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The European Central Bank's "whatever it takes" approach: the legality of its initiatives to safeguard euro during the crisis.

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TABLE OF ABBREVIATIONS

AG	Advocate General
BVerfG	BundesVerfassungsGericht (Germany)
CJEU	Court of Justice of the European Union
ECB	European Central Bank
EFSM	European Financial Stability Fund
EFSF	European Financial Stability Fund
EMU	European Monetary Union
ESCB	European System of Central Banks
ESM	European Stability Mechanism
EFSF	European Financial Stability Fund
EFSM	European Financial Stability Mechanism
FCC	Federal Constitutional Court (Germany)
GC	Governing Council (ECB)
GFC	Global Financial Crisis
GPD	Generalized Pareto Distribution
MS	Member States
NCB	National Central Bank
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
p./pp.	page / pages

para. /paras	paragraph/paragraphs
OMT	Outright Monetary Transactions
PSP	Public Sector Purchase Programme
SRM	Single Monetary Mechanism
SMP	Single Market Programme

Introduction

In 1992, the ambitions were high in the European Community due to the unveiling of the Maastricht Treaty which transformed the European Community into the European Union and establishes the main framework for the European Monetary Union¹. Thus, the fundamental principles governing its function were set by the Maastricht Treaty². The European System of Central Banks (ESCB) has dual structure: on the one hand the European Central Bank (ECB) at the center -as well as the centerpiece- of the European System of Central Bank, headquartered in Frankfurt and on the other hand the National Central Banks (NCB's) at the periphery. The objectives in order the sustainability to be achieved was enshrined in the Stability and Growth Pact (SPG) since 1997, requiring the Member States to maintain their public deficit below the ration of 3% of GPD annual and the total public dept below 60% of the GPT³.

Since 1999, when the single currency was fist adopted by some of EU Member States, the ECB has been responsible for monetary policy within Euro area. The Treaty of Lisbon did not change the basic construction of the EMU which is characterized by an asymmetry⁴. It is commonly said that EMU is based on a "dynamic balance" or a "systematic asymmetry" between two pillars⁵. The two pillars serve the common purpose of achieving the economic and social objectives of the Union as defined in Article 3⁶ of the Treaty for the European Union (TEU). The main bodies within the ECB which take decisions regarding the changes on monetary policy are the ECB Governing

¹ On the legal aspects of monetary union see among other, Proctor (2012).

² Available at <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

³ See among others 28 ECJ Judgment of 13 July 2004, Case C-27/04, Commission v. Council of the EU, ECLI:EU:C:2004:436.

⁴ See European Parliament Directorate-General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Implementation of the Lisbon Treaty Improving functioning of the E: Economic and Monetary Policy.

⁵ LEINO P., SAARENHEIMO T., Fiscal Stabilization for EMU: Managing incompleteness, European Law Review, Vol. 43, No. 5, October 2018, p. 624.

⁶ Article 3 TEU states ''.

Council⁷ and the Executive Board. Only the NCBs of the Member States whose currency is euro participate in the above decision-making bodies.

Member States materialized the monetary integration by abolishing their monetary sovereignty⁸ and at the same time by conferring the power to ECB to exercise the above power⁹. The primary ECB's legal framework is defined in the Treaties on the European Union and on the Functioning of the European Union as well as in the Statute of the European System of Central Banks and of the European Central Bank¹⁰. More specifically, the ECB under Article 13 TFEU¹¹ is a part of the EU constitutional framework and enjoys a legal personality which is, among others, a guarantee of its independence. Both ECB and national central banks of those Member States with the common euro currency constitute the Eurosystem.

The ECB was institutionalized by the Treaty of Lisbon and its main role is not only to define but also to implement monetary policy¹². The ECB operates as a monetary authority in those Member States that have adopted Euro as their single currency. Consequently, responsibility for monetary policy has been clearly transferred for national to supranational area. Since not all the Member States have chosen the euro, not only the distinction between the "ins" and the "outs" but also the existence of a "single monetary policy" for those Member States is inevitable. When NCBs implement tasks, defined by the ECB, act in their capacity as constituent part of the ESCB and not as autonomous national agencies and reflects the surrender of one of the attributes of sovereignty of the National State.

⁷ The council consists of the six members of the executive board of the ECB, plus the governors of all the national central banks from the 19-euro area countries.

⁸ Regarding the concept of monetary sovereignty, see Mann (1986).

⁹ Christos V. Gortsos, "Legal Aspects of the European Central Bank(ECB) (2018).

¹⁰ Protocol 4 on the Statute of the European System of Central Banks and the European Central Bank available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F04>.

¹¹ Article 13 TFEU states "...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".

¹² 18 A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, 2015, Oxford University Press. Further, on the other functions of central banks in economically developed states (relating, inter alia, to financial stability, as well as to their involvement in payment and settlement systems), see Gortsos (2020a), pp. 14-30, with extensive further references.

The primary objective of the ECB is to maintain price stability¹³. In addition to price stability ECB is entitled with the responsibility to support of the general economic policies aiming to contribute to the achievement of objectives of EU such as the economic growth, the achievement of high competition. The Eurosystem is required to act in accordance with the principle of an open market economy with free competition, favoring an efficient allocation of resources. The Treaty does not define the concept of price stability, whose definition is left to the independent assessment of the ECB's Governing Council in line with Article 12 of the ESCB Statute and with the overriding principle of central bank independence, as set out in Article 130 TFEU¹⁴.

It is clear that the formulation and implementation of monetary policy constitutes the most significant function to be carried out through the ECB. Hence, competence regarding the monetary policy has transferred to the exclusive competence of the ECB for those MS whose currency is Euro. This exclusive competence is not unlimited. MS of the Eurozone retain their sovereignty in those domains where no other limitations have been argued. The very purpose of a monetary policy is to provide a clear and coherent framework to structure information and the decision-making process internally and to explain the monetary policy decision externally. Transparency extends beyond mere openness but requires a degree of clarity that in fact enhances the public and standing of monetary strategy¹⁵.

The ECB exercised its competence throughout liquidity measures and open market operation. In order to perform the above, the ECB enjoys an organic, personal, functional and financial independence which is crucial in order monetary policy to be applied without influence by the political system. The independence from

¹³ For useful overviews of the role of price stability in the EMU architecture, see: Herdegen, "Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom", 35 *Common Market Law Review* (1998), 9.; Borger, "Outright Monetary Transactions and the stability mandate of the ECB: Gauweiler", 53 *Common Market Law Review*; *Common Mark. Law Rev.* (2016 According to the ECB «Price stability is defined as a year-on-year increase in the Harmonized Index of Consumer Prices (HICP) for the euro area of below 2%».

¹⁴ See "ECB, the stability-oriented monetary policy strategy of the Eurosystem" *ECB Monthly Bulletin*, January 1999, See further "The Eurosystem Transparent and Accountable" O. Issing.

¹⁵ See "Willem in Euroland", *Journal of Common Market Studies*, September 1999.

governmental direction of the ECB and the independence of the National Central Banks constitutes a key feature of the ESCB.¹⁶ The ECB's competence to provide market liquidity under 127 par. 2 TFEU and 18 of the ESCB Statute. Although it is unclear what ordinary liquidity is as opposed to emergency assistance. Such an independence is balanced by ex ante and ex post limits, provided for, inter alia, under art. 5, TEU, according to which the ECB must act within the previously defined boundaries, being accountable for its actions.

Also, article 127 TFEU defines a series of tasks to be carried out by the ESCB. These core mandates include monetary policy, foreign exchange operations (in accordance with article 219 TFEU), management of the official foreign reserves of the Member States, and the promotion of the smooth operation of payment. EU primary law does not confer the ESCB any specific competences on financial stability, i.e., prudential supervision and Lender of Last Resort (LOLR) functions. Any powers in that regard would have to come from other legal sources. Pursuant to article 127(6) TFEU, the Council might confer on the ECB certain tasks concerning policies relating to the prudential supervision of credit institutions and other financial institutions apart from insurance undertakings. These tasks, however, will need to be granted to the ECB by means of secondary legislation, such as the SSM Regulation. Powers for the protection of financial stability, like the provision of LOLR assistance to individual financial institutions, do not have an apparent grounding in the EU Treaties.

To materialize the above targets ECB is equipped with an alloy of both conventional and non-tools. However, the use of such tools is not unlimited but is subject to prohibitions laid down by the Treaties. Thus, Member States retain their exclusive competence in setting their economic policies when any default liability on behalf either the Member States nor the Union for commitments of "*central government*,

¹⁶ See also Article 282(3) TFEU. For the further organic, functional and financial safeguards for the ECB's independence, see: Lastra, "The Independence of the European System of Central Banks", 33 *The Harvard International Law Journal* (1992), 475–520, at 482 – 496.; as well as René Smits, *The European Central Bank, Institutional Aspects* (Kluwer Law International, 1997).

regional, local or other public authorities, other bodies governed by public law or public undertaking of any Member State ¹⁷ is strictly forbidden. ECB's action is determined by Article 123 and 125 TFEU which actually at the same time poses the limits in its powers.

¹⁷ Article 125 TFEU states: "The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local, or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

I.A.1 The euro crisis

The global financial crisis that initiated in the United States of America passed soon to the European countries. The collapse of Lehman Brothers and the following consequences led to a global financial crisis with huge dimensions. The financial and debt crisis which devastated the EU after 2007 causing a crucial impact on the EU institutions and especially on the ECB. As a result, the ECB was confronted with an alloy of serious political and institutional challenges. During the EU Crisis the ECB forced to use standard and non-standard measures in order to ensure not only the proper working of monetary transmission but also the liquidity in the banking systems of those Member States that have adopted the single currency.

In May 2008, to mark the forthcoming completion of the EMU's first decade, the Commission published a detailed assessment of the euro area's economic situation. In characteristically celebratory tone, the Commission stressed that 'the euro is a resounding success' 'Economically, the single currency had delivered sustained¹⁸ (and for certain countries, unprecedented) price stability; nominal interest rates had declined markedly in comparison to their levels under the old currencies (moving down to an average of around 5 per cent, from 9 per cent in the 1990 the cost of capital had also declined, leading to a great increase in 5 European Commission communication.

All banks in the euro area, even the strongest, experienced significant difficulties in terms of both access to funding and its cost. the euro area had to deal with a sequence of serious and highly destabilizing "national" crisis episodes. The credit crunch in conjunction with the lack of confidence led to a strong demand for liquidity and a malfunction in the interbank market. Under this framework arise the need for

¹⁸ See, among others, Pierre Schosser, "Resisting a European Fiscal Union: The Centralized Fragmentation of Fiscal Powers During the Euro Crisis", PhD thesis, EUI 2016.

immediate and effective ECB conventional measures¹⁹. Continued to run large budgetary deficits, the capital markets started to entertain doubts about the sustainability of their public finances. Between late 2009 and early 2012, first Greece, and then followed by other countries such as Ireland, Portugal, Italy, Slovenia, Cyprus, and even Spain –, attracted the strong and unforgiving scrutiny of credit rating agencies, the global media and international investors. As a result, these countries came to face exceedingly high borrowing costs and its bank system facing the crucial potential for a whole collapse.

The great impacts and threats of the EU crisis which has fallen mostly on the Southern nations, arose the need for effective and immediate measures in the field of monetary policy. He ECB took a number of non-standard measures to satisfy the high demand for liquidity, foster an even transmission of monetary policy impulses across countries and banks and help fend off risks of an even more dramatic financial meltdown. In 2009, it proceeded with the acquisition of cover bonds (60 billion euros) to encourage the liquidity of the partially paralyzed market segment responsible for providing funds to banks. Under such extraordinary circumstances the ECB adjust its monetary policy in order to address the risk for inflation.

¹⁹ As pointed out by A LAZOWSKI, S BLOCKMANS, Research handbook on EU Institutional law (Edward Elgar Publishing 2016), p. 104, the interventions taken across 2009-2010 can be peacefully deemed falling within the price stability mandate.

I.A.1. The role of the ESCB within the Euro Crisis.

The role of the ECB during the financial crisis was decisive, using a wide range of monetary policy instruments in order to safeguard the common currency. In particular, the ESB, beside the technical assistance which provided in the design and implementation of various agreements with borrow states, its contribution in bank supervision and resolution was significant.²⁰ Under the pressure of the emergence eurozone's sovereign debt crisis, epitaxially between 2009 and 2011, the ECB undertake a wide range of unorthodox monetary policy, mostly outside of its traditional role, aiming to prevent the total collapse of the common currency.²¹

The sovereign debt crisis increasingly turned into a twin sovereign debt and banking crisis. The high risk of break-up the euro combined with the banking crisis and the risk of deflation led the ECB not only to become the supervisor for eurozone banks. On the one hand, in order to ensure depth and liquidity in the sovereign bond markets of distressed countries and restore an appropriate functioning of the monetary policy transmission mechanism, in May 2010 the ECB introduced its first sovereign bond purchase programme, the Securities Markets Programme (SMP²²). To signal that the SMP was not designed to alter the stance of monetary policy, the SMP purchases of debt securities were sterilized financial tensions intensified again due to the worsening of public finances in several euro area countries and contagion from the agreement to restructure Greek sovereign debt. The SMP was terminated in September 2012 and replaced by OMT's.

In relation with the above measures, concerned were expressed regarding the unintended adverse side effects the unconventional monetary instruments. Although,

²⁰ See Council Regulation 1024/2013 regarding the tasks on the ECB concerning policies relating to the prudential supervision of credit institutions and Regulation 806/2017 regarding the establishment of uniform rules and procedure for the resolution of credit institutions and certain investment firms.

²¹ See Willem Buiters (2016), "Dysfunctional Central Banking; The End of Independent Central Banks or a Return to 'Narrow Central Banking' – or Both?", *Global Economics View*, Citi Research, 21 December; Otmar Issing (2016), Central Banks – From Overburdening to Decline? *SAFE White Paper Series*, No 42; Jakob de Haan and Sylvester C.W. Eijffinger (2017), Central bank independence under threat? *CEPR Policy Insight*, No 87.

²² Decision 2010/281/EU of the European Central Bank establishing a securities market programme.

in fact the Euro area faced a crucial need to handle an economic and financial crisis management framework almost from scratch. The traditional role of the ECB has expanded using unconventional monetary instruments and stepped in the public bonds market. Under extraordinary circumstances the Central Banks globally adjust their monetary policy in order to limit the negative impact of financial crisis.

I.B.1. Mario Draghi's "whatever it takes" statement.

In the view of the above and under these difficult financial conditions, Mario Draghi, as the President of ECB, announced in a speech given at the Global Investment Conference in London on 26 July 2012, that the ECB is ready to do "whatever it takes to preserve the euro" adding "and believe me, it will be enough"²³. It is undeniable, that the above statement, made at the height of the Eurozone debt crisis remains in History. This speech was the beginning combined with the three epitomized words were the trigger for a series of critical initiatives from the ECB.

A week later, presenting the results of a Governing Council meeting, the President of the ECB further highlighted "the severe malfunctioning in the price formation process in the bond markets of euro area countries" which in other words reflects the high risk observed in government bond prices in several countries. The fears of investors regarding the possible instability of euro²⁴ was increased. On this basis, Mario Draghi preannounced a new type of intervention involving "outright open market operation of a size of adequate to reach its objective" as a tool in order to repair the euro's monetary transmission mechanism.

A month later, on 6th of September 2012, the European Central Bank's Governing Council took a decision regarding the Eurosystem's Outright Monetary Transactions (OMT), indicating that its main objectives was to safeguard an appropriate monetary policy transmission and singleness of the monetary policy²⁵. The OMT decision, as a response to the distortions in the government bond markets, arise significant issues of legality. The OMT programme is a part of ECB's non-standard measures which were adopted to the financial crisis²⁶.

²³ Mario Draghi's speech at the Global Investment Conference in London available at <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

²⁴ ECB Monthly Bulletin of October 2012, p. 8.

²⁵ http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

²⁶ 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>.

will have together led the CJEU to enter into a more detailed discussion of these matters in this context.

The third leg of the proportionality test, finally, consists of analyzing whether the various interests in the case have been overall reasonably weighed up against each other – the so-called proportionality *strictu sensu*. Moreover, the role for a proportionality test *strictu sensu* is extremely limited. More specifically, proportionality *strictu sensu* usually involves a balancing of competing values. Certainly, it is not limited to the comparison of mere abstract values. Instead, it also takes into account the extent to which a measure restricts one value and the effectiveness with which it supports the competing value, i.e., the effects of the measure in question⁵². Yet, a mere comparison of effects is not possible without at least implicitly attributing a specific weight to the corresponding value that is subject to a comparison in the balancing test.

Proportionality is usually seen as a requirement of the rule of law⁵³. The OMT programme seems to have been effective and necessary to achieve the objectives of conducting monetary policy for the single currency, the Euro. The selection of bonds only from EFSM and ESM “programme countries” would ensure that the bond purchases would not disturb the general economic policy objectives of the Union. This selectivity is regarded as part of the limitations rendering the measure proportionate and not one of the matters which show that the measure is in fact an economic policy measure disguised as monetary bond buying programme⁵⁴.

All in all, the crucial element in order to conclude if an infringement of the principle of proportionality was occurred, is if the OMT go beyond what is necessary to achieve the objective of maintenance of price stability. Take into consideration the fact that the programme is indeed subject to strict conditionality and limited to a certain type of bond the above criterion fulfilled. The ECB reasonable take the view that the OMT

⁵² On Balancing and Subsumption: A Structural Comparison’, 16 *Ratio Juris* (2003) p. 433 at p. 443-448; P.-E.N. Veel, ‘Incommensurability, Proportionality, and Rational Legal Decision-Making’, 4 *Law & Ethics of Human Rights* (2010) p. 177.

⁵³See D.M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004) p. 163; “Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa” (Cambridge University Press 2017)

was appropriate, under such financial circumstances, to achieve the objectives outlined in the Treaty of conducting the single currency and without prejudice to the former also supporting the general economic policies of the EU. The selection of bonds only from ESM and EFSM programme countries further ensure that the bond purchases would not the general economic objective and hence this selectivity is regarded as a part of the limitations rendering the measure proportionate.

The ECB has committed itself to use the OMT whenever need, but always from the monetary perspective and under its role as guarantor of the single currency and financial stability. *“OMT’s are aimed at supporting the transmission mechanism in all euro area countries and the singleness of the monetary policy”*, added that *Per the ECB’s press release the Governing Council would consider Outright Monetary Transactions “to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme”*. Establishing the OMT, the ECB added an effective conditionality to the European Financial Stability Facility and the European Stability Mechanism (EFSF/ESM) programmes.

In the view of the above and in order to achieve a multi-tasking approach of the issue it is profound that a fundamental distinction among monetary and economic policy is necessary. On the one hand, monetary policy has transferred to the exclusive competence of European Union fulfilled by the Euro system while the economic policy, as a corporate competence of the Union, remains mainly in the sovereignty power of each Member State.

Moreover, price stability, as the primary objective of ECB, is broadly understood, covering the exchange rates as well, and defined by ECB as a year-on-year increase in the Harmonized Index of Consumer Price (HICP) for the euro area of below or close to 2% over the medium-term²⁷. In addition, the ESCB can further support general economic policies of the Union as long as this does not threaten the primary objective of price stability. As already been mentioned, Articles 127 and 282 of the TFEU, following the adoption of the Lisbon Treaty, indicates that financial stability, which was *somewhat neglected when the ECB was created*²⁸, has been entrusted to it. And

²⁷ “The definition of price stability available at <<<http://www.ecb.europa.eu/mono/strategy/pricestab/html/intidex.en.html>>>.

²⁸ V. Lastra, 2012:

wisely, as Central Banks have a major role in the euro area²⁹ and as the ECB proved to be a trustworthy key player in the financial and economic arena.

In the light of above, the ECB President declared that the main role the ECB is to maintain price stability at every cost. The OMT as an initiative aimed to help struggling eurozone economies by buying short-term government bonds on secondary markets. Thus, according to the OMT programme would buy government bonds from eurozone countries when nobody else will do so or in cases that their yield³⁰ is becoming so high that a member state will not have the ability to cover interest payments on newly issued bonds. Further, the OMT considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access. It is beyond a doubt, that during the crisis the traditional role of the ECB, which is closely related with the conduction of monetary policy has rapidly extended. Consequently, the ECB was forced to use a numerous of monetary policy instruments in order to avoid the collapsing of the single currency. With a wide range of specifically designed programs combined with monitors implementation of agreements, the ECB tries to handle the crisis. Furthermore, the EBC undertakes a significant role in bank supervision. The no-bail-out clause imposed by Article 125 TFEU, according to De Grauwe and Ji ended at the end of 2012 as the ECB under Mario's Draghi "*... appears to have made the fateful, but correct, decision to become a lender of last resort, not only for banks, but also for sovereigns, thereby re-establishing the stabilizing force needed to protect the system from market fears and panic that have destabilized the Eurozone*".

Although, the crucial tend for expansion of powers during the period or crisis is a fact. The OMT program was designed targeting in order for the ECB to buy government

²⁹ As the vast majority of companies and citizens meet their financing needs through the traditional banking system, via direct bank intermediation. As a result, the euro area banking system lies at the heart of the conduct of our monetary policy, v. speech by Praet, 2016.

³⁰ Yield is the profit expressed as a percentage of the investment, namely the annual interest paid on a security divided by the security's par value. It is represented by a percentage, which is tied to the risk associated with the investment.

bonds not directly for a member state but in secondary market. However, it is clearly declared in Article 123 TFEU prohibits from monetary financing or the ECB becoming a direct lender to a Member State³¹. The role of ECB as a guarantor of price stability within the Eurozone and the promise to do “whatever it takes”, laid the foundation for a series of interventions with long term impacts. The consequences of “whatever it takes” led Mario Draghi to be considered on the one hand as a savior³² of the euro and on the other hand as a threat of the Rule of Law³³ in the EU area.

I.B.2. The prohibition of monetary financing

a. Direct prohibition of monetary financing

The ECB has as its primary target the protection of central bank’s independence and the maintenance of price stability. In order to ensure the above aim, an ECB central bank cannot use its monetary instruments for reasons relating with the funding of public authorities. Article 123 of the TFEU plays a crucial role in this context. In particular, article 123 par. 1 TFEU prohibits any type of direct centra-bank credit to the public bodies as well as the direct purchase of sovereign bonds by the ECB or national central banks of member states. Direct monetary finance takes place when a central bank credits a government account via a secured loan transaction or purchase a government debt security on the primary market.

³¹ Article 123 TFEU states “1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as ‘national central banks’) in favor of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

³² See “Preparing for Next Steps on Better Economic Governance in the Euro Area”, (Four Presidents Report), Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselboem and Mario Draghi, Informal European Council, 12 February 2015.

³³ See SCHARPF F.W., Problem Solving Effectiveness and Democratic Accountability in the EU, Political Science Series, February 2006.

Thus, both ECB and the NCBs cannot finance the public sector or the public's sectors commitments to third parties. The prohibition of central bank financing of public sector was written into central bank statutes aiming to avoid similar abuses of the central bank's ability to print money. In addition, the prohibition of monetary financing is not applied in the distribution of central bank profits. The prohibition of monetary financing itself is neither necessary nor sufficient to ensure price stability but focuses on the protection of central bank's independence which might be violated if governments have direct access to central bank financing.

The restriction enshrined in article 123 TFEU strengthens the budgetary discipline and the commitment of price stability objective of monetary policy. However, it is crucial to be noted that the compliance with the prohibition does not mean that there is no leeway for the efficient fulfilment of central bank functions. Expectations which are further specified in law allow central banks to attain the objectives and fulfill basic tasks provided by the Eurosystem of Central Banks.

b. Indirect monetary financing

Indirect monetary policy occurs when central banks transfer surplus profits which derive from earning on securities acquired through their market operations or when central banks reinvest the proceeds of maturing government debt securities via purchases of new government debt on the secondary market. The ECB may also adopt measures under certain circumstances in order to contribute to the primary objective by fostering the precondition which are necessary to achieve its primary stability objective. Indirect subsequent financing of government spending by way of open market purchases of bonds from banks and other financial institutions is permitted under certain circumstances.

II.A.1 The compatibility of the OMT programme with the prohibition of monetary financing laid down in Article 123 TFEU.

The OMT is a programme where the ECB can purchase unlimited amounts of bonds issued by the EU Member States, only if they are bought on the secondary market and as long as those Member States have signed a bailout agreement with the European Stability Mechanism (ESM). OMT's are in principle unlimited³⁴ however, a precondition for support will be compliance with an EFSF/ESM program that embeds strict conditionality. The program will be concentrated on purchases of government bonds referring to the shorter part of the yield curve, with maturities of between one and three years.

A crucial issue which arises is if and in what extend, the ECB has breached its mandate by announcing potentially unlimited sovereign bond purchases. In particular, if the OMT program constitutes a step too far into the terrain of fiscal policy which violates European law (Art. 123 paragraph 1 TFEU), according to which monetary financing of sovereign entities is strictly prohibited or if the OMTs enable the monetary authorities to act as a lender of last resort in the government bond markets, which eliminates the risk of a liquidity squeeze.

Article 123 TFEU contains a prohibition of monetary financing, prohibiting the direct purchases of government bonds by the ECB, but regarding the purchase take place in secondary market the answer is not clear. This is an issue of utmost importance in the sense that if the prohibition is applied on secondary market or indirect purchases, the OMT programme violates article 123. The principal question is under what circumstances there is a circumvention which is closely related with the objective's limits of Article 123 TFEU. The main substantive constraint on the instrument comes from the monetary financing prohibition in Article 123 TFEU, which prohibits the direct

³⁴ (Deutsche Bundesbank, 2012),

purchase of public debt. It is explicitly drafted, however, to allow for the purchase of government bonds on secondary markets³⁵.

In the light of the above, the ECB has argued that in some cases the purchase of secondary markets is also prohibited³⁶ when the CJEU would further argue that circumvention of the prohibition is not allowed.³⁷ However, the provision clearly prohibits overdraft facilities or other credit facilities provided by the ECB to national governments, EU institutions, and other public bodies. The prohibition also includes any primary market purchase³⁸ of sovereign bonds by the ECB as well as by national central banks. Hence secondary market³⁹ purchases are not considered illegal per se and consequently article 123 must be interpreted widely. Although, the Treaty prohibits any financial assistance from the ESCB to a Member State, to possibility of purchasing from the creditors of such a Member State which previously issued by that State.

³⁵ Delors Committee, Report on economic and monetary union in the European Community, 17/04/1989.

³⁶ See ECB Opinion of 25 March 2010 on Independence, Confidentiality and the Prohibition of Monetary Financing available at http://www.ecb.europa.eu/ecb/legal/pdf/en_con_2010_25_f_sign.pdf.

³⁷ See Council Regulation 3603/93, 1993 O.J. (L 332) 1 (EC). De Grauwe is less concerned: "According to its statute, the ECB is allowed to buy government bonds in the secondary markets in the context of its open market operations. In doing so, the ECB does not provide credit to governments. What it does is to provide liquidity to the holders of these government bonds. These holders are typically financial institutions. In no way can this be interpreted as a monetary financing of government budget deficits." DE GRAUWE, *supra* note 1, at 529.

³⁸ i.e., purchases directly from the issuer, and thus transactions where the price paid for the purchase of the debt instrument directly flows to the issuer (i.e., the sovereign debtor). This prohibition is explicitly made in Article 123 TFEU, although primary market purchases are clearly caught by the general prohibition of any "credit facility".

³⁹ The notion that secondary market purchases are in principle permissible has not been seriously questioned. See also ESCB Statute, *supra* note 50, art. 18 (providing explicitly for these transactions).

II.A.2. Difficulties in the delimitation of OMT as an economic or monetary policy instrument.

The ECB's mandate, as stipulated in Article 282 par. 1 & 4 TFEU, is to conduct the monetary policy of the EU, for those States whose currency is the Euro. In addition, the ECB adopts the necessary measures in order to achieve this task. On the contrary, the competence regarding the economic and budgetary policy remains in the Member States. Notwithstanding the EU's competence in the field of fiscal policy is limited, it contributes to the coordination of the policies of the Member States in order to achieve the general goals set out by Article 3 TEU⁴⁰. Thus, the ECB cannot carry out its own economic policy but is limited to the support of general economic policy within the Union.

Several legal questions regarding the distinction among monetary and economic policy have arisen. It is commonly known that all measures of monetary policy have economic consequences. Hence since the Treaties do not provide a clear definition of what economic and fiscal policy constitute, they differentiate between both in terms of a policy's aim and its instruments. The mandate is very general where it comes to the instruments assigned to the ECB. Article 18 of the ESCB Statute permits the ECB to trade any "claims and marketable instruments, whether in euro or other currencies", and also permits lending to counterparties, with the condition that such lending is "based on adequate collateral".

With its OMT programme, the ECB has moved into the grey area among monetary and fiscal policy. On the one hand, the announcement of the OMT programme enables the ECB to fulfill its fundamental obligation of maintaining price stability. Thus, the OMT programme might be considered as an unconventional monetary instrument which is created and used under the crisis to ensure that the monetary transmission mechanism properly functions. The OMT programme enables the monetary

⁴⁰ See Art. 119 (1) TFEU and Case C-370/12, 27.11.2012, *Thomas Pringle v Government of Ireland*.

authorities to act as a lender in the government bond markets aiming to the elimination of the risk of liquidity squeeze.

The ECB argues that the OMT programme was required in order to safeguard the transmission of monetary policy on the grounds that the financial conditions are characterized by risk premiums on government bonds yields. Hence these risk premiums are undermining the proper functioning of the transmission of monetary policy. The main objective of OMTs was to achieve a better alignment of financing conditions in the real economy and thus strictly connected with the monetary policy and its primary aim of price stability.

On the one hand, it is undeniable that the OMT programme plays an essential role in stabilization of the EU area. Monetary instruments are pivotal to the treaty provision, although solely from the fact that a monetary measure has indirect effects on economy, cannot be treated as equivalent to an economic instrument. Another important element is that in the framework of global financial crisis monetary policy changes in two dimensions. First and foremost an extension of conventional operation is observed, and new unconventional measures are used. Under extraordinary circumstances, when the markets risk assessments are treated by the potential risk that a Member State might leave the common currency.

The main objectives of the OMT are closely related with the consistency and the proper transmission of monetary police. Thus, the OMT would be assigned to the area of monetary policy and consequently in the exclusive competence of the ECB. It is beyond a doubt, that the OMT programme has an indirect effect to economic policy which although itself cannot arise competence and legality issues. The powers of the ESB are defined in the Treaties and according to the principle of conferral of powers, the ECB has exclusive competence to adopt and implement a programme which is assigned to monetary policy by primary law. The OMT programme clearly aims to preserve the singleness of monetary policy and contributes decisively to the materialization of policy, laid down in EU Treaties.

In addition, it is beyond a doubt, that the potential disruption of the transmission mechanism will significantly influence the ability of ECB to guarantee the price stability. A monetary instrument cannot be considered as an equivalent to an economic one only by the fact that the above measure has indirect effects in the fiscal field. Another important point is that the OMT programme is implied to the Member States in which the European Financial Stability Facility or in the European Stability Mechanism is applied. Hence, the main objectives of these assistance mechanisms belong to the field of the economic policy⁴¹, without although these link to be suitable to entail that the ECB falls immediately of its monetary policy remit.

In the view of the above, the use of unconventional monetary tools such as sovereign bond purchases seem to be required during the crisis in order the proper function of the monetary transmission mechanism to be achieved. It should be further mentioned that the bond purchases are limited time in respect to short time maturities for one to three years. The main task of the ECB is to define and implement monetary policy in conjunction with the smooth operation of the payment system. The main objective hence of the OMT programme was to stabilize markets in which monetary policy did not operate properly anymore and ultimately the avoid of a potentially credit crunch stemming from liquidity and funding problems for banks.

On the other hand, the role of the ECB concerning the fiscal policy is restricted in the support of general economic policies within the EU as long as this is possible without compromising the main objective of price stability⁴². However, the ability to support general economic policies does not justify any kind of steering of economic policies by the ESCB. More specifically, according to the *Pringle judgment* in order to distinguish whether an act has a monetary or fiscal nature, is necessary to refer to the precise

⁴¹ 22 See *Pringle Case*, C-370/12, cited supra note 19, para 60, 95.

⁴² Case C-370/12 *Thomas Pringle v Ireland*, 27 November 2012, the European Court of Justice, para 157, <http://eur-lex.europa.eu/legalcontent/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).

objectives of the measure and the instruments chosen to attain them⁴³. Moreover, even though the OMTs were designed to restore the monetary policy transmission mechanism and the singleness of its monetary policy, it is crucial to define the immediate and the indirect objective of the programme.

In other words, if the restoring of the monetary policy transmission constitutes only an indirect objective, the measure would not pertain the monetary policy domain and consequently, incompatible with Article 119, 127 (1) and (2) TFEU as well as the Articles 17 to 24 of the ESCB Statute. The distinction between monetary and economic policy do not clearly define the concept of monetary policy nor refer specifically the instruments which economic policy must consist of. Consequently, an absolute delimitation of fiscal and monetary policy is not feasible. Both areas are interlined, and actions taken by the ECB in the field of monetary policy, have crucial impacts for the economy of the Member States.

43 Idem paragraph 46.

II.B.1. Principle of proportionality and the OMT programme.

The principle of proportionality is explicitly mentioned in Article 5 par. 1 TEU⁴⁴ as a condition for the exercise of EU competences. However, this specific dimension of proportionality has received limited attention in legal literature⁴⁵. The majority of analyses of the principle of proportionality, focuses on the general application of the test⁴⁶. According to this norm, the test of whether an EU measure is within the EU's competence contains two main steps. The first one related with the definition of competences which entails that the Union can act solely on the basis of a competence that has been clearly conferred upon the Treaties⁴⁷. Hence the EU, generally and the ESB specifically either has a competence or it does not. Further, the use of the competence is not circumscribed by the principles of subsidiarity and proportionality.

The principle of proportionality is enshrined in Article 5 par. 4 TFEU⁴⁸ but reflected elsewhere in the EU Treaties. The principle has been further developed and specialized by the Court of Justice. Instead of referring explicitly to Article 5 TFEU, the Court usually refers to the proportionality principle as a general principle of EU Law. This principle has a double dimension in the EU case law, it protects the subjective rights of individuals and the autonomy of the Member States.⁴⁹

⁴⁴ Article 5 (1) TEU states "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."

⁴⁵ See T. Tridimas, *The General Principles of EU Law*, 2nd editiona. (Oxford University Press 2006).

⁴⁶ See, e.g., G. de Búrca, 'The Principle of Proportionality and Its Application in EC Law', T. Tridimas, 'The Principle of Proportionality in Community Law: From Rule of Law to Market Integration', T.-I. Harbo, 'The Function of the Proportionality Principle in EU Law', A. Portuese, 'Principle of Proportionality as Principle of Economic Efficiency'.

⁴⁷ Article 5 (2) TFEU states "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States".

⁴⁸ Article 4 (4) TEU states "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality".

⁴⁹ ECJ 5 May 1998, Case C-157/96, *National Farmers' Union*, para. 60; 12 March 2002, Joined Cases C-27/00 and 122/00, *Omega Air*, para. 62; 10 December 2002, Case C-491/01, *British American Tobacco*, para. 122; 12 December 2006, Case C-380/03, *Germany v Parliament and Council*, para. 144; 10 January

Compliance with the obligations under the principle of proportionality imposes an obligation on the Union body “at least satisfy themselves that the proposed measures are prima facie adequate to attain the legitimate aims pursued”.⁵⁰

Proportionality, as a general principle of EU Law, involves considerations of three questions: first whether measure is suitable or appropriate to achieve the objective pursued, secondly, whether the measure is necessary to achieve that objective and finally whether the measure is stricto sensu proportional, namely whether the burden imposed by the measure is disproportionate to the benefits secured. The OMT programme, as a part of ECB’s non-standard measures, adopted in response to financial crisis. Compliance with the principle of proportionality is necessary when conflicts have to be balanced⁵¹.

The second leg of the proportionality review looks at whether the measure under review, the OMT programme in the present case, does not go manifestly beyond what is necessary to achieve the objectives it purposes. This level of review is particularly difficult in the event that it is not even clear at the time of judicial review if and under which exact conditions that measure would be ever implemented. After all, the object of review is not a legal act but an announcement at a press conference of the fact that the Governing Board of the ECB has decided that in future it may engage in certain activities. One might argue further in favor of proportionality review of this matter by the CJEU that the announcement of the ECB – a factual as opposed to a legally binding act – may have effects on the markets through regulation by information and may affect, if implemented, the budgetary interests of the shareholders of the ECB, which are the National Central Banks, backed by the Member States. These considerations

2006, Case C-344/04, *IATA and ELFAA*, para. 79; 21 July 2011, Case C-15/10, *Etimine*, para. 124; 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council*, para. 206.

⁵⁰Opinion of Sharpston AG in Case C-310/04 *Spain v Council* [2006] ECR I-7285 at para 80. The violation of the duty to care by the institutions was so severe that they were criticized as appearing arbitrary: “In the absence of any impact study, certain choices made by the Commission and the Council appear arbitrary” para 94.

The legality of ECB's unconventional monetary tools through case law.

a. Gauweiler case (C-62/14).

Following the announcement of the OMT programme, a group of people led by Peter Gauweiler, brought an action before the Federal Constitutional Court challenging its compatibility with the German and EU law. In particular, the applicants argued that⁵⁵ the ECB had overstepped its constitutional role, as this is defined by the Treaties, by creating a programme that should be viewed as a tool of economic policy. Further, they alleged that the programme directly violated the prohibition of monetary financing. Several constitutional actions have been brought before the Federal Constitutional Court concerning the participations of the Deutsche Bundesbank (German Central Bank) in the implementation of the OMT programme and alleged failure of the FCC and the Bundestag (Lower House of the German Federal Parliament) to act with regard to that programme.

According to the Federal Constitutional Court point of view, although the OMT program formally complies with the condition expressly set out in Article 123 (1) TFEU, which concerns solely the purchase of debt instruments in the primary market, the program none the less, may circumvent the prohibition concerned, because the ECB's interventions on the secondary market, similar like purchases on the primary market, in fact reflect financial assistance by means of monetary policy. In support of that view, the Constitutional Court refers to various technical features of the OMT programme.

In response to Gauweiler and others complaint against the OMT, the German Federal Constitutional Court (BVerfG) asked the European Court of Justice, the first time in its history, for a preliminary ruling under Article 267 TFEU⁵⁶ on the legality of the OMT

⁵⁵ The actions in question have been brought by several group of individuals, one of which is supported by more than 11.000 signatories. The Left Party Parliamentary Group in the Lower House of German Federal Parliament (The Fraktion DIE LINKE im Deutschen Bundestag) has brought proceedings before the referring Court on the ground of a conflict between constitutional bodies.

⁵⁶ Article 267 states "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:(a) the interpretation of the Treaties;(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under

programme. The FCC openly doubted the legality of the OMT and addressed to the CJEU a series of questions regarding the compatibility of OMT programme with EU Law.

While in the *Pringle case* the argument was that the European Stability Mechanism was illegal due to its monetary policy nature and hence fell outside the competence of the Member State in *Gauweiler* the argument was deployed and based on the FCC point of view that the OMT programme constitute an economic policy measure. It was central in both cases, that the measures infringed either Article 125 TFEU or Article 123 TFEU, limiting the extent which EU institutions or MS could provide financial assistance.

The CJEU is entrusted with the task to enforce the EU law and to ensure the legal interpretation and application of the Treaties. According to the BVerfG the ECB has exceeded its role provided by the Treaties of the European Union and act *ultra vires* by initiating a measure that a) has an economic and not a monetary nature (Art. 127 TFEU) and b) violates the prohibition of monetary financing (Art. 123 TFEU). On the view of *Gauweiler* and others, for example, the OMT-programme led to a “suspension of the market mechanisms which violates the Treaties”; a view also supported by Bundesbank president Jens Weidmann in his testimony.

Dealing with the principle of proportionality, the CJEU noted that although the ECB is obliged to state reasons, it is nonetheless not required to go into every point of fact. Further, ruled that an assessment should be undertaken with reference not only to the wording of the measure but also in its context and the whole body of rules governing in the matter of question⁵⁷. According to the press release, the purchase of government bonds by the ECB was strictly permitted only in so far as it was necessary to achieve the objectives of the programme.⁵⁸As a result, the Court finds that since the conditions for the OMT programme include strict limitations to objectives pursued

national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay

⁵⁷ Case C-62/14 *Gauweiler* para. 70.

⁵⁸ Case C-62/14 *Gauweiler* para. 82.

and is limited to certain types of bonds issued by Member States selected on the basis of pre-defined criteria the measure is not manifestly beyond what is necessary to achieve the ECB's monetary policy objectives⁵⁹. Limiting the proportionality review here, might become the most problematic element of the case, and I would predict, would constitute its weakest point. It is a failed opportunity to conduct proportionality review to a degree which would even be convincing to the openly critical BVerfG.

Further, as the CJEU already ruled in the *Afton Chemical* case⁶⁰, a long line of precedent restates its formula that "when is a choice between several appropriate measures recourse must be had to the least onerous". The notion of "least onerous" hence requires a clear distinction of the rights in question and of balancing. Generally, the CJEU, avoids this formulation and retreats a more general one in pure "limitation of competence" or in other words 'conferral' and cites instead *Association Kokopelli*⁶¹, a case which actually limited the criteria for review of proportionality. In the present case, the CJEU decided to reduce significantly the level of review as compared to the Advocate General opinion which refers to more onerous second-leg proportionality test⁶².

As a result, the Court finds that since the conditions for the OMT programme include strict limitations to objectives pursued and is limited to certain types of pf bonds issued by Member States selected on the basis of pre-defined criteria the measure is not manifestly beyond what is necessary to achieve the ECB's monetary policy objectives. Limiting the proportionality review here, might become the most problematic element of the case, and I would predict, would constitute its weakest point. It is a failed opportunity to conduct proportionality review to a degree which would even be convincing to the openly critical BVerfG. The third leg of the proportionality test, finally, consists of analyzing, which underlies the German what level of cost the monetary union might be worth to them. That is of course a question

⁵⁹ 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".

⁶⁰ C-348/09 available at <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-343/09>.

⁶¹ C-59/11 available at <https://eur-lex.europa.eu/legal-content/el/TXT/?uri=CELEX:62011CJ0059>

⁶² C-391/90 para 13 and C-451/05 para. 1(3).

completely unsuitable for litigation and for a court to decide. Accordingly, the discussion is short on this matter

On the substance of the case, the CJEU addressed two main questions. The first one is related with the potential the ECB powers to be exceeded in the fields of monetary policy and secondly whether the action of ECB violated the prohibition of monetary financing as defined in the treaties. At the starting point the CJEU underlined that according to Article 3 par. 1 TFEU the Union has exclusive competence in the area of monetary policy for those Member States which have adopted Euro as their single currency.

The first objection of the FCC, as already mentioned above, was that the OMT programme exceeded the ECB's mandate by straying into the field of the economic policy which under the primary law remains in the hands of Member States. In response, the CJEU underlined that under Article 282 par. 1 and par. 4⁶³, the single monetary policy is enshrined by the ECB which is obliged to take all the necessary and appropriate measures to this direction in accordance with the provision of the Treaty and the Statute of the ESCB. Hence the CJEU declared that the ESCB is responsible for the definition and the implementation of monetary policy. More specifically, under article 129 par. 1 combined with Article 12 par. 1 of the Statute of the ESCB, the Governing Council has the competence to formulate EU's monetary policy when the Executive Board is responsible for its implementation⁶⁴.

Further, the CJEU, referring to the *Pringle case*, ruled that to determine whether a measure falls within the scope of monetary or fiscal policy, reference must be made principally to the objectives of the measure, the instruments which it employs also being relevant⁶⁵. In relation to the main objective of the OMT programme, the CJEU

⁶³ Article 282 states "1. The European Central Bank, together with the national central banks, shall constitute the European System of Central Banks (ESCB). The European Central Bank, together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union.

4. The European Central Bank shall adopt such measures as are necessary to carry out its tasks in accordance with Articles 127 to 133, with Article 138, and with the conditions laid down in the Statute of the ESCB and of the ECB. In accordance with these same Articles, those Member States whose currency is not the euro, and their central banks, shall retain their powers in monetary matters".

⁶⁴ Case C-62/14 Gauweiler, para. 37–38.

⁶⁵ Case C-62/14 Gauweiler, para. 46; and Case C-370/12 Pringle, para. 53 and 55.

looks at the wording of the press release and states that it aims at safeguarding both “an appropriate monetary policy transmission and the singleness of the monetary policy”⁶⁶. The CJEU also underlined that the ECB acting so safeguard the “singleness” of monetary policy contributing to achieving its objectives since under Article 119 par. ⁶⁷2 TFEU, the monetary policy must be single ⁶⁸. The main purpose of the OMT programme was to safeguard an appropriate transmission and consequently to preserve the singleness of monetary policy and contribute to maintain price stability.

In addition, another catalytical point that should be noted is that the CJEU acknowledged that a government bond programme may indirectly increase the impetus to comply with the above adjustment programmes and hence further their economic-policy objectives. However, such indirect effect does not mean that the OMT programme must be treated as equivalent to a fiscal tool, since as clearly defined in the TFEU, the ESCB support general policies within the EU, without although prejudice to the objective of price stability⁶⁹. The CJEU emphasized in the fact that the ECB ensured that its monetary policy would not give the Member States whose sovereign bonds it purchased financing opportunities which enable them to depart from the adjustment programmes and hence achieved that its monetary policy instruments would not work contrary to the economic policy applied by Member States⁷⁰.

Further, the CJEU drew a significant distinction among purchase of government bonds by the ECB in the framework of the OMT programme and such purchase of government bonds in the secondary market by the ESM. The main difference is located in the objectives because ESM aiming to safeguard the stability as such within the EU

⁵⁰ 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.

⁶⁷ Case C-62/14 Gauweiler, para. 58.

⁶⁸ Case C-62/14 Gauweiler, para. 48.

⁶⁹ Case C-62/14 Gauweiler, para. 59 / See Articles 119 par. 2, 127 par. 1 and 282 par. 2 TFEU.

⁷⁰ Case C-62/14 Gauweiler, para. 60.

area, an objective which is a part of fiscal policy⁷¹. In addition, the CJEU firmly stated that the ECB preparing and implementing the OMT, would require to “*make choices of technical nature and to undertake forecast and complex assessments*”⁷². The ECB was required to follow specific process and to examine all the relevant elements. The respect to the procedural guarantees is crucial and underpins the settled case law⁷³.

In Pringle case the CJEU ruled that an economic policy measure cannot be treated as equivalent to a monetary policy one solely on the grounds that it may have indirect effects on the stability of the common currency. The same reasoning followed in the Gauweiler case underlined that any effects of the OMT programme on economic policy such as its capability of contributing to the stability of Eurozone, cannot itself lead to it being regarded as an economic policy measure. This interdependence among economic and monetary policy broadens the power of ECB to pursue monetary policy objectives. The CJEU emphasizes not only to the primary objective of the ECB but also to the secondary, namely, to support general economic policies of the Union. It is undeniable that the concept of “support economic policies” is vague, although the CJEU in the present case gave a wide interpretation in favor of the ECB⁷⁴.

All things considered, the CJEU concluded that purchases programmes, they are, in principle permitted, basically because its primary objective which is strictly related with the maintenance of price stability⁷⁵. Moreover, the Court declared that the fact that such purchases programmes further provide financial support for eurozone countries does not mean itself that the prohibition of monetary finance is violated. In its final judgment the German Constitutional Court accepted this judgment.

⁷¹ Case C-62/14 Gauweiler para. 63–64; Case C-370/12 Pringle, para. 56, 60.

⁷² Case C-62/14 Gauweiler para. 68.

⁷³ 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.

⁷⁴ A. Hinarejos, “The Euro Area Crisis in Constitutional Perspective”, p. 143.

⁷⁵ Gortsos, Ch. V “Pandemic Crisis and Financial Stability”, ¶ 8.

b. Advocate General Opinion in Gauweiler case

AG⁷⁶ considers the OMT is an “unconventional monetary policy instrument” hence covered by the ECB’s mandate. In particular, the AG underlined that the ECB in the framework of framing and implementing monetary policy, enjoys a broad discretion because of its technical expertise and reputation. A measure such as OMT, even it is not produced immediately effects on the primary objective of price stability, aimed at sending out signals to the real economy, covered by ECB’s competence. On the contrary of FCC perspective under which buying government bonds under the OMT is classified as an economic policy tool nevertheless the support provided in monetary policy, the AG emphasizes in the broad direction monetary instruments which undoubtedly can affect indirectly the economic sector.

Moreover, Article 127 par.1 clearly includes the support of general economic policies as a secondary, albeit subordinated, objective of the ECB, limited although by the scope of judicial review. However, judicial interpretation cannot substitute a central bank’s understanding of complex economic situation. The AG stated in the proportionality test which, among others, require a written justification for the concrete measure which must be exceptional and restricted to specific cases. The AG point out that the implementation of the OMT is closely linked to the compliance with specific goals under financial assistance programmes of the EFSF/ESM.

Moreover, the AG declared that the ECB is free to create and implement a scheme like OMT programme, as long as it is restricted by certain limits. AG emphasized in the “*functional difficulty*” of the reference under the sense that the CJEU should not issue a preliminary request by a national Court if that request “*already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received*” because this is not the intended or proper use of the preliminary procedure. Although, the AG based on the principle of sincere corporation argued that trust is required. Regarding the prohibition of monetary financing laid down in Article 123 TFEU, the AG states that secondary market operation does not circumvent this prohibition. The ECB

⁷⁶ See Opinion of Advocate General Cruz in Case C-62/14 Gauweiler. See further the contribution of D. Sarmiento in this Special Issue

under Article 18.1 of the ECB Statute is entitled to open market operation which additional covers the purchase of government bonds in the secondary market.

With his opinion, the AG enables the rule of law to keep up at least to some extent with the speed of necessary monetary policy decisions for which the standard legal procedures and mechanisms seem to be too ponderous and slow⁷⁷ On the basis of the above discussions both the CJEU and the AG have no difficulties finding that this level of review is complied with. The general question to be asked, which underlies the German concerns in the originating case is what level of cost the monetary union might be worth to them. That is of course a question completely unsuitable for litigation and for a court to decide. Accordingly, the discussion is short on this matter. The judgment raises significant issues not only pertaining the distinction among monetary and fiscal policy and the powers of ECB but also regarding the economic governance, democracy⁷⁸ in the Eurozone and the role of the Court of Justice⁷⁹.

According to Pr. Smits, "the Court's appraisal of the ECB's discretion to adopt policy measures it seems to be appropriate for the situation confirms its general approach to allow the institutions to make technical decisions on complex economic issues"⁸⁰ With the OMT judgment the tensions and instability arising from the separation of competences in monetary and economic policy gravitated to the advantage of the Union and the Court granted the ECB a distinct role not only in monetary policy but also in shaping the general economic policy of the Union"⁸¹.

⁷⁷ See para 115-122.

⁷⁸ See RUFFERT M., *The EMU in the ECJ: A New Dimension of Dispute Resolution in the Process of European Integration, Democracy in the EMU in the Aftermath of the Crisis*, Springer Publishing International AG and G. Giappichelli Editore 2017.

⁷⁹ See SCHARPF F.W., *Problem Solving Effectiveness and Democratic Accountability in the EU*, Political Science Series, February 2006.

⁸⁰ See Smits, René, *A central bank at time of crisis: the ECB's developing role in the EU's currency union*, 2018.

⁸¹ See Takis Tridimas-Napoleon Xanthoulis, *op. cit. supra* note 58, p.39.

c. Weiss case (C-493/17).

Weiss case concerns the legality of another bond buying scheme of the ECB, the Public Sector Purchase Programme (PSPP)⁸², as a part of ECB quantitative policy⁸³. According to PSPP, the ECB acquired significant quantities of Member States sovereign bonds in the secondary markets, instrument which is similar to the OMT programme. Once again, the legality of PSPP challenged by the FCC. More specifically, the German Court states that the ECB had not provided sufficient statement on this point especially regarding ⁸⁴the necessity, the scope, and the duration of PSPP programme.

The CJEU, like in the *Gauweiler case*, underlined that the ECB's primary objective is the maintenance of price stability. This objective has been defined in the Treaties in a general and abstract way and hence the ECB enjoys a broad in deciding how to define the instruments in order to achieve the above principal target⁸⁵. The borders among economic and monetary policy are unclear and the primary Law does not actually foresee an absolute separation⁸⁶. Further, the CJEU make a crucial observation and acknowledge that the conduct of monetary policy has major effects in economic policy. It is beyond a doubt, that the two areas are interconnected.

Regarding the implication of principle of proportionality, the Court ruled that the fact that ECB'S economic analysis may be disputed is not sufficient to establish a manifest error of assessment. Thus, concluded that PSPP was both necessary and appropriate. Both OMT and PSPP was a part of unconventional tools used by the ECB in response to the financial crisis. The CJEU acknowledged that "*nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical*

⁸² Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme.

⁸³In 2015, the European Central Bank launched a quantitative easing policy that included the purchasing of Member State sovereign bonds. Quantitative easing aims at increasing liquidity and stimulating the economy; the ECB set out to do this by acquiring, among other assets, large quantities of sovereign bonds through its so-called Public Sector Purchase Programme (PSPP). Shortly after the CJEU had delivered its decision in Weiss, the ECB announced the termination of its Expanded Asset Purchase Programme, which included the PSPP. See ECB Press Release 'Monetary policy decisions' (13 December 2018), available at <https://www.ecb.europa.eu/press/pr/date/2018/html/ecb.mp181213>.

⁸⁴ *Ibid.*, paragraph 123.

⁸⁵ C-493/17 Weiss, para 55.

⁸⁶ C-493/17 Weiss, para 60.

*means at its disposal to carry out that analysis with all care and accuracy*⁸⁷. Analyzing the technical its features the CJEU make clear that a programme such PSPP can not be considered as equivalent to the buying of governed bonds directly, and hence the programme does not violate the primary EU Law.

Weiss constitute another significant chapter in the interaction among the German Constitutional Court and the CJEU regarding the powers of the ECB and its role in the framework of financial crisis. The FCC sets crucial issues concerning not only the legitimacy of the EMU but also the whole EU project⁸⁸. Generally, the German Court accepts that the transfer of the monetary policy in the exclusive competence of the EMU, is totally compatible with democratic⁸⁹ foundation on the basis that an independent body which operates as a guarantor of financial stability. However, *“the endorsement under constitutional law of the ECB’s independence hinges on the requirement that its mandate be interpreted restrictively”*⁹⁰, and hence the CJEU plays an essential role in this direction.

In both Gauweiler and Weiss cases, this is reflected in a high standard of review regarding ECB’s actions. Although, this level of scrutiny was criticized because overstepped the major role of courts in the area of monetary policy⁹¹, where no consensus on the theories is existed. The FCC assumption that a clear distinction between economic and monetary policy is policy, especially when pursuing the Treaty primary objective of price stability amounts to the endorsement of a specific economic theory. Notwithstanding that the above statement is partly correct, the significant interconnection among two areas makes this distinction difficult. It should be noted that in the past the German FCC has rules that manifest transgressions of the

⁸⁷ C-493/17 Weiss, para 91 and Case C-62/14 Gauweiler para 75.

⁸⁸ See Miguel Azpitarte Sanchez, “The reform of the economic governance in the European Union and the progress of the political integration”.

⁸⁹ see SCHARPF F.W., Problem Solving Effectiveness and Democratic Accountability in the EU, Political Science Series, February 2006.

⁹⁰ Order of the German Federal Constitutional Court in Weiss, para 103.

⁹¹ See the Dissenting Opinion of Justice Lübke-Wolff on the Order of the BVerfG Second Senate of 14 January 2014 (Gauweiler): “In an effort to secure the rule of law, a court may happen to exceed judicial competence”.

European Union's competence should be trigger the national Court "*emergency situations*"⁹².

All things considered, competency for monetary policy is transferred within the limits of a mandate which clearly defines the objective of monetary policy and consequently limits the legally discretion that decision making bodies of the ECB while conducting monetary policy⁹³. The mandate of the ECB is very general because of the overriding objective of price stability laid down in Article 127 par. 1 combined with the competence to support general economic policies. Article 123 TFEU strictly prohibits the direct purchase, without although specific mention in the purchases in the secondary market⁹⁴. The ECB and the FCC adopted radically different approaches. The CJEU followed a permissive that gave the right to ECB to make a wide range of choices including emergency lending to banks and participation in sovereign debt restructuring⁹⁵, aiming in its main objective, the maintenance of price stability.

⁹² In *Honeywell*, the FCC held that it would exercise its ultra vires jurisdiction only if the transgression is manifest or obvious and leads to a structurally significant shift in the balance of competences between the EU and the Member States: Order of the German Federal Constitutional Court (Second Senate) of 6 July 2010, 2 BvR 2661/06. For a comment on the decision and its background see Payandeh (2011).

⁹³ Hanspeter K. Scheller, "The European Central Bank: History, Role and Functions, 2nd ed. (European Central Bank, 2006), p. 127." The preface by former president Jean-Claude Trichet positions the book as explaining the ECB's aims and activities as a part of its "communication with the world of banking, market participants, academia and the general public".

⁹⁴ The Delors Committee, Report on economic and monetary union in the European Community, 17/04/1989.

⁹⁵ Armin Steinbach, "The lender of last resort in the eurozone", *Common Market Law Review* (2016), p. 361–383.

CONCLUSIONS REMARKS

The legal framework of EU economic policy is in the process of continuous transformation. The economic and debt crisis of the years after 2008 have been catalytic for accelerating integration. Monetary policy was fully centralized in the ECB, while economic policy largely remained in the hands of the Member States. Hence the first one is conducted by an independent supranational authority, the European Central Bank (ECB), while the second one remains decentralized at national level. However, this distinction proved to be an impossible approach and so since 2008 in a series of international agreements and EU legislation, economic policy has been brought into the realm of the executive branches of Member States coordinating on an intergovernmental level and the EU Commission.

Article 127(1) assigns to the ECB an “overriding” objective of price stability, but nowhere do the Treaties define what price stability is. Instead, Article 127 (2) TFEU leaves it to the ECB itself to “*define and implement the monetary policy of the Union*”. The mandate also permits the ECB to “*support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union*” if this does not prejudice achieving price stability. It is left to the ECB itself to put forward an interpretation of these passages, which the ECB did in 1998 to spell out the 2% target, in 2003 reformulated as close to, but below, 2%, while on both occasions leaving the secondary mandate indeterminate.

The EMU governance is interpreted both intergovernmental and supranational focusing on the achievement of unity combined with respecting the diversity⁹⁶. The principle of conferral powers and loyal corporation⁹⁷ plays a role of utmost importance within the EU body. The economic constitution, however economic it may be, is a constitution, nonetheless. Thus, discretion need to be carefully delineated to prevent departures from the rule of law, as is the case in fields where there is a confluence between Member States and the EU.

⁹⁶ ALLEMAND F., “More or Less Intergovernmental Cooperation Within the New EMU?, Democracy in the EMU in the Aftermath of the Crisis”, Springer International Publishing AG and G. Giappichelli Editor, 2017.

⁹⁵ Katharina Pistor, “A legal theory of finance”, Journal of Comparative Economics (2013).

In the framework of the economic and debt crisis and under the light of the major concern to avoid a total credit crunch stemming from liquidity problems, arise the need for emergency action to safeguard the stability of Eurozone and its common currency. It is undeniable that a programme such as OMT has indirectly impacts in the fiscal field which although it's not sufficient to led to the conclusion that the OMT is a measure of economic policy and consequently incompatible with ECB legal competence. Primary Law laid down the ECB's primary objective but without providing a guidance as to which preconditions may be taken into consideration in the pursuit of the primary amount. The OMT programme was likely to contribute to reducing the excessive risk by dispelling the fears of a possible Eurozone break-up.

With Mario Draghi's whatever it takes, the ECB is considered at least as de facto lender of last resort in the sovereign debt markets vis a vis the participating countries⁹⁸. The above straightforward message considered one of the most effective ECB announcements, take into consideration the immediate response of financial markets. Mario Draghi further declared that *"insofar as monetary policy is intended as a macroeconomic stabilization 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"*⁹⁹.

The ECB's actions and the famous announcement have been widely criticized by legal scholars as violating the rule of law. There is a theoretical tend according to which the legal framework must be more flexible in exceptional crisis situations such as there during the global debt and financial crisis. However, others, strongly support that a conflict between a legal principle and financial necessities tends to be faces by suspending the full force of the Law¹⁰⁰. The programme as announces by ECB's Decision of September 2012 does not in itself sufficient grounds for challenging the compatibility of OMT's with EU law. Legal hermeneutics allowing to conceive as a

⁹⁸ See Micossi 2015, Beukers and Reestman, 2015.

⁹⁹ See the speech given by Mario Draghi as the President of the ECB: "Global and domestic inflation", Economic Club of New York", 4th of December 2015.

monetary measure with unconventional dimension, not per se extraneous to the ECB mandate.

The German Constitutional Court was right in its opinion that the authority to support the general economic policies of the Member States at Union level does not justify “any steering of economic policies” by the ESCB¹⁰¹. The process of delimitation is difficult, although offers a unique opportunity to explore and distinguish the meaning of monetary and economic policy and other different institution contexts thanks to the diversity of powers now available to the ECB, and the diversity of constitutional and legislative foundations for those powers. The CJEU acted as an intermediary aiming to ensure the internal constitutionality of the Union’s responses to financial crisis. The Court¹⁰² has accepted the legal reality while at the same time it has reaffirmed the primacy of EU law and its own jurisdiction to control whether the Member States respect their obligations imposed by EU Law¹⁰³.

All things considered, the OMT programme itself arises significant issues regarding the limits of ECB without although to provide stable routes threatening the legality of his statement which was made at the height of the Eurozone debt crisis. The European’s Central Bank President uttered two sentences that changed rapidly the course of Europe’s debt crisis. With the OMT programme the ECB added a strict *sensu effective* conditionality to an appropriate EFSM and ESM programme. Additionally, its impact on the market optimism and the strengthening the euro cannot be denied. The use of unconventional monetary policy measures such as sovereign bond purchases are proved required during the crisis aiming to ensure that the monetary transmission mechanism functions.

¹⁰¹ See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 2014, Case No. 2 BvR 2728/13, para. 68.

¹⁰² See MILIONIS N., *European Economic Governance and national policies: from fiscal self-discipline to, The Court of EU as safeguard of the easy functioning of the Union and citizens’ rights*, Publications Sakkoula, Athens-Thessaloniki.

¹⁰³ “Using International Law in the Euro Crisis, Causes and Consequences”, De Witte, available in www.arena.uio.no.

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