



Leibniz Institute for Financial Research SAFE
Sustainable Architecture for Finance in Europe (<https://safe-frankfurt.de/>)

SAFE Finance Blog

Every Year Again: The ECB's Monetary Policy in Court

12/21/2018

Matthias Goldmann: The European Court of Justice's verdict on the bond purchases of the European Central Bank (ECB) shows the rationalizing effect of legal discourses



Not only the background noise of the Brexit negotiations has absorbed a certain amount of attention for the judgment of the European Court of Justice (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=208741&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1&cid=1487188>) (ECJ) on the permissibility of the ECB's bond purchase program

(<https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html>). After all, on December 11th, Luxembourg rendered a preliminary ruling on one of the rare requests from the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG). But after the conclusions

(<http://curia.europa.eu/juris/document/document.jsf?text=&docid=206471&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1487188>) of Advocate General Melchior Wathelet, most observers did no longer expect that the ECJ would put a spoke in the ECB's wheels. Nevertheless, the verdict is remarkable for several reasons.

Germany vs Italy: 0-0

The court flatly rejects the Italian objections to the admissibility of the questions referred for a preliminary ruling. This is, first of all, indeed in line with the established case law. However, this might also imply that the ECJ rejected the Italian attempt to position itself as a monetary and constitutional antipode of Germany. The Italian government indeed suspected that the submission from Karlsruhe was an attempt to establish German constitutional law as a standard for the legality of monetary policy measures.

One can doubt whether the reproach is justified. After all, the BVerfG opened a new chapter (<https://verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/>) with the request at issue (https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/07/rs20170718_2bvr08591!) both in substance and in tone. It resisted the temptation to suggest to the Luxembourg court how it should interpret the European treaties. Instead it explained its concerns about the legality of the bond purchasing program – whether one likes them or not (<https://verfassungsblog.de/das-bundesverfassungsgericht-und-die-direktionskraft-der-normen/>) – on the basis of a thorough analysis of the case law of the Luxembourg court.

The ECJ takes up the offer for judicial dialogue instead of making itself a (further) scene of German-Italian disputes around the economic and monetary union or even to a water carrier of the Italian position. There is hardly an alternative if the ECJ wants to preserve its authority as a guardian of European law. It is also a wise strategy in order to turn the law from an instrument of intra-European polarization into a remedy.

Monetary policy and fiscal policy

The ECJ rejects the central argument of the BVerfG, according to which the character of the ECB's purchase program as monetary policy would be thwarted by the program's significant fiscal implications, on which all parties agreed. The aim of a program, and hence its qualification as a monetary or fiscal measure, therefore has to be measured by the purpose given to it by the ECB. This is in line with the reasoning in the Pringle case (<http://curia.europa.eu/juris/document/document.jsf?docid=130381&text=&doclang=EN&pageIndex=0&cid=3145783>), which established the ECJ's conviction that fiscal, monetary and, in general, any economic policy measures can possibly affect all other areas of economic and financial policy. The interdependencies are so complex that they do not provide a basis for the qualification of the measure.

Besides the economic arguments, however, the ECJ offers a strong legal argument: the ECB should not be distracted from the objective of price stability because its actions could have wider macroeconomic implications that in turn would deprive them of their monetary nature (margin number 66 of the verdict). In other words, by seeking to create a legal corset for the ECB, the plaintiffs threaten its ability to give primacy to its price stability objective – hence to the very principle which their lawsuit pretends to protect. That's a hit, ship sunk!

The ECB's actions must be coherent

Does this mean that the ECB's discretion is practically limitless? I do not think the verdict does allow such a conclusion at all. The ECJ demonstrates how discretionary decisions can be reviewed in a way that would honor any administrative court. It places particular emphasis on the scrutiny of the justification

provided by the ECB in accordance with article 296 (2) of the Treaty on the Functioning of the European Union (TFEU) – an issue to which the ECJ dedicates an entire section of the judgment, – and on the procedure followed by the central bank in the rollout of the program. In all these respects, the ECB's actions must be coherent with the justification provided. And the ECJ is not afraid to go into detail here. Thus, it accepts the multiple changes in the total volume of the purchase program, since they correspond with the dynamics of the inflation rate and are subject to regular revision (margin numbers 39 and 88). In contrast to the Gauweiler decision (<http://curia.europa.eu/juris/documents.jsf?oqp=&for=&mat=or&lgrec=de&jge=&td=%3BALL&jur=C%2CT%2CF&num=c-62%252F14&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008>) though, the ECJ does not have to rely on the stability of the euro area as a whole to determine the legality of the purchase program, because the disputed purchase program does not have an asymmetric structure, unlike the OMT program.

However, one contradiction runs through the entire verdict: When examining price stability, the ECJ highlights that fixed volume limits and the announcement to buy according to the capital ratios of the member states are conducive to the monetary policy objective. These features of the program are intended to foster market confidence. Market confidence, in turn, is a prerequisite for proper monetary policy transmission, hence, the desired credit growth.

This argument, however, is harmful in the context of Article 123 TFEU, which prohibits state financing by “printing money”. Therefore, when examining Article 123 TFEU, the ECJ visibly struggles to justify that the member states can under no circumstances have a false sense of security with their debt management and cannot rely blindly on the purchase program. However, what is right for the market participants cannot be completely different from the perspective of the member states. How much more reasonable would it have been to examine the questions of price stability and monetary state financing not separately but to set up a connection among the two, for instance by means of “practical concordance”, a doctrine familiar from German constitutional law, which sets out an algorithm for the reconciliation of conflicting principles. Actually, the interplay between the various prongs of macroeconomic policy recognized in the Pringle judgment would have given the ECJ reason enough to discuss price stability and Article 123 TFEU together, rather than separately. Case law and doctrine cannot ignore the interactions between monetary and financial policy. After all, the ECJ seems to hint in this direction in margin number 152 of the judgment, although that should have been made explicit.

Law vs politics: 1-0

The Brexit noisiness has not drowned out this decision without reason. After all, the ECJ has succeeded in removing “politics” from the matter without unduly depoliticizing it in the sense of “policy”. It demonstrates the rationalizing effect of legal discourse in an exemplary manner.

Legal discourse does by no means require that judges leave aside the political implications of a case. However, it removes some of the political controversy: this is “judicial dialogue” in the best sense. It replaces polarization with busy routine. It will be interesting to see whether a possible request for a preliminary reference in the case on the Banking Union continues this dialogue (more information here (<https://safe-frankfurt.de/policy-blog/details/oops-we-do-it-again-attack-on-the-banking-union-in-the-german-constitutional-court.html>) and here (<https://www.lto.de/recht/kanzleien-unternehmen/k/bverfg-2bvr168514-2bvr263114-verfassungsbeschwerden-bankenunion-ezb-bankenaufsicht-muendliche-verhandlung/>)). It would be the beginning of a beautiful tradition: every year gladly again.

Matthias Goldmann (<https://safe-frankfurt.de/research/researchers/researchers-details/showauthor/549-goldmann.html>) is Junior Professor for International Public Law and Financial Law at the Goethe University Frankfurt. This article is an edited version of his text for [Verfassungsblog.de](https://safe-frankfurt.de)

(<https://verfassungsblog.de/alle-jahre-wieder-die-geldpolitik-der-ezb-vor-gericht/>).


Keywords: Financial Institutions ([https://safe-frankfurt.de/news-latest/safe-finance-blog/search-result-blog.html?](https://safe-frankfurt.de/news-latest/safe-finance-blog/search-result-blog.html?tx_news_pi1%5BoverwriteDemand%5D%5Bcategories%5D=180&cHash=ae33c76342e22f01085651c7b9b65)

tx_news_pi1%5BoverwriteDemand%5D%5Bcategories%5D=180&cHash=ae33c76342e22f01085651c7b9b65 ECB (<https://safe-frankfurt.de/news-latest/safe-finance-blog/tag/ecb.html>), Banking Union (<https://safe-frankfurt.de/news-latest/safe-finance-blog/tag/banking-union.html>), Monetary Policy (<https://safe-frankfurt.de/news-latest/safe-finance-blog/tag/monetary-policy.html>)



Back (<https://safe-frankfurt.de/news-latest/safe-finance-blog.html>)

Want to get regular updates?

 Subscribe to the Finance Blog RSS feed (<http://safe-frankfurt.de/home/rss-policyblog.xml>)

 Follow us on Twitter (https://twitter.com/SAFE_Frankfurt)

Enter your email address to get regular blog updates.

* Please read our data protection statement (<https://safe-frankfurt.de/about-safe/data-protection.html>)(pdf version (https://safe-frankfurt.de/fileadmin/user_upload/editor_common/Files/Data_Protection_Statement_10Jan2020.pdf))

I agree to the data protection statement.*

Subscribe

RECENT POLICY PUBLICATIONS

Apr 2020

Corona-Bonds und ihre Alternativen (<https://safe-frankfurt.de/policy-center/policy-publications/policy-publications-detailsview/publicationname/corona-bonds-und-ihre-alternativen.html>)

Marcel Thum, (https://tu-dresden.de/cdd/leitung_und_beteiligte/mitglieder/lebensraum-und-infrastruktur/Thum) Alfons J. Weichenrieder (<https://safe-frankfurt.de/research/researchers/researchers-details/showauthor/52-weichenrieder.html>)

Apr 2020

The Case for Corona Bonds (<https://safe-frankfurt.de/policy-center/policy-publications/policy-publications-detailsview/publicationname/the-case-for-corona-bonds.html>)

Matej Avbelj, (<https://www.eui.eu/DepartmentsAndCentres/Law/People/Fellows/BBF/Matej-Avbelj>) Antonia Baraggia, (<https://www.mmg.mpg.de/person/99018/2553>) Jürgen Bast, (https://www.uni-giessen.de/fbz/fb01/professuren-forschung/professuren/bast/team/prof_leitung) Bojan Bugarič, (<https://www.sheffield.ac.uk/law/staff/bbugaric/index>)

Emanuel Castellarin, (<https://unistra.academia.edu/EmanuelCastellarin>) Francesco Costamagna, (<https://www.law.georgetown.edu/ctls/staff/francesco-costamagna/>) Anuscheh Faraha, (<https://www.oer5.rw.fau.de/prof-dr-anuscheh-farahat/>) Matthias Goldmann, (<https://safe-frankfurt.de/research/researchers/researchers-details/showauthor/549-goldmann.html>) Anna-Katharina Manold, (<https://www.europeanstudies.info/en/about-ma-eus/our->

team/administrative-team/prof-dr-anna-katharina-mangold-llm-cambridge/) Mario Savino, (<https://unitus.academia.edu/MarioSavino>) Alexander Thiele, (<https://www.uni-goettingen.de/de/pd-dr-alexander-thiele/418590.html>) Annamaria Viterbo (<http://www.dg.unito.it/do/docenti.pl/Alias?anna.viterbo#profilo>)

Apr 2020

Emerging Evidence of a Silver Lining: A Ridge Walk to Avoid an Economic Catastrophe in Italy and Spain (<https://safe-frankfurt.de/policy-center/policy-publications/policy-publ-detailsview/publicationname/emerging-evidence-of-a-silver-lining-a-ridge-walk-to-avoid-an-economic-catastrophe-in-italy-and-spa.html>)

Christopher Busch, (<https://safe-frankfurt.de/research/researchers/researchers-details/showauthor/468-busch.html>)

Alexander Ludwig, (<https://safe-frankfurt.de/research/researchers/researchers-details/showauthor/112-ludwig.html>) Raül Santaaulàlia-Llopis (<https://www.barcelonagse.eu/people/santaeulalia-llopis-raul>)

All Policy Publications (<https://safe-frankfurt.de/policy-center/policy-publications.html>)

Contact

Leibniz Institute for Financial Research SAFE

Theodor-W.-Adorno-Platz 3
60323 Frankfurt am Main

Phone: +49 69 798 30080

Fax: +49 69 798 30077

Email: info@safe-frankfurt.de

Find the right contact person (<https://safe-frankfurt.de/about-safe/contact.html>)

 Follow us on Twitter (https://twitter.com/SAFE_Frankfurt)

SAFE →

- About SAFE (<https://safe-frankfurt.de/about-safe.html>)
- Job Offers (<https://safe-frankfurt.de/about-safe/career/job-offers.html>)
- How to find us (<https://safe-frankfurt.de/about-safe/how-to-find-us.html>)

Policy Center →

- SAFE Senior Policy Fellows (<https://safe-frankfurt.de/policy-center/safe-senior-policy-fellows.html>)
- Policy Publications (<https://safe-frankfurt.de/policy-center/policy-publications.html>)
- SAFE Finance Blog (<https://safe-frankfurt.de/news-latest/safe-finance-blog.html>)
- Policy Center Team (<https://safe-frankfurt.de/policy-center/policy-center-team.html>)

Research →

- Research Departments (<https://safe-frankfurt.de/research/research-departments.html>)
- Researchers (<https://safe-frankfurt.de/research/researchers.html>)
- Data Center (<https://safe-frankfurt.de/data-center.html>)

News & Events →

- All News (<https://safe-frankfurt.de/news-latest/all-news.html>)
- Newsletter (<https://safe-frankfurt.de/news-latest/newsletter.html>)
- Expert List (<https://safe-frankfurt.de/press/expert-list.html>)



Home (<https://safe-frankfurt.de/footer-menu/home.html>) →

About this site (<https://safe-frankfurt.de/footer-menu/about-this-site.html>) →

Data Protection (<https://safe-frankfurt.de/footer-menu/data-protection.html>) →

© 2020 SAFE