UNIVERSITY OF AMSTERDAM

UvA-DARE (Digital Academic Repository)

# C-62/14 Gauweiler: How the ECJ avoided Stockholm syndrome but risks either a standoff or a stalemate

Tuominen, T.

**Publication date**
2015

**Document Version**
Final published version

Link to publication

**Citation for published version (APA):**
Tuominen, T. (Author). (2015). C-62/14 Gauweiler: How the ECJ avoided Stockholm syndrome but risks either a standoff or a stalemate. Web publication or website, BlogActiv. http://acelg.blogactiv.eu/2015/10/26/c-6214-gauweiler-how-the-ecj-avoided-stockholm-syndrome-but-risks-either-a-standoff-or-a-stalemate/

**General rights**
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: https://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

*UvA-DARE is a service provided by the library of the University of Amsterdam (https://dare.uva.nl)*

Download date:08 Mar 2023

BlogActiv.eu About Newsletter Create your Blog Support Login

# C-62/14 Gauweiler: How the ECJ avoided Stockholm syndrome but risks either a standoff or a stalemate

*October 26, 2015*

*By Tomi Tuominen*

The European Court of Justice (ECJ) delivered its judgment in the much followed case *Gauweiler* in last June, where it found the European Central Bank's (ECB) Outright Monetary Transactions programme (OMT) to be legal in light of the Treaties and the Statute of the ECB. Although the outcome of the case and the ECJ's reasoning was in line with what had been anticipated, the judgment is still interesting for several reasons. Firstly, it was the first ever preliminary reference from the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), which has had a difficult relationship with the ECJ. Secondly, it was only the second decision by the ECJ to assess the response mechanisms to the Eurozone crisis (the first being *Pringle*). And, thirdly, it highlights several of the pressing issues of European constitutionalism, many of which have become ever more timely due to the Eurozone crisis.

The facts and underlying context of the OMT have already been spelled out in an earlier blog post by professor Smits, which also analysed the Advocate General's findings. Since the judgment was passed already several months ago, I expect that people are familiar with its content, so I will only address some of the constitutional issues that the case brings forth, after which I will make some final remarks on the future judgment of the BVerfG.

There are three constitutional issues that the case highlights. Firstly, even though the ECJ has been expounding the *supremacy* of EU law already for over fifty years, and the BVerfG has been contesting it for almost as long, the question of final competence-competence – who has the last word – has not been settled in practice. This issue was bound to come up in a matter relating to the Economic and Monetary Union (EMU) because of its asymmetric nature: a common monetary policy without common economic

policy. Due to the intricate relationship between these two policies, it was foreseeable that a *competence* issue was going to surface sooner or later, which of course relates to supremacy and the final word.

Secondly, it shows how there are differences between the effectiveness of the different judicial review mechanisms within the Member States in relation to European actions. Basically, will the BVerfG's hypothetical review make any difference? My observation is that *ex ante* review and other such mechanisms of influencing have had more effects on the formation of the crisis response measures than actual *ex post* review by courts: so far none of the crisis response measures have been annulled by a court, whereas their content has been changed during the drafting phase due to such opinions. An example is how the Finnish Parliament's Constitutional Law committee's *ex ante* review of the Fiscal Compact affected its final shape (Tuori & Tuori 2014, p. 198).

Lastly, it highlights the pluralist nature of the European Constitution, but at the same time also points out how theories such as *constitutional pluralism* with their aspirations for mutual deference – "horizontal rather than vertical – heterarchical rather than hierarchical" – are unable to solve real world problems at the normative level: what about the risk of the BVerfG deciding not to accept the ECJ's stance?

By posing its ultimatum – "declare the OMT to be ultra vires under these conditions, or we will declare so" – the BVerfG effectively tried to hold the ECJ and the whole Union as its hostage by subjecting the legality of a Union act to the review of a national court. The whole point of the principle of primacy and supremacy – as well as the fact that *only* the ECJ is to rule on the legality of Union acts – is to guarantee the functioning of the Union as a composite system, but also to make sure that all of the Member States are treated equally and that none of them have a prerogative over Union actions. That said, this does not mean that the ECJ does not need to take national interests into consideration, to the contrary. In *Gauweiler* the ECJ was able to take a firm stance for the uniform interpretation of Union law while still showing adequate (although lighter than perhaps in some previous cases) deference to national interest.

Had the ECJ jumped on the BVerfG's bandwagon and reviewed the legality of the OMT under the criteria posited by the German Basic Law, be that national identity or something else, it would have shown signs of Stockholm syndrome – which its adaptation to *Solange I* can be argued to constitute. Luckily, the ECJ did not start to identify with its captors, show empathy and sympathy towards them, nor to think that their cause and means of action are just. The ECJ did what was the correct choice for it as the *de facto* supreme constitutional court of the Union, but at the same time there is still the risk of standoff or stalemate between the two courts.

Does the ECJ's ruling entice the BVerfG towards a standoff, where it would call its bluff and pull through with its threat to deem the OMT contrary to both the German Basic Law as well as the Treaties (although it implied that it would only assess it on the basis of the former)? Or, will it be more likely that the BVerfG wants to save its face by finding that the ECJ's judgement is not a "manifest" transgression of EU's competences (as per its *Honeywell* doctrine), and thus accept the ruling of the ECJ? In this event the BVerfG would not challenge the ECJ's ruling, although it would not strictly speaking be following it either. This would mean that the ultimate authority issue – who has the final word – is not settled, thus resulting in a stalemate: a draw, in which neither party wins, since still after this similar situations would be possible in the future.

Even if the standoff were to take place, it would not legally stop the ECB from putting the OMT-programme into practice, since it is not bound by German law or German Courts, although it would prevent the German central bank's participation in the OMT. But, and more importantly, the standoff might result in a reconsideration by the ECB and the relevant political institutions. Looking at the current situation in Greece,

there is also the possibility that the ECB initiates the programme before the BVerfG has passed its judgment. In this case the future judgment would become obsolete at least from the European perspective, although it might still have some repercussions in Germany: a crisis of the institutional and political system, perhaps.

All in all, the BVerfG's judgment is highly anticipated and will no doubt once again reflect the eminent legal-cultural status the court enjoys in Europe, although this time it will arguably not have as far reaching consequences as some of its previous judgments from earlier decades have had on the development of the Union. To prevent such problems in the future the legislator could: first, fix the asymmetry of the EMU by creating proper economic policy competences for the Union; and more generally, take the federal step, which would solve such issues by defining explicitly the categories of competences and the prerogatives of various institutions.

**Tomi Tuominen** is a PhD researcher at the Faculty of Law of University of Lapland and a visiting researcher at the Amsterdam Centre of European Law and Governance at the University of Amsterdam.

Author : acelg

Print

Case law, Member States

No comments

, Gauweiler; ECB; constitutional pluralism

## Leave a Reply

You must be logged in to post a comment.

# ACELG

Provides insights on European Law from an academic perspective. Discusses the latest developments in the context of the surrounding legal and political systems as well as wider structures of (global) governance

Advertisement