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e di Diritto dell'Unione europea

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«Oh My...OMT!».
Some Thoughts about the
German Constitutional Court's
Decision to Refer the Outright
Monetary Transactions
Programme to the Court of
Justice of the European Union

ANNAMARIA VITERBO (*)

1. *The Background.* – In May 2010, the Governing Council of the European Central Bank (ECB) adopted a Decision establishing the Securities Markets Programme (SMP) (ECB/2010/5). Under the SMP, the ECB and the Eurosystem National Central Banks (NCBs) were to purchase, on the secondary market, eligible debt instruments issued by central governments or public entities of the Eurozone. The SMP was applied by the ECB and the Eurosystem NCBs to purchase government bonds issued by Italy, Spain, Greece, Portugal and Ireland.

In February 2012, shortly before the Greek sovereign debt

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restructuring, the ECB was the single largest holder of the Hellenic Republic sovereign bonds, with 16.3% of the total, amounting to €42.7 billion, while the Eurosystem NCBs held around 5% of the total Greek bonds, amounting to €13.5 billion. Notably, during the restructuring these quasi-sovereign creditors were shielded from bearing any losses: shortly before Greece launched its exchange offer, they swapped their “old” bonds for “new” bonds with identical nominal value, payment terms and maturity dates, but different serial numbers. This was the only way to single out and aggregate bonds issued under different series. The new bonds were in fact protected from the debt swap performed by means of retroactive collective action clauses, or CACs (Claims are pending in front of the ECHR and also in front of an ICSID tribunal). While bondholders agreeing to the exchange offer received bonds maturing between 2023 and 2042 and suffered a huge haircut (53.5% on their principal), the maturity dates of the bonds held by the ECB, the Eurosystem NCBs and the European Investment Bank (EIB) remained unvaried.

The SMP was discontinued in September 2012, when the ECB announced the introduction of the Outright Monetary Transactions (OMT) programme.

The technical features of the OMT were described in a [press release](#), but the ECB Governing Council has not yet adopted a decision and, as of now, the OMT is not into effect.

Under the OMT programme, the ECB and the NCBs will conduct outright transactions in secondary sovereign bond markets with the aim of safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. No *ex ante* quantitative limits are set on the size of OMTs, but only bonds with a maturity of one to three years may be purchased. Both the amount of holdings and their market values will be [disclosed](#).

Moreover, interventions by the ECB on the secondary mar-

ket will be carried out only for countries that have requested European Financial Stabilization Mechanism (EFSF)/European Stability Mechanism (ESM) support and provided that the request is approved by the Eurogroup. Conditionality will be defined in the context of an EFSF/ESM macroeconomic adjustment programme. The ECB would purchase bonds on the secondary market if and until the country complies with the conditions attached to the EFSF/ESM support. However, the ECB Governing Council will maintain full discretion on the start, continuation and suspension of the OMT transactions and it will adopt its decisions in accordance with its monetary policy mandate. Therefore, OMTs will only be used to achieve the objective of maintaining price stability (see [ECB Monthly Bulletin](#), October 2012, p. 7–9).

2. The German Constitutional Court refers the OMT Programme to the Court of Justice of the European Union. – On 14 January 2014, the German Federal Constitutional Court (GFCC) separated from the proceedings related to the ESM and to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called Fiscal Compact) the matters related to the SMP and the OMT programmes.

In addition, the proceedings related to the SMP/OMT were stayed and a [referral](#) for a preliminary ruling was submitted by the GFCC (for the first time in its history) to the Court of Justice of the European Union (CJEU) on the OMT consistency with EU law: in particular, according to the GFCC, the OMT programme falls outside the monetary policy mandate of the ECB and is incompatible with the monetary financing prohibition set forth by Art. 123 TFEU.

In the alternative, the GFCC asked the CJEU whether Articles 119 and 127 of the TFEU and Articles 17 to 24 of the Protocol on the [Statute](#) of ESCB/ECB can be interpreted in such a

way that the adoption and the implementation of the OMT programme would be deemed in conformity with EU law.

3. *Is the OMT programme a monetary policy instrument?* – In the GFCC’s view, the OMT programme does not appear to be covered by the monetary policy mandate of the ECB and it is instead an economic policy measure aimed at reducing interest-rate spreads and at fiscal redistribution among member States, without the necessary democratic legitimation (par. 5).

In order to demonstrate that the OMT programme exceeds the ECB’s monetary policy mandate thus infringing the powers of the Member States, the GFCC affirmed that attention should be given to the parameters applied by the CJEU in the [Pringle case](#): the objective of the act, the instruments used for reaching the objective and their effects.

In applying these principles in the *Pringle* case, the CJEU held that the ESM, despite having an indirect effect on the stabilisation of the euro, belongs to the area of economic policy and that the grant of financial assistance to a Member State clearly does not fall within monetary policy (par. 54-57).

According to the GFCC, the OMT immediate objective is to neutralise spreads on government bonds of selected euro area Member States: a clear economic policy objective. Moreover, OMTs transactions are tied to an EFSF/ESM macroeconomic adjustment programme and they can be considered the functional equivalent to financial assistance measures, which fall into the economic policy area (par. 78).

The argument put forward by the ECB is that the SMP/OMT programmes are in fact to be considered monetary policy instruments pursuant to Art. 18.1 of the ESCB/ECB Statute.

The SMP/OMT programmes were adopted to counter the exceptional circumstances in the financial markets which were hampering the monetary policy transmission mechanism in the

euro area and thereby the effective conduct of monetary policy oriented towards price stability. In other words, the divergence in government bond yields was hampering the mechanism through which the ECB aims to influence prices in the entire euro area via its interest rates.

Under the OMT, should this mechanism be disrupted by dysfunctional market segments and the ECB's rate signal not be transmitted evenly to all parts of the euro area, the ECB could intervene by buying, on the secondary market (i.e. from banks and against market prices), the securities that it normally accepts as collateral. Even if the purchase of bonds will concern only selected countries receiving EFSF/ESM support, the singleness of the monetary policy will be safeguarded. Therefore, selectivity does not change the nature of the instrument.

The linkage with the EFSF/ESM conditionality does not attract the OMT purchases of government bonds into the field of economic policy. As we have already pointed out, the ECB Governing Council will independently assess the necessity of OMTs purchases in each individual case from a pure monetary policy perspective. Compliance with the EFSF/ESM conditionality is a necessary condition, but not a sufficient one for the start, continuation or termination of OMTs purchases.

Furthermore, the OMT programme is not aimed at the harmonization of the financing conditions of Member States, but only at reducing unwarranted interest rate spikes.

4. Are the ECB's purchases of government bonds on the secondary market compatible with the monetary financing prohibition of Art. 123 TFEU? – Doubts were also raised by the GFCC on the consistency of both the SMP and the OMT programmes with the prohibition of monetary financing enshrined in Art. 123 TFEU.

This provision explicitly prohibits the ECB and the Eurosystem NCBs from either providing credit facilities to or di-

rectly purchasing debt instruments from central governments and other public authorities, but it only applies if these instruments are purchased «directly». Therefore, under the prevailing interpretation of Art. 123 TFEU, the ECB – although prohibited from purchasing in the primary market – would still be allowed to operate in the secondary market in the fine-tuning of its monetary policy. However, reference should also be made to [Council Regulation \(EC\) No. 3603/93](#) according to which «purchases made on the secondary market must not be used to circumvent the objective of [Art. 123 TFEU]».

According to the GFCC, «an acquisition of government bonds on the secondary market by the ECB aiming at financing the Members' budgets independently of the capital markets is prohibited as well, as it would circumvent the prohibition of monetary financing» (para. 278 of the GFCC [decision](#) on the application for a temporary injunction). Moreover, the neutralisation of interest rate spreads, the selectivity of purchases, the parallelism with EFSF/ESM assistance programmes and the ECB's willingness to participate in a sovereign debt restructuring also indicate that the OMT aims at a circumvention of Art. 123 TFEU (paras. 87 ff. of the GFCC [order](#) of 14 January 2014).

To determine whether the OMT purchases might indirectly infringe the monetary financing prohibition, it has been suggested that it would be necessary to look at the rationale and at the objectives of the provision, which namely are to safeguard the (1) ECB's ability to maintain price stability, (2) fiscal discipline, and (3) central bank independence.

In these regards the following observations can be made: (1) OMTs – in the event that they are conducted – will not give rise to any inflationary risks, since the liquidity created through OMTs will be fully sterilized: the total additional liquidity injected through OMTs up to a certain week will be absorbed from the market in the following week and therefore the net ef-

fect of OMT purchases and sterilisation on the overall liquidity in the interbank money market will be neutral; (2) OMTs are attached to a strict conditionality which ensures that the State concerned remains under considerable pressure to implement reforms and maintain fiscal discipline; (3) the ECB Governing Council retains its full independence on deciding over OMT transactions.

For what concerns the ECB participation in a sovereign debt restructuring, we should recall what happened in the context of the Greek Private Sector Involvement (PSI), when the bonds purchased under the SMP were not involved in the application of retroactive CACs and the ECB and the Eurosystem NCBs were *de facto* awarded senior creditor status over the other bondholders.

Initially the ECB rejected criticism arguing that its exemption from the Greek restructuring was “special” and justified on the grounds that it had intervened on the bonds markets solely for monetary policy purposes. On 8 March 2012, the President of the ECB, [Mario Draghi](#), explained that the purchases of Greek bonds responded to public interest considerations and, as such, they deserved protection; furthermore, the integrity of the ECB balance sheet had to be protected, as well as the taxpayers’ money that was entrusted with it. In a second moment, however, the ECB declared that in similar situations, in accordance with the terms of the bonds (see Recital 11 and Article 12(3) of the ESM Treaty), it will not claim preferred creditor status.

If a strict interpretation of Art. 123 TFEU were to be favoured, an ECB “voluntary” participation in a debt restructuring or rescheduling could amount to monetary financing. In this sense, the ECB would be prevented from accepting losses deriving from the restructuring of Member States’ sovereign bonds in its portfolio.

We contend, however, that Art. 123 TFEU (as well as Art.

125 TFEU) has essentially a *preventive nature*, its objective being to reduce as far as possible the risk of public debt crises (cf. CJEU, *Pringle* case, par. 59). This provision was drafted with normal rather than turbulent times in mind, and at a time when a sovereign debt crisis in the Eurozone was unforeseeable. If the fiscal discipline objectives of Art. 123 have not been attained in normal times (which is clearly the case with Greece), to insist on strict compliance with the monetary financing prohibition at a time of acute, almost existential, crisis is to actively counteract the efforts of indebted Member States to return to fiscal discipline. If the participation of the ECB and NCBs in an Official Sector Involvement or a debt-buy-back scheme can help Greece (or, in the future, other states in trouble) to return to fiscal discipline (rather than to default), the main goal of Art. 123 will be not only preserved, but also well served.

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