Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful

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Judgment of 21 June 2016
2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13

If the conditions formulated by the Court of Justice of the European Union in its judgment of 16 June 2015 (C-62/14) and intended to limit the scope of the OMT programme are met, the complainants' rights under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3 of the Basic Law (*Grundgesetz* – GG) are not violated by the fact that the Federal Government and the *Bundestag* have not taken suitable steps to revoke or limit the effect of the policy decision of the European Central Bank of 6 September 2012 concerning the OMT programme. Furthermore, if these conditions are met, the OMT programme does not currently impair the *Bundestag's* overall budgetary responsibility. Such was the decision of the Second Senate of the Federal Constitutional Court in a judgment pronounced today. If interpreted in accordance with the Court of Justice's judgment, the policy decision on the OMT programme does not "manifestly" exceed the competences attributed to the European Central Bank. Moreover, if interpreted in accordance with the Court of Justice's judgment, the OMT programme does not present a constitutionally relevant threat to the German *Bundestag's* right to decide on the budget.

Facts of the Case:

The constitutional complaints and the application for *Organstreit* proceedings [*proceedings relating to disputes between constitutional organs*] challenge two programmes aimed at the purchase of government bonds of Member States of the Euro zone on the secondary market by the European System of Central Banks ("ESCB").
For further information please refer to press releases nos. 29/2013 of 19 April 2013 (available in German), 9/2014 of 7 February 2014, and 3/2016 of 15 January 2016.

Key Considerations of the Senate:

1. The constitutional complaints and the *Organstreit* proceedings are partially inadmissible. In particular, the constitutional complaints are inadmissible to the extent that they directly challenge acts of the European Central Bank. To that extent those acts cannot be challenged before the *Bundesverfassungsgericht* (German Federal Constitutional Court).

2. To the extent that the constitutional complaints and the application for *Organstreit* proceedings are admissible, they are unfounded.

a) By empowering the Federation to transfer sovereign powers to the European Union (Art. 23 sec. 1 sentence 2 GG), the Basic Law also accepts a precedence of application of European Union law (*Anwendungsvorrang des Unionsrechts*). The legislature deciding on European integration matters may not only exempt institutions, bodies, offices and agencies of the European Union from being comprehensively bound by the guarantees of the Basic Law but also German entities that implement European Union law.

However, the precedence of application of European Union law only extends as far as the Basic Law and the relevant Act of Approval permit or envisage the transfer of sovereign powers. Therefore, limits for the opening of German statehood derive from the constitutional identity of the Basic Law guaranteed by Art. 79 sec. 3 GG and from the European integration agenda (*Integrationsprogramm*), which is laid down in the Act of Approval and vests European Union law with the necessary democratic legitimacy for Germany.

b) The fundamental elements of the principle of democracy (Art. 20 secs. 1 and 2 GG) are part of the constitutional identity of the Basic Law, which has been declared to be beyond the reach both of constitutional amendment (Art. 79 sec. 3 GG) and European integration (Art. 23 sec. 1 sentence 3 in conjunction with Art. 79 sec. 3 GG). Therefore, the legitimacy given to state authority by elections may not be depleted by transfers of powers and tasks to the European level. Thus, the principle of sovereignty of the people (*Volkssouveränität*) (Art. 20 sec. 2 sentence 1 GG) is violated if institutions, bodies, offices and agencies of the European Union that are not adequately democratically legitimised through the European integration agenda laid down in the Act of Approval exercise public authority.

c) When conducting its identity review, the Federal Constitutional Court examines whether the principles declared by Art. 79 sec. 3 GG to be inviolable are affected by transfers of sovereign powers by the German legislature or by acts of institutions, bodies, offices and agencies of the European Union. This concerns the protection of the fundamental rights' core of human dignity (Art. 1 GG) as well as the fundamental principles that characterise the principles of democracy, of the rule of law, of the social state, and of the federal state within the meaning of Art. 20 GG.

When conducting its *ultra vires* review, the Federal Constitutional Court (merely) examines whether acts of institutions, bodies, offices and agencies of the European Union are covered by the European integration agenda (Art. 23 sec. 2 sentence 2 GG), and thus by the precedence of application of European Union law. Finding an act to be *ultra vires* requires – irrespective of the area concerned – that it manifestly exceed the competences transferred to the European Union.

d) Similar to the duties to protect (*Schutzpflichten*) mandated by the fundamental rights, the responsibility with respect to European integration (*Integrationsverantwortung*) requires the constitutional organs to protect and promote the citizens' rights protected by Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 sec. 2 sentence 1 GG if the citizens are not themselves able to ensure the integrity of their rights. Therefore, the constitutional organs' obligation to fulfil their responsibility with respect to European integration is paralleled by a right of the voters enshrined in Art. 38 sec. 1 sentence 1 GG. This right requires the constitutional organs to ensure that the drop in influence (*Einflussknick*) and the restrictions on the voters' "right to democracy" that come with the implementation of the European integration agenda do not extend further than is justified by the transfer of sovereign powers to the European Union.

In principle, duties to protect are violated only if no protective measures are taken at all, if measures taken are manifestly unsuitable or completely inadequate, or if they fall considerably short of the protection's aim. This means for the responsibility with respect to European integration (*Integrationsverantwortung*) that, if institutions, bodies, offices and agencies of the European Union exceed their competences in a manifest and structurally relevant manner or violate the constitutional identity in other ways, the constitutional organs must actively work towards respect of the European integration agenda. They may – within the scope of their competences – be required to use legal or political means to work towards revocation of measures that are not covered by the European integration agenda as well as – as long as the measures continue to have effect – to take suitable measures to restrict the national effects of such measures as far as possible. Just like the duties of protection inherent in fundamental rights, the responsibility with respect to European integration (*Integrationsverantwortung*) may in certain legal and factual circumstances concretise in such a way that a specific duty to act results from it.

3. According to these standards and if the conditions listed below are met, the inaction on the part of the Federal Government and of the *Bundestag* with regard to the policy decision of the European Central Bank of 6 September 2012 does not violate the complainants' rights under Art. 38 sec. 1 sentence 1, Art. 20 secs. 1 and 2 in conjunction with Art. 79 sec. 3. Furthermore, the *Bundestag*'s rights and obligations with regard to European integration (*Integrationsverantwortung*) – including its overall budgetary responsibility – are not impaired.

a) The Federal Constitutional Court bases its review on the interpretation of the OMT decision formulated by the Court of Justice in its judgment of 16 June 2015. The Court of Justice's finding that the policy decision on the OMT programme is within the bounds of the respective competences and does not violate the prohibition of monetary financing of the budget still remains within the mandate of the Court of Justice (Art. 19 sec. 1 sentence 2 TEU).

The Court of Justice bases its view to a large extent on the objectives of the OMT programme as indicated by the European Central Bank, on the means employed to achieve those objectives, and on the programme's effects on economic policy, which – according to the Court of Justice – are only indirect in nature. It bases its review not only on the policy decision of 6 September 2012 concerning the technical details, but derives further framework conditions – in particular from the principle of proportionality –, which set binding limits for any implementation of the OMT programme. Furthermore, the Court of Justice affirms that acts of the European Central Bank are not exempt from judicial review, in particular regarding whether the principles of conferral and proportionality are complied with.

b) Nevertheless, the manner of judicial specification of the Treaty (Treaty on the Functioning of the European Union) evidenced in the judgment of 16 June 2015 meets with serious objections on the part of the Senate. These objections concern the way the facts of the case were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted.

Firstly, the Court of Justice accepts the assertion that the OMT programme pursues a monetary policy objective without questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and

without testing these assumptions with regard to the indications that evidently argue against a character of monetary policy.

Furthermore, – despite its own belief that economic and monetary policy overlap – the Court of Justice essentially relies on the objectives of the measure as indicated by the organ on review as well as on the recourse to the instrument of the purchase of government bonds enshrined in Art. 18 of the ESCB Statute when qualifying the OMT programme as an instrument belonging to the field of monetary policy.

Lastly, the Court of Justice provides no answer to the following issue: that the independence granted to the European Central Bank leads to a noticeable reduction in the level of democratic legitimation of its actions and should therefore give rise to restrictive interpretation and to particularly strict judicial review of the mandate of the European Central Bank. This holds all the more true if the principles of democracy and sovereignty of the people (*Volkssouveränität*) are affected – and thereby the constitutional identity of a Member State, which the European Union is required to respect.

c) Despite these concerns, if interpreted in accordance with the Court of Justice's judgment, the policy decision on the OMT programme does not – within the meaning of the competence retained by the Federal Constitutional Court to review *ultra vires* acts – "manifestly" exceed the competences attributed to the European Central Bank. Although – unlike the Senate – the Court of Justice does not question the indicated objectives and evaluates each of the signs that the Senate holds to argue against the alleged objectives in an isolated manner instead of performing an overall evaluation, this is acceptable because on the level of the exercise of competences the Court of Justice has essentially performed the restrictive interpretation of the policy decision that the Senate's request for a preliminary ruling of 14 January 2014 held to be possible.

The Court of Justice differentiates between the policy decision of 6 September 2012 on the one hand and the implementation of the programme on the other. With a view to the proportionality of the OMT programme and the fulfilment of the obligations to state reasons, it specifies additional compelling restrictions that apply to any implementation of the OMT programme and exceed the framework conditions indicated in the policy decision. Against this backdrop, one must assume that the Court of Justice considers the conditions it specified to be legally binding. In using procedural means to limit the ECB's competences by reviewing whether the principle of proportionality has been observed, the Court of Justice takes up the issue of the nearly unlimited potential of the decision of 6 September 2012. The restrictive parameters developed by the Court of Justice do not completely remove the character of the OMT programme insofar as it encroaches upon economic policy. However, together with the conditions prescribed by the decision of 6 September 2012 – in particular the participation of Member States in adjustment programmes, Member States' access to the bond market, and the focus on bonds with a short maturity – they make it appear acceptable to assume that the character of the OMT programme is at least to the largest extent monetary in kind.

d) If interpreted in accordance with the Court of Justice's judgment, the policy decision on the technical framework conditions of the OMT programme as well as its possible implementation also do not manifestly violate the prohibition of monetary financing of the budget. Although the Court of Justice considers the policy decision to be permissible even without further specifications, its implementation must fulfil further conditions in order for the purchase programme to not violate Union law. Thusly interpreted, and when comprehensively assessed and evaluated, the OMT programme fulfils the requirements formulated by the Senate's order of 14 January 2014 requesting a preliminary ruling by the Court of Justice.

e) Since, against this backdrop, the OMT programme constitutes an *ultra vires* act if the framework conditions defined by the Court of Justice are not met, the German *Bundesbank* may only participate in the programme's implementation if and to the extent that the prerequisites defined by the Court of Justice are met; i.e. if

• purchases are not announced,

• the volume of the purchases is limited from the outset,

• there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted,

• the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds,

• purchased bonds are only in exceptional cases held until maturity and

• purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.

f) Their responsibility with respect to European integration does not require the Federal Government and the *Bundestag* to take action against the OMT programme in order to protect the overall budgetary responsibility of the *Bundestag*. If interpreted in accordance with the Court of Justice's judgment, the OMT programme does not present a constitutionally relevant threat to the *Bundestag's* right to decide on the budget. Therefore, it can currently also not be established that implementation of the OMT programme would pose a threat to the overall budgetary responsibility.

g) However, due to their responsibility with respect to European integration (*Integrationsverantwortung*), the Federal Government and the *Bundestag* are under a duty to closely monitor any implementation of the OMT programme. This compulsory monitoring shall determine not only whether the abovementioned conditions are met, but also whether there is a specific threat to the federal budget – deriving in particular from the volume and the risk structure of the purchased bonds, which may change even after their purchase.