Special Section
The CJEU's OMT Decision

Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling

By Sven Simon[*]

Abstract

By its first request for a preliminary ruling, the German Constitutional Court aired its doubts about the lawfulness of the Outright Monetary Transactions (OMTs) program. In this article it is argued that the ECB's pledge in the summer of 2012 to do "whatever it takes" to safeguard the monetary policy transmission mechanism in all countries of the euro area by buying government bonds was generally compatible with EU law. However, it is argued that there is some potential for the ECB to infringe the Treaty on the Functioning of the European Union (TFEU) while acting according to this announcement. The peculiarity of the situation, the author argues, is that we might be dealing with a "self-fulfilling prophecy" in that the ECB announces a particular policy, which might not be compatible with EU law, but the act announced, will never take place because the political problem would have been resolved by the measure previously announced. The critical question in this scenario refers to how a court should react to such a situation. The author argues that a court in such a situation has to show the legal limits of the particular institution, but neither the ECJ nor the German Constitutional Court may replace the central banks' task to maintain financial stability. Finally, a comment is given on how the German Constitutional Court will react to the ECJ's decision in that case.

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A. Introduction

After three years of intense debate and skepticism, the European Court of Justice (ECJ) has decided that the announcement[1] by the European Central Bank (ECB), which did more to end the euro crisis than any other, was legal. The German Federal Constitutional Court was right to ask for a preliminary ruling. However, the Outright Monetary Transactions (OMTs) program[2] announced by the ECB in September 2012, after Mario Draghi's "whatever it takes"[3] speech, is compatible with EU law. More specifically, the ECJ found that the program for the purchase of government bonds on secondary markets does not exceed the powers of the ECB in relation to monetary policy and does not contravene the prohibition of monetary financing of Member States. This essay will look at the particular style of the judgment and comment on the admissibility of the preliminary ruling (B.). It will assess the question whether the Court was right to find that the ECB not exceeded its mandate (C.), analyze the OMT program on the compatibility with the prohibition laid down in Article 123 (1) of the Treaty on the Functioning of the European Union (TFEU) (D.), draw attention to a topic not directly touched by the Court, namely the aspects of Article 125 (1) TFEU and the principle of democracy (E.), and finally venture a prediction on how the German Constitutional Court will handle the case after the ECJ has responded to its questions (F.).

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[1] Mario Draghi, President of the ECB, & Vítor Constâncio, Vice-President of the ECB, *Introductory statement to the press conference* (Aug. 2, 2012), http://www.ecb.europa.eu/press/pressconf/2012/html/is120802.en.html ("The Governing Council, within its mandate to maintain price stability over the medium term and in observance of its independence in determining monetary policy, may undertake outright open market operations of a size adequate to reach its objective. Furthermore, the Governing Council may consider undertaking further non-standard monetary policy measures according to what is required to repair monetary policy transmission.").

[2] *See ECB Monthly Bulletin* (Oct. 2012) 7–9, http://www.ecb.europa.eu/pub/pdf/mobu/mb201210en.pdf. Under the OMT program, the ECB and the national central banks will conduct outright transactions in secondary sovereign bond markets with the aim of safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. No *ex ante* quantitative limits are set on the size of OMTs, but only bonds with a maturity of one to three years may be purchased. Both the amount of holdings and their market values will be disclosed. Moreover, interventions by the ECB on the secondary market will be carried out only for countries that have requested European Financial Stabilization Mechanism (EFSF)/European Stability Mechanism (ESM) support and provided that the request is approved by the Eurogroup. Conditionality will be defined in the context of an EFSF/ESM macroeconomic adjustment program. The ECB would purchase bonds on the secondary market if and until the country complies with the conditions attached to the EFSF/ESM support. However, the ECB Governing Council will maintain full discretion on the start, continuation and suspension of the OMT transactions and it will adopt its decisions in accordance with its monetary policy mandate.

[3] Mario Draghi, President of European Central Bank, Global Investment Conference (July 26, 2012), *available at* http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

B. Particular Style of the Judgment and Admissibility

In a preliminary observation of the Court a sentence is found which seems important for the reasoning of the judgment. The Court states: "'[I]t should be observed that, according to settled case-law of the Court of Justice,[4] Article 267 TFEU establishes a procedure for direct cooperation between the Court and the courts of the Member States.'"[5] It is this particular style of direct cooperation, by which not only the preliminary observation, but the whole judgment is carried. In this case the much bespoken "spirit of cooperation" is not only symbolic but is instead taken seriously. This is particularly true for the question of admissibility of the preliminary ruling for which the German Constitutional Court was heavily criticized. The Irish, Greek, Spanish, French, Italian, Netherlands, Portuguese and Finnish Governments, the European Parliament, the European Commission and the ECB had challenged, on various grounds, the admissibility of the request for a preliminary ruling or of certain questions included.[6] It was argued that the dispute in the main proceedings was contrived and artificial.[7] The actions before the referring court were, in its submission, devoid of purpose, moreover, they should have been declared inadmissible since they concerned EU measures that were not legal acts. The Italian Government even argued that the questions were abstract and hypothetical inasmuch as they were based on a series of assumptions.[8] The European Court of Justice, however, with very clear words, rejects any criticism of the German Constitutional Court's decision to bring the case to Luxembourg, wipes aside any concerns about the admissibility and emphasizes that

> it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the

[4] *See* Case C-364/92, SAT Fluggesellschaft mbH v. Eurocontrol, 1994 E.C.R. I-43, para. 9; Case C-402/98, ATB and Others v. Ministero per le Politiche Agricole, Azienda di Stato per gli interventi nel mercato agricolo (AIMA) and Maria Pittaro, 2000 E.C.R. I-5501, para. 29.

[5] Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag, para. 15 (June 16, 2015).

[6] *Id.* at para. 18.

[7] *Id.* at para. 19.

[8] *Id.* at para. 20.

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> questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling.[9]

These opening words form the basis for direct cooperation between the Court and a constitutional court of a Member State. It was clever and wise to de-escalate the first preliminary ruling of the German Constitutional Court with a national court friendly approach. The ECJ makes clear that it is not an omniscient institution, but rather draws a distinct line between its own competences and those of the national courts. This approach is to be most welcome.

C. Transgression of the European Central Bank's Mandate?

By its first question, the German Constitutional Court aired its doubts about the validity of the OMT program, specifically requesting the Court determine whether it is a measure that is incompatible with Articles 119, 127 (1) and (2) TFEU and whether it encroaches upon the competence of the Member States.

I. The Limits of the ECB's Monetary Policy

Under Articles 127 (1) TFEU and 282 (2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that, without prejudice to that objective, the European System of Central Banks (ESCB) is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 of the Treaty of the European Union (TEU).[10] Articles 119 and 127 *et seqq.* TFEU and Article 17 *et seqq.* ESCB Statute include in principle a mandate that is limited to monetary policy for the ESCB in general and the European Central Bank in particular. In addition, the ESCB is allowed to support the general economic policies in the Union.

While the maintenance of price stability is generally accepted as a core task of the ECB, there are widely divergent opinions on the question of whether and to what extent the central bank may at the same time pursue further objectives, such as achieving balanced economic growth, a high employment rate and stability on the financial markets.[11]

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[9] *Id.* at para. 24; with regard to an earlier judgment in the ECJ, see Case C-399/11, Melloni v. Minesterio Fiscal, para. 28 and the case-law cited (Feb. 26, 2013), http://curia.europa.eu/.

[10] *Id.* at para. 43.

[11] *See* ALEXANDER THIELE, DAS MANDAT DER EZB UND DIE KRISE DES EURO 26 *et seq.* (2013).

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EU law differentiates in Article 119 (2) TFEU between economic and monetary policy.[12] Yet, the Treaties do not define the term "monetary policy."[13] The economic debate provides a number of indications of how the concept of price stability is to be interpreted, and what measures can be regarded as economic policy.[14] Nevertheless, it does neither seem to be possible to entirely separate monetary policy on the one hand, and fiscal and economic policy on the other, nor does it — for legal reasons — seem to be necessary to define a sharp distinction. Both fields are linked in various and complex ways and therefore practically every monetary action taken by the ECB will have economic effects and consequences for the economic policy of the Member States.[15] Furthermore, according to Article 127 (1) sentence 2 TFEU, the ECB has the right to support general economic policies within the European Union and not only those of the European Union. Thus, economic policy is not generally prohibited for the ECB.

It is true that the responsibility for economic policy lies with the Member States. They are responsible, in particular, for defining the objectives and choosing the instruments of economic policy.[16] The role of the Union is generally restricted to the adoption of coordinating measures.[17] But, the ESCB is authorized to support the general economic policies in the Union to the degree that this is possible without compromising the objective of price stability.[18] Against this background, 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[19] does not justify "any steering of economic policies" by the ESCB.[20] But as long as there are justifiable monetary reasons for a certain

[12] *See* Armin Hatje, *Art. 119 AEUV*, *in* EU-KOMMENTAR margin no. 4 *et seq.* and margin no. 14 *et seq.* (Jürgen Schwarze et al. eds., 3d. ed. 2012).

[13] *Cf.* Case C-370/12, Pringle v. Government of Ireland, Ireland and the Attorney General, para. 53 (Nov. 27, 2012), http://curia.europa.eu/; see Heiko Sauer, *Doubtful it stood…*, in this issue, at A.I.1.1.1.

[14] *See* THIELE, *supra* note 11, at 27 *et seq.*

[15] Alexander Thiele, *Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, 15 GERMAN L.J. 241, 259 (2014).

[16] Consolidated Version of the Treaty on the Functioning of the European Union art. 5 (1), 120 *et seq.*, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[17] *Id.* at arts. 2(3), 5(1); *cf. Pringle*, Case C-370/12 at para. 64.

[18] TFEU arts. 119(2), 127(1) sent. 1, & 282(3) sent. 3.

[19] TFEU art. 127(1) sent. 2.

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

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measure taken by the ECB, it generally falls within its mandate even though the Member States may have taken similar measures.[21]

II. Discretion of the ECB

In the view of the Federal Constitutional Court, the purchase of government bonds on the basis of the OMT decision exceeds the support of the general economic policies in the European Union that the ESCB is allowed to pursue.

The objectives outlined in Article 3 (3) TEU to which — in accordance with Article 127 (1) sentence 2 TFEU — the ECB is expected to contribute, include not only price stability but also among other things, the objectives of balanced economic growth and a highly competitive market economy aiming at full employment and social progress. This indicates the legal difficulty of creating a sharp division between the two activities. As far as this is possible without affecting the primary objective of price stability the ESCB may support general economic policies in the Union in order to contribute to achieving the objectives stated in Article 3 TFEU.[22] The objectives to be pursued by the ESCB can in this respect imply a conflict of interests. The main priority is maintaining price stability, but general economic policies may also be supported. The tension between potentially conflicting objectives provides the ESCB with scope for interpretation. The ECB has a certain amount of discretion in the solution of such areas of tension and conflicting objectives.

In the field of monetary policy it even has considerable discretion when it comes to making its own assessments. If, for example, the ECB determines that the government bonds of euro-crisis countries, which are no longer marketable without central bank intervention, are suitable as collateral for central bank loans, this latitude of discretion in principle has to be accepted by the courts. The various interdependencies between fiscal and monetary policy also provide an argument for the fact that the treaties cannot be interpreted as isolating monetary policy from other objectives of economic policy.

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https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html [hereinafter OMT Decision].

[21] *See generally* TFEU.

[22] TFEU art. 127(2) sent. 1; *see* Michael Potacs, *Art. 127 AEUV*, *in* EU-KOMMENTAR margin no. 6 (Jürgen Schwarze et al. eds., 3d ed. 2012).

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In any case, a court will only be able to assume a violation of Article 127 (1) TFEU if the ECB has "manifestly and gravely"[23] disregarded the limits on its discretion.[24] The ECB's latitude for discretion also refers in particular to the methods by which it seeks to pursue the objective of price stability. If, for example, it forms provisions for risks from one part of its revenues, it must be in a position to make its own decision on whether these cover the potential losses. A court can hardly replace this specific expertise.[25] The ECB must accordingly be afforded a broad discretion in framing and implementing the Union's monetary policy. The Courts, when reviewing the ECB's activity, must therefore avoid the risk of supplanting the central bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB.

The EU's institutions and bodies must be provided with further leeway,[26] especially when it comes to economic policy decisions.[27] The Court rightly points out that

> [a]s regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion.[28]

In the context of activities relating to economic policy the ECJ speaks of "a legislative context characterized by the exercise of a wide discretion, which is essential for

[23] See Joined Cases C-46/93 & C-48/93, Brasserie du Pêcheur SA and Factortame Ltd and others, 1996 E.C.R. I-1029, para. 55.

[24] *See* THIELE, *supra* note 11, at 31.

[25] Jürgen Bast, *Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, 15 GERMAN L.J. 167, 177 (2014); Heiko Sauer, *Doubtful it stood…*, in this issue, at A.I.2.1.2.

[26] In order to get an idea of how the ECB interprets the independence rule, see Eur. Cent. Bank Opinion of 1 July 210 on the remuneration of the staff of Banca Nationala a Romaniei (CON/2010/51); Eur. Cent. Bank Opinion of 25 March 2010 on independence, confidentiality and the prohibition of monetary financing (CON/2010/25); Eur. Cent. Bank Opinion of 14 July 2009 on the taxation of Banca d'Italia's gold reserves (COM/2009/59); Eur. Cent. Bank Opinion of 18 May 2009 on measures on public sector remuneration with regard to central bank independence (COM/2009/47).

[27] See Joined Cases 83 & 94/76, u.a., Bayerische HNL Vermehrungsbetriebe and Others v. Council and Commission of the European Communities, 1978 E.C.R. I-1209, para. 6 *et seq.*

[28] *Gauweiler*, Case C-62/14 at para 68.

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implementing a Community policy"[29]. Accordingly, activities in these areas can only be regarded as contrary to EU law if the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.[30] These considerations can also be transferred to monetary policy since the central banks also take decisions which are based on economic estimations and projections for which a certain amount of discretion is essential.[31] If a court rules that a mandate has been exceeded on the basis of an inadmissible economic policy, this ruling will as a minimum have to be based on substantial evidence. In the process the court must not put itself in the position of the central bank. Courts can include the monetary policy considerations of the ECB in their own considerations and evaluate them in relation to the normative background, but they cannot, however, replace the bank's expertise.[32]

According to the ECB, the special situation severely undermined the ESCB's monetary policy transmission mechanism in that it gave rise to fragmentation as regards bank refinancing conditions and credit costs, which greatly limited the effects of the impulses transmitted by the ESCB to the economy in a significant part of the euro area. Having regard to the information placed before the Court in the present proceedings, the Court is right in its assertion that "it does not appear that that analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment"[33].

At this point it should not be overlooked, moreover, that the mere announcement of the program itself was sufficient to achieve the effect sought — namely to restore the monetary policy transmission mechanism and the singleness of monetary policy. In that regard, the ECJ is also right in its assertion that the fact that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question. As questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, "nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy."[34]

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[29] *See* Joined Cases C-120/06 P & C–121/06 P, FIAMM and others v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-6531, para. 174.

[30] Case 265/87, Schräder v. Hauptzollamt Gronau, 1989 E.C.R. 2237, para. 22; Case C-331/88, The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State of Health, ex parte Fedesa and Others, 1990 E.C.R. I-4023, para. 14; *see Brasserie du Pêcheur and Factortame Ltd*., Joined Cases C-46/93 & C-48/93 at para. 45.

[31] *See* Bast, *supra* note 25, at 176.

[32] *See id.* at 176 *et seq.*

[33] *Gauweiler*, Case C-62/14 at para. 74.

[34] *Id.* at para. 75.

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D. Compatibility with Article 123 (1) TFEU

The recognition of such room for discretion, however, creates the risk that the prohibition of monetary financing of the Member States[35] and the purchase of government bonds by the ECB could be circumvented. Therefore, the German Constitutional Court has rightly raised the issue of the compatibility of the program with Article 123 (1) TFEU.

It is clear from its wording that Article 123 (1) TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.

The TFEU thus not only stipulates what goal the ECB has to follow, it also specifies just as clearly what the ECB is not allowed to do. According to Article 123 TFEU, overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States 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. In consideration of that prohibition the Federal Constitutional Court asked whether the OMT program, in authorizing the purchase on the secondary market by the ECB of bonds of States that are members of the euro area, infringes the prohibition laid down in Article 123 (1) TFEU.

According to the Federal Constitutional Court, 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, in its view, may circumvent the prohibition concerned, because the ECB's interventions on the secondary market, just like purchases on the primary market, in fact represent financial assistance by means of monetary policy. In support of that view, the Constitutional Court refers to various technical features of the OMT program: the waiver of rights, the risk of default, the retention of the bonds until maturity, the possible time of purchase and the encouragement to purchase in the primary market. According to the German Court, those are all clear indications that the effect is to circumvent the prohibition laid down in Article 123 (1) TFEU.[36]

[35] TFEU art 123(1).

[36] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 87 *et seq.*.

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All the States that have participated in the proceedings, together with the Commission and the ECB, contend that the OMT program is compatible with Article 123 (1) TFEU, maintaining that purchases of government debt instruments are expressly provided for in the Treaties. They point out that Article 123 (1) TFEU prohibits only purchases of government debt instruments directly from a Member State, whilst Article 18.1 of the Protocol on the Statute of the ESCB and of the ECB expressly empowers the ECB and the central banks of the Member States to carry out operations of that kind.

Article 18.1 of the Protocol on the Statute of the ESCB and the ECB indeed permits the ESCB, in order to achieve its objectives and to carry out its tasks, to operate in the financial markets, *inter alia*, by buying and selling outright marketable instruments, which include government bonds, and does not make that authorization subject to particular conditions as long as the nature of open market operations is not disregarded. Yet, government bonds may only be purchased if they are already on the market and are traded freely. Member States should not be able to finance themselves either via their central bank or the ECB.[37] The purpose of Article 123 TFEU in this regard is to maintain the sanctioning effect of the market. Despite the clear wording of Article 123 TFEU, both the economic impact and the legality of the purchase of government bonds are a matter of dispute, as is the announcement of the ECB that in order to save the euro it will if necessary buy government bonds to an unlimited extent (declaration of intent to purchase).

I. Open-Market and Credit Operations

There can be no doubt that in order to achieve the objectives of the ESCB and to carry out its obligations the ECB and national central banks may in principle operate on the financial markets. The business transactions and other instruments which are allowed are formulated in Articles 17 *et seqq.* of the ECB's Statute. In this context the greatest importance is attached to so-called open market and credit operations, which are regulated by Article 18.1 of the ESCB's Statute.[38] In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in Community or in non-Community currencies, as well as precious metals; they may also conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. Article 18.1 of the ESCB's Statute gives the ECB and the national central banks the right to conclude credit operations with banks and other market participants, provided that

[37] Ulrich Häde, *Art. 123 AEUV*, *in* EUV/AEUV para. 1 (Christian Calliess & Matthias Ruffert eds., 4th ed. 2011).

[38] Mattias Wendel, *Kompetenzrechtliche Grenzgänge: Karlsruhes Ultra-vires-Vorlage an den EuGH*, 74 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (ZaöRV) 615, 655 (2014).

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loans are covered by adequate collateral (principle of sufficient security). According to Article 18.2 of the ESCB's Statute the ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions. In principle this also includes government bonds of Eurozone countries on the secondary market. The ECB's Statutes do not include any special rules for government bonds.[39] The purchase of government bonds is therefore in principle admissible.

However, if a Eurozone Member State is no longer able to obtain refinancing and sustainable conditions on the capital markets, and the ECB provides support by softening its creditworthiness criteria for collateral or the declaration of intent to purchase, this might represent a violation of the principle of adequate collateral for central bank loans. As part of its crisis management operations the ECB "as an exceptional measure […] temporarily suspended the Euro system's minimum requirements for credit quality thresholds applicable to marketable debt instruments issued or fully guaranteed by the Hellenic Republic, declaring them eligible for the duration of the collateral enhancement".[40]

This differentiates the ECB's bond purchases from the approach adopted by other central banks. For example the Federal Reserve, the Bank of England and the Bank of Japan purchase bonds that have a high credit rating.[41] In contrast, with the OMT program the ECB intends to use government bond purchases in order to bring down the high risk premiums of individual Member States which have low credit ratings. This approach of the ECB has certainly strengthened the view of the German Constitutional Court that the OMT program infringes Article 123 (1) TFEU because it circumvents the prohibition laid down therein; and at least the question is more than justified.

II. Circumvention of Article 123 TFEU?

Article 123 TFEU and Article 21.1 of the ESCB's Statute specifically prohibit the direct purchase of government bonds.[42] In order to eliminate budget financing by the central banks, no government bonds may be purchased directly from the issuer on the primary

[39] THIELE, *supra* note 11, at 60.

[40] Eur. Cent. Bank, Decision of the European Central Bank of 18 July 2012 (ECB/2012/14), para. 4, https://www.ecb.europa.eu/ecb/legal/pdf/en_ecb_2012_14_f_sign.pdf.

[41] *See* Deutsche Bundesbank (German Federal Bank), *Statement to the Federal Constitutional Court* 11 (Dec. 21, 2012).

[42] *See* Christopher Mensching, *Das Verbot der monetären Haushaltsfinanzierung*, *in* ART. 123 ABS. 1 AEUV, EUROPARECHT (EuR), 333, 334 (2014).

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market. Numerous commentators therefore regard the indirect purchase on the secondary market as a permissible part of the so-called open-market operations of the ECB.[43] Such a purchase of bonds issued by Eurozone countries would not infringe Article 123 TFEU, which only prohibits the purchase of such bonds directly from the issuing party.[44]

Restricting the prohibition to direct purchase enables the central banks to pursue an open-market policy without major restrictions.[45] The word "direct" was deliberately included in Article 123 TFEU, and it is argued that it cannot be retroactively removed from the treaty by interpreting the wording differently.[46] It is argued that it would make no sense if it were not possible to purchase bonds indirectly, namely on the secondary market.[47] Christoph Herrmann is of the opinion that any circumvention of the prohibition does not need to be regarded as a risk, for the simple reason that the program of the ECB was not designed to acquire from participants on the financial market bonds to be emitted by Member States in future, too. He states that the "normal objective" of such so-called open market operations was the fine-tuning of interest rates and market liquidity in terms of monetary policy, and these had traditionally played a prominent role in the monetary policy pursued by central banks.[48]

Nevertheless, the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123 (1) TFEU. For that reason Martin Seidel rightly points out that for the purpose of implementing their activities regardless of their objectives in accordance with Article 18 of the ESCB's Statute, the ECB and the ESCB are only allowed to purchase marketable securities. This consequently prohibits providing credit for non-marketable government bonds, which is tantamount to the expressly

[43] Häde*, supra* note 37, at para. 10; Rudolf Bandilla, *Art. 123 AEUV*, *in* DAS RECHT DER EUROPÄISCHEN UNION para. 6 (Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim eds., 2011); Christoph Herrmann*, EZB-Programm für die Kapitalmärkte verstößt nicht gegen die Verträge – Erwiderung auf Martin Seidel*, 26 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (EUZW), 645, 646 (2010); THIELE, *supra* note 11, at 66 *et seq.*.

[44] *See* Herrmann*, supra* note 43, at 646.

[45] *See* Häde, *supra* note 37, at para. 10.

[46] Ralph Alexander Lorz, *Euro-Krise und Rettungsschirm: Weicht das Recht der Politik?*, *in* LEGAL TRIBUNE ONLINE (May 14, 2010), *available at* http://www.lto.de/persistent/a_id/525/.

[47] Franz C. Mayer, *Rebels without a cause? Zur OMT-Vorlage des Bundesverfassungsgerichts*, EUR 473, 487 (2014).

[48] *See* Herrmann*, supra* note 43, at 646.

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prohibited monetary financing of government budgets.[49] The economic effect of direct and indirect acquisition was equivalent, since both resulted in an increase in the existing money supply.[50] As evidenced by the motives of the contracting parties, the intention behind Article 123 TFEU was to prevent the financing of national budgets — directly or indirectly — by the ECB and the ESCB.[51]

This view is, however, difficult to reconcile with the wording of Article 123 (1) TFEU. It is true that the States of the euro area transferred their monetary policy competences to a common institution whilst at the same time retaining their competences in economic matters, and that it was — due to this reason — essential to ensure strict financial discipline in the States of the euro area.[52] However, Article 123 (1) TFEU includes a final clause, which prohibits only "the purchase directly from [the Member States] by the European Central Bank or national central banks of debt instruments". If the contracting parties wished to have Article 123 (1) TFEU understood in a different way, they would not have included the word "direct." Moreover, it is precisely the responsibility of a central bank to exert influence on the money supply by influencing the overnight rate.[53] In the opinion of the ECB the only criterion[54] for the marketability of a security is that it is approved for trading on a regulated market within the meaning of Directive 2004/39/EC[55]. This is the case with all government bonds issued by euro Member States.[56] Moreover, the conduct of monetary policy will always have an effect on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States.

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[49] Martin Seidel, *Der Ankauf nicht markt- und börsengängiger Staatsanleihen, namentlich Griechenlands, durch die Europäische Zentralbank und durch nationale Zentralbanken—rechtlich nur fragwürdig oder Rechtsverstoß?*, EUZW (2010) 521; Walter Frenz & Christian Ehlenz, *Schuldenkrise und Grenzen der europäischen Wirtschaftspolitik*, EUROPÄISCHES WIRTSCHAFTS - UND STEURRECHT (EWS) 211, 212 (2010).

[50] Markus C. Kerber & Stefan Städter, *Die EZB in der Krise: Unabhängigkeit und Rechtsbindung als Spannungsverhältnis*, EuZW 536, 537 (2011).

[51] *Id*.

[52] See Helmut Siekmann, *"Law and Economics of Monetary Union," in* RESEARCH HANDBOOK OF THE ECONOMICS OF EUROPEAN UNION LAW 370 *et seq.* (Thomas Eger & Hans-Bernd Schäfer eds., 2012).

[53] THIELE, *supra* note 11, at 60, 66.

[54] *See generally* Eur. Cent. Bank, Guideline of the European Central Bank on the monetary policy instruments and procedure of the Eurosystem, O.J. 2011 L 331/1, § 6.2.1.5.

[55] Directive 2004/39/EC, of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, 2004 O.J. (L 14), lastly changed by Art. 94(1) EC Directive 2014/65, of 15 May 2014, 2014 O.J. (L 173) 349.

[56] THIELE, *supra* note 11, at 60, 61.

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Indeed assuring purchasers on the primary market by the announcement of the OMT program that in an emergency they can pass on to the ECB the government bonds of certain crisis states acquired by them on the primary market, is tantamount to a circumvention of the prohibition on the direct purchase of government bonds. However, the ECB has not provided an unlimited purchase guarantee at the issue price. Market participants can therefore not be sure about the market conditions on which the ECB will make such purchases. Even if the statement by Mario Draghi that "the ECB is ready to do whatever it takes to preserve the euro"[57] suggests something else, the market risk incurred by market participants is merely reduced by the OMT program and not entirely eliminated. The factual limitation on the ESCB's intervention means that the Member States cannot, in determining their budgetary policy, rely on the certainty that the ESCB will at a future point purchase their government bonds on secondary markets.[58]

The OMT program therefore does not automatically breach the prohibition on the provision of credit stipulated by Article 123 TFEU. If the ECB uses the OMT program for the targeted purchase of government bonds of Eurozone crisis countries on the secondary market, namely because of the obvious difficulty of placing such securities on the primary market, this may lead to a circumvention of the prohibition on the direct purchase of government bonds. But, it is not necessarily the case that the prohibition will be circumvented by every indirect purchase. On the contrary, it is extremely difficult to determine when the economic effect of direct and indirect acquisition are equivalent. The implementation of a program such as the OMT program must be subject to conditions[59] intended to ensure that the ESCB's intervention on secondary markets does not have an effect equivalent to that of a direct purchase of government bonds on the primary market. Yet, in the occasional purchase of government bonds on the secondary market the ECB must be afforded a margin of discretion[60] which is not[61] or at most only partially verifiable by a court — regardless of Article 35 of the ECB's statutes.[62]

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[57] Speech by Mario Draghi, President of the European Central Bank, Global Investment Conference in London, (July 26, 2012), *available at* http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[58] *See Gauweiler*, Case C-62/14 at para. 113.

[59] *Id.* at paras. 103–09.

[60] *See* Potacs, *supra*, note 22, at para. 6.

[61] *See* Christoph Herrmann, *Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts*, EuZW 805, 810 (2012).

[62] *See also* Daniel Thym, *Anmerkung zu EuGH, Rs. C-370/12 (Pringle)*, JURISTENZEITUNG (JZ) 259, 263 (2013).

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E. Incompatible with Article 125 TFEU or even a breach of the principle of democracy?

There is one other important concern which was *not* touched by the ECJ, but lies behind the remark of the German Constitutional Court that the OMT decision could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail consequences that are difficult to calculate so that, due to this mechanism, the German *Bundestag* would not remain the 'master of its decisions' and could no longer exercise its budgetary autonomy under its own responsibility.[63]

In that concern the unlimited purchase of government bonds by the ECB could eventually give rise to a situation which leads to a violation of Article 125 (1) TFEU or even a breach of the principle of democracy. Article 125 TFEU stipulates that (for democratic reasons)[64] neither the EU nor the Member States are liable for the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or the public enterprises of Member States, and do not provide support for such liabilities. As soon as the ESCB begins to redistribute liability risks among the taxpayers of different Member States of the Eurozone, this could be regarded as the "pooling of liability via the central bank's balance sheet".

The accusation of a pooling of liability is a serious one not only in the context of Article 125 TFEU, but in particular due to its potential infringement of the principle of democracy. Within the context of the principle of democracy this is initially problematic, because the ECB has been given the privilege of autonomy, which in a democracy is not typical. A central bank typically represents the same kind of "democratic anomaly"[65] as a constitutional court. Both are "counter-majoritarian institutions"[66], whose democratic deficits can only be justified by their function.[67] Thus, the independence of the ECB can only be justified in terms of the principle of democracy (Article 10 TEU) if it operates in the field of monetary policy.

[63] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 102.

[64] *Cf.* Wolfang Kahl, *Bewältigung der Staatsschuldenkrise unter Kontrolle des Bundesverfassungsgerichts – ein Lehrstück zur horizontalen und vertikalen Gewaltenteilung*, DEUTSCHES VERWALTUNGSBLATT (DVBl) 197 (2013).

[65] Franz C. Mayer, *supra* note 47, at 509.

[66] Franz C. Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L.J. 111, 114 (2014).

[67] *See* Mayer, *supra* note 47, at 509.

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This is not unknown at the national level, consider the explicit independence of the *Bundesbank* in Article 88 of the German Basic Law [Grundgesetz]. At the European level, however, there is a further problem which is inherent in the concept of joint liability which the ECB represents. The ECB is the central bank of a monetary union, which consists of various sovereign States. This distinguishes it from other central banks. When the Fed purchases US bonds, this does not lead to redistributional effects among the individual states of the US. In contrast, the ECB does not purchase Eurobonds. It purchases only government bonds of individual States who are having financial difficulties. It is possible that the risks of these especially risky government bonds are shifted from the creditors of one State to the taxpayers of other States. In this manner, the taxpayers of the "solidly-financed States" can indirectly be burdened by the outcomes of other States' policies. Looking at the principle of democracy this is problematic because they are not responsible for these policies, and they cannot even influence these policies with their vote. It is not to be excluded that the governments of some States make debt-financed expenditures and distribute largesse to their voters, while the taxpayers of other States have to pay for this.

Thus, the actions of the ECB may cause a redistribution of liability among the taxpayers of the Member States. Liabilities that are mutually decided on or redistributed among the taxpayers of individual countries must not be the decision of a central bank, since it does not have the democratic legitimacy for this. As soon as the ECB begins to redistribute liability risks among taxpayers with the result that taxpayers in one country are burdened by the policies of another country, the question of democratic legitimacy becomes a pressing one.

The German Constitutional Court has expressly held that the democratic legitimacy, which emanates from the voters in the Member States, is restricted by the transfer of monetary policy powers to an independent European Central Bank, and that this affects the principle of democracy.[68]

> [I]t follows from the democratic basis of budget autonomy that the Bundestag may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the Bundestag's control and influence (BVerfGE 129, 124 <179-180>).

[68] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 59.

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Nevertheless, according to the German Constitutional Court this restriction is still compatible with democratic principles because it takes the tested and scientifically documented special character of monetary policy into account. This special character is shaped by the fact that an independent central bank is more likely to safeguard monetary stability, and thus the general economic basis for budgetary policies, than state bodies whose actions depend on money supply and value and which need to rely on short-term approval by political forces. Yet, "no parliament in the capitals of Europe can burden other states with debt without doing harm to the principle of democracy"[69].

Thus, the exception from the principle of democracy is not absolute.

I. Article 125 (1) TFEU

Peter Sester affirms the danger of a breach of Article 125 TFEU by stating that without restructuring ("a haircut") there is not only a theoretical possibility but a real possibility that the issuers of the purchased securities will not be able to make the interest payments.[70] If the ECB generates a loss, in accordance with Article 33 (1) of the ESCB's Statute this could be financed from the general reserve fund of the ECB. If this were not sufficient the foreign exchange reserves would have to be resorted to, and should these not be enough the Member States of the monetary union would have to recapitalize the ECB. Thus, the liabilities of taxpayers in one country would be redistributed to the other Member States of the Eurozone, without any democratic legitimacy arising from the joint liability association.

Christoph Herrmann contradicts this recapitalization thesis, and points to the broad discretion enjoyed by the ECB. He argues that the national central banks were not automatically liable for losses by the ECB which exceed the reserve fund and monetary revenues (Article 33 ECB statutes).[71] These losses could only be indirectly passed on to the national central banks by an increase in the ECB's capital, which was not a legal requirement and in accordance with Article 28.1, 10.3 of its statutes required a qualified majority vote by the bank's council (on which the president of the Bundesbank has no blocking minority). In accordance with Article 41 of the ECB's Statute this is subject to prior authorization by the Council. According to the ECB, there was no liability risk for the national budgets because the ESCB has ensured

[69] Udo Di Fabio*, Karlsruhe Makes a Referral*, 15 GERMAN L.J. 107, 109 (2014).

[70] Peter Sester, *The ECB's Controversial Securities Market Programme (SMP) and its role in relation to the modified EFSF and the future ESM*, 9 EUR. CO. & FIN. L.R. 156 *et seq.* (July 2014); Matthias Ruffert, *Europarecht: Vorlagebeschluss des BVerfG zum OMT-Programm*, JURISTISCHE SCHULUNG (JuS) 373, 374 (2014).

[71] *See* Herrmann, *supra* note 61, at 811.

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sufficient risk prevention, mostly through provisions and reserves. If losses occur nevertheless, they can be carried forward and balanced with revenues in the following years.[72]

Even if in German law the federal government is under no legal obligation to directly offset the losses of the *Bundesbank*, loss compensation could be required if a large loss carried forward could not be compensated for within a reasonable period of time.[73] Assumption of such a loss by the federal government could — in the opinion of Jens Weidmann — be required if the amount of the incurred losses threatened the financial independence of the *Bundesbank* and thus the credibility of the euro system.[74] This "risk", however, one might argue, was consciously entered into when the monetary union was established. Even at the time the monetary union was created one was well aware that such a project would involve risks. In particular, the risk of non-compliance with the stability criteria was recognized in the Maastricht decision of the Federal Constitutional Court.[75] And even if the lack of privileged creditor status may mean that the ECB is exposed to the risk of a debt cut decided upon by the other creditors of the Member State concerned, it must therefore be stated in line with the Court "that such a risk is inherent in a purchase of bonds on the secondary markets, an operation which was authorized by the authors of the Treaties, without being conditional upon the ECB having privileged creditor status"[76]. When central banks intervene in that market, they always assume a degree of risk, a risk which was also assumed by the Member States when they decided to create the ECB.

"As the OMT programme is designed, the ECB is admittedly exposed to a risk, but not necessarily to a risk of insolvency."[77] As long as the ECB does not buy government bonds on a scale which could involve the risk of a recapitalization, it is operating within its margin of discretion. The mere announcement of the intention of buying government bonds does not constitute a breach of Article 125 TFEU, nor does the

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[72] OMT Decision, BVerfG, Case No. 2 BvR 2728/1 at para. 12.

[73] *Cf.* Jens Weidmann, *Eingangserklärung anlässlich der mündlichen Verhandlung im Hauptsacheverfahren ESM/EZB beim Bundesverfassungsgericht in Karlsruhe am 11.6.2013*, *available at* http://www.bundesbank.de/Redaktion/DE/Kurzmeldungen/Stellungnahmen/2013_06_11_esm_ezb.html.

[74] *Id*.

[75] Bundesverfassungsgericht, [BverfG][Federal Constitutional Court], Feb. 7, 1992, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 204, 207.

[76] *Gauweiler*, Case C-62/14 at para. 126.

[77] Opinion of Advocate General Pedro Cruz Villalón at para. 196, Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag (Jan. 14, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=161370&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10276.

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purchase of such individual government bonds. It only comes into being in the event of the targeted, systematic purchase of government bonds aimed at the long-term funding of a state. At this moment there is at least the danger that the redistribution of liability risks for the taxpayers of different euro states could have an impact on which they have no democratic influence.

II. A breach of the Principle of Democracy

Even this method would not be entirely without democratic legitimacy. It is true that there is no full democratic legitimization for the OMT program. On the other hand, however, before it can formally come into force the national parliaments have to approve its activation, since it is linked to the European Stability Mechanism (ESM).[78] If the ECB has recourse to conditions that were negotiated as part of the ESM, it will be taking advantage of the intergovernmental legitimacy of the ESM. The OMT program can be put into effect only when the situation of certain of those States has already justified ESM intervention which is still under way.[79] The bond purchase is thus directly subject to political evaluation and control by the members of the ESM board of governors.[80] This fact was the basis for the statement made by Wolfgang Schäuble at the end of April 2014 saying that the German federal government would prevent such an ESM program and therefore ensure from the very beginning that the ECB wouldn't get into a situation of making decisions on OMT. The reason for this is that the ECB can't simply make decisions on OMT by itself: "It can't take the decision in the first place, since it is bound by preconditions over which it has no control", Schäuble is reported to have said that[81] "ESM decisions have to be unanimous, and we will not decide on such a program after this announcement by the ECB." In fact, within the framework of the ESM Germany has a *de facto* right of veto when it comes to an ESM program which is a prerequisite for ECB government bond purchases in favor of a single Member State. The German representative on the ESM is bound by the

[78] *See* Andreas Wiedemann, *Overview of the Karlsruhe Hearing on OMT*, Summary, 13 June 2013, *available at* http://www.bruegel.org/nc/blog/detail/article/1109-overview-of-the-karlsruhe-hearing-on-omt-summary/.

[79] *See Gauweiler*, Case C-62/14 at para. 87.

[80] Robert Uerpmann-Wittzack, *Völkerrecht als Ausweichordnung – am Beispiel der Euro-Rettung*, EuR-Bei 49, 53 (2013).

[81] *Kassiert Schäuble die Wunderwaffe der EZB? Die Kritik am OMT-Anleihekaufprogramm der Europäischen Zentralbank ist groß in Deutschland. Das Verfassungsgericht lehnt es ab. Hat nun ausgerechnet der Bundesfinanzminister das wirkungsvolle Instrument abgeräumt?*, F.A.Z. (May 24, 2015), http://www.faz.net/aktuell/wirtschaft/eurokrise/omt-schaeuble-kassiert-die-wunderwaffe-der-ezb-12955803.html.

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instructions of the *Bundestag*.[82] Of course the final decision about the extent of possible OMT purchases is the sole responsibility of the ECB.

Finally, the German Constitutional Court identified room for a potential compromise in suggesting that it could accept the supportive nature of the OMT policy if the total volume of the program was expressly limited.[83] In particular, in its judgment on the European Financial Stability Facility, the Constitutional Court held that the German parliament could not transfer unlimited budgetary responsibilities to the European level.[84] Against this background one of the most important sentences of the ECJ's ruling seems to be a statement concerning the *de facto* restricted volume of government bonds eligible to be purchased in the framework of the program. The Court finds:

> Thus, by limiting that programme to certain types of bonds issued only by those Member States which are undergoing a structural adjustment programme and which have access to the bond market again, the ECB has, de facto, restricted the volume of government bonds eligible to be purchased in the framework of the programme and, accordingly, has limited the scale of the programme's impact on the financing conditions of the States of the euro area.[85]

This statement will help the German Constitutional Court to accept the ruling of the ECJ. The ECB's solution is to announce that no *ex ante* quantitative limits will be established as regards the volume of purchase, although without prejudice to the fact that it has its own quantitative limits internally, the amount of which cannot be disclosed for strategic reasons which, in essence, seek to ensure that the OMT program is effective. The existence of objective quantitative limits on the volume of purchases would tend to confirm the limited scale of the risk. As the ECB itself has acknowledged, those limits will exist; they are, however, not made public for strategic reasons but they serve to reduce the Bank's exposure.

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[82] *See generally,* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 28,2012, Case No. 2 BvR 8/11 – 9er Sondergremium, paras. 72 *et seq*.

[83] *Gauweiler*, Case C-62/14 at para. 83; Niels Petersen, *Karlsruhe Not Only Barks, But Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court*, 15 GERMAN L.J. 321 325 (2015).

[84] Bundesverfassungsgericht [BverfG] [Federal Constitutional Court], Sep. 7, 2011, Case No. 2 BvR 1485/10, 124 ENTSCHEIDUNGENG DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] paras. 129, 179–80.

[85] *Gauweiler*, Case C-62/14 at para. 116.

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Of course, any quantitative limit published in advance would have been likely to reduce the program's effectiveness. The OMT program cannot be presented as a channel for limited purchases, because, if it were, that would contribute to provoking a bout of speculation which would severely undermine the program's objective. However, the program could legitimately be adopted by the ESCB without a quantitative limit since it is limited to certain types of bonds issued only by those Member States which are undergoing a structural adjustment program and which have access to the bond market again. The ECB has, therefore, *de facto* restricted the volume of government bonds eligible to be purchased in the framework of the program and, accordingly, has limited the scale of the program's impact on the financing conditions of the States of the euro area.[86] In addition, by providing only for the purchase of government bonds issued by Member States that have access to the bond market again, the ESCB in practice excludes from the program it intends to implement the Member States whose financial situation has deteriorated so far that they are no longer in a position to secure financing on the market.[87]

F. Conclusion

The bottom line is that the mere declaration to buy government bonds violates neither Article 123 nor Article 125 TFEU. The occasional purchase of government bonds on the secondary market is not prohibited, especially as risks and regional fiscal redistribution effects among the various Eurozone countries arise from the rest of the ECB's monetary policy anyway.[88] Such side effects of monetary policy are basically covered by the mandate of the ECB. The central question is therefore whether its mandate is exceeded by the increasing height of the risks and the fiscal distributional effects of government bond purchases.[89] This is a gradual process which is difficult to evaluate from the outside.

The ECB argues that the government bond purchases are adequately controlled and the euro system has sufficient risk buffers in place in the form of provisions for losses and reserves to be able to absorb any losses. However, in the event of more extensive purchases there is in principle a risk that the euro system will be subject to greater losses which it is not able to absorb on its own. If the ECB makes targeted purchases of government bonds to a major extent and thus becomes involved in state financing,

[86] *Id.*

[87] *Id.* at 119.

[88] See, e.g., the resulting problems under the payment system TARGET2 which cannot be explained in detail here.

[89] Jürgen Matthes & Markus Demary, *Überschreitet die EZB mit ihren Staatsanleihekäufen ihr Mandat?*, WIRTSCHAFTSDIENST 607, 614 (2013).

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this could lead to a circumvention of Article 123 TFEU and, ultimately, to a breach of Article 125 TFEU.

Thus, the ECB's pledge in the summer of 2012 to do "whatever it takes" to safeguard the monetary policy transmission mechanism in all countries of the euro area by buying government bonds was generally compatible with EU law. Yet, there might occur a situation in which the ECB, if acting according to the announcement, might infringe either article 123 or even article 125 TFEU. The peculiarity of this situation is that we are dealing with a "self-fulfilling prophecy." OMT has never actually been used. The ECB announces a particular policy, which might not be compatible with EU law, however, the act announced will never take place since the political problem was solved by simply announcing the measure. The question is now, how a court should react in such a situation. I would propose that a court in such a situation has to show the legal limits of the particular institution, but neither the ECJ nor the German Constitutional Court may replace the central banks' function to maintain financial stability. Otherwise the court would rule beyond its competences.

In view of all the foregoing considerations, the answer to the questions referred to the ECJ is that Articles 119 TFEU, 123 (1) TFEU and 127 (1) and (2) TFEU and Articles 17 to 24 of the Protocol on the ESCB and the ECB can be interpreted as permitting the ESCB to adopt a program for the purchase of government bonds on secondary markets, such as the program announced by the ECB. Carefully read, the Federal Constitutional Court's referred question explicitly left open an interpretation of the OMT decision in accordance with primary law.[90] *Karlsruhe* (the German Federal Constitutional Court) has not made a preliminary ruling on the question of the preliminary ruling and the ECJ has now declared the OMT decision compatible with European Union law. The preliminary ruling was wisely formulated sufficiently open to follow the answer of the ECJ. With its general conditional nature, the preliminary ruling of the Constitutional Court reads in such a way as if its critical remarks are preliminary legal opinions which are not binding at the moment, but which could be developed further in the light of the preliminary ruling of the ECJ. This can be seen as an attempt to enter into a dialogue within the context of direct cooperation with the ECJ.

There are numerous indications that the Federal Constitutional Court has no intention of entering into a conflict of jurisdiction with the ECJ. In the first place its ruling opens the way to avoiding such a conflict, because it still regards as possible — within what it sees as the boundaries of the German integration program — an interpretation that the OMT decision conforms to EU law. The court, however, required from the ECJ an interpretation of EU law which will not provide any conflicts with previous rulings, and

[90] OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at paras 99–100.

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can be justified within the interpretation of the law in such a way that it does not appear arbitrary. The ECJ has succeeded in this task.

As Article 267 TFEU provides an institutionalized mechanism for judicial dialogue between the ECJ and national constitutional courts it was right to ask for a preliminary ruling. And the decisions of the Federal Constitutional Court already have had its effect. The ECB has already reacted when drafting the Quantitative Easing program[91]. With regard to the sharing of hypothetical losses, the Governing Council decided that purchases of securities of European institutions — which will be 12 % of the additional asset purchases, and which will be purchased by national central banks — will be subject to loss sharing. The rest of the NCBs' additional asset purchases will not be subject to loss sharing. The ECB will hold 8 % of the additional asset purchases. This implies that 20 % of the additional asset purchases will be subject to a regime of risk sharing. This approach seems to be directly influenced by the rulings of the German Constitutional Court.

The preliminary procedure can be characterized "by mutual cooperation and shared responsibility."[92] Considering that many national constitutional courts have long been reluctant to participate at all in this direct dialogue procedure, the shift in preliminary reference practices during the last years[93] is remarkable.[94] "In the framework of the preliminary procedure, national constitutional courts and the ECJ should interact with each other on an equal footing and enter into an issues-based dialogue about the question what decisions best realize the constitutional principles of both, the European and the national legal order."[95] In that sense the German Federal Constitutional Court was right to refer the question to the ECJ. Even more than that,

[91] EUR. CENT. BANK, *ECB announces expanded asset purchase programme* (Jan. 22, 2015), https://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html.

[92] Koen Lenaerts cited by Andrej Lang, *How Constitutional Courts talk to each other: The Potential of the Preliminary Reference Procedure for Europe's pluralist Verfassungsverbund*, VERFASSUNGSBLOG (VERFBLOG), (Nov. 28, 2014), *available at* http://www.verfassungsblog.de/en/wie-verfassungsgerichte-miteinander-reden-das-potential-des-vorlageverfahrens-fuer-europas-pluralistischen-verfassungsverbund/#.Ve3H2LSPrL8.

[93] *Pringle*, Case C-370/12; *Melloni*, Case C-399/11; Case C-73/08*,* Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté française, 2010 E.C.R. I-2735; Case C-236/09, Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil des ministers, 2011 E.C.R. I-773; Joined Cases C-293/12 & C-594/12, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others, and Kärntner Landesregierung, Michael Seitlinger, Cristof Tschohl and Others (Apr. 8, 2014), http://curia.europa.eu/; Case C-168/13, Jeremy F. v. Premier ministre (May 30, 2013), http://curia.europa.eu/.

[94] Andrej Lang, *supra* note 92.

[95] *Id*.

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its first referred question will go down as "a masterpiece of truly cooperative constitutional pluralism"[96] in the history of European jurisprudence.

[96] See Matthias Goldmann, *Mutually Assured Discretion: The ECJ on the ECB's OMT Policy*, VERFBLOG, (June 18, 2015), *available at* http://www.verfassungsblog.de/mutually-assured-discretion-the-ecj-on-the-ecbs-omt-policy/.

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