ON-GOING JUDICIAL DIALOGUE AND THE POWERS OF THE EUROPEAN CENTRAL BANK: *WEISS*

ALICIA HINAREJOS[1]
University of Cambridge
ah428@cam.ac.uk

Cómo citar/Citation
Hinarejos, A. (2019).
On-going judicial dialogue and the powers of the European Central Bank: *Weiss*.
Revista de Derecho Comunitario Europeo, 63, 651-668.
https://doi.org/10.18042/cepc/rdce.63.09

Abstract

On the 11 December 2018, the Court of Justice of the EU delivered its preliminary ruling in *Weiss,* on the legality of the ECB's Public Sector Purchase Programme. The matter had been referred by the German Federal Constitutional Court; this was the second reference ever made by this particular national court, after the landmark case of *Gauweiler*. And just like *Gauweiler* before it, *Weiss* concerns the powers of the European Central Bank and, more broadly, the conflict between different

[1] University Senior Lecturer in Law and Fellow of Downing College, University of Cambridge. Co-Deputy Director of the Centre for European Legal Studies: Faculty of Law, University of Cambridge.

interpretations of the constitutional principles underlying the EU's Economic and Monetary Union.

Weiss should be seen as a further instalment in an on-going dialogue — between the CJEU and the BVerfG — that concerns the evolving powers of the ECB and, more generally, the structural changes to EMU that have taken place since the euro area crisis. This short commentary seeks to place the decision in *Weiss* against this background. It starts by discussing the changing role of the ECB in recent years, and associated concerns regarding its legitimacy and accountability (Section II). Said concerns regarding the growing powers of the ECB crystallised in the *Gauweiler* saga, which is be discussed briefly in Section III. Section IV focuses on the reasoning and decision of the Court of Justice in the subsequent case of *Weiss*. Section V provides some final critical reflections on the conflicting approaches adopted by the Court of Justice of the EU and the German Federal Constitutional Court, as well as the general context in which this dialogue unfolds.

Keywords

Weiss; *Gauweiler*; EMU; Economic and Monetary Union; ECB; European Central Bank; PSPP; asset purchase; bond-buying; non-standard measures; monetary policy; discretion; German Federal Constitutional Court.

EL DIÁLOGO JUDICIAL EN CURSO Y LOS PODERES DEL BANCO CENTRAL EUROPEO: LA SENTENCIA *WEISS*

Resumen

El 11 de diciembre de 2018, el Tribunal de Justicia de la UE dictó sentencia en el caso *Weiss*, sobre la legalidad del Programa de Compras del Sector Público del BCE. El asunto había sido remitido por el Tribunal Constitucional Federal de Alemania, en la segunda cuestión prejudicial planteada por este tribunal nacional después del caso *Gauweiler*. Y al igual que *Gauweiler*, *Weiss* concierne a los poderes del Banco Central Europeo y, más ampliamente, al conflicto entre las diferentes interpretaciones de los principios constitucionales que subyacen en la Unión Económica y Monetaria de la UE.

Weiss debe ser visto como un capítulo más del diálogo entre el CJEU y el BVerfG sobre la evolución de las competencias del BCE y, en general, sobre los cambios estructurales en la UEM que se han producido desde la crisis de la zona euro. Este breve comentario busca situar la decisión en *Weiss* en este contexto general. A tal fin, la discusión se centrará, primero, en el papel cambiante del BCE en los últimos años y las preocupaciones con respecto a su legitimidad y responsabilidad (sección II), y en cómo tales preocupaciones cristalizaron en *Gauweiler* (sección III). La sección IV analiza brevemente el razonamiento y la decisión del Tribunal de Justicia en el subsiguiente caso *Weiss*. La sección V ofrece una reflexión crítica sobre los enfoques

en conflicto adoptados por el Tribunal de Justicia de la UE y el Tribunal Constitucional Federal de Alemania, así como sobre el contexto general en que se desarrolla este diálogo.

Palabras clave

Weiss; *Gauweiler*; EMU; Unión Económica y Monetaria; BCE; Banco Central Europeo; PSPP; compra de activos; compra de bonos; medidas no estándar; política monetaria; discreción; Tribunal Constitucional Federal Alemán.

DIALOGUE JUDICIAIRE CONTINU ET POUVOIRS DE LA BANQUE CENTRALE EUROPÉENNE: *WEISS*

Résumé

Le 11 décembre 2018, la Cour de justice de l'UE a rendu un arrêt dans l'affaire *Weiss* sur la légalité du programme d'achat de titres du secteur public de la BCE. L'affaire avait été renvoyée par la Cour constitutionnelle fédérale d'Allemagne, étant la deuxième question posée par cette juridiction nationale après l'arrêt *Gauweiler*. Et, comme *Gauweiler*, *Weiss* concerne les pouvoirs de la Banque centrale européenne et, plus largement, le conflit entre les différentes interprétations des principes constitutionnels qui sous-tendent l'Union économique et monétaire de l'UE.

Weiss doit être considéré comme un autre chapitre du dialogue entre la CJUE et BVerfG sur l'*évolution des compétences de la BCE et, d'*une manière générale, sur les changements structurels intervenus dans l'UEM depuis la crise dans la zone euro. Ce bref commentaire cherche à situer la décision Weiss dans ce contexte général. À cette fin, la discussion portera d'abord sur l'*évolution du rôle de la BCE au cours des dernières années et sur les préoccupations concernant sa légitimité et sa responsabilité (section II), ainsi que sur la cristallisation de ces préoccupations à Gauweiler* (section III). La section IV analyse brièvement le raisonnement et la décision de la Cour de justice dans l'affaire ultérieure Weiss. La section V propose une réflexion critique sur les approches contradictoires adoptées par la Cour de justice de l'Union européenne et la Cour constitutionnelle fédérale d'Allemagne, ainsi que sur le contexte général dans lequel se déroule ce dialogue.

Mots clés

Weiss; *Gauweiler*; UEM; Union économique et monétaire; BCE; Banque centrale européenne; PSPP; achat d'actifs; achat d'obligations; mesures non conventionnelles; politique monétaire; pouvoir discrétionnaire; Cour constitutionnelle fédérale allemande.

SUMMARY

I. INTRODUCTION AND BACKGROUND TO THE CASE. II. THE CHANGING ROLE OF THE EUROPEAN CENTRAL BANK. III. THE CHALLENGE IN *GAUWEILER*. IV. THE DECISION IN *WEISS*. V. FINAL REFLECTIONS. *BIBLIOGRAPHY*.

I. INTRODUCTION AND BACKGROUND TO THE CASE

On the 11 December 2018, the Court of Justice of the EU (CJEU) delivered its preliminary ruling in *Weiss*[2]. The matter had been referred by the German Federal Constitutional Court (BVerfG or the German Court); this was the second reference ever made by this particular national court, after the landmark case of *Gauweiler*[3]. And just like *Gauweiler* before it, *Weiss* concerns the powers of the European Central Bank (ECB) and, more broadly, the conflict between different interpretations of the constitutional principles underlying the EU's Economic and Monetary Union (EMU).

In particular, it was the legality of the ECB's Public Sector Purchase Programme (PSPP)[4] that was at stake on this occasion. The PSPP was part of the ECB's quantitative easing policy, launched in 2015 in order to increase liquidity and stimulate the economy. Under the PSPP, the ECB acquired large quantities of Member State sovereign bonds in the secondary markets. The legality of this programme was challenged before the BVerfG and, in August 2017, the latter stayed the proceedings and asked the CJEU for a preliminary ruling[5].

The arguments put forward by the applicants and by the national court in its reference were similar to those used in *Gauweiler* against the ECB's OMT programme[6]. The applicants in *Weiss* argued, first, that the bond-buying programme exceeded the ECB's monetary policy mandate because it

2 Judgment of the Court of 11 December 2018, Heinrich Weiss and Others, 493/17, EU:C:2018:1000.

3 Judgment of the Court of 6 June 2015, Gauweiler and others, 62/14, EU:C:2015:400.

4 For an overview of the programme and its legal limits, see Grund and Grle (2016).

5 Order of the German Federal Constitutional Court (Second Senate) of 18 July 2017 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

6 *Gauweiler*, n. 3 paragraph 76 and ff.

was, primarily, a tool of economic policy, as well as potentially disproportionate; and second, that the programme infringed the prohibition on monetary financing of Member States [Art. 123(1) TFEU] and, likely, the no bail-out clause (Art. 125 TFEU). The German Court was of the opinion that the PSPP was not in accordance with the EU Treaties, because it did not — according to the same court — comply with the conditions imposed by the Court of Justice on the OMT programme in *Gauweiler*.

The Court of Justice of the EU responded in *Weiss* by adopting an approach consistent with the one it had adopted in *Gauweiler* and *Pringle*[7]. The CJEU considered the PSPP a (proportionate)[8] measure of monetary policy[9], the adoption of which was within the ECB's powers. Furthermore, the Court concluded that the specific features of the programme meant that it was not a breach of the Treaty's prohibition on monetary financing of Member States [Art. 123(1) TFEU][10], since enough safeguards had been built in to ensure that the effects of the PSPP were not equivalent to that of a direct purchase of public bonds, and not likely to reduce Member States' incentive to follow a sound budgetary policy[11].

Weiss should be seen as a further instalment in an on-going dialogue — between the CJEU and the BVerfG — that concerns the evolving powers of the ECB and, more broadly, the structural changes to EMU that have taken place since the euro area crisis. This short commentary will seek to place the decision in *Weiss* against this background. It will start by discussing the changing role of the ECB in recent years, and associated concerns regarding its legitimacy and accountability (Section II). Said concerns regarding the growing powers of the ECB crystallised in the *Gauweiler* saga, which will be discussed briefly in Section III. Section IV will focus on the reasoning and decision of the Court of Justice in the subsequent case of *Weiss*. Section V will provide some final reflections on the conflicting approaches adopted by the CJEU and the BVerfG, as well as the general context in which this dialogue unfolds.

---

7 Judgment of the Court of 27 November 2012, Pringle v Ireland, 370/12, EU:C:2012:756.

8 *Weiss,* n. 2, paragraphs 71 and ff. The Court concluded there had been no manifest error of assessment in the ECB's actions: *ibid.*, paragraph 78; and that the latter had not gone too far: *ibid.*, paragraph 81.

9 *Ibid.*, paragraphs 53 and ff. Despite the PSPP's indirect effects in economic policy, and even if those indirect effects had been foreseen and accepted in advance: *ibid.*, paragraphs 62 and ff.

10 *Ibid.*, paragraphs 101 and ff.

11 The CJEU did not go into the compatibility of the PSPP with Art. 125 TFEU, as it considered this question too hypothetical.

II. THE CHANGING ROLE OF THE EUROPEAN CENTRAL BANK

The role of the ECB is relatively narrowly defined in the Treaties. Since the euro area sovereign debt crisis, however, the ECB has had to adopt a wide range of non-standard measures, and its powers have increased. These changes have led to tensions and disagreements — of which *Weiss* is the latest example — over the proper role of the ECB and its legitimacy. This section will provide a brief overview of the nature and limits of the ECB's role, as defined in the Treaties and as interpreted by the Court of Justice in recent years.

The European System of Central Banks — with the ECB at its helm — is in charge of conducting the Union's monetary policy, with the primary objective of maintaining price stability[12]. The powers of the ECB are further outlined in, and constrained by, the Treaties.

The first constraint on the role of the ECB is the general principle of central bank independence and the separation between monetary policy, on the one hand, and the realm of politics (where fiscal and economic policy are decided and conducted), on the other. According to the Treaties, the ESCB and all its components are supposed to be independent and free from political influence[13]. Ultimately, the independence of central banks is predicated on their nature as independent expert bodies, which are — the argument goes — better placed to carry out a task that is technical rather than political (Tuori and Tuori 2014: 221-31). Thus central banks' technical and scientific role — as opposed to one that entails making political decisions — has been used to justify their lack of democratic control and input legitimacy[14]. This justification loses its force the more a central bank is seen to overstep its technical role[15]. This conception of the role of the ECB was part of the Maastricht compromise, in which monetary policy was thought of as a technical area

[12] Art. 127(1) TFEU. Sections II and III draw on material included in Hinarejos (2015a, 2015b).

[13] Art. 130 TFEU.

[14] Tuori and Tuori (2014: 221-229); on the topic of judicial control of central banks, among them the ECB, see also Eeckhout and Waibel (2014: 641 and ff.).

[15] This justification will weaken the more a central bank is seen to overstep its technical role: Tuori and Tuori make a very helpful distinction between experts, stakeholders, and politicians; an expert body will lose credibility the more it seems to adopt features of a stakeholder or a politician (Tuori and Tuori, 2014: 221-229). On the different aspects of central bank independence and central bank intervention in the context of the euro crisis: Beukers (2013); Baroncelli (2014).

that did not require the level of democratic legitimacy required in other, more political, areas[16].

A further, essential constraint on the role of the ECB is that it has to operate in accordance with the Treaties and, more specifically, the way in which EMU has been set up and limited within them. EMU was set up as a currency union where the Member States maintain responsibility for broad economic and fiscal policy, and where they are responsible to their creditors for their own debts. Accordingly, the ECB cannot be a direct lender of last resort to any Member State, or to the EU institutions (Art. 123 TFEU);[17] this is a further manifestation of the principle of national fiscal autonomy and liability that also underpins the so-called no-bailout clause[18].

As mentioned above, however, the role of the ECB has evolved and expanded substantially in recent years: for example, together with the Commission and the IMF, the ECB became part of the troika that negotiated and monitored economic conditionality in countries in need of financial assistance[19]; the ECB also acquired a central role in supervising euro area banks through the Single Supervisory Mechanism, part of the so-called (and on-going) banking union. Additionally, the ECB has adopted an ever-growing range of "non-standard" measures (as opposed to its "standard measures" relating to control of the interest rates), in order to address different aspects of the euro area sovereign debt crisis. The legality of these non-standard measures has raised significant concerns.

In adopting these measures, which can be broadly divided into measures of enhanced liquidity support and bond-buying schemes[20], the Bank has

---

16 See e.g. Dermine (2019: 13). Hence the BVerfG's approach to EMU in its *Maastricht* Decision: EMU integration, as structured at Maastricht, was an apolitical process that had an adequate level of democratic legitimacy: Judgment of the German Federal Constitutional Court (Second Senate) of 12 October 1993, 2 BvR 2134/92 & 2159/92.

17 Art. 123(1) TFEU: "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions […] central governments, regional, local or other public authorities […] shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments".

18 Art. 125 TFEU.

19 Beukers (2013: 1588 and ff.). The role of the ECB in this context was subject to fine-tuning in *Gauweiler*, n 3. See also Gros (2015).

20 This division mirrors the one used in Beukers (2013: 1591 and ff.). For an overview of non-standard measures in general: Cour-Thimann and Winkler (2012: 772 and ff.).

faced criticisms that it has overstepped the two constraints on its role highlighted earlier in this section: the principle of independence and of separation between monetary policy and economic/fiscal policy by becoming politicized and by seeking to influence Member States in their economic policies[21], and the prohibition of monetary financing of the Member States set out in the Treaty, thus changing the nature of EMU. These concerns first crystallized in a landmark challenge to the legality of the ECB's actions — specifically, of its Outright Monetary Transactions programme, a bond-buying scheme — and culminated in the Court of Justice's decision in *Gauweiler*, which will be the focus of the next section. Similar concerns surfaced, again, in relation to a different ECB programme in *Weiss*, to be discussed in Section IV.

III. THE CHALLENGE IN *GAUWEILER*

In September 2012, the ECB announced its Outright Monetary Transactions (OMT) programme in a press release[22]. This announcement followed Mario Draghi's notorious message that the ECB was "ready to do whatever it takes to preserve the euro"[23]. Within this programme, the ECB declared itself ready to buy government bonds from euro countries that had no more access to credit and were thus at risk of default. The ECB would acquire these bonds in the secondary market, rather than directly, to avoid the prohibition in Art. 123 TFEU[24]. There would also be a formal element of conditionality, as the Member State in question would need to obtain financial assistance from the European Stability Mechanism or the EFSF and comply with its conditions (macroeconomic reforms negotiated at the time between the Member State and the troika: the Commission, the ECB, and the IMF). The OMT programme was never activated.

---

21 Again, for an exhaustive account of the ways in which this has taken place Beukers (2013).

22 See ECB press release on the technical features of the OMT programme at: https://bit.ly/2VV3dmD, accessed June 2015.

23 Speech by Mario Draghi, President of the European Central Bank, at the Global Investment Conference in London, 26 July 2012. Available here: https://bit.ly/1B-VIUtx, accessed May 2013.

24 Art. 123(1) TFEU: "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions […] central governments, regional, local or other public authorities […] shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments".

As mentioned above, there are two main critiques that have been levelled at the ECB's bond-buying schemes; this includes the OMT programme that was at stake in *Gauweiler*, but also the subsequent PSPP that was at stake in *Weiss* and that will be discussed later. The first critique is that, in acquiring a government's bonds — even if indirectly, in the secondary markets — the ECB is attempting to circumvent the Treaty's prohibition of direct financing of a Member State (Art. 123 TEU), and it is in any case a breach of this provision's spirit[25]. This is because this sort of indirect acquisition will still have the effect of bringing down the yield or interest of the government bonds in question, making it easier for that Member State to refinance its debt. This is, critics argue, what Art. 123 TEU was meant to avoid. The second critique concerns the effects that these programmes have on Member States' economic policies, including, but not limited to, through the imposition of conditionality (Tuori and Tuori, 2014: 186-7).

These concerns came together in a challenge to the legality of the OMT scheme before the BVerfG[26]. It was alleged that the ECB had overstepped its Treaty role by creating a programme that should be viewed as a tool of economic, not monetary, policy; it was also alleged that the programme violated the prohibition of monetary financing[27]. In an exercise of *ultra vires* review[28], the German Constitutional Court's preliminary response was to consider the OMT programme illegal under EU law. For the first time ever, the national court then referred the case to the CJEU[29]. In the referring court's view, the Court of Justice could either declare the OMT scheme contrary to EU law, or provide a more limited interpretation of the programme that is in accordance with the Treaties. The German Court provided certain indications as to what those limits should be[30], and it went on to state that whether the OMT scheme could eventually be held to violate the constitutional identity

[25] For examples of this type of critique that predate the decision in *Gauweiler*, see e.g. Ruffert (2011: 1787-8); Mayer (2012: 111); Beukers (2013: 1612 and ff.).

[26] Order of the German Federal Constitutional Court (Second Senate) of 14 January 2014, 2 BvR 2728/13 et al. For commentary on the German decision see *inter alia*: Beukers (2014); Goldmann (2014); Kumm (2014); Mayer (2014); Wendel (2014).

[27] Art. 123 TFEU. See e.g. Borger (2013: 30 and ff.).

[28] For an in-depth discussion see Wendel (2014: 272 and ff.).

[29] The OMT had already been the object of an unsuccessful challenge before the General Court; the action was considered inadmissible: Case T-492/12, *von Storch and Others v ECB*, EU:T:2013:702. An appeal was unsuccessful before the CJEU: Case C-64/14 P, *von Storch and Others v ECB*, EU:C:2015:300.

[30] The German Court required an interpretation that keeps the OMT scheme from interfering with EFSF/ESM conditionality. It also required a limit on the quantity of

of the German Basic Law would depend on the CJEU's interpretation of the scheme in conformity with EU primary law. In its subsequent preliminary ruling, the Court of Justice considered the OMT programme to be broadly in accordance with the Treaties. First, the CJEU adopted an approach similar to the one it had adopted in *Pringle,* and ascertained that the OMT programme was, indeed, a measure of monetary policy — rather than one of economic policy — by investigating the programme's objectives and instruments. The Court considered that the presence of conditionality did not affect this classification; indeed, conditionality was deemed necessary in order to guarantee the accordance of the OMT programme with EU law (in particular, EU measures of economic coordination). Second, the Court conducted a proportionality assessment that took into account the ECB's broad discretion and the technical choices to be made in the area. And finally, after examining the technical features and safeguards built into the programme, the Court considered the latter to be in accordance with the Treaty's ban on monetary financing of Member States, because it would not have an equivalent effect to direct acquisition of a Member State's bonds, and it would not deter Member States from pursuing a prudent budgetary policy[31]. The BVerfG accepted the Court of Justice's interpretation, while expressing some remaining concerns[32].

IV. THE DECISION IN *WEISS*

The next chapter in this back-and-forth between the *Bundesverfassungsgericht* and the Court of Justice of the EU is the reference and decision in *Weiss*. As mentioned earlier, *Weiss* concerns the legality of yet another bond-buying scheme of the ECB, the Public Sector Purchase Programme (PSPP)[33],

bonds that can be bought, on how long they can be held, and on the possibility of taking part in a debt-cut.

31 For further commentary on the CJEU decision, see *inter alia* Craig and Markakis (2016); Adamski (2015); Editorial EuConst (2015); Claes and Reestman (2015); Fabbrini (2015); Sauer (2015); Simon (2015); Wilkinson (2015); Martucci (2015).

32 Judgment of the German Federal Constitutional Court (Second Senate) of 21 June 2016, 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13. The German Court detailed its "serious objections" (paragraph 181) in paragraphs 181-189 of its decision. For comment, see e.g. Sáinz de Vicuña y Barroso (2016).

33 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, as amended by Decision (EU)

a part of the Bank's quantitative easing policy.[34] Under the PSPP, the ECB acquired large quantities of Member State sovereign bonds in the secondary markets, similarly to what the ECB had announced it would do some years earlier under the OMT programme. The legality of the PSPP was challenged before the BVerfG; the latter stayed the proceedings and asked the CJEU for a preliminary ruling[35].

In many ways, the recent decision in *Weiss* was a re-run of *Gauweiler*, in that the ECB measures being challenged were of a similar nature and — according to the national court — raised similar legality concerns.

The applicants argued before the national court that the PSPP was, primarily, a tool of economic policy, and thus beyond the ECB's monetary policy mandate, as well as potentially disproportionate. They also contended that the programme infringed the prohibition on monetary financing of Member States (Art. 123 TFEU) and the no bail-out clause (Art. 125 TFEU). When submitting its preliminary reference to the CJEU, the German Federal Constitutional Court argued that the PSPP did not comply with the conditions set out by the CJEU in *Gauweiler* — albeit that in some cases the national court sought to fine-tune these conditions — and that the programme was therefore in breach of the EU Treaties.

The German Court argued, first, that the PSPP should be considered, primarily, as a measure of economic policy. The CJEU had stated in *Gauweiler* that a measure's classification would depend on its aim and objectives, and that the OMT's indirect effects in economic policy were not enough to classify it as a measure of economic policy. While the German Court accepted this approach in principle, it argued that the effects of the PSPP in economic policy could not be considered indirect because they were too significant in scale and had been foreseeable at the time of designing the

2017/100 of the European Central Bank of 11 January 2017. For an overview of the programme and its legal limits, see Grund and Grle (2016).

[34] In 2015, the European Central Bank launched a quantitative easing policy that included the purchasing of Member State sovereign bonds. Quantitative easing aims at increasing liquidity and stimulating the economy; the ECB set out to do this by acquiring, among other assets, large quantities of sovereign bonds through its so-called Public Sector Purchase Programme (PSPP). Shortly after the CJEU had delivered its decision in Weiss, the ECB announced the termination of its Expanded Asset Purchase Programme, which included the PSPP. See ECB Press Release 'Monetary policy decisions' (13 December 2018), available at https//www.ecb.europa.eu/press/pr/date/2018/html/ecb.mp181213.en.html accessed 21 January 2019.

[35] For a comment on the German Court's reference see Lang (2018).

programme[36]. By contrast, only taking into account the "official" objective and means of a measure would limit the judicial control of competence in its effectiveness. The German Court then proceeded to apply a proportionality test. In *Gauweiler*, the Court of Justice had resorted to reviewing the ECB's compliance with procedural guarantees, including its obligation "to examine carefully and impartially all the relevant elements of the situation", and to give an adequate account of its reasoning[37]. The German Court set out to apply this proportionality test to the PSPP, and concluded that the means chosen to achieve the official monetary policy aim were likely disproportionate, if it could not be ascertained that the ECB had weighed the economic effects of the PSPP against its monetary effects[38]. The German Court noted that the ECB had not provided an adequate statement of reasons on this point (or, in general, on the necessity, scope and duration of the programme)[39].

Finally, the German Court also argued that the PSPP was likely in breach of Art. 123 TFEU, or the ban on monetary financing of Member States[40]. The German Court argued that the effects of the PSPP could be considered equivalent to those of purchasing a Member State's bonds directly (the yardstick used by the CJEU in *Gauweiler*), due to some of the programme's technical features (that purchases were announced in a manner that made it possible to create certainty in the markets that bonds would be bought by the Eurosystem, because purchased bonds to date had been held until maturity, etc)[41].

The Court of Justice's response to the BVerfG was an unsurprising restatement of its approach to ECB independence in *Gauweiler*, and an opportunity to further elaborate on it[42]. The CJEU considered the PSPP a measure of monetary policy, despite its considerable effects in monetary policy, and even if those effects had been foreseen and accepted in advance. The CJEU recalled that the primary objective of the Union's monetary policy — to maintain price stability — has been defined in the Treaties in a general and abstract manner, leaving the ECB considerable discretion in deciding how to pursue or define this aim[43]; and that the Treaties do not foresee an

36 Order of the German Federal Constitutional Court in *Weiss*, n 5, paragraphs 119 and ff.

37 *Gauweiler*, n. 3, paragraph 69.

38 Order of the German Federal Constitutional Court in *Weiss*, n. 5, paragraph 122.

39 *Ibid.*, paragraph 123.

40 *Ibid.*, paragraphs 78 and ff.

41 The German Court also raised the possibility of a conflict between the PSPP and the no-bailout clause in Art. 125 TFEU, but this question was not addressed by the CJEU — due to its hypothetical nature — and will not be discussed here.

42 On the Court's reasoning on these matters see also, generally see Hofmann (2018).

43 *Weiss*, n. 2, paragraphs 55 and ff.

absolute separation between economic and monetary policies (and, indeed, Art. 127 TFEU provides that the ESCB should support the EU's economic policies)[44]. The Court acknowledged that the conduct of monetary policy will almost always have effects in economic policy, due to the interconnectedness of these two areas. When assessing the proportionality of the PSPP, the CJEU, again, recalled the broad discretion that the ECB should be allowed in the area, and limited itself to checking whether the ECB's economic judgment had been vitiated by a manifest error of assessment when deciding on the appropriateness of the PSPP to achieve its aim, and whether the programme went manifestly beyond what was necessary to achieve said aim. The Court's conclusion was that the measure was proportionate, overall: there had been no manifest error in assessing the suitability of the programme, and care had been taken to limit its effects to the achievement of that aim. More generally, the Court stated that the fact that the ECB's economic analysis may be disputed was not enough to establish a manifest error of assessment; and that given the controversial nature of questions of monetary policy and the ECB's broad discretion, "nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy"[45]. The Court was convinced that the ESCB had weighed up the various interests effectively[46].

Finally, the CJEU's analysis of the PSPP also diverged from that of its German interlocutor when considering the compliance of the programme with the ban on monetary financing of Member States[47]. The Court of Justice analysed the technical features of the PSPP and, in opposition to what the German court had done, came to the conclusion that the effects of the programme were not equivalent to those of buying a Member State's bonds directly. It moreover concluded that enough safeguards had been built into the programme in order not to reduce Member States' incentive to conduct a sound budgetary policy.

Overall, then, the Court of Justice found no conflict between the PSPP and the EU Treaties. In general, and as seen in *Gauweiler*, the Court of Justice's stance was much more deferential to the expertise of the ECB than that of the German Federal Constitutional Court. The latter is now expected to reach its own decision in the matter shortly, and it remains to be seen to what extent it will be satisfied with the Court of Justice's approach and results.

---

44 *Ibid.,* paragraph 60.

45 *Ibid.*, paragraph 91, and *Gauweiler*, n 3, paragraph 75.

46 *Weiss*, n. 2, paragraph 93.

47 *Ibid.*, paragraphs 101 and ff.

V. FINAL REFLECTIONS

Weiss is another chapter in the on-going judicial dialogue between the German Federal Constitutional Court and the Court of Justice of the EU regarding the nature of EMU and, more specifically, the powers of the ECB[48]. It is not a surprising chapter; rather, an opportunity for each court to reassert and develop their views on the role that courts should play in reviewing measures of monetary policy and the level of discretion to be afforded to the ECB in this area.

The BVerfG has long held a particular view of democratic legitimacy within the EU project, in general, and in EMU, in particular. Put broadly, the German court views the need to safeguard and rely on national democracy as a natural limit to European integration[49]. Integration within EMU is considered acceptable, in this respect, to the extent that it is seen as a technical and rule-based area, rather than one where political choices are made and discretion is exercised[50]. When it comes to the ECB, specifically, the German Court accepts that the transfer of monetary policy competences to this institution is compatible with democratic principles — on the scientifically accepted basis that an independent expert body is a better guarantor for monetary stability, be it at national or EU level — but that "the endorsement under constitutional law of the ECB's independence hinges on the requirement that its mandate be interpreted restrictively"[51], and that courts have an essential role to play in this respect. In *Gauweiler* and *Weiss*, this translated into a very high standard of review of the ECB's actions and their effects — one that looked past the measures' stated aim and the justification offered by the Bank. This level of scrutiny was criticised by many as going beyond the proper role of courts in an area such as monetary policy[52], where there is no consensus on the economic theories underlying many policy decisions. The German court was strongly criticised for, in fact, adjudicating between competing approaches in

48 See, for a concise overview, Herrmann (2016).

49 For an overview, see e.g. Theil (2014) with further references. In relation to EMU, in particular, see e.g. Azpitarte Sánchez (2014).

50 Hence the BVerfG's approach to EMU in its *Maastricht* Decision: Judgment of the German Federal Constitutional Court (Second Senate) of 12 October 1993, 2 BvR 2134/92 & 2159/92.

51 Order of the German Federal Constitutional Court in *Weiss*, n 5, paragraph 103.

52 For academic criticisms, see n 26; see also the Dissenting Opinion of Justice Lübbe-Wolff on the Order of the BVerfG Second Senate of 14 January 2014 (*Gauweiler*): "In an effort to secure the rule of law, a court may happen to exceed judicial competence", paragraph 1.

economic theory, instead of limiting itself to a rationality check (Goldmann, 2014). Indeed, the German Court's assumption that it is possible to separate monetary and economic policy when pursuing the (abstract and undefined) Treaty objective of price stability amounts to the endorsement of a particular economic theory in this area. Moreover, the high standard of review adopted in relation to ECB measures could be argued to be at odds with the German court's own *ultra vires* doctrine[53]: in this respect, the German Court has stated in the past that only manifest transgressions of the European Union's competences should trigger the national court's "emergency jurisdiction"[54].

By contrast, the Court of Justice did limit itself to a light-touch review, both in *Gauweiler* and *Weiss* — checking, broadly, for manifest errors of assessment — and was at pains not to substitute its own policy choices for those of the ECB, while still trying to guarantee a meaningful level of judicial control in the area. In some respect, this approach is less satisfying — at least for legal academics — in that it requires accepting the lack of a neat separation between monetary and economic policies, and thus entrusting the ECB with a certain degree of autonomy in defining the boundaries of its own competence. While not ideal, this arrangement stems directly from the technical nature of monetary policy and, more generally, the design of EMU and the way in which the underlying balance of EU and national competences was struck in the EU Treaties. In the circumstances, the level of review adopted by the Court of Justice seems appropriate; a suitable attempt at striking a necessary balance between institutional awareness and restraint, on the one hand, and a meaningful level of judicial control that remains, as ever, essential. There are, of course, calls for broader accountability arrangements for the ECB in view of the way its powers have expanded since the euro area crisis[55]. Equally, the German Court's concerns regarding recent changes to the original design of EMU and its level of democratic legitimacy should be taken seriously, and do require a broader debate on the requirements for further integration within this area, and the demands and limits it places on Member States and national democratic processes. It would not be correct, however, to place the *onus* for

---

53 See the Dissenting Opinion of Justice Gerhard Order on the Order of the BVerfG Second Senate of 14 January 2014 (*Gauweiler*), paragraphs 16-17.

54 In *Honeywell*, the *Bundesverfassungsgericht* held that it would exercise its ultra vires jurisdiction only if the transgression is manifest or obvious and leads to a structurally significant shift in the balance of competences between the EU and the Member States: Order of the German Federal Constitutional Court (Second Senate) of 6 July 2010, 2 BvR 2661/06. For a comment on the decision and its background see Payandeh (2011).

55 See e.g. Dermine (2019).

these constitutional reforms — whether in relation to EMU, in general, or to the ECB, in particular — on a court's shoulders.

Bibliography

Adamski, D. (2015). Economic constitution of the euro area after the Gauweiler preliminary ruling. *Common Market Law Review*, 52 (6), 1451-1490.

Azpitarte Sánchez, M. (2014). Los confines de la democracia y la solidaridad: a propósito de las decisiones del Tribunal Constitucional Federal Alemán de 14 de enero y de 18 de marzo de 2014, que enjuician el marco jurídico-supranacional de las políticas de rescate. *Revista Española de Derecho Constitucional*, 101, 301-336.

Baroncelli, S. (2014). The Independence of the ECB after the Economic Crisis. In M. Adams, F. Fabbrini and P. Larouche (eds). *The Constitutionalization of European Budgetary Constraints* (pp. 125-149). Oxford: Hart Publishing Ltd.

Beukers, T. (2013). The new ECB and its relationship with the Eurozone Member States: between Central Bank Independence and Central Bank Intervention. *Common Market Law Review*, 50 (6), 1579-1620.

Beukers, T. (2014). The Bundesverfassungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?". *German Law Journal*, 15 (2), 343-368. Available at: https://doi.org/10.1017/S2071832200002984.

Borger, V. (2013). How the debt crisis exposes the development of solidarity in the euro area. *European Constitutional Law Review*, 9 (1), 7-36. Available at: https://doi.org/10.1017/S1574019612001022.

Claes, M. and Reestman, J. H. (2015). The protection of national constitutional identity and the limits of European integration at the occasion of the Gauweiler Case. *German Law Journal*, 16 (4), 917-970. Available at: https://doi.org/10.1017/S2071832200019957.

Cour-Thimann, P. and Winkler, B. (2012). The ECB's non-standard monetary policy measures: the role of institutional factors and financial structure. *Oxford Review of Economic Policy*, 28 (4), 765-803. Available at: https://doi.org/10.1093/oxrep/grs038.

Craig, P. and Markakis, M. (2016). Gauweiler and the Legality of Outright Monetary Transactions. *European Law Review*, 41 (1) 4-24.

Dermine, P. (2019). Out of the comfort zone? The ECB, financial assistance, independence and accountability. *Maastricht Journal of European and Comparative Law*, 26 (1), 68-81. Available at: https://doi.org/10.1177/1023263X18822793.

Editorial (2015). On Courts of Last Resort and Lenders of Last Resort. *European Constitutional Law Review*, 11, 227-238. Available at: https://doi.org/10.1017/S1574019615000206.

Eeckhout, P. and Waibel, M. (2014). The United Kingdom. In U. Neergaard, C. Jacqueson and J. H. Danielsen (eds). *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU* (pp. 619-654). Copenhagen: DJØF Publishing. Available at: https://doi.org/10.2139/ssrn.2507141.

Fabbrini, F. (2015). After the OMT case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States. *German Law Journal*, 16 (4), 1003-1023. Available at: https://doi.org/10.1017/S2071832200019970.

Goldmann, M. (2014). Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial Review. *German Law Journal*, 15, 265-280. Available at: https://doi.org/10.1017/S2071832200002947.

Gros, D. (2015). Countries under Adjustment Programmes: What role for the ECB? *Centre for European Policy Studies*, 124.

Grund, S. and Grle, F. (2016). The European Central Bank's public sector purchase programme (PSPP), the prohibition of monetary financing and sovereign debt restructuring scenarios. *European Law Review*, 6, 781-803.

Herrmann, C. (2016). Verfassungsrechtliche Grenzen der EZB-Politik. *75 Rechtspolitisches Forum*. Trier: Institut für Rechtspolitik an der Universität Trier.

Hofmann, H. C. H. (2018). Controlling the Powers of the ECB: delegation, discretion, reasoning and care. What Gauweiler and Weiss and others can teach us. *ADEMU Working Paper Series*, 107.

Hinarejos, A. (2015a). *The Euro Area Crisis in Constitutional Perspective*. Oxford: Oxford University Press. Available at: https://doi.org/10.1093/acprof:oso/9780198714958.001.0001.

—— (2015b). Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union. *European Constitutional Law Review*, 11 (3), 563-576. Available at: https://doi.org/10.1017/S1574019615000346.

Kumm, M. (2014). Rebel without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might do About It. *German Law Journal*, 15 (2), 203-215. Available at: https://doi.org/10.1017/S2071832200002911.

Lang, A. (2018). National Courts Ultra vires review of the ECB's policy of quantitative easing: an analysis of the German Constitutional Court's preliminary reference order in the PSPP case. *Common Market Law Review*, 55 (3), 923-951.

Martucci, F. (2015). La Cour de justice face à la politique monétaire en temps de crise de dettes souveraines: l'arrêt Gauweiler entre droit et marché. *Cahiers de Droit Européen*, 51 (2), 493-534.

Mayer, F. C. (2014). Rebels without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference. *German Law Journal*, 15 (2), 111-146. Available at: https://doi.org/10.1017/S207183220000287X.

Mayer, T. (2012). *Europe's Unfinished Currency*. London: Anthem Press.

Payandeh, M. (2011). Constitutional Review of EU law after *Honeywell*: contextualizing the relationship between the German Constitutional Court and the EU Court of Justice. *Common Market Law Review*, 48 (1), 9-38.

Ruffert, M. (2011). The European debt crisis and European Union law. *Common Market Law Review*, 48 (6), 1777-1805.

Sáinz de Vicuña y Barroso, A. (2016). La política monetaria del BCE ante el Tribunal Constitucional Federal Alemán: la Sentencia de 21 de junio de 2016 en el caso «OMT». *Revista de Derecho Comunitario Europeo*, 55, 1067-1099. Available at: https://doi.org/10.18042/cepc/rdce.55.08.

Sauer, H. (2015). Doubtful it Stood: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment. *German Law Journal*, 16 (4), 971-1002. Available at: https://doi.org/10.1017/S2071832200019969.

Simon, S. (2015). Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling. *German Law Journal*, 16 (4), 1025-1048. Available at: https://doi.org/10.1017/S2071832200019982.

Theil, S. (2014). What Red Lines, If Any, Do the Lisbon Judgments of European Constitutional Courts Draw for Future EU Integration? German Law Journal, 15 (4), 599-635. Disponible en: https://doi.org//10.1017/S2071832200019064.

Tuori, K. and Tuori, K. (2014). *The Eurozone Crisis: a Constitutional Analysis*. Cambridge: Cambridge University Press. Available at: https://doi.org/10.1017/CBO9781107297289.

Wendel, M. (2014). Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference. *European Constitutional Law Review*, 10 (2), 263-307. Available at: https://doi.org/10.1017/S1574019614001187.

Wilkinson, M. A. (2015). The euro is irreversible!… Or is it?: On OMT, austerity and the threat of "Grexit". *German Law Journal*, 16 (4), 1049-1072. Available at: https://doi.org/10.1017/S2071832200019994.