The transformation of the euro: law, contract, solidarity

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7 Reconciling the Contract with the Treaties

1 INTRODUCTION

The commitment given by political leaders on 11 February 2010 to safeguard financial stability at all means marked a time of great uncertainty; politically but certainly also legally. It initiated a change in the Union's Founding Contract, a change that would be shaped further in the weeks and months ahead. Throughout that time, however, the law remained unaffected. Those having to act on the change therefore felt curbed by the law. The single currency's legal set-up, put in place by the Treaty of Maastricht, had been designed with a different conception of stability in mind. It was not made for the challenges the currency union was now facing. National governments questioned how far they could go in their display of positive solidarity without running counter to the no-bailout clause. The Commission racked its brain over assistance based on Article 122(2) TFEU. And the European Central Bank, too, found itself in unchartered territory given its carefully circumscribed stability mandate and the prohibition on monetary financing.

The question was therefore not *whether* but *when* the actions to which the change in the Contract had given rise would be put to the test before the Court. In 2012, it first ruled on the shift towards positive solidarity by pronouncing on the legality of the ESM in *Pringle*,[1] before assessing the Bank's bond purchases in *Gauweiler* in 2015.[2] In both cases the Court found itself between a rock and a hard place. It was not in a position to strike down actions that had been crucial to the single currency's survival. Yet, in order to approve of them it had to engage in a Herculean struggle with the law that still largely reflected a stability conception from the past. The conclusion to this study will address the question *why* the Court had to approve of the actions, or more specifically: why it could not disapprove, and show how this ultimately relates to solidar-

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▪ This chapter contains and/or builds on previously published work by the author. See especially Vestert Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) 14 GLJ 113; Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7; Vestert Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*' (2016) 53 CML Rev 139.

1 Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] ECLI:EU:C:2012:756 (*Pringle*).

2 Case C-62/14 *Peter Gauweiler and others v Deutscher Bundestag* [2015] ECLI:EU:C:2015:400 (*Gauweiler*).

ity. This current chapter instead focuses on *how* it approved the actions through an analysis of its reasoning. It will show that it managed to get out of its predicament precisely by turning the uncertainty surrounding the single currency's legal set-up to its advantage.

Understanding how the Court could do this requires a distinction between 'clear' and 'hard' cases.[3] Contrary to 'clear' cases, in which the applicability of a rule to a set of facts does not raise any problems, hard cases are characterised by uncertainty about which rule should apply or how it should be interpreted.[4] In such situations a court cannot dispose of a case through mere 'deductive justification', that is: by examining whether the facts of the case can be subsumed under a certain rule.[5] It will first have to determine which rule applies and/or decide on its interpretation. This at the same time complicates and helps a court in its task to dispose of a case. It complicates because a court cannot limit itself to applying a given rule to a set of facts but first needs to interpret this rule. But it also helps as the need for interpretation allows a court a certain freedom to reason in favour of a particular outcome.

To see why a court has such freedom, a further distinction needs to be made between 'first' and 'second-order' justification.[6] In clear cases, first-order (deductive) justification suffices to render judgment, yet in hard cases second-order justification is called for since a court needs to justify the use and interpretation of a certain rule.[7] Given, however, that there is no legal method that exhaustively determines how courts should operate at this level, allowing for a single right answer in each and every case,[8] they possess a certain freedom

3 Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 197; Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Hart Publishing 2013) 47-48.

4 As Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence* (Clarendon Press 1993) 183ff explains, the distinction between 'clear' and 'hard' cases is analytical and not 'absolute'. One could say they represent ideal types, forming two extremes of a spectrum, and that in practice a case will be situated somewhere along the spectrum depending on its degree of clarity or hardness. See also MacCormick (n 3) 197ff.

5 The term 'deductive justification' features prominently in MacCormick's theory on legal reasoning. See MacCormick (n 3) 19ff. For discussion and analysis of his theory see eg Eveline T Feteris, *Fundamentals of Legal Argumentation: A Survey of Theories on the Justification of Judicial Decisions* (Kluwer 1999) 73-91; Beck, *The Legal Reasoning of the Court of Justice* (n 3) 119-125.

6 MacCormick (n 3) 100ff.

7 MacCormick (n 3) 101: 'Second-order justification must therefore involve justifying choices; choices between rival possible rulings. And these are choices to be made within the specific context of a functioning legal system…'.

8 See in this regard Dworkin's 'right answer thesis' and his assertion that judges should strive to find the 'single' right answer in each case, aiming to act at the level of a model judge 'Hercules', 'a lawyer of superhuman skill, learning, patience and acumen' who is able to act in line with the best theory of a legal system. See Ronald Dworkin, *Taking Rights Seriously*

to favour one interpretation of the law over others.[9] This is not to say that 'everything goes' when it comes to judicial reasoning. Courts will have to justify their reasoning using accepted 'criteria of interpretation' and show that it fits the existing body of law.[10] Yet, whereas these criteria 'guide' their interpretation, they do not 'determine' their decisions.[11]

Both *Pringle* and *Gauweiler* are 'hard' cases.[12] As much as the meaning of key provisions of the single currency's original set-up were clear to economists, at least the stability hawks amongst them, their *legal* meaning was far from obvious. As with so many rules, they are at times 'vague', 'ambiguous' and 'imprecise', necessitating interpretation.[13] This chapter examines how the Court used the interpretative space at its disposal in both cases to reconcile the change in the Founding Contract with Union law. All the great interpretative challenges it encountered in this regard ultimately turned around the question whether and to what extent the law can accommodate the currency

(Duckworth 1977) 105 (and more generally ch 4 on 'hard cases'). As MacCormick (n 3) 255 points out, however, Dworkin's Hercules can 'construct' such a theory 'only at the far end of an infinite regress of theories. Dworkin has landed his Hercules in Augean stables in which the dung cannot run out, because it is in infinite supply'. See also Beck, *The Legal Reasoning of the Court of Justice* (n 3) 19-20, 23, 118.

9 Some, such as Robert Alexy, argue that not only first-order justification is of a deductive nature, but that this equally applies to (elements of) second-order justification. See generally Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (OUP 1989). For discussion see Feteris (n 5) 90-91, 92-118. Still, as Gunnar Beck explains, the uncertainty that exists at the level of first-order justification resurfaces at the level of second-order justification, not least because there is no 'meta-rule' or method that exhaustively determines which interpretative criteria should govern a certain interpretative question and which criteria take precedence over others in particular situations. See Beck, *The Legal Reasoning of the Court of Justice* (n 3) 129, 133-137.

10 In the words of MacCormick, a court cannot let itself be guided solely by 'consequentialist' considerations, but will have to show its ruling is 'consistent' and 'coherent' with the law that is already in place. See MacCormick (n 3) 108-128. See also text to n 6 (conclusion). For an analysis and overview of the European Court's generally accepted 'criteria of interpretation' see Bengoetxea, *The Legal Reasoning of the European Court of Justice* (n 4) 227-262; Beck, *The Legal Reasoning of the Court of Justice* (n 3) 187-230; Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing) 89-176.

11 See Bengoetxea, *The Legal Reasoning of the European Court of Justice* (n 4) 230.

12 Strictly speaking, one could argue that any case reaching the Court under the preliminary ruling procedure is 'hard' given that on the basis of the *CILFIT* doctrine national courts do not need to refer a question when it is 'materially identical' to one that has already been the object of a preliminary ruling respectively when previous judgments of the Court have 'already dealt with the point of law in question' (*acte éclairé*) or when there is no 'reasonable doubt as to the manner in which the question raised is to be resolved' (*acte clair*). See Case 283/81 *CILFIT* [1982] ECLI:EU:C:1982:335, paras 12-20. However, this does not necessarily mean that they will also be hard for the Court. See Joxerramon Bengoetxea, 'Book Review Essay: Text and Telos in the European Court of Justice – Four Recent Takes on the Legal Reasoning of the ECJ' (2015) 11 EuConst 184, 189.

13 For a discussion of such sources of (linguistic) vagueness see Beck, *The Legal Reasoning of the Court of Justice* (n 3) 52ff.

union's new stability conception, characterised by the need to protect financial stability. Its reasoning is imbued by that need.

Following the sequence in which the cases were brought before the Court, this chapter will first discuss *Pringle* before turning its attention to *Gauweiler*. It will show that just as in practice central bank intervention had been dependent on prior action by the member states, so too the Court's review in both cases was inextricably linked; its interpretation of the no-bailout clause and 136(3) TFEU had a great bearing on its reading of the mandate of the Bank and the prohibition on monetary financing. Most of the Court's reasoning on these issues is sound or, where it is strained, could have been justified through the use of different arguments. At one point in its reading of the no-bailout clause, however, the Court encounters the limits of what can be justified through legal reasoning alone.

Finally, a remark about the scope of analysis. Both *Pringle* and *Gauweiler* are rich judgments, touching on a host of interesting legal issues. *Pringle*, for example, sheds light on whether and to what extent the member states can make use of Union institutions when cooperating outside the Union legal order.[14] *Gauweiler*, in its turn, raises interesting questions concerning the Court's ability to review central bank decisions the content of which has only been published in a press release and has not yet been incorporated in a formal legal act.[15] It also provides insight into the relation between the *Bundesverfassungsgericht* and the Court and the hierarchy between them.[16] Exciting as they are, and notwithstanding the many interesting commentaries on them in the literature, this chapter will only discuss them if and to the extent necessary for the analysis of how the Court dealt with the core provisions of the single currency's original stability set-up in its attempt to reconcile the Founding Contract with the Treaties.

14 See on this issue Bruno De Witte and Thomas Beukers, 'The Court of Justice approves the creation of the European Stability Mechanism outside the Union legal order: *Pringle*' (2013) 50 CML Rev 805, 843-847; Stanislav Adam and Francisco Javier Mena Parras, 'The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on *Pringle*' (2013) 38 EL Rev 848, 861-864; Steve Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions Outside the EU Legal Framework' (2013) 9 EuConst 37; Paul Craig, '*Pringle* and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 EuConst 263.

15 See on this point Vestert Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*' (2016) 53 CML Rev 139, 167-169; Takis Tridimas and Napoleon Xanthoulis, 'A Legal Analysis of the *Gauweiler* Case: Between Monetary Policy and Constitutional Conflict' (2016) 23 MJ 17, 21-23.

16 See on this point Borger, 'Outright Monetary Transactions' (n 15) 165-167; Paul Craig and Menelaos Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) 41 EL Rev 4, 14-17; Matthias Goldmann, 'Constitutional Pluralism as Mutually Assured Discretion' (2016) 23 MJ 119; Daniel R Kelemen, 'On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone' (2016) 23 MJ 136; Tridimas and Xanthoulis (n 15) 35-37.

2 Accommodating the shift in solidarity

2.1 The boundary between economic and monetary policy

The Decision of the European Council to insert a third paragraph into Article 136 TFEU to clear the way for the ESM had been a German desire.[17] Berlin wanted to take away constitutional concerns about a violation of the no-bailout clause following the shift towards positive solidarity with the establishment of the 'Greek' facility and the EFSF in spring 2010.[18] At the same time, it was precisely this Decision that allowed these concerns to find their way into national courtrooms. As both the amending Decision and the ESM Treaty itself required ratification and/or approval at national level, all across the Union legal challenges were brought against these instruments. In as many as five member states – Germany, Estonia, Poland, Ireland and Austria –[19] they even reached the highest courts.[20]

Of these five challenges, the one before the *Bundesverfassungsgericht* held the public spotlight. As the entry into force of the ESM Treaty was dependent

17 European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L 91/1 (European Council Decision 2011/199). See also text to n 308 (ch 5).

18 Both assistance facilities were challenged before the *BVerfG*, which contributed to the constitutional concerns. See BVerfG, 2 BvR 987/10 of 7 September 2011 (BVerfG *Greek Loan Facility and EFSF*). The *BVerfG* only approved of the facilities on 7 September 2011, long after the European Council had decided to amend Article 136 TFEU and establish the ESM. See also text to n 187 (ch 7).

19 Supreme Court of Estonia, Judgment of 12 July 2012, Case No 3-4-1-6-12; Supreme Court of Ireland, *Thomas Pringle v The Government of Ireland, Ireland and the Attorney General* [2012] IESC 47; Austrian Constitutional Court, Judgment of 16 March 2013, Case No SV 2/12-18; Polish Constitutional Tribunal, Judgment of 26 June 2013, Case No K 33/12; BVerfG, 2BvR 1390/12 12 September 2012 (BVerfG *ESM and TSCG summary review*); BVerfG, 2 BvR 1390/12 of 18 March 2014 (BVerfG *ESM and TSCG principal proceedings*). For an overview of (some of) these judgments see Samo Bardutzky and Elaine Fahey, 'Who Got to Adjudicate the EU's Financial crisis and Why? Judicial Review of the Legal Instruments of the Eurozone' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 348-352. See also Federico Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective' (2014) 32 Berkeley Journal of International Law 64. Concerning the *BVerfG*'s judgments see also text to n 187 (ch 7).

20 In some member states lower courts had to review challenges against the ESM Treaty and/or European Council Decision 2011/199. An example forms the Netherlands, where the Dutch member of parliament and leader of the Freedom Party ('PVV') brought an unsuccessful challenge against the ESM Treaty in summary proceedings. See Rechtbank Den Haag 1 June 2012, Case No 419556, KG ZA 12-523, LJN: BW7242). For analysis see Stefaan Van den Bogaert, Tom de Gans and Johan van de Gronden, 'National report: The Netherlands' in Ulla Neergaard, Catherine Jacqueson and Jens Hartig Danielsen (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (XXVI FIDE Congress Publications Vol 1, 2014) 482-483.

on its ratification by Contracting Parties representing no less than 90% of the total subscriptions to its authorised capital stock,[21] a negative ruling from the German constitutional court could prevent the permanent rescue mechanism from becoming operational.[22] But whilst markets and the media were holding their breath in anticipation of the verdict from Karlsruhe, it was the Irish supreme court that made the most interesting move from a legal point of view: it referred preliminary questions to the Court.

Ireland's ratification of the ESM Treaty coincided with that of the Treaty on Stability Coordination and Governance.[23] And it was the latter that gained most attention in the public debate. As the fiscal treaty is not a measure of Union law but exists separately from the Union Treaties, it could not benefit from Article 29 of the Irish constitution according to which measures necessitated by Union membership enjoy 'automatic compatibility' with it.[24] The Government therefore decided to put it to a popular vote in a referendum on 31 May 2012.[25] No such referendum, however, was considered necessary for the ESM; an act of parliament sufficed for the ratification of the amending Decision of the European Council as well as the ESM Treaty.[26]

But not everyone agreed with this course of action, not even within the Irish parliament itself. Thomas Pringle, a left-wing independent member of the Irish lower house (*Dáil*), did consider a referendum necessary and even went to court for it.[27] His argument was based not only on Irish constitutional law, but also explicitly on the law of the Union.[28] In his view, the European Council Decision amending Article 136 TFEU violated the Union Treaties and,

21 Art 48(1) ESM Treaty and Annex II. See also text to n 330 (ch 5).

22 As discussed in ch 5, this scenario eventually did not materialise as the German constitutional court refused to issue a temporary injunction, allowing ratification of the ESM Treaty provided it would be ensured that Germany's payment obligations could not exceed the amount of €190bn that was specifically mentioned in the Treaty. Moreover, none of the provisions on the inviolability of documents, professional secrecy and immunities of persons should bar detailed information of the *Bundestag*. See text to n 332 (ch 5).

23 For analysis of the TSCG see text to n 93 (ch 6).

24 Stephen Coutts, *Constitutional Change Through Euro Crisis Law: Ireland* (EUI 2014) <eurocrisislaw.eui.eu/ireland/> accessed 2 May 2017.

25 The referendum was passed by a majority of 60% of the votes cast. For more detail see Coutts (n 24).

26 European Council Decision 2011/199 was ratified through the European Communities Act 2012. This act amends the European Communities Act 1972, including Decision 2011/199 in the definition of 'Treaties governing the European Union'. The ESM Treaty was ratified through the ESM Act 2012. For more information on these acts of ratification see Coutts (n 24).

27 For an analysis of whether Irish constitutional law indeed necessitated such a referendum see Gavin Barrett, 'The Treaty Amendment on the European Stability Mechanism: Does it Require a Referendum in Ireland?' (2011) 29 Irish Law Times 152.

28 For an overview of the arguments relating to Union law see High Court of Ireland, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] IEHC 296, para 18 (High Court of Ireland *Pringle*).

by extension, the Irish constitution, not in the least because it had been improperly adopted on the basis of the simplified revision procedure in Article 48(6) TEU.[29] As the third paragraph it sought to insert into Article 136 TFEU envisaged an alteration of Union competences, the Decision should have been adopted on the basis of the ordinary revision procedure in Articles 48(2)-(5) TEU. Moreover, the ESM Treaty itself was contrary to Union law and, consequently, the Irish constitution.[30] According to Mr Pringle the Treaty violated Union law for various reasons, yet his most fundamental objection was that it ran counter to the very essence of the single currency's legal set-up and the stability conception it embodied. It contradicted the system of market discipline that the prohibitions on monetary financing and bail-out sought to install and circumvented the limited assistance option in Article 122(2) TFEU.

At first instance, Justice Marty Laffoy in the High Court rejected most of Mr Pringle's claims in a judgment rendered on 17 July 2012.[31] But on appeal, on 31 July 2012, the Irish Supreme Court decided to refer the case to Luxembourg to obtain greater clarity on its Union law dimension.[32] Three questions were of particular concern to it, each of them relating to the change in the Contract and the shift in solidarity it had caused.[33] The first asked whether the amending Decision of the European Council was valid in as far as it was adopted on the basis of the simplified revision procedure in Article 48(6) TEU. The second sought guidance on the interpretation of several provisions of primary Union law with a view to ascertaining whether and to what extent they allowed the members of the currency union to conclude and ratify the ESM Treaty. Of particular interest were those provisions that made up the core of the single currency's original stability set-up, especially the ban on bail-out in Article 125 TFEU and the assistance clause in Article 122(2) TFEU.[34] The third question, finally, concerned the legal nature of the third paragraph that the European Council Decision aimed to insert into Article 136 TFEU and asked whether conclusion and ratification of the ESM Treaty was dependent on the Decision's entry into force.

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29 High Court of Ireland *Pringle* (n 28) para 152.

30 High Court of Ireland *Pringle* (n 28) paras 58-90.

31 High Court of Ireland *Pringle* (n 28).

32 In as far as Mr Pringle's claims concerning Irish constitutional law as well as his request for a temporary injunction preventing Irish ratification of the ESM Treaty pending the outcome of the preliminary ruling procedure were concerned, the Supreme Court dismissed them in a judgment on 19 October 2012. See Supreme Court of Ireland, *Thomas Pringle v Government of Ireland, Ireland and the Attorney General* [2012] IESC 47.

33 For an overview of the questions see *Pringle* (n 1) para 28.

34 Besides these two provisions, the Supreme Court sought guidance on Arts 2, 3, 4(3) and 13 TEU, Arts 2(3), 3(1)(c), 3(2), 119, 120, 121, 123, 126 and 127 TFEU, as well as Art 47 of the Charter. This study will only discuss the Court's interpretation of these provisions in as far as they relate to the shift in solidarity and the questions it raises about Arts 122(2) and 125 TFEU.

At first sight, the answer to the first question seemed straightforward. Article 136(3) TFEU clearly belongs to Title III of the TFEU on the Union's internal policies and does not increase the competences of the Union as it speaks about the possibility for *member states* to establish a permanent mechanism.[35] The European Council could therefore resort to the simplified revision procedure in Article 48(6) TEU to adopt the amendment. At a closer look, however, the matter was more complicated. Mr Pringle asserted that even though Article 136(3) TFEU formed part of Title III, it had an impact on provisions located elsewhere in the Treaties. More specifically, it affected the classification of monetary policy in Article 3(1)(c) TFEU as an exclusive Union competence by allowing states to establish a stability mechanism for the currency union. In so doing, its legal significance reached beyond Title III and the European Council should therefore have adopted it on the basis of the ordinary revision procedure.[36]

The claim that the European Council Decision amounted to an '*implied*' amendment to the division of competences between the Union and the member states forced the Court to pronounce on the policy nature of the stability mechanism mentioned by Article 136(3) TFEU. *De facto* this meant it had to identify the policy nature of the ESM.[37] After all, only when the latter belonged to the realm of monetary policy was there force in the argument that the Decision went beyond amending Title III of the TFEU. Identifying this policy nature was far from easy, however, since the Treaties define neither monetary nor economic policy. The absence of a clear definition is by no means a characteristic peculiar to the set-up of the single currency; Union law is renowned for its many undefined, 'open-ended' concepts.[38] In such situations the Court has to venture beyond the text and look to context and purpose to interpret

35 See in this regard also *Pringle* (n 1) paras 46, 71-75.

36 This argument finds support in academic writings. According to Steve Peers, for example, 'Neither can Article 48(6) be used to make *implied* amendments to other parts of the Treaty (or to other primary law texts). So it would not be possible to use Article 48(6) to adopt an amendment which is nominally placed in Part Three TFEU but which de facto amends other primary law provisions'. See Steve Peers, 'The Future of EU Treaty Amendments' (2012) 31 YEL 17, 38. See also De Witte and Beukers (n 14) 827.

37 Later in its judgment, when analysing the conformity of the ESM Treaty with Union law, the Court would also specifically address the policy nature of the ESM (instead of the mechanism envisaged by European Council Decision 2011/199). See *Pringle* (n 1) paras 95-98.

38 See in this regard Albors Llorens, 'The European Court of Justice, More than a Teleological Court' (1999-2000) 2 CYEL 373, 377-378. See also Anthony Arnull, *The European Union and Its Court of Justice* (2nd edn, OUP 2006) 612-613; Koen Lenaerts and Jose A Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013-2014) 20 Colum J Eur L 3, 16.

the law. In fact, in this case the Court resorted to both to determine the policy nature of Article 136(3) TFEU.[39]

Although the Treaties contain no definition of monetary policy, they do set out its objectives and instruments. In the view of the Court both are relevant for determining the policy nature of the mechanism envisaged by Article 136(3) TFEU, yet the objective takes centre stage.[40] Whereas the primary objective of the Union's monetary policy is to maintain price stability, that of the mechanism in Article 136(3) TFEU is to safeguard the stability of the euro area as a whole. This latter objective, according to the Court, is 'clearly distinct' from the objective of price stability and shows the envisaged mechanism falls within the realm of economic policy.[41] Although the stability of the euro area 'may have repercussions' on the stability of the single currency, 'an economic policy measure cannot be treated as equivalent to a monetary one for the mere reason it may have indirect effects on the stability of the euro'.[42]

The presumption flowing from the objective that the mechanism in Article 136(3) TFEU constitutes economic policy, the Court reasoned, is further strengthened by its instruments. Article 136(3) TFEU states that the mechanism may grant financial assistance, which clearly does not fall within the realm of monetary policy.[43] The provision's ties to other elements of Union law further underline its economic policy character.[44] Whereas the single currency's original legal set-up, in particular the prohibitions on bail-out and monetary financing, was largely 'preventive' in nature, aiming to avoid public debt crises, the mechanism in Article 136(3) TFEU intends to manage such crises if they 'nonetheless arise'.[45]

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39 This fusion of different methods of interpretation reflects the fact that they cannot be clearly separated in practice. When the Court resorts to the 'technical meaning' of a word instead of its ordinary one, for example, textual interpretation approaches a schematic reading of the law. Schematic and purposive criteria of interpretation may similarly overlap. When the Court identifies the purpose of a certain piece of legislation by having regard to its formulation by the legislator in its preamble, one could qualify it both as a purposive and schematic interpretation. See Giulio Itzcovich, 'The Interpretation of Community Law by the European Court of Justice' (2009) 10 GLJ 537, 550-552, 555-556; Beck, *The Legal Reasoning of the Court of Justice* (n 3) 214-215, 314-315.

40 *Pringle* (n 1) paras 53, 55.

41 *Pringle* (n 1) para 56.

42 *Pringle* (n 1) para 56. For an analysis of how this statement on effects fits the Court's 'centre of gravity approach' to identifying a measure's correct legal basis see Armin Steinbach, 'Effect-Based Analysis in the Court's Jurisprudence on the Euro Crisis' (2017) 42 EL Rev 254, 261-262.

43 *Pringle* (n 1) para 57.

44 *Pringle* (n 1) paras 58-59.

45 *Pringle* (n 1) para 59. For a broader analysis of how this fits the currency union's transition from a 'rule-based' to a 'policy-based' enterprise and how the Court has approved of this in *Pringle* see Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 127-129.

The finding that Article 136(3) TFEU belongs to economic policy would have sufficed for the conclusion that the amendment contained in the Decision of the European Council was restricted to Title III of the TFEU and had therefore been validly adopted on the basis of the simplified revision procedure.[46] Yet, as the Irish Supreme Court also wanted to know whether the Decision encroached on the Union's competences in the area of economic policy the Court continued its analysis. Articles 2(2) and 5(1) TFEU, it argued, limit the Union's role in this area to 'the adoption of coordinating measures' and there is no 'specific' Union power to establish a mechanism such as the one in Article 136(3) TFEU.[47] It admitted that Article 122(2) TFEU allows the Union to grant assistance to a member state which is coping with difficulties caused by 'exceptional occurrences beyond its control', yet it argued that this provision only covers '*ad hoc* financial assistance' and does not provide a legal basis for a mechanism that is permanent and whose objective is to safeguard the financial stability of the euro area as a whole.[48]

This part of the Court's reasoning seems unnecessary. Article 122(2) TFEU is not affected by the Decision of the European Council, and even if it were it is not clear how that would have a bearing on Treaty provisions outside Title III, for example those on the division and nature of competences in Title I.[49] The reasoning is not only unnecessary, it is also strained. For one thing, the Union's role in the area of economic policy is not restricted to that of coordination, if only because the assistance clause in Article 122(2) TFEU itself cannot be qualified as 'coordinative'.[50] More fundamentally, as will be explained below when looking specifically at this provision, the statement that this clause does not provide a legal basis for the stability mechanism envisaged by the European Council Decision due to its permanency and objective is too radical and unnecessarily casts doubt on the legality of the EFSM and its assistance operations.[51]

The Court's analysis of the policy nature of Article 136(3) TFEU shows how an act's perception in practice may differ from its classification under the law. Few who observed the succession of events back in 2010 would hold Article 136(3) TFEU nor the ESM Treaty to be acts of monetary policy. In fact, after

46 *Pringle* (n 1) para 63.

47 *Pringle* (n 1) para 64. Concerning the possibility to establish a mechanism like the one envisaged by European Council Decision 2011/199 on the basis of the flexibility clause in Art 352 TFEU, the Court limited its analyses to saying that the Union had 'not used its powers' under that provision and the latter does not impose 'any obligation to act' in this regard. See *Pringle* (n 1) para 67. For the argument that the ESM could have been established on the basis of that provision see Chris Koedooder, 'The *Pringle* Judgment: Economic and/or Monetary Policy?' (2013-2014) 37 Fordham Int'l LJ 111, 142.

48 *Pringle* (n 1) paras 64-65.

49 See also De Witte and Beukers (n 14) 834 (fn 103).

50 See also De Witte and Beukers (n 14) 833.

51 See text to n 141 (ch 7).

political leaders had initiated the change in the Contract on 11 February 2010 the European Central Bank waited with using its monetary policy tools to stem market unrest so as to put pressure on the member states to act first.[52] *They* had to demonstrate their commitment to safeguard financial stability through acts of positive solidarity before it could step in. The ESM is the permanent successor to the temporary rescue facilities that the states established in response.

But this clarity in practice between economic and monetary policy was of little help to the Court. It could not make the distinction between the two policy areas based on how this is played out in practice but had to ground it in the law. The latter does not give a definition of monetary nor economic policy, and for good reason. Economists already have a hard time understanding the law's endeavour to draw the boundary between the two, let alone attempts to do so by legal definition. But the absence of such a definition left the Court no option other than to base its reasoning on systemic-teleological arguments, causing it to engage directly with the single currency's new stability conception.[53] Paul Craig has criticised the way in which it did so. He argues that the Court's classification of financial stability as being 'clearly distinct' from price stability is no more than 'legal formalism' as the financial stability of the euro area 'is surely a condition precedent to price stability within that area'.[54] Yet, the Court is not denying that the two are related. On the contrary, precisely because of the fact that they are distinct yet highly connected objectives it stated that an economic policy measure should not be equated with a monetary one for the sole reason it may have indirect effects on price stability.

A different question is to what extent the objective of financial stability can be pursued by the Bank. In *Pringle* the Court did not provide an answer, and there was also no need to as it was not asked by the referring court. But in *Gauweiler* the Court would have to settle the issue, with its reasoning in *Pringle* coming to figure as a source of inspiration.

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52 See text to n 12 (ch 6).

53 Note that AG Kokott argued, by referring to Art 2(1) TFEU, that the member states may also act in areas of exclusive Union competence as long as they are empowered by the Union to do so. It was therefore not necessary to pronounce on the policy nature of Art 136(3) TFEU given that even if it were to have a monetary policy nature it would not amount to a substantive alteration of Arts 2(1) and 3(1) TFEU. See *Pringle* (n 1), View of AG Kokott, paras 48-53. However, this reasoning seems doubtful, especially in view of the fact that the Treaties first and foremost regulate the division of competences between the Union and the member states. On the basis of the AG's reasoning member states could flood the Treaties with 'empowering' clauses whilst formally leaving the exclusive nature of a Union competence intact.

54 Paul Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 MJ 3, 5.

2.2 The Court's struggle with history

2.2.1 Reading the ban on bail-out

When determining the policy nature of Article 136(3) TFEU, the Court stated that it 'complements' the single currency's economic policy set-up, including the no-bailout clause in Article 125 TFEU.[55] Whereas the latter is preventive in nature, focused on mitigating the risk of public debt crises, Article 136(3) TFEU covers situations in which such crises nonetheless occur. This is undoubtedly correct: Article 136(3) TFEU addresses an important policy need by indicating that the members of the currency union can establish a permanent stability mechanism. That still leaves open the question *how* it addresses this gap. Does it do so by providing an exception to the prohibition on bail-out or does it merely make explicit an assistance possibility that has always stood at the disposal of member states? This issue was at the very heart of the Court's quest to accommodate the shift towards positive solidarity, which it therefore had no choice but to address when assessing the ESM Treaty's conformity with Union law.

The relation between the ESM and the ban on bail-out illustrates how sometimes the meaning of a legal provision is unveiled only under the pressure of events. Prior to the crisis, the interpretation of the ban offered by most lawyers did not significantly exceed its general understanding among policy makers or economists; it sought to promote fiscal discipline by subjecting states to the logic of the market in order to allow the Bank to deliver price stability.[56] But the crisis forced lawyers to sharpen their reading of the ban and discover the true limits to financial assistance operations. The many different interpretations taken may be subdivided into three general categories: those defending a *literal*, a *systemic-teleological* and an *ultima ratio* reading.[57] To understand each of them, Article 125 TFEU deserves to be quoted in full:

> 'The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local, or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.'

55 *Pringle* (n 1) para 58. See also text to n 44 (ch 7).

56 René Smits, for example, argued that 'the rationale for this prohibition is ... the application of full market rigour to the activities of Governments'. See René Smits, *The European Central Bank: Institutional Aspects* (Kluwer Law International 1997) 77. See also text to n 274 (ch 3).

57 See Vestert Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) 14 GLJ 113, 129-131.

Those defending a *literal* interpretation focused on the ban's text and hence advocated a narrow reading.[58] Article 125 TFEU refers to the impossibility for the Union or member states to 'be liable for' or 'assume' the commitments of another state. This implies that it only rules out that the Union and its member states support a debtor state by guaranteeing or assuming its financial commitments to its creditors. Or to put it in the words of Advocate General Kokott: '[I]n addition to the exclusion of liability….The prohibition on assumption of commitments therefore prevents a Member State….from taking upon itself the commitments of another Member State, either by discharging the commitment by making payment or by itself becoming the obligated party subject to the commitment, which it then has to discharge at a late date'.[59]

For most lawyers, however, such a literal reading was too restrictive in nature and contrary to the *context* and *purpose* of the ban. It had been included to promote fiscal prudence by subjecting states to the logic of the market. Together with the prohibitions on monetary financing and privileged access to financial institutions in Articles 123 and 124 TFEU, it seeks to ensure that states can only (re)finance their debt on the markets under conditions similar to private entities.[60] Any form of assistance – not just the provision of guarantees or the direct assumption of commitments – has the capacity to weaken that discipline as it signals to both markets and states themselves that it is not only a state's individual capacity, but that of the Union and other member states which ultimately determines whether and to what extent financial commitments will be honoured. In its purest form, and except for 'mutual financial guarantees for the joint execution of a specific project' which are explicitly excluded by Article 125 TFEU, a systemic-teleological reading of the ban therefore rules out any form of assistance.[61]

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58 See eg Christoph Herrmann, 'Griechische Tragödie: der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone' (2010) 21 EuZW 413, 415. According to Herrmann: 'Art. 125I AEUV beinhaltet gerade kein generelles Verbot einer freiwilligen Hilfeleistung der Mitgliedstaaten füreinander. Primär verbietet Art. 125I AEUV nur den Eintritt in die Schuldbeziehung zwischen einem Mitgliedstaat und seinem Gläubiger'.

59 *Pringle* (n 1), View of AG Kokott, paras 119, 121.

60 See text to n 274 (ch 3).

61 See eg Kurt Fassbender, 'Der europäische "Stabilisierungsmechanismus" im Lichte von Unionsrecht und deutschem Verfassungsrecht' (2010) 29 NVwZ 799, 800; Lothar Knopp, 'Griechenland-Nothilfe auf dem verfassungsrechtlichen Prüfstand' (2010) 29 NVwZ 1777, 1779-1780; Hanno Kube and Ekkehart Reimer, 'Grenzes der Europäischen Stabilisierungsmechanismus' (2010) 63 NJW 1911, 1912-1914; Kai Hentschelmann, 'Finanzhilfen im Lichte der No Bailout-Klausel: Eigenverantwortung und Solidarität in der Währungsunion' (2011) 46 EuR 282, 286, 290-294; Hannes Hofmeister, 'To Bail Out or not to Bail Out?: Legal Aspects of the Greek Crisis' (2010-2011) 13 CYEL 113, 119-123; Matthias Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 CML Rev 1777, 1785-1787; Rainer Palmstorfer, 'To Bail Out or Not to Bail Out? The Current Framework of Financial Assistance for Euro Area Member States Measured Against the Requirements of EU Primary Law' (2012) 37 EL Rev 771, 775-779. According to the latter author (p 778): '[A]rt. 125(1) TFEU

Even though widely supported, this interpretation also met with objections as it would lead to the perverse result that the Union and its states are barred from granting assistance even if what is at stake is the very survival of their currency union. Some argued that fiscal prudence was not the no-bailout clause's sole, let alone its highest purpose. By subjecting states to the logic of the market and inducing them to budgetary discipline it ultimately seeks to safeguard the single currency.[62] If applying the prohibition with full rigour would not only lead to the default of the distressed state but, as a result of contagion and panic, would threaten to tear down that currency, the prohibition should gave way to this higher purpose.[63] Financial assistance should then, as *ultima ratio*, be possible.

The Court could not freely choose between these different interpretations. Unlike the scholars defending them, it could not afford to be guided solely by concerns of a legal '*fit*'.[64] Its reading of the no-bailout clause *had* to allow for the establishment of the ESM.[65] And it had to do so in a way that respected the change in the Founding Contract. This meant that not just any judgment permissive of the ESM would suffice. It had to be one that reflected the fact that the member states had jointly committed themselves to a move away from the no-bailout clause, yet only in a limited, carefully circumscribed way. It had to be one that reflected Article 136(3) TFEU.

But even an interpretation of the no-bailout clause that reflected this provision would not suffice in itself. After all, its entry into force on 1 May 2013 marked the end of a process in which the members of the currency union had already been shaping, and acting on, their new Contract.[66] The ESM Treaty had already seen the light of day on 27 September 2012, right after Karlsruhe had given the green light for the initiative.[67] And even before that, since May 2010, states had provided hundreds of billions of financial assistance to their distressed partners, first through the 'Greek' facility and shortly thereafter

covers and bans all forms of financial assistance given by the European Union or through a Member State to another'.

62 See Ulrich Häde, 'Die europäische Währungsunion in der internationalen Finanzkrise: An den Grenzen europäischer Solidarität' (2010) 45 EuR 854, 859-862.

63 Häde, 'Die europäische Währungsunion in der internationalen Finanzkrise' (n 62) 859-862.

64 Legal 'fit' refers to Dworkin's use of the term to indicate the requirement that in legal interpretation one should aim for consistency with existing law. See eg Ronald Dworkin, *Justice in Robes* (HUP 2006) 15.

65 See text to n 2 (ch 7) and the conclusion to this study. See also Martin Nettesheim, 'Europarechtskonformität des Europäischen Stabilitätsmechanismus' (2013) 66 NJW 14, 16 who notes about the Court's reasoning in this respect: 'Die diesbezüglichen Passagen lesen sich, als ob sie nicht aus dem AEUV heraus entwickelt, sonder zur Rechtfertigung des ESM passgenau zugeschnitten wurden. Sie nehmen damit einen tendenziell apologetischen Grundzug an'.

66 See also text to n 17ff (ch 5).

67 See text to n 336 (ch 5).

through the EFSF. If the legality of these constructs up to the entry into force of Article 136(3) TFEU was to be beyond doubt, this provision could not form an exception to the ban on bail-out. As the European Council had stressed in December 2010: it had to be declaratory in nature, 'not modifying Article 125 TFEU'.[68]

The Court managed to succeed in this task by adopting a reading of Article 125 TFEU that combined elements of all three suggested interpretations.[69] It began by pointing out that, judging from the prohibition's text which only speaks about liability for, or assumption of, commitments, it does not seek to rule out all forms of assistance.[70] The Court then supported this textual analysis with two systemic arguments. One concerned the prohibition on monetary financing in Article 123 TFEU.[71] Compared to its wording, which rules out 'overdraft facilities or any other type of credit facility', Article 125 TFEU is formulated in a much 'stricter' way and hence does not intend to prohibit all forms of assistance.[72] The other argument drew inspiration from the assistance clause in Article 122(2) TFEU. If Article 125 TFEU had contained an all-encompassing prohibition, this clause would have had to indicate that it 'derogated' from it.[73] Especially this second argument is unconvincing, as will be explained more fully below when reflecting on Article 122(2) TFEU and the EFSM.[74]

Having identified the lower limit to assistance operations through textual reasoning, the Court then resorted to its purpose to find out which kinds of financial support it does allow. It identified this purpose, quite exceptionally, with the help of the legislative history of the Treaty of Maastricht.[75] The Court rarely makes use of the *travaux préparatoires*,[76] if only because during the first

68 European Council, Conclusions, 28-29 October, Brussels, para 2. See also text to n 289 (ch 5).

69 In the run-up to the Court's judgment several academic contributions had already suggested a reading of the no-bailout clause consisting of several interpretative arguments. See eg Alberto De Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance' (2012) 49 CML Rev 1613, 1625-1630; Phoebus Athanassiou, 'Of Past Measures and Future Plans for Europe's Exit From the Sovereign Debt Crisis: What is Legally Possible (and What is Not)' (2011) 36 EL Rev 558, 560-565. For a careful analysis of the Court's interpretation see also Ben Smulders and Jean-Paul Keppenne, 'Artikel 125' in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015) Rn 13-16.

70 *Pringle* (n 1) para 130.

71 *Pringle* (n 1) paras 131-132.

72 *Pringle* (n 1) para 132.

73 *Pringle* (n 1) para 131.

74 See text to n 141 (ch 7).

75 *Pringle* (n 1) para 135.

76 The situation is different as far as historical interpretation in relation to secondary Union law is concerned. Although here too historical interpretation is still not as common as other methods of interpretation, the Court displays an increasing tendency to resort to this interpretative instrument in relation to secondary legislation. See in this regard Soren

35 years those of the Treaty of Rome were accessible only to a limited extent.[77] This time, however, it did adopt an originalist interpretation by referring to the draft treaty that the Commission had tabled in December 1990.[78] Although this draft represents the views of only one participant in the negotiations,[79] one moreover that would not become a party to the Treaty, the Court posited nothing less than a truism when distilling from it the legislative intention to ensure that states follow a sound budgetary policy by subjecting them to 'the logic of the market'.[80] This led it to conclude that Article 125 TFEU rules out assistance that weakens the 'incentive' of the benefiting state 'to conduct a sound budgetary policy'.[81] But such budgetary prudence is not an end in itself, the Court then reasoned, yet 'contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'.[82]

Schønberg and Karin Frick, 'Finishing, Refining, Polishing: On the Use of Travaux Préparatoires as an Aid to the Interpretation of Community Legislation' (2003) 28 EL Rev 149.

77 Lenaerts and Gutiérrez-Fons (n 38) 23. AG Mayras stated in this regard in *Reyners*: '[T]he States, signatories to the Treaty of Rome have themselves excluded all recourse to the preparatory work and it is very doubtful whether the declarations and reservations, inconsistent as they are, which have been relied upon can be regarded as constituting true preparatory work'. See Case 2/74 *Reyners* [1974] ECLI:EU:C:1974:68, View of AG Mayras, 657,666. The fact that the *travaux préparatoires* of the Treaty of Rome have not been officially published does not mean they are completely unavailable. See on this point Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012) 256 (fn 43).

78 Commission, 'Communication of 21 August 1990 on economic and monetary union' SEC(90)1659 final (Bulletin of the European Communities 1991, supplement 2/91) 24; Commission, *Commentary to the Draft Treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union* (Bulletin of the European Communities, supplement 2/91) 54 (Commentary to the Commission EMU-Draft Treaty). The Court's reliance in *Pringle* on the draft of just a single negotiating party can be contrasted with its more inclusive approach in *Inuit*. In that case it had to decide on the meaning of the notion 'regulatory act' in Art 263(4) TFEU. Prior to its inclusion into the TFEU this notion had already been incorporated into the (failed) Constitution for Europe (Article III-365). The Court could therefore have recourse to the publicly accessible workings of the European Convention to interpret the notion. More specifically, it could rely on a cover note of the Praesidium explaining the choice for the wording 'regulatory act' instead of 'act of general application' when discussing proposals for amending Art 263 TFEU. See Case C-583/11 *P Inuit* [2013] ECLI:EU:C:2013:625, paras 58-59. See also Lenaerts and Gutiérrez-Fons (n 38) 25-27.

79 For an analysis of the drafts of key players at the negotiating table, notably France and Germany, see ch 3.

80 *Pringle* (n 1) para 135.

81 *Pringle* (n 1) para 136.

82 *Pringle* (n 1) para 135. One may wonder why the Court specifically defines this higher objective as 'financial stability *of the monetary union*'. Given that Art 125 TFEU applies to all member states it is far from obvious why it should not allow for assistance targeting financial stability concerns outside the currency union or that of the Union as a whole. See also De Witte and Beukers (n 14) 841.

The Court subsequently made two crucial observations that synthesised the interpretive elements it had set out and defined the material scope of the ban on bailout. It first stated:

> '[T]he activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.'[83]

Immediately thereafter, it stipulated:

> 'Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.'[84]

Defined in this way, the ban not only matches Article 136(3) TFEU, it also avoids classifying the latter as an exception by indicating that assistance granted if indispensable to safeguard financial stability and subject to strict conditions falls outside its scope.

The ESM Treaty itself is in conformity with this reading of the ban. Concerning the lower limit to assistance, the Court reasoned that none of the instruments at the disposal of the ESM have as a result that it will 'act as guarantor of the debts of the recipient member state', which 'remains responsible to its creditors for its financial commitments'.[85] Neither credit lines granted on the basis of Article 14 ESM Treaty nor loans issued in accordance with Articles 15 and 16 free the recipient state from its commitments.[86] On the contrary, they give rise to a 'new debt', owed by that state to the ESM, which has to be repaid to the mechanism in line with Article 13(6) ESM Treaty.[87] Bond market intervention also stays clear of the lower limit to assistance. As regards primary market purchases on the basis of Article 18 ESM Treaty, the Court pointed out that this is 'comparable to the granting of a loan'.[88] And whereas in the case of secondary market purchases the ESM pays a price to the holder of a bond,

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83 *Pringle* (n 1) para 136.

84 *Pringle* (n 1) para 137.

85 *Pringle* (n 1) para 138. See also Athanassiou (n 69) 561: 'To lend is not to assume any obligations, as loans are "assets" (unlike obligations, which are "liabilities")'. For a discussion on to what extent this lower limit to assistance bars creditor member states from consenting to a 'haircut' on loans to a beneficiary state see Steinbach, 'The Haircut of Public Creditors Under EU Law' (2016) 12 EuConst 223, 231-232 (arguing that it rules out such a haircut); Alexander Thiele, '(No) Haircut for Hellas? (2016) 12 EuConst 520, 530 (arguing that it does not rule out such a haircut).

86 *Pringle* (n 1) para 139

87 *Pringle* (n 1) para 139. See also *Pringle* (n 1), View of AG Kokott, para 122.

88 *Pringle* (n 1) para 140.

such payment does not amount to an assumption of responsibility for the debt of the benefiting state.[89]

In relation to the purposes that Article 125 TFEU pursues, the Court drew attention to the fact that Articles 3 and 12(1) ESM Treaty provide that assistance may only be granted 'subject to strict conditionality' suited to the instrument used, thereby *inter alia* ensuring that the recipient state pursues 'a sound budgetary policy'.[90] These provisions also prescribe that the ESM cannot be activated as soon as a state is threatened with market foreclosure. They qualify assistance as *ultima ratio*, possible only 'if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States'.[91]

The Court's interpretation of the ban on bailout not only paved the way for the ESM, it also ensured that the conclusion and ratification of its founding Treaty was not dependent on the prior entry into force of Article 136(3) TFEU. The latter only has a declaratory value, confirming 'the existence of a power possessed by the Member States'.[92] This interpretation also provided an implicit seal of approval to all intergovernmental assistance operations following the change in the Contract initiated on 11 February 2010.[93] What is more, given that the scope of Article 125 TFEU is not restricted to members of the currency union, it also allows member states with their own currency to participate in assistance operations,[94] like the United Kingdom, Denmark and Sweden did in relation to Ireland in the fall of 2010.[95]

2.2.2 *The struggle with history*

What to think of this reading? The fact that the Court based it on a blend of textual, systematic and purposive considerations should come as no surprise. In many legal systems higher courts tend to reason cumulatively by resorting

89 *Pringle* (n 1) para 141. Kaarlo Tuori and Klaus Tuori challenge the Court's reasoning on this point, arguing that secondary market purchases 'certainly amount to discharging the issuing state's commitment to the former creditor and thus imply ... violation of the explicit prohibition on bailouts'. See Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (CUP 2014) 126. This view seems incorrect, however. The state that issues a bond has certain payment commitments *under that bond* which remain in place when it is purchased by the ESM from the original creditor.

90 *Pringle* (n 1) paras 142-143.

91 *Pringle* (n 1) para 142.

92 *Pringle* (n 1) paras 184-185.

93 See also Borger, 'The ESM and the European Court's Predicament' (n 57) 132.

94 Note in this regard that Recital 9 and Art 38 ESM Treaty make clear that member states outside the currency union can participate in assistance operations alongside the ESM on an *ad hoc* basis. See also Art 5(4) and 6(3) ESM Treaty.

95 See n 194 (ch 5).

to all three interpretative criteria and the Court is no exception in this regard.[96] This does not mean that the particular cumulative reasoning it employed to elucidate the meaning of the no-bailout clause is above all criticism. Gunnar Beck, for example, has fiercely criticised the Court's literal interpretation of the ban for confining its scope to 'the narrowest of circumstances', that is: situations in which a state's debt is legally 'assigned' to another state as a result of which the latter becomes responsible for that debt.[97] 'As the purpose of such an assignment can easily be achieved by other means, be it the establishment of a stability mechanism or rescue fund, or other multi- or bilateral aid packages', Beck argues, 'the Court's seemingly literal interpretation renders the prohibition in art. 125 TFEU effectively meaningless – a *reductio ad absurdum*, for if as the Court evidently implies, art. 125 was never intended to prevent the transfer of financial risk between euro zone governments, then the so-called "no-bailout" clause does little or nothing to restrict the mutualisation of debt within the euro zone.'[98]

More problematic even, according to Beck, is that the Court did not adhere to its own minimalist textual reading when it declared Article 25 of the ESM Treaty on coverage of losses to be compatible with the ban on bailout.[99] The second paragraph of this Article states that if an ESM member 'fails' to meet payments in the context of capital calls, a 'revised call' will be made to all other members in order to make sure that the ESM receives the envisaged amount of paid-in capital. Only when the non-paying member eventually 'settles its debt to the ESM', will the 'excess capital' be returned to the other members.[100] According to the Court this system is compatible with Article 125 TFEU as other ESM members 'do not act as guarantors of the debt of the defaulting ESM

96 See for an analysis Robert Summers and Michele Taruffo, 'Interpretation and Comparative Analysis' in Neil MacCormick and Robert Summers (eds), *Interpreting Statutes: A Comparative Study* (Dartmouth Publishing Company 1991) 461ff as well as Neil MacCormick and Robert Summers, 'Interpretation and Justification' in Neil MacCormick and Robert Summers (eds), *Interpreting Statutes: A Comparative Study* (Darmouth Publishing Company 1991) 511ff. Gunnar Beck, *The Legal Reasoning of the Court of Justice* (n 3) 312-313 points out, however, that contrary to most higher courts the Court of Justice tends to accord less weight to linguistic arguments. Whereas such arguments enjoy 'presumptive status' in most legal systems, the Court 'may readily consider systemic and purposive arguments even where the wording is tolerably clear'.

97 Gunnar Beck, 'The Court of Justice, Legal Reasoning and the *Pringle* Case' (2014) 39 EL Rev 234, 243. Subscribing to Beck's critique as far as the Court's reasoning is concerned is Michelle Everson, 'An Exercise in Legal Honesty: Rewriting the Court of Justice and the *Bundesverfassungsgericht*' (2015) 21 ELJ 474, 477-480. Voicing similar critique on the Court's literal interpretation is Jonathan Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) 14 GLJ 169, 181-182.

98 Beck, 'The Court of Justice, Legal Reasoning and the *Pringle* case' (n 97) 243.

99 Beck, 'The Court of Justice, Legal Reasoning and the *Pringle* case' (n 97) 244.

100 Art 25(3) ESM Treaty.

member', which 'remains bound to pay its part of the capital'.[101] To Beck, however, the increased capital calls constitute precisely the assumption of liability that the ban prohibits.

Beck's critique is unjustified. First let us consider the issue of capital calls. Although it pushes the boundaries of the no-bailout clause, Article 25 ESM Treaty does not violate it. As Advocate General Kokott argued, every ESM member only needs to comply with its own payment obligations under the ESM Treaty.[102] A disregard of these obligations has as a result that others have to pay up an increased amount of their own capital contribution. They do not, however, assume the commitments of the defaulting member, which the latter remains bound to fulfil as Articles 25(2) and (3) ESM Treaty make clear. What *would* amount to a violation of Article 125 TFEU is a mechanism that is based on joint and several liability. Further shifts in the direction of positive solidarity, like a fiscal capacity for the currency union with common debt issuance proposed in the 'five presidents report' of 2015, would therefore be unlawful if and to the extent it makes use of joint and several liability of states.[103]

More fundamentally, the Court's literal reading is not overly limited, as Beck contends. In fact, it is precisely a reasoning such as his that is strained as it implicitly reads into Article 125 TFEU an objective – a ban on transfers of financial risk – that is spelled out nowhere in the text.[104] What would have been problematic is if the Court's interpretation had only consisted of its literal strand.[105] Then, the ban would indeed be devoid of much purpose, only covering a particular legal construct which can easily be circumvented by other means. But the Court did not do that as it also took into account the ban's purpose. Contrary to Beck, however, it made that purposive reasoning explicit instead of trying to present it as a literal one justified on the basis of text alone.

At the same time, it is precisely on the point of objectives that the Court did run into trouble. At first, it correctly identified the purpose of Article 125 TFEU as the maintenance of fiscal discipline by ensuring that member states remain subject to the logic of the market. Immediately thereafter, however, it concluded that financial assistance is therefore allowed provided it is subject to

101 *Pringle* (n 1) paras 144-145.
102 *Pringle* (n 1), View of AG Kokott, paras 161-165.
103 See text to n 356 (ch 5).
104 See Paul Craig, '*Pringle* and the Nature of Legal Reasoning' (2014) 21 MJ 205, 218.
105 Interestingly, in her View on the case AG Kokott argued in favour of an interpretation of Art 125 TFEU consisting only of a literal strand. She was against a purposive interpretation of the no-bailout clause, covering assistance that has the *effect* of discharging the commitments of a state, as it would go against 'basic structural principles' of the Union 'that rank as of at least equal importance to Article 125 TFEU', in particular the protection of the sovereignty of the states and the solidarity that exists between them. See *Pringle* (n 1), View of AG Kokott, paras 136-144. This appeal to sovereignty and solidarity will be examined in more detail in the conclusion to this study. See text to n 89 (conclusion).

strict conditions that force the benefiting state to pursue a sound budgetary policy. This is nothing less than a jump over objectives.[106] When the leaders of the currency union decided on the main parameters of assistance operations in early 2010, they tried to stay as close as possible to the ban on bailout by demanding that any assistance had to be accompanied by strict conditionality.[107] But this cannot conceal the fact that this latter instrument of public discipline differs fundamentally from that of market discipline originally relied on by Article 125 TFEU. Certainly, both aim for budgetary prudence, yet their *modus operandi* vary greatly. Whereas markets operate at a preventive stage, trying to induce states to budgetary prudence through risk premia that match their fiscal record, conditionality usually comes into play *ex post*, once states can no longer (re)finance their debt on the market and are dependent on financial assistance from their partners.[108]

Stability-minded states, especially Germany, realised this when they were negotiating the modalities for assistance and that is why in addition to conditionality they initially insisted on non-concessional interest rates for any loans distressed states would receive.[109] Throughout the crisis, however, these interest rates have been lowered several times,[110] as a result of which assistance mechanisms like the ESM differ in nature from the Bank's bond purchases, as will be explained more fully below.[111] But in theory one could ensure that financial assistance pays tribute to the instrument of market discipline, at least in situations where the markets find themselves in a bad equilibrium and the official interest rate charged by them exceeds what can be explained by a state's fundamental economic condition.[112] In these situations assistance could be offered at interest rates that would prevail on the market under a good equilibrium. In its judgment, however, the Court did not pay attention to market discipline. It did mention that Article 20(1) ESM Treaty demands that assistance includes an appropriate 'margin',[113] yet it failed to operationalise that finding, instead limiting itself to the conclusion that financial assistance

106 Borger, 'The ESM and the European Court's Predicament' (n 57) 135-137; Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (n 54) 8-9.

107 See text to n 85 (ch 5).

108 Note, however, that some of the ESM's assistance instruments can be used at a preventive stage, especially precautionary credit lines which aim to promote sound economic policies by supporting states before they face major difficulties accessing the capital markets. See Art 14 ESM Treaty and ESM Guideline on Precautionary Financial Assistance.

109 See text to n 69 and n 89 (ch 5).

110 See eg text to n 199 (ch 5).

111 See text to n 229, n 244 and n 325 (ch 7).

112 On the issue of 'multiple equilibria' see text to n 27 (ch 4).

113 *Pringle* (n 1) para 139. This notion is less demanding than non-concessional interest rates, and the ESM's pricing policy may therefore be below market rates. For the ESM's current pricing policy see ESM Guideline on Pricing Policy.

falls outside the scope of Article 125 TFEU when it is subject to strict conditionality.[114]

Some have argued that this jump over objectives is not problematic as the Court's reasoning is ultimately tied to the *ultima ratio* consideration of financial stability. Take Kaarlo Tuori and Klaus Tuori. In their view the Court has confirmed that Article 125 TFEU has a 'double *telos*'.[115] Its primary objective, bringing about budgetary prudence through the markets, 'contributes' to the higher objective of financial stability.[116] It shares this latter objective with the ESM which, contrary to the ban on bailout, does not relate to 'crisis prevention' but 'crisis resolution'.[117] Due to this commonality in objectives, the ban should not stand in the way of financial assistance if indispensable to safeguard financial stability. But too much leeway for financial stability is not called for either, Tuori and Tuori argue. Realising that assistance is allowed to safeguard this stability, states may lapse into fiscal profligacy, which may endanger not only the ban's primary objective of budgetary prudence but also, and 'paradoxically', the higher objective of financial stability itself.[118] To prevent that scenario from unfolding, and to reconcile the ban's primary and secondary objectives, assistance to safeguard financial stability needs to be subject to 'strict conditionality'.[119]

This reasoning has its appeal, yet it does require regarding financial stability as an objective that has always been pursued by the ban on bailout.[120] It is the issue of financial stability, then, that puts most strain on the reasoning

114 For a different view see Steinbach, 'The "Haircut" of Public Creditors under EU Law' (n 85) 228 (arguing that the Court has effectively turned the presence of an 'appropriate margin' into a requirement for the granting of assistance).

115 Tuori and Tuori (n 89) 127-134. The term 'double telos' comes from Paul Craig. Contrary, to Tuori and Tuori, however, Craig argues that the Court should have opted (solely) for this double teology argument, considering that the Court's current reasoning does create problems from the perspective of market discipline. See Craig, '*Pringle*: Legal Reasoning, Text, Purpose and Teleology' (n 54) 9-11; Craig, 'Pringle and the Nature of Legal Reasoning' (n 104) 219-220. Note, however, that such a reading would restrict the scope of Art 125 TFEU beyond what the European Council agreed in Decision 2011/199. Moreover, this reasoning necessitates the problematic conclusion that financial stability has always been an objective of the no-bailout clause. See on this point text to n 120 (ch 7).

116 Tuori and Tuori (n 89) 129.

117 Tuori and Tuori (n 89) 129.

118 Tuori and Tuori (n 89) 130.

119 Tuori and Tuori (n 89) 130.

120 Tuori and Tuori themselves also struggle with that finding. Whilst they argue that the no-bailout clause has a double telos, they also classify the objective of financial stability of the euro area as a whole as a 'legal innovation' and as 'an important modification of the European macroeconomic constitution'. See Tuori and Tuori (n 89) 131-133. See also Christian Joerges, 'Brother Can You Paradigm?' (2014) 12 ICON 769, 783-785 (discussing the problematic nature of this innovation from the perspective of ordoliberalism).

of the Court.[121] If one were to identify an objective besides budgetary discipline that has inspired the no-bailout clause ever since the currency union's inception, it would have to be price stability.[122] To argue, as the Court did, that financial stability too has come within the purview of Article 125 TFEU from the start is to play with history.[123] Neither a '*subjective*' originalist interpretation – concentrating on the intention of the drafters of the Union Treaties – nor an '*objective*' one – focusing on the general perception of a provision in the legal system or political society when it was created – can justify such a conclusion.[124] To put it in the words of Pisany-Ferry:

> 'When thinking about possible threats that EMU should be defended against, policymakers in Maastricht looked back at past experience and identified two: inflation and fiscal laxity. Financial instability was at the time perceived as being of minor importance and, even though currency unification was expected to reinforce financial integration, no provision was envisaged to deal with the effects of private credit booms-and-busts.'[125]

It is only as a result of the crisis that one discovered the true importance of financial stability for the currency union and the inability of its original legal set-up to address it.[126] Or as Philippine Cour-Thimann and Bernhard Winkler argue: 'The concept of "ensuring the financial stability of the *euro area as a whole*" had to be "invented" in the crisis'.[127] Telling is the difference in justification for the Stability and Growth Pact put forward by the legislator in the preambles to its founding Regulations of 1997 and those amending it in 2011.[128] Whereas the former state that the Pact 'is based on the objective of sound government finances as a means of strengthening the conditions for

121 Not everyone, however, considers this element of the Court's reasoning to be problematic. See eg Adam and Parras (n 14) 861. See also Daniel Thym and Matthias Wendel, 'Préserver le respect du droit dans la crise: la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt *Pringle*)' (2012) CDE 733, 746; Daniel Thym, 'Anmerkung: Europarechtskonformität des Euro-Rettungsschirms' (2013) 60 Juristenzeitung 259, 262.

122 For a discussion of the stability focus of the single currency's original legal-setup and the predominance attributed to price stability as a policy goal see text to n 112ff (ch 3).

123 See also Borger, 'The ESM and the European Court's Predicament' (n 57) 134-135, 138-139; De Witte and Beukers (n 14) 840-843.

124 On the distinction between 'subjective' and 'objective' originalist interpretation see Conway (n 77) 20-21.

125 Jean Pisany-Ferry, 'The Known Unknowns and Unknown Unknowns of EMU' (Bruegel Policy Contribution No 18, October 2012) 7.

126 See text to n 258 (ch 4).

127 Philippine Cour-Thimann and Bernhard Winkler, 'The ECB's non-standard monetary policy measures: the role of institutional factors and financial structure' (2012) 28 Oxf Rev Econ Policy 765, 767.

128 Tuori and Tuori (n 89) 132-133 (n 21).

price stability and for strong sustainable growth',[129] the latter reconstrues the objective of sound finances as a means for attaining 'price stability and sustainable growth *underpinned by financial stability*'.[130]

To be clear: this study has no objection to purposive reasoning as such.[131] Rather, the difficulty is the absence of a proper legal basis for the argument that the objective of financial stability has always been pursued by Article 125 TFEU. Under international law, where the will of the contracting parties is key, the interpreter has to take into account the behaviour of the parties after treaty conclusion.[132] Article 31(2) of the Vienna Convention on the law of treaties stipulates that he or she needs to consider 'any subsequent agreement between the parties regarding the interpretation of the treaty' and 'any subsequent practice in the application of the treaty which establishes the agreement for the parties regarding its interpretation'.[133] On that basis, one could argue that the declaration that political leaders adopted on 11 February 2010 and the actions of positive solidarity to which it has given rise allow for the objective of financial stability to be read into Article 125 TFEU.

The problem is, however, that the Union Treaties are more than an agreement between sovereign states.[134] Ever since *Costa/ENEL* the Court has taken the view that the Union Treaties form an 'independent source of law',[135] that is not simply an '*expression*' of state sovereignty but also a '*limit*' to it.[136] This

129 Recital 1 of Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L 209/1 (unamended); Recital 2 of Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/6 (unamended).

130 Recital 3 of Regulation (EU) 1175/2011 of the European Parliament and the Council of 16 November 2011 amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L 306/12 (emphasis added); Recital 3 of Council Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L 306/33 (emphasis added).

131 For scholars that do consider the Court too 'activist', and as straying away from the text of the Treaties too much and reasoning too teleologically, at least during certain periods of European integration, see eg Hjalte Rasmussen, 'Towards a Normative Theory of Interpretation of Community Law' (1992) University of Chicago Legal Forum 135; Trevor C Hartley, 'The European Court, judicial objectivity and the constitution of the European Union' (1996) 112 LQR 95; Conway (n 77).

132 For an analysis of 'informal change' in international organizations like the United Nations, WTO and Council of Europe through the lens of the 'subsequent practice' of contracting parties see Julian Arato, 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' (2013) 38 Yale J Int'l L 289.

133 Art 31(2) Vienna Convention on the Law of Treaties, Vienna, 23 May 1969.

134 Itzcovich (n 39) 540-544.

135 Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66, 593.

136 Itzcovich (n 39) 542-543 (emphasis added). Or in the words of Tom Eijsbouts and Monica Claes: 'The member states are at once masters and servants of the Union, and they are many things in between'. See WT Eijsbouts and Monica Claes, 'From Confederacy to Convoy: Thoughts About the Finality of the Union and its Member States' (2010) 6 EuConst 1, 2.

does not mean that it should have disapproved of the assistance operations prior to the entry into force of Article 136(3) TFEU nor that the declaration of 11 February 2010 has no relevance in this respect. In fact, this declaration is of central importance. As the concluding chapter to this study will show, however, its importance requires a different, deeper explanation, one that goes beyond treating it simply as an agreement regarding the interpretation of a treaty in line with the Vienna Convention.[137]

Finally, what about a further widening of the currency union's stability conception towards *political* stability?[138] Would that be compatible with the no-bailout clause? It could be, in theory. Whereas the purpose of the ESM is to safeguard financial stability,[139] Article 136(3) TFEU merely speaks of 'stability of the euro area as a whole.' That wording is broad enough to cover assistance targeting political stability. However, in *Pringle* as well as in *Gauweiler* the Court has equated the purpose stated in Article 136(3) TFEU with the narrower one of the ESM.[140] Without a change of position, therefore, assistance granted explicitly for the benefit of political stability requires a fresh treaty amendment. Unless, of course, the Court were to reason that this kind of stability has also always formed an objective of the no-bailout clause.

2.3 Union assistance and the deal of Cameron

Although *Pringle* principally concerned the shift towards positive solidarity among the member states, it also shed light on the Union's follow up on the change in the Founding Contract. While giving the green light for the ESM and Article 136(3) TFEU, the Court also pronounced on the relation between Articles 122(2) and 125 TFEU as well as the former's suitability to serve as a legal basis for a mechanism like the ESM. The two issues are separate, yet interrelated and the way the Court deals with them casts doubt on the legality of the *EFSM*. To fully grasp its reasoning it is again important to cite Article 122(2) TFEU in full:

137 See text to n 83 (conclusion).

138 See also text to n 358 (ch 5).

139 Art 3 ESM Treaty.

140 See eg *Pringle* (n 1) para 65 in which the Court states that the mechanism envisaged by European Council Decision 2011/199 (which only relates to the introduction of Article 136(3) into the TFEU) is to safeguard *financial stability*. See also paras 136 and 184 of the same judgment in which the Court reasons that Art 136(3) TFEU confirms that member states may only grant assistance when this is indispensable for the safeguarding of financial stability. As far as *Gauweiler* is concerned, see *Gauweiler* (n 2) para 64 in which the Court states that ESM interventions (which are focused on financial stability on the basis of Art 3 ESM Treaty) are intended to safeguard *the stability of the euro area*.

> 'Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal of the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.'

First, the relation between this assistance clause and the ban on bailout. To recall: as a subsidiary argument to justify the conclusion that this ban does not prohibit any form of assistance, the Court reasoned that if it had done so, Article 122(2) TFEU would have had to state that it derogated from the ban.[141] This reasoning is unconvincing. Article 122(2) TFEU does not tell us anything about the scope of the ban on bailout other than that the Union has the competence to grant assistance when a state is coping, or is threatened, with difficulties caused by 'exceptional occurrences beyond its control'.[142] Its wording, in particular the absence of a reference to any exceptions, gives no indication about the reach of the ban in relation to assistance granted by member states.

What, then, to make of the relationship between Articles 122(2) and 125 TFEU? Since both are provisions of primary law and a systemic understanding of the law requires them to be in conformity with each other,[143] and given that there is no indication of any formal hierarchy, their scope of application can only be discovered through a balancing exercise. The legislative history of the Treaty of Maastricht may serve as a starting point. As chapter 3 explained, during the negotiations the Commission as well as southern states pressed for a 'counterweight' to the ban on bailout.[144] In its draft treaty of December 1990 the Commission proposed establishing a financial support mechanism that could be activated in the event of 'serious economic problems' or when 'economic convergence required a particular effort on the part of the Community' alongside national strategies of adjustment.[145] For stability-minded states, however, this went too far, as a result of which the more limited assistance clause in Article 122(2) TFEU was eventually settled for.[146] Even

141 See text to n 73 (ch 7).

142 Borger, 'The ESM and the European Court's Predicament' (n 57) 133-134.

143 See in this regard also Declaration on Article 100 of the Treaty establishing the European Community [2001] OJ LC 80/78: 'The Conference recalls that decisions regarding financial assistance, *such as are provided for in Article 100 and are compatible with the "no-bailout" rule laid down in Article 103*, must comply with…' (emphasis added). See also De Gregorio Merino (n 69) 1633.

144 See text to n 292 (ch 3).

145 Commentary to the Commission EMU-Draft Treaty (n 78) 54.

146 Jörn Pipkorn, 'Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union' (1994) 31 CML Rev 263, 273; Ulrich Häde 'Haushaltsdisziplin und Solidarität im Zeichen der Finanzkrise' (2009) 20 EuZW 399, 402-403; Jean-Victor Louis, 'Guest Editorial: The No-Bailout Clause and Rescue Packages' (2010) 47 CML Rev (2010) 971, 982-983; De Gregorio Merino (n 69) 1633.

though this clause is not formulated as an exception to the ban, when balancing it against Article 125 TFEU it should therefore nonetheless be construed as one. Its constitutive requirements should be interpreted with this in mind.[147]

The first of these, flowing from the text itself, is that assistance should be granted under 'conditions'. Similar to the role of conditionality under Article 136(3) TFEU, it ensures *inter alia* that assistance granted by the Union does not lead to a lessening of the budgetary prudence that Article 125 TFEU seeks to achieve.[148] The EFSM complies with that requirement as its assistance needs to be subject to conditions.[149] What about the second requirement, that assistance can only be granted when a state faces (a threat of) difficulties caused by 'exceptional occurrences beyond its control'? Budgetary problems as such, even if they cause a state to face exclusion from the capital markets, will not qualify as exceptional. If they did, the prohibitions in Articles 123-126 TFEU aiming at budgetary prudence would lose most of their meaning.[150] But what if a state's budgetary problems spring from a systemic crisis that threatens the financial stability of the currency union at large? It is at this point that the reasoning of the Court casts doubt on the legality of the EFSM.

According to the Court, a mechanism like the *ESM* cannot be based on Article 122(2) TFEU precisely because it aims to safeguard the financial stability of the euro area as a whole, instead of only targeting a specific member state.[151] It thereby implicitly throws doubt upon the *EFSM* whose focus also extends beyond the single state as it similarly seeks to safeguard financial stability, be it not that of the currency union but that of the Union at large.[152] Yet, this should not preclude recourse to Article 122(2) TFEU. Assistance based on this provision can perfectly address financial stability concerns beyond the state as long as every time it is granted the Council verifies whether the recipient state is (also) facing an exceptional occurrence beyond its control.[153]

147 Louis, 'The No-Bailout Clause and Rescue Packages' (n 146) 983.

148 Louis, 'The No-Bailout Clause and Rescue Packages' (n 146) 985.

149 Arts 3(3)(b) and 3(4)(b) Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1 (Reg 407/2010).

150 Louis, 'The No-Bailout Clause and Rescue Packages' (n 146) 984; Häde, 'Die europäische Währungsunion in der internationalen Finanzkrise' (n 62) 857; De Gregorio Merino (n 69) 1634.

151 See text to n 48 (ch 7).

152 Art 1 Reg 407/2010. See also text to n 164 (ch 5).

153 Borger, 'The ESM and the European Court's Predicament' (n 57) 128-129; Bruno De Witte and Thomas Beukers argue that the real issue is whether a stability mechanism only concerning the members of the currency union can be based on Art 122(2) TFEU. They argue, however, that this issue can be solved by combining the use of Art 122(2) TFEU with Art 326 TFEU on enhanced cooperation. See De Witte and Beukers (n 14) 833-834. One can even doubt, however, whether such recourse to enhanced cooperation is necessary. There seems to be no reason why Art 122(2) TFEU cannot be used to support several member states that are simultaneously hit by an economic shock instead of just targeting a single state. Moreover, the fact that Art 122(2) TFEU would be used as a legal basis for

Some have argued in this regard that only member states whose financial distress largely results from contagion and panic should qualify for assistance from the Union.[154] Those whose problems are mainly due to fiscal negligence, on the contrary, should not qualify for assistance as their problems were foreseeable and manageable in advance and thus not 'beyond control'. At least Greece, whose predicament is to a great extent grounded in financial mismanagement, should therefore not receive assistance from the EFSM.[155] What makes this reasoning problematic is that it links the requirement that the exceptional occurrence needs to be beyond control to the past instead of the present. Greece's distress is the product of years of fiscal mismanagement, yet it is also inherently bound up with the global financial crisis that affected Europe in 2008, and it was clearly beyond control when it materialised late 2009.

The exceptionality requirement similarly does not rule out using Article 122(2) TFEU for a stability mechanism of a permanent nature, as the Court reasoned.[156] Strictly speaking, this issue is only of relevance for the *ESM*, not the *EFSM*. After all, Article 9 of the latter's founding Regulation prescribes that within six months of its entry into force, and 'where appropriate every six months thereafter', the Commission has to prepare a report verifying whether the exceptional occurrence that justified its adoption still persists.[157] Then again, the Commission has only issued such a report once, after the first six months in November 2010, and since then it has never repeated the exercise.[158] However, the Court's temporal argument is beside the point. As Jean-Victor Louis has made clear, 'exceptional' means 'temporary'.[159] Permanent capital flows giving rise to a transfer union would therefore go against Article 122(2) TFEU.[160] A mechanism's permanency as such, however, is not problematic as long as the assistance it grants is of a temporary nature. The ESM satisfies that requirement: from the condition that it can only grant assistance if

a mechanism focusing on the currency union does not mean that states not (yet) using the single currency no longer qualify for assistance on the basis of this provision.

154 See eg Häde, 'Die europäische Währungsunion in der internationalen Finanzkrise' (n 62) 857-858; Ruffert (n 61) 1787; Palmstorfer (n 61) 780-781. For a different view see Athanassiou (n 69) 565.

155 See eg Ruffert (n 61) 1787; Palmstorfer (n 61) 781

156 In support of the Court's view see De Gregorio Merino (n 69) 1634-1635.

157 Art 9(1) Reg 407/2010.

158 See Commission, 'Communication of 30 November 2010 to the Council and the Economic and Financial Committee on the European Financial Stabilisation Mechanism' COM (2010) 713 final. In its report the Commission concluded that 'the exceptional events and circumstances that justified the adoption of Regulation no. 407/2010 establishing a European financial stabilization mechanism still exist and that the Mechanism should, therefore, be maintained' (without emphasis).

159 Louis, 'The No-Bailout Clause and Rescue Packages' (n 146) 985.

160 Borger, 'The ESM and the European Court's Predicament' (n 57) 128; De Witte and Beukers (n 14) 833.

indispensable to safeguard financial stability one can conclude that assistance operations need to cease the moment such a threat has disappeared.[161]

The Court has never had to clarify its position on the EFSM. After its adoption the mechanism became the subject of an action for annulment on the basis of Article 263 TFEU, but this was declared inadmissible in June 2011 for lack of direct concern.[162] And after the ESM had entered into force, the legality of the EFSM was considered of theoretical interest only as it was no longer supposed to enter into new assistance operations.[163] But things changed in the summer of 2015 when Greece had to receive a third assistance package.[164] On 16 July the Eurogroup decided in principle to agree to Greece's request for new support from the ESM.[165] The negotiations on this third assistance programme would take time, however, especially as trust in the Greek government had reached historic lows due to the decision of Prime Minister Tsipras earlier that month to put the conditionality linked to the final tranche of the second loan package to a popular vote.[166] Such time was not available to Greece which had to repay the European Central Bank only days later and clear its arrears with the IMF shortly thereafter. It needed a bridge loan of around €7bn to keep its head above water.[167] Yet, the options for granting such a loan at short notice were few and far between. The most realistic one, it seemed, was to use the EFSM.

When the British Prime Minister Cameron heard about the idea in the run-up to 16 July he was furious. Back in 2010, under pressure of Eurosceptic voices within and outside his own party, he had been at pains to ensure that his state would no longer participate – via the Union budget – in euro area rescue operations once the ESM became operational.[168] When the European Council had launched the simplified revision procedure to insert Article 136(3) into the TFEU at its meeting of 16 and 17 December 2010, it had therefore decided that Article 122(2) TFEU would 'no longer be needed' to safeguard the currency union's financial stability.[169] The heads of state – but not Commission President Barrosso who had wanted to keep open the possibility to resort to the rescue clause (!) – had even agreed that it 'should not be used'

161 Borger, 'The ESM and the European Court's Predicament' (n 57) 128; Koedooder (n 47) 141.
162 See Case T-259/10 *Thomas Ax v Council* [2011] ECLI:EU:T:2011:274, paras 17-25.
163 European Council, Conclusions, Brussels, 16-17 December 2010, para 1. See also text to n 314 (ch 5).
164 See also text to n 360 (ch 5).
165 Eurogroup statement on Greece, Brussels, 16 July 2015.
166 See also text to n 360 (ch 5).
167 'EU officials plan short term loans for Greece' *Financial Times (FT.Com)* (14 July 2015).
168 See text to n 310 (ch 5).
169 European Council, Conclusions, Brussels, 16-17 December 2010, para 1.

for such purposes.[170] Both decisions had subsequently been incorporated in the preamble to the amending Decision of the European Council.[171]

Cameron had considered the deal to be legally watertight. He had even used it to convince the British electorate of his ability to defend British interests at European level. Over the course of his first term as prime minister the pressure of Eurosceptics had intensified enormously, up to the extent that he had tied his re-election in 2015 to the promise of holding a referendum on membership of the Union. Prior to that referendum, he would negotiate a new 'settlement' for the position of the United Kingdom in the Union. In the Conservative party's electoral programme Cameron had bragged about the deal in support of his negotiating skills, saying: 'We took Britain out of euro-zone bailouts, including for Greece – the first ever return of power from Brussels'.[172] No wonder, therefore, that he sought to avoid a renewed use of the EFSM, fearing this would play into the hands of the 'Brexit' campaign,[173] which could claim that any 'settlement' short of treaty change would be meaningless.[174]

The truth is, of course, that the deal on Article 122(2) TFEU was not watertight, let alone that it amounted to anything like a 'return of power'. Only belonging to the preamble to the Decision of the European Council, it simply was not legally binding. Interestingly, its legal significance did increase as a result of *Pringle*. In its judgment, the Court referred to the deal in support of its contention that Article 122(2) TFEU does not provide a legal basis for a stability mechanism like the ESM due to its objectives and permanent nature.[175] The *European Council*, it argued, had emphasised in its Decision that 'Article 122(2) TFEU does not constitute an appropriate legal basis' for such a mechanism.[176] It thereby bestowed the deal with an authority it did not deserve. National leaders had reached agreement on this issue, not the European Council as President Barroso had deliberately withheld his consent on this point. The European Council had only referred to the agreement it in its Decision on Article 136(3) TFEU.

170 European Council, Conclusions, Brussels, 16-17 December 2010, para 1.
171 Recital 4 European Council Decision 2011/199.
172 Conservatives, 'Strong leadership, a clear economic plan, a brighter, more secure future' (Conservative Party Manifesto 2015) 72.
173 Alex Barker, Peter Spiegel and George Parker, 'Cameron frustrated by bailout manoeuvre; Greece fallout' *Financial Times* (16 July 2015).
174 This also explains why the heads of state and government were so adamant on stressing the 'legal bindingness' of the decision on the new settlement for the UK that they adopted at the European Council meeting of 18 and 19 February 2016. See European Council, Conclusions, Brussels, 18-19 February 2016, para 3(iii).
175 *Pringle* (n 1) para 65.
176 *Pringle* (n 1) para 65.

Politically, the tension surrounding the bridge loan for Greece was eventually taken away through a compromise. The EFSM would provide the loan,[177] yet on the condition that its founding Regulation would be amended so as to make sure that states outside the currency union would incur no financial liability for euro area assistance operations.[178] As a result, Article 3(2)(a) of this Regulation now determines that where the beneficiary state is a member of the currency union, the granting of Union assistance 'shall be conditional upon the enactment of legally binding provisions….guaranteeing that Member States whose currency is not the euro are immediately and fully compensated for any liability they may incur as a result of any failure by the beneficiary Member State to repay the financial assistance…'. This compromise could not, however, take away the legal uncertainty about the soundness of the EFSM that has arisen as a result of the Court's judgment in *Pringle*.

3 Approving central bank action

3.1 Weidmann's replay

When Jens Weidmann took over from Axel Weber as president of the *Bundesbank* in May 2011, it was widely believed that a less dogmatic central banker had taken charge.[179] Since 2006 Weidmann had been Merkel's chief economic advisor and he had been closely involved with the initiatives and actions the chancellor had taken to rescue the currency union. This man, it was thought, would combine the traditional stability-oriented views of the *Bundesbank* with a more pragmatic approach to the currency union's needs in extraordinary times.[180] Soon, however, it became clear he was just as sceptical of the attempts of the European Central Bank to stabilise government bond markets as his predecessor had been. Like Weber had done in relation to the Securities

177 Council Implementing Decision (EU) 2015/1181 of 17 July 2015 on granting short-term financial assistance to Greece [2015] OJ L 192/15. See also Council Implementing Decision (EU) 2016/542 of 17 July 2015 on granting short-term financial assistance to Greece (2015/1181) [2016] OJ L 91/22. Note that since entry into force of the Two-Pack the conditionality linked to EFSM assistance is not only approved through a Council implementing decision on the EFSM's founding Reg 407/2010, but also through a decision based on Reg 472/2013 containing a cross-reference to the former decision.

178 See Joint declaration by the Commission and the Council on the use of the EFSM, Brussels, 16 July 2015, 10994/15. The amendment has been adopted with Council Regulation (EU) 2015/1360 of 4 August 2015 amending Regulation (EU) 407/2010 establishing a European financial stabilisation mechanism [2015] OJ L 210/1.

179 Weidmann was appointed *Bundesbank* president in February 2011. He started his new job in May 2011. See also James Shotter, 'Merkel appoints central bank chief' *Financial Times* (17 February 2011).

180 See also Neil Irwin *The Alchemists: Three Central Bankers and a World on Fire* (Penguin Books 2014) 381.

Markets Programme in May 2010, Weidmann voted against its successor programme Outright Monetary Transactions in September 2012.[181] There was one crucial respect in which Weidmann did differ from his predecessor: he did not leave when he was outvoted in the Bank's Governing Council.

While Weidmann stayed on, he did not compromise on his views. He publicly criticised the new bond programme for what he saw as monetary financing. In a speech given shortly after the launch of the programme at a colloquium of the Institute for Bank-Historical Research, he even associated it with Goethe's *Faust*. Goethe, Weidmann, argued, pictured the modern economy and the use of paper money as 'a continuation of alchemy by other means'.[182] He called to mind the 'money creation' scene in Act One of the Second Part of *Faust* in which Mephisoteles, dressed up as a jester, approaches the emperor, whose royal coffers are empty, telling him: 'In this world, what isn't lacking, somewhere, though? Sometimes it's this, or that: here's what's missing's gold'.[183] The emperor then says: 'I'm tired of the eternal if and when: We're short of gold, well fine, so fetch some then',[184] to which Memphisoteles responds: 'I'll fetch you what you wish, and I'll fetch more'.[185] He subsequently floods the royal court with paper money. The economy initially flourishes and the state profits, yet all this soon gives way to severe inflation. *Faust*, Weidmann told his public, showed early on the importance of a central bank with a 'well-functioning, stability oriented compass' that can resist the 'temptation' of creating 'an unlimited amount of money out of thin air'.[186] It was an implicit sneer at his colleagues at the European Central Bank.

For a central banker to criticise colleagues so vocally is highly unusual, yet Weidmann certainly took it to another level when the bond programme was challenged before Germany's constitutional court.

The challenge formed part of a stream of cases on the response of the Union and its member states to the debt crisis.[187] To a great extent these cases focused on two issues. The first concerns '*ultra vires*' control. When the *Bundesverfassungsgericht* ruled on the compatibility of the Treaty of Maastricht with the German constitution in 1993 it claimed the right to examine whether and to what extent Union institutions had acted outside their competences in the

181 See in this regard text to n 200 (ch 6).

182 Jens Weidmann, 'Money creation and responsibility' (Speech given at 18th colloquium of the Institute for Bank-Historical Research, Frankfurt, 18 September 2012). See also Irwin (n 180) 383-384.

183 Weidmann, 'Money creation and responsibility' (n 182).

184 Weidmann, 'Money creation and responsibility' (n 182).

185 Weidmann, 'Money creation and responsibility' (n 182).

186 Weidmann, 'Money creation and responsibility' (n 182).

187 See especially BVerfG, 2 BvR 987/10 of 7 September 2011 (BVerfG *Greek loan facility and EFSF*); BVerfG, 2 BvE 8/11 of 28 February 2012 (BVerfG *parliamentary involvement EFSF*); BVerfG, 2 BvE 4/11 of 19 June 2012 (BVerfG *Right to information ESM & Euro Plus Pact*); BVerfG *ESM & TSCG summary review* (n 19); BVerfG *ESM/TSCG principal proceedings* (n 19).

Union Treaties.[188] This *ultra vires* review has matured over time.[189] In particular, in its *Lissabon Urteil*, the *Bundesverfassungsgericht* indicated that it would only exercise this review 'if legal protection cannot be obtained at Union level' and always in accordance with the German constitution's 'openness towards European law' (*Europarechtsfreundlichkeit*).[190]

Subsequently, in *Honeywell*, it stressed the importance of streamlining *ultra vires* review with the task of the Court 'to interpret and apply the Treaties'.[191] Before rendering judgment on an *ultra vires* claim, it would therefore first send a request for a preliminary ruling to its European colleague whose judgment it considers binding 'in principle'.[192] Moreover, Karlsruhe indicated it would only consider *ultra vires* review if the transgression of Union competences is 'sufficiently qualified'.[193] This means that it must be 'manifestly in violation of competences' and 'highly significant in the structure of competences between the Member States and the Union…'.[194]

The second issue concerns 'identity control'. Introduced in its *Lisbon* judgment, it allows the *Bundesverfassungsgericht* to verify whether Union acts respect the 'core content' of Germany's constitutional identity, which is 'inviolable' pursuant to Articles 23(1) and 79(3) of the *Grundgesetz*.[195] Such respect requires the retention at national level of competences of 'substantial political importance', not least in the area of fiscal policy, so as to leave 'sufficient space…. for the political formation of the economic, cultural and social living conditions'.[196]

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188 BVerfG, 2 BvR 2134/92 & 2159/92, 12 October 1993, para 106 (BVerfG *Maastricht*).

189 It should be noted, however, that dissenting judge Gerhardt, has criticised the *BVerfG*'s present decision for broadening the reach of *ultra vires* control too far, essentially turning it into an '*actio popularis*' endowing individual citizens with 'a general right to have the laws enforced'. See BVerfG, 2 BvR 2728/13 of 14 January 2014, Diss Opinion Gerhardt, paras 6-7 (BVerfG *OMT reference decision*). For similar criticism from scholars see Matthias Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference' (2014) 10 EuConst 263, 277-280; Franz C Mayer, 'Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference' (2014) 15 GLJ 111, 136-137; Karsten Schneider, 'Questions and Answers: Karlsruhe's Referral for a Preliminary Ruling to the Court of Justice of the European Union' (2014) 15 GLJ 217, 221-222.

190 BVerfG, 2 BvE 2/08 of 30 June 2009, para 240 (BVerfG *Lisbon*) .

191 BVerfG, 2 BvR 2661/06 of 6 July 2010, para 56 (BVerfG *Honeywell*). For extensive analysis of the implications of *Honeywell* for *ultra vires* review see Mehrdad Payandeh, 'Constitutional Review of EU Law After *Honeywell*: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' (2011) 48 CML Rev 9, 19-27; Wendel, 'Exceeding Judicial Competence' (n 189) 273-274.

192 BVerfG *Honeywell* (n 191) para 60.

193 BVerfG *Honeywell* (n 191) para 61.

194 BVerfG *Honeywell* (n 191) para 61.

195 BVerfG *Lisbon* (n 190) paras 240, 339.

196 BVerfG *Lisbon* (n 190) paras 246-249, 252, 256.

The first case in which crisis measures were challenged for their *ultra vires* nature and disrespect of Germany's constitutional identity, concerned a challenge against the 'Greek' facility and the EFSF. Brought by the same professors that had instituted proceedings against the transition to the third stage of monetary union in 1998,[197] it was rejected by the *Bundesverfassungsgericht* in 2011.[198] The next year a case followed on the ESM and the Treaty on Stability, Coordination and Governance.[199] This case is of particular interest as it required Karlsruhe to explicitly reflect on the shift towards positive solidarity and its relationship with the single currency's original stability set-up.

When it pronounced on the application for a temporary injunction to keep the German government from ratifying the ESM Treaty on 12 September 2012, it displayed an unexpected 'openness' to this shift.[200] Contrary to its European counterpart, the *Bundesverfassungsgericht* acknowledged that Article 136(3) TFEU had modified the ban on bailout. '[T]he introduction of Article 136(3) TFEU',[201] it reasoned, 'constitutes a fundamental reshaping of the existing economic and monetary union',[202] one that 'relativises the market dependence' associated with the ban.[203] It could accept this modification, however, as other pillars of the *Stabilitätsgemeinschaft* to which it had given its blessing twenty years earlier were still 'in place'.[204] In particular the independence of the Bank, 'its commitment to the paramount goal of price stability' and the prohibition on monetary financing remained 'unaffected'.[205] As to the latter stability safeguard, it argued that 'an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently of the capital markets is prohibited as it would circumvent the prohibition on monetary financing'.[206] For the judges in Karlsruhe, then, the independence and stability mandate of the Bank constituted a red line that should not be crossed.

197 See also text to n 7 (ch 4).
198 BVerfG *Greek loan facility & EFSF* (n 187).
199 BVerfG *ESM & TSCG summary review* (n 19).
200 See for an extensive analysis of the judgment Matthias Wendel, 'Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012' (2013) 14 GLJ 21. See also J-H Reestman and WT Eijsbouts, 'Watching Karlsruhe/Karlsruhe Watchers' (2012) 8 EuConst 367, 373: 'The judgment of 12 September 2012 can be read in two ways: in the key of continuity or in that of a turn ... Reading it as a turn stresses the opening to politics ("the legislator") in the development of the EMU beyond its original parameters. Even the notion of "Stability Community", central to the EMU in the German view, should be allowed to evolve, to include elements of solidarity'.
201 BVerfG *ESM & TSCG summary review* (n 19) para 128.
202 BVerfG *ESM & TSCG summary review* (n 19) para 128.
203 BVerfG *ESM & TSCG summary review* (n 19) para 128.
204 BVerfG *ESM & TSCG summary review* (n 19) para 129.
205 BVerfG *ESM & TSCG summary review* (n 19) para 129.
206 BVerfG *ESM & TSCG summary review* (n 19) para 174.

A week before the German court drew this line, the Bank had announced its Outright Monetary Transactions. In the case on the ESM some of the applicants had already challenged the Bank's activities on the secondary market for government bonds, although they had not yet specifically targeted this new programme. The judges in Karlsruhe had considered this complaint not to be 'covered by the application for the issue of a temporary injunction' and had decided to reserve it for 'the principal proceedings'.[207] Specific complaints concerning the new bond programme then followed and the judges decided to separate them from the ESM proceedings and to treat them in a separate case.[208]

For Weidmann, this offered the chance of a replay. During the oral proceedings he turned against the bond programme.[209] Ever since the start of the launch of the currency union, he argued, the *Bundesbank* had devoted itself to ensuring that the single currency would be stable. As a member of the Eurosystem, it had faithfully implemented the crisis measures of the European Central Bank, even those it saw as problematic. Now, however, it felt it needed to speak out as it considered the bond programme a threat to the Bank's independence and capacity to safeguard price stability, causing it to act outside its monetary policy mandate and engage in monetary financing.

Later the *Bundesbank*'s stance will be examined in greater detail, for now it suffices to point out that the *Bundesverfassungsgericht* shared its concerns.[210] On 14 January 2014 it published a decision in which it argued that the bond programme amounted to an *ultra vires* act as defined in *Honeywell*, considering it an act of economic policy manifestly and significantly exceeding the monetary policy mandate of the European Central Bank.[211] What is more, it believed the bond purchases to be 'politically motivated' and to form the 'functional equivalent' to ESM assistance measures, 'albeit without their parliamentary legitimation and monitoring'.[212] It based that finding on several

207 BVerfG *ESM & TSCG summary review* (n 19) para 98.

208 BVerfG, 2 BvR 1390/12 of 17 December 2013 (BVerfG *OMT separation order*). The *BVerfG* rendered its final judgment in the ESM/TSCG proceedings on 18 March 2014. See BVerfG *ESM/TSCG principal proceedings* (n 19).

209 Jens Weidmann, 'Eingangserklärung anlässlich der mündlichen Verhandlung im Hauptsacheverfahren ESM/EZB' (Karlsruhe, 11 June 2013).

210 Both the *BVerfG* and the Court refer in their judgments to the ESCB, the Eurosystem and the ECB, depending on the legal issue at hand. In what follows, and unless specifically indicated otherwise, this study will simply speak about the 'European Central Bank' or 'Bank'. For a discussion of the institutional framework of the currency union and the difference between the ESCB, the Eurosystem and the ECB see text to n 184 (ch 3).

211 BVerfG *OMT reference decision* (n 189).

212 BVerfG *OMT reference decision* (n 189) paras 55 and 78. See also Dietrich Murswiek, 'ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order From 14 January 2014' (2014) 15 GLJ 147, 149: 'What the ECB wants to do via the OMT program is exactly the same as what the ESM can do with its secondary

features of the bond programme, in particular its objective, the targeted nature of purchases (*selectivity*), its link to ESM conditionality and the parallelism with this mechanism's instruments (*conditionality/parallelism*) and its capacity to bypass the requirements for bond purchases by the latter (*bypassing*).

The *Bundesverfassungsgericht* also stated that the bond programme amounted to a violation of the prohibition on monetary financing.[213] Over and above the features mentioned above, it based that finding on the absence of limits to the size of the bond purchases (*volume*), the possibility of the Bank participating in a debt cut (*pari passu treatment*), the high risk profile of the envisaged purchases (*excessive risk taking*), the option to hold purchased bonds to maturity (*interference with market logic*), the lack of an embargo period between the issuance of a bond on the primary market and its purchase by the Bank on the secondary market (*market pricing*) and, finally, the Bank's encouragement of private investors to buy bonds on the primary market (*encouragement to purchase newly issued securities*).

The German court indicated, however, that its concerns about the bond programme 'could be met by an interpretation in conformity with Union law'.[214] With a view to the mandate of the Bank, this required that it had to implement the programme 'in such a way that it would not undermine the conditionality' linked to ESM assistance and only support the economic policies in the Union.[215] To ensure compliance with the prohibition on monetary financing, the possibility of a debt cut had to be 'excluded', government bonds of specific states should not be 'purchased up to unlimited amounts', and 'interferences with price formation on the market had to be avoided where possible'.[216] Construing the bond programme in line with these demands, however, would have arguably deprived it of much of its magic and would have increased the likelihood that it would actually have to be used.

Although the *Bundesverfassungsgericht* considered that the *ultra vires* claims would 'probably be successful',[217] and notwithstanding its suggestion of a Union law friendly interpretation, it abided by its promise in *Honeywell* to request a preliminary ruling from the Court before taking a final position. But even if it would ultimately reach the conclusion that the Bank had stayed within its mandate, it could still find that the bond purchases violated the *Grundgesetz*. After all, next to its *ultra vires* review, Karlsruhe also examines whether acts of Union law do not run counter to Germany's constitutional identity.[218] In its reference decision it signalled that the bond programme

market facility, except that the volume of purchases of government bonds by the ESM is limited…while the ECB can buy unlimitedly'.

213 BVerfG *OMT reference decision* (n 189) para 55.
214 BVerfG *OMT reference decision* (n 189) paras 99-100.
215 BVerfG *OMT reference decision* (n 189) para 100.
216 BVerfG *OMT reference decision* (n 189) para 100.
217 BVerfG *OMT reference decision* (n 189) para 55.
218 See in this regard text to n 195 (ch 7).

'could violate' this identity 'if it created a mechanism that would amount to an assumption of liability for decisions of third parties which entail consequences that are difficult to calculate', as a result of which the *Bundestag* 'could no longer exercise its budgetary autonomy under its own responsibility'.[219]

The *Bundesverfassungsgericht* would only rule on this issue, however, after having received the Court's interpretation of the Bank's mandate and the prohibition on monetary financing.[220] Although it would then base its analysis on that of the Court, it would not refer another question to Luxembourg. Despite the fact that Article 4(2) TEU demands respect for 'national identities' inherent in the political and constitutional structures of the member states, and contrary to many legal scholars,[221] it considered that 'identity review is not to be assessed according to Union law but exclusively according to German constitutional law'.[222]

Barely a month before the *Bundesverfassungsgericht* made that statement, the General Court had declared inadmissible an action for annulment against the bond programme for lack of direct concern.[223] As a result of the referral from Karlsruhe, however, the programme would nonetheless now be tested on its substance in Luxembourg. Let us therefore turn to the Court's judgment, to see how it dealt with Karlsruhe's concerns and discover what this tells us about the independence of the Bank. It will turn out that its view on this independence ultimately explains why, in spite of the scepticism from Karlsruhe, the Court managed to reconcile the Union's Founding Contract with the Treaties on the point of central bank action too.

219 BVerfG *OMT reference decision* (n 189) para 102.

220 BVerfG *OMT reference decision* (n 189) paras 102-103. In fact, the *BVerfG* indicated it might rule on it more than once, as it could not only review the OMT decision itself but also 'individual implementation measures'.

221 See eg Daniel Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court' (2009) 46 CML Rev 1795, 1811; Mattias Kumm, 'Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU Into a Game of "Chicken" and What the CJEU Might Do About It' (2014) 15 GLJ 203, 209-210; Mayer (n 189) 128-133; Wendel, 'Exceeding Judicial Competence' (n 189) 284-288.

222 *BVerfG OMT reference decision* (n 189) paras 27, 29 and 103. For a comparison of the German notion of constitutional identity with Art 4(2) TEU see Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case' (2015) 16 GLJ 917, 919-941.

223 Case T-492/12 *Von Storch v ECB* [2013] ECLI:EU:T:2013:702. Earlier, on 16 December 2011, the General Court had dismissed an annulment action against the predecessor programme SMP on similar grounds. See Case T-532/11 *Städter v ECB* [2011] ECLI:EU:T:2011:768, upheld on appeal in Case C-102/12 P *Städter v ECB* [2012] ECLI:EU:C:2012:723.

3.2 The policy nature of bond purchases

3.2.1 The battle over objectives

The discussion about the nature of Outright Monetary Transactions, in particular the question whether they turn the Bank into a lender of last resort for sovereigns, is originally one between economists, as chapter 4 explained.[224] Yet, the proceedings in Karlsruhe brought it to the courtroom for legal treatment. The Union Treaties, however, are unfamiliar with the concept of 'lender of last resort'.[225] In the eyes of the law, with its own notions, categories and methods of reasoning, the discussion is *broader* in nature. As the *Bundesverfassungsgericht* indicated in its reference decision, it concerns the question whether the bond programme falls within the Bank's monetary policy mandate or whether it forms an economic policy measure that lies outside this mandate and amounts to monetary financing. Given that the Bank's mandate in Article 127(1) TFEU is only functionally delimited by the goals it has to achieve, the objectives of the programme are key to this question.[226] The currency union's enlarged stability conception consequently took centre stage during the proceedings in Karlsruhe and Luxembourg. Parties would battle fiercely over the objectives pursued by the bond purchases and the extent to which these purchases could serve to safeguard financial stability. It is this issue, therefore, that ultimately explains much of the difference in views between the two courts.

At the oral hearing in Karlsruhe, Executive Board Member Jörg Asmussen explained to the judges what the objectives of the bond programme were and why they corresponded to the mandate of the European Central Bank. He took them back in time, to the summer of 2012, and reminded them of the daunting rise in bond yields the currency union witnessed in that period:

> 'Part of this rise in interest rates could be explained by the concern of investors about the sustainability of national fiscal positions. Fiscal grounds alone, however, could not fully account for it since the sudden rise in interest rates in the first half of 2012 was not matched by a corresponding deterioration in economic fundamentals of these states. At the same time, there was an immediate threat of contagion of other states in the currency union, which provided proof of systemic, not merely state specific, risk. A substantial, driving factor in all this was market anxiety about a forced break-up of the common currency, that is: the fear of the "reversibility of the euro" and the implicit exchange rate risk that goes with it.'[227]

224 See text to n 328 (ch 4).
225 See text to n 289 (ch 4).
226 See also text to n 162 (ch 3).
227 Jörg Asmussen, 'Einleitende Stellungnahme der EZB in dem Verfahren vor dem Bundesverfassungsgericht' (Karlsruhe, 11 June 2013) (translation by the author).

He subsequently explained once more why such high yields could threaten the transmission and singleness of the Bank's monetary policy and had consequently necessitated the launch of the programme.[228] In its written submissions the Bank further emphasised that it did not intend to harmonise bond yields across the board, but only aimed to bring them back to levels corresponding to fundamentals.[229]

Bundesbank President Weidmann also reflected on the rise in bond yields and made no secret of what *he* thought about the programme's objectives. He admitted that the crisis had revealed the importance of financial stability, but stressed that the European Central Bank could only secure this kind of stability within the limits of its mandate. Then, he argued:

> 'Secondary market purchases in my understanding should, however, not aim at reducing the solvency risk premiums of specific states. For that would risk among other things to knock out the disciplining role of market rates and undermine individual responsibility for financial policy ... The answer to the question whether investors accurately value the degree of risk associated with the bonds of specific Member States, is to a great extent subjective.'[230]

In its written submissions the *Bundesbank* further substantiated its critical stance on the issue of the correctness of bond yields.[231] It stressed the unfeasibility of determining to what extent risk premia reflect economic fundamentals or self-fulfilling beliefs and argued that they should therefore not be used as decisive indicators for central bank action. Moreover, as such premia could very well be the consequence of rational market behaviour, the resulting heterogeneity in the transmission of monetary policy should not necessarily be seen as an unwarranted disruption, and could actually be economically justified.

The difference in views between the two central banks reflected in the reasoning of the *Bundesverfassungsgericht* which, surprisingly, was based on *Pringle*. To recall: in that case the Court had to determine the policy nature of Article 136(3) TFEU and it had reasoned that it was necessary to look to its instruments and ties to other measures of Union law, yet most of all to its objectives. The German court now resorted to this test in order to determine the bond programme's policy nature. In defining the programme's objectives, however, it made two questionable moves. The first concerned the dispute between the

228 See in this regard also text to n 56 and n 335 (ch 4).

229 'Stellungnahme Europäische Zentralbank' (16 January 2013) <handelsblatt.com/downloads/8135244/3/EZB%20Gutachten> accessed 3 May 2017.

230 Weidmann, 'Eingangserklärung anlässlich der mündlichen Verhandlung im Hauptsacheverfahren ESM/EZB' (Karlsruhe, 11 June 2013) (translation by the author).

231 'Stellungnahme Bundesbank' (21 December 2012) <www.handelsblatt.com/downloads/8124832/1/stellungnahme-bundesbank_handelsblatt-online.pdf> accessed 3 May 2017.

European Central Bank and the *Bundesbank* and their diverging opinions about the correctness of yield spreads. The second related to its application of the *Pringle*-test, in particular the kind of objectives that need to be taken into account when determining a measure's policy nature.

Concerning spreads, the *Bundesverfassungsgericht* completely backed the *Bundesbank's* view that it is impossible to distinguish between justified and excessive components of yield spreads.[232] It even seemed to go a step further by saying that according to the 'convincing expertise' (*Überzeugende Expertise)* of the *Bundesbank* such spreads '*only* reflect the scepticism of market participants' about the solvency of individual states and are 'entirely intended'.[233] At the same time it rejected the reasoning of the European Central Bank – not possessing expertise but only a 'view' (*Auffassung*) – that such spreads may very well exceed levels that can be explained by fundamentals. It did so, moreover, without paying any attention to the considerable amount of economic research that does find evidence of multiple equilibria and considers it possible to identify the justified and excessive parts of spreads.[234] It only referred to a report of the German Council of Economic Experts to support its own argument.[235] But this report is not at all conclusive on the issue of spreads.[236] It goes into the difficulty of distinguishing between justified and excessive levels, but does not state this is impossible.[237] At one point it even allows for the possibility that yield levels were indeed excessive in the summer of 2012 and have been brought back to justified levels with the bond programme's announcement.[238]

As to objectives, and by referring to *Pringle*, the judges in Karlsruhe argued that relevant for the determination of a measure's policy nature is the '*immediate*' or *direct* objective of an act.[239] However, the Court did not say in *Pringle* that regard should be had specifically to immediate objectives. It just stated that one should look at objectives, full stop.[240] Limiting the analysis to immediate objectives allowed the German court to ignore the Bank's indirect objective of safeguarding the transmission and singleness of its monetary policy,

232 BVerfG *OMT reference decision* (n 189) para 71. See also Thomas Beukers, 'The *Bundesverfassungsgericht* Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"' (2014) 15 GLJ 343, 348-349; Jürgen Bast, 'Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's *Ultra Vires* Review' (2014) 15 GLJ 167, 176-177.

233 BVerfG *OMT reference decision* (n 189) paras 71, 98 (emphasis added).

234 See text to n 52 (ch 4).

235 BVerfG *OMT reference decision* (n 189) para 71.

236 See also Beukers (n 232) 348-349.

237 German Council of Economic Experts, *Annual Economic Report 2013/2014* (November 2013), para 200 .

238 German Council of Economic Experts, *Annual Economic Report 2013/2014* (November 2013), para 254.

239 BVerfG *OMT reference decision* (n 189) para 63 (emphasis added).

240 *Pringle* (n 1) paras 55-56 and 60.

and its ultimate aim of safeguarding price stability.[241] Moreover, in identifying the immediate objective of the bond programme, it disregarded its official objective.[242] By purchasing government bonds, the *Bundesverfassungsgericht* stated, the Bank aims to 'neutralise' spreads on bonds of certain states that 'have emerged in the markets' and which negatively affect their refinancing conditions.[243] Yet, the Bank has never said it aims for such neutralisation.[244] It only wants to bring down spreads to levels corresponding to fundamentals.

In what came closest to the recognition of an indirect objective, the German court argued that in as far as the Bank seeks 'to safeguard the current composition' of the currency union with its bond purchases, 'this is obviously not a task of monetary policy but one of economic policy, which remains a responsibility of the Member States'.[245] It backed up this argument with a discussion of the Union's procedure on accession to the currency union in Article 140 TFEU in which the Bank only plays a limited role.[246] Yet, it is unclear why these rules are relevant for identifying the bond programme's objectives. It appears the *Bundesverfassungsgericht* assumed that these accession rules are indicative of a broader division of responsibilities concerning the composition of the currency union.[247] This argument is hardly convincing when one takes into account how and to what extent concerns about the reversibility of the euro played a role in the Bank's decision to launch the bond programme.[248] Reversibility of the single currency played a role in as far as fears about it caused a rise in bond spreads exceeding what can be explained by fundamentals.[249] Given the problems this posed to the transmission and singleness

241 Matthias Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (2014) 15 GLJ 265, 275.

242 Beukers (n 232) 347; Carsten Gerner-Beuerle, Esin Küçük and Edmund Schuster, 'Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial' (2014) 15 GLJ 281, 298-301.

243 BVerfG *OMT reference decision* (n 189) para 70.

244 The *BVerfG* backed up this statement with a referral to the ECB's Monthly Bulletins of September and October 2012. However, these bulletins do not speak about the aim of neutralising bond spreads. See also Alexander Thiele, 'Friendly or Unfriendly Act? The "Historic" Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program' (2014) 15 GLJ 241, 256-257; Wendel, 'Exceeding Judicial Competence' (n 189) 296.

245 BVerfG *OMT reference decision* (n 189) para 72.

246 BVerfG *OMT reference decision* (n 189) para 72.

247 Gerner-Beuerle, Küçük and Schuster (n 242) 303.

248 If one followed this reasoning, one would actually have to conclude that it does not support the *BVerfG*'s argument on the vertical division of competences that safeguarding the currency union's composition is a task of economic policy, falling within the responsibility of the member states. Art 140 TFEU attributes most powers to Union institutions, in particular the Council, not the states. See Bast (n 232) 177.

249 Note, moreover, that some scholars even defend the more principled argument that it is not at all clear that safeguarding the composition of the currency union lies outside the Bank's mandate. See Christoph Herrmann, 'National report: Germany' in Ulla Neergaard, Catherine Jacqueson and Jens Hartig Danielsen (eds), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (XXVI FIDE

of its monetary policy, the Bank decided to intervene on secondary government bond markets.

Did this objective of safeguarding the transmission mechanism not play any role, then, in the decision of the German court? It did, but only in a very limited way. Whilst taking the view that the bond programme forms an act of economic policy that does not pursue monetary policy objectives,[250] at the end of its decision it stated that even if the bond purchases could, 'under certain conditions, help to support the monetary policy objectives' of the Bank, this would not change its conclusion about their policy nature.[251] What is more, 'the (economic) accuracy or plausibility of the reasons' behind the programme were 'irrelevant' and 'meaningless' in this respect.[252] It thereby again referred to *Pringle*, arguing that what the Court had said there in relation to the objectives of the ESM applied 'vice versa' in this case.[253] But in *Pringle* the Court did not make such a finding. It reasoned that the fact that the stability of the euro area as a whole, the objective for permanent stability mechanisms referred to by Article 136(3) TFEU, could have repercussions for price stability did not suffice to turn such mechanisms into monetary policy measures. An economic policy measure, it argued, cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect *effects* on the stability of the single currency.[254] In the case of the bond purchases the issue is not whether they may have indirect effects on price stability, but whether they are allowed when they pursue as their indirect, or ultimate objective this kind of stability.[255]

The objectives of the bond purchases were also central to the judgment of the Court.[256] What is more, in the slipstream of Karlsruhe it similarly adopted

Congress Publications Vol 1, 2014) 362; Martin Selmayr, 'Artikel 282' in Hans Von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht* (Nomos 2015), Rn 66-67.

250 The *BVerfG* drew this conclusion about the bond programme's objective in para 73. Earlier in its decision it was a bit less radical in its findings, arguing that bond purchases may not qualify as a monetary policy act 'for the sole reason that they also indirectly pursue monetary policy objectives'. See BVerfG *OMT reference decision* (n 189) para 64.

251 BVerfG *OMT reference decision* (n 189) para 96.

252 BVerfG *OMT reference decision* (n 189) para 96, 98.

253 BVerfG *OMT reference decision* (n 189) para 96.

254 See text to n 42 (ch 7).

255 See also Beukers (n 232) 346.

256 Formally speaking, the Court did not review the OMT programme itself. It only reviewed whether a programme *such as* OMT did not violate the mandate of the ECB and Art 123 TFEU. See *Gauweiler* (n 2) para 30. In so doing it avoided answering the question to what extent it can review a decision that has not yet been incorporated into a formal legal act. It could adopt this strategy as the *BVerfG* had indicated in its reference decision that the preparatory nature of the OMT programme did not affect the national proceedings. It had therefore also asked the alternative question whether Union law permits bond purchases

a reasoning based on *Pringle*. Yet, its conclusion could not have been more different as it took the view that the bond programme does fall within the Bank's mandate.[257] Central to this difference is the fact that, unlike the *Bundesverfassungsgericht*, the Court took into account the whole range of objectives, including indirect and ultimate ones. Both the objective of securing the transmission of monetary policy and that of ensuring the singleness of that policy indicate that the programme falls within the Bank's monetary policy mandate as they ultimately support its ability to safeguard the primary objective of price stability.[258]

In its reasoning the Court also paid attention to the conflicting views of the *Bundesbank*, but in a more subtle way than the *Bundesverfassungsgericht*. After it had concluded that the bond programme falls within the Bank's monetary policy mandate, it continued by examining whether it is proportionate.[259] This proportionality review is intriguing for various reasons,[260] yet for now it suffices to point out that in the context of reviewing the programme's appropriateness, the Court also assessed whether the Bank had erred on fact by taking the view that spreads for certain bonds were excessive and hampered the transmission of monetary policy.[261] It acknowledged that its analysis had been 'subject to challenge' before the German constitutional court and in so doing implicitly paid tribute to the *Bundesbank*'s critical stance.[262] This challenge, however, did not suffice to conclude that the reasoning of the European Central Bank was 'vitiated by a manifest error of assessment'.[263] Monetary policy issues, the Court reasoned, 'are usually of controversial nature' and highly technical and given the consequently broad discretion of the Bank 'nothing more' can be asked of it other than that it carries out its 'analysis with all care and accuracy'.[264]

Nonetheless, the Court's *Pringle*-inspired reasoning was not free from error either. Like the judges in Karlsruhe, it too gave in to the temptation of making statements on indirect effects of the bond purchases. It reasoned that the fact that they may also contribute to the stability of the euro area – which it equates with the more specific notion of financial stability (!) –[265] does not call into question the finding that their objective is a monetary one.[266] 'A monetary policy measure cannot be treated as equivalent to an economic policy measure'

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such as those envisaged by the OMT programme. See Borger, 'Outright Monetary Transactions' (n 15) 167-169.

257 *Gauweiler* (n 2) paras 46-65.
258 *Gauweiler* (n 2) paras 46-50.
259 *Gauweiler* (n 2) paras 66-92.
260 See text to n 343 (ch 7).
261 *Gauweiler* (n 2) paras 72-75.
262 *Gauweiler* (n 2) para 75.
263 *Gauweiler* (n 2) para 74.
264 *Gauweiler* (n 2) paras 74-75.
265 See text to n 140 (ch 7).
266 *Gauweiler* (n 2) para 51.

for the sole reason 'it may have indirect effects' on financial stability.[267] Later in its judgement it argued that to the extent financial stability does form an objective it does not fall 'within monetary policy'.[268]

This reasoning not only unduly downplays the importance financial stability has for the Bank, it also unnecessarily bans it from its mandate. The Bank targets financial stability to the extent that certain segments of the financial system, in particular bond markets, are dysfunctional and hamper the transmission of monetary policy. The question, therefore, is not whether its purchases have any indirect *effects* on financial stability, but whether they can pursue such an objective as an intermediate target whilst being ultimately focused on price stability. Whilst the Court answered that question in the negative in its *explicit* reasoning, *de facto* it took an affirmative stance by reasoning that restoring the transmission mechanism falls within the area of monetary policy.

3.2.2 The futility of the battle

The readings both courts adopted of the objectives of the bond programme were as different as night and day. Whereas the *Bundesverfassungsgericht* used them as the key indicator for its conclusion that the programme constituted economic policy, the Court regarded them as primary evidence of its monetary policy character. In analogy to *Pringle* both consolidated their positions with arguments based on the programme's instruments and ties to Union law, in particular the selective nature of bond purchases and their link to ESM assistance.[269] The difference in assessment of the programme's policy nature, however, was already decisively made at the stage of identifying objectives.

This begs the question whether it is wise to determine the legality of the programme with a reasoning based on *Pringle*, which serves to define a measure's policy nature primarily through an analysis of its objectives. After all, even the Court, while it managed to declare the programme compatible with the Bank's mandate, struggled with the currency union's new stability conception. Whereas the Bank itself explicitly admits that it targets financial stability to the extent that dysfunctional bond markets hamper the transmission of monetary policy,[270] the Court did so only implicitly. On the one hand, it talked down the importance of financial stability when it stated that a monetary policy measure cannot be treated as being equivalent to an economic policy measure for the reason it may have indirect effects on this kind of stability.

267 *Gauweiler* (n 2) paras 51-52.
268 *Gauweiler* (n 2) para 64.
269 For an extensive analysis of the reasoning of both courts concerning these features see Borger, 'Outright Monetary Transactions' (n 15) 175-179.
270 See text to n 56 and n 335 (ch 4) and n 227 (ch 7).

On the other hand, it argued that to the extent that financial stability does form an objective it does not fall within the remit of monetary policy.

Much of this struggle, this study claims, could have been avoided if the Court had not moulded its reasoning along the lines of *Pringle*. Instead of focusing on the policy nature of the bond purchases, it should have concentrated its analysis on their direct legal basis: Article 18(1) of the Statute.[271] This would have allowed it to better reconcile the change in the Founding Contract with the law.

To see why requires a closer look at *Pringle*. There, the Court had to determine the policy nature of the ESM in order to decide whether the European Council had been right in using the simplified revision procedure in Article 48(6) TEU to add a third paragraph to Article 136 TFEU. Defining the policy nature of Article 136(3) TFEU was therefore directly linked to the question whether Article 48(6) TEU formed the appropriate *legal basis* for the amending Decision of the European Council.[272] In *Gauweiler*, however, the Court's mission to define the policy nature of the bond programme was not directly linked to a legal basis analysis. It was rather the other way around. To the extent that it paid attention to the legal basis of the programme – Article 18.1 of the Statute – it did so only to make the case that targeted, outright purchases of government bonds are an instrument of monetary policy, thereby supporting its argument that the programme concerns monetary policy.[273] In this way, defining a measure's policy nature becomes an end in itself.

What would happen if one starts to address the question of whether the Bank acted within the scope of its powers by examining the legal basis used, which is a plausible thing to do in such cases?[274] One could point out that Article 18.1 of the Statute stipulates that outright bond purchases can be used 'to achieve the *objectives* of the ESCB and to carry out its *tasks*'. Conducting monetary policy, as Articles 127(2) TFEU and 3.1 of the Statute make clear, forms a basic task.[275] It makes little sense to then try to define monetary policy by juxtaposing it to economic policy, especially not by looking at objectives.[276] Not only can that be very difficult as the two policy areas overlap and can at times be hard to distinguish in practice, as judge Gerhardt

271 For similar criticism in relation to the *BVerfG*'s reasoning, see Bast (n 232) 174-176; Wendel, 'Exceeding Judicial Competence' (n 189) 294-295. See also Beukers (n 232) 366.

272 See text to n 35 (ch 7).

273 *Gauweiler* (n 2) paras 54-55.

274 Bast (n 232) 174; Wendel, 'Exceeding Judicial Competence' (n 189) 294; Beukers (n 232) 366.

275 In addition, one could possibly even point to Art 127(5) TFEU and Art 3.3 Central Bank Statute, which enable the ESCB to contribute to policies relating to the stability of the financial system. See René Smits, 'Correspondence' (2012) 49 CML Rev 827, 829; Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7, 33. See also text to n 318 (ch 4).

276 See also Bast (n 232) 175; Thiele, 'Friendly or Unfriendly Act?' (n 244) 258-259; Wendel, 'Exceeding Judicial Competence' (n 189) 295.

rightly pointed out in his dissenting opinion to the decision of the *Bundesverfassungsgericht*;[277] it also fails to pay tribute to the fact that Article 127(1) TFEU brings both the objective of price stability and that of supporting the general economic policies within the purview of the Bank, as a result of which the latter can aim for either one in the context of monetary policy.

It is more appropriate to state that not only price stability but also financial stability forms an objective the Bank can pursue. This second kind of stability can serve as an intermediate objective that in line with Article 12.1 of the Statute it can aim for to attain its supreme goal of price stability.[278] This is the approach taken by the Bank when it states that it targets the transmission mechanism so as to deliver monetary stability throughout the currency union. Theoretically, however, one could even envisage the more radical possibility that the Bank treats financial stability as a self-standing objective that it can pursue through bond purchases with a view to supporting the general economic policies in the Union,[279] provided this does not conflict with the primary goal of price stability.[280]

In its reference decision, the *Bundesverfassungsgericht* suggested that in this second, theoretical scenario the Bank would violate its mandate as its purchases would go beyond supporting economic policy. It presented two arguments why they exceeded what can be seen as supporting economic policy. The first was of a quantitative nature and concerned the volume of assistance measures of the ESM. This 'could *de facto* be considerably broadened, and potentially even multiplied', by parallel bond purchases of the Bank, as a result of which the political decisions underlying ESM assistance measures would be 'thwarted'.[281] In this regard, the German court had little confidence in the 'factual limitation'

277 BVerfG *OMT reference decision* (n 189), Diss Opinion of Judge Gerhardt, para 17: 'Monetary and economic policies relate to each other and cannot be strictly separated. The delimitation of the objectives and duties of the European System of Central banks in Art. 127 TFEU corresponds to this'. See also *Gauweiler* (n 2), Opinion of AG Cruz Villalón, para 129; Craig and Markakis (n 16) 20.

278 Peter Sester, 'The ECB's Controversial Securities Market Programme (SMP)' (2012) 9 ECFR 156, 165-166.

279 Selmayr (n 249) Rn 62-63.

280 The OMT programme complies with that limit as the ECB has made it clear that any liquidity that gets injected into the financial system through its bond purchases will be sterilised so as to make sure that the interventions will not negatively influence its monetary policy stance. Moreover, economists like Paul De Grauwe, also point out that what matters for inflation is not only the 'money base' (M0), which the Eurosystem can increase through bond purchases, but also the 'money stock' (M3). During a financial crisis the two may get 'disconnected', as a result of which 'an increase in the money base' does not automatically translate into 'an increase in the money stock'. See Paul De Grauwe, 'The European Central Bank as Lender of Last Resort in the Government Bond Markets' (2013) 59 CESifo Economic Studies 520, 522-525.

281 BVerfG *OMT reference decision* (n 189) para 81.

that the Bank has built into the programme.[282] It will only buy up bonds in the maturity spectrum of one to three years, but states could easily circumvent that constraint by adjusting their refinancing strategies.[283] Although the Bank has announced it will observe the emission behaviour of states, the *Bundesverfassungsgericht* considered it 'unclear' what would follow from that intention.[284]

The second argument was qualitative and related to central bank independence. Due to its independence the Bank has to make its own assessment on the necessity of bond purchases, without being tied to decisions made under the ESM.[285] Such 'independent economic assessments', however, would have the outcome that the purchases no longer qualify as 'support' of economic policy.[286] On the basis of these arguments the judges in Karlsruhe concluded that the bond purchases would only qualify as support 'if their volumes were so limited' that they could not thwart ESM assistance programmes and if they were 'approved on the merits' by the member states.[287]

Both arguments fail to convince. They only work if one accepts the premise that in order to assess whether the Bank's bond programme supports economic policies, one needs a specific 'comparator' like the ESM.[288] It is more plausible, however, to argue that the programme's efforts to prevent states from entering bad equilibria significantly contributes to stabilising the financial system. It is hard to see how this does not support the economic policies of both the Union and its member states.[289]

But even if one accepts, first, the premise of the need for a specific comparator and, second, that the ESM qualifies for that function,[290] both arguments lack persuasion. As to volume, it is a simple fact that the size of the bond programme is curtailed due to its focus on a particular part of the maturity spectrum. Not accepting the Bank's assurance that it will oversee the emission behaviour of states whose bonds are purchased amounts to 'distrust'.[291] Contrary to the *Bundesverfassungsgericht*, the Court did trust the

282 BVerfG *OMT reference decision* (n 189) para 83.
283 BVerfG *OMT reference decision* (n 189) para 83.
284 BVerfG *OMT reference decision* (n 189) para 83.
285 BVerfG *OMT reference decision* (n 189) para 82.
286 BVerfG *OMT reference decision* (n 189) para 82.
287 BVerfG *OMT reference decision* (n 189) para 83.
288 Gerner-Beuerle, Küçük and Schuster (n 242) 311.
289 See Gerner-Beuerle, Küçük and Schuster (n 242) 311; Selmayr (n 249) Rn 67.
290 Some have pointed out that due to its 'mode of operation' and 'pricing policy' the ESM differs significantly from the OMT programme. It should therefore not function as a comparator whose underlying political decisions could be 'thwarted' by OMT-interventions. See Thiele, 'Friendly or Unfriendly Act?' (n 244) 260; Gerner-Beuerle, Küçük and Schuster (n 242) 306-309, 311.
291 See also Beukers (n 232) 352: 'The *Bundesverfassungsgericht*'s distrust in the ECB's monetary policy motivation leads to distrust in its assessment of the appropriate circumstances of activation and the appropriate conditions'.

Bank on this point. When assessing the programme's proportionality, more specifically its necessity, it singled out several other elements besides the focus on a particular part of the maturity spectrum that factually limit the size of the programme, as a result of which there is no need to put an *ex ante* cap on the total volume of purchases.[292] First, bond purchases only take place to the extent this is necessary to achieve the programme's objectives and will cease as soon as these have been attained.[293] Second, and more important, only bonds of states which are subject to a macroeconomic adjustment programme and have regained access to the bond market can be bought.[294] Over and above these elements an *ex ante* cap could also 'trigger' speculation, thereby undermining the programme's effectiveness and increasing the likelihood it will actually have to be used.[295]

Karlsruhe's argument about central bank independence is simply contradictory.[296] Article 130 TFEU makes clear that the Bank is independent in the performance of all its tasks, including when it supports economic policy. Arguing that actions of the Bank exceed what can be qualified as support as it will have to carry out independent economic assessments, runs counter to this independence. Either the Bank carries out independent assessments, but then no longer supports economic policy, or it does support such policy, but then no longer acts independently. Whichever option is chosen, it conflicts with the Treaty's position on this point. The demand that bond purchases are approved on the merits and legitimised by the member states is not compatible with central bank independence either.

3.3 The Court's struggle with the present

Even if the Bank stays within its monetary policy mandate with its bond purchases, it could still violate the prohibition on monetary financing. After all, its acts may run counter to Article 123 TFEU regardless of their policy nature. In its judgment on the ESM, the *Bundesverfassungsgericht* had drawn a red line in this regard by saying that a financing of 'budgets independently from the capital markets' would impermissibly 'circumvent the prohibition on monetary financing'.[297] It had backed up this statement with a reference

292 *Gauweiler* (n 2) paras 82, 85-88. Note that the Court repeats these arguments in para 116 when it reviews compliance with the prohibition on monetary financing. See also text to n 322 and n 347 (ch 7).
293 *Gauweiler* (n 2) para 82.
294 *Gauweiler* (n 2) para 86.
295 *Gauweiler* (n 2), Opinion of AG Cruz Villalón, para 182. See also the Court's judgment in *Gauweiler* (n 2) para 88.
296 Thiele, 'Friendly or Unfriendly Act?' (n 244) 260; Gerner-Beuerle, Küçük and Schuster (n 242) 311.
297 BVerfG *ESM & TSCG summary review* (n 19) para 174. See also text to n 206 (ch 7).

to the legislation specifying Article 123 TFEU, the preamble of which determines that secondary market purchases should 'not be used to circumvent the objective' of the prohibition.[298]

In its reference decision, however, the German court suddenly seemed to adopt a much wider view of what amounts to such circumvention.[299] It no longer spoke about financing independently from markets, but simply stated that in assessing conformity with Article 123 TFEU one should focus on the objective pursued by the prohibition,[300] without however defining what that objective is.[301] The prohibition of buying bonds on the primary market should therefore not be 'circumvented by functionally equivalent measures'.[302] It then singled out five features of the bond programme – the possibility of a debt cut, the high risk profile of purchased bonds, the option to keep these bonds until maturity, an interference with market logic and an encouragement of private investors to purchase bonds on the primary market – which would indicate, 'at least when taken together', that the Bank aims at such circumvention.[303]

In its judgment the Court shared some of Karlsruhe's concerns, yet considered it possible to take care of them within the confines of the bond programme. Others it did not share at all.[304] What matters for this study, however, is that its analysis was embedded in a broader reading of Article 123 TFEU that closely resembled its interpretation of the no-bailout clause in *Pringle*. But not completely, especially on the issue of financial stability. To fully understand the Court's reasoning, Article 123 TFEU should be cited in full:

> 'Overdraft facilities or any other type of credit facility with the European Central Bank or the central banks of the Member States (hereinafter referred to as 'national central banks') in favour 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.'

298 Recital 8 of Council Regulation (EC) 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty [1993] OJ L 332/1 (Reg 3606/93). See also text to n 278 (ch 3).

299 Thiele, 'Friendly or Unfriendly Act?' (n 244) 261-262.

300 BVerfG *OMT reference decision* (n 189) para 86.

301 See also Beukers (n 232) 355.

302 BVerfG *OMT reference decision* (n 189) para 86.

303 BVerfG *OMT reference decision* (n 189) para 87. Note that these features came on top of those that the *BVerfG* had already discussed in relation to determining the policy nature of the bond programme (*objectives*, *selectivity*, *conditionality/parallelism* and *bypassing*).

304 For an extensive analysis of the position of both courts concerning these features see Borger, 'Outright Monetary Transactions' (n 15) 184-188.

In *Pringle*, the Court had used a textual interpretation to negatively define the scope of the ban on bailout. More specifically, it had argued on the basis of its text that Article 125 TFEU does not prohibit any assistance, but only that which leads a member state to be no longer responsible for its commitments to its creditors.[305] In *Gauweiler*, it similarly resorted to the text of Article 123 TFEU to set a lower limit to bond buying that the Bank has to respect. From its wording, covering credit facilities and direct bond purchases, it becomes apparent that it prohibits all forms of financial assistance to a member state.[306]

The Court then went on to say that the prohibition also covers secondary market purchases that would have an 'effect equivalent' to primary market intervention and thereby 'undermine' its effectiveness.[307] In its reference decision the *Bundesverfassungsgericht* had argued that such equivalence could occur if the Bank buys government bonds on the secondary market 'to a considerable extent and shortly after their emission'.[308] That risk would increase if it were to announce its intention to intervene 'prior to a new emission'.[309] In that case, the Bank would position itself as the currency union's 'lender of last resort'.[310] This is a serious problem. If the Bank indeed were to announce that it intends to strongly intervene shortly after emission this could blur the distinction between secondary and primary markets, turning its bond programme into the functional equivalent of primary market intervention.[311] No wonder, therefore, that the Court acknowledged this concern.[312] It pointed out, however, that the Bank had ensured its purchases would not have such an effect. It will observe a 'minimum' or 'embargo' period between a bond's emission and its purchase on the secondary market, so as to allow for a market price to form, and it will 'refrain from making prior announcements' concerning the timing of purchases or their volume.[313]

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305 See text to n 70 and n 84 (ch 7).

306 *Gauweiler* (n 2) paras 94-95.

307 *Gauweiler* (n 2) paras 96-97.

308 BVerfG *OMT reference decision* (n 189) para 92.

309 BVerfG *OMT reference decision* (n 189) para 93.

310 BVerfG *OMT reference decision* (n 189) paras 92-94.

311 Thiele, 'Friendly or Unfriendly Act?' (n 244) 262.

312 *Gauweiler* (n 2) para 104. Also the AG payed attention to this concern. See *Gauweiler* (n 2), Opinion of AG Cruz Villalón, paras 250 and 258.

313 *Gauweiler* (n 2) paras 105-107. Surprisingly, the *BVerfG* also recognised these precautionary efforts in its reference decision, but argued that Draghi's 'whatever it takes' pledge of 26 July 2012 had nonetheless given market participants 'the impression' that the Bank would act as a lender of last resort (para 94). Yet, it is rather strange to find an act – the decision of 6 September 2012 on the principal features of Outright Monetary Transactions – that in principle conforms to Union law to be nonetheless in violation of this law for the reason that an earlier statement has created the impression among the public that the Bank might act *contra legem*. Moreover, Draghi was careful to avoid any such impression as his pledge that the Bank would do 'whatever it takes' was preceded by the words 'within our mandate'. See also text to n 178 (ch 6).

This *effet utile* reasoning did not feature in the Court's interpretation of the ban on bailout in *Pringle*, but that is consistent with its view on the difference in scope of Articles 123 and 125 TFEU. After all, in *Pringle* it had supported its textual reading of Article 125 TFEU with the systemic argument that the difference in wording of the two provisions shows that, contrary to the prohibition on monetary financing, the ban on bailout does not rule out any financial assistance.[314] Given this restricted scope, applying an *effet utile* reasoning in relation to Article 125 TFEU is uncalled for. In fact, it could even undo the difference in scope based on their wording, as the ban on bailout would then also cover assistance measures that have an effect equivalent to taking over a state's financial commitments. One could argue that ESM assistance has such an effect.[315]

Having set a lower limit to bond buying on the basis of a literal reading, the Court shifted to a purposive one to determine which purchases would be compatible with Article 123 TFEU.[316] Like the *Bundesverfassungsgericht*, it supported this strategy by referring to the preamble of the legislation specifying the prohibition,[317] but unlike the latter it made explicit what the prohibition's purpose is. Copying its approach in *Pringle*, it relied on the legislative history of the Treaty of Maastricht to reach the conclusion that, just like the ban on bailout, the prohibition on monetary financing aims for fiscal prudence.[318] It subsequently identified several features of the bond programme that showed that the envisaged bond purchases comply with that purpose, four of which are particularly important.[319]

First, bonds can only be purchased to the extent this is necessary for safeguarding the transmission of monetary policy and up to the extent that bond yields exceed a state's fundamentals.[320] As a result, a state cannot 'rely on the certainty' that the Bank will purchase its bonds, nor can such intervention lead to a 'harmonisation' of yields disconnected from economic fundamentals.[321] Second, due to the focus on bonds in the maturity spectrum of one to three years that are issued by states undergoing an adjustment programme and having regained access to the bond market, the volume of bonds that can be bought and, by extension, the impact on the 'financing conditions' of states is '*de facto*' limited.[322] Third, as the Bank decides on the start, con-

314 See text to n 71 (ch 7).
315 See eg Beck, 'The Court of Justice, Legal Reasoning, and the *Pringle* Case' (n 97) 243-244.
316 *Gauweiler* (n 2) para 98.
317 *Gauweiler* (n 2) para 101.
318 *Gauweiler* (n 2) paras 99-102. It thereby followed a reasoning that was already suggested in the literature. See eg Athanassiou (n 69) 567.
319 *Gauweiler* (n 2) paras 98-102 and 109-120.
320 *Gauweiler* (n 2) paras 112-113.
321 *Gauweiler* (n 2) paras 113-114.
322 *Gauweiler* (n 2) para 116.

tinuation and suspension of purchases, it can adapt its strategy if it appears that a state tries to finance its budget by changing its issuance behaviour in favour of bonds that fall within the eligible maturity spectrum.[323] Fourth, bond purchases are conditional on 'full compliance' with an ESM adjustment programme, which limits the risk that the state whose bonds are purchased lapses into fiscal profligacy once the programme is activated.[324]

Where the Court's teleological interpretation differed from *Pringle* is on the point of market discipline. Whereas the Court had jumped over this objective when interpreting the ban on bailout,[325] it made it part of its reading of the prohibition on monetary financing.[326] Since bond purchases are only conducted to the extent necessary for safeguarding the transmission of monetary policy, member states cannot know for certain that the Bank will intervene on bond markets. More importantly, the disciplining effect of markets remains in place as the purchases do not aim to harmonise bond yields, but only to combat those parts that exceed fundamentals. *A contrario*, this means that a state's bonds cannot be purchased when yields do correspond to fundamentals, even when they are extremely high and hamper the transmission of monetary policy.[327]

The Court's third and final step in *Pringle* had been to rule that the no-bailout clause's goal of securing budgetary discipline in turn contributed to the higher aim of financial stability. Granting assistance is therefore only allowed when it is indispensable for safeguarding that stability.[328] This was a surprising move since the prohibition on bailout had originally intended to safeguard budgetary discipline and ultimately price stability, but not financial stability. Equally surprising, however, was that in *Gauweiler* the Court did not identify any superior goal in its interpretation of the ban on monetary financing, not even price stability. It simply confined its analysis to the aim of budgetary discipline.

Turning financial stability into the ultimate goal of Article 123 TFEU would also have been very difficult for the Court, and not only because it would then have repeated the strained reasoning in *Pringle* that this objective has always been pursued by the prohibitions focusing on fiscal prudence.[329] This de-

323 *Gauweiler* (n 2) para 117.
324 *Gauweiler* (n 2) para 120.
325 See text to n 106 (ch 7).
326 *Gauweiler* (n 2) paras 72 and 112-114.
327 This should assuage the *BVerfG*'s fear, expressed in its reference decision, that any deterioration of the transmission mechanism could justify improving a State's 'credit rating' through bond purchases. See BVerfG *OMT reference decision* (n 189) paras 97-98.
328 See text to n 82 and n 83 (ch 7).
329 In his Opinion the AG did identify financial stability as the ultimate objective of Art 123 TFEU but hardly operationalised that finding as he merely argued that it therefore constitutes a 'fundamental rule' of the currency union 'exceptions to which should be interpreted restrictively'. See *Gauweiler* (n 2), Opinion of AG Cruz Villalón, para 219.

viation from *Pringle* also occurred, paradoxically, because it had stayed faithful to that judgment at the stage of defining the Bank's monetary policy mandate.[330] Given its strategy to juxtapose monetary and economic policy and its related reasoning that financial stability is not a goal of the former, identifying financial stability as an objective of Article 123 TFEU, be it as an intermediate or ultimate one, is no longer an option if one wants to uphold the bond programme.

To reconcile the Founding Contract with the Treaties in *Pringle*, the Court had to play a little with history by arguing that it had always been possible for the members of the currency union to grant financial assistance when indispensable to safeguard financial stability. In *Gauweiler*, it did the same with the present by not allowing this stability to play any explicit role in its analysis of Outright Monetary Transactions at all.

3.4 Courts and central banks in a stability community

The views of the *Bundesverfassungsgericht* and the Court on the legality of the bond purchases could not have been more different. Whereas the former indicated in no uncertain terms in its reference decision that it considered the bond purchases a violation of the Bank's mandate, the latter found them to be compatible with it and in so doing managed to reconcile the Founding Contract with the Treaties. What can explain this enormous difference in views? It turns out that the judges in Karlsruhe and Luxembourg have a different opinion about the independence of the Bank and the authority of its position in a community based on stability.

The Union Treaties endow the Bank with great independence, institutionally, organisationally, functionally as well as financially.[331] This inevitably has consequences for the intensity of judicial review courts should exercise when called upon to interpret and rule on the validity of its actions. This is not to say the Bank should have *carte blanche* or be exempted from judicial review. Apart from the fact that this would be undesirable, it would also contradict Article 35 of the Statute which states that its 'acts or omissions are open to review or interpretation' by the Court in line with the arrangements in the Union Treaties. It does mean that courts should be careful not to get caught up in economic disputes which they cannot settle anyway and exercise considerable restraint in reviewing assessments of the Bank.[332]

330 See text to n 256 and n 269 (ch 7).

331 See text to n 184 (ch 3).

332 Goldmann, 'Adjudicating Economics?' (n 241) 271-272. See also Christoph Herrmann, 'Die Bewältigung der Euro-Staatsschulden-Krise an den Grenzen des deutschen und Europäischen Währungsverfassungsrechts" (2012) 24 EuZW 805, 810-811; Alicia Hinarejos,

At first sight the *Bundesverfassungsgericht* seemed to be aware of the necessity of such restraint in its reference decision. It argued that the independence guarantee in 130 TFEU covers the 'actual powers' conferred on the Bank, but not the 'determination of the extent and scope of its mandate' which it could therefore delineate.[333] This was particularly important given that this independence constituted a departure from the requirements of the *Grundgesetz* concerning 'the democratic legitimation of political decisions'.[334] It had consented to that independence given its beneficial effects on price stability, yet it had to be ensured that the Bank stuck to its carefully delineated mandate and did not expand it 'at will'.[335]

Although plausible at first sight, upon closer examination this approach is questionable.[336] In theory one can distinguish between a mandate's delineation and the actual exercise of powers, but in practice such a distinction hardly stands up. Especially in the case of the Bank, whose mandate is only functionally delimited by the goals it has to achieve, it is extremely difficult, if not impossible, to delineate its mandate without taking into consideration the actions that are based on it. This showed in the analysis of the *Bundesverfassungsgericht*, which only managed to identify and delimitate the Bank's mandate by discussing and interpreting the bond programme at length.

Moreover, when interpreting the programme any restraint on the side of the German court was hard to discern, in particular when it came to identifying objectives, the determining factor in the proceedings.[337] Not only did it limit its analysis to the programme's immediate objective, it also reconstrued that objective when it stated that the Bank intended to 'neutralise' bond spreads. In addition, it took a clear stance on the possibility to differentiate between excessive and justified yield spreads by arguing that such a division is not only unfeasible, but also 'meaningless'. In doing so, it essentially broke into the policy debate that was held within the Governing Council of the European Central Bank and that *Bundesbank* President Weidmann failed to win.[338] One would think that a court plays it safe when it overrules the expert assessment of an independent central bank, and backs up its reasoning with strong evidence. Yet, the *Bundesverfassungsgericht* only referred to the Annual Economic

'*Gauweiler* and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' (2015) 11 EuConst 563, 575; Sven Simon, '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' (2015) 16 GLJ 1025, 1032.

333 BVerfG *OMT reference decision* (n 189) para 60.

334 BVerfG *OMT reference decision* (n 189) para 59.

335 BVerfG *OMT reference decision* (n 189) paras 59-60.

336 Wendel, 'Exceeding Judicial Competence' (n 189) 301-302.

337 BVerfG *OMT reference decision* (n 189) paras 63, 71, 98. See also text to n 232ff (ch 7).

338 See also Heiko Sauer, 'Doubtful It Stood…: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment' (2015) 16 GLJ 971, 979.

Report of the German Council of Economic Experts, which does not even support its view indisputably.

This very intrusive review also had consequences for the way Karlsruhe abided by its promise in *Honeywell* to only consider *ultra vires* review in case of 'manifest' transgressions of competences. Admittedly, for a court to find an act *ultra vires* it is not required that its reasoning is immune to challenge. Yet, its reasoning does need to possess considerable authority in light of the arguments used.[339] It is highly questionable whether such authority is present when it leads a court to overrule a central bank not just on points of law, but on the definition and feasibility of the objectives pursued to find that it acts *ultra vires*. The German court's position on the *ultra vires* nature of the bond programme becomes only more startling when one realises that it also kept open the possibility that the instrument was interpreted in conformity with Union law.[340] How can a court establish a manifest violation when it considers itself that a Union law-friendly interpretation is possible too?[341]

Contrary to the *Bundesverfassungsgericht*, the Court was much more sensitive to the independence of the Bank.[342] This showed up most clearly in its proportionality analysis of the bond programme.[343] As is well known, in the case of policy measures involving a considerable amount of discretion the Court is cautious in its proportionality review, and for good reason.[344] It is not for a court to strike down a policy measure solely because it thinks it would have dealt with a situation differently, especially not when it concerns

339 According to dissenting Judge Gerhardt, the threshold of manifestness would be meaningful if it implies that the *BVerfG* only acts in the case of 'violations of the distribution of powers which are obvious from the outset and which suggest themselves without further legal analysis'. However, the majority of Judges 'also considered possible that a transgression of powers can be manifest if it is preceded by a lengthy clarification process'. See BVerfG *OMT reference decision* (n 189), Diss Opinion Judge Gerhardt, para 16. See also Wendel, 'Exceeding Judicial Competence' (n 189) 275; Dariusz Adamski, 'Economic Constitution of the Euro Area after the *Gauweiler* Preliminary Ruling' (2015) 52 CML Rev 1451, 1481.

340 Bast (n 232) 179; Wendel, 'Exceeding Judicial Competence' (n 189) 276.

341 As Thiele, 'Friendly or Unfriendly Act?' (n 244) 254-255 explains, the answer is that the *BVerfG* twists the criterion of 'manifestness' by 'delinking' the violation from its 'qualification'. The violation of Union law can be subject to debate, but nonetheless be manifest if ultimately considered a violation. See also Mayer (n 189) 137-138.

342 To put it in the words of Chiara Zilioli, the European Central Bank's general counsel: '[T]he Court of Justice has recognized that the right place for discussion among experts in matters of monetary policy and for monetary-policy-related decision making, is the Governing Council itself, rather than a court'. See Chiaro Zilioli, 'The ECB's Powers and Institutional Role in the Financial Crisis: A Confirmation From the Court of Justice of the European Union' (2016) 23 MJ 171, 172-173.

343 See also Georgios Anagnostaras, 'In the ECB We Trust…the FCC We Dare! The OMT Preliminary Ruling' (2015) 40 EL Rev 744, 754-755.

344 See extensively Paul Craig, *EU Administrative Law* (OUP 2012) 592-593.

matters requiring considerable expertise.[345] In such situations the Court will only examine whether it is 'manifestly' disproportionate. That standard was also applied in this case.[346] The Court considered reducing excessive bond rates through secondary market purchases a suitable instrument to safeguard the transmission of monetary policy and reasoned that the programme did not go manifestly beyond what was necessary to achieve that goal, thereby paying particular attention to the need to put an *ex ante* cap on the amount of purchases.[347]

In the context of its proportionality analysis the Court also examined whether the Bank had manifestly erred on *fact* by taking the view that spreads for certain bonds were excessive and hampered the transmission of monetary policy.[348] Here, central bank independence made itself heard when the Court stated that nothing more can be required of the Bank than that it uses its expertise 'with all care and accuracy'.[349] Perhaps it even made itself heard a bit too much.[350] By requiring the Bank to act to the best of its ability the Court actually did not establish any 'standard of proof' in relation to the facts that need to be met when taking decisions, nor a meaningful 'standard of judicial review' to examine whether the Bank had complied with that standard of proof.[351] The Court also used the manifest error of assessment test to avoid Karlsruhe's error of getting trapped in the debate between the *Bundesbank* and the European Central Bank. It reasoned that the mere fact that the latter's assessment is open to challenge does not suffice to establish a manifest error.[352]

It is significant that the Court dealt with many of Karlsruhe's concerns at the stage of proportionality review. This review is only warranted if the objective or interest pursued by a measure is a legitimate one. If the Court, like the *Bundesverfassungsgericht*, had found that the bond purchases were 'politically motivated', had limited its analysis to their immediate objective and had reconstrued that objective to the 'neutralisation' of bond spreads, it would have come close to accusing the Bank of a misuse of powers. Such misuse differs from a proportionality assessment in that it entails an ex-

345 See also Jean-Victor Louis, 'The EMU After the *Gauweiler* Judgment and the Juncker Report' (2016) 23 MJ 55, 63-64 (noting that in *Gauweiler* the Court did 'not aim at substituting its judgment to the one of the ECB').

346 See in particular *Gauweiler* (n 2) paras 68, 81 and 91.

347 See text to n 292 (ch 7).

348 See text to n 261 (ch 7).

349 See text to n 264 (ch 7).

350 See also Tridimas and Xanthoulis (n 15) 31: 'The key point that emerges from the judgment is the enormous discretion left to the ECB. Although its power is restricted by a number of conditions, none of those conditions are firm and the determination whether they are fulfilled invariably entails complex technical assessment in relation to which the Court of Justice left the ECB with broad discretion'.

351 Craig, *EU Administrative Law* (n 344) 432-434.

352 *Gauweiler* (n 2) paras 72-75.

amination of the 'motives' of the actor to see whether it aims for a goal different from the one which it is allowed to pursue by law.[353] That is a step the Court was clearly not prepared to take. Before it started its proportionality assessment, it first accepted the stated objective of the bond purchases – safeguarding the singleness and transmission of monetary policy and ultimately price stability – and used it as the primary indicator for the conclusion that they fell within the Bank's mandate in Article 127(1) TFEU.[354] It is at the point of objectives, then, that the Court paid most deference to the independence of the Bank.

The intensity with which the *Bundesverfassungsgericht* reviewed the bond programme in its reference decision tended to lead to a perverse result.[355] When it approved of the establishment of the currency union more than twenty years ago in its *Maastricht Urteil*, it did so on the condition that this union would be a *Stabilitätsgemeinschaft*, a community based on stability.[356] The independence of the Bank is the greatest symbol of, and safeguard for, such a currency union. It greatly contributes to its authority, enabling it to safeguard monetary stability, *especially* during a crisis when it needs to take actions that push the boundaries of its mandate.[357] Yet, in its desire to safeguard the currency union's continued existence as a community based on stability, the German constitutional court now reviewed the bond programme with such intensity that it actually risked undermining the Bank's independence as a powerful asset.

In the end, the judges in Karlsruhe too realised they should not go that far. In their final judgment of 21 June 2016 they accepted the Court's ruling that the Bank had stayed within its mandate and had not violated the prohibition on monetary financing.[358] If interpreted in line with that ruling, the bond programme did not constitute an *ultra vires* act nor violate Germany's

353 Takis Tridimas, *The General Principles of EU Law* (OUP 2006) 140.

354 *Gauweiler* (n 2) paras 46-50, 56 and 64.

355 See also Stefania Baroncelli, 'The *Gauweiler* Judgment in View of the Case Law of the European Court of Justice on European Central Bank Independence: Between Substance and Form' (2016) 23 MJ 79, 87: 'It is even paradoxical that the FCC has employed the notion of central bank independence to criticize the ECB's actions, considering that it was specifically at Germany's request that the ECB was made independent under the Treaty of Maastricht'.

356 See text to n 1 (ch 4).

357 See also WT Eijsbouts and B Michel, 'Between Frankfurt and Karlsruhe: The Move, the Law and the Institutions' (2013) 9 EuConst 355, 356-357 noting in relation to Draghi's 'whatever it takes' pledge that 'Draghi took *responsibility* for the survival of the euro and claimed fresh *authority* for his Bank through this action. The law is part of this, of course: the legal claim that he acted within his mandate was a part of his taking responsibility'.

358 BVerfG, 2 BvR 2728/12 of 21 June 2016 (BVerfG *final judgment OMT*). For extensive analysis of this judgment see Asteris Pliakos and Georgios Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides *Gauweiler*' (2017) 18 GLJ 213.

constitutional identity.[359] The judgment reveals how the assessment of the *ultra vires* nature of actions of the Bank, or of any other institution for that matter, ultimately requires the *Bundesverfassungsgericht* to determine whether the Court itself has acted *ultra vires*. It cannot avoid such a determination due to its commitment in *Honeywell* to always first ask a preliminary question before ruling on an *ultra vires* challenge and to regard the answer of its European counterpart as binding 'in principle'.[360]

In its judgment the *Bundesverfassungsgericht* argued that the Court had remained within its mandate in Article 19(1) TEU to ensure that in the application of the Union Treaties the law is observed, even though it had 'serious objections' against its reasoning.[361] It considered particularly worrisome the fact that the Court had accepted the Bank's assertion that its purchases have a monetary policy objective 'without questioning or at least discussing….the soundness of the underlying factual assumptions' and that it had not adequately addressed the necessity of a 'restrictive interpretation' of the Bank's mandate given its independence.[362] These objections did not suffice, however, for Karlsruhe to substitute its own views for those of the Court.[363]

4 Conclusion

The change in the Founding Contract that political leaders initiated on 11 February 2010 set in motion an unprecedented transformation of the currency union, turning it into something very different from what had been agreed to when they signed and ratified the Treaty of Maastricht. Its original set-up aimed to create an environment in which the Bank could effectively keep inflation in check. The Bank's mandate, which declares price stability to be the primary aim of monetary policy, as well as the bans on bail-out and monetary financing, constituted its most essential building blocks. Due to the change in the Contract, however, the currency union's stability conception changed profoundly, being no longer predominantly geared towards price stability, but acknowledging the importance of financial stability as well. This necessitated actions by the Union and its member states that before the crisis would have been considered impossible.

359 BVerfG *final judgment OMT* (n 358) paras 190-220.
360 See text to n 191 (ch 7).
361 BVerfG *final judgment OMT* (n 358) para 181.
362 BVerfG *final judgment OMT* (n 358) paras 182, 186-189.
363 The *BVerfG* could avoid that conclusion by setting the bar for a 'manifest' violation of competences extremely high. In *Honeywell* it had already stated that the Court should be granted 'a right to tolerance of error'. See BVerfG *Honeywell* (n 191) para 66. In furtherance thereof, it now reasoned that the Court only manifestly violates its mandate when it interprets the Treaties in a way that is 'manifestly utterly incomprehensible and thus objectively arbitrary'. See BVerfG *final judgment OMT* (n 358) para 149.

It is therefore tempting to simply dismiss these actions as violations of Union law. Illustrative are the statements of German central bankers Issing and Stark cited in chapter 5, where they show little hesitance in condemning financial assistance to distressed states in whatever form as being a violation of the ban on bailout.[364] Such firm language, however, indicates a misunderstanding of how law operates, as Thomas Beukers and Jan-Herman Reestman point out:

> 'Both *Pringle* and *Gauweiler* show the tension between conventional wisdom on economic and monetary union and the capacity of EU law to accommodate new developments and events, in particular in times of crisis. This may be a tough lesson to learn for – especially German – economists who support only a specific understanding of economic and monetary union'.[365]

What causes this tension? At the core, one could argue, it arises from a mistaken equation of the object of law with law itself. The Union Treaties seek to control and regulate the single currency, but they cannot 'escape' from the linguistic and normative 'uncertainties' that characterise most legal rules.[366] Terms like 'monetary financing' or 'bailout' are mentioned nowhere in the Treaties and are therefore of little legal significance. But even notions such as 'assumption of commitments' or 'exceptional occurrence', are vague and ambiguous and require interpretation before they can be applied.

In combination with a proper degree of deference to the independence of the Bank, this interpretative discretion enabled the Court in *Pringle* and *Gauweiler* to overcome the challenge of reconciling the change in the Founding Contract with the law. Central to this challenge was the requirement to accommodate the currency union's new stability conception, which formed the base for much of its reading of the ban on bailout, the assistance clause in Article 122(2) TFEU, as well as the mandate of the Bank and the prohibition on monetary financing. Much of it is well argued, although at times the Court could have been more permissive of financial stability as an objective. Despite its indications to the contrary in *Pringle,* Article 122(2) TFEU does seem to allow the Union to enter into assistance operations that pursue this objective. And if it had not applied *Pringle* logic in interpreting the Bank's mandate in the

364 See text to n 35 and n 36 (ch 5).

365 T Beukers and J-H Reestman, 'On Courts of Last Resort and Lenders of Last Resort' (2015) 11 EuConst 227, 237.

366 As Gunnar Beck, explains, such 'uncertainty' is not only present in the rules themselves ('primary level uncertainty') but also at the stage of argumentation ('secondary legal uncertainty'): '*Secondary* legal uncertainty is ultimately as inescapable as *primary* level uncertainty because legal argumentation is subject to the same defining ethical and linguistic constraints as the making of primary legal rules in the first place.' See Beck, *Legal Reasoning of the Court of Justice* (n 3) 139. See also n 9 (ch 7).

slipstream of Karlsruhe, it could have explicitly allowed for the objective to inform monetary policy.

On one crucial point, however, the Court's approval of the change in the Founding Contract pushes, and even crosses, the boundaries of its interpretative discretion: to argue that financial stability has always been an objective of the ban on bailout is to play with history. Does this then imply that it should have disapproved of the assistance operations prior to the entry into force of Article 136(3) TFEU? No. To see why requires us to return once more to solidarity.