

Rebel Without a Good Cause: Karlsruhe’s Misguided Attempt to Draw the CJEU into a Game of “Chicken” and What the CJEU Might do About It

By *Mattias Kumm* *

A. Introduction: Karlsruhe’s Game of “Chicken”

When the Federal Constitutional Court (hereinafter FCC) decided to refer the question of whether the European Central Bank’s (ECB) decision on the purchase of Outright Monetary Transactions (OMTs) is compatible with EU primary law, it effectively forced the Court of Justice of the European Union (CJEU) into a game of “chicken.”

“Chicken” is a game in which two drivers drive towards each other on a collision course. If neither of them swerves, both may die in the crash. But if one driver swerves and the other does not, the one who swerved is a coward (a “chicken”). The best outcome for each player is to go straight while the other swerves (a crash is avoided and the other is the “chicken”). A crash is presumed to be the worst outcome for both players. This yields a situation where each player, in attempting to secure his best outcome, risks the worst. One strategy for playing this game is to disable the steering wheel in a way clearly visible to the other party. The only way to avoid the crash is then for the other party to swerve, given that the first party has effectively pre-committed itself not to swerve.

The FCC has decided to disable the steering wheel and has limited its own options by largely pre-committing itself to declare the ECB’s policy unconstitutional, unless the CJEU follows the interpretative approach laid out by Karlsruhe. To elucidate the exact structure of this game and to understand the options available to the two major actors, part B of this essay will (I) briefly describe the specific legal context of the reference as the FCC sets it up, then (II) assess possible ways the CJEU might and perhaps should respond, and (III) finally discuss what options the FCC will have available to it, once the CJEU has responded.

The third part of the essay will analyze more closely why the FCC seeks to engage the CJEU in a game of chicken over the ECB’s OMT decision. In the 1955 classic Warner Brothers

* Research Professor for “Globalization and the Rule of Law,” WZB Berlin and Inge Rennert Professor of Law, NYU School of Law. Email: mattias.kumm@wzb.eu.

movie *Rebel Without a Cause*, Buzz, a high school bully, pushes Jim, the character played by James Dean, to play a version of “chicken.”¹ There is little more that motivates Buzz to challenge Jim than hurt pride, and the struggle to maintain his status, power, and identity as a leader in light of perceived challenges by the new kid on the block.

Of course the FCC does not present itself as a bully like Buzz, but claims to have a sound constitutional cause: To safeguard democracy and a meaningful right to vote. In the background, and, as we will see, looming quite large, is also the possibility that the constitutional identity, protected by the German Basic Law’s so-called eternity clause in Art. 79 III, is at stake. But the FCC’s constitutional claims are deeply misguided. Its arguments for engaging in *ultra vires* review of European Union acts on the grounds of protecting the individual’s right to vote is ill-conceived, even in the relatively deferential post-*Honeywell*² style. And even if one accepted the established doctrinal framework as a premise, the FCC’s application to the facts of the case is not convincing. Nor is the invocation of democratic statehood as a principle that establishes absolute limits of integration under the eternity clause plausible. Such a reading of the eternity clause is misguided on semantic, historical, systematic, and comparative grounds. Instead of insisting on absolute boundaries of integration, an FCC serious about democracy should redirect its attention and consider the consequences of the constitutional requirement that the European Union must meet democratic requirements. In its current incarnation, the FCC is a rebel without a good cause.³

B. “Chicken”: The State of Play

I. Making a reference: The taunt to play “chicken,” not submission

The fact that the FCC has made a reference to the CJEU for it to pronounce whether the European Central Bank’s OMT decision is compatible with EU primary law is less remarkable than much of the press commentary suggests. While the FCC has never made a reference to the CJEU itself, it did not do so because the FCC required other courts to make references before the case reached the FCC. The FCC has interpreted Article 101 of the Basic Law that establishes the right of every person to her legally designated judge as requiring the highest national courts to make use of preliminary reference procedure

¹ *REBEL WITHOUT A CAUSE* (Warner Bros. 1955). In fact the game that Buzz challenges Jim to in that movie is called “chicken run” and is structured slightly differently: Both cars race towards an abyss and the “chicken” is the person who jumps out first.

² Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06, 126 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 286 (July 6, 2010) [hereinafter *Honeywell Decision*].

³ And one would have to be generous beyond the interpretatively defensible not to associate the FCC with “Buzz,” rather than “Jim,” although trying to see the CJEU as the cool but troubled James Dean clearly leaves one confronted with the limits of this analogy.

under Art. 267 TFEU. Furthermore, even lower courts are required to make a reference to the CJEU before raising constitutional claims related to EU Law to the FCC.⁴ The FCC's description of a relationship of cooperation with the CJEU has substance and is more than empty talk. That the FCC did not make a reference in the context of the *Maastricht* or *Lisbon Treaty* decisions is equally unsurprising, given that those Treaties had not yet entered into force, leaving the ECJ without jurisdiction. The court probably should have made a reference in the *European Arrest Warrant* case,⁵ but at least formally that decision was focused on the German law implementing the EU Law Directive. So this is the first time that the FCC has actually made a reference to the CJEU. But in doctrinal terms the FCC merely implements the long established position that the CJEU must have an opportunity to pronounce on the question whether a European act is *ultra vires*, before the Constitutional Court makes its determination. Because the FCC is the first and only German court to hear the claim, it must make a reference both under Art. 267 TFEU and Art. 101 Basic Law, and it has done so here.

But of course that does not mean that the court has submitted itself to the authority of the CJEU. On the contrary, the FCC has already pronounced itself on how it sees the issues. It has not only provided reasons for its belief that the ECB's OMT policies are *ultra vires*. (There is nothing unusual in referring national courts or tribunals providing their views of an interpretative issue in the context of a reference.) The ordinary legal question of whether an EU act is or is not *ultra vires* is generally and uncontroversially left to the CJEU to decide. What the FCC, since its *Maastricht* decision, has insisted upon is that the CJEU itself is an actor that might act *ultra vires* in its interpretation of the EU's competencies. If an act, even an act held by the CJEU to be within the EU's competencies, is in fact determined by the FCC to be *ultra vires* in a *specifically qualified way*, then those acts are not constitutionally authorized under German law and thus not binding in Germany.⁶ In *Honeywell* the FCC elaborated that such a *qualified ultra vires* act exists, when its *ultra vires* nature is *evident* and it leads to a *structurally significant shift of competencies* away from Member States.⁷ In its reference to the CJEU the FCC has already determined that the *Honeywell* conditions are met in the case of the ECB's OMT decision.⁸

⁴ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 3/08, 129 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 186 (Oct. 4, 2011), at paras. 56–59, for the most recent decision.

⁵ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2236/04, 113 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 273 (July 18, 2005).

⁶ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (Oct. 12, 1993), at para. 106.

⁷ *Honeywell Decision* at headnote 1(a).

⁸ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2728/13 (Jan. 14, 2014), <http://www.bundesverfassungsgericht.de/en/index.html> [hereinafter *Jan. 14, 2014 Decision*], at para. 55 et seq.

The FCC is playing a game of chicken using a pre-commitment strategy: The FCC and the CJEU both claim jurisdiction to assess as ultimate arbiters of constitutionality whether EU acts are within the EU's competencies and they want to avoid direct conflict. In the past the FCC's strategy has been to draw lines in the sand doctrinally ("you must not cross this line, we will defend it!") only to determine that the measures it was assessing met the relevant standards, thereby avoiding conflict. Procedurally the FCC has always insisted that because of its role as guardian of the national constitution, it was a relevant veto player that could insist on certain conditions limiting the authority of EU Law. But substantively it left everything standing as it was. For these reasons the FCC was described by some as the dog that barks but does not bite.⁹ Now the FCC has shifted gear: It has provided an interpretation that establishes the ECB's OMT decision as a constitutionally qualified violation of EU Law (unless the policies were severely curtailed and limited to fit primary law) and then sent it to the CJEU to have that decision confirmed. Note that for all practical purposes the substantive decision has been made: These policies will not stand in their present form. Deference is only procedural—the CJEU is given the opportunity to successfully assert its role as the arbiter of the EU's competencies, but its decision will not be binding constitutionally in Germany, unless it follows parameters laid out by the FCC. The implicit message to the CJEU is clear: Either you play along and confirm our interpretation (chicken!), or there will be open constitutional conflict (the crash!).

II. How to Respond? The Options of the CJEU

So how might the CJEU respond? What might its strategy be in this game of chicken? There are four possible responses. First, the CJEU could refuse to play the game—it could hold the reference to be inadmissible. The ECB has not in fact acted yet under its declared policy, and the CJEU is not in the business of answering general hypothetical questions. It is unlikely, however, that the court will follow this path. It has in the past granted considerable leeway to national courts when determining whether a reference is admissible. When the reference is from a prominent court that in the past has been reluctant to make reference, the CJEU is likely to be even more disposed to engage the reference constructively. Furthermore it will not want the FCC to be able to claim that no adequate and effective legal protection against the concerns raised by the FCC is provided by the CJEU. So the court will probably play. But how will it respond? Second, it could straightforwardly reject the interpretation of the FCC and insist that the ECB's policies are within the ECB's mandate, thereby challenging the FCC to follow through on its threat. That would be a confrontational choice that would almost certainly lead to a direct confrontation, given the position articulated by the FCC in its reference. The CJEU is likely to shy away from this, if there are more promising options. Third, the court could follow

⁹ Peter Lindseth, *Barking vs. Biting: Understanding the German Constitutional Court's OMT reference ... and its implications for EU Reform*, EUTOPIA LAW (Feb. 10, 2014), <http://eutopialaw.com/2014/02/10/barking-vs-biting-understanding-the-german-constitutional-courts-omt-reference-and-its-implications-for-eu-reform/>.

the interpretation provided by the FCC wholesale. That, however, is not very likely. The legal arguments presented by the FCC relating to the competencies issue, although analytically refined, subtle, and not obviously implausible, are not compelling. Plausible counterarguments, equally complex, are available and have been made (more about that below). In such a legal context other factors are likely to be decisive: The CJEU has historically seen itself as the motor of integration and has laboured extensively interpretatively to allow EU organs to expand their domain of action. (The recent *Pringle* decision¹⁰ certainly does not undermine this description.) The policies declared by Draghi appear to be a remarkable success story. They succeeded to calm the markets and helped create a greater level of stability. This is a success story that the CJEU would have no interest to undermine.

Much more plausible and considerably more likely than any of the above options is a fourth option: The FCC has suggested that the ECB OMT policies could be interpreted in a way that would make it compatible with primary law.¹¹ For this to be the case, the OMT policies would have to be interpreted to ensure that they do not undermine European Financial Stability Facility (EFSF) and European Stability Mechanism (ESM) policies and have a merely supportive character for the EU's economic policies. The CJEU is likely to accept this general formula. It would do well, in particular, to emphasize the nexus to the ESM process. But there should be disagreement on the specific implications of the formula. The FCC has insisted that (1) losses on bond purchases have to be excluded (effectively this would probably require the ECB to ensure for itself preferred creditor status), (2) that there would have to be limits on the amount of debt purchased, and that (3) interference with the price mechanism should be avoided.¹² It would be risky for the CJEU to follow the FCC, given that it is not clear that fulfilling these requirements might not effectively gut the ECB's policies and render them ineffective. Under the circumstances it might be attractive for the CJEU to adopt the general formula, insisting in particular on connecting those OMT policies to the ESM procedure and ESM conditionality, but to refuse to provide any further specific restrictions. Whatever further restrictions might be derivable from the formula is to be worked out by the ECB in the design of its future policies and can then be challenged, if necessary, in future litigation. The CJEU would neither follow the FCC all the way, nor would it directly contradict it. It would leave key issues open. The CJEU would follow the FCC's formula, but refrain from giving it the severely constraining content the FCC is insisting on, instead granting deference to the ECB and kicking the can down the road.

¹⁰ *Pringle v. Ireland*, CJEU Case C-370/12 (Nov. 27 2012), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

¹¹ *Jan. 14, 2014 Decision* at para. 99 et seq.

¹² *Id.* at para. 100.

III. The Turn to Constitutional Identity and its Consequences

If a judgment along these lines describes a likely and plausible path, what kind of response would then be open to the FCC? First, it would be very difficult for the FCC to claim that such a qualified endorsement of the ECB's policies would meet the *Honeywell* criteria and constitute a clear and obvious violation of EU primary law. The CJEU's response along the lines sketched above would be too engaged, partially adopting the position of the FCC, not contradicting directly the FCC, merely leaving open some core points for determination in the future.

But at this point the FCC has set itself up nicely to switch gears: It would introduce the eternity clause as an absolute limitation to European integration. Note that by the time the FCC will address the issue, it is likely to have already laid down a quite detailed basic framework. It can be expected that when the FCC hands down its substantive judgment on the ESM and Fiscal Compact this March that it will use the opportunity to provide an *obiter dictum* that insists that any interpretation of EU mechanisms and competencies effectively burdening Germany with risks of significant financial losses beyond those specifically agreed upon and signed off on by the German Parliament will be a step too far and effectively violate Germany's constitutional identity under Basic Law Art. 79 III. The court would effectively constitutionalize as part of Germany's constitutional identity central elements of the requirements it laid down for interpreting the Draghi policy for it to conform to EU primary law. If it did this, it would put more pressure on the CJEU to "chicken out" and fully conform to the FCC's requirements. A CJEU that adopted the position described above would not satisfy the FCC. So would this amount to the dreaded "crash"? What would the practical implications be?

On the one hand, the ECB has not acted on its policy yet—it has not engaged in any OMTs—and many hope that will remain so indefinitely.¹³ If so, the conflict remains hypothetical. On the other hand, if the FCC establishes conditions that would delegitimize a particular future emergency bond-buying program by the ECB as incompatible with the German constitution, then German officials might find themselves under a constitutional duty to prevent it. This they could do, for example, by being obstructive in the context of the ESM procedure. With a strong nexus between that procedure and the ECB's bond buying policies, the possibility for German constitution-based obstruction grows.

Of course the dynamics might also go another way. Imagine a scenario where under pressure from capital markets and European colleagues, German officials are unable to resist pressure to support and coordinate with the ECB a major bond-buying program of a Member state in crisis. "German officials are undermining German constitutional identity,

¹³ Ingolf Pernice, *Karlsruhe wagt den Schritt nach Luxemburg*, VERFASSUNGSBLOG (Feb. 10, 2014), <http://www.verfassungsblog.de/de/karlsruhe-wagt-den-schritt-nach-luxemburg/#.UxoWaoU9Ozl>.

as established by the FCC!," some will shout outraged. But there might be a powerful response to that. Lawyers—and others—defending the actions of those German officials might well argue that the interpretations provided by the FCC in these judgments ought not to restrict their actions, because its judgments qualify as acts *ultra vires*: They clearly and obviously move beyond the boundaries of what can count as plausible interpretation of the German constitution, so they might claim. Implausible? Not in principle. Note how what appears to be scandalous in such an assertion is just the mirror image of the doctrinal constructions used by the FCC with regard to the actions of EU judges. What is sauce for the goose must be sauce for the gander.¹⁴ The question is whether the FCC's approach to these issues is a defensible interpretation of the German constitution or whether it might plausibly be seen as an act *ultra vires* that would require German officials to ignore it.

C. Rebel Without a Good Cause: At What Point Would Karlsruhe be Acting *Ultra Vires*?

The judges writing for the majority claim to have a sound constitutional cause: *Ultra vires* review has its grounds in the FCC's duty to safeguard democracy and a meaningful right to vote. In the background, and, as we have seen, looming quite large as a central piece of the overall puzzle, is the constitutional identity protected by the German Basic Law's so called "eternity clause" in Art. 79 III. So why are the FCC's constitutional claims deeply misguided?

I. Constitutional Identity and Absolute Limits of Integration

I will start with the claim that German constitutional identity clause can be plausibly brought into play as an absolute limit to integration. This was, of course, not an issue highlighted in the reference that the court has made. But the first point to make here is that it should have been. The FCC explicitly stated that it might very well later on have to assess whether the interpretation provided by the ECJ affects the guarantees under the eternity clause.¹⁵ Given that what will be at issue then are the contours of the constitutional identity guarantee of Art. 4 TEU as embodied in Basic Law Art. 79 III, the invocation of constitutional identity necessarily raises questions of interpretation of EU Law on which the FCC ought to make a reference to the CJEU, before it makes its

¹⁴ Armin von Bogdandy and his team in Heidelberg have brought into the discussion the idea of a European "reverse Solange" doctrine. It might be worthwhile to also consider the introduction of a "reverse *ultra vires*" doctrine. It would function as a check to allow the CJEU to interpret and check whether national actors, including national courts, have provided a plausible interpretation of their constitutional identity under Art. 4 TEU, or whether their interpretation constitutes an act *ultra vires* incompatible with the shared principles of constitutionalism under Art. 2 TEU. Mirroring *Honeywell* such an act might be *ultra vires*, if it is clearly and evidently not compatible with a plausible interpretation of Art. 2 values or it places unreasonable burdens on the attainment of common European objectives.

¹⁵ *Jan. 14, 2014 Decision*, at para. 102 et seq.

determination.¹⁶ If the Court were to invoke Art. 79 III Basic Law when the case comes back from Luxembourg, it would have to make another reference to the CJEU, given that it has not done so in its first reference.

But quite apart from these procedural points, if the above description of the state of play is correct, substantive arguments surrounding constitutional identity are likely to move to the foreground very quickly, both when the court hands down its final judgment of the ESM and Fiscal Compact later on this March and when the FCC eventually responds to the ECJ's opinion. The focal point is likely to be the possibility of considerable losses on bond purchases by the ECB and its fiscal implications for Germany. If the ECB's claim to be able to incur such risks with potentially considerable fiscal implications for Germany qualifies as an infringement of the constitutional identity of the democratic state, this would have severe consequences: Merkel's coalition government could not simply initiate Treaty reforms and introduce provisions that specifically authorize the ECB to purchase such bonds, that the Bundestag could ratify later on. Even an ordinary amendment of the constitution would not save such reforms. Under conventional constitutional wisdom, an act of constituent power would be required. What this amounts to is procedurally not entirely clear, but it would have to be an act that qualifies as an act of constituent power,¹⁷ which would probably require a referendum.

But is it plausible to read Art. 79 III that way? Does the guarantee of democratic statehood really preclude significant further steps of financial integration? I do not think such an argument is plausible. In the following I will seek to approach the issue as a simple question of conventional legal analysis, undertaken *lege artis* by engaging the conventional canons of constitutional interpretation. Nothing in the following is original, it has been said before. But it has to be repeated again, so that it is not drowned out by the court's misguided persistence since its Maastrich decision in 1991. Only frequent repetition, not careful analysis or argument, sustains the foundations of the court's current approach. There is no reason not to insist that it changes course.

To begin with a simple semantic point: Even if European competencies extended to include full-fledged taxing powers, would that mean that Germany no longer qualified as a democratic state? Of course not. States do not stop being states by giving up considerable powers and subjecting themselves to more extensive legal and political communities. Bavaria and Texas have not stopped being democratic states, just because they exercise taxing powers concurrently with federal governments. Not surprisingly this kind of argument has, as far as I can see, not been raised by a single other court in any of the other

¹⁶ For a discussion of these issues see Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Supremacy Before and After the Constitutional Treaty*, 11 EUR. L. J. 262, 302–03 (2005).

¹⁷ The dominant view is that an act of constituent power can validly bring about changes of even the basic guarantees of Art. 79 III of the Basic Law.

26 EU jurisdictions. This invites a second important point: The court's lack of use of comparative arguments. Given that the court is interpreting the meaning of the universal idea of democratic statehood, a concept that is part of the shared constitutional heritage of Member States and not an idiosyncratic national commitment, why does it not engage in any serious way the jurisprudence of other Member States courts on this point? The answer, of course, is that no other state and no other court has raised a similar concern. But that is a legally relevant fact in a community held together in part by a shared constitutional heritage. It is a grave failure of judicial hermeneutics in such a context not to reflect on and engage the comparative practice, or the lack of it. It should raise suspicion that only the German Constitutional Court provides an interpretation of democratic statehood precluding further financial integration. Could it be that reference to universal legal concepts mask national interests or populist inclinations? The argument becomes even more untenable in light of the specific *historical context* of the German constitution. The Basic Law was generated at the behest of the occupying powers after WWII and required their consent, before it could enter into force. Germany was not a sovereign state then and so, not surprisingly, there is no reference to sovereignty anywhere in the constitution.¹⁸ Endowing the concept of democratic statehood with competencies traditionally associated with sovereignty would be misguided in the context of the German constitution. On the other hand, at the time of its negotiation, ambitious ideas about a united Europe were part of the political debates. That is why a united Europe has, from the beginning, been featured as a reference point in the Preamble of the Constitution and, after reunification, also in Art. 23 of the Constitution. It is unthinkable that in such a context anyone would have imagined that the guarantee of democratic statehood as laid down in the Basic Law would preclude integration even in federalized European structures. Given the reference to a united Europe and the absence of any mention of sovereignty, there is also a strong *systematic* argument against such a reading. What follows from all of this is that the universalist principles at the heart of German constitutional identity cannot plausibly be marshaled against the transfer of competencies on the European level, when the transfer and exercise of such competencies is compatible with the principle of subsidiarity and the exercise of European public powers itself meets democratic standards. An ambitious German Constitutional Court seeking to have its voice heard as part of the choir of European constitutional courts might well be inclined to critically assess and work out what these principles commitments might amount to. But the Art. 79 III of the Basic Law provides no basis for the kind of statist recalcitrance that has informed the FCC's interpretation of the concept of democratic statehood since its post-reunification *Maastricht* judgment.

¹⁸ Erhard Denninger, *Vom Ende nationalstaatlicher Souveränität in Europa*, 55 JURISTENZEITUNG 1121, 1122 (2000).

II. Ultra Vires Review

The arguments for engaging in *ultra vires* review of European Union acts on the grounds of protecting the individual's right to vote are also ill conceived. The argument seems simple enough: If all authority exercised on German territory has to be derived from the German people, then the grounds for the application of EU Law in Germany is the act of ratification, involving German public authorities and the Bundestag specifically. If institutions established under the Treaty seek to expand their authority beyond what is conferred on them they act *ultra vires*, the link between the people and the actions of those authorities is severed and its legitimacy impinged. Of course the CJEU is tasked to ensure that that does not happen, but the CJEU is itself an actor that can act *ultra vires* when it effectively amends the Treaty under the guise of interpreting it. Some degree of deference is to be given to the CJEU, but the limits of that deference are to be determined by the FCC and have been defined in its *Honeywell* decision.

Here it must suffice to lay out very briefly (1) why such a framework is not plausible and even if it were, (2) why its concrete application is misguided.

1. Ultra Vires Review is not Plausible

The basic premise of this construction is that all public authority claimed by the laws has to be derived from authorizations of "We the People" either through their constitution or through legislation. But of course it is not at all obvious why that should be so. Why should "We the People" be thought of as having original authority to determine whether and to what extent national policies inflict harms on outsiders, whether this concerns foreign policy, environmental degradation, or economic discrimination? It is simply an unstated and deeply implausible presumption to think of "We the People" on any territory to be in authority with regard to all of the laws that govern them, given that the purpose of many of them is to ensure that states do not unjustly inflict harm on one another.¹⁹ International law is not based on state consent.²⁰ If we sometimes say otherwise, we mean it in much the same way as when we say that domestic law is based on the consent of citizens. Many international laws are binding on states without having consented to them, much like many laws are binding on citizens, even if they opposed them. Yes, Member States are part of the European Union in virtue of having consented to it. But that does not give them the authority to determine unilaterally whether acts emanating from the institutions of the European Union are to be regarded as binding or not.²¹ There may have been times when

¹⁹ See Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOBAL LEGAL STUD. 2013, 605.

²⁰ *Id.*

²¹ *Id.*

it was justified for a Member State court to set aside legislation on the grounds that it violated human rights as interpreted by a domestic constitutional court. Such authority may be claimed exceptionally, when the law of the larger legal order suffers from some structural defects—for example the lack of meaningful human rights review.²² Similarly, if there were no adequate safeguard against usurpation of powers by EU actors, then structural deficits might well be compensated by subsidiary review by national institutions. But at this point it is not clear whether there is a competence-related structural deficit.²³ True, the CJEU as the guardian of the Treaties has historically played the role of a motor of integration.²⁴ As such it played a constitutionally constructive role to occasionally overcome collective action problems of Member States to more clearly provide the EU with the competencies it needed to fulfill its politically desired function. The general interpretative approach to competencies by the CJEU has been justified persuasively with reference to the overall point and structure of the EU's constitution. Of course there have also been individual bad decisions. How could that not be? But the CJEU not only has jurisdiction to review whether acts of the EU are *ultra vires*, it has struck down EU acts on that ground a number of times in the past decade.²⁵ There is no justification for claiming a structural deficit that might authorize subsidiary review powers by national actors. Fears are more appropriately focused on temptations by national actors, including national courts, to use *ultra vires* arguments to score populist points in situations where politically salient national interests are in play. The powers and biases potentially pushing national constitutional courts to unduly block and sabotage EU actions may turn out to be more forceful than any powers and biases potentially pushing the CJEU to act in favor of expanding EU powers.

²² See the so-called “Solange” or “As-long-as” decision: Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvL 52/71, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 271 (May 29, 1974).

²³ See Mattias Kumm, *Constitutionalizing Subsidiarity in Integrated Markets: Case of Tobacco Regulation*, 12 EUR. L. J. 503–533 (2006), for a discussion of these issues.

²⁴ See, e.g., INGOLF PERNICE, DAS VERHÄLTNIS EUROPÄISCHER GERICHTE ZU NATIONALEN GERICHTEN IM EUROPÄISCHEN VERFASSUNGSVERBUND 22 (2006).

²⁵ E.g., Comm'n v. Council, CJEU Case C-137/12 (Oct. 22, 2013), [http://curia.europa.eu/juris/recherche.jsf?language=en.](http://curia.europa.eu/juris/recherche.jsf?language=en;); Parliament v. Comm'n, CJEU Cases C-317/04, C-318/04, 2006 E.C.R. I-4721; Germany v. Parliament, CJEU Case C-376/98, 2000 E.C.R. I-08419.

2. Ultra Vires Review Applied

But even if one were to accept the constitutional authority of the FCC to subject EU Law unilaterally to some kind of *ultra vires* review and also accept the *Honeywell* test, its application to the facts of the case remains audacious. As a preliminary point, is it plausible to claim that an act is clearly and evidently *ultra vires*, when, in a culture where judicial dissents are rare, there is at least one judge on the bench who files a written dissent in part because he is apparently not convinced that the act is *ultra vires* at all?²⁶ A close reading of the judgment leaves one perplexed. At first it is difficult not to admire the level of craftsmanship and attempts at conceptual clarity that characterizes the analysis of the court. But the more time is spent thinking through the arguments, while also drawing on the official ECB justification for its policies under its mandate, there is one overwhelming impression: The links between monetary and economic policies are close and complicated. The specific lines drawn by the FCC for the purposes of constructing an interpretation that would make the Draghi policies conform to EU primary law have a political purpose: They should be seen as an attempt to ensure political control over the ECB's actions by way of ESM conditionality (a legitimate concern for the CJEU to address) and to work towards minimizing the financial risks for Germany.²⁷ It is significantly less clear that these lines are particularly plausible as lines that define the boundary between monetary and economic policies. Indeed, given the complexities involved, there is a good case to be made for deference in favor of the ECB, in particular if that deference is effectively checked politically by linking it to the ESM mechanism. This is an area that both the CJEU and the German FCC are not well equipped to address. It would be misguided to put the ECB on a short leash by way of highly policy-sensitive doctrinal categories. In fact I am not aware of any court anywhere in the world trying to review central bank policies on competence grounds in a comparable way. But whatever the case might be, it is clearly and evidently implausible to claim that the ECB's policies are clearly and evidently in violation of the EU's competencies. The most plausible candidate for a clear and evident *ultra vires* act in this drama would be a judgment of the FCC declaring the ECB's policies incompatible with the German constitution.

D. Conclusion: The Structure of Constitutional Hubris

In *Rebel Without a Cause*, Buzz, the high school bully who challenges the James Dean character to a game of "chicken run," becomes the unfortunate victim of his taunts: He ends up getting killed while playing the game, getting stuck in his car.

The FCC, too, is playing a risky game. First, procedurally its reference amounts to forcing the CJEU into a game of chicken, while denying the court any input on the issues relating to

²⁶ See *Jan. 14, 2014 Decision* (Gerhardt, J., dissenting).

²⁷ See the reasoning of the FCC in the *Jan. 14, 2014 Decision* at para. 89.

German constitutional identity, notwithstanding its connection to Art. 4 TEU. Here the FCC interprets its relationship of cooperation in a way that elevates itself into a position of authority it cannot rightly claim and denies the CJEU the respect it is legally due. Second, substantively the position of the FCC seeks to impose detailed judicial control over technocratic processes, instead of restricting itself to strengthening political control over such processes. It can be hoped that the CJEU will endorse the FCC's claim that it is required for the ECB to hereby align its policies with the politically controlled ESM mechanism. The CJEU has no reason to follow the FCC and deny the ECB any meaningful discretion to draw the line between economic and monetary policies. More generally the FCC has worked out its positions using a doctrinal framework, whose foundations are constitutionally implausible.

It can be hoped that the FCC has not maneuvered itself into a corner, leaving no way of escape without great damage being inflicted. And if the FCC does inflict damage, it can only be hoped that it will be focused on its reputation and effectiveness and not on European citizens, who will be denied the benefits of legally sound and politically effective mechanisms to address the financial crisis in Europe.