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CASE LAW

A. Court of Justice

Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler*

Case C-62/14, *Peter Gauweiler and others* v. *Deutscher Bundestag*, Judgment of the Court (Grand Chamber) of 16 June 2015, EU:C:2015:400

1. Introduction

When the Member States signed the Treaty on European Union they had a clear vision of their future currency union: it had to be ultimately geared towards price stability. The single currency's legal set-up is therefore strongly focused on this goal. When the debt crisis exposed the shortcomings of this set-up, it forced a widening of the stability conception underlying the single currency to one also addressing *financial* stability. In the present case, the ECJ had to confront this transformation for the second time. Earlier, in *Pringle*,[1] it approved of the European Stability Mechanism (ESM), the currency union's permanent rescue fund. Now it was asked to rule on the ECB's bond buying programme *Outright Monetary Transactions* (OMT).

The challenge for the ECJ was huge. At its height, the crisis threatened not only the single currency; it threatened the Union. Striking down the very measure that has proved essential to preserve the European contract on the basis of which the ECJ itself functions, would therefore exceed the Court's authority. Approving it, however, would require a herculean struggle with the law and its stability conception from the past. What made matters even more complicated is that the preliminary question came from Germany's constitutional court, the *Bundesverfassungsgericht* (*BVerfG*). In this first referral by the *BVerfG*, it took an extremely critical stance on the legality of the bond buying programme.

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

The ECJ found the OMT programme compatible with the central bank's stability mandate, as now interpreted by the ECB.[2] Yet, in its desire to reconcile the programme with that mandate it adopted a reasoning exactly opposite to that of the *BVerfG*, which prevented it from embracing financial stability in its entirety. Much of the difference between the courts concerns the ECB's independence and actions in the face of its responsibilities under the Treaties. Now it is up to the *BverfG,* which must also face the difficult question whether it has the authority to rule against the bond buying programme. And if it draws the same conclusion as the ECJ, it too will have to give in to the currency union's updated stability conception.

This case note discusses the change in the single currency's stability, and the differing views of the ECJ and *BVerfG* on this change and, ultimately, central bank independence. The relationship between the two courts is a motif running throughout the entire piece.

2. Background

2.1. *The stability focus of the single currency's original legal framework*

The legal framework underlying the single currency is a product of its time. When the TEU was concluded in 1992, two especially important developments teamed up and greatly influenced the currency union's legal set-up. The first was a shift from Keynesian to monetarist thinking and a corresponding aversion to expansionary monetary and fiscal policies.[3] The second development was geopolitical in nature, and relates to the unification of Germany. After the fall of the Berlin wall in 1989 the looming prospect of unification raised fears of a renewed German dominance on the continent. By participating in a currency union Germany could dispel these fears and show its partners that it was committed to Europe and political stability. Nonetheless, occupying the anchor position in the European Monetary System (EMS), Germany had much to lose and little to gain economically speaking from a single currency. This gave it a strong position

2. The ECB and the NCBs of the Member States make up the European System of Central Banks (ESCB). As long as not all States have adopted the single currency, the ECB and the NCBs in the currency union together form the Eurosystem (Art. 282(1) TFEU). Within this system the ECB's Governing Council is in charge of formulating monetary policy. The ECB's Executive Board implements this policy and in doing so needs to have recourse to NCBs as much as possible (Art. 12(1) Statute ESCB and ECB).

3. McNamara, *The Currency of Ideas* (Cornell University Press, 1998).

at the negotiating table, allowing it to push for a single currency that would be at least as strong and stable as its precious *Deutsche Mark*.[4]

Both the shift towards monetarism and Germany's strong negotiating position contributed to a legal framework for the currency union incorporating a stability paradigm.[5] Characteristic of this paradigm is that it attributes overriding importance to price stability and aims to position the ESCB such that it is able to pursue this goal effectively. This shows in three ways in particular. The first is at the level of goals and principles. Price stability ranks as one of the goals of the Union,[6] it is the primary goal of monetary policy,[7] and it features as the first guiding principle for economic and monetary policy in Article 119(3) TFEU. The other principles mentioned in this provision, especially sound public finances and monetary conditions, facilitate the pursuit of the currency union's primary goal.

The paradigm also shines through in the mandate and constitutional position of the ESCB. Article 127(1) TFEU stipulates that its primary objective is to safeguard price stability and determines that it can only support the general economic policies in the Union to the extent that this does not conflict with that primary goal.[8] It has to achieve those objectives by performing several tasks, "basic" and "non-basic". Article 127(2) TFEU lists monetary policy among the basic ones,[9] without however specifying what it entails. The capacity in which the ESCB has to carry out that policy is one of great independence, the idea being that monetary policy geared towards price stability is most effective when it is taken out of the hands of elected politicians and put into those of technocratic, independent central bankers. Article 130 TFEU is key when it comes to ensuring independence,[10] stating that neither Union institutions, State governments, nor any other body shall

4. See e.g. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press, 1998), pp. 440–447 and 461–467.

5. Integration theorists have extensively discussed this "stability paradigm". See e.g. Dyson, *The Politics of the Euro-Zone: Stability or Breakdown?* (OUP, 2000), p. 27; Marcussen, "The dynamics of EMU ideas", 34 *Cooperation and Conflict* (1999), 383–411, at 402; Heipertz and Verdun, *The Politics of the Stability and Growth Pact* (Cambridge University Press, 2010), pp. 91–93. Legal scholars too have recognized its influence on the legal setup of EMU. See notably Herdegen, "Price stability and budgetary restraints in the Economic and Monetary Union: The law as guardian of economic wisdom", 35 CML Rev. (1998), 9–32.

6. Art. 3(3) TEU.

7. Art. 119(2) TFEU.

8. See also Art. 282(2) TFEU and Art. 2 of the Statute of the ESCB and ECB (hereinafter: "the Statute").

9. See also Art. 3(1) of the Statute.

10. Besides this "institutional" independence, a host of provisions of primary law seek to secure "financial", "organizational" and "functional independence". See Amtenbrink, "Economic, monetary and social policy", in Kapteyn et al. (Eds.), *The Law of the European Union and the European Communities* (Kluwer Law International, 2008), pp. 951–956.

seek to influence the ECB or NCBs in the performance of their tasks.[11] It thereby aims to shield them, to use the words of the Court, "from all political pressure" in order to enable the ESCB "effectively to pursue the objectives attributed to its tasks".[12]

Yet, the focus on stability is not limited to goals and principles or the ESCB's mandate. It also greatly shapes the Union's legal set-up for economic policy. Of special interest are the prohibitions in the Articles 123–126 TFEU which aim to ensure that States display fiscal prudence so as to prevent negligent fiscal policies forcing the ECB to change its monetary policy stance or, even worse, to finance national budgets.[13] Article 126 TFEU does so by requiring States not to have excessive government deficits and debts.[14] The other three prohibitions in Articles 123–125 TFEU strive for fiscal prudence by subjecting States to the discipline of the markets. Each of them cuts off certain financing mechanisms – central bank credit, privileged access to financial institutions, and "bail-outs" – in order to ensure that States are solely responsible for their fiscal policies. This should cause markets to apply their regular assessment of creditworthiness and charge higher risk premiums if they have doubts about a State's fiscal behaviour, resulting in increased interest rates.[15] These higher rates, in turn, should force States to change course.

The prohibition on monetary financing in Article 123(1) TFEU is of particular importance here. It is repeated in Article 21(1) of the Statute of the ESCB and ECB ("the Statute") and forbids the ECB and NCBs two things:[16] first, granting credit facilities to a State's central government, regional, local or other public authorities and bodies governed by public law or public undertakings; second, the direct purchase of their debt instruments, which means that they cannot buy up their bonds on the primary market, the place where new securities are issued.[17] By ruling out these financing mechanisms the prohibition not only aims to discipline Member States, it also seeks to

11. The text of Art. 130 TFEU is repeated in Art. 7 of the Statute. Importantly, both provisions also require the ECB and NCBs not to seek or take instructions from these bodies.

12. Case C-11/00, *Commission* v. *ECB*, EU:C:2003:395, para 134.

13. Gros and Thygesen, *European Monetary Integration* (Longman, 1999), pp. 327–329; De Grauwe, *Economics of Monetary Union* (OUP, 2014), p. 216.

14. See Art. 1 of Protocol No. 12 on the Excessive Deficit Procedure.

15. Smits, *The European Central Bank* (Kluwer Law International, 1997), p. 75.

16. The prohibition on monetary financing does not apply in full to the UK, which is allowed to maintain its "ways and means" facility with the Bank of England. See point 10 of Protocol No. 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

17. Both assistance mechanisms are also ruled out in relation to Union institutions, bodies, offices or agencies.

protect the ECB's independence, and thus its ability to safeguard price stability, by making sure it does not get drawn into fiscal politics.[18]

Importantly, Article 123(1) TFEU is silent about the purchase of government bonds on the secondary market; this makes sense, as such purchases can be an effective monetary policy tool. In fact, Article 18.1 of the Statute specifically allows the ECB (and NCBs) to carry out such purchases, stating that it can buy and sell outright marketable instruments. Nonetheless, the preamble to Council Regulation 3603/93, which amongst others defines the prohibition on monetary financing, indicates in its 7th recital that they should not be used to circumvent the ban's objectives.[19]

The crisis now puts strain on this legal framework. Each of the levels at which the focus on stability shines through – goals and principles, central bank mandate and independence, and fiscal disciplining mechanisms – has come under pressure. Causing this pressure is a change in the stability conception underlying the single currency from one that is predominantly focused on price stability to one that takes into consideration financial stability as well.[20] Nothing shows this more clearly than the ECB's bond buying action.

2.2. *Multiple equilibria, monetary policy transmission and ECB action*

The legal framework for the single currency puts quite some trust in the disciplining force of the markets and their ability to adequately price risk, but the crisis gives reason to question this ability. Yields for 10-year government bonds tell the story, specifically their "spreads", that is: the difference in yields. In the currency union, yields on the German *Bund* often serve as a benchmark to assess these spreads, as it is generally considered to be free of default risk. The spread between the *Bund* and other euro area government bonds is influenced by a host of factors, but especially important is the credit premium,[21] which reflects the compensation investors demand for bearing the risk of default. Since the launch of the currency union and up to the start of the financial crisis in 2007/2008, euro area government bond spreads were minor.[22] However, they took a

18. Smits, op. cit. *supra* note 15, pp. 290–291.

19. Council Regulation 3603/93 of 13 Dec. 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty, O.J. 1993, L 332/1.

20. For more detail see Van den Bogaert and Borger, "Differentiated integration in EMU", in De Witte, Vos, and Ott (Eds.), *Between Flexibility and Disintegration: The State of EU Law Today* (Edward Elgar, forthcoming 2016).

21. See ECB Monthly Bulletin, "The determinants of euro area sovereign bond yield spreads during the crisis" (May 2014), 68–69.

22. Ibid., 74. Looking back at that period it even leads the ECB to think investors underpriced risk.

dramatic turn for the worse once the crisis started, especially when it developed into a debt crisis during 2010. Yields for certain government bonds, in particular those of States in the currency union's periphery, skyrocketed, which made it increasingly difficult for them to obtain financing in the market.

In recent years economists have sought to explain this capriciousness of markets.[23] For instance, De Grauwe and Ji study a range of economic "fundamentals" that serve as indicators of a State's solvency (e.g. debt to GDP ratio, fiscal space etc.) and examine how far these can account for euro area bond spreads.[24] Although they find that spreads became much more sensitive to such fundamentals during the crisis, they also conclude that a considerable part in their quick surge cannot be explained by them, in particular for States in the currency union's periphery.[25] This leads them to argue that States in the currency union are susceptible to "multiple equilibria".[26] A State with solid fundamentals can experience a "good" equilibrium in which it benefits from liquidity inflows pushing down the interest rate it has to pay when (re)financing its debt. But that same State can also find itself in a "bad" equilibrium, if it is distrusted by the markets. In a bad equilibrium, it is charged a high interest rate which forces it to impose austerity measures that set off a recession, in turn affecting its fiscal position. Default then becomes a self-fulfilling prophecy in which markets, caught by panic, push a State into default despite its initially solid fundamentals. The cruelty of a currency union, moreover, is that such developments often do not stay confined to one particular State but may "infect" others, triggering events unrelated to fundamentals there as well.[27]

23. This capriciousness did not come as a total surprise, however. Back in 1989 the Delors Committee had already warned against it in its famous report paving the way for a currency union, and argued that the markets should not be fully trusted as a disciplining device; see Committee for the Study of Economic and Monetary Union, "Report on economic and monetary union in the European Community" (April 1989), 20.

24. De Grauwe and Ji, "Mispricing of sovereign risk and macroeconomic stability in the Eurozone", 50 JCMS (2012), 866–880. For a more detailed analysis see De Grauwe and Ji, "Self-fulfilling crises in the Eurozone: An empirical test", 34 *Journal of International Money and Finance* (2013), 15–36.

25. See De Grauwe and Ji, op. cit. *supra* note 24, at 27 and 30.

26. Ibid., at 17. Also arguing that the currency union has suffered from multiple equilibria see, amongst others, Hördahl and Tristani, "Macro factors and sovereign bond spreads: A quadratic no-arbitrage model", Working Paper (April 2013); Gros, "On the sustainability of public debt in a monetary union", 50 JCMS Annual Review Lecture (2012), 36–48; Gärtner and Griesbach, "Rating agencies, self-fulfilling prophecy and multiple equilibria? An empirical model of the European sovereign debt crisis 2009–2011", Universität St. Gallen Discussion Paper No. 2012-15 (June 2012). See also the references *infra* note 63.

27. As ECB Vice-President Constâncio said: "Financial contagion refers to a situation whereby instability in a specific market or institution is transmitted to one or several other

The idea that the currency union has been coping with multiple equilibria is not shared by everyone,[28] but it certainly is by the ECB. The ECB has even acted on it, considering the high government bond yields very problematic from a monetary policy perspective.[29] The ECB's policy interest rates are passed on to bank lending rates through a series of "channels". In normal times the channels work well, but during the crisis some of them were "blocked" due to the high yields for certain government bonds, as a result of which the ECB's policy rates could no longer reach out evenly across the currency union.[30] Three channels, in particular, were not functioning properly.[31] The first was the "price channel": States compete with banks on the markets for capital. Higher government bond rates can therefore also drive up the rates for banks, which in turn may translate into higher bank lending rates. The second relates to liquidity. Government bonds are used as collateral in the interbank market. They also figure as "benchmarks" to determine the value of other collateral assets in lending operations. A rise in government bond rates can therefore make it more difficult for banks to obtain liquidity, as it affects the eligibility of their assets as collateral in lending operations. The third and final channel was banks' balance sheets. Banks often hold significant amounts of government bonds on their balance sheets. Changes in the price of these bonds can therefore seriously weaken a bank's capital base, negatively affecting its capacity to extend credit to customers.

During the crisis the ECB tried to "unblock" these channels, so as to restore the singleness and proper transmission of its monetary policy, and thus to

markets or institutions… Criteria that have been used in the literature to identify contagion include: (i) the transmission is in excess of what can be explained by economic fundamentals", Constâncio, "Contagion and the European debt crisis", 16 *Financial Stability Review* (2012), 109–121, at 110–111.

28. See e.g. Giordano, Pericoli and Tommasino, "Pure or wake-up call contagion: Another look at EMU's sovereign debt crisis", *16 International Finance* (2013), 131–160. The authors argue that in as far as the currency union experienced contagion during the crisis this still related to fundamentals ("wake-up call" contagion), and not so much to self-fulfilling beliefs ("pure" contagion). More specifically, after the start of the Greek crisis investors became more sensitive to fundamentals in other euro area States.

29. Draghi during the ECB Press Conference on 6 Sept. 2012: "the assessment of the Governing Council is that we are in a situation now where you have large parts of the euro area in what we call a 'bad equilibrium', namely an equilibrium where you may have self-fulfilling expectations that … generate very adverse scenarios. So, there is a case for intervening, in a sense, to 'break' these expectations, which, by the way, do not concern only the specific countries, but the euro area as a whole. And this would justify the intervention of the central bank".

30. ECB Monthly Bulletin, "Assessing the retail bank interest rate pass-through in the euro area at times of financial fragmentation" (Aug. 2013), 83–91.

31. See extensively Cour-Thimann and Winkler, "The ECB's non-standard monetary policy measures: The role of institutional factors and financial structure", 28 *Oxford Review of Economic Policy* (2012), 765–803, at 774–775.

deliver on its mandate to safeguard price stability, through several "unconventional" or "non-standard" policy tools. Of particular importance here are its bond buying programmes. Key to these programmes is that they serve not as substitute of, but as a complement to the ECB's "standard" interest rate instrument.[32] By purchasing government bonds on the secondary market, the ECB aims to lower bond rates so as to ensure that the policy signals it sends out with its interest rate instrument get properly transmitted to the real economy.

The ECB launched its first programme, called "Securities Markets Programme" (SMP), in May 2010.[33] The programme helped ease tensions in bond markets for a while, but it lacked the decisiveness the ECB may have hoped for.[34] Not helpful either was the fact several distressed States did not live up to their commitment to restore the soundness of their economies and budgets.[35] The ECB had launched the programme on the (implicit) condition that they would stick to that commitment,[36] considering that its bond purchases would only be effective if they were not counteracted by unconstructive policies on the part of States.[37]

Despite this negative experience, market panic forced the ECB to take further action in the summer of 2012. Yields for certain government bonds, in particular those of Italy and Spain, had become so disconnected from fundamentals that the ECB considered markets were pricing in a "currency redenomination" risk premium, i.e. they wanted compensation for the risk that the monetary union would fall apart and (some of) its members would

32. Ibid., at. 781.

33. ECB Decision 2010/281/EU of 14 May 2010 establishing a securities markets programme (ECB/2010/5), O.J. 2010, L 124/8.

34. See also ECB Monthly Bulletin, "The determinants of euro area sovereign bond yield spreads during the crisis" (May 2014), 79–80, giving an overview of several studies assessing the SMP's impact.

35. On this lack of commitment, in particular in relation to Italy in the summer of 2011, see Beukers, "The new ECB and its relationship with Eurozone Member States: Between central bank independence and central bank intervention", 50 CML Rev. (2013), 1579–1620, at 1598–1601.

36. See the 4th recital to the preamble of ECB Decision 2010/281/EU which reads: "The Governing Council has taken note of the statement of the euro area Member State governments that they will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures and the precise additional commitments taken by some euro area Member State governments to accelerate fiscal consolidation and ensure the sustainability of their public finances".

37. Draghi during the ECB Press Conference on 3 Nov. 2011: "The Securities Markets Progarmme (SMP) … is justified on the basis of restoring the functioning of monetary policy transmission channels… The relationship with conditionality should be viewed from this perspective. We want our monetary policy to function".

have to live on with a new, devalued currency.[38] With a view to this fear and panic, ECB president Mario Draghi spoke the following, by now famous, words at a conference in London on 26 July 2012: "Within our mandate, the ECB is prepared to do whatever it takes to preserve the euro. And believe me, it will be enough".[39]

On 6 September 2012 the Governing Council put flesh on this "whatever-it-takes" pledge by deciding on the modalities of its second bond buying initiative, called "Outright Monetary Transactions" (OMT).[40] Similar to the first programme, which was terminated at the same time,[41] it allows the Eurosystem to buy government bonds on the secondary market and intends to sterilize any injected liquidity, i.e. offset it by absorbing measures, so as not to affect the monetary policy stance and avoid negative consequences as regards inflation.

Compared to its predecessor, however, the OMT programme contains some important improvements that are meant to make it much more effective.[42] First, there is no *ex ante* limit on the size of purchases, so as not to play into speculators' hands (although the ECB indicated before the ECJ that it will employ limits internally).[43] Second, purchases are focused on the shorter part of the yield curve, specifically on bonds with a maturity varying between one and three years. Third, the Eurosystem accepts *pari passu* treatment with private creditors so as not to discourage the latter from investing in bonds of distressed States as well. Fourth, purchases are explicitly tied to conditionality this time: the Eurosystem will only buy up bonds of States that are subject to an ESM or EFSF macroeconomic adjustment programme or a precautionary programme, provided they include the possibility of primary market

38. Draghi during the ECB Press Conference on 6 Sept. 2012: "We aim to preserve the singleness of our monetary policy and to ensure the proper transmission of our policy stance to the real economy throughout the area. OMTs will enable us to address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors of the reversibility of the euro…." See also ECB Monthly Bulletin, "The determinants of euro area sovereign bond yield spreads during the crisis" (May 2014), 77–78.

39. Verbatim of the speech by Draghi at the Global Investment Conference in London, 26 July 2012, available at <www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> (all websites last visited 17 Oct. 2015).

40. ECB Press release, "Technical features of outright monetary transactions", 6 Sept. 2012. The Governing Council's decision had already been announced on 2 Aug. 2012.

41. Under the SMP programme Greek, Irish, Portuguese, Italian and Spanish public debt securities were purchased for a total book value of around €211 bn. See ECB Monthly Bulletin, cited *supra* note 38, 79.

42. See also Cour-Thimann and Winkler, op. cit. *supra* note 31, at 778–779.

43. See Opinion of A.G. Cruz Villalón in Case C-62/14, *Gauweiler and others*, EU:C:2015:7, para 191.

purchases.[44] If States do not comply with such a programme, the Eurosystem will cease its purchases. Over and above such situations, the Governing Council can decide to stop purchases, just as it can decide to activate or continue them, in full discretion and on the basis of its monetary policy mandate. Until now the ECB has never had to use the OMT programme. In fact, it has not yet even incorporated it in a formal legal act. Its mere announcement sufficed to take away much of the fear that was holding markets in its grip.[45]

The ECB's bond buying activities proved very effective, but are highly controversial. Especially in Germany, the State that fought hard to make the single currency as stability-minded as possible, they were received with scepticism in financial circles. *Bundesbank* president Axel Weber (allegedly) voted against the first SMP programme in the ECB Governing Council,[46] and the bond purchases subsequently also greatly influenced his decision to resign before the end of his term and not to run for the office of ECB president.[47] ECB Executive Board member and former *Bundesbank* vice-president Jürgen Stark left his post in September 2011 out of opposition to the purchases.[48] Finally, current *Bundesbank* president Jens Weidmann (allegedly) voted against the OMT-programme and,[49] as will become clear later on, has even defended his critical views before the *BVerfG*.

2.3. *The alternative reading: Financial stability and the ECB as last resort lender for States*

The legal framework for the single currency may create the impression that price stability is all that matters. But it is not. Several kinds of stability are

44. In practice, only ESM adjustment programmes are still of relevance. As of 1 July 2013 the EFSF can no longer enter into new assistance operations. States that received EFSF assistance have successfully exited their programmes or are now subject to (new) ESM programmes.

45. On the OMT's impact on bond yields, see Altavilla, Giannone and Lenza, "The financial and macroeconomic effects of OMT announcements", ECB Working Paper series No. 1707 (Aug 2014).

46. Atkins, "ECB divided over policy U-turn", *Financial Times*, 11 May 2010.

47. Schäfer, "Weber says hawkish views led to ECB race exit", *Financial Times*, 14 Feb. 2011.

48. "Stark admits bond-buying led to ECB resignation", *Financial Times*, 18 Dec. 2011.

49. At the press conference following the decision on the OMT programme, ECB president Draghi stated that the decision "was not unanimous. There was one dissenting view. We do not disclose the details of our work. It is up to you to guess". Although not specifically pointing to Weidmann, the latter is widely seen as having voted against the programme; see e.g. "Weidmann isolated as ECB plan approved", *Financial Times*, 7 Sept. 2012.

relevant for a currency union,[50] one being *financial* stability. A crucial doctrine in that context is that of "lender of last resort". It stipulates that during a liquidity crisis, characterized by an acute drying up of funds, a central bank should take responsibility for the integrity and stability of the financial system. The banking sector is susceptible to such crises due to the maturity mismatch between assets, often consisting of longer term loans, and liabilities such as deposits that can be withdrawn by depositors at short notice. In case of a panic, depositors will rush to the bank to get their money out first, knowing that it will not be able to pay out all its customers at the same time.[51] In situations like these, the central bank should preserve the stability of the financial system by acting as a lender of last resort, which means that it should prevent illiquid (but solvent) banks from failing by lending to them on the short term.

Despite the importance of the doctrine, the Union Treaties are silent about a last resort responsibility for the ESCB. What is more, they hardly attribute it any responsibility for financial stability. The only explicit reference is in Articles 127(5) TFEU and 3.3 of the Statute which state that the ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of financial institutions and the stability of the financial system. Article 25.1 of the Statute specifies in this regard that the ECB may offer advice to and be consulted by the Council, the Commission and relevant national authorities on legislation on these issues. More far reaching tasks relating to prudential supervision can be conferred on the ECB by the Council on the basis of Article 127(6) TFEU,[52] used during the crisis to establish the banking union's Single Supervisory Mechanism (SSM).[53]

This meagre attention for financial stability can again be explained by the time in which the Union Treaties were concluded. Given the prevalence of monetarism and the concern for price stability, financial stability issues got pushed into the background.[54] It was even feared, especially by Germany,[55]

50. See Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press, 2014), pp. 57–60.

51. Freixas, "Lender of last resort: A review of the literature", in Goodhart and Illing (Eds.), *Financial Crises, Contagion, and the Lender of Last Resort* (OUP, 2002), p. 28 et seq.

52. See also Art. 25(2) of the Statute.

53. Council Regulation 1024/2013 of 15 Oct. 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, O.J. 2013, L 287/63.

54. Schoenmaker, "Central banks role in financial stability", in Caprio (Ed.), *Safeguarding Global Financial Stability: Political, Social, Cultural and Economic Theories and Models, Vol. 2* (Elsevier, 2013), p. 272.

55. Tellingly, a draft Statute of the ESCB and ECB, drawn up by the Committee of Central Bank Governors, initially envisaged giving the ESCB a greater responsibility for financial

that endowing the ESCB with too great a responsibility for financial stability could lead to situations in which it would have to pursue policies conflicting with the goal of price stability.[56]

The fact that the Union Treaties are silent about any lender of last resort role for the ESCB does not mean that it cannot perform that function. A distinction must be made between "classic" lender of last resort assistance to specific, individual institutions, and general, system-wide liquidity providing operations.[57] Individual assistance, called "Emergency Liquidity Assistance" (ELA), is left to national central banks and falls outside the ESCB's responsibilities.[58] The situation on general last resort assistance was until recently less clear. Prior to the financial crisis, some had argued that the ESCB's contribution to financial stability is not limited to giving advice under Article 25.2 Statute, pointing out that the ESCB could also use its powers under Article 18.1 Statute for last resort assistance in case of a general drying up of funds.[59] In hindsight, one can say that this wider interpretation has prevailed during the financial crisis, as several measures of the Eurosystem's "enhanced credit support"[60] are widely seen as lender of last resort actions,[61] including by the ECB itself.[62]

stability and listing it among its "basic" tasks instead of placing it in a separate provision. Several States opposed the proposal, and it did not make it into the final Treaty text. See Art. 3 of the Draft Statute of the ESCB and ECB (Europe Documents, No. 1669/1670, 8 Dec. 1990). For a discussion of this draft see Smits, op. cit. *supra* note 15, pp. 336–338. See also Lastra, "The governance structure for financial regulation and supervision in Europe", 10 CJEL (2003), 49–68, at 56.

56. See Goodhart and Schoenmaker, "Should the functions of monetary policy and banking supervision be separated?", 47 *Oxford Economic Papers* (1995), 539–560, at 548–549. The authors discuss the risks and benefits of having the central bank taking responsibility for both price and financial stability. They argue that, on balance, a central bank should be in charge of both objectives, enabling it to internalize any conflicts that may emerge.

57. For a discussion of both, see Freixas, op. cit. *supra* note 51, pp. 35–37.

58. Art. 14(4) Statute states in this regard that NCBs may perform tasks other than those in the Statute, unless the Governing Council decides, with a two third majority, that they are incompatible with the ESCB's tasks and objectives. See also ECB, "ELA procedures", available at <www.ecb.europa.eu/mopo/ela/html/index.en.html>.

59. See e.g. Smits, op. cit. *supra* note 15, pp. 268–269 and 348–349; Lastra, op. cit. *supra* note 55, at 57.

60. For an overview of this support see ECB Monthly Bulletin, "Monetary and fiscal policy interactions in a monetary union" (July 2012), 57–59.

61. See e.g. Schoenmaker, op. cit. *supra* note 54, pp. 280–281; Lastra, "The evolution of the European Central Bank", 35 *Fordham International Law Journal* (2012), 1260–1281, at 1270–1272.

62. "The provision of liquidity to prevent a collapse of sound financial institutions during a liquidity crisis is also consistent with the broader ESCB's responsibility to contribute to financial stability. This is in line with the provisions in the Treaty, which gives the ESCB the competence, without prejudice to the primary objective of price stability and to the ECB independence, to support the general economic policies of the European Union and notably to

However, the debt crisis arguably shows that not only banks, but also States need a lender of last resort. Understanding why requires a return to the issue of "multiple equilibria". According to several economists the members of the currency union risk such equilibria because, just like States issuing debt in a foreign currency, they issue debt in a currency they do not control.[63] States controlling their own currency can (implicitly) guarantee their creditors that they will always be able to pay them off by calling on their central bank to provide liquidity. Members in a currency union, on the contrary, cannot provide such a guarantee as they stand in a different relationship to the central bank, which makes them susceptible to self-fulfilling crises.[64] Assistance funds like the EFSF and ESM were first attempts to deal with this inherent fragility but lacked sufficient fire power.[65] The ECB has now presented itself as a lender of last resort with its pledge to intervene in bond markets without any *ex ante* limit on the volume of purchases. De Grauwe explains: "The central bank should be a lender of last resort in the banking system to ensure that the bubbles and crashes that are part and parcel of capitalism do not bring down the banking system. Should this lender of last resort also be extended to the government? It must be, if financial stability is to be maintained…. The Eurozone did not have such a contract between the sovereigns and the common central bank, explaining its fragility. It now has one with the OMT programme".[66]

The ECB itself does not share this reading. In line with an increasing number of economists who argue that financial stability concerns should play

contribute to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system. Most central banks have performed such a role as financial lender of last resort to the banking sector in history when severe crises struck", speech given by ECB vice-president Constâcio, "Challenges to monetary policy in 2012", 26th International Conference on Interest Rates (Frankfurt, 8 Dec. 2011), available at <www.ecb.europa.eu/press/key/date/2011/html/sp111208.en.html>.

63. See e.g. De Grauwe and Ji, op. cit. *supra* note 24, at 16 et seq; Krugman, "Currency regimes, capital flows and crises", 62 IMF Economic Review (2014), 470–493, at 473–475; Gros, op. cit. *supra* note 26, at 37–38; Buiter and Rahbari, "The European Central Bank as a lender of last resort for sovereigns in the Eurozone", 50 JCMS Annual Review Lecture (2012), 6–35, at 8.

64. According to Paul Krugman: "… countries without a printing press are subject to self-fulfilling crises in a way that nations that still have a currency of their own are not. The point is that fears of default, by driving up interest costs, can themselves trigger default – and that's because there's a crossing- the-Rubicon aspect to default, once a country crosses that line it will probably impose fairly severe losses on creditors. A country with its own currency isn't in the same position…." See Krugman, "The Printing Press Mystery", *New York Times,* 17 Aug. 2011, available at <krugman.blogs.nytimes.com/2011/08/17/the-printing-press-mystery/?_r=0P.Krugman>.

65. Buiter and Rahbari, op. cit. *supra* note 63, at 23.

66. De Grauwe, "Stop this guerilla campaign against the ECB policy", *Financial Times*, 23 Oct. 2012.

a role in monetary policy,[67] it targets this stability as its purchases aim to remedy dysfunctioning bond markets.[68] Yet, it does not provide an implicit guarantee that a State will always be able to pay off its creditors. Its purchases serve the transmission and singleness of its monetary policy and therefore ultimately its primary objective of price stability.[69] They can only occur to the extent that they are warranted from that perspective, and to the extent that yields exceed a State's fundamentals, thereby ruling out that the Eurosystem acts as last resort lender for States.[70]

The dispute about the nature of the OMT programme is originally between economists, but the proceedings in Karlsruhe have brought it to the courtroom for legal treatment. The Union Treaties, however, do not clearly define monetary policy nor operationalize the term *lender of last resort*.[71] In the eyes of the law, with its own legal notions, categories and methods of reasoning, the dispute is *broader* in nature and turns around the question whether the programme forms a monetary policy instrument falling within the ESCB's mandate and its responsibilities or, on the contrary, a financial assistance measure falling outside this mandate and violating the prohibition on monetary financing. The *BVerfG* heavily leans towards the latter restrictive view.

67. See also Goldmann, "Adjudicating economics? Central bank independence and the appropriate standard of judicial review", 15 GLJ (2014), 265–280, at 269–270.

68. That reasoning is supported by central bank theory. Schinasi, for example, argues that "the banking system is the transmission mechanism through which monetary policy has its effect … for this reason alone central banks have a natural interest in sound financial institutions and stable financial markets"; see Schinasi, "Responsibility for central banks for stability in financial markets", IMF Working Paper 03/121 (June 2003), 8.

69. (Former) ECB president Trichet stated in this regard: "We had to consider that there is a serious problem of the transmission of our monetary policy because financial stability is not ensured at the level of the euro area as a whole and because we have a number of countries which have their own 'risk-free' benchmark rates at levels that are different from country to country". See ECB Press Conference (Oct. 2011).

70. ECB president Draghi has only used the notion of lender of last resort for States once, prior to the launch of the OMT programme. Asked about the issue during the ECB press conference of Nov. 2011, he responded: "What makes you think that the ECB becoming the lender of last resort for governments is what is needed to keep the euro area together? No, I do not think that this is really within the remit of the ECB. The remit of the ECB is maintaining price stability over the medium term".

71. Even if one regards the OMT programme as a lender of last resort measure, one may therefore still come to the conclusion that it is compatible with Union law. See e.g. De Grauwe, "The ECB as lender of last resort in the government bond markets", 59 *CESifo Economic Studies* (2013), 520–535, at 529.

2.4. *The preliminary reference from Karlsruhe*

When the *BVerfG* ruled on the compatibility of the Treaty of Maastricht with the German Constitution in 1993 it turned the stability focus of the single currency's legal set-up into a permanent requirement for Germany's participation in the currency union.[72] It also more generally set limits to European integration by claiming the right to examine whether and to what extent Union institutions have exceeded their competences in the Union Treaties.[73] This *ultra vires* control, which can be activated by individuals claiming a violation of their right to vote under Article 38(1) of the German Basic Law or through an action concerning conflict between constitutional organs, has developed over time. The present contribution does not extensively discuss this case law,[74] but limits itself to pointing out that in its *Lisbon* judgment the *BVerfG* indicated that it would only exercise *ultra vires* review if legal protection cannot be obtained at Union level and always in accordance with the Basic Law's openness towards European law (*Europarechtsfreundlichkeit*).[75] Later, in *Honeywell*, it underlined the necessity to coordinate the *ultra vires* review with the ECJ's task to interpret and apply the Treaties under the preliminary ruling procedure. Before rendering judgment on an *ultra vires* claim, it would therefore first send a request for a preliminary ruling to the ECJ whose judgment it considers binding "in principle".[76] Moreover, the *BVerfG* indicated it would only consider *ultra vires* review if the transgression of Union competences is "sufficiently qualified". This means that it must be "manifestly in violation of competences" and "highly significant" for the structure of competences between the Member States and the Union.[77] Some thought that with these procedural and substantive conditions in place the possibility of an *ultra vires*

72. *BVerfG* 2 BvR 2134/92 & 2159/92 of 12 Oct. 1993, as published in 1 *Common Market Law Reports* (1994) (hereinafter: "*BVerfG Maastricht*"), para 90.

73. Ibid., paras. 47–49.

74. It should be noted, however, that dissenting judge Gerhardt, as well as several scholars, have criticized 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 Dissenting Opinion of judge Gerhardt, *BVerfG OMT*, *infra* note 84, paras. 6–7; Wendel, "Exceeding judicial competence in the name of democracy: The German Federal Constitutional Court's OMT Reference", 10 EUConst (2014), 263–307, at 277–280; Mayer, "Rebels without a cause? A critical analysis of the German Constitutional Court's OMT Reference", 15 GLJ (2014), 111–146, at 136–137; Schneider, "Questions and answers: Karlsruhe's referral for a preliminary ruling to the Court of Justice of the European Union", 15 GLJ (2014), 217–239, at 221–222.

75. *BVerfG*, 2 BvE 2/08 of 30 June 2009 (hereinafter: "*BVerfG Lisbon*"), para 240.

76. *BVerfG*, 2 BvR 2661/06 of 6 July 2010 (hereinafter: "*BVerfG Honeywell*"), para 60.

77. Ibid., para 61.

ruling was greatly diminished.[78] The president of the *BVerfG* himself indicated that "emergency brake mechanisms" like *ultra vires* control are most effective if they do not have to be applied.[79] But as a result of the crisis it is no longer certain whether that still holds.

Over the last years, the *BVerfG* has pronounced several times on crucial developments in the currency union.[80] In the case on the request for a temporary injunction to stop Germany from ratifying the ESM Treaty and the Treaty on Stability, Coordination and Governance (TSCG), it still sent mixed signals. On the one hand, it emphasized that the single currency's legal set-up is not carved in stone but open to change. "A continuous further development of the monetary union may be necessary", it argued, "if otherwise the conception of the monetary union, which had been designed as a stability union, would be departed from".[81] At the same time, however, it also emphasized that it could only approve of the ESM because "essential parts of the stability architecture remain in place". In particular the independence of the ECB, its commitment to the paramount goal of price stability and the prohibition of monetary financing stayed "unaffected".[82] Concerning the latter stability safeguard, it drew a clear red line on central bank action by stating that "an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently from the capital markets is prohibited … as it would circumvent the prohibition on monetary financing".[83]

In the view of the *BVerfG* this red line has now been crossed. From its reference, it is clear that it regards the OMT programme as an act of economic policy manifestly and significantly exceeding the ESCB's monetary policy mandate. Stronger, it considers the bond purchases to be "politically motivated" and as forming the "functional equivalent" to an ESM assistance

78. See e.g. Payandeh, "Constitutional review of EU Law after *Honeywell*: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice", 48 CML Rev (2011), 9–38, at 30.

79. Voßkuhle, "Multilevel cooperation of the European Constitutional Courts: *Der Europäische Verfassungsgerichtsverbund*", 6 EUConst (2010), 175–198, at 195.

80. See notably *BVerfG*, 2 BvR 987/10 of 7 Sep. 2011 (hereinafter: "*BVerfG Greece & EFSF*"); *BVerfG*, 2 BvR 1390/12 of 12 Sept. 2012 (hereinafter: "*BVerfG ESM & TSCG temporary injunction*"); *BVerfG*, 2 BvR 1390/12 of 18 March 2014 (hereinafter: "*BVerfG ESM & TSCG principal proceedings*").

81. *BVerfG ESM & TSCG temporary injunction*, para 222. See also 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", 14 GLJ (2012), 21–52, at 45.

82. *BVerfG ESM & EFSF temporary injunction*, para 233.

83. Ibid., para 278.

measure, albeit without their parliamentary legitimation.[84] It bases that finding on several features of the bond buying 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 *BVerfG* also argues that the OMT programme amounts to a violation of the prohibition on monetary financing.[85] Over and above the features already mentioned, it grounds this on the possibility that the Eurosystem has to participate in a debt cut (*pari passu treatment*), the high risk profile of the envisaged bond purchases (*excessive risk taking*), the possibility to hold purchased bonds to maturity (*interference with market logic*), the absence of an embargo period between the issuance of a bond on the primary market and its purchase by the Eurosystem on the secondary market (*market pricing*) and, finally, the ECB's encouragement of private investors to buy bonds on the primary market (*encouraging purchase of newly issued securities*).

The *BVerfG*'s reasoning is examined in more detail below. For now, suffice it to say that the *BverfG* allows that its concerns about the validity of the OMT decision could be met by an interpretation in conformity with Union law.[86] This requires the Eurosystem to implement its bond buying programme in such a way that it does not undermine the conditionality of ESM assistance programmes and only supports the economic policies in the Union, thus staying within its mandate. From the perspective of the prohibition on monetary financing specifically, this means that the possibility of a debt cut must be excluded, that government bonds of specific States are not purchased up to unlimited amounts, and that interferences with price formation on the market are to be avoided where possible. Such a construction of the OMT programme, however, would arguably deprive the instrument of much of its magic and increase the likelihood that it would actually have to be used.

Although the *BVerfG* considers that the *ultra vires* claims would "probably be successful",[87] and notwithstanding its suggestion of a Union law friendly interpretation, it abides by its promise in *Honeywell* to request a preliminary ruling from the ECJ before rendering its final judgment. But even if in that

84. *BVerfG*, 2 BvR 2728/13 of 14 Jan. 2014 (hereinafter: "*BVerfG OMT*"), paras. 55 and 78. See also Murswiek, "ECB, ECJ, democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's referral order from 14 January 2014", 15 GLJ (2014), 147–165, at 149. He argues: "What the ECB wants to do via the OMT program is exactly the same as what the ESM can do with its secondary market facility, except that the volume of purchases of government bonds by the ESM is limited … while the ECB can buy unlimitedly".

85. *BVerfG OMT*, para 55.

86. Ibid., paras. 99–100.

87. Ibid., para 55.

final judgment it would reach the conclusion that the ECB has stayed within its mandate, it could still find the OMT programme to conflict with the Basic Law. As well as its *ultra vires* review, the *BVerfG* also examines whether acts of Union law run counter to Germany's constitutional identity.[88] This "identity control", introduced in its *Lisbon* judgment,[89] allows it 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 Basic Law. Such respect requires the retention at national level of competences of substantial political importance, not least in the area of fiscal policy, thereby leaving "sufficient space … for the political formation of the economic, cultural and social living conditions".[90]

In its preliminary reference decision, the *BVerfG* signals that the OMT decision could violate Germany's constitutional identity if it created a mechanism that amounted to an assumption of liability for decisions of third parties that are difficult to calculate, as a result of which the *Bundestag* could no longer exercise its budgetary autonomy under its own responsibility. Yet, it will only rule on this issue after having received the ECJ's interpretation of the ESCB's mandate and the prohibition on monetary financing. In fact, it may rule on it more than once, as it indicates that it will not only review the OMT decision itself but also individual implementation measures.[91] Although it will then base its analysis on the ECJ's interpretation, the *BVerfG* will not refer another preliminary question to Luxembourg. Despite the fact that Article 4(2) TEU demands respect for Member States' national identities inherent in their political and constitutional structures, and contrary to many scholars,[92] it considers that "identity review is not to be assessed according to Union law but exclusively according to German constitutional law".[93]

88. On the relationship between the two, from the German and EU perspective, see Claes and Reestman, "The protection of national constitutional identity and the limits of European integration at the occasion of the *Gauweiler* Case", 16 GLJ (2015), 917–970, at 929–931.

89. BVerfG *Lisbon*, paras. 240 and 339.

90. Ibid., paras. 246–249, 252 and 256.

91. *BVerfG OMT*, paras. 102–103.

92. See e.g. Thym, "In the name of sovereign statehood: A critical introduction to the *Lisbon* judgment of the German Constitutional Court", 46 CML Rev. (2009), 1795–1822, at 1811; 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", 15 GLJ (2014), 203–216, at 209–210; Wendel, op. cit. *supra* note 74, at 284–288; Mayer, op. cit. *supra* note 74, at 128–133.

93. *BVerfG OMT*, paras. 27, 29 and 103.

3. The Opinion of Advocate General Cruz Villalón

The Opinion starts with a discussion of what the Advocate General calls the "functional difficulty" of the *BVerfG*'s request for a preliminary ruling.[94] The root of this difficulty, which occurs both in relation to "*ultra vires*" and "identity review", is that the *BVerfG* claims ultimate responsibility to state what the law is with regard to the constitutional basis and limits to Germany's integration into the Union, and it may therefore not treat the ECJ's answers as decisive.[95] Various Member States, in particular Italy, argued that due to this functional difficulty the preliminary ruling procedure is changed so fundamentally that it no longer falls within the scope of Article 267 TFEU, so the case should be inadmissible.

Whilst recognizing that one may draw this conclusion,[96] the Advocate General suggested an alternative reading of the relationship between the *BVerfG* and the ECJ that allows the functional difficulty to be overcome. Central to this reading is the principle of sincere cooperation, laid down in Article 4(3) TEU, which also applies to the courts.[97] The commitment to make a preliminary reference appears to have been introduced by the *BVerfG* in its *Honeywell* judgment with the intention of keeping open the dialogue with the ECJ. Such a reference should therefore be seen as entailing a sincere intention that the ECJ's interpretation of EU law should serve as a sufficient basis for deciding the case at national level.[98] At the same time the principle of sincere cooperation imposes a two-fold obligation on the ECJ. First, it has to respond in the greatest possible spirit of cooperation to the questions of the *BVerfG*. To the extent that the latter has raised serious doubts about the validity or interpretation of Union law, this should therefore be seen as an expression of its level of concern. Second, the ECJ should make a serious effort to answer the *BVerfG*'s questions on substance, notwithstanding all the functional difficulties arising out of their mutual relationship. Concretely, this means that it should trust the *BVerfG* to accept its answer as decisive.[99]

The Advocate General then turned to the fact that OMT programme has not yet been transposed into a legal act. He argued that, notwithstanding its "preparatory" nature, the Governing Council's OMT decision does constitute an act whose validity can be examined in a preliminary ruling procedure, for two reasons in particular.[100] The first relates to the fact that the OMT

94. Opinion, paras. 30–69.
95. Ibid., para 49.
96. Ibid., para 51.
97. Ibid., paras. 62–63.
98. Ibid., para 63.
99. Ibid., paras. 65–67.
100. Ibid., paras. 73.

programme forms an act setting out the broad features of a general programme for action by a Union institution. Pointing to previous case law, the Advocate General argued that in the case of such acts, the conditions governing actionability – their binding nature and production of legal effects – should be interpreted more flexibly compared to those creating rights and obligations for third parties.[101] The second, more principled reason concerns the working method of modern central banks. Communications strategy is a central instrument of monetary policy. Announcements, opinions and statements all play important roles in influencing and managing market expectations and are therefore key to an effective monetary policy. Denying the actionability of such acts merely for the reason they have not been formally adopted and published in the Official Journal therefore risks excluding from judicial review important monetary policy tools. What is more, it could seriously undermine the Union's system of legal review.[102]

The Advocate General's examination of the *BVerfG*'s questions on substance is elaborate and to a considerable extent similar to the reasoning of the ECJ. Therefore only those aspects of his analysis that differ from the Court's judgment or that the latter leaves undiscussed are singled out here. One such aspect concerns the determination of the policy nature of the bond purchases. On the basis of its objectives and instruments, the Advocate General came to the presumption that the OMT programme is monetary policy, whilst explicitly ruling out the possibility that it turns the ECB into a lender of last resort.[103] That presumption, the Advocate General reasoned, could however be refuted by an analysis of the programme's content, after which he analysed each of the problematic issues the *BVerfG* had drawn attention to in its decision.

Although he did not side with the German court on the issues of "selectivity" and "circumvention", the Advocate General did see problems concerning "conditionality" and "parallelism".[104] Examining them together, he shared the concern that the ECB's role under the ESM could turn the OMT instrument into "into something more than a monetary policy measure".[105] Given the ECB's substantial involvement in designing, adopting and monitoring ESM assistance programmes,[106] tying bond purchases to such a programme risks converting them into an instrument for enforcing compliance with ESM conditionality. In order to avoid this scenario and retain the OMT instrument's monetary character, a "functional distance" between

101. Ibid., paras. 74–85.
102. Ibid., paras. 86–90.
103. Ibid., para 123–139.
104. Ibid., paras. 140–157.
105. Ibid., para 145.
106. See Arts. 4(4), 5(3), 6(2), 13(1), 13(3), 13(7), 14(6) and 18(2) ESM Treaty.

OMT purchases and ESM assistance needs to be ensured. This means that the ECB has to detach itself from all direct involvement in a specific ESM programme if it starts purchasing bonds of the State subject to it.[107]

Taking the view that the OMT programme constitutes monetary policy provided that the functional distance from the ESM is ensured, the Advocate General then assessed the programme's proportionality, which he considered particularly important given its unconventional nature.[108] In this regard, he not only looked at suitability and necessity, but also at proportionality *stricto sensu*, weighing up the programme's "benefits" – the restoration of the transmission of monetary policy – against its "costs" – the incurrence of financial risk through bond purchases and moral hazard on the part of beneficiary States.[109] Stressing the importance of central bank independence, the Advocate General found that the ECB had not exceeded its broad margin of assessment when carrying out this balancing exercise. More specifically, he argued that the risks that could be incurred under the OMT programme are not excessive. That would only be the case if they were of such volume that they would inevitably lead to the ECB facing insolvency.[110] For several reasons, however, there is no such risk.[111] One of these is the fact that the ECB has made clear that bond purchases will be subject to internal limits. These cannot be announced *ex ante*, however, so as to avoid triggering a bout of speculation and to preserve the programme's effectiveness.

As to the *BVerfG*'s second question, the Advocate General sought to define the scope of the prohibition on monetary financing by looking at its origin, systemic context and objectives. Following the ECJ's interpretation of the no-bailout clause in *Pringle*, he found that the prohibition on monetary financing not only aims for budgetary discipline, but also for the higher objective of financial stability. Any exceptions to the prohibition should therefore be interpreted restrictively. At the same time, however, Article 123(1) TFEU is silent on secondary market interventions; these are therefore allowed, provided they do not run counter to the purpose of Article 123(1) TFEU.[112]

The Advocate General next assessed whether the OMT programme indeed respects this purpose by going into each of the problematic features the *BVerfG* had singled out. For the most part he did not share the latter's concerns. On the lack of preferential creditor status, for example, he noted that a debt restructuring forms a future, hypothetical event that does not form an

107. Opinion, paras. 149–151.
108. Ibid., para 161.
109. Ibid., paras. 159–201.
110. Ibid., paras. 193–195.
111. Ibid., paras. 196–201.
112. Ibid., paras. 215–228.

intrinsic component of the OMT programme. Moreover, the ECB had emphasized in its observations that it would not actively contribute to the realization of such a restructuring.[113] There is also no indication that the ECB would become a lender of last resort as a result of prior announcements about the activation of the OMT programme encouraging investors to purchase newly issued bonds. In fact, the ECB had made clear it would not make any prior, detailed announcements as these could trigger speculation and undermine the programme's effectiveness.[114]

The *BVerfG*'s concern about the timing of bond purchases did resonate in the Opinion. Buying up bonds on the secondary market shortly after emission on the primary market risks blurring the boundaries between the two markets and would therefore run counter to Article 123(1) TFEU. The ECB should therefore live up to its commitment expressed during the proceedings that it will observe an "embargo period" during which it will not carry out transactions. However, this period does not have to be precisely determined and published in advance so as to preserve the OMT programme's effectiveness, provided the ECB ensures a market price can be formed.[115]

4. The Judgment of the Court of Justice

Like the Advocate General, the ECJ commenced with some preliminary observations on its relationship with the *BVerfG* and the consequences thereof for the admissibility of the request for a preliminary ruling. It distinguished the present request from earlier case law in which it had ruled that it does not have jurisdiction to render judgment when the referring court is not bound by its interpretation. In that case, the relevant national law only took an act of Union law as a model and merely partly reproduced its terms, making the interpretation of the ECJ dispensable. The *BVerfG*'s request, however, directly concerns the interpretation and application of Union law; this means, according to the ECJ, that its judgment will have definitive consequences for the resolution of the main proceedings.[116] It did emphasize, however, that the preliminary ruling procedure is based on a clear separation of functions and that its judgment is binding on the referring national court.[117]

113. Ibid., paras. 233–237.
114. Ibid., paras. 255–261.
115. Ibid., paras. 247–254.
116. Judgment, paras. 11–14.
117. Ibid., paras. 15–16.

The ECJ then addressed a range of other admissibility issues. Of particular interest are those concerning the OMT programme's preparatory nature. In the view of the ECJ this does not mean that the *BVerfG*'s questions are hypothetical. It pointed out that the OMT decision's lack of implementation does not render the main actions devoid of purpose as the German court has specifically made clear that under German law preventive legal protection could still be granted in that case. What the *BVerfG* in essence wants to know, therefore, is whether primary Union law allows the ESCB to adopt a bond buying programme *such as* OMT. [118]

On substance, the ECJ started its answer to the questions put, which it considered together, by pointing out that the Treaties contain no precise definition of monetary policy but that they do set out its objectives and instruments; these are both relevant when determining whether a measure forms monetary policy, but in particular the objectives.[119] As regards objectives, the ECJ noted that the aim of safeguarding an appropriate monetary policy transmission as well as the singleness of that policy contribute to the ESCB's primary objective of price stability.[120] The fact that such a programme may also have indirect effects on the stability of the currency union, an objective of economic policy, does not change this finding. Again following *Pringle*, the ECJ reasoned that a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the currency union's stability.[121] As for instruments, the Court found that outright bond purchases on the basis of Article 18.1 of the Statute further underline the programme's monetary policy character. That these purchases are selective in nature is not relevant. Not only does this correspond to the fact that the disruption of the transmission mechanism stems from the excessive rates for specific government bonds only, it is also in line with EU law given that no Treaty provision requires the ESCB to carry out purchases across the board.[122]

For several reasons, the finding that purchases like those envisaged by the OMT programme constitute monetary policy does not change as a result of their linkage to ESM adjustment programmes.[123] First, although this linkage may have the indirect effect of enhancing compliance with such adjustment programmes, this does not turn the OMT instrument into economic policy, as the TFEU specifically allows the ESCB to support the general economic policies in the Union. Second, the ESCB has put in place this linkage to make

118. Ibid., paras. 27–30.
119. Ibid., paras. 42, 46, citing C-370/12, *Pringle*.
120. Ibid., paras. 47–50.
121. Ibid., paras. 51–52.
122. Ibid., paras. 53–55.
123. Ibid., paras. 57–65.

sure that States cannot free themselves from adjustment programmes because their financing constraints are eased due to OMT purchases. It thereby also pays tribute to Article 119(3) TFEU, which makes sound public finances a guiding principle for economic and monetary policy. Third, and most important, even though bond purchases tied to compliance with adjustment programmes constitute economic policy when carried out by the ESM, the same cannot be said when they are conducted by the ESCB. Decisive in this regard is the difference in objectives. Whereas the emergency fund aims to protect the stability of the euro area, the ESCB focuses on safeguarding price stability through restoring the transmission of monetary policy. Activation of its OMT programme is therefore specifically tied to the condition that this transmission is disrupted. Due to this difference in objectives OMT purchases can also not serve to circumvent bond market intervention by this emergency fund.

Having established the monetary policy nature of a programme like OMT, the ECJ then assessed its proportionality. Like the Advocate General, and given the complex and technical nature of monetary policy, it too allowed the ESCB a broad discretion in this regard. It also argued that due to this discretion compliance with the duty to state reasons is particularly important, but that the ECB's draft legal acts and the press release together were of such specificity that it could exercise its power of review.[124]

As to suitability, the Court found that the ESCB's analysis of the economic situation in the currency union when it announced the programme, in particular its view on the excessive nature of the interest rates charged for certain government bonds, was not vitiated by a manifest error of assessment. Importantly, the fact that this analysis is subject to challenge, not least before the *BVerfG*, does not in itself suffice to call that conclusion into question. Monetary policy issues are usually of a controversial nature and nothing more can be asked of the ESCB than that it uses its expertise and technical means to carry out the required analysis with all care and accuracy.[125] Given its analysis of excessive interest rates, moreover, the ESCB was entitled to consider bond purchases on the secondary market a useful tool to fight this excessiveness and safeguard the transmission of its monetary policy.[126]

As to necessity, the ECJ pointed to several elements showing that a programme such as OMT does not go manifestly beyond what is necessary to safeguard the singleness and transmission of monetary policy.[127] First, bond purchases can only take place as long as warranted to safeguard these

124. Ibid., paras. 66–71.
125. Ibid., paras. 72–75.
126. Ibid., paras. 76–80.
127. Ibid., paras. 81–90.

objectives. Second, until now there has been no need to implement the OMT programme. Third, the scale of the programme is limited in several ways: the ESCB can only buy bonds of States that are subject to a macroeconomic adjustment programme and, moreover, have access to the bond market again. In addition, only bonds with a maturity of up to three years can be purchased. As a result of this limited scale there is no need, the ECJ argued, to require an *ex ante* quantitative limit on the volume of purchases – which could also seriously undermine its effectiveness. A fourth element proving the programme's necessity concerns its selective nature which too ensures that its scope does not go beyond what is necessary to safeguard the transmission of monetary policy. Like the Advocate General, be it more briefly, the ECJ ended its proportionality assessment with a consideration of proportionality *stricto sensu,* stating that the ESCB had weighed up all relevant interests so as to make sure that no disadvantages can arise that are manifestly disproportionate to the programme's objectives.[128]

As for the prohibition on monetary financing, the ECJ started by stating that from the wording of Article 123(1) TFEU it is clear that the provision prohibits all financial assistance from the ESCB to a Member State, but that it does not rule out bond purchases on the secondary market. Not every such purchase, however, is permissible as it may have an effect equivalent to primary market intervention.[129] Moreover, and by analogy with *Pringle*, in order to determine which secondary market purchases are allowed, the prohibition's objective is key, which also follows from the preamble to Regulation 3603/93 defining this prohibition. The preparatory work relating to the Treaty of Maastricht shows that this objective is the imposition of budgetary discipline.[130]

The ECJ found that a programme such as OMT does not have an effect equivalent to primary market purchases nor circumvents the objective of budgetary discipline. Several safeguards ensure that bond purchases will not have an effect similar to primary market intervention, although they will inevitably exercise some influence on the functioning of bond markets.[131] First, both the draft decision and guideline make clear that the Governing Council decides on the scope, start, continuation and suspension of the purchases. Second, a minimum period will be observed between the issue of a bond and its purchase on the secondary market. Third, the ESCB will refrain from making prior announcements concerning its decision to carry out bond purchases or their volume.

128. Ibid., para 91.
129. Ibid., paras. 94–97.
130. Ibid., paras. 98–102.
131. Ibid., paras. 104–108.

As to circumvention, the ECJ concluded that a programme like OMT contains several features ensuring that it does not lead to a lessening of budgetary discipline. Bond purchases can only take place to the extent they are necessary for safeguarding the singleness and transmission of monetary policy. Consequently, States cannot know for sure that the ESCB will purchase their bonds. This also shows that the programme only envisages to combat those parts of bond rates considered excessive and does not aim to harmonize them altogether, which means that States will remain subject to market discipline.[132] In addition, such a programme is characterized by a number of elements that seek to limit its impact on the incentive to conduct sound budgetary policies.[133] Its limitation to bonds with a certain maturity, issued by States that are subject to an adjustment programme and have access to the market again, restricts the volume of bonds eligible to be purchased and thus the impact on States' financing conditions. Another limitation is due to the fact that the ESCB can sell purchased bonds at any time, which means that it can change its intervention strategy if a State should seek to take advantage of the programme by changing its issuing behaviour.

According to the ECJ, the fact that the ESCB has the option to keep purchased bonds until maturity is not decisive for the programme's compatibility with Article 123 TFEU. Not only is this option in no way precluded by Article 18.1 of the Statute, it may also prove necessary to achieve the programme's objectives. A further limitation of the impact on budgetary prudence resides in the fact that only bonds of States having access to the bond market can be purchased. The ESCB can therefore not buy up bonds of States that are financially in such a bad shape that they can no longer obtain market financing. Finally, the programme's linkage to ESM adjustment programmes ensures that States cannot slip into budgetary negligence.

For the Court, these elements together already ensure that a bond-buying programme such as OMT does not violate the prohibition on monetary financing.[134] Nonetheless, it added that this conclusion was not called into question by two additional features of the OMT programme, the risk of significant losses and the lack of privileged creditor status, which the *BVerfG* had singled out in its referring decision.[135] Even if bond purchases were to carry a risk of significant losses, this would not lessen the programme's guarantees aimed at ensuring budgetary prudence. Stronger, these guarantees may in fact reduce such risk. Moreover, any open market operation carries a risk and nowhere does Union law put a cap on the risk the ECB may take.

132. Ibid., paras. 112–114.
133. Ibid., paras. 115–121.
134. Ibid., para 121.
135. Ibid., paras. 122–126.

Union law is silent too on the necessity of privileged creditor status. Although the absence of such status may expose the ECB to the risk of having to participate in a debt cut, such risk is inherent in secondary market purchases, an activity that was specifically allowed for by the drafters of the Union Treaties.

5. Comments

5.1. *The evolving "dialogue" between Karlsruhe and Luxembourg*

The *BVerfG*'s decision to turn to the ECJ for a preliminary ruling was not a unanimous one. Germany's constitutional court can only carry out *ultra vires* review of Union acts to the extent that they form the basis of actions by State authorities.[136] Earlier in the crisis, this was a reason to declare inadmissible a constitutional complaint against the SMP programme.[137] However, the *BVerfG* now broadened the reach of the instrument by arguing that *ultra vires* applications can also be targeted at inactivity of authorities, specifically the *Bundestag* and the Federal Government.[138] Their responsibility for European integration requires that they "do not remain passive" and "not simply let a manifest or structurally significant usurpation of sovereign powers by European Union organs take place".[139] They are therefore under the duty to "actively deal with the question of how the distribution of powers entailed in the treaties can be restored… and which options they want to use to pursue this goal".[140]

For two judges, Gerhardt and Lübbe-Wolff, this was an unacceptable move into the realm of politics. As the *BVerfG* cannot specify what kind of actions the *Bundestag* and government should take if it should finally decide that the bond purchases are not covered by Union law – an exit from the monetary union, a change of the Treaties, the reversal of the respective act or perhaps only a parliamentary debate? – it should have refrained from dealing with the substance altogether and, in the absence of a political question doctrine in German law, have declared the case inadmissible.[141] In fact, as judge Gerhardt pointed out, government and parliament have already dealt with the bond purchases precisely by not opposing them. That should not be seen as

136. *BVerfG OMT*, para 23.
137. *BVerfG Greece & EFSF*, para 116.
138. See for more detail Murswiek, op. cit. *supra* note 84, at 156–157; Wendel, op. cit. *supra* note 74, at 280–284.
139. *BVerfG OMT*, paras. 46 and 54.
140. Ibid., para 53.
141. Dissenting Opinion of judge Lübbe-Wolff, *BVerfG OMT*, paras. 12, 17 and 22–23.

inactivity, but as political approval of this crucial development in the currency union.[142]

In Luxembourg, some States argued that the case should be declared inadmissible because of these considerations about German law and politics.[143] That admissibility argument, however, was rightly dismissed by the ECJ as it is in principle for the national court to decide on admissibility issues in the main proceedings and to assess the need for a preliminary ruling.[144] But there were also strategic, pragmatic reasons for the Court not to declare the case inadmissible. It is in a fundamentally different position from the *BVerfG*. The latter is placed at the start of proceedings and holds the key to a chain of events that may eventually result in the inapplicability of the OMT programme in Germany. Now that this process is put in motion, the ECJ can only decide whether or not to get involved in it. If it wants to have any influence on the result, and thus to deliver on its mandate in Article 19(1) TEU to ensure that in the application and interpretation of the Treaties the law is observed, it can better do so. Moreover, declaring the case inadmissible would not be a very tactful way of dealing with the *BVerfG*'s first ever preliminary reference.

This is not to say that were no legal arguments supporting inadmissibility. On the contrary, precisely because the question originates from Karlsruhe, the ECJ did have reasons not to deal with the substance. The problem is not so much that in its decision the *BVerfG* sets out in detail what it thinks itself of the bond purchases; in its recommendations to national courts, the ECJ even invites them to give their views on the answers to the questions they refer.[145] Rather, due to the fact that the *BVerfG* claims the last word on the *ultra vires* nature of Union acts, its views get the character of an order with which the ECJ needs to comply if it does not want to run the risk of being accused of acting *ultra vires* itself.[146] Needless to say, this is not in line with the role Article 267 TFEU attributes to the ECJ in the preliminary ruling procedure.

In his Opinion the Advocate General sought to take the sting out of this tension surrounding the "dialogue" between the ECJ and the *BVerfG* by urging each of them to act in line with the demands of the principle of sincere

142. Dissenting Opinion of judge Gerhardt, *BVerfG OMT*, paras. 22–23.

143. See Judgment, para 19.

144. Ibid., paras. 24–26.

145. Point 24 of the Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedures, O.J. 2012, C 338/1. See also Editorial comments, "An unintended side-effect of Draghi's bazooka: An opportunity to establish a more balanced relationship between the ECJ and Member States' highest courts", 51 CML Rev. (2014), 375–388, at 384.

146. It is established case law that only the ECJ can declare acts of Union institutions invalid. See Case C-314/85, *Foto-Frost* v. *Hauptzollamt Lübeck-Ost*, EU:C:1987:452, paras. 15–17.

cooperation in Article 4(3) TEU. He also suggested that the principle coincides with the notion of *Europarechtsfreundlichtkeit* that incites the *BVerfG* to approach the preliminary ruling procedure in a spirit of cooperation.[147] It thus almost seemed as if he tried to elevate sincere cooperation into a higher order or "contrapunctual" principle that some protagonists of constitutional pluralism have sought to identify in order to reconcile and integrate the various claims of authority of national and European legal systems.[148] Reality is, of course, that the potential for conflicts that exists between the *BVerfG* and the ECJ cannot be reasoned away by resorting to sincere cooperation, nor any other principle. As long as the two courts each claim ultimate authority to state what the law is, including the principle of sincere cooperation, the possibility of a clash remains.[149] That does not mean, however, that they should not strive to prevent that possibility from turning into reality. The ECJ has done exactly that by not pronouncing on the difficulties of the *BVerfG*'s claim to *ultra vires* review, instead tactfully limiting itself to the general mantra that it is settled case law that its judgment is binding on the referring court.[150]

5.2. *Central bank announcements: A legal no man's land?*

Several States and Union institutions argued that a question on validity cannot be directed at an act which, like the Governing Council's OMT decision, is preparatory in nature or does not have legal effects.[151] If that were indeed the case, central bank instruments that have not yet been incorporated into a legal act would be exempt from judicial review. In 2013 the General Court declared in *Von Storch* an action for annulment against the OMT decision inadmissible for lack of direct concern of the applicants, since the decision required further implementation measures.[152] It added that the validity of the OMT programme could nonetheless be reviewed through the preliminary ruling procedure when implementing measures of NCBs are challenged before national courts.[153] The problem is, of course,

147. Opinion, para 48.

148. See e.g. Maduro, "Contrapunctual law: Europe's constitutional pluralism in action", in Walker (Ed.), *Sovereignty in Transition* (Hart Publishing, 2003), pp. 501–537.

149. See Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples* (Meijers, 2013), pp. 282–285.

150. Judgment, para 16.

151. Ibid., para 23.

152. Case T-492/12, *Von Storch and Others* v. *ECB*, EU:T:2013:702, paras. 34–35. The judgment has been upheld on appeal in Case C-64/14 P, *Von Storch and Others* v. *ECB*, EU:2015:300.

153. Case T-492/12, *Von Storch*, para 47.

that up until this day no such measures have been taken. The programme's mere announcement sufficed to calm down markets considerably.

The lack of bindingness as such does not prevent the ECJ from reviewing the OMT programme; it has already rendered preliminary rulings on non-binding acts in the past.[154] Admittedly, these cases only concerned the *interpretation* of such acts, which raised the question whether the ECJ would also be prepared to rule on their *validity* given that they are exempted from challenge under the annulment procedure in Article 263 TFEU. From an *obiter dictum* in *Grimaldi* one might conclude that it is indeed prepared to do so,[155] which would seem reasonable given the fact that Article 267 TFEU is formulated more broadly than Article 263 TFEU, allowing the ECJ to take on questions concerning the validity of non-binding acts as well.[156]

Still, however, this does not put the reviewability of the Governing Council's OMT decision beyond doubt. Problematic too is its preparatory nature. In this regard it is important to point out that the ECJ has ruled in the context of annulment actions that preparatory measures are in principle not actionable for the reason that they do not have legal effects, which are only brought about by the final decision to which the measures relate.[157] One could argue that the absence of legal effects is not an argument for inadmissibility if the ECJ, as indicated in *Grimaldi*, were to accept preliminary questions concerning the validity of non-binding acts. Then again, the Governing Council's OMT decision does anticipate the adoption at a later stage of a binding, formal and more detailed decision on outright monetary transactions. One could therefore also take the view that preliminary questions concerning the OMT programme's validity should only be admissible insofar as they relate to that final, binding act.

The Advocate General sought to reason around this uncertainty using two arguments. The first was to bestow the OMT decision with bindingness by portraying it as an act setting out the broad features of a general programme for action by a Union institution, thereby blurring the boundaries between a preparatory act and the later, binding measure. The second argument related to the fact that communication strategy nowadays forms one of the key monetary policy tools of central banks, as the announcement of the OMT programme shows. Excluding this programme from judicial review for the sole reason it has not yet been incorporated into a formal legal act therefore risks seriously

154. See e.g. Case C-188/91, *Deutsche Shell* v. *Hauptzhollamt Hamburg-Harburg*, EU:C:1993:24, para 18.

155. Case C-322/88 *Grimaldi* v. *Fonds des maladies professionnelles*, EU:C:1989:646, para 8.

156. See Schermers and Waelbroeck, *Judicial Protection in the European Union* (Kluwer Law International, 2001), p. 290.

157. See e.g. Case C-60/81, *IBM* v. *Commission*, EU:C:1981:264, paras. 10–11 and 20.

undermining the Union's system of judicial review.[158] Although very engaging, it is highly questionable whether this argument can of itself enable review of the OMT decision. On several occasions the ECJ has ruled that it does not consider itself capable of amending the Union's system of judicial review, which is something Member States should do through treaty amendment.[159]

The ECJ avoids pronouncing on these issues by making strategic use of the *BVerfG*'s decision. The latter had already anticipated the admissibility problems by pointing out that the preparatory nature of the OMT decision does not have a bearing on the national procedure as the German legal requirements for granting preventive legal protection are met in any case.[160] Next to its question whether the OMT decision is in conformity with Union law, it therefore also formulated a second, alternative question asking whether Union law permits bond purchases like those envisaged by the OMT programme. The ECJ now uses that reasoning to argue that the programme's preparatory nature does not render the actions in the national proceedings devoid of purpose and that it suffices to examine whether Union law permits the adoption of a bond programme *such as* OMT.[161]

5.3. *Using Pringle as a guide to define the OMT programme's policy nature*

When the *BVerfG* announced in *Honeywell* that it would refer a preliminary question to the ECJ before deciding on an *ultra vires* claim, it accorded the latter a "right to tolerance of error".[162] Yet, the difference in views between the two courts on the policy nature of the OMT programme is striking. Whereas the *BVerfG* considers it an assistance measure of economic policy falling outside the ESCB's mandate, the ECJ finds that it forms an act of monetary policy. Paradoxically, the two courts reach these opposite conclusions by adopting a reasoning based on *Pringle*. In that case the ECJ argued that in order to determine the policy nature of the stability mechanism envisaged by Article 136(3) TFEU (i.e. the ESM) one had to look first to its objectives and, second, to its instruments and ties to other measures of Union law.[163]

This section will first show how the identification of different objectives forms the crucial reason for the courts' opposite findings. Then, it explains

158. Opinion, paras. 87–89.
159. See notably Case C-50/00P, *UPA* v. *Council*, EU:C:2002:462, para 45.
160. *BVerfG OMT*, paras. 34–35 and 101.
161. Judgment, paras. 27, 28 and 30.
162. *BVerfG Honeywell*, para 66.
163. Case C-370/12, *Pringle*, paras. 53–60.

how both courts consolidate their findings with arguments based on the OMT programme's instruments and ties to Union law. It ends by questioning the ECJ's *Pringle*-inspired reasoning, instead arguing that the Court should have attributed central importance to the programme's direct legal basis: Article 18(1) of the Statute.

5.3.1. *Identifying objective(s): Expressing confidence and distrust in the ECB*

In September 2012, *Bundesbank* president Weidmann lost his battle against government bond purchases when he was outvoted in the ECB's Governing Council on the OMT programme. But the proceedings in Karlsruhe gave him the chance of a replay. In his introductory statement he criticized the programme and reminded the court of the primary position of price stability within the single currency's legal set-up and the necessity of central bank independence and the prohibition on monetary financing to secure this goal. He then stated that the crisis had nonetheless revealed the importance of financial stability for monetary policy but that the Eurosystem could only secure this kind of stability within the limits of its mandate. He then argued that "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".[164]

In its written submissions, the *Bundesbank* further substantiated its critical stance on the issue of the correctness of bond yields.[165] It stressed the unfeasibility of determining to what extent risk premiums 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 premiums 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 may be economically justified.

164. Weidmann, *Eingangserklährung anlässlich der münclichen Verhandlung im Hauptsacheverfahren ESM/EZB*, 11 June 2013, available at <www.bundesbank.de/Redaktion/DE/Kurzmeldungen/Stellungnahmen/2013_06_11_esm_ezb.html> (translation by the author).

165. The *Bundesbank's* written submissions are available at <www.handelsblatt.com/downloads/8124832/1/stellungnahme-bundesbank_handelsblatt-online.pdf>.

The difference in views between the ECB and the *Bundesbank* played a very important role in the identification by both the *BVerfG* and the ECJ of the OMT programme's objective and, ultimately, its policy nature. Let us first turn to the decision of the *BVerfG*. In defining the objective of the bond purchases it made two questionable moves. The first was that it sided completely with the *Bundesbank* on the correctness of yield spreads. The second relates to its interpretation of the *Pringle* judgment and the kind of objectives it considers relevant when determining a measure's policy nature.

With regard to spreads, the *BVerfG* completely backed the *Bundesbank's* view that it is impossible to distinguish between justified and excessive components of yield spreads.[166] 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 markets about the solvency of individual States and are "entirely intended". At the same time it rejected the reasoning of the ECB (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 bond spreads.[167] It only referred to a report of the German Council of Economic Experts to support its own argument. Yet, this report is not at all conclusive on the issue of spreads.[168] It goes into the difficulty of distinguishing between justified and excessive levels, but does not state this is impossible. 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 OMT's announcement.[169]

As to objectives, and referring to *Pringle*, the *BVerfG* argued that it is the *immediate* or *direct* objective of a measure which is relevant for the determination of its policy nature.[170] However, the ECJ 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.[171] Limiting the analysis to immediate objectives allowed the *BVerfG* to ignore the ECB's indirect

166. *BVerfG OMT*, para 71. See also Beukers, "The *Bundesverfassungsgericht* preliminary reference on the OMT program: "In the ECB we do not trust. What about you?", 15 GLJ (2014), 343–368, at 348; Bast, "Don't act beyond your powers: The perils and pitfalls of the German Constitutional Court's *ultra vires* review", 15 GLJ (2014), 167–182, at 176–177.

167. See text to note 23 *supra*.

168. See also Beukers, op. cit. *supra* note 166, at 348–349.

169. German Council of Economic Experts, *Annual Economic Report 2013/2014*, paras. 200 and 254.

170. *BVerfG OMT*, para 63.

171. Case C-370/12, *Pringle*, paras. 55–56 and 60.

objective of safeguarding the transmission and singleness of its monetary policy, and its ultimate aim of safeguarding price stability.[172] Moreover, in identifying the immediate objective of the OMT programme, it disregarded its official objective as declared by the ECB.[173] By purchasing government bonds, the *BVerfG* stated, the ECB aims to "neutralize" spreads on bonds of certain States that have emerged in the markets and which negatively affect refinancing conditions.[174] However, the ECB has never said it aims for such neutralization.[175] It only wants to bring down spreads to levels corresponding to fundamentals.

In what came closest to the recognition of an indirect objective, the *BVerfG* stated that insofar as the ECB sought to safeguard the current composition of the currency union with its bond purchases, this was "obviously" not a task of monetary policy but one of economic policy, which is the responsibility of the Member States. It backed this argument with a discussion of the Union's procedure on accession to the currency union in Article 140 TFEU in which the ECB only plays a limited role.[176] Yet, it is unclear why these rules are relevant for identifying the OMT programme's objectives. It seems the *BVerfG* assumes that these accession rules are indicative of a broader division of responsibilities concerning the composition of the currency union.[177] Apart from the fact that it is not at all clear that safeguarding the composition of the currency union lies outside the ESCB's mandate,[178] this argument can hardly convince when one takes into account how and to what extent concerns about the reversibility of the euro played a role in the ECB's decision to launch the OMT programme.[179] Reversibility of the single currency played a role since

172. See also Goldmann, op. cit. *supra* note 67, at 275.

173. See also Gerner-Beuerle, Küçük and Schuster, "Law meets economics in the German Federal Constitutional Court: Outright monetary transactions on trial", 15 GLJ (2014), 281–320, at 300–301.

174. *BVerfG OMT*, para 70.

175. The *BVerfG* backed up this statement with a referral to the ECB's Monthly Bulletins of Sept. and Oct. 2012. However, these bulletins do not speak about the aim of neutralizing bond spreads. See also Thiele, "Friendly or unfriendly act? The 'historic' referral of the Constitutional Court to the ECJ regarding the ECB's OMT program", 15 GLJ (2014), 241–264, at 257; Wendel, op. cit. *supra* note 74, at 296.

176. *BVerfG OMT*, para 72.

177. Gerner-Beuerle et al., op. cit. *supra* note 173, at 303.

178. See Herrmann, "National report: Germany", in Neergaard, Jacqueson and Danielsen (Eds.), *XXVI FIDE Congress Vol. 1* (Copenhagen, 2014), p. 362; Selmayr, "Artikel 282", in Von der Groeben, Schwartze & Hatje (Eds.), *Europäisches Unionsrecht* (Nomos, 2015), §66–67.

179. If one followed this reasoning, one would have to conclude that it does not support the *BVerfG*'s argument on the vertical division of competences that safeguarding the composition of the currency union is a task of economic policy, "which remains a responsibility of the Member States". Art. 140 TFEU attributes most powers to Union institutions, in particular the Council, not the States. See also Bast, op. cit. *supra* note 166, at 177.

fears about it caused a rise in bond spreads exceeding what can be explained by fundamentals. Given the problems this posed to the transmission and singleness of its monetary policy, the ECB decided to conduct secondary market purchases of government bonds.

Did this objective of safeguarding the transmission mechanism not play any role, then, in the decision of the *BVerfG*? It did, but only in a very limited way. The *BVerfG* takes the view that the OMT programme is an act of economic policy not pursuing monetary policy objectives.[180] At the end of its decision, however, it stated that even if the bond purchases could, under certain conditions, help to support monetary policy objectives this would not change the conclusion about their policy nature. Stronger, the economic accuracy or plausibility of the reasons behind the OMT programme are "irrelevant" in this respect.[181] It thereby again referred to *Pringle*, arguing that what the ECJ said there in relation to the ESM applied vice versa in this case.[182] But in *Pringle* the ECJ 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 featuring in 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.[183] In the case of the OMT programme the issue is not whether it may have indirect effects on price stability, but whether bond purchases are allowed when they pursue as their indirect, or ultimate objective this kind of stability.[184]

How does the ECJ go about defining the objective of the OMT programme? It too applies a reasoning analogous to the one in *Pringle*, but unlike the *BVerfG* it takes into account the whole range of objectives, including indirect and ultimate ones. Both the objectives of securing the transmission of monetary policy and the singleness of that policy indicate that the programme falls within the ESCB's monetary policy mandate as they ultimately support its ability to safeguard the primary objective of price stability.[185] Interestingly, the ECJ also pays attention to the conflicting views of the *Bundesbank*, but in a more subtle way than the *BVerfG*. Its statement in

180. The *BVerfG* draws this conclusion about the OMT programme's objective in para 73. Earlier in its decision it is 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*, para 64.

181. Ibid., para 96.

182. Ibid., para 96.

183. Case C-370/12, *Pringle*, paras. 56, 97.

184. See also Beukers, op. cit. *supra* note 166, at 346.

185. Judgment, paras. 46–50.

the context of proportionality review that the ECB's analysis has been "subject to challenge" before the referring court forms an implicit recognition of the *Bundesbank*'s critical stance. For the ECJ, however, this does not suffice to conclude that the ECB's reasoning is vitiated by a manifest error of assessment. Monetary policy issues are usually controversial and highly technical and given the consequently broad discretion of the ECB nothing more can be asked of it than that it carries out its analysis with all care and accuracy.[186]

However, the ECJ's analogous *Pringle* reasoning is not free from error either. Like the *BVerfG*, it too gives in to the temptation of making statements on indirect effects of the OMT programme. According to the ECJ, the fact that the programme may also contribute to the stability of the euro area – which it equates with the more specific notion of financial stability -[187] does not call into question the finding that its objective is monetary in nature. A monetary policy measure cannot be treated as equivalent to an economic policy measure merely for the reason that it may have indirect effects on financial stability.[188] However, by arguing that the OMT programme may merely have indirect *effects* on financial stability the ECJ downplays the important role this kind of stability plays in the context of bond purchases. The ECB 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 is therefore not whether the OMT programme has any indirect effects on financial stability, but whether it can pursue such an objective as an intermediate target whilst being ultimately focused on price stability. The ECJ *de facto* answers that question in the affirmative when it states that restoring the transmission mechanism falls within the area of monetary policy.

186. Ibid., paras. 74–75.

187. It should be noted that Art. 136(3) TFEU speaks about "stability of the euro area". The ESM Treaty itself, however, more specifically states in Art. 3 that its objective is to safeguard "financial stability of the euro area as a whole and of its member states". Although the notion of stability of the euro area may in theory be broader in scope than *financial* stability, the ECJ equates the two. See e.g. para 64 of *Gauweiler* where it states that *ESM interventions* are intended to safeguard *the stability of the euro area*. See also para 65 of *Pringle* where it states that the mechanism envisaged by European Council Decision 2011/199 (which only relates to the introduction of Art. 136(3) into the TFEU) is to safeguard *financial stability*. See also paras. 136 in combination with 184 of *Pringle* in which the ECJ reasons that Art. 136(3) TFEU confirms that States may only grant assistance when this is indispensable for safeguarding *financial stability*.

188. Judgment, paras. 51–52.

5.3.2. *Strengthening positions taken: Selectivity, conditionality/parallelism and bypassing*

In *Pringle* the ECJ argued that as well as a measure's objective, its instruments and ties to other provisions of Union law may provide further leads as to its policy nature.[189] In its decision the *BVerfG* followed this line or reasoning and pointed to several features – some relating to instruments, others to links with Union law – that backed up its initial finding that the OMT programme constitutes economic policy.[190] The ECJ goes into each of them but finds, to the contrary, that they either strengthen its assessment that the programme constitutes monetary policy or at least do not refute it.

The first feature relates to instruments and concerns the selective nature of bond purchases. According the *BVerfG*, the Union's monetary policy framework does not generally have a targeted approach. Conventional monetary policy instruments, like the fixing of key interest rates or the reserve ratio, are applicable to all members of the currency union and their resident commercial banks alike. It admitted that such measures may produce different effects in the various national economies, but argued that this is the consequence of an open market economy, as Union law presupposes in Article 127(1) TFEU,[191] and such effects are in any case controllable by the ESCB only to a limited extent. With the OMT programme, however, the ECB envisages conducting targeted purchases, focused on the bonds of specific Member States. This selectivity therefore provides a further indication for the programme's economic policy nature.[192]

The ECJ holds a different view on the targeted nature of bond purchases. It points out that Article 18.1 Statute specifically allows the ECB and Eurosystem NCBs to buy and sell outright marketable instruments and that no provision of primary law requires the ESCB to carry out its monetary policy by means of general measures only. Moreover, given that the disruption in the transmission mechanism of monetary policy results from the excessive rates for specific government bonds, it makes sense to target the purchases specifically at these bonds.[193]

This latter view is more convincing. Although monetary policy is usually carried out in a general fashion, there is indeed no legal provision making this an absolute requirement. In this regard it is interesting to see that the *BVerfG* supported its argument about selectivity with a reference to the ECB's "General Documentation", a Guideline of the ECB setting out the principles,

189. Case C-370/12, *Pringle*, para 60.
190. See also *BVerfG OMT*, paras. 65–67.
191. See also Art. 119(1) and (2) TFEU.
192. *BVerfG OMT*, paras. 65 and 73.
193. Judgment, paras. 54–55, 89.

instruments and procedures on the basis of which monetary policy is implemented throughout the currency union. [194] But what does this document actually say? The version to which the *BVerfG* referred states: "the Eurosystem's monetary policy operations are executed under uniform terms and conditions in all Member States".[195] It therefore does not require that monetary policy needs to be carried out in a general fashion. Rather, it stipulates that this policy must always be conducted on the basis of uniform terms and conditions. The OMT decision satisfies that requirement, as it sets out clearly the terms and conditions on the basis of which the Eurosystem may conduct bond purchases. Any member of the currency union meeting these criteria may qualify for purchases.[196]

In addition to the arguments advanced by the ECJ in favour of targeted purchases, one can also point out that these purchases aim to ensure that the ECB's conventional interest rate instrument, which does have a general approach,[197] is actually effective throughout the currency union. Moreover, if purchases lacked a targeted character and were carried out for all States regardless of their economic situation, this would in fact be legally problematic. With the OMT programme, the Eurosystem only buys up government bonds whose yields are excessive and no longer correspond to fundamentals. Were it to buy up any bond regardless of the level of its yield, this could lead to a suppression of yields below the level justified by fundamentals which, as will be explained more clearly below,[198] would set it on a collision course with the prohibition on monetary financing.

A second feature of the OMT programme that the *BVerfG* considered problematic was its link with ESM assistance programmes. Although not being very clear on this point, its concern about this "parallelism" seems to consist of two strands. First of all, the Eurosystem will only intervene on secondary bond markets if the State whose bonds are bought fully complies with ESM conditionality. Tying purchases to such conditionality is problematic not only because the latter concerns economic and fiscal policy;

194. *BVerfG OMT*, para 73.

195. See point 1.1, Ch. 1, Annex 1 of the Guideline of the European Central Bank of 20 Sept. 2011 on monetary policy instruments and procedures of the Eurosystem (ECB/2011/14), O.J. 2011, L 331/1, as amended by Guideline of the European Central Bank of 26 Nov. 2012 (ECB/2012/25), O.J. 2012, L 348/30. The General Documentation is now laid down in a new Guideline. See Guideline 2015/510 of the European Central Bank of 19 Dec. 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60), O.J. 2015, L 91/3, as last amended by ECB Guideline 2015/1938 of 27 August 2015, O.J. 2015, L 282/41.

196. See also Gerner-Beuerle et al., op. cit. *supra* note 173, at 305.

197. Ibid. The authors, however, rightfully point out that even the setting of interest rates is at least implicitly targeted as the ECB takes into account how the rate will affect different members of the currency union.

198. See text to note 271 *infra*.

it also means that the ECB retains its own conscientious examination of the necessity of bond purchases.[199] Second, by intervening in secondary government bond markets, the Eurosystem engages in an activity that the ESM may carry out as well.[200] Together, they cause the German court to argue that the OMT programme forms an instrument of economic policy. Stronger, it constitutes the "functional equivalent" of ESM assistance measures, albeit without their parliamentary legitimation and monitoring.[201]

Interestingly, the Advocate General shares the *BVerfG*'s concerns about the link with ESM assistance, yet his suggested remedy of a "functional distance" cannot completely address them.[202] Even if the ECB observed such distance, the fact remains that it engages in an activity that the ESM performs as well. More importantly, it will only conduct purchases as long as the State in question complies with policy conditionality. As stated above, the *BVerfG* considers that the ECB thereby retains its own examination on the necessity to carry out bond purchases, turning them into an instrument of economic policy. Besides its inability to meet fully the *BVerfG*'s concerns, the functional distance suggested by the Advocate General would also be difficult to implement in practice, as the ESM Treaty requires the ECB's involvement in negotiating and monitoring policy conditionality. Since the entry into force of the "Two-Pack", consisting of two Regulations that strengthen fiscal and economic surveillance in the currency union,[203] its involvement is also demanded by Union law itself. One of these instruments, Regulation 472/2013, requires the ECB's involvement both in the context of enhanced surveillance that accompanies precautionary financial assistance and regular macroeconomic adjustment programmes.[204] Without changes to the ESM Treaty and the Regulation, the ECB would therefore find itself in a difficult spot. Either it would observe a functional distance when conducting bond purchases and thereby disregard its duties under both legal instruments, or it would respect these duties but then be unable to intervene on bond markets.

The ECJ, however, does not see any need for such a functional distance as it considers that the link with ESM assistance does not alter its finding that the OMT programme constitutes monetary policy. In this regard, it stresses the

199. *BVerfG OMT*, paras. 75, 77.

200. Ibid., para 76. See Art. 18 ESM Treaty.

201. Ibid., paras. 65 and 77–79.

202. Opinion, paras. 148–150.

203. Regulation 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, O.J. 2013, L 140/1 (hereinafter "Regulation 472/2013"); Regulation 473/2013 of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits in the Member States of the euro area, O.J. 2013, L 140/11.

204. See especially Art. 3 and Art. 7 of Regulation 472/2013.

ECB's independence and points out that the latter has actually established the link with ESM conditionality to exclude moral hazard, in particular the risk that States no longer consider it necessary to comply with adjustment programmes once the Eurosystem purchases it bonds,[205] as has happened under the SMP. The ECB is afraid this may negatively impact on the effectiveness of the purchases and ultimately on its own independence.[206] Decisive for the ECJ, however, is the difference in objectives between the ESM and OMT programme. Whereas ESM bond purchases tied to conditionality aim at safeguarding the (financial) stability of the currency union, similar conditional purchases can only be carried out by the Eurosystem if and to the extent they are necessary for the maintenance of price stability. In making this argument, however, it also goes into overdrive as it states that the (financial) stability of the euro area is an objective "not falling within monetary policy".[207] Again, the issue of objectives is much more subtle and rather relates to the question *to what extent* financial stability considerations can inspire monetary policy.

The third and final feature strengthening the *BVerfG* in its finding that the OMT programme constitutes economic policy is "bypassing". According to the *BverfG,* the criteria for secondary market intervention by the ESM are more demanding than for the OMT programme. The ESM can only purchase bonds on the secondary market if it satisfies the general requirement that assistance is indispensable to safeguard the financial stability of the euro area as a whole and if there are in addition exceptional financial market circumstances.[208] Moreover, States only qualify for such purchases by the ESM when they are either subject to a macroeconomic adjustment programme or when they at least meet several strict requirements.[209] Under the OMT programme, however, States merely need to be subject to a precautionary programme of the ESM (Enhanced Conditions Credit Line) which only requires them to take "certain corrective" measures.[210] These more generous conditions attached to central bank action lead the *BVerfG* to conclude that the OMT programme "is likely to bypass" the conditions and

205. Judgment, para 60.

206. Draghi during a press conference on 6 Sept. 2012: "… we should not forget why countries have found themselves in a bad equilibrium to start with. And this is because of policy mistakes. That is why we need both legs to fix this situation and move from a bad equilibrium to a good equilibrium. If the central bank were to intervene without any actions on the part of governments, without any conditionality, the intervention would not be effective and the Bank would lose its independence".

207. Judgment, para 64.

208. Art. 12(1) and 18(2) ESM Treaty and Art. 1 ESM Guideline on the Secondary Market Support Facility.

209. Art. 2 ESM Guideline on the Secondary Market Support Facility.

210. Art. 2(4) ESM Guideline on Precautionary Financial Assistance.

conditionalities for ESM bond market intervention, enabling the Eurosystem to purchase bonds in a wider range of circumstances.[211]

For the ECJ this potential divergence in the scope of action is not problematic. Again, the difference in objectives between the ESM and the OMT programme is central to its reasoning. As the Eurosystem's bond purchases do not intend to replace the ESM in reaching the latter's objectives but, on the contrary, aim at objectives that are peculiar to monetary policy, it is of no use to argue that they may serve to circumvent or bypass ESM intervention.[212]

5.3.3. *The road not taken by the ECJ: Focusing on legal bases instead of policy areas*

In the slipstream of the *BVerfG* the ECJ adopts a reasoning analogous to *Pringle* to determine the policy nature of the OMT programme. Even though its reasoning is substantively more solid than that of the *BVerfG*, this approach leads to difficulties with respect to financial stability. As stated above,[213] economists increasingly recognize that financial stability should be on the radar screen of central banks and the ECB itself admits that it targets this kind of stability with its bond purchases to the extent that dysfunctional bond markets hamper the transmission of monetary policy. Yet, by following a *Pringle*-inspired reasoning the ECJ forces itself to strictly define the OMT programme as either monetary or economic policy, which causes it to struggle with this objective. On the one hand, it talks down the importance of financial stability when it states that a monetary policy measure cannot be treated as equivalent to an economic policy measure for the reason it may have indirect effects on this kind of stability. On the other hand, it argues that to the extent that financial stability does form an objective it does not fall within the remit of monetary policy.

More fundamentally, one can also question whether the ECJ's approach is the most appropriate one to determine whether the OMT programme is covered by the ECB's mandate. In fact, there are good reasons for arguing that it should not have moulded its reasoning so much on *Pringle*, which forced it to focus strongly on the policy character of the bond purchases, and that instead it should have concentrated its analysis more on the direct legal basis for the bond purchases: Article 18(1) of the Statute.[214] Doing so would also

211. *BVerfG OMT*, para 79.
212. Judgment, para 65.
213. See text to note 67 *supra*.
214. For similar criticism in relation to the *BVerfG*'s reasoning, see Wendel, op. cit. *supra* note 74, at 294–295; Bast, op. cit. *supra* note 166, at 174–176. See also Beukers, op. cit. *supra* note 166, at 366.

have allowed it to reconcile the currency union's changed stability conception with Union law even better.

This argument, in favour of the Statute as basis, requires reconsideration of *Pringle*. The ECJ there had to determine the policy nature of the ESM in order decide whether the European Council had been right to use the simplified treaty revision procedure in Article 48(6) TEU to add a third paragraph to Article 136(3) TFEU, stating beyond doubt that the members of the currency union may establish a permanent stability mechanism. Article 48(6) TEU determines that the simplified procedure can only be used to revise provisions in Part III of the TFEU. It would therefore not have been the proper legal basis for incorporating Article 136(3) into the TFEU if this provision related to monetary policy. The introduction of that provision would then have brought about a fundamental change in the division of competences between the Union and the Member States, which is regulated in Part I of the TFEU. More specifically, it would have undone the current classification of monetary policy as an exclusive Union competence.[215] Ultimately, then, defining the policy nature of Article 136(3) TFEU and its envisaged stability mechanism (i.e. the ESM) was directly linked to the analysis whether Article 48(6) TEU formed the appropriate *legal basis* for a European Council decision amending Article 136 TFEU.[216]

In the present case, however, the ECJ's mission to define the policy nature of the OMT programme is not directly linked to a legal basis analysis. It is the other way round. The Court only pays attention to Article 18.1 Statute to make the case that outright bond purchases are an instrument of monetary policy, thereby supporting its argument that the OMT programme concerns monetary policy. In this way, defining a measure's policy character becomes an end in itself.

What would happen if one started to address the question whether the ESCB acted within the scope of its powers by examining the legal basis used, which is a plausible thing to do in such cases?[217] One could point out that Article 18.1 Statute stipulates that the Eurosystem may use the instruments provided therein, including outright bond purchases, "to achieve the *objectives* of the ESCB and to carry out its *tasks*". The conduct of monetary policy, as Article 127(2) TFEU and 3.1 Statute make clear, is a basic task of the ESCB.[218] It makes little sense to try then to define monetary policy by

215. See Art. 3(1)(c) TFEU.

216. Case C-370/12, *Pringle*, paras. 46–47 and 52.

217. See also Bast, op. cit. *supra* note 166, at 174.

218. In addition, one could possibly even point to Art. 127(5) TFEU and Art. 3.3 of the Statute, which enable the ESCB to contribute to policies relating to the stability of the financial system. See Smits, "Correspondence", 49 CML Rev. (2012), 827–831, at 829; Borger, "How

juxtaposing it with economic policy,[219] especially not by looking at a measure's objectives. Not only can that be very difficult, as the two policy areas overlap and can at times be hard to distinguish in practice;[220] 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 ESCB, 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 ESCB may pursue. This second kind of stability can serve as an intermediate objective that the ESCB, in line with Article 12.1 Statute, can aim for to attain its supreme goal of price stability.[221] That is the approach taken by the ECB 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 ESCB treats financial stability as a self-standing objective that it is allowed to pursue through bond purchases with a view to supporting the general economic policies in the Union,[222] provided this does not conflict with the primary goal of price stability.[223] That in this second, theoretical scenario the ESCB would violate its mandate as its purchases would go beyond supporting economic policy, as the *BVerfG* suggests in its referring decision, is not a persuasive argument. The German court gives two arguments why the OMT programme exceeds what can be seen as supporting economic policy, thereby acting outside its mandate. The first is of a quantitative nature and concerns the volume of assistance measures of the ESM. Such assistance could *de facto* be considerably broadened, even multiplied, by parallel bond purchases of the Eurosystem, as a result of which

the debt crisis exposes the development of solidarity in the Euro area", 9 EUConst (2013), 7–36, at 33. See also text to note 50 *supra*.

219. See also Thiele, op. cit. *supra* note 175, at 258–259.

220. As judge Gerhardt rightly pointed out in his dissenting opinion in *BVerfG OMT*, 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 Opinion, para 129.

221. Sester, "The ECB's controversial Securities Market Programme (SMP)", 9 ECLR (2012), 156–178, at 166.

222. See Selmayr, op. cit. *supra* note 178, §62–63.

223. The OMT programme complies with that limit as the ECB has made it clear that any liquidity injected into the financial system through its bond purchases will be sterilized, so as to make sure that the interventions will not negatively influence its monetary policy stance. Moreover, it has also been pointed 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 increases in the money base do not automatically translate into an increase of the money stock. See De Grauwe, op. cit. *supra* note 71, at 522–525.

the political decisions underlying ESM assistance measures would be "thwarted". In this regard, the *BVerfG* has little confidence in the actual limitation that the ECB has built into the programme. The Eurosystem will only buy up bonds in the maturity spectrum of one to three years, but States could easily circumvent that constraint by changing their refinancing policies. Although the ECB has announced that it will observe States' emission behaviour, the *BVerfG* considers it unclear what would follow from that intention.[224] The second argument is qualitative and relates to the independence of the ECB. Due to its independence it has to make its own assessment on the necessity of bond purchases, without being tied to decisions made under the ESM. As a result of such independent economic assessments, however, bond purchases no longer qualify as mere support of economic policy.[225] On the basis of these arguments the *BVerfG* concludes that Eurosystem bond purchases would only qualify as "support" if their volumes were so limited that they could not thwart ESM assistance programmes and if they are approved on the merits by the Member States.[226]

Both arguments fail to convince. They only work if one accepts the *BVerfG*'s premise that in order to assess whether the OMT programme supports economic policies, one needs a specific comparator like the ESM. However, it is more plausible to argue that the programme's efforts to prevent States from entering bad equilibria significantly contributes to stabilizing the financial system. It is hard to see how this does not support the economic policies of both the Union and the States.[227]

Even if one accepts, however, both the premise of the need for a specific comparator and that the ESM qualifies for that function,[228] the arguments lack persuasion. As to volume, in fact the size of the OMT programme is curtailed due to its focus on a particular part of the maturity spectrum. Not accepting the ECB's assurance that it will oversee the emission behaviour of States whose bonds are purchased amounts to distrust. Contrary to the *BVerfG*, the ECJ does trust the ECB on this point and also singles out several other elements 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

224. *BverfG OMT*, paras. 81 and 83.

225. Ibid., para 82.

226. Ibid., para 83.

227. See Selmayr, op. cit. *supra* note 178, §67; Gerner-Beuerle et al., op. cit. *supra* note 173, at 311.

228. 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 be used as a comparator whose underlying political decisions could be "thwarted" by OMT interventions. See Thiele, op. cit. *supra* note 175, at 260; Gerner-Beuerle et al., op. cit. *supra* note 173, at 306–309, 311.

purchases.[229] Over and above these elements, and as the Advocate General argued as well,[230] such a cap could also trigger speculation, thereby undermining the programme's effectiveness and increasing the likelihood that it will actually have to be used. Interestingly, the ECJ makes these statements mostly in the context of its proportionality review, only after having come to the conclusion that the OMT programme falls within the ESCB's monetary policy mandate. That raises interesting questions about the nature and context of this proportionality assessment, on which more is said below.[231]

The *BVerfG*'s argument about central bank independence is simply contradictory.[232] Article 130 TFEU makes clear that the ECB and NCBs are independent in the performance of all their tasks, including when they aim to support economic policy. Arguing that actions of the ECB exceed what can be qualified as support, as the ECB will have to carry out independent economic assessments runs counter to this independence requirement. Either the ECB 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 *BVerfG*'s demand that bond purchases are approved on the merits and legitimized by the Member States is not compatible with central bank independence either.

5.4. *The OMT programme and the prohibition on monetary financing*

The ECJ also had to examine whether the OMT programme is compatible with the prohibition on monetary financing. And on this point too its views differ significantly from those of the *BVerfG*. Whereas the latter considers that the bond purchases are "likely" to violate the prohibition on monetary financing, the ECJ thinks they are compatible with it. This difference in views between the two courts is discussed first, after which the focus shifts to the reasoning of the ECJ. After *Pringle* this is the second time it had to interpret a cornerstone provision of the currency union aiming for budgetary prudence and price stability. The ECJ's reasoning resembles that in *Pringle* to a great extent, but not completely.

229. Judgment, paras. 85–88 and 116–117.
230. Opinion, para 182.
231. See text to note 287 *infra*.
232. See also Thiele, op. cit. *supra* note 175, at 260; Gerner-Beuerle et al., op. cit. *supra* note 173, at 311.

5.4.1. *More divergence: The permissibility of secondary market intervention*

In earlier case law, the *BVerfG* argued (with reference to Regulation 3603/93 specifying Article 123 TFEU) that a "financing of the Members' budgets independently from the capital markets" would circumvent the prohibition on monetary financing in a way which was not permitted.[233] In the present case, however, the *BVerfG* seems to adopt a much wider view of what amounts to such circumvention.[234] It no longer speaks about financing independently from markets, but simply states that in assessing conformity with Article 123 TFEU one should focus on the objective pursued by this provision, without even defining what that objective is.[235] The prohibition of buying bonds on the primary market may therefore not be circumvented by "functionally equivalent" measures. The *BVerfG* then argues that in addition to the previously discussed features of neutralizing interest rate spreads, selectivity and parallelism, five others also indicate, "at least when taken together", that the OMT programme aims at such circumvention.[236] The ECJ shares the *BVerfG*'s concerns in relation to some elements, but considers it possible to take care of them within the confines of the OMT programme. Others it does not share at all.

Starting with the features that might indeed lead to financing budgets independently from the markets: purchasing bonds shortly after their emission and encouraging private investors to buy them on the primary market. The *BVerfG* argues that the Eurosystem can circumvent the prohibition on monetary financing if it conducts secondary market purchases to a considerable extent and shortly after emission. That risk only becomes more real if it announces its intention to intervene on bond markets prior to a new emission. In that case, the ECB would position itself as the earlier discussed "lender of last resort".[237] This is a serious problem. If the ECB indeed announced that it intended to strongly intervene shortly after emission this could blur the distinction between secondary and primary markets, turning the OMT programme into the functional equivalent of primary market intervention. No wonder, therefore, that both the Advocate General and the ECJ recognize this concern.[238] Yet, the latter also rightly points out that the ECB has made clear it will make sure that its purchases do not have such an effect. It will observe a "minimum" or "embargo" period between a bond's

233. *BVerfG ESM & TSCG temporary injunction*, para 278.
234. Thiele, op. cit., *supra* note 175, at 262.
235. See also Beukers, op. cit. *supra* note 166, at 355.
236. *BVerfG OMT*, para 87.
237. Ibid., paras. 92–94.
238. Judgment, para 104; Opinion, paras. 250 and 258.

emission and its purchase on the secondary market, so as to allow for the possibility of a market price to be formed, and it will refrain from making prior announcements concerning the timing of purchases or their volume.[239]

Interestingly, the *BVerfG* also recognizes these precautionary efforts of the ECB, but argues that the "whatever it takes" pledge of July 2012 nonetheless gave market participants "the impression" that the Eurosystem would act as a lender of last resort.[240] Yet, it is rather strange to find an act – the decision of 6 September 2012 on the principal features of the OMT programme – 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 ECB might act *contra legem*. Moreover, when ECB president Draghi made his statement he was careful to avoid any such impression, as his pledge that the ECB would do "whatever it takes" was preceded by the words "within its mandate".

The *BVerfG* is also concerned about three other features that do not really create the risk of financing budgets independently from markets, but which it nonetheless considers problematic from the point of view of Article 123 TFEU. One of them is the fact that the Eurosystem will not enjoy preferred creditor status, but rank *pari passu*, which means it may have to participate in a debt restructuring if that is decided by a majority of creditors. According to the *BVerfG* a full or partial waiver of securitized claims contained in government bonds would amount to monetary financing. It adds that "at least if a purchase contains, from the outset, the prospect of subsequently becoming part of a potential debt cut, one cannot … establish a relevant difference between waiving the repayment obligation from a loan and providing funds that are *a priori* irrevocable and not tied to any performance".[241] To ensure an interpretation of the OMT programme in conformity with Union law, the possibility of a debt cut would therefore have to be excluded.[242]

The ECJ counters the *BVerfG*'s reasoning on this point by rightfully stressing the fact that nowhere do the Union Treaties require the ECB to insist on having a privileged creditor status. In fact, they allow for the possibility to intervene on secondary government bond markets without making it conditional on such a status.[243] The Advocate General even goes a step further; he also points out that the *BVerfG*'s comparison falls short. There is certainly a relevant difference between a bond purchase that contains the prospect of a debt cut and a provision of funds that is *a priori* irrevocable. A

239. Judgment, paras. 105–107.
240. *BVerfG OMT*, para 94.
241. Ibid., para 88.
242. Ibid., para 100.
243. Judgment, para 126.

debt cut forms a hypothetical event of which one cannot know for certain that it will materialize.[244] Until its materialization, the bondholder has a right to payment in full. In the case of a provision of funds that is *a priori* irrevocable, the creditor does not have such a right even from the start. The Advocate General also emphasized that the ECB has indicated that in the context of a restructuring subject to Collective Action Clauses (CACs), which the ESM Treaty requires all euro area States to include in their securities as of 1 January 2013,[245] it will always try to prevent this hypothetical event from unfolding by voting against a full or partial waiver of its claims.[246] In other words, the fact that the Eurosystem accepts the prospect of a debt cut does not mean that it will actively contribute to it realization.

Closely related to the *pari passu* issue are the concerns about risk taking. The *BVerfG* takes the view that purchasing bonds with an increased risk of failure because of their lower credit rating or even of a debt cut is likely to violate the prohibition on monetary financing too. Through such purchases the Eurosystem would be turned into a "bad bank" for banks in the members of the currency union. Importantly, it would also contribute to financing these members' budgets. The *BVerfG* admits that Union law contains no provisions that "completely" prohibit potentially loss-making monetary policy operations, but it argues that it does not include the authorization to take "large and unnecessary" risks of losses.[247]

These arguments in favour of limiting the amount of risk the Eurosystem can take on are not particularly strong. It has been pointed out that the Eurosystem could be found guilty of monetary financing if it bought bonds at a price that is disproportionately high given the associated default risk.[248] But the OMT programme only aims to prevent States from entering bad equilibria, in which yields no longer correspond to fundamentals, and does not seek to lower these yields below levels that would prevail in a good equilibrium. On the assumption that one can indeed distinguish between good and bad equilibria, as the ECB holds, the purchases should not be seen as monetary financing as long as they are not carried out for a price exceeding that prevailing in the market under a good equilibrium.

In that case, what is left of the *BVerfG*'s argument is the general claim that the Eurosystem should not take on "large and unnecessary" risks of losses. In this regard one should bear in mind that the purchase of a bond, which is allowed for by Article 18.1 Statute, always carries a risk. The risk of large

244. Opinion, para 234.
245. See Art. 12(3) ESM Treaty.
246. Opinion, para 235.
247. *BVerfG OMT*, para 89.
248. See Gerner-Beuerle et al., op. cit. *supra* note 173, at 316.

losses may affect the proper functioning of a central bank as it may lead the bank to base its policy on considerations unrelated to, or conflicting with price stability. More specifically, when this risk stems from government bonds it may cause the central bank to take on board fiscal policy considerations. But that same concern for price stability can also be used for an opposite reasoning, which is followed by the ECJ. Whereas the Advocate General still tried to define some kind of limit, arguing that risk taking should not lead the ECB to face insolvency,[249] the ECJ points out that the Union Treaties oblige the ESCB to strive for price stability and they do not make that functional obligation conditional on respect for any limits as to risk taking. It therefore has to secure this primary goal even if that necessitates taking considerable risks.[250] Next to this principled legal argument, the ECJ states that the guarantees built into the OMT programme to ensure that a State follows a sound budgetary policy, such as the link to ESM conditionality, also reduce the risk of losses.[251] This second argument is less convincing. Does it mean the Eurosystem would not be allowed to undertake risky purchases of government bonds so as to deliver on its mandate to safeguard price stability in the absence of these guarantees?

The last feature of the OMT programme raising doubts in Karslruhe was the possibility to hold bonds to maturity, which could lead to an interference with "market logic". The *BVerfG* argues that if a substantial amount of bonds are taken from the market until maturity "certain effects" that result from the sale of bonds prior to maturity cannot occur. Not only would the Eurosystem in such a case obstruct an unbiased price determination, it would also contribute to the financing of the respective budgets. In order to ensure conformity with EU law such interferences with price formation on the market should therefore be avoided "where possible". [252]

In response to these concerns the ECJ rightfully points out that any monetary policy measure has an impact on financial markets, including those for government bonds, and thus also on the conditions under which States can refinance their debts.[253] If the *BVerfG*'s concern about avoiding "effects" on bond markets is taken to the extreme, this would mean that the ECB could no longer set policy rates without violating the prohibition on monetary

249. Opinion, paras. 194–199 and 238–241. Following this reasoning is 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", 16 GLJ (2015), 1025–1048, at 1042–1043.

250. Judgment, para 125.

251. Ibid., para 124.

252. *BVerfG OMT*, paras. 90–91 and 100.

253. Judgment, para 110.

financing.[254] And again, Article 18.1 Statute allows for secondary market purchases of government bonds. Doing so inevitably has an effect on secondary bond markets and indirectly also on the primary market. Article 18.1 also does not make purchases conditional on selling bonds before maturity, as a result of which the Eurosystem has great freedom to decide how to handle its bond portfolio. Implicitly, the realization that the Eurosystem has great discretion on this point is also present in the reasoning of the *BVerfG*. What are the exact implications for the Eurosystem of the demand to avoid "where possible" interferences with price formation and is such a limit justiciable in the first place? Besides, some also point out that the concerns about holding bonds to maturity are not borne out by the OMT programme's design. Given that purchases are focused on government bonds with a remaining maturity of between one and three years, other bonds could still ensure an adequate price formation in the market.[255]

5.4.2. *The prohibition on monetary financing and legal interpretation*

When the ECJ had to assess the ESM's conformity with the no-bailout clause in *Pringle*, it adopted a reasoning in essence consisting of three strands. It first focused on the text of the provision, then resorted to its purpose, and ended with *ultima ratio* considerations.[256] The ECJ's present interpretation of the no-bailout clause's twin provision in Article 123 TFEU resembles this approach to a considerable extent, but also shows some interesting deviations, in particular concerning financial stability.

In *Pringle,* the ECJ used a textual interpretation to define the scope of the no-bailout clause negatively. Article 125 TFEU states that neither the Union nor Member States shall be "liable for" or "assume" the commitments of, generally speaking, other States. This showed, according to the Court, that assistance should not have as a result that a Member State is no longer responsible for its commitments to its creditors.[257] The ESM complies with that requirement as none of its assistance instruments has the effect of freeing the recipient State from its commitments to its creditors. On the contrary,

254. See also Thiele, op. cit. *supra* note 175, at 262.

255. See Gerner-Beuerle et al., op. cit. *supra* note 173, at 317.

256. On the ECJ's interpretation of Art. 125 TFEU, see Borger, "The ESM and the European Court's predicament in *Pringle*", 13 GLJ (2013), 113–140, at 129–132; Smulders and Keppenne, "Artikel 125", in Von der Groeben et al., op cit. *supra* note 178, pp. 13–16; De Witte and Beukers, "The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*", 50 CML Rev. (2013), 805–848, at 838 et seq.; Adam and Parras, "The European Stability Mechanism through the legal meanderings of the Union's constitutionalism: Comment on Pringle", 38 EL Rev. (2013), 848–865, at 860–861; Koedooder, "The Pringle judgment: Economic and/or monetary union?", 37 *Fordham Int. L.J.* (2013), 111–146, at 121–124.

257. Case C-370/12, *Pringle*, paras. 130–132 and 137.

when it provides assistance through a credit line or loan it even creates a new debt,[258] owed to the ESM by the State in question.[259] In the present case the ECJ similarly uses the text of Article 123 TFEU to set a lower limit to bond buying, which the ESCB must respect. The wording of the provision, covering credit facilities and direct bond purchases, shows that it prohibits all financial assistance to a Member State.[260] Interestingly, the Court then goes on to say that the prohibition also covers those secondary market purchases that would have an effect equivalent to primary market intervention and thereby undermine its effectiveness.[261] Such an *effet utile* reasoning did not feature in the ECJ's interpretation of the no-bailout clause, but this is consistent with its view on the difference in scope of Articles 123 and 125 TFEU. Already in *Pringle* it argued that the difference in wording of the two provisions shows that, unlike the prohibition on monetary financing, the no-bailout clause does not rule out any financial assistance to a Member State but is instead restricted to situations in which a State is no longer responsible for its financial commitments.[262] Given this restricted scope, applying an *effet utile* reasoning in relation to Article 125 TFEU is not called for. In fact, it could even undo the difference in scope between the prohibitions that the ECJ has identified on the basis of their wording, as the no-bailout clause 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.[263]

In *Pringle,* after applying a textual interpretation, the ECJ then turned to the no-bailout clause's purpose to determine which forms of assistance would be compatible with the prohibition. Quite exceptionally, it relied on the *travaux préparatoires* to identify this purpose,[264] and defined it as the need to ensure that States follow a sound budgetary policy by subjecting them to the logic of the market when entering into debt. Article 125 TFEU thus rules out assistance that would diminish the incentive of the recipient State to follow a sound fiscal policy.[265] The ESM complies with this second requirement too, as it can only grant assistance subject to strict policy conditions.[266] In reaching

258. Arts. 14–16 ESM Treaty.
259. Case C-370/12, *Pringle*, paras. 138–141.
260. Judgment, paras. 94–95.
261. Ibid., para 97.
262. Case C-370/12, *Pringle*, para 132. See also Judgment, para 95.
263. See e.g. Beck, "The Court of Justice, legal reasoning, and the *Pringle* case: Law as the continuation of politics by other means", 39 EL Rev. (2014), 234–250, at 243–244.
264. On historical interpretation by the ECJ see Lenaerts and Gutiérrez-Fons, "To say what the law of the EU is: Methods of interpretation and the European Court of Justice", 20 CJEL (2013), 3–61, at 23–31.
265. Case C-370/12, *Pringle*, paras. 133–136.
266. Ibid., paras. 142–143.

this conclusion, however, the ECJ had to jump over objectives. The no-bailout clause certainly aims for fiscal prudence, but it only does so by subjecting States to market discipline. By finding that the ESM complies with the objective of fiscal prudence through the policy conditionality attached to its assistance, the ECJ left out of the equation this prior objective of market discipline.[267]

In the present case, the ECJ also resorts to a teleological reasoning to discover what kinds of bond purchases are still permitted by the prohibition on monetary financing. Like the *BVerfG,* it refers to the preamble of Regulation 3603/93 to support that strategy, but unlike the German court it makes explicit what the purpose of Article 123 TFEU is. Copying its approach in *Pringle*, it relies on the legislative history of the Maastricht Treaty to reach the conclusion that, like the no-bailout clause, the prohibition on monetary financing aims at fiscal prudence.[268] It then identifies several features of the OMT programme showing that the envisaged bond purchases comply with that purpose.[269] Contrary to *Pringle*, however, it specifically makes market discipline part of the analysis.[270] Since bond purchases are only conducted to the extent necessary for safeguarding the transmission of monetary policy, States cannot know for certain that the Eurosystem will intervene on bond markets. More importantly, the disciplining effect of markets remains in place as the purchases do not aim at harmonizing yields for government bonds, but only combat those parts that exceed fundamentals.[271] *A contrario*, it also 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. This should assuage the *BVerfG*'s fear that any deterioration of the transmission mechanism could justify improving a State's credit rating through bond purchases.[272]

The ECJ's third and final step in *Pringle* was to rule that the no-bailout clause's goal of securing budgetary discipline in turn contributed to the higher aim of financial stability. The granting of assistance is therefore only allowed when it is indispensable for safeguarding that stability.[273] This was a surprising move. The prohibition on bail-outs was originally intended to

267. Borger, op. cit. *supra* note 256, at 135–137; Craig, "*Pringle*: Legal reasoning, text, purpose and teleology", 21 MJ (2014), 3–11, at 8–9.

268. It thereby follows a reasoning that was already suggested in the literature. See e.g. Athanassiou, "Of past measures and future plans for Europe's exit from the sovereign debt crisis: What is legally possible (and what is not)", 36 EL Rev. (2011), 558–575, at 567.

269. Judgment, paras. 98–102 and 111–120.

270. Ibid., paras. 112–114.

271. Ibid., paras. 72 and 112–114.

272. *BVerfG OMT*, paras. 97–98.

273. Case C-370/12, *Pringle*, paras. 135–136.

safeguard budgetary discipline and ultimately price stability, but not financial stability.[274] Rather, the crisis made everyone aware of the importance of this kind of stability for the currency union and the inability to protect it with the single currency's original legal set-up.[275] Yet, by turning financial stability into the ultimate aim of Article 125 TFEU, the ECJ could reach the conclusion that States had always been able to grant assistance via a mechanism like the ESM. This in turn allowed it to argue that Article 136(3) TFEU has nothing but a declaratory value, as a result of which ratification of the ESM Treaty was not dependent on its entry into force.[276]

It is at this point that the ECJ's present analysis differs most from *Pringle*. It does not declare financial stability to be the ultimate goal of the prohibition on monetary financing. Instead, it simply confines its analysis to the aim of budgetary discipline and does not identify any superior goal, not even price stability. Turning financial stability into the ultimate goal of Article 123 TFEU, as the Advocate General still tried to do,[277] would also have been very difficult for the Court, and not only because the ECB itself considers that the bond purchases are ultimately focused on price stability. This deviation from *Pringle* also occurs, paradoxically, because of the fact that the ECJ stays faithful to that judgment at the stage of defining the ESCB's monetary policy mandate, as explained above.[278] 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 then no longer an option if one wants to uphold the OMT programme.

In *Pringle*, the ECJ played a little with history by arguing that it had always been possible for the members of the currency union to grant financial assistance when indispensible to safeguard financial stability.[279] Now it does the same with the present by not allowing this stability to play any explicit role in its analysis of the OMT programme at all.

274. See also Cour-Thimann and Winkler, op. cit. *supra* note 31, at 767. They argue: "… the Treaty did not include provisions to ensure joint action in the field of cross-border or euro area-wide risks to financial stability. The concept of 'ensuring the financial stability of the euro area as a whole' had to be 'invented' in the crisis".

275. Pisany-Ferry, "The known unknowns and unknown unknowns of EMU", Bruegel Policy Contributions, No. 12 (Oct. 2012), at 7.

276. Case C-370/12, *Pringle*, paras. 184–185.

277. The A.G. does identify financial stability as the ultimate objective of Art. 123 TFEU but hardly operationalizes that finding, merely arguing that it therefore constitutes a fundamental rule of EMU exceptions to which should be interpreted restrictively; see Opinion, para 219.

278. See text to note 162 *supra*.

279. Borger, op. cit. *supra* note 256, at 139.

5.5. *Explaining the difference in views: Judicial review and central bank independence*

The ECJ and the *BVerfG* hold sharply diverging views about the policy nature of the OMT programme and its compatibility with the stability framework for the single currency. Let us see what explains this divergence: it turns out that the judges in Karlsruhe and in Luxembourg think differently about the independence of the ECB and the authority of its position.

The Union Treaties, especially Article 130 TFEU, endow the ECB with great independence. 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. To be clear, this is not to say the ECB should have *carte blanche* or be exempted from judicial review. This would be quite undesirable, and it would also contradict Article 35 of the Statute which states that its acts or omissions are open to review or interpretation by the ECJ in line with the arrangements in the Union Treaties. It does mean that courts should be careful not to get entangled in economic debates which they cannot settle anyway, and exercise considerable restraint in reviewing assessments of the ECB.[280]

At first sight the *BVerfG* seems to be aware of the necessity of such restraint. It argues that the independence guarantee in 130 TFEU covers the actual powers conferred on the ECB, but not the determination of the extent and scope of its mandate. It can therefore delineate that mandate so as to make sure that the ECB cannot expand it at will.[281] However, on closer examination this approach is questionable.[282] 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 ESCB, 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 shows in the analysis of the *BVerfG*, which only manages to identify and delimitate the ESCB's mandate by discussing and interpreting at length the OMT programme.

Moreover, when interpreting the programme, any restraint on the side of the *BVerfG* is hard to discern, in particular when it comes to identifying its objective. Not only does the German court limit its analysis to the programme's immediate objective, it also reinterprets that objective when it

280. Goldmann, op. cit. *supra* note 67, at 271–272; Herrmann, "Die bewältigung der Euro-Staatsschulden-Krise an den grenzen des Deutschen und Europäischen währungsverfassungsrechts", 24 EuZW (2012), 805–812, at 810–811.

281. *BVerfG OMT*, para 60.

282. See also Wendel, op. cit. *supra* note 74, at 302.

states that the Eurosystem intends to "neutralize" bond spreads. In addition, it takes 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 breaks into the policy debate that was held within the ECB Governing Council and that *Bundesbank* president Weidmann failed to win. One would think that a court would play it safe when it overrules the expert assessment of an independent central bank, and back up its reasoning with strong evidence. Yet, as stated above,[283] the *BVerfG* only refers to the Annual Economic Report of the German Council of Economic Experts, which does not even indisputably support its view.

This very intrusive review also has consequences for the way the *BVerfG* abides 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 cannot be challenged by counterarguments. Yet, its reasoning does need to possess considerable authority in light of the arguments used.[284] It is highly questionable whether such authority is present when a court has to overrule a central bank not just on points of law, but on the definition and feasibility of the objectives pursued, so as to find that it acts *ultra vires*. The *BVerfG*'s position on the *ultra vires* nature of the OMT programme becomes even more startling when one realizes that it also keeps open the possibility that the instrument is interpreted in conformity with Union law.[285] How can a court establish a manifest violation when it considers itself that a Union law friendly interpretation is possible too?[286]

Ultimately, then, the great intensity with which the *BVerfG* reviews the OMT programme tends to lead to a perverse result. When it approved the establishment of the Economic and Monetary Union more than twenty years ago in its *Maastricht* judgment, it did so on condition that the currency union would be a *Stabilitätsgemeinschaft,* a community of stability. The independence of the ECB is the greatest symbol of, and safeguard for, such a currency union. In its desire to safeguard the currency union's continued existence as a community of stability the *BVerfG* now reviews the OMT

283. See text to note 167 *supra*.

284. According to dissenting judge Gerhardt, the threshold of manifestness is meaningful if it implies that the *BVerfG* only acts in 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 Dissenting Opinion of judge Gerhardt, *BVerfG OMT*, para 16.

285. Bast, op. cit. *supra* note 166, at 179; Wendel, op. cit. *supra* note 74, at 276.

286. 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. On this logical inconsistency, see Thiele, op. cit. *supra* note 175, at 254–255; Mayer, op. cit. *supra* note 74, at 137–138.

programme with such intensity that it undermines precisely the ECB's independence as a powerful asset.

Contrary to the *BVerfG*, the ECJ is much more sensitive to the independence of the ECB. This shows up most clearly in its proportionality analysis of the bond buying initiative.[287] As is well known, in case of policy measures of the Union involving a considerable amount of discretion, the European judiciary is cautious in its proportionality review, and for good reason.[288] 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 matters requiring considerable expertise. In such situations, the ECJ will only examine whether it is "manifestly" disproportionate. That standard is also applied here.[289] The Court finds reducing excessive bond rates through secondary market purchases a suitable instrument to safeguard the monetary policy transmission and reasons that the programme does not go manifestly beyond what is necessary to achieve that goal, thereby paying attention to issues such as selectivity and the need to put an *ex ante* cap on the amount of purchases.

Interestingly, in the context of its proportionality analysis the ECJ also examines whether the ECB manifestly erred on *fact* by taking the view that spreads for certain bonds were excessive and hampered the transmission of monetary policy. Here, central bank independence makes itself heard when the ECJ states that nothing more can be required of the ECB than that it uses its expertise with all care and accuracy. Perhaps it even makes itself heard a bit too much. By requiring the ECB to act to the best of its ability, the ECJ actually does 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 ECB has complied with that standard of proof.[290] The ECJ also uses the manifest error of assessment test to avoid the *BVerfG*'s error of getting trapped in the debate between the *Bundesbank* and the ECB. It reasons that the mere fact that the ECB's assessment is open to challenge does not suffice to establish a manifest error.[291]

It is significant that the ECJ deals with many of the *BVerfG*'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 ECJ, like the *BVerfG*, had found that the OMT programme was "politically motivated", had limited its analysis to the programme's immediate objective and had reinterpeted that objective as the "neutralization" of bond spreads, that would

287. See also Anagnostaras, "In ECB we trust… the FCC we dare! The OMT preliminary ruling", 40 EL Rev. (2015), 744–762, at 754–755.

288. See extensively Craig, *EU Administrative Law* (OUP, 2012), pp. 592–593.

289. See in particular Judgment, paras. 68, 81 and 91.

290. Craig, op. cit. *supra* note 288, pp. 432–434.

291. Judgment, paras. 72–75.

have come close to accusing the ECB of a misuse of powers. Such a misuse differs from a proportionality assessment in that it involves an enquiry as to the motives of the author to see whether it pursues a purpose other than that which it is lawfully entitled to pursue.[292] That is a step the ECJ is clearly not prepared to take. Before it starts its proportionality assessment, it first accepts the stated objective of the ECB's bond purchases – safeguarding the singleness and transmission of monetary policy and ultimately price stability – and uses it as the primary indicator for the conclusion that they fall within its monetary policy mandate in Article 127(1) TFEU.[293] It is at the point of objectives, then, that the ECJ pays most deference to the independence of the ECB.

6. Conclusion

The debt crisis has forced the Union, its Member States and Union law to broaden their conception of stability, seeking ways to not only secure price stability but financial stability as well. In *Gauweiler,* the ECJ was confronted with this search for the second time. Its challenge was to declare the OMT programme compatible with the legal set-up for the single currency, which to a great extent still reflects a stability conception from the past. That it managed to overcome that challenge, not least by scrutinizing the programme in a way that respects central bank independence, is a great achievement. Yet, its *Pringle*-inspired approach, copied from the *BVerfG*, of defining the OMT programme's policy nature strictly is no help. It prevents the Court from embracing financial stability in its entirety.

It is now up to the *BVerfG* to render judgment in the main proceedings. Like the ECJ, it will have to decide whether it can afford a ruling against the OMT programme. From the start at least one of the judges thought it cannot. In her dissenting opinion Ms Lübbe-Wolff argued: "A judicial decision from which the future of the euro may depend is per se an awkward matter, even if only consequences for the respective country are taken into account…. The question is, however, whether the national perspective, which is properly held up against the Union perspective in certain cases of conflict, is still the appropriate and the constitutional one where a decision may have legal and factual consequences of the magnitude and reach at issue here. That some few independent judges – invoking the German interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et. seq. TFEU – make a

292. Tridimas, *The General Principles of EU Law* (OUP, 2006), p. 140.
293. Judgment, paras. 46–50, 56 and 64.

decision with incalculable consequences for the operating currency of the euro zone and the national economies dependent on it appears as an anomaly of questionable democratic character".[294]

Hopefully some of this modesty will shine through in the *BVerfG*'s final judgment.

Vestert Borger[*]

294. Dissenting Opinion of judge Lübbe-Wolff, *BVerfG OMT*, para 28.

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