HELMUT SIEKMANN

The Legality of Outright Monetary Transactions (OMT) of the European System of Central Banks

Institute for Monetary and Financial Stability
GOETHE UNIVERSITY FRANKFURT AM MAIN

WORKING PAPER SERIES NO. 90 (2015)

Revised version published: The Legality of Outright Monetary Transactions of the European System of Central Banks. In: F. Rövekamp, M. Bälz, H. G. Hilpert (eds.), Central Banking and Financial Stability in East Asia (Cham et al.: Springer Verlag, 2015) 101.

Institute for Monetary and Financial Stability
Goethe University Frankfurt
House of Finance
Theodor-W.-Adorno-Platz 3
D-60629 Frankfurt am Main
www.imfs-frankfurt.de | info@imfs-frankfurt.de

THE LEGALITY OF OUTRIGHT MONETARY TRANSACTIONS (OMT) OF THE EUROPEAN SYSTEM OF CENTRAL BANKS[1]

Helmut Siekmann

ABSTRACT

In its meeting on 6 September 2012, the Governing Council of the ECB took decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets (OMT). This decision was challenged in the German Federal Constitutional Court (GFCC) by a number of constitutional complaints and other petitions. In its seminal judgment of 14 January 2014, the German court expressed serious doubts on the compatibility of the ECB's decision with the European Union law.

It admitted the complaints and petitions even though actual purchases had not been executed and the control of acts of an organ of the EU in principle is not the task of the GFCC. As justification for this procedure the court resorted to its judicature on a reserved "ultra vires" control and the defense of the "constitutional identiy" of Germany. In the end, however, the court referred the case pursuant to Article 267 TFEU to the European Court of Justice (ECJ) for preliminary rulings on several questions of EU law. In substance, the German court assessed OMT as an act of economic policy which is not covered by the competences of the ECB. Furthermore, it judged OMT as a – by EU primary law – prohibited monetary financing of sovereign debt. The defense of the ECB (disruption of monetary policy transmission mechanism) was dismissed without closer scrutiny as being "irrelevant". Finally the court opened, however, a way for a compromise by an interpretation of OMT in conformity with EU law under preconditions, specified in detail.

---

[1] This work uses reflections of HELMUT SIEKMANN and VOLKER WIELAND (2014a) and HELMUT SIEKMANN and VOLKER WIELAND (2014b) as a starting-point. They are considerably intensified and enlarged. All references are new.

Procedure and findings of this judgment were harshly criticized by many economists but also by the majority of legal scholars. This criticism is largely convincing in view of the admissibility of the complaints. Even if the "ultra vires" control is in conformity with prior decisions of court it is in this judgment expanded further without compelling reasons. It is also questionable whether the standing of the complaining parties had to be accepted and whether the referral to the ECJ was indicated. The arguments of the court are, however, conclusive in respect of the transgression of competences by the ECB and – to somewhat lesser extent – in respect of the monetary debt financing. The dismissal of the defense as "irrelevant" is absolutey persuasive.

1. INTRODUCTION

In the course of the crisis, the European Central Bank (ECB) has acted several times to support the EU Member States and banks in financial distress: Covered Bonds Programmes,[2] Securities Market Programmes (SMP),[3] and Long Term Refinancing Operations (LTRO).[4] These measures were accompanied by a substantial lowering of the quality standards for the (outright) purchase of securities or for accepting them as collateral,[5] and by allowing national central banks to provide liquidity to basically insolvent banks in their home countries through the granting of "Emergency Liquidity Assistance" (ELA). Although, in applying these measures, a substantial amount of sovereign debt from selected Member States was purchased and a major part of the banking system was protected from bankruptcy, the public

---

2 ECB/2009/16, Official Journal 2009/L 175/18; ECB/2011/17 Official Journal 2011/L 297/70.

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

4 Two longer-term refinancing operations provided about one trillion euro to commercial banks at favourable interest rates for three years, ECB press release of 8 December 2011.

5 For example, the decision of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government ECB/2010/3, Official Journal of 11 May 2010, L 117/102; the decision of the European Central Bank of 31 March 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government ECB/2011/4, Official Journal of 8 April 2011, L 94/33; the decision of the European Central Bank of 7 July 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government ECB/2011/10, Official Journal of 12 July 2011, L 182/31; for further examples, see HELMUT SIEKMANN (2013a), p. 113 at footnote 55.

outcry was relatively mild[6] and the judiciary did not object in substance.[7] This changed with the announcement of another newly-designed measure.

Despite these measures, the interest rates for the bonds of various euro-area Member States rose sharply in the summer of 2012. It was at this time that the President of the ECB made the statement that subsequently became so famous:

> "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough."[8]

Some weeks later, on 6 September 2012, the Governing Council of the ECB took "decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets" which allegedly "aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy". Under the name of "Outright Monetary Transactions" (OMTs), they were to be conducted in a specific framework which required adherence to a European support programme ("conditionality"), with no *ex-ante* quantitative limits ("coverage"), accepting same creditor treatment with private creditors ("creditor treatment"), and promising full "sterilisation" of the created liquidity and enhanced "transparency".[9]

This announcement spawned a lively debate on its economic suitability, political feasibility and – particularly – on its legality.[10] From the legal concerns, several lawsuits

---

6 Critical, see MARTIN SEIDEL (2010); MARTIN SEIDEL (2011); supporting, or at least not questioning, the "unconventional" measures: CHRISTOPH HERRMANN (2010).

7 GFCC, judgment of 7 May 2010, BVerfGE [Reports of judgements of the Federal Constitutional Court] 125, 385 et seq; judgment of 7 September 2011, BVerfGE 129, 124 (128 et seq.); GFCC, judgment of 18 March 2014 on the basis of the oral hearing of 11 and 12 June 2013, cases: 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, available at: www.bundesverfassungsgericht.de/entscheidungen/rs20140318_2bvr139012en.html (in English) [ESM final judgment]. A transgression of the competences of the ESCB and a (prohibited) monetary financing of budgets was already seen by HELMUT SIEKMANN (2013a), pp. 144-149; HELMUT SIEKMANN (2014c), Article 88 margin no. 20.

8 The context was as follows: "When people talk about the fragility of the euro and the increasing fragility of the euro, and perhaps the crisis of the euro, very often non-euro area Member States or leaders underestimate the amount of political capital that is being invested in the euro. And so we view this, and I do not think we are unbiased observers, we think the euro is irreversible. But there is another message I want to tell you. Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough." The full text of the speech can be found at: http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

9 Press release of 6 September 2012, infra appendix I.

10 Supporting the measure: ROLAND HENRY (2012); GUNTRAM WOLFF (2013) - also in view of German

brought against the German Federal Constitutional Court (*Bundesverfassungsgericht*) evolved, with petitioners also asking the court to issue provisional orders with the goal of halting the ratification process.

2. THE RULINGS OF THE GERMAN FEDERAL CONSTITUTIONAL COURT

2.1. THE COURSE OF ACTION

With some reservations, the German Federal Constitutional Court (GFCC) refused, in its judgment of 12 September 2012, to issue a temporary injunction (provisional order) to halt the ratification process in act to establish a European Support Mechanism (ESM). In this decision, it expressed the already considerable concerns about the legality of the ECB's OMT Decision, but left the final decision to the judgment issued in the main proceedings.[11] Eventually, on 7 February 2014, the German Federal Constitutional Court announced the following:[12]

- the charges concerning the OMT Decision of the ECB of 6 September 2012 are separated from the other matters subject to adjudication: the amendment of Article 136 TFEU, the creation of a permanent support mechanism (ESM), and the "fiscal compact";[13]
- the proceedings with regard to the OMT Decision are suspended and a list of questions with regard to its compatibility with EU law is referred to the

---

constitutional concerns; VESTERT BORGER (2013), p. 125, as an *obiter dictum*; critical: DEUTSCHE BUNDESBANK (2012); MARTIN SEIDEL (2010), p. 521; HANS-WERNER SINN (2013), pp. 9-30; to some extent sceptical in view of quantitative easing and "unconventional" monetary policies: INTERNATIONAL MONETARY FUND (2013); CARL CHRISTIAN VON WEIZSÄCKER (2012).

[11] German Federal Constitutional Court, judgment of 12 September 2012, cases: 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12, (availabel at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html?nn=5403310) [ESM provisional order] at margin no. 278: "For an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently of the capital markets is prohibited as well, as it would circumvent the prohibition of monetary financing" (= BVerfGE 132, 195 [286].)

[12] Press release No. 9/2014 of 7 February 2014, available at: http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-009.html?nn=5404690.

[13] German Federal Constitutional Court, judgment of 17 December 2013, cases: 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12 (available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html?nn=5403310) [ESM separation order] (= BVerfGE 134, 357).

European Court of Justice (ECJ) for a preliminary ruling pursuant to Article 19(3)(b) TEU, Article 267 (1)(a)(b) TFEU;[14]

- a final decision on the part of the case which is not suspended will be pronounced on Tuesday, 18 March 2014.

In effect, the final judgment, delivered 18 March 2014,[15] dismissed the remaining complaints as mainly inadmissible and unfounded, with some minor reservations concerning mainly the prerogatives of the *Bundestag* (the federal parliament) to participate in crucial questions regarding the new support mechanism in plenary session.[16] The insertion of the new paragraph 3 in Article 136 TFEU opening the door for permanent support facilities on the part of the Member States, the Treaty establishing the European Stability Mechanism (ESM), and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("the new fiscal compact") were all judged as being consistent with the German Basic Law (*Grundgesetz*).[17]

2.2. DEMARCATION OF COURT COMPETENCES

The tasks of the ECJ and the GFCC are well defined: The ECJ is to ensure that, in the interpretation and application of the Treaties, the law is observed, whereas the German Court is installed as the "guardian" of the German Federal Constitution (*Grundgesetz*), the "Basic Law". The domain of the ECJ is the enforcement of EU-law; that of the GFCC, the compliance with the Basic Law. In particular, the GFCC has the power to control whether a statute is in accordance with the constitution.

The competences of the German Court are limited to the control of acts of the German authorities and do not include the control of the measures of the institutions and organs of the

---

[14] GFCC, judgment of 14 January 2014, cases: 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html?nn=5403310) [OMT-judgment] (= BVerfGE 134, 366); now ECJ case C-62/14.

[15] GFCC, judgment of 18 March 2014 upon the basis of the oral hearing of 11 and 12 June 2013, cases: 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 (available at: www.bundesverfassungsgericht.de/entscheidungen/rs20140318_2bvr139012en.html - in English) [ESM final judgment].

[16] At margin no. 176.

[17] At margin no. 158, 176 et seq. (Article 136 paragraph 3 TFEU), 183 et seq. (Treaty Establishing the European Stability Mechanism), 243 et seq. (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [SCG Treaty – TSCG]).

European Union.[18] Although no formal hierarchy has been established between the ECJ and the national courts, the described distribution of competences – in conjunction with the primacy of Union law, in application (*Anwendungsvorrang*),[19] would give the word of the European Court precedence. As a consequence, OMT and all other actions of the ECB would not fall within the jurisdiction of the German Court.

This, theoretically clear, demarcation of competences has been blurred by the judicature of the German Federal Constitutional Court. In a series of decisions, the Court has held that the acts of the institutions, agencies, and organs of the European Union are binding in the Federal Republic of Germany only under certain conditions:

> "[If] European agencies or institutions were to administer the Union Treaty, or develop it by judicial interpretation, in a way that is no longer covered by the Treaty as it underlies the Act of Assent, the ensuing legislative instruments would not be legally binding within the area of German sovereignty. For constitutional reasons, the organs of the German government would be prevented from applying these instruments in Germany."[20]

This holds, however, only "if a violation is manifest and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States".[21]

> "Transgressions of the mandate are structurally significant especially (but not only) if they cover areas that are part of the constitutional identity of the Federal Republic of

---

[18] Enumeration of competences in Articles 93(1) and 100 *Grundgesetz* [GG] (German Constitution).

[19] ECJ, judgment of 15 July 1964, Case 6/64 *Costa/E.N.E.L.*, Reports of Cases 1964, 587 (594); judgment of 9 September 1978, Case 106/77 *Simmenthal*, Reports of Cases 1978, 630 margin no. 17: "automatically inapplicable"; BVerfGE 31, 145 (173f.); 37, 271 (277 et seq.); 73, 339 (375 et seq.); 89, 155 (175); see, for more details, *e.g.*, HANS D. JARASS and SAŠA BELJIN (2004), pp. 1-6; BURKHARD SCHÖBENER (2011), p. 889 et seq.

[20] BVerfGE [Reports of judgments of the Federal Constitutional Court] 89, 155 (187 and 188); earlier BVerfGE 58, 1 (30 and 31); 75, 223 (235, 242); affirmed in the judgment on OMT (footnote 14 above) at margin no. 21.

[21] BVerfGE 126, 286 (304 and 305 with further references); affirmed in the judgment on OMT (footnote 14 above) at margin no. 21.

> Germany (*Verfassungsidentität*), which is protected by Art. 79 sec. 3 Basic Law or if they particularly affect the democratic discourse in the Member States."[22]

The Federal Constitutional Court thus examines whether the legislative instruments of European agencies and institutions remain within the limits of the sovereign powers conferred upon them, or whether they transgress these limits.[23] This examination is called *ultra vires* control. In this context, it considers the protection of the core content of the Basic Law ("constitutional identity": *Verfassungsidentität*) as a task of the Federal Constitutional Court alone.

The German Court concedes, however, that these reserved powers of control have to "be exercised only in a manner that is cautious and friendly towards European law. This means for the *ultra vires* review at hand that the Federal Constitutional Court must in principle comply with the rulings of the Court of Justice as a binding interpretation of Union law". But it "will take the interpretation which the Court of Justice gives in a preliminary ruling" only as a basis. In their "co-operative relationship", it attributes to the European Court of Justice the interpretation of the act. On the other hand, it is to be the GFFC that "determines the inviolable core content of the constitutional identity (*Verfassungsidentität*), and to review whether the act interferes with this core".[24] By this, the German Court claims to have the "last word" in extreme cases.

In the German Court's opinion, a manifest and structurally-significant transgression of powers would have to be assumed if the European Central Bank acted beyond its monetary policy mandate or if the prohibition of the monetary financing of the budget was violated by the OMT programme.[25] In addition, the GFFC has reserved the right to determine whether the OMT – even after an interpretation by the ECJ has taken the concerns of the German Court into account – would infringe the "inviolable core content of the constitutional identity".[26] Such a "last word" of the German Court could lead to an open conflict among the judicial institutions.

---

[22] BVerfGE 126, 286 (307).

[23] Cf., BVerfGE 58, 1 (30 and 31); 75, 223 (235, 242).

[24] BVerfGE 123, 267 (354); 126, 286 (303 and 304); GFCC, OMT-judgment (footnote 14 above), margin no. 27, 29.

[25] GFCC OMT judgment (footnote 14 above), margin no. 42.

[26] GFCC, OMT judgment (footnote 14 above), margin no. 27: "…it is for the Federal Constitutional Court to

2.3. THE SUBSTANCE OF THE REFERRAL DECISION

The questions presented to the ECJ deal with the problem of whether the OMT is consistent with EU primary law. In view of the German Court, the OMT may well exceed the "mandate" given to the ECB, which is limited to monetary policy. It lists a number of important reasons why OMT may interfere with the economic policy reserved to Member States,[27] and why OMT may violate the prohibition of the monetary financing of both the EU and its Member States.[28] The key argument employed by the ECB in order to justify its actions is "the disruption of the monetary policy transmission mechanism". This argument is rejected by the Court, without closer scrutiny, as being irrelevant.[29]

If all this is true - pursuant to the opinion of the German Federal Constitutional Court - the decision of the ECB Council introducing the design for the OMT may have to be considered as *ultra vires* already, even if actual purchases have not taken place to date. An act of any organ or other institution of the EU has to be judged as *ultra vires* - following this view - if it transgresses, in a "manifest and structurally significant way", the competences granted to the EU and the ECB in line with the EU Treaties and the consent of the German legislature (the *Bundestag* and the *Bundesrat*). Such a transgression, lacking democratic legitimation, could constitute a violation of German constitutional law even if it were inconsistent with EU law in the first place.

However, the GFCC also delineated an alternative interpretation of OMT, which it would consider to be consistent with EU primary law (*unionsrechtskonforme Auslegung*). This interpretation involves a range of constraints and limitations that the Court derived from the statements which the representatives of the ECB presented in the hearings in June 2013. They had conceded that the objectives of OMT could also be achieved within such constraints.

---

determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with the core."

[27] Section 2.4.2. below.

[28] Section 2.4.3. below.

[29] Section 2.4.4. below

2.4. THE REASONING OF THE COURT

2.4.1. Preventative Legal Protection

The German Federal Constitutional Court has admitted complaints with regard to the OMT Decision of the ECB despite the fact that this instrument has not been applied to date. In its opinion, the admissibility "does not depend on whether the OMT Decision can already be understood as an act with an external dimension within the meaning of Art. 288 sec. 4 TFEU, or only as the announcement of such an act". Instead, it holds that "the requirements for granting preventive legal protection are met".[30] The main reason for this result is that the "execution of the OMT Decision could lead to [...] consequences that could not be corrected".[31]

2.4.2. Transgression of Competences

The German Court points out that the "mandate of the ECB" is limited to monetary policy, while economic policies in general are reserved to Member States.[32] According to its assessment, the OMT Decision - not to mention its implementation - already interferes with Member State competences in economic policy.[33] The reasons for this assessment are as follows:

- with OMT, the ECB aims to neutralise risk premiums on the debt of certain sovereigns which are market results;[34]
- an approach that differentiates between Members States does not fit in with the monetary decision-making framework for a monetary union;[35]
- the linkage to the conditionality of an ESM programme of the Member States indicates that OMT reaches into the realm of the economic policies reserved to Member States;[36]

---

[30] GFCC, OMT judgment (footnote 14 above), margin no. 34.
[31] At margin no. 35.
[32] At margin no. 56.
[33] At margin no. 56-83.
[34] At margin no. 70.
[35] At margin no. 73.
[36] At margin no. 74.

- the purchase of government debt as outlined in the OMT Decision of the ECB Council exceeds the support of the general economic policies in the European Union that the European System of Central Banks is allowed to pursue.[37]

The German Court also emphasises that the ECB is expected to make an independent economic evaluation of its own, which could imply removing its support when conditions are not met. Such a decision would be of an economic-policy nature, at its core.

2.4.3. The Violation of the Prohibition of Monetary Financing

Furthermore, the German Federal Constitutional Court assumes a wide understanding of the prohibition of monetary financing of the budget. It holds that the (explicit) interdiction of direct purchase of government debt on the primary market also applies to functionally-equivalent measures that are simply intended to circumvent this prohibition. Article 123 TFEU is considered as "an expression of a broader prohibition of monetary financing of the budget".[38] In this context, it lists aspects that "indicate the OMT Decision aims at a circumvention of Art. 123 TFEU and violates the prohibition of monetary financing of the budget"; in particular, the willingness to participate in a debt cut, the increased risk of such a cut, the option of keeping the purchased bonds until maturity, the interference with the price formation on the markets, and the encouragement of market participants to purchase government bonds.[39]

In essence, it judges the OMT Decision as "likely to violate" the prohibition of monetary financing of the budget as "enshrined in Art. 123 TFEU".[40]

2.4.4. No Justification

Without closer scrutiny, the German Court also rejects the objective used by the ECB to justify the OMT Decision – "to correct a disruption of the monetary policy transmission

---

[37] At margin no. 80.

[38] GFCC, OMT-judgment (footnote 14 above), margin no. 85 et seq; already prepared by GFCC, ESM provisional order, (footnote 11 above), margin no. 278. As support for this view, it gives exactly the following references:
"c.f. VESTERT BORGER, (2013) 14 *German Law Journal*, p. 113-140, at 119, 134; ALBERTO DE GREGORIO MERINO, *CMLR* 2012 p. 1613 <1625, footnote 36, 1627>; KOEN LENAERTS and PIET VAN NUFFEL, *European Union Law*, 3rd ed., London: Sweet & Maxwell, 2011, n. 11-037."

[39] GFCC, OMT-judgment (footnote 14 above), margin no. 87, elaborated at margin no. 88-93.

[40] At margin no. 84.

mechanism" – as irrelevant. It could neither change the assessment of the transgression of the European Central Bank's mandate, nor the violation of the prohibition of monetary financing of the budget.[41] The main argument is that it would amount to granting plain power to the European Central Bank to remedy any deterioration of the credit rating of any euro area Member State. Furthermore, it also "seems irrelevant" to the Court that the ECB only *intends* to assume a disruption to the monetary policy transmission mechanism if the interest rate charged from a Member State of the euro currency area were "irrational". To its view, it would be an almost "arbitrary interference with market activity" to single out individual causes as irrational. Thus, the distinction between "rational and irrational" ultimately appears to be "meaningless in this context".[42]

2.4.5. Alternative Interpretation of OMT in Conformity with Union Law

The German Court offers, however, an alternative interpretation of OMT, which it would consider to be consistent with primary law (*unionsrechtskonforme Auslegung*).[43] This would be the case if the OMT did not subvert the conditionality of the EFSF and ESM rescue programmes and if it were only of a supportive character for EU policies. Specifically, in the Court's view, the following limitations on OMT would mitigate the legal concerns:

- exclusion of the possibility of a debt cut;
- no purchases of selected Member States' debt up to unlimited amounts;
- the avoidance of interference with the price formation on the market as where as possible.[44]

In this regard, the detailed explanations issued by the Court include an interesting reference to the testimony of ECB representatives during the hearings of the Court in June 2013. Specifically, the explanations to the framework for the implementation of the OMT Decision (limited volume of a possible purchase, no participation in a debt cut, observance of certain time lags between the emission of a government bond and its purchase, no holding of the bonds to maturity) by the ECB representatives[45] would "suggest that an interpretation in

---

41 At margin no. 95.
42 At margin no. 98.
43 At margin no. 99 and 100.
44 At margin no. 100
45 Ibid.

conformity with the Union law would also most likely be consistent with the meaning and purpose of the OMT Decision".[46] It has remained, however, unclear how many of these provisions have to be implemented in order to make OMT legally acceptable for the German Federal Constitutional Court.

3. EVALUATION

The judgment of the German Federal Constitutional Court of 14 January 2014 has been widely criticised, not only by economists,[47] but also by legal scholars.[48] Nevertheless, consenting, or at least balanced, comments which see the merits of the clear stance that the Court has taken can also be found.[49]

3.1. THE INTEGRATION-FRIENDLY ATTITUDE AS A STARTING-POINT

At first sight, the German Court has demonstrated respect for the distribution of powers in the multilevel system of the EU and specifically for the European Court of Justice. Some legal scholars, however, question this:[50] a closer look would reveal that the decision of 14 January 2014 does, in fact, not respect the primacy of application of Union law (*Anwendungsvorrang*) and its interpretation by the ECJ,[51] as the GFCC has reserved the right to review whether an act has interfered with the inviolable core content of the "constitutional identity" (*Verfassungsidentität*) – even after a "friendly" interpretation of the OMT Decision by the ECJ.[52]

---

[46] Ibid.

[47] ADALBERT WINKLER (2014), imputing that the Court has decided on a financial theory.

[48] WERNER HEUN (2014), questioning the admissibility of the original complaints (p. 331), also questioning the admissibility of the referring order (p. 332), and criticising distinctively the qualification of OMT as *ultra vires* (p. 333); ALEXANDER THIELE (2013), p. 320; IDEM (2014b), stating serious technical flaws (p. 694) and disagreeing with the demarcation between monetary policy and general economic policy and stipulating in essence an almost free discretion of the ECB (pp. 694-697); DANIEL THYM (2013), p. 264; see, also, JÖRG UKROW (2014), p. 120 ("not continuously convincing"); ALEXANDER THIELE (2014a), pp. 244, 246-250.

[49] ASHOKA MODY (2014), p. 6 et seq, discussing the tasks the ECJ now has to fulfil (p. 17 et seq).

[50] ALEXANDER THIELE (2014a), p. 264: "can hardly be interpreted as a 'friendly act'".

[51] Cf. ALEXANDER THIELE (2014a), p. 248.

[52] GFCC, OMT-judgment (footnote 14 above), margin no. 27, 29.

The German Court referred key questions concerning the European System of Central Banks to the ECJ while, at the same time, unmistakably signalling its own judgment of the facts. Furthermore, by not asking for an expedited procedure pursuant to Article 23a ECJ Statute,[53] the GFCC left itself room to wait for a final decision when the economic situation in the euro area has improved. This way, the crisis does not need to unduly influence the ECJ's decision on the lawfulness of the OMT Decision.

In the final decision on the rest of the proceedings, the Court has again demonstrated its integration-friendly basic attitude.[54] In its constant jurisdiction to date it has never blocked a step towards further integration. After some initial reservations,[55] it conceded judiciary protection of fundamental rights against acts of the European organs to the ECJ (*Solange*) as long as it provided – "in general" – protection that was comparable to the German civil rights in force and their judicial enforcement.[56] Since this is warranted, the German Federal Constitutional Court does not exercise its jurisdiction in these fields and will treat complaints and petitions as inadmissible.[57] Only if this level of protection is not upheld in the jurisprudence of the ECJ, a petition to the GFCC can be admissible.[58]

In effect, the German Court has also not halted the Treaty of Maastricht,[59] the introduction of the euro,[60] or the re-shaping of the European Union by the Treaty of Lisbon,[61] all of which have brought considerable structural changes and fundamental advancements towards a closer union. However, it has expressed its concern about the flaws of some acts at European level, such as the deficits in democratic legitimation,[62] specifically in budgetary

---

53 Protocol (No 3) on the Statute of the Court of Justice of the European Union, Official Journal of 26 October 2012, C 83/210; hereafter "Statute ECJ".

54 GFCC, ESM final judgment (footnote 15 above); partially dissenting Jörg Ukrow (2014), p. 120.

55 BVerfGE 37, 271 (285) – *Solange I*.

56 BVerfGE 73, 339 (387) *Solange II*; 102, 147 (162 ff.) – *Soweit I*; 118, 79 (95) – *Soweit II*.

57 BVerfGE 102, 147 (162 ff.) – *Soweit I*.

58 BVerfGE 102, 147 (164) – *Soweit I*; 118, 79 (95) – *Soweit II*.

59 BVerfGE 89, 155.

60 BVerfGE 97, 350; affirmed BVerfG (K), *Neue Jurisitsche Wochenschrift* 1998, p. 3187.

61 BVerfGE 123, 267.

62 GFCC judgment of 27 October 2011, EFSF temporary injunction (BVerfGE 129, 284); final decision: GFCC judgment of 28 February 2012 (BVerfGE 130, 318), no decision by small committee of *Bundestag*; GFCC judgment of 29 June 2012 (BVerfGE 131, 152), obligation to inform the *Bundestag*.

matters,[63] but eventually refrained from interfering with the various measures introduced in the course of the crisis: financial support for Greece,[64] the establishment of the European Financial Support Facility (EFSF),[65] and its refusal to issue temporary injunctions (provisional orders) to stop the ratifications of ESM.[66]

In the procedures dealing with the creation of the European Stability Mechanism and the OMT Decision, the admissibility of the complaints has been largely rejected by the Court.[67] Only in view of the "overall budgetary responsibility" of the German federal parliament (*Bundestag*) complaints have been admitted,[68] largely due to the hard-to-calculate financial risks for German finances.[69] From a dogmatic point of view, the decisions can be questioned for procedural reasons.[70] The Court's arguments in favour of a review of the acts of the institutions and organs of the EU by a national court are not totally convincing.[71]

3.2. THE ADMISSIBILITY OF THE REFERRAL

The admissibility of the order for referral by the German Federal Constitutional Court has been questioned; mainly for three reasons:[72] (1) the opinion of the ECJ would, in essence, be

---

63 GFCC ESM provisional order (footnote 11 above) (= BVerfGE 132, 195 [239, margin no. 106]).

64 BVerfGE 125, 260 (denial of issuing a temporary injunction).

65 BVerfGE 126, 158 (denial of issuing a temporary injunction); GFCC judgment of 27 October 2011, EFSF temporary injunction (= BVerfGE 129, 124); see commentary, Daniel Thym (2011), p. 1011.

66 GFCC ESM provisional order (footnote 11 above) (= BVerfGE 132, 195); additional provisional order denied: BVerfGE 132, 287.

67 GFCC ESM provisional order (footnote 11 above) (= BVerfGE 132, 195); margin no 91, 93-102; GFCC ESM final judgment (footnote 15 above), margin no. 123.

68 GFCC, ESM provisional order (footnote 11 above), margin no. 197 et seq, with reference to BVerfGE 129, 124 (167 et seq); GFCC ESM final judgment (footnote 15 above), margin no. 122.

69 GFCC ESM final judgment (footnote 15 above), margin no. 122: "complaints are admissible to the extent that (…) incalculable risks are taken and democratic decision processes are shifted to the supranational or intergovernmental level, so that it is no longer possible for the German *Bundestag* to exercise its overall budgetary responsibility."

70 See the dissenting opinion of Justice Lübbe-Wolff to GFCC OMT-judgment (footnote 14 above), margin no. 1; highly critical in this point Alexander Thiele (2014a), pp. 250-255.

71 Dissenting opinion GERTRUDE LÜBBE-WOLF, GFCC, OMT judgment (footnote 14 above), margin no. 1; ALEXANDER THIELE (2014a), pp. 250-255; Jörg Ukrow (2014), p. 128; disagreeing ARMIN STEINBACH (2013), p. 918.

72 WERNER HEUN (2014), questioning the admissibility of the original complaints (p. 331), also questioning the admissibility of the referring order (p. 332); JÖRG UKROW (2014), p. 20; ALEXANDER THIELE (2014a), p. 50-255.

reduced to a mere advisory statement; (2) the OMT Decision of the ECB were only the preparation of an act and not a measure with legal consequences suitable for a review; (3) the asked questions would lack relevance for the cases pending in Germany.

3.2.1. The Reservation about having the "Last Word"

It was argued that the referral for a preliminary ruling is intended to ensure that the review is carried out by a judicial body which has exclusive jurisdiction for this purpose. If a national court were to reserve the last word to itself, like the GFCC does in view of the "identity control",[73] the preliminary ruling of the ECJ would then only be of an advisory nature.[74]

In several judgments, the ECJ has clearly stated that the preliminary ruling procedure may not be used as an instrument to obtain "advisory opinions on general or hypothetical questions". The activation of the procedure has to be an essential pre-requisite for the "effective resolution of a dispute". Article 267 TFEU may not be regarded as providing for a possibility of extracting an opinion from the European Court while at the same time reserving itself the right to depart from the answer handed down.[75]

With its judgment the GFCC has used a legal tool it had accepted in theory also for constitutional courts some time ago but had refrained to apply it in fact. It had accepted already many years ago, that the ECJ is part of the procedural due process in Germany[76] and that even supreme federal courts (*oberste Bundesgerichte*) are obliged to refer to the ECJ.[77] It had also required that before an *ultra vires* control takes place by the GFCC, the ECJ has to be given an opportunity to express its opinion on the questions of EU law in debate.[78] This now initiated practice is in line with the judicature of the majority of other supreme courts in the EU.[79]

---

[73] See p. 7 above.

[74] ALEXANDER THIELE (2014a), p. 247 et seq.

[75] ECJ, judgment of 12 March 1998, C-314/96 *Djabali*, I 1157 margin no 19, judgment of 30 March 2004, C-147/02 *Alabaster*, I-3127 margin no. 4, judgment of 26 February 2013, C-617/10 *Åkerberg Fransson*, ECLI:C:2013:105, margin no. 2.

[76] BVerfGE 73, 339 (366).

[77] BVerfG, 1 BvR 1036/99, judgment of 9 January 2001, *Deutsches Verwaltungsblatt*, 2001, p. 720; 1 BvR 230/09. judgment of 25 February 2010, *Neue Juristische Wochenschrift*, 2010, p. 1268.

[78] BVerfGE 126, 286 (304).

[79] See, for details, with many references also for German courts: JÖRG UKROW (2014), pp 122 et seq.

This can be regarded as a sign of the intensification of a development in which EU law becomes a constitutional legal order of its own, and in which even a constitutional court with a prominent status evolves into a "normal" court or tribunal within the meaning of Article 267 TFEU.[80] The "cooperative relationship"[81] between the ECJ and the GFCC may require a more receptive stance on the part of the ECJ in exceptional cases like this. At the level of constitutional courts, "mutual loyalty" might require it to open a path to dialogue. A "spirit of co-operation" "must prevail in the preliminary ruling procedure".[82] Trust in the loyalty of the national court should speak in favour of the admissibility of the GFCC's order of referral.

The reservation of a "last word" may be questionable in view of the consequences as the European organs and institutions are likely to follow the ECJ and the *Bundesbank* may be forced by the instruments of the primary law (Article 35.6 Statute ESCB/ECB) to follow as well. This appears to be consistent with the logic of a multilayered governmental structure. Only in extreme cases, it might be appropriate that national courts refuse to follow court decisions of the higher level.

3.2.2. The OMT Decision as Object of Judicial Review

Since no purchases under OMT have actually been performed to date, it could be questioned whether the decision of the Governing Board of the ECB and the publication of the "technical features" at the subsequent press conference and on the Internet already constitute an act which could be subject to legal challenge. Preventive legal protection has been provided before by the GFCC in order to "avoid consequences that cannot be corrected".[83] The minutes of the board meeting[84] clearly show that a distinct decision was taken by the competent organ and it was not just a discussion of a tentative plan. In contrast to other legal acts of the EU, formal publication was not necessary for its legal validity; not even *any* form

---

[80] Specifically, JÖRG UKROW (2014), p. 122, 124, 129 et seq; see, also, GIUSEPPE MARTINICO (2010); FRANZ C. MAYER (2010), pp. 402, 434-436; JAN KOMÁREK (2013).

[81] Also, the ECJ describes the reference procedure as an "instrument of cooperation", judgment of 12 March 1998, C 314/96 *Djabali*, I 157, margin no. 7.

[82] ECJ judgment of 30 March 2004, C-147/02 *Alabaster*, I-3127 margin no. 54.

[83] GFCC, OMT judgment (footnote 14 above), margin no. 34, referring BVerfGE 1, 396 (413); 74, 297 (318 et seq); 97, 175 (164); 108, 370 (385); 112, 363 (367); 123, 267 (329).

[84] Appendix II below.

of publication at all. An often-overlooked provision in EU primary law explicitly leaves it to the discretion of the ECB to decide whether to publish "its decisions, recommendations and opinions", Article 132(2) TFEU. This rule makes sense in view of the global economic consequences that a decision or even a mere opinion of this institution may have.

In addition to this argument, it can also be argued that the ECB emphasises the objective of the ECB to "intervene" in the markets in an unconventional way. It highly esteems (informal) communication as an instrument to conduct monetary policy. Also, with regard to the statement of the President of the ECB about defending the euro "whatever it takes"[85] and its effect on the markets, the announcement of OMT with specific details regarding its technical features can only be judged as an act of legal significance that is open to judicial review.

3.2.3. Lacking Relevance

It has been deliberated that the questions submitted by the GFCC to the ECJ lack relevance for the cases pending in the German court. In specific, it has been doubted that the petitioners have standing in the German court.[86] Accepting the standing of the petitioners, however, appears to be consistent with the former jurisprudence of the German court in respect of Article 38 (1) of the German federal constitution but contains an extension.[87] A simple omission by the German federal government to act may now satisfy the requirements for a standing.[88] More serious are the concerns, that by granting standing for everyone in a constitutional complaint on the grounds of a transgression of competences any complaint of a breach of competences by a European organ or institution would have to be heard in the national court.[89] Whether the "qualified" and "evident" transgression of competences has been demonstrated by the petitioners may also be doubted. The German court states such a

---

85 See Section 1 above.

86 ALEXANDER THIELE (2014a), p. 250.

87 Even stricter JÖRG UKROW (2014), p. 127 (change of judicature), contending furthermore that another extension can be seen that not only an "identity control" – affecting only German constitutional law – but also an "*ultra vires* control" – affecting all Member States – has been admitted (p. 125 et seq).

88 JÖRG UKROW (2014), p. 127 et seq; WERNER HEUN (2014), p. 331.

89 ALEXANDER THIELE (2014a), p. 253 et seq; WERNER HEUN (2014), p. 332; JÖRG UKROW (2014), p. 128, disagreeing: dissenting opinion of judge MICHAEL GERHARD, GFCC, OMT-judgment (footnote 14 above), margin no. 54; WERNER HEUN (2014), p. 331.

breach only in conditional[90] even if it makes clear that in its opinion it would have to be affirmed. By using the phrase "controversial but evident breach" it shows some additional flexibility.

Concerns about the admissibility of the complaints do, however, not affect the admissibility of the referral.[91] To a large extent, the ECJ has left to the national courts to decide which questions of EU law are considered relevant for the pending case.

3.3. THE CONFORMITY OF OMT WITH EU LAW

However, the legal concerns expressed by the German Court with regard to the conformity of OMT with key provisions of the primary law of the EU are convincing and well-founded. The very wording of the provisions, the systematic structure of the rules, and the history of the legislation, which led to the Treaty of Maastricht, all support the reasoning of the Court.[92]

The Court is right in judging OMT to be a measure of economic policy which is not covered by the competence of the EU and the ESCB, which is an instrument that undermines the prohibition of monetary financing by the Member States, and in discarding the alleged malfunctioning of the monetary transmission mechanism as a pretext for justification.

3.3.1. OMT as Measure of Economic Policy

Several legal scholars question already the possibility of distinguishing between monetary policy and economic policy.[93] Both were too closely interwoven for a clear separation. It is contended that all measures of monetary policy have economic consequences. Hence, only a distinction according to the instruments used would be feasible.[94] Furthermore, it is argued –

---

90 Critical ALEXANDER THIELE (2014a), p. 254 et seq.

91 JÖRG UKROW (2014), p. 128, disagreeing: dissenting opinion of judge MICHAEL GERHARD, GFCC, OMT-judgment (footnote 14 above), margin no. 54; WERNER HEUN (2014), p. 331.

92 MARTIN SEIDEL (2010), p. 521; WALTER FRENZ and CHRISTIAN EHLENZ (2010), p. 334; HELMUT SIEKMANN (2013a), p. 144-149; disagreeing: CHRISTOPH HERRMANN (2010c), p. 645; HANNO KUBE (2012); PETER SESTER (2013), pp. 453-456 (without structured legal reasoning); WERNER HEUN (2014), pp. 333-335; ALEXANDER THIELE (2014a), pp. 256-264; IDEM (2014b), p. 697 et seq.

93 ALEXANDER THIELE (2014a), pp. 255-264; IDEM (2014b), p. 697 et seq.

94 WERNER HEUN (2014), p. 333; ALEXANDER THIELE (2014a), pp. 255-264; IDEM (2014b), p. 697 et seq.

contrary to the opinion of the GFCC – that an independent economic policy is essential for conducting monetary policy.[95]

Rescuing insolvent banks, banking systems, and sovereigns has always been a matter of fiscal or economic policy. The primary law of the Union strictly separates monetary policy – attributed exclusively to the EU pursuant to Article 3(1)(c) – from (general) economic policy – retained by the Member states pursuant to Article 119, 127 TFEU. Economic policy does – in general – not belong to the tasks and competences of the ESCB. This separation and distribution of competences is fundamental for the design of the Economic and Monetary Union, found after long debates.[96] It would become meaningless, however difficult it might be to draw the line in a specific situation, if the ECB were allowed to salvage insolvent debtors or to subsidize selected regions of the euro area. For the same reasons the often-propagated wide margin of discretion for the ECB[97] cannot be acknowledged. If the superior expertise of the persons framing a decision would be a decisive threshold for judicial control the most existential decisions would be excluded from the system of checks and balances. The principle of limited government, fundamental for western democracy, would come to an end.

This result is even more compelling in case the rescue operations could select single institutions and countries to save from financial distress. Monetary policy at its core is characterised by its global scope. It may not be used to support only fractions of the area in which the currency is legal tender. Along this line, the Federal Reserve System of the USA may not support single states. It may not purchase debt of these entities but only of the Federal Government.[98] Simply because there is no sufficient debt of a central government

---

95 WERNER HEUN (2014), p. 333.

96 HELMUT SIEKMANN (2012), p. 366; IDEM (2013b), *Einführung*, margin no. 30; Article 119 TFEU margin no. 22, 24 et seq; strongly disagreeing ALEXANDER THIELE (2013), p. 33, referring to Article 127 (1) sentence 2 TFEU, which is, however, not a suitable basis for measures outside of monetary policy.

97 MAX VOGEL (2012), p. 487 et seq; ALEXANDER THIELE (2013), p. 39 et seq; WERNER HEUN (2014), p. 333.

98 In essence, only bonds of the Federal Government and the agencies it has assumed liability for may be purchased, provided that they are bought "in the open market". The purchase of obligations of any state, county, district, political subdivision, or municipality in the continental United States is *only allowed* if they are issued in anticipation of the collection of taxes or in anticipation of the receipt of assured revenues and only if they have maturities not exceeding six months from the date of purchase, 12 USC § 355 (1).

does not justify an expansion of the range of competences;[99] in specific, not to selectively purchase debt of specific subsets of the currency area.

It would be a serious methodological flaw to conclude from instruments given to the ECB, like operations in the open market (Article 18.1, first indent, Statute ESCB/ECB), to its legality, no matter what purpose or what effect is pursued by employing them. The provision clearly states that this instrument may only be used to achieve the *objectives* of the ESCB and to carry out its *tasks*. Neither the objective of price stability is promoted by Outright Monetary Transactions nor do they serve the discharge of the tasks outlined in Article 127(2) TFEU.

The ancillary tasks described in Article 127(5) TFEU only allow the ESCB to "contribute" to the smooth conduct of policies pursued by the "competent authorities". Outright Monetary Transaction as designed by the ECB would not contribute to the actions of the competent (national) authorities but replace them; at least to the greatest part. Not all measures involving money are monetary policy.

In the beginning, the support measures of the ECB might have been justifiable as providing liquidity for basically solvent institutions. This cannot be supported any more after seven years of financial distress, re-structuring the Greek sovereign debt, rescuing the insolvent banking system of Cyprus, and the still unsound southern European banking systems despite a zero-interest environment.[100]

3.3.2. Monetary Financing of the Budget

Article 123 TFEU and Article 21.1. Statute ESCB/ECB forbids the purchase of government bonds "directly" from the emitting Member States, *i.e.*, the purchase on the primary market. This prohibition is, however, not limited to this interdiction, but is an expression of a broader prohibition of monetary financing of the budget.[101] In specific, it interdicts all manoeuvres to elude, dodge, or to circumvent this provision.[102]

---

[99] This is, however, a main argument of WERNER HEUN (2014), p. 334.

[100] MARTIN SEIDEL (2010), p. 521; WALTER FRENZ and CHRISTIAN EHLENZ (2010), p. 334; HELMUT SIEKMANN (2012), p. 371; IDEM (2013a), pp. 144-149; disagreeing: CHRISTOPH HERRMANN (2010c), p. 645; WERNER HEUN (2014), pp. 333-335; ALEXANDER THIELE (2014a), pp. 256-264; IDEM (2014b), p. 697 et seq.

[101] See KOEN LENAERTS and PIET VAN NUFFEL (2011), n. 11-037; ALBERTO DE GREGORIO MERINO (2012), pp. 1625, footnote 36, 1627; HELMUT SIEKMANN (2012), p. 370 et seq; VESTERT BORGER (2013), p. 119, 134.

[102] WALTER FRENZ and CHRISTIAN EHLENZ (2010), p. 334; HELMUT SIEKMANN (2012), p. 371, with further

Nevertheless, it is contended that all arguments in favour of such an evasion of strict legal norms are not valid: debt cut, enhanced default risk, holding until maturity, financing of budget aloof from capital markets, and incentive to purchase in the primary market although not warranted by the fundamentals of the issuer.[103]

The GFCC has seen all this. To alleviate the dangers (so far) negated in the scholarly writings it has listed the crucial points for a benign interpretation of the OMT Decision in order to be acceptable.[104]

3.4. CONSEQUENCES OF DIVERGING COURT RULINGS

The GFCC's decisions are binding for all German authorities. They have the virtue of law. Thus, the German government and the *Bundesbank* would be obliged to comply with the decisions of the Court. All constitutional organs, authorities and courts "may not take part in the decision making process and the implementation of *ultra vires* acts".[105] If, notwithstanding this, they proceed to do so, legal actions against them could ensue. As a consequence, the *Bundesbank* would be prohibited from participating in OMT, regardless of what the European Court of Justice pronounces about the conformity with EU-law. In the event that the GFCC finally comes to the conclusion that OMT violates the "core content of the constitutional identity" protected by Article 79 sec. 3 GG, it would be inapplicable "from the outset".[106]

In the event that the ECJ were to decide that OMT was in conformity with EU law and that the *Bundesbank* was not implementing the Eurosystem policy appropriately, the ECB could sue the *Bundesbank* in a specific procedure before the ECJ, pursuant to Article 35.6. Statute ESCB/ECB.

---

references; idem (2013a), p. 149; in principle, also conceded by: ALEXANDER THIELE (2013), p. 73, with critical discussion of HELMUT SIEKMANN (2013); WERNER HEUN (2014), p. 335.

[103] WERNER HEUN (2014), p. 335, retreating again to a wide margin of discretion; cf. with a more sublime argumentation ALEXANDER THIELE (2013, pp. 63-76, discussing in particular the possibilities of circumvention.

[104] Section 2.4.5. above.

[105] GFCC, OMT-judgment (footnote 14 above), margin no. 29 at the end, with reference to: BVerfGE 89, 155 (188); 126, 286 (302 et seq.).

[106] GFCC, OMT-judgment (footnote 14 above), margin no. 27.

4. OUTLOOK

The reputation of both courts would suffer from an open conflict. The judges of both institutions know each other and meet often in a variety of settings. It is also noteworthy that the President of the ECJ, Vasilios Skouris, of Greek origin, speaks German, studied law in Germany, and was professor of law in Germany. Although the courts may well disagree, they certainly understand where each is coming from in its analysis.

If the ECJ were to ignore completely the GFCC's analysis and the arguments presented without providing substantially new arguments or evidence, the GFCC could consider itself well-justified in ruling that OMT are beyond the ECB's mandate and forbid German authorities to support them.

All things considered, the ECJ has an incentive to adopt at least some of the limitations held to be essential by the GFCC. However, it could announce its own interpretation of OMT which would incorporate a subset of the criteria given by the GFCC for a potential admissibility of OMT,[107] but not all them. The GFCC might then find it rather difficult to reject such a "compromise interpretation". What to accept and what to reject would depend, importantly, on which aspect the ECB considered to be most important in order to achieve the objectives that it has in mind.

REFERENCES

Borger, Vestert (2013): "The ESM and the European Court's Predicament in Pringle", *German Law Review*, 14 (1): pp. 113-127.

de Gregorio Merino, Alberto (2012): "Legal development in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance", *Common Market Law Review* 49 (5): pp. 1613-1645.

Deutsche Bundesbank (2012): "Stellungnahme gegenüber dem Bundesverfassungsgericht zu den Verfahren mit den Az. 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1439/12, 2 BvR 1824/12, 2 BvE 6/12", 21 December 2012.

[107] Section 2.4.5. above

European Central Bank (2011a): "The Reform of Economic Governance in the Euro Area – Essential Elements", *Monthly Bulletin*, March 2011: pp. 99-119.

Henry, Roland (2012): "Unkonventionelle Geldpolitik in Krisenzeiten", *Kurswechsel*: pp. 64-69.

Frenz, Walter and Christian Ehlenz (2010): "Europäische Wirtschaftspolitik nach Lissabon", *Gewerbe Archiv*, (9): pp. 329-336.

Herrmann, Christoph (2010a): Währungshoheit, Währungsverfassung und subjektive Rechte, Tübingen: Mohr Siebeck.

Herrmann, Christoph (2010c): "EZB-Programm für die Kapitalmärkte verstößt nicht gegen die Verträge – Erwiderung auf Martin Seidel", *Europäische Zeitschrift für Wirtschaftsrecht*, (9): p. 645.

Heun, Werner (2014): "Eine verfassungswidrige Verfassungsgerichtsentscheidung - der Vorlagebeschluss des BVerfG vom 14.1.2014", *Juristen Zeitung*, (7): pp. 331-337.

International Monetary Fund (2013): "Unconventional Monetary Policies – Recent Experiences and Prospects", 18 April 2013.

Jarass, Hans D. and Saša Beljin (2004): "Die Bedeutung von Vorrang und Durchführung des EG-Rechts für die nationale Rechtsetzung und Rechtsanwendung", *Neue Zeitschrift für Verwaltungsrecht*, 23 (1): pp. 1-11.

Komárek, Jan (2013): "The Place of Constitutional Courts in the EU", *European Constitutional Law Review*, 9 (3): pp. 420-450.

Kube, Hanno (2012): "Rechtsfragen der völkervertraglichen Euro-Rettung", *Zeitschrift für Wirtschafts- und Bankrecht*, (6): pp. 245-253.

Lenaerts, Koen, and Piet Van Nuffel (2011): *European Union Law*, 3rd ed, London: Sweet & Maxwell.

Martinico, Giuseppe (2010): "Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?", in: Filippo Fontanelli, Giuseppe Martinico and Paolo Carrozza (eds), *Shaping Rule of Law through Dialogue: International and Supranational Experiences*, Groningen: Europa Law Publishing.

Mayer, Franz C. (2010): "Multilevel Constitutional Jurisdiction", in: Armin von Bogdandy and Jürgen Bast, (eds), *Principles of European Constitutional Law*, 2nd ed, Oxford: Hart Publishing/Munich: C.H. Beck, pp. 399-439.

Mody, Ashoka (2014): "Did the German Court Do Europe a Favour?", Bruegel Working Paper 2014/09.

Schöbener, Burkhard (2011), "Das Verhältnis des EU-Rechts zum nationalen Recht der Bundesrepublik Deutschland", *Juristische Arbeitsblätter*, 43 (12), pp. 885-894.

Seidel, Martin (2010): "Der Ankauf nicht markt- und börsengängiger Staatsanleihen, namentlich Griechenlands, durch die Europäische Zentralbank und durch nationale Zentralbanken – rechtlich nur fragwürdig oder Rechtsverstoß?", *Europäische Zeitschrift für Wirtschaftsrecht*, (14): p. 521.

Seidel, Martin (2011): "Europarechtsverstöße und Verfassungsbruch im Doppelpack", *Europäische Zeitschrift für Wirtschaftsrecht*, (7): p. 241.

Peter Sester (2013): "Plädoyer für die Rechtmäßigkeit der EZB-Rettungspolitik", *Recht der internationalen Wirtschaft*, (7): pp. 451-456.

Siekmann, Helmut (2012): "Law and Economics of the Monetary Union", in: Thomas Eger and Hans-Bernd Schäfer (eds), *Research Handbook on the Economics of the European Union Law*, Cheltenham UK/Nothampton, MA, USA: Edward Elgar Publishing, pp. 355-411 (Research Handbooks in Law and Economics, Series Editors: Richard A. Posner and Francesco Parisi).

Siekmann, Helmut (2013a): "Missachtung rechtlicher Vorgaben des AEUV durch die Mitgliedstaaten und die EZB in der Staatsschuldenkrise", in: Thomas M.J. Möllers and Franz-Christoph Zeitler (eds), *Europa als Rechtsgemeinschaft – Währungsunion und Schuldenkrise*, Tübingen: Mohr Siebeck.

Siekmann, Helmut (2013b): "Einführung, Article 119 TFEU", in: Helmut Siekmann (ed): *Kommentar zur Europäischen Währungsunion*, Tübingen: Mohr Siebeck.

Siekmann, Helmut, and Volker Wieland (2014a): "Have Markets Misunderstood the German Court's Decision on OMT?", *Vox*, 3 October 2014.

Siekmann, Helmut, and Volker *Wieland* (2014b): "The German Constitutional Court's Decision on OMT: Have Markets Misunderstood?", London: Centre for Economic Policy Research, Policy Insight No. 74 (October 2014).

Siekmann, Helmut (2014c): "Article 88 GG", in: Michael Sachs (ed), *Grundgesetz*, 7th ed, Munich: C.H. Beck.

Siekmann, Helmut (2015): "The Legal Framework for the European System of Central Banks", in: Frank Rövekamp, Moritz Bälz, Hanns Günther Hilpert (eds.), Central Banking and Financial Stability in East Asia, Heidelberg, Springer, Chapter 3 (in print).

Sinn, Hans-Werner (2013): "Verantwortung der Staaten und Notenbanken in der Eurokrise", *ifo Schnelldienst 66*, 12 June 2013, pp. 03-33 (available at: http://www.cesifo-group.de/ifoHome/policy/Sinns-Corner/Sinn-Juni2013-Verantwortung-in-der-Eurokrise.html).

Steinbach, Armin (2013): "Die Rechtmäßigkeit der Anleihekäufe der Europäischen Zentralbank", *Neue Zeitschrift für Verwaltungsrecht*, (14): pp. 918-921

Thiele, Alexander (2013): *Das Mandat der EZB und die Krise des Euro*, Tübingen: Mohr Siebeck.

Thiele, Alexander (2014a): "Friendly or Unfriendly Act? The 'Historic' Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program", *German Law Journal*, 15 (2): pp. 241-264.

Thiele, Alexander (2014b); "Die EZB als fiskal- und wirtschaftspolitischer Akteur?", *Europäische Zeitschrift für Wirtschaftsrecht*, (18): pp. 694-698.

Thym, Daniel (2011): "Anmerkung", *Juristen Zeitung*, (20): p. 1011.

Thym, Daniel (2013): "Anmerkung", *Juristen Zeitung*, (5): pp. 259-264.

Ukrow, Jörg (2014): "Von Luxemburg lernen heißt Integrationsgrenzen bestimmen. Anmerkungen zur Vorlage-Entscheidung des Bundesverfassungsgerichts vom 14. Januar 2014", *Zeitschrift für Europarechtliche Studien*, 17 (2): pp. 119-139.

Vogel, Max (2012): "Die europarechtliche Bewertung der Euro-Rettung", *Zeitschrift für Europarechtliche Studien*, 10 (4), pp. 459-491.

von Weizsäcker, Carl Christian (2012): "Grenzen des Konzepts der unabhängigen Zentralbank", *Wirtschaftsdienst*, 92 (2): pp. 91-94.

Winkler, Adalbert (2014): "Mario Draghi und Helmut Schmidt – Retter, die gegen die Verfassung verstießen. Oder: Das Bundesverfassungsgericht entscheidet über die richtige Finanztheorie", *Credit and Capital Markets*, 47 (2): pp. 213-240.

Wolff, Guntram B. (2013): "The ECB's OMT Programme and German Constitutional Concerns", Think Tank 20: The G-20 and Central Banks in the New World of Unconventional Monetary Policy, available at: http://www.bruegel.org/publications/publication-detail/publication/789-the-ecbs-omt-programme-and-german-constitutional-concerns.

APPENDIX

1. PRESS RELEASE ON THE OMT-DECISION OF THE ECB

6 September 2012 – Technical features of Outright Monetary Transactions

As announced on 2 August 2012, the Governing Council of the European Central Bank (ECB) has today taken decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework:

Conditionality

A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

Coverage

Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No ex ante quantitative limits are set on the size of Outright Monetary Transactions.

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors with respect to

bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation

The liquidity created through Outright Monetary Transactions will be fully sterilised.

Transparency

Aggregate Outright Monetary Transaction holdings and their market values will be published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme

Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.[1]

[1] Taken from the report of the facts of the Case, GFCC, OMT-judgment (footnote 14 above), margin no. 3.

2. MINUTES OF THE 340TH MEETING OF THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK ON 5 AND 6 SEPTEMBER IN FRANKFURT AM MAIN

Minutes of the Meeting on 5 and 6 September in Frankfurt am Main

[…]

With regard to Outright Monetary Transactions (OMT), on a proposal from the President, the Governing Council:

[...]

(b) approved the main parameters of the Outright Monetary Transactions (OMT), which would be set out in a press release to be published after the meeting (Thursday, 6 September 2012);

[...].[2]

[2] Taken from the report of the facts of the Case, GFCC, OMT-judgment (footnote 14 above), margin no. 2.

IMFS WORKING PAPER SERIES

Recent Issues

89 / 2015	Helmut Siekmann	The Legal Framework for the European System of Central Banks
88 / 2015	Florian Deuflhard Dimitris Georgarakos Roman Inderst	Financial Literacy and Savings Account Returns
87 / 2015	Falko Fecht Roman Inderst Sebastian Pfeil	A Theory of the Boundaries of Banks with Implications For Financial Integration and Regulation
86 / 2015	Markus Behn Rainer Haselmann Thomas Kick Vikrant Vig	The Political Economy of Bank Bailouts
85 / 2014	Elena Afanasyeva Jochen Güntner	Lending Standards, Credit Booms and Monetary Policy
84 / 2014	Athanasios Orphanides	Are Rules and Boundaries Sufficient to Limit Harmful Central Bank Discretion? Lessons from Europe
83 / 2014	Tobias H. Tröger	How Special Are They? – Targeting Systemic Risk by Regulating Shadow Banking
82 / 2014	Markus Behn Rainer Haselmann Vikrant Vig	The Limits of Model-Based Regulation
81 / 2014	Volker Wieland Maik Wolters	Is there a threat of self-reinforcing deflation in the Euro area? A view through the lens of the Phillips curve
80 / 2014	Hermann Remsperger	Der makroprudenzielle Komplex: der Prozess, das Schloss, das Urteil
79 / 2014	Athanasios Orphanides	What Happened in Cyprus? The Economic Consequences of the Last Communist Government in Europe
78 / 2014	Michael Binder Marcel Bluhm	On the Conditional Effects of IMF Loan Program Participation on Output Growth
77 / 2014	Helmut Siekmann	Zur Offenlegung der Bezüge von Sparkassenführungskräften im Internet
76 / 2013	Y. Emily Yoo	Financial Regulation and Supervision Across Business Lines in the United States – Financial Holding Companies post Gramm-Leach-Bliley Act
75 / 2013	Athanasios Orphanides	Is Monetary Policy Overburdened?

74 / 2013	Tilman Bletzinger Volker Wieland	Estimating the European Central Bank's "Extended Period of Time"
73 / 2013	Tobias H. Tröger	The Single Supervisory Mechanism – Panacea or Quack Banking Regulation?
72 / 2013	Matthias Burgert Sebastian Schmidt	Dealing with a Liquidity Trap when Government Debt Matters: Optimal Time-Consistent Monetary and Fiscal Policy
71 / 2013	Helmut Siekmann Volker Wieland	The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany (publ. partially as "The question before the court", in: Economist, June 18, 2013)
70 / 2013	Elena Afanasyeva	Atypical Behavior of Credit: Evidence from a Monetary VAR
69 / 2013	Tobias H. Tröger	Konzernverantwortung in der aufsichtsunterworfenen Finanzbranche (publ. in: ZHR 2013, S. 475-517)
68 / 2013	John F. Cogan John B. Taylor Volker Wieland Maik Wolters	Fiscal Consolidation Strategy: An Update for the Budget Reform Proposal of March 2013
67 / 2012	Otmar Issing Volker Wieland	Monetary Theory and Monetary Policy: Reflections on the Development over the last 150 Years
66 / 2012	John B. Taylor Volker Wieland	Surprising Comparative Properties of Monetary Models: Results from a new Model Database
65 / 2012	Helmut Siekmann	Missachtung rechtlicher Vorgaben des AEUV durch die Mitgliedstaaten und die EZB in der Schuldenkrise (publ. in: Thomas M.J. Möller und Franz-Christoph Zeitler (ed.), Europa als Rechts-gemeinschaft – Währungsunion und Schuldenkrise, Tübingen 2013, pp.97-154)
64 / 2012	Helmut Siekmann	Die Legende von der verfassungs-rechtlichen Sonderstellung des „anonymen" Kapitaleigentums (publ. in: Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstag, herausgegeben von Michael Sachs und Helmut Siekmann, Berlin, 2012, pp. 1527-1541)
63 / 2012	Guenter W. Beck Kirstin Hubrich Massimiliano Marcellino	On the Importance of Sectoral and Regional Shocks for Price Setting
62 / 2012	Volker Wieland Maik H. Wolters	Forecasting and Policy Making