Special Section
The CJEU's OMT Decision

After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States

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Abstract

This article analyzes the recent judgment of the European Court of Justice (ECJ) in *Gauweiler*, answering the first preliminary reference ever by the German Constitutional Court (BVerfG), on the legality of the Outright Monetary Transaction (OMT) program of the European Central Bank (ECB). As the article explains, the ECJ rejected any possible claim of illegality of a key program devised by the ECB at the height of the Euro-crisis. However, because the BVerfG had defined the OMT program as ultra vires, and had threatened to strike it down if the ECJ did not reach the same result, the article defends the principle of the supremacy of European Union (EU) law, indicating that a possible nullification of the OMT program by the BVerfG would be clearly unlawful. To re-affirm the supremacy of EU law, the article argues that this principle is functional to ensure the equality of the member states before the law, preventing each country of the EU from cherry-picking which provisions of EU it likes or not. As the article suggests, respect of the principle of the supremacy of EU law — including by the BVerfG — is ultimately in the interest of every EU member state, including of Germany.

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A. Introduction

On 16 June 2015, the European Court of Justice (ECJ) delivered its judgment in *Gauweiler*.[1] In this case, the ECJ answered the first preliminary ruling ever raised by the Bundesverfassungsgericht (BVerfG), concerning the legality of the Outright Monetary Transaction (OMT) program designed by the European Central Bank (ECB) at the height of the Euro-crisis.[2] The OMT program — which followed on ECB President Mario Draghi's pledge to do "whatever it takes" to save the euro[3] — allowed the ECB to purchase government bonds on the secondary market when necessary to restore the normal transmission of monetary policy stimulus, on the condition that the member state(s) concerned entered a program of economic adjustment.[4] In its preliminary reference, the BVerfG had been explicit in describing the OMT program as in violation of European Union (EU) law and asking the ECJ to strike down the challenged measure as ultra vires.[5] Moreover, the BVerfG had reserved to itself a right to invalidate the OMT program in Germany if the ECJ had not followed its interpretation.[6] In *Gauweiler*, however, the ECJ soundly rejected the view that the OMT program exceeded the powers conferred to the ECB by the EU Treaties and that violated the prohibition of monetary financing, fully backing the action of the ECB.

For many years now, the ECJ and the BVerfG have been advancing incompatible claims about their relations within the EU multilevel constitutional order.[7] While the ECJ has always held that EU law prevailed over conflicting national law, and that, as a corollary of this, only the ECJ was entitled to rule on the validity of a measure of EU law,[8] the BVerfG has advanced opposite claims, reserving to itself the power to review whether action by

[1] Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag (June 16, 2015), http://curia.europa.eu/.

[2] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 2014, Case No. 2 BvR 2728/13, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html.

[3] *See* Mario Draghi, Speech at Global Investment Conference, London (July 26, 2012), *available at* http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html (last visited Aug. 11, 2015).

[4] EUR. CENT. BANK, *Technical Features of Outright Monetary Transaction*, (Sep. 6, 2012), *available at* http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (last visited Aug. 11, 2015).

[5] For an analysis of the BVerfG preliminary reference, see the case notes collected in 15 GERMAN L.J. (2014) (issue 04).

[6] BVerfG, Case No. 2 BvR 2728/13 at para. 5.

[7] *See* Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511 (2002) (introducing the concept of multilevel constitutionalism to define the relationship between the ECJ and national courts in the EU).

[8] *See* Bruno De Witte, *Direct Effect, Supremacy and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 177 (Paul Craig & Grainne de Burca eds., 1999).

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the EU institutions — including by the ECJ — complied with the integration mandate authorized by Germany through the ratification of the EU Treaties.[9] Until now, the ECJ and the BVerfG had found ways to accommodate their stands, averting a direct confrontation, and this unsettled arrangement attracted the praise of many scholars.[10] However, the case of the OMT program reveals the dangers connected with this protracted ambiguity. With the OMT case now pending again before the BVerfG,[11] an outright defiance by Germany's highest court of the decision of the ECJ —with the consequential nullification of the act of the ECB in Germany — appears an increasingly likely prospect.

Faced with this threatening scenario, this article makes a new case in favor of the supremacy of EU law. This article argues that EU law should be interpreted as unequivocally trumping conflicting national law, and prohibiting a member state's highest court from unilaterally nullifying an EU act. In fact, following the judgment of the ECJ upholding the legality of the OMT program of the ECB, it should be, in my view, crystal clear that any ruling by the BVerfG invalidating a measure of EU law upheld by the ECJ, and suspending its effect in Germany, would be blatantly unlawful. After *Gauweiler*, a possible decision by the BVerfG to disobey the ECJ should be treated as a breach of EU law — and should be pursued by the EU institutions (as well as by the German political branches of government) as a danger for the survival of the EU. At a time where the future of the Eurozone is at stake, the struggle over the legality of the OMT program of the ECB ought to be used as the opportunity to settle once and for all the constitutional uncertainty which has so far characterized the EU, and to affirm the supremacy of EU law.

In making the case for the supremacy of EU law, however, this article advances a new argument, based on equality between the member states. As the article explains, the struggle for supremacy should not be interpreted within a bilateral framework — opposing the ECJ to the highest court of a single member state: in casu, Germany. Rather, it should be appraised in a multilateral context, where action by one member state('s highest court) affects also the other member states (and their courts). When seen from this perspective, it appears that only the supremacy of EU law can ensure the equality of member states before the law. If a single member state('s highest court) could claim to decide unilaterally on the validity of EU law, this would put it above the other states, creating a situation of inequality where the law applies to some EU member states but not to others. Because the EU is based on a reciprocal delegation of powers by all the member states, if a single country, by the action of its highest court or otherwise, could set for itself the terms of its participation to the EU, this would undermine the mutual conditions on the basis of which the member states have decided to create a Union.

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[9] *See generally* BILL DAVIES, RESISTING THE EUROPEAN COURT OF JUSTICE (2012).

[10] *See generally* CONSTITUTIONAL PLURALISM IN THE EU AND BEYOND (Matej Avbelj & Jan Komarek eds., 2012).

[11] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 2728/13 (pending).

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Differently put, the article advances a transnational argument for the supremacy of EU law, suggesting that the case for supremacy should not be based on ontological claims, grounded in some inherent value or authority, but should rather be defended in light of the principle of equality between the states. Because of that, the article maintains that the possible counter-arguments do not bite. In particular, the article considers the possible criticisms that the member states retain Kompetenz-Kompetenz, that the EU treaties recognize the national identity of the member states, and that the principle of supremacy is not textually enshrined in primary law, but explains that none of these arguments is such as to lead to a restriction of the principle of supremacy as the guarantee of the equality between the member states. In conclusion the article suggests that respect for the rules is the best guarantee for the survival of the EU — a position forcefully advanced by Germany in the recent handling of the Euro-crisis. Yet, also the supremacy of EU law is a rule of the EU — and Germany's highest court is also bound by it. Settling the question of supremacy will be beneficial for every EU member state — including Germany.

The article is structured as follows. Section B summarizes the judgment of the ECJ in *Gauweiler*, explaining the reasoning of the ECJ in rejecting claims that the OMT program of the ECB violated its powers and the prohibition of monetary financing. Section C reflects on the implications of the ECJ judgment for the relation with the BVerfG and, anticipating a likely confrontation, makes the case for the supremacy of EU law. Here, in particular, I explain that supremacy should be seen as the necessary condition to guarantee the equality of the member states, and I clarify what would be the obvious risks connected to a situation where each member state (or its highest court) could decide on the application of EU law à la carte. Section D considers possible counter-arguments to the case in favor of the supremacy of EU law, but rejects the view that Kompetenz-Komeptenz, the recognition of national identity, or the absence of a textual codification of the principle of supremacy could introduce an exception to the supremacy of EU law. Section E, finally, concludes, underlining the importance of respecting rules — also by Germany('s highest court) — at a time when the future of the EU, and the Eurozone, is at stake.

B. The OMT Case

While the ECJ had already delivered important rulings on Euro-crisis related measures,[12] in *Gauweiler* the Grand Chamber was faced with the critical question whether the OMT program of the ECB violated EU primary law. As a preliminary matter, the ECJ set aside the procedural argument raised by an intervening party, according to which the ECJ should not have answered the case because the BVerfG in its preliminary reference did not accept as

[12] *See, e.g.*, Case C-370/12, Pringle v. Government of Ireland, Ireland and the Attorney General (Nov. 27, 2012), http://curia.europa.eu/; on which see Federico Fabbrini, *The Euro-Crisis and the Courts*, 32 BERKELEY J. INT'L L. 64 (2014).

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binding and definitive the interpretation to be provided by the ECJ. Rather, the ECJ observed "that, according to [its] settled case-law [. . .] Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States,"[13] and it strongly re-affirmed the principle that "a judgment in which the [ECJ] gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question, for the purposes of the decision to be given in the main proceedings."[14] Equally, the ECJ set aside the view that the case ought to be declared inadmissible because the OMT had never been put into operation, holding that "questions concerning EU law enjoy a presumption of relevance."[15] And it also discarded the claim that the challenge against the ECB ought to have been brought through a direct action of annulment,[16] rather than through a preliminary reference procedure, stating that "it [found] sufficient [that] the national court [wa]s seised of a genuine dispute in which the question of the validity of such an act is raised on indirect grounds."[17]

On the substance of the case, the ECJ separately addressed the questions: First, whether the OMT program exceeded the powers of the ECB in the field of monetary policy, as defined by primary law; Second, whether the action of the ECB violated the prohibition of monetary financing, enshrined in primary law. With regard to the former, the ECJ underlined as a starting point that "Article 3(1)(c) TFEU states that the Union is to have exclusive competence in th[e] area [of monetary policy] for the Member States whose currency is the euro"[18] and that, under the Treaties, "the ECB and the central banks of the Member States whose currency is the euro [. . .] are to conduct the monetary policy of the Union."[19] As the ECJ pointed out, with reference to its previous case law,[20] the ECB "is to be independent when carrying out its task,"[21] but, "[i]n accordance with the principle of conferral of powers set out in Article 5(2) TEU, the [ECB] must act within the limits of the powers conferred upon it by primary law."[22] In light of this, the ECJ engaged in an analysis

[13] *Gauweiler*, Case C-62/14 at para. 15.

[14] *Id*. at para. 16.

[15] *Id*. at para. 25.

[16] *See* Case T-492/12, von Storch v. ECB, Order of 10 December 2013 (EU General Court declaring inadmissible action for annulment against decision of the ECB), now appealed as Case C-64/14, P von Storch v. ECB, pending.

[17] *Gauweiler*, Case C-62/14 at para. 29.

[18] *Id*. at para. 35.

[19] *Id*. at para. 36.

[20] *See* Case C-11/00, Comm'n v. ECB, 2003 E.C.R. I-7147.

[21] *Gauweiler*, Case C-62/14 at para. 40.

[22] *Id*. at para. 41.

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of the limits between economic and monetary policy, holding that "in order to determine whether a measure falls within the area of monetary policy"[23] it was necessary to assess the objectives of the measures and the instrument used.[24]

According to the ECJ, the OMT program certainly fell within the scope of the ECB monetary policy. First, as regards the objectives, the program aimed "to safeguard both 'an appropriate monetary policy transmission and the singleness of the monetary policy'"[25] — and the fact that OMT "might also be capable of contributing to the stability of the euro area, which is a matter of economic policy [. . .] does not call that assessment into question."[26] Second, as regard the instrument used, the program "entail outright monetary transactions on secondary sovereign bond markets"[27] — but the ECB Statute granted to the ECB such a power,[28] and the "fact that the implementation of such a programme is made conditional upon full compliance with [...] macroeconomic adjustment programmes does not alter that conclusion."[29] As the ECJ pointed out, in fact, while OMT may "to some extent, further the economic policy objectives" of economic adjustment programs,[30]

> such indirect effects do not mean that such a programme must be treated as equivalent to an economic policy measure, since it is apparent from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union.[31]

Moreover, the ECJ ruled that the OMT program complied with the principle of proportionality. Following the Advocate General's advice,[32] the ECJ acknowledged that,

[23] *Id*. at para. 46.

[24] *Id*.

[25] *Id*. at para. 47.

[26] *Id*. at para. 51.

[27] *Id*. at para. 53.

[28] *Id*. at para. 54.

[29] *Id*. at para. 57.

[30] *Id*. at para. 58.

[31] *Id*. at para. 59.

[32] Opinion of Advocate General Cruz Villalón, Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag (Jan. 14, 2015), at para. 111,

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because the ECB is tasked "to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion."[33] Nevertheless, the ECJ also stated that "where an EU institution enjoys broad discretion, a review of compliance with certain procedural guarantees is of fundamental importance."[34] Those guarantees include the obligation for the ECB to examine carefully and impartially all the relevant elements of the situation in question, and to give an adequate statement of the reasons for its decisions.[35] Yet, the ECJ concluded that the OMT program passed the suitability and the necessity tests which are the core of proportionality analysis. As regards, in the first place, the appropriateness of OMT program, it held that "it does not appear that that analysis of the economic situation of the euro area [made by the ECB when launching the OMT program] is vitiated by a manifest error of assessment."[36] In fact,

> given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.[37]

As regards, in the second place, the necessity of OMT program, the ECJ ruled the action of the ECB did "not go manifestly beyond what is necessary to achieve [its] objectives."[38] As the ECJ pointed out, after its announcement the OMT program had never been implemented,[39] its activation is subject to the precondition that the state concludes a program of economic adjustment,[40] and "the commitments which the ECB is liable to enter

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http://curia.europa.eu/juris/document/document.jsf?text=&docid=161370&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10276.

[33] *Gauweiler*, Case C-62/14 at para. 68.

[34] *Id*. at para. 69.

[35] *Id*.

[36] *Id*. at para. 74.

[37] *Id*. at para. 75.

[38] *Id*. at para. 81.

[39] *Id*. at para. 84.

[40] *Id*. at para. 86.

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into when such a programme is implemented are, in fact, circumscribed and limited."[41] At the same time, in the ECJ's view the ECB "was fully entitled to take the view that a selective bond-buying programme may prove necessary in order to rectify that disruption [of the monetary policy transmission system],"[42] rendering OMT proportionate.

Having ruled that the ECB had not exceeded the powers conferred to it by the Treaties, the ECJ subsequently considered whether OMT violated the prohibition of monetary financing of Article 123 TFEU.[43] In this regard, while the ECJ emphasized that Article 18(1) of the Protocol on the ECB permits the ECB to operate in the financial markets,[44] it acknowledged that the ECB "does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU."[45] Yet, as it had done in the *Pringle* case,[46] the ECJ engaged in an historically–informed interpretation of the Treaties and it concluded that from the preparatory work of the Maastricht Treaty it emerged that the prohibition laid down in "Article 123 TFEU [was designed to] encourage the Member States to follow a sound budgetary policy."[47] Given the logic of Article 123 TFEU, the ECJ found that the features of the OMT "exclude the possibility of that programme being considered of such a kind as to lessen the impetus of the Member States to follow a sound budgetary policy."[48] First, the OMT program "provides for the purchase of government bonds only in so far as is necessary for safeguarding the monetary policy transmission mechanism and the singleness of monetary policy"[49] – and the states "cannot, in determining their budgetary policy, rely on the certainty that the ESCB will at a future point purchase their government bonds on secondary markets."[50] Second, the OMT program "is accompanied by a series of

[41] *Id*. at para. 87.

[42] *Id*. at para. 89.

[43] *Id*. at para. 94.

[44] *Id*. at para. 96.

[45] *Id*. at para. 97.

[46] *See also* ALICIA HINAREJOS, THE EURO AREA CRISIS IN CONSTITUTIONAL PERSPECTIVE 126 (2015).

[47] *Gauweiler*, Case C-62/14 at para. 100.

[48] *Id*. at para. 111.

[49] *Id*. at para. 112.

[50] *Id*. at para. 113.

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guarantees that are intended to limit its impact on the impetus to follow a sound budgetary policy."[51] Finally,

> the fact that the purchase of government bonds is conditional upon full compliance with the structural adjustment programmes to which the Member States concerned are subject precludes the possibility of a programme, such as that announced in the press release, acting as an incentive to those States to dispense with fiscal consolidation.[52]

As a last observation, the ECJ addressed the risk of the potential of losses to which the ECB would be exposed as a result of the OMT program — thus tackling an issue which had been of main concern for the BVerfG, this being the argument on the basis of which it had admitted the challenge against the OMT in the first place.[53] As the ECJ remarked,

> a central bank, such as the ECB, is obliged to take decisions which, like open market operations, inevitably expose it to a risk of losses and [. . .] Article 33 of the Protocol on the ESCB and the ECB duly provides for the way in which the losses of the ECB must be allocated, without specifically delimiting the risks which the Bank may take in order to achieve the objectives of monetary policy.[54]

Otherwise, the ECB Legal Service had emphasized that so far the OMT had cost nothing to the ECB, while preventing potential major losses which would have occurred had the Eurozone broke up — a development that could not be excluded before the OMT program was announced. Hence, the ECJ concluded "that Articles 119 TFEU, 123(1) TFEU and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB must be interpreted as permitting the ESCB to adopt a programme for the purchase of government bonds on secondary markets, such as the [OMT]."[55]

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[51] *Id*. at para. 115.

[52] *Id*. at para. 120.

[53] See Mattias Wendel, *Judicial Restraint and the Return to Openness: the Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, 14 GERMAN L.J. 21, 24 (2013) (explaining that the BVerfG adjudicated the case based on possible financial losses, and their negative effect on the right to vote).

[54] *Gauweiler*, Case C-62/14 at para. 125.

[55] *Id*. at para. 127.

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C. Re-affirming the Supremacy of EU Law

The ECJ judgment in *Gauweiler* puts the BVerfG on a collision course with the EU. In its preliminary reference, a six-judge majority of the BVerfG's 2nd Senate had been adamant in defining the OMT program of the ECB as incompatible with EU law.[56] Furthermore, over two strongly worded dissents,[57] the BVerfG had made clear that if the ECJ would not reach its same conclusion, it would still reserve to itself the power to strike down the OMT program as in violation of Germany's constitutional identity.[58] Because the ECJ decided to back the legality of the OMT program as fully compatible with EU primary law, it would seem inevitable for the BVerfG to disapprove of this ruling, and thus disobey it. If the BVerfG is to follow the pledge it made in the preliminary reference procedure to disregard a possible ECJ judgment with which it disagreed, it seems that the scene is set for the first explicit act of nullification of EU law by the BVerfG. This would precipitate into open war the cold conflict which has characterized for more than four decades the relation between the BVerfG and the ECJ.

As it has been suggested, it is still possible that the BVerfG may at the last minute avert a direct confrontation with the ECJ, by inventing an elegant way to backtrack on its pledge.[59] After all, the BVerfG has accustomed its observers with an approach of "barking without biting".[60] In all the previous cases in which it raised concerns about legal developments in the EU — from *Solange*, to *Bananamarkt*, to *Honeywell* — the BVerfG fired a warning shot against the ECJ, but ultimately managed to avoid a conflict with EU law, developing new concepts to reaffirm its stand while safeguarding the application of EU law.[61] Nevertheless, in this case the BVerfG seems to have taken a position which makes it a lot less easy for it to maneuver than in the past. By referring its first preliminary reference procedure to the ECJ, and explicitly threatening the ECJ that if it did not rule as it wished it would simply

[56] BVerfG, Case No. 2 BvR 2728/13 at para. 4.

[57] *Id*. (Separate Opinion of Justice Lübbe-Wolff and Separate Opinion of Justice Gerhardt).

[58] *Id*. at para. 5.

[59] *See* Matthias Goldman, *Mutually Assured Discretion*, paper presented at the conference on "The ECJ, the ECB and the Supremacy of EU Law" at iCourts, Center of Excellence for International Courts, Faculty of Law, University of Copenhagen (Sept. 2015) (on file with author).

[60] *See generally* Christoph Schmid, *All Bark and No Bite: Notes on the Federal Constitutional Court's 'Banana' Decision*, 7 EUR. L.J. 95, 95–113 (2001).

[61] *See generally* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 29, 1974, 37 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 271 (Solange I); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 6, 2010, Case No. 2 BvR 2661/06, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html (Honeywell).

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disregard its ruling, the BVerfG has dramatically reduced its options to avoid the collision. Unless the BVerfG is ready to make an about face, overturning its aggressive description of the OMT as a bluntly illegal program, we must expect to see the first act of defiance by the BVerfG against EU law.

This prospect should be reason for major concern to anyone interested in the survival of the EU. However, the precipitation of the events may actually lead to a welcome clarification of a key constitutional question in EU law: that of supremacy. Until today, the EU has been based on a fundamental ambiguity. While the ECJ has since the founding era held that EU law enjoys supremacy over state laws,[62] and, as a corollary of that,[63] that only the ECJ is empowered to rule on the validity of EU acts,[64] the BVerfG has adopted a diametrically opposite view, claiming that it held ultimate authority to review the legality of EU action on the basis of the act of delegation of powers from Germany to the EU.[65] Certainly, the position of the BVerfG is not exceptional: Several other national constitutional courts have, albeit to varying degrees, adopted a similar position.[66] In fact, in 2012 the Czech Constitutional Court even declared for the first time an EU act ultra vires, and thus inapplicable in the Czech Republic.[67] Yet, the BVerfG has been by far the most determined, and influential, court in opposing the ECJ, so the resolution of the conflict on the OMT program may have an evidentiary value for the entire Union.

While the struggle between the ECJ and national constitutional courts has been a favorite topic in European constitutional law,[68] a widespread belief among scholars appears to have been that the potential for a real conflict within the European Verfassungsgerichtsverbund was minimal.[69] A burgeoning literature generally identified with the label 'constitutional pluralism' has emphasized the ability of national constitutional courts to avert possible conflicts through dialogue and mutual accommodation.[70] In fact, constitutional pluralism

[62] Case 6/64, Costa v. ENEL, 1964 E.C.R. 585.

[63] *See* MONICA CLAES, THE NATIONAL COURTS' MANDATE IN THE EUROPEAN CONSTITUTION 562 (2006).

[64] Case 314/85, Foto-Frost, 1987 E.C.R. 4199.

[65] *See generally* Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 1 EUR. L.J. 259 (1995).

[66] *See, e.g.*, Trybunał Konstytucyjny, Case TK 32/09, judgment of Nov. 24, 2010 (Lisbon Treaty) (Poland); Højesteret, Case No. 199/2012 U 2013/1451H, judgment of Feb. 20, 2013 (Lisbon Treaty) (Denmark).

[67] *See* ÚS 5/12, judgment of Jan. 31, 2012 (Slovak Pension XVII) (Czech Republic).

[68] *See, e.g.*, THE EUROPEAN COURTS AND NATIONAL COURTS (Anne-Marie Slaughter et al. eds., 1998).

[69] *See* Andreas Voßkhule, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtverbun*, 6 EUR. CONST. L. REV. 175 (2010).

[70] *See* Miguel Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 501 (Neil Walker ed., 2003).

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has been hailed as the normatively superior theory to define a non-hierarchical regime such as the one of the EU.[71] However, notwithstanding its appeal in peaceful time, the theory of constitutional pluralism seems to face insurmountable difficulties at a moment in which a member state court such as the BVerfG has openly pledged to disobey a ruling of the ECJ, shattering the fragile compromise on which claims of constitutional pluralism rested.[72] With the BVerfG potentially set to nullify the OMT act of the ECB — and the related decision of the ECJ upholding it — the looming question of supremacy has powerfully returned on the table.[73]

My argument is that, when faced with this critical question, the unequivocal answer shall be that EU law prevails. As the BVerfG ponders how to react to the judgment of the ECJ in *Gauweiler*, it shall know that a decision striking down the action of the ECB, and thus suspending its effect in Germany, would be in blatant breach of the obligations that Germany has subscribed as a member state of the EU, and would open a dramatic crisis in the fabric of our Union, with unpredictable consequences for its future. In making the case in favor of the supremacy of EU law, however, I want to advance here a new justification for it. In my view, the supremacy of EU law — and thus the related prohibition for a member state's highest court to nullify the decision of an EU institution, validated by the ECJ — should not be seen as the vertical imposition of supranational rule over the will of a member state. Rather, the supremacy of EU law — with the exclusive delegation to the ECJ of the power to declare the invalidity of an EU act — must be defended as the guarantee of the *equality of the member states in the EU*. The primacy of EU law over opposing claims of the supremacy of national constitutional courts is the conditio sine qua non to ensure that all member states remain equal in the EU.

To appreciate this point, we must abandon the traditional bilateral prism through which the struggle between the ECJ and the BVerfG has been observed, and rather embrace a multi-lateral perspective. In academic commentaries the struggle for supremacy is generally analyzed as a clash between the ECJ and the highest court *of a single member state*: in casu, the BVerfG. Hence, the doctrinal position of the BVerfG on the question of supremacy is defended from a national perspective, or criticized from a supranational perspective — but without paying attention to the effects that this struggle produces to third parties, namely the other member states. Nevertheless, in the context of the EU, as a multi-state compound, the confrontation on supremacy has inevitably implications that go

[71] *See generally* Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 EUR. L.J. 262 (2005).

[72] *See* Daniel Kelemen, *On the Unsustainability of Constitutional Pluralism*, paper presented at the conference on "The ECJ, the ECB and the Supremacy of EU Law" at iCourts, Center of Excellence for International Courts, Faculty of Law, University of Copenhagen (Sept. 2015) (on file with author).

[73] *See* FEDERICO FABBRINI, FUNDAMENTAL RIGHTS IN EUROPE 268 (2014) (arguing that the question of supremacy cannot be side-stepped in debates concerning European constitutionalism).

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beyond the bilateral relations between a specific member state and the EU. If the highest court of a member state makes a claim about supremacy, this does not only affect its one-on-one relations with the ECJ, but it also impacts on the other EU member states (and their courts). Thus, a decision by the BVerfG to nullify an EU act such as the OMT program on the basis of a domestic conception of supremacy directly affects all the other member states of the EU (and of the Eurozone specifically).[74]

The connection between the supremacy of EU law and the guarantee of the equality of the member states emerges from the foundational judgment of the ECJ: *Costa v. ENEL*. While in this case the ECJ grounded the supremacy of EU law over conflicting national law on concerns for the uniform application of EU law, it also emphasized that "[t]he integration into the laws of each Member State of provisions which derive from the [EU] [. . .] make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them *on a basis of reciprocity*."[75] As Ingolf Pernice has underlined, in the judgment of the ECJ the supremacy of EU law is connected with the principle of non-discrimination:

> For every individual, the trust in the full respect of equally applicable terms of law by all the others justifies its own obedience. There cannot be privileges nor discrimination. It is ultimately the reciprocity of such mutual trust among citizens as among their Member States which allows a legal system to function.[76]

By preventing states from unilaterally re-defining the conditions of their membership in the EU, the principle of supremacy protects the equality of the member states (and their citizens), making sure that they all remain equally bound to the terms they have unanimously agreed to.

In fact, the supremacy of EU law — with the connected impossibility for a member state to adopt measures which nullify EU law within its territory — should be read in conjunction with another foundational judgment of the ECJ: *Commission v. Luxembourg and Belgium*.[77] In this case, the ECJ rejected any use by the member states of general international law

[74] *See, e.g.*, Gilles Moec & Mark Wall, *Monetary Union After the German Constitutional Court Ruling*, Deutsche Bank Research Paper (Feb. 11, 2014) (emphasizing negative consequences for the entire Eurozone of a decision by the BVerfG regarding OMT as ultra vires).

[75] *Costa*, Case 6/64 at 585 (emphasis added).

[76] Ingolf Pernice, Costa v ENEL *and* Simmenthal*: Primacy of European Law*, *in* THE PAST AND FUTURE OF EU LAW 47, 49 (Miguel Maduro & Loïc Azoulai eds., 2010).

[77] Joined Cases 90 & 91/63, Comm'n v. Luxembourg & Belgium, 1964 E.C.R. 625.

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instruments of self-help, such as retaliation and counter-measures, against another member state (or EU institution) which failed to respect EU law. Whereas a maxim of international law is the 'exceptio non adimpleti contractus', according to which a party is not bound by the terms of a contract vis-à-vis another party which fails to respect them, the ECJ denied that this could be the case within the EU autonomous legal order.[78] As William Phelan has recently explained, in the reasoning of the ECJ the rejection of the international law measures of self-help rested on the implicit bargain among the member states, "premised on the acceptance of direct effect / direct application (in *Van Gend en Loos* and in the Treaty of Rome itself) and supremacy (in *Costa*)."[79] It is because the EU is supreme over national law — and the contracting parties abide by this rule — that the member states are not entitled in the EU to tit-for-toe each other in case of violations of EU law.

In sum, there is in my view a strong argument to be made for the supremacy of EU law in light of the principle of the equality of the member states before the Treaties. A member state('s highest court) should not be allowed to invalidate an EU law within its territory, because this would call into question the equality of all the states before the law, and thus the reciprocal nature of the commitments undertaken by them when signing the EU Treaties.[80] Incidentally, while my argument is inspired by, and criticizes, a challenge against the supremacy of EU law — with the related pledge to invalidate an EU act — raised by the highest court of Germany, the case made here should be read as being to the advantage *of Germany too*. It is evident that if the BVerfG could claim the power to re-define for itself the terms of Germany's participation to the EU, (the highest courts of) other member states could follow suit. Yet, the risks for Germany of a Union à la carte, are too obvious to tell: It would clearly not be in German interest if — say — a Greek or an Italian court could unilaterally set aside the budgetary obligations imposed on the member states by the Stability and Growth Pact, or if France could redefine rules on agricultural policy or Poland discretionally introduce custom duties on German exports. In the end, in the compound order of the EU, the supremacy of EU law is the only guarantee that states will abide by the same rules, mutually depriving themselves of the power to discretionally pick and choose the rules of EU law they like or not.

[78] *See also* Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastinghen, 1963 E.C.R. 1.

[79] William Phelan, *Supremacy, Direct Effect and Dairy Products in the Early History of European Law* 5 (EUI, Working Paper 11/2014).

[80] *See* Art. 11 Costituzione (Italy) (stating that Italy allows limitations of sovereignty "in condizioni di parità con gli altri stati"); Art. 88–2 Constitution (France) (stating that France allows transfer of competences to the EU "sous réserve de réciprocité").

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D. Rejecting the Counter-Arguments

The argument I articulate in this article is admittedly not in tune with the Zeitgeist. During the last decade — especially, I would say, since the demise of the Constitutional Treaty[81] — the dominant narrative in the scholarly debate has become increasingly hostile towards claims about the supremacy of EU law.[82] By making the case here in favor of the supremacy of EU law as the guarantee of the equality between the member states, I am aware that I expose myself to three possible criticisms. First, my argument can be described as inconsistent with the Kompetenz-Kompetenz of the member states. Second, my position could be faulted for failing to appreciate the growing importance that respect for national identity has acquired in EU law, including as a possible limit to the supremacy of EU law. Third, my argument can be criticized considering that the supremacy of EU law has not been textually entrenched into EU primary law. In my view, however, none of these arguments is capable to challenge the core of my claim: That the supremacy of EU law intrinsically follows from the equality of the member states under the Treaties and that unless we are willing to accept the domination of one state (per its highest court) over the others, any exception to the supremacy of EU law ought to be resisted.[83]

To begin with, the validity of my case is not challenged by arguments about Kompetenz-Kompetenz. As is well known, the BVerfG and some other national high courts have proclaimed that the EU is a creation of international law and that member states remain the masters of the Treaties, with the result that action by the EU institutions which goes beyond the power conferred to them by the states is null and void.[84] In fact, irrespective of whether the EU is an international organization or — say — a supranational federation,[85] Article 5 TEU affirms that the limits of the Union competences are governed by the principle of conferral. As a result of that, action by the EU institutions which exceed the scope of the powers delegated to the EU is unlawful.[86] Yet, according to the BVerfG, as the EU institutions— including the ECJ — do not have the competence to discretionally enlarge their competences, an act by the EU institution which is ultra vires can be struck down by the BVerfG itself as going beyond the delegation of power undersigned by Germany when

[81] *See also* Renaud Dehousse, *'We the States': Why the Anti-Federalists Won*, *in* WITH US OR AGAINST US? EUROPEAN TRENDS IN AMERICAN PERSPECTIVE 105 (Nicolas Jabko & Craig Parsons eds., 2005).

[82] *See, e.g.*, Armin Von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417 (2011).

[83] *See* Federico Fabbrini, *States' Equality v States' Power: the Euro-Crisis, Inter-State Relations and the Paradox of Domination*, 17 CAMBRIDGE Y.B. EUR. LEG. STUD. 1 (2015) (emphasizing growing imbalance in interstate relations).

[84] Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Feb. 7, 1992, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 155, 89 (Maastricht), para. C.II.1.a.

[85] *See, e.g.*, Armin Von Bogdandy, *The European Union as a Supranational Federation*, 6 COLUM. J. EUR. L. 27 (2000).

[86] *See generally* Case C-376/98, Germany v. European Parliament and Council, 2000 E.C.R. I-8419.

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becoming a member of the EU.[87] In the view of the BVerfG, this would be the case precisely with the OMT program of the ECB.[88]

However, even if one accepts that the competence on the competence rests with the EU member states, it is a non sequitur that a member state's highest court is free to declare an EU act ultra vires, with the consequence that the challenged act ceases to have effects within its territory, while remaining valid in the other member states. Under international law, the rule of Kompetenz-Kompetenz is no derogation to the principle of 'pacta sunt servanda', and contracting parties to a treaty are reciprocally bound to the terms of the contract.[89] Needless to say, as I shall point out below, EU law endows a state which deems an act ultra vires with the instruments to remedy the possible infringement by the EU institutions of the power conferred on them.[90] Yet, as long as a member state is a party to a multilateral treaty, the principle of equality between the contracting parties implies that decisions taken by the institutions created by the treaty shall prevail against unilateral determinations by the institutions of a member state.

Similarly, it is not convincing to claim that the principle of the supremacy of EU law finds a limit in view of the recent recognition of the principle of respect for national identity within the framework of EU law. As a number of scholarly works have emphasized, the Lisbon Treaty has strengthened the protection of national identity in EU law,[91] by entrenching in Article 4 TEU the principle that the EU shall respect the member states' "national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." Moreover, in a several recent judgments the ECJ has accorded greater weight to the respect for national identity — cautiously ruling that this could justify a restriction on the application of EU free movement rules.[92] In fact, some scholars have been vocal in calling on the ECJ to grant even more importance to national identity in its case law.[93] And the BVerfG has capitalized on this debate by claiming that a possible decision to nullify EU law within Germany would be justified in view of protecting

[87] *See generally* Paul Craig, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, 48 COMMON MKT. L. REV. 395 (2011).

[88] *See* BVerfG, Case No. 2 BvR 2728/13 at para. 5.

[89] *See* Art. 26 Vienna Convention on the Law of the Treaties.

[90] *See infra* note 107.

[91] *See, e.g.*, Gerhard van der Schyff, *The Constitutional Relationship between the EU and its Member States: The Role of National Identity in Art. 4(2) TEU*, 37 EUR. L. REV. 563 (2012); ELKE CLOOTS, NATIONAL IDENTITY IN EU LAW (2015).

[92] *See generally* Case C-208/09, Sayn-Wittgenstein, 2010 E.C.R. I-13693.

[93] *See* FRANÇOIS-XAVIER MILLET, L'UNION EUROPEENNE ET L'IDENTITE CONSTITUTIONNELLE DES ÉTATS MEMBRES (2013).

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the constitutional identity of the state.[94] This situation would occur, once again, with regard to the OMT case.[95]

However, the recognition of member states' national identity cannot imply a limitation of the principle of supremacy, seen as the guarantee of the equality between the member states. Ironically, this point is reaffirmed precisely by the provision which is typically invoked to justify a restriction of absolute primacy: Article 4 TEU. Although the point seems to have been entirely overlooked in the literature, the text of Article 4 TEU provides first and foremost a recognition of the principle of the equality of the member states, and only secondly — and I argue, in sub-ordine — the recognition of member states' national identities. As Article 4 TEU textually proclaims, "*The Union shall respect the equality of Member States before the Treaties*, as well as their national identities."[96] By putting the equality of the member states *before* national identity, Article 4 TEU reaffirms a central value in the EU integration project. Therefore, it cannot be interpreted as introducing a national identity-based derogation to the principle of supremacy — whose main purpose is to secure the equality of the member states under the Treaties, as I have maintained above. In other words, the codification of the principle of national identity in the EU Treaties does not call into question the supremacy of EU law.

Finally, the fact that the supremacy of EU law is not enshrined in EU primary law does not change the situation either. As it was pointed out above, the ECJ recognized the principle of the supremacy of EU law in the earliest phases of the process of European integration, but the principle itself was never written down in the EU Treaties.[97] In fact, the Convention that drafted the Treaty establishing a Constitution for Europe introduced a new provision, Article I-6, proclaiming that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". Yet, after the failures in the ratification of the Constitutional Treaty, this provision did not find its way into the text of the Lisbon Treaty. Rather, the member states attached to the Treaty a Declaration, which does not have the same value of a Protocol, stating that "in accordance with well settled case law of the [ECJ], the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member

[94] Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], 123 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 267 (Lissabon), para. 234.

[95] *See* BVerfG, Case No. 2 BvR 2728/13 at para. 5.

[96] Emphasis added.

[97] *See generally* Jonas Liisberg, *Does the EU Charter of Fundamental Rights Threatens the Supremacy of Community Law?*, 38 COMMON MKT. L. REV. 1171 (2001).

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States, under the conditions laid down by the said case law,"[98] and referred to an opinion of the Legal Service of the Council in support of this.[99]

Nevertheless, leaving aside the fact that if the member state were unhappy with the principle of supremacy articulated by the ECJ they could have rolled-back on it, which they never did, the fact remains that a codification of the principle of supremacy would not by itself set aside the state sovereignty claims based on the above-mentioned concepts of Kompetenz-Kompetenz and national identity. As the example of the United States (US) shows, even in a Union where the Constitution explicitly proclaimed the supremacy of federal law over state law,[100] several member states had historically advanced the claim that they had a power to review whether federal authorities acted within the limits of the power delegated to it by the states themselves, or respected the states' rights.[101] In particular, pursuant to the so-called compact theory of the US Constitution, the states of the Union remained the sovereign masters' thereof, and therefore it was within the power of each state to nullify, or interpose, action by the federal institutions which was seen as exceeding the competences conferred on them, or threatening their sovereign rights.[102] While constitutional transformations in the US— including a Civil War — have falsified the validity of this theory,[103] its very existence makes clear that the supremacy of federal law over state law cannot rely on a simple textual provision, but must be justified through a deeper argument.

In fact, it is remarkable to notice how the US Supreme Court has grounded the justification of the supremacy of federal law over state law on arguments about uniformity which are analogous to those advanced by the ECJ in *Costa v. ENEL*.[104] As the US Supreme Court held in *Ableman v. Booth*, if the several states could set aside federal law:

> conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the

[98] Declaration No. 17, Declaration Concerning Primacy, 2012 O.J. (C 326/346).

[99] Opinion of the Legal Service (EC) No. 11197/07 of June 22, 2007 (JUR 260).

[100] *See* Art. VI, § 2 U.S. CONST.

[101] *See, e.g.*, Virginia Resolution (Dec. 24, 1789); South Carolina Ordinance of Nullification (Nov. 24, 1832).

[102] *See* THEORIES OF FEDERALISM (Dimitrios Karmis & Wayne Norman eds., 2005) (reporting thought of John Calhoun about the US Constitution as an inter-state *compact*).

[103] *See* DANIEL FARBER, LINCOLN'S CONSTITUTION (2003) (explaining how the Civil War vindicated Daniel Webster's view of the US Constitution as a *constitution*).

[104] *Costa*, Case 6/64 at 585.

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> Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another.[105]

In *Cooper v. Aaron*, the US Supreme Court emphasized that, in the US, the supremacy of US law acts ultimately as the guarantee of the equality between the citizens,[106] while in the previous section I claimed that, in the context of the EU, the supremacy of EU law acts still also as the guarantee of the equality between the states.

In conclusion, neither the argument about Kompetenz-Kompetenz, nor that of national identity, nor the fact that supremacy is not textually codified in the Treaties, can justify a restriction to the principle of supremacy of EU law, and empower a member state's highest court to nullify an EU act within its territory. Nevertheless, this does not mean that a state which is a member of an organization such as the EU is helpless before an action by an EU institution which it deems as ultra vires, or in violation of its constitutional identity. First, Article 263 TFEU makes member states privileged applicants in starting proceedings before the ECJ for violation of primary law. So a state which claims that the EU has acted ultra vires can sue to redress this situation. Second, Article 50 TEU now officially enshrines in the Treaty the right of a member state to withdraw from the EU. Third, states can obtain at times of treaty amendment special protocols which allow them — with the agreement of all other member states — to opt-out of specific provisions of the treaty with which they have insurmountable problems. These mechanisms provide solid protections of a member state's rights, while being respectful of the equality of the member states. Moreover, they rely on action by a member state's democratic institutions, such as government and parliament, hence vesting with greater legitimacy the request for special accommodation of national concerns.[107]

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[105] Ableman v. Booth, 62 U.S. 506, 517–18 (1858).

[106] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[107] *See generally* Steve Boom, *The European Union after the Maastricht Decision: Will Germany be the "Virginia of Europe?"*, 43 AM. J. COMP. L. 177 (1995) (emphasizing political and legislative, besides judicial, opposition to supremacy in Ante-bellum U.S.).

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E. Conclusion

In the summer of 2015, with the integrity of the Eurozone increasingly under challenge due to the revamping of the Euro-crisis in Greece, the German federal government made a strong plea for compliance with rules in the EU.[108] Dealing with a newly elected anti-austerity Greek government — which sought to renegotiate the conditions of its financial bailout and to redeem part of its skyrocketing public debt — the German government underlined that mutual trust among the member states can only be based on respect for the rules. As Chancellor Angela Merkel put it at the Bundestag on 17 July 2015: "Pacta sunt servanda. Das heißt, wenn europäische Verträge ihre Gültigkeit verlieren sollen, geschieht das durch einstimmig vorgenommene Vertragsänderungen und Ratifizierungsverfahren. Es geschieht nicht, indem Einzelne aufgrund nationaler Wahlen diese Verträge einfach für null und nichtig erklären können; denn wir sind eine Rechtsgemeinschaft."[109] Indeed, the EU is a community based on laws. But one of these is the principle of the supremacy of EU law, with the related prohibition for member states to unilaterally invalidate measures of EU law. And this rule applies to Germany('s highest court) too.

On 16 June 2015 the ECJ has delivered a milestone judgment. In *Gauweiler*, the ECJ answered the first preliminary reference of the BVerfG and ruled that the OMT program devised by the ECB to do whatever it takes to save the euro was compatible with EU law. In referring a preliminary question to the ECJ, the BVerfG had defined the OMT as ultra vires, and pledged to strike it down as in violation of the German Basic Law if the ECJ would not do so. Unless the BVerfG is ready to do an about-face, this raises the likely prospect of a declaration by the BVerfG that OMT is ultra vires and thus deprived of effects in Germany. As I have argued, however, a decision by the BVerfG nullifying the act of the ECB, upheld by the ECJ, would be a blatantly illegal act, defying EU law, and threatening the survival of the EU. As Advocate General Cruz Villalón stated in his Opinion in *Gauweiler*, indeed, it is "an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States."[110]

As this article has maintained, the supremacy of EU law is not an arbitrary imposition of supranational authority over the will of a member state. Rather, it is the guarantee that member states will remain equal under the EU Treaties. As member states have accepted to become members of the EU, limiting their sovereignty on a reciprocal basis, if a member

[108] *See* FEDERICO FABBRINI, ECONOMIC GOVERNANCE IN EUROPE (forthcoming 2016) (discussing changes and challenges produced by the Euro-crisis on economic governance in Europe).

[109] *See* Angela Merkel, Speech at the Bundestag, Berlin (17 July 2015), *available at* http://dipbt.bundestag.de/doc/btp/18/18117.pdf (last visited Aug. 11, 2015).

[110] Opinion of Advocate General Pedro Cruz Villalón, *Gauweiler*, Case C-62/14 at para. 59 (emphasis in original).

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state(’s highest court) could unilaterally decide to redefine the terms of its participation to the EU, this would undermine the equal position of all the member state vis-à-vis EU law. Some states, in fact, would be more equal than others. By examining the struggle for supremacy from a multilateral prism, rather than a bilateral one, the article has shed light on the fact that only the supremacy of EU law can prevent a Union à la carte in which every member state (or the highest court thereof) can pick and choose those aspects of EU law it likes or not. Since the member states are endowed with instruments to make sure that the EU institutions comply with the powers conferred on them, and respect national identity, no convincing argument can be advanced to restrict the supremacy of EU law, and empower a state court to unilaterally nullify a valid act of EU law. In light of that, the EU institutions, but also the German federal government, must be ready to rein into the BVerfG if it follows on its pledges. As much as the prospect of a nullification of the ECB OMT program by the BVerfG sheds dark clouds on the future of the EU, the case may serve as the opportunity to clarify once and for all that, in our Union of states, no state court is above the common law. Defending the principle of the supremacy of EU law as the guarantee of the equality of the member states is ultimately in the interest of every member state — including Germany.