

# CONSTITUTIONAL PLURALISM AS MUTUALLY ASSURED DISCRETION

## The Court of Justice, the German Federal Constitutional Court, and the ECB

MATTHIAS GOLDMANN\*

### ABSTRACT

*This article analyses the standard of review applied by the Court of Justice in the Gauweiler case concerning the European Central Bank's (ECB) Outright Monetary Transaction (OMT) policy. It argues that the Court's focus on rationality and proportionality checks bears great potential for constitutional pluralism in the European Union. Both standards are relatively vague. This allows each actor to use these standards to keep other actors in check. Their particular virtue lies in the fact that they induce self-restraint in other actors because their vagueness leaves them in the dark about possible reactions and because all actors have an interest in keeping the Union intact, or at least in avoiding responsibility for causing serious cracks. Questions of hierarchy and the ultimate say can therefore remain undecided. The Federal Constitutional Court pursued exactly this strategy in its Solange judgments and the Honeywell decision. If it continues following this line of reasoning, the Gauweiler case would lead to a more robust form of constitutional pluralism in the EU. Under this framework, the ECB would have the possibility to decide, in the ambit of its discretionary powers, whether to participate in a sovereign debt restructuring.*

**Keywords:** constitutional pluralism; discretion; European Central Bank; Outright Monetary Transactions; primacy (supremacy) of EU law

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\* Max Planck Institute for Comparative Public Law and International Law, goldmann@mpil.de. For comments and critique, the author would like to thank Federico Fabbrini and the participants in the conference 'The ECJ, the ECB, and the Supremacy of EU Law' at Copenhagen University in September 2015.

## §1. CONSTITUTIONAL PLURALISM AS LAW'S THEODICY PROBLEM

For centuries, theologians have grappled with the theodicy paradox. Assuming that God is merciful and almighty, why is there evil on earth? For many critics, it follows that God is either not merciful, or not almighty. By contrast, sophisticated theologians have pleaded for the acceptance that the theodicy paradox as an 'impossible possibility'.<sup>1</sup> Instead of solving the paradox, they propose that people should seek to overcome evil and provide a quantum of solace to the sufferers.<sup>2</sup>

Constitutional pluralism is constitutional theory's theodicy problem.<sup>3</sup> Some argue that where different legal orders claim supremacy, logic requires one of them to be supreme and the others to succumb.<sup>4</sup> This article argues that this is a fallacy. One can leave the paradox unresolved and seek to operationalize it. The judgment of the Court of Justice of the European Union (Court of Justice) in the *Gauweiler* case concerning the Outright Monetary Transactions (OMT) programme of the European Central Bank (ECB) devises a solution.<sup>5</sup> It relies on an idea which I call 'mutually assured discretion'. This idea applies to both vertical relationships between the European Union and domestic courts, and horizontal relationships between European institutions and the Court of Justice. Accordingly, the institutions of the European Union exercise their powers on the basis of competences and mandates which grant them some degree of discretion. The power of courts to review such discretion is limited. But at the same time, judicial review also involves discretion. It is up to the reviewing court to determine the applicable standard of review, and apply it to a given case. This mutually discretionary relationship instigates enough self-discipline in each actor to stabilize the respective relationships – not dissimilar to the logic of the Cold War, yet within a much more harmonious framework.

This article will first provide an inductive, reconstructive elaboration of the idea of mutually assured discretion. The contours of the discretion of the European institutions, as well as the applicable standard of judicial review, are different for horizontal and vertical relationships. Concerning the former, this article will elaborate on mutually assured discretion as it emerged in the case law of the Court of Justice concerning the judicial review of post-crisis measures (Section 2). Concerning the latter, this article will show that

<sup>1</sup> K. Barth, *Der Römerbrief* (2nd edition, Theologischer Verlag Zürich, 1922), p. 114.

<sup>2</sup> E.g. G. Theißen, 'Das Hiobexperiment', in G. Theißen, *Protestantische Akzente* (Gütersloher Verlagshaus, 2008), p. 36–43.

<sup>3</sup> This is not the only place in the law where we encounter a 'theodicy problem'. The relationship between law and justice is another. While N. Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, 1993), p. 214 et seq., considers this relationship as law's 'contingency formula', Gunther Teubner speaks of 'Juridizee', see G. Teubner, 'Selbstsubversive Gerechtigkeit: Kontingenz- oder Transzendenzformel des Rechts?', 29 *Zeitschrift für Rechtssoziologie* (2008), p. 9–36.

<sup>4</sup> But see M. Loughlin, 'Constitutional pluralism: An oxymoron?', 3 *Global Constitutionalism* (2014), p. 9–30.

<sup>5</sup> Case C-62/14 *Gauweiler*, EU:C:2015:400.

the *Bananas*<sup>6</sup> and *Honeywell*<sup>7</sup> decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht*; FCC) follow a similar logic of mutually assured discretion (Section 3). Having thus carved out the idea of mutually assured discretion underlying the *Gauweiler* case, it will be argued that this approach is normatively preferable to others for constitutional pluralism in the European Union (Section 4). The FCC would be well advised to follow the logic of mutually assured discretion in the present post-crisis context, whether in the *Gauweiler* case or in future disputes concerning, for example, the legality of the ECB's participation in sovereign debt restructurings in the European Union (Section 5).

## §2. HORIZONTAL DISCRETION: THE COURT OF JUSTICE AND THE EURO CRISIS

In the law of the European Union, the horizontal variant of mutually assured discretion describes the standard of review that the Court of Justice has developed for the measures taken in response to the Euro crisis by the ECB and the Member States. However, it is my understanding that this standard of review also has a potential for other situations. One might generally use it as a standard of review in situations where an institution of the Union enjoys some degree of independence from others, which judicial review of its measures may not undermine. Examples might include the relationship between the European institutions and regulatory agencies like the European Securities and Markets Authority (ESMA),<sup>8</sup> or the issue of the right of the European Parliament to access to classified Council documents.<sup>9</sup>

As the following analysis of the *Pringle* and *Gauweiler* cases will show, the horizontal variant of mutually assured discretion is usually characterized by a broadly framed legal mandate of the institution concerned, which stipulates a certain objective to be reached rather than specific acts to be taken. Judicial control is confined to a three-pronged test whether the institution in question (in the case at hand, the ECB) actually pursues the stipulated objective; whether it uses the right instruments for that purpose; and whether its measures are proportionate.<sup>10</sup> This horizontal variant of mutually assured discretion

<sup>6</sup> BVerfG, Case 2 BvL 1/97 *Bananas*, BVerfGE 102.

<sup>7</sup> BVerfG, Case 2 BvR 2661/06 *Honeywell*, BVerfGE 126.

<sup>8</sup> E.g. Case C-270/12 *UK v. Parliament and Council (ESMA)*, EU:C:2014:18.

<sup>9</sup> Inter-institutional Agreement of 20 November 2002 between the European Parliament and the Council concerning access by the European Parliament to sensitive information of the Council in the field of security and defence policy, [2002] OJ C 298/1–3; Inter-institutional Agreement of 12 March 2014 between the European Parliament and the Council concerning the forwarding to and handling by the European Parliament of classified information held by the Council on matters other than those in the area of the common foreign and security policy, [2014] OJ C 95/1–7.

<sup>10</sup> Compare with H. Sauer, 'Doubtful it Stood...: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment', 16 *German Law Journal* (2015), p. 971–1002, 978.

resembles the judicial review of administrative discretion on the domestic level, which is usually confined to the question whether the actor in charge by and large pursued the objectives underlying its mandate and the limits set by certain basic legal principles.<sup>11</sup>

#### A. *PRINGLE*

For the greater part of its existence, the ECB has been a rare guest before the Luxembourg court.<sup>12</sup> The Court of Justice began developing its standard of review for ECB measures as unconventional fiscal and monetary policies unfolded in the aftermath of the financial crisis.<sup>13</sup> In *Pringle*, the Court of Justice developed important elements of its purpose-oriented standard of review. In delineating the Union's exclusive competence in monetary policy from fiscal policy, the Court of Justice ruled that it is not by the specific properties of a certain measure that one may distinguish monetary from fiscal policy, but by the objective of a measure pursued.<sup>14</sup> The Court of Justice found that the European Stability Mechanism (ESM) aimed at the financial stability of the Eurozone as a whole and thus pursued a different objective which did not fall within the exclusive competence of the Union.<sup>15</sup> However, as Paul Craig rightly criticizes, this conclusion may have been drawn prematurely. The financial stability of the Union as a whole being a precondition for price stability, one may also say that the ESM aims at price stability.<sup>16</sup> As Craig emphasized, the Court of Justice does not fully cling to its other premise, namely that monetary and fiscal policy mutually influence each other at least indirectly.<sup>17</sup> Craig suggests that the solution lies in the consideration that the ESM does not have the competence to set monetary policies such as interest and exchange rates.<sup>18</sup> It is thus the combination of policy objectives and the instruments used to realize them, which allows a meaningful and practicable delimitation of monetary and fiscal policies. From this viewpoint, the ESM clearly does not fall into the field of monetary policy, given that it has the purpose of safeguarding the financial stability of the Eurozone and its members<sup>19</sup> and makes provision for granting financial support to member states to that end through loans, precautionary, primary and secondary market facilities.<sup>20</sup>

<sup>11</sup> For a comparative overview see C. Grabenwarter, 'Ermessenslehren', in A. von Bogdandy, S. Cassese and P.M. Huber, *Ius Publicum Europaeum*, vol. 5 (C.F. Müller, 2014), para. 90, margin note 46–72.

<sup>12</sup> Overview: C. Herrmann, 'Art. 35 Satzung', in H. Siekmann (ed.), *EWU-Kommentar* (Mohr Siebeck, 2013), no. 5.

<sup>13</sup> For an overview, see J.-V. Louis, 'The EMU after the OMT judgment and the Juncker report', in this Special Issue.

<sup>14</sup> Case C-370/12 *Pringle*, EU:C:2012:756, para. 54–55.

<sup>15</sup> *Ibid.*, para. 56.

<sup>16</sup> P. Craig, 'Pringle and the nature of legal reasoning', 21 *Maastricht Journal of European and Comparative Law* (2014), p. 205–220, 215–16.

<sup>17</sup> Case C-370/12 *Pringle*, para. 56.

<sup>18</sup> P. Craig, 21 *MJECL* (2014), p. 216.

<sup>19</sup> Article 3 of the Treaty Establishing the European Stability Mechanism (ESM Treaty), 27 September 2012.

<sup>20</sup> Articles 14–18 of the ESM Treaty.

This object-instrument combination also needs to be used within strict limits, namely if there is a risk to the financial stability of the Eurozone, if public debt in the respective Member State is sustainable, and subject to conditionality.<sup>21</sup> Effectively, these conditions boil down to some form of proportionality test: there needs to be a legitimate goal (financial stability), the ESM facilities need to be the least restrictive measure (as a debt restructuring is not necessary), and conditionality ensures that such support has a certain political and economic price tag attached to it. Nevertheless, the Court of Justice does not call this a proportionality test, although it points out the significance of these conditions for the legality of the ESM treaty under EU law, especially in light of the no-bailout provision of Article 125 TFEU,<sup>22</sup> which the ESM complements and transforms.<sup>23</sup> The reason for this might be that the proportionality principle stipulated in Article 5(4) TEU only applies to the exercise of the competencies of the EU. But in the opinion of the Court of Justice, the ESM Treaty does not fall within the competence of the EU, and the newly added Article 136(3) TFEU is only of declaratory character.<sup>24</sup>

## B. GAUWEILER

The *Gauweiler* case continues this line of reasoning and further clarifies the standard of review to be applied to ECB measures.<sup>25</sup> Advocate General Cruz Villalón clearly spelled out the test which ECB measures need to pass: objectives pursued, instruments used, and proportionality.<sup>26</sup> Again, the Court of Justice elaborates the limits of broadly phrased provisions in the primary law, which grant the ECB a wide margin of discretion, by a combination of their objectives, the instruments used, and a proportionality test.<sup>27</sup> The Court of Justice begins its review by taking a very close look at the objectives of the ECB's monetary policy mandate stipulated in Article 127(1) TFEU. Contrary to the FCC,<sup>28</sup> it finds that the ECB not only has the mandate to maintain price stability, but also to conduct a *single* monetary policy, that is, that the preservation of the integrity of the Eurozone is a legitimate objective of ECB policy.<sup>29</sup> This opinion finds textual support in Article 127(1) TFEU and Article 3(4) TEU. They not only reveal the purposive character

<sup>21</sup> Article 12, 13(1) of the ESM Treaty.

<sup>22</sup> Case C-370/12 *Pringle*, para. 136.

<sup>23</sup> K. Tuori, 'The European Financial Crisis – Constitutional Aspects and Implications', *EUI Working Paper LAW 2012/28* (2012), <http://cadmus.eui.eu/handle/1814/24301>, p. 22–25, speaking of a 'second-order purpose' created by the ESM.

<sup>24</sup> Case C-370/12 *Pringle*, para. 72.

<sup>25</sup> On earlier case law, see S. Baroncelli, 'The OMT Judgment in view of the ECJ Case Law on ECB Independence', in this Special Issue.

<sup>26</sup> Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, EU:C:2015:7, para. 132.

<sup>27</sup> Compare F. Mayer, 'Zurück zur Rechtsgemeinschaft: Das OMT-Urteil des EuGH', *Neue Juristische Wochenschrift* (2015), p. 1999–2004, 2001.

<sup>28</sup> BVerfG, Case 2 BvR 2728/13 et al. *Gauweiler*, decision of 14 January 2014, para. 72.

<sup>29</sup> Case C-370/12 *Pringle*, para. 48.

of the ECB's monetary policy mandate,<sup>30</sup> but link it directly with the integration programme pursued by the Treaties.

According to the Court of Justice, the instruments the ECB intended to use for its OMT programme, outright transactions on the secondary market, clearly serve these objectives.<sup>31</sup> Their selective character does not take away their character as monetary policy instruments. Moreover, in line with *Pringle*, the Court of Justice points out that the effects of the OMT programme on fiscal policy would not suffice to disqualify it as monetary policy.<sup>32</sup> These issues might only raise proportionality questions, which the Court of Justice addresses in the following.

Proportionality requires the Court of Justice to relate the instruments to the objectives pursued. Given the discretionary character of the ECB's monetary policy mandate, the Court of Justice does not try to replace the expertise of the ECB with its own.<sup>33</sup> Jürgen Stark, former ECB chief economist of the ECB, fiercely criticized Advocate General Cruz Villalón for recommending this line of reasoning in his Opinion.<sup>34</sup> However, a legal review that respects the discretionary powers of the ECB by necessity requires accepting that different economic views are legally permissible. Law needs to acknowledge that economics has its own rationality, and vice versa.<sup>35</sup> Otherwise, one would relegate the ECB to the ranks of an administrative unit at the service of the Court of Justice – or of the FCC.

This, however, does not amount to a denial of judicial scrutiny on the part of the Court of Justice. Instead of a full review, the proportionality test bears a largely procedural character.<sup>36</sup> The Court of Justice establishes that the ECB is under a duty to provide sufficient reasons, which it derives *mutatis mutandis* from Article 296(2) TFEU.<sup>37</sup> What follows is a plausibility test in which the Court of Justice finds that the reasoning given by the ECB in support of its OMT programme is consistent and in line with certain features of the OMT programme such as its selective character and conditionality.

<sup>30</sup> M. Wendel, 'Kompetenzrechtliche Grenzgänge: Karlsruhes Ultra-vires-Vorlage an den EuGH', 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014), p. 615–70, 657.

<sup>31</sup> Case C-62/14 *Gauweiler*, para. 53–55.

<sup>32</sup> *Ibid.*, para. 59.

<sup>33</sup> *Ibid.*, para. 68, 74–75.

<sup>34</sup> J. Stark, 'Sachkenntnis – mangelhaft', *Frankfurter Allgemeine Zeitung*, 21 January 2015, [www.faz.net/aktuell/wirtschaft/eurokrise/anleihekaeufer-der-ezb-sachkenntnis-mangelhaft-13381429.html](http://www.faz.net/aktuell/wirtschaft/eurokrise/anleihekaeufer-der-ezb-sachkenntnis-mangelhaft-13381429.html), reacting to the Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, EU:C:2015:7, para. 110.

<sup>35</sup> See C. Gerner-Beuerle, E. Küçük and E. Schuster, 'Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial', 15 *German Law Journal* (2014), p. 281–320; M. Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review', 15 *German Law Journal* (2014), p. 265–280.

<sup>36</sup> C. Ohler, 'Rechtliche Maßstäbe der Geldpolitik nach dem Gauweiler-Urteil des EuGH', *Neue Zeitschrift für Verwaltungsrecht* (2015), p. 1001–1007, 1003–1004.

<sup>37</sup> Case C-62/14 *Gauweiler*, para. 70.

After this exhaustive analysis, the Court of Justice turns to an examination of the conformity of the OMT programme with Article 123 TFEU. Despite its relative brevity, the same pattern can be discerned here. The Court of Justice begins by exploring the objective of Article 123 TFEU, namely that of instilling sound budgetary policies in the Member States.<sup>38</sup> In that respect, the difficult question whether Article 123 TFEU also prohibits secondary market purchases which generate effects that are equivalent to those of primary market purchases – a position which some scholars<sup>39</sup> and the FCC<sup>40</sup> had stressed – also requires a consideration of ends and means, objectives and instruments.<sup>41</sup> The Court of Justice considers that secondary market purchases are not prohibited to the extent that they do not lessen the incentive of Member States to conduct sound budgetary policies. Whether that is the case with respect to the OMT programme reveals – again – a look at the instrument used. The Court of Justice concludes that certain limitations and conditions attached to the OMT programme reduce moral hazard and instigate sound budgetary policies.<sup>42</sup>

At this point, a conundrum arises. The Court of Justice does not explicitly carry out a proportionality test with respect to Article 123 TFEU. In light of the purpose of Article 5(4) TEU, to ensure the proportionality of EU measures, there is no reason to apply a proportionality to the positive competencies of the ECB stipulated in Article 127 TFEU, but not to the ‘negative’ competencies, or rather, to the limits of the ‘positive’ competences stipulated in Article 123 TFEU. In both cases, the goals pursued by the OMT programme must be weighed against other ends. However, I think that the Court of Justice’s analysis of the limits and conditions of the OMT programme which are meant to reduce moral hazard effectively amounts to a kind of proportionality analysis. In any event, there would not have been many arguments left for the court to discuss in a separate proportionality analysis.

By way of an intermediate conclusion, one can say that the Court of Justice has developed a fairly consistent standard of judicial review of crisis-related measures of the ECB and the Member States. This standard lends itself for the review of measures of other independent agencies or institutions. It comprises a close scrutiny of the purposes of a mandate or competence, a check whether the instruments deployed serve that mandate, and an analysis whether the effects are proportionate to the objectives. One might call this the horizontal variant of mutually assured discretion: the Court of Justice accepts the discretion of the ECB by exercising judicial self-restraint, while the ECB recognizes the Court of Justice’s power of review by providing reasons to the Court of Justice which the latter uses to take the ECB at its word and scrutinize independently, guided by legal,

<sup>38</sup> Ibid., para. 98–100.

<sup>39</sup> E.g. J.A. Kämmerer, ‘Art. 123’, in H. Siekmann (ed.), *EWU-Kommentar* (Mohr Siebeck, 2013), no. 24.

<sup>40</sup> BVerfG, Case 2 BvR 1390/12 et al. *ESM*, BVerfGE 132, 195, 268.

<sup>41</sup> Case C-62/14 *Gauweiler*, para. 109.

<sup>42</sup> Ibid., para. 111–126.

not economic considerations, whether the instruments deployed are in line with the ECB's stated objectives.

### §3. VERTICAL DISCRETION: THE FCC AND THE EUROPEAN INSTITUTIONS

A similar, but different standard of review governs vertical relationships between different levels of government in the EU. This concerns, first and foremost, the FCC's very own case law concerning its powers of review of EU measures and, specifically, of Court of Justice rulings. I argue that the notorious relationship between the Court of Justice and the FCC as well as other supreme and constitutional courts actually constitute a vertical constellation of mutually assured discretion.

In vertical relationships, the discretion test works differently. It focuses on the question whether the European Union has put in place structures and procedures ensuring that the exercise of its powers stays within the defined limits of its competence and does not violate human rights. Added to this is a kind of proportionality test which provides a threshold. Domestic courts may only intervene where there is a manifest violation of the respective rules of competence or human rights guarantees. In contrast to horizontal relationships, vertical mutually assured discretion does not consider the concrete object and purpose of a measure and the instruments used. Rather, it is confined to an assessment whether the European Union has put in place adequate structures for ultra vires and human rights reviews. This difference accounts for the fact that the judicial review of the Union's public authority – whether discretionary or not – is to be carried out principally within the legal order of the European Union. Being located at some distance and in a different legal order, domestic courts need to grant the Union, including the Court of Justice, a margin of discretion.

#### A. HUMAN RIGHTS

The horizontal variant of mutually assured discretion originates in the idea of judicial cooperation which the FCC has developed, initially, in its case law regarding the human rights review of EU law. The long road that led the FCC and the Court of Justice from *Stauder* to the *Bananas* decision testifies to the willingness of the Court of Justice to put in place structures for the human rights review of EU law.<sup>43</sup> The FCC's decision in *Bananas* grants a wide margin of discretion to the Court of Justice – but at the time still

<sup>43</sup> Case 29/69 *Stauder*, EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114; BVerfG, Case BvL 52/71 *Solange I*, BVerfGE 37, 271; BVerfG, Case 2 BvR 197/83 *Solange II*, BVerfGE 73, 339; Case C-280/93 *Federal Republic of Germany v. Council of the European Union (Bananas)*, EU:C:1994:367.

in a wholly substantive sense.<sup>44</sup> The FCC did not satisfy itself with the ‘discovery’ of human rights in the EU legal order by the Court of Justice, and the development of a body of case law for their effective enforcement in EU law. Rather, it insisted that the standard of human rights protection needs to be *substantively* equivalent to the one granted under the German Basic Law. Otherwise, it would restart hearing complaints about human rights violations caused by EU law. This substantive approach is not (yet) fully capable of organizing a pluralistic constitutional setting. It would inevitably lead to legal conflicts in a Union where all Member States did the same and insisted on their specific human rights standard – a situation which the European Court of Human Rights only escapes by invoking the margin of appreciation doctrine. But it is well-known that the last chapter on the issue of human rights enforcement in the EU legal order has not been written.<sup>45</sup>

## B. ULTRA VIRES

By contrast, the more recent case law concerning ultra vires acts of the EU resembles, *mutatis mutandis*, much more closely the rationale of the Court of Justice in horizontal situations of mutually assured discretion. It started with the *Maastricht* judgment,<sup>46</sup> was expanded in the *Lisbon* judgment,<sup>47</sup> and reached full blossom in the *Honeywell* judgment. Here, the FCC argued that the alleged ultra vires act needs to structurally affect the repartition of competencies in the EU legal order, and needs to be manifest.<sup>48</sup> The FCC based this decision on the insight that, when courts determine the limits of the Union’s competence under the treaties, there is no single right solution. The Treaties stipulate the competence of the Union in broad, general terms. For this reason, before declaring an EU act ultra vires, domestic courts need to refer the case to the Court of Justice, which enjoys a certain margin of discretion to develop these provisions.<sup>49</sup> Conversely, the FCC claims discretion with respect to the standard of ultra vires review. There are no objective criteria for determining manifest, structurally significant transgressions of the competencies of the EU.<sup>50</sup> Such a mutually discretionary relationship instils self-discipline in each participant and allows courts in a pluralistic setting to establish a stable relationship among the respective legal orders, even though they might rationally disagree.

Seen from this perspective, it is deplorable that the request for preliminary decision in *Gauweiler* has been less cognizant of the possibility of rational disagreement and hence of the need for courts to grant each other some leeway. The FCC concluded that what it held to be a transgression of EU competencies by the ECB would immediately

<sup>44</sup> BVerfG, Case 2 BvL 1/97 *Bananas*, BVerfGE 102, 147.

<sup>45</sup> Opinion C-2/13, EU:C:2014:2454.

<sup>46</sup> BVerfG, Case 2 BvR 2134, 2159/92 *Maastricht*, BVerfGE 89, 155, 188.

<sup>47</sup> BVerfG, Case 2 BvE 2, 5/08 et al. *Lisbon*, BVerfGE 123, 267.

<sup>48</sup> BVerfG, Case 2 BvR 2661/06 *Honeywell*, BVerfGE 126, 286, 304 et seq.

<sup>49</sup> *Ibid.*, para. 62.

<sup>50</sup> *Ibid.*, para. 87 et seq.

qualify as a manifest one.<sup>51</sup> In drawing this conclusion, the FCC did not simply exercise its discretion over the standard of judicial review and its application. Rather, it completely disregarded that *Honeywell* created the ‘manifestness’ test to allow for rational disagreement. Hence, it tried to tie the Court of Justice to its own interpretation, leaving it seemingly with no choice but to follow the suggestion of the FCC and interpret the OMT policy restrictively,<sup>52</sup> or to face the consequences of an overt confrontation. The lack of respect for mutually assured discretion destabilized relations among the two courts – and their respective legal orders.

#### §4. MUTUALLY ASSURED DISCRETION AS A PREFERABLE APPROACH TO CONSTITUTIONAL PLURALISM

The foregoing analysis has provided a reconstruction of discretionary standards in horizontal and vertical relationships in the EU context. While horizontal relationships are characterized by goal-oriented reasoning that checks the objectives, instruments and proportionality of a measure,<sup>53</sup> the successful organization of vertical relationships relies rather on structures and their manifest modification. Within these outer limits, an institution or the Court of Justice is free to act, subject only to the discretionary application of these standards by the Court of Justice or domestic courts, respectively. This understanding of mutually assured discretion sums up different methods of differentiated integration of pluralistic legal orders.<sup>54</sup> It is not to be confused with discretion in a technical, administrative law-like sense, but discretion that is mindful of the need to recognize diverging rationalities and interpretations. As the preceding shows, mutually assured discretion is already a reality in EU law, not merely wishful thinking.<sup>55</sup> This section argues that mutually assured discretion is not only practical, but also normatively superior to a host of alternative approaches.

##### A. PRACTICALITY

Mutually assured discretion has a solid legal foundation in each of the legal orders or legal regimes concerned. Concerning vertical relationships, EU law provides for the principle

<sup>51</sup> BVerfG, *Gauweiler*, para. 43; see also M. Wendel, 74 *ZaöRV* (2014), p. 631; J. Bast, ‘Don’t Act Beyond your Powers: The Perils and Pitfalls of the German Constitutional Court’s *Ultra Vires* Review’, 15 *German Law Journal* (2014), p. 167–181, 179.

<sup>52</sup> BVerfG, *Gauweiler*, para. 100.

<sup>53</sup> On different levels of such discretion, see P. Craig, 21 *MJECL* (2014), p. 210–211.

<sup>54</sup> For more detail see M. Wendel, *Permeabilität im europäischen Verfassungsrecht* (Mohr Siebeck, 2011), p. 434 et seq.

<sup>55</sup> Compare also P.M. Huber, ‘The Federal Constitutional Court and European Integration’, 21 *European Public Law* (2015), p. 83–108, 93–94.

of loyal cooperation.<sup>56</sup> Domestic legal orders might provide for analogous legal bases, such as the principle of *Europafreundlichkeit* which the FCC spelled out in its *Lisbon* judgment.<sup>57</sup> As concerns horizontal relationships on the EU level, mutually assured discretion finds a possible legal basis in the principle of mutual sincere cooperation in Article 13(2) TEU.<sup>58</sup> This principle finds a counterweight in the independence of the ECB according to Article 130 TFEU.

Why should we suppose that this kind of pluralism actually functions in practice? The key lies in the uncertainty of the very standard of review applied. This brings me to the core of my argument: mutually assured discretion is indeed mutual – it does not only recognize the discretion of the ECB, or of the Court of Justice and the European institutions. That would be one-sided discretion. Rather, the broad, open-ended concepts that guide the standard of review, whether in its horizontal (objective, proportionality) or vertical variant (structural, manifest), give discretion to the reviewer who has to apply them to concrete cases. One can never be sure when and why the reviewer will be of the opinion that a certain measure is disproportionate, or that there is a manifest structural modification. This uncertainty bears a destructive potential which, in the optimal case, stabilizes the whole relationship. It gives each actor a lot of power over the other so that each of them should have strong incentives not to test its own power. ‘The point of having the nuclear option is that you don’t actually have to use it.’<sup>59</sup> This is why domestic courts hardly pull the trigger and almost always comply with the Court of Justice,<sup>60</sup> which in turn has at times modified its case law in ways that accommodated the concerns of domestic courts, especially relating to human rights.

Mutually assured discretion further benefits from common principles that generate mutual trust. These principles are contained in the basic ideas of human rights, democracy, and rule of law, recognized in each composite legal order of the European Union. This is what distinguishes the EU not only from the situation of the Cold War,<sup>61</sup> but also from international law in a wider sense. The absence of a thick layer of shared convictions (*Lebenswelt*)<sup>62</sup> might cause difficulties for a system relying on mutually assured discretion because individual decisions of one actor will face contestations of a very principled nature once they reach another actor.<sup>63</sup>

<sup>56</sup> Article 4(3) TEU.

<sup>57</sup> BVerfGE 123, 267, 354.

<sup>58</sup> R. Schütze, *European Constitutional Law* (Cambridge University Press, 2012), p. 86.

<sup>59</sup> M.A. Wilkinson, ‘The Euro Is Irreversible! ... Or is it?: On OMT, Austerity and the Threat of “Grexit”’, 16 *German Law Journal* (2015), p. 1049, 1051.

<sup>60</sup> The exception proves the rule: Constitutional Court of the Czech Republic, Case no. Pl. ÚS 5/12 *Slovak Pensions*, judgment of 31 January 2012.

<sup>61</sup> But see J.H.H. Weiler, ‘The Reformation of European Constitutionalism’, 35 *Journal of Common Market Studies* (1997), p. 97–131, 125.

<sup>62</sup> J. Habermas, *Faktizität und Geltung* (Suhrkamp, 1992), p. 37 et seq.

<sup>63</sup> Compare, however, A. von Bogdandy, ‘Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law’, 6 *International Journal of Constitutional Law* (2008), p. 397–413.

## B. NORMATIVE SUPERIORITY

There is thus practical advantage in leaving ultimate theoretical questions open – one of the main features of constitutional pluralism in the European Union.<sup>64</sup> In fact, this kind of constitutional pluralism is deliberately agnostic if it comes to questions of normative superiority or primacy.<sup>65</sup> In the terms of the taxonomy of constitutional pluralisms suggested by Avbelj and Komarek,<sup>66</sup> mutually assured discretion may best correspond to what they call ‘harmonious discursive constitutionalism’, which accepts plurality in substance, but stresses the universality of procedure.<sup>67</sup> It demonstrates that constitutional pluralism is far from being an oxymoron – at least if one understands it as epistemic pluralism, that is, a plurality of views about the ultimate decision-maker, not an oxymoronic plurality of ultimate decision-makers. The consequence is that each actor is free to consider itself as the ultimate source of normativity, as long as it respects that others do the same. This raises several normative issues. I argue that mutually assured discretion as a form of constitutional pluralism is not just practically viable, but also normatively superior to other approaches to EU integration.<sup>68</sup> For this purpose, let us take a look at how this approach differs from others, most of which are of a substantive nature.

First, one could assume that the principle of conferred powers should lead to a repartition of competencies, at least in a vertical sense, that does not allow for serious conflicts. But given that this principle has been in place ever since the beginning, one might not only have second thoughts about its practical viability. Indeed, it is theoretically unsatisfactory because it ignores the vagueness of legal rules, especially purpose-oriented ones like the rules on the competence of the Union. In and of itself, the principle of conferred powers thus raises questions which it is not able to answer, especially not in the context of a Union with an evolutionary character.<sup>69</sup> This is a fortiori true for the non-exclusive competencies of the EU. The principle of subsidiarity is notoriously vague and feeble. Perhaps it is only through mutually assured discretion that one can expect the Union to truly respect subsidiarity and proportionality in the exercise of its non-exclusive competences, in accordance with Article 5(3) and (4) TEU. In a hierarchical

<sup>64</sup> F.C. Mayer and M. Wendel, ‘Multilevel and Constitutional Pluralism’, in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), p. 127–151, 135.

<sup>65</sup> Compare I. Pernice, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’, 15 *Columbia Journal of European Law* (2009), p. 349–407, 374.

<sup>66</sup> M. Avbelj and J. Komarek, ‘Introduction’, in M. Avbelj and J. Komarek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart, 2012), p. 2–15, 5–6.

<sup>67</sup> This variant of constitutional pluralism is closely linked with that suggested by M. Poiáres Maduro, ‘Contrapunctual Law. Europe’s Constitutional Pluralism in Action’, in N. Walker (ed.), *Sovereignty in Transition* (Hart, 2003), p. 502.

<sup>68</sup> See M. Goldmann, 15 *GLJ* (2014), p. 272.

<sup>69</sup> P.M. Huber, 21 *EPL* (2015), p. 106. The same observation can be made for international law. See J. Klabbers, *An Introduction to International Institutional Law* (2nd edition, Cambridge University Press, 2009), p. 59 et seq.

setting like a federal state, a vague standard like subsidiarity often enough has little teeth to resist centripetal forces.<sup>70</sup> A variation of this approach distinguishes policy fields where the EU enjoys broader, open-ended competences, from more specific functions of the EU which are to be narrowly interpreted. Granted, this distinction has some support in EU law.<sup>71</sup> However, fields can be very broad and vague at times, so that it might only be possible to determine whether a certain measure relates to a specific field if one also takes into consideration the specific function of that measure. The problem is that many measures are highly interrelated, just like fiscal and monetary policy.<sup>72</sup>

Second, one could argue that recognizing the hierarchical superiority of the EU level and the Court of Justice would better ensure the equality of the Member States,<sup>73</sup> while the supremacy of national constitutional law would enhance the integrity of domestic constitutional law.<sup>74</sup> However, from a viewpoint of constitutional pluralism, such solutions appear to be normatively unsatisfactory. They require one side to succumb. It is either the unity of EU law, or the integrity of domestic constitutions which will inevitably suffer, depending on which level one deems to be hierarchically superior. If one accepted EU law as superior then well-known problems afflicting the democratic legitimacy of the Union would not disappear. The Union would lose the democratic ‘relief valve’ provided by domestic judicial review. Instead, mutually assured discretion carries a normative idea resembling Halbersam’s constitutional pluralism characterized by voice and right,<sup>75</sup> or Howse’s and Nicolaidis’ suggestion that a democratic version of global governance should recognize that sovereignty is divisible and establish a democratic ethos of ‘other-regardingness’ for the relations between different constituencies.<sup>76</sup>

Third, while the idea of constitutional identity also provides a safety valve for sensitivities of domestic constituencies or courts, mutually assured discretion is normatively preferable. The concept of constitutional identity has developed a short but speedy career over the past few years.<sup>77</sup> I would not criticize the resort to constitutional

<sup>70</sup> J. Bast, ‘Article 5’, in E. Grabitz, M. Hilf and M. Nettesheim (eds.), *Das Recht der Europäischen Union* (C.H. Beck, 2013), no. 30.

<sup>71</sup> Compare J. Bast, 15 *GLJ* (2014), p. 175–176.

<sup>72</sup> For example, in the tobacco case, the Court of Justice had to decide whether the directive in question contributes to the goals of free movement of goods and free provision of services, or to the fairness of competition. Case C-376/98 *Germany v. Parliament*, EU:C:2000:544.

<sup>73</sup> F. Fabbrini, ‘After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States’, 16 *German Law Journal* (2015), p. 1003–1024.

<sup>74</sup> P.M. Huber, 21 *EPL* (2015), p. 87.

<sup>75</sup> D. Halberstam, ‘Local, global and plural constitutionalism: Europe meets the world’, in G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012), p. 150–202.

<sup>76</sup> R. Howse and K. Nicolaidis, ‘Democracy without Sovereignty: The Global Vocation of Political Ethics’, in T. Broude and Y. Shany (eds.), *The Shifting Allocation of Authority in International Law* (Hart, 2008), p. 163–191.

<sup>77</sup> BVerfG *Lisbon*, BVerfGE 123, 267, 352–353; on significant differences between constitutional courts in Europe regarding the concept constitutional identity: M. Claes and J.-H. Reestman, ‘The Protection

identity merely because it is a highly vague and subjective concept.<sup>78</sup> Mutually assured discretion is no less vague a standard. One might criticize the concept of constitutional identity because it appears to be relatively rigid. Indeed, its purpose is to set a counterpoint to the steady, incremental transformation of the European and domestic legal orders through practice. An open society needs this capacity for change, and the EU epitomizes the concept of an open society. But as Walter and Vordermayer have emphasized, the constitutional identity is itself a flexible notion. It has seen dramatic changes in the recent past as it can now be taken to comprise the idea of European integration.<sup>79</sup> In such an understanding, constitutional identity is only a relative, comparative notion, not an absolute given.<sup>80</sup>

Nevertheless, the problem with the concept of constitutional identity – which distinguishes it sharply from mutually assured discretion – is its one-sidedness. Constitutional identity only allows one part of the game to ‘pull the plug’, that is, the domestic level. It is not based on a reciprocal relationship that ensures equality of the arms. There is almost no way of contesting the identity of another actor. The identity of a community is by definition determined by the community and its members.<sup>81</sup> That does not mean that identity is not an inter-subjective concept. It certainly changes through inter-subjective interaction, whether with members of the community or non-members. But it is a characteristic, defining feature of identity claims that they do not need to be justified to anyone outside the community. Consequently, while EU law recognizes the national identity of the Member States,<sup>82</sup> their constitutional identity is not a European concept.<sup>83</sup>

Another factor is that claims of identity can lead to a stalemate, once we widen our perspective for a more complex picture including other actors than just the FCC and the Court of Justice. If several Member States make conflicting invocations of constitutional identity, integration becomes a long-distance goal. This might effectively render the principle of conferred competencies and primacy of EU law powerless.

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of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case’, 16 *German Law Journal* (2015), p. 917–970, 941.

<sup>78</sup> C. Schönberger, ‘Identitätserä. Verfassungsidentität zwischen Widerstandsformel und Musealisierung des Grundgesetzes’, 63 *Jahrbuch des öffentlichen Rechts* (2015), p. 41–62; but see O. Lepsius, ‘Souveränität und Identität als Frage des Institutionen-Settings’, 63 *Jahrbuch des öffentlichen Rechts* (2015), p. 63–90, 84.

<sup>79</sup> C. Walter and M. Vordermayer, ‘Verfassungsidentität als Instrument richterlicher Selbstbeschränkung in transnationalen Integrationsprozessen. Vergleichende Überlegungen anhand der Rechtsprechung von EuGH und EGMR’, 63 *Jahrbuch des öffentlichen Rechts* (2015), p. 129–166, 164–165.

<sup>80</sup> Compare A. Ingold, ‘Die verfassungsrechtliche Identität der Bundesrepublik Deutschland. Karriere – Konzept – Kritik’, 140 *Archiv des öffentlichen Rechts* (2015), p. 1–30, 17–20.

<sup>81</sup> C. Taylor, *Sources of the Self. The Making of the Modern Identity* (Harvard University Press, 1989), Chapter 1.5.

<sup>82</sup> Article 4(2) TEU.

<sup>83</sup> Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, para. 61; see also F.-X. Millet, *L’Union européenne et l’identité constitutionnelle des États membres* (L.G.D.J., 2013).

Only if one translates constitutional identity into requirements concerning the participation of domestic actors it might change from a unilateral to a more pluralistic notion. The insistence of the FCC on a strong role for domestic parliaments might provide an example;<sup>84</sup> a position which the FCC confirmed in a number of Euro-Crisis-related decisions.<sup>85</sup> It introduces a structural criterion which does not preempt any decision in favour of a substantive domestic law standard. But a merely procedural approach has its own problems.<sup>86</sup> In fact, it would replace the uncertainty involved in the application of substantive standards with more formal criteria that effectively disempower the domestic level.

To sum up, the comparative disadvantage of these alternative approaches to European integration is that they rely either on substantive notions on which we may rationally disagree, or on formal criteria which lack the uncertainty involved in mutually assured discretion. In this situation, mutually assured discretion lends itself as a standard that sits in the middle between substantive and procedural standards, an open standard of control that still has some teeth because it allows both actors to keep each other in check – in other words, a standard that leaves the question of theodicy unresolved and finds practical solutions to open questions.

## §5. CONSEQUENCES FOR THE FCC IN *GAUWEILER* AND OTHER CASES

The standard of mutually assured discretion is thus a viable way of making constitutional pluralism work. It does not subscribe to the superiority of one actor over the others. One may only speculate how the FCC will decide the *Gauweiler* case, but it would be well-advised to follow this line of thinking. This implies that the FCC, in its upcoming decision, may well continue to insist that it has the ultimate say. But it should accept that both the ECB and the Court of Justice enjoy discretion in the exercise of their mandate. Consequently, the FCC should not examine whether the Court of Justice has given the one and only ‘correct’ answer to the questions submitted, but rather examine whether the Court of Justice has overstepped the limits of the horizontal variant of mutually assured discretion by not scrutinizing the ECB closely enough. I anticipate that it will become difficult to accuse the Court of Justice of a manifest, structurally significant failure to keep the ECB in check. In fact, in its judgment, the Court of Justice

<sup>84</sup> BVerfG, *Lisbon*, BVerfGE 123, 267, 346 et seq.

<sup>85</sup> E.g. the case concerning the use of a special committee of the Bundestag for emergency safeguard measures of 7 September 2011, BVerfGE 130, 318; the judgment of 19 June 2012 on information rights of the Bundestag, BVerfGE 131, 152; and the judgment regarding preliminary measures in the ESM case, 2 BvR 1390/12 et al. of 12 September 2012, para. 106 et seq.

<sup>86</sup> The paradigmatic approach would be that of J.H. Ely, *Democracy and Distrust. A Theory of Judicial Review* (Harvard University Press, 1980).

has meticulously tackled each argument raised by the FCC and given responses with which one might rationally disagree, but which never appear as entirely far-fetched or arbitrary to qualify as manifest transgressions. The FCC might find a face-saving solution that spares it the humiliation of recognizing the position taken in its referral as erroneous by distinguishing two different standards of ‘manifest’ transgressions of EU powers: a stricter one to be applied at the time of the referral (whose strictness is partly justified by Article 267 TFEU, which ties the admissibility of a referral to its necessity for a judgment), and a less strict one, to be applied when reviewing the answers of the Court of Justice.

Such a solution may entail repercussions for other cases in the present post-crisis context. Quantitative Easing is, of course, an obvious candidate,<sup>87</sup> and so is the recent case against the ECB for its cessation of liquidity assistance after the announcement of the Greek referendum.<sup>88</sup> Another issue which created much confusion during the dramatic time surrounding the Greek referendum of summer 2015 is the question whether the ECB may voluntarily participate in a Greek sovereign debt restructuring. Some claimed that it could not, on top of problematic claims that the restructuring of debt owed to the ESM or to other Member States would violate Article 125 TFEU.<sup>89</sup> The FCC demanded that the ECB exclude participation in a sovereign debt restructuring regarding bonds purchased under its OMT programme. This would bring the programme in line with the Treaties.<sup>90</sup> There are not only many reasons of international law militating against such a view, such as an emerging principle of debt sustainability as well as considerations of good faith and creditor equality.<sup>91</sup> This view also seems to contradict the idea of mutually assured discretion. Certainly, Article 123 TFEU does not allow for monetary financing, that is, for fiscal policy in monetary disguise.<sup>92</sup> But as long as the objective of any participation in sovereign debt restructuring remains a monetary one, and as long as the instruments used are capable to reach this monetary policy objective and proportionate, participation in a bailout should be possible under the idea of mutually assured destruction. As regards the monetary policy objective, it could well be argued that participation in a bailout would, as the case may be, save the European Monetary

<sup>87</sup> A case against quantitative easing has been filed with BVerfG on 4 September 2015. The case number is not known at the time of writing.

<sup>88</sup> Case T-368/15 *Alcimos Consulting v. Greece*, [2015] OJ C 381/43.

<sup>89</sup> E.g. the non-paper by the German federal government, ‘Comments on the latest Greek proposals’, 10 July 2015, [www.sven-giegold.de/wp-content/uploads/2015/07/grexit\\_bundesregierung\\_non\\_paper\\_10\\_juli\\_2015.pdf](http://www.sven-giegold.de/wp-content/uploads/2015/07/grexit_bundesregierung_non_paper_10_juli_2015.pdf); A. Steinbach ‘Die Beteiligung öffentlicher Gläubiger im Rahmen der europäischen Staatsschuldenkrise’, 68 *Juristenzeitung* (2013), p. 1148–1152.

<sup>90</sup> BVerfG, *Gauweiler*, para. 100.

<sup>91</sup> See UN General Assembly, Resolution of 10 September 2015; UNCTAD, *Sovereign Debt Workouts: Going Forward. Roadmap and Guide*, 28 April 2015, <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=987>.

<sup>92</sup> Compare in the context of a smashing critique of the OMT referral: W. Heun, ‘Eine verfassungswidrige Verfassungsgerichtsentscheidung – der Vorlagebeschluss des BVerfG vom 14. 1. 2014’, 69 *Juristenzeitung* (2014), p. 331–337, 336.

Union as a *single* monetary policy union. This would be in line with the Court of Justice's reasoning in *Gauweiler*.<sup>93</sup> Therefore, under the concept of mutually assured discretion, there is no need to categorically exclude voluntary ECB participation in a necessary – and proportionate – restructuring of sovereign debt. While such a step does not have the dimension and quality of a potential solution to the theodicy or primacy problems, it certainly appears feasible.

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<sup>93</sup> Article 20(2) of the Statute of the ESCB and the ECB (Protocol (No 4) to the Consolidated version of the Treaty on the Functioning of the European Union on the Statute of the European System of Central Banks and of the European Central Bank, [2012] OJ C 326/23) lends itself as a legal basis for the instruments that the ECB may use to reach this objective. See R. Smit, *The European Central Bank* (Kluwer, 1997), p. 284; C. Keller, 'Art. 20 ECB Statute', in H. Siekmann (ed.), *EWU-Kommentar* (Mohr Siebeck, 2013), no. 11 et seq.