them within the terms of the subsidiarity principle. In so doing the Bundestag will also be performing a constitutional duty incumbent upon it under Article 23(1), first sentence, of the Constitution. In addition, it is to be expected that the Bundesrat, too, will pay particular attention to the subsidiarity principle.”

2. – Over a course of several years following the Maastricht judgment, Germany (among others) demanded that the Union’s competences were clearly defined by a catalogue of competences. Since the Lisbon Treaty entered into force, European Primary Law includes different areas and categories of competences laid out in Art. 2 et seqq. TFEU, resembling Art. 70 et seqq. German Basic Law. The list, which differentiates between exclusive competences of the EU and shared competences, is intended to clarify the allocation of responsibilities among the EU and the Member States and to give justice to the principle of conferral. The German Constitutional Court does not consider it necessary to design a state-like European Union as long as the principle of conferral is in force and the competences of the EU and of the Member States remain well-balanced.

IV. 1. – In order to reduce the democratic deficit which exists on the European level, it is necessary to further “democratize” EU institutions, but also to further include the Member States’ national parliaments. As early as in its Maastricht decision, the FCC stated that “[i]n a state union such as the

42 Martin Nettesheim, Art. 2 AEUV, in Das Recht Der Europäischen Union, marginal no. 7 (Eberhard Grubitz et al. eds., 52nd ed. 2014) (Ger.); Entschließung des Bundesrates zur Eröffnung der Regierungskonferenz zu institutionellen Fragen, Feb. 4, 2000, Bundesratsdrucksachen [BR-Drucks.] 61/00 (Ger.). For an overview of votes in favor of the catalogue before its creation, see Marc Bungenberg, EuR 879 et seqq., 2000 (Ger.). On competences in general, see Christian Calliess, Europäische Grundrechte-Zeitschrift [EuGRZ] 181, 2003 (Ger.).
43 As early as 2003, Christian Calliess, EuGRZ 181, 2003 considered the European rules on competence to be „more differentiated“ than the German ones.
45 FCC, dec. of June 30, 2009, 2 BvE 2/08 et al., marginal no. 272 – Lisbon (Ger.) (see fn. 17).
46 FCC, dec. of June 30, 2009, 2 BvE 2/08 et al., marginal no. 297 – Lisbon (Ger.) (see fn. 17).
EU, democratic legislation is ensured by reconnecting the European institutions’ acts to the parliaments of the member states. 47

The Court’s ESM decision emphasized that Germany is represented at the ESM by its Minister of Finance, who in turn is accountable and indirectly responsible to the Bundestag. 48 Thus, the Bundestag’s rights are maintained.

2. – The Lisbon Treaty 49, which entered into force in late 2009, immensely promoted the national parliaments’ role in the European Union 50. Their influence on European lawmaking is set out in art. 12 TEU. It provides them with far-reaching rights of information, surveillance and participation. The parliaments’ right is further explained in two protocols to the Treaties: The first protocol 51 deals with the national parliaments’ role in the Union. Protocol No. 2 codifies the principles of subsidiarity and proportionality 52, complementing art. 5 TEU. This protocol of subsidiarity allows that the national parliaments bring an action against legislative acts before the ECJ if the principle of subsidiarity was violated (art. 8) 53 and to amend a legislative act if necessary (art. 7 para. 2).

V. – 1. – Whereas the Constitutional Court used its Maastricht judgment to emphasize that the EU does not have any original competences 54, the Lisbon decision stressed the corresponding issue of exclusive competences having to remain with the national parliaments. Headnote no. 3 reads:

“European unification on the basis of a treaty union of sovereign states may, however, not be


53 On the mechanisms related to the principle of subsidiarity, see Damian Chalmers et al., European Union Law, 363 (2nd ed. 2010); Lorna Woods & Philippa Watson, Steiner & Woods EU Law, p. 56 et seqq. (11th ed. 2012); Paul Craig & Gräinier de Bürca, EU Law, 94 et seqq. (5th ed. 2011); Rudolf Streinz, Art. 5 EUV, in EUV/AEUV, marginal no. 32 et seqq., (Rudolf Streinz, et al. eds., 2nd ed., 2012) (Ger.).

54 See above II.3.a).
achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. This applies in particular to areas which shape the citizens’living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics” 55.

In detail, the Constitutional Court explains:

“Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, _inter alia_, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)” 56.

Among the “eternal” competences are the budgetary powers. The FCC elaborates:

“A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20 (1) and (2), Article 79 (3) of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently “the master of its decisions” (see BVerfGE 129, 124 179-180)” 57.

Despite the European Union’s supranational character, “elected members of the German Bundestag, being the representatives of the people, must be in control of basic budgetary matters” 58. Therefore, the FCC requires that the amounts provided by financial aid programmes such as the ESM are clearly defined and not unlimited. Justice can only be done to the principle of democracy if “an effective control of budgetary and integration responsibility is guaranteed” 59.

55 FCC, dec. of June 30, 2009, 2 BvE 2/08 et al., 123 BVerfGE 267 Headnote 3, 4, marginal no. 249 – Lisbon (see fn. 17).
56 FCC, dec. of June 30, 2009, 2 BvE 2/08 et al., 123 BVerfGE 267, marginal no. 252 – Lisbon.
57 FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12 et al., marginal no. 197, NJW 3145 (3157), 2012 – ESM (see fn. 49).
58 FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12 et al., marginal no. 213, NJW 3145 (3148), 2012 – ESM (Ger.) (see fn. 49).
59 FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12 et al., marginal no. 213, NJW 3145 (3157), 2012 – ESM (Ger.) (see fn. 49).
2. – Whereas the distribution of budgetary power remained a somewhat theoretical issue before, it became subject to hot discussions when the European Stability Mechanism (ESM) was created as a response to the Economic and Monetary Crisis in 2012. The FCC’s injunctive judgment on the ESM’s legality was anxiously awaited in the fall 2012.\(^60\) Financial markets celebrated the judgment with increased prices at the stock exchanges.\(^61\) The Court concluded that the ESM Treaty (TESM) is consistent with the German constitution. However, it required the administration to ensure under international law that the German obligation will not exceed 190 billion Euros. In order to guarantee national budgetary powers even in the context of the Euro currency crisis, the FCC created conditions which needed to be fulfilled for the TESM to be valid and binding for Germany.\(^62\) Germany, said the Constitutional Court, is only bound by the TESM if none of the treaty’s provision can be interpreted as to create higher payment duties for Germany without the German representative’s consent.\(^64\) Furthermore, the participants’ duty to secrecy must not sabotage the information rights of Bundestag and Bundesrat.\(^65\)

In an important aspect, the ESM judgment follows the same method as other Constitutional Court judgments on European Union law: All these decisions generally approve the European amendments in question. In a second step, however, the justices highlight future requirements necessary for a European law which is consistent with the German constitution.

3. – Even though it was a national judgment offering only interim legal protection, the Ger-


\(^ {62}\) FCC, dec. of Sept. 12, 2012, BvR 1390/12,NJW 3145 (3153), 2012 – ESM (Ger.) (see fn. 49).

\(^ {63}\) See BT-Drucks. 17/9045, 6 et seqq. ( Ger.).

\(^ {64}\) FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12, headnote 1 and marginal no. 253, NJW 3145 (3153), 2012 – ESM (Ger.) (see fn. 49).

\(^ {65}\) FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12, headnote 1 and marginal no. 254 et seqq., NJW 3145 (3153), 2012 – ESM (Ger.) (see fn. 49).
man Constitutional Court’s ESM decision enjoyed European and world-wide attention. The ECJ’s Pringle decision, a judgment by the court which is actually authorized to interpret European law, got much less media coverage. Politically, as well, the Constitutional Court’s decision had consequences on all of Europe: The reservations which it proclaimed were not only formulated by Germany in accordance with art. 2 para. 1 d), art. 19 of the Vienna Convention on the Law of Treaties, but was adopted by all other member states. The ESM “reservation” thus differs from other reservations, which are typically defined as a “unilateral statement (...) made by a State or an international organization, whereby that state or that organization purports to specify of clarify the meaning or scope of a treaty or of certain of its provisions”.

The Constitutional Court required the German administration to ensure under international law that its interpretation remains valid. By requiring such declaration, the Constitutional Court indirectly dictated its desired interpretation of the TESM to the ECJ. According to art. 37 para. 3 S. 2 TESM, though, the ECJ is competent to decide disputes on interpretation and application of the treaty. The ECJ’s Pringle/Government of Ireland judgment dealt with the ESM’s legality. It hardly came as a surprise that the Court approved of the ESM; the questions in the preliminary ruling allowed that the Court approved of the German Constitutional Court’s implicit criticism. It is highly improbable that the ECJ will ever interpret the treaty in a way that would exclude Germany’s participation, as neither the ECJ nor any other European institution is likely to risk Germany’s quitting the Euro bailout. The other member states to the treaty also confirmed that they share the German court’s interpretation of the treaty.

68 With correct criticism: Matthias Ruffert, Zur Frage nach der Vereinbarkeit des ESM mit dem Unionsrecht, JZ 257, 2013 (Ger.).
69 The ESM Treaty entered into force on Oct. 8, 2012 with such reservation, see Klaus Kafszack, Eurostaaten setzen ESM in Kraft, FAZ, Oct. 9, 2012, at 1-2 (Ger.); Werner Mussler, Eurogruppe erfüllt Karlsruher Bedingung, FAZ, Sept. 15, 2012, at 1. The agreement’s wording can be found at BT-Drucks. 17/10767, Sept. 25, 2012, at p. 5 (Ger.). For the exact wording of the reservation and potential problems arising from international law, see Mattias Wendel, Judicial Restraint and Openness, 14 German Law Journal (2013) 21, 30 et seq.
70 ILC, Reports of the 63rd Session [2011], UN Doc. A/66/10, para. 75: Guide to Practice on Reservations to Treaties 2011, No. 1.2.
72 On the necessity of reservations and the threat of being non-binding: FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12, marginal No. 253, 259, NJW 3145 (3153), 2012 – ESM (Ger.) (see fn. 49).
74 ECJ, Nov. 27, 2012, Case C-370/12, Thomas Pringle v. Government of Ireland, Ireland.
75 The declaration can be found word-by-word in BT-Drucks. 17/10767, Sep. 25, 2012, at p. 5; see also Werner Mussler, Eurogruppe erfüllt Karlsruher Bedingung, FAZ, Sep. 15, 2012, at p. 1.
4. – Long after the ESM had entered into force and after some payments had already been made, the German Constitutional Court issued its final judgment on the ESM in March 2014. The judgment is not so much remarkable for the ruling itself; the Court generally confirms its injunctive decision. It also expressly requires the Bundestag to always ensure that German TESM obligations can be paid in due time, as Germany would otherwise lose its voting right (art. 4 para. 8 TESM) and thus its influence within the ESM regime.

Interestingly, however, the final judgment was positively received as valuing parliament’s decision-making margin. This assessment is, at best, euphemistic, and ignores the previous injunctive decision as well as its subsequent political implementation: The final judgment is the only logical consequence of the injunctive judgment, which required limiting payment obligations to 190 billion Euros. Instead of granting more political power to the Bundestag, the decision honors that parliament complied with the FCC’s instructions and proclaimed a corresponding international reservation.

VI. 1. – The Constitutional Court’s OMT decision of January 14, 2014, stands out among all of the Court’s EU-related decisions as the justices seemingly accept the ECJ’s precedence by referring the case for a preliminary ruling.

The FCC stayed true to what it signalized in the ESM decision and considered the ECB’s OMT decision illegal as the ECB allegedly exceeded its authorities. The request for a preliminary decision is shadowed by the interpretation of European law which the Court offers when it states:

“According to these principles, it is likely that the OMT Decision – if one bases the assessment on its wording – is not covered by the mandate of the European Central Bank. Based on an overall assessment of the delimitation criteria that the Federal Constitutional Court considers relevant, it does not constitute an act of monetary policy, but a predominantly economic-policy act. This is supported by its immediate objective (aa), its selectivity (bb), the parallelism with assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (cc), and the risk of undermining their objectives and requirements (dd). Therefore, it is likely that the OMT Decision can also not be justified as an act to support the Union’s economic


77 FCC, dec. of March 18, 2014, 2 BvR 1390/12 (marginal no. 183) – ESM (final) (see fn. 78).


80 FCC, dec. of Sept. 12, 2012, File No. 2 BvR 1390/12, NJW 3145 (3153) marginal no. 247, 278, 2012 – ESM (Ger.) (see fn. 49).
policy (ee). Against this background, there are considerable doubts concerning its validity” 81.

The Court does, however, point out a way for the ECB’s illegal decision to be interpreted and designed within the scope of legality. It defines some requirements and states:

“In the view of the Federal Constitutional Court, the OMT Decision might not be objectionable if it could, in the light of Art. 119 and Art. 127 et seq. TFEU, and Art. 17 et seq. of the ESCB Statute, be interpreted or limited in its validity in such a way that it would not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism (cf. n. 72 et seq.; 77; 79 et seq.), and would only be of a supportive nature with regard to the economic policies in the Union (cf. n. 68 et seq.; 71; 79 et seq.). This requires, in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded (cf. n. 86 and 87), that government bonds of selected Member States are not purchased up to unlimited amounts (cf. n. 81), and that interferences with price formation on the market are to be avoided where possible (cf. n. 88 et seq.). Statements by the representatives of the European Central Bank in the proceedings before the Constitutional Court concerning the framework for the implementation of the OMT Decision (limited volume of a possible purchase of government bonds; no participation in a debt cut; observance of certain time lags between the emission of a government bond and its purchase; no holding of the bonds to maturity) suggest that such an interpretation in conformity with Union law would also most likely be compatible with the meaning and purpose of the OMT Decision.” 82.

The Constitutional Court admits that it cannot yet confirm a violation of the Basic Law’s constitutional identity by the OMT, as such claim depends on the ECJ’s interpretation of the OMT programme 83.

2. – Udo DiFabio, former Constitutional Court judge competent for EU law, called the decision “wise” and “intelligent” 84. Others scathed the Court a “coward” 85. The Court indeed deserves credit and might be called “wise” for requesting a preliminary ruling from the ECJ. The matter at hand involves interpreting art. 123 TFEU. National courts of last instance are required by art. 267 para. 2 TFEU to suspend their procedure and request a ruling by the ECJ. Had the Constitutional Court refused to suspend its procedure, the Commission might have filed suit against Germany for non-compliance with art. 267 para. 2 TFEU 86.

81 FCC, dec. of Jan. 14, 2014, 2 BvR 2728/13 (marginal no. 69) – ECB (see fn. 1).
82 FCC, dec. of Jan. 14, 2014, 2 BvR 2728/13 (marginal no. 100) – ECB (see fn. 1).
83 FCC, dec. of Jan. 14, 2014, 2 BvR 2728/13 (marginal no. 102) – ECB (see fn. 1): “The Senate will have to decide on this on the basis of the answers given to the questions it referred for a preliminary ruling.”
84 Udo DiFabio, Die Weisheit der Richter, FAS of 9.2.2014, at p. 20 (Ger.).
86 Bernhard W. Wegener, Art. 267, in EUV/AEUV, marginal no. 34 (Christian Calliess et al. eds. 4th
Looking more closely, however, the referral is anything but subordinative. In fact, it appears that the Court does not only refer a “question” to be answered by the ECJ, but at the same time strongly suggests an answer as well. This suggests that the Court sees itself as equal, if not superior, to the ECJ. Despite its decision to refer the case, it is clear that the Constitutional Court does not consider itself entirely incompetent to interpret European law, as much of the decision does exactly that. It seems too optimistic, therefore, to assume that the German justices recognized the ECJ’s superiority. In fact, it appears to tell the ECJ what to do. Certainly, the Constitutional Court bought time by suspending until the ECJ’s judgment. This, in the end, is all the “wisdom” the decision has to offer. Justice Gerhardt offers good arguments that the Court was not competent in this case at all. It would have been more consistent (albeit wrong), had the Court not suspended at all, but decided in its usual “yes, but” manner. The decision as it is clearly is a compromise, since both proponents and opponents of the ECB consider themselves the winner. Meanwhile, the rule of law might be the one losing the battle. It is one thing that the decision appears to ignore economic facts. Whether or not the FCC’s judgment will prove fatal for the OMT program remains to be seen. ECB president Mario Draghi emphasized that it is ready to be activated in case of need despite the legal turmoil by which it is surrounded. More importantly, the decision’s legal arguments are questionable. The FCC’s “ultra vires” doctrine was originally carved for the most extreme of cases, safeguarding Germany against a European Union that would overstep its boundaries and endanger German sovereignty as a whole. By applying this standard to a decision by an independent EU institution and threatening that Germany will not be bound by it, the Court most apparently increases its jurisdiction on such political matters.

ed. 2011); see also Ulrich Ehricke, Art. 167, in EUV/AEUV, marginal no. 45 (Rudolf Streinz ed. 2nd ed. 2012).

87 Along these lines, Udo DiFabio, Die Weisheit der Richter, FAS v. 9.2.2014, p. 20, does not consider the decision submissive, but „friendly“ towards Europe – a view that ignores that the Court is, in fact, required by law to refer the case.

88 FCC, dec. of Jan. 14, 2014, 2 BvR 2728/13, marginal no. 55-100 – ECB (see fn. 1); bluntly titled “Interpretation of Union Law by the Federal Constitutional Court”.

89 Wolfgang Münchau, Germany’s constitutional court has strengthened the eurosceptics, Financial Times Online, February 9, 2014. Thomas Oppermann, Die Grenze, in: Briefe an die Herausgeber, FAZ, March 10, 2014, at p. 10 (Ger.), even considers such threat to constitute a breach of the European system of legal protection.

90 See Michael Gerhardt, Dissent to FCC, Jan. 14, 2014, 2 BvR 2728/13, marginal no. 2 et seqq. – ECB (see fn. 1).

91 According to Lisa Nienhaus & Christian Siedenbiedel, FAZ, Feb. 9, 2014 at p. 19 (fn. 92), there were actually three opinions in the court: One third sought to decide the case, one third requested a preliminary decision by the ECJ, and one third considered the case inadmissible.

92 Johannes Pennekamp, Draghi hält Pulver trocken, FAZ, March 7, 2014, at p. 17 (Ger.).

93 Werner Heun, Eine verfassungswidrige Verfassungsgerichtsentscheidung, JZ 331, 337 (2014) (Ger.) even calls it unconstitutional.
3. – It is fair to say that the FCC did not just request any preliminary ruling by the ECJ, but one that interprets the OMT in a certain way. It leaves the ECJ with three options: The ECJ could comply with the German Court’s requirements. This is unlikely, if only because of the ECJ’s self-perception as the highest European Court. The ECJ is generally generous in interpreting the acts of European institutions, valuing the “effet utile”.

Alternatively, the ECJ could create its own, possibly more lenient conditions for illegal actions by the ECB. The FCC would then find itself in a predicament: Its credibility would suffer if it complied with the ECJ’s requirements after having created stricter ones before. If it stayed faithful to its own interpretation of the ECB’s actions as an excess of competences, however, the Court would force German institutions such as the Bundesbank or Bundestag to walk on a path different from everyone else’s in Europe. The last word in the legal matter would thus have immense political and economic consequences. It remains ambiguous, therefore, whether it was wise to lay out a detailed interpretation which the ECJ should follow and threaten the European Court in case of “disobedience”. The FCC took a large risk by hoping that the ECJ will at all costs seek to avoid a situation in which EU law is not binding and applicable in Germany.

The third option for the ECJ is to consider the request inadmissible and thus deny a judgment on the merits. This might be possible because the ECB’s OMT decision does not actually buy any government bonds, much less in unlimited amounts. It only states the right to do so and establishes rules for the acquisition. The inadmissibility argument does not hold for two reasons, though: Firstly, contrary to an oral statement at a press conference, an ECB decision is binding according to art. 288 para. 4 TFEU. Secondly, the decision (as communicated in the press conference) did have actual consequences: By announcing its willingness to acquire unlimited government bonds, the ECB defused the crisis and made actual acquisitions unnecessary. This effect is hardly one to be contested by the complainants.
C. – I. – 1. – Despite all concerns, the FCC refrains from deciding that the various European treaties are unconstitutional. Several methodological categories are touched by this behavior. The idea of “judicial self-restraint” developed in U.S. law. Self-restraining courts grant discretion to democratic lawmakers when dealing with important political questions. When in doubt, they dismiss a case. The German Constitutional Court, too, emphasizes the legislature’s discretionary margin by stating that

“the legislature has broad latitude of assessment, in particular with regard to the risk of the payment obligations and commitments to accept liability being called upon and with regard to the consequences then to be expected for the budget legislature’s freedom to act; the Federal Constitutional Court must in principle respect this latitude”.

It is revealing, for example, that even those who have claimed many violations of competence provisions ultimately never won a lawsuit. In the end, the Court seemingly understands that it “cannot fulfill such “hopes of salvation” without transgressing the limits of its judicial mandate”.

2. – Another interesting methodological idea is one which was developed by Georg Jellinek more than 100 years ago: the “normative power of the factual”. Admittedly, Hans Kelsen taught us to strictly distinguish between factual “being” and normative “ought”. In truth, however, reality often influences what ought to be.

Considering the large number of currently 28 EU Member States, this concept is virtually imposing. A single Constitutional Court would ignore mere facts, was it to rule all by itself that
European law was non-binding. Politically, the FCC had no choice but approve of the European amendments, albeit reluctantly. Even the plaintiff in many cases does not expect a “stop” for the amending legislation. The alleged unconstitutionality of the Maastricht and Lisbon treaties and, even more significantly, the TESM’s compatibility with the Basic Law clearly show that a Constitutional Court’s decision affects not only the EU Member States, but is of world-wide relevance: When the Court’s ESM judgment was published, markets rose considerably. Accordingly, leading economists warned that a “deep depression” might follow if the FCC limits the ECB’s powers. The OMT ruling as well has been criticized for ignoring economic realities and being “illusionary”. Furthermore, the ESM decision set out binding requirements for political actions (such as the international law reservations), thus shaping facts and making future decisions by other courts impossible.

II. – 1. – Yet, that is only one way to regard the issue: At first glance, it may seem as though the Constitutional Court simply signed off on the European amendments such as the Maastricht or new developments such as the ESM treaty. The court did not, however, show any intention to restrain itself or even to silently accept the European goings-on. The Court’s “yes” was typically followed by a grand “but”, expressing the Court’s concerns and reservations and pointing the European Union to what it considered the only remaining path of constitutionality.

In German constitutional law, such judgments are described as “postulation decisions with improvement requirements”, “declarations of ‘barely constitutional’” or decisions to “con-
continue observation and, where necessary, amend.\footnote{118} They allow considering potentially undesired political consequences if a provision is declared void\footnote{119} and are quite common, e.g. in general tax law or the judgment on wealth taxes\footnote{120}.

2. – The German Constitutional Court cannot decide that a European provision is invalid; only the national act of assent can be declared void. However, the Court considers European legal acts which are unconstitutional to stand outside of European law’s primacy toward national law. In these – as of yet hypothetical – cases, the court threatens that Germany would not be bound by the European law in question. It states, for example:

“… in future it will have to be noted as regards interpretations of enabling provisions by Community institutions and agencies that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects for Germany.”\footnote{121}

The OMT ruling expanded this concept by emphasizing that

“an ultra vires act (…) creates an obligation of German authorities to refrain from implementing it and a duty to challenge it. These duties can be enforced before the Constitutional Court at least insofar as they refer to constitutional organs.”\footnote{122}

Furthermore, the Constitutional Court reserves its right to examine if the EU or the ECJ exceed their respective competences. It reasons that these competences were conferred by national law and that, consequently, their scope must be defined and checked by national law and na-

\footnote{118} Herbert Bethge, Para. 31, in Bundesverfassungsgerichtsgesetz, marginal no. 251, (Theodor Maunz et al. eds. 42nd ed., 2014) (Ger.) (translation by the authors); cf. Peter Badura, Die verfassungsrechtliche Pflicht des gesetzgebenden Parlaments zur „Nachbesserung“ von Gesetzen, in Staatsorganisation und Staatsfunktion im Wandel: Festschrift für Eichenberger zum 60., in Geburtstag, 481 (Georg Müller et al. eds., 1982) (Ger.).

\footnote{119} Klaus Schlaich & Stefan Korioth, Das Bundesverfassungsgericht, marginal no. 439 (9th ed., 2012) (Ger.).

\footnote{120} FCC, dec. of June 22, 1995, 93 BVerGE 121 – Vermögenssteuer (Ger.); cf. FCC, dec. of Aug. 8, 1978, 49 BVerGE 89 – Atomgesetz (Ger.); BVerfG, dec. of Nov. 16, 1992, 87 BVerfGE 348 – Versorgungsausgleich (Ger.). These decisions must not be confused with decisions to declare a law to be void, but leaving it valid for a certain period of time in order to allow the legislature to react (e.g. FCC, dec. of Feb. 9, 2010, 1 BvL 1/09 – Hartz IV-Regelsätze (Ger.)). Cf. Peter Badura, Die verfassungsrechtliche Pflicht des gesetzgebenden Parlaments zur „Nachbesserung“ von Gesetzen, in FS Eichenberger, 481 (see fn. 125); Tzu-hui Yang, Die Appellentscheidungen des Bundesverfassungsgerichts, 2003 (Ger.).

\footnote{121} FCC, dec. Oct. 12, 1993, 2 BvR 2134/92 & 2 BvR 2159/92, 89 BVerGE 155 (210) – Maastricht (emphasis by the authors) (Ger.); see FCC, dec. of June 30, 2009, 2 BvE 2/08 et al., 123 BVerfGE 267 (353), marginal no. 240 – Lisbon (see fn. 17).

\footnote{122} FCC, dec. Jan 14, 2014, 2 BvR 2728/13 – OMT (fn. 1).
tional courts, respectively. The Constitutional Court claims that it needs to judge potential violations of competences because otherwise, the ECJ would be given competences without being controlled, thus have “Kompetenz-Kompetenz” 123.

Other member states’ (constitutional) courts also emphasize that certain parts of their national constitutions cannot be amended or altered by European law. They do not accept the supremacy of European law in these areas of law 124. The Danish Highest Court, however, in its Maastricht decision 125, created an assumption in favor of the ECJ’s legal interpretation 126. It argued that the principle of conferral was observed 127 and that the principle of unanimity (art. 235 TEU Maastricht) ensured a veto right for the Danish government 128.

3. – Not only with its “yes, but” arguments, but also and most definitely by threatening that European acts will not be legally binding, the Court gives up any judicial self-restraint. Instead, the Court enters the field of legal policy-making, also called “judicial activism”. 129 In Germany, a dissenting opinion criticized as early as 1975 that judicial policy-making was beyond the Constitutional Court’s competences:

“The order of judicial self-restraint, having been called the lifeblood of the Constitutional Court’s judgments, is even more valid when the matter in question is not resistance against governmental offences but when the legislature, which is directly elected by the people, is told how to positively establish social order. The Federal Constitutional Court must not give in to the temptation to take up the controlling institution’s role, as it would otherwise put in jeopardy the constitutional jurisdiction’s position” 130.

123 Michael Gerhardt, Europa als Rechtsgemeinschaft: Der Beitrag des Bundesverfassungsgerichts, Zeit­schrift für Rechtspolitik [ZRP] 161 (163), 2010 (Ger.).
124 A good overview can be found in Paul Craig & Gráinne de Búrca, EU Law, p. 268 et seqq. (5th ed. 2011); Franz Mayer, Art. 19 EEU, in Das Recht der Europäischen Union, marginal no. 92 et seq., (Eberhard Grabitz et al. eds., 52nd ed., 2014) (Ger.); The Polish Constitutional Court decided similarly to the German Court: Trybunal Konstytucyjny, May 11, 2005, K 18/04, German translation in EuR 236 (243), 2006.
126 Frederik Thomas, Das Maastricht-Urteil des dänischen Obersten Gerichtshofs vom 6. April 1998, ZaöRV 879 (905 et seq.), 1998 (Ger.).
127 Frederik Thomas, Das Maastricht-Urteil des dänischen Obersten Gerichtshofs vom 6. April 1998, ZaöRV 879 (903 et seq.), 1998 (Ger.).
128 Frederik Thomas, Das Maastricht-Urteil des dänischen Obersten Gerichtshofs vom 6. April 1998, ZaöRV 879 (904 et seq.), 1998 (Ger.).
More recently, Justice Müller pointedly remarked that the FCC may not substitute a reasonable legislative decision by its own, regardless of whether the FCC’s decision itself is reasonable as well 131. The FCC’s jurisprudence sets clear standards which the European lawmaker fulfills and, for example, strengthens fundamental rights after such lack was criticized. The Court’s far-reaching decisions must therefore be examined critically in two aspects: Firstly, it must be asked – even on a national level – if and to what extend an institution such as the Constitutional Court, which is not democratically legitimized, may make quasi-legislative decisions. This is true in particular because the judgments typically deal with parliamentary majority decisions and do not always respect the lawmaker’s margin of discretion (which is, however, largely cited) 132. Secondly, this question becomes even more volatile in a European context: Is it legitimate that one member state’s court so largely influences the EU’s policy and law and with it, the other member states’?

III. – 1. – The German Constitutional Court has become a forum to discuss methodological questions: Such issues dominated the Court’s decision on “complaint atrophy” 133. The Court defined instances in which extending the law is admissible. It must therefore tolerate that its own decisions, including those on European law, are judged by the same standards.

Most recently, parameters in favor or against law extension were defined 134. In order to fill gaps and create analogies, the expected result, especially the legal consequences, must be considered appropriate 135. Since whoever extends the law enters “unknown land”, he must consider his actions’legal consequences, just like a lawmaker would 136. Hassemer agrees with these ob-

131 Dissent by Peter Müller, to FCC, dec. of 26.2.2013, 2 BvE 2/13, marginal no. 9 – 3% Threshold (see fn. 37).
132 Cf. FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12, marginal no. 217, NJW 3145 (3149), 2012 – ESM (Ger.) (see fn. 49).
135 Katja Hemke, Methodik der Analogiebildung im öffentlichen Recht, 371, 2006 (Ger.): „No one would come up with the idea to use an analogy if the legal consequence of the non-regulated case would not become appropriate and fitting in case of analogy.“ (Translation by the authors).
136 Art. 1 § 2 of the Swiss civil code [ZGB] states very bluntly: „In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator“. 
Observations: Legal methodology serves only to give reasons for and to present a decision, but is not to be used for finding the law. The starting point for extending the law, more often than not, is an existing grievance. Value judgments and concepts of justice play an important role as can the prohibition to deny justice to anyone. Denial of justice, then, is not just a formal argument, but reminiscent of “unbearable injustice” as defined by Radbruch. Contrarily, the legal gap need not be filled if the plaintiff can reach legal protection by other means. Then, the situation does not justify a court’s competence to extend the law. A legal provision’s practical consequences are often crucial for assuming an analogy. Therefore, a results-oriented interpretation can be decisive. Consequently, the economic impact of a decision such as the one on the ESM Treaty can play a role as well.

Rarely, legal scholarship promotes a legal opinion’s acceptance to be a criterion for extending the law. Jurisprudence speaks more openly when reasoning with a legal view which has been shared by the Deutscher Juristentag, the German Jurists Forum. Furthermore, the international viewpoint is taken into consideration by comparing foreign judgments which argue in favor of the desired development. This is true in particular if many other countries have regulated the field and (only) Germany has not yet done so. Finally, it must be discussed whether the new legal development would be practical and if certainty of the law prevails. When considering extending or developing the law, courts must take into account if they can limit “legal certainty to a certain extend and for a certain time … for the sake of promoting material justice” or if they should leave it to the legislature to create legal rules.

2. – Public rules can turn private relationships into triangular ones. One person’s damages claim for breach of fundamental rights is met by another’s defense claim: “Protection by intru-
One person’s fundamental rights can affect another’s. These are not supreme in principle, but become elements to consider in trial. The more important these constitutionally protected rights are, the more loudly do they speak against extending the law. Vividly speaking, the constitution is violated by a judgment if an identical law would also constitute a breach.

3. Mainly, courts develop legal solutions if the legislature is incapable of doing so. It is no coincidence that the legislature often waits and sees what solutions jurisprudence has to offer. If they are good, they are transferred into law. If not, the lawmaker can oppose them with differing legislation.

The focus can be reversed as well. Administrative and legislative bodies often have advantages over the courts’ procedure in risky decisions with uncertain perspectives: The courts lack the necessary instruments and the universal perspective to include extra-legal considerations; they cannot create abstract and general rules but are forced to decide on a case-by-case basis.

4. It is striking that the “Solange I” decision fulfills most parameters: The missing fundamental rights created a gap, which lead to a grievance in need of correction. Since the (European) lawmaker did not act, the courts felt called to create legal certainty. It remains doubtful, however, whether the FCC was called to such action since the ECJ is competent of such European questions and had begun to develop European fundamental rights in its Nold judgment.

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144 FCC, June 26, 1991, 84 BVerfGE 212 (228 et seq.) – Arbeitskampfrecht (Ger.); Stefan Vogenauer, Die Auslegung von Gesetzen in England und auf dem Kontinent, 149, 2001 (Ger.). Before, cf. FCC, dec. of Oct. 11, 1979, 84 BVerfGE 212 (228 et seq.) – Sachverständigenhaftung (Ger.).

145 Examples include the development of strike law and of the general right to privacy, which has not been codified yet.

146 For instance, the law of obligations reform in 2002 codified legal concepts such as culpa in contrahendo and cease of the transaction’s basis which has been developed by the courts.

147 For the development of state liability in Europe, see Thomas Möllers, Doppelte Rechtsfortbildung contra legem?, EuR 20 (32 et seq.) 1998 (Ger.).

148 Phrasing cf. Fritz Baur, Sozialer Ausgleich durch Richterspruch, JZ 195 (196), 1957 (Ger.). „The judge is put in the legislature’s position without eqipping him with this branch’s resources and without ensuring that his decision is subject to a policy-making process like a law.“ (Translation by the authors); see Ernst Kramer, Juristische Methodenlehre, S. 285, 3rd ed., 2010 (Ger.); Eduard Picker, Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung, JZ 62 (72), 1988 (Ger.).


Regarding German jurisprudence on the European Parliament’s role and on a catalogue of competences, the parameters are less convincing. The Constitutional Court considered itself to be in the position to further define the principles of conferral and of subsidiarity. This defining right, however, lies in the Council’s or at least the ECI’s competences.

The decisions on the national parliaments’ultra vires competence and the member states’exclusive (residual) competence must be seen even more critically. The Lisbon judgment, in particular, is more likely to stall the European’s Union’s development\textsuperscript{151} by threatening that further integration would be stopped by a negative judgment\textsuperscript{152}. However, the Lisbon decision’s actual impact was alleviated by the Honeywell decision\textsuperscript{153}.

It is little convincing to argue with the legislature’s alleged failure to act. National lawmakers often remain inactive for decades\textsuperscript{154}. The member states, on the contrary, have amended primary European law many times over the course of the last twenty years. The OMT judgment’s tendency to allow complaints against the Bundestag’s inaction in response to a decision by a European institution is more than questionable; indeed, the dissenting Justice Lübbe-Wolf rightly denied a constitutional right to “random parliamentary or governmental discussions”\textsuperscript{155}.

The German Constitutional Court thus is an additional player of European legal policy and takes up tasks which are originally designated to the Council as the national parliaments’representation (art. 15 TEU).

However, one can argue in favor of the Court as well: Granted, fundamental rights as defensive rights did not lie at the center of the most recent decisions. However, the Constitution was affected in those cases, too: be it the right to vote according to art. 38 Basic Law\textsuperscript{156} or the prin-

\begin{footnotesize}
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  \item \textsuperscript{151} Daniel Halberstam & Christoph Möllers, \textit{The German Constitutional Court says “Ja zu Deutschland!”}, 10 GLJ 1241 (1250 et seq.), 2009; Christoph Schönberger, \textit{Lisbon in Karlsruhe: Maastricht’s Epigones At Sea}, 10 GLJ 1207 (1209), 2009.
  \item \textsuperscript{152} Christoph Schönberger, \textit{Lisbon in Karlsruhe: Maastricht’s Epigones At Sea}, 10 GLJ 1207 (1216), 2009.
  \item \textsuperscript{153} FCC, dec. of Jul. 6, 2010, 2 BvR 2661/06, 126 BVerfGE 286 headnote 1 (304 marginal no. 61) – Honeywell (Ger.) (see fn. 17): „the breach of competences is […] sufficiently qualified“: Christoph Möllers, \textit{German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances}, 7 European Constitutional Law Review 161, 2011.
  \item \textsuperscript{155} Dissent by Lübbe-Wolf to FCC, dec. of Jan 14, 2014, 2 BvR 2728/13 – ECB, marginal no. 22.
  \item \textsuperscript{156} FCC, dec. of June 30, 2009, 2 BvE 2/08 et al., 123 BVerfGE 267 (330 et seq., marginal no. 174 et seq.) – Lisbon (see fn. 17). \textit{With an identical result}, FCC, dec. of October 12, 1993, 2 BvR 2134/92 & 2 BvR 2159/92, 89 BVerfGE 155 (headnote 1) – Maastricht. (Ger.). However, using art. 38 GG as an argument may only be a „trick“, Elnar Brok & Martin Selmayr, \textit{Der ’Vertrag der Parlamente’ als Gefahr für die Demokratie? Zu den offensichtlich unbegründeten Verfassungsklagen gegen den Vertrag von Lissabon}, integration, 217 (221 et seq.), 2008.
\end{itemize}
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Principle of democracy (art. 29 Basic Law)\textsuperscript{157}. Furthermore, other states’ national referendums allowed their respective peoples to decide upon the treaties by popular vote\textsuperscript{158}. This is impossible in Germany\textsuperscript{159}, which in turn emphasizes the importance that the Constitutional Court voices the generally skepticism towards amending the treaties.

Many years ago, a political discussion among the peoples of Europe was stipulated\textsuperscript{160}, the German Constitutional Court recently brought into play the idea of a mandatory referendum\textsuperscript{161}. Infringements of the Constitution’s core identity, in particular art. 79 para. 3’s eternity clause, must be approved by the people, which is pouvoir constituant\textsuperscript{162}. This rightly defines the limitations of parliamentary action and restricts law extension by the Constitutional Court. To be substantial, however, the Constitution’s identity and the scope of art. 79 para. 3 must be defined – a task which Huber assigns to the FCC\textsuperscript{163}. If it takes upon this task, however, the Court claims the exact competence which it tries to take away from the ECJ.

By including art. 79 para. 3 Basic Law, the Constitution’s founding fathers and mothers primarily intended to secure the free and democratic order and deny the lawmaker access to it\textsuperscript{164}. Art. 79 para. 3 seeks to protect the general principles of art. 1 and 20 Basic Law. Not everything affecting either human dignity or the principle of democracy is automatically illegal\textsuperscript{165}. The constituent process was dominated by past experiences from the Weimar Republic and the “Third Reich”; the founders mainly wanted to prevent that the new constitution, as well, would

\textsuperscript{157} Recently, FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12, marginal no. 223, NJW 3145 (3145), 2012 – ESM (Ger.) (see fn. 49).

\textsuperscript{158} Contrary to the „European Constitution“, the Treaty of Lisbon was subject to a referendum in Ireland only, see Johannes Leithäuser & Nikolas Busse, Iren sagen ja zum Lissabonvertrag, Frankfurter Allgemeine Sonntagszeitung, Oct. 4, 2009, at p. 1.

\textsuperscript{159} The government of the federal state of Bavaria, however, plans to introduce a bill on federal referendums on basic European topics, s. Pressrelease No. 396 of the Bavarian government Dec. 11, 2012; Bayern will mehr Plebiszite, SZ, Dec. 12, 2012, at 6. It is highly improbable that such initiative is successful.

\textsuperscript{160} Thomas M.J. Möllers, \textit{Die Rolle des Rechts im Rahmen der europäischen Integration}, 79 et seqq., 1999 (Ger.).

\textsuperscript{161} FCC, dec. of June 30, 2009, 2 BvE 2/08 et al., 123 BVerfGE 267 (347 et seq.), marginal no. 228 et seqq. – Lisbon: „The Basic Law does not grant powers to bodies acting on behalf of Germany to abandon the right to self-determination of the German people in the form of Germany’s sovereignty under international law by joining a federal state. Due to the irrevocable transfer of sovereignty to a new subject of legitimation that goes with it, this step is reserved to the directly declared will of the German people alone“.


\textsuperscript{163} Peter Huber, in \textit{Europa als Rechtsgemeinschaft – Währungsumwandlung und Schuldenkrisen}, 229, 239 (Thomas Möllers & Franz-Christoph Zeitler eds., 2013) (see fn. 168).

\textsuperscript{164} Horst Dreier (et al. eds.), \textit{Grundgesetz Kommentar}, Vol. 2, Art. 79 III marginal no. 5, 2\textsuperscript{nd} ed., 2006 (Ger.).

\textsuperscript{165} Horst Dreier (et al. eds.), \textit{Grundgesetz Kommentar}, Vol. 2, Art. 79 III marginal no. 26, 2\textsuperscript{nd} ed., 2006 (Ger.).
erode and a new dictatorship begin\textsuperscript{166}. Legislative history shows that the founding mothers’ and fathers’ concern was for the most important constitutional principles: for instance, the substance clause (art. 19 para. 2) and art. 19 para. 4’s guarantees are not protected by art. 79 para. 3 Basic Law\textsuperscript{167}. Amendments to the provisions mentioned in art. 79 para. 3 do no lead to an automatic adjustment of the eternity clause\textsuperscript{168}; all this shows that the historic constituent intent determines the clause’s content. Even the Constitutional Court considers art. 79 para. 3 to be a provision of exception which must be interpreted narrowly\textsuperscript{169}; however, the Court appears not to live up to that exceptional character in a European context.

IV. 1. – The Constitutional Court’s “Solange II” judgment was often considered an invitation to the ECJ to cooperate\textsuperscript{170}. In its Maastricht decision, the Court itself emphasized a cooperative relationship\textsuperscript{171}. A jurisprudential dialogue between national and European courts repeatedly results in changes of European jurisprudence after the judges were convinced by their national colleagues\textsuperscript{172}. Some national constitutional courts, among them not only the German but also its Polish counterpart, apply more “amicable pressure” than others and reserve certain competences for themselves\textsuperscript{173}. The Polish Constitutional Court decided in 2005:

“The right to assess whether the Community’s legislature acted in accordance with the competences given to them when passing a certain act, and whether they practiced according to the principles of subsidiarity and appropriateness, remains with the member states. Exceeding these borders would have as consequence that the passed acts are not subject to Community law’s supremacy”\textsuperscript{174}.

\textsuperscript{166} Matthias Herdegen, Art. 79, in Grundgesetz, marginal no. 63 (Theodor Maunz, et al. eds., 67th ed., 2012) (Ger.).

\textsuperscript{167} Matthias Herdegen, Art. 79, in Grundgesetz, marginal no. 67 (Theodor Maunz, et al. eds., 67th ed., 2012) (Ger.).


\textsuperscript{171} FCC, dec. of October 12, 1993, 2 BvR 2134/92 & 2 BvR 2159/92, 89 BVerfGE 155 (156, 175) – Maastricht (Ger.).


\textsuperscript{173} Cf. Guy Canivet, Actes du Colloque pour le cinquantième anniversaire des traités de Rome (1957-2007), marginal no. 12, in Cour de justice des Communautés européennes (Eds.).

\textsuperscript{174} Judgment by the Polish Constitutional Court (Trybunal Konstytucyjny) of May 11, 2005, K 18/04, Ger-
Similarly, the German Constitutional Court attempts to have the last word in competence issues, creating an “ultra vires” doctrine. This doctrine, however, conflicts with the ECJ’s self-perception of deciding upon competences. The Constitutional Court’s threat must not be underrated, considering Germany’s position in the EU. In the context of the efforts to rescue the Euro, for example, it is highly improbable that the ECJ decides in a way which excludes Germany from the group of potential creditors. Furthermore, referencing the FCC can enable the German administration to block certain decisions against the in-debt states. Thus, the FCC does not directly influence European law, but impacts European policy and decision-making process. In light of the most recent decisions, cooperation appears to be a euphemistic term. The OMT ruling, seemingly accepting the ECJ’s sole competence to interpret European Law, was seen by some commentators as a way “to wash its hands of the final ruling”, even as a plain threat to the ECJ.

By its judgments, the German Constitutional Court actively shapes European law – even beyond the German borders.

2. – Art. 4 para. 3 TEU lays out the principle of loyal cooperation of the EU and the member states. For the member states, this results in the prohibition to apply national law which violates European law.

The relationship of ECJ and national courts is largely influenced by the ECJ’s interpretative
“monopoly” for European law and the resulting obligation to refer cases in the context of the preliminary ruling procedure. In its CILFIT jurisprudence, the ECJ states that the obligation to refer exists if the interpretative question is “relevant” and “affect[s] the outcome of the case”. An obligation to refer exists for courts of last instance (art. 267 para. 1, 3 TFEU), thus also for the FCC. However, before its most recent ECB ruling, the Court had never referred a case to the ECJ. In the opinion of Constitutional Justice Gerhardt, the Court’s cases typically lack relevance since the German and European legal orders are independent of each other.

European Union law becomes part of the German legal order by individual commands to be applied. These acts of assent are subject to the Constitutional Court’s scrutiny. In the end, this allows the Court to judge the national constitutional limitation to EU law’s supremacy by scrutinizing the act of assent. Since the ECJ is required to cooperate (art. 19 para. 1 subpara. 2 TEU), this procedure in the end restrains its interpretative powers.

Whether or not the two legal orders are indeed independent of each other does not need to be determined (though it is questionable); the FCC is definitely and without doubt competent to review the national acts of assent. However, the Court uses its interpretation (and extension) of art. 38 Basic Law as a bridge to adjudicate on European matters as well and more or less openly also interprets European law. In its Maastricht decision, for example, the Court interprets art. F para. 3 TEU and concludes that it is not a provision which grants competence to the EU. In the ESM urgent motion decision, the Constitutional Court requires the administration to ensure under international law that the German obligation will not exceed payments of 190 million EUR and states that otherwise, Germany would not be bound by the TESM.

As long as Germany can compel a certain interpretation, it is insignificant which interpretation the ECJ
would actually follow if it had to decide about the TESM’s meaning after it entered into force. In the urgent motion, the Constitutional Court was not obliged to refer the case. By requiring the international interpretation provision, the Court evades a future referral: In the main proceedings, the TESM will be in force with the reservation, rendering a potentially different interpretation irrelevant to the Constitutional Court. To put it more clearly: Had the TESM been ratified without any international reservation, the Constitutional Court would have been obliged to refer the case if it considered only one of several possible TESM interpretation to be constitutional. The ECJ would then have interpreted the TESM – something it will probably not have to do now.

3. National representatives are forced to create majorities in order for their opinion to prevail. It leaves an unpleasant aftertaste that the distribution of votes in EU institutions has been changed: Formerly, Germany had only one vote (a fact that was criticized for the ECB). This system mirrored the Union’s idea that all member states are equal and that neither a state’s size nor its financial capacities were relevant.

The German Constitutional Court’s decisions do not grant a second vote to Germany. Since the judgments are binding according to sec. 31 BVerfGG, both the administration and the parliament must comply with them. This leads to blockage in case of non-compliance. As the above-analyzed decisions showed, the FCC shapes European law. Formally, the parliament’s margin of discretion is emphasized, showing judicial self-restraint. However, the Court wants its requirements to be fulfilled and not only threatens that rules will become dispositive, but also sets out very strict requirements such as the exact limit for ESM payments. For instance, it is mainly a political question whether the ECB may buy government bonds. It should therefore be answered in the course of the European political process. Limiting the ECB’s actions is irrational both from a political and an economical viewpoint, robbing the ECB of its mechanisms to appropriately react to speculating market participants. Additionally, it remains a fact that the monetary union’s rules must be interpreted by the ECJ. Negative consequences would be immense if a Constitutional Court judgment contradicted an ECJ one.

German government officials also find ways to circumvent objections: If creating a majority

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192 Herbert Bethge, *para. 31*, in *Bundesverfassungsgerichtsgesetz*, marginal no. 120, (Theodor Maunz et al. eds., 42nd ed., 2014) (Ger.).

193 *Cf. recently* FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12, marginal no. 200, 234, NJW 3145 (3151), 2012 – ESM (Ger.) (see fn. 49).

194 *Cf. recently* FCC, dec. of Sept. 12, 2012, 2 BvR 1390/12, marginal no. 553, 234, NJW 3145 (3151), 2012 – ESM (Ger.) (see fn. 49).

195 *Cf.*, Werner Heun, *Eine verfassungswidrige Verfassungsgerichtsentscheidung*, JZ 2014, 331, 332 (Ger.).

196 Werner Heun, *Eine verfassungswidrige Verfassungsgerichtsentscheidung*, JZ 2014, 331, 336 et seq. (Ger.). The ECJ has passed only one decision involving the ESM, ECJ, dec. of Nov. 27, 2012, Case C-370/12, Thomas Pringle v. Government of Ireland, Ireland, The Attorney General.
is impossible or politically negative, they refer the matter to the Court, which will gladly accept the offer to actively shape European Union law.

D. – In its most recent European decisions, the FCC was faced with the realities of the economic and monetary crisis\(^\text{197}\). These judgments were often met with the similar criticism: The FCC is accused of lacking economic insight. In fact, they clearly show the difficulty to meet economically exceptional situations with general legal rules\(^\text{198}\). Traditionally, courts reacted to such situations by creating an exceptional response through an extension of the law. Currently, roles appear to be reversed: The (European) legislator finds answers to the crisis, but must fear to be thwarted by the Constitutional Court.

Without doubt, the Constitutional Court sets broader limits for inadmissible extensions in questions concerning national constitutional and European law as it does in criminal and civil law\(^\text{199}\). The ECJ has been described as motor of the European Communities, implying that it exceeds its competences. This article sought to show that the German Constitutional Court is a motor of the European Union as well and gladly takes upon tasks such as filling gaps or substantiating vague principles: A European Union without fundamental rights now is unimaginable. Whereas the EU’s competences were extended by the Lisbon Treaty, the principle of conferral and strong national parliaments have become more and more important for a functioning and well-accepted European Union. The Constitutional Court will presumably remain important in European law and politics, considering that its judgments have often led to amendments of European law. It may be doubted, though, that it was always necessary for the Court to act upon a “gap”. Or, closing with words by Constitutional Court justices Voßkuhle, Osterloh and Di Fabio,

“The principle of democracy and the Basic Law’s functional structure would suffer strongly if the judicial branch could ignore legislative decisions whenever it regards the consequences as “inappropriate” and the legislature does not comply with the courts’ wishes. Legislative concepts that can clearly be seen must be respected by the judge”\(^\text{200}\).

\(^{197}\) The most famous and most recent exception was the decision dealing with the 3%-threshold in European Parliament Elections, FCC, dec. of 26.2.2014, 2 BvE 2/13.

\(^{198}\) For example, Holger Schmieding, Der Irrtum der Karlsruher Richter, FAZ, Mar. 31, 2014, at p. 6, criticizes the FCC for „not sufficiently differentiating between normality and emergency“ in the context of the OMT.

\(^{199}\) See references at Thomas M.J. Möllers, Ein Vier-Stufen-System zur Rationalisierung der Grenze zulässiger Rechtsfortbildung, in: FS Roth, 473 ff., 2011 (Ger.).

\(^{200}\) Dissent by Justices Andreas Voßkuhle, Lerke Osterloh and Udo Di Fabio, to FCC, dec. of Jan. 15, 2009, 122 BVerfGE 248 (285, marginal no. 103) (Ger.) – Rügeverklärung.