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EDITORIAL COMMENTS

An unintended side-effect of Draghi's bazooka: An opportunity to establish a more balanced relationship between the ECJ and Member States' highest courts

Since it became known that the German Constitutional Court decided to ask the Court of Justice of the EU for a preliminary ruling on the question as to whether the European Central Bank's announcement of its OMT (Outright Monetary Transactions) programme – colloquially referred to as the "Draghi bazooka" – is incompatible with EU law in that it exceeds the ECB's monetary policy mandate *ex* Article 127 TFEU and/or violates the prohibition of monetary financing *ex* Article 123 TFEU, the media has been flooded with commentaries of all sorts, academic and non-academic.[1] There is little doubt that the main reason for this broad attention is the political and financial-economic importance of the ECB's contested announcement, which is hard to overestimate in the context of the unprecedented sovereign debt crisis the euro area is facing.[2] It remains to be seen what the actual impact of the legal uncertainty triggered by these proceedings will be on markets and in particular on the confidence of (potential) investors in government bonds.

From the outset, it should be noted that these editorial comments aim to shed light on the content of the arguments made so far, rather than giving an assessment of the legal merits of the case submitted to the ECJ. Moreover, although the views of the GCC and some leading academics are well known, those of the ECB, other EU institutions and Member States are much less or not at all.[3] Nevertheless, giving a flavour of the arguments is useful in order to explain the background against which the ECJ and the GCC are bound to interact and establish an equilibrium between themselves, an issue of a

1. Judgment of 14 Jan 2014, BVerfG, 2 BvR 2728/13; English version available at <www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html> The ECJ has registered the case under number C-62/14, *Gauweiler and others.* See for commentary e.g. Pernice, "Karlsruhe wagt den Schritt nach Luxemburg" available at <www.verfassungsblog.de/de/karlruhe-wagt-den-schritt-nach-luxembourg/#.UvpW516p0Z.c>; Borger and Eijsbouts, "De hoogste Duitse rechter is de kluts kwijt over de euro", *NRC-Handelsblad* of 19 Feb. 2014; Wolff, "OMT ruling: Karlsruhe says no, refers to ECJ and suggests ECB should always be preferred creditor", available at <www.bruegel.org> see also articles by Mac Amhlaigh, Gerstenberg, Thym and Lindseth available at <eutopialaw.com>.

2. See Editorial comments: "Debt and democracy: 'United States then, Europe now'?" 49 CML Rev. (2012), 1833–1840.

3. The ECB's views as expressed in its written observations and during the two-day hearing held by the GCC in June 2013 are reported rather summarily in the referral.

constitutional nature, the importance of which goes well beyond their bilateral relationship as it is equally important for the relationship between the ECJ and the highest courts of the all Member States.

The OMT programme's compatibility with EU law in the context of the sovereign debt crisis

In normal times, the ECB's main monetary policy tools for achieving price stability are interest rate policy, short-term liquidity management and communication.[4] The sovereign debt crisis led the ECB to adopt "non-standard" measures beyond its traditional monetary policy instruments,[5] of which the main ones can be summarized as follows.[6] *First*, the ECB took a number of measures in order to provide euro area banks with liquidity (enhanced credit support). Access to liquidity was extended, rules on collateral were softened, and the maturity of liquidity operations was extended several times. The ECB also conducted LTORs (Long Term Refinancing Operations) with maturities of three years. ELA (Emergency Liquidity Assistance) was also provided by NCBs (National Central Banks) to solvent banks in difficulties, under the surveillance of the ECB's Governing Council.[7] *Secondly*, the ECB set up successively two government bond purchasing programmes, the SMP and the OMT. The SMP (Securities Market Programme) consisted of limited purchases of euro area Member States' bonds on the secondary market.[8] On 2 August 2012, ECB President Draghi went a step further and announced the framework of the OMT (Outright Monetary Transactions) programme: from now on, the ECB would be prepared to buy government bonds on the secondary market provided certain conditions were met; in particular the Member State issuing the bonds in question should be subject to strict macroeconomic conditions. The modalities for launching the programme were decided by the ECB Governing Council on 6 September 2012.[9] The OMT programme is certainly the most controversial ECB measure since the beginning of the sovereign debt crisis, but probably also the most effective in terms of calming down sovereign bond

4. Darvas and Merler, "The European Central Bank in the age of banking union", Bruegel policy Contribution, 2013, p. 3, available through <www.bruegel.org/>.

5. All major central banks have adopted broadly similar non-standard measures.

6. For a description, see Darvas and Merler, op. cit. *supra* note 4.

7. ELA can be provided by the NCBs unless the Governing Council finds, by a majority of two thirds of the votes cast, that it interferes with the objectives and tasks of the ESCB (Art. 14.4, ESCB Statute).

8. SMP also covers eligible marketable debt instruments issued by private entities incorporated in the euro area.

9. ECB Monthly Bulletin September 2012.

markets, in that its mere announcement has helped ensure that most euro area Member States continue to be able, through bond emissions, to borrow money at reasonable conditions on capital markets. The non-standard measures adopted by the ECB have to rely on the *instruments* listed in Articles 18 to 20 of the ESCB Statute. The bond buying programmes are based on Article 18.1, which allows the ECB to buy and sell outright marketable instruments. Some have argued that the government bonds concerned are actually in practice not marketable, but this opinion is rejected by other commentators.[10]

Moreover, certain commentaries[11] claim that the non-standard measures adopted by the ECB, especially the OMT, were justified insofar as they were necessary in order to restore conditions for a well-functioning banking system with the aim of delivering price stability in the medium term. To achieve that objective, measures had to be adopted to repair the monetary transmission mechanism, since exceptionally high risk premiums, embodied in government bond prices for some Member States, were hindering the transmission of the monetary policy signals sent by the ECB. According to this view, repairing the monetary transmission mechanism is clearly part of the monetary policy, albeit indirectly.[12] If interest rate decisions taken by the ECB are not being passed on by banks to borrowers in some Member States, it is argued, the ECB cannot properly influence the interest rates for the euro area. By restoring functional markets, the OMT is intended to allow the ECB, in a second stage, to conduct an effective monetary policy. A considerable number of economists tend to agree that monetary transmission was not functioning properly during the crisis. They also seem to agree that the SMP and OMT have played a useful role in that respect.[13] For some,[14] it is clear *ex post* that the announcement of the OMT has reduced financial fragmentation in the euro area and, therefore, allowed the ECB to help ensure more similar monetary policy conditions throughout the euro zone.

10. For a summary of this discussion, see Beukers, "The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention", 50 CML Rev. (2013), 1579–1620, at 1612. On the more specific question as to whether the OMT programme could lead to a considerable redistribution between the Member States and thus amount to a system of fiscal redistribution, see the materials of the conference organized by DIW and CEPR in Berlin, 2 Sept. 2013, available at <www.diw.de/en/diw_01.c.426911.en/publikationen_veranstaltungen/veranstaltungen/omt_conference/omt_conference.html>.

11. See e.g. institutional report by Keppenne, for Topic 1, "The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU", FIDE 2014, section 11.2–3.

12. From the Board, "Stumbling blocks and corner stones in building a deep and genuine EMU", (2013) LIEI, 95–104.

13. See Darvas and Merler, op. cit. *supra* note 4; Wolff, "The ECB's OMT Programme and German Constitutional Concerns", Think Tank 20, 2013.

14. See Wolff, ibid.

As regards the prohibition of monetary financing, Article 123(1) TFEU and Article 21.1 of the ESCB Statute prohibit the ECB or NCBs from granting credit facilities to governments and from "directly" purchasing debt instruments of Member States. The purpose of this prohibition is to force governments to seek financing on a competitive basis at market-determined prices as well as to avoid inflation. The scope of this prohibition is elaborated in Regulation 3603/93, whose seventh recital states that "… purchases made on the secondary market must not be used to circumvent the objective of [Article 123 TFEU]".[15] Some commentators[16] claim that the concrete details of the SMP and OMT do not support the argument that Article 123 TFEU is circumvented. The fact that only rather short term bonds are concerned and that there is a link with conditionality are said to indicate that this policy is not a policy for financing inflationary deficits.[17] These commentators also point out that that the measures are in principle temporary and regionally selective, which is relevant in terms of proportionality. From these elements, they infer that temporary purchasing policies conducted on the secondary markets do not violate the prohibition of monetary financing enshrined in Article 123 TFEU. According to this view, what does matter is that these operations are conducted in view of monetary policy objectives. In that respect, one should recall that, according to the ECJ ruling in *Pringle,*[18] monetary policy is defined in the Treaties by reference to its *objectives* rather than to its instruments. The primary mandate of the ESCB is to maintain price stability (Art. 127(1) TFEU, first sentence). In addition, some commentators point to the fact that there are no quantitative criteria in the Treaty for assessing the achievement of price stability, giving some flexibility as regards the means to achieve that objective.[19] Others go a step further, claiming that the wording of Article 127(2) TFEU even suggests a link between the ECB's monetary policy and the latter's role in connection with economic policy and thus provides for "a degree of constructive ambiguity" which would be desirable when

15. See Petch, "The compatibility of Outright Monetary Transactions with EU law", (2013) *Law and Financial Markets Review*, 13–21.

16. See in particular Keppenne, op. cit. *supra* note 11, section 11.3.9. Cf. also Siekmann and Wieland, "The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany, Institute for Monetary and Financial Stability", SAFE White Paper No. 4, 2013, available through <safe-frankfurt.de/en/home.html>.

17. Yiangou, O'Keeffe and Glöckler, "'Tough Love': How the ECB's monetary financing prohibition pushes deeper euro area integration", (2013) *Journal of European Integration*, 223–237, 234.

18. Case C-370/12, *Thomas Pringle* v. *Government of Ireland and the Attorney General*, judgment of 27 Nov. 2012, nyr, para 53.

19. Leino, "The European Central Bank and Legitimacy – Is the ECB a Modification of or an exception to the Principle of Democracy?", Jean Monnet Working Paper (Harvard, 2000), p. 2 and p. 6.

discussing the role of the ECB as a potential lender of last resort in the case of crisis management.[20]

However, it follows clearly from the GCC's widely publicized referral that the German court does not share the views described in the previous paragraphs. At the risk of doing insufficient justice to the extent and depth of the GCC's considerations, special attention is drawn to the following of its views. First, the GCC claims that the OMT Decision should be classified as an act of economic policy, which primarily falls with the responsibility of the Member States.[21] Such a classification is claimed to be supported by its immediate objective, which is to neutralize spreads on government bonds of selected Member States of the euro area. In this context, the GCC notes that, according to the ECB, these spreads are partly based on investors' fears of a reversibility of the euro; however, according to the *Bundesbank*, such interest rate spreads only reflect the scepticism of market participants as to whether individual Member States will show sufficient budgetary discipline to stay permanently solvent. According to the GCC, the purchase of government bonds to provide relief to individual Member States as envisaged by the OMT Decision appears, in this context, as the functional equivalent of an assistance measure by the relevant institutions – albeit without their parliamentary legitimation and monitoring.

With respect to the prohibition of monetary financing *ex* Article 123 TFEU, the GCC submits that this may not be circumvented by functionally equivalent measures. Certain aspects of the OMT Decision – namely the neutralization of interest rate spreads, selectivity of purchases and the parallelism with EFSF and ESM assistance programmes – are suggested to indicate that the OMT Decision results in a prohibited circumvention of Article 123 TFEU. Moreover, the GCC claims that other aspects warrant this conclusion, such as the ECB's willingness to participate in a debt cut with regard to the bonds to be purchased; the increased risk; the option to keep the purchased government bonds to maturity; the interference with the price formation on the market; and the encouragement, coming from the ECB's Governing Council, of market participants to purchase the bonds in question on the primary market.[22]

In the GCC's view,[23] the objective mentioned by the ECB in order to justify the OMT Decision, i.e. to correct a disruption to the monetary policy transmission mechanism, cannot change this assessment: the fact that the

20. See Keppenne, op. cit. *supra* note 11, section 11.1.2 and Lastra, "The governance structure for financial regulation and supervision in Europe", (2003) *Columbia Journal of European Law*, 49–68, at 57.

21. Paras. 56–83.

22. Paras. 84–94.

23. Paras. 95–98.

purchase of government bonds can, under certain conditions, also help to support the monetary policy objectives of the European System of Central Banks does not turn the OMT Decision itself into an act of monetary policy. If purchasing of government bonds were admissible every time the monetary policy transmission mechanism is disrupted, the GCC holds, it would amount to granting the ECB the power to remedy any deterioration of the credit rating of a euro Member State through the purchase of that State's government bonds.

The GCC's judicial reserves of scrutiny with respect to EU acts

In its judgment concerning the Lisbon Treaty,[24] the GCC allowed Germany's ratification after a reinforcement of participation rights of the *Bundestag* and the *Bundesrat*. The judgment stressed the "integration responsibility" of the German legislative bodies. At the same time, the GCC added, however, a third judicial reserve of scrutiny with respect to EU acts, in addition to the two that already existed in its case law. These reserves concern:

– fundamental rights (in case of systemic deficiency of EU protection of these rights);
– *ultra vires* (structurally important modification of the system of competences);
– impingement on Germany's constitutional identity.

The Constitutional Courts in other EU Member States, such as the Czech Republic and Poland, have made similar reservations in case an EU institution were to act *ultra vires,*[25] and the relationship between those courts and the ECJ in this context was addressed by the President of the GCC when he delivered a speech to the Hessian Parliament on 1 March 2012 on the "Bewahrung und Erneuerung des Nationalstaats im Lichte der Europäischen Einigung" (preservation and reformation of the nation State in the light of European unification). There he claimed that the *ultra vires* control of constitutional courts – which he called *Notkompetenz* (emergency competence) – could only be invoked in exceptional cases when an EU institution had clearly exceeded its powers. He emphasized the importance of this emergency competence, which the GCC developed in its *Maastricht* judgment.[26] He considered these

24. Judgment of 30 June 2009, BVerfG, 2 BvR 2/08. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.

25. See e.g. the judgment of the Polish Constitutional Tribunal of 27 April 2005 on the European Arrest Warrant (available at: <www.trybunal.gov.pl/eng/summaries/summaries_assets/P_1_05, htm>) and its judgment of 16 Nov. 2011 on the Brussels I Regulation in case No SK 45/09, as well as the judgment of the Czech Constitutional Court in the Slovak pensions case of 14 Feb. 2012 in case No. Pl US 5/12.

26. Judgment of 12 Oct. 1993, BVerfG 89, 1553.

developments as "salutary" for the ECJ, in that they induced the latter not to act too expansively, and to consistently take into account the national peculiarities – highlighting law as being such a cultural peculiarity of each Member State – and to be more reticent.

How relevant is ultra vires control to the GCC when deciding on the OMT case, and why did it ask the ECJ for a preliminary ruling?

For EU lawyers, the answer to the question why the GCC made a preliminary reference seems obvious. Neither the ECB's treaty mandate nor the scope of the prohibition for the ECB to engage in monetary financing has been the subject of any ECJ case law. In such circumstances, the wording of Article 267(1) and (3) TFEU does not leave much doubt: there is an obligation for the GCC to make a reference and such an obligation is an expression of the principle of autonomy and primacy of EU law and the ensuing need for its uniform interpretation which only the ECJ can guarantee. On closer examination, however, it appears that upstream a number of questions need to be addressed before reaching the question of the reference. Why did the GCC in this case consider the action before it as admissible in the first place? Why didn't the complainants seek the annulment of the ECB decision before the ECJ on the basis of Article 263 TFEU exclusively? Which German constitutional norm is claimed to be violated, allowing the GCC under its national law to rule on the case? What is the relationship between that norm and *ultra vires* control of EU acts? How autonomously can the GCC review this aspect or, to put it differently, to what extent does it consider itself bound by the ECJ's preliminary ruling on that issue?

Paragraphs 17 et seq. of the GCC's referral shed some light on the German constitutional right which is at stake in the *OMT* case and the standard of review to be applied by the GCC in order to determine whether it has been violated: it is the complainants' right to vote (in the election of the *Bundestag*, Art. 38 of the German Basic Law). Two aspects of that right are relevant here: according to a GCC majority view, the right to vote "excludes the possibility that, in the area of [EU integration], the legitimation of State authority and the influence on its exercise which an election provides is depleted by a transfer of the Bundestag's responsibilities and powers to such a degree, that the democratic principle is violated to the extent that [the famous *Ewigkeitsklausel* as laid down in Art. 79(3) of the German Basic Law…] declares it inviolable" (referral, para 17). "The actions of [EU] institutions and agencies are democratically legitimated – as far as Germany is concerned – in the legislative Acts of Assent to the [TEU and TFEU], which were enacted on the basis of [the integration clause of the Basic Law] and in the programme

of integration set out therein. An essential element of this programme of integration is the principle of conferral" (referral, para 20). This seems to entitle, under German constitutional law, the GCC to review whether an EU institution has acted *ultra vires*. To sum up: in this case, there is an actual or imminent act of an EU institution (the ECB) which – if *ultra vires* – would interfere with the complainants' right to vote, and therefore the *ultra vires* issue is relevant for the GCC because it is only by addressing that issue that it will be able to determine whether there is an interference with the complainants' right to vote at all. Were the GCC to find that the EU act is *ultra vires,* that act would neither be applicable nor have binding effects "in Germany insofar as these acts provide the basis of actions taken by the German authorities" (referral, para 23). German authorities would then be under an obligation "to refrain from implementing [such acts] and … to challenge [them]", these duties being in turn enforceable "before the GCC at least insofar as they refer to constitutional organs" (referral, para 44). Yet, it is not clear from the referral what concrete role the German authorities would have to play in the event of activation of the OMT programme by the ECB. In this context, it is interesting to note that there are two dissenting opinions in this case, concluding in essence that a constitutional complaint based on an alleged violation by an act of an EU institution of the right to vote should be declared inadmissible, because *inter alia* (i) it is neither clear nor even amenable to be legally determined what precise measures German authorities would be obliged to take in relation to an EU act found *ultra vires* (dissenting opinion Lübbe-Wolff, paras. 11–27; dissenting opinion Gerhardt, paras. 8–24); (ii) there would be a negative external effect of any decision by a national court on the *ultra vires* character of an act of an EU institution (dissenting opinion Lübbe-Wolff, para 28).

The answer to the question why the GCC felt the need to ask the ECJ for a preliminary ruling and to what it extent it feels bound by that ruling can be found in its earlier judgment in *Honeywell.*[27] There it held that, prior to the acceptance of an *ultra vires* act on the part of the European bodies and institutions, it should give the ECJ the opportunity, as it has done for the first time in the *OMT* case, to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU.[28] The GCC does not accept, however, that the ECJ has a *Kompetenz-Kompetenz*: a major limit on further development of the law by judges at Union level is the principle of conferral (Art. 5 TEU). This, in its view, gains its significance against the background of the highly federalized, cooperative organizational structure of

27. Judgment of 6 July 2010, BVerfG, 2 BvR 2661/06.
28. Ibid., para 60.

the European Union, which is analogous to a State in many areas, both as to the scope of its competences and in the organizational structure and the procedure, but which does not have the characteristics of a federal State.[29] The GCC, therefore, concludes that the Member States have only assigned limited individual sovereign powers. General empowerments and the competence to gain further competences for themselves contradict this principle, and would undermine the Member States' constitutional law responsibility for integration.[30] Does that mean the GCC does not feel in any way bound by the ECJ ruling? No. Again, from its judgment in *Honeywell* it can be inferred that it holds that its own *ultra vires* review, subsequent to an ECJ preliminary ruling, must be exercised "reservedly", and what that concretely means is spelled out in some detail in *Honeywell*:

> "Since it also has to find on a legal view of the Court of Justice in each case of an ultra vires complaint, *the task and status of the independent supra-State case law must be safeguarded.* This means, on the one hand, *respect for the Union's own methods of justice* to which the Court of Justice considers itself to be bound and which do justice to the 'uniqueness' of the Treaties and goals that are inherent to them (see ECJ Opinion 1/91 EEA Treaty [1991] ECR I-6079 para. 51). Secondly, *the Court of Justice has a right to tolerance of error.* It is hence *not ... for the Federal Constitutional Court* in questions of the interpretation of Union law which with a *methodical interpretation of the statute can lead to different outcomes in the usual legal science discussion framework, to supplant the interpretation of the Court of Justice with an interpretation of its own.* Interpretations of the bases of the Treaties are also to be tolerated which, *without a considerable shift in the structure of competences,* constitute a restriction to individual cases and either do not permit impacts on fundamental rights to arise which constitute a burden or do not oppose domestic compensation for such burdens." (emphasis added)[31]

Conversely, the GCC does admit that the ECJ is acting within its treaty mandate if it refines the law "by means of methodically bound case law";[32] it is also convinced of the need to develop the law by judges "where programmes are fleshed out, gaps are closed, contradictions of evaluation are resolved or account is taken of the special circumstances of the individual case".[33] In sum, it seems that GCC will not consider itself bound by an ECJ ruling where the latter, as an institution of the EU, would be considered to act beyond the limits of its competence, and this would be in the GCC's view only the case if the

29. Ibid., para 65
30. Ibid., para 65.
31. Ibid., para 66.
32. Ibid., para 62.
33. Ibid., para 64.

ECJ ruling were to amount to a modification of the Treaties or a substantive transfer of competences from the Member States to the Union.[34] Hence, the breach of competence must be "sufficiently qualified" – in the GCC's own words – and by using that term, as it explicitly acknowledges, it seeks some inspiration from the ECJ's own case law regarding the conditions that need to be met in order to establish the EU's non-contractual liability.[35]

Turning to the *OMT* case, it is worth noting that, in its referral, the GCC not only explains at length why it believes the ECB acted *ultra vires* and in violation of Article 123 TFEU, but also provides the ECJ with a concrete proposal in order to *avoid* reaching that conclusion. The technique it uses for that purpose seems to be inspired by point 24 of the ECJ's own recommendations to national courts in relation to the initiation of preliminary ruling proceedings: if it considers itself able to do so, the referring court is invited to briefly state its views on the answer to be given to the questions referred for a preliminary ruling.[36] Here, they take the form of a list of strict conditions which, if met by the ECJ's interpretation of the OMT Decision with reference to the relevant provisions of the Treaty, could, according to the GCC, avoid a transgression of the boundaries of monetary policy and a violation of the prohibition of monetary financing.[37] Arguably, the fact that in this case the OMT programme has only been announced and not yet activated may facilitate such an approach.[38]

Striving for supremacy or for harmonious coexistence?

By not ruling out in theory the possibility of not following the ECJ ruling, one may argue that the GCC has hung a sword of Damocles above the ECJ, which undermines the latter's authority in a way contrary to *inter alia* the duty of loyal cooperation under Article 4(3) TFEU, as it affects the very purpose of the reference for a preliminary ruling, i.e. a fundamental mechanism of EU law aimed at enabling the Member States' courts to ensure *uniform* interpretation and application of the law within the Union. The *rationale* given by the GCC for that hypothesis has also been questioned by some, who even go as far as claiming that the GCC's idea of democracy behind some of its judgments is

34. BVerfG, 2 BvR 2728/13, para 61.

35. The GCC makes an explicit reference to paras. 26–27 of the ECJ judgment of 10 July 2003 in Case C-472/00 P, *Fresh Marine,* [2003] ECR I-7541.

36. O.J. 2012, C 338/1 et seq.

37. BVerfG, 2 BvR 2728/13, paras. 99–100.

38. This arguably hypothetical element may also explain the fact that the GCC's primary request to the ECJ is to answer a question of validity and, in the alternative, a question of interpretation of EU law.

outdated and incompatible with a divided-power system.[39] Moreover, other commentators note that the GCC, through its case law, has developed in the name of (German) democracy a legal remedy making it relatively easy for any citizen to launch an attack on EU law before the GCC.[40]

One may argue about the form it has chosen, but the fact of the matter is that by asking for the first time the ECJ for a preliminary ruling, the GCC has entered into a genuine and structured dialogue with the ECJ. As pointed out by Baquero-Cruz,[41] even within such a dialogue, "one may want to accept the theoretical possibility of exceptional interventions on the side of a national institution when a fundamental principle or value is at stake, all the resources of the Union have been tried to no avail … ." But it is equally legitimate to ask oneself the question what is worse, not least for the unity and autonomy of EU law, embedded as it may be,[42] and thus for EU as a whole: the possibility of a "mistake" by the ECJ or the possibility of unilateral "mistakes" by the twenty-eight highest courts of the Member States?[43] Hence, the objective of the dialogue should be: "gleichberechtigte Kooperation im europäischen Gerichtsverbund statt Kampf um das letzte Wort" (cooperation on an equal footing within a European partnership of courts rather than a fight for the last word).[44]

Member States' national identity is a great good and needs to be respected, as acknowledged by Article 4(2) TEU, but that should not mean that whenever EU law touches upon such identity it must be disapplied automatically. The ECJ cannot put into question the constitutional foundations of a Member State but, as seems to follow from its recent *Melloni* judgment, it has a role to play in controlling the arguments on the basis of which it is claimed that national

39. See e.g. Auel and Baquero-Cruz, "Karlsruhe's Europe", (July 2010) *Notre Europe*, and Schönberger, "*Lisbon* in Karlsruhe: Maastricht's Epigones at Sea", (2009) *German Law Journal*, 1210–1216.

40. See Mayer, "Judicial conflict or normal procedure?", interview with the Bertelsmann Stiftung on 7 Feb. 2014, available at <www.bertelsmann-stiftung.de/cps/rde/xchg/SID-0BD8A7DD-D95FA988/bst_engl/hs.xsl/nachrichten_119997.htm>. In his view, this entails the risk of creating an *actio popularis* leading to a "self-inflicted gridlock".

41. Ibid, p. 17.

42. See Pernice, "The Autonomy of the EU legal order – Fifty Years After Van Gend", Walter Hallstein Institut Paper 08/2013, p. 9 et seq., claiming that the Union's constitutional setting is "compound, embracing and based upon the constitutions of its Member States".

43. See the UK Supreme Court's judgment of 22 Jan. 2014 in *R.* v. *the Secretary of State for Transport and another*, [2014] UKSC 3, in which it held that there was no need to make a reference for a preliminary ruling, based on arguments related to the UK's constitutional practices which, arguably, are difficult to reconcile with the ECJ's *CILFIT* case law.

44. Skouris, "Es gibt nicht nur Karlsruhe" (There is not only Karlsruhe), *Frankfurter Allgemeine Zeitung*, 21 Sept. 2011.See also "Europäischer Gerichtshof ermahnt Karlsruhe", *Die Welt*, 17 Dec. 2012.

constitutional rights prevail over the application of EU law.[45] A complicating factor in this respect is that, according to the referral in the *OMT* case, the "constitutional identity" to be protected by the GCC is not the same as the "national identity" protected under Article 4(2) TFEU:

> "However, as an interest which may be balanced against others, the respect of national identity which is required according to Article 4(2) TFEU does not meet the requirements of the protection of the core content of the Basic Law according to Article 79(3) of the German Basic Law, which may not be balanced against other legal interests. The protection of the latter is the task of the Federal Constitutional Court alone".[46]

Against this background – and mindful of Eeckhout's paradigm of the integration of laws as an alternative to the concept of constitutional pluralism, which, admittedly, he advocated in relation to human rights and the autonomy of EU law[47] – it is submitted that the *OMT* case may provide both the GCC and the ECJ with a unique opportunity for establishing a more balanced relationship between them, if they accept clearly limited and shared jurisdiction. Determining the precise scope of such jurisdiction on the basis of a sound interpretation of that key Treaty provision, and a further assessment of its relationship with the protection of the "constitutional identity", as protected by the German Basic Law, represents in itself a considerable challenge for both courts.[48] Meeting that challenge is all the more difficult given the technical complexities of the case and the huge financial interests at stake. However, the advantage would be that such an approach could lead away from a conception of conflict between supreme judicial authorities, something the EU, weakened by an unprecedented social-economic crisis, can live without in this turbulent period. Maintaining the *status quo* is not an attractive alternative, since it is characterized by what in German doctrine has

45. See Case C-399/11, *Melloni* v. *Ministerio Fiscal*, judgment of 26 Feb. 2013, nyr. Cf. also Timmermans, "Constitutioneel Pluralisme, norm of feit?", speech delivered on the occasion of the 175th birthday of the Dutch Supreme Court in The Hague on 1 Oct. 2013. In the same vein, Lenaerts, "The Court's Outer and Inner Selves", pp. 31–32 in Adams, de Waele, Meeusen and Straetmans (Eds.), *Judging Europe's Judges* (Hart publishing, 2013).

46. Referral, para 29.

47. Eeckhout, "Human Rights and the autonomy of EU law: Pluralism or integration?" (2013) *Current Legal Problems*, 1–34.

48. In order to establish a more balanced relationship between the GCC and the ECJ perhaps inspiration could be sought from the different techniques used for that purpose by the Austrian Constitutional Court in its judgment of 14 March 2012, VfGH U 466/11–18 1836.11, dealing with the interface between the Austrian Constitution and the EU Charter of fundamental rights, and by the Spanish Constitutional Court in its final judgment of 13 Feb. 2014 in *Melloni* following the ECJ's preliminary ruling in that case, cited *supra* note 45.

been called a *Schwebezustand",*[49] i.e. a situation where some key questions as to the relationship between the ECJ and Member States' highest courts remain in suspense and therefore constitute a source of legal uncertainty which is not conducive to, for instance, the serene investors' climate the EU so much needs. Indeed, one should avoid a situation where the current financial-economic crisis is paralleled by a constitutional conflict. Even less attractive, and at any rate not realistic in the medium term, would be a treaty change incorporating Weiler's long-standing idea of creating a "European Constitutional Council", with jurisdiction over issues of competences (including subsidiarity), which could be seized by any EU Institution or EU Member State.[50] Not only would this increase the institutional complexity of the EU and trigger endless discussions about its proper composition and nomination procedure, but also – and more importantly – it would create yet another body claiming judicial supremacy, and that is exactly the opposite of what should be aimed for.

49. See Nürnberger, "Die Auferstehung der Souveränität: Rückkehr zur Monarchie oder Wandel eines staatsprägenden Konzepts im Zuge der Auflösung des Nationalstaats" Walter Hallstein-Institut Paper 03/10, p. 22. Within Germany a similar situation appears to have existed in the 19th century: see Böckenforde, "Der Verfassungstyp der deutschen konstitutionellen Monarchie im 19. Jahrhundert" in Böckenforde and Wahl (Eds.) *Moderne deutsche Verfassungsgeschichte (1815–1914)* (Verlagsgruppe Athenäum – Hain – Scriptor – Hanstein, 1981), p. 155.

50. See Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), pp. 322 and 353 et seq.