

A dance between judges in Karlsruhe and Luxembourg

René Smits

donderdag 06 maart 2014, 12:34



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The BVerfG also considers itself competent to determine the limits of the conferral of powers to the EU by the German parliament. German authorities may not take part in the implementation of an ultravires act of the EU. Should an act be adopted beyond the powers given, German authorities must either seek an ex post validation of the act by specific authorisation, or its reversal. Such is the approach in Karlsruhe. Needless to say, the Luxembourg approach is based on the primacy of EU law.

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The German Constitutional Court considers the OMT decision politically motivated. The stability of the euro area and the current composition of the currency union are not values that the ECB is permitted to defend: it is confined to monetary policy and price stability. Price stability was the ultimate reason why Germany could agree to monetary union, provided it was to be secured by an independent central bank and no monetary financing takes place.

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One may expect the CJEU to take up the request for a preliminary interpretation in [Case C-62/14](#) with speed and to take an in-depth view of all the arguments. My guess is that the discretion the CJEU usually accords to EU institutions when it comes to decision-making in the economic sphere (in the wide sense of the term) will see it confirm that OMTs are within the central bank’s mandate. The CJEU is likely to accept that OMTs are a monetary policy instrument even though they may result in additional funding for Member States’ budgets in times of crisis, funding which is otherwise primarily achieved by economic policy instruments such as financing through the ESM.

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Source: <http://fd.nl/economie-politiek/columns/rene-smits/392860-1403/a-dance-between-judges-in-karlsruhe-and-luxembourg>

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René Smits

donderdag 06 maart 2014, 12:34



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Background: OMT

In the summer of 2012, when the euro area debt crisis was at its worst, ECB President Mario Draghi [announced](#) that, within its mandate, the ECB would do whatever it takes to preserve the euro. A few weeks later, the ECB announced its OMT programme. The central bank stands ready to buy debt instruments of States with a 'troika' programme in order to ensure that the interest rates on these States' bonds reflect their market standing, not speculation on the demise of the euro. The then prevailing market conditions saw huge interest rate differentials between euro area States. These hindered the transmission of the single monetary policy across Europe. The OMT programme is intended to restore the singleness of the ECB's monetary policy and the credibility of monetary union.

Background: ECB versus Bundesbank

The Governing Council of the ECB considers that the OMT programme, announced but not yet implemented in a legal act or applied in the markets, remains within the ECB's mandate. Germany's central bank, the [Bundesbank](#), strongly disagreed. They exchanged their arguments in the proceedings before the German Constitutional Court. The latter was seized by 36,000 citizens who wish to see the ECB's OMT programme declared unconstitutional.

The German Constitutional Court has repeatedly ruled that it is the ultimate arbiter of the lawfulness of EU legal acts within the German constitutional order. It sees itself as the guarantor of the ‘inviolable’ core of German constitutional identity. This core identity includes democratic decision-making on the national budget. Should the ECB incur losses on OMT transactions, such losses may result in budget shortfalls that are imposed upon Germany rather than autonomously decided upon by the Bundestag.

The BVerfG also considers itself competent to determine the limits of the conferral of powers to the EU by the German parliament. German authorities may not take part in the implementation of an ultravires act of the EU. Should an act be adopted beyond the powers given, German authorities must either seek an ex post validation of the act by specific authorisation, or its reversal. Such is the approach in Karlsruhe. Needless to say, the Luxembourg approach is based on the primacy of EU law.

The spectre of the ECB and the largest central bank of the Eurosystem fighting a legal battle in a Member State’s constitutional court is preferably avoided in the future. One may regard such judicial strife among members of the Eurosystem as going against central bank independence, so cherished by Germany.

Contents of the BVerfG decision

The German Constitutional Court considers the OMT decision politically motivated. The stability of the euro area and the current composition of the currency union are not values that the ECB is permitted to defend: it is confined to monetary policy and price stability. Price stability was the ultimate reason why Germany could agree to monetary union, provided it was to be secured by an independent central bank and no monetary financing takes place.

Central bank independence is an acceptable deviation from the constitutional requirements of democracy because of the – according to the Karlsruhe judges – “scientifically documented” special character of monetary policy: monetary stability is better entrusted to a central bank than to politicians with an inherently short-term view. A central bank that oversteps the limits of its mandate clashes with the democracy principle.

The Karlsruhe judges consider activation of the OMT to amount to financing of public budgets by the central bank, which is specifically prohibited by the [Treaty on the Functioning of the European Union](#) (TFEU). The ECB would be “granting assistance” to the peripheral States, just as the European Stability Mechanism

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