

OMT is Monetary Policy and Not Economic Policy

N°5 – June 2015

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In January 2014, for the first time in its history, the German Federal Constitutional Court submitted several questions to the European Court of Justice (ECJ) in Luxembourg and asked for a preliminary ruling. The questions had arisen within the framework of the OMT case, and the issue was whether or not the OMT (“outright monetary transactions”) programme announced by Mario Draghi, the head of the European Central Bank (ECB), is in compliance with the law of the European Union. The OMT programme (which has become well-known because Draghi said “whatever it takes to preserve the euro” when he unveiled it) plays an important role in the stabilization of the euro area. It means that the European System of Central Banks will be empowered to engage in unlimited buying of government bonds issued by certain Member States if and as long as these Member States are simultaneously taking part in a European rescue or reform programme (under the EFSF or the ESM). Hitherto the OMT has not been implemented. Nonetheless a suit contesting its legality was filed with the Federal Constitutional Court.

The European Court of Justice now had to decide whether or not the activities of the ECB were in compliance with European law. However, the ECJ had to take into account the prior assessment of the Federal Constitutional Court. In its submission the Federal Constitutional Court made it quite clear that it was of the opinion that there has been a violation of European law. But at the same time it did not exclude the possibility that the ECJ set up legal conditions for OMT in order to avoid a violation of European law.

Franz C. Mayer, Professor of European Law at the University of Bielefeld, was Counsel to the Federal Parliament in earlier cases on the Euro in Karlsruhe. He explains the ruling by the European Court of Justice and assesses the possible consequences.

The European Court of Justice confirmed the view of the European Central Bank that if it purchases bonds within the framework of the OMT programme, it is not violating European law. What are the main arguments of the court? And has it issued any guidelines to which the bank will have to adhere?

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One of the main objections to the OMT programme has been that it is actually economic policy. Since this is not one of the ECB's competences, it would seem to be acting in violation of its powers (an "ultra vires act"). Basically the ECJ agrees with the view taken by the European Central Bank, which is that the OMT programme can be assigned to the area of monetary policy. And this is one of the competences of the EU – and thus of the ECB. The argument centres on the assertion that the purpose of the OMT programme is to ensure the consistency and proper transmission of monetary policy. If the objectives of monetary policy decision-making are no longer transmitted and indeed disregarded in parts of the euro currency area, it will have a negative effect on the ECB's ability to promote price stability. The ECJ admits that there is an indirect economic policy impact of such a programme, but this is not relevant for the competence issue. Furthermore, the ECJ considers "selectivity," that is, the fact that only some of the Member States are covered by the OMT programme, i.e. crisis-ridden states which have sought refuge under the ESM umbrella, to be legally defensible if, that is, the disruption of the monetary policy transmission mechanism emanates from only a few Member States.

The ECB links OMT purchases to participation in economic adjustment programmes (which in effect are austerity and consolidation programmes). However, the ECJ does not believe that this has robbed it of its independence. The ECJ emphasizes the fact that independence also signifies the ability to base one's actions "in a wholly independent manner" on certain preconditions.

Another complaint is that the ECB has in fact been engaged in banned monetary financing, de facto financing government expenditure. When all is said and done, by purchasing government bonds it is in the final analysis providing financial support for the budgets of the states concerned, which thus no longer have any incentive to exercise budget discipline. In this context it needs to be remembered that the treaties permit the ECB to purchase government bonds on the secondary market, but not on the primary market. The ECJ makes it quite clear that it is not permissible to

circumvent the ban on purchases on the primary market and to cook the books and makes a number of constraints in this regard. In particular market participants and the Member States should not always be able to assume that the ECB will immediately purchase certain government bonds on the secondary market, there must not be a certainty that bonds will be purchased.

In its reference the Federal Constitutional Court emphasized the fact that it was expecting the European Central Bank to be given certain guidelines and constraints. Has the ECJ met these expectations?

To a large extent at any rate. The ECJ makes it very clear that the OMT programme can operate only as long as there are in fact problems concerning the transmission of monetary policy. Furthermore, as I said, the ban on monetary financing must not be circumvented. The ECJ has subjected the OMT programme to a proportionality test in order to evaluate both its suitability and its necessity. The express renunciation of a debt cut, which the Federal Constitutional Court (FCC) was asking for, is not mentioned by the ECJ, though. But the ECJ makes a point of emphasizing that the concept of the treaties is to have a central bank which, whether one likes it or not, has the duty to make certain decisions that can incur certain financial risks for the bank.

Much has been written about the fact that the courts have conflicting views. What issues are at the heart of this conflict, and do you believe that it has now been defused?

One needs to draw certain distinctions. In as much as we are talking about the legality of the ECB's activities with regard to OMT, the question has been answered, at least as far as the ECJ is concerned. With this, there is a chance that the FCC will not allow the conflict to escalate in this area. This would also help to defuse the issue of "quantitative easing" (QE), another ECB purchasing programme which has a different structure and a different background. A suit contesting the legality of this programme has now been filed with the Federal Constitutional Court in Karlsruhe.

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However, the fundamental point of conflict between the courts has not gone away. This is due to the fact that the FCC believes that it has a right to monitor the limits of EU competences and in certain cases to contest the primacy of European law when it is in conflict with the Basic Law. In its reference to the ECJ the FCC in fact developed two lines of argument. On the one hand it asked whether the activities of the ECB were within its mandate and EU competences. The ECJ's unequivocal answer to this was "Yes." At the same time it emphasized that this dictum based on European law was binding for the court concerned, which is the FCC. But on the other hand even in its reference the FCC stated that after receiving a ruling from the ECJ it still intended to ascertain whether the activities of the ECB were in any way inimical to German constitutional identity. The reasoning on this point is rather convoluted, and personally I do not find it particularly convincing. Here is the argument: The purchases within the framework of the OMT programme would largely be made by the national central banks. The argument seems to be that the OMT program could lead to significant losses of the Bundesbank, the German Central Bank, which in turn could cripple the federal budget. This would render elections to Parliament meaningless to German voters, since a crippled budget deprives Parliament of any room for maneuver. This in turn would have an impact on the very core of democracy in Germany, which cannot be changed by a constitutional amendment, so that in the final analysis the OMT programme would harm German constitutional identity. I think this line of argument is rather hypothetical. The ECJ addresses the problem in an oblique way by pointing out that there are de facto limits of OMT purchases.

But let me get back to the principles at stake here. Monitoring competences in an "Ultra vires-control" and monitoring identity in an "identity control" can both have deleterious effect on European law if national courts engage in this monitoring. Just imagine if the courts in all of the 28 Member States decided to monitor all sorts of European legal acts. That is a task the ECJ reserves for itself, in accordance with the founding treaties. This point of conflict is defused in the ECJ's OMT ruling inasmuch as the ECJ briefly states its point of view – "the ECJ decides" – and does not keep

going on about it. That is a pragmatic way of doing things.

What impact is all this going to have on the rulings of the Federal Constitutional Court? Karlsruhe still has to decide whether the OMT programme is in compliance with the German Basic Law.

This question concerns the future of the FCC's ideas on how to monitor competences and identity, the Ultra vires-control and identity control. I cannot imagine that the FCC will throw out the ECJ's affirmative ruling on the ECB's competences with regard to OMT, even if not everyone in Karlsruhe is going to agree with everything the ECJ says. It remains to be seen whether in the future, the FCC will retract its monitoring of ultra vires activities and concentrate instead on constitutional identity. It is quite conceivable that the FCC claim to have jurisdiction on ultra vires acts will morph into a path for individuals to submit cases of competence violations to the European Court of Justice, which currently is not exactly easy when one thinks of the procedural limitations for individuals in that respect in European law. In future the FCC may simply pass such competence cases to Luxembourg and then adopt the rulings of the ECJ. By monitoring constitutional identity one would still have a lever with which to protect core provisions of one's own constitution.

In this particular case we will have to wait and see how the Second Senate of the FCC deals with the preliminary ruling of the ECJ. It is conceivable that after the ECJ ruling the FCC quietly decide to drop the subject of monitoring identity. The opposite is also conceivable. Perhaps the FCC will convene another huge hearing with all those involved and media coverage and experts and all the rest in order to clarify the question of whether the OMT programme can have a detrimental effect on the constitutional identity of the Federal Republic and the principles of democracy.

In this case it is not only the credibility of the OMT programme and its stabilizing effect on the euro which are at stake, but – once again

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– the euro rescue policy of the Federal government. It emphasizes that the ECB is independent, and refuses point blank to comment on its policies. Can the Federal Constitutional Court force it to change tack? And what would be the consequences if that happened?

Of course one of the criticisms of the two judges who wrote dissenting opinions to the FCC's reference to the ECJ was that it is not quite clear what the FCC should actually do if it comes to the conclusion that OMT has violated the constitution. Forcing the Federal Government by means of an FCC ruling to file a suit contesting the legality of the OMT programme with the ECJ would not be very meaningful, since the ECJ has just issued a ruling on the legality of the OMT programme. The FCC could certainly stop the Bundesbank from participating in such programmes. But in order for this to happen someone would have to demonstrate that the OMT programme violates the constitution, and that is something I cannot imagine.

What does the ruling and its impact on German law signify for future crisis policy as a whole?

It means on the one hand that when they choose instruments in the context of crisis policy the political actors and the ECB will have the same flexibility as they have had in the past. This ruling does not deprive them of anything. In particular the ruling does not suggest that the ECJ is critical of the ECB's "quantitative easing." But at the same time it is made clear that there are certain legal constraints which must be complied with. Thus the ruling is neither a carte blanche nor a blank cheque, but a reminder of the fact that certain rules in general and procedural and justification rules in particular have to be obeyed. It emphasizes that the ECB is not above the law. But most importantly the ECJ ruling with its level-headed tone and its sober statements has not exacerbated the risk of a judicial conflict, or a war of judges between the ECJ and the FCC. When one thinks of the Greek crisis and its economic problems, the last thing the EU needs is a legal crisis. The ECJ has proffered its hand to the FCC. The

German Constitutional Court should not refuse to shake it.

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