

# The ECB's independence and the German Constitutional Court

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2013-06-19 10:11:59.0



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**Last week, the German Constitutional Court has heard arguments in a case concerning the legality of the actions undertaken by the ECB to support the euro and to reinstate the effectiveness of the central bank's monetary policy. It is odd, indeed, that a national court would sit in judgment on the legality of what a federal central bank is undertaking.**

Meer over dit onderwerp

[Lees column in het Nederlands - De onafhankelijkheid van de ECB en het Duitse Constitutionele Hof](#)



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A brief look back.

The 2008 financial crisis was hardly over when the Greek fiscal data showed a truly excessive budget deficit. The financial markets, already unsettled by the crisis, over-reacted and shunned lending to Greece and, through contagion, to other 'peripheral economies': Ireland, Portugal, Spain, Cyprus, Italy.

The perception was that these nations had all overspent (even though Spain and Ireland had been fiscally virtuous during the past decade) and that their governments were unsafe to lend to.

Media-hyped speculation that the euro would not survive the crisis fragmented the single financial market, which became balkanised again into national lakes connected by un-deep channels, instead of forming one big pool of liquidity for the euro area's economic operators. Companies and individuals in the 'periphery' pay far higher interest rates when borrowing than, say, their Dutch or German counterparts.

The European Central Bank was the first central bank to detect the credit crunch in 2007 and to respond adequately. Later, the ECB adopted non-traditional measures to quell the crisis, just like other central banks did, notably the Fed in the US and the Bank of England. Among these measures were schemes to buy bonds, including bonds issued by Member States in distress.

After [Mario Draghi announced, in London, in the summer of 2012](#), within its mandate, that the ECB was ready to do "whatever it takes" to save the euro, the central bank announced [a programme of Outright Monetary Transactions](#) in September. Under this scheme, the ECB stands to buy, at the secondary market, bonds issued by Member States which have agreed a programme with the Commission and the IMF to correct their budget deficits and adopt structural economic reform.

Not a cent has been spent thus far but the programme has been effective. Speculation that the end of the euro is near has diminished and sovereign borrowing rates have come down. Disparities within the euro area have been reduced and some unity of the European money markets has been restored. This is necessary for the ECB's monetary policy decisions to translate across the entire euro area.

But the action has not been agreed consensually, with German central bankers being notably, and vocally, contra. Many German citizens share their misgivings and fear that the ECB has overstepped the limits of its mandate. This may be a valid point of discussion, even though I firmly believe the ECB remained within its remit and acted responsibly according to its brief.

What astonishes is that the highest constitutional court of the Member State whose insistence on independence of the central bank has traditionally been greatest, is hearing a case on the constitutionality of the ECB's measures. This has to do with the German perception of the European Union as being bound, ultimately, to the limits of the transfer of sovereignty from States to Union.

The crisis measures have been the subject of judicial review in Germany and elsewhere, notably in Estonia. The ratification of the treaty establishing the [European Stability Mechanism](#) was ultimately not held up. In the [Pringle Case](#), the European Court of Justice (ECJ) found, at the request of the highest court in Ireland, the euro area Member States are competent to establish this fund: it does not contravene the so called bail-out clause. State courts sitting in judgment of the Union's actions is neither desirable nor legal. The EU is based on supremacy of the law common to the 27 (or the 17 where the euro area is concerned). It has extensive [mechanisms to survey the legality of the actions undertaken by the EU's institutions](#). The ECB is rightly subject to this system of judicial review. Having a national court join this review is not in line with how Europe should be governed. At the very least, the highest national court should ask the ECJ to interpret the relevant law, as a [colleague at the University writing about the Karlsruhe case rightly argues](#).

Having a national central bank arguing in court against the ECB may even be against the independence of the latter, as former ECB Board member [Lorenzo Bini Smaghi argued in the Financial Times of 14 June](#). In this perspective, there are two legal reasons to consider national courts not competent to sit in judgment on the ECB's actions: (1) this goes against the way the EU has been established and the order between the ECJ and national courts, and (2) hearing arguments from different central banks in the Eurosystem goes against the independence which the Treaty grants the central banking system of Europe.

Source: <http://fd.nl/economie-politiek/columns/rene-smits/819134-1306/the-ecbs-independence-and-the-german-constitutional-court>