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The Limits of Legal Accountability of the European Central Bank

This article will focus on the state of legal accountability in the relation between the European Court of Justice (ECJ) and the European Central Bank (ECB) as developed after the unfolding of the so-called Euro crisis. The underlying hypothesis behind this analysis is twofold: the 2008 crisis has marked a remarkable change in the constitutional balance of the Euro-zone, and as a consequence the constitutional function of the ECB has emerged and become visible. To detect these changes, three cases will be discussed with a view to show that there has been a shift in the ECJ's interpretation of the Treaties and, accordingly, of the role of the ECB. The reaction to the Euro crisis has shown that the ECB cannot be deemed to be only an administrative independent agency, but it should be treated as an organ with constitutional functions whose role has systemic implications for the stability of the European Union itself. Such recognition implies that its decisions (of the ECB) ought to be treated not only procedurally, but in a genuinely political and constitutional way. In a nutshell, the article pleads, first, for the recognition of the limits of legal accountability¹ before the power-grabbing of the ECB and, second, for the opening of a constitutional discussion on central banking. In order to prove this point, the next section will explain why in the context of the EU, and in particular after the 2008 crisis, the ECB has become an organ with a share in the European governing function. Hence, in the following three sections, the trajectory of the case law related to that role will be drawn and the limits of judicial review exposed. The last section will briefly assess the timid attitude of the ECJ before the ECB and mention why this is a constitutional question. If the diagnosis is correct, then the prognosis is that a compensation scheme in the European balance of power with more political accountability of central banking will have to be introduced.

1. The Role of the European Central Bank in the Euro Governance

The rise of central banks as independent administrative agencies is undeniable and has been the outcome of a revolutionary transformation in the conception of the constitutional organisation of monetary and economic policies. Until the end of the Seventies, in the Western world the only central bank fully independent and autonomous was the Bundesbank, for obvious historical reasons.² But in order to cope with the increasing demand for a non-political government of monetary policy, and in the wake of the revival of monetarism, many Western states decided to disentangle their central banks from the relevant minister (usually, the treasury). The European Central Bank is quintessentially a product, if not the epitome, of this widespread constitutional transformation. But, compared to other Central Banks, it operates in a rather different constitutional environment and on the basis of some different assumptions. The ECB is designed as a highly independent EU agency with a legal basis and detailed statutes on the level of the Treaties since the age of Maastricht. In theory, it operates like an administrative authority whose primary entrenched

¹ On the difference between legal and political accountability see, among many, A. Tomkins, *Our Republican Constitution*, Hart, Oxford, 2005, pp. 15-21.

² R. Lastra, *International Monetary and Financial System*, Oxford University Press, Oxford, 2014, p. 235.

objective is price stability (art. 127[1] TFEU), but it is embedded in a wider constitutional framework which bestows upon it other important functions. Its independence is explicitly recognised by the treaties: ‘when exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body’ (art. 130 TFEU). The classic argument in support of a strong independence is based on ‘the belief that central bankers, because of their specialisations and relative insulation from political pressures, are more prepared than politicians to pursue the objective of price stability. The skills, expertise and superior qualifications of central bankers compared to politicians recommend an independent central bank, better able to guarantee a more objective, more neutral and faster decision-making process’.³ Legally, the argument is based on the recognition that the creation and regulation of the ECB’s activities was not delegated to EU legislation (in which case, the ECB would have been a creature of statute), but directly by the Treaties and its protocol. Its independence is also strengthened by another material factor: only the national central banks subscribe to its capital, and the ECB derives its revenues solely through its own monetary operations or through those of the national central banks operating within the ESCB (European System of Central Banks). Financially, the ECB does not depend on any other EU institutions. Even the status of its staff enjoys a remarkable independence when compared to other institutions.⁴

The Central Bank’s independence is also explicitly recognised by the Treaties not only because of its competence, but also in a way functional to the realisation of the Economic and Monetary Union (EMU) as a currency union without federal devices of transfer or compensation schemes. In fact, the ECB independence from political pressure is basically necessary in order to maintain the separation between monetary policy (whose management is by now fully supranational, obviously only in the Euro-zone) and economic policy (still driven by intergovernmental logic). The underlying argument is that the jurisdiction of an independent Central Bank ensures a coherent monetary policy not exposed to the pressure of short-term political interests. Functionally, the constitutional role of the ECB is made possible by the expertise of its members, which plays a key role when it comes to highly technical decisions on complicated questions of monetary policy.⁵ As a consequence of this setting, the ECB is isolated from any type of input legitimacy.⁶ Its credentials depend on its capacity of delivering outputs in a credible and independent (from stakeholders and politicians) way. The nature of this independence was not clear until the entry into circulation of the Euro. Some authors went actually as far as stating that the ECB and the

³ R. Lastra, ‘European Monetary Union and Central Bank Independence’, in M. Andenas, L. Gormley, I. Harden (eds), *European Economic and Monetary Union: The Institutional Framework*, The Hague, Kluwer, 1997, p. 305.

⁴ R. Smits, *The European Central Bank*, Kluwer, The Hague, 2000, p. 53.

⁵ The rationale of the division between monetary and economic policy, which belong to two different rationalities, one technical and one political, is clearly explained in K. Tuori, K. Tuori, *The Eurozone Crisis: A Constitutional Analysis*, Cambridge University Press, Cambridge, 2012, pp. 22-23.

⁶ I take the distinction between input and output legitimacy from the work of F. Scharpf, *Governing in Europe*, Oxford University Press, Oxford, 1999. See how the distinction is applied to the ECB by A. Glencross, ‘Democratic Input versus Output-oriented Governance: The ECB’s Evolving Role and the New Architecture of Legitimacy in the EU’, in 5 *Journal of International Organizations Studies* (2015), pp. 23-36.

ECSB enjoy an intrinsically autonomous constitutional status, essentially a new supranational organization (sic!) within the European Union.⁷ Given the expertise of the authors and the robust tradition of respect for central bank autonomy among academics, this position enjoyed considerable respect.

The provisions not only circumscribe the objectives of monetary policy but also the instruments to pursue it to great detail. Following the logic of a currency union overseen by a technical body, the governance of the Euro is presented in the treaties as being rule-based. Hence, the amount of detailed regulation around monetary policy. This is not only the outcome of the concern of the Eurozone reluctant hegemon (Germany), but it is also a way to ensure that the Euro governance's mechanisms, being managed according to rules, maintain a neutral character and remain within the realm of the rule of law. Otherwise, the whole project of the common currency would not be capable of generating a sufficient amount of mutual trust among the participating Member States and it would collapse, eventually generating financial burdens for all Member States and in particular for those in the position of creditors.

On a comparative note, such a strong constitutional definition of the principle of independence is rather exceptional. As already noted by Francis Snyder, the ECB enjoys greater independence than the US Federal Reserve Board and virtually all central banks prior to the Monetary Union. The US Federal Reserve Board does not enjoy constitutional status and, although it enjoys great independence by custom, nothing prevents the Congress from adopting legislation mandating certain goals or policies, a power that the Congress has exercised only rarely, but nonetheless knows it can resort to in extreme circumstances.⁸ The Bank of England and the Netherlands Central Bank enjoyed a high reputation for their efficacy in monetary control, even though each one's functional independence was largely based on custom and each could be subjected to binding instructions from the Chancellor of the Exchequer or the Ministry of finance.⁹

Contrary to previous example, it is key to note that, in the context of the Eurozone, the construction of the single currency already provided the ECB with a *de facto* governing power. Kenneth Dyson, in a prescient way, already detected the conditions which would make possible for the ECB to become one of the key players in the Euro-zone. He calls this outcome an 'ECB-Centric Eurozone'.¹⁰ Among the factors determining the rise of the ECB leadership the following should be mentioned: 'a dominant economic policy paradigm of sound money and finance [...] an asymmetric Economic and Monetary Union [...] the predominance of negative over positive integration [...] the issue of regime compatibility [...]'. The asymmetric character of the EMU has been explained as a necessary device in order to cope with prisoner's dilemma issues affecting the interaction among Member States. The core issue, in the case of the Euro, was that 'of inducing credibility in others of one's commitment to the policy to be agreed to avoid defection from a mutually beneficial

⁷ C. Zilioli, Selmayer, *The Law of the European Central Bank*, Hart, Oxford, 2001, p. 143.

⁸ R. Goebel, 'Court of Justice Oversight over the European Central Bank: Delimiting the ECB's Constitutional Autonomy and Independence in the *OLAF* Judgment', in *29 Fordham International Law Journal* (2006), pp. 298-299.

⁹ I take this argument from L. Gormley, J. De Haan, 'The Democratic Deficit of the European Central Bank', *21 European Law Review* (1996), pp. 98-99.

¹⁰ K. Dyson, *The Politics of the Eurozone*, Oxford University Press, Oxford, 1999, p. 11.

agreement'.¹¹ In order to cope with this problem, as explained by Otmar Issing (one of the most thoughtful writers and activists on the role of central banks), it was thought that, because democratic competition works to create deficit financing, thereby undermining the long-term stability of the currency and public finances, the Euro was designed to avoid forms of strong political accountability in the governance of the single currency.¹² Key for this conclusion is the idea that what gives the Euro-zone its distinctive character is its two-level nature: the EU and national levels are at once separate and interacting. It means that in terms of the governance of the Euro, the formal monopoly is in the hands of Euro-institutions (mostly, the ECB and the Commission) with no formal decisionmaking power left to the national level; yet, the decisions taken at the supranational level impact massively not only on the policies at the national level, but also on the fabric of national constitutions. The risk is that the stabilising force of the Euro is limited to the goal of price stability, but at the expenses of the solidity of Member States' political systems.

In addition to the previous factors, one has to bear in mind the legal distinction between monetary and economic policies. In fact, even if it were possible to postulate that monetary and economic policies can be played out separately in distinct channels (and this remain a debatable issue), the ECB would still be in charge of determining the amount of credit to which the Member State and its banking system have access to. The special position of the ECB, that is, its being beyond outside any clear State framework, gives to this institution an impact upon other European and Member States' institutions quite extraordinary in nature. One has to bear in mind that even in the case of a State with an independent Central Bank, the main objectives are usually set by other institutions with more solid representative credentials. In this way, as it was shown during the Greek crisis, the decisions of the ECB, for example, on liquidity, do shape, albeit indirectly, the policies of Member States.

The new economic governance of the Euro has partially mutated and actually enhanced the role of the ECB in the constitutional framework of the Euro-zone. The ECB is actively involved in the European Stability Mechanism (ESM) as a member of the supervision team over the Member State's fiscal and financial policies to be implemented in compliance with conditionalities. This new role entails that the ECB, together with the Commission and the IMF, and outside the framework of EU law, co-dictates certain policies and then supervises their application by the Member State subject to the programme. Furthermore, the ECB has been given new tasks of supervision in the recently enacted European Banking Union. In a nutshell, as an organ (the ECB) and as a function (as central banking), the ECB co-determines the political direction of the Eurozone. In constitutional parlance, this means that the ECB performs a governing function. As such, its status as a materially constitutional organ ought to be recognised and its political salience too. Unsurprisingly, a series of suits provided the chance to the ECJ to send a signal to the European political process that such a transformation ought to be discussed in and by the public. Unfortunately, the Court shied away and showed an unduly, yet predictable, deference toward the policies of the ECB. The outcome of the recent decisions is to strengthen the solidity of the emergency regime created

¹¹ R. Bellamy, A. Weale, 'Political Legitimacy and European Monetary Union: Contracts, Constitutionalism and the Normative Logic of Two-Level Games', in *22 Journal of European Public Policy* (2015), p. 261.

¹² O. Issing, *The Birth of the Euro*, Cambridge University Press, Cambridge, 2008, pp. 234-236.

to tackle the Euro crisis.¹³ Far from being temporary in nature, the enhanced role of the ECB will have to be addressed at the level of constitutional design.

2. *OLAF: Resisting the Power-Grabbing of the ECB*

The nature of the ECB's independence, when already subject to academic analysis,¹⁴ has been tested in an influential case decided in 2003 by the ECJ in occasion of a confrontation between the European Commission and the ECB on the extents of powers of the newly instituted OLAF agency. The latter is the European Anti-Fraud Office created in the aftermath of a major scandal with the task of contrasting all illegal activities which are detrimental to the European Union financial interests.¹⁵ Despite being formally part of the European Commission, it enjoys a high level of autonomy and independence. The case was seminal for several reasons, but one has to be highlighted for the purposes of this article. The ECB's line of defence was based on the argument that the nature of its institutional independence was of a constitutional nature; hence, the protection of its autonomy and independence ought to be the highest. Note that here the constitutional nature of the ECB's independence meant legal entrenchment. The core of the ECB claim went so far as to state that it should not be deemed to be simply an organ within what was back then the European Community and stated to have a legal personality distinct from the EC. The idea, advocated by Zilioli and Selmayr, of an ECB as a supranational organisation is usually based on the recognition of the legal source behind its creation. In the case of the ECB, its institution and granting of powers and duties come from the Member States' ratification of the Maastricht Treaty and not from ordinary Community legislation. The Maastricht treaty would have separated the position of the ECB not only in terms of its function, but even in terms of its full autonomy: 'the ECB is not institutionally linked to the Communities and it never acts as financial instrument of the community institutions or even for or on behalf of them ... as this would be incompatible with both its independence and with its primary objective of price stability'.¹⁶ Moreover, the ECB budget, financial resources and expenses are totally autonomous, based upon grants of power under the EC Treaty or the Protocol on the Statute of the ESCB and ECB. The ECB noted also that it was granted the right to set alone its internal organisation procedures and staff rules, which would also include internal controls against fraud and corruption. In light of these points, and on a comparative scale, it is reasonable to affirm that the ECB enjoys an autonomy and independence that go much further than any historical precedent.¹⁷

The question submitted to the Court concerned the ECB's decision 1999/726, creating its own internal procedures to combat fraud: according to the Commission, this ECB decision violated the rules of Regulation 1073/1999, which authorised OLAF to exercise its

¹³ For a brilliant analysis of the long-term impact of the Euro emergency regime see J. White, 'Authority after Emergency Rule', in 78 *Modern Law Review* (2015), pp. 585-610.

¹⁴ For example, F. Antembrink, *The Democratic Accountability of Central Banks*, Hart, Oxford, 1999, pp. 18-22, has analysed the ECB's independence under its institutional, functional, organisational and financial aspects.

¹⁵ For an in-depth analysis of this body see J. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office*, EuropaLaw Publishing, Groningen, 2011.

¹⁶ Zilioli, Selmayr, *The Law of the ECB*, cit., p. 622.

¹⁷ For academic reactions against this argument, see R. Torrent, 'Whom Is the European Central Bank the Central Bank of?', in 36 *Common Market Law Review* (1999), pp. 1229-1334; F. Amtentbrink and J. de Haan, 'The European Central Bank: An Independent Specialized Organization of Community Law', in 39 *Common Market Law Review* (2002), pp. 69-70.

investigative powers in internal reviews of all Community institutions, agencies, and bodies. By delegating its own antifraud powers to an independent agency like OLAF, the Commission hoped to improve the fight against fraud, corruption and other illegal activities. The problem is that, from the perspective of the ECB, the latter autonomous status and effective functioning in shaping monetary policies, might be jeopardised if subjected to external (even though independent) investigations. As a matter of constitutional balance, the argument stated that the inter-institutional equilibrium among EU institutions would have been shaken in a negative way for the ECB in case of an ‘intrusion’ by an administrative agency. On the basis of its claim of constitutional nature, the ECB maintained, against the Commission, that the regulation did not apply to it.

In adjudicating this inter-institutional conflict (an issue on which the Court has always proved to be particularly careful), the ECJ had to face the first attempt at power-grabbing by the ECB. The Court, in an assertive and non-deferential way, rejected the view that the ECB could be considered an autonomous order among other orders. The Advocate General (Jacobs) rejected already the arguments made by the ECB in his highly detailed opinion: ‘The ECB is subject to the general principles of law which form part of Community law and promotes the goals of the Community set out in Article 2 EC though the implementation of the tasks and duties laid upon it. It may therefore be described as the Central Bank of the European Community: it would be inaccurate to characterize it, as have some writers, as an organisation which is “independent of the European Community”, a “Community within the Community”, a “new Community”, or, indeed, as something falling outside the notion of a body established by, or on the basis of, the EC Treaty in Regulation no. 10763/1999’.¹⁸

The Court followed the Advocate General’s opinion, stating that the ECB, by being created by the EC Treaty, was to be granted a high level of independence¹⁹ but should still be considered an organ of the European Community and as such, to be subject to the OLAF regulation. The main justification behind this decision was determined by a functional interpretation of the ECB’s independence: ‘the independence thus established is not an end in itself; it serves a specific purpose. By shielding the decision-making process of the ECB from short-term political pressures the principle of independence aim to enable the ECB effectively to pursue the aim of price stability and, without prejudice to that aim, support the economic policies of the Community’.²⁰ In other words, the Advocate General draws a functional boundary for the ECB’s independence: the interference on its independence forbidden by the Treaty is limited to those activities liable to undermine the ability of the ECB to carry out its task of delivering price stability.²¹ Beyond this realm, other interaction

¹⁸ Opinion of the AG Jacobs on *Pringle*, 15 January 2015, para 60.

¹⁹ The opinion of the Advocate General led the recognition of the ECB’s independence by the ECJ: ‘As is evident [...], the Treaty and the Statute confer upon the ECB a high level of independence which is equivalent to, or perhaps greater than, the independence of the national central banks which prevailed prior to the reforms undertaken at national level in order to comply with the requirements for entry into the Monetary Union. However, the principle of independence does not imply a total isolation from, or a complete absence of cooperation with, the institutions and bodies of the Community. The Treaty prohibits only influence which is liable to undermine the ability of the ECB to carry out its tasks effectively with a view to price stability, and which must therefore be regarded as undue’: *Ibid.*, para 155.

²⁰ *Ibid.*, para 149-150.

²¹ Note that even the definition of price stability, absent from the Treaties, has been left to the ECB. In its monthly bulletin and in the scientific working papers published on its website, price stability has been defined as the ability of maintaining real inflation below 2 percent.

or reviews are actually legitimate. The Court followed the same line of reasoning, stating that the ECB's independence is 'strictly functional and limited to the performance of its specific tasks'. More specifically, the Court stated that the ECB's independence did not mean complete absence of control over its activities. In fact, 'the ECB is, on the conditions laid down by the EC Treaty and the ESCB statute, subject to various kinds of Community controls, notably review by the court of Justice and control by the Court of Auditors'.²²

In this decision, the Court basically rebutted the ECB's attempt of expanding its independence in a way completely unrelated to its functions.²³ In this way, the Court defined both the nature of the ECB and its constitutional role. It even went as far as discussing the necessary elements of democratic accountability which had to be respected by the ECB, even though this kind of accountability was basically reduced to the participation, without right to vote, of the President of the Council and of the accountability owed to the European Parliament in the form of reports and questioning before the latter's Committees. However, the decision occurred at the outset of the governance of the Euro-zone and still far removed from the first signs of the incipient economic and financial crises. What might have seemed an assertion of judicial activism and a defeat for the ECB was reverted a few years later when the ECJ had to decide on ECB's competences in a global context where the functions of central banking were being re-discussed.

3. *Pringle: From Rule-based to Policy-based Governance*

Crucial to the understanding of the new challenges faced by the ECJ is the change in central banking practices and thinking occurred after the 2008 crisis.²⁴ Fear of catastrophic meltdown from contagious debts drew central banks (directly or indirectly) into monetizing public debt. The Bank of England and the Federal Reserve Bank resorted to programs of quantitative easing. They sought to inject liquidity and to reduce long-term interest rates by purchasing government bonds. The Bank of England, for example, had acquired government bonds up to almost 10 per cent of GDP.²⁵ The ECB was facing the same type of systemic pressure but in a completely different constitutional and administrative system. To cut a long story short, the self-perception of the role of the ECB partially changed as a reaction to the crisis, but its activities had to find a way to ground legitimacy and legality in the Treaties. The ECB proceeded basically by stealth in re-financing both national banking systems and governments through enhanced credit provisions to banks. Furthermore, in order to stabilise market expectations, the ECB, during the years 2011-2012, embraced a new role, committing itself to unlimited, if conditional, intervention in sovereign bond secondary markets, despite the strong and public opposition of the Bundesbank. From May 2010, the ECB agreed to limited sovereign bond purchases as part of a larger Euro area bail-out package, raising many concerns in terms of the legality and long-term consequences of this move. It also agreed to be an active part of the new economic governance of the Eurozone, by taking part in the oversighting institutions introduced by the European Stability

²² *OLAF*, C-11/00 2003 E.C.R. I-7147, par 135.

²³ R. Goebel, 'Court of Justice Oversight over the European Central Bank: Delimiting the ECB's Constitutional Autonomy and Independence in the *OLAF* Judgment', cit., pp. 642-643.

²⁴ H. Davies and D. Green, *Banking on the Future*, Princeton University Press, Princeton, 2010.

²⁵ K. Dyson, *States, Debt and Power*, Oxford University Press, Oxford, 2014, p. 386.

Mechanism (ESM) and to act as the site for the Single Supervisory Mechanism at the heart of the projected European banking union. Finally, after having abandoned the temporary and circumscribed project of limited buying on the secondary markets of bonds issued by debtor States, the ECB launched the infamous OMT programme, on which more will be said in the following section.²⁶ All these new instruments conjure up a substantial transformation of the role of the ECB and a change of the constitutional balance within the EU.²⁷

By now, the legitimacy of the ECB's position in the Euro crisis has been judicially tested already twice. The first seminal case, *Pringle*, has been brought before the ECJ by a preliminary reference coming from the Irish Supreme Court and it has been decided in 2012. In *Pringle* the Court was asked to assess the legality of the newly introduced European Stability Mechanism (ESM). The Irish Supreme Court decided to make a reference for a preliminary ruling to the ECJ asking whether the ESM was compatible with several provisions of the EU Treaties. We can anticipate that the Court, sitting in full with its 27 judges (a rare event), rejected all challenges and upheld the ESM in all its aspects. For the purposes of this article, only some of the aspects treated in *Pringle* are directly relevant. First of all, the case signalled the new deference adopted by the Court in issues related to the economic and financial crises. While on other topics the Court has always been rather assertive, in this field it has shown a remarkable level of deference. Crucially, the Court adopted in this case a purposive and teleological reading of the no-bail clause in article 125 TFEU.²⁸ According to the Court, this article has two aims: the first one is to encourage prudent budgetary policy in the member States by ensuring that they remain responsible to their creditors; the second is to safeguard the financial stability of the euro area as a whole.²⁹ The Court introduced a new rationale for the governance of the Eurozone, one which did not have any explicit recognition in the Treaties. In the case of the ESM, the instrument was necessary to safeguard the financial stability of the Euro-zone and because it was attached to conditionality, it was not in violation of the no bail-out clause. A second important point, which concerns the ECB more directly, is dictated by the use of EU institutions outside the context of EU law. As known, the ESM and the Fiscal Treaty have been approved not as part of EU law, but as international treaties coming out of intergovernmental decisions. The Court concluded that the allocation of tasks to EU institutions outside the framework of EU law was not problematic, at least as long as it was affecting an area of exclusive EU competence. Note, incidentally, that this recognition implies the non-applicability of the EU charter of fundamental rights to actions taken by EU institutions outside of the framework of EU law. The ECB's function in the governance of the Euro would be sanctioned, from now on, as an exercise first in crisis management (for which no rules were foreseen) and then in policy making. In other words, the Court's purposive reasoning in *Pringle* paved the way for the formal recognition of an informal transformation. The governance of the Euro-zone

²⁶ For a more detailed reconstruction of the unfolding of the Euro crisis and the role played by the ECB see A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, Oxford, 2015, chaps 2 & 3.

²⁷ On changes caused by the response to the crisis in the EU see M. Dawson, F. de Witte, 'Constitutional Balance in the EU after the Euro Crisis', in 76 *Modern Law Review* (2013), pp. 817-844; cf F. Fabbrini, M. Adams, P. Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, Hart, Oxford, 2014.

²⁸ On the Court's legal reasoning in *Pringle* see P. Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology', 14 *Maastricht Journal of European and Comparative Law* (2013), pp. 1-14.

²⁹ Case 370/12, *Pringle v Ireland*, 2012, par 136.

would still be left in the hands of technocratic bodies, but now with an overtly discretionary and rather political function to perform. Once this transformation was publicly ratified by the ECJ, it was only a matter of time before a new challenge, concerning the changed nature of the EMU's and of the role of the ECB's would be presented to the ECJ.

4. *Gauweiler: Proportionality Trumps the Rule of Law?*

The background which led to the most important decision on the role of the ECB, at least up to now, that is, *Gauweiler*, has to be quickly summed up for a proper understanding of the major shift in the constitutional balance of the EU and of what is properly at stake in the mentioned case. In 2012 doubts about the future of the Euro were still rampant and the cost of borrowing money for some Member States had increased alarmingly in the previous year, in particular for Spain, Italy and Greece. In the middle of this crisis, the President of the ECB, Mario Draghi, announced that 'the ECB is ready to do whatever it takes to preserve the euro', adding, famously, 'and believe me, it will be enough'.³⁰ One month later, at a press conference, after a meeting of the ECB's Governing Council, the president of the ECB announced to the public the decision to conduct the OMT programme and gave some details. In its statement, the ECB declared that it was ready to purchase on secondary markets government bonds issued by States of the euro area, subject to certain conditions which included: first, states concerned had to be subject to financial assistance, by either the EFSF (European Financial Stability Facility) or the European Stability Mechanism (ESM); Second, no quantitative limits for the amount of purchases of these bonds were announced; Third, the ECB would act in the same way as any private creditors and therefore would not benefit from a special status as public actor. Following the announcement, the volatility of the interest rates paced down, and until today, the OMT programme has never been activated, and the programme itself has now been overcome by a new project of 'quantitative easing' (defined as 'Asset Purchase Programme (APP)'), a staggering 60 billion euros per month programme through which buying government bonds on the secondary markets.³¹ It is again this background that the question around the legality of the OMT emerged and, extraordinarily, through the first preliminary reference ever sent from the German Federal Constitutional Court (FCC). The FCC basically asked the ECJ whether the ECB overstepped its powers relating primarily to monetary policy. Did the ECB act *ultra vires* in venturing into economic policy? More specifically, the FCC, in its reference, raises the question whether the OMT programme, rather than being a monetary policy measure under Article 18 ESCB Statutes and Art. 119 TFEU, is in fact an economic policy measure, which would be outside the jurisdiction of the ECB.

Predictably, both the Advocate General and the Court decided in favour of the legality of the OMT programme. The unsurprising character of the decision is not solidly grounded in legal reasoning or in natural deference. It is just that after *Pringle* one could foresee that the Court had bought into the narrative which links the trajectory of the single currency to the survival of the EU as such: no Euro, no EU. The case also tested the boundaries of what is admissible

³⁰ Draghi Speech, London 26 July 2012. A transcript is available on the ECB's website at the following address: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

³¹ Cf the announcement of the renewal of the programme at the following address: <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>

as *res judicanda* before the Court. In fact, the Court thought that it had jurisdiction over the communication of the ECB, which is something not automatically out of doubt. After all, no future binding legal act had been performed by the ECB and the communication in itself did not have a manifest legal nature. But the Court thought that in the context of regulation of monetary policy, the circulation of information matters and the ECB, as European agency, has the explicit legal obligation to communicate widely and transparently. The ECJ maintained that this would be enough to make the ECB communicative act legally reviewable under the same criteria of a formal act.³²

Beyond the jurisdictional question, that is, in terms of substance, there is a lot to be said about this decision.³³ *Gauweiler* represents the most prominent case in the definition of the limits of judicial review of central banking. It is part and parcel of the sui generis nature of the European constitutional order that a nearly hypothetical question essentially of administrative-law nature about the potential action of an independent agency might trigger such a heated confrontation between the German constitutional court and the ECJ. But, as we shall see, it is also the certification of a transformation in the nature of the function of central banking. In light of the previous history of confrontations, this judicial dialogue has the potential of triggering an authentic constitutional conflict between the two most powerful European courts.³⁴ Yet, this issue, as important as it is in the identification of the legal value of EU law (in the hierarchy of legal sources), won't be discussed in this article. The focus is rather on two other points: the first one is the transformation of the structure of governance in the Eurozone; the second is the limited judicial capacity of holding the ECB to account for its policies. The two aspects are sides of the same coin: the new policy-oriented governance of the Eurozone requires stronger forms of accountability and in particular of political responsibility. This two-fold argumentation is reflected in the structure of the Court's judgment. In fact, after having established that the press release of the Governing Council of the ECB was subject to judicial review, the Court engaged first with the legal basis of the ECB's action. As reminded, the key provision here is art. 126 TFEU, on the prohibition of excessive government deficits. In this field, the competence of the ECB is strictly circumscribed by the prohibition of monetary financing of Member State debt by means of direct purchase of governments' bonds (art. 123 TFEU). In an analysis of the distinction between economic and monetary policy, the Court held that 'in order to determine whether a measure falls within the area of monetary policy' it was necessary to assess the objectives and the instrument used.³⁵ According to the Court, the OMT programme certainly fell within the scope of the ECB monetary policy. The core of the Court's argument revolves around the point made by the ECB itself: the OMT aimed 'to safeguard both an appropriate monetary policy transmission and the singleness of the monetary policy'.³⁶ The ECB based its

³² This is not the first time that the Court takes up this line of reasoning. In *ERTA*, the ECJ reviewed a Council position paper coordinating Member States in the negotiations for the conclusion of an international agreement which was subject to judicial review because it was capable of 'derogating ... from the procedure laid down by the Treaty': *ERTA*, Case 22/70, 1971, para 54.

³³ For insightful comments on this seminal case see F. Fabbrini, 'After the OMT Case: the Supremacy of EU Law as the Guarantee of the Equality of the Member', in 16 *German Law Journal* (2015), pp. 1005-1024; A. Hinarejos, '*Gauweiler* and the OMT Programme', in 11 *European Constitutional Law Review* (2015), pp. 563-576.

³⁴ See M. Wilkinson, 'The Euro is Irreversible!... or Is It?', in 16 *German Law Journal* (2015), pp. 1049-1072.

³⁵ *Gauweiler v Deutscher Bundestag*, C-62-14, 2015 para 46.

³⁶ *Idem*, para 47.

argument for constructing an expanded role in its need to act to secure the monetary policy transmission mechanism by preventing financial fragmentation in the form of widely different interest rates in Member States. ‘Appropriate monetary policy transmission’ cannot be granted in presence of massive spreads among national bonds.³⁷ For what concerns the instrument used, the ECB Statute granted to the ECB the power to conduct transactions on the secondary markets. While OMT may ‘to some extent, further the economic policy objectives’ of adjustment programs, ‘such indirect effects do not mean that such a programme must be treated as equivalent to an economic policy measure, since it is apparent from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union’.³⁸

The Court reads the prohibition contained in art. 123 TFEU against the background of the conditionality imposed by ESFS or ESM programmes. Here, the shift is clear: what is essential in order to determine the legality of the ECB’s OMT program is that it does not lessen the impetus of the Member States to follow a sound budgetary policy: (120) ‘the fact that the purchase of government bonds is conditional upon full compliance with the structural adjustment programmes to which the Member States concerned are subject precludes the possibility of a programme, such as that announced in the press release, acting as an incentive to those States to dispense with fiscal consolidation, relying on the financing opportunities to which the implementation of such a programme could give rise’.

A large part of the Court’s reasoning is then devoted, in classic fashion, to proportionality review of the programme. In accordance with the Advocate General’s advice,³⁹ the ECJ acknowledged that because the ECB is supposed ‘to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion’. The question, at this stage, obviously concerns how to harness such discretion in a way which remains compatible with the rule of law. The ECJ suggests a procedural test of proportionality in order to check the legality of the ECB’s discretion. As for what concerns the suitability step of proportionality review, the Court held that ‘it does not appear that that analysis of the economic situation of the euro area is vitiated by a manifest error of assessment’.⁴⁰ The point of technical expertise is again conjured up at this point: ‘given that questions of monetary policy are usually of a controversial nature and in view of the ESCB’s broad discretion, nothing more can be required of the ESCB apart from that it uses its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy’.⁴¹ As for the second step of proportionality review, the necessity of the OMT programme, the ECJ ruled the action of the ECB did ‘not go manifestly beyond what is necessary to achieve its objectives’. The ECB had the expertise to decide if and when a bond-buying programme may prove necessary in order to avoid the disruption of the monetary policy transmission. However, given that it is impossible to establish in advance how long will it take to support a Member State’s bonds on the markets,

³⁷ K. Dyson, *States, Debt & Power*, cit., p. 385.

³⁸ *Gauweiler*, para 59.

³⁹ Opinion of AG Villalón Cruz, *Gauweiler*, 15 January 2015, para 123.

⁴⁰ *Gauweiler*, para 74.

⁴¹ Para 75.

it seems that the necessity of the programme and the absence of possible alternatives have not been fully appreciated by the ECJ.

Finally, the Court seems completely unconcerned that the ECB is involved both as monetary broker in its role as Europe's central bank and fiscal enforcer through its part in the Troika's adjustment programs. On this point, the Court ignored the Opinion of the Advocate General. According to the latter, the double role of the ECB as part of a supervising body within a framework for financial assistance and in its bond-buying role in the OMT programme, would blur the attribution of functions of the ECB. The Advocate General, in case of the activation of the OMT programme, deemed necessary that the ECB ought to distance itself from the troika immediately.⁴² However, the Court failed to mention this important point. As noted by Wilkinson, in this way 'the ECB would thus come to wield enormous power over a Member State that found itself in a situation of requesting assistance- with the ECB then setting monetary policy as well as negotiating economic policy and monitoring compliance with adjustment programs to the level of detail where it is dictating the opening hours of bakeries'.⁴³

In conclusion, the decision seems to grant a wide margin of discretion to the ECB when it comes to deciding about monetary policies. As remarked by the Advocate General Cruz Villalón, to exercise this task the ECB has at its disposal technical expertise and access to crucial information which allows it to devise monetary policies.⁴⁴ Coupled with an extensive use of proportionality analysis, such an approach gives a great margin of discretion to the ECB, given that no one can anticipate what will be necessary to do in order to stabilise the monetary transmission and hence to secure the singleness of the currency. The measure of discretion granted to the ECB is not only beyond the reach of substantive judicial review and the application of EU fundamental rights. It is so wide that it has assumed a political dimension because it is capable of determining the trajectory of political aims in countries of the Eurozone (i.e., the debtor countries). In fact, the Governing Council of the ECB is not only entitled to decide interest rates, but actually to steer the political trajectory of monetary policies and to oversee fiscal and financial capacities of debtor Member States. In a nutshell, the ECJ has rubberstamped the entrenchment of a political role for an independent agency such as the ECB. What is possibly the most independent central bank in the world has now become a political player in the Eurozone. It is fair to note that it was not possible to demand from the Court an extremely activist attitude because 'there is indeed reason to exercise a degree of judicial restraint when scrutinising the European Central Bank's policy decisions, given its nature as an expert body and the independence granted to it by the Treaties'.⁴⁵ However, remaining within a strict understanding of its competences, the Court could have openly discussed whether the independence and the expertise of the Bank are tainted by its participation under different guises in the new economic governance or applied a more demanding proportionality test.

5. *The Limits of Legal Accountability*

⁴² Opinion AG Villalón Cruz, Gauweiler, para 150.

⁴³ Wilkinson, 'The Euro Is Irreversible!..', cit., p. 1058.

⁴⁴ Opinion AG Villalón Cruz, Gauweiler, para 151.

⁴⁵ Hinarejos, 'Gauweiler and the OMT Programme', cit., p. 575.

Pringle and *Gauweiler* show that there has been a shift in the governance of the single currency. The question of the respect of competences by the ECB's press release is then addressed starting from this assumption, which remains unscrutinised and taken for granted as if it were not problematic for the principle of the rule of law. Even the claim that the measures adopted to cope with the Euro-crisis have an emergency-wise character is never fully questioned, whereas it has become evident, at least by now, that the bulk of the new economic governance of the Euro and of the new policies adopted by the ECB and the Eurogroup are here to stay.⁴⁶ Whether the rule of law had been violated required a stricter scrutiny than the one applied by the Court. These limits of judicial review are a consequence of using a flattening and weak device like a procedural understanding of the proportionality test for cases where even the first step of proportionality analysis, the legitimacy of the aim of the measure under review, deserved a deeper analysis than what it is usually granted.⁴⁷

The Court has avoided both to confront the political implications of monetary policy in the suboptimal currency and the consequences deriving from the new constitutional function granted to the ECB. Some commentators have praised the new approach adopted by the ECJ, mostly in light of its prudential stance and the creativity of its reasoning.⁴⁸ But, as it has been remarked, while the ECJ has played a crucial role in shaping European integration, 'in relation to post-crisis developments that have affected the nature of EMU deeply ... the Court has tended to take a back seat to the political, often intergovernmental, process'.⁴⁹ One wonders whether such an extreme deferential attitude was really necessary and what will be the consequences. It is clear, however, that the twist given to legal accountability of the ECB by the Court's case law has by now proved to be largely insufficient. The failures of holding the ECB accountable and in signalling to the other European institutions (and in this way to the wider public) certain potential issues arising out of the OMT litigation represent one of the weakest moments in the Court's history. This decision is a missed opportunity for flagging up questions concerning the constitutional function exercised *de facto* by the ECB, at least in the Eurozone. The rule of law and the political quality of central banking decisions have been sacrificed to the altar of the single currency. Once assumed that this bargain may be effective (and this is far from being certain), it will remain to be seen whether it is worthwhile.⁵⁰

⁴⁶ Cf J. White, 'Emergency Europe', in 63 *Political Studies* (2015), pp. 300-318.

⁴⁷ For a reconstruction of the different forms of proportionality review, usually determined by the relevant constitutional culture, see A. Barak, *Proportionality*, Cambridge University Press, Cambridge, 2013; J. Bomhoff, *Balancing*, Cambridge University Press, Cambridge, 2014, and, in the European context, the classic R. Alexy, *A Theory of Fundamental Rights*, Oxford University Press, Oxford, 2010.

⁴⁸ See, for example, P. Craig, 'Pringle and the Nature of Legal Reasoning', in 21 *Maastricht Journal of European and Comparative Law* (2014), pp. 205-220.

⁴⁹ Hinarejos, *The Euro Area Crisis*, cit., p. 121.

⁵⁰ Ben Crum, 'Saving the Euro at the cost of Democracy', 51 *Journal of Common Market Studies* (2013), pp. 614-630.