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The Asset Purchase Programmes of the ESCB - an interdisciplinary evaluation

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HELMUT SIEKMANN

The Asset Purchase Programmes of the ESCB –
an interdisciplinary evaluation

Institute for Monetary and Financial Stability
GOETHE UNIVERSITY FRANKFURT

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1. Introduction

In the course of the crisis, the European System of Central Banks (ESCB) has acted several times to support the EU Member States and banking systems in financial distress by purchasing debt instruments: Covered Bonds Programmes (CBP), Securities Market Programmes (SMP), Long Term Refinancing Operations (LTRO), and Targeted Long Term Refinancing Operations (TLTRO). These measures were accompanied by a substantial lowering of the quality standards¹ for the (outright) purchase of securities or for accepting them as collateral,² 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).³ Within this context, the (previous) Agreement of Net Financial Assets (ANFA) has to be mentioned which was kept secret.⁴ Although, in applying these measures, already a substantial amount of sovereign debt from selected Member States eventually found its way into the balance sheets of the Eurosystem and a major part of the banking system was protected from bankruptcy, the public outcry was relatively mild and the judiciary did not object in substance, as will explicated in detail in section 1.4.

This changed in 2012 with the announcement of a new, more comprehensive programme for purchasing sovereign debt of Member States whose currency is the euro,

¹ For example, Regulation (EC) No. 1053/2008 of the ECB of 23. October 2008 (ECB/2008/11), O.J. 2008/L 282/17; Decision of the ECB of 14. November 2008 *on the implementation of regulation EZB/2008/11* (ECB/2008/15); Guideline of the ECB of 21. November 2008 (ECB/2008/18), O.J. 2008/L 314/14; Guideline of the ECB of 10. December 2009 (ECB/2009/24), O.J. 2009/L 330/95; Decision of the ECB *on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government* (ECB/2010/3), O.J. 2010/L 117/102; Decision of the ECB *on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government* (ECB/2011/4), O.J. 2011/L 94/33; Decision of the ECB *on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government* (ECB/2011/10), O.J. 2011/L 182/31; Decision of the ECB of 14. December 2011 (ECB/2011/25), O.J. 2011/L 341/65; Decision of the ECB of 5. March 2012 (ECB/2012/3), O.J. 2012/L 77/19. For more details see *Hoffmann* (2015), p. 63-156.

² Repurchase agreements (repos) are used as collateral with the effect the underlying debt stays in place. Like any other lien it yields the creditor two debtors, whereas in an outright (final) purchase the same debtor remains by himself and only the creditor is finally replaced.

³ *European Central Bank*, Agreement on emergency liquidity assistance, 17 May 2017; *Hoffmann* (2015), p. 179-235.

⁴ *Jost* (2015).

the Outright Monetary Transactions (OMT), treated in section 1.5. This programme was heavily criticized both from the economic and the legal side. Although it was never executed the announcement as such might have spurred discernible effects. At last, in 2015 followed the announcement and implementation of another programme, the Extended Asset Purchase Programmes (EAPP)⁵ – colloquially labelled as Quantitative Easing (QE).⁶ In specific, its Public Sector Purchase Programme (PSPP) raised severe objections and lead to another case in the German Federal Constitutional Court (GFCC) which was referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The CJEU delivered a decision at the end of 2018 rebutting almost all concerns of the GFCC.⁷

The beforehand described measures of the ESCB are part of the “unconventional” policy of the central banks. The European Central Bank specifies as “non-standard” measures, as it calls them, the following measures: fixed-rate, full-allotment liquidity provision, expansion of the list of assets eligible as collateral, longer-term liquidity provision, liquidity provision in foreign currencies, changes in the required reserve ratio, outright purchases of specific debt securities.⁸

⁵ Later usually labelled as Asset Purchase Programme (APP).

⁶ *Sachverständigenrat* [German Council of Economic Experts] (2015), at no. 278; *Jędrzejowska-Schiffauer* and *Schiffauer* (2016), p. 203. The term “quantitative easing” – and perhaps the policy itself – was probably coined by the Bank of Japan as early as in 2001, see *Shirakawa* (2002).

⁷ For details see section 1.6.3 below.

⁸ See for “unconventional” measures of the monetary institutions: *Giannone, Lenza, Pill, Reichlin* (2011); *Henry* (2012); *Cour-Thimann and Winkler* (2012); *ibid.* (2013); *International Monetary Fund* (2013); *Siekmann* (2013a), p. 145 et seq.; *Lammers* (2015); *Jäger and Grigoriadis* (2017); *Varghese and Yuanyan* (2018).

2. The Programmes

2.1 Covered Bond Purchase Programmes (CBPP)

Covered bonds are negotiable instruments issued by commercial institutions backed by a portfolio of specific secured debt. In principle, these debt serve to finance investments in real estate but also government entities, ships, and airplanes. They are secured by specific types of lien. Although the collateral securing the underlying loans is now almost never a mortgage – in the legal sense of the word – any more, they are often called “mortgage backed securities”. Despite some similarities they don’t have to meet the (still relatively) strict prerequisites of a German *Pfandbrief* which could from its origin only be issued by special institutions separately licensed and with an extremely restricted scope of business.⁹ For the public law institutions guaranteed by states a separate statute was enacted.¹⁰ Although the requirements have been considerably relaxed in 2005,¹¹ the *Pfandbrief* can still be judged as safer than other covered bonds since all claims from it are backed by a cover pool of assets satisfying very strict eligibility criteria. These assets have to be sorted out in the case of insolvency of the issuer and the components of the cover pool have to meet strict quality criteria with a considerable “haircut”.¹² The security of a covered bond depends in the end on national statutory rules or contractual arrangements.

On 7 May 2009 the Governing Council of the ECB decided to initiate a programme to purchase covered bonds with the aim to promote the ongoing decline in money market term rates, to ease the funding conditions of banks and enterprises, to encourage credit institutions to maintain and expand their lending to clients, and to improve

⁹ Section 1 para. 1, section 5 *Hypothekbankgesetz* of 13 July 1999, RGBI. 375 [Official Gazette of the German empire].

¹⁰ *Gesetz über die Pfandbriefe und verwandten Schuldverschreibungen öffentlich-rechtlicher Kreditanstalten* of 21 December 1927, RGBI. I 1927 [Official Gazette].

¹¹ *Gesetz zur Neuordnung des Pfandbriefrechts* of 22 May 2005, BGB. I 1373. [Official Gazette]; for the situation after the fundamental change by the *Pfandbriefgesetz* of 2005 and an international comparison see the contributions in *Bundesverband Öffentlicher Banken Deutschlands* (2006); in several ways defective: *International Monetary Fund* (2011).

¹² See for details *Hagen* (2016), 21. Kapitel [chapter], margin no. 2, 32 et seq., 56, 59-62.

liquidity in the segment of the market (CBPP1).¹³ It was started in July 2009 and ended after one year, when the nominal amount of €60 billion had been - as planned - attained on 30 June 2010. The Eurosystem intends to hold the assets bought under this programme until maturity.¹⁴

More than one year later, in November 2011, a second Covered Bond Purchase Programme (CBPP2) was initiated.¹⁵ This programme ended - as planned - on 31 October 2012, when it reached a nominal volume of €16.4 billion. Again, the Eurosystem intends to hold the purchased assets until maturity.¹⁶

A third Covered Bond Purchase Programme (CBPP3) was set up in October 2014 with a planned duration of two years.¹⁷ The objective of this programme was the restoration of the transmission mechanism of monetary policy and bringing the inflation rate closer to the intended 2%.¹⁸ Contrary to the original plans, CBPP3 was “extended until the end of December 2017, or beyond, if necessary,”¹⁹ and in force until the end of 2018 as part of the (Expanded) Asset Purchase Programme – (E)APP, the quantitative easing (QE), undertaken by the ESCB since 2015.²⁰

The legality of these Covered Bond Programmes was rarely questioned even if they contained a (small) fraction of loans to government entities - mainly municipalities - and their *agencies*.

¹³ Decision of the European Central Bank of 2 July 2009 on the implementation of the covered bond purchase programme, ECB/2009/16, Official Journal 2009/L 175/18, recital 2.

¹⁴ ECB press release of 30 June 2010.

¹⁵ Decision of the European Central Bank of 3 November 2011 on the implementation of the second covered bond purchase programme, ECB/2011/17, Official Journal 2011/L 297/70.

¹⁶ ECB: <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>.

¹⁷ Decision of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme, ECB/2014/40, Official Journal 2014/L 335/22; Decision (EU) 2017/101 of the European Central Bank of 11 January 2014 amending Decision ECB/2014/40 on the implementation of the third covered bond purchase programme (ECB/2017/2), Official Journal 2017/L 16/53; Decision (EU) 2017/1360 of the European Central Bank of 18 May 2017 amending Decision ECB/2014/40 on the implementation of the third covered bond purchase programme (ECB/2017/14), Official Journal 2017/L 190/22..

¹⁸ *Ibid.*, recital 2.

¹⁹ Decision (EU) 2017/101 of the European Central Bank of 11 January 2014 amending Decision ECB/2014/40 on the implementation of the third covered bond purchase programme (ECB/2017/2), Official Journal 2017/L 16/53, recital 4.

²⁰ For details see below, sections 1.2.5 and 1.6.

In the beginning, the money provided this way by the central banks was sterilized in its effects on monetary policy, i.e. it should not contribute to the growth of money volume.

2.2 Securities Market Programme (SMP)

On 10 May 2010, the central banks of the Eurosystem started purchasing securities in the context of the Securities Markets Programme (SMP) “with regard to addressing the severe tensions in certain market segments” which had been hampering the monetary policy transmission mechanism according to the view of the ECB.²¹ The official decision of the Governing Council ensued a few days later.²²

According to Article 1 of the decision debt instruments issued by central governments or public entities of Member States whose currency is the euro or debt issued by private entities incorporated in the euro area were eligible to be purchased. In fact, only securities from a small group of states, mainly from Southern Europe, were bought. This way, interest rates in those states were lowered in a highly selective manner. This procedure spurred legal concerns because of its nature as selective subsidies for some state budgets.

Following a Governing Council decision on 6 September 2012 to initiate outright monetary transactions, the SMP was terminated. The Eurosystem intends to hold the purchased securities to maturity.²³

2.3 Long Term Refinancing Operations (LTRO and TLTRO)

The first two longer-term refinancing operations (LTRO) provided about one trillion euro to commercial banks at favourable interest rates for 3 years.²⁴ As they have been aimed at improving bank lending to the euro area non-financial private sector and do not

²¹ ECB, <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>.

²² Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5), Official Journal 2010/L 124/8.

²³ ECB, <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>.

²⁴ ECB press release of 8 December 2011, https://www.ecb.europa.eu/press/pr/date/2011/html/pr111208_1.en.html.

comprise the purchase of assets they are not considered further in this context.

A similar programme was resumed in 2014 as the Targeted Longer-Term Refinancing Operations (TLTROs). A first series was announced on 5 June 2014 (TLTRO I)²⁵ and a second series on 10 March 2016 (TLTRO II).²⁶ It consisted of four targeted longer-term refinancing operations, each with a maturity of four years, starting in June 2016. Borrowing conditions in these operations can be as low as the interest rate on the deposit facility.²⁷ The ECB describes them as “Eurosysteem operations that provide financing to credit institutions for periods of up to four²⁸ years. They offer long-term funding at attractive conditions to banks in order to further ease private sector credit conditions and stimulate bank lending to the real economy.”²⁹ Due to the apparent slowdown of growth the Governing Council decided in March 2019 to launch another programme directed at financing investments of the private sector (TLTRO III).³⁰ These operations try to enhance monetary policy transmission into the “real” economy but contain elements of a central planning of the economic activities. Since they do not encompass the purchase of assets they can be dismissed here as well.

²⁵ ECB press release of 5 June 2014; Targeted Longer-Term Refinancing Operations, Updated modalities; Decision (EU) 2014/34 of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations; Decision (EU) YYYY/XX of the European Central Bank of 10 February 2015 amending Decision ECB/2014/34 on measures relating to targeted longer-term refinancing operations (ECB/2015/5), <https://www.ecb.europa.eu/mopo/implement/omo/tltro/html/index.en.html>; Decision (EU) 2016/811 of the European Central Bank of 28 April 2016 amending Decision ECB/2014/34 on measures relating to targeted longer-term refinancing operations (ECB/2016/11), Official Journal 2016/L 132/129.

²⁶ ECB press release of 10 March 2016, https://www.ecb.europa.eu/press/pr/date/2016/html/pr160310_1.en.html.

²⁷ Decision (EU) 2016/810 of the European Central Bank of 28 April 2016 on a second series of targeted longer-term refinancing operations (ECB/2016/10), Official Journal 2016/L 132/107 ; Decision (EU) 2016/[XX*] of the European Central Bank of 31 October 2016 amending Decision (EU) 2016/810 on a second series of targeted longer-term refinancing operations (ECB/2016/30); <https://www.ecb.europa.eu/mopo/implement/omo/tltro/html/index.en.html>; .

²⁸ For the first series two years, ECB press release of 5 June 2014.

²⁹ <https://www.ecb.europa.eu/mopo/implement/omo/tltro/html/index.en.html>.

³⁰ Press release of 7 March 2019 at (3), <https://www.ecb.europa.eu/press/pr/date/2019/html/ecb.mp190307~7d8a9d2665.en.html>.

2.4 Outright Monetary Transactions (OMT)

In the summer of 2012, the ECB designed a programme for the outright purchase of sovereign bonds. It was aligned to replace the *Securities Markets Programme* and to integrate the Covered Bonds Purchase Programme. One of its main traits was again the narrow limitation of the bonds that could be purchased. Under certain prerequisites bonds from selected Member States in need should be eligible. The purchase was to be performed by the European System of Central Banks (ESCB).

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 these secondary sovereign bond markets (OMT). These technical features were publicized on the same day but the programme was never activated so far.³¹

The purchases 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”.³²

This announcement spawned a lively debate on its economic suitability, political feasibility and—particularly—on its legality. From the legal concerns, several lawsuits brought against the programme at the German Federal Constitutional Court (*Bundesverfassungsgericht*) evolved, with petitioners also asking the court to issue temporary injunctions with the goal of halting the ratification process.³³

2.5 Expanded Asset Purchase Programme (EAPP)

On 19 November 2014 the Governing Council of the ECB decided to implement an Asset-Backed Securities Purchase Programme (ABSPP)³⁴ and on 15 October 2014 to

³¹ See for the wording appendix 1.

³² Press release of 6 September 2012; ECB Monthly Bulletin September 2012, p. 8; *Siekmann* (2015), p. 103, 119-121.

³³ *Siekmann* and *Wieland* (2013); *ibid.* (2014a); *ibid.* (2014b); *Siekmann* (2015), p. 103 et seq., with references.

³⁴ Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the

continue with the purchase of covered bonds, CBPP3.³⁵ The difference is marked by the type of collateral for the underlying claim. Whereas covered bonds are in general backed by highly specific claims collateralized by a selected number of liens (originally mortgages); asset backed securities can be backed by any kind of asset. The ESCB, however, has restricted them by specified quality requirements to be eligible for a purchase. The Programme is also open for the purchase of securities issued by private corporations.

These programmes were already to be seen as part of a comprehensive bond buying programme³⁶ in the manner of the quantitative easing³⁷ already previously realized by the Bank of Japan, the Bank of England, the Swiss National Bank, and the Federal Reserve System of the United States. The focus of the new programme lied, however, on the outright purchase of sovereign debt from all Member States whose currency is the euro. On 4 March 2015 the Governing Council adopted a decision³⁸ on a secondary markets Public Sector Asset Purchase Programme (PSPP).³⁹ It was complemented by the Decision of the European Central Bank of 1 June 2016 on the implementation of the Corporate Sector Purchase Programme (CSPP).⁴⁰

The main objective of these programmes is to lower interest rates on a large scale and to bring inflation closer to the planned target of below 2% but close to it on the average in medium term. It is not designed to support selected Member States with

implementation of the asset-backed securities purchase programme (ECB/2014/45), Official Journal 2015/L 1/4; as amended by the decision of the European Central Bank of 10 September 2015 (Decision [EU] 2015/1613).

³⁵ See footnotes 17 and 18 above.

³⁶ Decision of the Governing Council of the ECB of 22 January 2015 on an Expanded Asset Purchase Programme (ECB/2015/10), press release of 22 January 2015. The decision itself was not publicized.

³⁷ See footnote 6 above.

³⁸ Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), Official Journal 2015/L 121/20; amended by: the Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015, Official Journal 2015/L 301/106, the Decision (EU) 2015/2464 of the European Central Bank of 16 December 2015, Official Journal 2015/L 344/1, the Decision (EU) 2016/702 of the European Central Bank of 18 April 2016, Official Journal 2016/L 121/24, the Decision (EU) of the European Central Bank of 11 January 2017, Official Journal 2017/L 16/51.

³⁹ See for details its wording in appendix 1.

⁴⁰ Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16), Official Journal 2016/L 157/28.

interest rates deemed to be exaggerated like in SMP which is terminated. The Covered Bonds Purchase Programme is restarted as CBPP3 and integrated in the new strategy.⁴¹

The Expanded Asset Purchase Programme (EAPP) (or Asset Purchase Programme - APP) thus is a framework containing four elements:⁴²

- Third Covered Bond Purchase Programme (CBPP3)
- Asset-Backed Securities Purchase Programme (ABSPP)
- Public Sector Purchase Programme (PSPP)
- Corporate Sector Purchase Programme (CSPP).⁴³

On 13 December 2018, the Governing Council of the European Central Bank (ECB) decided to end the net purchases under the APP in December 2018 and announced that it “intends to continue reinvesting, in full, the principal payments from maturing securities purchased under the APP for an extended period of time past the date when it starts raising the key ECB interest rates, and in any case for as long as necessary to maintain favourable liquidity conditions and an ample degree of monetary accommodation”.⁴⁴

⁴¹ See above section 1.2.1.

⁴² The chronology is unfolded in detail by the judgment the GFCC of 18 July 2017, cases: 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 [PSPP-referral], BVerfGE [Reports of judgments of the Federal Constitutional Court] 146, 216 (223-240); English version available at:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr085915en.html, margin nos 4-23.

⁴³ For its volume and composition, see section 3.1.4.1 below.

⁴⁴ <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>.

3. Economic Facts

3.1 Terminated programmes

3.1.1 Securities Markets Programme

The last operation of the Securities Markets Programme was allotted on 10 June 2014.

The present holdings are as follows:

SMP holdings*

EUR mil. 62,690

Date 15 March 2019

* at amortised cost

In view of the selectivity of the programme which is of major legal concern, the composition of the holdings according to the country of origin of the debt is especially interesting. The numbers are from a time near the end of the programme.

Table 1: Composition and outstanding amounts (21 February 2013)⁴⁵

Issuer country	Nominal amount (EUR billion)	Book value * (EUR billion)	Average remaining at maturity (in years)
Ireland	14.2	13.6	4.6
Greece	33.9	30.8	3.6
Spain	44.3	43.7	4.1
Italy	102.8	99.0	4.5
Portugal	22.8	21.6	3.9
Total	218.0	208.7	4.3

⁴⁵ ECB, http://www.ecb.europa.eu/press/pr/date/2013/html/pr130221_1.en.html.

*The SMP holdings are classified as held-to-maturity and consequently valued at amortised cost.

3.1.2 Covered Bond Purchase Programme

The first Covered Bond Purchase Programme was launched on 2 July 2009 and ended on 30 June 2010 after it had reached a nominal amount of €60 bn. It is intended to hold the acquired assets until maturity. The present holdings amount to €4.2 bn.

CBPP holdings*

EUR mil. 4,229

Date 15 March 2019

* at amortised cost

3.1.3 Covered Bond Purchase Programme 2

The second Covered Bond Purchase Programme was initiated in November 2011 and ended on 31 October 2012 after it had reached a nominal amount of €16.4 bn. the purchases took place both on the primary and the secondary market. It is intended to hold the acquired assets until maturity. The present holdings amount to €16.8 bn.

Market	Primary	Secondary
EUR mil. *	6,015	10,375
Share *	36.70%	63.30%
Date	31 October 2012	

* at amortised cost

3.1.4 Asset Purchase Programme (APP)

3.1.4.1 Volumes and Composition of Purchases

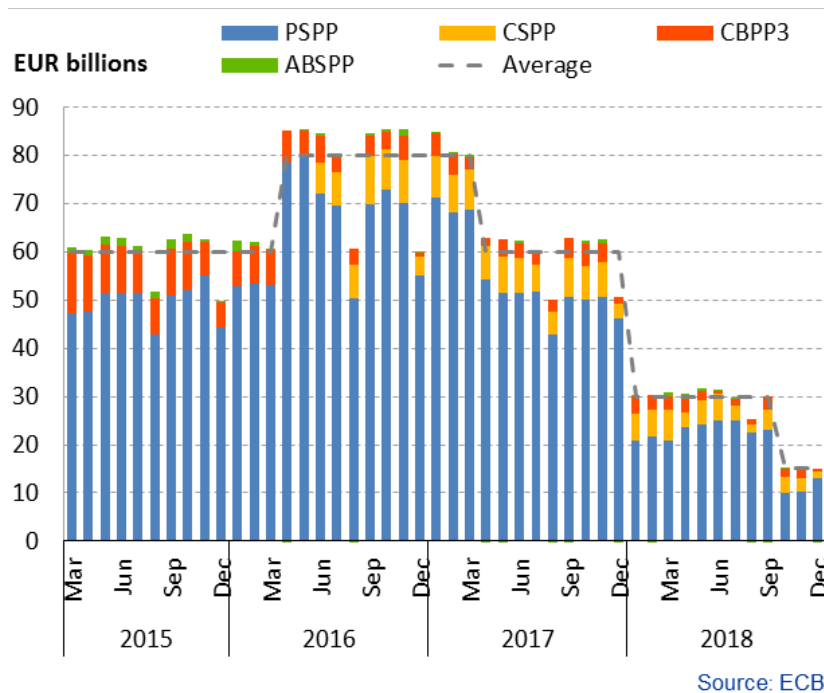
The net monthly purchases, i.e. total purchases minus redemption after maturity, raised from around €60 bn. to €80 bn. after the decision of the ECB in March 2016, were again lowered to approximately €60 bn. in April 2017, to €30 bn. in January 2018, and to €15 bn. in October 2018. They were terminated in December 2018.

The development is specified in the following compilation provided by the ECB:⁴⁶

- €60 billion from March 2015 until March 2016
- €80 billion from April 2016 until March 2017
- €60 billion from April 2017 to December 2017
- €30 billion from January 2018 to September 2018
- €15 billion from October 2018 to December 2018

As can be derived from the following chart 1 the lion's share of all purchases has been acquired as part of the Public Sector Purchase Programme (PSPP), hence this debt stems from sovereign entities. It was mainly this part of the programme which lead to the legal concerns and court cases.

⁴⁶ <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>.

Figure 1: Net monthly purchases

https://www.ecb.europa.eu/mopo/pdf/app_monthly_net_purchases-620x410px.png?mrt

In specific, the PSPP has again spurred serious legal concerns despite the fact that in contrast to Securities Markets Programme (SMP) and the Outright Monetary Transactions (OMT) not only the bonds of selected Member States are bought but assets issued by the public sector of *all* Member States whose currency is the euro – with the exception of Greece. This means that in principle the whole currency area is targeted – in proportion to the national central bank’s share of the capital of the ECB. Another striking difference is the risk distribution: 80% of the purchased assets remain on the balance sheet of the national central bank of the country where they have been issued. Only 20% of the additional purchases were to be subject of a risk sharing regime.⁴⁷

⁴⁷ ECB press release of 22 January 2015; *Sachverständigenrat* [German Council of Economic Experts] (2015), at no 308: 12% issued by European institutions, 8% bought by the ECB itself, later changed to 10% and 10%. Moreover, not more than 33% of a bond in circulation should be bought. For a description of the details see *Deutsche Bundesbank* (2018b), p. 17-20.

3.1.4.2 Redemption and re-investment

Even if the net purchases were reduced to zero at the end of 2018 it has to be kept in mind that a time limit for the “re-investment” of redeemed debt is not yet in sight. The demand for those securities by the central banks will hence continue – so far indefinitely and influence interest rates. In addition, it is a question whether the original distribution of the originating countries can be upheld in the medium range and when a matured debt has to be replaced in the future.

Table 1 shows the anticipated amounts which will be “re-invested” during the twelve months following February 2019.

Table 2: Expected monthly redemption amounts for the APP over a rolling 12-month horizon (in EUR millions)

month	ABSPP	CBPP3	CSPP	PSPP	APP
Feb 19*	694	2,388	120	8,783	11,985
Mar 19	<i>655</i>	<i>1,777</i>	<i>529</i>	<i>10,894</i>	<i>13,855</i>
Apr 19	<i>534</i>	<i>1,212</i>	<i>447</i>	<i>21,111</i>	<i>23,305</i>
May 19	<i>394</i>	<i>908</i>	<i>273</i>	<i>15,319</i>	<i>16,894</i>
Jun 19	<i>909</i>	<i>2,907</i>	<i>205</i>	<i>7,072</i>	<i>11,093</i>
Jul 19	<i>498</i>	<i>2,307</i>	<i>938</i>	<i>17,483</i>	<i>21,226</i>
Aug 19	<i>385</i>	<i>458</i>	<i>0</i>	<i>4,542</i>	<i>5,385</i>
Sep 19	<i>550</i>	<i>3,242</i>	<i>1,097</i>	<i>10,381</i>	<i>15,270</i>
Oct 19	<i>468</i>	<i>1,590</i>	<i>592</i>	<i>29,024</i>	<i>31,674</i>
Nov 19	<i>874</i>	<i>1,720</i>	<i>769</i>	<i>13,126</i>	<i>16,490</i>
Dec 19	<i>504</i>	<i>647</i>	<i>186</i>	<i>8,668</i>	<i>10,004</i>
Jan 20	<i>873</i>	<i>3,654</i>	<i>2,349</i>	<i>24,853</i>	<i>31,729</i>
Feb 20	<i>289</i>	<i>1,184</i>	<i>565</i>	<i>4,596</i>	<i>6,633</i>

*Actual redemption, based on month end data.

ECB estimates in italics. Figures may not add up due to rounding. Figures are preliminary and may be subject to revision.

Note: Realised redemptions may differ from estimated redemptions.

Source: ECB at

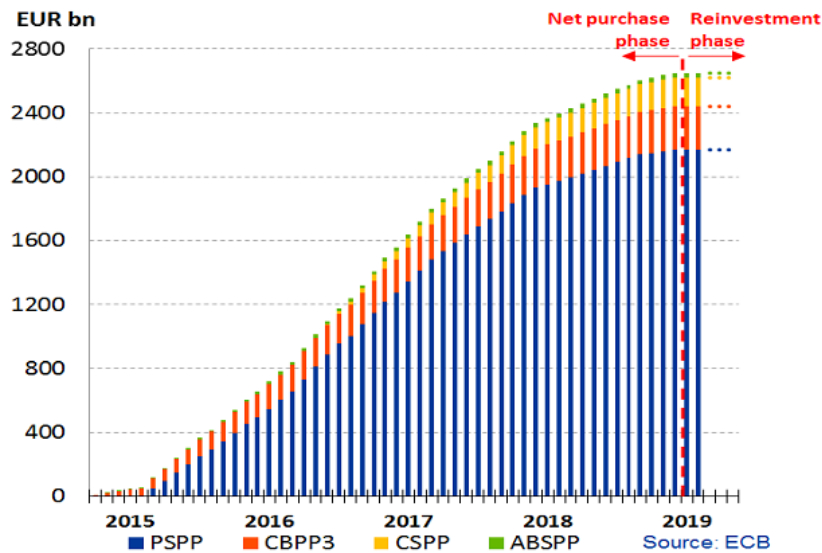
<https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>

3.1.4.3 Holdings and their composition

The accumulated holdings from purchases within the framework of the Asset Purchase Programme have summed up to more than €2.5 tn. in January 2019, after the end of the net purchases in December 2018. The development over time and the composition of

the accumulated holdings can be derived from chart 2.

Figure 2: Holdings



https://www.ecb.europa.eu/mopo/pdf/app_cumulative_net_purchases-620px.png?jkl

The composition of the holdings mirrors the predominance of purchases originating from the public sector. They have a share of 81, 84 % of all holdings under the Asset Purchase Programme. Details are shown in the following table 2.

Table 3: Eurosystem holdings under the asset purchase programme

Changes of holdings (previous month)	ABSPP	CBPP3	CSPP	PSPP	APP
Holdings* January 2019	26,656	262,090	177,812	2,100,735	2,567,292
Monthly net reinvestments	-519	-98	376	1,183	942
Quarter-end amortisation adjustment	0	0	0	0	0
Holdings* February 2019	26,137	261,992	178,188	2,101,918	2,568,234

*At amortised cost, in euro million, at month end.

Figures may not add up due to rounding. Figures are preliminary and may be subject to revision.

Source: ECB

<https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>

3.2 Consolidated purchases and asset structure

Noteworthy is the development of the size of the consolidated balance sheet of the Eurosystem which can be derived from the following chart 3. Both the size and the structure of the balance sheet of a central bank reflect all policy decisions that have been taken in the past. For a long time those sheets captured very little interest, especially from academic research. This has changed dramatically since the measures of the central banks to fight the crisis of 2007 and mitigate its longer term effects came to the public interest. Now it is a keenly debated question whether the balance sheets – in the first place their size – are and should be used as a policy tool.⁴⁸

In general, four major risks may arise from the expanded balance sheets:

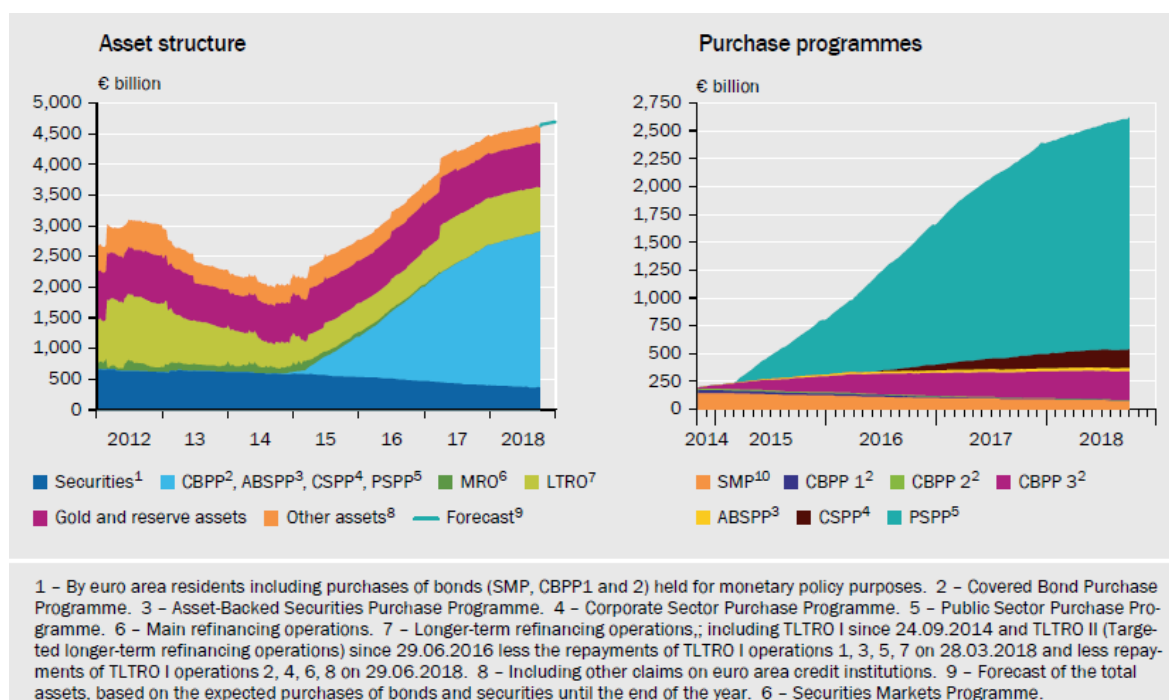
- Inflation risks

⁴⁸ *Cúrdia and Woodford (2011); Caruana (2012).*

- Financial stability risks
- Financial markets distortions
- Sovereign debt management conflicts.⁴⁹

In specific, with the growing size of central bank's balance sheets the political pressure increases to use it for the host of "great" objectives outside of monetary policy, like a "green" revolution or a cut of government debt (held by the central bank). Almost automatically central bank independence is questioned, as can e.g. seen in the U.S. and Italy at the moment.⁵⁰ Using balance sheets appears to politicians and some media as an easy way out of an (allegedly) unsustainable debt burden or a financing seemingly without costs. Its effectiveness and enhancing of welfare might also be given only under certain conditions.⁵¹

Figure 3: Asset structure and purchases of the Eurosystem



Source: Sachverständigenrat [German Council of Economic Experts] (2018), chart 48.

⁴⁹ Caruana (2012), section 4.

⁵⁰ Lachman (2019).

⁵¹ Cúrdia and Woodford (2011); more positive Weale and Wieladek (2016); Ademuyiwa, Siklos and St. Amand (2018).

4. Challenging the Legality of the Securities Market Programme (SMP)

4.1 Direct complaints to the Courts of the EU

In 2011 a direct challenge of the ECB measures to widen the eligibility criteria of collateral to ensure continued use of Greek, Portuguese, and Irish government bonds in monetary policy operations of the Eurosystem was dismissed by the General Court of the EU (GCEU).⁵² The ensuing appeal was rejected by the Court of Justice of the EU (CJEU)⁵³ in 2012.⁵⁴

4.2 Proceedings in the German Federal Constitutional Court

In Germany, the legality of the Securities Market Programme (SMP) was questioned⁵⁵ in the course of the legal fight against the insertion of paragraph 3 in Article 136 TFEU,⁵⁶ the treaty establishing a permanent European Stability Mechanism (ESM)⁵⁷,

⁵² GCEU of 16 December 2011, Case T-532/11 - *Städter v ECB*.

⁵³ Often labelled “European Court of Justice (ECJ)”. In the primary law its name is “the Court of Justice of the European Union”, Article 13(1) fifth indent TEU and Part six, Title I section 5 TFEU.

⁵⁴ CJEU of 15 November 2012, Case C-102/12 P.

⁵⁵ Constitutional complaints (*Verfassungsbeschwerden*) of several citizens and some members of the federal parliament (*Deutscher Bundestag*). The parliamentary fraction of the party, *Die Linke*, lodged proceedings as an *Organstreit*.

⁵⁶ European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU), Official Journal 2011/L 91/1; entering into force only on 1 May 2013 due to the lengthy ratification procedure following Article 49 para. 6 TEU; see: *Richter* (2015), margin no. 7; *Häde* (2016), margin no. 9.

⁵⁷ Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, replacing the temporary European Financial Stability Facility (ESFS) and the European Financial Stabilisation Mechanism (EFSM), BGBl II [Official German Federal Gazette part II] of 18 September 2012, 981 (German consenting act), 983 (treaty).

the “fiscal compact”,⁵⁸ and the German act empowering the government to participate in the financing of the ESM.⁵⁹ The Treaties had been signed in Brussels on 2 February 2012 and went into force with Germany's ratification on 27 September 2012. The criticism in the legal literature was limited⁶⁰ and the courts did in effect not object. The concrete objects of the complaints were at the origin of the court procedure the following bills:

- Gesetz zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrages über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist [draft of the consent on the amendment to Article 136 TFEU],⁶¹
- Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus [draft of the act on the ESM-Treaty],⁶²
- Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz - ESMFinG) [draft of the act on the participation in the financing of the ESM],⁶³
- Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion [draft of the act on

⁵⁸ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden of 2. March 2012, BGBl II [Official German Federal Gazette part II], 1006 (German consenting act), 1008 (treaty).

⁵⁹ Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus (ESM-Finanzierungsgesetz – ESMFinG) of 13 September 2012, BGBl I [Official German Federal Gazette part I], 1918.

⁶⁰ Supporting, or at least not questioning, the “unconventional” measures: *Herrmann* (2010a); *idem* (2010b); critical: *Seidel* (2010); *idem* (2011); *Frenz and Ehlenz* (2010), p. 334; *Siekmann* (2013a), p. 144-149.

⁶¹ BTDrucks. [*Bundestags Drucksache*, Federal Government Imprints] 17/9047.

⁶² BTDrucks. [*Bundestags Drucksache*, Federal Government Imprints] 17/9045.

⁶³ BTDrucks. [*Bundestags Drucksache*, Federal Government Imprints] 17/9048.

the “fiscal compact”].⁶⁴

4.2.1 *Petition for a temporary injunction*

The petitioners asked the German Court to issue a temporary injunction prohibiting the German President from signing the statutes consenting and transforming the treaties into German Law. On 10 July 2012, the Court heard oral arguments which is quite unusual for a petition to issue a temporary injunction.

In its judgment of 12 September 2012 it dismissed the petition but imposed several conditions for ratification.⁶⁵ It emphasized, however, already in this temporary procedure that Article 123 TFEU, which prohibits explicitly only the “direct” purchase of government debt instruments would also prohibit its circumvention by purchases on the secondary market.⁶⁶ The Court also expressed substantial concerns about the financing of the ESM but left the final assessment to the principal proceedings.⁶⁷

The ratification procedure was also not halted on the European level although a case was already pending in the Court of Justice of the European Union which had been referred to it by the High Court of the Republic of Ireland questioning the legality of establishing the ESM as well.⁶⁸

4.2.2 *Procedural Separation and Referral to the CJEU by the GFCC*

In the course of the proceedings at the German Federal Constitutional Court, the interest

⁶⁴ BTDrucks. [*Bundestags Drucksache*, Federal Government Imprints] 17/9046.

⁶⁵ GFCC 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 BvE 6/12 [*ESM temporary*], BVerfGE [Reports of judgments of the Federal Constitutional Court] 132, 195 et seq.

⁶⁶ *Ibid.* at 268 (margin no. 174): “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 (...).”

⁶⁷ *Ibid.* at 274 (margin no. 189).

⁶⁸ *Pringle v Government of Ireland* [2012] IEHC 296, court record number: 2012 3772 P, judgment of 17 July, specifically at para 35.

shifted increasingly to the OMT decision of the ECB⁶⁹ which had not been part of the original petitions but was subsequently treated extensively by the petitioners. Eventually, on 7 February 2014, the German Federal Constitutional Court announced the following:

- 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”.⁷⁰
- 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 European Court of Justice (ECJ) for a preliminary ruling pursuant to Article 19(3) letter b TEU, Article 267(1) letters a and b TFEU.⁷¹
- A final decision on the part of the case which is not suspended will be pronounced on Tuesday, 18 March 2014.

4.2.3 German Federal Constitutional Court: Final Judgment I

As a result, the final judgment, delivered 18 March 2014, dismissed the remaining complaints as mainly inadmissible or unfounded,⁷² with some minor reservations concerning mainly the prerogatives of the *Bundestag* to participate in crucial questions regarding the new support mechanism in plenary session which could be resolved if the statutory rules were interpreted in a specific way respecting German constitutional

⁶⁹ See section 1.2.4 supra.

⁷⁰ GFCC 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 [*ESM separation order*], BVerfGE [Reports of judgments of the Federal Constitutional Court] 134, 357.

⁷¹ 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, [*OMT referral*], English version available at: [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html?nn¼5403310], BVerfGE [Reports of judgments of the Federal Constitutional Court], 134, 366; pronounced on 7 February 2014.

⁷² GFCC, judgment of 18 March 2014, cases: 2 BvR 1390, 1421, 1438, 1439, 1440, 1824/12, 2 BvE 6/12 [*ESM final*], BVerfGE [Reports of judgments of the Federal Constitutional Court], 135, 317 et seq.

law.⁷³

Prior to this decision, the Court of Justice of the European Union had already accepted in its *Pringle* decision the compatibility of the amendment of Article 136 TFEU, the Treaty establishing the ESM, and the “Fiscal Compact” with the EU law. For this, the Court advocated a *narrow demarcation* of monetary policy⁷⁴ so that the measures under scrutiny as instruments following the law of nations would not infringe the exclusive competences of the EU in view of its exclusive competence in monetary policy, Article 3 para 1 lit. c TFEU. To the assessment of the CJEU, they belong to the domain of economic policy reserved almost completely to the Member States, Article 119 TFEU.⁷⁵

4.2.4 Critique

It is not entirely convincing that the GFCC did not judge the SMP more critically because of its selectivity. It is in effect a special subsidy for a limited, highly selective number of Member States by the monetary authorities. At least because of this selectivity it can hardly be assessed in its objects and means as monetary policy. In later decisions, the German court also followed this line of argumentation and shifted its emphasis of reasoning to the criterion of selectivity.⁷⁶ The *Pringle* Decision of the CJEU with its narrow interpretation of monetary policy could be supported, given that this interpretation would be handled in a consistent manner and upheld in other controversies, like on the asset purchase programmes.

⁷³ *Ibid.*, margin nos. 176, 223-242.

⁷⁴ Judgment of 27 November 2012, case C-370/12, *Pringle*, collection of cases 2012, S. I-0000, ECLI:EU:2012:756, margin nos. 53-57. *Hinarejos* (2015), p. 131, considers the decision as a shift from a more “rule-based EMU” to a more “policy-oriented EMU”, whatever that means.

⁷⁵ *Ibid.*, margin no. 60.

⁷⁶ For references see footnote 151.

5. The Battle over the Outright Monetary Transactions (OMT)⁷⁷

5.1 Direct complaints to the Courts of the EU

5.216 citizens of the EU filed complaints against the Outright Monetary Transactions (OMT) announced by the ECB in 2012. The General Court of the EU (GCEU) denied the admissibility and held that the applicants were not directly concerned in the sense of the fourth paragraph of Article 263 TFEU since OMT needed additional legal instruments and decisions subject to the discretion of the ECB to become operative.⁷⁸ The appeal against this decision had no success.⁷⁹

5.2 The First Referral Decision

In its seminal decision of 14 January 2014, the German Federal Constitutional Court (GFCC) referred the OMT case to the Court of Justice of the European Union with questions concerning EU law.⁸⁰ This petition for a preliminary ruling was based on Article 19(3)(b) TEU and Article 267(1)(a) TFEU and was the first in the history of the GFCC.

In contrast to its (final) judgment on the complaints in view of the Securities Markets Programme (SMP), the GFCC expressed in this decision serious doubts about the compatibility of the the programme with EU law and – as a consequence - with German constitutional law. In this (referral) decision the Securities Markets Programme (SMP) was (again) not considered although it was still active.

5.2.1 Admissibility

The Court admitted the complaints and petitions even though actual purchases had not

⁷⁷ Parts of this section are adopted from *Siekmann* (2015).

⁷⁸ Order of the General Court of 10 December 2013, Case T 492/12 - *Sven A. von Storch and Others v ECB*, ECLI:EU:T:2013:702, Official Journal 2014/C 45/32.

⁷⁹ CJEU, Order of the Court in Case C-64/14P of 30 April 2015, Press release of 30 April 2015, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/cp150048en.pdf>.

⁸⁰ GFCC *OMT referral* (footnote 71 above).

been executed (1) and the control of the acts of an organ of the EU is, in principle, not the task of the GFCC (2). As justification for its handling of the complaints, the Court resorted to its judicature on a reserved *ultra vires* control and the defence of the “constitutional identity” (*Verfassungsidetität*) of Germany. Finally, the court referred the case, however, to the CJEU for preliminary rulings on several questions of EU law.⁸¹

(1) Preventive Legal Protection

It also granted in this (extraordinary) case – in effect – a preventive legal protection despite the fact that actual purchases had not taken place. The Court underlined that “the case-law of the Federal Constitutional Court recognises that preventive legal protection can [...] be warranted in constitutional complaint proceedings in order to avoid consequences that cannot be corrected [references].⁸² 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”. The Court held that “the requirements for granting preventive legal protection are met”.⁸³ The complainants had satisfactorily stated “that the execution of the OMT Decision could lead to such consequences that could not be corrected” even if “further implementing measures” were required. The OMT decision of the ECB were sufficiently specified. It could be executed “at any time and within a very short timeframe”.⁸⁴ Somewhat surprisingly it did not refer to the real effects which might be caused in fact by the simple announcement.

(2) Ultra vires Act

The competences of the Court are limited and follow from an enumeration in Articles 93(1) and Article 100 German Federal Constitution (*Grundgesetz*), the “Basic Law”. The control of acts of organs and institutions of the EU are not mentioned there. Thus the demarcation of competences between the CJEU and the GFCC is in theory

⁸¹ GFCC *OMT referral* (footnote 71 above).

⁸² GFCC *OMT referral* (footnote 71 above), margin no. 34.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, at margin no. 35.

clear: 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, 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 German federal constitution (“constitutional review”). Although no formal hierarchy has been established between the CJEU and the national courts, the described distribution of competences—in conjunction with the supremacy of Union law, in application, (*Anwendungsvorrang*),⁸⁵ 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.⁸⁶

In a series of decisions, however, 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 the condition that they do not transgress their competences in a “manifest” way and do not lead to a “structurally significant shift in the allocation of Powers to the detriment of Member States”. Such “structurally significant” transgression would have to be assumed “if they cover areas that are part of the constitutional identity of the Federal Republic of Germany (*Verfassungsidentität*), which is protected by Art. 79 sec. 3 Basic Law or if they particularly affect the democratic discourse in the Member States.”⁸⁷ Noteworthy is that the Court does not strictly differentiate here between the *ultra-vires* control and the protection of the *Verfassungsidentität* as in other (ensuing) decisions.⁸⁸

Ultimately, the Court held that a manifest and structurally-significant transgression of powers would have to be assumed if the European Central Bank acted beyond its

⁸⁵ CJEU, 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”; GFCC: BVerfGE [Reports of judgments of the Federal Constitutional Court], 31, 145 (173 f.); 37, 271 (277 et seq.); 73, 339 (375 et seq.); 89, 155 (175); see, for more details, e.g., *Jarass and Beljin* (2004), p. 1–6; *Schöbener* (2011), p. 889 et seq)

⁸⁶ See especially *Heun* (2014), p. 331 for details: *Siekmann* (2015), p. 105 et seq.

⁸⁷ GFCC, *OMT referral* (footnote 71 above), at margin no. 21, 37, with references; earlier decisions were BVerfGE [Reports of judgments of the Federal Constitutional Court], 73, 339 – *Solange II*; 89, 155 – *Maastricht*; 123, 267 – *Lissabon*; 126, 286 – *Mangoldt*.

⁸⁸ Section 1.6.1 below.

monetary policy mandate⁸⁹ or if the prohibition of the monetary financing of the budget was violated by the OMT programme.⁹⁰ In addition, it 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”.⁹¹

5.2.2 *Merits of the Case*

In substance, the German Court assessed OMT as an act of economic policy beyond the competences of the ECB. Furthermore, it judged OMT as a monetary financing of sovereign debt prohibited by EU primary law and that these infractions could not be justified. Finally, the court presented a way for a compromise by an interpretation of OMT which was in conformity with EU law.

With regard to the *transgression of competences*, it points out that the “mandate of the ECB” is limited to monetary policy, while economic policies in general are reserved to Member States relying on Articles 119 and 127 TFEU and Articles 17 et seq. ESCB Statute.⁹² According to its assessment, the OMT Decision—not to mention its implementation—already interferes with Member State competences in economic policy.⁹³ 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 results⁹⁴;

⁸⁹ The term “mandate” was originally propagated by economists including the president of the ECB, journalists, and politicians although it is not a legal category of the relevant primary law of the Union and cannot be found there. Goals, objectives, competences, and powers are the (defined) legal categories used by the primary law. Using the term relieves the user from knowing and employing the correct terminology.

⁹⁰ GFCC, *OMT referral* (footnote 71 above), at margin no. 42.

⁹¹ GFCC, *OMT referral* (footnote 71 above), at margin no. 27: “. . .it is for the Federal Constitutional Court to 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.”

⁹² *Ibid.*, at margin no. 56.

⁹³ *Ibid.*, at margin no. 56-83.

⁹⁴ *Ibid.*, at margin no. 70.

- an approach that differentiates between Member States does not fit in with the monetary decision-making framework for a monetary union⁹⁵;
- 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 States⁹⁶;
- 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.⁹⁷

In view of a violation of the *prohibition of monetary financing* Member States' budgets Court assumes a wide understanding. It resumes its argumentation from the temporary injunction proceedings⁹⁸ and 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.⁹⁹ Article 123 TFEU is considered as “an expression of a broader prohibition of monetary financing of the budget”.¹⁰⁰ To specify this, it lists aspects that “indicate the OMT Decision aims at a circumvention of Art. 123 TFEU and 214 violates the prohibition of monetary financing of the budget”; in particular, the willingness to *waive claims*, 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.¹⁰¹ 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”.¹⁰²

As regards to a *justification* of the possible violations of EU law, the Court judges the objective used by the ECB to justify its decision—“to correct a disruption of the

⁹⁵ Ibid., at margin no.73.

⁹⁶ Ibid., at margin no. 74.

⁹⁷ Ibid., at margin no. 80.

⁹⁸ See GFCC, *ESM temporary* (footnote 65 above).

⁹⁹ GFCC, *OMT referral* (footnote 71 above), at margin no. 86.

¹⁰⁰ GFCC, *OMT referral* (footnote 71 above), at margin no. 85.

¹⁰¹ GFCC, *OMT referral* (footnote 71 above), at margin no. 87, with details at margin nos. 88-90.

¹⁰² GFCC, *OMT referral* (footnote 71 above), at margin no. 84.

monetary policy transmission mechanism”—as irrelevant;¹⁰³ an unusually blunt evaluation. 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”.¹⁰⁴

Finally the Court explored an *alternative interpretation* of the OMT programme in order to achieve its conformity with EU law. This could be secured if OMT did not subvert the conditionality of the EFSF and ESM rescue programmes and if it would only have the nature of a “contribution” to the “smooth conduct of policies pursued by the competent authorities”. The Court saw its concerns mitigated if the following conditions were met: (i) exclusion of a debt-cut, (ii) no unlimited purchases of selected Member States’ debt, and (iii) avoidance of an interference with the price formation on the financial market. Within this context, the Court appears to concur with the ECB since its representative emphasized at the oral hearing the limited volume of a possible purchase, the absence of a participation in a debt cut, the observance of certain time lags between the emission of a government bond and its purchase, and the intention of not holding the bonds to maturity.¹⁰⁵ This would lead the Court to the conclusion that its alternative interpretation would “most likely be consistent with the meaning and purpose of the OMT Decision”.¹⁰⁶

The following development, especially the Public Sector Purchase Programme, revealed, however, that only part of this concord was existing in reality; especially in view of holding until maturity and a pre-determined volume.

¹⁰³ GFCC, *OMT referral* (footnote 71 above), at margin no. 95.

¹⁰⁴ GFCC, *OMT referral* (footnote 71 above), at margin no. 98.

¹⁰⁵ GFCC, *OMT referral* (footnote 71 above), at margin no. 100.

¹⁰⁶ *Ibid.*

5.2.3 Critique

Although the wide interpretation of the prohibited monetary financing of Member States' budgets has followers in legal literature¹⁰⁷ both the procedure and the findings of this judgment were harshly criticized not only by many economists¹⁰⁸ but also by the majority of legal scholars.¹⁰⁹ This criticism is, by and large, convincing in view of the admissibility of the complaints because of the resulting de-facto control of acts of the organs and institutions of the EU reserved to the CJEU.¹¹⁰ It is also not beyond all doubts that the referral to the CJEU was indicated.¹¹¹ The arguments of the court are, however, conclusive in view of the transgression of competences by the ECB, and—to somewhat lesser extent—with regard to the monetary financing of sovereign debt.¹¹² *Ashoka Mody* resumed: “What is clear is that the economics behind OMT is flawed – and so is the politics.”¹¹³

To some extent surprising is, however, that the Securities Markets Programme (SMP) was (again) not considered although it was still active. The consistency of this approach has to be questioned since SMP contains some of the same legally critical traits as OMT; foremost the selectivity of the purchased assets which implies the risk of arbitrarily subsidizing the interest a government has to pay for its debt and thus

¹⁰⁷ *Borger* (2013), p. 119, 134; *de Gregorio Merino*, (2012), p. 1613, 1625, footnote 36, 1627; *Lenaerts and van Nuffel* (2011), n. 11-037.

¹⁰⁸ *Winkler* (2014), imputing that the Court has decided on a financial theory.

¹⁰⁹ *Thym* (2013), at 264; *Thiele* (2013) at 320; *ibid.* (2014a) at 244, 246–250; *ibid.* (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); *ibid.* (2015), p. 8 et seq.; *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); *Lammers* (2015); *Jędrzejowska-Schiffauer and Schiffauer* (2016) at 201, 204, in specific disagreeing with the Courts “parellism“ but with some reservations: “a measure of this kind needs to be carefully balanced and monitored as to avoid that its implementation is in breach of the EMU’s Maastricht macroeconomic constitution”; see, also, *Ukrow* (2014) at 120 : “not continuously convincing”.

¹¹⁰ Reserved also *Herrmann* (2012), p. 810.

¹¹¹ *Siekman* (2015), p. 113-116, with further references for the various arguments.

¹¹² *Mody* (2014a), p. 6 et seq., discussing the tasks the ECJ now has to fulfil (p. 17 et seq); see for a detailed discussion of both the transgression of competences and the circumvention of the prohibition of monetary financing of Member States' budgets *Siekman* (2015), p. 116-118, with further references for the various arguments.

¹¹³ *Mody* (2014b).

distorting seriously markets reactions for an unsound fiscal policy and undermining this way market forces securing fiscal discipline.

5.3 The Judgment of the CJEU

More than a year later, the Court of Justice of the European Union delivered its judgment¹¹⁴ on the questions of EU law the German Constitutional Court had referred for a preliminary ruling at the beginning of 2014.¹¹⁵ In sum, the CJEU decided that Article 119 TFEU, Article 123(1) TFEU, Article 127(1) and (2), and Articles 17 to 24 ESCB/ECB Statute must be interpreted as permitting the European System of Central Banks to adopt a programme for the purchase of government debt on the secondary market, such as the Outright Monetary Transactions (OMT).¹¹⁶

5.3.1 Admissibility

Although a considerable number of Member States' governments, the European Parliament, the European Commission, and the ECB had challenged the admissibility of the request for a preliminary ruling the Court decided in favour of its admissibility¹¹⁷ and affirmed its obligation to reply to the referring German court.¹¹⁸ In this context, it underlined that decisions of the CJEU are binding for the courts requesting a preliminary ruling. Despite being subject to judicial review by the Court,¹¹⁹ the Governing Council of the ECB were to command a wide margin of discretion in interpreting the clauses delineating its competences and in the substance of monetary

¹¹⁴ Court of Justice of the European Union (CJEU), judgement of 16 June 2015, case C-62/14, *Gauweiler*, ECLI:EU:14:C:2015:400, available at *Europäische Zeitschrift für Wirtschaftsrecht (EuZW)* 2015, 599.

¹¹⁵ GFCC, *OMT referral* (footnote 71 above).

¹¹⁶ CJEU, *Gauweiler* (footnote 114 above), at margin no. 128.

¹¹⁷ CJEU, *Gauweiler* (footnote 114 above), at margin nos. 18-31.

¹¹⁸ CJEU, *Gauweiler* (footnote 114 above), at margin no. 17.

¹¹⁹ CJEU, *Gauweiler* (footnote 114 above), at margin no. 153.

policy.¹²⁰

5.3.2 Competences

In delimiting the competence of the ESCB for monetary policy, the European Court built principally on the objectives of the measure in question but conceding that the instruments used to “attain those objectives” are also “relevant”.¹²¹ It reflected briefly the *Pringle* decision where it had advocated a narrow delineation of monetary policy¹²² but did not see a contradiction because of the difference between the objectives of the ESM and those of the ESCB pursued with OMT which were to be judged as “decisive”.¹²³ To its opinion, the purchase of government bonds “on the secondary market subject to a macroeconomic adjustment programme could be regarded as falling within economic policy” when “undertaken by the ESM” whereas this did not mean that the same purchase should be equally treated in the case “when that instrument is used by the ESCB”.¹²⁴

Solely relying on the price stability objective of the ESCB to render such a purchase monetary policy¹²⁵ is hard to perceive, especially when taking the selectivity of OMT into account.¹²⁶ The CJEU dismissed this aspect, however, without closer scrutiny. To its opinion, “a bond buying programme may prove necessary in order to rectify ... the disruption” the ESCB wants to mitigate.¹²⁷

5.3.3 Monetary Financing of Budgets

In view of bond buying operations, the CJEU states that Article 123(1) TFEU does not

¹²⁰ CJEU, *Gauweiler* (footnote 114 above), at margin no. 48, 68: “a broad discretion”.

¹²¹ CJEU, *Gauweiler* (footnote 114 above), at margin no. 46.

¹²² CJEU, *Pringle* (footnote 74 above) at margin nos 53 and 55.

¹²³ CJEU, *Gauweiler* (footnote 114 above), at margin no. 53, 55, 64.

¹²⁴ CJEU, *Gauweiler* (footnote 114 above), at margin no. 63.

¹²⁵ *Ibid.*

¹²⁶ See section 1.5.1 above.

¹²⁷ CJEU, *Gauweiler* (footnote 114 above), at margin no. 89.

preclude in generally the possibility of such purchases, pointing to the existence of Article 18.1 Statute.¹²⁸ This was, however, not questioned but the specific setup of OMT. On the next step, the CJEU follows, however, the complainants and the GFCC in so far as to concede that the ESCB, nevertheless, “does not have authority to purchase government bonds on secondary markets under conditions which would, in practice mean that its action has an effect equivalent to that of a direct purchase ... from public authorities ..., thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU”;¹²⁹ a stance the GFCC had repeatedly underscored before.¹³⁰ Furthermore, the CJEU concedes that the “ESCB’s intervention could, in practice, have an effect equivalent to that of a direct purchase of government bonds...”.¹³¹ This would – at least – prohibit the use open market operations at the discretion of the ECB.¹³²

In applying these rules, the CJEU follows, however, largely again the factual explanations provided by the ECB in the course of the proceeding¹³³ with the result that (i) “the Member States cannot, in determining their budgetary policy, rely on the certainty that the ESCB will at a future point purchase their government bonds” and that (ii) the programme cannot be implemented in a way which would bring about a harmonization of the interest rates applied to the government bonds ... regardless of the differences arising from their macroeconomic or budgetary situation”.¹³⁴ In essence, a programme like OMT “would not lesson the impetus for the Member States concerned to follow a sound budgetary policy.”¹³⁵

¹²⁸ CJEU, *Gauweiler* (footnote 114 above), at margin no. 95.

¹²⁹ CJEU, *Gauweiler* (footnote 114 above), at margin no. 97.

¹³⁰ GFCC, judgment of 12 September 2012 (footnote 65 above) at margin no. 175; GFCC, *OMT referral* (footnote 71 above), at margin no. 86 with concretisation of the likely circumvention by the OMT Programme at margin nos. 87-93.

¹³¹ CJEU, *Gauweiler* (footnote 114 above), at margin no. 104.

¹³² Disagreeing *Petch* (2013), p. 15, erroneously deriving from the systematic position of Article 18 Statute in Chapter IV headed “monetary functions and operations“ that the legality of OMT may *per se* not be questioned.

¹³³ CJEU, *Gauweiler* (footnote 114 above), at margin nos. 105-121.

¹³⁴ CJEU, *Gauweiler* (footnote 114 above), at margin no. 113.

¹³⁵ CJEU, *Gauweiler* (footnote 114 above), at margin no. 121.

5.4 German Federal Constitutional Court: Final Judgment II

After the questions of the GFCC had been answered by the CJEU¹³⁶ the case returned to the German Court for a final judgment.¹³⁷ In the course of this stage of the proceedings, another oral hearing took place on 16 February 2016.¹³⁸

In its final decision, pronounced 21 June 2016, the GFCC dismissed the constitutional complaints and the application for an *Organstreit* proceeding only with some minor reservations. It did not activate the right to deviate from a decision of the European Court in cases of manifest and structurally significant transgression of competences (*ultra vires*) or of endangering the “constitutional identity” (*Verfassungsidentität*) of Germany it had reserved in several previous decisions.¹³⁹ As a result, the complaints and applications were finally rejected.¹⁴⁰

But this was not the end of the quarrels between the German Court and the ECJ. On open conflict between the courts was, however, avoided which would have jeopardized the reputation of both.

5.4.1 Admissibility and range of control

The GFCC judged the constitutional complaints – like in the prior decisions – as *admissible* to the extent that they “challenge the fact that the Federal Government did not take steps to challenge the policy decision of the Governing Council of the European Central Bank regarding the OMT Programme...”. For the rest, they were held inadmissible.

The petitions in the course of the *Organstreit* proceeding were judged admissible “to the extent” that they “seek a declaration to the effect that the German *Bundestag* is obliged to take steps towards having the policy decision of 6 September 2012 regarding

¹³⁶

¹³⁷ GFCC, judgment of 21 June 2016, cases: 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, [*OMT final*], BVerfGE [Reports of judgments of the Federal Constitutional Court], 142, 123.

¹³⁸ GFCC, *OMT final* (footnote 137 above).

¹³⁹ GFCC, *OMT referral* (footnote 71 above), at margin no. 27.

¹⁴⁰ GFCC, *OMT final* (footnote 137 above) at margin nos. 76, 114.

the OMT Programme rescinded.” For the rest, they were declared inadmissible as well.¹⁴¹ Noteworthy is the fact that the Court underscored that the programme under scrutiny “has not been rendered obsolete by more recent purchase programmes”. “The ongoing possibility that it may be implemented” were “the true reason for the effect the policy decision of 6 September 2012 ... still has on the financial markets”.¹⁴²

In addition, the Court took the opportunity to clarify that “neither the SMP nor the OMT Programme as such are proper objects of a constitutional complaint” but only the “inaction on the parts of the German constitutional organs”.¹⁴³ It also reiterated its reservation in view of the review of the constitutional identity of Germany (*Identitätskontrolle*) and of structurally significant infractions of the competence order (*ultra-vires-Kontrolle*) conceding, however, again an interpretation open to European integration (*europafreundlich*).¹⁴⁴ A transfer of competences to decide on its own competence to the European Union (*Kompetenz-Kompetenz*) and blanket empowerments would nevertheless still be incompatible with German constitutional law.¹⁴⁵

A slight shift in concretizing identity review and the *ultra vires* review is visible since the Court carefully outlined that the two instruments “are independent of one another” deviating from its former reasoning in treating the infraction of the constitutional identity as a specific and most severe case of acting *ultra vires*.¹⁴⁶ Each one would constitute an “independent instrument of review”.¹⁴⁷ In addition, it focused their application on omissions of the “constitutional organs ... to counter acts institutions, bodies, offices, and agencies of the European Union that constitute a violation of identity as well as *ultra vires* acts”.¹⁴⁸ Apart from this it resumed and

¹⁴¹ GFCC, *OMT final* (footnote 137 above) at margin no. 76.

¹⁴² GFCC, *OMT final* (footnote 137 above) at margin no. 91.

¹⁴³ GFCC, *OMT final* (footnote 137 above) at margin no. 100 ; see at footnote 86.

¹⁴⁴ GFCC, *OMT final* (footnote 137 above) at margin no. 121, 142, 144 et seq.

¹⁴⁵ GFCC, *OMT final* (footnote 137 above) at margin no. 130.

¹⁴⁶ GFCC, *OMT referral* (footnote 71 above), at margin no. 21, 37, with references.

¹⁴⁷ GFCC, *OMT final* (footnote 137 above) at margin no. 153 et seq.

¹⁴⁸ GFCC, *OMT final* (footnote 137 above) at margin no. 163 et seq.

explicated its former judicature.¹⁴⁹

5.4.2 *Substance*

In substance, the German Federal Constitution Court rejected the constitutional complaints and the application in the *Organstreit* proceedings. The decision of the European Central Bank of 6. September 2012 were neither a violation of the complainants' rights under Article 38(1), Article 20(1)(2) in conjunction with Article 79(3) Basic Law nor of the budgetary rights of the *Bundestag* as long as the conditions formulated by the Court of Justice of the European Union in its ruling of 16 June 2015 were met. The policy decisions of the Governing Council of the European Central Bank of 6 September 2012 and its possible implementation (OMT) were neither constituting a qualified exceeding of the competences nor a violation of the prohibition of monetary financing.¹⁵⁰

The Court expressed, however, some “serious objections” in view of the establishment of the facts of the case, the principle of conferral, and the judicial review of acts of the European Central Bank. It criticized that the CJEU accepted the assertion of the ECB that the OMT Programme pursues monetary policy objectives “without questioning or at least discussing and individually reviewing the soundness of the underlying factual assumptions, and without testing these assumptions against indications that evidently argue against a character of monetary policy – particularly the selectivity of the purchases...”.¹⁵¹ Furthermore, even if accepting a “wide margin of assessment to bodies of the European Union” and a resulting considerable decrease of the “judicial review” the principle of conferral were to have “an effect on the methodical review of whether it is respected. The asserted “discretion” must not lead to the result that the judicial review “simply accepts the asserted positions of organs of the

¹⁴⁹ GFCC, *OMT final* (footnote 137 137 above) at margin no. 155-162.

¹⁵⁰ GFCC, *OMT final* (footnote 137 above) at margin no. 174 et seq.

¹⁵¹ GFCC, *OMT final* (footnote 137 above) at margin no. 182, referring to the GFCC *OMT referral* (footnote 71 above), at margin no. 73. The factual contention of the ECB is also not challenged by *Jędrzejowska-Schiffauer* and *Schiffauer* (2016), p. 199, stating that it is “broadly recognised in the specialist literature” but providing only one (peripheric) reference: *Beukers* and *Reestman* (2015), p. 231.

European Union without verification.”¹⁵² Finally, it restates that as a consequence of the independence granted to the European System of Central Banks a “restrictive interpretation”, as well as a “particularly strict judicial review, of the mandate of the European Central Bank” had to be essential.¹⁵³

Despite these well founded concerns the GFCC finally did not object the policy decision on the OMT Programme as unconstitutional since they would – in the interpretation of the CJEU – not “manifestly” exceed the competences of the European Central Bank thus not fulfilling the requirements for an *ultra vires* act as defined by the judicature of the GFCC.¹⁵⁴ The limitations stated in *Gauweiler* would ensure that the potential of the policy decision of ECB which would reach far into economic policy, i.e. far beyond its competences, “is limited”. The OMT Programme would only be allowed to secure price stability but not to “stabilize the euro area”. Moreover, it would have to be limited to alleviate “disruptions of the monetary policy transmission mechanism and the uniformity of monetary policy. It would have to be terminated as soon as they were achieved.”¹⁵⁵ In addition, the Court demanded that “the volume of future purchases must be mandatorily fixed from the outset and may not exceed the amount necessary for restoring the transmission mechanism.”¹⁵⁶

The policy decision would also not “manifestly” violate the *prohibition of monetary financing*¹⁵⁷ if they fulfil certain requirements set up by the GFCC:

- Purchases may not be announced.
- The volume of the purchases must be limited
- There must be a minimum period between the issue of the government bonds and their purchases by the ESCB that is defined from the outset and prevents the

¹⁵² GFCC, *OMT final* (footnote 137 above) at margin no. 184, 186.

¹⁵³ GFCC, *OMT final* (footnote 137 above) at margin no. 187, 189: “...the principles of democracy and the sovereignty of the people require that the monetary policy mandate of the European Central Bank be interpreted restrictively and that its observance be subject to strict judicial review in order to at least limit the decrease in the level of democratic legitimation of the Bank’s actions to what is absolutely necessary...”.

¹⁵⁴ GFCC, *OMT final* (footnote 137 above) at margin no. 190, under the assumption that the reservations of the *Gauweiler* decision are treated as binding.

¹⁵⁵ GFCC, *OMT final* (footnote 137 above) at margin no. 194, referring to CJEU, *Gauweiler* (footnote 114 above), at margin nos. 62 and 64, 112.

¹⁵⁶ GFCC, *137 OMT final* (footnote 137 above) at margin no. 195.

¹⁵⁷ GFCC, *OMT final* (footnote 137 above) at margin no. 197, 201.

issuing conditions from being distorted.

- The ESCB may purchase only government bonds of Member States that have bond market access enabling the funding of such bonds.
- Purchased bonds may only in exceptional cases be held until maturity.
- Purchases must be restricted or ceased and purchased bonds must be remarketed should continuing the intervention or further holding of the bonds become unnecessary for achieving the monetary income policy aims.¹⁵⁸

The Court tries to secure the enforcement of these rules by declaring a failure to fulfil them as “a sufficiently qualified exceeding of competences within the meaning of the *ultra vires* review and assessing their observance as a mandatory prerequisite for the German *Bundesbank* to participate in the bond buying programme.¹⁵⁹

As regards to the *budgetary responsibility* of the *Bundestag*, the Court did not see at the moment an apparent threat but looking forward, it pointed out that the “overall budgetary responsibility” were “part of the constitutional identity of the Basic Law”.¹⁶⁰ It warns that “the purchases of government bonds by the Eurosystem may lead to losses of revenue that are relevant for the budget.¹⁶¹ In excess to forfeited losses in revenue (*Bundesbank* profits) it reflects on a special liability (*Anstaltslast*) of the Federal Republic of Germany for securing the functioning of the *Bundesbank* which might even lead to an obligation to inject additional capital.¹⁶²

5.5 Evaluation

5.5.1 The Opinion of the European Court

Some of the prerequisites the GFCC has demanded for an interpretation of OMT as compatible with EU law¹⁶³ appear to have been met: The CJEU acknowledges that the

¹⁵⁸ GFCC, *OMT final* (footnote 137 above) at margin no. 199, 206.

¹⁵⁹ GFCC, *OMT final* (footnote 137 above) at margin no. 207.

¹⁶⁰ GFCC, *OMT final* (footnote 137 above) at margin no. 210

¹⁶¹ GFCC, *OMT final* (footnote 137 above) at margin no. 215.

¹⁶² GFCC, *OMT final* (footnote 137 above) at margin no. 217 ; disagreeing *Siekman* (2017), p. 1164 et seq.

¹⁶³ GFCC, *OMT referral* (footnote 71 above), at margin no. 100.

ECB will (i) ensure that a “minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market” and (ii) the ECB will “refrain from making any prior announcements concerning either its decision to carry out such purchases or the volume of purchases envisaged.”¹⁶⁴

Regarding a transgression of competences, the CJEU used the *Pringle* delimitation of monetary policy as a starting point and built essentially on the *objectives* of the measure under scrutiny but conceding that the *instruments* which the measure employs in order to attain those objectives “are also relevant”.¹⁶⁵ To the opinion of the CJEU, the requirement that the “implementation” of OMT “will not, in practice, have an effect equivalent to that of a direct purchase of government bonds” which is explicitly prohibited. In specific, it did not follow the concerns of the GFCC that by the “neutralisation of interest spreads”, the waiving of “securitised claims against individual Member States”, “the increased risk of failure or even a debt cut”, and the holding of “government bonds to maturity” will be an indication for a circumvention of the prohibition of monetary financing and negated an infringement of the “principle of proportionality”¹⁶⁶

The argumentation of the CJEU lacks to a non-negligible extent a critical analysis of the assertions of the ECB. Especially in the *demarcation of the competences* it follows quite uncritically the assertions of the ECB. An individual, in-depth assessment of its own would have been appropriate, as the GFCC rightly admonishes.¹⁶⁷ The question was, whether a bond buying programme was in fact “necessary”. The court takes intentions of the ECB as a given fact. Solely relying on the objectives of a measure for assessing its legal nature comes close to a circular reasoning, especially when addressing the concept and purpose of the ESM - created by secondary law of the EU - on the same level as the tasks, goals and objectives of the ESCB, carefully designed after long discussions by the primary law.

Similarly, the CJEU asserts uncritically that the “conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions” which

¹⁶⁴ CJEU, *Gauweiler* (footnote 114 above), at margin no. 106.

¹⁶⁵ CJEU, *Gauweiler* (footnote 114 above), at margin no. 46.

¹⁶⁶ GFCC, *OMT referral* (footnote 71 above), at margin nos. 87-91.

¹⁶⁷ GFCC, *OMT final* (footnote 137 above) at margin no. 182, 184, 186.

necessarily would have “consequences on the financing conditions of the public debt of the Member States.”¹⁶⁸ The same holds for the supposition that the OMT Programme provides for the purchase of government bonds “only in so far as is necessary for the safeguarding the monetary policy transmission mechanism and the singleness of monetary policy”.¹⁶⁹ This would have to be scrutinized closer. The Court’s further assumption that the “purchases will cease as soon as those objectives are achieved” may be doubted considering the factual development more than three and a half years later.¹⁷⁰

Particularly critical is its opinion on risk taking by the ESCB¹⁷¹ following in so far – without discussion – the final plea of the Advocate General at the European Court of Justice, *Pedro Cruz Villalón*. He had elaborated that all monetary policy implies risk taking by the monetary authorities.¹⁷² The Court opens this way the door for a – very hard to limit – transfer of risks from the private or public sector to the central bank. The wishes for a presumably “easy” path to alleviate debt burdens are already getting louder. At least, a more comprehensive and in-depth reasoning would have been suitable. This opinion on the tasks and powers of a central bank is far from self-evident and not a long lasting, generally accepted practice.

The reasoning of the Advocate General, not rescinded by the CJEU, is particularly dangerous as he stipulated that the Member States had agreed to the risk transfer from private or sovereign bond issuers to the ESCB by creating the ECB.¹⁷³ This appears

¹⁶⁸ CJEU, *Gauweiler* (footnote 114 above), at margin no. 110.

¹⁶⁹ CJEU, *Gauweiler* (footnote 114 above), at margin no. 112.

¹⁷⁰ Very outspoken *Sachverständigenrat* [German Council of Economic Experts] (2018), at no. 342: “The ECB is postponing interest-rate increases and the reduction of its bond holdings for too long.”

¹⁷¹ CJEU, *Gauweiler* (footnote 114 above), at margin no. 125: “a central bank, such as the ECB, is obliged to take decisions which, like open market operations, inevitably expose it to a risk of losses ...”.

¹⁷² Final plea of Advocate General Cruz Villalón, delivered on 14 January 2015, at no. 194 et seq. In effect, he rejected all concerns regarding: i) waiver of rights and *pari passu* status, ii) default risk, iii) holding the bonds until maturity, iv) time of purchase, v) encouragement to purchase newly issued bonds (nos. 232-261). In his test of proportionality *stricto sensu* (potential) costs of the programme do not outweigh benefits (at margin nos. 185 et seq.) referring repeatedly to “common wisdom” or “common knowledge” instead of providing concrete references. This is a quite weak legal reasoning, if at all.

¹⁷³ Final plea (footnote 172 above) at no. 194: “It is common knowledge that the central banks

highly questionable and lacks the appropriate underpinning by facts

The lurking discord between the CJEU and the GFCC on whether a possible debt cut conflicts with the prohibition of monetary financing may only be postponed when accepting the CJEU's holding that "only government bonds of such Member States that have bond market access may be purchased" as sufficient safeguard against a circumvention of the prohibition of monetary financing of Member States' budgets by the ESCB.¹⁷⁴ This holding may later be interpreted as a requirement at the time of purchase but does not interdict a participation in such a cut or a waiving of claims.

5.5.2 *The Opinion of the German Court*

In view of the admission of the complaints and petitions, the argument of the Court that "neither the SMP nor the OMT Programme as such are proper objects of a constitutional complaint" but only the "inaction on the parts of the German constitutional organs"¹⁷⁵ looks quite artificial from a more distant perspective.

Much more convincing is the clearly visible effort of the GFCC to expurgate or at least rescind the discretion of the institutions of the EU to define their competences. Following this line, it is consistent when the OMT Programme is judged as exceeding the monetary policy competences of the ESCB. The backdoor for avoiding an open conflict with the CJEU is declaring these transgressions as not being "manifest" in the sense of the *ultra vires* review but a clear signal is set that in the next case this might not be open any more – and it came with PSPP. The prerequisites the GFCC sets up for bond buying programmes to secure the observance of the prohibition of monetary financing of Member States' budgets and its threatening with *ultra vires* and an infraction of the "constitutional identity" of Germany are well intended but it remains to be seen whether they can in fact produce the aspired results.

intervene in the sovereign debt market, since purchases of government bonds, or repurchase agreements in respect of those bonds, are among the monetary policy instruments which are a means of controlling the monetary base. When they intervene in that market, the central banks always assume a degree of risk, a risk which was also assumed by the Member States when they decided to create the ECB." Such a recourse to "common knowledge" instead of a concrete argument and a specific reference is a clear indication for a deficient reasoning.

¹⁷⁴ GFCC, *OMT final* (footnote 137 above) at margin no. 204; CJEU *Gauweiler* (footnote 114 above), at margin no. 86.

¹⁷⁵ GFCC, *OMT final* (footnote 137 above) at margin no. 100; see at footnote 86.

6. Public Sector Purchase Programme

Again some members of the *Bundestag* and a large group of citizens – by individual complaint – questioned the legality of an asset purchase programme, this time the Public Sector Purchase Programme (PSPP), which had been initiated in spring 2015.¹⁷⁶ On 18 July 2017 the German Federal Constitutional Court decided once more to refer the case to the Court of Justice of the EU for a preliminary ruling in accordance with Articles 19(3)(b) and 267(1)(a) TFEU on several questions of EU law.¹⁷⁷ A petition for a temporary injunction interdicting the *Deutsche Bundesbank* to execute the purchases was denied, however, by the Court in a judgment of 10 October 2017.¹⁷⁸ The case has been decided by Court of Justice of the EU on 11 December 2018.¹⁷⁹ The final decision of the German Federal Constitutional Court is still open.

6.1 The second referral by the German Federal Constitutional Court to the Court of the EU

In the first place, the GFCC questioned the compatibility of the decision of the ECB to introduce the PSPP and the manner and method of its implementation with Article 123(1) TFEU.¹⁸⁰ But again, it also questioned whether the ECB might have violated Article 119 and Article 127(1) and (2) TFEU as well as Articles 17 to 24 ESCB/ECB Statute by exceeding its monetary policy “mandate”¹⁸¹ and thus “encroaching upon the competences of the Member States.”¹⁸² In the final part of its

¹⁷⁶ See section 1.2.5 above.

¹⁷⁷ GFCC, *PSPP-referral* (footnote 42 above).

¹⁷⁸ GFCC, judgment of 10 October 2017, cases: 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 [*PSPP-temporary*], BVerfGE [Reports of judgments of the Federal Constitutional Court] 147, 39.

¹⁷⁹ CJEU judgment of 11 December 2018, Case C-493/17 [*Heinrich Weiss*], ECLI:EU:C:2018:1000, Press Release No. 192/18, <http://curia.europa.eu/juris/document/document.jsf?docid=208741&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=7557213>.

¹⁸⁰ GFCC, *PSPP-referral* (footnote 42 above) at margin nos. 77-99.

¹⁸¹ See for the dubiousness of the term footnote 89 above.

¹⁸² GFCC, *PSPP-referral* (footnote 42 above) at margin nos. 100-123.

reasons, the Court elaborated the (possible) negative impact of the new Programme on the “overall budgetary responsibility of the *Bundestag*”.¹⁸³

6.1.1 *Relevance of the Referred Questions*

Following the procedural requirements the CJEU had set up for preliminary rulings, the German Court explicated the relevance of the referred questions for deciding the case brought up to its adjudication. It held that in the event that the PSPP Decision of the ESCB did constitute, “in a sufficiently qualified manner an exceeding of the mandate of the ECB and encroached upon the economic policy competences of the Member States and/or a violation [of] the prohibition of monetary financing of Member State budgets” the proceedings would be successful. In this case, the PSPP Decision would have to be “qualified as an *ultra vires* act under German constitutional law” and the “inaction on the part of the Federal Government and the *Bundestag* would amount to a violation of the complainants’ constitutional rights”.¹⁸⁴

The Court followed its judicature on *ultra vires* and confirmed that an act of the European Union constitutes a “sufficiently qualified violation” if it “manifestly” exceeds EU competences, “resulting in a structurally significant shift in the distribution of competences to the detriment of Member States”.¹⁸⁵ If “the ECB acted outside its monetary mandate” or “if the PSPP violated the prohibition of monetary financing of Member States budgets” it would “constitute” such a “significant exceeding of competences”.¹⁸⁶

Ultra vires acts would also give rise to duties on the part of “German state organs to take or refrain from action.” These duties are held to be “justiciable before the Federal Constitutional Court”¹⁸⁷ since the German *Bundestag* and the Federal Government “may not simply tolerate *ultra vires* acts of institutions, bodies, offices and agencies of

¹⁸³ GFCC, *PSPP-referral* (footnote 42 above) at margin nos. 124-134.

¹⁸⁴ *Ibid.* at margin no. 62.

¹⁸⁵ *Ibid.* at margin no. 63, citing BVerfGE [Reports of judgments of the Federal Constitutional Court] 126, 286 (304 et seq., 209); 142, 123 (200 et seq. margin no. 147 et seq.).

¹⁸⁶ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 64.

¹⁸⁷ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 69.

the European Union”.¹⁸⁸

6.1.2 Prohibition of Monetary Financing

In its interpretation of the European Union law, the Court expresses serious doubts that the PSPP Decision is compatible with the prohibition of monetary financing of government budgets according to Article 123 TFEU. Building on the cornerstones of the *Gauweiler* ruling of the CJEU¹⁸⁹ it takes up from its referral decision in OMT proceedings¹⁹⁰ that Article 18.1 ESCB/ECB Statute permits the ESCB “in order to achieve its objectives and to carry out its tasks” (not: mandate¹⁹¹) “to operate in the financial markets, *inter alia*, by buying and selling outright marketable instruments, which include government bonds”¹⁹² but emphasizing again that “the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action had an effect equivalent to that of a direct purchase of government bonds from the public bodies and institutions of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU.”¹⁹³ In so far it follows explicitly the opinion of the CJEU¹⁹⁴ and its own prior judicature.¹⁹⁵ Furthermore, it stipulates again that – taking up verbatim the CJEU – any programme “relating to the purchase of government bonds on the secondary market must provide sufficient guarantees to effectively ensure observance of the prohibition of

¹⁸⁸ Ibid., at margin no. 71.

¹⁸⁹ CJEU, *Gauweiler* (footnote 114 above), at margin nos. 94-97.

¹⁹⁰ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 90; see also GFCC, *OMT final* (footnote **Fehler! Textmarke nicht definiert.** above) at margin no. 199.

¹⁹¹ See for the dubiousness of the term footnote 89 above.

¹⁹² GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78 in its first part.

¹⁹³ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, citing literally CJEU, *Gauweiler* (footnote 114 above), at margin no. 97.

¹⁹⁴ CJEU, *Gauweiler* (footnote 114 above), at margin no. 97.

¹⁹⁵ GFCC, *ESM temporary* (footnote 65 above) at margin no. 175; GFCC, *OMT referral* (footnote 71 above), at margin no. 86 with concretisation of the likely circumvention by the OMT Programme at margin nos. 87-93; final.

monetary financing”.¹⁹⁶

The Court sees - in accordance with the CJEU¹⁹⁷ - the objective of Article 123 TFEU as to “encourage the Member States to follow a sound budgetary policy” and refrain from “excessively high levels of debt or excessive Member States deficits”.¹⁹⁸ Purchases on the secondary market may not be used “to circumvent” this objective.¹⁹⁹ Such a circumvention would be precluded if the following conditions were met²⁰⁰ which are partially taken from *Gauweiler* and its own OMT final decision from June 2016:²⁰¹

- Market operators must not know for certain that the ESCB is going to purchase those bonds within a certain period and under conditions allowing them to act, *de facto*, as intermediaries for the ESCB when investing in those bonds.²⁰²
- Member States “may not, in determining their budgetary policy, be afforded certainty that the ESCB will at a future point purchase their government bonds on secondary markets”.²⁰³
- A “minimum period must be observed between the issue of a security on the primary market and its purchase on the secondary market. Any prior announcement concerning either the ESCB’s decision to carry out such purchases or the volume of the envisaged purchases must be ruled out”.²⁰⁴
- “Purchased bonds may only in exceptional cases be held until maturity.”²⁰⁵
- “Purchases must be limited or suspended, and purchased bonds must be

¹⁹⁶ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, citing CJEU, *Gauweiler* (footnote 114 above), at margin no. 102 et seq.

¹⁹⁷ CJEU, *Gauweiler* (footnote 114 above), at margin no. 100.

¹⁹⁸ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78.

¹⁹⁹ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, referring to CJEU, *Gauweiler* (footnote 114 above), at margin no. 101.

²⁰⁰ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78.

²⁰¹ GFCC, *OMT final* (footnote 137 above) at margin no. 199, 201.

²⁰² CJEU, *Gauweiler* (footnote 114 above), at margin no. .

²⁰³ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, citing CJEU, *Gauweiler* (footnote 114 above), at margin no. 113.

²⁰⁴ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, citing CJEU, *Gauweiler* (footnote 114 above), at margin no. 106.

²⁰⁵ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, citing CJEU, *Gauweiler* (footnote 93 above), at margin nos. 117 and 118.

remarketed, should continuing intervention or further holding the bonds no longer be necessary for achieving the monetary policy objectives”.²⁰⁶

Again, the Court tries to lend bite to these requirements by restating that it considers them to be “legally binding criteria” and that a non-compliance with them would be considered “an exceeding of competences”.²⁰⁷

Applying the criteria on PSPP, the Court sees a violation of Article 123 TFEU, namely because of four reasons which are elaborated in-depth:

1. The details of the purchases were “announced in a manner that could *de facto* induce certainty in the markets that issued government bonds will, indeed, be purchased by the Eurosystem”.²⁰⁸
2. It would not be “possible to verify compliance with certain minimum periods between the issuance of the securities on the primary market and their purchase on the secondary market”.²⁰⁹
3. All “purchased bonds were – without exception – held until maturity”.²¹⁰
4. Purchases “include bonds that, from the outset, return a negative yield”.²¹¹

6.1.3 *Exceeding of competences*

6.1.3.1 Foundations

The GFCC starts with underlining that the competences of the ESCB in general and the ECB in particular are limited to monetary policy.²¹² Beyond this, the ESCB is only authorised to support the general economic policy of the European Union,

²⁰⁶ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, citing CJEU, *Gauweiler* (footnote 93 above), at margin nos. 112 et seq., 117 et seq.

²⁰⁷ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 79, affirming GFCC, *OMT final* (footnote **Fehler! Textmarke nicht definiert.** above) at margin no. 192.

²⁰⁸ GFCC, *PSPP-referral* (footnote 42 above) at margin nos. 80, 81-92.

²⁰⁹ GFCC, *PSPP-referral* (footnote 42 above) at margin nos. 80, 93-95.

²¹⁰ GFCC, *PSPP-referral* (footnote 42 above) at margin nos. 80, 96-98.

²¹¹ GFCC, *PSPP-referral* (footnote 42 above) at margin nos. 80, 99.

²¹² GFCC, *PSPP-referral* (footnote 42 above) at margin no. 100, referring to its Maastricht decision, BVerfGE [Reports of judgments of the Federal Constitutional Court] 89, 155 (208 et seq.).

Articles 119(2), 127(1) second sentence, 282(2) third sentence TFEU.²¹³ Based on these principles, the Court expresses doubts whether the PSPP Decision falls within the “mandate”²¹⁴ of the ECB “given the volume and its implementation ... and the effects resulting therefrom”.²¹⁵ The power to support the general economic policy of the Member States at the level of the European Union according to Article 127(1) second sentence TFEU would “not justify a steering influence of the Eurosystem over economic matters.”²¹⁶

In its argumentation, the Court emphasizes again the crucial role of the “principle of conferral”, following Article 5(1) and (2) TEU, which also holds for the functions and powers of the ESCB. To satisfy democratic requirements the “mandate” has to be “narrowly restricted” and is subject to full judicial review. Referring to its case-law, the Court reminds that the encroachment on the democratic principle by granting independence to central banks is only justified by the empirically supported “particularity of monetary policy” in guaranteeing monetary stability. This “endorsement” hinges decisively on a restrictive interpretation of monetary policy; “it cannot be extended to other areas of policy”.²¹⁷

For drawing the line, the Court follows again the CJEU in employing in the first place the aim (objective) pursued with the measure – determined “objectively” – but also the means (instruments) chosen with the view to achieving this aim. The “decisive factor” for delineating competences shall be whether a measure pursues “directly” economic policy objectives. Granting financial assistance to a Member State “clearly” does not fall within the monetary policy.²¹⁸ From this the Court derives “that if and to the extent that the ESCB grants financial assistance, it engages an economic policy in a manner that the European Union is prohibited from doing”.²¹⁹

²¹³ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 100, 113; in concordance with CJEU, *Gauweiler* (footnote 114 above), at margin no. 59;

²¹⁴ See for the dubiousness of the term footnote 89 above.

²¹⁵ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 100, 114.

²¹⁶ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 113.

²¹⁷ BVerfGE [Reports of judgments of the Federal Constitutional Court] 89, 155 (208 et seq.), 97, 350 (368 et seq.), 142, 123 (220 et seq. margin nos. 188 et seq.).

²¹⁸ CJEU, *Gauweiler* (footnote 114 above), at margin no. 57.

²¹⁹ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 109.

The GFCC deviates, however, from the European Court which discards almost completely indirect effects. The European Court had held that simply because a programme could have to a certain degree further economic policy objectives would not mean that it must be treated as an economic policy measure.²²⁰ Instead the GFCC stipulates to employ a clear demarcation:

“It might be untenable, however, to still consider economic policy effects as ‘indirect’ in nature if the economic policy effects of a measure are intended or deliberately accepted, and these effects are at least comparable in weight to the monetary policy objective pursued.”²²¹

In particular, the GFCC rejected the holding that the competent EU institutions and bodies command “wide margins of assessment” decreasing “the intensity of judicial review”. Conceding the autonomy to delineate competences for the institutions, bodies, offices, and agencies of the European Union would “not sufficiently give consideration to the principle of conferral and the necessity of interpreting the ECB’s mandate in a restrictive manner.” Rather it would be “necessary to conduct an overall assessment and evaluation, also taking into account factors contradicting the proclaimed objective”.²²²

6.1.3.2 Application

This overall assessment lead to the result that the PSPP Decision does not fall within the ECB “mandate”²²³ considering its volume and duration. To the opinion of the GFCC, it could no longer be qualified as a monetary policy measure but instead constitutes a “measure that is primarily of an economic policy nature”.²²⁴ Its justification is mainly based on the sheer volume of the purchases which lead to considerable economic policy effects with steering effects on the economy as inevitable” consequence. It were to “affect balance sheet structures in the commercial banking sector by transferring large quantities of Member State bonds, including high-

²²⁰ CJEU *Pringle* (footnote 74 above), at margin no. 56, 97 ; affirmed by CJEU *Gauweiler* (footnote 114 above), at margin nos. 58 et seq.

²²¹ GFCC, *PSPP-referral* (footnote 46 above) at margin no. 119.

²²² GFCC, *PSPP-referral* (footnote 42 above) at margin no. 114, 119, referring to GFCC, *OMT final* (footnote **Fehler! Textmarke nicht definiert.** above) at margin no. 183 et seq.

²²³ See for the dubiousness of the term footnote 89 above.

²²⁴ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 114.

risk ones, from the balance sheets of the Member States [banks] to the balance sheets of the ECB and national central banks”. This would lead to a significant improvement of their economic situation and their credit ratings.²²⁵

In addition, the PSPP would improve the refinancing conditions for the Member States. Beyond the effects of “normal” open market operations, allowed by Article 18.1 ESCB/ECB Statute, on the economy, the “particularly large volume” of the purchases might have “deliberately accepted consequences” of such a weight that they might be seen as superseding the monetary policy objectives (not: mandate!). Thus it could be concluded that the economic policy effects of the PSPP were not mere indirect effects” of a monetary policy, “but rather constituted an at least equally weighty aim pursued by the programmes”.²²⁶

6.1.4 Proportionality

Regarding the development of inflation, the effect that the euro area Member States could deliberately use low-yield government bonds as a means of budgetary policy, and that the activities of commercial banks are “factually subsidized”, the GFCC questions that the means chosen are still proportionate to achieving the proclaimed monetary policy objective.²²⁷

6.1.5 Budgetary responsibility

The GFCC also sees dangers for the overall budgetary responsibility of the German *Bundestag* repeating its opinion stated in the final decision on OMT where it had not seen an apparent threat “at the moment”.²²⁸ It restates that “the purchases of government bonds by the Eurosystem may lead to losses of revenue that are relevant for the budget.”²²⁹ In excess to forfeited losses in revenue (*Bundesbank* profits) it reflects on

²²⁵ Ibid., at margin no. 120.

²²⁶ Ibid., at margin no. 121.

²²⁷ Ibid., at margin no. 122.

²²⁸ GFCC, *OMT final* (footnote 137 above) at margin no. 210

²²⁹ GFCC, *OMT final* (footnote 137 above) at margin no. 215.

a special liability (*Anstaltslast*) of the Federal Republic of Germany for the functioning of the *Bundesbank* which might even lead to an obligation to inject additional capital.²³⁰

A closer scrutiny, however, reveals that the risk sharing regime established by PSPP differs considerably from design of OMT. The risk of defaults is in fact largely attributed to the various national central banks and only to a small fraction “communitised” at the ECB.²³¹

Despite the lack of evidence that PSPP could or would, at the moment, result to losses ultimately infringing the overall budgetary responsibility of the *Bundestag*,²³² the Court points out that the rules of risk distribution in the context of PSPP could be changed to the detriment of Member States fairly easily.²³³ In addition, it deliberates that Article 32.4 ESCB/ECB Statute might allow a redemption of losses of a national central bank and changing this way the appropriation of incurring financial losses from the asset purchased.²³⁴

Looking forward, the Court again points out that the “overall budgetary responsibility” were “part of the constitutional identity of the Basic Law”.²³⁵

6.2 Denial of a Temporary Injunction

In the fall of 2018, the German Federal Constitutional Court²³⁶ rejected petitions to issue temporary injunctions

- releasing the *Deutsche Bundesbank* from its obligation to purchase assets in executing the Public Sector Purchase Programme and the Corporate Sector Purchase Programme (PSPP) of the ESCB and interdicting further purchases

²³⁰ GFCC, *PSPP referral* (footnote 42 above) at margin no. 126, referring to GFCC, *OMT final* (footnote **Fehler! Textmarke nicht definiert.** above) at margin no. 217; disagreeing *Siekmann* (2017), p. 1164 et seq.

²³¹ GFCC, *PSPP referral* (footnote 42 above) at margin no. 127.

²³² GFCC, *PSPP referral* (footnote 42 above) at margin no. 128..

²³³ GFCC, *PSPP referral* (footnote 42 above) at margin no. 130, 133.

²³⁴ GFCC, *PSPP referral* (footnote 42 above) at margin no. 132.

²³⁵ GFCC, *PSPP referral* (footnote 42 above) at margin nos. 129, 131, referring to GFCC *OMT final* (footnote 137 above) at margin no. 210

²³⁶ GFCC, *PSPP temporary* (footnote 178 above).

within the framework of PSPP;

- ordering the German Federal Government to file lawsuits against those programmes in the Court of the EU and to secure that - in the meantime until a final judgment is handed down - the effects of the programmes in Germany remain as much as possible limited;
- interdicting the Federal Government of Germany, and in particular the Federal Minister of Finance, to aid the European Central Bank in conducting the PSPP, in specific by public statements, until the German Federal Constitutional Court had adjudicated the main proceedings.

The Court rejected the petitions as inadmissible.²³⁷ Its main reason was that they would result in a pre-emption of the decision of the main proceedings which is in principle prohibited.²³⁸ The Court argued that the objective of PSPP would in effect be impaired if the petition would be granted.²³⁹ Reasons for an exception, like serious, non-mendable damages on the petitioners, were not visible.²⁴⁰

6.3 The Judgment of the Court of Justice of the EU

Following the final plea of Advocate General *Wathelet*, proposing that the PSP Programme does not infringe the prohibition of monetary financing and does not exceed the powers of the ECB, the Court of Justice of the European Union decided on 11 December 2018 that the ESCB's PSPP does not exceed the ECB's "mandate"²⁴¹ and does not contravene the prohibition of monetary financing.²⁴²

6.3.1 Exceeding of Competences

In its judgment, the Court found that the consideration of the questions referred by the

²³⁷ GFCC, *PSPP temporary* (footnote 178 above) at margin no. 10.

²³⁸ *Ibid.*, at margin no 13.

²³⁹ *Ibid.*, at margin no. 14.

²⁴⁰ *Ibid.*, at margin no. 16.

²⁴¹ See for the dubiousness of the term footnote 94 above.

²⁴² CJEU, *Heinrich Weiss* (footnote 179 above).

German Federal Constitutional Court had disclosed no factor of such a kind as to affect the validity of the PSP programme. The Court held, first, that the PSP programme does not exceed the ECB's "mandate"²⁴³. The programme would fall within the area of monetary policy, in respect of which the EU has exclusive competence for the Member States whose currency is the euro, and would observe the principle of proportionality.²⁴⁴

It reduced, however, its judicial review of the acts of the ESCB to the control of a "manifest error of assessment" which - foreseeably - it did not find.²⁴⁵ In this context it emphasized "that Article 127(1) TFEU provides, inter alia, that (i) without prejudice to its primary objective of maintaining price stability, the ESCB is to support the general economic policies in the Union and that (ii) the ESCB must act in accordance with the principles laid down in Article 119 TFEU." The Court also contended that, "within the institutional balance established by the provisions of Title VIII of the FEU Treaty ... the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies".²⁴⁶ A reference for this was, however, not provided.

The Court did not concur with the referring court's view that any effects of an open market operations programme that were knowingly accepted and definitely foreseeable by the ESCB when the programme was set up should not be regarded as "indirect effects" of the programme.²⁴⁷

Moreover, the Court held that the PSP programme, in its underlying principle, does not manifestly go beyond what is necessary to raise inflation rates. Without scrutiny of its own, it declared it to be clear, inter alia, that it was not possible to counter the risk of deflation by means of the other instruments available to the ESCB. Key interest rates were at their lower bound and the ESCB had, for several months, already been implementing a programme of large-scale purchases of private sector assets.²⁴⁸

²⁴³ See for the dubiousness of the term footnote 89 above.

²⁴⁴ CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. 100.

²⁴⁵ CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. 56.

²⁴⁶ CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. 60.

²⁴⁷ CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. 62.

²⁴⁸ CJEU, *Heinrich Weiss* (footnote 179 above) at margin nos. 86, 100.

6.3.2 *Monetary Financing of Member States Budgets*

The Court further found that the PSP programme does not infringe the prohibition of monetary financing, which prevents the ESCB from granting any type of credit to a Member State. Implementation of that programme was not considered to be equivalent to a purchase of bonds on the primary markets and would “not reduce the impetus of the Member States to follow a sound budgetary policy”.²⁴⁹

To the opinion of the Court, the safeguards built into the PSPP are sufficient to ensure that a private operator cannot be certain, when it purchases bonds issued by a Member State that those bonds will actually be bought by the ESCB in the foreseeable future. The fact that the PSPP procedures make it possible to foresee, at macroeconomic level, that there will be a purchase of a significant volume of bonds issued by public authorities and bodies of the Member States does not afford a given private operator such certainty that it can act, *de facto*, as an intermediary of the ESCB for the direct purchase of bonds from a Member State.²⁵⁰

Furthermore, the Court held that the PSP programme would not enable the Member States to determine their budgetary policy without taking account of the fact that, in the medium term, continuity in the implementation of the PSPP is in no way guaranteed and that they will thus be led, in the event of a deficit, to seek financing on the markets without being able to take advantage of the easing of financing conditions that implementation of the PSPP may entail. Moreover, the effects of the PSP programme on the impetus to conduct a sound budgetary policy are considered to be limited by (i) the restriction of the total monthly volume of public sector asset purchases, (ii) the subsidiary nature of the PSP programme, (iii) the distribution of purchases between the national central banks in accordance with the key for subscription of the ECB’s capital, (iv) purchase limits per issue and issuer (which means that only a minority of the bonds issued by a Member State can be purchased by the ESCB under the PSPP) and (v) stringent eligibility criteria (based on a credit quality assessment).²⁵¹

The Court also stated that the prohibition of monetary financing does not preclude either the holding of bonds until maturity or the purchase of bonds at a negative yield to

²⁴⁹ CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. 144.

²⁵⁰ CJEU, *Heinrich Weiss* (footnote 179 above) at margin nos. 127 et seq.

²⁵¹ CJEU, *Heinrich Weiss* (footnote 179 above) at margin nos. 133-142.

maturity²⁵² and thus rejecting explicitly one of the prerequisites the German Court had set up to judge an asset purchase programme as conform with EU law.²⁵³

6.4 Critique

6.4.1 Referral Decision of the German Federal Constitutional Court

Fully convincing are the attempts of the German Federal Constitutional Court to define a clear demarcation between monetary policy and economic policy and, in particular, to reject the notion of a margin of assessment or discretion in favour of the organs and institutions of the EU to delineate their competences. For various reasons, the delineation of competences must not be subject to autonomous decisions of the entities profiting from it. The final result that in an overall assessment PSPP might not be considered to be monetary policy is plausible despite the fact that the critical selectivity of OMT is avoided. The sheer volume and the long duration in a considerably changing economic environment are strong arguments especially then weighted against the potential benefits.

Furthermore, the assessment that PSPP in effect leads to a monetary financing of government budgets can be supported given the duration of it and the *de facto* guarantee of the assumption of questionable bonds by the ESCB. The described effects on the budgetary policy by the Member States which is part of the economic policy reserved to them are as well visible as the waning efforts for structural reform due to reduced market forces.

Still not fully convincing are the reflection on the admissibility of the petitions although it can clearly be seen that the Court has further rescinded the admissible grounds for a petition since it judged them largely inadmissible.

In essence, not convincing are the reflections of the Court on the liability structure within the Eurosystem, the obligation by the *Bundestag* to provide for an injection of capital in the *Bundesbank*, and the range of Article 32.4 ESCB/ECB Statute.

²⁵² CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. .

²⁵³ GFCC, *OMT referral* (footnote 71 above), at margin no. 100; GFCC, *OMT final* (footnote 137 above) at margin no. 199, 206; GFCC, *PSPP-referral* (footnote 42 above) at margin no. 78, citing CJEU, *Gauweiler* (footnote 93 above), at margin nos. 117 and 118.

6.4.2 *The Ruling of the Court of Justice of the European Union*

First annotations to the judgment appreciate that the court did not question the principle of limited conferral and undertook did not refrain from a judicial control of the observance of the limits of the “mandate” of the EESCB despite its guaranteed independence.²⁵⁴ Moreover, it was accepted that the impact of the programme on economic policy were only “indirect” and thus in conformity with Article 127(1) TFEU.²⁵⁵

The reduction of the judicial control to “manifest” errors²⁵⁶, “manifest” transgression of the necessary to achieve the goal,²⁵⁷ or the concession of a wide margin of discretion²⁵⁸ was also supported despite some mild reservations. In effect a kind of political question doctrine was activated.²⁵⁹ Some voices even contend that the implementation of PSPP against the opposition to quantitative easing in the EMU can be viewed as “testimony to the ECB’s ability to resist national pressures”.²⁶⁰ No matter if this is a correct observation, at least the CJEU did not hesitate to grant in effect a wide space of freedom to the Eurosystem to do what it wants to do.

The court’s rejection of a (potential) infringement of Article 123(1) TFEU was, however, not wholeheartedly accepted in view of the guarantees against a circumvention of the provision. The double criterion of the judgment against a circumvention: (i) no certainty for the investor that the government debt will be bought by the ESCB and (ii) no certainty for the government that one of its debt instruments will eventually be purchased by a central bank of the Eurosystem, is insofar questioned

²⁵⁴ *Müller-Graff* (2019), p. 172.

²⁵⁵ *Ibid.*

²⁵⁶ CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. 56, 78, 91.

²⁵⁷ *Ibid.*, at margin no. 79, 81, 86, 92.

²⁵⁸ *Ibid.*, at margin no. 30, 41, 91, 92.

²⁵⁹ *Müller-Graff* (2019), p. 172 et seq.: “Insoweit mögen sich judiziell formulierbare Nachfrage stellen, die freilich doch in judikativ unzugängliche politikartige Ermessensfragen münden dürften.”

²⁶⁰ *Lombardi and Moschella* (2016) at 865.

as it would have needed more empirical underpinning.²⁶¹

In conceding the institutions and bodies of the European Union a margin of discretion or assessment when deciding on their competences, it reduces the elaborated competence order widely to a mere guideline with little normative content. The distribution of competences is not primarily a technical feature but an essential decision about the attribution of real powers. If the obedience to these rules cannot be strictly controlled by the judiciary the balance of powers is endangered.

The contention of the CJEU that “the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies”²⁶² is questionable, since no reference is provided. Moreover, even if an “absolute” separation were not intended, a strict control and a judicable demarcation between the two policies cannot be negated. The clear and consistent separation and differing distribution of competences in the system of Title VIII TFEU would be rendered almost useless if the quest of organs and institutions of the EU for (new) competences and powers would only be controlled for “manifest error of assessment”.

In accepting, furthermore, the uncontrolled allegation of the ESCB that strong, automatic and not unwanted (indirect) effects on economic policy of a measure with monetary policy objective does not change its characteristic – perhaps over time – to a measure of economic policy opens widely a door for substantial circumventions. Due to the lack of strict judicial control the monetary policy objective can easily be used as a mere pretext. The rationale of Article 123(1) TFEU can be and is thwarted by using a dummy to act in between the sovereign issuer of a debt and the ESCB purchasing it. The norm is reduced to an absurd attempt to prevent an abuse of monetary policy instruments to mend an irresponsible fiscal policy of certain governments. In this interpretation it appears as mere symbolic legislation without any real directing power.

The alleged safeguards for limiting the effects of the PSP programme on the impetus to conduct a sound budgetary policy are largely counterfactual. Contrary to the allegations of the Courts it can be seen in several Member States that the impetus for structural reforms enabling a sound fiscal policy has withered away over the years of conducting the asset purchases in conjunction with a zero interest policy. The time the

²⁶¹ Müller-Graff (2019), p. 173.

²⁶² CJEU, *Heinrich Weiss* (footnote 179 above) at margin no. 60.

asset purchases have bought was wasted to quite some extent.

7. Overall Evaluation

To the opinion of the critics, the bond buying programmes, especially OMT, are a selective or even arbitrary subsidy of interest rates in favor of governments or banking systems in financial distress.²⁶³ In their view, safeguarding the present composition of the euro zone is not a task conferred on the ECB.²⁶⁴ Also, the Bundesbank could not find any evidence for an impaired transmission of monetary policy that would need to be counteracted by such interventions.²⁶⁵

7.1 Monetary Policy

7.1.1 Differences in Design

A final assessment of the various programmes from a distant perspective would have to come to the result that the Securities Market Programme (SMP) was the most questionable in view of a transgression of the competences attributed to the ESCB. It was in effect an arbitrary subsidy of selected Member States and their banking systems (Greece, Italy, Spain, Portugal, and Ireland). This is typically an act of economic policy as it only faintly affects the currency and the currency area. The decision, which country will be supported and which not, is in view of the criteria, intentions, and consequences of genuine economic nature as explicated by the CJEU in the *Pringle* case.

The selectivity can also be found in the OMT Programme but the decision to purchase is not designed as arbitrary as in SMP since it is tied to an EU support programme. Even more, the purchases within the framework of APP follow a predefined key, the selectivity is almost completely eliminated and PSPP could be assessed as a measure with a monetary objective and thus is not as critical as SMP and OMT in view of staying within the competences of the ESCB.

For Germany, the rules of PSPP lead to a – probably unintended – change in the composition of the holders of the federal bonds (*Bundesanleihen*; Bunds) and of the

²⁶³ Ruffert (2019), p. 181.

²⁶⁴ Siekmann (2013a); Siekmann and Wieland (2013), at 3, 7.

²⁶⁵ Deutsche Bundesbank (2013).

structure of the balance sheet of the *Bundesbank*: The percentage of creditors from the euro area decreased from 59,8% in 2014 to 44,6% in 2017 and from Germany increased from 11,6% in 2014 to 34,4% in 2017. Striking is the surge of the fraction of all bonds – issued by the federal government – held by the *Bundesbank* from 0% in 2014 to 23,5% in 2017. This means, that the *Bundesbank*, a federal authority, is on the way to become the biggest creditor of its bearer, the federal government. Correspondingly, at the end of June 2018 app. €454,8 bn. from a total of €1.823,0 bn. on the balance sheet of the *Bundesbank* are bonds purchased within the framework of PSPP. €1.000 bn. of the total are claims against the ECB stemming from TARGET 2. Summing up, it can be assumed that more than 40% of all (redeemable) assets of the *Bundesbank* are claims against sovereigns from the euro area. The fundamental separation of monetary policy from economic policy is becoming almost meaningless, however difficult it might be to draw the line in a specific situation, if it were the ESCB allowed to salvage insolvent debtors – public of private.

It remains, however, to scrutinize closer the transgression of competences, the prohibited monetary financing of Member States' budgetary deficits, and the necessity (proportionality) of the programmes in the present economic environment.

7.1.2 *Discretion of an Institution to Decide its Own Competences?*

The GFCC is right in emphasizing that the “wording and systematic concept as well as the spirit and purpose of the Treaties” assume and demand a clear distinction between “matters of a monetary policy nature from economic policy matters”²⁶⁶ although it does not even mention the literature which denies such a separability.²⁶⁷ Later, also the CJEU in effect supported this view by reducing its judicial control to almost nil.²⁶⁸

The democratic principle requires, however, a restriction of the tasks and powers

²⁶⁶ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 108.

²⁶⁷ Thiele (2014a), at 255-264; *ibid.* (2014b), at 697 et seq.; Simon (2015), at 1029; *Jędrzejowska-Schiffauer* and *Schiffauer* (2016), at 200 et seq.: “methodological impossibility” assessing a “formalistic ex-ante legal definition” as “arbitrary and counterproductive” and defending the margin of discretion ceded to the ECB as “reasonable”. Categories like “counterproductive” and “reasonable” are not really convincing arguments when exhorting the distribution of powers and competences, and, law is and has to be formalistic.

²⁶⁸ See at footnote 245 above.

conferred on an agency or authority with guaranteed independence. In specific, it wants a narrow interpretation of the term monetary policy in Articles 119, 127(1) TFEU. For the same reasons the propagated wide margin of discretion for the monetary authorities must not be acknowledged. This has been expressed by the German Federal Constitutional Court with appropriate clarity.²⁶⁹

If the superior expertise of the persons framing a decision would be a decisive threshold for judicial control some of the most existential decisions would be excluded from the system of checks and balances and democratic legitimation. This result is even more compelling in case the rescue operations could select single institutions and countries to save from financial distress.

7.1.3 No Regional Selectivity of Central Bank Measures

Monetary policy at its core is characterised by its encompassing scope for the whole currency area. It alters its character when it is targeted only at a part of the area.

7.1.3.1 Federal Reserve System

Along this line, the Federal Reserve System of the USA is not allowed to support single states by buying their debt under the allegation that the interest rate it has to accept for its debt is “irrational”, or more general: the “transmissions mechanism” is impaired. The Fed may not purchase any debt of these “sub-central” entities²⁷⁰ in open market operations; only of the Federal Government.²⁷¹ It is a widely spread misconception that the “quantitative easing” employed by the Fed is comparable to the – installed or announced – programs of the ESCB. It does not buy or accept as collateral debt instruments issued by any state, its agencies, or municipalities, no matter whether direct or on the secondary market. It does not even provide liquidity assistance, not to speak of solvency support, or subsidy of allegedly too high interest rates for sub-central entities.

²⁶⁹ GFCC, *PSPP-referral* (footnote 42 above) at margin no. 102: “Compliance with these restrictions is subject to full judicial review”.

²⁷⁰ Sometimes also labelled as “municipal” in the US, which has led to quite some misunderstandings in Europe.

²⁷¹ 12 USC § 355 (1).

In case of financial distress they have to help themselves.

In essence, the Federal Reserve Act follows the *real bill doctrine* in designing the instruments granted to the Fed. This can be demonstrated by the regulation of the discount window (12 USC § 343). It only allows to accept instruments with an underlying *commercial transaction*, similar to the former § 19(1) no. 1 *Bundesbank Act* of 1957 (*gute Handelswechsel*). Notes, drafts, or bills covering merely financial operations are explicitly excluded from discount. The same holds for financial instruments of states, municipalities, or their agencies. Only obligations of the Federal Government and its agencies are exempted from this prohibition. The Dodd-Frank-Act has somewhat relaxed these limitations in “unusual and exigent circumstance” but only with strict safeguards.

Even more important are the strict legal rules for open market operations. 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)).

This is comparable to the limited power of the *Bundesbank* to grant short term loans to public entities (*Kassenkredite*).²⁷² Even this very limited power had to be removed in establishing the European Monetary Union. Noteworthy is also the clause requiring a purchase “only in the open market”. This has to be taken literally. It requires that the instrument had been bought before by an investor. For this simple reason, maneuvers like the ELA handling in the case of Ireland and Cyprus would have been illegal in the U.S.

7.1.3.2 Bank of England

The situation in the UK is not comparable to the U.S. or the EMU. The Bank of England does not have to operate in a heterogeneous area of a federal type with several states. Technically, it executes its purchases by a wholly-owned subsidiary, the “Bank of

²⁷² § 20(1) no. 1 *Bundesbank Act* 1957.

England Asset Purchase Facility Fund Limited” (“the Company”). Although the purchases are financed by central bank money and could be used for monetary policy purposes, the economic risk is not borne by the Bank of England. The Company is fully indemnified by the Treasury. This procedure has to be judged as an attempt to comply with Article 123 TFEU and protocol no.15, clause 10 that provides an exemption only for the “ways and means’ facilities of the Bank of England”, which are also comparable to short term *Kassenkredite*. In effect, the Bank of England has not acquired sub-national assets and holds as assets from the public sector only UK government bonds (“gilts”). Loans to local authorities are granted by the “United Kingdom Debt Management Office” and not by the Bank of England.

7.1.3.3 Conclusion

Simply because (allegedly) not sufficient debt of a central government exists in the euro area does not justify an expansion of the range of competences; in specific, it does not allow to selectively purchase debt of subsets of the currency area. It would be a serious methodological flaw to conclude from instruments provided to the ESCB, like operations in the open market (Article 18.1, first indent, ESCB/ECB Statute), to its legality, no matter what purposes they follow, or what (regional) effect is envisaged 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. Not all measures involving money are monetary policy.

7.2 Monetary Financing of Budgets of Sovereigns

In essence, the support measures of the ESCB might have been judged as monetary policy but the selectivity of OMT and the substantially changed economic environment makes this increasingly questionable – not to speak of the prohibited (indirect) financing of budgetary deficits by the monetary authorities.

7.3 Necessity and Proportionality

The distribution of losses incurring from write-downs on the purchased assets also plays a crucial role in the legal assessment of the programmes. Establishing in effect an equalization system via asset purchases of the ESCB by shifting risks of write downs is definitely economic policy and not monetary policy and hence a transgression of competences.

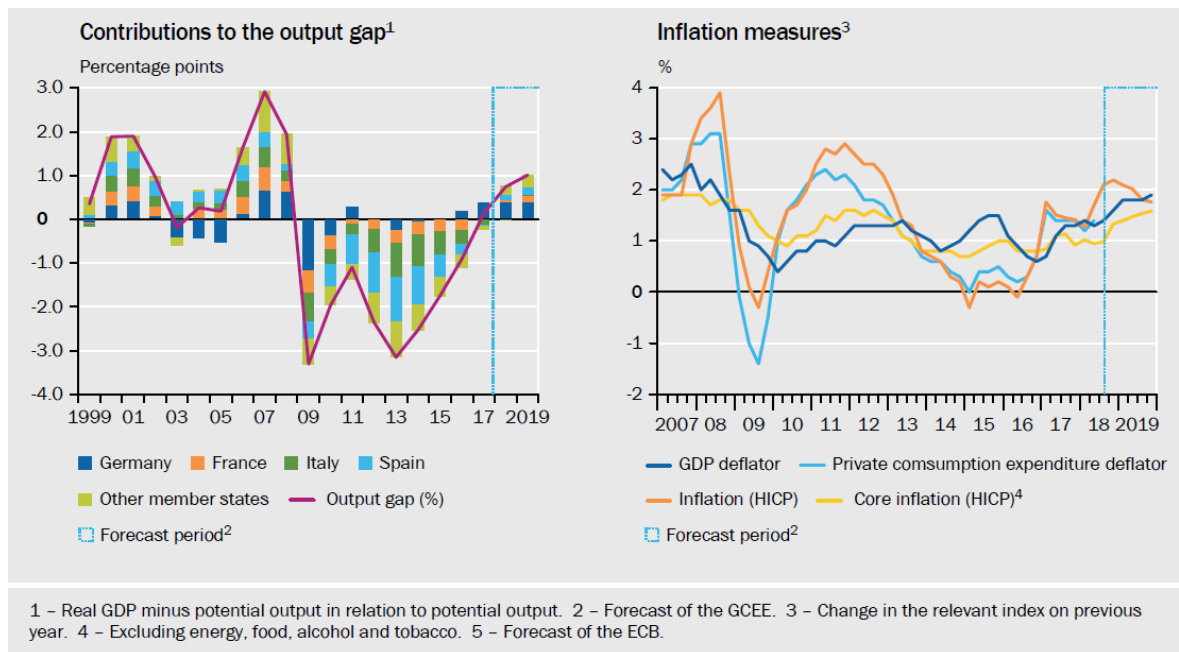
Time has become an important factor. The sheer duration of the programmes and the transition of the economic environment raise questions of *necessity* and *proportionality*. At least their downsides and risks appear to outweigh increasingly their (potential) benefits.²⁷³

That the economic environment clearly has changed can be derived from the following chart 4. Since 2017 the output gap has turned positive indicating that production factors are overused. In addition, the inflation rate, particularly the core inflation, is well above 1.5 % thus being close to the goal the ECB has set for its monetary policy. The risks and downsides are increasing which warrant an exit. Although the ESCB has finished its net purchases but is continuing to “re-invest” the redeemed debt instruments.

In order to return to normal the ESCB would have to reduce these “re-investments” and reduce the size of its balance sheet which poses a growing danger; not the least for its independence. Finally interest rates would have to be raised. This might already be too late since economic growth has slowed somewhat during Q3 and Q3 of 2018.²⁷⁴

²⁷³ *Sachverständigenrat* [German Council of Economic Experts] (2015), p. 143-145, no 307-309; *ibid.* (2016), p. 185, 208-213, 223 et seq.; *ibid.* (2017), p. 179-182; *ibid.* (2018), p. 178-190.

²⁷⁴ For a comprehensive assessment of the need for normalization see *Sachverständigenrat* [German Council of Economic Experts] (2018), margin nos 352-361.

Chart 4: Output gap and inflation measures

Source: *Sachverständigenrat* [German Council of Economic Experts] (2018), at 179, chart 49

Some German economist recently tried to construe a liability in view of TARGET2 and ELA even without an exit of a Member State whose currency is the euro. Such a liability would also be relevant for write downs stemming from a (partial) default of bonds purchased in the context of PSPP²⁷⁵ and thus could infringe the overall budgetary responsibility of the German federal parliament. This train of thoughts suffers, however, from serious flaws both in facts and legal assessment.

7.4 Size of the Consolidated Balance Sheet as a Threat to Independence

The sheer size of the balance sheet of a central bank lodges a potential threat for its independence. It might incite demands to use it for other objectives than price stability deemed useful and wanted by politicians and the public. The dangers are apparent.

²⁷⁵ *Fuest and Sinn* (2018).

Tampering with its independence is already visible (US, Italy). In the euro area another risk exists. Unlike the Federal Reserve System²⁷⁶ the Eurosystem has acquired to a large extent debt issued by the sub-central parts of the currency area²⁷⁷ which are basically sovereign entities. If these holdings are not reduced they would amount to an additional monetary financing of Member States' activities and would weaken the signaling and disciplining functions of the markets for public finances of the members of the Monetary Union.²⁷⁸

The threat to the independence of the institutions, organs, and acting persons (personal independence)²⁷⁹ might become real despite its comprehensive guarantees in the primary law of the Union²⁸⁰ which can be amended only by unanimous consent of all Member States, Article 48 TEU. As can be derived from the right hand side of chart 5, a substantial part of government of some Member States, foremost Italy, is held by a central bank. The large share held by the other domestic financial institutions might also spur political pressure on the central bank system with the goal to ease financing conditions irresponsibly or to grant Emergency Liquidity Assistance (ELA) on the basis of Article 14.4 ESCB/ECB Statute.

²⁷⁶ See above at section 7.1.3.1

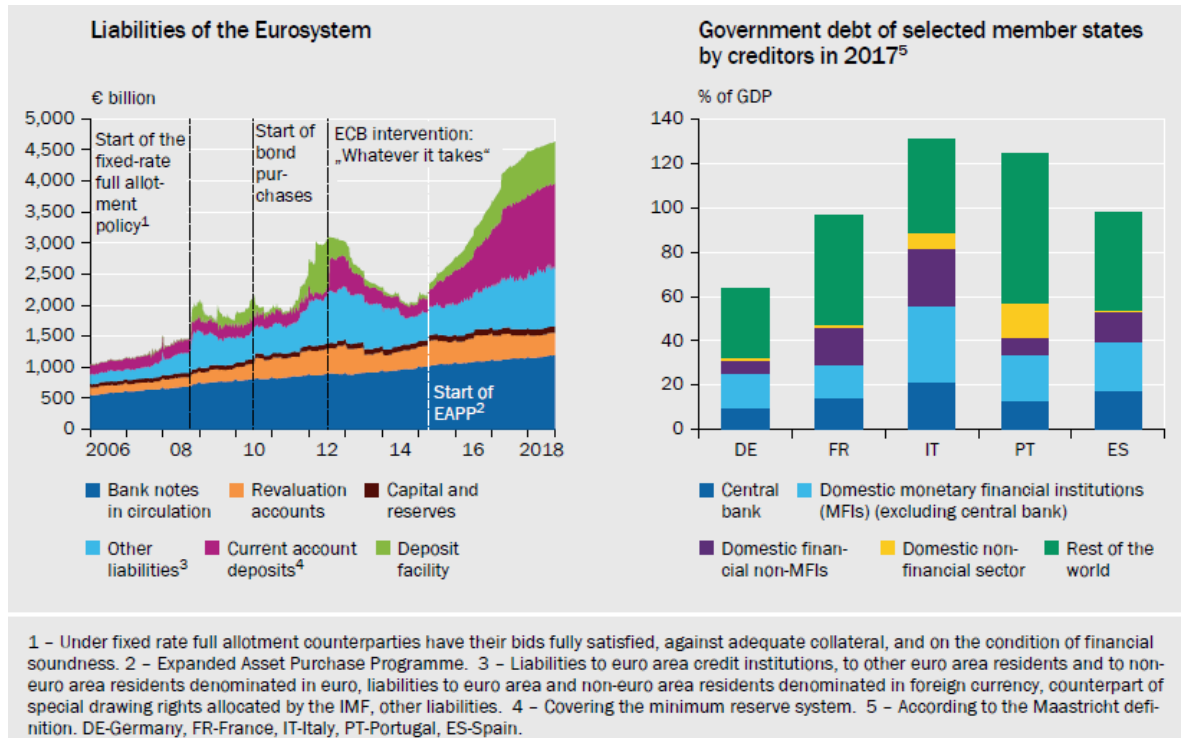
²⁷⁷ See chart 5.

²⁷⁸ Sachverständigenrat [German Council of Economic Experts] (2016), margin nos. 427 et seq.; *ibid.* (2018), at margin no. 378.

²⁷⁹ For the personal independence see *Siekmann* (2013b) Article 130 TFEU at margin no. 64; *ibid.* (2018), Article 88 at margin nos 58 et seq.

²⁸⁰ *Siekmann* (2013b) Article 130 TFEU at margin nos. 18-23; *ibid.* (2018), Article 88 at margin nos. 51-68.

Chart 5: Liabilities of the Eurosystem and government debt of selected Member States by creditors



Source: *Sachverständigenrat* [German Council of Economic Experts] (2018), at 190, chart 51

8. Conclusion

Initially, the support measures of the ESCB might have to be judged as monetary policy but the selectivity of OMT and – even more – SMP in conjunction with the transfer of risks to the ESCB speak against it. The holding until maturity, the de-facto guarantee for investors that the sovereign debt will be purchased by the ESCB, and the imminent threat of waiving debt or an externally imposed debt-cut, already demanded by politicians, suggest that the asset purchase programmes have to be judged as a prohibited (indirect) financing of budgetary deficits by the monetary authorities. The substantially changed economic environment tips the balance between benefits and costs of the programmes increasingly to a preponderance of the latter.

The Court of Justice of the EU came to a different assessment both in all aspects negating the concerns of the German Federal Constitutional Court. It remains to be seen how the German court will exert its reserved control of *ultra vires* acts and of the constitutional identity of the Basic Law, the German Federal Constitution.

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Appendix 1: Outright Monetary Transactions

Technical features of Outright Monetary Transactions

6 September 2012

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.

European Central Bank

Directorate General Communications

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https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html

Appendix 2: Decision on a Public Sector Purchase Programme

L 121/20

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Official Journal of the European Union

14.5.2015

DECISION (EU) 2015/774 OF THE EUROPEAN CENTRAL BANK

of 4 March 2015

on a secondary markets public sector asset purchase programme (ECB/2015/10)

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular to the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular to the second subparagraph of Article 12.1 in conjunction with the first indent of Article 3.1, and Article 18.1 thereof,

Whereas:

- (1) In accordance with Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), the European Central Bank (ECB), together with the national central banks of the Member States whose currency is the euro (hereinafter the 'NCBs') may operate in the financial markets by, among other things, buying and selling marketable instruments outright, in order to achieve the objectives of the ESCB.
- (2) On 4 September 2014, the Governing Council decided to initiate a third covered bond purchase programme (hereinafter the 'CBPP3') and an asset-backed securities purchase programme (ABSPP). Alongside the targeted longer-term refinancing operations introduced in September 2014, these asset purchase programmes are aimed at further enhancing the transmission of monetary policy, facilitating credit provision to the euro area economy, easing borrowing conditions of households and firms and contributing to returning inflation rates to levels closer to 2 %, consistent with the primary objective of the ECB to maintain price stability.
- (3) On 22 January 2015, the Governing Council decided that asset purchases should be expanded to include a secondary markets public sector asset purchase programme (hereinafter the 'PSPP'). Under the PSPP the NCBs, in proportions reflecting their respective shares in the ECB's capital key, and the ECB may purchase outright eligible marketable debt securities from eligible counterparties on the secondary markets. This decision was taken as part of the single monetary policy in view of a number of factors that have materially increased the downside risk to the medium-term outlook on price developments, thus jeopardising the achievement of the ECB's primary objective of maintaining price stability. These factors include lower than expected monetary stimulus from adopted monetary policy measures, a downward drift in most indicators of actual and expected euro area inflation — both headline measures and measures excluding the impact of volatile components, such as energy and food — towards historical lows, and the increased potential of second-round effects on wage and price-setting stemming from a significant decline in oil prices.
- (4) The PSPP is a proportionate measure for mitigating the risks to the outlook on price developments, as it will further ease monetary and financial conditions, including those relevant to the borrowing conditions of euro area non-financial corporations and households, thereby supporting aggregate consumption and investment spending in the euro area and ultimately contributing to a return of inflation rates to levels below but close to 2 % over the medium term. In an environment where key ECB interest rates are at their lower bound, and purchase programmes focussing on private sector assets are judged to have provided measurable, but insufficient, scope to address the prevailing downside risks to price stability, it is necessary to add to the Eurosystem's monetary policy measures the PSPP as an instrument that features a high transmission potential to the real economy. Thanks to its portfolio re-balancing effect, the sizable purchase volume of the PSPP will contribute to achieving the underlying monetary policy objective of inducing financial intermediaries to increase their provision of liquidity to the interbank market and credit to the euro area economy.
- (5) The PSPP contains a number of safeguards to ensure that the envisaged purchases will be proportionate to its aims, and that the related financial risks have been duly taken into account in its design and will be contained through risk management. To allow for the smooth operation of markets in eligible marketable debt securities, and to avoid obstructing orderly debt restructurings, thresholds will apply to the purchases of those securities by the Eurosystem central banks.

- (6) The PSPP complies fully with the obligations of the Eurosystem central banks under the Treaties, including the monetary financing prohibition, and does not impair the operation of the Eurosystem in accordance with the principle of an open market economy with free competition.
- (7) In terms of the size of the PSPP, the ABSPP and the CBPP3, the liquidity provided to the market by the combined monthly purchases will amount to EUR 60 billion. Purchases are intended to be carried out until the end of September 2016 and will, in any case, be conducted until the Governing Council sees a sustained adjustment in the path of inflation which is consistent with its aim of achieving inflation rates below, but close to, 2 % over the medium term.
- (8) With a view to ensuring the effectiveness of the PSPP, the Eurosystem hereby clarifies that it accepts the same (*pari passu*) treatment as private investors as regards the marketable debt securities that the Eurosystem may purchase under the PSPP, in accordance with the terms of such instruments.
- (9) The purchases of eligible marketable debt instruments by the Eurosystem under the PSPP should be implemented in a decentralised manner, giving due regard to market price formation and market functioning considerations, and coordinated by the ECB, thereby safeguarding the singleness of the Eurosystem's monetary policy.

HAS ADOPTED THIS DECISION:

Article 1

Establishment and scope of PSPP

The Eurosystem hereby establishes the PSPP under which the Eurosystem central banks shall purchase eligible marketable debt securities, as defined in Article 3, on the secondary markets, from eligible counterparties, as defined in Article 7, under specific conditions.

Article 2

Definitions

For the purposes of this Decision, the following definitions apply:

- (1) 'Eurosystem central bank' means the ECB and the national central banks of the Member States whose currency is the euro (hereinafter the 'NCBs');
- (2) 'recognised agency' means an entity that the Eurosystem has classified as such for the purpose of the PSPP;
- (3) 'international organisation' means an entity within the meaning of Article 118 of Regulation (EU) No 575/2013 of the European Parliament and of the Council ⁽¹⁾ and that the Eurosystem has classified as such for the purpose of the PSPP;
- (4) 'multilateral development bank' means an entity within the meaning of Article 117(2) of Regulation (EU) No 575/2013 and that the Eurosystem has classified as such for the purpose of the PSPP;
- (5) 'positive outcome of a review' means the later of the following two decisions: the decision by the Board of Directors of the European Stability Mechanism and, in case the International Monetary Fund co-finances the financial assistance programme, the Executive Board of the International Monetary Fund to approve the next disbursement under that programme, on the understanding that both decisions are necessary for the resumption of purchases under the PSPP.

Lists of the entities referred to in points (2) to (4) are published on the ECB's website.

⁽¹⁾ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

Article 3

Eligibility criteria for marketable debt securities

1. Subject to requirements laid down in this Article, euro-denominated marketable debt securities issued by central governments of a Member State whose currency is the euro, recognised agencies located in the euro area, international organisations located in the euro area and multilateral development banks located in the euro area shall be eligible for purchases by the Eurosystem central banks under the PSPP. In exceptional circumstances, where the envisaged purchase amount cannot be attained, the Governing Council may decide to purchase marketable debt securities issued by other entities located in the euro area, in accordance with the conditions laid down in paragraph 4.

2. In order to be eligible for purchases under the PSPP, marketable debt securities shall comply with the eligibility criteria for marketable assets for Eurosystem credit operations pursuant to Annex I to Guideline ECB/2011/14 ⁽¹⁾, subject to the following requirements:

- (a) the issuer or guarantor of the marketable debt securities shall have a credit quality assessment of at least Credit Quality Step 3 in the Eurosystem's harmonised rating scale expressed in the form of at least one public credit rating provided by an external credit assessment institution (ECAI) accepted within the Eurosystem credit assessment framework;
- (b) if multiple ECAI issuer or ECAI guarantor ratings are available, the first-best rule shall apply, i.e. the best available ECAI issuer or guarantor rating shall apply. If the fulfilment of the credit quality requirements are established based on an ECAI guarantor rating, the guarantee shall fulfil the features of an acceptable guarantee as laid down in Section 6.3.2(c)(i) to (iv) of Annex I to Guideline ECB/2011/14;
- (c) if the credit assessment provided by an accepted ECAI for the issuer or guarantor does not comply with at least Credit Quality Step 3 in the Eurosystem's harmonised rating scale, marketable debt securities shall be eligible only if they are issued or fully guaranteed by the central governments of euro area Member States under a financial assistance programme and in respect of which the application of the Eurosystem's credit quality threshold is suspended by the Governing Council pursuant to Article 8 of Guideline ECB/2014/31 ⁽²⁾;
- (d) In the event of a review of an ongoing financial assistance programme, eligibility for PSPP purchases shall be suspended and shall resume only in the event of a positive outcome of the review.

3. In order to be eligible for purchases under the PSPP, debt securities, within the meaning of paragraphs 1 to 2, shall have a minimum remaining maturity of two years and a maximum remaining maturity of 30 years at the time of their purchase by the relevant Eurosystem central bank. In order to facilitate smooth implementation, marketable debt instruments with a remaining maturity of 30 years and 364 days shall be eligible under the PSPP. National central banks shall also carry out substitute purchases of marketable debt securities issued by international organisations and multilateral development banks if the envisaged amounts to be purchased in marketable debt securities issued by central governments and recognised agencies cannot be attained.

4. Eurosystem central banks may, in exceptional circumstances, propose to the Governing Council public non-financial corporations located in their jurisdiction as issuers of marketable debt instruments to be purchased as substitutes in case the envisaged amount to be purchased in marketable debt instruments issued by central governments or recognised agencies located in their jurisdiction cannot be attained. The proposed public non-financial corporations shall at least fulfil both of the following criteria:

- be a 'non-financial corporation' as defined in Regulation (EU) No 549/2013 of the European Parliament and of the Council ⁽³⁾,
- be a 'public sector' entity, meaning an entity within the meaning of Article 3 of Council Regulation (EC) No 3603/93 ⁽⁴⁾.

⁽¹⁾ Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem (OJ L 331, 14.12.2011, p. 1).

⁽²⁾ Guideline ECB/2014/31 of 9 July 2014 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9 (OJ L 240, 13.8.2014, p. 28).

⁽³⁾ Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ L 174, 26.6.2013, p. 1).

⁽⁴⁾ Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

Following approval by the Governing Council, euro-denominated marketable debt instruments issued by such public non-financial corporations located in the euro area which comply with (i) the eligibility criteria for marketable assets as collateral for Eurosystem credit operations, as per Section 6.2.1 of Annex I to Guideline ECB/2011/14; and (ii) the requirements in paragraphs 2 and 3 shall be eligible for purchases as substitutes under the PSPP.

5. In principle, purchases of nominal marketable debt instruments at a negative yield to maturity (or yield to worst) above the deposit facility rate are permissible.

Article 4

Limitations on the execution of purchases

1. To permit the formation of a market price for eligible securities, no purchases shall be permitted in a newly issued or tapped security and the marketable debt instruments with a remaining maturity that are close in time, before and after, to the maturity of the marketable debt instruments to be issued, over a period to be determined by the Governing Council ('blackout period'). For syndications, the blackout period in question is to be respected on a best effort basis before the issuance.
2. For debt securities issued or fully guaranteed by the central governments of euro area Member States under a financial assistance programme, the period of purchases under the PSPP after a positive outcome of each programme review shall, as a rule, be limited to two months, unless there are exceptional circumstances justifying a suspension of purchases before or a continuation of purchases after such period and until the start of the next review.

Article 5

Purchase limits

1. Subject to Article 3, an issue share limit per international securities identification number shall apply under the PSPP to marketable debt securities fulfilling the criteria laid down in Article 3, after consolidating holdings in all of the portfolios of the Eurosystem central banks. The limit will initially be set at 25 %, for the first six months of purchases and subsequently reviewed by the Governing Council.
2. In case of debt securities referred to in Article 3(2)(c), a different issue share limit will apply.
3. Under the PSPP, an aggregate limit of 33 % of an issuer's outstanding securities shall apply to all eligible marketable debt securities in respect of the maturities defined in Article 3, after consolidating holdings in all of the portfolios of the Eurosystem central banks.

Article 6

Allocation of portfolios

1. Of the total value of purchased marketable debt securities eligible under PSPP, 12 % shall be purchased in securities issued by eligible international organisations and multilateral development banks, and 88 % shall be purchased in securities issued by eligible central governments and recognised agencies. This allocation is subject to revision by the Governing Council. Purchases in debt securities issued by eligible international organisations and multilateral development banks shall be conducted by NCBs only.
2. The NCBs' share of the total market value of purchases of marketable debt securities eligible under PSPP shall be 92 %, and the remaining 8 % shall be purchased by the ECB. The distribution of purchases across jurisdictions shall be according to the key for subscription of the ECB's capital as referred to in Article 29 of the Statute of the ESCB.
3. Eurosystem central banks shall apply a specialisation scheme for the allocation of marketable debt securities to be purchased under the PSPP. The Governing Council shall allow for *ad hoc* deviations from the specialisation scheme should objective considerations obstruct the achievement of the said scheme or otherwise render deviations advisable in the interests of attaining the overall monetary policy objectives of the PSPP. In particular, each NCB shall purchase eligible securities of issuers of its own jurisdiction. Securities issued by eligible international organisations and multilateral development banks may be purchased by all NCBs. The ECB shall purchase securities issued by central governments and recognised agencies of all jurisdictions.

*Article 7***Eligible counterparties**

The following shall be eligible counterparties for the PSPP:

- (a) entities that fulfil the eligibility criteria to participate in Eurosystem monetary policy operations pursuant to Section 2.1 of Annex I to Guideline ECB/2011/14; and
- (b) any other counterparties that are used by Eurosystem central banks for the investment of their euro-denominated investment portfolios.

*Article 8***Transparency**

1. The Eurosystem shall publish on a weekly basis the aggregate book value of the securities held under the PSPP in the commentary of its consolidated weekly financial statement.
2. The Eurosystem shall publish on a monthly basis the weighted average residual maturity by issuer residence, separating international organisations and multilateral development banks from other issuers, of its PSPP holdings.
3. The book value of securities held under the PSPP shall be published on the ECB's website under the open market operations section on a weekly basis.

*Article 9***Securities lending**

The Eurosystem shall make securities purchased under PSPP available for lending, including repos, with a view to ensuring the effectiveness of the PSPP.

*Article 10***Final provision**

This Decision shall enter into force on the day following its publication on the ECB's website. It shall apply from 9 March 2015.

Done at Nicosia, 4 March 2015.

The President of the ECB
Mario DRAGHI

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