Comment on judgment 2 BvE 13/13, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13 of the German Federal Constitutional Court of 21 June 2016

I. Main Points

It was eagerly awaited: The judgment of the Federal Constitutional Court – two days before the British referendum about the Brexit – on the OMT-decision of the European Central Bank (ECB) of 6 September 2012 and the inactivity of the Federal Government on it. The constitutional complaints and the proceedings between governmental bodies were rejected, the purchase of government bonds by the ECB could continue and Germany does not have to do anything against it. But one condition is the compliance with from the European Court of Justice in his OMT-judgment defined limits. Although this judgment is criticized, it is not regarded ultra vires and so finds acceptance. So does the OMT-decision, but only in the interpretation of the European Court of Justice and so in the following conditions (para 206): Purchases should not be announced, their volume should be restricted to a fixed limit; to a former issuance of a debt security a minimum period has to be elapsed. The acquired debt securities have to be purchased by the member states with a financing, which makes an access to the bond market possible and then shall exceptionally be held until the final maturity; generally they have to be brought back to the market respectively may not even be bought, if the requirement of intervention is cancelled.

These conditions recall the requirements of the Federal Constitutional Court in his order for reference of 14 January 2014, namely a limited volume of a potential purchase of government bonds, the avoidance of interventions on the market price as far as possible as well as the missing participation in a debt cut. But this last condition remained formally unfulfilled, although the representative of the ECB stated in an oral hearing from 16 February 2016, that the ECB would not agree to a debt cut (para 204 at the end). The European Court of Justice did not see a charged relationship between debt cut and the prohibition of monetary budget finance, but excluded the bonds of member states in a tense financial position, which points in the same direction (para 204).

II. Important Monitoring Function of the Federal Constitutional Court for the Further Development of European Law

1. Re-marking of the Collaboration with the European Court

After all the Federal Constitutional Court has with his first-time submission to the European Court of Justice indirectly limited the action of purchasing government bonds by the ECB. Finally the European Court of Justice has just materialized his conception in the Pringle-judgment in a very formal way and especially with the principle of proportionality of the ECB set real limits for the purchase of government bonds, which are subject to judicial control as the Federal Constitutional Court positively notes (paras 177, 191 et seq. in detail). With this the Federal Constitutional Court has also ensured the compliance of the competencies at EU-level and so effectively filled out the collaboration with the European Court – even if in an initiative and not in an ordering sense.

Such a supplying function is very important for the European Court. He could enter into dialogue with the national constitutional courts in particular, if the national courts fill their submissions argumentatively, as the Federal Constitutional Court did in great detail in his OMT-decision. This also applies if the European Court of Justice does not refer to all the points, so to the question of lowering the democratic legitimation level with regard to the independence of the ECB under Article 130 TFEU (para 187) – although the German Central Bank is independent too. It is also usual – and so accepted by the Federal Constitutional Court (para 154) – that the European Court of Justice may have a different opinion and partial approach (in detail paras 181 et seq.); on the other hand the Federal Constitutional Court awards an error tolerance, as long as the European Court of Justice remains in the sector of common juridical interpretation methods and no objective arbitrary interpretation exists (para 149).

Significant is that the European Court of Justice includes the argumentation of the national Constitutional Courts and works it judicially proper up with his categories. In this case the Federal Constitutional Court is bound by the outcome of European Court of Justice (para 175). However, it remains the general objection that the Federal Constitutional Court wants to elevate himself to an interpretation of EU-competencies and measures the legitimacy of EU-secondary law with them. As long as it is just a reason for a submission to the European Court of Justice and he still has the final authority to decide, there are no problems – but there is, if the Federal Constitutional Court attributes to himself the ultimate decision-making and sees the submission to the European Court of Justice just as an intermediate step, as it was expressed in the OMT-decision.

2. Self-restrain of the Federal Constitutional Court

In the Federal Constitutional Court's view it is harmless that the European Court of Justice does not question the specified objectives and disregards the mediate consequences on the actual for the member states reserved economic policy (see Article 119 (1) and also (2) TFEU; para 178), as long as he comes in the end essentially to the conclusion to comply with the specified conditions by the Federal Constitutional Court, even under the inclusion of judicially by the European Court of Justice controlled requirements for the implementation of the OMT-programme (paras 190, 193). The volume is limited, so the stability-oriented measure of the monetary policy only supports the economic policy under Article 119 (2) TFEU and complies with the prohibition of monetary budget finance under Article 123 TFEU (para 195 et seq.).

In this respect the concerns of the Federal Constitutional Court step back with regard to the constitutional dimension of the principle of conferral. To protect the basic competencies of the EU, the Federal Constitutional Court excludes the higher degree of discretion allowed by the European Court of Justice (para 185), but reserves himself the enforcement of his restrictive point of view only for the case that fundamental interests of the member states are affected (para 186). But this is what occurs with regard to the protection of budgetary sovereignty of the German Bundestag considering the impending risks of the purchase of government bonds by the ECB. But it is only the obviousness of the transgression of competencies, which could be complained by the Federal Constitutional Court (para 190).

3. Also Responsibility for Integration of the Federal Constitutional Court

The Federal Constitutional Court supplied the submission to the European Court of Justice so that he could measure off the EU-competencies stricter than in the Pringle-decision and at the same time could integrate the decision of the European Court of Justice in his constitutionally developed verification system. So the Federal Constitutional Court fulfilled his responsibility for integration, which he duns the German state organs and now connects with protective duties. But these compress only under specific legal and actual conditions to a concrete obligation to act like the fundamental duty to protect (para 166 et seq.). The responsibility for integration of the Federal Constitutional Court is dual: firstly with regard to the progress of the European agreement and therewith in cooperation with the European Court of Justice, on the other hand controlling the responsibility for integration as

supervisory and ordering authority if German constitutional bodies are seised.

4. Continuous Observation

Here merely exists another obligation to observe, because actually the requirements of the European Court of Justice are adhered and also the budgetary total responsibility of the German Bundestag and therewith the core area of the principle of democracy is not at risk. But these shall not be affected by the volume and the risk structure of the purchased shares; from this shall not arise a concrete risk for the federal budget. But this is uncertain and has to be continuously observed. That is the second part of the obligation to observe (para 220).

III. Dogmatic Consistency in a New Tone

1. National Established and Thus Limited Primacy of Application

The OMT-programme of the ECB is permanent. With this the Federal Constitutional Court shows again that he acknowledges the primacy of application of the European Law in general. This is even specifically emphasized and taken as a basis for the European integration. Article 23 (1) Grundgesetz (German Basic Law) contains a “Wirksamkeits- und Durchsetzungsversprechen für das Unionsrecht” (promise of efficiency and enforcement for European Law) (para 117). The primacy of application basically exists also with regard to opposed national constitutional law and lets it be inapplicable in a particular case (para 118); also national implementing agencies could be released from the full binding of the Grundgesetz (German Basic Law) (para 119).

However the primacy of application results in spite of the accession to the EU not only from European Law, but still from the domestic command of application of law of the Approving Act to the Treaties and is so limited by the frame of the applicable constitutional system (para 120).

As the primacy of European Law opposite to the simple statutory law is not put into question, the Federal Constitutional Court sees the primacy opposite to the domestic Constitutional Law only within the limits of Article 23 Grundgesetz (German Basic Law) and Article 79 (3) Grundgesetz. If these are not adhered, the Federal Constitutional Court may declare this European Law as inapplicable in Germany. Than it is not part of the primacy of application of the European Law – against the absolute conception of the European Court of Justice, which provides no exceptions and underlies the system of the European Law. So the differences of the 28 legal systems of the member states should be balanced. The Federal

Constitutional Court sees this uniform scope as a key element of European Law (para 118) and only wants to breach it very restrictively ("ausnahmsweise", exceptionally, para 141), as ultima ratio to protect the indispensable constitutional parts.

2. More Openness for Integration

The decision shows a fundamental openness for integration and no national restrictions. Even though this limitation is not dropped completely, it stays embedded in the European integration and refers to this under Article 4 (2) TEU (para 140) as well as it is compared with the approaches of other constitutional courts (para 142). The Federal Constitutional Court became quasi European and sees himself completely as a part of the integration process and not as a national fortress. It does not defend the Grundgesetz (German Basic Law) against the European integration, but with and in it.

3. Restrictions of the Member States?

However, the Federal Constitutional Court sees the European integration influenced by the member states as Masters of the Treaties, which could decide on "the whether" as well as the range of validity and primacy of European Law (para 140). With this the Federal Constitutional Court takes back the essentiality of the uniform validity with fundamental importance of the European Law given by himself (para 117) and places it at the member states' disposal. By this the essential core of European Law is affected. This core is accepted by the accession to the EU of every member state and shall not be put in question afterwards – even not by indispensable national constitutional law. Otherwise it is a transfer of sovereignty with parking brake applied.

Either the continuous consistency of European Law is permanent – or the national constitutional systems with its possible different indispensable contents, but then the European Law could not be applied in its full dimension as originally intended. This discrepancy remains between the European Court of Justice and the Federal Constitutional Court. Tertium non datur. But under Article 267 TFEU there is a procedural tool for defusing, which was used successfully in the OMT-case.

4. Protection Obligations of National Bodies under Article 1 in Conjunction with Article 79 (3) Grundgesetz (German Basic Law, Right to Democracy) as Innovation

The sword of Damocles of the Federal Constitutional Court, not to apply EU-measures in particular cases, remains (para 141). But the OMT-programme takes effect on EU-level and

helps other member states, but burdens in the case of damage the federal budget in reverse. His non-application in Germany does not prevent this consequence. So it is only a counteraction of the German state organs possible, when they not agree from the start – what is not possible yet, but is only in the future. Or they take measures to cancel or limit the OMT-programme. But this duty requiring action also depends on the exceeding of the conferred sovereign rights of the EU; from this the state organs have to protect the citizens and so ensure the right to democracy. This results, in the opinion of the Federal Constitutional Court, not only from Article 38 Grundgesetz (German Basic Law), but is anchored in the dignity of men and at the same time limited to the defense of structural changes in the state organization right (paras 124, 126).

This protection obligation does simply not intervene, because the possibilities under the OMT-programme of the ECB were limited in their realization by the European Court of Justice. This limitations were criticized by the Federal Constitutional Court as not sufficient, but seen as just acceptable with regard to the fundamental interpretation monopole of the European Court of Justice. Finally there is only a concrete obligation to act (comparing the constitutional duty to protect), if the fundamental responsibility for integration compresses under specified legal and factual grounds – for example with the purchase of government bonds in astronomical heights. Then the budgetary rights of the German Bundestag are massively threatened in the case of follow-up liability (see paras 215 et seq.). So the core of democratic principle is touched under Article 1 in conjunction with Article 79 (3) Grundgesetz (German Basic Law), which is also untouchable with regard to EU-measures (para 133). Promising measures and a specified procedure are necessary, if this is the only way to maintain the indispensable core of human dignity.

5. Identity Control

The identity control is already mentioned, which also includes the protection of the fiscal overall responsibility of the German Bundestag (para 138 at the end). It ensures the indispensable constitutional content-related transfer limits also against actual transfer of competencies, which is not compatible with the Grundgesetz (German Basic Law, para 139). Extending EU-legislation is in a broader and deeper sense “ultra vires”, namely beyond the transferable sovereignty. This identity control stands beside the fundamental right- and the proper ultra vires-control.

6. Ultra-Vires-Control in the Strict Sense

Broader and with that beyond constitutional identity the possible transgression of competencies is controllable by the European legislator. In this case he is in the proper sense ultra vires, namely beyond the transferable sovereignty. But there has to be a sufficient serious and evident transgression of the European competencies, which shifts the structure of competencies between the EU and the member states significantly to the advantage of the former. To this belongs that the competence on the basis of general methodical standards is completely unfounded by a legal aspect (para 149). A significant weight for the principle of democracy and the sovereignty of the people is required, which are guaranteed if an amendment of the contract under Article 48 TEU or a necessary use of the future developments clause is required (para 151). The rule of law requests a sufficient specified authorization in favor of the EU (para 152). Not least because of this the Federal Constitutional Court rejects the generous award of interpretation scopes with regard to the determination of competencies.

Because only the sufficient specified transgression of competencies is considerable, the Federal Constitutional Court rates the ultra vires-control as a specific application for the protection of the general constitutional identity by the Federal Constitutional Court (para 153). This relation could also be recognized vice versa, but then provides more scope for the ultra vires-control. Anyway with the limitation to significant transgressions of competencies the risk of a boundless expansion of the ultra vires-control to general EU-supervisory procedures (“uferlosen Ausdehnung der Ultra-vires-Kontrolle zum allgemeinen Unionsaufsichtsverfahren”, Wendel, ZaöRV 2014, 615 (630)) is eliminated.

IV. Conclusion

The Federal Constitutional Court keeps and refines his dogmatic line with his OMT-judgment. It refers in his legal grounds to the core of the human dignity of the democratic participation and develops in the legal consequences state obligations to protect. But in particular there happened an embedding in the European integration, to which the Federal Constitutional Court wants to make an important contribution. The Federal Constitutional Court himself regards the unit of European Law as elementary. For the OMT-decision and his application it sees – how to expect – no reason for complaints, because the European Court of Justice determined an important limitation in his OMT-judgment in continuation of

the Pringle-judicature especially with his proportionality test for the purchase of government bonds. These limitations shall also apply to the in the EBC-Council beginning of 2015 adopted and still current QE-programme, which leads anyway to purchases of a smaller share on community accounts. The actions before the Federal Constitutional Court shall also remain unsuccessful.

With this neither the competence limits of the European Law are significantly transgressed, nor the constitutional identity of the Grundgesetz (German Basic Law) is touched. After all the Federal Constitutional Court gave important impulses and even caused the European Court of Justice to a tightening of the competence limits. So it did not have to complain about the OMT-decision and could accept the judgment as well as constitutionally anchor it back. It is a good example for an efficient cooperation between European Court of Justice and Federal Constitutional Court.

The more the European Court of Justice checks the competence limits like here or in the Schrems case, an ultra vires-control is made and no such control is needed by the Federal Constitutional Court. This control has to enter in submissions to the European Court of Justice and he finally decides as here. The in the OMT-order for reference designed right to make the final decision of the Federal Constitutional Court after an order for reference of the European Court of Justice is very fragile. The Federal Constitutional Court has to fit into the European integration process. For this the OMT-judgment was an important and in the senate unanimously adopted step.