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Siekmann, Helmut; Wieland, Volker

Working Paper

The European Central Bank's outright monetary transactions and the Federal Constitutional Court of Germany

IMFS Working Paper Series, No. 71

Provided in Cooperation with:
Institute for Monetary and Financial Stability (IMFS), Goethe University Frankfurt am Main

Suggested Citation: Siekmann, Helmut; Wieland, Volker (2013) : The European Central Bank's outright monetary transactions and the Federal Constitutional Court of Germany, IMFS Working Paper Series, No. 71, Goethe University Frankfurt, Institute for Monetary and Financial Stability (IMFS), Frankfurt a. M.,
https://nbn-resolving.de/urn:nbn:de:hebis:30:3-305845

This Version is available at:
https://hdl.handle.net/10419/97779

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HELMUT SIEKMANN, VOLKER WIELAND

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Institute for Monetary and Financial Stability
GOETHE UNIVERSITY FRANKFURT AM MAIN

WORKING PAPER SERIES NO. 71 (2013)

Institute for Monetary and Financial Stability
Goethe University Frankfurt
House of Finance
Grüneburgplatz 1
D-60323 Frankfurt am Main
www.imfs-frankfurt.de | info@imfs-frankfurt.de

The European Central Bank's Outright Monetary Transactions and the Federal Constitutional Court of Germany

Helmut Siekmann and Volker Wieland*

June 11, 2013

Abstract

This note reviews the legal issues and concerns that are likely to play an important role in the ongoing deliberations of the Federal Constitutional Court of Germany concerning the legality of ECB government bond purchases such as those conducted in the context of its earlier Securities Market Programme or potential future Outright Monetary Transactions.

* Helmut Siekmann is Professor of Money, Currency and Central Bank Law and Volker Wieland is Professor of Monetary Economics at the Institute for Monetary and Financial Stability (IMFS) at Goethe University of Frankfurt. All remaining errors are the authors' sole responsibility.

1. The OMT controversy and how it became central to the German Constitutional Court's deliberations in summer 2013

The European Central Bank's August 2, 2012 announcement that it would be willing to buy government bonds without limit in certain scenarios arguably constitutes the most controversial decision in its 15-year history. Already the limited purchases of euro crisis countries' sovereign bonds under the ECB's Securities Markets Programme (SMP) since May 2012 had been cited as the reason for the resignations of Axel Weber, then-President of the Bundesbank and member of the ECB Governing Council, and Jürgen Stark, then the ECB Board Member in charge of its Directorate General Economics. The 2012 announcement of potentially unlimited future Outright Monetary Transactions (OMT) was publicly opposed by Jens Weidmann, Weber's successor as Bundesbank President, and has been criticized heavily by former ECB Board Members Otmar Issing and Jürgen Stark, while Stark's successor, Jörg Asmussen, turned out to be a staunch supporter of this policy. Weidmann and Asmussen have been called to testify during the hearings of the Federal Constitutional Court on June 11-12, 2013 on the legitimacy of the OMT. In this note, we review the legal issues and concerns regarding the OMT that will be the focus of the Court's deliberations and discuss potential outcomes.

As explained by ECB President Mario Draghi in the statement for the August 2, 2012 ECB press conference, the ECB was concerned at the time that exceptionally high risk premia embodied in government bond prices for some euro area member countries were hindering the transmission of monetary policy in that part of the monetary union. Specifically, he considered risk premia that are related to fears of the reversibility of the euro as the currency of these countries as unacceptable. While emphasizing that governments would need to push ahead with fiscal consolidation, structural reform and European institution-building in order for those risk premia to disappear, Draghi also called on them to request support by the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM) in the bond market when exceptional financial circumstances and risks to financial stability exist. In those circumstances, the ECB would then be willing to buy sovereign bonds in the quantity needed to reduce the above-mentioned risk premia. Such interventions would thus be subject to the conditionality imposed on the respective government by the EFSF/ESM. Importantly, the ECB would forego seniority status and its holdings of these sovereign bonds would be subject to the same losses as privately-held bonds in the event of a sovereign

default. The technical features of the OMT are described in the ECB Press Release of September 6, 2012 that is also found in the appendix to this note.

In the judgement of critics of the OMT, the ECB has ventured too far into the terrain of fiscal policy by announcing such potentially unlimited government bond purchases. The announcement itself is likely to cause delays in the implementation of necessary fiscal and structural adjustments by national governments, because it has reduced market pressures via government financing conditions. Furthermore, such purchases may violate the prohibition of monetary financing of sovereign entities in the EMU. ECB critics question whether the OMT and earlier SMP comply with the general prohibition of granting loans by the European Central Bank or national central banks in favour of any type of government entity or public undertaking (Article 123 paragraph 1, Treaty on the Functioning of the European Union (TFEU)). The critics emphasize that subsidizing interest rates of selected countries' government debt or even saving insolvent governments transcends the powers and competences given to the European System of Central Banks (ESCB). Furthermore, they call into doubt the ECB's assessment that the transmission of monetary policy is disturbed by unfounded or irrational fears of investors that need to be counteracted by such interventions. Importantly, critics of the OMT argue that the current membership of the euro-zone cannot be guaranteed as long as Member States remain sovereign, at least not by the European Central Bank. If the justification of these measures as an act of monetary policy is rejected, they must be considered acts of economic policy that are not conferred on the Union. They are reserved for the Member States (Article 119 paragraph 1 and 2, Article 127 paragraph 2 and 5 TFEU). Finally, critics fear that the independence of the ECSB and of the members of their decision-making bodies is jeopardized by the large-scale transfer of credit risks from the private and public sector to the ECSB. Their independence is guaranteed by Article 130, 282 paragraph 3 clause 2 TFEU, Article 7 of the Statute of the European System of Central Banks and of the European Central Bank, and by Article 88 clause 2 of the German Federal Constitution.

The subject matter of the case presently pending at the Federal Constitutional Court of Germany was initially focusing on the EFSF/ESM support mechanism set up by Member States of the EU and its legal foundation. More specifically, three legal acts of the German legislature to transform the agreements on the European level into German law had come under scrutiny of the court:

1. Consent to the creation of a basis in the primary law of the Union for setting up a support mechanism (amendment to Article 136 TFEU)
2. Implementation of the compact on enhanced fiscal stability
3. Putting into effect of the agreement on the (permanent) European Stability Mechanism (ESM)

The actions of the ESCB and the ECB to assist Member States with financial problems were originally not central to the petitions.

A preliminary injunction had been requested in order to prevent the international acts to become effective before the Court could decide the case. The injunction was denied under certain provisions by the decision of the Court of September 12, 2012. In its opinion, the Court mentioned that ECB purchases of sovereign bonds on secondary markets with the aim of financing government budgets independently from capital markets would violate the prohibition of monetary financing. However, the Court left the question whether this prohibition applies to the SMP or OMT open for the final decision that was then expected to be handed down in July 2013 (Judgement of September 12, 2012, text numbers 202 and 278). Subsequently, petitioners have extended their petitions and asked the court explicitly to review the measures of the ECB and ECSB member central banks as well.

The Court has asked both the ECB and the Deutsche Bundesbank to deliver an opinion on aspects of the controversy. The Bundesbank has submitted a statement dating from December 21, 2012. This statement has been leaked to the public and raises many of the concerns mentioned above. The ECB has asked a German law professor, Frank Schorkopf, to prepare a statement as its representative. A comprehensive oral hearing is scheduled for June 11 and 12.

2. What is the German Constitutional Court deliberating and deciding on?

2.1 Jurisdiction

The Federal Constitutional Court of Germany has been installed to enforce the norms of the Basic Law ("Grundgesetz"), the federal constitution, and to review the conformity of all German state actions with the federal constitution. That is why the court is restrained to apply the norms of the Basic Law. The conformity of actions with the laws of the European Union, and specifically with the European Treaties ("primary law"), does not fall into the German Court's competence. In fact, if the Court finds that the interpretation of the Treaties is concerned or that the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union is in question, it has to refer it to the European Court of Justice (ECJ) for a ruling, Article 267 paragraph 1 TFEU. However, such a referral is only needed if such a clarification by the ECJ is of substantial relevance for the adjudication of the case by the national court, Article 267 paragraph 2 TFEU. This rule holds for all courts or tribunals of Member States against whose decision there is no judicial remedy under national law; Article 267 paragraph 3 TFEU. Thus, in principle, also the Federal Constitutional Court of Germany would have to refer a case to the ECJ. However, such a referral has never taken place so far. It would be a novelty in the history of the Court.

There are, however, exceptions: The Court has reserved the right to review itself—without referral to the ECJ—whether a particular act of an organ or institution of the EU stays within the limits of the competences and powers conferred on the EU (BVerfGE 89, 155 [188]; 123, 267 [353 et seq.]). To its opinion such a transgression is not covered by the parliamentary consent to the transfer of sovereign rights and is considered to be „ultra vires", that is, beyond the legal power or authority of the European institution ("ausbrechender Rechtsakt"). Moreover, the court examines if the transfer of sovereign rights to the European Union level maintains the unalienable core of the constitutional identity ("unantastbarer Kernbereich der Verfassungsidentität") of the Basic Law (BVerfGE 123, 267 [268, 354]; restated in BVerfGE 129, 124 [177] in view of the democratic rights of the electorate. These caveats have been theoretical so far. The Court has not yet invoked them in a specific case. Already in its decision on the Lisbon Treaty it demanded that the transgression of competence must be clearly visible ("ersichtlich"). In the ensuing Honeywell case it has further specified that the act challenged in court must be grave and have the quality to lead to a structural shift

in the design of competences at the expense of Member States (BVerfGE 126, 286). It also concedes to perform such a review only in a cooperative manner with the ECJ, which would mean to ask for a prior opinion of this court.

Aside from the above considerations that are centered around European Union law, there is also a direct way to a judicial review by the court applying German constitutional law. Article 88 clause 2 of the Basic Law deals with the transfer of the monetary authority to a European institution. It could be directly used as a yardstick for judging the measures of the ESCB. The provision requires that the European monetary institution must be independent and committed to the superior goal of price stability. Whether this requirement has been obeyed has to be scrutinized by the Court itself. The Court's jurisdiction, in principle, only covers actions of German authorities. However, the participation of the Bundesbank within the framework of the ECSB may be sufficient for a decision that the review of this action falls into the competence of the Court.

2.2. Application

(1) In any case, the Court first has to decide whether an individual complaint pursuant to Article 93 no. 4a of the Basic Law challenging the conformity of the measures of the monetary authorities with Article 88 clause 2 of the Basic Law is admissible. This might be questioned with good reasons as it has to be demonstrated that individual rights of the petitioners are possibly infringed. An infringement of property rights—protected by Article 14 Basic Law—is unlikely, at least at the present situation. In recent cases concerning acts on the European level, democratic participation has, however, been judged as a sufficient cause of action by the court (BVerfGE 123, 267; BVerfGE 129, 124).

Looking at the merits of the case, so far price stability has been interpreted as "consumer price stability" (Siekmann, in: Sachs [ed.], Grundgesetz, 6. Auflage, Art. 88 Rdn. 89). As the harmonized consumer price index (HICP) which is generally accepted as a metric, lingers at a historically low level a verdict will probably not be based on this part of Article 88 clause 2 Basic Law. Endangering independence by the envisaged – almost symbiotic - cooperation of the ECB with administrative agencies could, however, be an issue.

(2) As the seriousness of an infringement of European Union Law is decisive for the ensuing procedural steps, it ought to be assessed in the first place.

Already the Securities Market Program is difficult to justify with the goal of addressing malfunctioning or non-functioning in the channels of transmission of monetary policy as the ECB has claimed. Questions such as what exactly are the appropriate risk premia and what is the necessary degree of intervention by the ECB in light of the many factors influencing such premia, including the statements and actions of many national and other European policy makers, have remained largely unanswered.

With the Outright Monetary Transactions, the ECB officially „aims at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy“ (ECB press release of September 6, 2012). They do not fall into the domain of the generally accepted standard open market operations which are in accordance with Article 18.1 of the Statute. They do not serve as a tool to gauge the interest rate for risk free loans. Effectively, they imply subsidies in favour of specific countries and institutions by lowering risk premia demanded by the market. Importantly, standard open market operations are designed as an instrument aimed at fine-tuning the monetary environment for the complete area of a currency and not for specific regions of the area or single credit institutions. Of course, the financial crisis and threat of deflation has also led other central banks around the world to purchase government debt. However, this debt has been federal or national debt rather than debt of regional authorities. For example, the Federal Reserve System of the United States has bought federal debt but it has not bought state debt and has not used government debt purchases to mitigate financial problems of troubled states such as, for example, California. In Germany, neither the Bundesbank nor the Reichsbank have historically used debt purchases to mitigate financial problems of one of the member states (Länder).

„Strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme“ is referred to by the ECB as a necessary condition for any Outright Monetary Transaction. However, this provision, which implies close cooperation with executive authorities in administering support programs by making them a prerequisite for OMT measures, can also be interpreted to indicate that the envisaged measures fall outside the area of monetary policy as these

conditions serve to achieve other economic and fiscal objectives. Similarly, the unlimited volume of the measures points in that direction.

By tethering the support to decisions of a government agency (EFSF/ESM) the ESCB may also endanger the autonomy in its decision making. The primary law of the Union assesses this independence as crucial. A mutual dependence of central bank action and administrative decisions would not conform to the design of the Monetary Union and its distribution of powers. Additionally, it can well be questioned whether the conditionality will in effect work as a safeguard against an inacceptable transfer of risks to monetary institutions. In the case of Greece, for example, private sector investors had to accept haircuts on government debt in a more or less voluntary private sector involvement. If the ECB does not insist on seniority status in such a case as promised with the OMT, losses on its portfolio would have to be borne either by the ECB or assumed by other government agencies.

(3) Turning again to the procedural aspects of the pending case, the court has to decide whether the (possible) infringements of the primary law of the Union by the measures of the central banks of the Euro system are so serious that they lead to a structural shift in the design of competences at the expense of Member States (BVerfGE 126, 286). Article 3 paragraph 1 lit. c TFEU transfers the (exclusive) competence for the monetary policy to the Union. This is a structural decision. Further tasks may only be conferred to the ECB under the narrow preconditions and within the close limits of Article 127 paragraph 6 TFEU which has not been activated so far. Most importantly, a mandate to secure financial stability has not been given to the ESCB. According to Article 127 paragraph 5 TFEU (Article 3.1. of the statute) it has only been charged with contributing to the “smooth conduct” of the measures taken by the “competent authorities”. This can only mean that the other authorities are competent and have to take up the actions deemed to be necessary. The ESCB is restricted to an ancillary role in this field (for the strict separation of “monetary policy” and “economic policy” by the primary law see Siekmann, Einführung No. 121 et seq., Art. 119 No. 22 et seq., in: Siekmann (ed.), Kommentar zur Europäischen Währungsunion, 2013).

The other leg of the court’s reservation: unalienable core of the constitutional identity (“unantastbarer Kernbereich der Verfassungsidentität”) of the Basic Law is basically aimed at further transfers of powers and is not touched sufficiently in substance.

Looking at the overall system of the distribution of competences, the transgression gets close to the line the court has drawn in its previous decisions. It remains, however, doubtful, if it will really invoke its reserved right to review an act of an institution of the EU.

(4) If the court sees a (possible) breach of the law of the Union and does not decide to review the acts in question by itself, it has to consider a referral to the ECJ. The necessary act of an organ or institution of the Union is given. But it is not sure that a judgement on the conformity of the measures taken by the ESCB, and of the ECB specifically, is a necessary prerequisite for a decision on the three original subject matters of the case, that is, (i) amending the primary law of the Union by inserting a paragraph 3 in Article 136 TFEU dealing with support measures of Member States, (ii) agreement of Member States on fiscal soundness – new fiscal compact and (iii) agreement on establishing the support mechanism ESM.

These questions, especially the amendment of the TFEU, do touch on the conformity with European Union law but a compelling junction with the measures of the monetary institutions is not apparent. It could also be argued that the mere design of OMT is not decisive for the pending case but only the actual purchase of bonds. If the court follows this line of thinking, it could once more refrain from invoking Article 267 TFEU and leave the questions of European Union Law open as it has done in the previous cases.

2.3. Consequences

(1) Provided the court comes to the result that former bond buying programs or OMT are not in conformity with Article 88 Basic Law or transgress competences of the Union in the required serious scope, German authorities would not be allowed to participate in any actions performing or promoting them. As the national central banks play a key role in executing the purchases implied by these programs, the Bundesbank would in this case not be allowed to participate in these actions any further.

Normally, the Bundesbank is required to follow instructions of the ECB (Article 14.3 of the statute of ECSB and ECB). However, if the ECB’s were to be judged illegal by the

German Federal Constitutional Court, the Bundesbank would not have to implement them anymore. Possibly it would even be obliged to use all legal instruments to fend off measures that have been judged as illegal by the German Federal Constitutional Court. Specifically, the Bundesbank would have to resort to litigation before the ECJ following Article 263 paragraph 4 TFEU.

It is an open and undecided question whether acts of the ESCB or the ECB that have been judged as a breach of German constitutional law are void and thus legally not existing.

(2) Provided the court comes to the result that a breach of the primary law has taken place and a ruling is necessary for adjudicating the case, it has to refer it to the ECJ. This will usually lead to a considerable delay of the final decision.

(3) Provided the German court would either not see a breach of European Union Law or refrain from a referral to the ECJ, the final judgement of the case may well be handed down in July as anticipated last fall.

3. Potential outcomes of the Court's deliberations

The Court could still deny the admissibility of the complaint regarding the measures of the ESCB. This result appears to be fairly unlikely since the Court has put on its agenda for the hearing taking place on June 11, 2013, detailed questions concerning actions of the ECB, specifically OMT. Additionally, one part of the court action has been petitioned in a specific procedure by the members of the Bundestag of the Party "The Left/ die Linke". Such a procedure concerning a conflict between high-level state institutions regarding their constitutional rights (the so-called "Organstreitverfahren") follows reduced requirements for admissibility. Thus, it can be expected that the Court will decide on the merits of the case.

But even if the Court judges SMP and OMT to violate the provisions of EU-law, there are high hurdles to come to the result that the measure are "ultra vires" and violate as such German constitutional law. In this case a referral to the ECJ has to be considered. It would, however, be a novelty in the Court's history and appears to be fairly unlikely.

More likely is however an outcome in a way that has been used fairly frequently by the Court: a “yes, but”. It could underline its concerns but not adjudicate the measures in question as illegal on their face and could emphasize the limits for actions of the ESCB. Specifically the (future) implementation of measures in the framework of OMT may be constrained, for example by stating which bonds cannot legally be purchased as they are not marketable, or by setting limits in respect of duration and volume, or by not allowing to take a haircut in restructuring the debt as this might be judged an economic policy action outside the realm of monetary policy.

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ECB Press Release of 6 September 2012 - Technical features of Outright Monetary Transactions

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

Conditionality

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

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

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

Coverage

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

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

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

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation

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

Transparency

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

Securities Markets Programme

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

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