

Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review

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A. Unconventional Monetary Policy Triggers Unconventional Adjudication

In Karlsruhe's recent request for a preliminary ruling, an unconventional monetary policy measure of the European Central Bank (ECB) finds an unconventional judicial response.¹ Based on its mandate to enforce the fundamental right to vote,² the Federal Constitutional Court (FCC) leaves no doubt about its view that the ECB's Outright Monetary Transactions Programme (OMT Programme)³ violates the law of the European Union and hence the German Basic Law, unless one reads them in a rather restrictive way. But as unconventional monetary policy steps up the need for the ECB to justify the legality of its measures, so does the FCC's unconventional expansion of the scope of judicial review raise questions which the recent decision in its—generally laudable—brevity leaves underexplored. In particular, the decision does not dwell much on the issue whether it is appropriate for a court to review issues of monetary policy, and which standard of review should apply. Only Judge Gerhardt calls the majority's standard of review into question when he doubts whether the requirement for transgressions of the European Union's competences to be "manifest" is a workable criterion for defining the scope of the FCC's ultra vires control.⁴

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¹ Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2728/13 (Jan. 14, 2014), http://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html [hereinafter OMT Ruling].

² GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, Art. 38 (Ger.).

³ See Press Release, European Cent. Bank, Technical Features of Outright Monetary Transactions (Sep. 6, 2012), http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

⁴ OMT Ruling at paras. 16–17 (Gerhardt, J., dissenting).

This article argues first that the concept of democracy endorsed by the Basic Law as well as the contested nature of the economic theories underpinning monetary policy rule out the possibility of a full review of ECB measures by the FCC or any other court. Instead, courts may only perform rationality checks.⁵ Subsequently, it tackles the arguments advanced by the FCC against the legality of the ECB's OMT Programme one by one and demonstrates that the conclusions of the FCC cannot be upheld if one applies a rationality check instead of a full review and avoids adjudicating between competing approaches in economic theory.⁶ Ultimately, the article points out that the full review exercised by the FCC and the watering-down of the requirement for ultra vires acts to be manifest might compromise the ECB's independence by rendering its monetary policy rate subject to judicial review.⁷

B. The ECB and the Courts: Full Review or Rationality Check?

Contrary to the assumption of the majority of the FCC, both the concept of democracy endorsed by the Basic Law⁸ and reasons intrinsic to the ECB's mandate for monetary policy⁹ militate in favor of a limited standard of judicial review. Accordingly, the FCC should only review the rationality of the ECB's policy measures.¹⁰

I. Judicial Review and the Democratic Legitimacy of the ECB: The Judiciary vs. the Executive

In the view of the majority of the FCC, the independence of the ECB constitutes a deviation from the concept of democracy enshrined in Articles 20 and 79(3) of the Basic Law. It considers such independence to be in conformity with said concept of democracy only under the condition that it is tied to a narrowly interpreted legal mandate and subject to full judicial review.¹¹ One might challenge this view from two different angles.

First, the "constitutionalization" of ECB independence in Article 130 of the Treaty on the Functioning of the European Union (TFEU) and in Article 88 of the Basic Law do not require the full judicial review of ECB measures. Prior to the Economic and Monetary Union, the independence of the Bundesbank was based on a simple legislative provision.¹² The

⁵ See *infra* Part B.

⁶ See *infra* Part C.

⁷ See *infra* Part D.

⁸ See *infra* Part B.I.

⁹ See *infra* Part B.II.

¹⁰ See *infra* Part B.III.

¹¹ See OMT Ruling at paras. 59–60.

¹² See Bundesbankgesetz [BBankG] [Bundesbank Act], Oct. 22, 1992, BUNDESGESETZBLATT at § 12 (Ger.).

Bundestag was considered to be entitled to delegate its powers over monetary policy to an independent institution. Obviously, the possibility to modify or revoke the delegation sufficed in order for such delegation to be considered constitutional.¹³ At the time, it would have been possible to give the Bundesbank a mandate for discretionary monetary policy instead of rules-based monetary policy, or to give it a mandate similar to that of the Open Market Committee of the Federal Reserve which does not give preference to price stability.¹⁴ The Basic Law would not have provided an obstacle to such mandates because monetary policy does not directly affect fundamental rights like the right to property.¹⁵ In such a situation, the constitutional requirement for the legislature to determine the essential elements of a policy and not to delegate away this task (*Wesentlichkeitslehre*) does not apply with full force.¹⁶

The “constitutionalization” of ECB independence in Article 130 TFEU and in Article 88 of the Basic Law did not put these considerations upside down. Certainly, these provisions make parliamentary control over the exercise of monetary policy considerably more burdensome. The revocation of the powers delegated to the ECB now requires an amendment of the treaties and the constitution. But this constituted the very point of the “constitutionalization” of central bank independence at the occasion of the establishment of the Economic and Monetary Union. Germany wanted to cement the independence of the ECB in order to ensure that it follows the politics of price stability cherished by Bundesbank.¹⁷ As a constitutional provision, the requirement of an independent ECB in Article 88 of the Basic Law has since qualified the concept of democracy defined as popular sovereignty in Article 20(2) of the Basic Law in an important respect. The FCC reached this conclusion in its *Maastricht* judgment by way of a systematic interpretation of all relevant constitutional provisions.¹⁸ Hence, the Basic Law does not necessarily warrant a narrow reading of the ECB’s mandate or a rigorous judicial review. Contrary to this understanding, the FCC now identifies ECB independence as a deviation from the concept of democracy

¹³ ULRICH HÄDE, *JENSEITS DER EFFIZIENZ: WER KONTROLLIERT DIE KONTROLLEURE?* 662, 664 (2011).

¹⁴ *Cf.* Federal Reserve Act, 12 U.S.C. § 225a (obliging the Open Market Committee to pursue the goals of maximum employment, stable prices, and moderate long-term interest rates).

¹⁵ *E.g.*, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1877/97, 97 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 350 (Mar. 31, 1998).

¹⁶ Helmuth Schulze-Fielitz, *Art. 20 (Rechtsstaat)*, in GRUNDGESETZ-KOMMENTAR 2 170, paras. 113–118 (Horst Dreier ed., 2d ed. 2006).

¹⁷ HUGO J. HAHN & ULRICH HÄDE, *WÄHRUNGSRECHT* § 20 para. 3 (2d ed. 2010).

¹⁸ Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 2134/92, 2 BvR 2159/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (Oct. 12, 1993). The FCC considers this qualification to be in line with Article 79(3) of the Basic Law, which guarantees the concept of democracy in perpetuity. *See also* Ingolf Pernice, *Art. 88*, in GRUNDGESETZ-KOMMENTAR 3 316, para. 28 (Horst Dreier ed., 2d ed. 2008).

endorsed by the Basic Law.¹⁹ This interpretation is one-sided in that it does not take account of the constitutional quality of Article 88 of the Basic Law and leads to an inappropriately high standard of judicial review.

Second, even though the concept of democracy resulting from a systematic reading of Articles 20(2) and 88 of the Basic Law seems to require the ECB to follow a rules-based approach and to rule out a discretionary approach, it does not necessarily ensue that the FCC or the ECJ should apply an overly strict standard of review. Monetary policy is not just any administrative activity that requires being subjected to full judicial review in order to ensure respect for individual rights. Rather, the making of monetary policy resembles that of any other economic policy. It involves forward-looking estimates about economic growth and risks and makes use of complex empirical methods in order to measure actual growth or risks, or at least to reduce uncertainty about it. These are typical tasks of the executive and legislative branches of government because they have both the knowledge and expertise, and the necessary legitimacy to make such assessments. They need to run for re-election sooner or later, or to assume responsibility for bad assessments and resign. By contrast, the perspective of the judiciary is retrospective. It is well understood that courts do not possess the legitimacy for second-guessing decisions involving high degrees of uncertainty about the future,²⁰ and that they are not equipped for such tasks. For these reasons, the FCC regularly grants the executive and the legislature a wide margin of discretion.²¹ In the case at hand, where the FCC reviews measures of the ECB, it has reason to grant the latter an even wider margin of discretion because its decision affects the entire Eurozone and not just Germany, as Judge Lübbe-Wolff emphasizes on the basis of an integration-friendly, pro-European understanding of the Basic Law's concept of democracy.²² Hence, applying too high a standard of review might be just as harmful to the concept of democracy as exercising no review at all.

¹⁹ See OMT Ruling at para. 59 ("The independence which the European Central Banks and the national central banks enjoy . . . *diverges* from the requirements the Basic Law states with regard to the democratic legitimation of political decisions.") (emphasis added); CHARLOTTE GAITANIDES, DAS RECHT DER EUROPÄISCHEN ZENTRALBANK 213–14 (2005).

²⁰ This follows from the practice of judicial reasoning. With respect to international courts, see ARMIN VON BOGDANDY & INGO VENZKE, IN WESSEN NAMEN? 146–50 (2014).

²¹ E.g., Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 20/73, 1 BvL 21/73, 1 BvL 22/73, 1 BvL 23/73, 1 BvL 24/73, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 210 (Mar. 19, 1975) (Mühlenstrukturgebiet); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvR 532, 533/77, 419/78, 50 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 290 (Mar. 1, 1979) (employee co-determination); Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvF 1/01, 107 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 62 (Oct. 25, 2002) (Altenpflegegesetz).

²² See OMT Ruling at para. 28 (Lübbe-Wolff, J., dissenting).

II. Judicial Review and the Mandate of the ECB: Separation vs. Interdependence of Monetary and Fiscal Policy

Apart from the concept of democracy, reasons that are intrinsic to the mandate of the ECB according to Article 127(1) TFEU as well as to Article 123(1) TFEU militate for some degree of judicial restraint. Indeed, the way in which the mandate has been defined contains the key to a solution regarding the appropriate standard of review for monetary policy measures of the ECB. The argument unfolds in three steps.

First, as Judge Gerhardt observes, the duty of the ECB to achieve price stability is defined in Article 127(1) TFEU as a goal, not as a behavioral obligation.²³ That leaves deliberately open by which instruments this goal is to be achieved.²⁴ Second, to make things more complicated, the concept of “price stability” is rather undefined, leaving the meaning of the goal to be pursued somewhat in the dark. Usually, the central bank defines what it understands as price stability. The ECB, which was among the first central banks to make its definition public, understands price stability as “inflation rates below, but close to, 2% over the medium term.”²⁵ Both of these points seriously call into question whether the FCC or any other court might actually carry out a full review.

Third, and most importantly, the concept of price stability is subject to a lively debate in economics. Participants in this debate are divided over the relationship between monetary policy and other forms of economic policy. While both sides would agree that price stability and financial stability are empirically interrelated, questions arise as to the normative consequences to be derived thereof. On the one hand, the approach which follows—what one might call the “separation theorem”—favors a monetary policy that largely disregards other policy objectives like financial stability or fiscal policy.²⁶ Jan Tinbergen was among the first to propose that different aspects of economic policy such as monetary policy, fiscal policy, and the maintenance of financial stability should be singled

²³ OMT Ruling at para. 17 (Gerhardt, J., dissenting).

²⁴ Pringle v. Ireland, CJEU Case C-370/12, para. 53 (Nov. 27, 2012), <http://curia.europa.eu/juris/recherche.jsf?language=en>.

²⁵ EUR. CENT. BANK, MONTHLY BULLETIN (Sep. 2012), available at <http://www.ecb.europa.eu/pub/pdf/mobu/mb201209en.pdf>. Previously, the ECB understood price stability as “a year-on-year increase in the Harmonized Index of Consumer Prices (HICP) for the euro area of below 2%.” Press Release, European Cent. Bank, A Stability-Oriented Monetary Policy Strategy for the ESCB (Oct. 13 1998), http://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html.

²⁶ OLIVIER BLANCHARD ET AL., INT’L MONETARY FUND STAFF POSITION NOTE, RETHINKING MACROECONOMIC POLICY (2010); Gary Hufbauer & Daniel Danxia Xie, *Financial Stability and Monetary Policy: Need for International Surveillance*, in INT’L LAW IN FIN. REGULATION AND MONETARY AFFAIRS 382, 385 (Thomas Cottier et al. eds., 2012).

out and assigned to different regulators that should put their main focus on one task.²⁷ This matched well with Milton Friedman's monetary theory which teaches that the quantity of money should develop steadily and in accordance with a strict rule rather than in a discretionary fashion in order to achieve economic growth.²⁸ Political slack and the influence of interest group pressure might prevent central banks from observing this rule. Friedman therefore argued that central banks should be independent from government.²⁹ Although Friedman's theory received many modifications, such as John Taylor's rule for a growth-dependent interest rate policy,³⁰ the reasons for central bank independence still inform much of modern monetary policy and sustain the separation theorem. On that basis, many economists reject the OMT Programme.³¹

On the other hand, the separation theorem, which has never remained uncontested by the more Keynesian economists,³² has come under pressure since the beginning of the present crisis. A number of economists challenge it, arguing that central banks should give more weight to issues of financial stability in their policy decisions, and thereby taking greater account of interdependencies among the various fields of economic policy.³³ They emphasize the importance of observing the development of the volumes of private and public credit. Before the crisis, the prevention of credit bubbles or crunches was not considered to be the business of the central bank, but rather of financial regulation and supervisory authorities. However, there is an intrinsic relationship between monetary policy and credit markets. Low monetary policy rates might fuel credit bubbles, such as in a situation where growth in the entire economy remains below growth in one sector of the economy. Consequently, central bank policy affects financial stability.³⁴ What is important

²⁷ JAN TINBERGEN, CENTRALIZATION AND DECENTRALIZATION IN ECONOMIC POLICY 75 (1954); Tinbergen's approach as such is not necessarily incompatible with the interdependence theorem discussed in the following paragraph, see JAN TINBERGEN, ECONOMIC POLICY: PRINCIPLES AND DESIGN 218 et seq. (1956).

²⁸ MILTON FRIEDMAN, A PROGRAM FOR MONETARY STABILITY 77 et seq. (1959).

²⁹ MILTON FRIEDMAN, CAPITALISM AND FREEDOM 51–54 (2002).

³⁰ John B. Taylor, *Discretion versus Policy Rules in Practice*, 39 CARNEGIE-ROCHESTER CONFERENCE SERIES ON PUBLIC POLICY 195–214 (1993).

³¹ With respect to the programme preceding OMT, see Ansgar Belke, *Driven by the Markets? ECB Sovereign Bond Purchases and the Securities Markets Programme*, 45 INTERECONOMICS: REV. OF EUR. ECON. POL'Y 357 (2010); Dirk Meyer, *Kosten des Europäischen Finanzstabilisierungsmechanismus (EFSM) aus deutscher Sicht*, 231 J. ECON. & STAT. 288, 292–94 (2011).

³² Peter Sester, *Plädoyer für die Rechtmäßigkeit der EZB-Rettungspolitik*, 59 RECHT DER INTERNATIONALEN WIRTSCHAFT 451, 452 (2013).

³³ BROOKINGS INSTITUTION, THE COMM. ON INT'L ECON. POLICY AND REFORM, RETHINKING CENTRAL BANKING (2011); BLANCHARD, *supra* note 26.

³⁴ BROOKINGS INSTITUTION, *supra* note 33, at 5–7; Hufbauer & Xie, *supra* note 26, at 384.

for the present case is that the reverse situation is also true: If credit remains below the level necessary for expected growth, there is a risk of deflation. This is the effect of the so-called “bank lending channel,” the increase and decrease in the quantity of money due to the growth or contraction of the volume of credit.³⁵ Furthermore, regulatory policy affects monetary policy because it influences the lending activities of banks and thereby the quantity of money. According to this view, what is required is the “joint optimization” of policies pursued by different agencies. If the central bank discards issues of financial stability, it risks ruining its legitimacy.³⁶ One might call this the “interdependence theorem.” It finds already some reflection in practice, whether in the OMT Programme or in the augmentation of supervisory tasks of central banks.³⁷

The prohibition of primary market purchases of government debt in Article 123(1) TFEU also gives rise to disagreement between the separation and interdependence theorems. On its face, it explicitly prohibits only primary market purchases of sovereign bonds, but one might argue that secondary market purchases should also be prohibited to the extent that they might undermine the prohibition of primary market purchases.³⁸ However, secondary market purchases of sovereign debt are a common feature of the ECB’s open market refinancing operations, usually in the form of repurchase agreements. Distinguishing legitimate from illegitimate secondary market purchases therefore requires a reconsideration of the limits of monetary policy. This leads directly to the same dispute among diverging schools of economic thought as the concept of price stability.

When judges engage in a full review of central bank policy, they may have difficulty getting around this dispute. Whatever the mandate of the central bank is, they will have to engage with the underlying, highly contested and indeterminate economic concepts like price stability, or the precise delimitation of monetary politics and its relation to issues related to financial stability.³⁹ However, judges usually do not possess the qualification or legitimacy to adjudicate economics.⁴⁰ A court that gets entangled in economic debates

³⁵ Frederic S. Mishkin, *The Channels of Monetary Transmission: Lessons for Monetary Policy* 9 et seq. (Nat’l Bureau of Econ. Research, Working Paper No. 5464, 1996).

³⁶ BROOKINGS INSTITUTION, *supra* note 33, at 7, 10; Hufbauer & Xie, *supra* note 26, at 395; BLANCHARD, *supra* note 26, at 11–13.

³⁷ See Rosa M. Lastra, *The Evolution of the European Central Bank*, 35 *FORDHAM INT’L L.J.* 1260–1281, 1276 (2012).

³⁸ In favor of this, see Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvR 1390, 1421, 1438, 1439, 1440/12, 132 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERFGE] 195, 268 (Jul. 10, 2012) (ESM Provisional Measures); Doris Hattenberger, *Art. 123 AEUV*, in *EU-KOMMENTAR* 1531, para. 6 (Jürgen Schwarze ed., 3rd ed. 2012); Against, see Ulrich Häde, *Art. 123 AEUV*, in *EUV—AEUV KOMMENTAR* 1585, para. 10 (Christian Calliess & Matthias Ruffert eds., 4th ed. 2011).

³⁹ Cf. OMT Ruling at para. 17 (Gerhardt, J., dissenting).

⁴⁰ Christoph Herrmann, *Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und europäischen Währungsverfassungsrechts*, *EUR. J. ECON. L.* 805, 810–11 (2012).

might compromise its legitimacy when its views are contested by those with more expertise on the issue. Likewise, making the economic issues at stake look uncontroversial involves the identical risk, especially because the expert testimonies solicited by the FCC reveal fundamental disagreement.⁴¹ To avoid this risk, it would be wise for judges to review ECB measures with some restraint.

III. Rationality Check Instead of Full Review

The concept of democracy in the Basic Law as well as the intricacies of the mandate of the ECB hence strongly suggest a good dose of judicial self-restraint when reviewing ECB measures.⁴² However, that raises the question where the line should be drawn. While full review appears inappropriate, full discretion would be incompatible with Article 35 of the ECB Statute, which explicitly provides for judicial review of ECB measures, as well as with the constitutional law of the member states.

In between these two extreme positions, the FCC might take recourse to rationality checks. In a theoretical perspective, rationality checks lend themselves to the present situation. They are situated in the middle between legal theories that assume the existence of a “single right answer” to any legal question and consequently favor full judicial review,⁴³ and legal theories that are skeptical of law’s rationality and therefore consider judges as mere procedural “referees” that should not engage in substantive arguments.⁴⁴ Advocates of rationality checks consider the former view as incompatible with a pluralistic society where one might rationally disagree about the values underlying a certain policy,⁴⁵ and the latter view as normatively insufficient for law to ensure its integrative function in a pluralistic society that is supposed to express the common interest which everybody can agree with and not just the self-interest of the prevailing interest group.⁴⁶

What is meant by rationality checks that fall short of full reviews, but exceed mere procedural control? According to Sunstein, rationality checks of the legislature require legislation to be based on a “reasoned analysis” of the problem at stake and the proposed solution, thereby ensuring that legislation pursues public and not private interests.⁴⁷

⁴¹ Kai A. Konrad et al., *Bundesverfassungsgericht und Krisenpolitik der EZB — Stellungnahmen der Ökonomen*, 93 WIRTSCHAFTSDIENST 431–454 (2013).

⁴² HAHN & HÄDE, *supra* note 17, § 17 para. 34.

⁴³ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81, 116 (1977).

⁴⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87–88 (1980).

⁴⁵ JÜRGEN HABERMAS, *FAKTIZITÄT UND GELTUNG* 272 (1992).

⁴⁶ Frank I. Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1526–7 (1988).

⁴⁷ Cass Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 56, 78 (1985).

However, it is difficult to legitimately distinguish between public and private reasons. Another starting point for an understanding of rationality checks might be Habermas' proposal to disentangle the different types of reasons characterizing law-generating (as opposed to law-applying) discourses.⁴⁸ Law-generating discourses may include moral arguments of universal applicability, ethical arguments that define and relate to the self-understanding of the respective community, and pragmatic arguments that represent compromise among the self-interests of various groups.⁴⁹ Therefore, judicial review of legislation needs to respect the pragmatic, ethical, and moral choices of the legislature. Courts may only review whether the discursive requirements which ensure that legislative procedures are rationally acceptable have been respected.⁵⁰ These discursive requirements comprise more than just the legislative procedure, but the entirety of procedural, institutional, and deliberative requirements necessary in a democratic society, including human rights.⁵¹ The FCC has followed this approach in a number of cases in which it did not doubt the policy reasons of the legislature, but in which it reviewed whether legislative acts followed these policy reasons in a consistent and coherent manner⁵² or whether the legislature observed a transparent and comprehensible procedure.⁵³

By contrast, the judicial review of law-applying discourses like court decisions needs to respect the pragmatic, ethical, and moral decisions of the legislature and may not replace them with their own. Judges might take recourse to these reasons in order to interpret the law and ensure its consistent application.⁵⁴ In principle, the same considerations apply to executive decisions to the extent that their legal basis spells out the relevant moral, ethical and pragmatic decisions. Courts may therefore replace the legal reasoning of the administration that puts the law into practice with their own reasoning.⁵⁵ However, the

⁴⁸ On the difference between law-generating and law-applying discourses, see HABERMAS, *supra* note 45, at 212.

⁴⁹ HABERMAS, *supra* note 45, at 187, 343.

⁵⁰ *Id.* at 347, 361.

⁵¹ *Id.* at 208.

⁵² *E.g.*, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 5/64, 25 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 17 (Dec. 18, 1968) (Mühlengesetz). On the constitutional significance of consistency checks as part of rationality checks, see Niels Petersen, *Gesetzgeberische Inkonsistenz als Beweiszeichen. Eine rechtsvergleichende Analyse der Funktion von Konsistenzargumenten in der Rechtsprechung*, 138 ARCHIV DES ÖFFENTLICHEN RECHTS 108–34, 114–17 (2013).

⁵³ *E.g.*, Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 1 BvL 1, 3, 4/09, 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175, 225 (Feb. 9, 2010) [hereinafter Hartz IV]. Criticizing the court and advocating a review limited to procedure, see Philipp Dann, *Verfassungsgerichtliche Kontrolle gesetzgeberischer Rationalität*, 49 DER STAAT 630–646 (2010).

⁵⁴ See Hartz IV at 235–6.

⁵⁵ See Hartz IV at 231.

executive branch might enjoy different degrees of discretion, especially if it is charged with the implementation of policies that formulate goals while leaving the means open. To the extent that the reasoning expected from the executive emulates the reasoning of the legislature and legitimately engages in moral, ethical, and pragmatic discourse, judicial review should respect such reasoning and only review whether the discursive prerequisites were in place.⁵⁶

The decisions required from the ECB under Article 127(1) TFEU, as well as the limitations applicable to its measures under Article 123(1) TFEU, resemble the latter type of activity. As the previous sections reveal, a contextual interpretation of these provisions that pays heed to both the institutional position of the ECB and the theoretical implications of its mandate, shows that they charge the ECB with a good deal of pragmatic, ethical and maybe even moral reasoning and only define some outer limits. Within these boundaries, courts may not replace the ECB's moral, ethical or pragmatic reasons with their own reasons. They may only exercise a rationality check and ask whether the presuppositions of such discourses have been observed, i.e. whether the act in question is rationally justifiable in a deliberative sense, bearing in mind the possibility of rational disagreement.

C. Full Review vs. Rationality Check: Reviewing the FCC's Arguments

This section reviews the FCC's arguments and asks whether they cross the limits of judicial review spelled out above. It shows that the decision of the ECB might appear incoherent from the point of view of the separation theorem, but is coherent and rationally justifiable if one follows the interdependence theorem. Since the applicable treaty provisions do not render the interdependence theorem rationally unjustifiable, but leave this choice to the ECB, the FCC appears to have overstepped the appropriate limits of judicial review.

I. The Argument about Direct vs. Indirect Policy Objectives

A first objection to the standard of review applied by the FCC relates to the distinction it draws between direct and indirect policy objectives. In the opinion of the FCC, a measure cannot be qualified as one of monetary policy unless it directly pursues monetary policy objectives. Indirect monetary policy objectives are irrelevant.⁵⁷ The FCC thereby draws a converse argument from the ECJ's finding in *Pringle*, according to which the European Stability Mechanism qualifies as an economic policy measure because it affects monetary policy only indirectly.⁵⁸ Although it remains unclear how the distinction between "direct" and "indirect" monetary policy goals is to be understood exactly, the argument follows the

⁵⁶ See Hartz IV at 233.

⁵⁷ See OMT Ruling at para. 64.

⁵⁸ Cf. *Pringle*, CJEU Case C-370/12 at paras. 56, 57.

separation theorem quite obviously. It analyzes each measure separately and asks whether it pursues the objective of price stability in the first place. A measure pursuing a goal other than monetary policy is not within the ECB's mandate, even if price stability, the goal of monetary policy, is still safeguarded on the whole.⁵⁹

The interdependence theory would prefer a more holistic assessment of ECB measures, keeping in mind that Article 127(1) TFEU formulates price stability as a goal only. Accordingly, price stability—however it is to be defined—needs to prevail on the whole over other policy objectives.⁶⁰ However, this does not exclude that the ECB takes measures pursuing the goal of financial stability in the short term so long as it generally pursues a policy aimed at price stability in the medium term.⁶¹ This position would be compatible with the view that price stability and other objectives are closely interrelated and sometimes hard to distinguish. In contrast to the view of the FCC, it is meaningless to ask, under the interdependence theorem, whether an individual measure pursues monetary policy directly or indirectly because what matters is the policy of the ECB as a whole. One therefore cannot invert the conclusions of the *Pringle* judgment. If a measure qualifies as one of economic policy, it does not mean that it might not be a legitimate objective of monetary policy. The ECB may take such measures as long as they do not affect price stability on the whole.

On a side note, the question whether price stability is affected on the whole might receive two different answers, depending on the relevant time frame. On the one hand, one might argue that the OMT Programme does not compromise price stability even in the short term.⁶² On the other hand, one might argue that price stability still prevails if one modifies its definition in order to allow for short-term inflation rates of above 2% while maintaining that rate as a long-term objective.⁶³ The treaty provisions do not prescribe a numerical medium-term inflation rate. Rather, they leave the ECB discretion to define the key terms of its policy.⁶⁴ While one might easily find economic reasons against this latter view, one

⁵⁹ Cf. Markus C. Kerber & Stefan Städter, *Die EZB in der Krise: Unabhängigkeit und Rechtsbindung als Spannungsverhältnis*, 22 EUR. J. ECON. L. 536, 536–7 (2011); Hans-Walter Forkel, *Zur Frage des Rechtsschutzes für jedermann gegen die Geldpolitik der EZB*, ZEITSCHRIFT FÜR RECHTSPOLITIK 240, 241 (2012).

⁶⁰ Ulrich Häde, *Art. 127*, in EUV—AEUV KOMMENTAR 1618, para. 6 (C. Calliess & M. Ruffert eds., 4th ed. 2011).

⁶¹ Christoph Hermann, *EZB-Programm für die Kapitalmärkte verstößt nicht gegen die Verträge—Erwiderung auf Martin Seidel*, 21 EUR. J. ECON. L. 645, 646 (2010); Marcel Fratzscher, *Zum währungspolitischen Mandat der EZB und möglichen Auswirkungen von Maßnahmen der EZB auf die nationalen Haushalte*, in WIRTSCHAFTSDIENST: ZEITSCHRIFT FÜR WIRTSCHAFTSPOLITIK 445–451, 447.

⁶² Jürgen Matthes & Markus Demary, *Überschreitet die EZB mit ihren Staatsanleihekäufen ihr Mandat?*, 93 WIRTSCHAFTSDIENST 607–615 (2013).

⁶³ Fratzscher, *supra* note 61.

⁶⁴ Hence, whether price stability is an absolute or a relative concept is a rather academic question. Cf. GAITANIDES, *supra* note 19, at 17–18.

would have a hard time arguing that it is rationally unjustified because it violates essential discursive requirements.

II. The Argument about Irrational Interest Rates and Selectivity

A second objection to the standard of review applied by the FCC relates to two of its arguments that have a lot in common. The first argument is that the unusually high interest rates which the ECB attempts to reduce with its OMT Programme are the result of solvency problems caused by excessive debt and show that market discipline is working.⁶⁵ Any disturbance of the market for sovereign debt would be the rule rather than the exception in a debt crisis.⁶⁶ A second, related argument suggests that the selectivity of the OMT Programme, which limits asymmetrical secondary market purchases to troubled states, shows that the real issue is solvency, not liquidity and the transmission mechanism.⁶⁷ This position presupposes, in line with the separation theorem, that the ECB may try to fix either solvency problems or liquidity problems such as a troubled monetary transmission mechanism, and that the two objectives can be neatly distinguished.

Again, the interdependence theorem would suggest the contrary. Accordingly, there is a rational basis for the presumption that solvency and liquidity concerns might converge in times of crisis. Thus, measures that pursue monetary policy objectives would be rationally justifiable even if they fix solvency problems at the same time, provided that price stability prevails on the whole. It would be difficult to challenge that view empirically and argue that secondary market purchases of sovereign bonds of troubled states only pursue solvency concerns, since there is at least some evidence for liquidity problems, i.e. for an irrational credit crunch.⁶⁸ As the Bundesbank submitted, it is hard to tell liquidity from solvency problems, or rational from irrational interest rates.⁶⁹ In such a situation, some degree of judicial self-restraint under a rationality check model seems to suggest itself. At least as long as the ECB is able to sterilize potential purchases under the OMT Programme for the foreseeable future, it would be premature for any court to intervene.

⁶⁵ OMT Ruling at para. 71.

⁶⁶ *Id.* at para. 95ff.

⁶⁷ *Id.* at para. 73.

⁶⁸ Making the case for liquidity concerns (irrational credit crunch), see Ali Al-Eyd & S. Pelin Berkmen, *Fragmentation and Monetary Policy in the Euro Area* (Int'l Monetary Fund, Working Paper No. 13/208, 2013); suggesting that solvency might have been the issue for the preceding SMP Programme, see Christoph Trebesch & Jeromin Zettelmeyer, *Deciphering the ECB Securities Markets Programme: The Case of Greek Bonds* (2012) (unpublished manuscript) (on file with author).

⁶⁹ DEUTSCHE BUNDESBANK, STELLUNGNAHME GEGENÜBER DEM BUNDESVERFASSUNGSGERICHT ZU DEN VERFAHREN MIT DEN AZ. 2 BVR 1390/12 ET AL. 7 (Dec. 21 2012), available at http://www.handelsblatt.com/downloads/8124832/1/stellungnahme-bundesbank_handelsblatt-online.pdf.

III. The Argument about the Integrity of the Eurozone

The FCC's insistence on the separation theorem might be most evident where it suggests that threats to the integrity of the Eurozone are nothing for the ECB to worry about.⁷⁰ The legal argument as such appears doubtful. The FCC reverses the meaning of Article 140 TFEU, which stipulates that the Council decides about accession of new members to the Economic and Monetary Union. According to the FCC, not only accession, but also exit from the Eurozone, is a political decision and not for the ECB to oversee—although the treaty does not contain an exit procedure and Article 140 TFEU is singularly useless for that purpose. While it is certainly within the competence of the FCC to make flawed legal arguments, the real question is whether it should have made a legal argument at all. The idea that the ECB might not care about the integrity of the Eurozone again follows the view that the ECB must pursue price stability by all means and whatever the cost, without regard to financial stability. The interdependence theorem suggests that the ECB may very well pursue stability objectives such as the integrity of the Eurozone, as long as price stability remains its ultimate concern.⁷¹ Indeed, the ECB may take into account that monetary unions feature a much higher risk of disintegration because troubled states may not devalue their currency.⁷² The treaty suggests that the choice should be left to the ECB, which needs to assume responsibility for the consequences of its decisions.

IV. The Argument about Conditionality

According to the FCC, the fact that the ECB requires states benefitting from the OMT Programme to be subject to a macroeconomic adjustment programme or a precautionary programme⁷³ shows that the ECB is in fact aware of, and worried by, the fiscal effects of the OMT Programme. Hence, it pursues fiscal and not monetary policy goals.⁷⁴ Again, it seems inconceivable for the FCC that a policy pursues purposes other than purely monetary ones without compromising the idea of price stability—a clear case of a strictly applied separation theorem. In accordance with the interdependence theorem, such conditionality required by the ECB is a matter of prudence. It takes account of the fact that monetary and fiscal policy may converge and that moral hazard may potentially ensue

⁷⁰ See OMT Ruling at para. 72.

⁷¹ Conversely, this implies, as the Bundesbank has pointed out, that the ECB may not defend the integrity of the Eurozone by all means. DEUTSCHE BUNDESBANK, *supra* note 69, at 9.

⁷² Sester, *supra* note 32, at 455.

⁷³ Cf. Commission Regulation 472/2013, Of the European Parliament and of the Council on the Strengthening of Economic and Budgetary Surveillance of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability, 2013 O.J. (L 140) 3, 7.

⁷⁴ See OMT Ruling at para. 74.

from unconditional sovereign bond purchases.⁷⁵ From that angle, the ECB is aware of the polyvalence of some of its monetary policy measures and tries to contain them. It is thus acting consistently with the interdependence theorem.

This also concerns the issue that the ECB does not always require exactly the same conditions as the legal regime of the European Stability Mechanism.⁷⁶ From the viewpoint of the interdependence theorem, some divergence might be acceptable because the ECB pursues monetary policy and only wants to somehow limit moral hazard. More lenient conditionality might provide sufficient protection against moral hazard because the ECB may always stop bond purchases and start selling. A consistent explanation of the ECB's policy is thus possible under the interdependence theorem.

V. The Arguments about Lacking Volume Limits and Increasing Risks for the ECB

A few FCC arguments relate to the prohibition of primary market purchases, as stipulated in Article 123(1) TFEU. As has been said, one might argue that secondary market purchases should not undermine that prohibition.⁷⁷ Primary and secondary Union law do not define what counts as illegitimate secondary market purchases.⁷⁸ The FCC identifies features of the OMT Programme which it considers as indicators for the fact that the policy aims at illegitimate secondary market purchases; these features include the lack of volume limits and the increased risks for the ECB that have arisen from waiving claims to superiority in the case of a restructuring and its acceptance of lower-quality collateral.⁷⁹ This line of argument shows the underlying separation theorem. It assumes that monetary policy is possible without, and should dispense with, any concern about fiscal policy. Only transactions which are practically risk-free for the ECB ensure that fiscal and monetary policy remain within their neatly separated cages.

A reading on the basis of the interdependence theorem suggests otherwise. Accordingly, liquidity and solvency concerns cannot be clearly separated, especially not in times of crisis. This necessarily entails increasing risks for any central bank that pursues liquidity concerns. There is thus an unavoidable spillover from monetary to fiscal policy: volume limits would make the OMT Programme incredible and thereby undermine its purpose of providing liquidity. The preceding Securities Markets Programme of the ECB provided

⁷⁵ 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. COMPANY AND FIN. L. REV. 156, 158–9 (2012); DEUTSCHE BUNDESBANK, *supra* note 69, at 14.

⁷⁶ *But see* OMT Ruling at para. 79.

⁷⁷ *See supra* note 38 and accompanying text.

⁷⁸ Herrmann, *supra* note 40, at 810.

⁷⁹ OMT Ruling at paras. 83, 88–89.

evidence for this.⁸⁰ The holding periods of debt under that policy are believed to have been too short to reassure trust on the part of market participants.⁸¹ The commitment not to claim superiority serves the same purpose of reestablishing market confidence. Besides that, it would by no means be clear that the ECB could withstand the political and economic pressure once more in case of another default and claim superiority.⁸² The lower quality of collateral is yet another sign of the crisis. The ECB should not cut off banks from troubled states of necessary liquidity—at least to the extent that it does not compromise its objective of price stability too much.

Seen from the angle of the interdependence theory, the ECB's policy again appears consistent. The fact that the ECB incurs higher financial risks also does not compromise its independence required by Article 130 TFEU.⁸³ Independence in that respect amounts to a prohibition of instructions, not of factual constraints and self-incurred risks which are unavoidable in an interdependent—and not artificially separated—economy.⁸⁴

D. Conclusion: Full Review—A Manifest Threat to ECB Independence

The preceding section reveals that the FCC uses a problematic standard of review. It takes a position in the debate about the right approach to monetary policy which the treaties leave deliberately open. Only the ECB has the legitimacy to decide this issue. Had the FCC exercised its review of ECB measures with some restraint, it would have had to accept the interdependence theorem, pursuant to which the ECB's OTM Programme is entirely consistent both in theoretical terms and with respect to the available evidence.

Nevertheless, the FCC opted for an inadvertently non-deferential full review, replacing the ECB's policy choices with its own. This might have serious consequences of which the FCC might not have been aware. They derive from the combination of a high standard of review and the almost unlimited ultra vires control which considers every step of the ECB into the field of fiscal policy as a "manifest" transgression, even if it requires 53 pages for the court to make the point about fiscal policy. I believe that it is now possible to second guess the ECB's monetary policy rate (i.e. interest rate). Every monetary policy measure

⁸⁰ Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme. ECB 2010/5, 2010 O.J. (L 124) 8.

⁸¹ Charles Wyplosz, *ECB's Outright Monetary Transactions*, *European Parliament 7* (Directorate General for Internal Policies, Working Paper IP/A/ECON/NT/2012-05, 2012).

⁸² Sester, *supra* note 75, at 158.

⁸³ *But see* DEUTSCHE BUNDESBANK, *supra* note 69, at 17.

⁸⁴ On the meaning of ECB and national central bank independence, see CONVERGENCE REPORT, EUROPEAN CENTRAL BANK 21 (2012), available at <http://www.ecb.europa.eu/pub/pdf/conrep/cr201205en.pdf> (listing functional, institutional, personal and financial independence).

affects fiscal policy.⁸⁵ If the monetary policy rate is only a little bit too low, it leads to (little) inflation and melts away sovereign debt, causing undeserved fiscal policy effects. That would amount to a “manifest” transgression of the powers of the ECB. It is important to keep in mind in the case at hand that one of the plaintiffs is a faction of the Bundestag. The theoretical prospect of litigation from any political actor targeting the monetary policy rate of the ECB indeed constitutes a serious threat to the independence of the ECB—caused by those that wished to safeguard it.

Again, this article is not intended as a defense of the ECB’s OMT Programme. Rather, it is meant as a call for judicial restraint based on rationality checks of ECB measures instead of full reviews. Judges should not overstep the limits of their competence in order to enforce the limits of other actors’ competence. Otherwise, they might cause consequences they neither know nor want.

⁸⁵ *E.g.*, Marcel Fratzscher et al., *A Call for Support for the European Central Bank’s OMT Programme*, DIW BERLIN (Jul. 19, 2013), <https://berlinoeconomicus.diw.de/monetarypolicy/a-call-for-support-for-the-european-central-banks-omt-programme/>.