The Euro Is Irreversible! … Or is it?: On OMT, Austerity and the Threat of "Grexit"

*By Michael A. Wilkinson**

A. Introduction

The promise of the ECB to act effectively as the Eurozone's 'lender of last resort' was widely praised as a central plank in a broader strategy to protect the Euro and avoid financial meltdown in its Member States. "Never has so much effect been gained by doing so little. Words alone, it seemed, calmed the markets . . . ."[1] The OMT program appeared as a "watershed" in the Eurozone crisis,[2] "one of the most effective announcements any central bank has ever made."[3]

The reason for its success was straightforward: Financial investors would be encouraged to buy the bonds of distressed member states with the knowledge that they could later sell them on to the ECB. The prospect that the ECB would move into sovereign debt markets "with the full weight of its balance sheet" was an offensive that "no market participant could hold a short position against." That is what Draghi meant when he said "the euro is irreversible."[4]

There was, however, a snag. The ECB had no authority to do it. Restricted by the rules set up by the Treaty of Maastricht, the ECB's objective is to ensure price stability alone—to avoid inflation, and in order to promote fiscal discipline it is prohibited from monetary financing of national budgets (Article 123 TFEU). OMT was not only *ultra vires* as a matter

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[1] MARK BLYTH, AUSTERITY: THE HISTORY OF A DANGEROUS IDEA 247 (2013).

[2] Nicolas Jakoby, *The Elusive Economic Governance and the Forgotten Fiscal Union*, *in* THE FUTURE OF THE EURO 82 (Matthias Matthijs & Mark Blyth eds., 2015).

[3] *See* C. Gerner-Beuerle & E. Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, 15 GERMAN L.J. 281, 282 (2014).

[4] Erik Jones, *The Forgotten Financial Union: How You Can Have a Euro Crisis Without A Euro*, *in* THE FUTURE OF THE EURO 63 (Matthias Matthijs & Mark Blyth eds., 2015). The subsequent lowering of Spanish, Italian, and Greece yields was directly attributed to the ECB's program, without it ever having to be triggered in practice, and in the case of Spain and Italy, without ever entering a structural adjustment program through participation in EFSF or ESM (an apparently trivial fact that needs to be kept in mind, as it later resurfaces).

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of European law; it was also a structural transgression of competence in breach of German Basic Law. This, at least, was the opinion of the German Federal Constitutional Court.[5]

After many decades of shadow-boxing, the German Court, in its first ever reference to the ECJ, made plain its objections to OMT but gave the ECJ the opportunity to do its work for it, either by declaring OMT invalid, or by interpreting it in such a way that the program would conform to German constitutional standards—the famous paragraph 100.[6]

The German Court's referral set up a dilemma for the ECJ. On the one hand, in the event of disagreeing, the ECJ would be risking constitutional conflict with the most powerful domestic court in the region and for the sake of maintaining a program, which, however economically beneficial, had evidently questionable constitutional credentials. On the other hand, in the event of agreeing with the German Court, declaring OMT beyond the powers of the ECB, or—what would amount to the same, legal only if revamped along lines offered in paragraph 100 by the GFCC, that would render it ineffective[7]—the ECJ would be jeopardizing the prospect of economic recovery in the Eurozone.

In its ruling of 16 June 2015, the European Court of Justice declined Karlsruhe's offer, giving OMT a clean bill of constitutional health, refusing to declare the program *ultra vires*, or to interpret it in the limited way demanded by Karlsruhe.[8] The matter now returns to the German Court.

It is no surprise that, as well as substantively defending the ECB's prerogatives, the ECJ asserted its own excusive authority to determine their legality.[9] If the Advocate General had suggested that Article 4(2) TEU was already there to balance national constitutional

[5] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 2014, Case No. 2 BvR 2728/13, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140114_2bvr272813.html.

[6] In short, judicial guarantees of limited purchasing, no debt restructuring and avoidance of market interference.

[7] *See, e.g.*, Gerner-Beuerle & Schuster, *supra* note 3; and which were anyway "untestable" according to Kristen Schneider, Q*uestions and Answers: Karlsruhe's Request for a Preliminary Ruling to the Court of Justice of the European Union*, 15 GERMAN L.J. 231 (2014).

[8] Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag (June 16, 2015), http://curia.europa.eu/.

[9] Long perceived to have an integrationist agenda, the ECJ was unlikely either to query the authority of what is currently the region's most powerful institution, taking the lead since the Euro crisis through its part in the "Troika," or to allow its own authority to be blatantly usurped by the German Constitutional Court, with which it has long had a 'complicated' relationship.

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identity against the "uniformity" of EU law, [10] the ECJ itself was silent on that point, noting only that its authority on the matter would have to be "definitive."[11]

It was a surprise that the European Court didn't opt for a "third alternative": A solution to placate the markets and their financial institutions, as well as the German Court and its constituency, giving the ECB room to emerge with a viable bond-buying program and the German Court room to emerge with a judicial compromise. Could it have avoided both institutional conflict with the ECB and constitutional conflict with the GFCC? Perhaps such an avenue did not exist.[12]

Karlsruhe is now in an unenviable position. The point of having the nuclear option is that you don't actually have to use it. This is the logic of Mutually Assured Destruction (MAD) and it was thought to apply to the relationship between Karlsruhe and Luxembourg as much as between the global superpowers.[13] The only thing worse than using the weapon, at least from the point of view of the party that launches it, is that it turns out to be a dud. The first ever reference from the GFCC to the ECJ may have ended years of ambiguity, beginning with the *Solange* jurisprudence, continuing through to the *Maastricht* and *Lisbon* decisions; but the result looks unlikely to favor Karlsruhe. If this was a bluff, then the ECJ's OMT decision called the GFCC.

The surprise was that Karlsruhe played it at all in the urgency of the Euro crisis and on such a manifestly critical political and economic matter, extending far beyond legal niceties.[14]

[10] As the Advocate General noted, unilateral reservations of authority such as that demanded by Karlsruhe would soon lead to constitutional disintegration of the EU's quasi-federal judicial structure. *See Gauweiler*, Case C-62/14 at para. 59.

[11] *See Gauweiler*, Case C-62/14 at para. 14. Every first year student of EU law knows that EU law takes primacy over domestic law and that only the ECJ has the authority to determine the legality of EU acts—at least from the perspective of the ECJ.

[12] Given the ambiguous nature of the measure complained of (a press release), its speculative nature (it was never actually used), and the fact that the German Court seemed to have made its mind up already, the ECJ could have avoided direct conflict by ruling the reference inadmissible (as argued by a number of states, see *Gauweiler*, Case C-62/14 at para. 18). But because of the possibility in German Constitutional Law of ordering preemptive action against it, as well as the significance of the subject matter, the ECJ probably felt obliged to give an answer.

[13] *See, e.g.*, NEIL MACCORMICK, QUESTIONING SOVEREIGNTY (1999). This metaphor seems to have been replaced with another, the game of "chicken," lowering the metaphorical stakes, see Mattias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do About It*, 15 GERMAN L. J. 210 (2014).

[14] This was understood by at least two dissenting German Justices, the reference made against the advice of Gerhard and Lübbe-Wolff, who thought the very idea of a constitutional challenge in this case to be unwise and even unconstitutional. Others concurred: "[T]he actual surprise is the FCC's willingness to experiment with untested components of the ultra-vires pattern just when the currency Union seems to be at stake." *See* Gerner-Beuerle & Schuster, *supra* note 3, at 239. For a compelling critique of the Court's granting of standing to individuals to pursue ultra vires in a case such as this, based indirectly on a violation of their right to vote, see

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But, if legal scholars now ask, "what reaction will the ECJ's defiance provoke?"—that question, although of interest to "Karlsruhe watchers", may be of secondary importance compared to the fundamental constitutional difference between the two Courts that the OMT ruling reveals.

Considered in broader constitutional context, the OMT saga reveals the precariousness of two structural edifices of Economic and Monetary Union—fiscal discipline and the irreversibility of the Euro. If fiscal discipline pushes against financial rescue, because assistance disincentivizes prudent economic management, irreversibility pulls in its favor, at least as far as assistance is necessary to avoid default or exit.

So far, the logic of irreversibility has prevailed, partly due to considerations of expediency, partly due to the higher duty to protect the Euro as a whole, but above all because the tension has been resolved on terms—dictated by a Euro group led by Germany, along with the Troika of institutions, ECB, Commission and IMF—that maintain the ideology of "austerity" ("strict conditionality"). OMT threatens this tense balance between assistance and austerity, because it potentially offers rescue without conditionality, doing its work without ever needing to be triggered. And it shifts control over the balance between assistance and austerity from the Member States to the EU institutions.

Although in tension, the twin dogmas of fiscal discipline and irreversibility can be maintained provided it is understood that there can be no alternative—either to austerity or to membership of the Euro. The irony is that if austerity is truly irrational in purely economic terms because of its contractionary effect, as many seem to think, then the further it is pushed, the more that rescue will be necessitated as countries fall further into debt, but are not permitted to sink.[15]

OMT reveals that the tension between these logics permeates to the heart of the EU's juridical constitution. Whereas the ECJ elevates irreversibility of the Euro above fiscal discipline, giving the green light to OMT, the GFCC reverses the priority. Indeed, although it has been implicitly advanced by Angela Merkel ("if the Euro fails, Europe fails"),[16] irreversibility is not even recognized by Karlsruhe as a constitutional imperative.

Klaus Garditz, *Beyond Symbolism: Towards a Constitutional Actio Popularis in EU affairs? A Commentary on the OMT Decision of the Federal Constitutional Court*, 15 GERMAN L. J., 189, 196 (2014).

[15] *See generally* Simon Wren-Lewis, "The Ideologues of the Eurozone," MAINLY MARCO: COMMENT ON MACROECONOMIC ISSUES (July 3, 2015), http://mainlymacro.blogspot.sg/2015/07/the-ideologues-of-eurozone.html?spref=tw; *see also* Olivier Blanchard & Daniel Leigh, *Growth Forecast Errors and Fiscal Multipliers*, (Int'l Monetary Fund, Working Paper WP/13/1).

[16] *See, e.g.*, *Merkel warns of Europe's Collapse: If the Euro Fails, So Will the Idea of European Union*, DER SPEIGEL, May 13, 2010.

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However, the placing of "Grexit" on the table in the recent Greek debacle fundamentally changes the nature of the game, by dispelling the illusion that the Euro is irreversible for each and every country. Even though it is too early to say precisely where this will end, it will be suggested in conclusion that this signposts a fundamental but as yet uncharted mutation in the constitution of EMU: The Euro is irreversible not in its composition, but in its ideology. In other words, in the final battle, austerity wins.

The article proceeds in three parts. First, we will explore the argument that OMT violates fiscal discipline by promoting unmitigated moral hazard—the risk that the ECB's bond-buying program will discourage sound economic management. Normally, financial assistance—whether through bilateral loans, EFSF, ESM or OMT—would be made compatible with the structure of EMU by attaching strict conditionality, mitigating any moral hazard. OMT potentially threatens this arrangement. Its acquiescence by the political establishment, however, suggests that austerity is more ideologically than practically upheld.

Second, and in tension with the obligation to avoid moral hazard, there is an obligation to maintain the Euro as a currency union: The duty of irreversibility—a political, if not a legal, duty to protect the composition of the Euro area. According to the ECB, the promise of financial assistance by way of a bond-buying program was justified because markets were irrationally pricing the sovereign bonds of Member State in financial difficulty on the basis of 'unjustified fears' of reversibility of the Euro.

But *is* the Euro irreversible? The election of Syriza in Greece tested this hypothesis, pushing the tension between fiscal discipline and irreversibility nearly to breaking point by openly contesting austerity and the authority of the Euro area leading powers to enforce it in a domestic setting in which it had been unequivocally rejected. The political threat of "Grexit" recently tabled by the German Finance Minister Wolfgang Schäuble has called into question the fundamental justification for OMT, transgressing a taboo by calling the Euro as "reversible," even if only temporarily. The final part of this act of the drama ended with Greek prime Minister and Syriza leader Alexis Tsipras wearily declaring after months of negotiations that there was, after all, "no alternative."

B. Fiscal Discipline and its Undoing: Is Austerity Predominantly Ideological?

The substantive concern raised by the *Bundesbank* and endorsed by the German Court was that the promise to purchase unlimited bonds of ailing member states, to act effectively as a "lender of last resort," violated the basic constitution of Economic and Monetary Union (EMU) and its twin features of the separation of monetary policy and fiscal authority and the avoidance of moral hazard.[17]

[17] I will not deal here with the complaint from the perspective of German constitutional identity.

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At the heart of EMU is a division of labor between supranational monetary policy and national fiscal autonomy. To complement fiscal autonomy and enforce fiscal discipline, each Eurozone state would retain fiscal liability. Only if one is fiscally liable will one act with fiscal discipline; hence the no bail-out rule (Article 125 TFEU) and the no monetary financing of the budget rule (Article 123 TFEU). A Member State's ability to spend and repay its existing debts would be based on its ability to tax and—increasingly in the era of the "debt state" and not least due to tax arbitrage in a world where capital moves relatively freely—to borrow.[18] Thus the market would take care of ensuring fiscal discipline by setting bond yields at a level appropriate to the soundness of a state's finances, albeit with the aid of credit rating agencies and whatever other information is available to financial investors on the creditworthiness of the investment.

Market pressure on its own, however, would be insufficient to discipline Member States, especially in a complex, compound and heterogeneous Union such as the Eurozone. That this was clearly understood could be seen from the attempt to create a loose structure of public discipline, the "Stability and Growth Pact." The deficit and debt levels set by this agreement were violated almost immediately by France and Germany but were under-enforced by the Council and the European Court of Justice.[19] The fact that its rules—if that is even an appropriate label for its requirements—were leniently enforced, if at all, was given relatively little attention at the time. It was after all, the era of the Open Method of Co-Ordination, soft law, and new governance, celebrated by many as sensible departure from a Community method of law-making that was too centralized and "one-size fits all," unable to accommodate the constitutional diversity within the Union.

When crisis hit, it became evident that fiscal discipline had not been maintained through this twin pronged pressure of market and public logics. Despite the constitutional logic of EMU, financial assistance would be required to Ireland, Portugal and Greece between 2010 and 2012, through bilateral loans, EFSF and EFSM—temporary mechanisms designed for crisis resolution and natural emergencies. But it was accompanied by strict conditionality for the most part consisting in measures that would be called austerity, in order to maintain the logic—in appearance, at least—of fiscal discipline.[20]

These measures were not, however sufficient to calm the financial markets. So in August 2012, Mario Draghi promised that the ECB, within its mandate, would do "whatever it

[18] *See* Agustin Menendez, *Existential Crisis of the European Union*, 14 GERMAN L.J. 453, 453–526 (2013).

[19] Case C-27/04, Comm'n v. Council (July 13, 2004), http://curia.europa.eu/.

[20] THE FUTURE OF THE EURO 71–72 (Matthias Matthijs & Mark Blyth eds., 2015). Financial market dynamics would also require bank recapitalization in Spain as well as political change in Italy, contributing to the removal of Silvio Berlusconi from office.

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takes to save the Euro,"[21] adding, "and believe me, it will be enough." A month later the OMT program was announced by way of press release, replacing the earlier Securities Market Program, and promising unlimited purchases of selected bonds on the secondary markets.[22]

Reducing sovereign bond spreads was not the primary stated purpose of OMT. Rather it was explained on the basis that the financial crisis had influenced the "monetary transmission mechanism" and the ECB had to guarantee the "singleness of monetary policy."[23] The explicit purpose was to make private credit more easily attainable; but reducing borrowing costs of member states was an expected side effect, helping to "unblock the system" by encouraging banks burdened by toxic assets to lend into the real economy.

There were undoubtedly genuine concerns about a Central Bank departing from its mandate and potentially violating its constitutional obligations. But apart from the "runaway legitimation" of the ECB, the substantive concern of the German Court was that conditionality—so central to reconciling financial loans with ordoliberal aims—might be bypassed through OMT. Might this be a way for profligate states to benefit without being disciplined for their profligacy: To have their cake (receive assistance) and eat it too (maintain fiscal autonomy)?

The European Stability Mechanism (ESM), agreed by Eurozone governments in September 2012 but using the EU institutions, consolidated the temporary EFSF and EFSM mechanisms and had continued the requirement of negotiating strict conditionality with the Troika in return for assistance.[24] This was even constitutionalized by way of Amendment to Article 136 TFEU and given the ECJ's seal of approval in *Pringle*, an important precursor to the OMT ruling. In *Pringle*, the European Court of Justice held that agreeing to ESM outside the Treaty was legal: Constituting economic policy, it did not encroach on the EU's exclusive monetary authority, nor did it increase the competence of the EU institutions or involve them in actions that would contradict their mandate. The

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

[22] Jones, *supra* note 4, on the difference between these two instruments.

[23] Press Release, Eur. Cent. Bank (Sep. 6, 2012).

[24] This had already raised concerns in Germany and was challenged by the German Constitutional Court, which insisted on important concessions regarding the protection of the prerogatives of the Bundestag in its ESM (temporary injunction) decision. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Sept. 12, 2012, Case No. 2 BvR 1390/12, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html.

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ECJ's reasoning was derided for its formality, although it was not clear that it had many other options.[25]

Nevertheless, the ECJ insisted that ESM satisfied the basic principles of EMU, in particular the logic behind the no-bail out clause (Article 125 TFEU), the maintenance of budgetary discipline. Ingeniously the Court found there to exist a "higher objective" of financial stability of the Euro area as a whole behind the narrower goal of fiscal discipline. Member States were therefore justified in pursuing ESM. But, and this was a key point, ESM could only satisfy the rules if strict conditionality were included as a quid pro quo for assistance. Moreover, because ESM was determined outside EU Law, protections that the Court had painstakingly built up in its fundamental rights jurisprudence would not apply; the conditionality negotiated between the Troika and a recipient state could not for example be challenged on the grounds of violating social rights or labor protection.[26]

Karlsruhe's concern was that if conditions were laxer under OMT than under ESM, the very principles on which EMU was structured might be jeopardized: sound finances and fiscal discipline. OMT might create genuine and unmitigated moral hazard, by encouraging both governments to borrow and financial investors to lend in the knowledge that they could be rescued by the ECB in an emergency and in unlimited amounts. The concern was that this feature might enable the 'bypassing' of strict conditionality so central to the justification of ESM (para 79).

Member State governments —especially Germany, with a hold on ESM through its voting weight based on a higher financial contribution—may have been concerned that their control could be circumvented by the ECB's unorthodox monetary policy tools. An expression of Member State "sovereignty," even if using the EU's institutions, ESM must not be unilaterally outflanked by a technocratic institution such as the ECB acting with a broader European remit—to rescue the currency by promising its irreversibility.

If the OMT is a good example of how EMU is becoming more flexible in one direction—monetary powers—and more rigid in another—fiscal sovereignty, with the ECB uneasily straddling this divide, the German concern is that flexibility might end up mitigating its efforts in the sphere of austerity. This is where the German authorities might find it useful to play the "Karlsruhe card":[27]

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[25] *See* Paul Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 MAASTRICHT J. OF EUR. & COMP. L. 1 (2013); *cf*. Michelle Everson, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgerricht*, EUR. L. J. 474, 474–99 (2015).

[26] *Cf.* Claire Kilpatrick, *Are the EU Bail-Outs Immune to Social Challenge because they are not EU Law?,* 10 EUR. CONST. L.R. 393, 393–421 (2014).

[27] According to Meyer,

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> Because the [German] Court asked European Court of Justice (ECJ) to weigh in, many commentators have assumed that a more euro-friendly court can bless the OMT. But this is not really what Karlsruhe's decision says. Instead, the subtext is far more to call on the ECJ to adapt the OMT to Germany's needs.[28]

On this point, the ECJ does its rhetorical best to assuage German concerns. Emanating from the substance of the ECJ's decision is a clear message—connection to conditionality or an "adjustment programme" is what makes OMT legally possible under the Treaty. Only then is moral hazard avoided, and, in the terms used here, "sound finances" maintained. In other words, there is no bypassing of conditionality: OMT is conditional upon full compliance with an ESFS or ESM macroeconomic adjustment programme.

To repeat the substantive point: Only conditionality could reconcile financial aid with fiscal discipline and sound budgetary policy; circumventing the markets is allowed only on terms that market logic would supposedly insist on. Conditionality would ensure that Member States acted "as if" under the dictates of market logic. As OMT would only be available to a State already under an ESFS/ESM support program it would, if actually triggered, be connected to the conditionality negotiated between the debtor state and the Troika, a situation referred to by the German Court as "parallelism."

And yet, in reality, OMT was said to have effects as soon as the ink was dry on Draghi's press release. We will return to that point shortly. But the linking of OMT with conditionality raises an obvious constitutional difficulty. In emphasizing its attachment to "conditionality," OMT looks more like an economic policy measure. This is outside the ECB's monetary remit, and therefore not something it should be interfering with. If it is functionally equivalent to the ESM, which according to the ECJ's decision in *Pringle* is economic policy, it should be exclusively for the Member States to pursue. This "double

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> The reality of the Euro crisis is that constitutional law arguments replace political arguments, which goes far beyond an attempt to respect the constitutional framework. The Federal government is not entirely innocent in this development, as they do play the 'Karlsruhe-card' domestically and in negotiations in Brussels… Clearly, some government bureaucrats have no sense of the potential damage to the community of law that comes with kind of reasoning.

As Franz Mayer puts it, as the Constitutional Court increasingly "over-reaches," "politicians increasingly try to anticipate" its "sensitivities." Franz Mayer, *Rebels without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L. J. 111, 135 (2014).

[28] Wade Jacoby, *Europe's New German Problem: The Timing of Politics and the Politics of Timing, in* THE FUTURE OF THE EURO 209 (Matthias Matthijs & Mark Blyth eds., 2015).

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life" of the ECB, acting both in monetary and fiscal matters, raised serious concerns, and was highlighted by the Advocate General in his opinion in OMT.[29]

On this point the ECJ is rather formalistic. The ECJ agrees with the ECB that OMT is about price stability and the "singleness of monetary policy" but justifies it along the following lines: Because the ECB only has competence to pursue price stability and the "singleness of monetary policy" this is what the OMT program must be intended to achieve. And unlike the Advocate General, the ECJ is unconcerned that the ECB is involved both as monetary broker in its role as Europe's central bank and fiscal enforcer through its part in the Troika's adjustment programs.

The ECB would thus come to wield enormous power over a Member State that found itself in a situation of requesting assistance—with the ECB then setting monetary policy as well as negotiating economic policy and monitoring compliance with adjustment programs to the level of detail where it is dictating the opening hours of bakeries.

The Court dismisses this concern but then questions whether the OMT is, nevertheless, a disproportional exercise of the ECB's power. This question, central to the A-G, did not feature at all in the German Court's referral because OMT was already determined to be in principle outside the realm of the ECB's competence. It requires exploring in a little more detail because it is in this apparently innocuous passage that we can identify a much deeper disagreement between the European and national institutions, with the ECB and ECJ on one side, the *Bundesbank* and *Bundesverfassungsgericht* on the other.

First, the ECJ adopts what might be called a "featherweight review" of proportionality, a nominal judicial scrutiny on the basis of conferring a wide margin of discretion to the ECB. Unsurprisingly given this level of deference, the Court finds no "manifest error of judgment", the ECJ adding that in a "controversial" area like monetary policy, nothing can be required of the ECB except that it use its expertise "with all care and accuracy."[30]

And crucially, the ECJ is keen to retain the effectiveness of the ECB's proposed weapon, rejecting its limiting along the lines of the BVerG's paragraph 100, albeit noting that the program is in any case limited in a number of ways. Significantly, however, there is no need in the ECJ's view for quantitative limits to be set *ex ante* (paragraph 88).

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[29] Opinion of Advocate General Cruz Villalón at paras. 143–50, Case C-62/14, Peter Gauweiler and Others v. Deutscher Bundestag (Jan. 14, 2015), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd72f89a6f42cd4794a189fb6b352beeb2.e34KaxiLc3qMb40Rch0SaxuRaxb0?text=&docid=161370&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=129342.

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

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Conceding the inevitability therefore of "some influence" on the primary and secondary sovereign debt markets' (paragraph 108),[31] the ECJ is adamant that a program such as OMT must not and will not discourage fiscal discipline on the part of Member States; it will not jeopardize the objective or decrease the impetus to follow "sound budgetary policy" (e.g. paragraph 111). Member States, in determining budgetary policy, cannot actually *rely* on OMT; there is no immediacy or even guarantee that the ECB will intervene, and if it does intervene, the ECB retains the option of selling the bonds "at any time" (paragraph 117).[32] There is no obligation to hold them to maturity. It is not equivalent to the direct purchase of government bonds by the ECB, which *would* violate Article 123 TFEU.

This, however, is surely to miss the point. Budgetary policy at the moment a Member State asks for OMT assistance is no longer determined by that Member State. If fiscal discipline is retained at that stage it is because fiscal autonomy has *already* been lost; not self-discipline any longer, but outside enforcement by the Troika of the adjustment programs connected to EFSF or ESM. By the time OMT would actually be activated, governments would already have surrendered their fiscal sovereignty.

The question rather is whether the mere initial promise of OMT has an effect on fiscal discipline. It is at this point that the alleged effect of Draghi's announcement on Spain and Italy, "shoring up" southern bond markets, becomes a crucial fact.[33]

As stated at the outset, neither Spain nor Italy has been placed under a structural adjustment program, although Spain did benefit from indirect bank recapitalization. Neither government, in other words, had to ask for official help under EFSF or ESM for the ECB's bond-buying promise to work its magic. OMT, it has been said, put any fear of a "doom loop" or "death spiral" in Spain and Italy to rest.[34]

If the effect of OMT on them is real, the whole edifice of a trade-off between financial support and austerity collapses. This is where law and economics depart. The promise of financial support may in reality alleviate the market pressure for austerity—irrespective of

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[31] *Id*. at para. 104 ("The ESCB's intervention could, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.").

[32] Although the ECB has the possibility to hold the bonds to maturity, a Member State "cannot be certain" that will happen.

[33] *See, e.g.*, Jonathan Hopkin, *The Troubled Souther Periphery: The Euro Experience in Italy and Spain*, *in* THE FUTURE OF THE EURO 161 (Matthias Matthijs & Mark Blyth eds., 2015).

[34] Jones, *supra* note 4, at 63–64.

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the legal argumentation that links them together — and assuming that is otherwise what the markets would demand.

And that assumption—that conditionality mimics the pressure on states to retain fiscal discipline that would otherwise be enforced by the financial markets—suffers from a further problem: The evidence seems to refute it. To be sure, the market's preference for austerity would be doubtful by any measure of economic reason, assuming its contractionary effects. The irrationality of austerity is by now well documented. As Mark Blyth shows, its irrationality can be substantiated by any number of historical examples: The facts just do not support the argument that austerity works in the way its advocates suggest.

Specifically, the fall in yields of government debt in the Euro zone had nothing to do with any neo-liberal structural reforms, reductions in public expenditure, privatizations, regressive tax rises and so on. The fall in yields certainly did not correlate to any reduction of sovereign debt—always touted as the ultimate reason for austerity—because debt continued to *rise* as austerity was pursued. Blyth demonstrates that post-OMT yields or in his words, "Draghi-put yields" are *negatively correlated* with sovereign debt loads.[35]

But what then does a central bank liquidity-put "designed to back-stop financial markets that are running out of funding (the purpose of OMT) have to do with cutting the state's budget?" In other words, what does financial stability have to do with enforcing "strict conditionality"? The answer, according to Blyth, is "nothing at all":[36] "Central bank policy, not public sector cuts, brought down yields and stabilized European sovereign debt markets. And so long as the markets believe that Draghi's promise to use Outright Monetary Transactions (OMT) — direct bond buying by the ECB if yields spike again — is credible, then those yields will stay down."[37]

This non-relation between austerity and financial stability should not be too surprising. "Austerity", after all, is an ideology, not an economic theory; often is it more effective in rhetoric than effected in practice. This also makes it a very difficult target. [38]

[35] Blyth, *supra* note 1, at 251.

[36] *Id*. at 247.

[37] *Id*. at 249.

[38] This has proved to be the case outside the Eurozone too, e.g. in the UK. *See Simon Wren-Lewis, The Austerity Con*, LONDON REVIEW OF BOOKS (Feb. 19, 2015), http://www.lrb.co.uk/v37/n04/simon-wren-lewis/the-austerity-con.

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C. The Euro Is Irreversible!

No matter how coherent the economic theory, how sound the constitutional basis, the consequences of OMT seemed clear enough. On the plus side—at least from the perspective of government borrowing—yields dipped.

The economic justification for "Draghi's put" was that the yields on peripheral bonds were "irrational" because the market, incorrectly, had begun to assume the possibility of break up of the currency and was factoring in the possibility of contagion following orderly or disorderly exit from the Euro, a "convertibility" or "redenomination" risk in the jargon. As the Euro was deemed "irreversible"—meaning that everything would be done to save it—it was irrational for the market to be pricing interest for government borrowing at such high levels.[39] The risk premia were "excessive", in the concurring words of the European Court of Justice. The ECB was therefore justified in stepping in to correct them. To quote the crucial passage of the ECJ in full,

> [t]he purchase, on secondary markets, of government bonds of the Member States affected by interest rates considered by the ECB to be excessive is likely to contribute to reducing those rates by dispelling unjustified fears about the break-up of the euro area and thus to play a part in bringing about a fall in—or even the elimination of—excessive risk premia.[40]

There is a wonderful circularity to this. According to the ECB, OMT was appropriate to avoid excessive premia for certain MS on the basis of a non-existent risk of break-up of the Euro area perceived on the part of investors. OMT dispelled "unjustified fears" about the break-up of the Euro area. This is of course self-fulfilling—by promising OMT, such risk is indeed reduced, such fears less justified. This is the whole point of the "Draghi put": A credible promise by a powerful institution that the Euro would not break-up would make it less likely that the Euro would in fact break up. Markets work on the basis not only of imperfect and unequal knowledge, but also of beliefs. But is rationality based on knowledge or on belief? And if belief matters, how is it to be quantified?

This is not merely academic—the idea that a financial market could respond irrationally would be a key disagreement between the 'expert opinion' of the *Bundesbank* and the ECB

[39] *Cf*. on the irrationality of the sovereign bond market as a whole, see Gerner-Beuerle & Schuster, *supra* note 3.

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

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in the hearings before the German Court.[41] The *Bundesbank*, with the *Bundesverfassungsgericht* concurring, rejected the notion that the market could have priced sovereign debt irrationally.[42] Markets were simply pricing in the risk of default based on peripheral profligacy and unsound finances.

This debate lies at the heart of the OMT judgment: The ECJ accepted the legitimacy of the ECB's margin of discretionary action in the case, justifying the program in its essentials, on the basis that the Euro is indeed irreversible, the fears about its break-up unjustified.

To pursue this point, we need to consider the rationality of the yields in the period of convergence following the launch of the single currency. It is important to remember that there are two sides to the avoidance of moral hazard; not only the public debtor, but the private creditor is taking calculated risks.

As by now is well known, interest rates on peripheral sovereign bonds dipped in the run-up to and following the introduction of the single currency, with Eurozone states borrowing at roughly similar rates, in what appears to be a spectacular convergence. This propelled a credit boom, with northern European banks in particular lending to the periphery in vast amounts, which facilitated consumption of northern surpluses, emanating, for example, from Germany and the Netherlands.[43] If this was bound to create asset bubbles in the periphery through a transnationalized form of "privatised Keynesianism", by substituting private debt for public demand management and elsewhere to function in clientilistic states as a disincentive to pursue modernizing reforms, few seemed particularly concerned.[44]

But once it became clear that Greek fiscal fundamentals were not as healthy as previously thought—a twelve percent instead of six-and-a-half percent government deficit was announced shortly after the center-left PASOK was elected in October 2009 (although it was long understood that Greece had fudged its entry in conjunction with Goldman Sachs)—the markets, still reeling from the global financial crisis that began with the collapse of Lehman Brothers in September 2008, took aim at Greece, and other weak links in the Euro chain. In a short space of time yields on Greek, Spanish and Italian bonds shot

[41] The German Court had been keen to add that it found more "convincing" the expertise of the Bundesbank than the OMT Decision, BVerfG, Case No. 2 BvR 2728/13 at paras 71.

[42] *Id*. at para 98 (describing as "meaningless" the idea that a portion of the debt was irrationally priced).

[43] And, it is important to note, not through productivity gains, but through wage repression, see Abraham Newman, *The Reluctant Leader: Germany's Euro Experiment and the Long Shadow of Reunification*, *in* THE FUTURE OF THE EURO 117–36 (Matthias Matthijs & Mark Blyth eds., 2015).

[44] *See* Menendez, *supra* note 18m at 494–97.

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up back towards their pre-Euro levels, and Greek bonds were eventually graded junk in April 2010.

Once the banking bubble turned into a banking crisis and then into a sovereign debt crisis as liquidity dried up and banks were demanding rescue, the situation started to become more problematic. The sequence of events should not have surprised economists: "banking bubbles and busts cause sovereign debt crises. Period."[45] But it merits repetition.

There were more general concerns at the time about the solvency of the co-called PIIGS (Portugal, Ireland, Italy, Greece, Spain) and contagion was feared. The subsequent bailouts of Greece, Ireland and Portugal "were connected by European financial markets – both to each other and to the rest of Europe . . . As this process wore on, the European financial crisis evolved into a full-fledged sovereign debt crisis."[46]

At the time of the first Greek bail-out, Greek debt was mostly privately owned, held largely by French and German banks.[47] The financial problems in Ireland and Spain were also bank-related; housing-bubbles had grown on the back of credit bubbles. A solution was required to protect these private banks from losses at such a delicate financial moment. Banks were considered too big to fail, at least outside Iceland. But the banking system as a whole was too big to bail.

Although Merkel initially announced that each country would have to deal with the aftershocks of the global banking crisis separately and individually,[48] it soon became evident that Greece would require a bail-out in order to prevent default on its debt.[49] Either Greece would have to be bailed out, and the Northern European banks saved indirectly, or Greece would default and those banks would have to be bailed-out directly. It

[45] *See* Jakoby, *supra* note 2, at 73 (noting that even Reinhart and Rogoff argue that in eighty percent of cases a banking crisis is followed by a sovereign debt crisis. This is supposedly why a government should never let a bank go bust, a point Bagehot emphasized more than a hundred years ago).

[46]Jones, *supra* note 4, at 54.

[47] European banks, not least those in the core in German and France "were attracted to the margin of interest that could be procured on peripheral euro-zone state bonds and concluded that the risk that the margin represented—massively underpriced as it was by the markets—would ultimately have to be borne by the European Central Bank (ECB) in the interests of the systemic stability of the currency union, not themselves."' Helen Thompson, *Austerity as Ideology: The Bait and Switch of the Banking Crisis*, 1 COMP. EUR. POLS. 729, 730 (2013).

[48] See George Soros, *The Tragedy of the European Union and How to Solve It*, NEW YORK REVIEW OF BOOKS (Sep. 27, 2012), http://www.nybooks.com/articles/archives/2012/sep/27/tragedy-european-union-and-how-resolve-it/.

[49] The story of course begins pre-Greek bailout. The "European rescue of the Washington Consensus" begins with the financial assistance granted to Hungary, Latvia and Romania in 2008. On the link between the mutation of Hungary and the Debt Crisis, see Claire Kilpatrick, *Constitutions, social rights and sovereign debt states in Europe: a challenging new area of constitutional inquiry* (EUI Law, Working Papers 2015/34).

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was determined that Greece would continue to borrow money to service its debt, loans which would therefore return to the places it had borrowed from, there being little appetite either in Greece or the rest of the Euro zone for any kind of default or debt restructuring, a theme that should, by now, be recognizable.[50]

Even the modest, voluntary, haircut accepted by private creditors was accompanied by various sweeteners, and anyway dwarfed by the 1 trillion passed the way of the banks at nominal interest rates, beginning with the first act of Draghi as Central Bank President when he took over from Trichet in 2011 (Long Term Refinancing Operations (LTRO's) at one percent and later three-quarters of one percent over three years). It has been calculated that total state support of the financial sector amounts to some five trillion Euros.[51] But, in the narrative of the Eurozone crisis, a private debt crisis would be turned into public one, in the course of the greatest "bait and switch in history."[52]

The economic situation—despite the bilateral, ESFS, and EFSM loans—had continued to worsen, debt loads had continued to rise and unemployment to increase. Austerity was not only reducing the prospect of a return to growth in countries such as Greece, Ireland and Portugal, it was destroying the hopes of their citizens, particularly the young—by June 2012 youth unemployment in Greece was running at over fifty percent. And yields were still continuing to rise through 2012. Despite historically low Central Banks interest rates, money was not being passed on through the general economy; banks loaded with toxic assets (non-performing loans) were holding on, despite the huge injections of liquidity through Draghi's LTRO's.[53]

In the view of the ECB, the monetary transmission mechanism was not working. Variations in liquidity and in bond yields did not reflect the fact that the Euro was a single currency, the Euro zone a single currency area. This link between sovereign bonds and general economic performance was crucial in justifying OMT. According to the ECB (with the ECJ concurring, or at least deferring on this point), the spike in peripheral bond yields was based on unfounded fears of a break-up of the currency. With economies continuing to tank, something needed to be done. It was at this point that Draghi loaded his bazooka, and aimed. But whom was he protecting?

[50] See *Most Aid to Athens Circles Back to Europe*, N. Y. TIMES (May 30, 2012).

[51] *See* BLYTH, *supra* note 1, at 249.

[52] *Id*.

[53] *Id*. at para. 78 ("It is undisputed that interest rates for the government bonds of a given State play a decisive role in the setting of the interest rates applicable to the various economic actors in that State, in the value of the portfolios of financial institutions holding such bonds and in the ability of those institutions to obtain liquidity.").

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To consider this question fully demands raising an aspect of moral hazard that is less conspicuous in the recent literature on the Eurozone crisis, as if it is already forgotten that the sovereign debt crisis begins with a banking crisis. The set-up of EMU should have deterred private creditors investing too heavily in countries with unsound finances as well as deterred states from over-borrowing; the avoidance of moral hazard should cut both ways and equally apply against bank bailouts as sovereign assistance. Behind every irresponsible borrower is an even more irresponsible lender.

The financial tool of choice has since moved from OMT to Quantitative Easing (QE), incidentally scheduled to begin a week after the Advocate General's opinion had given OMT a qualified green light in January 2015. QE may only prolong an illusion of economic recovery. [54] But, building on Wolfgang Streeck's suggestion, it reflects the fact that the morality tale that ultimately triumphed in the narrative battle of the Euro crisis was of debtor state profligacy rather than creditor irresponsibility: "The idea that it is only right and proper for all debtors to pay off what they owe is a myth that serves to moralise global finance markets under cover of the morality of everyday life – and to make opposition to their demands appear immoral."[55]

This morality tale, however mythical, was strengthened by the European institutions led by the most economically powerful Member State in the Eurozone, and buttressed by its Constitutional Court. The frugal "Schwabian housewife" became the model for countries to emulate, however inapposite the analogy. The banking crisis was relegated to a footnote. But, with the goal of encouraging private investors to keep lending to Euro area States, a constitutional claim was launched that would take priority over the actual if not rhetorical promotion of austerity: the Euro is irreversible.

D. … Or is it?

On the day that the European Court of Justice delivered its OMT ruling, the 16 June 2015, eyes were on Athens rather than Luxembourg. Some sixth months earlier, the Greek people had elected the assorted Left-wing party Syriza to power, forming a coalition with the conservative and nationalist Independent Greeks.

Anger in Greece at austerity measures had existed since before even the first bailout in May 2010; by the second bailout, agreed in March 2012, there were large-scale protests and rioting in Athens. This by then was part of a broader social and political dynamic, reflected by the global Occupy movements and the *Indignados* movement in Spain—out of

[54] *QE Will Lower Living Standards in Long Term: Prospect of improvement in Growth is Largely A Monetary Illusion*, FINANCIAL TIMES, March 25, 2015.

[55] WOLFGANG STREECK, BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM 161 (2014); for the long view, see DAVID GRABER, DEBT, THE FIRST 5,000 YEARS (2012).

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which would rise with extraordinary speed the political party *Podemos*—protesting against what were perceived to be austerity agendas imposed by the Troika and other political and economic elites and serving only the interests of these elites.[56]

The situation of increasingly open conflict in the Eurozone had even begun to startle the most staunch Europhiles, German sociologist Ulrich Beck opening his book *A German Europe* by expressing the incredulity he felt upon hearing, in February 2012, that "today the *Bundestag* will decide the fate of Greece."[57]

These bailout packages in general, and OMT in particular, were significant aspects in a strategy of "extend and pretend": lending or promising to lend enough to extend the illusion of solvency and denying the need for any serious discussion of debt relief or restructuring, permitting the game to continue as before. In Wolfgang Streeck's apposite expression, the ECB was merely "buying time", papering over cracks that would continue to grow beneath the surface.

What effect might OMT have had on the motivation of political elites, national and European, to reform the structure of the Euro governance regime, by agreeing, for example to Eurobonds, comprehensive banking union or other institutional changes geared towards pursuing economic growth? Not very surprisingly, "the governments' willingness to adopt common institutional or economic measures declined once the pressure receded."[58] OMT was by all accounts, a crucial pressure valve, but at the cost of lessening the resolve to have proper institutional reform.

Moreover, the rescue packages offered, whether via EFSF, ESM, or OMT are invariably presented as aimed at rescuing ailing Member States rather than irresponsible private creditors. And preventing sovereign bankruptcy comes with a serious public cost, namely that national fiscal sovereignty is lost; a country dependent upon aid is stripped of any pretense of democratic government.[59]

Syriza was elected in Greece in January 2015 with the promise to regain democratic self-government, and more specifically with a dual mandate to remain in the Eurozone and end an austerity agenda that was harming the most vulnerable in society.

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[56] See MARY KALDOR, SABINE SELCHOW, SEAN DEEL & TAMSIN MURRAY-LEACH, THE BUBBLING UP OF SUBTERRANEAN POLITICS IN EUROPE (2012).

[57] ULRICH BECK, GERMAN EUROPE (2013).

[58] Jakoby, *supra* note 2, at 82–83.

[59] On the way this played out prior to Syriza's election in January 2015, see Kevin Featherstone, *Le Choc de la Nouvelle, Maastricht, déjà vu, and EMU Reform*, (LEQS, Working Paper 52/2012).

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As would soon be discovered, that was 'mission impossible', at least as far as the Euro group leaders and the European institutions were concerned.[60] And they were not only in a numerically and financially superior position to the Greek government but also armed with the "rules of the game," a constitutional structure of Economic and Monetary Union built on ordoliberal principles of fiscal discipline, market logic and avoidance of moral hazard.[61]

The Euro group of Finance Ministers also had the clear advantage of institutional ambiguity, enabling them to play outside the rules and having only hypothetical rather than real constituencies to represent. The Euro group itself is an institution that exists almost entirely in a legal void, as caustically noted by its own President, Jeroen Dijsselbloem, when its convention of unanimity was swept aside in order to deal with a recalcitrant Greek Finance Minister. The Euro group is formally an "informal group", according to article 1 of protocol 14 attached to the Treaty of European Union. This combination of a strict ruled-based ordoliberal rhetoric adopted by shadowy institutions that exist above the rules is an unorthodox one from a constitutional perspective, but also, it seems, a forceful one in conditions of political and economic emergency.

Although Syriza was elected expressly on a mandate to reject austerity, each representative of the Euro group could claim hypothetical resistance to any unconditional or non-austere bailout of Greece from their own constituencies — as if each had been explicitly mandated by its people to refuse the loosening of austerity not merely on itself — but also on Greece.[62] The re-emergence of right wing nationalism within the Euro zone would hinder Greece's prospects of benefitting from any transnational solidarity, and was an unexpected boon to those arguing for Greek submission to the creditors' strict demands.[63]

Responsiveness to constituencies elsewhere was, of course, an easy and superficially powerful claim to make, but it had less weight when argued by those with no national constituency to represent, such as the Presidents of the various European institutions — Bank, Commission, Euro group, Council, and of course the head of the IMF. The sixth month long negotiations exploded the myth that inter-governmentalism proceeds through

[60] The IMF has played a more ambiguous role.

[61] The extent to which the constitution of EMU is (or is still) truly ordoliberal is disputed. *See, e.g.*, Christian Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation* (Zentra, Working Paper, 06/2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595.

[62] The point is not to deny that this might well be the reaction of other electorates; but it remains speculation. If the leaders thought it was the right thing to do, if only they had a free hand, they could have attempted to persuade their electorate that is was in their interests.

[63] As an aside, it is telling how far the project has travelled that so much attention has been devoted to crushing a Greek government with moderate social democratic aims, and so little to a Hungarian government that recently announced the desire to return the death penalty – amongst other things.

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rational interstate bargaining, given that the effect of further austerity, particularly in the absence of debt restructuring, would almost certainly be to reduce the Greek pie from which creditors would be repaid — including one must presume, to the detriment of the Euro group's and creditors' own constituencies, at least in the long-term. Bargaining took place in the shadow of a "non-ideological ideology" where the Euro group plus the Troika apparently held not only a trump card but a conversation stopper: ordoliberal austerity.[64]

The Greek Party Syriza had only the forlorn hope that "justice", "history" and "European values" were on its side,[65] and that it was in possession of the "better argument", a claim bolstered by a phalanx of Nobel prize winning economists and noteworthy political scientists from their position on the sidelines, but otherwise surely a sign of desperation in times of financial crisis.[66] Yet this faith was so strong that hardly any serious preparations had been made to put "Grexit" on the table as a credible bargaining tool in the negotiations that would follow Syriza's election victory.

A serious Grexit strategy would have had less leverage in 2015 than in 2010 when Greek default could potentially have had an enormous impact on a global economy that was still reeling from the collapse of 2008 (hence the walk along the beach in Cannes when Merkozy successfully dissuaded Papandreou from holding a referendum). But it would still have had some clout given the historical investment of the European political elites in the project of integration. Instead, Syriza believed that they could convince their European partners to ease the austerity programs and restructure a sovereign debt that hardly anyone thinks is realistically repayable. They too were hampered, but by a constituency, as well as a leadership, that was not willing or politically prepared to appear un-European by putting "Grexit" on the table itself.[67]

Here, then, we come to a key point of this whole saga, which is missed if the focus remains solely on the legal text or the judicial decisions. Recall that OMT, in the view of the ECJ, legitimately dispelled "unjustified fears" about the break-up of the Euro. We now know, however, that such fears were real. But we know that from an unexpected source—the German finance minister.

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[64]*See The Donald Tusk interview*, FINANCIAL TIMES (July 16, 2015), http://blogs.ft.com/brusselsblog/2015/07/16/donald-tusk-interview-the-annotated-transcript/ Reference. On contextualizing the German lead on austerity, see Newman, *supra* note 43.

[65] See Helena Smith, *Tsipras Favour Greek Jobless over Creditors in Defiant Policy Speech*, THE GUARDIAN (Feb. 8, 2015), http://www.theguardian.com/world/2015/feb/08/greece-prime-minister-alexis-tsipras-unveil-anti-austerity-plan-parliament.

[66] Including e.g. Joseph Stiglitz, Paul Krugmann, Jeffrey Sachs, Thomas Picketty, Jurgen Habermas.

[67] As Hopkins notes, "in the southern democracies euro membership was an unquestioned national objective, with only peripheral and mostly extremist political forces offering an alternative view." Jakoby, *supra* note 2, at 162–63.

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It was thought that the risk of break-up would be realized from a country defaulting on its debt. And it is worth reiterating that there is no legal option of exit from the Euro. OMT was designed to prevent the practical likelihood of a country forced to leave "voluntarily," to deter the financial markets from pushing a country over the edge. (In practice it might precipitate a domino effect, the markets targeting the next "weakest link" in the Euro chain. There is, in other words, a flipside to the Draghi "put": If it were actually triggered, investors might be spooked to such an extent that it would entirely backfire. The ECB's promise, then, begins to resemble a feature of the MAD logic that was thought to apply to the Courts: Some weapons are effective only if they are not actually used.)

Since the election of Syriza on a platform of renegotiating the memoranda in order to reject or at least to temper the austerity packages, the ECB has taken on a new role. It was able to use the threat of freezing emergency liquidity (ELA) to Greeks Banks as a warning tool, wrecking the entire payments system and threatening the economic stability of the country. This precipitated a flight of capital, and then a liquidity crisis, followed, as we know now, with the imposition of limited cash withdrawals from Greek bank accounts (60 Euro per day), as the ECB froze ELA when the (in)famous referendum was promised by Alexis Tsipras at the end of June this year.

Sovereign debt is issued in a currency the Member States of the Eurozone have no control over. This means that some states are highly vulnerable to attacks from the financial markets and that there is only one way for them to regain "competitiveness" — internal devaluations, meaning neo-liberal structural reform and austerity. In times of crisis this lack of autonomy becomes acute. If ever proof were needed that the Euro is a currency with foreign masters for its member states, the actions of the ECB in Greece over the last six months was surely it.

As French economist Michel Aglietta puts it, the Euro "is a foreign currency for each country."[68] He continues:

> There is, however, one country for which the euro is less external than it is for the others: Germany. If Berlin were to agree to play the role of benevolent leader—that is, taking onboard the interests of the monetary union as a whole, while pursuing its own policies—it might have been possible to arrive at a second-best scenario; but it has done nothing of the sort. Historically, monetary unions have gone in one of two directions: either they have been dissolved—the Latin and Scandinavian unions—or they have moved

[68] Michel Aglietta, *A European Vortex*, 75 NEW LEFT REV. 15, 15–36 (2012).

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> towards constituting political sovereignty, as when the Zollverein customs union formed the basis for the German Reich.[69]

Political sovereignty, however, has not moved upwards to the supranational institutions. Something else happened in the course of the recent Greek crisis. Lending programs previously dealt with technocratically, by the Troika, in a "non-political" or "non-ideological way", the scare quotes here of course quite deliberate, became spectacularly politicized, not just in a Left/Right sense, but in a new, geo-political way. Proposals and counter-proposals were brought out into the open in the Euro group, not least due to the presence of an unconventional figure on the scene, in the shape of a Greek finance minister unwilling to follow the rules of the game.

What was new was not the decision of the Euro group and Troika to attempt to manage Greece as if a protectorate or an outpost of economic colonialism. That was already well understood as a consequence of the asymmetric and incomplete economic union, long before Syriza obtained power.[70] What was new was the realization that the threat of Grexit would not be one used—or even laid out on the table as a bargaining tool—by Greece, at least not yet.

On the contrary, less than a month after the ECJ's OMT ruling legally reinforced the irreversibility of the Euro, and the Greek's offered their own political reinforcement to this claim, it became clear that at least for one country the unity of composition of the Euro may no longer be sacrosanct. Not for Greece, but for Germany: The Euro is *reversible*.

The so-called Schaüble plan, scribbled on the back of an envelope and presented at the Euro group meeting on 11 July signaled not only the willingness, but the preparation—however half-baked—for a "temporary," managed "Grexit."[71]

This is a truly political and constitutional event for Europe. It was previously assumed, and on good authority, that European political elites—especially German—would never let the Euro fail, epitomized in Merkel's claim that "if the Euro fails, Europe fails." "Defence of the Euro at any price" was a matter "not only of economic expediency but also of German political and moral raison d'etat."[72]

[69] *Id*.

[70] *See, e.g.*, GIANDOMENICO MAJONE, RETHINKING THE UNION OF EUROPE POST-CRISIS (2014).

[71] *See How Germany Prevailed in the Greek Bail-Out*, N. Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/30/world/europe/how-germany-prevailed-in-the-greek-bailout.html. According to the article, the plan originated from Slovenia.

[72] STREECK, *supra* note 55, at 149.

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That may still hold good. But now we know a little more about what that means, or at least about what it does *not* mean. It does not mean that the "weakest link" will be retained at any cost, rescued on conditions that are acceptable to its people. On the contrary, it seems that the weakest link may well be used in order to demonstrate to others that the principles upon which the Euro must proceed and the masters upon whose control it rests are non-negotiable and not at all up for grabs. It was openly noted by European political elites that a "no vote" in the Greek referendum would actually be punished. As indeed it was.

But politicization has gone further. The most independent central bank in the world has now become one of the most politicized. The European Court of Justice has rubber-stamped this transformation in its OMT judgment. But the justification for its stamp now looks flimsy. Pandora's box has been opened: The Euro is reversible.

E. Conclusion

If OMT, and now QE, threatens the first edifice on which the Eurozone was built — fiscal discipline, then 'Grexit' openly erodes the second — the irreversibility of the Euro as a constitutional promise of European unity. On both counts it is hard to disagree with Jürgen Habermas: The recent treatment of Greece is an "act of punishment" against a left-wing government that dared openly to oppose austerity whilst promoting values of European integration.[73] In terms of the damage this act of punishment will do to the future of the European project, only time will tell. It does not look promising.

There is of course nothing new in government resorting to extraordinary measures — formal as well as informal — in times of crisis or emergency in an attempt to restore order, security, or a return to economic normality;[74] nor in a compliant judiciary. What is distinct in the wake of the raft of measures implemented since the Euro-crisis is the way extraordinary measures appear to be becoming the "new normal".[75] Thus, they are not justified on the basis of needing to respond to an "emergency" that will be over at any identifiable future point. Rather, their justification lies in the need to assuage the markets, maintain the "singleness" of the currency, avoid moral hazard and ensure fiscal discipline.

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[73] *See* Interview with Jürgen Habermas (July 16, 2015), *available at* http://www.theguardian.com/commentisfree/2015/jul/16/jurgen-habermas-eu-greece-debt-deal. This aspect of Eurozone politics is not often addressed. Conditionality (austerity) is what Blyth calls a "class-specific put-option." It protects the top seventy percent who have assets and hurts the bottom thirty percent who most depend on public services.

[74] *See generally* Victor Ramraj, *No Doctrine More Pernicious? Emergencies and the Limits of Legality*, *in* EMERGENCIES AND THE LIMITS OF LEGALITY 3–29 (Ramraj ed., 2008).

[75] *See* Jonathan White, *Emergency* Europe, POLITICAL STUDIES (2015).

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There is nothing distinctly temporary about these needs — they are the products of an ideology, not of a particular situation. In true Schmittian fashion, an enemy has even been identified; the "enemy within" this new constitutional project are those "bad Europeans" who disregard the economic stability criteria.[76]

Politically, the euro has undergone a significant, if yet only vaguely perceptible mutation. From being a currency without a state and a symbol of European unity, it now looks increasingly like a currency with an ideology—austerity—and a core geopolitical constituency, a large bloc of nations led by Berlin, willing to defend it against ideological and political enemies, even if in practice permitting departures from its strictures when expedient to do so. This signals a rejection of the notion of solidarity under economic governance, pushed, to little avail it seems by the French, in favour of stability under constitutionalized rules of the game that can be bent when necessary. German ideology, including by way of the German Constitutional Court, is being imposed on the rest of the EU—although many seem to be voluntarily swallowing the medicine, and even with relish.

To be sure, against this background, the disagreement between Karlsruhe and Luxembourg appears rather churlish, if not childish. On the main substantive point there is concurrence—OMT must not jeopardize strict conditionality. But this is only an appearance; dig deeper and it turns out that there is a fundamental difference between the two courts. For the ECJ, unlike the German Court, the Euro is irreversible. But if it looks juridically as if the European Court of Justice comes out stronger after OMT, it is Karlsruhe that may have the last laugh, judging by the way the constitutional politics have been played out above the heads of both Courts. OMT, although based on the irreversibility of the Euro, may, in the final analysis, and paradoxically so, also make "Grexit" easier to manage in the future: Reducing and containing the remaining threat of contagion in conjunction with other firewalls that have been built around Greece.

It is perhaps with this knowledge in mind that Tsipras now declares in full harmony with neoliberal rhetoric and ordoliberal philosophy that there is, after all, "no alternative" to austerity. The irony is that the more austerity is pushed—in actuality rather than merely rhetorically—the more a country such as Greece will likely require further rescue. 'Extend and pretend' will continue. The difference now is that this can no longer be expected on the sole basis that the Euro must not fail for each and every member; it is only to be expected so long as the rules of the game are not openly contested. Who will be next to dare contest them?

[76] *See* Udo di Fabio, *Karlsruhe Makes a Referral*, 15 GERMAN L.J. 107, 107–10 (2014). For Di Fabio, oddly, the crisis was caused not by financial problems accumulated over years of neo-liberal excesses (as even many of its architects concede) but "massive violations of the law," without explaining the chain of causation. He also appears to query the independence of the ECJ because it has a Greek president.

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