

**The impossible constitutional reconciliation of the
BVerfG and the ECJ in the OMT case. A legal analysis
of the first preliminary referral of the BVerfG**

by

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Abstract

In *Gauweiler v. ECB*, the German Constitutional Court referred for the first time a case to the European Court of Justice. The BVerfG openly doubted the legality of the OMT program of the European Central Bank, one of the most effective European instruments in counteracting the effects of the Euro-crisis. Despite the apparent willingness of the BVerfG to accept the referring decision of the ECJ, it is clear that the German judges have a different constitutional interpretation of the monetary mandate of the ECB. This article will focus on the different conceptions of European Monetary Union and in particular of the ECB proposed by the two Supreme Courts in their case-law, and will explain why the legality of the ECB's activity will be re-examined in the near future.

Key-words

ECB, OMT Program, Gauweiler, unconventional monetary measures, Eurocrisis, European Court of Justice, Constitutional Federal German Court

1. Introduction

In 2012, in a *press release*,^I the Governing Council of the European Central Bank (hereinafter: ECB/the Bank) activated the Outright Monetary Transactions program (hereinafter: OMT). Through this the Bank promised to purchase, in the secondary market, a potentially unlimited amount of government bonds of Member States in a macroeconomic adjustment program using the financial assistance received from the European Stability Mechanism (hereinafter: ESM). The OMT was the clearest example of the new expansive and unconventional monetary policy implemented by the ECB, initiated by the pledge of the Bank's President Draghi to do "whatever it takes"^{II} to save the Eurozone.

The purchasing program was justified by the necessity of reducing the excessive difference between the yields of government bonds of certain Member States (*spread*), which risked compromising the ECB's transmission mechanism of monetary policy. Indeed, according to the Bank, the bond yields of certain Member States was not completely dependent upon their economic fundamentals, but also incorporated "redenomination risk premia" (Nordvig 2015), consisting of the fear of investors about the possible breakup of the Eurozone and the abandonment of the euro by Member States in financial difficulties.

Since government bonds represent an essential instrument in regulating interest rates, their excessive volatility risked compromising the "singleness of the monetary policy"^{III} implemented by the ECB, compelling the Bank to intervene.

Although the mere announcement of the program was sufficient to reduce the *spread*, and the risk of a break-up of the Eurozone, the Bundesverfassungsgericht (hereinafter: BVerfG/Federal Court) decided to refer for the first time a case to the European Court of Justice (hereinafter: ECJ), openly putting into doubt the legality of the OMT. The referral,^{IV} in fact, was more a "diktat" (Mayer 2014) than an act of judiciary dialogue, since the German judges clearly deemed the OMT program illegal. According to their view, the promise to purchase Government Bonds under the normative framework created in the

press release was an act of economic policy, therefore outside the monetary mandate of the ECB, as well as a violation of the prohibition of monetary financing ex art. 123 TFEU.

The German judges decided to follow their controversial but well-established theory of the *ultra vires* and *identity* control (Schorkopf 2009, Mahlmann 2010), according to which they reserve for themselves the last word on the legality of the acts enacted by European institutions. Through these judiciary locks, the BVerfG aims to review and eventually strike as illegal every “manifest”^V violation of the principle of conferral perpetrated by European Institutions, especially every time the latter might put the fundamental prerogatives of the German Parliament in danger.

The ECJ, deciding in plenary session on the questions referred, did not agree with the view of the BVerfG on the nature of the OMT, considering it in keeping with the monetary competences of the ECB. The European Judges also established that the legal framework enshrined in the *press release*, including a certain number of limitations, was sufficient to avoid any violation of art. 123 TFEU.

The last chapter of the *Gauweiler* case was written on 21 June 2016, when the ball was kicked back into the field of the Federal Court, which decided *ob torto collo* to back the ECJ’s decision on the program. The case is important for two reasons. Firstly, because it represents another example of the “European case-law” of the BVerfG (Beck 2011), through which the German Court clarifies, and hopefully improves, its difficult relationship with the ECJ. Secondly, it sheds light on the complex role fulfilled by the ECB during the financial crisis, with the transformation of the Bank from a technocratic institution to a policy maker capable of preventing the breakup of the Eurozone with its unconventional monetary measures.

The present contribution will focus on the case law of the two supreme courts in respect of European Monetary Union, and in particular the action of the ECB. In the first section, it will analyze the first preliminary referral of the BVerfG, contextualizing this decision within the famous European jurisprudence of the Federal Court.

In the second, a similar assessment will be provided for the *Gauweiler* judgement of the ECJ, which must be read in conjunction with the *Pringle* case. In the last section, the final decision of the BVerfG will be taken into consideration to demonstrate that irreconcilable interpretations of the extension of the monetary mandate of the ECB are destined to resurface again in the future.

2. The monetary mandate of the ECB according to the BVerfG

As is well known, the treaties lay down a clear distinction between the economic and monetary pillars of European Economic Governance, with Member States' sovereignty in fiscal and economic policies coupled with the exclusive competence of the ECB in the monetary field.

The BVerfG's judgment strongly implied that the OMT program was an act of economic policy, therefore outside the monetary mandate of the ECB, because of 1) its objective, 2) the selectivity of the potential purchases and 3) the parallelism with the ESM and the risk to compromise the functioning of the latter.

For point 1), in the *Pringle*^{VI} case, the ECJ had stressed that the institution of the ESM, created for the financial assistance of Member States in economic distress, was an act of economic policy outside the exclusive monetary mandate of the ECB. The Bank, pursuing the same objective of the ESM with the OMT program, would have promised to perform an act which only Member states have the competence to implement.

At point 2) the German judges also stated that the monetary policies of the ECB cannot have a selective approach, or be differentiated according to the economic situation of single Member States. Differences in the yield of government bonds are entirely due to the economic fundamentals of issuing States, and the ECB must accept that in an open market economy there will always be differences in yields based on market assessments.^{VII}

Finally, in point 3), the judges stated that the purchases of government bonds implemented by the ECB may compromise the activity of the ESM. The latter is, indeed, provided with limited resources specifically conferred by Member States. The ECB, on the other hand, can issue an unlimited amount of money and therefore it could easily multiply the expenditure envisaged in the aid measure of the ESM. Furthermore, Member States under an adjustment program of the ESM would have no reason to follow the agreement reached with the latter, since they could still count on the better financial assistance provided by the ECB.^{VIII}

The BVerfG therefore proposed a particularly intense judicial review of the activity of the ECB; and the German judges were not afraid of analysing the motivation provided by the ECB for the program ("the safeguard of the monetary transmission mechanism") and,

supported by the technical advice of the Bundesbank, considering it “meaningless”. The Court did not accept the analysis formulated by the ECB according to which the *spread* of certain Member States would be the result of the “redenomination risk”, namely the fear of the markets for a possible breakup of the Eurozone. In the blunt analysis of the financial situation endorsed by the BVerfG, “*spreads* always only result from market participants’ expectations and are, regardless of their rationality, essential for market-based pricing”.^{IX} Trying to level the yields of different government bonds through the OMTs would amount to an illegal intervention in an open-market based economy, which is supposed to self-regulate.

Taking the above into consideration, it is now important to examine why the BVerfG, despite the dissenting opinions of the two most senior judges,^X decided to refer a question not only capable of exacerbating the already difficult relationship with the ECJ, but also of compromising the effectiveness of the most effective instrument of financial stabilization in the Eurozone’s toolkit.

A brief digression is paramount in understanding why the German Court sees, in the new expansionary measures of the ECB, a departure from the Treaties. The legal framework created at Maastricht to bring discipline to the euro was based on a strong “stability paradigm” (Tuori 2012, Borger 2016). In particular, Germany accepted giving up its strong and stable Deutsche Mark only on condition that the new European Economic Governance was a constitutionalized “Community of stability” (*Stabilitätsgemeinschaft*: Tuori 2012, Saitto 2015).

The characteristics of this Community are well known; the euro was put under the protection of an independent central bank, whose exclusive objective was to safeguard price stability (art. 127.1 TFEU). National governments, on the other hand, still retained responsibility for their budgets, and were put under the legal obligation to avoid fiscal profligacy, since excessive deficits may have spill-over effects on price stability. The budgetary freedom of national parliaments was legally constrained through a precise set-up of prohibitions (art. 123-125 TFEU), established in order to subject their economies to the control of financial markets.

The entire system was based on the conviction that Constitutional Law might effectively dictate the course of action of monetary and economic actors. Under this new

constitutional framework, the ECB was supposed to pursue price stability exclusively, while expansionary monetary policies were not only considered ineffective, but also illegal under the prohibition of monetary financing.^{XI}

The BVerfG promised to control the future compatibility of the monetary activity of the ECB with the principle of stability in the *Maastricht Urteil*,^{XII} where the transfer of functions and powers of the Bundesbank to the ECB was considered compatible with the Basic Law only because the latter was constitutionally committed to the “stability paradigm” of prices and budgets (Tuori 2012, Saitto 2015). In particular, the institution of an independent European Central Bank was acceptable because it was “inspired by Germany’s stability philosophy and only as long as this stability pact was actually respected” (Joerges 2014a).

It is easy to see in this referral a follow-up to the *Maastricht Urteil*. In order to counteract the effects of the sovereign debt crisis, the ECB decided to adopt expansionary, unconventional measures, which are incompatible with the original, stability-driven philosophy enshrined in the Maastricht economic rules.

It also constitutes further evidence of the “methodological nationalism” (Joerges 2014,b) continuously exercised by the BVerfG in its “European case-law”. The German Court has a distinctive inward-looking mentality (Weiler 2009), according to which the German culture of stability must be imposed at any cost within the German legal system, disregarding any potential spill-over effect on the European one.

During the euro-crisis, in a contested record of decisions,^{XIII} the Court defended the budgetary powers of the *Bundestag*, which was always to remain “the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments.”^{XIV} Any capital disbursement in bilateral loans to Greece before the crisis, and in rescue mechanisms later, was legitimate only as long as the *Bundestag* was “adequately informed, enabled to deliberate, and prevented from delegating its evaluation” (Everson & Joerges 2013).

But ultimately, the empowerment of the *Bundestag* was also the *judicial empowerment*^{XV} of the BVerfG itself. Evaluating the compatibility of European rescue measures with the budgetary powers of the German Parliament was the easiest way for German judges to directly control the process of European integration.

This operation was successful, since the final result of this judicial activism, carried out in the name of democracy (Wendel 2013), was economic governance where the Bundestag could effectively control its own expenditure, while the national parliaments of Member States financially rescued by the Union have lost any control on their own, forced to operate in “zero-choice democracies” (Heplas 2014).

The German judges were not satisfied when they discovered that the ECB was also capable of putting in place rescue mechanisms capable of circumventing the budgetary control of the *Bundestag*, thus outside their direct judicial control (SMP, OMT, QE programmes). The ECB, provided with its own budget, does not require any transfer of resources from the German Parliament, rendering a possible control from the BVerfG theoretically impossible. This led to the decision to carry out a further judicial empowerment, this time in favour of the Bundesbank.

The Bundesbank, despite the obligation to follow the directives of the European System of Central Banks,^{xvi} openly opposed^{xvii} the decision of the ECB to resort to unconventional monetary measures, considered incompatible with its monetary mandate. This “monetary controversy”, that should have remained within the Governing Council of the ECB, suddenly become a constitutional clash of continental proportions when the Federal Court empowered the *Bundesbank* with a “permanent responsibility for integration” (*Integrationsverantwortung*). This comprised the power to prohibit the implementation of EU acts, including the OMT, in cases where the BVerfG found them incompatible with the Basic Law. It is certainly true that the Federal Court also created *motu proprio*,^{xviii} a positive obligation for the Bundestag and the German Government to *actively* deal with manifest transgressions of power produced by EU Institutions (Wendel 2014). However, the entire referral revolves around the Bundesbank, and without the participation of the most important central bank of the continent, the bond-purchasing programme would lose its credibility.

Once again, the judicial empowerment of a German Constitutional actor constituted an opportunity to uphold the German philosophy of stability, this time directly *vis-à-vis* the ECJ, in order to defend the preservation of the *Stabilitätsgemeinschaft*.^{xix}

3. ... and according to the ECJ ...

The *Pringle* case was also at the basis of the ECJ's analysis,^{xx} although paradoxically the European judges used it to oppose the BVerfG's arguments rather than confirm them.

According to the *Pringle* judgment, in order to establish whether an act has a monetary or economic nature is necessary to refer principally to the objectives of the measure and the instruments chosen to attain them.^{xxi} Therefore, if we are to apply this case-law to the OMT Program, we may say that the latter seeks to ensure an "appropriate monetary transmission and the singleness of the monetary policy" (objectives) through the purchase of government bonds in the secondary market (implementing instruments).^{xxii}

The ECJ states that the monetary policy of the ECB, in order to function properly, must be "single"; therefore, the objective of ensuring an "appropriate monetary transmission" must be considered an objective consistent with the monetary mandate of the ECB.

The European judges also maintain that the Treaties expressly envisage the possibility for the ECB to purchase market instruments in the secondary market, including government bonds (art. 18, ESCB statute), and thus the instrument chosen is also in line with the objectives sought.^{xxiii}

The ECJ clearly establishes judicial control centered on an analysis of the objectives pursued which is very different from the one proposed by the BVerfG. The European Court, for instance, accepts without further analysis the objectives announced by the ECB in its press release ("the singleness of the monetary policy") as well as the technical analysis underlying the monetary situation of the Eurozone. While the BVerfG is ready to enter in the substance of the ECB's decisions without taking into consideration the risks involved in such a strong judicial review, the ECJ exercises the widest possible degree of judicial restraint, promising to limit its control only to an eventual (and unlikely) "manifest error of assessment."^{xxiv}

Alongside the formal control on the objectives announced by the ECB, the ECJ has also promised to verify the compatibility of the bank's action with the principle of proportionality. But here again, the European Judges confirm that, in reviewing the monetary decisions of the ECB, they need to leave the Governing Council with an

important margin of appreciation; and the more complex the technical features involved in the monetary assessment are, the broader will be the discretion enjoyed by the bank:

“As regards judicial review of compliance with those conditions, since the ESCB is required when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion.”^{xxv}

The ECJ, further on in its judgment, correctly points out that the mere announcement of the OMT program was sufficient to attain the objective sought, namely the restoration of the monetary transmission mechanism, and therefore the ECB never purchased any government bond under the legal framework established in the *press release*. According to the Court, the total lack of implementation is a clear evidence of the proportionality between the objectives and the instruments used by the ECB.^{xxvi}

The decision of the European judges to leave to the Governing Council a broad margin of discretion is also evident in the motivations, generic and almost tautological, used by the Court to dismiss the most important arguments made by the BVerfG.

Firstly, in the view of the ECJ, the fact that the purchases could indirectly support the financial stability of the Eurozone does not make the OMT program incompatible, in any way, with the monetary mandate of the ECB. The Bank has the competence to purchase government bonds in the secondary market (art. 18, ESCB statute) when in its assessment the singleness of its monetary policy is at risk (1).^{xxvii} While the BVerfG considers every overlapping effect between monetary and economic policies as an evidence of the violation of the ECB's competences, the ECJ considers it normal given the tight relationship between the two fields.

Secondly, the ECJ states that the treaties do not prohibit the ECB's implementation of monetary policy characterized by selectivity. Although conventional monetary measures are usually directed at the Eurozone as a whole, this does not mean that the bank cannot carry on a program whose effects are directed at selected Member States (2).^{xxviii}

Thirdly, the issue of parallelism with the ESM is resolved by the ECJ once again empowering the ECB with the discretion to take the right monetary decisions according to its technical expertise. The ECJ's judges point out that the involvement of the ESM

constitutes a necessary but not sufficient requisite in the activation of the OMT program. The Directive Council, therefore, will financially support the targeted Member States only as long as the purchases will be necessary to restore the singleness of the ECB's monetary policy. They will also be suspended (always at the ECB discretion!) in case the Member State assisted does not respect the macroeconomic adjustment program stipulated with the ESM (3).^{XXIX}

The current scholarship mostly seems to make a positive assessment of the light degree of judicial review applied by the ECJ to the monetary activity of the Bank (Pisaneschi 2016); the judgment has been considered a positive step towards developing legal accountability while respecting the technical expertise and discretion of the Bank (Hofmann 2015). According to this view, a more substantial judicial review would have forced lawyers to take monetary decisions, replacing the technical assessments of central bankers (Pisaneschi 2016, Bast 2014).

Even if a robust dose of judicial self-restraint is necessary when discretionary acts are involved, the judgment seems difficult to reconcile with the historical position of the Court, according to which no European Institution can escape judicial scrutiny.^{XXX}

Indeed, the judicial review established by the ECJ of the monetary activity of the Bank is at best residual. Although it is certainly true that during financial crises central banks encounter difficulties in producing uniform monetary effects in the whole area of their competence, it is clear that the "singleness of the monetary policy" is a too broad an objective on which to base a proper judicial review.

Within the Eurozone there will always be differences in the yield of government bonds of different Member States, and such *spread* will always constitute an obstacle to the singleness of the monetary policy of the ECB. As long as the ECJ accepts the objective formally announced by the ECB without engaging in further analysis, also empowering the bank with a broad margin of discretion in the implementation, the judicial review of the bank's activity will always be nothing more than a necessary formalism.

In addition to the light form of judicial review applied, it is also relevant to stress another element of this judgment, namely the absence of any constitutional analysis on the role of the ECB. The ECJ's decision to refrain from broadening the spectrum of its judicial analysis was probably a necessary choice in order to defuel the potentially explosive nature of the referral and avoid an open conflict with the Federal Court. It is possible to see a

similar, recalcitrant attitude in the *Pringle case*,^{xxxI} where the decision to legitimize the financial rescue of Member States despite the apparent literal incompatibility with the no-bail out clause constituted a silent “constitutional mutation” (Tuori & Tuori, 2014).

Compared to the European case-law of the BVerfG, finding a common narrative in the ECJ’s *Pringle* and *Gauweiler* decisions is more difficult.

According to Ioannidis, the two judgments had a similar impact on European integration to older milestone cases such as *Van Gend en Loos* and *Costa v. Enel*, providing a constitutional shift from “the Maastricht-born, market-based paradigm to that of cross-border transfers and financial assistance” (Ioannidis 2016). Following this theory, the Court, disregarding the textual meaning of the provisions under examination, would have provided a judicially-driven modification of the constitutional charters whose effects would be comparable with a process of treaty revision.

The major result of this transformation would be the abandonment of the “Maastricht price stability paradigm”, which had previously constrained the action of the ECB; but if price stability were no longer at center stage, with what principle has it been replaced?

Some may say solidarity,^{xxxII} where, in particular, the purchase of government bonds by the ECB would constitute an example of a Union willing to lend a hand to Member States in financial distress (SMP, OMT and QE Programs). Unfortunately, the strict conditionality attached to these monetary operations, similar and even more controversial than those implemented by Member States,^{xxxIII} seems to put into doubt the narrative of a Union based on solidarity.

At the center of new Economic Governance, and in particular of the action of the ECB, seems to be financial stability^{xxxIV} (Beukers 2014, Tuori & Tuori 2015). The OMT program, transforming the Bank into a lender of last resort,^{xxxV} willing to help national governments to refinance themselves despite the contrary opinion of the financial markets, would be the clearest example of this constitutional transformation.

4. The last chapter of the OMT saga

After the referral, the BVerfG had to decide whether follow the ECJ’s position on the legality of the program or confirm the incompetence of the ECB regarding the OMT; the answer arrived on 21 June 2016.^{xxxVI}

The choice of the Federal Court confirmed its reputation of a supreme court which “barks, but never bites” (Weiler 2009), accepting the ECJ’s ruling according to which the OMT Program would be perfectly compatible with EU Primary Law. In particular, the BVerfG declared inadmissible the questions directly concerning the ECB press release, whilst the questions regarding the omission perpetrated by the Bundestag, the German Government and the Bundesbank were deemed admissible, but unfounded.

The Federal Court strongly criticized the reasoning of the ECJ, but *obtorto collo* decided to accept its jurisdiction on the ECB’s action. According to the Federal Court, indeed, the judicial control promised by the ECJ would be insufficient to preserve the principle of conferral (art. 5 TEU). Taking the objectives declared by the ECB for granted without further analysis would be a *de facto* authorization to the bank to self-determine its own competence.^{xxxvii}

The BVerfG also criticized the decision of the ECJ to accept the objective of the restoration of the monetary mechanism, considered by the Federal Court as a justification of convenience for the action of the Bank.^{xxxviii} In addition, the BVerfG gave its comment on the constitutional role of the ECB, reaffirming its *status* of institution *sui generis*, which constitutes an exception to the fundamental democratic principle protected by the German Constitution.^{xxxix}

According to the BVerfG, the independence of the ECB constitutes an exception to the fundamental principle of democracy, established in the German Constitution (art. 38 and 20 of the *Grundgesetz*). Nevertheless, such an exception is justified because an independent central bank represents the best possible instrument to attain price stability.

The democratic principle, according to which every political decision must derive from the *demos*, represented in Germany by the Bundestag, can be derogated only “as long as” the ECB pursues exclusively the stability of prices. However, the justification underlying the “suspension” of such a principle is no longer considered feasible when the ECB adopts unconventional monetary programs such as the OMT, capable of producing relevant effects on the public budgets of Member States.

As already stated in the order of referral, the judges could not accept that the ECJ empowers so much competence to an institution acting outside the democratic arena, pleading for a stricter judicial review on the monetary activity of the Bank.

After the *pars destruens*, which actually does not present any new element in the analysis

of the monetary mandate of the ECB, the BVerfG explained, in its *pars costruens*, why it decided to establish the legality of the OMT program.

The BVerfG resorted to a judicial technique already used in its complicated relationship with the ECJ,^{XI} establishing that the OMT program was compatible with the German constitution “as long as” the program were implemented in adherence to the conditions laid down by the ECJ in its ruling.

The Federal Court has upheld on many occasions such requisites, as if the ECJ had substantially limited the possibility of the ECB to purchase government bonds; although it is quite clear that the ECJ did not establish any concrete limitations, thus giving the ECB the widest possible discretion in the implementation of the OMT program.

The BVerfG emphasized the obligation of the ECB to give a proper motivation for its acts,^{XII} a requisite that, according to the Federal Court, would lead to a stricter judicial review in the implementation of the program. The inconsistency of this reasoning is clear, since the Federal Court first laments the unconditional acceptance of the objective declared by the ECB, then expects a different result from the motivation attached to the implementing acts of the bank. It is, however, evident that if it were necessary to proceed with bond purchasing, the Directive Council would always resort to the objective already accepted by the ECJ, claiming that the singleness of the monetary policy is at risk. This broad and non-judicable motivation may help the judicial review of the BVerfG, but not the one promoted by the ECJ.

Furthermore, the BVerfG claims with great satisfaction that the ECJ’s ruling would have eliminated the most controversial element of the program, namely the possibility of purchasing an unlimited amount of government bonds. According to the Federal judges, indeed, the ECJ would have expressly limited the volume of bonds purchasable. This claim does not seem in keeping with the ruling of the ECJ either, for while it has clearly established that the ECB can only purchase the volume of bonds necessary to attain the objective pursued (“singleness of monetary policy”), it has also left this necessity-test at the discretion of the bank. The responsibility to check whether the objective has been attained, or not, will lie in the hands of the ECB.

Reading this decision it is clear that the BVerfG still considers the OMT program as illegal, but the German judges once again lacked the courage to use their controversial case-law to nullify an EU act and openly defy the ECJ.^{XIII} This lack of determination might

ultimately be beneficial to the Union, since it is unclear what effects a different decision could have been produced on the financial stability of the Eurozone.

Unfortunately, though, the decision of the German judges does not appear to be the result of a sincere preoccupation over the future of the Eurozone, but rather seems a natural consequence of the lack of juridical jurisdiction.

Although in fact the BVerfG has judicially created a complex system to evaluate the legality of EU secondary law,^{XLIII} it does not have any jurisdiction over EU institutions; the BVerfG has jurisdiction only over German national institutions, such as the Bundestag and the German Government.

The problem of the BVerfG is that these institutional actors do not in turn have any power over the ECB, and therefore the Federal Court does not have any instrument to strike down the monetary behavior of the bank as illegal. The BVerfG mentions the Luxembourg compromise,^{XLIV} but it is impossible to understand how this instrument could prevent the implementation of the OMT program. The ECB is completely independent from political actors, including the European Council, and it has a legal obligation to disregard any instruction received from European and National institutions.^{XLV}

In addition, the impositions established by the BVerfG over the Bundestag are incompatible with the independence of the ECB. In particular, it is impossible to understand what role the principle of subsidiarity would fulfill, which cannot be applied in monetary policies where the competence of the EU is exclusive, or the obligation to adopt political resolutions or parliamentary interrogations. The only obligation for accountability of the ECB is the “monetary dialogue” towards the European Parliament.^{XLVI} The Bank does not have any formal obligation to account to the German Parliament for its activity. In addition, even the strongest and most controversial political resolution from the Bundestag would have zero effects on the monetary activity of the ECB.

The only feasible option for the BVerfG was to empower the Bundesbank with a “responsibility for integration”, namely the responsibility to actively prevent any manifest transgression of competences by the ECB. As stated before, such responsibility was actually a judicially created excuse to influence the process of European integration, rendering the participation of the Bundesbank in the OMT program conditional to the respect of the “stability philosophy” of the *Maastricht Urteil*.

Nevertheless, such empowerment failed for two reasons. Firstly, a judicial decision of

the BVerfG, which prohibited the Bundesbank from taking part in the bond-purchasing operations, would be illegal, since national central banks are under the legal obligation of implementing the decisions and guidelines established by the Directive Council of the ECB.^{XLVII} And, secondly, although the credibility of the program would be compromised by such a decision, the ECB could still implement the purchases without the participation of the Bundesbank (Zilioli 2016).^{XLVIII}

Preliminary rulings should be an instrument to ensure the uniform interpretation of EU Law, not an excuse for supreme courts to fight over constitutional interpretation of the Treaties. Unfortunately, contraposition becomes inevitable when there are irreconcilable differences in the interpretation of the constitutional mandate of an Institution that, like it or not, has become the main institutional actor of the European politics in economic and monetary policies (Peroni 2013).^{XLIX} These differences did not disappear during the referral; and probably even worsened, since the German judges decided not only to interpret the treaty provisions, but also the ECJ ruling according to their domestic constitutional view of the ECB.

We can only explain the strong opposition of the BVerfG to the OMT program by taking in consideration the constitutional transformation of the ECB. The Bank, in the first ten years of its activity, was faithful to the “stability philosophy” of the Maastricht Treaty as interpreted in the *Maastricht Urteil*. In particular, it pursued the primary objective of price stability exclusively, while the mere possibility of adopting Keynesian-inspired expansionary monetary policies was considered both illegal and political unfeasible (Howarth & Loedel 2003). During the crisis, on the other hand, the Bank found itself in a constitutional dilemma of unprecedented complexity: how to ensure the survival of the currency, which it was called on to protect, without violating its constitutional mandate, which prevented it, at least textually, from the pursuit of the objective of financial stability. This is a classic “Catch-22” situation: not saving the common currency would have entailed the end of the European project, while saving it would have broken the constitutional pact at the origin of the EMU.

Unsurprisingly, the Bank decided to put the economy before the law. With a series of monetary operations, it supplied liquidity for the banking market, becoming the lender of last resort for banks in financial distress (Steinbach 2016). Furthermore, with the OMT program, it promised to purchase an unlimited amount of government bonds, becoming

the lender of last resort for national governments (De Grauwe 2014).

It is easy to see the dichotomy between the ECB before the crisis, whose actions were exclusively based on price stability, and the ECB after the crisis, focused on financial stability.

As long as the BVerfG does not accept the constitutional mutation of the Bank and the abandonment of the “stability philosophy” of the *Maastricht Urteil*, there will always be constitutional clashes between the German and the European Court.

It is likely that this broad divergence in the interpretation of the monetary mandate of the bank will reappear in the near future, since another expansive and unconventional monetary program of the ECB, the c.d. *Quantitative Easing*,^L has also been challenged before the BVerfG.

Are supreme courts the best actors to limit the increasing power and decision-making of the ECB? The overwhelming role fulfilled by the bank during the on-going crisis has raised concern among scholars and politicians alike. The Bank has even been considered as the “heir of the ECJ”^{L1} in promoting European integration at the expense of more democratic actors.

Although these concerns are well founded, it is necessary to take into consideration two elements. Firstly, the ECB has undoubtedly taken the driving seat in counteracting the effects of the euro-crisis, but its monetary behavior does not seem to present any element of originality if compared to the monetary policies of other major central banks; as the Fed, the Bank of England and the Bank of Japan have also implemented massive acquisitions of government bonds. Through the lens of comparative analysis, the monetary activity of the ECB does not seem so “unconventional” anymore.

Secondly, these analyses focus their attention on the technocratic nature of the monetary mandate of the ECB, without considering the *federal* one. The ECB, whose decision-making processes and executive role require the involvement of national central banks, is the only genuinely *federal* institution in European Economic Governance. If it is true that systemic crises require a common response by the Union, then the ECB was the only Institution correctly equipped to act.

The mismatch between monetary policy, firmly in the hands of President Draghi, and the economic pillar, still scattered and divided among Member States, is an issue that only a modification of the treaties can solve. The judicial dialogue among supreme courts does

not seem to be the right arena for this kind of challenge.

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^I ECB, *Technical features of the Outright Monetary Transactions*, Press Release, 6 September 2012.

^{II} Draghi Mario, speech at the Global Investment Conference in London, 26 July 2012.

^{III} Draghi Mario, *La politica monetaria della Banca Centrale Europea e la sua trasmissione nell'area euro. I mercati finanziari e le disfunzioni causate alla trasmissione della politica monetaria*, inaugural speech of the academic year 2012/2013, Bocconi University, Milan.

^{IV} BVerfG, 2 BvR 2728/13, 14 January 2014.

^V BvfrG, 2661/06, 6 July 2010 (Honeywell Decision).

^{VI} ECJ, Case C-370/12, *Thomas Pringle v. Government of Ireland*, 2012.

^{VII} BVerfG, 2 BvR 2728/13, 14 January 2014, paragraph 73.

^{VIII} *Ibidem*, paragraph 74.

^{IX} *Ibidem*, paragraph. 98 (emphasis not present in the original source).

^X Cfr the dissenting opinions of Judges Gerhardt and Lübke-Wolff.

^{XI} Cfr Howarth & Loedel 2003, analysing the first ten years of activity of the ECB: "In other words, there can be no short term tradeoffs between a little bit more inflation for a little less unemployment. Keynesian-inspired macroeconomic policy finds little if no supports among the ECB's executive board and, in large part, the national central bank governors".

^{XII} BVerfG, 2134/92, 12 October 1993 (Maastricht Urteil).

^{XIII} Cfr BVerfG, BvE 4/11, 19 June 2012 (concerning Germany's commitments in EU financial rescues measures), BVerfG, BvR 987/10, BvR 1485/10 – 2 BvR 1099/10, 7 September 2011 (concerning financial aid for Greece), BVerfG, 2 BvR 1390/12 (concerning the fiscal compact), BVerfG, 2 BvR 1390/12, 12 September 2012 (concerning the ESM).

^{XIV} BVerfG, 2 BvR 987/10 - 2 BvR 1099/10, 7 September 2011, par. 124.

^{XV} The notion was borrowed from the seminal work of Weiler 1991, although it was used in a completely different context.

^{XVI} Cfr art. 12 of the ESCB Statute.

^{XVII} Weber, the President of the Bundesbank, resigned openly criticizing the new course of the ECB. Weidmann, the current President, openly advocated the illegality of the bond-purchasing programs of the ECB, even pleading in front of the BVerfG against the OMT: "secondary markets purchases in my understanding should, however, not aim at reducing the solvency risk premiums of specific States. For that would risk among other things to knock out the disciplining role of market rates and undermine individual responsibility for financial policy." Translation provided by Borger 2016. See also Wagstyl 2016.

^{XVIII} The analysis of the procedural requirements to challenge an EU act deemed *ultra vires* before the BVerfG clearly lies outside the scope of this contribution. An explanation concerning the loosening of the national criteria to challenge EU acts before the German Constitutional Court to the extreme, creating a semi-*actio popularis*, can be found in Garditz 2014.

^{XIX} The author is aware of the possible risk of over simplification of the complex doctrine of the *ultra vires* and constitutional review of the BVerfG. Nevertheless, it is difficult to not see in this doctrine (and especially in this referral) the attempt of the BVerfG to control the process of European Integration.

^{XX} ECJ, Case C-62/14, *Gauweiler v. European Central Bank*, 2014.

^{XXI} *Ibidem* paragraph. 46.

^{XXII} *Ibidem* paragraph 47.

^{XXIII} *Ibidem* paragraph 54.

^{XXIV} *Ibidem* paragraph 74.

^{XXV} *Ibidem* paragraph 68.

^{XXVI} *Ibidem* paragraph 79.

^{XXVII} *Ibidem* paragraph 64.

^{XXVIII} *Ibidem* paragraph 89.

^{XXIX} *Ibidem* paragraph 112.

^{XXX} ECJ, Case 294/83, *Les Verts v European Parliament*, 1983.

^{XXXI} Cfr Joerges 2014a, who writes: "Nowhere in the Pringle judgment does one find an explanation as to the conceptual or a means-end rationality of the new modes of European Governance. The law delegates such

matters to politics without caring about the democratic legitimacy of political decision-making”.

XXXII For a legal analysis of solidarity in the euro-crisis see Borger 2013a.

XXXIII The ECB has always attached to its rescue monetary measures a strict conditionality, using its unconventional policies to pressure member states in financial distress towards acceptance of structural reforms. For an analysis of the first, implicit conditionality see Beukers 2013. For a study of the second, explicit conditionality expressly attached to the OMT and the QE programs, see Viterbo 2016.

XXXIV Defining such broad and complex interdisciplinary principle is an herculean task which will not be attempted here. For the difficulties of defining the exact characteristics of financial stability see Borger 2013b.

XXXV For an economic explanation of the role and importance of the lender of last resort in a currency area see De Grauwe 2013. For a legal analysis, see Steinbach 2013, and De Grauwe Paul, Yuemei and Steinbach 2016.

XXXVI BVerfG, 2 BvR 2728/13, 21 June 2016

XXXVII *Ibidem* paragraph 177.

XXXVIII *Ibidem* paragraph 177.

XXXIX *Ibidem* paragraph 188.

XL The formula “yes, but” was firstly used in the Solange I and II case, the first constitutional clash between the BVerfG and the ECJ. For further analysis, see Martinico and Pollicino 2012.

XLI *Ibidem* paragraph 195.

XLII Cfr Pace 2016.

XLIII Cfr endnote n. XVIII.

XLIV *Ibidem* paragraph 171.

XLV Cfr art. 130 TFEU.

XLVI Cfr art. 284 (4) TFEU.

XLVII Cfr art. 14 (3) of the Statute of the ESCB and ECB. Cfr Baroncelli 2016. “The German Central Bank is a member of the Governing Council of the ECB, and it is not only independent from the electorate by definition (in particular from the German Parliament), but it is also an integral part of the ESCB and should act in accordance with the guidelines and instructions of the ECB. It is true that the Bundesbank voted the adoption of the OMT programme within the Governing Council, but once a measure has been adopted on the basis of a majority, the rule of law should apply”.

XLVIII Cfr Zilioli 2016: “Indeed, in accordance with Article 12(1) of the Statute of the ESCB and the ECB, Eurosystem operations are carried out in a decentralized way, subject to the assessment by the Governing Council of the possibility and appropriateness of decentralization. Part of this assessment concerns the modalities of decentralization: it is not always necessary, nor efficient, to have all NCBs participating in all Eurosystem operations. This is why, for example, in the running of the platforms of Target2 and T2S, in the production of the various cuts of banknotes, in the management of the foreign reserves of the ECB, some NCBs, and not all, carry out these operations on behalf of the whole Eurosystem.”

XLIX Cfr Peroni 2013, according to which the ECB would have become during the crisis “the new central hub of economic policies”.

^L Decision ECB/2015/10 of 4 March 2015 on a secondary markets public sector asset purchase programme, [2015] OJ L 121/20.

^{LI} Scicluna 2013.

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