

Mutually Assured Discretion: The ECJ on the ECB's OMT Policy

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Matthias Goldmann Do 18 Jun 2015

Unsurprisingly, the European Court of Justice (ECJ) has held the Outright Monetary Transactions policy of the European Central Bank to be in conformity with the treaties. Ever since Advocate General Cruz Villalón fiercely rejected the view of the Federal Constitutional Court (FCC) that the European Central Bank (ECB) had gone too far this time, no other outcome has seemed to be likely. The markets reacted briefly, with the euro gaining against the dollar by about half a cent for a few hours, before everything went back to normal – that is, back to watching the stalemate between Greece and her creditors. In a political and economic perspective, the judgment is not more than a footnote, a short sideshow in a seemingly never-ending sequel of another dimension.

Legally, however, I find the case quite remarkable. Unlike its Advocate General, the ECJ did not yield to the temptation to respond in kind to the FCC's provocations. In particular, it avoids the issue of domestic vs. European constitutional identity that juxtaposed the FCC and the Advocate General. Instead, the ECJ has shown political responsibility and legal foresight in framing what could become a masterpiece of truly cooperative, other-regarding constitutional pluralism. In this sequel, the other actors play the king.

Key to this is an understanding of constitutional pluralism that might find an explanation in the principle of loyal cooperation, even though the judgment does not mention it. It assigns to each actor a certain margin of discretion in deciding questions that fall within its sphere of competence. Such discretion is not without limits, but subject to a standard of review characterized by a rationality check and the proportionality principle.

For the relationship between the ECJ and the FCC, this standard of review implies that the ECJ does not question the proceedings on the domestic level and presumes the relevance of the questions referred. That presumption would only be rebutted if a question referred obviously had no significance for the original case. For the relationship between the ECJ and the ECB, this standard of review amounts to an examination of the reasons given by the ECB for its OMT policy. Applying Art. 296 para. 2 TFEU *mutatis mutandis*, the ECJ deems it obligatory for the ECB to give such reasons. The ECJ checks these reasons for consistency, but does not replace them with its own evaluation. Thus, it reasons that the ECB might take asymmetric measures to ensure that the euro becomes a “single” monetary policy (para. 48, cf. Art. 119 para. 2 TFEU), but does not prescribe how exactly this objective has to be factored in into the ECB's general objective of maintaining price stability. Similar considerations prevail in the subsequent proportionality test, where the ECJ grants the ECB a wide margin of

discretion in assessing the consequences of its policy. The ECJ thus stays clear of any attempt to play the role of Europe's chief economist, in line with what Christoph Herrmann has advocated in this blog.

The ECJ remained silent on the issue whether the ECB should leave the Troika once it starts buying bonds under the OMT program. The Advocate General had made that point, fearing that the ECB might look like the IMF, like a creditor that checks whether the debtor deals well with its money. Applying the standard of review advanced by the ECJ, I do not see why the ECB should leave the Troika. Rather, in line with the Pringle judgment, the ECJ recognizes that indirect effects between monetary and fiscal policy are acceptable as long as each policy follows a consistent rationale and as long as the means are proportionate to the aspired ends. In the case of the OMT program, conditionality is supposed to mitigate the effects of monetary policy on fiscal policy. Whatever one thinks of the Troika, why should the ECB not contribute towards a measure that ensures the proportionality of the effects of its monetary policy on fiscal policy?

This standard of review is especially suitable for a situation of constitutional pluralism because it avoids non-pluralistic assumptions, such as questions of primacy, or the question of whose knowledge and perspective is superior. Nevertheless, it does not allow for a total pluralism where each actor does whatever it desires. Rather, it implies that the granting of discretion needs to be mutual. Like the ECB's OMT policy, it uses the preventive, deterrent effect of the possibility of review. Rationality checks and proportionality do not provide carte blanche to the ECB. They might be vague, but I think it is exactly this vagueness which makes them effective for the maintenance of a system of mutually assured discretion. Each actor always needs to stay attentive of the limits of its conferred powers and the effects of its policies on other actors. There is no ultimate certainty, but a continuous duty to justify and question its decisions.

One might ask whether such a policy satisfies the plaintiffs in the OMT case, those for whom the OMT program is anathema. The ECJ takes their arguments seriously, but one needs to recognize that, bottom line, it favors an understanding of price stability that is not pureblooded, but that takes other economic considerations such as the unity of the Eurozone into account. It thus follows the path taken in Pringle, and for the reasons they disagree with Pringle, plaintiffs will disagree with the OMT judgment. However, the strategic move of the ECJ makes it highly difficult to frame such disagreement as a legal argument. As the ECJ states, monetary policy is contested. It thus compels the plaintiffs to bring their concerns into the arena where it belongs: politics. This might raise serious questions of democratic legitimacy, but that is a different debate.



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