



The German Constitutional Court's decision about the European Central Bank's OMT mechanism: A masterpiece of judicial arrogance

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The German Constitutional Court (BVG) recently referred different questions to the European Court of Justice for a preliminary ruling. They concern the legality of the European Central Bank's Outright Monetary Transaction mechanism created in 2012. Simultaneously, the German Court has threatened to disrupt the implementation of OTM in Germany if its very restrictive analysis is not validated by the European Court of Justice.

This raises fundamental questions about the future efficiency of the ECB's monetary policy, the damage to the independence of the ECB, the balance of power between judges and political organs in charge of economic policy, in Germany and in Europe, and finally the relationship between the BVG and other national or European courts.

At the beginning of 2014, the German Constitutional Court (Bundesverfassungsericht or BVG) referred a list of questions to the European Court of Justice for a preliminary ruling. These questions concern the legality of the decision of the European Central Bank (ECB) of 2012 establishing the mechanism of Outright Monetary Transactions (OMT). Simultaneously, the BVG gave its own analysis on the main problems.¹ In a nutshell, it considered that the mechanism was illegal for two main reasons. Firstly, it encroached on economic policy, which remains according to the EU Treaties a competence of the Member States. Secondly, it violated the prohibition of financing public deficits.²

Most immediate comments were rather comforting after this decision. Most important of all, the financial markets did not budge. The investors seem to remain impressively unconcerned. But are they right? The answer could be yes in the short term and no in the long term. This question, however, is not easy, since this concerns a very specific domain of macroeconomic policy, which is also a very

specific area of EU law, and even of law in general.

MACROECONOMIC POLICY AS A SPECIFIC DOMAIN OF LAW

The concept of macroeconomic policy regroups basically budgetary (or fiscal) policy on one side, and monetary policy. Both instruments developed progressively throughout the 20th century, and especially after the Great Depression.³ Legally speaking, macroeconomic policy has always been one quite special area of public law. Budgetary policy was – and remains – mainly the responsibility of the executive and legislative powers. The authorisation of spending belongs to the legislative. The execution of spending belongs to the executive. The control of budget execution is generally trusted to a court of auditors, which depends on the legislative assemblies. There exist thus very few judicial decisions about budgetary policy in all developed countries. Judges are meant to show some restraint in that field, in view of the need to preserve the balance of powers. This is still more the case for monetary policy.

MONETARY POLICY AS A VERY SPECIFIC DOMAIN OF LAW

Since the creation of the Bank of England at the end of the 17th century, the first function of the central banks has been the lending of money to financial intermediaries in case of crisis. They played the role of the lender of last resort. They lent in a context of financial hysteria, to put a floor under the destruction of financial assets.⁴ Later, this role developed into the managing of the monetary creation of the banking system through the use of interest rates. Central banks were generally private organs, which progressively became public ones. More recently, since the great inflation surge of the 1970s, they have tended to be more independent (though there remain huge variations between,

for example the USA, Japan, the UK, and the EU).

Legally speaking, monetary policy has always been one extremely special area of public law. Financial markets have two characteristics. Firstly, they are always intensely innovative, since this allows the creation of more wealth (sometimes quite artificially, as we still re-discovered in 2008). Secondly, they are often unstable, oscillating from ungrounded exuberance to excessive fears (as we also re-discovered in 2008). That's why they need both regulation, and salvation lending (accompanied by restructuration) each time regulation fails. This tends to happen quite regularly, because of their permanent innovation compulsion.

Legally, these characteristics have huge implications. To begin with, since there are always new financial innovations, one cannot anticipate all of them with precision in a legal text. The reading of C. Kindleberger's masterpiece, *Manias, panics and crashes*, says it all.⁵ "Central banks typically have rules. Where these cannot be broken... there is frequently trouble". (...) "The rule is that there is no rule". (...) "There are times when rules and precedents cannot be broken; others when they cannot be adhered to with safety".⁶

Additionally, if one wants to stabilise markets, the volume of salvation measures cannot be limited in advance. In the middle of the 2008 meltdown, it would have been impossible for the central banks to say: "we are going to lend, but within the limit of 200 billion dollars". Automatically, financial institutions would have kept on rushing for the nearest exit. Famously, M. Friedman quipped once that the extreme price deflation could be fought by "dropping money out of a helicopter".⁷ This quip became nearly official policy after 2008. Ben Bernanke, after the very impressive (and successful) monetary expansion he launched at the

American Federal reserve, became “helicopter Ben”.

These features make it impossible for the law to restrict in advance the precise form of central banks’ interventions. So it defines general objectives, whose respect is very difficult to control through the classical judicial means, not only because the objectives are very general, but because the technical instruments are quite complex. So in fact there is more or less no caselaw about this topic in most States (including in Germany). This limited control is compounded by a third reason, being that central banks are meant to possess some strong independence in the exercise of their main functions.

THE GREAT MAASTRICHT INNOVATION OF MONETARY POLICY ORGANISED BY A TREATY

In this field, the EU has introduced an enormous innovation with the Maastricht Treaty. From this point of view, the euro is a project without any precedent. More precisely, the treaty has established a central bank whose legal statute is defined by an international law instrument, and not a national one. There had been treaties organising the cooperation of national monetary authorities, like the statute of the International Monetary Fund, but establishing a single international monetary authority to manage a continental reserve currency, is something much more ambitious.

The institutional setting of the Economic and Monetary Union (EMU) is quite complex. It encompasses a European System of Central Banks (ESCB), and the European Central Bank (ECB). The objectives, classically, are quite general. According to article 282(2) TFEU, “the primary objective of the ESCB shall be to maintain price stability. Without prejudice to that objective, it shall support the general economic policies in the Union in order to

contribute to the achievement of the latter’s objectives”. As the need of trust, and thus certainty, is paramount in the financial markets, the monetary competence of the EU in this framework has been made exclusive. The national banks of the Eurosystem are execution agents. They follow the instructions of the ECB. Otherwise, functionally, there can be no monetary policy.

The independence of the ECB has also been protected in a very strong way.⁸ As the European Court of Justice has emphasised in 2003 in a landmark case, this independence is however not always absolute,⁹ but it is in the field of its tasks.

THE OMT FEATURES

The OMT program was launched by the ECB in 2012 in the midst of an acute crisis of confidence in the Euro. At the time, the threat of a possible exit from Greece had slightly receded. However, the interest rates on the public debt of the peripheral Member States were steadily increasing, associated with growing threats concerning the solvability of peripheral banks. In June 2012, the Euro area summit decided to take measures “to break the vicious circle between banks and sovereigns”.¹⁰ In July 2012, President Draghi made famously clear the full determination of the ECB: “within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough”.¹¹ In August 2012, the ECB decided to launch the OMT.

From the reading of the press release, one is immediately struck by the high level of conditionality surrounding this new instrument.¹² All Member States covered must follow some kind of adjustment programme.¹³ This is definitely no helicopter money. This high level of conditionality has even been criticised in some quarters. As an instrument for the management of a deep and urgent crisis,

entering into a discussion for the adoption of an adjustment programme is not precisely the basis of a rapid strategy.

However, the simple announcement was sufficient in itself to calm the financial markets. During summer 2012, they were going through a real spasm. “The situation in the eurozone was dramatic before the announcement of the OMT programme. Nominal interest rates had hugely diverged, banks’ access to finance was severely hampered, and the eurozone’s financial system was deeply fragmented. Changes in the monetary policy stance of the ECB were not transmitted throughout all the Eurozone and the ECB was therefore not able to fulfill its mandate of ensuring the proper conduct of monetary policy in the Eurozone”.¹⁴

The programme was quickly productive. As the IMF noted in its second 2012 Outlook, “OMTs, which the ECB will consider for countries under a macroeconomic adjustment or precautionary program with the European Financial Stability Facility and its successor, the European Stability Mechanism (ESM), should help ensure that low policy rates transmit to borrowing costs in countries in the periphery with a program”.¹⁵ The calm came back on the markets without any beginning of implementation. This tends to indicate that there was a real aberration of the financial markets in summer 2012, and that the measure was precisely adequate and balanced. Moreover, the programme did not cost one cent, and even brought money to all the Euro area Members.¹⁶

THE BVG’S DECISION

In a nutshell, the most important part of the BVG’s decision consists in referring some questions regarding the OMT’s respect of the European Union Treaty to the European Court of Justice. In the same breath however, the BVG already provides the answer, meaning that the OMT is invalid unless it is constrained by

very strong and multiple limits, enumerated by the judgment.

According to § 55 of the judgment, “subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 et seq. of the ESCB Statute because it exceeds the mandate of the European Central Bank that is regulated in these provisions and encroaches upon the responsibility of the Member States for economic policy. It also appears to be incompatible with the prohibition of monetary financing of the budget enshrined in Art. 123 TFEU. The European Central Bank’s reference to a “disruption to the monetary policy transmission mechanism” is not likely to change the assessment of these two points. Accordingly, the applications would probably be successful. Another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law.”

According to the BVG, the ECB has transgressed its own mandate. Revealingly, the BVG then begins some very amateuristic course in monetary economics.¹⁷ For example, the ECB has taken bad (according to the BVG) monetary measures. “The constitutional justification of the independence of the European Central Bank is, however, limited to a primarily stability-oriented monetary policy” (§ 59). Any monetary measure deemed by the BVG not to be “primarily stability-oriented” is unconstitutional. “What is relevant is not only the objective, but also the instruments used for reaching the objective and their effects. (...) To the degree that the European System of Central Banks thus grants financial assistance, it pursues an economic policy that the European Union is prohibited from conducting” (§ 65).

Additionally, the simple reference to the Euro area instruments EFSM and ESM *ipso facto*

transforms the OMT into a budgetary measure. “By tying the purchase of government bonds of selected Member States to full compliance with the requirements of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism and thus retaining its own conscientious examination, the European Central Bank makes the purchase of government bonds on the basis of the OMT Decision an instrument of economic policy” (§ 77).

These concerns could however be met if the European Court of Justice makes “an interpretation in conformity with EU law” (§ 99). This means in reality “in conformity with the exclusive authentic interpretation of EU law given by the BVG”. Should this not happen, “German authorities may not take part in the decision making process and the implementation of *ultra vires* acts and are not entitled to participate in measures affecting the constitutional identity protected by Art. 79 sec. 3 GG. This applies to all constitutional organs, authorities and courts” (§ 30).

Such an approach provokes (at least) four fundamental questions. The first one concerns the future efficiency of the ECB’s monetary measures, the second one the possible damage to the independence of the ECB, the third one the balance of power between the constitutional judges and the legitimate political organs in charge of economic policy, in Germany and in Europe, and the fourth one the relationship between the BVG and other national or European courts.

A THREAT TO THE GENERAL EFFICIENCY OF THE ECB’S MONETARY POLICY

The 2014 decision makes little analysis of the crisis context of 2012. Germany’s constitutional judges seem to live in a far, far away galaxy from the financial reality. Though this seems hard to believe at such a level of responsibility, the

economic line of reasoning is largely limited to an incredibly simplistic argument, that buying any State bond automatically provokes monetary financing of the budget.

Better yet, absolutely no value is recognised to the ECB’s analysis of the situation. “The fact that the purchase of government bonds can, under certain conditions, help to support the monetary policy objectives of the European System of Central Banks does not turn the OMT Decision itself into an act of monetary policy. (...) The (economic) accuracy or plausibility of the reasons for the OMT Decision are irrelevant in this respect” (§ 96). Surprisingly, this strong affirmation does not prevent the BVG from offering immediately its own vision of the functioning of the financial markets, of course infinitely more intelligent than the ECB’s. “It seems irrelevant in this regard that the European Central Bank only intends to assume a disruption to the monetary policy transmission mechanism if the amount of the refinancing interest of a Member State of the euro currency area were “irrational”. Spreads always only result from the market participants’ expectations and are, regardless of their rationality, essential for market-based pricing. To single out and neutralise supposedly identifiable individual causes would be tantamount to an arbitrary interference with market activity. Ultimately, the distinction between rational and irrational is meaningless in this context and can in any case not be operationalised” (§ 98).¹⁸

This substitution of the BVG to the ECB could provoke enormous consequences. Firstly, if all monetary measures taken in a context of crisis are contested and analysed this way, there can be at the end no stabilisation of financial crises, and no monetary policy. Secondly, this example could rapidly result into multiple contestations of the ECB’s independence, from various judges and various Member States. Thirdly, “the not-

insignificant issue of the limits to quantitative easing created by the [BVG] decision could be in focus if the Euro area settles in a deflationary trap. (...) Buying government bonds is... the most efficient form of quantitative easing".¹⁹

In 2013, a call of support for the OMT was launched, and signed by hundreds of world economists to underline the risks of such a summary judicial approach.²⁰ It underlined both the efficiency and the legitimacy of the ECB's strategy. "The announcement of the OMT programme in the summer of 2012 is one of the most skilful and successful monetary policy communications in decades. Without spending a single euro, the ECB has succeeded to enhance liquidity, to prevent a bank run, to reduce uncertainty and volatility in financial markets, to lower borrowing costs for sovereigns, banks and corporations (in particular in its most vulnerable countries), and to improve confidence and trust in the sustainability of the euro and the prospects of the euro area economy. These effects of the OMT announcement have benefited not only the most vulnerable countries of the euro area, but all European countries, including Germany. Indeed, the success of the OMT announcement proves that the OMT is primarily a monetary policy instrument. The effects of the announcement of the OMT programme show that liquidity risk premia and an unjustified exchange rate risk did exist in euro area markets in the summer of 2012. Hence the ECB's justification of the OMT programme to address such risk premia, but not solvency risk of sovereigns in the euro area, is supported by the evidence over the past year".²¹

To put it in a more technical way, "both a cursory and a deep reading of Article 123 TFEU make it clear that the article says nothing about monetary financing. Monetary financing concerns the liability side of the balance sheet of the central bank. Article 123 TFEU exclusively puts restrictions on the asset side of the balance

sheet of the central bank. It bans overdraft facilities or any other type of credit facility with the ECB or the NCBs for any member state government institution and for Union institutions and direct purchases of government debt by the ECB and NCBs. This suggests the desirability of Basic Law and TFEU amendments banning bodies that don't know debit from credit to rule on matters that depend crucially on that distinction".²² One could add that there is nothing to indicate that the ECB's stability mandate does not cover all prices, including those of financial assets if they become manifestly erratic in a context of financial hysteria.

To conclude, this brings a result without any precedent in the history of monetary policy. "The ECB is not in court because of monetary financing, but rather as a lender of last resort. Accordingly, a court decision against the OMT would endorse an economic reasoning which contradicts 150 years of modern central bank history and would expose the euro area to the instabilities of financial markets. Such a monetary union is neither sustainable nor desirable".²³ Very simply, had such an approach been followed by the central banks in 2008, there would not be financial markets any more.

A THREAT TO THE INDEPENDENCE OF THE EUROPEAN CENTRAL BANK

From the beginning of the negotiation of the Maastricht Treaty, the independence of the European Central Bank has always been considered a fundamental pillar of Economic and Monetary Union (EMU). It is necessary to protect monetary policy from the pressures of various political authorities or interested parties.

From this point of view, the BVG's approach generates different problems. The intervention of a national authority in such a debate is liable to unbalance monetary policy. More fundamentally, this type of debate can create a

general feeling of uncertainty in the financial markets. There are presently 18 Member States in the eurozone, and thus more or less 18 Constitutional courts. What will happen if each European monetary instrument begins to be contested during months and years before different national courts? In truth, monetary policy becomes impossible.²⁴

Furthermore, from this point of view, the decision seems very strongly inspired by the Bundesbank's reasoning. The exclusive use of a national central bank's analysis to interpret EU law, while criticising repeatedly the EU central bank, reflects an unwelcome bias.²⁵

More directly yet, this nationalist streak is compounded by the repeated criticism of any selectivity. The fact that the OMT targets the bonds of some Member States is invoked as a proof that it is no monetary measure. "Because the OMT Decision envisages a targeted purchase of government bonds of selected Member States, however, the spreads on government bonds issued by these states are levelled by changes in market conditions, and the government bonds of other Member States are eventually placed at a disadvantage" (§ 73). So, potentially, other crisis measures benefiting more some specific Member States, even based on fully objective criteria, could suffer the same fate.

By doing so the BVG clearly contributes to the growing "germanisation" of the general management of the Euro area. Additionally, it reinforces its dual evolution mixing stronger federal control brakes and weaker intergovernmental accelerators, leading to an increasingly imbalanced institutional structure. As a consequence, the macroeconomic policy mix is much more restrictive in the euro area than in other developed countries, as any quick comparison reveals (with the foreseeable negative impact regarding growth and unemployment).

How would the BVG react, for example, if the Spanish constitutional council decided that the ECB's monetary policy is too restrictive to protect the stability of the economy, thus contrary to the treaty, and used the threat of disobedience of the Spanish authorities to impose its own interpretation? Or forbade for the same reason the Spanish financial institutions to pay any debt to external creditors? The answer is easy to imagine.

This leads to a manifest decline of the ECB's independence. Revealingly, some ECB members' speeches acknowledge simply that its inaction is at least partly justified by political considerations.²⁶ "The fact that a member of the ECB Executive Board cites political problems as a reason not to ease is a clear example of the increased politicization and diminished independence of the ECB and the disinflationary pressure that this generates."²⁷

A THREAT TO THE BALANCE OF POWER BETWEEN POLITICAL AND JUDICIAL AUTHORITIES

The OMT concept is already strongly conditional. Among these conditions one finds the need of an adjustment programme, thus negotiated between the assisted Member State, the European institutions and (most probably) the International Monetary Fund. This as a matter of fact has happened repeatedly during the last five years. There is no lack of democratic control, especially in Germany. So the German government, especially the Prime minister and the Minister of Finance, spend much time in the Bundestag before and after any European council.

Through its decision, the BVG thus intervenes in fact also in the domain of economic policy, where the political organs this time have a classical legitimacy. It considers in principle that *per se* the OMT is unconstitutional, since it is linked to economic policy (as any intelligent

monetary action is). Such a control could be legitimate in case of a “manifest violation”, as the BVG decision emphasises. This is however quite difficult to establish here, especially when so many institutions and specialists from so many countries and disciplines explain the contrary. Such a situation certainly does not warrant the intervention of constitutional judges in all aspects of macroeconomic policy. This goes clearly against the principle of judicial restraint (and was emphasised by the BVG dissenting judges). The protection of checks and balances imposes restraint to all constitutional authorities. This is clearly not the BVG’s approach here. The problem does not concern only the relation between the judicial and the democratically elected powers in Germany, but also in the whole European Union.

Additionally, this reduces the efficiency of the whole Euro area macroeconomic policy. During the last twenty years, torrents of comments have criticised the disconnection between monetary policy and economic policy established in the Maastricht Treaty. To be efficient, macroeconomic policy requires precisely some connection between these two components. Otherwise, there are serious risks of incoherence and expensive confusion.²⁸ From the 1999 German presidency onwards, the European Council has tried to correct this weakness. The OMT was precisely an original progress in that direction. The BVG goes precisely into the opposite one, since it considers that monetary measures conditioned to the implementation of economic programmes must be considered as an abuse of power.

To conclude, the BVG decision “is a friendly gloss on the quest to be the ultimate power in the Euro’s survival”.²⁹ Unfortunately, this blatant power grab is made by taking hostage the financial stability of the whole European Union. In case of a new crisis, the damage could be colossal.

A THREAT TO THE EUROPEAN JUDICIAL SYSTEM

Finally, one must underline the very bizarre approach of the BVG’s decision regarding its relationship with the European Court of Justice... and the other national courts. Basically, for an external observer, this looks a lot like some kind of judicial blackmail. “I consider that the OMT is a violation of the Treaty. This decision allows me to provoke chaos in various ways for its implementation in Germany. However, I could change my conclusion if you decided that OMT is conditioned by the elements that I enumerate below. You know what you have to do.”

The European Court of Justice has been created to protect the rule of law, in a vision balancing the interests of all its Member States. If all supreme courts in the 28 Member States begin to use the same strategy, and condition their implementation of EU law to the respect of their own interpretation, there can be at the end no European Union. The BVG’s approach could thus raise questions regarding the principles of equality between Member States and of sincere cooperation between the Union and the Member States. How would the BVG react, for example, if the French constitutional council referred a question to the European Court of Justice in the same way? “I believe that the Reach decision authorising some chemical substances used in big (German) cars is a violation of the Treaty. I will thus authorise the French authorities to disregard EU rules and forbid these products. However, I could change my conclusion if you decided that these substances must respect different additional conditions. You know what you have to do.”

CONCLUSION

Using a bizarre methodology, the BVG’s 2014 decision is somewhat final without being completely final. So this is not the (complete)

end of the story. However, by the multiple systemic questions it raises, it will already have important consequences, short term and long term. At the end, its rationale is crystal clear. To summarise, neither the European Central Bank nor the International Monetary Fund do understand what monetary policy is, hundreds of world recognised specialists in the field do not understand it either, political representatives have no serious things to say in the field of economic policy, other national constitutional judges have nothing to bring in this debate, and the European Court of Justice's judges are just

good enough to repeat what they are told. Only the German constitutional judges know all the answers. Though it is saddening to reach such a conclusion, from whatever angle one chooses to look at it, one can only conclude that this decision is a masterpiece of judicial arrogance, written by people who care very little about the essential common interests each of us should strive to protect. “Humility is truth” (Erasmus).

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ENDNOTES

¹ The decision was also published in English:

http://www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html

² There has been a press release:

<http://www.bundesverfassungsgericht.de/en/press/bvg14-009en.html>

³ See P. Samuelson and W. Nordhaus, Macroeconomics, McGraw-Hill, 2009.

⁴ C. Kindleberger, A financial history of Western Europe, 2nd ed., Routledge, 2006.

⁵ C. Kindleberger, Manias, panics and crashes – A history of financial crises, 2nd ed., Macmillan, 1989.

⁶ Ibid., pp. 181, 194 and 196.

⁷ M. Friedman, Optimum Quantity of Money, Aldine Publishing Company. 1969. p. 4. The debate remains quite alive ; see L. Reichlin, A. Turner, M. Woodford, Helicopter money as a policy option, Vox, 20 May 2013.

⁸ See article 282(3) TFEU.

⁹ Case C-11/00, Judgment of 10 July 2003, § 134.

¹⁰ See statement 29 June 2012.

The Euro summit affirmed its strong commitment “to do what is necessary to ensure the financial stability of the euro area, in particular by using the existing EFSF/ESM instruments in a flexible and efficient manner in order to stabilise markets for Member States respecting their Country Specific Recommendations and their other commitments including their respective timelines”

¹¹ Draghi’s speech at the Global Investment Conference, 26 July 2012.

¹² “A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme. The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme. Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.”

¹³ “Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access. Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years. No ex ante quantitative limits are set on the size of Outright Monetary Transactions.”

¹⁴ G. Wolff, The ECB's OMT Programme and German Constitutional Concerns, in The G-20 and Central Banks in the New World of Unconventional Monetary Policy, 2013, pp. 26-31.

¹⁵ <http://www.imf.org/external/pubs/ft/weo/2012/02/pdf/c2.pdf>.

¹⁶ See P. De Grauwe and Y. Ji, Fiscal implications of the ECB's bond buying program, CEPS, 2013.

¹⁷ See also P. De Grauwe, Economic flaws in the German Court decision, Vox, 13 March 2014.

¹⁸ In a previous judgment of 12 September 2012, the BvG was more careful when it stated that “an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently of the capital markets is prohibited“ (BVerfG 1390/12, § 278 English translation). This time, it has abandoned the criterion of the measure's aim.

¹⁹ Deutsche Bank, Monetary union after the German constitutional court ruling, 11 February 2014, p. 3.

²⁰ M. Fratzscher, F. Giavazzi, R. Portes, B. Weder di Mauro, C. Wyplosz, *A call of support for the OMT*, 2013.

<https://berlineconomicus.diw.de/monetarypolicy/a-call-for-support-for-the-european-central-banks-omt-programme/>

²¹ Idem. “First on the substance, the criticisms are based on a faulty understanding of the responsibilities of central banks. In its role as lender of last resort, a central bank must ensure that its liquidity reaches all parts of

the economy. This may require, in particular in crisis times, the use of unconventional policy tools such as the purchase of government bonds or other financial assets, to ensure that the monetary policy transmission mechanism functions. This is a precondition for a central bank to achieve its mandate. The OMT programme is an essential monetary policy element for the ECB to be able to fulfil its primary mandate of achieving price stability.

There is no doubt that the OMT programme is first and foremost a monetary policy instrument, and not a fiscal policy tool. Each and every central bank policy always exerts an influence on the financing conditions for governments (as well as for private companies and households), including the costs of government debt issuance in the primary market. This is true for changes in the policy interest rate as well as for unconventional tools, such as liquidity policies, collateral policies and active purchases of financial assets by the central bank in secondary markets. It is the responsibility of a central bank and a defining feature of a lender of last resort to assume liquidity risk, including through the purchase of financial assets when necessary (a step that has also been used by the Bundesbank itself in the past). The ECB's OMT programme is in this regard no different from any other monetary policy instrument.

Many central banks worldwide, with similar legal constraints and mandates as the ECB, have actively and successfully used programs to purchase debt of their sovereigns. The OMT programme is thus a proven tool that is not extraordinary in times of crisis.”²²

²² W. Buiter, quoted in Financial Times, 24 September 2012.

²³ A. Winkler, The lender of last resort in court, Frankfurt School Working Paper 207, 2014, p. 2.

²⁴ It could also be asked whether the credibility of the ECB's interventions can be preserved if all national banks of the Euro area begin to assist, like the Bundesbank, national judicial actions against these interventions in front of national courts. The same could be asked about the practice of announcing publicly what can be accepted or not as monetary measure before going to an ECB meeting.

²⁵ See for example § 71. “According to the European Central Bank, these spreads are partly based on fear – declared to be irrational – of investors of a reversibility of the euro. However, according to the convincing expertise of the *Bundesbank*, such interest rate spreads only reflect the scepticism of market participants that individual Member States will show sufficient budgetary discipline to stay permanently solvent. Pursuant to the design of the Treaty on the Functioning of the European Union, the existence of such spreads is entirely intended. (...) In any case, according to explanations given by the *Bundesbank*, one cannot in practice divide interest rate spreads into a rational and an irrational part”. There are clearly bad and good economists, and fortunately the BVG possesses also the amazing lucidity to distinguish them.

²⁶ See for example Y. Mersch, Euro area monetary policy: where we stand, December 9, 2013.

²⁷ A. Ubide, Is the European Central Bank Failing Its Price Stability Mandate ?, Peterson Institute, PB 14/5, 2014, p. 18.

²⁸ “The OMT is no doubt a great improvement over the SMP. The notion that solving the crisis requires a two-legged approach, as President Draghi insisted several times during his press conference, involving both the ECB and governments, and the creation of a mechanism of conditionality meant to ensure that each leg moves in the right direction is a great step forward. Indeed one of the tragedies of the euro area crisis so far has been the lack of an authority capable of providing the necessary coordination between the various actors, mainly the national governments and the independent central bank resulting in a game of chicken among governments and between governments and the central bank.” (A. Sapir, The SMP is dead. Long live the OMT, Breugel, 6 September 2012).

²⁹ K. Pistor, German court decision: Legal authority and deep power implications, Vox, 26 February 2014.



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