

(c) Lorenzo F. Pace – all rights reserved

**The OMT case, the “intergovernmental drift” of the Eurozone crisis and the (inevitable) rectification of the *BVerfG* jurisprudence in light of the ECJ’s Gauweiler judgment**

**Lorenzo F. Pace**

forthcoming in

**Diritto dell’Unione europea (2016)**

and accessible at

<http://ssrn.com/author=812305>

**Abstract**

The aim of the present article is twofold. Firstly, to put the German Federal Constitutional Court (i.e., the *BverfG*) judgment into the context of a drawn-out conflict between the German Republic and the European Union regarding the setting up of a crisis management tool in the area of monetary policy (the SMP program in 2010 and the OMT program in 2012); secondly, to contest what the *BVerfG* claims in its judgment, namely that the European Court of Justice's judgment accepted the “requests” of the German Court issued in its preliminary reference. The opposite is true: the *BVerfG* had to bring *its* judgment into line with the *Gauweiler* judgment.

## The OMT case, the “intergovernmental drift” of the Eurozone crisis and the (inevitable) rectification of the *BVerfG* jurisprudence in light of the ECJ’s *Gauweiler* judgment

Lorenzo Federico Pace

Summary: **1.** Introduction; **2.** The birth of the ECB program to protect the effective exercise of monetary policy during a crisis: from the SMP to the OMT; **3.** The Eurozone financial crisis as a regulatory crisis. The causes of its start and its development. The legal means singled out in order to resolve the crisis; **4.** The role of the German Republic in creating the “intergovernmental drift” of the Eurozone crisis. The peculiarity of the “OMT case”; **5.** The various criticisms addressed to it by the *Bundesbank* in 2010-2012 ... ; **6.** ... and the criticism by the *BVerfG* in the 2014 preliminary reference. The ECB, the *BVerfG* and the “understanding” of OMT program: worlds apart; **7.** The *Gauweiler* judgment of the Court of Justice. The legality of the requirement of no *ex ante* limitation of bond purchases in the OMT program; **8.** The judgment of the *BVerfG*, the lawfulness of the OMT program and the alleged accommodation of the Court of Justice to the German Court’s preliminary reference “requests”; **9.** The *BVerfG* judgment, “*the humiliation of recognizing the position taken in its referral as erroneous*” and other “inaccuracies” contained therein; **10.** Conclusions. Winners and losers of the OMT case: the *Bundesbank*, the *BVerfG*, the Court of Justice, the ECB and European legal scholarship.

**1.** In an article of mine on the OMT case of early 2016 I had anticipated that: «Against the generalized criticism of the preliminary reference of the *BVerfG*, and also of the convincing *Gauweiler* judgment, the German Court is unlikely to confirm the final judgment in its assessment of the unconstitutionality of the OMT, leaving it then space only for the formulation of general disapproving criticism»<sup>1</sup>.

The German Court issued on 21 June 2016<sup>2</sup> a judgment that decides, after the 2015 *Gauweiler* judgment of the Court of Justice<sup>3</sup>, the “OMT case”. In this judgment the *BVerfG*, in contrast to what was telegraphed in its 2014 preliminary reference<sup>4</sup>, confirmed the legality of the OMT program. In the reasoning of the judgment, the *BVerfG* criticized some aspects of the *Gauweiler* judgment and set out some additional implementing conditions to the OMT program. These are not provided for in the *Gauweiler* judgment but are implicitly contained in the 2012 ECB decision.

As is well known, the Outright Monetary Transactions (OMT) program is the crisis management tool for an effective protection exercise of monetary policy adopted by the European Central Bank (ECB) in 2012 in one of the more virulent periods of the Eurozone crisis.

With the present article, I would like firstly to put the *BVerfG* judgment into the context of a drawn-out conflict between the German Republic and the European Union regarding the setting up of the crisis management tool in the area of monetary policy, the SMP program in 2010 and the OMT program in 2012. Secondly, I would like to show that contrary to what the *BVerfG* claims in its judgment, namely that the Court of Justice did accept in its judgment the “requests” of the German Court issued in its preliminary reference, quite the opposite is true.

---

<sup>1</sup> L.F. PACE, *The OMT Case: Institution Building in the Union and a (Failed) Nullification Crisis in the Process of European Integration*, in L. DANIELE (ed.), *The Democratic Principle and the Economic and Monetary Union*, 2016, forthcoming. It can be downloaded at: [goo.gl/Z5wWlm](http://goo.gl/Z5wWlm).

<sup>2</sup> Bundesverfassungsgericht, 21 June 2016, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13. On the *BVerfG* judgment see also my *And Indeed It Was a (Failed) Nullification Crisis: The OMT Judgment of the German Federal Constitutional Court and the Winners and Losers of the Final Showdown in the OMT Case*, in *SIDI Blog*, 1 September 2016. It can be downloaded at: [goo.gl/0oHP19](http://goo.gl/0oHP19).

<sup>3</sup> Judgment of the Court (Grand Chamber), case C-62/14, 16 June 2015, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.

<sup>4</sup> Bundesverfassungsgericht, Order of 14 January 2014, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13.

2. The OMT (like the previous version of the program, the SMP) is an open market operation program (art. 18 ESCB Statue) enacted by the ECB in July-September 2012 aimed at guaranteeing the effective exercise of its monetary policy in a crisis scenario.

The birth of the OMT program is based on a principle decided by the ECB before the start of the Eurozone crisis. The ECB argued that excessive spreads in the interest rates of government bonds of different Eurozone Members would effectively eliminate the possibility of the ECB to exercise its monetary policy using ordinary “levers”, first of all, through the setting of money interest rates<sup>5</sup>. Excessive spreads would thus undermine the singleness of the ECB monetary policy as defined in the Treaties, and the correct transfer of ECB monetary policy impulses. The OMT, not unlike the SMP program, allowed intervention in exceptional situations when interest rates of Eurozone States’ bonds became irrationally high as a consequence of market conditions. Through bond purchases, and according to the principle of supply and demand, the OMT would bring these rates to a rational level. In this sense, the OMT does not transform the ECB into a “lender of last resort”, as erroneously feared by the *BVerfG* (Preliminary reference, para. 94). The ECB’s objective is not the stability of the Eurozone but the protection of the effective exercise of its monetary policy (this is actually recognized by the *BVerfG* itself in its judgment of 21 June 2016 - see *BVerfG* judgment, para. 3.c). The OMT can achieve this result because the program does not provide for *ex ante* quantitative limits of the OMT size. And in fact this is one of the features of the OMT decision, that reads: «No *ex ante* quantitative limits on the size of Outright Monetary Transactions [are permitted]». This ensures that the ECB, regardless of the market situation, will succeed in bringing interest rates to rational levels (and in any case to keep them at sustainable levels).

The OMT’s important incidental effect is that, by not allowing interest rates on government bonds of States in financial stress to reach levels that make their debt unsustainable, Eurozone States are prevented from defaulting on their debt, thereby making the euro irreversible (at least from an economic point of view).

Given the exceptional nature of this program, the OMT decision, unlike the SPM program, sets out strict criteria and conditions for its activation and exercise.

The OMT program has until now never been activated.

3. The Eurozone financial crisis is the result of the choice of Member States, at the time of the creation of Economic and Monetary Union (EMU), not to establish institutions to tackle EMU economic and monetary crises. The absence of such institutions was justified in the following terms by the *ex member* of the ECB Executive Board, Jürgen Stark: «There were no bailouts or rescue facilities because they weren’t ever supposed to be necessary»<sup>6</sup>. In other words, prior to the crisis, owing to a problem of unsatisfactory regulation by the Member States (based nevertheless on a clear political choice), there were no institutional tools to counter systemic crises relating to Member States’ public debt or to address the impact of a crisis on the ECB’s monetary policy.

The cause of the onset of the Greek crisis in October 2009, as now agreed by many and recently acknowledged by the President of the *Bundesbank*, Jens Weidmann<sup>7</sup>, was the 2003 decision of France and Germany to breach the Stability Pact without being sanctioned<sup>8</sup>. The *de facto* suspension of the Stability and Growth Pact, along with the severe limitations of the European statistical system for the correctness of the budgetary data provided by the Member States and the emergence of the real dimension of the Greek public debt in 2009<sup>9</sup>, created the situation which then led to the start of the financial crisis. The mismanagement of the Irish crisis through the Franco-

<sup>5</sup> J.C. TRICHET, *State of the Union: The Financial Crisis and the ECB’s response between 2007 and 2009*, SCMS, 2010, p. 11.

<sup>6</sup> As reported by R. ZHONG, *The Last Hawk in Europe*, in *WSJ Europe*, 28 June 2012.

<sup>7</sup> J. WEIDMANN, *Solidität und Solidarität in der Europäischen Währungsunion - Rede bei der deutschen Botschaft in Rom*, 26th April 2016, para. 3.2. See also L.F. PACE, *The OMT case*, cit., para. 3.

<sup>8</sup> This was already denounced by the European Court of Auditors in 2000. Please on this aspect see L.F. PACE, *La crisi del «sistema euro» (2009-2013): cause, fasi, players e soluzioni*, in *Studi in onore di Giuseppe Tesauero*, Editoriale scientifica, 2014, p. 2162. It can be downloaded at: [goo.gl/EclK9e](http://goo.gl/EclK9e).

<sup>9</sup> ECA, Special Report n. 17 in OJ 27 November 2000, C 336, p. 1.

German Deauville Pact of October 2010 as well as the mismanagement of the second Greek crisis created a contagion effect that spread to Portugal, Spain, Italy<sup>10</sup>.

As I have tried to outline elsewhere<sup>11</sup>, the Eurozone crisis was solved by the creation of crisis management institutions as the crisis unfolded, firstly through the two crisis management institutions that were not foreseen in the original framework of the EMU: the European Stability Mechanism (ESM) for the management of crises related basically to Member States' debt, and the Outright Monetary Transactions (OMT) aimed at guaranteeing the effective exercise of the ECB monetary policy in a crisis scenario. Moreover, during the crisis, also the legal framework for the "day-to-day" managing of the Economic Union - the Stability and Growth Pact (SGP) - was modified through the amendment of the so-called "six-pack" and "two-pack" as well as of the Fiscal Compact. Finally, during the crisis the Banking Union was devised with the goal of stopping the "perverse relationship" between Member States' debt and banking sector crises.

4. It is not my goal to make value judgments about how the German Republic chose to direct and control for its part the development and solution of the Eurozone crisis. Instead, I aim to identify the dynamics that led to the development of the crisis in order to perform a correct legal analysis.

It is beyond doubt that, in the definition of the crisis management institutions, the German Republic insisted that the most important aspects of these institutions had to be drafted in intergovernmental agreements so as to prevent their being modified by a majority vote according to the Community method. The decision to enact measures with acts outside the confines of EU law allowed for the well-known Eurozone crisis "intergovernmental drift".

This was the case with the permanent 2012 ESM bail-out fund. The fund was in fact established through an intergovernmental agreement after the amendment of art. 136 TFEU. The temporary 2010 European Financial Stability Facility (EFSF) bail-out fund was also established outside the framework of EU law. The EFSF was established in the form of a private company under Luxembourg law whose shareholders were the Eurozone Member States. Even the main principles of the Stability and Growth Pact set out in the "six pack" (including the so-called "golden rule" of balancing the budget) were inserted into the Fiscal Compact<sup>12</sup>, an intergovernmental agreement. In the Banking Union, certain aspects of the bank restructuring fund are set out in an intergovernmental agreement. Discussions at the European level are now focused on the creation of the European deposit insurance system (the so-called Banking Union "third leg") through another intergovernmental agreement<sup>13</sup>.

The OMT program is the only crisis management tool that was approved, as an ECB decision, by a simple majority (art. 10.2 ESCB Statute). In other words, no Member State could unilaterally impose its veto at the time of its adoption. By the same token, no part of the OMT decision could be "crystallized" in an intergovernmental agreement.

The "OMT case" must be understood in light of the dynamic of this "intergovernmental drift". In particular, it must be understood as the desire of the Member States (in particular Germany) to amend unilaterally, outside the Community method, the crisis management measures. Indeed, the "OMT case" is basically the means by which the *BVerfG* attempted to "impose" stricter program requirements on the OMT. By contrast, the Court of Justice in the 2015 Gauweiler judgment confirmed the legality of the OMT program as defined by the ECB in 2012.

5. Both the SMP and the OMT program have been criticized by the German Republic, specifically by both the *Bundesbank* and the *BVerfG*.

The first wave of the *Bundesbank's* criticism was formulated, based on financial reasons, as the ECB rolled out its first bond purchase program, i.e. the 2010 SMP program. The program was

---

<sup>10</sup> The 2013 Cyprus crisis presents several peculiarities. Please see L.F. PACE, *La crisi*, cit., para. 3.

<sup>11</sup> See L.F. PACE, *La crisi*, cit., p. 2162.

<sup>12</sup> *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, 2 March 2012.

<sup>13</sup> B. ROMANO, *Banche e bond, stretta Ue rinviata*, in *Il Sole 24 Ore*, 18 June 2016.

widely criticized by the *Bundesbank's* President at that time, Axel Weber, and by one of the ECB's Executive Board members (and former *Bundesbank* Deputy President), Germany's Jürgen Stark. In particular, President Weber complained that the injection of liquidity into the market would create «substantial stability risks»<sup>14</sup>. Furthermore, it was feared that this decision would favor an uncontrolled increase in inflation<sup>15</sup>. Over time, these fears proved unfounded. What is relevant here is that both of them, lacking the possibility to veto the SMP program (as unanimity in the Council pursuant to art. 10.2 ESCB Statute was not provided for) decided to resign from their posts in 2011.

The *Bundesbank's* second area of criticism was raised against the new ECB program for the protection of the effective exercise of the ECB's monetary policy<sup>16</sup>, i.e. the OMT. In fact, Jens Weidmann, as *Bundesbank* President, was the only of the (at that time) 23 members of the ECB Governing Council who on 2 August 2012 voted against the decision on the possibility of establishing a new bond-buying program<sup>17</sup>. Subsequently, the ECB Governing Council approved on 6 September 2012 the strict OMT activation and exercise requirements. The OMT formally replaced the SMP.

There were two reasons that pushed in 2012 the *Bundesbank* to oppose the new bond-buying program. In the words of President Weidmann, there was a risk that the ECB would «overstep its mandate»; furthermore, the program was «tantamount to financing Governments by printing bank notes»<sup>18</sup>. In other words, the *Bundesbank* stopped criticizing the ECB's (SMP) bond-buying program from an economic/financial point of view (issues that after two years had proved to be unfounded) and started to raise criticisms about the OMT program on a point of law – a peculiar perspective for an entity like the *Bundesbank*. The two criticisms raised by the *Bundesbank* President (such a program was illegal because in breach of both the ECB mandate and art. 123 TFEU) appear to be at odds with the OMT program set up. In fact, these two issues were specifically addressed and resolved in the drafting of the OMT program<sup>19</sup>.

These OMT activation and exercise requirements were later assessed by the Court of Justice in its *Gauweiler* judgment and were deemed to be fully in line with EU law.

6. The third order of criticism of the German Republic against the OMT was formulated by the *BVerfG* in its 2014 preliminary reference. One can see a clear *trait d'union* between the German *Bundesbank* and the German Constitutional Court in continuing the same objections regarding the legality of the OMT program. Like the *Bundesbank*, the *BVerfG* – as a result of the appeals brought before it in October 2012 - considered that the OMT program was in breach of the ECB mandate and that it violated the prohibition contained in art. 123 TFEU.

The *BVerfG* also added, when referring the case to the Court of Justice, a new issue related to Germany's «constitutional identity» (Preliminary reference, para. 27). In this respect, one of the *BVerfG's* concerns, ultimately, was the inability of the *Bundestag* to exercise its powers of control over the federal budget as provided by the Federal Constitution. These powers were, in the *BVerfG's* view, part of the German constitutional identity (Preliminary reference, para. 28).

The *BVerfG* concluded, in its *sui generis* referral, that the OMT was a breach of both European Union law and German Constitutional law. In particular, the Court threatened the disapplication of the OMT program by all German agencies, federal and state (Preliminary reference, para. 30), in the absence of a corrective interpretation of the Court of Justice (Preliminary

---

<sup>14</sup> As reported by D. CRAWFORD - B. BLACKSTONE, *Bundesbank Attacks ECB Bond-Buying Plan*, in *WSJ Europe*, 1 June 2010.

<sup>15</sup> As reported by T. FAIRLESS, *Italy vs. Germany*, in *WSJ Europe*, 1 August 2012.

<sup>16</sup> On the ECB's role in the crisis, see S. CAFARO, *How the ECB reinterpreted its mandate during the euro-crisis (and why it was right in doing so)*, in L. DANIELE (ed.), *The Democratic Principle and the Economic and Monetary Union*, 2016, forthcoming.

<sup>17</sup> M. DRAGHI, *Introductory statement to the press conference (with Q&A)*, ECB, 2 August 2012.

<sup>18</sup> As reported by B. BLACKSTONE – W. BOSTON, *Draghi Defends Bond Program in Germany*, in *WSJ Europe*, 25 October 2012.

<sup>19</sup> For the general presentation of the OMT program features please see L.F. PACE, *The OMT case*, cit., para. 4.

reference, para. 99). This conclusion of the *BVerfG* has been labeled as an “(offensive) invitation to the ECJ to restrict the implication of the OMT program by means of interpretation”<sup>20</sup>.

The distance in the “understanding” of the function and structure of the program by the *BVerfG*, on the one hand, and the ECB (and the ECJ), on the other, is radical. It poses in doubt the mere possibility of what the German constitutional Court supported later in its final judgment: that is, that the Court of Justice in its judgment would incorporate “in essence” (par. 3.c) the requests of amendment of the OMT program formulated by the *BVerfG* in its preliminary reference.

In fact the *BVerfG*, in order to reach this conclusion, fully overturned the structure of the OMT as defined by the ECB (Preliminary reference, para. 69).

Indeed, the ECB drafted the program based on the following four pillars. In first place, the identification of the reason for the financial stress of some Eurozone States; this was the fear of financial institutions of the possible collapse of the Eurozone. In second place, the aim of the OMT, which in the ECB’s view was the protection of the successful transfer of ECB monetary policy impulses and its singleness. In third place, the legal means used for this purpose. In particular these were monetary policy measures consisting of open market operations (art. 18 ESCB Statute). In fourth place, the expected results of the OMT program, i.e. the reduction of the interest spreads amongst Eurozone States’ bonds.

The *BVerfG*’s position regarding these four elements was diametrically opposite. First, the *BVerfG* decisively rejected the argument of the ECB (formulated in the exercise of its exclusive competence in the field of monetary policy) regarding the reasons for the financial stress of some Eurozone States. However, it accepted the view put forward by the German Central Bank (referring to “the convincing expertise of the *Bundesbank*”, Preliminary reference paras. 70-71). Second, the German Court regarded the ECB’s goal of protecting the successful transfer of monetary policy and its singleness to be irrelevant (Preliminary reference, para. 95). However, as noted before, this goal was already identified by the ECB well before the SMP program of 2010 was established (see *supra* para. 2). Third, the *BVerfG* designated ECB measures pursuant to art. 18 ESCB Statute as economic policy measures (more precisely, the *BVerfG* considered the OMT not as “an act of monetary policy, but mainly an act of economic policy”, Preliminary reference para. 69) without openly contesting the ECB’s differing claim. Indeed, the European Central Bank had argued before the *BVerfG* that open market operations were typical instruments of monetary policy (Preliminary reference, para. 10). Fourth, the *BVerfG* did not take into consideration that the mere presentation of the OMT program obtained the desired result without using cash from the budgets of the ECB, or from those of National Central Banks or even from those of the Member States.

7. The Court of Justice responded to the preliminary reference of the *BVerfG* with the *Gauweiler* judgment<sup>21</sup>. This judgment was rightly called a «model of restraint»<sup>22</sup>. The Court in its judgment did not in fact seek confrontation with the *BVerfG* - confrontation that was already created with the previous *Mangold/Honeywell* judgment<sup>23</sup>. Rather, it sought to show the legality of the OMT «on the force of its substantive arguments»<sup>24</sup>. The only point disputed by the Court (*Gauweiler*, para. 16) related to the supposed lack of binding nature of the judgment of the Court (Preliminary reference, para. 27; the *BVerfG* in its final judgment conformed to the content of the Court ruling differently from what it had previously held in the preliminary reference, see *infra* paras. 9-10).

With reference to the OMT, the Court recognized the legality of the program by clarifying that the requirements as defined there constituted a solid system of checks and balances in order to

---

<sup>20</sup> R. WENDEL, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, in *Eur. Const. Law Rev.*, 2014, p. 277.

<sup>21</sup> See L.F. PACE, *The OMT case*, cit., para. 5.

<sup>22</sup> See the editorial, *On Courts of Last Resort*, *Eur. Const. Law Rev.*, 2015, p. 227.

<sup>23</sup> See A. TIZZANO, *La Corte di giustizia dell'Unione europea e la Corte costituzionale italiana*, in L.F. PACE (a cura di), *Nuove tendenze del diritto dell'Unione europea dopo il Trattato di Lisbona*, Giuffrè, 2011, p. 223.

<sup>24</sup> M. CLAES – J.H. REESTMAN, *The Constitutional Protection of National Identity and the Limits of European Integration*, in *German Law Jour.*, 2015, p. 946.

ensure that the bond-buying program was in breach of neither the mandate of the ECB nor of art. 123 TFEU.

However, the Court did not follow the *BVerfG*'s "request" to impose new restrictions on the activation and exercise of the OMT program. To the contrary, the Court affirmed the legality of the program as drafted by the ECB in 2012 without any reservation. Moreover, the Court in para. 88 of the judgment clearly rejected the *BVerfG*'s "request" that the size of the OMT program should be limited *ex ante* (Preliminary reference, para. 101). This aspect is of particular importance with regard to the subsequent judgment of the *BVerfG* (see *infra* para. 9).

**8.** In spite of the numerous and different profiles of illegality raised by the German Republic starting from 2010, the German Constitutional Court has recognized in its judgment the legality of the OMT program.

Regarding the first part of the *ultra vires* review, the *BVerfG* concluded (contrary to what it stated in the preliminary reference, Preliminary reference, para. 56, 84, 95, 99) that the OMT program does not breach the ECB mandate. The program is in fact «to the largest extent monetary in kind»<sup>25</sup> (para. 3.c). In order to reach this conclusion, the Court had to elaborate a difficult analysis aimed at showing that the Court of Justice had in fact accepted the views of the *BVerfG* as expressed in the preliminary reference. The difficulty stems from the fact that the Court of Justice, as mentioned above, considered the OMT decision as adopted in 2012 to be lawful, without taking the *BVerfG*'s requests into consideration.

It is no coincidence that the German Court criticized "in principle" the content of the *Gauweiler* judgment, arguing that the judgment «meets with serious objections on the part of the [*BVerfG*]» with reference to different aspects<sup>26</sup>. In spite of this, the German Court found that the OMT program is lawful arguing that it does not «manifestly exceed the competence attributed» to the ECB (para. 3c).

This apparent contradiction is justified, according to the *BVerfG*, by the fact that the Court of Justice «essentially performed the restrictive interpretation of the policy decision that the Senate's request for a preliminary ruling of 14 January 2014 held to be possible» (para. 3.c). To this end, the *BVerfG* made a distinction between «the decision of 6 September», on the one hand, and «the implementation of the programme» on the other. The distinction is clearly aimed at the (expected) goal of the German Court: that is, to single out a (restrictive) interpretation of the OMT program's requirements<sup>27</sup>.

Continuing with its *ultra vires* review, the *BVerfG* also found that the OMT is not in breach of art. 123 TFEU. That is again the opposite of what the *BVerfG* concluded in its preliminary reference. As the *BVerfG* states: «If interpreted in accordance with the Court of Justice's judgment,

---

<sup>25</sup> According to the German Court, the Court of Justice «bases its review not only on the policy decision of 6 September 2012 concerning the technical details, but derives further framework conditions – in particular from the principle of proportionality –, which set binding limits for any implementation of the OMT programme» (para. 3.a.). Moreover, «in using procedural means to limit the ECB's competences by reviewing whether the principle of proportionality has been observed, the Court of Justice takes up the issue of the nearly unlimited potential of the decision of 6 September 2012» (para. 3.c). The *BVerfG* concluded that: «The restrictive parameters developed by the Court of Justice do not completely remove the character of the OMT programme insofar as it encroaches upon economic policy. However, together with the conditions prescribed by the decision of 6 September 2012 [...] they make it appear acceptable to assume that the character of the OMT programme is at least to the largest extent monetary in kind» (para. 3.c).

<sup>26</sup> The *BVerfG* judgment reads: «These objections concern the way the facts of the case were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted» (para. 3.a).

<sup>27</sup> The *BVerfG* held that the Court of Justice «bases its review not only on the policy decision of 6 September 2012 concerning the technical details, but derives further framework conditions – in particular from the principle of proportionality –, which set binding limits for any implementation of the OMT programme» (para. 3.a.). Following this, «in using procedural means to limit the ECB's competences by reviewing whether the principle of proportionality has been observed, the Court of Justice takes up the issue of the nearly unlimited potential of the decision of 6 September 2012» (para. 3.c). The *BVerfG* concluded that: «The restrictive parameters developed by the Court of Justice do not completely remove the character of the OMT programme insofar as it encroaches upon economic policy. However, together with the conditions prescribed by the decision of 6 September 2012 [...] they make it appear acceptable to assume that the character of the OMT programme is at least to the largest extent monetary in kind» (para. 3.c).

the policy decision on the technical framework conditions of the OMT programme as well as its possible implementation [...] do not manifestly violate the prohibition of monetary financing of the budget» (para. 3.d). The German Court is here faced with an even harder problem, which is to bring its own demands in the preliminary reference into line with the *Gauweiler* judgment. This is a harder task because the Court of Justice clearly refused in the *Gauweiler* judgment to amend the requirements of the OMT decision, as “requested” by the *BVerfG*, particularly *vis-à-vis* the “request” to impose *ex ante* limits to the size of the OMT program (*Gauweiler*, para. 88).

In spite of this, surprisingly the German Court in its judgment included among the conditions of the OMT program (conditions allegedly listed by the Court of Justice in the *Gauweiler* judgment) the one regarding the *ex ante* size limitation of the OMT program<sup>28</sup> (namely: « The volume of the purchases is limited from the outset», para. 3.e; see *infra* par. 9 on the real content of the judgment on this point and the reasons for the deliberately ambiguous formulation of the *BVerfG* judgment).

With reference to the alleged breach of the German constitutional identity, the *BVerfG* excluded that the OMT program as interpreted by the Court of Justice «presents a constitutionally relevant threat to the *Bundestag*’s right to decide on the budget» (para. 3.f). The *BVerfG* concluded by outlining an obligation on the Federal Government and the *Bundestag* in the context of *Integrationverantwortung*. According to the *BVerfG*, not only is it necessary to control that the conditions defined in the *BVerfG* judgment are met, but these bodies should also check the existence of a specific danger for the federal budget that may arise, in particular, from the volume of bonds purchased pursuant to the OMT and the risk structure of the purchased bonds, «which may change even after their purchase» (para. 3.g).

9. I propose to focus the present remarks only on the operative part of the *BVerfG* judgment; that is, the final 46 paragraphs of the 220 paragraphs of the judgment (specifically, paras. 174 - 220). As noted in my analysis of the OMT preliminary ruling, in that case there was a significant difference (if not contradiction) between the “theoretical” and the “operative” part of the preliminary reference<sup>29</sup>.

Moreover, it should be noted that final judgment was not fully translated into English, unlike the preliminary reference and other key *BVerfG* judgments with European relevance. The summary of the judgment in English organized by the *BVerfG* does not allow us to fully ascertain some contradictions contained in the final decision in German .

In essence, the grounds of the judgment of the *BVerfG* in the operative part are all aimed at demonstrating what clearly is not the case: namely, that the ECJ had fulfilled the requests in the *BVerfG*’s preliminary reference, thus modifying the features of the OMT program. In this sense, the way in which the *BVerfG* justifies its conclusion has the goal not only of avoiding «the humiliation of recognizing the position taken in its referral as erroneous»<sup>30</sup> but also of dissimulating its (failed) attempt to modify the content of the OMT program through the interpretation requested in the preliminary reference to the Court of Justice.

The German Constitutional Court, with reference to the first part of the *ultra vires* review on the ECB mandate, had to argue that the Court of Justice accepted the *BVerfG*’s requests. The German Constitutional Court maintained that the Court of Justice «has essentially performed the restrictive interpretation of the policy decision that the Senate’s request for a preliminary ruling of 14 January 2014 held to be possible» (para. 3.c). This formulation, however, is *per se* an admission

---

<sup>28</sup> These are namely: «purchases are not announced // the volume of the purchases is limited from the outset // there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted // the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds // purchased bonds are only in exceptional cases held until maturity and // purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary».

<sup>29</sup> See L.F. PACE, *The OMT case*, cit., para. 4.

<sup>30</sup> M. GOLDMANN, *Constitutional Pluralism as Mutually Assured Discretion: The ECJ, the BVerfG, and the ECB*, in *Maastricht Jour.l of Europ. and Comp. Law*, 2015, p. 9.



that the Court had not agreed to the requests from the *BVerfG*. In fact, the Court of Justice did not comply with those requests directly but, according to the *BVerfG*, only “in essence” («essentially performed»).

Since the Court of Justice did not modify the OMT program, the only way for the *BVerfG* not to trigger an institutional crisis by declaring the OMT unlawful was to follow Goldmann’s suggestion<sup>31</sup>, i.e., to revert to the principle that: «finding an act to be *ultra vires* requires [...] that it manifestly exceed the competences transferred to the European Union» (*BVerfG* judgment, para. 3.c). By following this principle, the *BVerfG* was able to claim that «if interpreted in accordance with the Court of Justice’s judgment, the policy decision on the OMT programme does not [...] “manifestly” [exceed] the competences attributed to the European Central Bank» (*BVerfG* judgment, para. 3.c). This is all the more peculiar in that the *BVerfG* had already rejected the same conclusion on the «manifest nature of the breach» on the same point of law in the preliminary reference (Preliminary reference, paras. 56, 84, 95, 99).

From this point of view, given that the Court of Justice did not operate a restrictive reading of the OMT program as “required” in the preliminary reference, the *BVerfG* could have relied more wisely on the “manifestly exceed the competence” principle before deciding to ask the ECJ for a preliminary ruling. But, as already pointed out, the intention of the *BVerfG* was not to have the ECB program reviewed for legality. The *BVerfG*’s goal was to have the OMT program amended in the way it had “requested” the Court of Justice to do in the preliminary reference.

In fact, *inter alia*, *BVerfG* had tried with the preliminary ruling to secure the additional condition that the «government bonds of selected Member States [must not be] purchased up to unlimited amounts» (Preliminary reference para. 101). In its view, this principle could have threatened (wrongfully, as claimed by many<sup>32</sup>) the *Bundestag*’s power to control the federal budget (Preliminary reference, para. 28). That “request” was clearly intended to limit (or rather repeal) the already recalled central feature on which rests the success of the OMT program and that reads: «No *ex ante* quantitative limits on the size of Outright Monetary Transactions [are permitted]».

In its final judgment, the *BVerfG* would seem to argue that the Court of Justice in *Gauweiler* had changed this aspect of the OMT program. The *BVerfG* claims in fact that: «Unlike the parameters resulting from the basic decision of 6 September 2012, [...] the Court of Justice denies an unlimited extension of the purchase program» (*BVerfG* judgment, para. 195). Moreover it affirms: «The German *Bundesbank* is entitled only to participate in a future implementation of the OMT program if and when the prerequisites laid down by the Court of the European Union are met, i.e. if [...] the volume of the purchases is limited from the outset» (para. 3.e)<sup>33</sup>.

As portrayed by the *BVerfG*, it would appear that the ECJ opted for a narrow reading of the OMT program as “requested” by the *BVerfG*. However, a closer reading shows that this is not the case, and that indeed the opposite is true.

In fact, the Court of Justice in *Gauweiler* did not limit or derogate from the “open ended” requirement. In clear opposition to para. 101 of the *BVerfG*’s preliminary reference, the European Court supports the lawfulness of such a clause in these terms: «In those circumstances, a programme [...] could legitimately be adopted by the ESCB without a quantitative limit being set prior to its implementation» (*Gauweiler*, para. 88). The Court of Justice also indicated why it would not be possible to limit *ex ante* that volume, explaining that such a limit was likely «to reduce the programme’s effectiveness» (*Gauweiler*, para. 88).

If the German Court had wished to contest the “no *ex ante* OMT size limit” feature in its final judgment it would have recalled and criticized para. 88 of the *Gauweiler* judgment, but it did

---

<sup>31</sup> M. GOLDMANN, op. cit., p. 9.

<sup>32</sup> On the general criticisms on the *BVerfG* reading of the OMT see L.F. PACE, *The OMT case*, cit, para. 4.

<sup>33</sup> The *BVerfG* final judgment in German language reads: «Die Deutsche Bundesbank darf sich an einer künftigen Durchführung des OMT-Programms nur beteiligen, wenn und soweit die vom Gerichtshof aufgestellten Maßgaben (Rn. 199) erfüllt sind, das heißt wenn: [...] das Volumen der Ankäufe im Voraus begrenzt ist [...]» (para. 206).

not. The *BVerfG* instead recalled para. 106 of *Gauweiler* (*BVerfG* judgment para. 195)<sup>34</sup>. This merely claims that the (future and possible) execution of the OMT program will provide *ex ante* the volume of bond purchases (without this being announced) set with the goal of restoring monetary policy transmission. This reading does not exclude but rather recognizes that if the volume of purchases decided *ex ante* by the ECB does not reach the predefined ECB goal (that is, a certain level of interest requested for bonds of Member States in financial stress), the European Central Bank could further extend the volume of bond purchases. What the *BVerfG* clearly held in its judgment provided nothing new. Indeed, what the *BVerfG* made clear is exactly what the OMT decision sets forth: i.e. a program quantitatively limited to the achievement of the restoration of the transmission mechanism<sup>35</sup>. This does not exclude (and indeed requires for its success) that the program as such does not provide for *ex ante* quantitative limitations of the program.

This proves the correctness of the contention advanced in the introduction of this article, namely that, contrary to what the *BVerfG* maintained in its judgment, the Court of Justice in its *Gauweiler* judgment did not accept the requests made by the German Court in its preliminary reference (Preliminary reference, para. 195). Indeed, the reverse is true: the *BVerfG* has accepted the conclusions of the *Gauweiler* judgment.

In the face of this, the following paradox is revealed. The requirement in question (i.e. the absence of *ex ante* quantitative limits on the size of the OMT) was considered by the *BVerfG* unlawful in the preliminary ruling (par. 101). Subsequently, the *BVerfG* stated in its judgment (contradictorily) that such a requirement is lawful. The *BVerfG* thus shows that this OMT feature was lawful even before *Gauweiler*. The request made by the *BVerfG* in the preliminary reference, at least on this point, proved not only to be incorrect but also useless.

This does not rule out that the wording contained in the *BVerfG* judgment on this point appears to be deliberately ambiguous. It is no coincidence that in an article published in the *Financial Times* of September 23, 2016 with reference to the case OMT one reads: «Both the German court and the European Court of Justice [...] found the EU had acted within its mandate [*vis-à-vis* the OMT program]»<sup>36</sup>. Given this correct view, the article goes on to say (incorrectly) that: «But the German court held that the ECB's bond purchase had to meet certain conditions - such as limits on purchases [...]». A similar non-technical reading does not change the real content of the *BVerfG* judgment, which is that the *BVerfG* in its final judgment changed its interpretation of the OMT program carried out in the preliminary reference in order to bring it "in line" with that of the Court of Justice.

Also objectionable is the *BVerfG*'s statement in its judgment that the OMT decision of 6 September 2012, that is before the issue of *Gauweiler* by the Court of Justice, had an "almost unlimited potential" in its application (the German language version reads: «Das Problem des nahezu unbegrenzten Potentials des Beschlusses vom 6. September 2012», *BVerfG* judgment, para. 196). With this wording once again the German Constitutional Court would seem to hold that the Court of Justice had actually performed the restrictive interpretation of the OMT program requested in the preliminary reference. In fact the *BVerfG* seemed to imply that thanks to this alleged restrictive interpretation the "original" issue of the "almost unlimited potential" of the OMT program was solved. As we have already seen, this is certainly not the case with regard to the OMT.

Aside that, the OMT features, as shown before (*supra* para. 3), were drafted aiming precisely at restricting this "almost unlimited potential" in its application, differently from the SMP (probably this was an unlawful program *vis-à-vis* Union law)<sup>37</sup>. The ECB in the activation and

---

<sup>34</sup> Paragraph 106 of *Gauweiler* reads: «The ECB has also made clear before the Court that the ESCB intends [...] to refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged».

<sup>35</sup> The OMT program sets forth that «“The Governing Council will consider Outright Monetary Transactions [...] and terminate them once their objectives are achieved [...]”».

<sup>36</sup> A. JONES, *ECB fears legal action will rein in scope for QE*, in *Financial Times*, 23 September 2016.

<sup>37</sup> It is reasonable to claim that the SMP program had an "almost unlimited potential" in its application. That is why I claimed that the SMP program, after the interpretation of the law in *Gauweiler*, was probably in breach of Union law. See my *The OMT case*, cit., para. 4.a. Ruffert limits the illegality of the SMP to the concrete bond purchases of August 2011, see

exercise of the OMT bond purchase program has to follow these strict conditions. These were specifically defined in order to dispel the doubts of legality raised by the *BVerfG* (alleged breach of the ECB mandate and of art. 123 TFEU) as already claimed in 2012 by President of the *Bundesbank* Weidmann (see *supra* para. 5).

**10.** The “OMT case” cannot be reduced to the mere issue of Union Law interpretation between the Court of Justice and the *BVerfG*. In my view, the OMT case was a final “showdown” regarding the extent to which the Community method could be “bent” in order to reassure major Eurozone Member States in the design of crisis management institutions. The *BVerfG* with its 2014 preliminary reference sought to influence the way in which the OMT program operates. This attempt by the *BVerfG* was rejected by the Court of Justice in its 2015 *Gauweiler* judgment (*supra* para. 6). It upheld the lawfulness of the OMT program as formulated by the ECB in 2012.

As in every “showdown” there are, in a broad sense, “winners” and “losers”.

Among the “winners” one could list the ECB. The OMT case shows that it exercised its monetary competence in a lawful manner, without misusing its independence. From this point of view, one should not forget that the ECB had to enact such a program since neither the Member States nor the EU institutions, which would have been more properly competent parties to enact a measure of this kind, had enacted them<sup>38</sup>. Instead, they preferred to leave that role to the ECB, thereby endangering its independence and legitimacy, and turning the ECB into a “lightning rod” for criticism – as the *BVerfG* reference shows –; this despite the fact that the OMT program has proven lawful under EU law.

Also among the “winners” one could list the Court of Justice and its role as a centralized body of binding interpretation of EU Law. The stronger Court of Justice role emerges *inter alia* from the fact that the *BVerfG*, notwithstanding its “self-proclaimed” independence from the binding nature of the judgments of the Court of Justice (Preliminary reference, para. 27), had to bring its judgment into line with the *Gauweiler* judgment.

An important role in the “positive” conclusion of the OMT case was played by European legal scholarship. The decision of the *BVerfG* not to “cross the Rubicon” and not to start an institutional crisis with the Union was probably driven also by the coherent and intense criticisms raised in that scholarship against the *BVerfG*’s preliminary reference<sup>39</sup>.

Among the “losers” of this showdown is the *Bundesbank*. It is clear that the German Court too recognizes, pursuant to European Union and German Constitutional Law, that the *Bundesbank*’s criticisms of the OMT that began in 2012 (together with the ones raised in 2010, see *supra* para. 5) were inconsistent, and that the OMT program was fully legal.

In the same category one could list also the *BVerfG*. The German Court with its preliminary reference threatened to create an institutional crisis of dimensions previously unknown in the Union that could have led the Union into uncharted waters. Such a crisis could have been comparable to the *nullification crisis* of the United States of America of 1832 following the enactment of the *Tariff Act*<sup>40</sup>. It was probably advisable to review the legality of the OMT program. These kinds of open market operations are in fact subject to intense scrutiny and criticism on both sides of the Atlantic (I am referring, for instance, to the U.S. Federal Reserve’s Quantitative Easing). The way in which the *BVerfG* tried to have the legality of the OMT program reviewed was probably not the correct one. But again, the *BVerfG*’s goal was different. Its aim was to modify the content of the OMT program following its wishes through the interpretation of the Court of Justice; in this, the *BVerfG* failed.

---

RUFFERT, *The EMU in the ECJ – a new dimension of dispute resolution in the process of European integration*, in Daniele (ed.), *The Democratic Principle*, cit..

<sup>38</sup> See also DE GRAUWE, *The European Central Bank as Lender of Last Resort in the Government Bond Markets*, in *CEDifo Econ. Studies*, 2014, p. 524.

<sup>39</sup> For a list of the abundant legal scholarship that discussed, *inter alia*, the *BVerfG*’s preliminary reference, see my *The OMT case*, cit.. See also the special issue of *The Maastricht Journal of European & Comparative Constitutional Law*, 2016, in F. FABBRINI (ed.), *The European Court of Justice, the European Central Bank and the Supremacy of EU Law*.

<sup>40</sup> See my comparison with the *nullification crisis* in *The OMT case*, cit., para. 6. For a positive judgment of the comparison of the US “nullification crisis” with the actual situation of the Union see G. TREMONTI, *Mundus Furiosus*, Milano, 2016, pp. 10, 106.