

European central bank's OMT decision: still within the framework of the monetary policy?

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Abstract. This contribution looks into the details of the ECB's Governing Council Decision of 6 September 2012 on Outright Monetary Transactions (OMTs) in secondary sovereign bond markets with a view to exploring whether the controversies raised around the ECB's alleged transgression of its mandate in the context of the OMTs are well-grounded. The authors analyse the legal basis for the ECB's activity and attempt to answer the question whether the OMT programme may be interpreted as a monetary policy instrument compatible with the EU law, notably the prohibition of monetary financing laid down in Article 123 TFEU. The authors contend that, given the inherent overlap of economic and monetary policies, drawing a clear demarcation line between them is neither possible, nor desirable. This delimitation lacuna under the EU law leaves the ECB a convenient margin of manoeuvre to intervene for the sake of maintaining financial stability of the monetary union on the one hand, and the ECJ to legally leverage such intervention by prudent, but capable legal hermeneutics. Consequently, there is currently no basis for challenging the legality of OMTs under the EU law, albeit the question of possible transgression of the ECB's mandate remains open in respect of such modalities of OMT implementation which would provide defaulting Member States financial assistance detached from financial markets logic and discipline.

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INTRODUCTION

On 6 September 2012, the European Central Bank's Governing Council took a decision on a number of technical features regarding the Eurosystem's Outright Monetary Transactions (OMT) in secondary sovereign bond markets which was announced by the ECB in its Press Release of 6 September 2012, indicating that its main objective was to safeguard an appropriate monetary policy transmission and singleness of the monetary policy.¹ The OMT decision came as a response to the distortions in the government bond markets, notably the malfunctioning of the price formation process, which resulted from the fears of investors concerning the stability of the euro and its possible reversibility.² The decision in question was, however, challenged in a case brought before the German Constitutional Court (*Bundesverfassungsgericht*) which addressed to the Court of Justice of the European Union (the ECJ) a request for a preliminary ruling putting the legality of the decision in question on grounds that the OMT programme:

- a) is a forbidden circumvention of the prohibition of monetary financing enshrined in Article 123 TFEU,
- b) falls within the field of economic policy, thus resulting in a transgression of the ECB's mandate.³

Following the OMT Decision, the earlier Securities Markets Programme (SMP) was terminated. In the meantime, the ECB set in motion its expanded Asset Purchase Programme (APP, more commonly referred to as the Quantitative Easing (QE) programme) which differs in various aspects from the OMT programme since it is in principle relevant for all Member States (with a temporary exception for Greece) and combines the private sector asset purchase programmes, namely the third covered bond purchase programme (CBPP3) and the asset-backed securities purchase programme (ABSPP), with the – for the current crisis resolution most relevant – public sector purchase programme (PSPP).⁴ The purchase of public sector securities under PSPP was initiated on 9 March 2015 and includes:

- a) nominal and inflation-linked central government bonds,
- b) bonds issued by recognised agencies, international organisations and multilateral development banks located in the euro area.

It is noteworthy that, under the said programmes, the Eurosystem intends to allocate 88% of the total purchases to government bonds and recognised agencies, and the remaining 12% to bonds issued by international organisations and multilateral development banks.⁵ On 3 December 2015 the ECB President Mario Draghi announced that the monthly purchases of €60 billion under the entire EAPP are now intended to run until the end of March 2017 or, if need there is, beyond that date. The ECB President also emphasised that there may not be any limit to how far the ECB's instruments are to be deployed, both "within mandate, and to achieve our mandate".⁶ In this context Mario Draghi recalled the ECJ judgment of 16 June 2015 in which the Court not only rules the ECB's OMT decision as *intra vires* (i.e. within the ECB's mandate), but also ascertains the necessity for the ECB's broad discretion when it comes to shaping and implementing an open market operations programme.⁷

¹ http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (referred on 30.11.2015)

² Cf. ECB Monthly Bulletin of October 2012, p. 8, available at:

<https://www.ecb.europa.eu/pub/pdf/mobu/mb201210en.pdf> (referred on 19.11.2015).

³ Reference for a preliminary ruling made by the decision of the *Bundesverfassungsgericht* of 14 January 2014, Case 2 BvR 2728/13 et al. *OMT*, the decision available in English at: www.bundesverfassungsgericht.de/en/decisions/rs20140114_2bvr272813en.html (referred on 14.09.2015)

⁴ Decision (EU) 2015/774 of the ECB of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121, 14.5.2015, p.20.

⁵ <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html> (referred on 07.12.2015).

⁶ <https://www.ecb.europa.eu/press/key/date/2015/html/sp151204.en.html> (referred on 4.12.2015).

⁷ Case C-62/14, *Peter Gauweiler and Others v. Deutscher Bundestag*, 16 June 2015, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014CC0062> (referred on 11.12.2015).

This does not mean, however, that the controversies surrounding the ECB's OMT programme have been fully settled. The case brought before the *Bundesverfassungsgericht* which led to the German Constitutional Court's referral for a preliminary ruling is pending⁸ and, were the Court to consider the ECJ's interpretation as *ultra vires*, Germany's participation in the implementation of the ECB's OMT decision could be put into question, triggering an unprecedented major constitutional conflict in the functioning of the Monetary Union and the European Union as a whole. With respect to the substance of the Karlsruhe Court's concerns, laxer financial assistance conditions under OMT than under ESM (see below) could potentially jeopardize the pursuance of sound finances and fiscal discipline by the Member States, which principles constitute the basis on which EMU was structured (see Wilkinson, 2015, p.1056). It must, however, be recalled that the future judgement of the German Court in the case regarding the OMT decision could not directly affect the implementation of the legally distinct QE programme, albeit it could possibly deploy indirect consequences for it.

The present contribution looks into the rationale behind the ECB's OMT decision and the modalities of the ECB's bond-buying programme with a view to determining whether it remains within the framework of monetary policy or whether the reservations as to the alleged transgression by the ECB of its mandate are justified. To that end, the authors analyse the legal basis of ECB's activity as well as OMT objectives and operational modalities so as to establish whether the programme as announced by the ECB may be interpreted as a monetary policy instrument compatible with the EU law, in particular in the light of the prohibition of monetary financing under Article 123 TFEU. Specifically, this contribution attempts to identify consequences of the objective-oriented and somewhat diffuse wording of the EU law provisions on monetary policy as well as articulate certain aspects of the double narrative that has accompanied the announcement of the OMT programme.

1. LEGAL FRAMEWORK OF THE ECB'S ACTIVITIES

The legal basis of the ECB's activity is laid down in the Treaties on the European Union (TEU) and on the Functioning of the European Union (TFEU) as well as in Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank.⁹ Under Article 282(1) TFEU the European System of Central Banks (ESCB, i.e. the European Central Bank, together with the national central banks of the EU Member States) is tasked with the maintenance of price stability. On the other hand, pursuant to Article 13 TEU the ECB is part of the institutional framework of the EU which "which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions". Furthermore, the ECB and national central banks of euro area countries constitute the Eurosystem which shall conduct monetary policy of the Union. The distinction between the ESCB and the Eurosystem is based on whether the members of the ESCB are respectively "Outs" or "Ins" of the Monetary Union and has no further-reaching legal ramifications.

Amongst the institutional particularities of the EBC the fact that Article 282(3) TFEU attributes to it legal personality merits attention. Article 47 TEU confers legal personality to the Union as a whole while besides the ECB no other EU institution enjoys a distinct legal personality. Such distinct legal personality can only be interpreted as forming part of the guarantee of the ECB's independence which, nevertheless, is not

⁸ Subsequently to the judgement by the ECJ the *Bundesverfassungsgericht* is to hold on 16 February 2016 a second oral hearing in the cases 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (see Pressemitteilung Nr. 3/2016 of 16 February 2016, available only in German).

⁹ OJ C 326, 26.10.2012, p. 230.

an end in itself, but rather a means of achieving a concrete objective, namely free and uninfluenced conduct of the EU's monetary policy (Repasi, 2012, p.5). The institutional independence of the ECB is accompanied by three other dimensions of independence, namely: a financial one consisting in the ECB's own resources outside the EU budget¹⁰; a personal one construed as a long (eight years) and not renewable term of office for the members of the ECB's Executive Board (Article 283(2) *in fine*); finally a functional one which consists in freedom from external influence, would that be from European Union or national institutions or authorities (cf. *ibid.*). Furthermore, Article 130 TFEU stipulates that in exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute, neither the ECB, nor a national central bank, nor any member of their decision-making bodies may seek or take instructions from EU institutions, bodies, offices or agencies, from any government of a Member State or from any other body. In accordance with the cited Article, as well as Article 282(3) TFEU, the Union institutions, bodies, offices and agencies, as well as the governments of the Member States shall respect this principle of independence and undertake not to seek to influence the members of the ECB's decision-making bodies or that of the national central banks (NCBs) in the performance of their tasks.

Regarding the legal basis for the ECB's activities, it may not be overlooked that under Article 18(1) of the Statute of the ESCB, in order to achieve the ESCB's objectives and to carry out its tasks, the ECB and the NCBs are expressly empowered to "operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals." The ECB establishes general principles for open market and credit operations which it or the NCBs are to carry out, including for the announcement of conditions under which the institutions stand ready to engage in such transactions (Article 18(2)). The said provisions are featured under Chapter IV of the Statute devoted to ESCB's *monetary* functions and operations. On these grounds the view is held that questioning of OMTs classification as a monetary policy instrument is a priori legally not viable (see Pech, 2013, p.15). From a less legalistic hermeneutical approach the question, whether or not the ECB's OMT programme is reaching beyond monetary policy and therefore *ultra vires* may only be determined on the basis of the purposes and modalities of that programme, which ultimately determine its compliance with the EU law.

2. PURPOSES AND OPERATIONAL MODALITIES OF OMTs

As announced in the ECB's Press Release on 2 August 2012, the Eurosystem's outright transactions in secondary sovereign bond markets are aimed at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy.¹¹ From the ECB's perspective, OMTs are a necessary, proportional and effective monetary policy instrument, the objective of which is the achievement of price stability.¹² The ECB has placed particular emphasis on the fact that the use of outright purchases of bonds as a monetary policy instrument is, as has been stated above, expressly provided for in Article 18(1) of the Statute of the ESCB. The ECB contends, moreover, that the close link of OMTs to traditional monetary policy is demonstrated by the fact that they will consist in purchasing government-issued bonds the maturity of which would be from one to three years.

The ECB defends its intervention as necessary in the light of the obvious malfunctioning of the government bond markets, with the significant default of some Eurozone countries rendering member states'

¹⁰ Article 282(3) TFEU lays down the ECB's independence in the management of its finances.

¹¹ http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (referred on 08.12.2015).

¹² See ECB Monthly Bulletin of October 2012 cited *supra* note 2, p. 7-8.

access to capital markets at reasonable interest rates even more difficult, which fact is also broadly recognised in the specialist literature (see e.g. Beukers and Reestman, 2015, p. 231). The proportionality of the measure is, in the view of the ECB, warranted by the fact that OMTs are only to be used to the extent necessary to achieve the objective of maintaining price stability and they will be terminated once this objective is attained. Finally, according to the ECB, the effectiveness of the OMT programme will be safeguarded by the specific modalities of its implementation. Strict conditionality is beyond doubt one of the salient features of OMTs. As announced by the ECB in its Press Release, “[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.”¹³ In other words, OMTs are designed to be carried out in conjunction with EFSF or ESM commonly seen as bail-out programmes, albeit subject to strict conditionality linked to the due and timely adoption by the member states of the necessary macroeconomic, structural, fiscal and financial adjustments.

The latter argument describing the OMTs operational modality as devised so as not to impair simultaneous progress by member states in the areas of fiscal consolidation and long-term structural reforms would arguably allow to consider OMTs as compatible with the prohibition on monetary financing laid down in Article 123 of the TFEU (see in this regard e.g. Yiangou *et al.* 2013, notably p.234). Pursuant to this Article, the ECB and the NCBs may not purchase public debt instruments not only on the primary, but also secondary markets insofar as such purchases on the secondary markets would be used to circumvent the prohibition of monetary financing.¹⁴ Apart from fiscal discipline, the operational modalities of OMTs are also said to be in line with two other objectives of the monetary financing prohibition, namely the pursuit of its primary objective of price stability and the ECB’s independence. As to the former, the link between the achievement of price stability and OMTs is elucidated by the ECB to the effect that OMTs, although constituting a “non-standard” monetary policy instrument, are aimed at “ensuring an effective transmission of the Eurosystem’s monetary policy and, thereby, at securing the conditions for an effective conduct of the single monetary policy within the euro area, with a view to achieving its primary objective of maintaining price stability.”¹⁵ As for the ECB’s independence, it is safeguarded by the ECB’s Governing Council’s full discretion in deciding on the start, continuation and suspension of OMTs. It is noteworthy that specifically in the context of the OMT programme some reservations have been formulated vis-à-vis such a substantial scope of the ECB’s independence (very critically e.g. Danzmann, 2015, p.214). Incidentally, Art. 88 sentence 2 of the *Deutsches Grundgesetz* (GG, the German Basic Law/ Constitution) explicitly provides for the conferral of powers to the ECB “which is *independent* and committed to the overriding goal of assuring price stability” (emphasis by the authors). This provision was inserted into the GG in order to enable Germany’s ratification of the Maastricht Treaty and hence intended to have the same meaning as Article 282(2) TFEU according to which the ECB’s main objective is “to maintain price stability”. Moreover, Article 186(2) entrusts the ECB with the task not only to implement but also to define the “monetary policy of the Union”. The latter is a term of European Union law and not referred to in the GG, hence subject to final interpretation of the

¹³ See the Press Release cited *supra* note 9. EFSF and ESM bailout funds were launched to alleviate the shocks of the European sovereign debt crisis.

¹⁴ See motive no.7 of the Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 [renumbered after the Lisbon Treaty as Article 123 TFEU] and 104b(1) [renumbered after the Lisbon Treaty as Article 125 TFEU] of the Treaty, OJ L 332, 31.12.1993, p. 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993R3603&from=EN> (referred on 2.12.2015), see also e.g. Wendel 2014.

¹⁵ See ECB Monthly Bulletin of October 2012 cited *supra* note 2, p. 7.

ECJ. Submitting to the ECJ its request for a preliminary ruling the *Bundesverfassungsgericht* nevertheless argued that the constitutional justification of the ECB's independence is limited to the power to conduct a primarily stability-oriented monetary policy and cannot be transferred to other policy areas (such as economic policy or – as recently was the case – to banking supervision)¹⁶.

3. DIFFICULTIES IN THE DELIMITATION OF ECONOMIC AND MONETARY POLICY

Whilst Article 119(2) TFEU provides for the distinction between economic and monetary policy, the EU Treaties do not define the concept of monetary policy, nor do they specifically refer to measures which economic policy should consist in. This state of affairs may convincingly be interpreted as a conscious and thoughtful preference of the EU contracting parties based on two premises: Firstly, whilst legal definitions may in specific regulatory measures prove useful for formulaic or clarity purposes (e.g. specification of the addresses of a legal norm)¹⁷, they may also constitute a hindrance, or even a handicap where interpretation and/ or application of law in a concrete context or judicial case is to be effected. Given the limited capacity of any constituent power or legislator, would that be at national or EU-level, to foresee all future contingencies relevant for the field concerned, it appears appropriate that a certain leeway has been left so as to prevent that the application of the law be paralysed should any such unpredicted circumstances occur. Secondly, defining the concepts in question encounters difficulties of purely practical nature. A clear delimitation of economic and monetary policies is not feasible in the light of the fact that both areas are interlinked in various and complex ways, with practically every monetary action taken by the ECB having simultaneously economic consequences for the economic policy of the Member States (cf. e.g. Simon, 2015, p.1029). This argumentation is in line with the circumspect stance taken by the ECJ in *Gauweiler* Case in which the Court states that “given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.”¹⁸

It should be noted here that in their provisions on monetary policy, the EU Treaties refer to the objectives rather than to the instruments of that policy (with the emphasis on the objectives being also central in the argumentation of the ECJ in defence of the OMT programme¹⁹). Furthermore, whilst under Article 127(1) and Article 282(2) TFEU the primary objective of the European System of Central Banks is to maintain price stability, the provisions in question further stipulate that ESCB is to support the general economic policies in the EU, with a view to contributing to the achievement of the Union's objectives, as laid down in Article 3 TEU. In the same vein pursuant to Article 13 TEU the ECB as a part of the Union's institutional framework is expected to promote the Union's values and advance its objectives in consistency with the policies pursued by the other EU institutions. In accordance with the cited provisions, the ECB is entitled to support general economic policies within the European Union (including those of the Member States) and not only those of the Union (Simon, 2015, p.1029). Thus, dealing with economic policy is not

¹⁶ BVerfG, Case 2 BvR 2728/13, cited supra note 3, para 59 *in fine*.

¹⁷ The inflationary use of legal definitions in legislative drafting, which seems to be a general trend, and particularly affects EU-legislation, may to a considerable extent be held responsible for the perception of the latter as bureaucratic and distant from the citizenry. Such legal perfectionism renders the law less readable. Flooded with legal provisions of that kind, ordinary citizens' compliance with the norms will rather depend on hazard than on knowledge. From a methodological point of view the use of legal definitions is questionable since any legal definition in the end needs to recur to undefined terms of the common language. Thus the gain in clarity and legal certainty is fallacious, since the semantic controversy is merely shifted to another linguistic locus.

¹⁸ Case C-62/14, cited supra note 7, para 75.

¹⁹ Loc.cit., para 46 *et seq.*

generally prohibited for the ECB (*ibid*). Furthermore the ESM Treaty entrusts the ECB with the duty to support the general economic policies in the Union. The tasks allocated to the ECB in that regard consist amongst others in:

- a) assessing requests for stability support and their urgency (Art. 13(1) and Art. 4(4), respectively),
- b) participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2))
- c) negotiating memoranda of understanding (Article 13(3)), and
- d) monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)).²⁰

The German Constitutional Court is correctly arguing that, pursuant to Art. 2(3) and Art. 5(1) TFEU, the role of the Union in economic policy is restricted to the adoption of coordinating measures and the ESCB is only authorised to support the general economic policies in the EU in so far as this is possible without compromising the objective of price stability (Art. 119(2), Art. 127(1) and Art. 282(2) TFEU). It is consequently also arguable that the authority to support the general economic policies of the Member States at EU-level (Art. 127(1) sentence 2 TFEU) does not justify any *steering* of economic policies by the ESCB.²¹ However, the argument put forth by the *Bundesverfassungsgericht* that the OMT Decision is incompatible with the ECB's mandate because it links the purchase of bonds to the EFSF and ESM macroeconomic adjustment programmes (parallelism) is not quite tenable. It is by no means disputed that the objectives and mechanisms of the aforementioned assistance programmes belong to the field of economic policy²² (and hence it is understandable that under the prevailing political circumstances they were established beyond the EU legal framework). The very fact that the intended government bond purchases are subject to strict conditionality attached to the EFSF and ESM adjustment programmes does not mean, however, that the ECB, by linking its action to an economic policy activity which both programmes perform, immediately falls outside its monetary policy remit.²³ Yet, the Bank has assumed a role of the most important expert body in the field of the macroeconomic constitution (Tuori & Tuori, 2014, p.221), including supervisory role with respect to the banking sector and fiscal positions of ESM Member States requesting financial assistance.

It follows from the foregoing that, as long as there are justifiable monetary reasons for a certain measure taken by the ECB, it generally falls within its mandate even though it might directly affect economic policy and the Member States may have taken similar measures (*cf.* Simon, 2015, p.1029f). The ECJ justifies this broad margin of manoeuvre for the ECB on grounds of the pursuance of a higher objective, namely maintaining the financial stability of the monetary union.²⁴ The ultimate justification for such discretionary power may be found in the methodological impossibility to draw a sharp borderline between economic and monetary policy. While numerous types of action may be clearly attributed to the one or the other policy field, in many overlapping and borderline-cases it would appear as arbitrary and counterproductive if a formalistic *ex-ante* legal definition attributed them to one of the said fields. It is therefore reasonable that the constitutionally competent body decides case by case with a view to the implementation of its own objec-

²⁰ Case C-370/12 Thomas Pringle v Ireland, 27 November 2012, the European Court of Justice, para 157, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0370&from=PL> (referred on 20.01.2016). The Court holds that in areas which do not fall under the exclusive competence of the Union, Member States are entitled to task the institutions, outside the framework of the Union, with coordinating a collective action undertaken by the Member States or managing financial assistance as long as those tasks do not alter the essential character of the powers conferred on those institutions by the EU Treaties (see para 158 and the relevant case law cited therein).

²¹ BVerfG, Case 2 BvR 2728/13, cited *supra* note 3, para 68.

²² See *Pringle* Case, cited *supra* note 19, para 60, 95.

²³ An opposite view is advanced by BVerfG, Case 2 BvR 2728/13, cited *supra* note 3, para 76.

²⁴ See *Pringle* Case, cited *supra* note 19, para 135.

tives on the exact scope of the monetary policy for which it is responsible. Still, the discussed legal dimension of the OMT programme does not provide a full account of the ECB's performance as a key stakeholder in the economic and financial crisis management and resolution.

4. THE ECB'S DOUBLE NARRATIVE ON OMTs

Not surprisingly, the prospects of ECB's intervention on the sovereign bond markets arose severe criticism (cf. inter alia Hristov *et al* 2014, p.15-16; Wyplosz, 2012), the climax of which was the aforementioned German Constitutional Court's referral to the ECJ for a preliminary ruling. In the view of the *Bundesverfassungsgericht*, a purchase of government bonds which carry an increased risk of failure or, if need there is, even a debt cut is likely to violate the prohibition of monetary financing under Article 123 TFEU.²⁵ OMTs are thus believed to pose genuine moral hazard by providing incentives to both governments to borrow and financial investors to lend in the knowledge that the ECB's interventions through the program are stipulated to be potentially limitless if need there is (cf. Wilkinson 2015, p.1056). Indeed, one of the most contentious features of the programme is that no *ex ante* quantitative limits are set on the size of OMTs. With Mario Draghi's pledge to rescue European Monetary Union "whatever it takes",²⁶ the ECB can be considered as emerging, even if not in legal terms, than at least as *de facto* lender of last resort in the sovereign debt markets vis-à-vis the participating countries (cf. e.g. Micossi 2015, Beukers and Reestman, 2015, p.236; see also Danzmann, 2015, with his concept of the ECB as *Endlager für Verluste*). This straightforward message, rightly considered as one of the most effective ECB announcements, seems to have reassured enough the bondholders.²⁷ At least one clear objective of the ECB's intervention in the bond markets has been attained, namely reducing the borrowing costs of indebted Eurozone countries, thus enhancing the ability of governments to borrow instead from the ECB from third parties, which is not prohibited by Article 123 of the TFEU (cf. Petch, 2013, p.18). The ECB President's preliminary self-assessment of the Bank's activity is to the effect that "[i]nsofar as monetary policy is intended as a macroeconomic stabilisation policy, it is succeeding. But our mandate is not phrased in terms of real growth. It is phrased in terms of price stability. And there, success is not achieved yet."²⁸ This declaration implies a risk of the term "price stability" being differently interpreted by the European Union and the national level. According to the declaration of its President, the ECB, very likely backed by the ECJ, would interpret this term appearing in Article 282(2) TFEU in the sense of a low inflation target (somewhat below 2%). In a case challenging the action of the ECB the German Constitutional Court could, however, be tempted to give to the same term employed in Article 88 German GG (and thus falling under its exclusive jurisdiction) a much stricter interpretation (as close as possible to 0%), albeit it was initially believed that both terms would have identical meaning. Such diverging rulings would create a conflict between the national and the European constitutional level where

²⁵ BVerfG, Case 2 BvR 2728/13, cited supra note 3, para 89.

²⁶ "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough." Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London on 26 July 2012, available at: <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> (referred on 21.01.2016).

²⁷ As to the immediate response of the financial markets, see e.g. ECB's Mario Draghi unveils bond-buying euro debt plan, BBC News of 6 September 2012, available at: <http://www.bbc.com/news/business-19499950> [accessed on 19.11.2015]. The Bulletin reported that the implied cost of borrowing over two years (4.71%), three years (5.09%) and four years (5.97%) fell to 2.80%, 3.68%, and 4.60%, respectively. A downward trend was also observed on the secondary market, with the government bonds already in circulation are traded by banks and other financial institutions, the yield on 10-year bonds fell below 6%.

²⁸ See the speech by the President of the ECB Mario Draghi: "Global and domestic inflation", Economic Club of New York, 4 December 2015, available at: <https://www.ecb.europa.eu/press/key/date/2015/html/sp151204.en.html> (referred on 14.12.2015).

from the EU perspective Germany would act in breach of Union law²⁹ while from the national perspective the Union would act *ultra vires*, since the interpretation of the Union law would exceed the limits of the powers which could be validly conferred to the European level by the German ratification law. Since no legal redress would be available for a conflict of this kind, it is vital for the European Union legal order that it be avoided by a prudent cooperation between the ECJ and the Bundesverfassungsgericht.

The current legal reading of the OMT programme is, nevertheless, in contrast to the messages sent to financial markets. As formulated by Beukers and Reestman (2015, p.236), “so far the Bank manages to successfully speak two languages to its different audiences: lawyers and bondholders.” This double narrative is ultimately the effect of a mismatch between the foundations and legal framework of EMU on the one hand, and the pressing need to re-establish financial stability of the euro area as a whole in the current acute crisis. The no-bailout clause enshrined in Article 125 TFEU was introduced by the Treaty of Maastricht with the aim of ensuring that the Member States, being subject to the logic of the market when entering into debt, would be prompted to follow a sound budgetary policy.³⁰ In hindsight the expected impact of market pressure was largely overestimated. Furthermore, in order not to quote Article 125 *in extenso*, the no-bailout clause operates a clear prohibition for the Union to assume liability commitments of national governments or other public authorities/ entities. The same applies to single member States, which explicates the strict conditionality attached to the ESM as a permanent stability mechanism which is entitled to purchase government bonds on the primary market, seen *nota bene* by the ECJ as equivalent to granting of a loan.³¹ Incidentally, as an external (international) financial institution, ESM is sometimes regarded as a “compensation” for systemic instability created by the ECB’s strict adherence to the monetary financing prohibition, which forced Member States to develop a framework for providing liquidity to countries in financial difficulties (Yiangou *et al.* 2013, p.233). However, despite the absence of quantitative limits for such an external lender of last resort, there was apparently not enough political will to exercise it convincingly through the ESM emergency fund (Beukers and Reestman, 2015, p.236). This in effect prompted the ECB to elaborate its OMT programme, subsequently developed into the Public Sector Purchase Programme (more commonly known as ECB’s QE), whereby the Bank effects a massive government bond purchase, interestingly, not limited to Member States in distress. It is noteworthy that the ECB’s QE is by no means an isolated intervention of this kind, with central banks of Japan, UK and US having previously embarked on QE in an attempt to stimulate economic recovery.

In sum, a mere *declaration* of intent by the ECB to purchase government bonds, even to an unlimited extent, is not enough for the OMTs to be legally challenged. The operational modalities of the OMTs remain such that a defaulting Member State, in determining its budgetary policy, cannot actually fully rely on the ECB’s intervention (i.e. purchase of its bonds on the secondary markets), and even if it does so, the ECB retains the option of selling the bonds “at any time”.³² Furthermore the ECB has made clear (and the ECJ in its judgement has taken this argument in account³³) that its interventions are not of an unlimited scope, while it would have counterproductive effects on the markets if such limits were unveiled in advance. Member States thus remain subject to the constraints of market logic and discipline which is fundamental for the government bond purchases on the secondary markets not to be considered as aimed at financing national economies independent from the capital markets, and consequently in breach of Article 123 TFEU

²⁹ Cf. Art. 131 TFEU: “Each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.”

³⁰ See *Pringle* Case, cited *supra* note 19, para 135.

³¹ *Loc. cit.* para 140.

³² See in this sense ECJ, Case C-62/14, cited *supra* note 7, paras 113 and 117.

³³ *Loc. cit.* paras 106, 116.

(Reestman & Eijssbouts, 2012, p.372). A separate question is that the OMT programme and ECB's policies in general have a direct impact on national financial and fiscal policies, while being out of democratic control from the sovereign, i.e. the voter (cf. e.g. Uhlig, 2015, p.49; Tuori & Tuori, 2014, p. 186f p. 221ff). This subject matter falling outside the scope of the study, suffice to say that the voter would neither exercise democratic control on analogous operations if they were carried out by a national central bank.

CONCLUDING REMARKS

The OMT programme as announced by ECB's Decision of September 2012 does not, in itself, provide sufficient grounds for challenging the legality of OMTs under EU law (cf. e.g. Petch 2013: 19), with legal hermeneutics allowing to conceive it as a monetary policy measure, however unconventional, not *per se* extraneous to the ECB mandate. In the light of the acute economic and financial crisis and the need for emergency action to safeguard the stability of Eurozone and its currency, it would be naïve to expect that the ECJ would be prepared to quash a decision based on expert economic assessment, unless it was "manifestly inappropriate" with a view to the objectives to be pursued by the competent institution. At the same time it should be emphasised here that a measure of this kind needs to be carefully balanced and monitored so as to avoid that its implementation is in breach of the EMU's Maastricht macroeconomic constitution. Its principles would apply not only to OMTs but similarly to programmes of QE and justify that such programmes undergo a double stress test. On the one hand, the ECB's bond buying programmes must *convincingly* remain in compliance with the EU law, otherwise they run the risk of being put into question by Member States' authorities, with the outcome of the ruling in the case before the German Constitutional Court being still to be awaited. On the other hand, such programmes are and will be evaluated in terms of output legitimacy, i.e. their practical effectiveness. It may not be denied that both the immediate reaction of the financial markets to the unveiling of the OMT programme, as well as the long-term stabilisation prospects seem to speak in favor of the ECB's pragmatic decision. However, the concrete impact of the QE programme on the inflation rate is still expected. The lack of specific powers and legal instruments for the Eurozone's economic governance, which the ECB in the financial crisis could only attenuate by stretching its mandate up to its legal limits, and the existing shortcomings of its democratic legitimacy remain to date unsolved.

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