

ADEMU WORKING PAPER SERIES

All's well that ends well? Crisis policy after the German Constitutional Court's ruling in Gauweiler

Armin Steinbach[†]

April 2018

This paper was originally submitted in December 2016

WP 2018/102

www.ademu-project.eu/publications/working-papers

Abstract

Crisis policy of the ECB has been controversial on the judicial stage between the Court of Justice of the EU (CJEU) and the German Constitutional Court (FCC). While the controversy appears to be settled at this stage following the FCC's judgment in June 2016, disagreement between the courts persists in two regards. First, on the scope and intensity of judicial review of a potential future application of the OMT programme, the FCC gives less discretionary leeway to the ECB than the CJEU and thus exerts stricter judicial review. Second, there are legal boundaries on a “haircut” relinquishing parts of the debt of euro countries owed to Member States and the ECB. This article offers a legal analysis of the remaining controversies and the policy scope of the ECB.

Keywords: European Central Bank; OMT; Judicial Review; Haircut

JEL Classification: E52, F34, H63, K33, E61

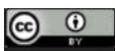
[†] European University Institute Email armin.steinbach@eui.eu

Acknowledgments

The author would like to acknowledge the support of the ADEMU project, "A Dynamic Economic and Monetary Union. This project is related to the research agenda of the ADEMU project, "A Dynamic Economic and Monetary Union". ADEMU is funded by the European Union's Horizon 2020 Program under grant agreement N° 649396 (ADEMU).

The ADEMU Working Paper Series is being supported by the European Commission Horizon 2020 European Union funding for Research & Innovation, grant agreement No 649396.

This is an Open Access article distributed under the terms of the Creative Commons Attribution License Creative Commons Attribution 4.0 International, which permits unrestricted use, distribution and reproduction in any medium provided that the original work is properly attributed.



All's well that ends well? Crisis policy after the German Constitutional Court's ruling in *Gauweiler*

Armin Steinbach*

BVerfG, judgment of 21 June 2016, 2 BvR 2728/13 following preliminary ruling of CJEU in Case C-62/14, – *Gauweiler and Others*, ECLI:EU:C:2015:400

1. Introduction

The widely debated controversy between the German Constitutional Court (FCC) and the CJEU, which led to the first preliminary ruling of the FCC to the CJEU in history, has ultimately not entered the final stage of escalation. Some scholars saw the “Kooperationsbeziehung”¹ (cooperative relationship) between the two Courts seriously at risk.² Following the preliminary ruling of the CJEU in *Gauweiler* on June 16, 2015, the FCC finally accepted the safeguard measures specified by the CJEU³ in order to restrain the OMT programme should it once become operational.⁴ Hence, the FCC's judgment brings to an end an iterative dialogue through four phases: Initially, the ECB adopted its OMT programme,⁵ as a consequence of which individuals claimed the incompatibility with the German constitution leading to the preliminary request of the FCC,⁶ which then gave rise to the CJEU's decision in *Gauweiler*,⁷ to which the

* Jean Monnet Fellow (European University Institute, Florence); Associate Member, Nuffield College (Oxford University); armin.steinbach@eui.eu; a shorter German version of this article will be published in *JuristenZeitung*.

¹ Initially propounded by the FCC in its Maastricht decision, Maastricht, 12 October 1993, BVerfGE 89, 155, 175, 178.

² On the confrontation and the effect on the cooperative relationship between the two Courts, see Craig und Markakis, “*Gauweiler* and the Legality of Outright Monetary Transactions”, 41 *EL Rev.* (2016), 1 (14); Dicosola, Fasone and Spigno, “The Prospective Role of Constitutional Courts in the Advisory Opinion Mechanism Before the European Court of Human Rights”, 16 *GLJ* (2015), 1317, as well as the contributions in the special edition of the *German Law Journal* (2015) 16(6).

³ Case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:400, paras. 106 ff.

⁴ BVerfG (Federal Constitutional Court), judgment of 21 June 2016, 2 BvR 2728/13.

⁵ EZB, Monthly Bulletin 2012/9, 7.

⁶ BVerfG, Order of 14 January 2014, 2 BvR 2728/13.

⁷ Case C-62/14, *Gauweiler and Others*.

FCC has recently made its final judgment. Along this way, the initial OMT policy decision has been subject to changes and constraints rendering its practical application both lawful (for FCC and CJEU) and implementable (for the ECB⁸).

Already in its preliminary request, the FCC had determined a way how the OMT decision could be applied consistently with EU law. In that ruling, despite its heavy criticism against the OMT programme, it had thereby indicated a potential solution to the dispute by accepting the validity of the OMT ruling, provided that the ECJ would agree to stipulate some restrictive requirements for the implementation of the OMT programme.⁹ More specifically, the FCC had requested from the CJEU a ruling that would restrict the OMT decision to the effect that it, “when comprehensively assessed and evaluated, essentially complies” with the conditions set by the FCC.¹⁰ The CJEU then responded to this demand of the FCC by specifying a number of safeguards on the OMT programme aimed at ensuring the compatibility of the OMT programme with EU law. These safeguards formulated by the CJEU, in turn, led the FCC in its recent and last judgment to draw a red line marking the limits of its *ultra vires*-control. Non-compliance with these safeguards would lead the application of OMT to amount to an “ausbrechender Rechtsakt” incompatible with the German constitution. However, the present judgment suggests that the red line drawn by the FCC may go beyond the line previously sketched by the CJEU underscoring that several incompatibilities between the two courts persist and could become relevant in future again. More specifically, controversies between the two courts seem to persist in relation to the scope of judicial review of ECB’s decisions and the legal treatment of a “haircut” on public debt.

2. The Reasoning of the Court

The standard of review for the FCC was to verify the precedence of application of European Union law, which in line with the constitutional requirements only extends within the demarcations of the constitutional identity of the German Basic Law. As in previous judgments of the FCC, the democratic principle is at the core of the court’s concern in assessing the

⁸ Draghi, *Hearing of the Committee on Economic and Monetary Affairs of the European Parliament* (21 June 2016).

⁹ BVerfGE 134, 366 para. 99.

¹⁰ The formulation chosen by the FCC allows all parties to save their faces, BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 193.

compliance of the EU act with the Constitution.¹¹ More specifically, the principle of sovereignty of the people would be infringed if institutions of the European Union that are not adequately democratically legitimised through the European integration agenda (*Integrationsprogramm*) laid down in the Act of Approval exercise public authority. The FCC thus refers to the “Integrationsprogramm”, the contours of which it had previously shaped (and later refined) in its *Maastricht* judgment on the compatibility of the Lisbon Treaty with the Constitution.¹² The FCC considers an act to go beyond the “Integrationsprogramm”, if the act “manifestly exceeds” the competences transferred to the European Union.¹³ In relation to the OMT programme, the FCC finds that the boundaries of *ultra vires* are not violated as the programme remains within the bounds of the respective competences and does not violate the prohibition of monetary financing of the budget,¹⁴ because, “when comprehensively assessed and evaluated”, the prerequisites defined by the CJEU meet the requirements formulated by the FCC’s order requesting a preliminary ruling.

However, it is the FCC’s reference to the “serious objections” it continues to have vis-à-vis the assessment of the CJEU which reveal the persistent disagreement of the two courts about the lawfulness of the programme. On the one hand, the FCC appreciates the restrictions imposed by the CJEU on the programme, in particular the binding limits for the implementation of OMT and the judicial review to which the acts implementing OMT would ultimately be subject. On the other hand, the FCC’s “objections concern the way the facts of the case were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted”.¹⁵

More specifically, the FCC criticizes the CJEU for not having questioned the monetary policy objective of the OMT measures and for not having taking account the evidence arguing against

¹¹ Murswiek, “ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitution Court’s Referral Order from 14 January 2014”, 15 GLJ (2014), 158 ff.

¹² BVerfGE 89, 155, 187 f.; see also Mayer, “Rebels without a cause”, 15 GLJ (2014), 116ff.

¹³ Adamski, “Economic constitution of the euro area after the Gauweiler preliminary ruling”, 52 CML Rev. (2015), 1451, 1478; Claes and Reestman, “The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case”, 16 GLJ (2015), 917; Bast, “The Perils and Pitfalls of Ultra Vires Review”, 15 GLJ (2014), 167, 175; Mayer, “Rebels without a cause? A critical analysis of the German Constitutional Court’s OMT reference”, 15 GLJ (2014), 111.

¹⁴ On the consequence of the FCC finding an EU act to be *ultra vires*, see Mayer, “Rebels without a cause? A critical analysis of the German Constitutional Court’s OMT reference”, 15 GLJ (2014), 111, 124ff.

¹⁵ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 181. (own translation)

a character of monetary policy.¹⁶ In its previous referral judgment, the FCC had elaborated extensively on the allocation of competences of the OMT, and ultimately referred to the expertise of the German *Bundesbank* for supporting its finding that OMT would be a measure of economic policy (and thus in violation of the Treaty's order of competence).¹⁷ It seems that the FCC remains unconvinced when stating that the restrictions imposed on the application of the OMT programme do not suffice to avoid the encroachment of the programme upon economic policy (highlighting the FCC's persistent conjecture that OMT is actually an economic policy measure).¹⁸ Further, seemingly the most important issue for the FCC, given the importance it places on the democratic principle and the safeguarding of the limits of the "Integrationsprogramm", is that the comparatively wide independence of the ECB undermines the ECB's level of democratic legitimation – this leads the FCC to call for a "restrictive interpretation and to particularly strict judicial review of the mandate of the European Central Bank".¹⁹ More broadly, this request for intense judicial review and restrictive interpretation of ECB competences corresponds to the FCC's attempt (inspired by standard legitimacy doctrine under the democratic principle²⁰) to safeguard the principle of sovereignty of the people.

Despite these concerns indicating the persistent disagreement of the FCC, it is the compelling requirements specified by the CJEU and restricting the implementation of the OMT programme which ultimately lead the FCC not to see an *ultra vires* act, because the restrictions on the OMT programme "make it appear acceptable to assume that the character of the OMT programme is at least to the largest extent monetary in kind".²¹ For the same reasons, and due to the safeguard mechanisms specified by the CJEU, the FCC sees its own requisites formulated in its order of 14 January 2014 "when comprehensively assessed and evaluated" to be fulfilled to the end that it does not find a violation of the ban on monetary financing. It finally reiterates the precise restrictions to be imposed on the application of the OMT programme, notably that purchases are not announced; the volume of the purchases is limited from the outset; there is a minimum

¹⁶ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 182.

¹⁷ BVerfG, Order of 14.01.2014 – 2 BvR 2728/13, para. 71.

¹⁸ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 196.

¹⁹ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 187.

²⁰ Accordingly, every act of public authority must be able to be traceable to the legislator along the ladder of hierarchy (Böckenförde, "Demokratie als Verfassungsprinzip" in Böckenförde (ed.), *Staat, Verfassung, Demokratie, Studien zur Verfassungstheorie und zum Verfassungsrecht*, 2nd ed. (Frankfurt am Main, 1991), 289, 299.

²¹ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 196.

period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted; the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds; purchased bonds are only in exceptional cases held until maturity; and purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary.²²

3. Comment

The judgment puts a (preliminary) end to a controversy about the scope of the ECB's competences, which had not only triggered a controversy between the two courts, but also among policy-makers,²³ as well as in economic²⁴ and legal scholarship.²⁵ From a legal doctrinal

²² BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 199.

²³ See Fairless, German Finance Minister Disagrees with ECB but Says Its Political Independence Is Vital, (11 April 2016) *Wall Street Journal*, available at <http://blogs.wsj.com/brussels/2016/04/11/german-finance-minister-disagrees-with-ecb-but-says-its-political-independence-is-vital/>.

²⁴ For the economists' perspective, see critics on the ECB's OMT programme: Sinn, "Verantwortung der Staaten und Notenbanken in der Eurokrise", 66 *IFO Schnelldienst* (2013), 3, 9-30; Deutsche Bundesbank, *Federal Constitutional Court of Germany regarding the lawsuits with file reference 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1439/12, 2 BvR 1824/12, 2, BvR 6/12* (21 December 2012); by contrast, the OMT programme also gained support, see De Grauwe, "Greece is solvent but illiquid: What should the ECB do?", *CEPS Commentary* (18 June 2015); Wolff, "The ECB's OMT Programme and German Constitutional Concerns", *Think Tank 20: The G-20 and Central Banks in the New World of Unconventional Monetary Policy* (2013); Henry, "Unkonventionelle Geldpolitik in Krisenzeiten", (2012) *Kurswechsel*, 64.

²⁵ Arguing in favour of EU consistency of the OMT programme: Borgers, "Outright monetary transactions and the stability mandate of the ECB: Gauweiler", 53 *CML Rev.* (2016), 1, 53; Beukers, "The new ECB and its relationship with the eurozone Member States", 50 *CML Rev.* (2013), 1579, 1613 f.; Herrmann, "Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts", (2012) *EuZW*, 805, 810 f.; Heun, "Eine verfassungswidrige Verfassungsgerichtsentscheidung - der Vorlagebeschluss des BVerfG vom 14.1.2014", (2014) *JZ*, 331, 333 ff.; Mayer, "Rebels without a cause? Zur OMT-Vorlage des Bundesverfassungsgerichts", (2014) *EuR*, 473, 478; Selmayr, "Grundzüge des Rechts der Währungsunion" in Müller-Graff (Ed.), *Europäisches Wirtschaftsordnungsrecht* (St. Gallen, 2015), § 23 para. 251; Steinbach, "The compatibility of the ECB's sovereign bond purchases with EU law and German constitutional law", 39 *Yale Journal of International Law Online* (2013), 15; Thiele, "Die EZB als fiskal- und wirtschaftspolitischer Akteur?", (2014) *EuZW*, 694, 695 f.; Ukrow, "Von Luxemburg lernen heißt Integrationsgrenzen bestimmen", (2014) *ZEuS*, 119, 131 ff.; other scholars consider OMT to be in violation of EU law, e.g., Klement, "Der geldpolitische Kompetenzmechanismus", (2015) *JZ*, 760; Murswiek, "ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Consitution Court's Referral Order from 14 January 2014", 15 *GLJ* (2014), 147;

perspective, the institute of “EU law consistent application” has enabled both courts to save their faces, at the same time avoiding open conflict. More specifically, the differentiation between the OMT policy decision of 6 September 2012, on the one hand, and the future implementation of the OMT programme, on the other, allows the FCC to maintain its very critical stance vis-à-vis the OMT policy decision (including its doubtful character as monetary policy measures), but accept the CJEU’s restrictions on the actual implementation of the policy decision (if one day it were to become operational). In other words, the present judgment reveals that the FCC continues to disagree with the CJEU on the nature of the OMT policy decision (monetary or economic), but the conditions specified by the CJEU ensure an application of the (otherwise from the FCC’s presumably unlawful) OMT programme which is consistent with EU law.

More specifically, disagreement persists in notably two regards, even if this disagreement does not have legal consequences at this point in time. The unresolved issues between the two courts concern scope and intensity of judicial review of a potential future OMT application (1) and the compatibility with the ban on monetary financing of a “haircut” on bonds held in the ECB’s portfolio (2). While the controversy appears to be settled at this stage, it may become relevant again in two potential future scenarios: If the OMT policy decision actually became operational, and if a “haircut” relinquishing parts of the debt of euro countries owed to Member States and the ECB occurred, which is currently called for from various sides.²⁶

I. Judicial review of the ECB

a) Judicial restraint or extended judicial control?

Schmidt, “Die entfesselte EZB”, (2015) JZ, 317 ff.; Siekmann, “The Legality of Outright Monetary Transactions (OMT) of the European System of Central Banks”, *Institute for Monetary and Financial Stability (IMFS) Working Paper Series No. 90* (2015), 18 ff.

²⁶ See von Bogdandy, Fratzscher and Wolff, “Griechenland-Krise: Schuldenschnitt auch ohne Grexit möglich”, (23 July 2015) *Frankfurter Allgemeine Zeitung*, 6; Steinbach, “Die Beteiligung öffentlicher Gläubiger im Rahmen der europäischen Staatsschuldenkrise”, (2013) JZ, 1148; the Greek debt sustainability has repeatedly been questioned by the International Monetary Fund (IMF), see IMF Country Report No. 16/130 (May 2016), available at <http://www.imf.org/external/pubs/ft/scr/2016/cr16130.pdf>; see also Gros and Mayer, “Debt reduction without default?”, *CEPS Policy Brief No. 233* (February 2011).

Divergent views seem to persist between the two courts regarding the scope of judicial review once the OMT programme is activated. This refers to the discretionary leeway granted to the ECB, which in turn determines the scope of judicial review. A comprehensive and substantial review of the ECB's decision has been one of the central requirements specified by the FCC. The CJEU's *Gauweiler* judgment, however, rather indicates a significant "judicial restraint" of the Court: It was precisely the ECB's monetary policy assessment,²⁷ based on the bond spreads dissociated from fundamental variables,²⁸ which led the CJEU to state that "it does not appear that that analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment."²⁹ The Court's restraint to limit its review to "manifest errors of assessment" corresponds to the fact that the monetary policy decisions are typically controversial in nature implying that the ECB enjoys "broad discretion" – in such situations the ECB can only be expected to "use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy".³⁰ Technical complexity and broad discretion accordingly lead the CJEU to review compliance with certain procedural standards only, that is, whether the ECB examined "carefully and impartially all the relevant elements of the situation in question and [gave] an adequate statement of the reasons for its decisions."³¹ To that end, the Court was able to undertake a review on the basis of the "press release, together with draft legal acts considered during the meeting of the Governing Council at which the press release was approved".³²

The CJEU's specification of the scope of judicial review had remained apodictic and without reference to its well-established line of jurisprudence, leaving without specification the quality of the reasons given by the ECB and which procedural guarantees it would require from the ECB.³³ By contrast, the FCC elaborated on the doctrinal basis of judicial review in the

²⁷ Case C-62/14, *Gauweiler and Others*, para. 73.

²⁸ Case C-62/14, *Gauweiler and Others*, para. 72.

²⁹ Case C-62/14, *Gauweiler and Others*, para. 74.

³⁰ Case C-62/14, *Gauweiler and Others*, para. 75.

³¹ Case C-62/14, *Gauweiler and Others*, para. 69.

³² Case C-62/14, *Gauweiler and Others*, para. 71; on the relevance of the reasons provided for the OMT programme, see Villalón, Case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:7, para. 164ff. – Opinion in *Gauweiler*; in general on the duty to give reasons Case 24/62, *Germany v. Commission*, ECLI:EU:C:1963:14, 155, and Case C-164/98 P, *DIR International Film and Others v. Commission*, ECLI:EU:C:2000:48, para. 33.

³³ Case C-62/14, *Gauweiler and Others*, para. 41; on the scope of discretion, see also Heun, "Eine verfassungswidrige Verfassungsgerichtsentscheidung - der Vorlagebeschluss des BVerfG vom 14.1.2014",

jurisprudence of the CJEU – it extensively quotes the CJEU’s previous jurisprudence underpinning the wide scope of manoeuvre granted to EU institutions.³⁴ However, the FCC then turns to argue that the specific constitutional and EU law provision would require an extended judicial control of the ECB. In particular, the FCC points to the risks associated with “a generous acceptance of alleged objectives”³⁵ (i.e., the monetary policy objective of the ECB) and the reduction of judicial review – this could lead to an impermissible disposition of EU institution over their competences granted under the Treaties.³⁶

b) The compensatory function of judicial review for limited legitimacy

The FCC puts forward two arguments underlining its request for an extensive judicial review, both of which are rooted in the democratic principle: the principle of conferral of powers³⁷ and the reduced level of legitimacy due to the independence of the ECB.³⁸ The Court characterizes the principle of conferral of powers as performing a “function of intersection” between the national constitutional law requirements, on the one hand, and the “respect of national identity mandated by EU law”, on the other hand. In this vein, the principle of conferral of powers provides the safeguard provided under EU law, which ensures what is nationally required by constitutional law. The FCC seems to consider the principle of conferral of powers and the democratic principle as communicating pipes: The more fundamental interests are concerned in the specific case, the more strictly the principle of conferral of powers should be applied and the more careful and intense the judicial control should be.³⁹

Similar considerations apply, in the FCC’s view, to the ECB’s reduced level of legitimacy.⁴⁰ The FCC puts in judicial guise what has been dominating the political discussion for some time: the lack of democratic legitimacy of the ECB stands in contrast to the increasing power and authority this institution gained throughout the crisis.⁴¹ The tension results from the following observation: On the one hand, the ECB secures stable prices, thereby ensuring individual

(2014) JZ, 331, 334; on the judicial review, see Türk, *Judicial Review in EU Law* (Cheltenham, 2010), 137.

³⁴ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 179.

³⁵ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 184.

³⁶ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 184.

³⁷ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 184ff.

³⁸ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 187ff.

³⁹ See BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 186.

⁴⁰ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 187; on this discussion, see Scharpf, “Monetary Union, Fiscal Crisis and the Preemption of Democracy”, *LEQS Paper No. 36/2011* (May 2011).

⁴¹ See Amtenbrinck, *The Democratic Accountability of Central Banks* (Oxford, 1999), pp. 359 ff.

freedoms and the functioning of public financial system. On the other hand, the ECB is not part of the chain of legitimacy and hierarchy and therefore not subject to the control of the legitimized organs. According to the FCC, this justifies a restrictive interpretation of ECB competences and the judicial review fulfills a compensatory function, “in order to mitigate the reduced level of legitimacy”.⁴²

The FCC’s stance on combining restrictive interpretation of competences and extended judicial review cannot hide the difficulties that will occur when operationalizing this standard. The independence of the ECB not only requires personal and substantive independence of the institution,⁴³ but also entails that its decisions are not replaced by another institution (that might lack the specific economic expertise).⁴⁴ As the CJEU has underscored,⁴⁵ legality control can only be limited to the review of procedural guarantees – any further review of the substantial decision would encroach upon the core of the ECB’s competence and violate its independence. Therefore, impartiality, careful analysis, an account of all the relevant elements of the situation in question and an adequate statement of the reasons for the ECB’s decisions should all be among the basic procedural obligations subject to judicial review.⁴⁶ However, unanimity among experts on the monetary policy decision and the relevant reasons is not a prerequisite – even a controversial decision in substance does not justify an extensive judicial review of the ECB’s decision.⁴⁷ Monetary policy decisions rarely concern issues of consensus among experts, as highlighted also by the fact that the principle of simple majority applies for monetary policy decisions in the ECB Council. A review of the reasons for monetary policy decision must thus be limited to manifestly erroneous, arbitrary or illogical assumptions or conclusions.

Against this backdrop, there continue to be different views of the two courts on the scope of judicial review. The present judgment of the FCC reveals a strong emphasis the court places on judicial control of the ECB. It almost seems as if the FCC wants to nail down the CJEU on a rigorous judicial control of a future application of the OMT policy decision. However, the

⁴² BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 189.

⁴³ Siekmann, “Die Unabhängigkeit von EZB und Bundesbank nach geltendem Recht und dem Vertrag über eine Verfassung für Europa”, *IMFS Working Paper Series No. 2* (2006).

⁴⁴ Herrmann, “Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts”, (2012) *EuZW*, 805, 811; Thiele, “Die EZB als fiskal- und wirtschaftspolitischer Akteur?”, (2014) *EuZW*, 694, 696.

⁴⁵ Case C-62/14, *Gauweiler and Others*, para. 69.

⁴⁶ Case C-62/14, *Gauweiler and Others*, para. 69.

⁴⁷ Thiele, “Die EZB als fiskal- und wirtschaftspolitischer Akteur?”, (2014) *EuZW*, 694, 696.

CJEU, in *Gauweiler*, had made only some general references to judicial review,⁴⁸ but did not reveal a similarly strict stance on the control of the ECB. By contrast, the FCC requested on two occasions in its judgment⁴⁹ that the ECB's "assessment of the monetary policy situation",⁵⁰ preceding an activation of the OMT programme, must be subject to judicial review – a point that the CJEU had not explicitly referred to. In fact, the FCC's request amounts to a control of the ECB's motivation with the aim to distinguish between permissible monetary policy objectives and impermissible economic policy considerations. Hence, if OMT were eventually implemented in the future, the divergent views of FCC and CJEU on the scope of judicial control of the ECB's decision and its reasoning would come to the forefront again. Not only because of the obvious difficulties that a control of (technical complex) motivation would pose to legal judges (let alone the additional complexities due to the institutionalized character of the decisions), but it is also plausible to respect the discretionary space of the ECB, with regard to monetary policy, and to limit judicial review to basic procedural guarantees and the compliance with the safeguards specified by the CJEU and accepted by the FCC.⁵¹

II. The "haircut" as the next issue of conflict?

In light of the ongoing discussions concerning a "haircut" on Greek debt, new controversies are likely to emerge.⁵² In May 2016, the International Monetary Fund repeated its doubts regarding the debt sustainability of Greece and claimed the indispensability of a "haircut".⁵³ While the "haircut" is likely to be in violation of the no-bailout principle of Article 125 TFEU,⁵⁴ the present judgment of the FCC raises new questions regarding the role of the ECB and the government bonds in its portfolio – this has to be assessed in view of the ban on monetary

⁴⁸ Case C-62/14, *Gauweiler and Others*, para. 41, 69.

⁴⁹ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 194, 195.

⁵⁰ Case C-62/14, *Gauweiler and Others*, para. 83.

⁵¹ See the enumeration in BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 199.

⁵² On the discussion on the "haircut", see Fn. 12 above.

⁵³ IWF, IMF Country Report No. 16/130 (Mai 2016), available at

<http://www.imf.org/external/pubs/ft/scr/2016/cr16130.pdf>; on the previous „haircut“ on private debt see Witte, "The Greek Bond Haircut", 9 *Manchester J. Int'l Econ. L.* (2012), 307; Zettelmeyer et al., "The Greek Debt Restructuring: An Autopsy", 28 *Economic Policy* (2013), 513.

⁵⁴ Comprehensively, Steinbach, "The 'Haircut' of Public Creditors under EU Law", 12 *European Constitutional Law Review* (2016), 223-239.

financing laid down in Article 123 TFEU. The FCC makes clear that it considers a “haircut” to be in conflict with this prohibition.⁵⁵

In its preceding decision on *Gauweiler*, the CJEU established high hurdles for a “haircut”. Even if one recognizes the wide margin of discretion of the ECB, the CJEU stresses that bond purchases must strictly be motivated by monetary policy considerations⁵⁶ excluding fiscal policy objectives.⁵⁷ Even if the bonds’ loss in value constitutes a typical market risk,⁵⁸ the high debt burden would have to impair the monetary transmission mechanism in order for a “haircut” to be necessary for monetary policy reasons. However, the current debate about the “haircut” seems to be informed by fiscal policy considerations rather than by monetary policy concerns.⁵⁹

General-Advocate *Villalón* has been very explicit on this issue: Compatibility of a “haircut” with Article 123 TFEU can only be considered provided that the “ECB will not actively contribute to bringing about a restructuring but will seek to recover in full the claim securitised on the bond.”⁶⁰ This statement must apply particularly pertaining to “haircuts” driven by fiscal policy reasons. In light of the currently discussed scenarios of a debt cut, the question is what the term “actively contribute” of the ECB would mean with a view to the Collective Action Clauses” (CAC), which were introduced during the crisis. Greece introduced these bonds during the crisis to the effect that an agreement of 67 per cent of the creditors would suffice to implement a haircut binding on all creditors (while the ECB was excluded from that effect).⁶¹ Moreover, the ESM Treaty made compulsory CAC for future issuance of bonds.⁶² In future, one potential scenario is that the ECB, holding less than 25 per cent of the government bonds concerned, would not be in a position to block a vote on the “haircut”. In this scenario, the term “active contribution” becomes relevant – the ECB would be obliged to vote against such

⁵⁵ BVerfG, judgment of 21 June 2016, 2 BvR 2728/13, para. 204.

⁵⁶ Case C-62/14, *Gauweiler and Others*, para. 62.

⁵⁷ See also Schorkopf, *Legal Opinion prepared for the ECB* (16 January 2013), 52.

⁵⁸ Case C-62/14, *Gauweiler and Others*, para. 125.

⁵⁹ IWF, Greece, IMF Country Report No. 15/165 (26 June 2015), available at www.imf.org/external/pubs/ft/scr/2015/cr15165.pdf.

⁶⁰ Villalón, Case C-62/14, *Opinion in Gauweiler and Others*, ECLI:EU:C:2015:7, para. 235.

⁶¹ Zettelmeyer et al., “The Greek Debt Restructuring: An Autopsy”, 28 *Economic Policy* (2013), 513, 550, 554.

⁶² This has been based on the conclusion drawn at the European Council on 24/25 March 2011, which then had been further developed by the Economic and Financial Committee (EFC) on 18 November 2011. See europa.eu/efc/sub_committee/cac/cac_2012/index_en.htm.

“haircut”, even if it would have to accept it under the described conditions. In this vein, the FCC refers to the assurances made by the ECB in the proceedings before the FCC that it would not give its consent to a “haircut”.⁶³

III. Conclusions

The widely feared confrontation between CJEU and FCC was finally averted. Legally, this became possible by way of distinguishing between the basic OMT policy decision and the future acts implementing the programme: While the recent FCC judgment reveals that it continues to disagree with the CJEU on the lawfulness of the OMT policy decision, the legal institute of EU law consistent application of a legal act paves the way of compromise – the restrictive safeguards specified by the CJEU suffice from the FCC’s perspective to apply the (otherwise illegal) OMT policy decision in conformity with EU law. However, this distinction may just have shifted the conflict between the two courts in the future, namely until the OMT programme actually becomes operational one day. This is particularly possible because the courts have divergent views of the scope and standards of judicial review to which monetary policy decision of the ECB should be subject to. The FCC sets high expectations for judicial control – it would not only ask to review compliance with the specific safeguard measures, but would also request the CJEU to enter into an extensive review of the ECB’s monetary policy assessment, an exercise that would ultimately not be compatible with the well-founded wide discretionary space of the ECB. In any case, even rigorous control of the monetary policy decision would have to recognize that the ECB’s decision has (until today) been backed by relevant empirical economic literature, so that there would at least be no ground for finding a manifest erroneous assessment.

Most market observers believe that OMT will ever be activated. The mere announcement of the OMT policy decision in September 2012 contributed to a significant decline of market turbulences. It is more likely both politics and courts would at some point be confronted with a Greek “haircut” – the no-bailout principle and the ban on monetary financing offer very limited legal space for the cutting of debt. An involvement of the ECB would be feasible only if the “haircut” were motivated by monetary policy grounds, excluding primarily fiscal-policy

⁶³ BVerfG, judgment of 21 June 2016, *Gauweiler and Others*, 2 BvR 2728/13, para. 204; see also Zilioli, “The ECB’s powers and institutional role in the financial crisis”, 23 MJ (2016), 171, 176.

objectives. Also, the ECB would not be allowed to give its consent to a “haircut” within the community of debt holders.⁶⁴

⁶⁴ Comprehensively, Steinbach, “The ‘Haircut’ of Public Creditors under EU Law”, 12 *European Constitutional Law Review* (2016), 223-239.