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CHRISTIAN JOERGES

Si tacuisses, philosophus mansisses.

Why the OMT Controversy is Undecidable?

Abstract – In this article, the controversy between the European Court of Justice and the German Federal Constitutional Court over the Outright Monetary Transactions (OMT) Programme remains in the background. Rather than summarising and evaluating all this, the Author focuses his attention on a defence of the message in the title. Firstly, he starts with the ruling of the German Court of January 2014, which, as is well known, is the “first reference ever”. In this the Author focuses his attention on the two dissenting opinions by judges Lübbe-Wolff and Gerhardt. Then, the analysis focuses mainly on to the exercise of discretion by the ECB and the role of the judiciary. Thereafter, the Author examines the responses to these developments in various branches of European studies and concludes with an explanation of title.

Keywords – OMT Programme; European Court of Justice; German Federal Court; European Central Bank.

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Why the OMT Controversy is Undecidable?*

Commentary on the controversy between the European Court of Justice and the Federal Constitutional Court over the “Outright Monetary Transactions” (OMT) Programme is available in abundance. The great majority of the commentators allies with Luxembourg; the reasoning of Karlsruhe is hardly appreciated anywhere, probably least in the quarters of European law scholarship in Germany. Rather than summarising and evaluating all this I will in the following remarks focus on a defence of the message in the title. This I will do in three steps:

- (1) I will start with the ill-fated ruling of the German Court of 14 January 2014, its “first reference ever”, as every commentator hastens to add¹. I am particularly interested in the two Dissenting Opinions by judges Lübbecke and Gerhardt.
- (2) I will then turn to the exercise of discretion by the ECB and the role of the judiciary.
- (3) Thereafter, I will look at the responses to these developments in various branches of European studies.
- (4) ... and then conclude with a further explanation of my title.

* Hertie School of Governance, Berlin. Centre for European Law and Politics, Bremen.

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¹ BVerfG, 2 BvR 2728/13 vom 14.1.2014, §§ 1–105, www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

Ad (1) Will Karlsruhe ever move “from barking to biting” – thereby falsifying Joseph Weiler’s famous comment?² What else could the judges have had in mind when submitting their “first reference ever”? The dissenters do not reveal this. They opted for inadmissibility. Judge Lübbe-Wolff has submitted a host of reasons³. Here is a selection:

- The order goes “beyond the limits of judicial competence under the principles of democracy and separation of powers” (3).
 - “The more far-reaching, the weightier, the more irreversible – legally and factually – the possible consequences of a judicial decision, the more judicial restraint is appropriate” (7).
 - “Where for reasons of law the judges’ courage must dwindle when it comes to the substance, they ought not to go into the substance at all” (27).
 - “The democratic legitimacy which the decision of a national court may draw from the relevant standards of national law (if any) will not, or not without substantial detriment, extend beyond the national area” (28).
- This point is particularly interesting. What Frau Lübbe-Wolff criticises here, has been thoroughly neglected in the judgment on the rescue package for Greece, where the Court defended the budgetary power of the German Bundestag while, by the same token, not caring at all for the rights of the Greek Parliament⁴.

She furthermore emphasised that the complaint could not insist on a specific action of the German government and parliament. “With regard to the question of whether there exists a qualified *ultra vires* act, the Federal Government and the *Bundestag* must have a margin of appreciation and

² JOSEPH H.H. WEILER, *The ‘Lisbon Urteil’ and the Fast Food Culture*, in *European Journal of International Law*, vol. 20, 3/2009, 505–509, 505.

³ The following numbers go to the paragraphs of her dissent.

⁴ See CH. JOERGES, *Der Berg kreite - gebar er eine Maus? Europa vor dem Bundesverfassungsgericht*, in *WSI-Mitteilungen*, vol. 65, 8/2012, 560; M. EVERSON, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht*, in *European Law Journal*, vol. 21, 4/2015, 474–499, 497.

discretion, which the citizen needs to accept” (15). Note that this is not the type of discretion, which is the key concept of the *Gauweiler* judgment⁵ to which I now turn.

Ad (2) Judge Lübbe-Wolff refers to the powers of democratically-legitimated actors. The *Gauweiler* Court is concerned with the powers of a non-majoritarian institution – one, which enjoys unprecedented autonomy⁶. To understand both the importance and the *problématique* of the way the Court interprets the discretionary powers of the ECB, we should consider first the twofold meaning of the notion and then the constitutional context in which it has been applied. The “*Meroni*-doctrine” with its distinction of “wide discretionary powers” and “clearly defined executive powers” comes to the mind of European lawyers when they encounter our nation⁷. *Meroni* is as old as it is outdated, they would tend to add. But is it really? Joana Mendes, in her recent very subtle reconstruction of the relationship between discretion, law and judicial review, has documented how the *Meroni* dichotomy survived in the distinction between “discretionary power involving policy choices and discretion stemming from technical assessments”⁸. Is this a sound refinement? It is at least a bridge into the reasoning of the court. “Monetary policy”, so the Advocate General explained in his *Gauweiler* Opinion is “a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB”⁹. The two points are connected with each other here. For one: in the case of monetary policy, it is the technical

⁵ C-62/14 Peter Gauweiler EU:C:2015:400.

⁶ See D. CURTIN, *Accountable Independence’ of the European Central Bank: Seeing the Logics of Transparency*, in *European Law Journal*, vol. 23, 1-2/2017, 28-44.

⁷ Case C-9/56 *Meroni v High Authority* EU:C:1958:7 (*Meroni*).

⁸ J. MENDES, *Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU*, in *The Modern Law Review*, vol. 80, 3/2017, 443–472.

⁹ Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler*, para. 111.

side of the dichotomy, which justifies discretion and requires judicial caution. Second, and somewhat surprisingly, this expertise is declared to be uncontroversial or sacrosanct. It must not be contested, not be exposed to scrutiny by other bodies because the Treaty has assigned it to the ECB. Both points are as bold as they are unconvincing. Monetary policy is a very complex matter, but by no means a merely technical one. Here, as in so many other instances, Joana Mendes correctly notes, “technical assessments and policy choices are inextricably intertwined”¹⁰.

The whole weight of this assignment of discretionary powers becomes apparent only in the light of the institutional framework of EMU. The German Court had not only identified with another concept of monetary policy, namely that submitted by the President of the German Bundesbank, Jens Weidmann. It also had asked, or better insinuated that the ECB, by its explicit reference and approval of the conditions of the financial assistance programmes of the EFSF and/or the ESM, overstepped its monetary policy competence and interfered with the powers of the Member States in the sphere of economic policy. It had suggested that the OMT programme was incompatible with the prohibition of monetary financing (Article 123 TFEU). The *Bundesverfassungsgericht*, furthermore, had wondered how the support granted could be compatible with the budgetary autonomy and responsibility of Member States, which it held to be “constituent for the design of the monetary union”, as evidenced by Article 125 TFEU¹¹.

The argument of the Court of Justice on the epistemic nature of monetary policy and the supremacy of the expertise of the ECB is a response to the entire range of these queries. The whole construction is such that the conferral of de facto unlimited discretionary powers to the ECB becomes but a stringent implication of the design of the EMU.

¹⁰ Note 8, 471.

¹¹BVerfG, 2 BvR 2728/13 vom 14.1.2014, §§ 1–105, www.bverfg.de/entscheidungen/rs20140114_2bvr272813en.html.

That design, so the Court stresses, is in one respect incomplete. Economic and Fiscal policy remained a reserve of the Member states, but the substance of monetary policy, which became the exclusive competence of the EU, was not positively defined. What is nevertheless clear under Articles 127(1) TFEU and 282(2) TFEU is the objective of monetary policy, namely the defence of price stability and hence the mandate of the ECB to pursue that objective with the help of the instruments described in Chapter IV of the Protocol on the ESCB and the ECB¹². In the parlance of Niklas Luhmann's sociology of law¹³, the Court moves here into realms of "purposive" programming, a move which liberates it from the disciplining power of traditional "conditional" legal programming. This liberating move does not do away with the importance of precedential case law. In its reference the German court had cited the passage of the *Pringle* judgment in which the Court of Justice had qualified the financial aid under the ESM Treaty as a matter of economic policy¹⁴. Again, through the resort to purposive programming this constraint is overcome. "When the ESM buys up bonds on secondary markets, it is 'economic policy'. When the ECB does the same, and makes these purchases conditional on compliance with the ESM's 'macroeconomic adjustment' demands, it is 'monetary policy'...[I]t is the difference between the objectives of the respective operations, which is decisive" – precisely this is the magic charm of purposive programming¹⁵. The ESCB/ECB are entitled to define the objectives and to determine the means in full autonomy. This cannot be otherwise once it has been held that the conduct of monetary policy "requires an expertise and experience which,

¹² *Gauweiler* judgment, paras. 42-45.

¹³ See, e.g., his *Recht und Automation in der öffentlichen Verwaltung*, Berlin: Duncker & Humblot, 1966, 36 ff.

¹⁴ Para. 64

¹⁵ H. SCHEPEL, *The Bank, the Bond, and the Bail-out: On the Legal Construction of Market Discipline in the Eurozone*, in *Journal of Law & Society*, vol. 44, 1/2017, 79-98, 96.

according to the Treaties, devolves solely upon the ECB”¹⁶. Governance in of the Eurozone, we have to realise, is a technocratic exercise. By definition, this type of praxis can be exposed neither to quests for democratic legitimacy nor to the constraints of the rule of law. What does this entail? The American law and political science scholar Alec Stone Sweet has characterized the foundational jurisprudence a “*juridical coup d’état, a fundamental transformation in the normative foundations of a legal system through the constitutional lawmaking of a court*”¹⁷. Pringle and Gauweiler present another example. Stone Sweet was sure to be empirically correct about the foundational jurisprudence but refrained from a definite normative assessment. Was this the type of “constitutional moment”, which Bruce Ackerman has identified in the constitutional history of the United States? Is it conceivable that the present transformation will “deserve recognition”, or is this an unconstitutional amendment of the European legal order?

To this point, I will return in my final remark. For the present, I am just concerned with the disquieting theoretical poverty of this revolutionary jurisprudence. One core assumption upon which it builds is plainly wrong. Technical expertise cannot be neatly separated from, or insulated against, normative assessments and policy choices¹⁸. A second weakness is not so plainly visible. This is the distinction between monetary policy and fiscal policy, which the Treaty has firmly institutionalized and which the OMT litigation sought to clarify. This legal architecture has a long history, which Isabel Feichtner, when she was still an assistant professor at the House of Finance at the Goethe University has reconstructed in an eye-opening

¹⁶ Opinion AG Gruz Villalón, para. 111.

¹⁷ A. STONE SWEET, *The Juridical Coup d’État and the Problem of Authority*, in *German Law Journal*, vol. 8, 10/2007, 915-928 at 924 ff.

¹⁸ J. MENDES, note 10 above.

essay¹⁹. We have learned to treat money as a commodity on which the state raises taxes. Tax revenues are sound finance; the alternative is to print money, a temptation that governments have to withstand in order to avoid inflation. This is why we need politically independent monetary authorities. In order to defend us against inflation these authorities must discipline governments and their fiscal policy. This is the narrative, which we have internalised in our nation states and on which the EMU relies. But this is also why we have established in the Eurozone a governance regime, which does not content itself with the adjustment of interest rates and the use of other conventional monetary policy instruments. An irresistible logic is at work here. The ECB cannot restrain itself to a focus on price stability and leave financial stability operations to national governments. The Bank's concerns for financial stability are the unlimited in their scope. They reach out into the whole range of economic and social policies with requests for structural reforms and adjustments²⁰. The fundamental error, Feichtner argues, is to treat money as an external factor and to conceal its construction by the state. Money should be understood as credit, be regarded as credit; the transfers of such credit only work if a state that guarantees their enforceability exists. She refers to sophisticated literature defending this reconceptualisation. This, however, is beyond my horizon. What I can see and what I feel is plainly visible is the destruction of the separation of fiscal and monetary policy by Europe's crisis politics and the jurisprudence of the CJEU. To repeat, "When the ESM buys up bonds on secondary markets, it is 'economic policy'" – this is the Pringle judgment. When the ECB does the same, and makes these purchases conditional on compliance with the ESM's macroeconomic adjustment demands, this is monetary policy ... – it all depends on who does it for what purpose.

¹⁹ I. FEICHTNER, *Public Law's Rationalization of the Legal Architecture of Money: What Might Legal Analysis of Money Become?*, in *German Law Journal*, vol. 17, 5/2016, 875-906.

²⁰ I. FEICHTNER, *ibid.*, p. 895.

Ad (3) However, sophisticated this reasoning may be, the practice, which it legalises, is anything but legitimate. Our crisis politics has created a sharp asymmetry between the North and the South of Europe; it has, to cite Habermas, divided Europe because of its palpable, indeed glaring social injustice²¹. The harsh critique of the famous philosopher is widely noticed but does not impress European integration studies. What I find amazing and telling are the affinities between all of its pertinent branches, law, economics, political science: a tacit consensus not to take normative concerns too seriously.

This seems most amazing in my own discipline. The *Pringle* judgment has hardly irritated anybody. The decision in *Gauweiler* is praised as a thoughtful and non-polemical examination of the somehow cheekily German reference. What is true for the jurisprudence of the ECJ, is *cum grano salis* also true for the enormous body of the so-called crisis law. I cite from the introductory chapter to a pertinent volume of the EUI in Florence: “After over half a decade of legal measures and prolific commentary on those measures, it is helpful to stand back and take stock. We will consider whether euro-crisis law ... has by now mainly become simply the macro-economic law of the EU”²².

The considerations end with a principled discharge, constrained by a few caveats.

Economists have replaced us lawyers as the prime advisors in European politics. Their views are dominated by functionalist reason. Even a

²¹ J. HABERMAS, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, in *European Law Journal*, vol. 21, 4/2015, 546-557, 550. («einer Krisenpolitik [...], die infolge ihrer handgreiflichen, ja schreienden sozialen Ungerechtigkeit die europäischen Nationen gegeneinander aufgebracht hat»).

²² TH. BEUKERS, C. KILPATRICK and B. DE WITTE, *Constitutional Change Through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead*, in id (eds) *Constitutional Change through Euro-Crisis Law*, Cambridge: CUP, 2017, 1-24.

statement like “The first victim of the crisis is democracy” pronounced by my Berlin colleague Henrik Enderlein, is not meant to question that commitment²³. One of the leading German authorities in the field of monetary policy is the Director of the Max Planck Institute for Public Goods, Martin Hellwig. I listened to a talk of his on the Independence of the ECB. He made it clear that the law has nothing useful to contribute to the praxis of monetary policy. The German Constitutional Court – and then likewise its economic experts – are ignorant. “Economists are the ones who assess economic situations, whether there is an extraordinary crisis or not, how actors have to act to improve or protect welfare, and how the economic order looks like”²⁴.

And what about political science, a discipline brought to post war Germany to teach us, especially us lawyers, democracy? Political scientists explain events, identify independent and dependent variables, and analyse changes within the framework of their integration theories. These attitudes did not fundamentally change after the crisis²⁵. “Business as usual” – this diagnosis of my Berlin colleague Jachtenfuchs dates from 2013²⁶. Business is even improving because we are witnessing a take-over of core state function by European institutions. Not only neo-functionalists, but intergovernmentalists, too, are delighted; they observe a take-over by some

²³ H. ENDERLEIN, *Das erste Opfer der Krise ist die Demokratie: Wirtschaftspolitik und ihre Legitimation in der Finanzmarktkrise 2008-2013*, in H. BUCHSTEIN (ed.), *Die Versprechen der Demokratie*, Baden-Baden: Nomos Verlagsgesellschaft, 2013, 45-75.

²⁴ F. TRAUT, *Tensions between fiscal and monetary policy in the Euro-zone: comparison between economic and legal approaches*, Ms. Hertie-School Berlin, 2017 (on file with author).

²⁵ CH. KREUDER-SONNEN, *Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance*, in *Journal of Common Market Studies*, vol. 54, 6/2016, 1350-1366.

²⁶ PH. GENSCHER and M. JACHTENFUCHS, *Alles ganz normal! Eine institutionelle Analyse der Euro-Krise*, in *Zeitschrift für Internationale Beziehungen*, vol. 20, 1/2013, 75-88, 83.

new “deliberative” intergovernmentalism – more Europe everywhere – and this is by definition progress.

Epilogue

What have we done? We have legalised the transformation of Europe into a technocratic regime and forgot about our commitments to democracy and the rule of law. Was there no alternative? I have started my intervention with citations from Judge Lübbe-Wolff’s Dissent in the OMT order. This complaint was inadmissible she and her colleague Gerhardt have argued. I would modify their objections with the category used in my title. This is a case of “undecidability”²⁷. The German Court must realise that its commitment to the Basic Law and the German taxpayer is an insufficient entitlement to hand down a judgment, which would affect the rest of Europe in unpredictable ways. The CJEU must realise that it has no mandate to give its blessing to the establishment of a technocratic regime, which destructs the constitutional accomplishments of post-war Europe in the European “periphery”. Would a refusal to do this have changed the course of events? It would have impressed neither the ECB, nor the governments. However, it would have protected the integrity of the law, and, who knows, incentivised democratic political processes. Back in 1905, Justice Oliver W. Holmes delivered his seminal dissent in the *Lochner* Case submitting: “This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law”²⁸.

²⁷ This is not an established category. See J. LENOBLE, *Law and Undecidability: A New Vision of the Proceduralization of Law*, in *Cardozo Law Review*, vol. 17, 5/1996, 935-1004.

²⁸ *Lochner v. People of State of New York*, U.S. Supreme Court, 198 U.S. 45 (1905).

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Europe's dilemma is that no such majority has been put in place; the failure of *Gauweiler* is to conceal that deficit and to replace democratic will formation by technocratic rule.