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Economic Constitutionalism in the EU and Germany – The German Constitutional Court, the European Court of Justice and the European Central Bank between Law and Politics

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Abstract: The relationship between the European Union (EU) and its member states has recently been the subject of several legal proceedings in the German Federal Constitutional Court (GFCC) and the European Court of Justice. The backdrop to the underlying controversies were policies instituted by the European Central Bank (ECB) dealing with the economic and monetary situation in various member states in the context of the sovereign debt crises to influence interest rates, combat deflationary tendencies and keep inflation under but close to the ECB's 2% inflation target. Especially so-called outright monetary transactions (OMTs) and the corresponding OMT-program and a particular high volume public sector asset purchasing program (PSPP) announced by the ECB have been controversially discussed. Legally, the controversies are about the prohibition for the ECB to finance debt held by the EU or member states (Article 123 TFEU) and about the delineation of economic policy (Article 119 *et seq*. TFEU), which lies in the hands of the members states, and monetary policy (Article 127 *et seq*. TFEU), which is exclusively in the hands of the ECB. The GFCC in its decisions propagated a restrictive approach emphasizing the role of the member states and pointing to the doctrines developed by it around ultra vires acts and so-called identity review. This paper attempts to shed some light on this controversy and argues that beyond the legal controversy lies a deeper problem of the relationship between judicial and political decision-making that the GFCC should exercise restraint in exercising its functions and remember its own doctrine of "open constitutional norms" developed in a different context but applicable here as well.

Keywords: constitutional review, European Union (EU), monetary policy, economic policy, German Federal Constitutional Court

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1 “Constitutionalism”

Merriam-Webster defines “constitutionalism” as the “adherence to or government according to constitutional principles” or “a constitutional system of government”.[1] The Stanford Encyclopaedia of Philosophy expands on this rudimentary understanding of the term and points to the concept’s core purpose, i.e. to provide a framework and thus inherently a limitation to the exercise of power:

> Constitutionalism is the idea, often associated with the political theories of John Locke and the founders of the American republic, that government can and should be legally limited in its powers, and that its authority or legitimacy depends on its observing these limitations.[2]

The Stanford Encyclopaedia of Philosophy then goes on to distinguish between a (very) minimalistic and a richer understanding of constitutionalism:

> Often these limitations are in the form of civil rights against government, rights to things like free expression, association, equality and due process of law. But constitutional limits come in a variety of forms. They can concern such things as the *scope* of authority (e.g. in a federal system, provincial or state governments may have authority over health care and education while the federal government’s jurisdiction extends to national defense and transportation); the *mechanisms* used in exercising the relevant power (e.g. procedural requirements governing the form and manner of legislation); and of course *civil rights* (e.g. in a Charter or Bill of Rights). Constitutionalism in this richer sense of the term is the idea that government can/should be limited in its powers and that its authority depends on its observing these limitations.[3]

This latter understanding of constitutionalism undergirds the analysis in this paper. As will be shown, much of what currently happens in Germany and the European Union (EU) is in essence driven by the controversy over the scope of constitutionalism, or, to formulate it differently, by the conflict between politics and political decision-making and law and legal decision-making or, at least,

1 Available at: <https://www.merriam-webster.com/dictionary/constitutionalism>, accessed January 27, 2019.

2 Available at: <https://plato.stanford.edu/entries/constitutionalism/>, accessed July 22, 2019.

3 *Ibid*., in “1. Constitutionalism: a Minimal and a Rich Sense”. There are many conceivable notions of what the term “constitutionalism” might mean. A very interesting approach is taken by A. Afilalo and D. Patterson, *Global Economic Constitutionalism and the Future of Global Trade*, 40 University of Pennsylvania Journal of International Law, no. 2 (2019), 323 *et seq*. The authors regard as the “global economic constitution [...] a set of evolving, interlocking, and mutually reinforcing principles adhered to by a diverse group of sovereign states that is capable of applying different norms to different groups of actors”, *ibid*., at 330. This very specific notion fits well into their purpose of developing governance answers from the various stages of development of the global economic constitution as espoused in their paper.

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political decision-making that is significantly guided, restricted and influenced by a normative constitutional framework.

2 Economic Constitutionalism

The particular version or "flavour" of constitutionalism used in what follows is constitutionalism qualified by the attribute "economic".[4] In the context of the German *Grundgesetz*[5] and beyond, the term "*Wirtschaftsverfassung*" (economic constitution) or "*Wirtschaftsverfassungsrecht*" (economic constitutional law) is not uncommon and usually understood very broadly in the sense of any and all constitutional norms that address economic matters. This would include fundamental rights such as the freedom to choose and exercise your profession (Article 12 GG), the protection of property (Article 14 GG), more generally the freedom to contract as an expression of personal autonomy (Article 2.1 GG), the protection of enterprise bargaining (Article 9.1 and 9.3 GG), and institutional provisions such as the power to legislate in the commercial area (in federal states).

It is not entirely clear what "economic" means in the context of the EU. One could point to provisions analogous to those of the German *Grundgesetz* just mentioned. However, there are elements not always found in constitutional texts that would be considered part of EU economic constitutionalism, especially the common market, i.e. the customs union and the fundamental freedoms around the trade in goods and services and the free movement of people and capital.[6]

4 There are other "constitutionalisms". Feminist constitutionalism, for example, has been described as "the project of rethinking constitutional law in a manner that addresses and reflects feminist thought and experience", Beverly Baines, Daphne Barak-Erez, and Tsvi Kahana, *Introduction – The Idea and Practice of Feminist Constitutionalism*, in Beverly Baines, Daphne Barak-Erez, and Tsvi Kahana (eds.), *Feminist Constitutionalism – Global Perspectives* (2012), p. 1. Replacing the word "feminist" by the word "economic" would not do justice to the undertaking here because the attribute economic in this paper does not at all suggest to address constitutional law "in a manner that addresses and reflects economic thought and experience." Economic constitutionalism in this paper is much closer to the understanding that Lael K. Weis proposed for "environmental constitutionalism", using the term as shorthand for a "remarkable global trend in the constitutional entrenchment of environmental provisions." See Lael K. Weis, *Environmental Constitutionalism: Aspiration or Transformation?*, 16 International Journal of Constitutional Law, no. 3 (2018), 836 at 837.

5 The Basic Law (Grundgesetz, GG) is the name for the German Constitution. Henceforth referred to as GG.

6 For an instructive overview see, for example, Peter Badura, *Die Wirtschafts- und Arbeitsordnung der Verfassung – Gesetzgebung, verfassungsgerichtliche Rechtsfindung und verfassungsrechtliche Dogmatik*, 140 Archiv des öffentlichen Rechts (AöR) (2015), 333 *et seq.*

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Economic policy or common economic policy is a sub-header (Chapter I) in Title VIII "Economic and Monetary Policy" in the Treaty on the Functioning of the European Union (TFEU).[7] The explicit con-joining of economic and monetary policy in the name of Title VIII of the TFEU is quite telling as the controversy over the alleged shortcomings of the Euro could be described as a conflicting relationship between these two policy areas. The scope and content of what constitutes monetary policy is to be determined by the European Central Bank (ECB), which has been awarded independence from political interference in this regard.[8] The ECB must be guided by the primary objective of price stability (Article 127.1 TFEU) in the discharge of its monetary policies. In contrast, economic policy[9] remains within the purview of the member states of the EU. If the national economic policy in a member state is unsuccessful causing financial difficulties for that member state, the scope of the possible response by the EU or other member states has been given considerable attention in the provisions on economic policy.[10] Determining where the ECB's monetary policy powers end and the member states' broader economic policy powers begin continues to be a point of contention. Especially in Germany those critical of the policy approaches taken by European policymakers, chief among them the ECB, have tried and are still trying to enlist the German Federal Constitutional Court (GFCC) in an attempt to undo or at least limit the scope of what policies can be pursued in response to the sovereign debt crises in some of the EU member states.

For a good understanding of the arguments used in this debate, it is useful to have a closer look at the "headline-article" 119 TFEU which summarizes the core economic policy goals are because this article precedes the two subchapters that contain detailed rules on economic and monetary policy:

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.
2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set therein, these activities shall include a single currency, the euro, and the definition and conduct of a single

7 European Union, OJ C 202/1 (47 at 96), Article 119 *et seq.*
8 The ECB enjoys independence, see Article 130 TFEU.
9 Articles 120–126 TFEU.
10 Articles 122 *et seq.* TFEU.

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> monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

What becomes apparent is that economic policy largely remains with the member states, but that the latter do not enjoy full autonomy in this regard: national economic policies must be coordinated with the goal of formulating an EU-wide economic policy based on that coordination. Other core pillars of economic policy are the internal market, i.e. the free movement of goods, people, services and capital,[11] and the open market economy with free competition as its hallmark.

Matters are complicated by the fact that the Euro as the common currency is not the common currency across the EU. The subchapter on monetary policy (Articles 127–133 TFEU) therefore applies only to the members of the single currency and the ECB can set monetary policy only for these states. For the others, the legal framework for monetary policy is much broader and concentrates on tethering them, for example, to the goal of price stability and demanding certain institutional structures at home, e.g. the independence of their national central banks (Article 131).

3 Economic Constitutionalism in the EU/Member State Relationship – Overview

Economic constitutionalism in the relationship between the EU and its member states has gained considerable significance in the context and aftermath of the global financial crisis and the sovereign debt crisis in several member states of the EU, particularly in Greece. The aim of this section is to provide an overview of the key issues, questions and problems that have been raised in this context.

First, there is the core feature of constitutional norms, i.e. their hierarchical supremacy. In the complex relationship between the EU and its member states, we have a twofold hierarchy. There are the constitutional norms within the member states that take priority over all lower-ranking national legal rules (from statutes to regulations to administrative decisions). At the same time,

11 Article 26.2 TFEU: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

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the primary law of the EU, mainly the foundational treaties and their protocols, has been asserted by the European Court of Justice (ECJ) as enjoying supremacy (or primacy) of EU law over each and every rule of member state law, their constitutions included.[12] This supremacy doctrine has so far withstood all attempts to exempt at least certain areas of member state constitutional law from its scope.

However, as will be shown in more detail below, the potential conflict between EU law and domestic constitutional law is far from resolved. In particular, the GFCC continues to reserve for itself the last word on whether an act by the EU has been enacted *ultra vires*, i.e. beyond the powers allocated to the EU by the member states in the foundational treaties. This question is at the heart of several challenges brought against the assistance afforded to Greece in the context of that country's sovereign debt crisis and against various policies undertaken by the ECB such as so-called OMTs or asset purchasing programs (APPs). In addition and more fundamentally, the GFCC has sought to create an exclusive space for Germany to act autonomously to the exclusion of the EU. The Court understands this exclusive sphere as reflecting the constitutional identity of Germany.

Secondly, the constitutional relationship can be expanded into a broader normative framework around the economic activities of the EU, its member states, and individuals. This normative framework covers aspects ranging from the open market economy and the central feature of any market economy, i.e. competition between market participants, to various supporting policies that impact on market activity, such as social or environmental policy aspects. The central tenet of economic constitutionalism in the EU in this regard is the internal market. The internal market consists of treaty obligations for the member states and subjective rights for EU citizens and other entitled individuals against the member states. The significance of this vast framework cannot be underestimated. The free movement of persons, in addition to the free movement of goods services and capital (Article 26.2 TFEU), is one of those subjective

12 See, with further references, ECJ, Opinion 2/13 pursuant to Article 218(11) TFEU, December 18, 2014, ECLI:EU:C:2014:2454, para. 166: "[…] the specific characteristics arising from the very nature of EU law. In particular, as the Court of Justice has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in Costa, EU:C:1964:66, p. 594, and Internationale Handelsgesellschaft, EU:C:1970:114, para. 3; Opinions 1/91, EU:C:1991:490, para. 21, and 1/09, EU:C:2011:123, para. 65; and judgment in Melloni, C-399/11, EU:C:2013:107, para. 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in van Gend & Loos, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, para. 65).

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rights and was one of the main drivers of Brexit in the United Kingdom. The free movement of persons continues to be controversial in other member states as well when conflict is perceived or alleged especially with domestic social and welfare policies.[13]

This part of the EU's economic constitution has come under increasing criticism precisely because of the quasi-constitutional character that the EU legal norms enjoy as a result of the supremacy doctrine. The term created by critics is "overconstitutionalization."[14] What is meant by this term is the combined effect of two intertwined aspects: the supremacy of EU law over national law, which in essence creates a quasi-constitutional hierarchy of law at the top of which sits EU law and its final interpreter, the ECJ. This is exacerbated by the fact that the EU-treaties were never written as constitutional documents, with a brief to set a general framework; the foundational treaties were written with much greater detail and on issues nationally dealt with in legislation. The result is, so the argument goes, that many policy issues are in essence removed from the political process, shifted into the legal arena and decided by the ECJ.[15]

Thirdly, the GFC and the European sovereign debt crises have put the spotlight on the normative framework dealing more broadly with economic policy, in particular with fiscal policy (and specifically with the level of sovereign debt incurred by member states to finance their budgets) and the legal limits placed on these policies. The role the ECB plays in this regard is currently determined in

13 On January 24, 2019 the European Commission formally notified Austria of its intent to open treaty infringement procedures against Austria because of legislation in force there from the beginning of 2019 under which Austria makes family benefits and family tax reductions paid for children residing in another Member State dependent on the costs of living of that Member State, thus lowering these benefits in effect. The Commission regards this as discriminatory because it means that many EU citizens, who work in Austria and contribute to its social security and tax system in the same way as local workers, would receive fewer benefits only because their children are living in another Member State, see European Commission, Press Release IP/19/463, available at: <http://europa.eu/rapid/press-release_IP-19-463_en.pdf>, accessed April 29, 2019. This is not just a matter of controversy between the EU and Austria. Other member states have themselves voiced similar initiatives, including Germany, Denmark and Ireland and the EU itself had offered similar concessions to the United Kingdom in the negotiations preceding the Brexit referendum in the UK, see C. Stupp, *Four Countries Push for EU Law to Slash Childcare Benefits* (March 6, 2017), available at: <https://www.euractiv.com/section/economy-jobs/news/vocal-member-states-push-for-legal-change-to-slash-childcare-benefits/1124309/, accessed April 29, 2019.

14 Dieter Grimm, *The Democratic Cost of Constitutionalization: The European Case*, 21 European Law Journal, no. 4 (2015), 460 *et seq*.; Fritz W. Scharpf, *After the Crash: A Perspective of Multilevel European Democracy*, 21 European Law Journal, no. 3 (2015), 384 *et seq*.; see also Susanne K. Schmidt, *The European Court of Justice & The Policy Process* (2018).

15 Grimm (2015), *supra* note 14, at 469 *et seq*.; Scharpf (2015), *supra* note 14, at 401.

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a way that could well be decisive for the overall future of the European integration project.

This broader normative framework requires an institutional architecture, i.e. a governance structure to set, apply, implement and, if necessary, resolve conflict between the various institutions exercising jurisdiction in these areas. On the EU side, this involves the EU's institutional system, the European Commission, the European Parliament (EP) and, significantly, the ECJ and the ECB. Similarly, on the side of the member states, the protagonists are the executive branches and, most visibly in Germany, the Federal Constitutional Court. Interestingly, in the specific context of EU/member states economic constitutionalism, the national parliaments play a lesser *legal* role. The emphasis here is on the word legal. Bailouts and the conditionality coming with these bailouts, the policies pursued by the ECB, and the legal limits defined by the ECJ and domestic constitutional courts are not matters immediately associated with the various national parliaments or the EP for that matter because the parliaments do not appear to be the drivers of such policies. However, fiscal policy and the extent of deficit financing in the member states are very much a matter for parliaments. In fact, the power of the purse is typically considered parliament's most significant power and common to all parliaments in western democracies.

It is therefore noteworthy, to say the least, to see the unfolding of a discussion on deepening European integration considerably in precisely these areas. None other than the French President Emmanuel Macron elevated the question of whether the institutional framework has to be broadened to the highest political sphere. In a speech given at the Sorbonne in Paris, President Macron called for "coordinating our economic policies and a common budget." As the main reason, President Macron stated that "no state can tackle an economic crisis alone when it no longer controls its monetary policy." As a consequence, he called for "a stronger budget [...], at the heart of the Eurozone" of a size that "must reflect its ambition" and that is to be financed from newly created European digital or environmental fields and complemented by "partly allocating at least one tax to this budget, such as corporation tax once it has been harmonized." Macron proposed that this "budget must be placed under the strong political guidance of a common minister and be subject to strict parliamentary control at the European level."[16] German Chancellor Merkel waited very

16 Présidence de la République, Service de Presse, *Initiative for Europe, Speech by President M. Emmanuel Macron, President of the French Republic* (September 26, 2017), available at: <https://www.diplomatie.gouv.fr/IMG/pdf/english_version_transcript_-_initiative_for_europe_-_speech_by_the_president_of_the_french_republic_cle8de628.pdf>, accessed April 29, 2019. The President

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long with her answer and when she finally reacted in a foundational speech, she did not mention an EU Finance Minister and a budget to go along with such a position. Instead, she concentrated on the creation of a "European Monetary Fund" and "sustainable finances".[17]

Does the EU need a European finance minister who controls a larger EU budget? Would such an institution be a kind of fiscal equalization instrument, to ensure the redistribution of funds from richer member states and regions to poorer member states and regions?[18] Does the EU require the banking union and, if so, what should the scope of this banking union be and especially what kind of financial risk management framework would govern such a banking union? These questions are hotly contested and very controversial. They are foremost political questions rather than legal ones. At the same time, any political decisions in favour of such new institutions will almost certainly be attacked judicially, be it nationally, before the ECJ or at both levels. As a matter of fact, it should be noted here that the GFCC has been asked to rule on the compatibility of the so-called banking union with the German *Grundgesetz*, with the oral hearing having taken place in November 2018.[19] It is all but certain that the GFCC would be asked to quash any attempt at deeper financial and fiscal integration in the same way as all major amendments have been brought before the GFCC ever since the Treaty of Maastricht 25 years ago[20] and a fair number of other challenges since. The

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of the Commission, Jean Claude Juncker, also presented a proposal for a European Minister of Economy and Finance, albeit without mentioning a new ambitiously financed budget on the EU level, see European Commission, *President Jean-Claude Juncker's State of the Union Address 2017* (September 13, 2017), available at: <http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm>, accessed April 29, 2019.

17 See Die Bundeskanzlerin, *Rede von Bundeskanzlerin Merkel zur*, 18 Jahreskonferenz des Rates für nachhaltige Entwicklung, am 4 (Juni, 2018), available at: <https://www.bundeskanzlerin.de/bkin-de/aktuelles/rede-von-bundeskanzlerin-merkel-zur-18-jahreskonferenz-des-rates-fuer-nachhaltige-entwicklung-am-4-juni-2018-1141186>, accessed April 29, 2019.

18 See, for example, the informative comments of the German Federal Council (Bundesrat), *Drucksache 755/1/17* (March 12, 2018), available at: <https://www.bundesrat.de/drs.html?id=755-1-17>, accessed April 29, 2019, regarding the Communication from the European Commission – A European Minister of Economy and Finance, 6/12/2017, COM(2017) 823 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0823&from=EN>, accessed April 29, 2019; see also J. Brauneck, *Erlauben die Europäischen Verträge einen Europäischen Währungsfonds und einen Europäischen Finanzminister?*, EWS (2018), 81.

19 The relevant cases are still pending before the GFCC. The oral hearing took place on November 27, 2018, see cases 2 BvR 1685/14, 2 BvR 2631/14, see Federal Constitutional Court, Press Release No. 73/2018 of September 5, 2018, available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-073.html>, accessed April 29, 2019.

20 GFCC, Judgment of October 12, 1993, BVerfGE 89, 155, available at: <http://www.servat.unibe.ch/dfr/bv089155.html>, accessed April 29, 2019.

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over-legalization of political questions, including those pertaining to the organization of the economy writ large, is a trademark of German constitutionalism.

4 The Constitutional Identity Fortress

It is against this backdrop of the widening of tangible EU influence on the lives of all EU citizens not least because of the implications of the monetary union and its fiscal and economic consequences that the member states have to find and assert their position. The legal doctrine which leverages the EU influence is the doctrine of the sovereignty of EU law. The doctrine of the supremacy of EU law, established unequivocally and early by the ECJ,[21] has never been fully accepted by the GFCC. Originally the – potential – conflict pivoted around fundamental rights protection and the question whether EU law should also prevail over conflicting national rules even if no adequate fundamental rights protection was guaranteed by the EU. That problem had its root cause in the absence of a body of fundamental rights in the founding treaties based on which EU legal acts could be reined in. The ECJ reacted by resorting to the public international law concept of "general principles of law" and, over the years, has developed EU fundamental rights as EU general principles of law in its case law, using national constitutional law and the European Convention on Human Rights, to which all EU member states must be a party, as sources of inspiration.[22] With the Treaty of Lisbon, the separately created EU Charter of Fundamental Rights[23] has effectively incorporated into the EU foundational treaties and given "the same value as the treaties"[24] so that the EU now has its own bill of rights against which the conduct of its institutions can be judged.[25] Since the content of the EU Charter bears

21 ECJ, Case 26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen (1963) ECR 1; Case C-6/64, Costa v ENEL (1964) ECR 585; Case C-11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970) ECR 1175; Case C-213/89, R v Secretary of State for Transport ex parte Factortame Ltd and others (1990) ECR I-2433.

22 For a brief but very instructive overview of the development of fundamental rights as general principles of EU law see Armin Cuyvers, *General Principles of EU Law*, in Cuyvers *et al.* (eds.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (2017), pp. 217 *et seq.*

23 Charter of Fundamental Rights of the European Union, OJ C 326/391, (October 26, 2012), available at: <https://eur-lex.europa.eu/eli/treaty/char_2012/oj>, accessed April 29, 2019.

24 Article 6.1 TEU: "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of December 7, 2000, as adapted at Strasbourg, on December 12, 2007, which shall have the same legal value as the Treaties."

25 On the impact of the Charter see Sara Iglesias Sanchez, *The Court and the Charter: The impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights*, 49 Common Market Law Review (CMLR) (2012), 1612 *et seq.*

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considerable similarity to national fundamental rights catalogues, including that found in the German Grundgesetz, the threat of the latter prevailing over EU law, thus upending the doctrine of supremacy, has *de facto* been removed.

4.1 The GFCC's Judgments on the Constitutionality of the Treaties of Maastricht and Lisbon – The Groundwork for Identity Review

Especially with the Maastricht Treaty and its creation of the European Monetary Union, which led to the introduction of the Euro as the common currency for now 19 member states, the focus shifted from fundamental rights protection to the delineation of power between the EU and its member states as the new "red line" in protecting German constitutionalism from perceived excessive encroachment by the Union. The GFCC stipulated in its judgment on the constitutionality of the Maastricht Treaty:

> The important factor is that the Federal Republic of Germany's membership [in the EC as it still was before the entry into force of the Maastricht Treaty] and the rights and obligations which arise from it, in particular the legally binding direct activity of the European Communities in the domestic legal territory, have been defined foreseeably for the legislator in the Treaty, and that the legislator has standardised them to a sufficiently definable level in the Act of Accession to the Treaty (...). This also means that any subsequent substantial amendments to that program of integration provided for by the Maastricht Treaty or to its authorizations to act are no longer covered by the Act of Accession to this Treaty (...). If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Accession is based, any legal instrument arising from such activity would not be binding within German territory. German State institutions would be prevented by reasons of constitutional law from applying such legal instruments in Germany. Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds (...).[26]

To this defence line against potential ultra vires acts attributable to the EU, the GFCC's judgment on the constitutionality of the Lisbon Treaty added a further line of defence – the GFCC's identity review:

> Furthermore, the Federal Constitutional Court reviews whether the inviolable core content of the constitutional identity of the Basic Law pursuant to Article 23.1 third sentence in

26 BVerfGE 89, 155 at 187–188 as translated in 33 I.L.M 388 at 422–423.

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> conjunction with Article 79.3 of the Basic Law is respected (...). The exercise of this review power, which is rooted in constitutional law, follows the principle of the Basic Law's openness towards European Law (*Europarechtsfreundlichkeit*), and it therefore also does not contradict the principle of sincere cooperation (Article 4.3 Lisbon TEU); otherwise, with progressing integration, the fundamental political and constitutional structures of sovereign Member States, which are recognised by Article 4.2 first sentence Lisbon TEU, cannot be safeguarded in any other way. In this respect, the guarantee of national constitutional identity under constitutional and under Union law go hand in hand in the European legal area. The identity review makes it possible to examine whether due to the action of European institutions, the principles under Article 1 and Article 20 of the Basic Law, declared inviolable in Article 79.3 of the Basic Law, have been violated. This ensures that the primacy of application of Union law only applies by virtue and in the context of the constitutional empowerment that continues in effect.[27]

It is evident that the GFCC wants to retain the final word about the degree of European integration possible without the need for an amendment of the GG. For the GFCC the supremacy of EU-law applies by virtue of the national assent legislation that is subject to the GG and hence limited by it. It does not apply by virtue of the EU treaties.

The GFCC also gave some guidance on what it would regard as identity-relevant. Unsurprisingly, all of the examples given can be traced to the foundational principle of democracy which the GFCC interprets not as a merely formal principle but requiring that the people, when exercising their democratic right of electing the German Bundestag, elect members to an assembly that actually has meaningful and substantial decision-making powers:

> cc) European unification on the basis of a treaty union of sovereign states may, however, not be 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. Essential areas of democratic formative action comprise, *inter alia, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution*. These important areas also include cultural issues such as the

27 BVerfG, 2 BvE 2/08, (June 30, 2009), para. 240, available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html>, accessed April 29, 2019.

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> disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.[28]

In short, the GFCC's identity alarm sounds when matters of citizenship, use of force, serious encroachments on fundamental rights and, of particular significance in the context of this paper, when major budgetary implications are at issue.

4.2 Identity Review in Practice: The Greek Bail-Out Case

Potential budget implications served as the basis for the GFCC's approach[29] to challenges brought against various measures[30] undertaken to assist Greece with its debt crises in 2010 ("bail-out"). The response to the crises in Greece required massive financial aid packages in the form of direct loans and guarantees and through the creation of precursors to the European Stabilisation Mechanism (ESM), i.e. the European Financial Stabilisation Mechanism (EFSM)[31] and the later created "special purpose vehicle" European Financial Stability Fund (EFSF). The total financial volume of this "comprehensive package of measures to preserve financial stability in Europe" was EUR 500 billion.[32] The GFCC calculated Germany's share of these monies to sit at EUR 123 billion and hence more than one-third of the total federal budget in 2010.[33] In this context the

28 *Ibid*., at para. 249.

29 BVerfG, 2 BvR 987/10 (September 7, 2011), available at: <http://www.bverfg.de/e/rs20110907_2bvr098710en.html>, accessed April 29, 2019.

30 The measures in question essentially were the "Act on the Assumption of Guarantees to Preserve the Solvency of the Hellenic Republic Necessary for Financial Stability within the Monetary Union" (Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik) of May 7, 2010, Federal Law Gazette (BGBl.) I, 537 and the "Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus) of May 21, 2010, Federal Law Gazette (BGBl.) I, 627.

31 Council Regulation No 407/2010 of May 11, 2010 establishing a European Financial Stabilisation Mechanism, OJ L 118/1.

32 The IMF's contribution of half of this sum would increase the total volume to EUR 750 billion. See Council of the European Union, Conclusions of the (Ecofin) Council of May 9, 2010, 9602/10, ECOFIN 262 UEM 176, May 10, 2010, available at: <https://data.consilium.europa.eu/doc/document/ST-9602-2010-INIT/en/pdf>, accessed April 29, 2019.

33 BVerfG, 2 BvR 987/10 (September 7, 2011), para. 18, available at: <http://www.bverfg.de/e/rs20110907_2bvr098710en.html>, accessed April 29, 2019. The total volume of the federal

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GFCC reiterated its consistent view that the fundamental right to vote in elections for the Federal Parliament (Bundestag) is the crucial point because that right is valuable only if the elected body retains significant powers not least with regard to the budget:

> There is a violation of the right to vote if the German *Bundestag* relinquishes its parliamentary budget responsibility with the effect that it or a future *Bundestag* can no longer exercise the right to decide on the budget on its own responsibility.[34]

On the question where the delineation lies for such budget relevant measures, i.e. what amount or percentage of the national budget could have to be decided upon outside of the German Parliament but with binding relevance (financial obligations or liability) for Germany the GFCC remained somewhat vague. In any case, the amounts described above did not reach the necessary threshold of unconstitutionality. The GFCC explained:

> As representatives of the people, the elected Members of the German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental administration. In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany commits itself not only in legally [sic], but also in fiscal policy. Even if such commitments assume a substantial size, parliament's right to decide on the budget has not been infringed in a way that could be challenged with reference to the right to vote. The relevant factor for adherence to the principles of democracy is whether the German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments. If decisions were made on essential budgetary questions of revenue and expenditure without the requirement of the *Bundestag*'s consent, or if supranational legal obligations were created without a corresponding decision by free will of the *Bundestag*, Parliament would find itself in the role of merely re-enacting and could no longer exercise overall budgetary responsibility as part of its right to decide on the budget.[35]

In the Court's view, the matter thus concerns not only the relationship between Germany and the EU (or another international institution); it also concerns the relationship between the executive branch of government and the legislature. Such decisions as were made in the Greek bail-out situation with considerable

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budget in Germany in 2010 was just under EUR 304 billion, Federal Ministry of Finance, Monatsbericht – Bundeshaushalt 2010–2015 (June 22, 2015), available at: <https://www.bundesfinanzministerium.de/Content/DE/Monatsberichte/2015/06/Inhalte/Kapitel-5-Statistiken/5-1-05-bundeshaushalt-2010-2015.html>, accessed April 29, 2019.

34 BVerfG, 2 BvR 987/10 (September 7, 2011), para. 121, available at: <http://www.bverfg.de/e/rs20110907_2bvr098710en.html>, accessed April 29, 2019.

35 *Ibid*., at para. 124.

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potential liability or with immediate financial aid obligations, and hence with significant budget implications, are not made against the will of a member state. But in such scenarios the member states are represented at EU level by a member of the executive branch and it is, therefore, the executive branch which could, if there were no safeguards, circumvent the position of any Parliament to exercise sufficiently meaningful control over the financing of government activity. What is more, Parliament itself is legally prevented from relinquishing this responsibility of oversight. It must "permanently" remain "the master of its decisions" and whereas the Bundestag will have some discretion in determining the threshold,

> […] it follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the *Bundestag*'s control and influence. If the *Bundestag* were to give indiscriminate authorisation in a substantial degree to guarantees, fiscal disposals of other Member States might lead to irreversible, possible massive, restrictions on national political legislative discretions.[36]

It is obvious that these restrictions have relevance beyond questions of financial bail-outs of other member states. If the Bundestag is constitutionally "condemned" to "permanently" be the "master of its decisions" it follows that this would have to be the case even if the EU and its member states were to embark on a program of deeper integration involving more budgetary power and prowess on the central EU level. Any increase in tax revenue for the EU will likely result in a decrease in revenue for member state governments (or higher tax burdens for taxpayers). The EU's budget for 2019 sits at EUR 165.8 billion[37] and is therefore less than half the size of the federal budget of Germany.[38] From the

36 *Ibid*., at 127.
37 European Commission, Press Release IP/18/6381 of December 5, 2018, The EU Budget for 2019: growth, solidarity and security in Europe and beyond – provisional agreement reached, available at: <http://europa.eu/rapid/press-release_IP-18-6381_en.htm>, accessed April 29, 2019.
38 Budget volumes are difficult to compare because they are not constructed the same. Germany's federal budget volume for 2019 stands at EUR 356.4 billion (§1 Gesetz über die Feststellung des Bundeshaushaltsplans für das Haushaltsjahr 2019, 17.12.2018, BGBl. I, 2528), see Ministry of Finance, Budget Act 2019, available at: <https://www.bundeshaushalt.de/fileadmin/de.bundeshaushalt/content_de/dokumente/2019/soll/Haushaltsgesetz_2019_Bundeshaushaltsplan_Gesamt.pdf>, accessed April 29, 2019. It does, for example, not contain most social security expenditure (health insurance, pensions, unemployment, age care) and there are additional budgets in the various states of the federation. The Treasury of the UK presented a policy paper "Budget 2018" on (October 29, 2018), available at: <https://www.gov.uk/government/publications/budget-2018-documents/budget-2018>, accessed April 29, 2019, according to

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perspective of deepening integration and enabling the EU to play a significant role in areas of welfare, combatting financial crises and defence, to name only a few examples, it is not inconceivable to envisage a development where the EU's budget would have to be about the same size or perhaps even larger than a comparable budget of one of its larger member states. Such a scenario, if one were to imagine a volume of around 1 trillion Euros for a future EU budget to be administered by a European Finance Minister, would clearly pose issues in the light of the constitutional requirements stipulated by the GFCC for Germany's participation in developing and deepening European integration and for the Federal Parliament's ability to make decisions and to remain in financial control to the degree required.

4.3 Identity Review in Practice: The GFCC's Arrest Warrant Order

The GFCC had its first opportunity to explain its understanding of identity review in a case regarding the extradition to Italy of a US citizen arrested in Germany on the basis of a European Arrest warrant.[39] The person in question had been sentenced *in absentia* to a long prison term and claimed that extradition would violate the foundational principle of "*nulla poena sine culpa*", which includes the ability of a defendant to put forward his perspective of what happened before the deciding court because Italian law would have prevented him from appealing the sentence on factual grounds. The GFCC concurred and

which the "Total Managed Expenditure (TME)" for 2019/2020 is expected to be around £842 billion (about half of this sum goes to health and social protection), which equates to almost 1 trillion Euros. According to the Federal Statistical Office (Statistisches Bundesamt) the figures collated for 2018 as directed by the EU Budgetary Framework Directive (Council Directive 2011/85/EU of November 8, 2011 on Requirements for Budgetary Frameworks of the Member States, OJ L 306/41), Germany's total budget (because of surpluses calculated on the aggregate income figures and rounded off) was roughly EUR 1.482 trillion, of which EUR 398.4 billion constituted the federal budget, EUR 419 billion the aggregate budgets of the Länder, EUR 269.9 billion the aggregate budgets of the municipalities and EUR 690,7 billion the budgets of the Social Security Funds, see Statistisches Bundesamt (Destatis), EU-Haushaltsrahmenrichtlinie – Ausgaben, Einnahmen und Finanzierungssaldo des Öffentlichen Gesamthaushalts nach Ebenen, Quartalsdaten, available at: <https://www.destatis.de/DE/Themen/Staat/Oeffentliche-Finanzen/EU-Haushaltsrahmenrichtlinie/Tabellen/oeffentlicher-gesamthaushalt.html>, accessed April 29, 2019.

39 BVerfG, 2 BvR 2735/14, (December 15, 2015), available at: http://www.bverfg.de/e/rs20151215_2bvr273514en.html, accessed February 23, 2019.

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held that his inability to do so would indeed have to be regarded as a violation of the GG's foundational dignity clause in Article 1 and that hence Germany could not extradite.[40] The underlying EU legislation governing the European Arrest Warrant (the Framework Decision) limits the reasons the enforcing state can invoke against extradition requests and contains specific language with regard to trials and convictions in absentia.[41] Article 4a(1)(c) of the Framework Decision requires that after a conviction *in absentia* a merit review of the original conviction must be possible and the Italian authorities had submitted information to show that this possibility existed. However, the GFCC, unlike the "lower" courts,[42] did not regard these assurances as sufficient to overcome its concerns regarding the principle of guilt and human dignity.[43] The guilt principle is deemed to be part of Germany's constitutional identity, so that the *de facto* inability to apply for a review of the facts in the requesting state after conviction in absentia would be a violation of that principle and hence the European legislative act must not be applied. However, the GFCC avoided an open challenge to the doctrine of EU supremacy by explaining that this result was not exclusively the consequence of applying German constitutional law. Instead, the proper construction of the EU legislation in question, i.e. the Framework decision, read together with the judicial guarantees of the EU-Charter of Fundamental Rights, would "obviously" yield the same result.[44] In other words, the GFCC turned a possible conflict of EU law with German constitutional norms of the most distinguished kind (as part of the suite of norms shaping the

40 *Ibid*.

41 Council Framework Decision of June 13, 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) as amended by the Council Framework Decision 2009/299/JHA of February 26, 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, available at: http://data.europa.eu/eli/dec_framw/2002/584/2009-03-28, accessed February 23, 2019.

42 The GFCC is not a court of appeal and hence does not sit "above" other courts. However, its judgments, decisions and orders have in essence the same effect as overruling or remanding appellate court decisions.

43 BVerfG, 2 BvR 2735/14, (December 15, 2015), paras 111–123, available at: <http://www.bverfg.de/e/rs20151215_2bvr273514en.html> accessed February 23, 2019.

44 *Ibid*., at para. 125. The obviousness of this application of EU law was important because it allowed the GFCC to circumvent having to submit the EU law part of the case to the ECJ under the preliminary ruling procedure. The ECJ's jurisdiction with regard to the interpretation of EU law does not have to be invoked if the meaning of the EU norms in question is clear and obvious ("acte clair").

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German constitutional identity) into a celebration of the harmonious co-existence of norms built on the same values.

Of course, one might ask what need there was for the GFCC to engage in muscle flexing around identity review? A simple reference to the ECJ to confirm this reading of the Framework Decision would have been sufficient. The reason is more obvious than perhaps the stipulated outcome of the proper construction of EU law in the matter: the GFCC wanted to – again – stake its claim and demonstrate that, while it adjudicates in the spirit of cooperation and EU law friendliness, it continues to regard the national constitution as the ultimate foundation of everything that happens in Germany and assert that it is thus the GFCC, not the ECJ, that ultimately determines the limits of the EU law when potential conflicts with the GG are at stake.[45]

4.4 Identity Review: New Doctrinal Concept or Doctrinal Politics?

From a structurally-legal perspective, there is nothing particularly novel about the notion of identity review. The underlying concept of ultra vires acts is a well-developed principle, not only in public international law, and, as shown, the GFCC had threatened to give it teeth long before it introduced identity review. The related concept of enumerative powers, i.e. the attribution of specifically listed powers to various institutions or levels of government is also familiar. It is a standard constitutional principle in federated states and more generally relevant and necessary whenever power is distributed between several power centres in multilevel or distributed structures. The overstepping of attributed powers is what constitutes the ultra vires act. In the context of the EU, the dispute between some national constitutional courts and the ECJ was always and continues to be who has the last word in determining whether a particular legislative, administrative or other act adopted by a European institution has exceeded the competences that have been attributed by the member states to the EU in the foundational treaties. The ECJ has always held that it has the final word on the scope of the powers attributed to the EU in the treaties because in Article 263.1 TFEU the member states explicitly gave the Court the power to review the legality of all legislative and other acts capable of producing legal effects with actions "on grounds of lack of competence" (Article 263.2 TFEU) specifically

45 Cf. Dana Burchardt, *Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht – zugleich Besprechung des Beschlusses 2 BvR 2735/14 vom 15.12.2015 („Solange III"/"Europäischer Haftbefehl")*, 76 ZaöRV (2016), 527 at 550–551.

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included. In contrast, the GFCC (and other national courts) have always maintained that they determine the extent of the powers ceded by their respective states to the EU when passing assent or implementing legislating and constitutionally ratifying the treaties.

In this context, the identity review is really the creation of a generalized, quasi-normative formulation of what will trigger the watchful eye of the GFCC in EU matters. The review items listed by the GFCC above have little to do with the specific facts of the case it had to decide or the area of law at issue. Instead, these items are directed as a warning at both the EU and the German political actors that they have to reckon with the GFCC should any of these items play a role in future political decisions. The concept of identity review as developed and used by the GFCC is more than a tool to decide a case. It is judicial politicking aimed directly at influencing future political undertakings. At the same time, identity review is a form of transnational judicial marketing because the GFCC's efforts to operationalize the ultra vires concept in general terms have, i.e. the decision in has not gone unnoticed by the constitutional courts of other EU member states.[46]

5 Can the "Ultra Vires" Defence-Line Go Ultra Vires? The Legal Controversy over OMTs and APPs

The attempt to secure the relevance of the national political process and to retain sufficient powers in Germany vis-à-vis the EU is a reflection of processes common to all federal systems where such powers need to be attributed to the various levels of government. Identity review in this sense adds, as it were, a qualitative element to back up the role at least of Germany as a member state where the principle of enumerated competences alone apparently cannot yield the desired result. However, achieving this by judicial processes is fraught with the risk of judicial overreach. The ECB's policies in reaction to the economic conditions in the EU and in the Eurozone of low growth and the danger of deflationary tendencies are illustrating examples in this regard.

46 See the collection by A. Saiz Arnaiz and C. Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (2013), which looks at a range of constitutional courts, among them the GFCC, its Spanish counterpart and eastern European constitutional courts.

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OMTs and specific APPs[47] are two instruments the ECB has used and, in the case of asset purchasing, continues to use[48] in the discharge of its functions.[49] Simply put, these are instruments to influence interest rates on bonds to

> ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area non-financial corporations and households, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to levels below but close to 2 % over the medium term.[50]

The inflation target to stave off depressionary tendencies is one important aspect and arguably more directly related to maintaining price stability, which is the ECB's primary objective.[51] However, the improvement in borrowing conditions

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47 For basic information about monetary policy instruments and asset purchasing see, for example, ECB, *How Does the ECB's Asset Purchase Programme Work?*, available at: <https://www.ecb.europa.eu/explainers/tell-me-more/html/app.en.html>; ECB, *What Is the Expanded Asset Purchase Programme?*, available at: <https://www.ecb.europa.eu/explainers/tell-me-more/html/asset-purchase.en.html>; ECB, *The Eurosystem's Instruments*, available at: <https://www.ecb.europa.eu/mopo/implement/html/index.en.html>, all accessed April 29, 2019. See also ECB, The Recalibration of the ECB's Asset Purchase Programme, Economic Bulletin, Issue 7/2017, available at: <https://www.ecb.europa.eu/pub/economic-bulletin/html/eb201707.en.html#IDofBox2>, all accessed April 29, 2019.

48 See *infra* note 70.

49 For short overviews on the various responses to the financial crises and critiques see, for example, F.P. Mongelli and G. Camba-Mendez, *The Financial Crisis and Policy Responses in Europe (2007–2018)*, 60 Comparative Economic Studies, no. 4 (2018), 531 *et seq*.; J. Driffill, *Unconventional Monetary Policy in the Euro Zone*, 27 Open Econ Rev (2016), 387 *et seq*.; D.L. Thornton, *The Downside of Quantitative Easing*, 34 Economic Synopses (2010), available at: <https://files.stlouisfed.org/files/htdocs/publications/es/10/ES1034.pdf>, accessed April 29, 2019.

50 Decision (EU) 2015/774 of the ECB of March 4, 2015 on a Secondary Markets Public Sector Asset Purchase Programme (ECB/2015/10), recital 4 with regard to the specific purchase program at issue in the case, the Public Sector Asset Purchase Programme (PSPP), which is also by far the largest of the three specific purchase programs. The other two are the corporate sector purchase program (CSPP, commenced in June 2016 and aimed at outright purchases of investment-grade euro-denominated bonds issued by non-bank corporations established in the euro area, see ECB, *Press Release: ECB Announces Details of the Corporate Sector Purchase Programme (CSPP)* (April 21, 2016), available at: <https://www.ecb.europa.eu/press/pr/date/2016/html/pr160421_1.en.html>, accessed April 29, 2019; the asset-backed securities purchase program (ABSPP, for certain eligible asset-backed securities such as securitized loans, see ECB, *Asset-Backed Securities Purchase Programme (ABSPP) – Questions & Answers* (January 3, 2019), available at: <https://www.ecb.europa.eu/mopo/implement/omt/html/abspp-faq.en.html>, accessed April 29, 2019. For the third covered bond purchase programme (CBPP3, for certain eligible bonds) see ECB, *Third Covered Bond Purchase Programme (CBPP3) – Questions & Answers*, available at: <https://www.ecb.europa.eu/mopo/implement/omt/html/cbpp3-qa.en.html>, accessed April 29, 2019.

51 Articles 127.1 and 282.2 TFEU.

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will not only affect "corporations and households"; it also has an effect on the conditions of sovereign debt financing. It could be said that through the use of these instruments the ECB expands the supply of money supply, prompting some observers to – metaphorically or not – speak of "printing money".[52] It is therefore not surprising that these instruments are rather controversial from an economic or monetary policy perspective, not least because a potentially unrestricted market participant can by its sheer presence and financial prowess influence upwards or downwards trajectories in the bond markets.[53] Legally, these instruments are also controversial because they can appear to breach, directly or at least indirectly, the prohibition of monetary financing of national budgets contained in Article 123 TFEU.[54]

It should be pointed out that there are some major differences between the OMT and APP programs. The OMT program was the operational response to ECB President Mario Draghi's steadfast commitment that

> [W]ithin our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough."[55]

The speech from which the above excerpt is taken was delivered by President Draghi in reaction to the severe increase of (risk premiums on) interest rates faced by some Euro member states (Greece, Ireland, Italy, Portugal, Spain) for

52 It can safely be said that these instruments do not consist of printing money in the sense of coins and bills but that leaves open the question of whether the sustained and substantial use of these instruments could have a similar effect. The term "quantitative easing" is also often used in this context.

53 As of January 2019, the Eurosystem (ECB and the national central banks (NCBs)) holdings under the asset purchase program amounted to just over 2.5 trillion [sic] Euros, see ECB, Asset Purchase Programmes, available at: <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>, accessed April 29, 2019.

54 Article 123.1 TFEU reads: "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments." See also Council Regulation (EC) No 3603/93 of December 13, 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 [renumbered after the Lisbon Treaty as Article 123 TFEU] and 104b(1) [renumbered after the Lisbon Treaty as Article 125 TFEU] of the Treaty, OJ L 332/1, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993R3603>, accessed January 31, 2019.

55 Speech by Mario Draghi, *President of the ECB at the Global Investment Conference in London* (July 26, 2012), available at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>, accessed April 29, 2019.

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debt financing of their budgets, which were threatening the existence of the Euro or at least the membership of these countries in the common currency. From the perspective of the bond markets, the OMT program was "threatening" the unlimited purchase by the ECB of government bonds of these states contingent on prescribed budget austerity measures undertaken in the affected member states as part of being eligible for funding under the ESM.[56] As it turned out, the "threat" of this market intervention was so profound that the OMT program was never put into practice.[57] The important features were that the OMT program was unlimited in financial scope but geared only to selective countries in severe financial strife. The APPs, in contrast, are neither unlimited nor selective. Instead, there is an "issue share limit per international securities identification number",[58] i.e. a limit on the holding of a certain bond expressed as a percentage of the bond volume that the Eurosystem (ECB and the national central banks (NCBs)) may purchase to ensure and demonstrate that there is sufficient market interest in the bonds.[59] The APPs are also not selective as bonds may be purchased in all Euro member states.[60]

The OMT and the PSPP, as the most important specific APP,[61] have both been the subject of proceedings before the GFCC as well as the ECJ. In both proceedings, the main question was whether and, if so, under what conditions these instruments would come within the powers attributed to the ECB or

56 The ESM is an international financial institution established by international treaty (Article 1 ESM-Treaty) by the 19 Eurozone member states with the purpose (Article 3 ESM-Treaty) of "mobilis[ing] funding and provid[ing] stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States." See Treaty Establishing the European Stability Mechanism, available at: <https://www.esm.europa.eu/sites/default/files/20150203_-_esm_treaty_-_en.pdf>, accessed April 29, 2019.

57 A.-M. Fuertes, E. Kalotychou, and O. Saka, *How Did the ECB Save the Eurozone Without Spending a Single Euro?* (March 26, 2015), available at: <https://voxeu.org/article/how-did-ecb-save-eurozone-without-spending-single-euro>, accessed April 29, 2019.

58 Article 5 of Decision (EU) 2015/774 of the ECB of March 4, 2015 on a Secondary Markets Public Sector Asset Purchase Programme (ECB/2015/10), OJ L 121/20 (May 14, 2015), available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32015D0010>, accessed April 29, 2019; see also ECB, Press Release, ECB announces details of the corporate sector purchase programme (CSPP), available at: <https://www.ecb.europa.eu/press/pr/date/2016/html/pr160421_1.en.html>, accessed April 29, 2019.

59 ECB, *Public Sector Purchase Programme (PSPP) – Questions & Answers*, Q3.1 (January 3, 2019), available at: <https://www.ecb.europa.eu/mopo/implement/omt/html/pspp-qa.en.html>, accessed April 29, 2019.

60 Article 3.1 of Decision (EU) 2015/774, *supra* note 56.

61 See *supra* notes 47 and 49 for more information on these programs.

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whether those programs constituted violations of certain Treaty limitations such as the prohibition of monetary financing of budgets contained in Article 123 TFEU?[62]

The GFCC went through great lengths to explain to the ECJ its concerns regarding the constitutionality of the ECB's actions.[63] Given that the GFCC, like any other national court in an EU member state, has no authority to construe the scope of the TEU, TFEU or EU secondary legislation, any issues identified by it had to be framed as pertaining to the extent of the powers transferred from Germany and its institutions (e.g. the Bundesbank) by the German Parliament to the EU and its institutions, e.g. the ECB. When engaging in that task, the EU treaties, in essence, become a kind of double-headed instrument: they are international treaties construed authoritatively and ultimately exclusively by the ECJ and, at the same time, they become national law by way of the parliamentary ratification of the new of amended treaty (e.g. the TEU or TFEU). The GFCC exclusively and with ultimate authority interprets the Act of Parliament that constitutes the assent legislation. There is a very fine line indeed between trying to demonstrate that certain measures are ultra vires because they are not covered by the national assent legislation without appearing to tell the ECJ how to "correctly" interpret and apply the EU treaties. In the OMT case, the GFCC attempted to imply quite forcefully that it regarded the program is incompatible with the EU law[64] and hence as ultra vires. From the perspective of constitutionalism, i.e. the relationship between two supreme constitutional courts empowered to exercise judicial review, it is remarkable to read how the GFCC tries to convey its point:

> Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 *et seq*. of the ESCB Statute because it exceeds the mandate of the European Central Bank that is regulated in these provisions and encroaches upon the responsibility of the Member States for economic policy (1.). It also appears to be incompatible with the prohibition of monetary financing of the budget enshrined in Art. 123 TFEU (2.). The European Central Bank's reference to a "disruption to the monetary policy transmission mechanism" is not likely to change the assessment of these two points (3.). Accordingly, the applications would probably be successful. Another assessment could,

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62 See *supra* note 52.

63 Under Article 267 TFEU the courts of the member states must submit to the ECJ for preliminary ruling questions pertaining to the application and interpretation of EU law if the decision in the concrete case depends on the correct application of EU law.

64 BVerfG, 2 BvR 2728/13 (January 14, 2014), paras 55, 67 *et seq*., 70, 71, 87 *et seq*., available at: <http://www.bverfg.de/e/rs20140114_2bvr272813en.html> (OMT I – Reference for Preliminary Ruling).

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> however, be warranted if the OMT Decision could be interpreted in conformity with primary law (4.).[65]

The GFCC expresses certainty with regard to the encroachment on the economic policy power retained by the member states, thereby strongly insinuating that the OMT program could not be regarded as monetary policy, responsibility for which has been allocated to the ECB. The GFCC then suggests that it is highly probable, but not certain ("appears"), that the instrument also infringes the prohibition of monetary financing of budgets in Article 123 TFEU. At the same time, it formally acknowledges that both of these assumptions are subject to the findings to the ECJ. Of course, at the time it received the GFCC's preliminary reference, the ECJ had no way of knowing what would happen if it did not follow the lead of the GFCC and actually hold the OMT program compatible with EU law. One option would have been for the GFCC to change its cooperative attitude vis-à-vis the ECJ into an antagonistic one and openly challenge the supremacy of EU law by putting the ultra vires defence in effect – and thus asserting that the OMT program was unconstitutional and hence barring any German governmental institution (e.g. the Bundesbank as the German central bank) from participating in this program in any way.

Fortunately, however, that did not happen. While ECJ ruled that the OMT program was compatible with EU law,[66] it qualified that finding by holding that "sufficient safeguards must be built into this intervention"[67] to restrict the broad discretion of the ECB in these matters to alleviate the fears that the program would not constitute monetary policy and instead could be a clandestine attempt to help finance state budgets. In particular, the ECJ placed a lot of weight on ensuring that the ECB is restricted to interventions in the secondary markets so that a realistic market price can develop. That means that the ECB's purchasing activities are contingent on private actors having purchased bonds first (on the primary market). It also means that the ECB must ensure that these private market participants cannot know with certainty if or when the ECB will be intervening and how long the ECB will hold on to any bonds it has purchased on the secondary market.[68]

Thus armed with the judgment of the ECJ the GFCC reached its final verdict on the OMT program and, perhaps surprisingly for some, upheld the constitutionality of the program on the basis of the conditions formulated by the ECJ. At

65 *Ibid*., at para. 55.
66 ECJ, Case C-62/14 (June 16, 2015), Gauweiler *et al*., ECLI:EU:C:2015:400, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CJ0062>, accessed April 29, 2019.
67 *Ibid*., at para. 102.
68 Cf. *ibid*., at 104, 117 and 118.

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the same time, the GFCC clarified and elaborated on the restrictive conditions formulated by the ECJ, while further asserting that the threat to failure to comply with these conditions "would constitute a sufficiently qualified exceeding of competences within the meaning of the *ultra vires* review."[69]

The "battlefield" has now shifted to the PSPP program, which, in contrast to the OMT program, actually was implemented and underwrote ECB interventions in the bond markets to the tune of almost EUR 2.1 trillion (sic!).[70] The GFCC again voiced grave concerns as to the legality of the program and it again submitted the matter to the ECJ to give a preliminary ruling on the EU-law compatibility of the program.[71] The concerns expressed by the GFCC were formulated in light of the ECJ's OMT decision, which was heavily referenced in the preliminary reference. The core question again was whether the PSPP can be qualified as "monetary policy" and hence as part of the power attributed to the ECB in the TFEU or whether the PSPP is predominantly an economic policy measure, which falls under the jurisdiction of the member states – in which case it should be considered an ultra vires activity on the part of the ECB. The GFCC was predominantly concerned with the volume and duration (of more than two years) of the PSPP which it regards as an indication that economic – and not monetary – policy considerations are the prime drivers for this program[72] pointing to the effect that these interventions have:

> Beyond its proclaimed monetary policy objectives, and irrespective of the extent to which such objectives are achieved, the PSPP has considerable economic policy effects. Based on its sheer volume alone, the inevitable consequences of its monetary policy objectives are its considerable steering effects on the economy. The PSPP affects balance sheet structures in the commercial banking sector by transferring large quantities of Member State bonds, including high-risk ones, from the balance sheets of the Member States to the balance sheets of the ECB and national central banks. As a result, the economic situation of the banks is improved significantly and their credit rating increases. The mechanism allows banks to sell the Eurosystem high-risk securities that otherwise could have only been unloaded at a loss, if at all. The factual preponderance of economic policy that this brings

69 BVerfG, 2 BvR 2728/13 (June 21, 2016), paras 206–207, available at: <http://www.bverfg.de/e/rs20160621_2bvr272813en.html>, accessed April 29, 2019.

70 ECB, APP cumulative net purchases, by programme (net purchases ended in December 2018 and the ECB has now entered the "reinvestment phase"), see ECB, Asset purchase programmes, available at: <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>, accessed April 29, 2019. The other three special asset purchasing programs remained relatively small in scope with a combined volume of just under EUR 467 billion (numbers as of February 2019, see *ibid*. (table "Eurosystem holdings and the asset purchasing programme."

71 BVerfG, Order of the Second Senate of July 18, 2017, 2 BvR 859/15, available at: <http://www.bverfg.de/e/rs20170718_2bvr085915en.html>, accessed April 29, 2019.

72 BVerfG, *ibid*., at paras 100, 114

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> about could potentially result in the ECB exercising a steering influence in economic matters, thus undermining the distribution of competences of Chapter VIII of the Treaty on the Functioning of the European Union.[73]

In essence, the GFCC asked whether the mere existence of a monetary (co-) objective can be sufficient when other factors, such as volume and duration of the intervention, suggest that the monetary policy objective is dwarfed by the intended economic policy impacts. The GFCC appeared to strongly favour the view that it would not be sufficient that monetary policy objectives merely can, however faintly, be attributed to an ECB policy, but that such objectives must constitute a major pillar of the intervention in question.[74]

The ECJ in its decision on the preliminary reference disagreed with the GFCC's interpretation. It stated that the foreseeable and knowingly accepted existence of economic policy effects of a measure such as the PSPP do not hinder the qualification of a measure as monetary policy:

> 61. In that connection, it should be recalled that a monetary policy measure cannot be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects that can also be sought in the context of economic policy […].
> 62. The Court cannot concur with the referring court's view that any effects of an open market operations programme that were knowingly accepted and definitely foreseeable by the ESCB when the programme was set up should not be regarded as 'indirect effects' of the programme.[75]

The ECJ argued that it is impossible to segregate the two policy goals because the pursuit of monetary objectives, such as the attempt to move the inflation rate towards the 2% goal, inherently impacts economic factors such as interest rates

73 BVerfG, *ibid*., at 120.

74 See also A. Lang, *Ultra Vires Review of the ECB's Policy of Quantitative Easing: An Analysis of the German Constitutional Court's Preliminary Reference Order in the PSPP Case – Bundesverfassungsgericht, Order of July 18, 2017, BvR 859/15 etc., PSPP* (case note), 55 CMLR (2018), 923 (937), correctly points out that the GFCC refers to the conflict between democracy and central bank independence and that this conflict must be resolved by restricting the space for independent decision-making, see BVerfG, Order of the Second Senate of July 18, 2017, 2 BvR 859/15, available at: <http://www.bverfg.de/e/rs20170718_2bvr085915en.html>, accessed April 29, 2019, para. 103. That notwithstanding in the eyes of the GFCC there is an overarching conflict between (national) democracy and EU decision-making by way of determining, possibly with limiting effect, the extent of powers transferred by the German Parliament to European institutions, in this case the ECB, see *ibid*., at paras 63 *et seq*.

75 ECJ, Case C-493/17, (December 11, 2018), Weiss *et al*., ECLI:EU:C:2018:1000, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0493>, accessed April 29, 2019 paras 61–62.

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and hence refinancing conditions for public and private actors, credit supply or other monetary or financial conditions:

> 66. Consequently, in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy, which might also be sought — to different ends — in the context of economic policy. In particular, when the maintenance of price stability requires the ESCB to seek to raise inflation, the measures that it must adopt to ease monetary and financial conditions in the euro area for that purpose may entail an impact on the interest rates of government bonds because, inter alia, those interest rates play a decisive role in the setting of the interest rates applicable to the various economic actors […].[76]

What is one to make of this? As has been explained, the GFCC regards itself as the guardian of the power balance between the EU institutions and Germany. In the context of a typical federalist controversy about the respective competencies of different levels of governance, a judicial settlement can be quite helpful and is indeed commonly accepted as the preferred mode of dispute resolution. If the one level is found not to have had the power to act, the result is that the act in question is void, leaving the other governmental level free to legislate (or not) as it pleases. Of course, if such a verdict comes from a member state court in the face of a finding by the ECJ that sufficient authority did exist at the EU level, the constitutional problem of the denial of the supremacy of EU law by the national court becomes the real issue. The latter would also apply in the PSPP case if the GFCC, when it reaches its final decision on the basis of the ECJ's preliminary ruling, were to declare the ECB's PSPP program ultra vires. However, it is much less clear whether Germany, through the Bundesbank or otherwise, or indeed any other (Eurozone) member state could now engage in its own APP if it wanted to, or if the member states would be barred from such activities because of the monetary policy effects inherent in such action given that the monetary policy power lies exclusively with the ECB. The result could then be, paradoxically, that APPs could be legally impossible altogether or admissible only if their scope does not reach any monetary policy threshold: the ECB could not undertake such measures because of their economic policy impact but neither could the member states because of the monetary policy impacts. That result would clearly be at odds with the legal framework of the TFEU and Article 18.1 of the Protocol on the ESCB and the ECB[77] which allow the ECB and the central banks of the Member States, in order to achieve the objectives of the ESCB, to operate

76 ECJ, *ibid*., at para. 66, see also paras 64–65.

77 Article 18 ECB-Statute – Open market and credit operations states:
"18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

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in the financial markets by buying and selling outright marketable instruments denominated in euros.[78]

The crux of the matter lies elsewhere, however. The issues at stake in these types of situations are not readily justiciable. The GFCC, or any other court for that matter, cannot decide with legitimate authority just what kind of ratio between monetary and economic policy is constitutionally required. Vertical competence adjudication works when clearly demarcated powers are attributed to different echelons – and hence can be exercised regardless of the decision – or when the outright denial or limitation of a policy option is legally possible. Respect for fundamental rights, for example, might make it impossible for the government to pursue certain security policies. However, it would be difficult to argue that such security policies cannot be pursued if their non-existence could leave a manifest and life-threatening security gap. The duty to protect life, health and property, i.e. the second pillar of fundamental rights protection, would necessitate striking a different balance between individual freedom and the security interest as a matter of law. It is important to note in this context, as the ECB and the ECJ did, that APPs have been employed not only by the ECB but by several significant central banks, such as the Federal Reserve Bank in the USA, the Bank of England or the Bank of Japan.[79] This is important because it makes it hard to argue that such measures are manifestly outside the tasks of a typical central bank and its brief to conduct monetary policy. The only role a court can, and should, play in a scenario like this is to define the outer limits of jurisdiction, i.e. to identify and invalidate those policies that would be manifestly outside the scope of the power attributed to the ECB. Asset purchasing programs such as the PSPP can only be manifestly outside the scope of the ECB's monetary policy mandate if a contrary finding would have to be regarded as irrational and obviously abusive, denoting that the ultra vires character of the policy is, to borrow a phrase from criminal procedure, beyond a reasonable doubt. Beyond that lies the realm of politics where the (extent of) the use of asset purchasing programs might indeed be very controversial. It cannot be a

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– operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;
– conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral."

18.2. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.

78 ECJ, *supra* note 76, at para. 69.

79 ECJ, *supra* note 76, at para. 77.

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court's role to decide, in essence, whether certain measures are good policy or not. Courts must limit themselves to legal reasoning and any legal quality assessment is only legitimate when the arguments at issue yield to irrationality. In that sense the PSPP controversy between the ECJ and the GFCC is not only a controversy about who has the final word to determine the scope of certain powers exercised by the ECB; it is also a controversy about the limits of judicial power itself.[80] The ECJ is clearly yielding to the judgment of the ECB and its determination of what is a sufficient degree of monetary policy. The GFCC, if it indeed were to take a contrary position, would inherently have to assume that its remit to determine what is monetary, what is economic and what is an admissible or inadmissible mix of the two policy areas is much broader. In addition, the GFCC would be faced with developing criteria for delineation between the two policy areas[81] unless it wanted to risk just handing the matter back to the political actors with a negative verdict and leaving it to them to determine the relevant threshold by trial and error.

6 Conclusion

The paper has sought to demonstrate the degree to which inherently political questions can be drawn into constitutionally determined legal debates and

80 The OMT decision was a majority decision (6:2) and came with two dissenting opinions by Justices Lübbe-Wolff and Gerhardt. Especially the former raised issues around separation of powers and the role of courts, see the Dissenting Opinion of Justice Lübbe-Wolff, BVerfG, 2 BvR 2728/13 (January 14, 2014), available at: <http://www.bverfg.de/e/rs20140114_2bvr272813en.html> (OMT I – Reference for Preliminary Ruling), accessed April 29, 2019, paras 1, 3–5: "[...] what the plaintiffs, insofar as they turn against federal inaction with respect to the OMT decision, petition the Federal Constitutional Court to order goes, in my view, beyond the limits of judicial competence under the principles of democracy and separation of powers." Justice Gerhardt points to the fact that these acts have been vetted by the parliament and the executive and that it is therefore not a case of powers having been relinquished, *ibid*. Dissenting Opinion of Justice Gerhardt, para. 23. He also opposes the notion of a manifest transgression of powers by the OMT program because of the inherent ambivalence of monetary policy instruments with regard to their economic impacts which "cannot be contradicted, at least not with the necessary unequivocalness", *ibid*., at para. 17. Both dissenting judges have since retired from the GFCC and did not participate in the GFCC's PSPP reference to the ECJ, BVerfG, Order of the Second Senate of July 18, 2017, 2 BvR 859/15, available at: <http://www.bverfg.de/e/rs20170718_2bvr085915en.html>, accessed April 29, 2019. This second reference order of the GFCC regarding the PSPP program was decided unanimously. Given that the ECJ did not follow the GFCC's concerns the absence of these two more cautious justices could indeed prove to be consequential for the Court's final decision.

81 Dissenting Opinion of Justice Lübbe-Wolff (*supra* note 76), at para. 5.

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decisions in the particular context of the EU and one of its most prominent member states. It is beyond the scope of this paper to enter into a profound discussion of the "political question doctrine" which has played a colourful role in the history of the jurisprudence of the US Supreme Court.[82] A good argument can be made that the German GG knows no such thing as a "political question" that would place certain constitutional issues, including those with a core economic flavour, beyond the purview of the GFCC. The powers of the GFCC are expressed in Article 93 GG[83] and "political questions" are not mentioned there as a restriction.[84] However, even if one accepts that premise, the question arises whether it is wise for the GFCC to review and possibly replace the wisdom of the political decision-makers with its own. The GFCC has in the past, been remarkably deferential, in the best sense of the word, when cases before it came down to evaluating fundamentally political issues, though never acknowledging the concept of political questions as the motivating factor for its deference. In fact, all its decisions regarding the constitutionality of the process of European integration are marked by this deference, which can be explained as acknowledging that the decision to be part of this integration process, its direction and pace are at their core political decisions. At the same time, the Court has forcefully – and rather successfully – guided national political actors to pay due respect to the constitutional parameters. This was the case with regard to the observance of fundamental rights by the EU and its institutions and also with regard to the delineation of powers between Germany as a member state and the EU. The relationship has in that sense been a cooperative one – not only cooperation with the ECJ as its judicial European counterpart but also cooperation with the political institutions and actors.

The GFCC has previously followed this line of collaboration and restraint in domestic controversies with a strong political flavour. The most illustrating example in this regard is perhaps the GFCC's decision concerning the dissolution of Parliament by Helmut Kohl after he was elected Chancellor by way of a constructive vote of no-confidence against his predecessor Helmut Schmidt in the German Bundestag.[85] Kohl desired a direct mandate from the German

82 See, for example, the comprehensive study of edited by N. Mourtada-Sabbah *et al.* (eds.), *The Political Question Doctrine and the Supreme Court of the United States* (2007).

83 Text in English available at: <https://www.gesetze-im-internet.de/englisch_gg/>, accessed April 29, 2019.

84 See also Dissenting Opinion of Justice Lübbe-Wolff, BVerfG, 2 BvR 2728/13 (January 14, 2014), available at: <http://www.bverfg.de/e/rs20140114_2bvr272813en.html> (OMT I – Reference for Preliminary Ruling), accessed April 29, 2019, para. 4.

85 BVerfGE 62, 1, available in German at <http://www.servat.unibe.ch/dfr/bv062001.html>, accessed April 29, 2019.

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people, that is to say, he wanted to base his tenure on having won a parliamentary majority in a proper election, rather than as a result of the junior partner in the previous coalition having switched allegiance to form a new coalition with his party to secure a majority in parliament. For historical reasons, the GG only contemplates the dissolution of Parliament under restrictive conditions. The only option is for the German Federal President to use his discretionary power to dissolve Parliament and call for elections because the Chancellor has lost the trust of the majority in a confidence vote under Article 68. Kohl sought to use this possibility, called for a confidence vote and then instructed his supporters in the Bundestag to abstain. The opposition won the vote and the President accordingly had to decide whether to dissolve the Parliament on the basis of what was essentially a staged no-confidence vote. Given the political situation at the time – the stationing of nuclear missiles in Europe had become an extremely controversial issue expressed in massive opposition politically and in the streets – a democratic election could indeed be regarded as very helpful and on that view, could certainly not be construed as an attempt to call an election at an opportune time. However, the President's decision to dissolve the Bundestag was challenged before the GFCC. Interestingly, in its judgment the GFCC qualified Article 68 as "an open constitutional norm" in the sense that its content can only be determined by taking into account how the other constitutional institutions (legislative and executive branch) are reading the clause. The GFCC stated that whereas it exercises the task of construing constitutional norms, it does not exercise this responsibility exclusively. Parliament and the executive branch also share in this responsibility. If there is a strong consensus to construe a constitutional norm in a particular manner without either of the latter institutions adopting controversial or opposing political views on what a certain norm might require then this is relevant for the approach of the GFCC as well.[86]

This "open norm" concept is applicable with regard to the OMT and PSPP conflict as well. Articles 119, 120, 121 TFEU on economic policy and Article 127 TFEU on monetary policy must also be considered "open treaty norms" the interpretation of which need not be exclusively in the hands of the GFCC. Instead, the GFCC can draw on the positions taken by other top-level institutions dealing with these issues, i.e. the Bundestag and the government in Germany, the ECB, the Commission or the other EU member states. This would help to

86 *Ibid.*, at 38–39 [translation by author]. See also J. Bröhmer, *"Containment eines Leviathans"-Anmerkungen zur Entscheidung des Bundesverfassungsgerichts zum Vertrag von Lissabon*, ZeuS (2009), 543 at 549–552, where I suggested a similar view with regard to the GFCC's decision on the constitutionality of the Lisbon Treaty.

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avoid judicial overreach and with it the politicization of the constitutional judicial process.

Opposition to measures such as provided for in the OMT or PSPP programs on political or economic grounds is not only legitimate but necessary Nobody can claim to know with certainty whether such measures are helpful or harmful in the long run. But everybody can have an opinion and offer their opinion and supporting argument in the public arena. It is precisely because we do not and cannot know what outcomes policies will have in complex environments with conflicting interests that we engage in the democratic process of free speech and free elections. It is that process and not judicial decision-making that yields the best results.[87] The courts in general, and constitutional courts such as the GFCC or the ECJ in particular, guard the playing field for this democratic process, secure the (constitutional) rules of democratic engagement and define outer limits for decision-making on the basis of constitutional norms. Of course, whatever the decision of the GFCC in the PSPP case will be, the Court will always claim it did just that. Therein lies the conundrum of constitutional review: there is no sharp line between necessary constitutional review and judicial overreach. However, there are guiding indicators which can help with exercising the necessary restraint, such as criteria for distinguishing between certain policies and their effects (in the case at issue here between monetary policy on the one hand and economic policy on the other) and the determination of whether a certain finding will exclude certain policy measures (rather than allocating it to one or the other level of government) from the available arsenal altogether without clear legal prescriptions in that regard. Article 123 TFEU[88] contains such a clear prescription. The distinction between monetary and economic policy is much harder. As Dieter Grimm accurately stated with regard to the relationship between EU treaties and the national constitutions and hence between the EU itself and its member states: "[...] more constitutional law means less democracy."[89] That this is so is not necessarily a bad thing but it does place a burden on the GFCC and similar courts to calibrate and exercise their powers very carefully.

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87 On the issue of "overconstitutionalization" in this context see *supra* note 14.
88 See *supra* note 54.
89 Grimm (2015), *supra* note 14, at 471.

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