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## ARTICLES

### A LEGAL ANALYSIS OF THE GAUWEILER CASE

#### Between Monetary Policy and Constitutional Conflict

TAKIS TRIDIMAS\* and NAPOLEON XANTHOULIS\*\*

#### ABSTRACT

*In Gauweiler, in response to the first ever preliminary reference made by the German Federal Constitutional Court (Bundesverfassungsgericht; FCC), the Court of Justice gave the green light to the ECB's power to selectively purchase Eurozone government bonds in secondary markets (OMT programme). Whilst the Court of Justice sets some limits to European Central Bank's (ECB) authority relying on the golden standard of proportionality, it is a judgment of institutional empowerment. The tensions and instability arising from the separation of competences in monetary and economic policy gravitate to the advantage of the Union. By placing emphasis on the objectives rather than the effects of the programme and linking OMT power to conditionality, Gauweiler builds on Pringle providing normative legitimization to the austerity model whilst granting the ECB a distinct role not only in monetary policy but also in shaping the general economic policy of the Union. The Court of Justice's ruling also indicates a measured but firm response to the dialogue of conflict initiated by the FCC.*

**Keywords:** ECB; EMU empowerment; judicial conflict

#### §1. INTRODUCTION

On 6 September 2012, the European Central Bank (ECB) announced by a press release its 'Outright Monetary Transactions' (OMT) programme,<sup>1</sup> a new scheme

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<sup>1</sup> ECB Monthly Bulletin, September 2012, <https://www.ecb.europa.eu/pub/pdf/mobu/mb201209en.pdf>; ECB Press Release, 'Technical features of Outright Monetary Transactions', 6.09.2012, [www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html).

conferring it power to purchase government bonds in secondary markets. The time had come to enact the ECB President's promise to do 'whatever it takes'<sup>2</sup> to protect the single currency. The announcement proved an exemplary exercise of 'regulation by information',<sup>3</sup> calming markets and reducing interest spreads, thus rendering its actual application unnecessary.<sup>4</sup> The ECB's decision, however, triggered an intense judicial debate as the German Federal Constitutional Court (*Bundesverfassungsgericht*; FCC) openly questioned the compatibility of the OMT programme with EU law and the German Basic Law (*Grundgesetz*). The FCC took the view that, unless interpreted in a specific way, the OMT decision was an obvious and structurally significant ultra vires act which had adverse consequences for core provisions of the Basic Law and thus was unconstitutional. In those circumstances, it made a preliminary reference to the Court of Justice but the substance and tone of the reference suggests that it was, perhaps, less an invitation to provide a binding ruling and more an opportunity to repent.<sup>5</sup>

On 16 June 2015, the Court of Justice delivered its preliminary ruling<sup>6</sup> by which it upheld, subject to certain safeguards, the compatibility of the OMT programme with the Treaties.<sup>7</sup> The judgment raises important points pertaining to the distinction between economic and monetary policy, the powers of the ECB, economic governance and democracy in the Eurozone, and the role of the Court of Justice. The present article engages selectively with some of those issues focusing on the admissibility of the questions referred, the Court of Justice's deferential application of proportionality, the role of the ECB, and the relationship between the Court of Justice and national courts.

<sup>2</sup> See Speech of the ECB President, Mr Mario Draghi, at the Global Investment Conference in London, 26.07.2012, <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

<sup>3</sup> G. Majone, 'The New European Agencies: Regulation by Information', 4 *Journal of European Public Policy* (1997), p. 262–275, 264–265.

<sup>4</sup> For empirical evidence regarding the effect of the announcement of the OMT programme, see C. Altavilla, D. Giannone and M. Lenza, 'The Financial and Macroeconomic Effects of OMT Announcements', *ECB Working Paper Series* No. 1707 (2014), <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1707.pdf>.

<sup>5</sup> BVerfG, 2 BvR 2728/13, 14.1.2014, [www.bverfg.de/en/decisions/rs20140114\\_2bvr272813en.html](http://www.bverfg.de/en/decisions/rs20140114_2bvr272813en.html). For a discussion of the judgment, see, among others, the contributions in Special Issue 15(2) *German Law Journal* (2014).

<sup>6</sup> Case C-62/14 *Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:400. Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:7.

<sup>7</sup> The legality of the OMT programme was also unsuccessfully challenged before the General Court which held the action inadmissible. See Case T-492/12 *von Storch and Others v. ECB*, EU:T:2013:702; upheld on appeal in Case C-64/14 P *von Storch and Others v. ECB*, EU:C:2015:300.

## §2. THE OMT PROGRAMME AND THE REFERENCE OF THE FCC

The OMT programme forms part of the ECB's non-standard measures which were adopted in response to the financial crisis.<sup>8</sup> In 2012, the yields of the bonds of some Member States started to incorporate redenomination risk premia, namely a tail risk of an abandonment of the Euro for a new currency. Against that background,<sup>9</sup> the ECB decided to introduce the OMT programme. Unlike the Securities Market Programme (SMP) that the ECB had introduced in 2010,<sup>10</sup> the OMT Programme would be triggered only for selected Member States which were under a macroeconomic adjustment programme in the context of financial assistance received from the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM). The significance of that conditionality is that it gave OMT intervention a residual character. The ECB would intervene only if that proved necessary, after the Eurozone governments had collectively decided to commit their own funds.<sup>11</sup>

Following the announcement of the OMT programme, some German citizens brought an action before the FCC challenging its compatibility with the German Constitution.<sup>12</sup> The FCC stayed proceedings and, for the first time in its history, made a reference for a preliminary ruling.<sup>13</sup> Under normal circumstances, this would have been considered a positive step towards initiating a direct dialogue between the two courts. Yet, this was no an ordinary case. The FCC's reference was based on its 'self-proclaimed right' to determine, as a court of last instance, whether an EU act has been issued *ultra vires*.<sup>14</sup> Its suggestion that it may have the power to depart from the answers received

<sup>8</sup> Non-standard measures generally apply in times of crisis when the standard policy instruments for achieving price stability, such as interest rate policy or the provision of liquidity, are not effective. See ECB, 'The Monetary Policy of the ECB', 2011, <https://www.ecb.europa.eu/pub/pdf/other/monetarypolicy2011en.pdf>.

<sup>9</sup> For a more detailed analysis of the reasons that led to the introduction of the OMT programme see: ECB Monthly Bulletin, September 2013, p. 7–11; and also B. Cœuré, 'Outright Monetary Transactions, one year on', Speech at the conference 'The ECB and its OMT programme', Centre for Economic Policy Research, German Institute for Economic Research and KfW Bankengruppe, Berlin, 2.09.2013.

<sup>10</sup> See ECB Decision establishing a Securities Markets Programme, [2010] OJ L 124/8. The SMP was adopted under Article 18.1 of the Statute of the ESCB and enabled Eurosystem central banks to purchase, among others, eligible sovereign debt securities on secondary markets with a view to ensuring the necessary depth and liquidity in market segments that were dysfunctional.

<sup>11</sup> P. Cour-Thimann and B. Winkler, 'The ECB's non-standard monetary policy measures the role of institutional factors and financial structure', *ECB Working Papers Series* No. 1528 (2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2239093](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2239093), p. 18.

<sup>12</sup> For a more detailed analysis on the socio-political circumstances surrounding these actions see D. Schiek, 'The German Federal Constitutional Court's Ruling on Outrights Monetary Transactions (OMT) – Another Step towards National Closure?', 15 *German Law Journal* (2014), p. 329–342, 331–337.

<sup>13</sup> See further the contribution of D. Kelemen in this Special Issue.

<sup>14</sup> M. Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', 10 *European Constitutional Law Review* (2014), p. 263–307,

by the Court of Justice, if it was not satisfied by them, revealed a ‘conflict-seeking attitude’<sup>15</sup> and, according to some, made the reference seem an abusive exercise of the right to request a preliminary ruling.<sup>16</sup> The FCC held by a 6 to 2 majority that the OMT programme was not covered by the ECB’s mandate under the Treaties, being an exercise of economic rather than monetary policy, and also that it violated the prohibition of monetary financing of the budget under Article 123 TFEU.

In its order for reference, the FCC stated that, if implemented, the OMT programme would violate the constitutional right to vote<sup>17</sup> and Germany’s constitutional identity, part of which is the principle of democracy,<sup>18</sup> under a dynamic interpretation developed in the German case law.<sup>19</sup> Moreover, the OMT programme gave rise to a risk of financial loss for the German Central Bank (*Bundesbank*), thus affecting the German parliament’s (*Bundestag*) budgetary sovereignty. In short, the FCC found that the OMT announcement was a manifest and structurally significant ultra vires act which violated core elements of the national constitutional identity.<sup>20</sup> Notably, with a view to saving the legality of the OMT programme, the FCC provided an alternative interpretation of it which would require the restriction of several of its features.<sup>21</sup>

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265, 271 et seq. According to the case law of the FCC, it can exercise an ‘emergency competence’ when an EU act violates Germany’s constitutional identity or an EU institution has adopted a manifest and structurally significant ultra vires act. See, inter alia, *Maastricht Treaty*, Judgment of 12.10.1993, BVerfG 89, 1553; *Lisbon Treaty*, Judgment of 30.06.2009, BVerfG, 2 BvR 2/08, 2BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09; and, more recently, *Honeywell*, Judgment of 6.7.2010, BVerfG, 2 BvR 2661/06. As the FCC stated in its order for reference, while the Court of Justice is the competent authority to interpret EU law, the FCC retains the right to determine ‘the inviolable core content of the constitutional identity and to review whether the act interferes with this core’, thus, claiming to have the final say on the legality of the OMT programme within the German legal order. See para. 22 et seq. of the FCC’s order for reference.

<sup>15</sup> Z. Snell, ‘*Gauweiler*, Some Institutional Aspects’, 2 *European Law Review* (2015), p. 133–134; Editorial Comments, ‘An unintended side-effect of Draghi’s bazooka: An opportunity to establish a more balanced relationship between the ECL and Member States’ highest courts’, 51 *Common Market Law Review* (2014), p. 375–388, 382–384.

<sup>16</sup> M. Wendel, 10 *E.C.L.R.*, p. 290. This view was endorsed by some governments in the proceedings.

<sup>17</sup> Article 38 of the German Basic Law.

<sup>18</sup> *Ibid.*, Article 79(3) of the German Basic Law.

<sup>19</sup> See para. 27 et seq. of the order for reference. The FCC stated that the power to decide on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to shape itself democratically and that, if the German Bundestag relinquished its parliamentary budget responsibility, that would amount to a violation of Article 38(1) of the German Basic Law. By transgressing the ECB’s mandate, the OMT decision encroached upon the Member States’ powers on economic policy and violated the prohibition on the monetary financing of the budget. See further S. Dahan, O. Fuchs and M.-L. Layus, ‘Whatever It Takes? Regarding the OMT Ruling of the German Federal Constitutional Court’, 18 *Journal of International Economic Law* (2015), p. 137–151, 140.

<sup>20</sup> See para. 28 and 33 of the order for reference.

<sup>21</sup> *Ibid.*, para. 100 discussed below.

### §3. THE NATURE OF THE OMT PRESS RELEASE

The first issue examined by the Court of Justice pertained to the nature of the press release announcing the OMT programme. The Court of Justice dismissed the argument that the reference was devoid of purpose since the OMT programme had not been implemented and its implementation would be possible only after further legal acts had been adopted. It pointed out that the main action was preventative in character seeking to avoid the infringement of rights which were under threat. Since such actions were permitted under German law, the request for a preliminary ruling met an objective need for resolving the cases before the FCC.<sup>22</sup> Furthermore, it dismissed the argument that there was a violation of the system of judicial review established by the Treaties. Spain had argued that the national proceedings created a direct action against the validity of an EU act without complying with the conditions for admissibility laid down by Article 263 TFEU. The Court of Justice pointed out that where, under national law, a person may seek judicial review of the legality of the intention or obligation of the national authorities to comply with EU legislation, individuals may plead the invalidity of an EU act of general application before the national courts, without it being necessary that implementing measures have been adopted in national law.<sup>23</sup> In that respect, it is sufficient if the national court is seised of a genuine dispute in which the question of the validity of such an act is raised on indirect grounds. In the Court of Justice's view, it was clear from the FCC's order for reference that this was indeed the case.<sup>24</sup>

A number of intervening governments questioned the admissibility of the question whether the OMT programme exceeded the ECB's mandate on the ground that a question concerning validity cannot be directed at an act which, like the OMT decision, is preparatory or does not have legal effects.<sup>25</sup> The Court of Justice dismissed that argument in a summary form holding essentially that the reference raised a question of interpretation and not a question of validity. The question was admissible since the referring court had asked whether certain provisions of the TFEU and the Statute of the ESCB and the ECB<sup>26</sup> must be interpreted as permitting the ESCB to adopt the OMT programme.<sup>27</sup>

Even though this is strictly speaking correct, given the principle of hierarchy of norms, the inevitable consequence of a finding of incompatibility would be that the OMT press release would be illegal and liable to annulment. The Court of Justice's bold answer

<sup>22</sup> Case C-62/14 *Gauweiler*, para. 28.

<sup>23</sup> See Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, EU:C:2002:741; Case C-308/06 *Intertanko and Others*, EU:C:2008:312.

<sup>24</sup> Case C-62/14 *Gauweiler*, para. 29.

<sup>25</sup> *Ibid.*, para. 23.

<sup>26</sup> 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 326/230.

<sup>27</sup> *Ibid.*, para. 30.

suggests that the way the referring court asks the question is conclusive of whether the Court of Justice will deliver a ruling on the interpretation or the validity of the rule in issue. Even though, in exceptional circumstances, the Court of Justice has gone as far as to provide a ruling on the validity where the national court posed only a question of interpretation,<sup>28</sup> as a general rule, it will not rule on the validity of a measure unless it has expressly been asked to do so. This is because it is mindful to ensure that the rights of defence are respected.<sup>29</sup>

The *Gauweiler* case, however, is different since it is clear from the order for reference that it was raising the ultra vires character of the ECB press release. It would have been well within the powers of the Court of Justice to treat the question as one of validity. Indeed, disguising a question of validity as one of interpretation of higher ranking rules is liable to create legal uncertainty as to the effects of the ruling in the event that the Court of Justice finds incompatibility. In this case, the summary dismissal of the admissibility argument was an expedient. By accepting the characterization of the reference as one pertaining to interpretation, the Court of Justice avoided entering into a discussion of whether the OMT announcement was a reviewable act within the meaning of Article 263 TFEU.

By contrast, Advocate General Cruz Villalón provided an extensive analysis on the reviewability of the OMT press release concluding that it fell within the Court of Justice's reviewing power.<sup>30</sup> The Advocate General considered not only the content and the actual effects of the announcement on the market but also the circumstances in which the OMT press release was adopted. He concluded that it was an act whose validity could be called into question in preliminary reference proceedings taking into account, inter alia, that it was a 'full normative programme'<sup>31</sup> which had a regulatory purpose and aimed at producing an immediate external effect, indicating clearly the ECB's decision to intervene in the market. The fact that it had a significant impact on the financial markets, enduring more than two years since the announcement, provided proof that the ECB intended it to produce effects.

Although Advocate General Cruz Villalón fell short of declaring expressly that the OMT press release was a reviewable act for the purposes of Article 263 TFEU, it is submitted that that is the case. The OMT press release is not a preparatory act. It sets out a firm intention that, if certain conditions are fulfilled, the ECB will intervene. It is not a mere intention to legislate but a concrete normative framework which had widespread effects in the market. Furthermore, it provided a firm assertion by the ECB that it has

<sup>28</sup> Case C-16/65 *Schwarze*, EU:C:1965:117.

<sup>29</sup> See Joined Cases C-141 to C-143/81 *Holdijk*, EU:C:1982:122, para. 6; and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni II*, EU:C:1994:208; Opinion of Advocate General Jacobs in Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni II*, EU:C:1994:208, para. 87 et seq.

<sup>30</sup> Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, para. 78–90.

<sup>31</sup> *Ibid.*, para. 85.

competence to take specific action in a concrete policy area. In those circumstances, it would be difficult to deny its reviewability.<sup>32</sup>

#### §4. AN EXERCISE OF MONETARY OR ECONOMIC POLICY?

The first objection of the FCC was that the OMT programme exceeded the ECB's mandate by straying into the realm of economic policy which remains in the hands of Member States. In response, the Court of Justice stated that, under Articles 282(1) and 281(4) TFEU, the single monetary policy is conducted by the ECB which can adopt any measures that are necessary to this effect in accordance with the provisions of the Treaty and the conditions laid down in the Statute of the ESCB and the ECB.<sup>33</sup> It is for the ESCB to define and implement this policy.<sup>34</sup> In particular, under Article 129(1) TFEU and Article 12(1) of the Statute of the ESCB and the ECB, the Governing Council formulates the EU's monetary policy and the ECB's Executive Board implements it, in accordance with the Governing Council's guidelines and decisions.<sup>35</sup>

While the Treaties provide no precise definition of monetary policy, its objectives and the instruments which are available to the ESCB are clearly defined.<sup>36</sup> The primary objective is to maintain price stability.<sup>37</sup> Without prejudice to that objective, the ESCB also supports the general economic policies of the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU.<sup>38</sup> Referring to *Pringle*, the Court of Justice held that, to determine whether a measure falls within monetary or economic policy, reference must be made principally to the objectives of the measure, the instruments which it employs also being relevant.<sup>39</sup>

In relation to the objectives, the Court of Justice looked at the wording of the press release and noted that it aims at safeguarding both 'an appropriate monetary policy transmission and the singleness of the monetary policy'.<sup>40</sup> Both aims fell within

<sup>32</sup> Note that in Case T-492/12 *von Storch* the General Court dismissed a direct action for annulment against the OMT press release brought by private applicants on the ground that they lacked direct concern. The General Court's order was confirmed on appeal (Case C-64/14 P *von Storch*) but neither court examined the question whether the OMT press release was reviewable under Article 263 TFEU. That question would need to be determined in the event that the OMT press release was challenged by a privileged applicant.

<sup>33</sup> Case C-62/14 *Gauweiler*, para. 36.

<sup>34</sup> See Article 127(2) TFEU.

<sup>35</sup> Case C-62/14 *Gauweiler*, para. 37–38.

<sup>36</sup> See Case C-370/12 *Pringle*, EU:C:2012:756, para. 53.

<sup>37</sup> See Articles 127(1) TFEU and 282(2) TFEU.

<sup>38</sup> Case C-370/12 *Pringle*, para. 54.

<sup>39</sup> Case C-62/14 *Gauweiler*, para. 46; and Case C-370/12 *Pringle*, para. 53 and 55.

<sup>40</sup> The term 'monetary policy transmission' refers to the process through which monetary policy decisions affect economic variables, such as output and prices. The individual links between monetary policy decisions and economic variables are defined as 'transmission channels', for example interest-rate channel, credit-rate channel, and so on. See A.-L. Riso, 'An analysis of the OMT case from an EU law

the objectives of monetary policy. Safeguarding the ‘singleness’ of monetary policy contributed to achieving its objectives, since, under Article 119(2) TFEU, monetary policy must be ‘single’;<sup>41</sup> safeguarding an appropriate transmission was likely both to preserve the singleness of monetary policy and contribute to maintaining price stability.<sup>42</sup>

In contrast to the reasoning of the FCC, the Court of Justice endorsed the ECB’s submission<sup>43</sup> that the effectiveness of the ESCB’s single monetary policy and its ability to influence price developments depends on whether it can transmit ‘impulses’ across the money market to the various sectors of the economy.<sup>44</sup> If the monetary policy transmission mechanism is disrupted, the ESCB’s ability to guarantee price stability will be undermined.<sup>45</sup> Such disruption would be likely to render the ESCB’s decisions ineffective in a part of the Eurozone undermining the singleness of monetary policy. Also, since disruption of the transmission mechanism undermines the effectiveness of ESCB measures, this would necessarily affect the ESCB’s ability to guarantee price stability.<sup>46</sup> Accordingly, the introduction of measures that are intended to preserve the monetary transmission mechanism may be regarded as pertaining to the primary objective of maintaining price stability.<sup>47</sup>

In relation to the means employed, the Court of Justice pointed out that the transactions that would be undertaken in the context of the OMT programme, namely purchase of government bonds on secondary markets, fell within Article 18(1) of the Statute of the ESCB and the ECB, which states that the ECB and the national central banks may buy and sell outright marketables in Euros. Thus, the OMT announcement envisaged the use of one of the monetary policy instruments provided for by primary law.<sup>48</sup>

The Court of Justice then went on to examine the OMT programme’s distinct features. The OMT is selective in that it aims to target only the bonds of Member States that are disruptive to the monetary policy transmission mechanism. The FCC saw the OMT’s selectivity as one of the main reasons why it fell within the scope of economic rather than monetary policy. The Court of Justice held that, since the programme was intended to rectify disruptions to the monetary policy transmission mechanism caused by the specific situation of the bonds issued by certain Member States, the mere fact that

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perspective’, in H. Siekmann, V. Vig and V. Wieland (eds.), *The ECB’s Outright Monetary Transactions in the Courts* (IMFS Interdisciplinary Studies in Monetary and Financial Stability, 2015), p. 19–29, 19–20.

<sup>41</sup> Case C-62/14 *Gauweiler*, para. 48.

<sup>42</sup> *Ibid.*, para. 49.

<sup>43</sup> Notably, the FCC had relied upon the German Central Bank’s ‘convincing expertise’ rather than on the ECB’s claims, thus presenting the positions of the two central banks as conflicting. See para. 71 of the FCC’s order for reference.

<sup>44</sup> Case C-62/14 *Gauweiler*, para. 50.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, para. 54.

it was specifically limited to them did not imply per se that the instruments used by the ESCB fall outside the realm of monetary policy.<sup>49</sup> Moreover, no provision of the Treaties requires the ESCB to operate in the financial markets by means of measures that would necessarily be applicable to all Eurozone states.<sup>50</sup>

Another distinct feature of the programme is its conditionality. The ECB Governing Council would consider purchases of bonds only in relation to Member States which were under a macroeconomic adjustment programme in the context of financial assistance received from EFSF or the ESM. The Court of Justice held that conditionality did not alter the conclusion that the programme formed part of monetary policy.<sup>51</sup> It acknowledged that a government bond-buying programme may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further their economic-policy objectives.<sup>52</sup> Such indirect effects, however, do not mean that such a programme must be treated as equivalent to an economic policy measure, since under the TFEU, without prejudice to the objective of price stability, the ESCB is also to support the general economic policies in the Union.<sup>53</sup> By making 'in a wholly independent manner' implementation of the OMT conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes, the ECB ensured that its monetary policy would not give the Member States whose sovereign bonds it purchased financing opportunities which would enable them to depart from the adjustment programmes. It thus ensured that its monetary policy measures would not work against the effectiveness of the economic policies followed by the Member States.<sup>54</sup>

The Court of Justice also held that, in conducting monetary policy, the ECB must promote sound public finances since the secondary objective of monetary policy is to support the general economic policies of the Union and those policies must, in turn, be conducted in accordance with the guiding principles listed in Article 119(3) TFEU, one of which is sound public finances.<sup>55</sup> It followed that the conditions included in a programme, which prevent it from acting as an incentive to Member States to allow their financial situation to deteriorate, cannot be regarded as taking the programme beyond the confines of monetary policy framework.<sup>56</sup>

The Court of Justice drew a distinction between the purchase of governments bonds in the secondary market by the ESM, and such purchase by the ECB in the framework of the OMT programme. The difference lies in the objectives. ESM purchase, subject to a condition of compliance with a macroeconomic adjustment programme, aims to

<sup>49</sup> Ibid., para. 55.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid., para. 57.

<sup>52</sup> Ibid., para. 58.

<sup>53</sup> Ibid., para. 59. See Articles 119(2), 127(1) and 282(2) TFEU.

<sup>54</sup> Case C-62/14 *Gauweiler*, para. 60.

<sup>55</sup> See Article 127(1) TFEU in conjunction with Article 119(3) TFEU.

<sup>56</sup> Case C-62/14 *Gauweiler*, para. 61.

safeguard the stability of the Eurozone, an objective falling within economic policy and not monetary policy.<sup>57</sup> By contrast, the implementation of the OMT programme is to be implemented only in so far as it is necessary for the maintenance of price stability, the primary objective of monetary policy. The programme is activated by the ESCB independently and does not aim to replace the competence of the ESM or circumvent the conditions circumscribing the ESM's activity in the secondary market.<sup>58</sup> Also, the OMT programme will not automatically be implemented in all cases where the respective Member State complies with the macroeconomic adjustment programme. It is only when there is a need to maintain price stability and the transmission mechanisms or the singleness of monetary policy are disrupted that the ECB will apply the mechanism in practice.<sup>59</sup>

## §5. THE APPLICATION OF THE PRINCIPLE OF PROPORTIONALITY

Having established that the OMT programme fell within the scope of monetary policy, the Court of Justice proceeded to examine whether it complied with the principle of proportionality, namely whether it was appropriate and necessary to achieve its monetary policy objectives.

With regard to the scope of judicial review, the Court of Justice considered that, in the course of preparing and implementing the OMT programme, the ECB would be required to 'make choices of a technical nature and to undertake forecasts and complex assessments'.<sup>60</sup> It followed that a soft standard of review should apply allowing the ECB a 'broad discretion'.<sup>61</sup> Nevertheless, the ECB was required to follow process safeguards which included the obligation to examine carefully and impartially all the relevant elements of the situation in question and give adequate reasons for its decision.<sup>62</sup> It will be noted that the importance to respect procedural guarantees as a counterbalancing factor of broad discretion in relation to the substance is not new and underpins the case law in all policy areas.<sup>63</sup>

In relation to the suitability of the OMT programme, the Court of Justice accepted the ECB assessment. It stated that, at the date of the programme's announcement, interest rates on the government bonds of various Eurozone Member States were characterized by high volatility and extreme spreads. Those spreads were caused, in part, by the risk of

<sup>57</sup> Ibid., para. 63–64; Case C-370/12 *Pringle*, para. 56, 60.

<sup>58</sup> Case C-62/14 *Gauweiler*, para. 65.

<sup>59</sup> Ibid., para. 62.

<sup>60</sup> Ibid., para. 68.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid., para. 69.

<sup>63</sup> See e.g. Case C-269/90 *Technische Universität München*, EU:C:1991:438; Joined Cases C-584/10 P C-593/10 P and C-595/10 P *Commission et al v. Kadi (Kadi II)*, EU:C:2013:518.

a break-up of the Eurozone.<sup>64</sup> That situation gave rise to fragmentation as regards bank refinancing conditions and credit costs, which greatly limited the effects of the impulses transmitted by the ESCB. In other words, it severely undermined the ESCB's monetary policy transmission mechanism.<sup>65</sup> The OMT programme was likely to contribute to reducing or even eliminating the excessive risk premia by dispelling unjustified fears of a possible Eurozone break-up.<sup>66</sup>

The Court of Justice pointed out that interest rates for government bonds play a decisive role in the setting of market rates, the value of the portfolios of financial institutions holding such bonds, and their ability to obtain liquidity. It follows, that eliminating or reducing excessive risk premia would likely limit their volatility and level from hindering the transmission of the effects of the ESCB's monetary policy to the economy of the Member States in issue and the overall single monetary policy.<sup>67</sup>

In dealing with the second leg of proportionality review, namely necessity, the Court of Justice noted that, although the ECB is obliged to state reasons, it is nonetheless not required to go into every relevant point of fact and law, and that an assessment should be undertaken with reference not only to the wording of the measure but also its context and the whole body of rules governing the matter in question.<sup>68</sup> In this case, the measure in question was published in the form of a press release, which, together with draft legal acts considered during the meeting of the Governing Council of the ECB at which the press release was approved, provided sufficient reasons so as to enable the Court of Justice to exercise its power of review.<sup>69</sup>

According to the press release, the purchase of government bonds was permitted only in so far as it was necessary to achieve the objectives of the programme and such purchases would cease as soon as those objectives had been achieved.<sup>70</sup> Secondly, the implementation of the OMT programme would be dependent on a separate in-depth assessment of the requirements of monetary policy.<sup>71</sup> Thirdly, more than two years after the announcement of the OMT programme, it had not been considered necessary to implement it.<sup>72</sup> Finally, the OMT programme would apply with certain limitations as it targeted specific government bonds in objectively identifiable Member States which were under macroeconomic adjustment programmes.<sup>73</sup> In view of the above considerations, the Court of Justice ruled that the announcement of the OMT programme did not infringe the principle of proportionality.

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<sup>64</sup> Case C-62/14 *Gauweiler*, para. 72.

<sup>65</sup> *Ibid.*, para. 73.

<sup>66</sup> *Ibid.*, para. 76.

<sup>67</sup> *Ibid.*, para. 78.

<sup>68</sup> *Ibid.*, para. 70.

<sup>69</sup> *Ibid.*, para. 71.

<sup>70</sup> *Ibid.*, para. 82.

<sup>71</sup> *Ibid.*, para. 83.

<sup>72</sup> *Ibid.*, para. 84.

<sup>73</sup> *Ibid.*, para. 85–87 and 90.

## §6. THE PROHIBITION OF MONETARY FINANCING

The second objection raised by the FCC was that the OMT programme violated the prohibition of monetary financing provided for in Article 123(1) TFEU. According to that provision, the ECB may not grant any type of credit facility to Member States or directly purchase their debt instruments from them. The prohibition seeks to avoid inflationary tendencies and force Member States to borrow at prevailing market prices and is thus central to the objective of ensuring price stability.

Following *Pringle*,<sup>74</sup> the Court of Justice held that Article 123(1) TFEU does not preclude the possibility of the ESCB purchasing government bonds in the secondary market. Under Article 18(1) of the Statute of the ESCB and the ECB, such purchase is permissible for the purpose of achieving ESCB objectives, provided that the nature of open market operations is not disregarded.<sup>75</sup> Nevertheless, secondary market purchases are not permitted where in practice that would circumvent the prohibition of direct purchases.<sup>76</sup> The FCC took the view that the OMT programme had precisely the effect of circumventing Article 123(1) TFEU and would result in certain Member States becoming responsible for the debt of other Member States, therefore undermining fiscal discipline.<sup>77</sup>

The Court of Justice, however, followed a more nuanced, objectives-led approach. It held that the aim of Article 123(1) TFEU is to encourage Member States to follow a sound budgetary policy and prevent monetary financing of public deficits or privileged access by public authorities to the financial markets, leading to excessively high levels of debt.<sup>78</sup> The OMT programme could undermine the effectiveness of the Article 123(1) TFEU prohibition if it replaced market discipline with the certainty of central bank intervention, namely if ‘the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries.’<sup>79</sup>

The Court of Justice accepted that the OMT programme was accompanied by sufficient safeguards. The ECB had produced a draft decision and draft guidelines indicating that the Governing Council was to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention envisaged by such a programme. The ECB had also made clear before the Court that the ESCB intended: first, to ensure that a minimum period was observed between the issue of a security on the primary market and its purchase on the secondary market; and secondly to refrain

<sup>74</sup> Case C-370/12 *Pringle*.

<sup>75</sup> Case C-62/14 *Gauweiler*, para. 95–96; and see Case C-370/12 *Pringle*, para. 132.

<sup>76</sup> Case C-62/14 *Gauweiler*, para. 97.

<sup>77</sup> *Ibid.*, para. 84–94.

<sup>78</sup> *Ibid.*, para. 100.

<sup>79</sup> *Ibid.*, para. 104.

from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged.<sup>80</sup>

The Court of Justice accepted that, despite the above safeguards, the ESCB's intervention could influence the functioning of the primary and secondary sovereign debt markets but held that that did not alter its conclusion. Such influence is inherent to its power to purchase bonds in the secondary market and, in fact, essential for the effectiveness of the purchase in the framework of monetary policy.<sup>81</sup>

The Court of Justice also stated that the OMT programme may circumvent the objectives of Article 123(1) TFEU if it lessened 'the impetus of the Member States concerned to follow a sound budgetary policy'.<sup>82</sup> This risk arises from the fact that monetary policy always entails an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the Member States' public deficit.<sup>83</sup> The Court of Justice considered that this risk is sufficiently addressed under the guarantees provided in the OMT. First, in determining their budgetary policy, Member States cannot rely on the certainty that the ESCB will at a future point purchase their government bonds on secondary markets.<sup>84</sup> Secondly, the programme does not harmonize the interest rates applied to the government bonds of the Eurozone Member States.<sup>85</sup> Thirdly, by limiting the OMT programme to certain types of bonds issued only by Member States undergoing a structural adjustment programme and which have access to the bond market again, the ECB restricts the volume of bonds eligible for purchase and accordingly, the impact on the financing conditions of the Eurozone Member States.<sup>86</sup> Member States whose financial situation has deteriorated so far that they are no longer able to secure financing on the market are excluded from the programme.<sup>87</sup> Fourthly, the ESCB has the option of selling the purchased bonds at any time. This has important effects. Any consequences that occurred from withdrawing those bonds from the market may be temporary; furthermore, the ESCB is able to adapt the programme in the light of the attitude of the Member State concerned, particularly by limiting or suspending purchases of government bonds, if a Member State changes its issuance behaviour by issuing short-maturity bonds in order to finance its budget by means of bonds that are eligible for ESCB intervention.<sup>88</sup> Fifthly, the purchase of government bonds is conditional upon full compliance with the structural adjustment programme of the Member State concerned. This precludes the OMT programme from being an incentive to dispense with fiscal consolidation.<sup>89</sup>

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<sup>80</sup> Ibid., para. 106.

<sup>81</sup> Ibid., para. 108.

<sup>82</sup> Ibid., para. 109.

<sup>83</sup> Ibid., para. 110.

<sup>84</sup> Ibid., para. 113.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid., para. 116.

<sup>87</sup> Ibid., para. 119.

<sup>88</sup> Ibid., para. 117.

<sup>89</sup> Ibid., para. 120.

In response to the argument of the referring court that the programme could expose the ECB to a significant risk of losses, the Court of Justice ruled that the ECB is obliged to take decisions which inevitably expose it to such a risk. In any case, the abovementioned guarantees were likely to reduce it.<sup>90</sup>

## §7. JUDICIAL DEFERENCE?

Given the Court of Justice's unwillingness to put into question the architecture of the EU's economic and monetary policy or jeopardize post-crisis recovery,<sup>91</sup> the recognition of the legality of the OMT programme was the more likely outcome. Notably, Advocate General Cruz Villalón reached the same conclusion.<sup>92</sup> The Court of Justice took a different approach from the referring court in all central issues, namely the characterization of the OMT programme as a monetary policy measure, the level of judicial scrutiny, and the finding that the programme does not violate the prohibition of Article 127(3) TFEU.

The compatibility of the OMT programme was not upheld by issuing a 'blank check'. For the programme to fall within ECB competence, the Court of Justice considered that certain safeguards must apply, albeit those safeguards did not match the FCC's requirements nor did they reflect the Advocate General's reservations.<sup>93</sup> It remains to be seen whether the safeguards recognized by the Court of Justice will be sufficient to satisfy the FCC.

According to the FCC, the OMT programme could be interpreted as being compatible with the Treaties provided that it did not undermine the conditionality of the ESM/EFSF financial assistance programmes. This entailed the following safeguards: (i) the exclusion of the possibility of a debt cut; (ii) the requirement that government bonds would not be purchased up to unlimited amounts; and (iii) the requirement that interferences with price formation on the market were to be avoided where possible.<sup>94</sup>

<sup>90</sup> Ibid., para. 123–125. It appears that the rationale underlying the FCC's hostile attitude was the latter's fear that Germany would be exposed to undefined financial liability resulting from the ECB's bond purchasing activities. The risk of the ECB, an institution which is immune from national judicial or parliamentary scrutiny, being bankrupt itself would mean that it would have to be bailed out by its shareholders, namely the national central banks. See H.C. Hofmann, 'Gauweiler and OMT: Lessons for Public Law and the European Economic Monetary Union', *Working Paper* (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621933), p. 21. Also, U. Di Fabio, 'Karlsruhe Makes a Referral', 15 *German Law Journal* (2014), p. 107–110, 109.

<sup>91</sup> A. Hinarejos, 'Is the ECB's OMT programme legal? The Advocate-General's Opinion in Gauweiler', *EULawAnalysis* (2015), <http://eulawanalysis.blogspot.com/2015/01/is-ecbs-omt-programme-legal-advocate.html>.

<sup>92</sup> For a discussion, see the contribution by D. Sarmiento in this Special Issue.

<sup>93</sup> See para. 99–100 of the order for reference. For the caveats of the Advocate General, see Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, para. 142–150, discussed below.

<sup>94</sup> See para. 100 of the order for reference.

Whilst the Court of Justice's safeguards are linked to those concerns, they do not appear to go as far. According to the Court of Justice, the Governing Council would be responsible for deciding the scope, the start, the continuation and the suspension of the ESCB's intervention on the secondary market under the OMT programme. Also, the ESCB would ensure that a minimum period is observed between the issue of a bond on the primary market and its purchase on the secondary market. Finally, the ESCB would refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases.<sup>95</sup>

The key point that emerges from the judgment is the enormous discretion left to the ECB. Although its power is restricted by a number of conditions, none of those conditions are firm and the determination whether they are fulfilled invariably entails complex technical assessment in relation to which the Court of Justice left the ECB with broad discretion. This is a judgment of institutional empowerment. Given the Court of Justice's traditional stance on EU competence and policy issues, this may not be surprising; yet, the judgment sets an important precedent in the field of monetary policy.

At first sight, the language of the judgment might, perhaps, suggest a limited margin of manoeuvre for the ECB. The Court of Justice grants it 'broad discretion'. The Court of Justice did not start by using directly the 'manifestly inappropriate' formula that the case law traditionally uses in relation to the review of economic policy decisions. It did, however, refer to manifest error in several parts of its reasoning.<sup>96</sup> There is little, if anything, in such semantic differences. The Court of Justice was deferential and did not apply a stricter standard of scrutiny. It recognized that the ECB, as the expert institution for conducting the Eurozone's monetary policy, was in a better position to assess its policy options. On this basis, it only applied a soft proportionality review over the ECB's technical and economic assessments focusing on whether the required procedural requirements have been met. This reflects, according to Hofmann, a trend in the EU of 'proceduralisation of review criteria'.<sup>97</sup> The Court of Justice provided a somewhat more rigorous review of the compatibility of the OMT programme with the prohibition of financial assistance under Article 123(1) TFEU. Discretion in that area however also remains ample.

Conflicting considerations emerge here. On the one hand, it can be argued that the ECB is essentially a politically non-accountable institution, and extensive judicial deference would make it immune to any type of legal scrutiny which is necessary to maintain checks and balances in a democracy. Yet, judicial deference aims precisely to protect the independent character of the ECB and allow it to pursue the objectives conferred under

<sup>95</sup> Case C-62/14 *Gauweiler*, para. 106.

<sup>96</sup> See inter alia Case C-331/88 *Fedesa and others*, EU:C:1990:391. See Case C-62/14 *Gauweiler*, para. 74, 81, and 91, compare para. 68.

<sup>97</sup> H.C. Hofmann, '*Gauweiler* and OMT: Lessons for Public Law and the European Economic Monetary Union', SSRN (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621933), p. 16.

the Treaties.<sup>98</sup> In the case at hand, judicial deference appears to be justified. First, the OMT programme has not yet been implemented; therefore, the information available is limited and the detailed particularities governing the first purchase of government bonds (if ever applied) are still vague. Secondly, its announcement was apparently necessary owing to the emergency circumstances requiring immediate monetary policy intervention. Thirdly, the judgment does not foreclose future challenges. On the contrary, each purchase under the OMT programme will need to be assessed vis-à-vis the criteria laid down therein and the parameters of the ruling even though the ECB enjoys discretion in determining the subject, timing and volume of purchases.

Goldmann<sup>99</sup> argues that the legal dispute on whether the OMT programme should be classified as monetary or economic policy reflects an underlying dispute in economic theory between the ‘separation theory’ and the ‘interdependence theory’.<sup>100</sup> He suggests that, in light of the unsettled ongoing economic debate and the lack of expertise required to make decisions in this field, courts should neither apply a full review nor a mere procedural review of ECB decisions, but rather exercise a ‘rationality check’. In his own words,

[C]ourts may not replace the ECB’s moral, ethical or pragmatic reasons with their own reasons. They may only (...) ask whether the presuppositions of such discourses have been observed, i.e. whether the act in question is rationally justifiable in a deliberative sense, bearing in mind the possibility of rational disagreement.<sup>101</sup>

## §8. THE ECB’S ROLE WITHIN THE EMU

A prominent aspect of the judgment is that, in determining the distinction between economic and monetary policy, the Court of Justice placed emphasis on objectives rather effects. In this respect, the impact of *Pringle* is significant. In *Pringle*, the Court of Justice considered that an economic policy measure, in that case the ESM, cannot be treated as equivalent to a monetary policy one solely on the ground that it may have indirect effects on the stability of the Euro.<sup>102</sup> The same reasoning was followed in *Gauweiler*, only this

<sup>98</sup> A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP, 2015), p. 131.

<sup>99</sup> M. Goldmann, ‘Adjudicating Economics? Central Bank Interdependence and the Appropriate Standard of Judicial Review’, 15 *German Law Journal* (2014), p. 266–280, 269–270.

<sup>100</sup> Separation theory ‘favors a monetary policy that largely disregards other policy objectives like financial stability or fiscal policy’. On the other hand, interdependence theory suggests that ‘central banks should give more weight to issues of financial stability in their policy decisions, and thereby emphasize taking greater account among the various fields of economic policy’. *Ibid.*, p. 269. The FCC’s analysis appears to be inspired by the separation theory. On the contrary, given that Court of Justice applied a more ‘holistic assessment of ECB measures’, it can be argued to be more in line with the independence theory. *Ibid.*, p. 275.

<sup>101</sup> *Ibid.*, p. 274.

<sup>102</sup> Case C-62/14 *Gauweiler*, para. 95–96; Case C-370/12 *Pringle*, para. 56 and 97.

time regarding a monetary policy measure. The Court of Justice took the view that any effects of the OMT programme on economic policy, such as its capability of contributing to the stability of the Eurozone, cannot lead to it being regarded as an economic policy measure. Focusing on objectives rather than effects allows the same action to be considered either as part of economic or as part of monetary policy depending on the entity that undertakes it and its objectives. This results in the fusion of the two policies and, as *Pringle* and *Gauweiler* indicate, grants immense discretion to the entity that undertakes the action. Whilst allowing for institutional discretion, the interdependence between economic and monetary policy works mostly to the advantage of the ECB whose broad powers to pursue monetary policy objectives may have substantial and widespread spillover effects in economic policy.

A distinct feature of the judgment is that the Court of Justice attached importance not only on the primary but also on the secondary objective of monetary policy, namely to support the economic policies of the Member States. The judgment grants to the ECB much more than merely a supporting role. Given that the concept of the ‘general economic policies in the Union’ is very vague, the Court of Justice interprets that vagueness in favour of the ECB by allowing it not only a supportive but also a proactive role.<sup>103</sup> As Hinarejos argues, the Court of Justice’s approach reflects the evolution from the original, rule-based conception of the EMU to a ‘more policy-oriented EMU that rose out of the crisis’.<sup>104</sup>

*Pringle* and *Gauweiler*, bring to the fore the ‘artificial nature, from an economic point of view, of the divide between monetary policy and economic policy’.<sup>105</sup> While monetary policy remains under the exclusive competence of the Union under Article 3(1)(c) TFEU, economic policy remains with the Member States and is only ‘coordinated’ at EU level pursuant to Article 119(1) TFEU. Considering, however, the role of the ECB and the Commission in monitoring and supervising the macroeconomic adjustment programmes, and the ECB’s powers under the OMT programme, the Union institutions appear to do far more than simply coordinating the Member States’ economic policies.

Notably, the Court did not examine the ECB’s role within the Troika, in contrast to Advocate General Cruz Villalón who provided an extensive analysis.<sup>106</sup> In particular, Advocate General Cruz Villalón examined the FCC’s argument that the ECB’s significant involvement in the financial assistance programmes provided by Member States brings the OMT programme within the sphere of economic policy. He accepted that the ECB

<sup>103</sup> Case C-62/14 *Gauweiler*, para. 109.

<sup>104</sup> A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, p. 143.

<sup>105</sup> D. Pigani Danrika, ‘The ECJ upholds the ECB’s bond buying programme: Preliminary reflections on the judgment of the Court in the Case C-62/14’, *Hungarian Academy of Sciences, Blogsite of the Institute for Legal Studies* (2015), <http://jog.tk.mta.hu/en/blog/2015/07/ecj-upholds-the-ecbs-bond-buying-programme>.

<sup>106</sup> Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, para. 143–144. See the contribution of D. Sarmiento in this Special Issue.

actively participates in ESM financial assistance programmes pointing out that the ESM rules confer on it multiple responsibilities, including participation in negotiations and monitoring.<sup>107</sup> Moreover, the experience of financial assistance programmes which have been implemented demonstrates that the ECB's role in the design, adoption and regular monitoring of those programmes is significant, not to say decisive.<sup>108</sup> It follows that the ECB is involved in the elaboration of conditionality whilst it also takes part in the task of monitoring compliance with conditionality, which is crucial if the programme is to continue and eventually come to an end.<sup>109</sup>

Such involvement raises concerns in respect of the OMT programme, since the ECB ends up with a 'dual role', namely as holder of a claim the basis for which is a government bond issued by a Member State and also as supervisor and negotiator of the financial assistance programme applied to the same Member State.<sup>110</sup> According to the Advocate General, unilaterally making the purchase of government bonds subject to compliance with conditions which have not been set by a third party but by the same party is problematic. The purchase of debt securities may eventually become another instrument for enforcing the conditions of the financial assistance programmes. It follows, that it is necessary to draw a distinction between (i) a measure intended to exclude 'moral hazard', such as a unilateral requirement to comply with the conditionality of a financial assistance programme, and (ii) a measure which, when considered in its context, includes the ECB as one of the institutions negotiating and, above all, directly co-supervising that conditionality.<sup>111</sup> In light of the above considerations, the Advocate General concluded that, should the OMT programme become activated, 'to retain its function as a monetary policy measure, [it would] be essential for the ECB to detach itself thenceforth from all direct involvement in the monitoring of the financial assistance programme applied to the State concerned'.<sup>112</sup> In other words, there must be a 'functional distance' between the two programmes.<sup>113</sup>

The Advocate General took the view that whilst the ECB could retain some passive and indirect involvement in those programmes, it would not be possible for it to continue to take part in their monitoring when, at the same time, the Member State subject to the programme was the recipient of substantial assistance under the OMT programme.<sup>114</sup> It is however very difficult to see how such functional distance may in practice be achieved.

<sup>107</sup> See, specifically Articles 4(4), 5(3) and (5)(g), 6(2), 13(1), (3) and (7) and 14(6) of the Treaty establishing the ESM.

<sup>108</sup> T. Beukers, 'The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention', 50 *Common Market Law Review* (2013), p. 1579–1620, 1588 et seq.

<sup>109</sup> Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, para. 144.

<sup>110</sup> *Ibid.*, para. 142.

<sup>111</sup> *Ibid.*, para. 146.

<sup>112</sup> *Ibid.*, para. 150.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

It is also a pity that the Court of Justice did not engage with the dual role of the ECB in this context. The judgment essentially underplayed the influence of the ECB's multiple roles and its capacity to have a decisive input on economic policy.

## §9. THE RELATIONSHIP BETWEEN THE COURT OF JUSTICE AND THE NATIONAL COURTS

While the reference in *Gauweiler* will not be the last development in the long balancing relationship between the FCC and the Court of Justice,<sup>115</sup> it is by all means a historic event.<sup>116</sup> It is the first time that the Court of Justice has been asked to decide on a reference by which the referring court reserves its right to disregard the preliminary ruling which it itself has requested.<sup>117</sup> By opting for direct confrontation, the FCC could be regarded as undermining the Luxembourg Court's authority, the principle of loyal cooperation under Article 4(3) TFEU, and, essentially, the Court of Justice's version of the EU construct.<sup>118</sup>

The reference presented the Court of Justice with a difficult dilemma. On the one hand, it could agree with the FCC's view on the OMT programme which would entail the risk of undermining the effectiveness of the ECB's response to the Euro-crisis and even the survival of the single currency. On the other hand, it could uphold the legality of the OMT measures and risk the FCC subsequently refusing to comply with its preliminary ruling with unpredictable consequences. By its judgment, the Court of Justice accepted the challenge but not the provocation.

It wisely did not question the national rules governing the judicial review of the OMT measures nor the organization of the domestic judicial proceedings. It did not express any views on the FCC's reserve power merely confining itself to a simple statement that preliminary rulings are binding on the national courts.<sup>119</sup> Notably, it went on to give clear answers to the questions referred without discussing directly the FCC's analysis, in contrast to Advocate General Cruz Villalón,<sup>120</sup> who examined the alleged consequences of the OMT programme to Germany's constitutional identity. One may say that, if the Court of Justice's ruling is read in isolation from the reference and the Advocate

<sup>115</sup> F. Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference', 15 *German Law Journal* (2014), p. 111–146, 116.

<sup>116</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. 1003–1023; the contribution of D. Kelemen in this Special Issue.

<sup>117</sup> K. Gärditz, 'Beyond Symbolism: Towards a Constitutional *Actio Popularis* in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court', 15 *German Law Journal* (2014), p. 183–201, 199.

<sup>118</sup> Editorial Comments, 51 *CMLR* (2014), p. 384.

<sup>119</sup> Case C-62/14 *Gauweiler*, para. 16.

<sup>120</sup> Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, para. 30–69.

General's Opinion, it would not be easy to see the peculiarities of the FCC's request or the underlying controversial constitutional debate.

As a result, it is now the FCC that bears the burden of deciding whether to reconsider its analysis or realise its threat. In essence, the Court of Justice responded that it retained the exclusive competence to determine the legality of an EU act and that it was not willing to negotiate. If the FCC were not to follow the ruling, it would not be the first time that a national court defied the Court of Justice,<sup>121</sup> but would be the first ever case where a national supreme court exercised its reserve power to declare an EU act ultra vires in direct contradiction to a preliminary ruling. European integration has been founded on the effective cooperation between the Court of Justice and national judicial authorities, who are the key interlocutors. If that cooperation becomes endangered, that would add a 'constitutional crisis to the euro-crisis'.<sup>122</sup>

Fabbrini argues that the OMT case may be an opportunity to settle once and for all the constitutional uncertainty regarding the supremacy of EU law which must be defended 'as the guarantee of the equality of the member states in the EU'.<sup>123</sup> Given that the confrontation regarding supremacy has implications that go beyond the bilateral relationship between a national court and the Court of Justice, if the FCC decided to nullify the OMT programme, this would directly affect all the other EU Member States. More importantly, it would jeopardize 'the reciprocal nature of the commitments undertaken' by each Member State when signing the Treaties. As Fabbrini suggests, the FCC's prism is inconsistent with the multilateral nature of the Union.<sup>124</sup>

The rationale of the preliminary ruling procedure is to ensure the uniform interpretation and application of Union law. The FCC suggests that it can resist on the basis of the principle of democracy as enshrined in Germany's Basic Law. Yet, it has been argued that national democracies have inherent limits on certain occasions. For instance, the domestic legitimacy of national decision-making appears to be insufficient on transnational issues which affect the interests not only of the Member State in question but also citizens of other Member States.<sup>125</sup> In that light, the question of legality of the

<sup>121</sup> In 2012, the Czech Constitutional Court blatantly refused to follow the interpretation provided by the Court of Justice in an earlier preliminary ruling without itself making a reference to the Court of Justice. See *Slovak Pensions*, Pl. ÚS 5/12, Judgment of 31.01.2012. For a commentary see G. Anagnostaras, 'Activation of the Ultra Vires Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court', 14 *German Law Journal* (2013), p. 959–973; M. Wendel, 10 *E.C.L.R.* (2014), p. 263; R. Zbiral, 'A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires', 49 *Common Market Law Review* (2012), p. 1474–1491. For a more circumspect recent defiance by the UK Supreme Court, see *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] UKSC 3; and T. Tridimas, 'The ECJ and the National Courts, Dialogue, Cooperation and Instability', in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of EU Law* (OUP, 2015), p. 425–428.

<sup>122</sup> Z. Snell, 2 *ELR* (2015), p. 133–134.

<sup>123</sup> F. Fabbrini, 16 *GLJ* (2015), p. 1006.

<sup>124</sup> *Ibid.*, p. 1005–1006.

<sup>125</sup> M. Poirares Maduro, *We, the Court* (Hart Publishing, 1998); see also the dissenting Opinion of Justice Lübbe-Wolff, para. 28, in the FCC's order for reference in *Gauweiler*.

ECB's policy actions within the EMU constitutes a transnational matter which cannot be determined unilaterally by a domestic court without risking the fragmentation of EU law. In a power-sharing political system, such as the EU, the democratic legitimacy of Germany cannot provide convincing grounds for resisting the ultimate power of the Court of Justice to determine the legality of an EU act.<sup>126</sup> In this sense, the FCC's position risks giving the impression that it lacks 'constitutional empathy'<sup>127</sup> by failing to take into consideration the sacrifices of constitutional sovereignty accepted by the other Member States.

## §10. WHAT NEXT?

What would happen if, despite the Court of Justice's findings, the FCC were to decide that the OMT programme was ultra vires? From an EU law perspective, such a ruling would be a flagrant breach of the principle of primacy, the exclusivity of the Court of Justice's jurisdiction to declare EU acts invalid, Article 4(3) TEU, and Article 344 TFEU. It could also lead to consequential violations of other provisions.<sup>128</sup> Such a breach could in theory even trigger enforcement proceedings against Germany under Article 258 TFEU. Furthermore, if the German Central Bank failed to comply with the ECB's decisions, the ECB could take action against it before the Court of Justice under Article 35(6) of the Statute of the ESCB and the ECB.<sup>129</sup>

Nevertheless, the effects of an ultra vires declaration by the FCC are still unclear. Would it mean, as the FCC implied in its reference, that the German Central Bank may be prohibited from participating in the decision-making process or the implementation of the OMT programme?<sup>130</sup> More interestingly, would the German public authorities have a 'duty to sabotage'<sup>131</sup> the OMT programme, meaning, essentially, that they must take measures to reverse the acts providing for the OMT programme or take adequate precautions to ensure that effects on Germany remain as limited as possible?<sup>132</sup>

Given the ECB's independence and immunity from any political influences, it is hard to imagine what actions the German Government and Parliament could possibly

<sup>126</sup> See also Editorial Comments, 51 *CMLR* (2014), p. 385, citing K. Auel and C.-J. Baquero, 'Karlsruhe's Europe', *Notre Europe* (2010), [www.institutdelors.eu/media/karlsruheeeuropeauel-baqueroacruznejuly10.pdf?pdf=ok](http://www.institutdelors.eu/media/karlsruheeeuropeauel-baqueroacruznejuly10.pdf?pdf=ok); C. Schönberger, 'Lisbon in Karlsruhe: Maastricht's Epigones At Sea', 10 *German Law Journal* (2009), p. 1201–1218, 1210–1216.

<sup>127</sup> F. Mayer, 15 *GLJ* (2014), p. 143.

<sup>128</sup> See Article 131 TFEU; and F. Mayer, 15 *GLJ* (2014), p. 123.

<sup>129</sup> See also Article 271(d) TFEU.

<sup>130</sup> See para. 45 of the FCC's order for reference.

<sup>131</sup> C. Gerner-Beuerle, E. Küçükin 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, 287.

<sup>132</sup> See para. 49 of the FCC's order for reference.

undertake.<sup>133</sup> It appears that the Bundesbank's objection cannot by itself block a decision in the ECB's Governing Council. Some have even questioned whether the German Central Bank is obliged to comply with such an order from a national court in light of its independent status under Article 130(1) TFEU.<sup>134</sup> Moreover, that scenario would bring the German public authorities in front of conflicting legal obligations: on the one hand, the obligation to give effect to the Court of Justice's ruling and, on the other, the obligation to comply with the FCC's declaration of invalidity.<sup>135</sup>

Several commentators suggest that the risk of damage to the credibility of all actors involved significantly reduces the likelihood of a conflict scenario,<sup>136</sup> and thus favours keeping the institutional power struggle at a symbolic level.<sup>137</sup> The FCC might have an option to avoid the deadlock. Although the extensive analysis and strong language contained in the reference appear to limit the flexibility of FCC's and the possibility to avoid open conflict with the Court of Justice, the FCC might perhaps still be able to apply the standards provided in its own case law and conclude that the OMT programme is compatible with the German Constitution.<sup>138</sup>

## §11. CONCLUSION

*Gauweiler* is a judgment of institutional empowerment. The ECB emerges as the big winner of the judgment. The emphasis on the objectives rather than the effects of a measure as the determining factor for deciding whether it falls within monetary or economic policy, coupled with a low standard of review, grants the author of the measure enormous discretion. The interdependence between economic and monetary policy works mostly to the advantage of the ECB whose broad powers to pursue monetary policy objectives may have substantial and widespread spillover effects in economic policy. Essentially, the tensions and instability arising from the separation of competences in monetary and economic policy gravitate to the advantage of the Union. By linking financial

<sup>133</sup> A. Thiele, 'Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program', 15 *German Law Journal* (2014), p. 241–264, p. 249.

<sup>134</sup> F. Mayer, 15 *GLJ* (2014), p. 127–128; M. Wendel, 10 *E.C.L.R.*, p. 281, footnote 113. For the opposite, and more persuasive view, see F. Amtenbrink and R. Repasi, 'Opinion of Advocate General Cruz Villalón in the OMT Case C-62/14', *EURO-CEFG Commentary* (2015), [http://euro-cefg.eu/fileadmin/Files/lde/Euro\\_CEFGEURO-CEFG\\_Commentary\\_on\\_AG\\_opinion\\_-\\_OMT\\_is\\_legal\\_under\\_EU\\_law.pdf](http://euro-cefg.eu/fileadmin/Files/lde/Euro_CEFGEURO-CEFG_Commentary_on_AG_opinion_-_OMT_is_legal_under_EU_law.pdf), p. 9.

<sup>135</sup> M. Wendel, 10 *E.C.L.R.*, p. 281, footnote 113 and the works cited therein.

<sup>136</sup> F. Mayer, 15 *GLJ* (2014), p. 128.

<sup>137</sup> K. Gärditz, 15 *GLJ* (2014), p. 199.

<sup>138</sup> M. Wendel, 10 *E.C.L.R.*, p. 305. Thiele argues that, in its order for reference, the FCC does not expressly state that the ECB is definitely violating the treaties but only that 'a violation would have to be interpreted as qualified, if one came to the conclusion that there was a violation'. While admitting this argument is weak from a logical point of view, it could open the door for the FCC to accept the Court of Justice's ruling: See A. Thiele, 15 *GLJ* (2014), p. 254–255. It is however difficult to see how that argument could stand in the light of the FCC's reasoning in the order for reference.

assistance and OMT power to conditionality, *Pringle* and *Gauweiler* provide normative legitimization to the austerity model whilst granting the ECB a distinct role not only in monetary policy but also in shaping the general economic policy of the Union. Although the Court of Justice placed various safeguards on the ECB's power to implement the OMT, none of them is firm and the assessment whether they are fulfilled invariably entails complex technical assessment in relation to which the Court of Justice left the ECB with broad discretion. The Court of Justice underplayed the multiple roles that the ECB performs in financial adjustment programmes failing to address the concerns raised by the FCC and the Advocate General.

The emphasis on objectives appears understandable. Given that economic and monetary policy are highly interconnected, seeking to distinguish between the two on the basis of their effects would be an arbitrary exercise. Nonetheless, reliance on objectives makes the classification equally subjective and favours institutional discretion. Overall, the ruling marks a reasonable step towards developing the legal accountability of the ECB<sup>139</sup> without undermining its independence and wide discretion to conduct its own economic assessment in selecting the policy measures necessary for pursuing its objectives.

In terms of intra-judicial relations, the FCC's reference illustrates the dialogue of conflict and, perhaps, a growing disagreement between the Court of Justice and national courts about what and how much can be done on the basis of the Treaties. This is perhaps inevitable. As the EU integration project expands in scope and intensity so does the engagement of national constitutional courts.<sup>140</sup> It remains to be seen how the FCC will react to the ruling. Suffice it to say that the contribution of national courts is a *sine qua non* to the success of the integration project.

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<sup>139</sup> H.C. Hofmann, 'Gauweiler and OMT: Lessons for Public Law and the European Economic Monetary Union', *Working Paper* (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2621933](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2621933), p. 21.

<sup>140</sup> See T. Tridimas, in D. Chalmers and A. Arnall (eds.), *The Oxford Handbook of EU Law*, p. 430.