



The ECB's Outright Monetary Transaction Programme compatibility with the EU Law (Judgment in case Gauweiler C-62/14)



On 16th June, 2015 in its preliminary ruling (Article 267(b)) the Court of Justice of the European Union found that the Outright Monetary Transaction programme established by ECB in September 2012 is **compatible with the EU law**. ECJ stated that such a programme for purchasing government bonds on the secondary market (1) **does not go beyond ECB powers under EU law** and (2) **neither does it contravene the prohibition of monetary financing** of Member States under Article 123 (1) TFEU.

The judgement follows the **referral by the German Constitutional Court** in Karlsruhe regarding **constitutional action** brought in front of it concerning the alleged failure of the Deutsche Bundesbank, Federal Government and the Bundestag to act with regard that programme. The parties brought the action **claiming that** by establishing the programme **ECB breached the EU law** and **its decisions impair the German constitutional identity** by breaching the principle of democracy entrenched in the German Basic Law.

This judgment can be considered as an important clarification of the ECB's powers under EU treaties. It could be interpreted as potentially shielding the institution against challenges to its decision to deploy the Quantitative Easing programme, launched in January 2015.

OMT established in 2012 but not yet activated

On 2nd August 2012 the **Governing Council of the European Central Bank** (ECB) has taken number of **decisions concerning the technical features of the Outright Monetary Transactions Programme**, established as the translation of the plea of the ECB President Mario Draghi to "do whatever it takes to save the euro". This action entailed a number of technical measures aimed at "safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy", and it focused on **application of conditionality** (under EFSF/ESM), coverage (maturity between 1 and 3 years) and creditor treatment (ECB accepting treatment equivalent to private creditors). It should be highlighted though that until now the instrument **has not been activated**. At the time ECB considered that the **announcement of the programme was sufficient to produce the desirable stabilising effects** both on volatility in the bond markets and on extreme spreads between the debts issues by Member States.

OMT programme is within the remit of ESCB powers under EU treaties

The ECJ replied to Karlsruhe Court that the **current treaty framework allows ESCB to adopt a programme such as OMT** as with the regards to the objectives pursued and instruments provided it falls **within the remit of the conduct of the monetary policy**. It

considered that the stated **objectives of the ECB in adopting the OMT programme** in preserving "singleness" of the EU monetary policy and ensuring the "appropriate monetary transmission" clearly **contribute to its primary objective of maintaining price stability**. The fact that the given policy set might also be capable of contributing to the stability of the euro area, which in itself is an economic policy objective and not a monetary one does not call this evaluation into question.

With respect to the **means deployed** by ECB to reach such objectives eg. purchase of sovereign bonds on the secondary market, those are **clearly provided for in the EU treaties** which allow ECB and central banks "operate in the financial markets by buying and selling outright marketable instruments in euro".

The court also stated that the OMT programme **does not infringe the principle of proportionality** as it does not go beyond what is necessary to achieve the objective of maintenance of price stability. Based on submissions from ECB, Court of Justice concluded that the programme is indeed subject to strict conditionality and limited to a certain types of bonds issued and following precise criteria.

OMT does not contravene the prohibition of monetary financing

The Court extensively analysed the issue of prohibition of monetary financing and tested whether ESCB's decision could be considered as breaching EU primary law, notably in the context of the articles 119 TFEU, 123(1) TFEU, 127(1) and (2) TFEU and Article 17 to 24 of the Protocol 4 on Statute of the ESCB and ECB. It found that such **prohibition does not prevent ECB from adopting such programme**, considering it does not have an effect equivalent of a direct purchase on the primary market which would constitute the prima facie case of monetary financing. It judged that when ECB purchases bonds on secondary markets, sufficient safeguards are built into its intervention, which requires notably the full **responsibility of the Governing Council** to define the scope, start, continuation or suspension of the programme as well as existence of a **minimum period** which would be observed between the issue of a security on primary market and its purchase on the secondary market.

The Court concludes that the OMT decision **does neither circumvent the objective of prohibition of monetary financing** of the Member States as it does not provide Member States with impetus to steer away from sound budgetary policy.

Next steps and implications

Karlsruhe court will now take its time to consider ECJ judgment, process which can last several months and could lead to number of additional hearings from both ECB as well as some of its vocal critics. Although in principle ECJ's preliminary ruling is binding under EU law, Bundesverfassungsgericht **can still find that the programme is contrary to the German Basic Law** and the principle of democracy. In such case it might lead Bundesbank to opt out of such programme. Number of analysts concur that such judgment clears the concerns about possible challenges to the legality of the ECB's **Quantitative easing programme**, launched earlier this year.

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