

Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union

European Court of Justice, Judgment of 16 June 2015, Case C-62/14
Gauweiler and others v Deutscher Bundestag

Alicia Hinarejos*

On 16 June 2015 the European Court of Justice delivered its decision in the *Gauweiler* case,¹ concerning the legality of the Outright Monetary Transactions Programme of the European Central Bank. The Court considered the Programme compatible with EU law, as long as certain safeguards are observed in its implementation. The decision has important implications for the powers of the European Central Bank, the constitutional framework of the EU's Economic and Monetary Union, and for the relationship between the Court of Justice of the EU and the referring court, the German Federal Constitutional Court. This was the first time that the German court had asked for a preliminary ruling,² and it remains to be seen whether the national

*University of Cambridge. I am grateful to Thomas Beukers, Michael Blome-Tillmann, Pedro Cruz Villalón, Steve Peers, Daniel Sarmiento, Jukka Snell, Kaarlo Tuori, Mattias Wendel, and the editors of *EuConst*. All errors remain my own.

¹ECJ 16 June 2015 ECLI:EU:C:2015:400, *Peter Gauweiler and others v Deutscher Bundestag*. The Programme had already been the object of an unsuccessful challenge before the General Court; the action was considered inadmissible: ECJ 10 December 2013, Case T-492/12, *von Storch and Others v ECB*. An appeal was equally unsuccessful: ECJ 29 April 2015, ECLI:EU:C:2015:300, *von Storch and Others v ECB*.

²BVerfG, 2 BvR 2728/13 et al., Order of 14 January 2014. For commentary on the German decision see, *inter alia*, T. Beukers, 'The Bundesverfassungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"', 15 *German L J* (2014) p. 343; J. Bast, 'Don't Act Beyond your Powers', 15 *German L J* (2014) p. 167; M. Goldmann, 'Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial Review', 15 *German L J* (2014) p. 265; M. Kumm, 'Rebel without a Good Cause: Karlsruhe's

European Constitutional Law Review, 11: 563–576, 2015

© 2015 The Authors

doi:10.1017/S1574019615000346

court is satisfied by the limits imposed by the Court of Justice on the Programme. This paper will offer a short overview of the background to the case and an analysis of the decision itself. Finally, it will offer some critical reflections on the nature of the European Central Bank's mandate and the rationale behind its limits, as well as what the decision means for the interpretation of those limits. The evolution of the role of the Bank will be placed against the broader context of the evolution of Economic and Monetary Union.³

BACKGROUND TO THE CASE

The European Central Bank is in charge of conducting monetary policy for the euro area and its role is very narrowly defined in the Treaties. This role, however, has evolved and expanded substantially in recent years, as the Bank has announced or adopted various 'non-standard' measures in response to the euro area sovereign debt crisis. The Outright Monetary Transactions Programme is one of these measures: it was announced in September 2012 in a press release and,⁴ so far, it has never been used. The announcement of the Programme followed Mario Draghi's notorious message that 'the ECB is ready to do whatever it takes to preserve the euro'.⁵

The idea is that the European Central Bank will buy government bonds from euro countries in trouble, i.e., when nobody else buys these bonds, or their yield is becoming so high that a member state will not be able to cover interest payments on newly-issued bonds, thus having no more access to credit and risking default.

Misguided Attempt to Draw the CJEU into a Game of Chicken and What the CJEU Might Do about It', 15 *German LJ* (2014), p. 203; F. C. Mayer, 'Rebels without a Cause: A Critical Analysis of the German Constitutional Court's OMT Reference', 15 *German LJ* (2014) p. 111; M. Wendel, 'Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference', 10 *Eur Constitutional L Rev* (2014) p. 263.

³For further commentary on the ECJ decision, see, *inter alia*, Editorial, 'On Courts of Last Resort and Lenders of Last Resort', 2 *EuConst* (2015) p. 1; M. Claes and J. H. Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler* Case', 16 *German LJ* (2015) p. 917; F. Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States', 16 *German LJ* (2015) p. 1003; H. Sauer, 'Doubtful it Stood: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment', 16 *German LJ* (2015) p. 971; S. 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 *German LJ* (2015) p. 1025; M. Wilkinson, 'The Euro Is Irreversible! ... Or is it?: On OMT, Austerity and the Threat of "Grexit"', 16 *German LJ* (2015) p. 1049.

⁴See ECB press release on the technical features of the OMT programme at: <www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>, accessed 19 October 2015.

⁵Speech by Mario Draghi, President of the European Central Bank, at the Global Investment Conference in London, 26 July 2012. Available at <www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>, accessed 19 October 2015.

Crucially, the Treaty prohibits the Bank from acquiring government bonds directly (Article 123 TFEU)⁶ as this would amount to monetary financing, or becoming a direct lender of last resort to a member state. Instead, the Bank would buy government bonds in the secondary market—that is, from a party that has bought these bonds first from a member state—rather than from a member state directly. While the European Central Bank has already done this before in the course of the crisis, with the Outright Monetary Transactions Programme there would be an added formal element of conditionality, as the member state in question would need to obtain financial assistance from the European Stability Mechanism or the European Financial Stability Facility and comply with its conditions (i.e. macroeconomic reforms negotiated between the member state and the troika: the Commission, the European Central Bank, and the International Monetary Fund).

The applicants before the German Court argued that the European Central Bank had overstepped its Treaty role by creating a Programme that should be viewed as a tool of economic, not monetary, policy; it was also alleged that the Programme violated the prohibition on monetary financing. Exercising what the national court considers its jurisdiction to review EU law that may be *ultra vires*,⁷ the German Constitutional Court's preliminary response was to consider the Outright Monetary Transactions Programme illegal under EU law. For the first time ever, the national court then referred the case to the European Court of Justice. In the referring court's view, the Court of Justice could either declare the OMT scheme contrary to EU law, or provide a more limited interpretation of the Programme that is in accordance with the Treaties. The German Court provided certain indications as to what those limits should be,⁸ and it went on to state that whether the scheme could eventually be held to violate the constitutional identity of the German Basic Law would depend on the European Court of Justice's interpretation of the scheme in conformity with EU primary law.

The case was sensitive for various reasons: although not yet used, the mere announcement of the Outright Monetary Transactions scheme played an important role in getting the euro area out of the acute phase of the crisis, and offers a credible defence against similar future scenarios. A declaration of illegality,

⁶Art. 123(1) TFEU: 'Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions ... central governments, regional, local or other public authorities ... shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments'.

⁷For an in-depth discussion see Wendel, *supra* n. 2, p. 272 ff.

⁸The German Court requires an interpretation that keeps the Outright Monetary Transactions Programme from interfering with European Financial Stability Facility/European Stability Mechanism conditionality. It also requires a limit on the quantity of bonds that can be bought, on how long they can be held, and on the possibility of taking part in a debt cut.

or the placing of substantive limits on the Programme, could possibly jeopardise post-crisis recovery. Additionally, the reference was the first ever submitted by the German Constitutional Court, and its tone was quite bold; there was, and is, clear potential for conflict between the two courts, with consequences unknown for Economic and Monetary Union and beyond. Moreover, the case touches on the nature and legitimacy of the role of the European Central Bank as an independent expert, and on the dichotomy between the original, rule-based conception of Economic and Monetary Union and the evolving, more policy-oriented conception that rose out of the crisis.⁹ This paper will explore these broader questions again in its last section, after providing a brief analysis of the Court's decision below.

THE COURT OF JUSTICE'S DECISION

Preliminary questions

Various arguments had been put forward against the admissibility of the reference. Some of them went to the nature of the European Central Bank's announcement of the Outright Monetary Transactions Programme and its reviewability; others to the circumstances under which the reference had been made by the national court.

First, it was argued that the European Central Bank's announcement was not a legal act, but a preparatory act without legal effects. The Court of Justice rejected the relevance of this argument without going into its merits. Second, the Court similarly rejected arguments to the effect that the conditions under which the reference had been made were not compatible with the preliminary ruling procedure, because the questions at stake were too abstract and hypothetical, because the German court would not consider itself bound by the resulting preliminary ruling, or because the national proceedings could be said to create the possibility for German citizens to bring a direct action against the validity of an EU act without having to use Article 263 TFEU (and without complying with its conditions for admissibility). In dealing

⁹The original arrangement was supposed to be rule-based and therefore non-political, with important consequences for its democratic legitimacy. This goes back to the ordoliberal vision of the EU and the European economic constitution. See e.g. W. Sauter and H. Schepel, *State and Market in European Union Law. The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009) p. 1-21 for a brief overview of the European economic constitution; K. Tuori, 'The European Financial Crisis: Constitutional Aspects and Implications', EUI Working Paper, (2012) Law 2012/28; C. Joerges, 'The Market without the State? The "Economic Constitution" of the European Community and the Rebirth of Regulatory Politics', 1 *Eur Integration Online Papers* (1997) No 19. This view also underlies the BVerfG's approach to Economic and Monetary Union in its *Maastricht* Decision: EMU integration, as structured at Maastricht, was an apolitical process that had an adequate level of democratic legitimacy: BVerfG, 2 BvR 2134/92 and 2159/92, Decision of 12 October 1993 (Maastricht).

with these arguments,¹⁰ the Court relied on the division of competences between itself and the national courts within the framework of the preliminary ruling procedure, refusing to second-guess the German court's assessment of the need for a preliminary ruling or the rules of national law governing judicial review and the organisation of legal proceedings. Unsurprisingly, the Court reasserted the binding force of its preliminary rulings upon national courts.¹¹

The legality of the Outright Monetary Transactions Programme

Broadly speaking, the German court had raised two main concerns: that the Outright Monetary Transactions Programme was a measure of economic, not monetary, policy, thus beyond the powers of the European Central Bank; and that the Programme was incompatible with the prohibition of monetary financing of member states enshrined in Article 123(1) TFEU.

The Court started by assessing the nature of the Programme and whether it should be classified as a measure of monetary or economic policy.¹² The applicants had argued that the scheme should be viewed as an economic policy measure adopted with the aim of saving the euro by changing certain flaws in the design of monetary union, i.e. by pooling the debt of euro countries. They also emphasised the effects of the attached conditionality on member states' economic policies. All this, they argued, placed the Outright Monetary Transactions scheme beyond the merely supporting role that the European Central Bank may have in economic policy, according to the Treaties. The German Constitutional Court agreed, based on various features of the scheme: its conditionality and parallelism with European Central Bank and European Financial Stability Facility financial assistance programmes (as well as its ability to circumvent them) and its selectivity (in that OMT bond-buying would only apply to select countries, whereas measures of monetary policy typically apply to the whole currency area).

The European Central Bank, on the other hand, argued that the aim of the scheme is not to facilitate the financing conditions of certain member states, or to determine their economic policies, but rather to 'unblock' the Bank's monetary policy transmission channels. In other words, the crisis was making it impossible for the European Central Bank to pursue monetary policy through the usual channels. The proposed bond-buying would ensure that credit conditions return to normality, and that the Bank is able to conduct its monetary policy again. Additionally, the European Central Bank argued that the element of conditionality was necessary to ensure that the Outright Monetary Transactions scheme would not interfere with the programme

¹⁰ *Gauweiler*, para. [18] ff.

¹¹ *Gauweiler*, paras. [11]-[17].

¹² *Gauweiler*, para. [41] ff.

of macroeconomic reform agreed between the European Stability Mechanism and the member state in receipt of financial assistance.

As it had done in *Pringle*,¹³ the Court set out to determine whether the measure in question fell within the scope of monetary or economic policy by investigating its objectives and instruments. The Court considered the stated objectives of the Outright Monetary Transactions Programme (to safeguard ‘appropriate monetary policy transmission and the singleness of the monetary policy’) and concluded that they contributed to the ultimate aim of monetary policy, i.e. maintaining price stability. The Court drew an analogy with *Pringle* at this point to argue that possible indirect effects of the Programme in economic policy (the fact that the Programme may contribute to safeguarding the stability of the euro area) did not mean the measure should be classified as pertaining to economic policy. The Court came to similar conclusions when examining the instruments to be used in order to achieve the objectives of the Programme. In sum, both objectives and instruments of the Outright Monetary Transactions Programme—and thus the Programme itself—were taken to fall within the scope of monetary policy.

Interestingly, while Advocate General Cruz Villalón had come to the same overall conclusion regarding the classification of the Outright Monetary Transactions Programme as a measure of monetary policy,¹⁴ he had introduced an important caveat: he saw a problem in the fact that the European Central Bank made bond-buying through the OMT scheme conditional on the member state’s compliance with a programme of macroeconomic reform adopted within the framework of the European Stability Mechanism or European Financial Stability Facility, and the fact that the European Central Bank plays a very active role in the negotiating and monitoring of this programme with the member state.¹⁵ This double role of the Bank—first within a framework for financial assistance which constitutes economic policy, according to *Pringle*, and then in its bond-buying role within the Outright Monetary Transactions Programme—would tip the scheme beyond the boundaries of the European Central Bank’s powers: monetary policy with, at most, a supporting role in economic policy. The Advocate General thus considered that, if the Outright Monetary Transactions Programme were to be activated, the European Central Bank would have to distance itself from the troika and the monitoring of the conditionality for financial assistance immediately.¹⁶

¹³ Case C-370/12, *Pringle*, ECLI:EU:C:2012:756. On the judgment and its significance, see A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) Chapter 8, with further references.

¹⁴ Opinion of AG Villalón in ECJ 16 June 2015 ECLI:EU:C:2015:400 *Gauweiler*, para. [123] ff.

¹⁵ *Ibid.*, para. [140] ff.

¹⁶ *Ibid.*, para. [150]. It remains open whether this would have required an amendment to the ESM Treaty or simply a different interpretation in practice of the provisions within that Treaty concerning the Bank’s role.

For its part, the Court saw no problem with making bond-buying through the Programme conditional upon the member state's compliance with European Stability Mechanism or European Financial Stability Facility conditionality; this would lead to the sort of indirect effects in economic policy that the Court had already considered irrelevant to the classification of the measure, and it would ensure that European Stability Mechanism/European Financial Stability Facility conditionality would not be rendered ineffective by the European Central Bank's actions. This, according to the Court, is in line with the Bank's obligation to support the general economic policies in the Union. The fact that bond-buying in the secondary markets can be considered a measure of economic policy when the European Stability Mechanism does it (*Pringle*), and a measure of monetary policy when the European Central Bank does it, is justified, according to the Court, because of the different objectives pursued in each case; these different aims have as a consequence that bond-buying will be justified under different circumstances in each of those cases. Finally, the Court made no reference to the involvement of the European Central Bank within the troika.

The Court concluded that the Outright Monetary Transactions Programme, as described by the European Central Bank in its announcement, is appropriate for attaining its objectives and does not go beyond what is necessary to achieve them.¹⁷ In conducting its review of proportionality, the Court recognised the Bank's broad discretion to make complex assessments and technical choices in the area, and it conducted a light-touch review. The Court was persuaded that the European Central Bank had satisfied its duty to give reasons sufficiently, and that it had not made a manifest error of assessment in its analysis of the economic situation and in its view that the OMT Programme would be appropriate to achieve the effect sought. Equally, the Court surmised that the measure, as described in the Bank's press release, would not go beyond what was necessary to achieve its objectives, given the limited nature of the Programme and the wording of the press release itself (i.e. that bond-buying would only take place in order to satisfy very specific objectives, and that it would cease as soon as they had been achieved). Importantly, no prior quantitative limit was considered necessary.

The Court then turned to the possible circumvention of the prohibition on monetary financing of member states.¹⁸ While the Treaty makes it illegal for the European Central Bank to buy government bonds directly from a member state, the referring court argued that, although OMT bond-buying would take place in the secondary market, this amounted to a circumvention of the same rule. This circumvention would undermine fiscal discipline and would make certain member states responsible, ultimately, for the debts of others.

¹⁷ *Gauweiler*, para. [66] ff.

¹⁸ *Ibid.*, para. [93] ff.

The Court of Justice agreed that the European Central Bank should not be able to buy bonds from member states in the secondary markets under conditions which meant that, in practice, the bond-buying would have the same effect as if it had taken place directly; or, put differently, if indirect bond-buying would defeat the purpose of Article 123(1) TFEU in the same way as buying bonds directly. In order to decide whether the Outright Monetary Transactions Programme could be considered such an illegitimate circumvention of the Treaties, the Court sought to elucidate, first, the aim of Article 123(1) TFEU (the prohibition on monetary financing of member states); and second, the extent to which indirect bond-buying within the OMT scheme would threaten the achievement of that aim.

According to the Court, the purpose of the prohibition on monetary financing of member states is to encourage the latter to pursue a sound budgetary policy: if member states cannot rely on monetary financing, they are subject to market discipline and they need to avoid excessive debt and deficits if they want to be able to sell their bonds, and thus have access to credit in the financial markets, in favourable or sustainable conditions.

The aim of encouraging a prudent budgetary policy could be threatened by indirect bond-buying within the Outright Monetary Transactions Programme to the extent that such actions would improve a member state's access to credit, unless certain safeguards were built into the Programme. The Court was convinced by the European Central Bank's assurances that any implementation of the Programme would contain such safeguards: distortion to the conditions under which a member state can sell its bonds in the primary market would be limited – by not announcing in advance the Bank's intention to buy a member state's bonds in the secondary market, and by allowing a reasonable period of time to elapse between the member state's sale of its bonds in the primary market and their subsequent acquisition by the European Central Bank. The Court was further satisfied that the uncertain possibility of having the Bank buying a member state's bonds in the secondary market would not, by itself, diminish member states' incentive to pursue a prudent budgetary policy, given the limited nature of the Outright Monetary Transactions Programme and the limited cases in which it may be used. Finally, making bond-buying within the Programme conditional on the member state's compliance with European Stability Mechanism/European Financial Stability Facility conditionality would ensure, according to the Court, that member states in receipt of financial assistance would not see bond-buying through the OMT Programme as an alternative to fiscal consolidation.

Overall, then, the Court concluded that the Outright Monetary Transactions Programme – as presented in the press release and subject to the safeguards explained by the European Central Bank before the Court – is compatible with the prohibition on monetary financing: under those conditions, indirect bond-buying through the OMT Programme would have an effect on member states' access to credit, but that

effect would not be equivalent to that of buying bonds directly from member states (monetary financing) and it would not defeat the purpose of the ban of monetary financing, which is to encourage member states to pursue a prudent budgetary policy.

REFLECTIONS

The *crux* of the decision was whether a scheme such as the Outright Monetary Transactions Programme is within the European Central Bank's powers, and it is on this question and its significance that the following reflections will focus.¹⁹

Limits to the European Central Bank's mandate: rationales

The European Central Bank is tasked with conducting the Union's monetary policy, with the primary objective of maintaining price stability.²⁰ The powers of the Bank are further delineated in, and constrained by, the Treaties. There are two interconnected rationales for these constraints: the first one is the general principle of central bank independence and the separation between monetary policy, on the one hand, and the fiscal and economic policy conducted by a different branch of government (in this case, at the national level) on the other. The second rationale is the preservation of the configuration of Economic and Monetary Union as a currency union that is not a transfer union, i.e. where member states are responsible for their own debts. Each rationale will be discussed in turn.

The robust independence of central banks, in general, preserves the separation between monetary policy, on the one hand, and broad economic and fiscal policy, on the other. It is supposed to be conducive to a consistent monetary policy that does not fluctuate because of short-term political considerations²¹ – i.e. a monetary policy that will not become more relaxed whenever the government of the day seeks re-election, for example.

Ultimately, the independence of central banks is predicated on their nature as independent expert bodies, which are better placed to carry out a task that is scientific rather than political – that is, they supposedly act in areas where there is one correct technical decision, as opposed to areas that require value judgments.²² Traditionally, monetary policy has been deemed to be technical,

¹⁹ For further discussion of other aspects of the judgment, see the articles cited *supra* n. 3.

²⁰ Art. 127(1) TFEU. Parts of this section draw on material included in Hinarejos, *supra* n. 13, p. 17-19.

²¹ C. Hadjiemmanuil, 'Democracy, supranationality and central bank independence', in J. Kleinman (ed.), *Central Bank Independence: The Economic Foundations, the Constitutional Implications and Democratic Accountability* (Kluwer Law International 2001) p. 155.

²² K. Tuori and K. Tuori, *The Eurozone Crisis: a Constitutional Analysis* (Cambridge University Press 2013) p. 221-231.

whereas economic policy has been considered to lie within the realm of politics. Of course, there is plenty of room for disagreement as to whether this distinction holds in practice. In any case, central banks' technical and scientific role—as opposed to one that entails making political decisions—is also used to justify their lack of democratic control and input legitimacy, which is the flipside of their independence.²³ This justification will weaken the more a central bank is seen to overstep its technical role.²⁴ Consequently, central banks should be wary of 'meddling' in economic and fiscal policy or, in general, of becoming too involved in the political debate. Equally, they cannot risk becoming too involved with stakeholders who are affected by central bank decisions; all these behaviours will lead to a central bank being regarded as a politicised actor and thus losing credibility and legitimacy as an independent expert body.²⁵

While it is a feature of independent central banks in general that their role be defined relatively narrowly, this was especially the case for the European Central Bank. First, Economic and Monetary Union is based on a particular distribution of competences between the EU (monetary policy) and national level (economic policy). The limits to the Bank's role in conducting monetary policy centrally are thus imbued of added constitutional significance that relates to the vertical attribution of competences within the EU and the member states. Second, it has already been mentioned that the original Economic and Monetary Union setup was rule-based, rather than discretion-based: this is also true of the definition of the European Central Bank's role in the Treaties. This narrow, rule-based role responded not only to the conception of monetary policy as a technical area that did not require the level of democratic legitimacy required in other areas; it is also connected to the extra 'disembeddedness' of the Bank as compared to national central banks. Indeed, while national central banks are independent, they still operate alongside a democratically elected government and the national political process, while the Bank has been said to operate in something of a political

²³ On the topic of judicial control of central banks, among them the European Central Bank, see P. Eeckhout and M. Waibel, 'The United Kingdom', in U Neergaard et al. (eds.), *Proceedings from the XXVI FIDE Congress Vol 1: The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (Djøf publishing 2014) p. 641 ff.

²⁴ Tuori and Tuori make a very helpful distinction between experts, stakeholders and politicians; an expert body will lose credibility the more it seems to adopt features of a stakeholder or a politician: *supra* n. 22, p. 221-231.

²⁵ On the different aspects of central bank independence and central bank intervention in the context of the euro crisis see T. Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention', 50 *CML Rev* (2013) p. 1579; S. Baroncelli, 'The Independence of the ECB after the Economic Crisis', in M. Adams et al. (eds), *The Constitutionalization of European Budgetary Constraints* (Hart 2014).

vacuum.²⁶ A different manifestation of this disembeddedness is that, previously, monetary policy had been in constant dialogue with social and labour policies within the national setting;²⁷ the level of responsiveness of monetary policy had to change once it was transferred to EU level and became the same policy for all euro area countries. All these factors, together, contribute to explain the narrow role given to the European Central Bank in the Treaties, and the concerns that have arisen due to the expansion of this role in the wake of the euro area crisis.

The mandate of the European Central Bank is also limited in the Treaties by the nature of Economic and Monetary Union: not just because the latter was created as a predominantly rule-based area, which was mentioned above, but because of the substantive principles that underpin it. Economic and Monetary Union was set up as a currency union, where the member states maintain responsibility for broad economic and fiscal policy, and where they are responsible to their creditors for their own debts. Accordingly, the European Central Bank is able to work towards its primary objective (to maintain price stability) through a series of measures that include the setting of interest rates and the supply of liquidity to the banking system against appropriate collateral, acting as 'lender of last resort' to private banks. What it is not able to do, according to the Treaties, is to provide liquidity directly to the EU or the member states. The Treaties were worded in such a way as to preclude the possibility of the Bank becoming direct lender of last resort to any member state, or to the EU institutions;²⁸ this is a further manifestation of the principle of national fiscal autonomy and liability that also underpins the so-called 'no bail-out clause'.²⁹

The crisis has prompted dramatic changes to the role and practices of the European Central Bank,³⁰ which has had to carry out a difficult balancing exercise between the restrictions imposed by the Treaties and the necessities of an unprecedented situation. In doing so, the Bank has faced criticisms that it has acted against both rationales highlighted above: against the principle of independence and of separation between monetary policy and economic policy by becoming politicised and by seeking to dictate economic policy or to influence member states in their economic policies,³¹ and against the prohibition of

²⁶ G. Majone, *Rethinking the Union of Europe Post-Crisis* (Cambridge University Press 2014) p. 134, 165, 173.

²⁷ Tuori and Tuori, *supra* n. 22, p. 185.

²⁸ Art. 123(1) TFEU: *see* n. 6. *See also* Editorial, 'On Courts of Last Resort and Lenders of Last Resort', 2 *EuConst* (2015) p. 1.

²⁹ Art. 125 TFEU.

³⁰ D. Wilsher, 'Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis', 15 *Cambridge Ybk of Eur Legal Studies* (2013) p. 503.

³¹ Again, for an account of the ways in which this could be argued to have taken place, beyond the specific case of the Outright Monetary Transactions Programme *see* Beukers, *supra* n. 25.

monetary financing of the member states set out in the Treaty, thus changing the nature of Economic and Monetary Union. As we saw earlier, both criticisms came together in the specific case of the Outright Monetary Transactions Programme.

Limits to European Central Bank powers and the Gauweiler decision

Gauweiler was not a surprising decision, in that very few expected the Court of Justice to declare the Outright Monetary Transactions Programme incompatible with EU law. But the devil was always going to be in the details: precisely what reading of the OMT Programme is in accordance with the Treaties or, in other words, what safeguards or limits does this reading include?

As mentioned above, the German Federal Constitutional Court had stated that only a very limited version of the Outright Monetary Transactions Programme could be considered in accordance with EU law (and with the national constitution). The German Court envisaged an interpretation that would keep the OMT scheme from interfering with European Stability Mechanism/European Financial Stability Facility conditionality, as well as a limit on the quantity of bonds that could be bought, on how long they could be held, and on the possibility of taking part in a debt cut. The problem was that such a limited reading of the Programme could arguably deprive the latter of its usefulness. Faced with a choice between the reading proposed by the national court and the latter's possible rebellion – a threat spelt out in the German reference – the Court of Justice tried to square the circle by choosing something in between: the Outright Monetary Transactions Programme cannot be unlimited in order to be compatible with the European Central Bank's mandate and the EU Treaties, in general, so certain safeguards have to be built into the system, but these safeguards are not new – in that they were presented by the Bank as inherent to the Programme – or, arguably, especially onerous, and they do not go as far as the ones put forward by the German Federal Constitutional Court as conditions of legality. The remaining question is whether the safeguards required by the Court of Justice will satisfy the referring court, and what impact this decision will have on the relationship between the two courts.

The Court of Justice sought to recognise the broad discretion of the European Central Bank to make complex economic assessments and technical choices, while at the same time striving to discharge a meaningful and necessary role: it seems that the Court did not want to be seen to be second-guessing the expert body's policy choices, so it focused on procedural requirements and applied a light-touch review when it came to assessing the proportionality of the scheme. It is in the final part of the judgment (when assessing the compatibility of the Programme with the ban on monetary financing, and thus with one of the essential features of Economic and Monetary Union) that the decision is at its most strict. It is in this section that the Court sought to apply, and be seen to be applying, a coherent, rigorous-enough-yet-within-judicial-boundaries compatibility test.

Do the Court's efforts prove convincing enough? There is indeed reason to exercise a degree of judicial restraint when scrutinising the European Central Bank's policy decisions, given its nature as an expert body and the independence granted to it by the Treaties.³² And while the Court could be accused of drawing an arbitrary line between measures of monetary and economic policy, it seems impossible not to engage on arbitrary distinctions of some kind—an arbitrariness that seems imposed not by the Court itself, but by the problematic separation of competences at the heart of Economic and Monetary Union. All in all, one's judgment of the Court's approach depends on one's broader view of Economic and Monetary Union and its future. The decision can be said to continue in the *Pringle* vein of ratifying a move away from a rules-based EMU to a policy-based one in the wake of the crisis. This move means more discretion and powers for central bodies such as, in this case, the European Central Bank. It also brings deep changes to the way in which Economic and Monetary Union works and what it means for its members, notably in terms of its potential for redistribution. With its objections to the Outright Monetary Transactions scheme, the German Court could be seen to be defending the original, rule-based conception of EMU, with its emphasis on a limited and apolitical role for the European Central Bank,³³ and on national fiscal autonomy and liability.

Ultimately, disagreement is bound to remain between those in favour and those against this evolution. There are indeed arguments on both sides: on the one hand, these changes to the constitutional underpinnings of Economic and Monetary Union seem unavoidable and necessary if the latter is to adapt and survive; on the other hand, there are understandable concerns about democracy, as more central policy-making and more redistribution – brought through incremental changes such as the Outright Monetary Transactions Programme – would, ideally, need more politics and more democratic legitimacy at the EU level.³⁴ Finally, one could argue that, while this evolution may be necessary for the sustainability of Economic and Monetary Union, it is not taking place by the right means. In other words, these changes to EMU are of such significance overall, that they should take place through political channels with adequate democratic participation.³⁵ As it is, the old EMU

³² Art. 130 TFEU. See also Dissenting Opinion of Judge Lübbe-Wolff, BVerfG, 2 BvR 2728/13 et al., Order of 14 January 2014 [2]. Most commentators have argued for review limited to a 'rationality check'; see, *inter alia*, Bast, *supra* n. 2, p. 176; Goldmann, *supra* n. 2, p. 266; Kumm, *supra* n. 2, p. 214; Mayer, *supra* n. 2, p. 135; Wendel, *supra* n. 2, p. 301 ff.

³³ See also S. Dahan et al., 'Whatever it takes? Regarding the OMT Ruling of the German Federal Constitutional Court', 18 *Journal of International Economic Law* (2015) p. 137.

³⁴ Tuori and Tuori, *supra* n. 22, p. 181 ff; Hinarejos, *supra* n. 13, Chapter 8, with further references.

³⁵ See e.g. C. Joerges, 'Where the Law Ends' (2014) <www.verfassungsblog.de/where-the-law-ends/#.Vii2YkpyHTo> visited 22 October 2015. See Hinarejos, *supra* n. 13, Chapter 8 for further examples of this type of critique.

may be said to be dying a death by a thousand cuts. Economic and Monetary Union seems to be undergoing a slow incremental change that takes place through a series of limited *faits accomplis*: the list includes the Outright Monetary Transactions Programme and the European Stability Mechanism, and it is likely to continue to grow in the future, as more changes become necessary (or part of 'whatever it takes', to echo Mario Draghi's message regarding the role of the European Central Bank).³⁶ This is not to argue that the Court of Justice should have acted differently in *Gauweiler*: the Programme, in itself, may not be such a meaningful change to Economic and Monetary Union as to warrant its striking down by judicial means. Instead, the Court's attempts to temper the Programme seem more in accordance with the role of courts and their focus on the particular case before them. The fact remains, however, that the Outright Monetary Transactions Programme is part of a cumulative process that is difficult to stop at any given point, and of which we should be mindful.



³⁶ See n. 5 *supra*.