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**FEPS YOUNG
ACADEMICS
NETWORK**

Monetary v. Economic Policy: A Bug in the Maastricht Design?

A Legal and Economic Analysis in the Light of the OMT Case

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FEPS YOUNG ACADEMICS NETWORK

The Young Academics Network (YAN) was established in March 2009 by the Foundation of European Progressive Studies (FEPS) with the support of the Renner Institut to gather progressive PhD candidates and young PhD researchers, who are ready to use their academic experience in a debate about the Next Europe. The founding group was composed of awardees of the “Call for Paper” entitled “Next Europe, Next Left” – whose articles also help initiating the FEPS Scientific Magazine “Queries”. Quickly after, with the help of the FEPS member foundations, the group enlarged – presently incorporating around 30 outstanding and promising young academics.

FEPS YAN meets in the Viennese premises of Renner Institut, which offers great facilities for both reflections on the content and also on the process of building the network as such. Both elements constitute mutually enhancing factors, which due to innovative methods applied make this Network also a very unique project. Additionally, the groups work has been supervised by the Chair of the Next Left Research Programme, Dr. Alfred Gusenbauer – who at multiple occasions joined the sessions of the FEPS YAN, offering his feedback and guidance.

This paper is one of the results of the third cycle of FEPS YAN, (the first one ended with three papers in June 2011, while the second one led to five papers in spring 2013), in which six key themes were identified and were researched by FEPS YAN working groups. These topics encompass: “*Precarious employment in Europe*”; “*Full employment: A progressive vision for Europe*”; “*Get the party started: Modernizing progressive politics*”; “*The 2014 European elections*”; “*Enhancing EU enlargement*” and “*Young and easily allured? A comparative analysis on the relationship between populism and youth in Europe*”. Each of the meetings is an opportunity for the FEPS YAN to discuss the current state of their research, presenting their findings and questions both in the plenary, as also in the respective working groups. The added value of their work is the pan-European, innovative, interdisciplinary character – not to mention, that it is by principle that FEPS wishes to offer a prominent place to this generation of academics, seeing in it a potential to construct alternative that can attract young people to progressivism again. Though the process is very advanced already, the FEPS YAN remains a Network – and hence is ready to welcome new participants.

FEPS YAN plays also an important role within FEPS structure as a whole. The FEPS YAN members are asked to join different events (from large Conferences, such as FEPS “Call to Europe” or “Renaissance for Europe” and PES Convention to smaller High Level Seminars and Focus Group Meetings) and encouraged to provide inputs for publications (i.e. for FEPS Scientific Magazine “Queries”). Enhanced participation of the FEPS YAN Members in the overall FEPS life and increase of its visibility remains one of the strategic goals of the Network for 2014.

AUTHORS AND MEMBERS OF THE WORKING GROUP

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I am a PhD student at SOAS, University of London. My dissertation looks at the demand for emerging markets assets by institutional investors from advanced countries. I am interested in understanding the motives behind their allocation to emerging markets assets. In my thesis, I use a diverse range of methods: panel econometrics, semi-structured interviews and stock-flow consistent models. I have also been working in several projects as part of the EU-funded research programme FESSUD (Financialisation, Economy, Society and Sustainable Development), on various topics related to finance, developing countries and the

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I am 30 years old and I am from Tuscany (Italy). I am the national vice secretary of the youth organization of the Italian Democratic party. I am a lawyer and I am currently working at the legal office of the Italian Government. I hold a Ph.D. in Public Law from Scuola Superiore Sant’Anna (University of Pisa). My dissertation dealt with European Administrative Law and in particular the protection of EU citizens in the European administrative procedure. After the degree in Law at the University of Pisa, I obtained a LLM in Administrative Law in Rome and another LLM in Parliamentary Law in Florence. My academic interests involve different fields of Public Law and especially the impact of the European Union on member states and administrations. I conducted research in various institutions abroad, for example in France (École Normale Supérieure), Spain (Universidad de Barcelona) and England (University of Oxford).

MONETARY V. ECONOMIC POLICY: A BUG IN THE MAASTRICHT DESIGN? A LEGAL AND ECONOMIC ANALYSIS IN THE LIGHT OF THE OMT CASE

Executive summary

With an order issued on 14 January 2014, the German Federal Constitutional Court (FCC), for the first time in its history, referred a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling under Article 267(1) of the Treaty on the Functioning of the European Union (TFEU). The controversy concerns the Outright Monetary Transaction (OMT) programme, consisting in the potentially unlimited purchase of sovereign bonds by the European Central Bank (ECB) on the secondary market.

The *OMT* case is situated at the crossroad of a bundle of legal, economic and political issues. In particular, it directly concerns the asymmetric construction of the Economic and Monetary Union, as designed in the Maastricht Treaty, and now based on the rules contained in Title VIII of Part III of the TFEU. In particular, the Economic and Monetary Union is built on the separation between a “single monetary policy”, governed by the ECB, and the “close coordination of Member States’ economic policies”, whose definition remains the competence of the national governments. The definition of the boundaries between “economic” and “monetary” policies is, indeed, at the heart of the dispute between the FCC and the ECB.

The paper will argue that such controversial separation between “economic” and “monetary” policies reflects a wrong political choice made at the time of the Maastricht Treaty, based on a neoliberal approach that has proven to be inadequate to face the challenges brought by the financial crisis. To this end, the paper will investigate the (strictly interconnected) legal and economic issues deriving from the separation, operated by the Treaty, between “economic” and “monetary” policies. In particular, the legal and the economic arguments will be jointly analysed in order to demonstrate how the attempt to “constitutionalise” a flawed economic theory has resulted into a number of legal contradictions, some of which have reached the surface in the *OMT* case. The paper aims, therefore, at investigating the legal and economic issues deriving from the separation, operated by the Treaty, between “economic” and “monetary” policies, and to present a set of proposals to correct and overcome the Maastricht design.

Keywords

Economic and Monetary Union

European Central Bank

German Federal Constitutional Court

Euro Crisis

Outright Monetary Transactions

1. Introduction

With an order issued on 14 January 2014, the German Federal Constitutional Court (FCC), for the first time in its history, referred a question to the Court of Justice of the European Union (CJEU) for a preliminary ruling under Article 267(1) of the Treaty on the Functioning of the European Union (TFEU).¹ The controversy concerns the Outright Monetary Transaction (OMT) programme, allowing under certain conditions the European Central Bank (ECB) to purchase on the secondary market potentially unlimited amounts of sovereign bonds issued by one or more Eurozone country .

After the famous statement of the President of the ECB of 26 July 2012 (when Mr Mario Draghi declared that the ECB would do “whatever it takes” in order to safeguard the stability of the euro)² the details and the guidelines concerning the OMT programme have been disclosed in a press release of 6 September 2012,³ notwithstanding the firm and explicit opposition of the German Bundesbank. The press release, in particular, reflects a previous decision of the Governing Council of the ECB, and it is aimed to disclose the rules and the conditions on the basis of which the ECB will since then be allowed to launch a potentially unlimited buyout of sovereign bonds of one or more Eurozone countries, in connection with an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme, and subject to a strict conditionality.

The OMT programme was intended to reduce the difference in the yield rates of the government bonds issued by the Eurozone Member States, in order to re-establish the correct functioning of the monetary policy channels. In this sense, it was justified as a measure directly connected with the achievement of the monetary policy objectives conferred to the ECB by the TFUE. The programme has never been called into action so far, but its simple announcement was actually sufficient to reduce the interest rates on the sovereign debts that were more exposed to speculation on the financial markets, and to rescue the Eurozone from a situation that looked dramatic.

¹ BVerfG, 2 BvR 2728/13 of 14.01.2014 (*OMT Decision*)

² Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, available at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>, accessed June 2015.

³ European Central Bank, Technical features of Outright Monetary Transactions, Press release of 6 September 2012, available at: http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html, accessed June 2015.

Meanwhile, however, the participation of Germany to the OMT programme has been challenged in front of the FCC. In the mentioned order of 14 January 2014, the FCC affirmed that the OMT programme, as it results from the press release, is, in principle, incompatible with EU primary law, as adopted beyond the powers of the ECB (*ultra vires*). In particular, the FCC stated that “the OMT Decision does not appear to be covered by the mandate of the European Central Bank”, as it cannot be considered *stricto sensu* as an act of monetary policy, but has to be classified as an act of economic policy.⁴ However, the FCC recognised that its final judgement will depend on the interpretation that the CJEU will give of the conditions under which the ECB is bound to act, as described in the press release. For this reason, the Court decided to refer a complex set of questions to the CJEU, conceding that “another assessment could be warranted if the OMT Decision could be interpreted in conformity with primary law”.⁵ In practice, the FCC asked the CJEU to adapt, by way of interpretation, the rules governing the OMT programme, in order to make it coherent with its assessment as regards the boundaries of the ECB competences: otherwise, the FCC threatened to declare the programme unconstitutional in Germany, making it *de facto* non-operational. The CJEU finally rendered its judgement on 16 June 2015,⁶ entirely upholding the ECB decision, and sending the ball back in the court of the German FCC for (arguably) the last chapter of the saga.

The *OMT* case is situated at the crossroad of a bundle of legal, economic and political issues. In particular, it directly concerns the asymmetric construction of the Economic and Monetary Union, as designed in the Maastricht Treaty, and now based on the rules contained in Title VIII of Part III of the TFUE. In particular, the Economic and Monetary Union is built on the separation between a “single monetary policy”, governed by the ECB,⁷ and the “close coordination of Member States’ economic policies”, whose definition remains the competence of the national governments.⁸ The definition of the boundaries between “economic” and “monetary” policies is, indeed, at the heart of the dispute between the FCC and the ECB.

⁴ BVerfG, 2 BvR 2728/13 of 14.01.2014 (*OMT Decision*), para. 56.

⁵ *Ibidem*, para. 55.

⁶ CJEU, Case C-62/14, *Gauweiler*, Opinion of Advocate General Cruz Villalón [2015], para. 136.

⁷ Article 119 TFUE

⁸ Article 120 TFUE

The paper will argue that such controversial separation between “economic” and “monetary” policies reflects a wrong political choice made at the time of the Maastricht Treaty, based on a neoliberal approach that has proven to be inadequate to face the challenges brought by the financial crisis. To this end, the paper will investigate the (strictly interconnected) legal and economic issues deriving from the separation, operated by the Treaty, between “economic” and “monetary” policies. The legal and the economic arguments will be jointly analysed in order to demonstrate how the attempt to “constitutionalise” a flawed economic theory has resulted into a number of legal contradictions, some of which have reached the surface in the *OMT* case. The legal analysis, in other words, will be used with the aim to explain that the path chosen through the crisis is not only politically undesirable and economically questionable, but it is also suitable to create a wound in the legal texture of the EU architecture. This affects, in particular (but not only), the role of the judiciary (with the German and the European judges substantially debating upon the definition and the boundaries of monetary policy), and ultimately concerns the role of politics and of democratic participation in influencing allegedly technical choices.

To this end, Section 2 will present the *OMT* case, while Section 3 will further investigate the legal issues surrounding the separation between “economic” and “monetary” policies operated by the Treaty. Section 4 will provide for a close-up on the economic notions underlying the *OMT* case, while Section 5 will be, dedicated to a critical appraisal of the economic rationale underpinning the Maastricht design. Finally, Section 6 will present a set of proposals to correct and overcome the current asymmetrical constitution.

2. The OMT case in the light of the case-law of the FCC

The *OMT* programme was brought before the FCC as part of a broader complaint against the legality of the *ESM* and the Treaty on Stability Coordination and Governance (*TCSG*, the so-called *Fiscal Compact*). The FCC separated the *OMT* issue in a new case. Before the FCC cleared the *ESM* and the *Fiscal Compact* (in March 2014) it however decided to send a reference for a preliminary ruling reference to the CJEU, formally asking the Court to interpret the decision of the ECB Governing Council, but *de facto* questioning the compatibility of the *OMT* programme with EU law as well as national constitutional law.

The FCC claimed that the *OMT* programme, aimed at the purchase of government bonds of Eurozone Member States, cannot be considered as an instrument of monetary policy, but rather as an instrument

of economic (i.e. fiscal) policy, which has not been conferred to the ECB. Therefore, the decision of the ECB Governing Council is an act adopted *ultra vires*. Additionally, the FCC has reasoned in the reference that the OMT programme is suitable to run against the German constitutional identity: this would allow the FCC to pull a sort of emergency brake which is independent from the monopoly of the CJEU as regards the validity of the acts of EU institutions.

At a first sight, the *OMT* case can be perceived to be very technical and confined to a purely economic or monetary discourse. However, another layer of argumentation exists, connected to the ongoing legal and political debate over the creeping competences of the EU as well as the strengthening of the role of national parliaments. On the basis of this argument, the FCC is indeed reacting to the circumvention of the Bundestag through the OMT programme, which would be serving the same fiscal policy purpose as the ESM, without however the need of an approval of the national parliaments.⁹ In this sense, the main rationale underlying the reasoning of the FCC is very much related to the one which has been elaborated in previous decisions of the FCC involving EU law, the democratic principle.

The FCC has, in fact, a long line of judgments concerning EU law.¹⁰ In its discursive practice of adjudication it has been emphasizing its attachment to democracy and its ultimate guarantees at the national level. It has been using this principle to set boundaries and limits to EU competences and integration. In this sense, in its seminal *Lisbon* judgment the FCC expressed its view on the limits of the European integration by claiming that “the Basic Law does not permit the special bodies of the legislative, executive and judicial power to dispose of the essential elements of the constitution, i.e. of the constitutional identity (Article 23.1 sentence 3, Article 79.3 GG). The constitutional identity is an inalienable element of the democratic self-determination of a people. To ensure the effectiveness of the right to vote and to preserve democratic self-determination, it is necessary for the FCC to watch, within

⁹ F.C.Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court’s OMT Reference*, German Law Journal, Lexington, N° 15, 2014, pp. 111-146.

¹⁰ A series of judgments by the German Constitutional Court concerning the relationship with EU law: BVerfG, *Solange I*, 29.05.1974, BVerfGE 37, 271 2 BvL 52/71; BVerfG, *Vielleicht-Beschluß*, 25.07.1979, BVerfGE 52,187, 2 BvL 6/77; BVerfG, *Mittlerweile-Beschluß*, 14.02.1983, 2 BvR 1461/82; BVerfG, *Solange II*, 22.10.1986, BVerfGE 73, 339 2 BvR 197/83; BVerfG, *Maastricht-Urteil*, 12.10.1993, BVerfGE 89, 155; BVerfG, *Bananenmarktordnung-Urteil*, 07.06.2000, 2 BvL 1/97; BVerfG, *Lisbon-Urteil*, 30.6.2009, BVerfG, 2 BvE 2/08.

the boundaries of its competences, over the Community or Union authority's not violating the constitutional identity by its acts and not evidently transgressing the competences conferred on it".¹¹

Even though the Lisbon judgment of the FCC includes a clear message about the problems and the limits of the process of European integration within its current framework, it is still formulated in a very cautious manner. One can observe a shift of expectations concerning the democratic legitimation from the European to national level.¹² While beforehand the emphasis was rather on the necessity to ensure democratic governance within the EU, in 2009 the Court in Karlsruhe seemed to entrust its hopes and expectations for a representative link to the society in the hands of the national parliaments.

This democratic threshold could be seen as one of the hurdles in view of allocating more competencies in the domain of economic policy at EU level. In its *Lisbon* judgement the Court also drew the line in the sand especially when the fiscal and budgetary autonomy and responsibility of the Bundestag is concerned. Namely the FCC in this decision stated that "particularly sensitive for the ability of a constitutional state to democratically shape itself are [...] fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, by social policy considerations."¹³ [...] A transfer of the right of the Bundestag to adopt the budget and control its implementation by the government which *would violate the principle of democracy and the right to elect the German Bundestag* in its essential content would occur if the determination of the type and amount of the levies imposed on the citizen were supra-nationalised to a considerable extent".¹⁴

The determination of the reserved domains (such as the fiscal policy), however, has not been substantiated by any objective criteria. For this reason there seems to be a selectivity of areas that are fundamental for a state to democratically shape itself. There is no objective criteria why economic would

¹¹ BVerfG, *Lisabon-Urteil*.

¹² D. Jancic, *Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon?*, Columbia Journal of European Law, New York, N° 16, 2010, pp. 337-383.

¹³ BVerfG, *Lisabon-Urteil*, 252.

¹⁴ *Ibid.*, 256.

be more fundamental than, for example, monetary policy, and thus not allowed to be subject to supranationalisation.¹⁵

Against this background, the first preliminary ruling question sent by the FCC to Luxembourg essentially applies the democratic authority arguments to the OMT programme. It is in this light that the FCC stated that it is “inclined” to regard the decision taken by the Governing Council of the ECB concerning the OMT as *ultra vires*.

The task of drawing a sharp line between monetary and economic/fiscal policy is, however, already difficult to be framed in economic terms: it becomes nearly impossible to put it in the framework of a compelling legal argumentation. Thus, the question arises whether this is a task that could be fulfilled by a court (and whether this is the underlying dispute in the *OMT* case). In this regard, it seems very plausible that the underlying goal of the FCC in this case is political, and namely it is an “attempt to ensure political control over the ECB’s action by way of ESM conditionality (a legitimate concern for the CJEU to address) and to work towards minimizing the financial risks for Germany”.¹⁶ The very fact that the FCC, besides the use of *ultra vires* review, also invokes or threatens with the use of constitutional identity review as a weapon of last resort indicates that the issue at hand does not involve a pure economic debate over the nature of the OMT, but a politically and legally imbued issue, with the protection of the democratic authority serving as a justification for the FCC¹⁷. It is also for this reason that the FCC has left some space for flexibility, allowing the CJEU to interpret the OMT in a way that it considers as being in compliance with EU law¹⁸ (even though by forcing the CJEU in a sort of “game of chicken”).¹⁹

¹⁵ D. Halberstam and C. Möllers, *The German Constitutional Court says “Ja zu Deutschland!”*, 10 German Law Journal, Lexington, N° 10, 2009, pp. 1249-1251.

¹⁶ M. Kumm, *Rebel Without a Good Cause: Karlsruhe’s Misguided Attempt to Draw the CJEU into a Game of “Chicken” and What the CJEU Might do About It*, German Law Journal, Lexington, N° 15, 2014, pp. 203-216.

¹⁷ F.C. Mayer, *Rebels Without a Cause?*, *op.cit.*

¹⁸ OMT-Reference, 11.06.2014, BVerfG, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvR 1824/12, 2 BvE 6/12, Principal Proceedings ESM/ECB: Pronouncement of the Judgment and Referral for a Preliminary Ruling to the Court of Justice of the European Union, 99.

¹⁹ M. Kumm, *Rebel Without a Good Cause*, *op. cit.*; F.C. Mayer, *Rebels Without a Cause?*, *op.cit.*

3. “Economic policy coordination” v. “Single monetary policy” in the OMT case

In the light of the arguments put forward by the FCC, it appears that the question of whether the OMT programme constitutes an act adopted within the powers conferred to the ECB by Articles 120 ss. of the TFUE can be ultimately reduced to the more specific issue of the definition of the border between economic and monetary policy. This is apparent in the order of the FCC, where it is clearly stated that “subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 et seq. of the ESCB Statute because it exceeds the mandate of the European Central Bank that is regulated in these provisions and encroaches upon the responsibility of the Member States for economic policy”.²⁰

The core of the order is, therefore, dedicated to the analysis of the reasons why “it is likely that the OMT Decision – if one bases the assessment on its wording – is not covered by the mandate of the European Central Bank”.²¹ In particular, “based on an overall assessment of the delimitation criteria that the Federal Constitutional Court considers relevant, it does not constitute an act of monetary policy, but a predominantly economic-policy act. This is supported by its immediate objective, its selectivity, the parallelism with assistance programmes of the European Financial Stability Facility or the European Stability Mechanism, and the risk of undermining their objectives and requirements”.²² These considerations ultimately affect the final outcome of the order, containing the “conditional” reference to the CJEU: the interpretation of the OMT Decision required by the FCC in order to drop the allegation that it constitutes an *ultra vires* act must be sufficiently narrow to exclude those elements that have been indicated as spies of an invasion of the Member States competences in the field of economic policies.²³

It appears, in sum, that the FCC has ultimately decided to apply a specific economic theory (which happened to be the same proposed by the Bundesbank) in order to draw a line between economic and

²⁰ BVerfG, 2 BvR 2728/13 of 14.01.2014 (*OMT Decision*), para. 55.

²¹ *Ibid.*, para. 69.

²² *Ibid.*, para. 69.

²³ *Ibid.*, para. 99-100.

monetary policy, and to answer the question raised by the applicants.²⁴ All the doubts raised by the FCC as regards the compatibility of the OMT programme with the limits set by the Treaty to the mandate of the ECB can be, in fact, rebutted if one follows a different approach as regards the definition of monetary policy, and especially as regards the interdependencies between price stability and financial stability.²⁵

An example of such different approach can be found in the opinion of AG Cruz Villalón, upholding the ECB reasoning: “the OMT programme has [...] a two-fold objective, the first direct or immediate and the other indirect: in the first place the aim is to reduce the interest rates demanded for a Member State’s government bonds in order, subsequently, to normalise the interest rate differentials and thus restore the ECB’s monetary policy instruments”.²⁶ This argument will be upheld by the CJEU in its judgement, where it affirms that “a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area”.²⁷

It is interesting to remark that both the FCC²⁸ and the CJEU²⁹ make reference to the *Pringle* case,³⁰ the seminal pronouncement of November 2012 in which the CJEU has attempted for the first time to identify the boundary between economic and monetary policy. At a first glance, the findings of the CJEU in *Pringle* seem to leave the OMT programme on the wrong side of the frontier: the CJEU recognises, in fact, that “even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro”.³¹ However, AG Cruz Villalón, also referring to the opinion rendered by AG Kokott in the *Pringle*

²⁴ M. Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, [in:] German Law Journal, Lexington, N° 15, 2014, pp. 265-280. Similar conclusions can be drawn, in this sense, from the reading of C. Gerner-Beuerle, E. Küçük and E. Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, [in:] German Law Journal, Lexington, N°15, 2014, pp. 281-320.

²⁵ M. Goldmann provides for a synthetic account of the two possible approaches, that he classifies under the two broad labels of “separation theorem” and “interdependence theorem”. See M. Goldmann, *Adjudicating Economics?*, *op. cit.*, p. 269 ss..

²⁶ CJEU, Case C-62/14, *Gauweiler*, Opinion of Advocate General Cruz Villalón [2015], para. 136.

²⁷ CJEU, Case C-62/14, *Gauweiler* [2015], para. 52.

²⁸ BVerfG, 2 BvR 2728/13 of 14.01.2014 (*OMT Decision*), para. 64.

²⁹ CJEU, Case C-62/14, *Gauweiler* [2015], para. 34, 35, 36, 42, 43, 46, 51, 52, 63, 64, 94, 95, 98.

³⁰ CJEU, Case C-370/12, *Pringle* [2012].

³¹ *Ibid.*, para. 56.

case,³² points out that “that reasoning is entirely valid if turned around [...] since a monetary policy measure does not become an economic policy measure merely because it may have indirect effects on the economic policy of the Union and the Member States”.³³ This is, indeed, the reasoning that has driven the final judgement of the CJEU in the *OMT* case, where the statement of *Pringle* has been intentionally carbon-copied and reversed.

The confrontation on the judicial arena of two different approaches as to the economic theory leads to the question of the limits of judicial review. In fact, the *OMT* case constitutes, somehow, the transfer of a political battle lost by the German Central Bank into the field of judicial review. This raises significant issues, which are both of a substantive and of a procedural nature, as testified by the dissenting opinions of Judges Lübbe-Wolff and Gerhardt.³⁴ Most of all, this leads to a judicial battle having as object the evaluation of the boundaries of monetary policy. But is it ultimately possible, or desirable, for a court to substitute its judgement to the one such institution, on the basis of the application of a different economic theory, when the original appraisal was not manifestly irrational? The question is certainly complex, but the final answer shall be that this is in fact not desirable, and it is far from certain that this is indeed legally admissible. In the specific context of the *OMT* case, in fact, the FCC seems to have adopted a standard of review that is susceptible to invade the ECB discretion and to jeopardise its independence, deciding to substitute its own judgement to the one of the ECB as regards “the right approach to monetary policy, which the Treaties leave deliberately open”, instead of limiting itself to a

³² CJEU, Case C-370/12, *Pringle*, Opinion of Advocate General Kokott [2012], para. 85.

³³ CJEU, Case C-62/14, *Gauweiler*, Opinion of Advocate General Cruz Villalón [2015], para. 129.

³⁴ The issue of the legitimacy of the *ultra vires* review, on the basis of the attributions of the FCC, as defined in the German Basic Law, has been extensively treated since the delivery of the order containing the referral to the CJEU in the *OMT* case. In particular, we consider as noteworthy the contributions of I. Pernice, *A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU*, [in:] Maastricht journal of European and comparative law, Maastricht, N°21, 2014, pp. 3-14; K. F. Gärditz, *Beyond Symbolism: Towards a constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court*, [in:] German Law Journal, Lexington, N° 15, 2014, pp. 183-202; A. Di Martino, *Le Outright Monetary Transactions tra Francoforte, Karlsruhe e Lussemburgo. Il primo rinvio pregiudiziale del BVerfG*, [in:] Federalismi.it, Rome, N° 4, 2014, <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=24218&dpath=document&dfile=18022014235349.pdf&content=Le+Outright+Monetary+Transactions+tra+Francoforte,+Karlsruhe+e+Lussemburgo.+Il+primo+rinvio+pregiudiziale+del+BVerfG+stato+dottrina+>, accessed June 2015.

rationality check (and therefore ensuring the actual correspondence of the instruments used by the ECB with the chosen approach).³⁵

The vexed issue of the limits of judicial review is not the only one deserving attention in the context of the *OMT* case. It is useful, here, to briefly refer to the issue of conditionality, that plays an important role in both the *Pringle* and the *OMT* cases. In particular, in the *OMT* case, the CJEU has to respond to the German FCC claim that, on the one hand, the conditionality attached to the eventual purchase of sovereign bonds alters the nature of monetary policy instrument of the *OMT* programme and, on the other hand, it undermines the functioning of the rescue programmes and their legality under Articles 123 and 125 TFUE. The Court briefly dismisses these arguments on the basis of the same main argument exposed above, and namely insisting in applying a different economic understanding of the issues than the one proposed by the German FCC.³⁶ Conditionality, appears, therefore, to be an interesting concept while discussing the relationship between the competences of the EU institutions and of the Member States in the field of economic governance, and it can be seen as a sort of flexible, but sometimes dangerous, bridge to accommodate certain rigidities in the allocation of powers. What remains to be seen is how this bridge will support the pressure of future weight and stretches, such as the possible legal challenge of the recent Expanded Asset Purchase Programme (the so-called Quantitative Easing, QE).

In a more general way, and coherently with the purposes of this paper, the *OMT* case is a useful tool for the analysis of the distortions that the separation between economic and monetary policy operated in Title VIII of Part Three of the TFUE can produce to the equilibrium among the powers and the institutions of both the EU and its Member States, and ultimately to the functioning of the democratic principle at the EU level. The argument is certainly linked to the economic one, as it starts indeed from the assumption that a monetary union as the one designed in Maastricht is necessarily an incomplete one. This is because the fixation of certain parameters as regards the objectives of fiscal policy is not sufficient to ensure either an adequate level of convergence of the economies of the Member States, or a

³⁵ See M. Goldmann, *Adjudicating Economics?*, *op. cit.*, p. 279.

³⁶ CJEU, Case C-62/14, *Gauweiler* [2015], para. 60.

consistent response to possible asymmetric shocks.³⁷ In this framework, the result of the choice to split monetary and fiscal policies is not, as it could appear at a first sight, the one of maintaining a solid control of the national parliaments over the national budgets, but, more perversely, the one of forcing the coordination of economic policies into the intergovernmental channel.³⁸ These considerations weaken the somehow formalistic argument put forward by the FCC as regards the democratic principle: the defence of parliamentary prerogatives within the boundary of each Member State does not necessary imply an aggregate gain when seen from a supranational perspective.

The intervention of a national constitutional court in the arena, using the arguments of the national central bank against the BCE, and ultimately relying on the financial position of Germany for cornering the CJEU into a potentially impossible dilemma, is, ultimately, just another consequence of subtracting the coordination of the economic policies of the Member States from the competences of the EU institutions. In more general terms, it seems that the original sin must be sought in the political choices underlying the legal and institutional framework of the EU economic and monetary governance, as set out in the Maastricht Treaty. In particular, the separation of economic and monetary policy is, in fact, set out in a context in which the aim of macroeconomic convergence is pursued through the “constitutionalisation” of certain restrictions to the powers of the Member States, rather than through the conferral of certain competences to a supranational institution. Indeed, the national political authorities (governments and parliaments) see the range of their possible actions significantly reduced by the rules contained in the Treaty and in the Stability and Growth Pact, without a corresponding increase of the powers of the political authorities at the EU level. More than the transfer of a share of

³⁷ The literature on the pitfalls and failures of the EU economic and monetary governance framework, as designed in the Maastricht Treaty, is wide and varied, and has seen a great number of contributions coming up especially in the past years, after the breakout of the financial crisis in the Eurozone. For a synthetic and critical appraisal, let us limit the reference, at this point, to P. De Grauwe, *Design Failures in the Eurozone: Can they be fixed?*, [in:] LEQS Paper n. 57/2013, February 2013, <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper57.pdf>, accessed June 2015.

³⁸ For a short reflection as regards the relation between the allocation of competences in the Treaties, and the actual decision-making process, see D. Sardo, *Democrazia e distribuzione del potere nell'Unione Europea: tra sostanza e procedura*, [in:] Pandora Rivista di Teoria e Politica, Bologna, N° 2, 2015, pp. 70-76.

sovereignty from the national to the supranational level, what seems to matter here is, instead, a significant shift from political discretion to a “rules-based governance” in the field of economic policy.³⁹

This “extension of the so-called *non-agenda* of the governments” was mainly intended as a “defence of the economic freedoms, and of the efficient functioning of the markets”.⁴⁰ This (and not the sovereignty of national democracies) is what the combination of the Stability Pact and of the loose coordination at the intergovernmental level of the national economic policies have been built to protect, *de facto* engraving (or attempting to engrave) an economic theory in the “economic constitution” of the EU. The years of the crisis have shown how complicated it is for the EU and for the national institutions to organise a political strategy that departs from the economic assumptions underlying the Maastricht design. Against this background, the OMT case is an interesting test bench in order to establish the legal margins that the ECB has in order to overturn an economic theory that proved to be insufficient to read the consequences of the crisis.

In general, however, it seems that there is no way out from the impasse without recognising the space for politics, at the European level, to ensure a sound and coherent governance of national fiscal and economic policies. This also appears to be the necessary condition for allowing the ECB to run the European monetary policy without the need to intervene with unconventional instruments on macroeconomic conditions that are outside the realm of monetary policy, but constitute an obstacle to its correct functioning.

4. The OMT case and the economics of the FCC

The opposition to the OMT programme by the FCC, aside from its legal dimension, can also be assessed through the lens of economic theory. Indeed, the basic arguments supporting the Court’s claim that such operations are illegal are based on economic reasoning. The central contention is, as discussed, that the OMT programme – though similar arguments can be made about more fully-fledged Quantitative Easing (QE) – exceeds the boundaries of monetary policy and is actually part of a more general fiscal policy. This

³⁹ An interesting analysis of the consequences of the Maastricht design on democracy and political accountability is contained in P. Leino and J. Salminen, *Should the Economic and Monetary Union Be Democratic After All? Some Reflections on the Current Crisis*, [in:] German Law Journal, Lexington, N°14, 2012, pp. 844-868.

⁴⁰ See M. D’Antoni, R. Mazzocchi, *L’Europa non è finita. Uscire dalla crisi rilanciando il modello sociale europeo*, Roma: Editori Internazionali Riuniti, 2013, p. 57 ss.

section addresses such claims on economic grounds and tries to frame them into the bigger context of the relationship between monetary policy, other economic policies, and the independence of the Central Bank.

When looked at a procedural level, OMT and QE operations are unmistakably monetary policy operations. The ECB would be buying and selling government bonds, which, although not the usual way to conduct monetary policy by the ECB⁴¹, is in line with general central banks operations and allowed by its regulatory framework. Indeed from a purely mechanical point of view the OMT and QE are very similar to standard open-market operations described in any macroeconomics textbook. Therefore, potential interference of the ECB with non-monetary economic policies should be looked for in the goals of such policies.

The stated goal of the OMT programme is to affect the long-end of the yield curve in order to re-establish the ECB monetary policy transmission channels.⁴² In other words, the ECB considered that the very high yields on long-term government bonds of some countries, reinforced by the “tail-risk” of a euro breakdown, impaired its ability to influence interest rates to achieve its policy goal of price stability.

The recently implemented “Expanded Asset Purchase Programme” (EAPP),⁴³ is even more directly aimed at achieving the goal of price stability. By effectively injecting money into the economy the ECB seeks to increase inflation back to its target level, below but close to 2%.

However, an undeniable consequence of the OMT announcement has been to effectively transform the ECB in a lender of last resort for government bonds. This new role makes the OMT programme contentious, as it is not explicitly recognised as a competence of the ECB.

It is important to remember that ECB has already been acting as a lender of last resort to bank since 2008, by implementing the fixed-rate full-allotment policy⁴⁴. This policy allows banks to borrow at a fixed

⁴¹ Contrary to many other Central Banks, the ECB operates in the refinancing markets through collateralised loans and repos.

⁴² A speech by Benoît Cœuré, Member of the Executive Board of the ECB, at the conference “The ECB and its OMT programme”, organised by Centre for Economic Policy Research, German Institute for Economic Research and KfW Bankengruppe, Berlin, 2 September, 2013, <http://www.ecb.europa.eu/press/key/date/2013/html/sp130902.en.html>, accessed June 2015.

⁴³ ECB, *ECB announces expanded asset purchase programme*, 22 January 2015, http://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html, accessed June 2015.

rate, effectively avoiding that liquidity problems could result in systemic financial crises of the banking sector. Therefore, although the FCC has focused on the OMT operations only, all the lender of last resort functions of the ECB could be equally exceeding its mandate⁴⁵.

A decision of this sort would however be unjustifiable from the point of view of economic history and theory. Indeed the lender of last resort function of a central bank is a key and indispensable role of any central bank, which was arguable crucial to avoid crises⁴⁶. Recent models show how liquidity crises in the banking system or self-fulfilling liquidity crises in sovereign bond markets in a monetary union can be effectively prevented to have catastrophic consequences by this function of the central bank⁴⁷. In this sense a legal decision against the OMT programme would declare the lender of last resort function illicit, ignoring both economic theory and 150 years of central banking history.

In fact many of the economic arguments used by the FCC show a limited understanding of the economics of central banks and financial markets. The claim that bond yields spreads accurately reflect the market evaluation of the solvency of the underlying issuers⁴⁸ is effectively based on the Efficient Market Hypothesis⁴⁹. According to this theory security prices reflect fully the most efficient use of available information and thus reflect the underlying fundamentals of their issuer. Aside from the general theoretical and empirical criticisms that could be applied to this theory⁵⁰, there is substantial evidence that bond yields spreads in the EU have been at least partially driven by shifts in investors' risk-appetite

⁴⁴ A speech by J.M. González-Páramo, Member of the Executive Board of the ECB, Closing Speech at the Tenth Economic Policy Conference, Málaga, 21 October 2011, http://www.ecb.europa.eu/press/key/date/2011/html/sp111021_1.en.html, accessed June 2015.

⁴⁵ A. Winkler, *EZB-Krisenpolitik: OMT-Programm, Vollzuteilungspolitik und Lender of Last Resort*, [in :] Wirtschaftsdienst, Hamburg, N° 93, 2013, pp. 678-685.

⁴⁶ C. Goodhart, 'Myths about the Lender of Last Resort', [in :] *International Finance*, London, N° 2, 1999, pp. 339-360. H. Minsky, *John Maynard Keynes*, New York, McGraw-Hill, 1975.

⁴⁷ P. De Grauwe, 'The European Central Bank as Lender of Last Resort in the Government Bond Markets', [in :] *CESifo Economic Studies*, Oxford, N° 59, 2013, pp. 520-535. J.C. Rochet and X. Vives, 'Coordination Failures and the Lender of Last Resort: Was Bagehot Right After All?', [in :] *Journal of the European Economic Association*, Malden, N° 2, 2004, pp. 1116-1147.

⁴⁸ Siekmann and Volker, *The German Constitutional Court's Decision on OMT: Have Markets Misunderstood?*, Policy Insight, Centre for Economic Policy Research, London, 2014.

⁴⁹ E.F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, [in :] *The Journal of Finance*, Malden, N° 25, 1970, pp. 383-417.

⁵⁰ See Beechey et al., *The Efficient Market Hypothesis: A Survey*, RBA Research Discussion Paper, Reserve Bank of Australia, Sydney, 2000.

and other non-fundamentals related factors⁵¹. Once again, a lender of last resort can intervene to avoid that changes in yields can lead solvent countries to illiquidity and eventually to defaults⁵².

This position of FCC ruling also essentially implies that sovereign bond yields are purely market driven phenomena. This position seems to ignore the contemporary reality, where Central Banks determine the basic “risk-free” interest rates to induce changes in all other rates to eventually affect the real economy. In this sense no interest rate is a purely market phenomenon so long as the central bank has a degree of control over it, and indeed it can be argued that EU bond spreads were high as a consequence of a lack of commitment from the ECB to intervene, and quickly declined precisely as a consequence of such a commitment, i.e. the OMT programme.

Another problem of the FCC ruling is the claim of potential fiscal redistribution across EU countries as a result of the ECB bond purchases. As effectively argued by De Grauwe,⁵³ this claim misunderstands the nature of a central bank, which does not require equity to work: by definition, the ECB cannot be insolvent and does not need capital to work. Even in the unlikely event of a recapitalisation – which would be a policy choice rather than a necessity-, this would only result in a bookkeeping operation of bond transfer from member countries to the ECB, which in turn would distribute its interest gain back to those countries.

In sum, the OMT and the EAPP programmes remain within the boundaries of monetary policy from an economic point of view, especially when assessed with the reality of economic theory and evidence of central banking and financial markets today.

The OMT case therefore very clearly highlights the limitations of the legal separation between economic and monetary policy from an economic point of view. It has called for the intervention of an actor, the FCC, which may not be in the best position to judge over economic matters, many of which remain

⁵¹K. Bernoth, J. von Hagen and L. Schuknecht, *Sovereign Risk Premia in the European Government Bond Market*, ZEI Working Paper, Bonn, 2003. R. A. De Santis, *The Euro Area Sovereign Debt Crisis: Safe Haven, Credit Rating Agencies and the Spread of the Fever from Greece, Ireland and Portugal*, Working Paper Series, European Central Bank, Frankfurt, 2012. J. Aizenman, M. Hutchison and Y. Jinjark, *What Is the Risk of European Sovereign Debt Defaults? Fiscal Space, CDS Spreads and Market Pricing of Risk*, *Journal of International Money and Finance*, London, N°34, pp. 37-59.

⁵² P. De Grauwe, *The European Central Bank as Lender*, *op.cit.*

⁵³ *Ibid.*

contentious within the economic profession. This only serves to reinforce the main point of the paper: such a division is unwarranted and must be overcome in order to achieve a better working economic policy framework for the EU.

5. Separating monetary and fiscal policy: an economic analysis

The current configuration of policy-making distribution in the EU, and in particular the rigid division between economic and monetary policies, reveals a narrow understanding of how institutions can intervene to affect the European economy. Indeed this division seems to suggest that monetary policy is not an “economic policy” and needs to be separated completely from the rest of the policies. However, from a macroeconomic point of view, all types of economic policies fundamentally try to influence aggregate demand to achieve a pre-specified economic goal.

The EU Treaties seem therefore to adhere to a strictly rule-based policy consensus that sees monetary policy as only responsible to watch over inflation – which would appear to be not an “economic policy” – , and national governments as primarily looking over their budget and debt sustainability and implement their in respect of those goals. The ECB’s only goal is that of maintaining price stability, which translates in inflation below but close to 2%. On the fiscal side, the Stability and Growth Pact forces government budget to be at least in balance, allowing to an automatic cyclical adjustments up to a maximum deficit of 3% of GDP, and a ratio of 60% public debt to GDP. Moreover the recent implementations of the Six-Pack and Fiscal Compacts imply much quicker adjustments in case of a country exceeding such thresholds.

It is important to note that, while this configuration is clearly entrenched in the EU institutional architecture, this is by no means the only possible one, or indeed the most desirable one. For example, the balanced-budget consensus and especially the adjustment mechanisms of the European treaties have been criticised on the grounds that they make it impossible to actually implement counter-cyclical fiscal policies⁵⁴.

⁵⁴See P. De Grauwe, *Balanced Budget Fundamentalism*, CEPS, Brussels, 2011, <http://www.ceps.eu/system/files/book/2011/09/De%20Grauwe%20on%20Balanced%20budget%20fundamentalism%20September%202011.pdf> (accessed June 2015); K. Whelan, *Golden Rule or Golden Straitjacket?*, February 25, 2012, <http://www.voxeu.org/article/golden-rule-or-golden-straightjacket-critique-europe-s-fiscal-compact>, accessed June 2015;

The more general point is that judging what constitutes legitimate monetary policy or economic policy is very hard from an economic point of view.

For example what exactly is the role of a central bank in an economy? The competences of central banks could be drawn along two main lines: its policy goals and its tools. With respect to the former, price stability is the most common goal for most central banks, and is in fact the ECB's only policy goal. However, central banks in other countries have adopted different policy rules. In the US, for example, the Fed has a double mandate to control both inflation and unemployment⁵⁵. The People's Bank of China's objective is "maintain the stability of the value of the currency and thereby promote economic growth"⁵⁶. The Bank of England has the double mandate of ensuring monetary and financial stability⁵⁷. In countries with fixed exchange-rate systems, central banks' primary policy goal is to maintain such a peg.⁵⁸

To achieve these goals central banks have been using a vast array of tools. The most common one nowadays, as mentioned, is interest rate setting, typically moved to target inflation, or exchange rates for countries with currency pegs. But central banks can complement it in many other ways to achieve their goals. The mentioned lender of last resort function is one of them, particularly important to achieve the goal of financial stability. Intervention on foreign exchange markets and reserves accumulation is another crucial action for developing and emerging countries.

Central banks are therefore not limited by nature at only shifting interest rate to target inflation. The boundaries of what constitutes a legitimate act a central bank are ultimately determined by the state(s) that entrusted them with such powers. It could be argued, as some economists have, that the ECB needs to have a dual mandate, that also takes into account growth and employment.⁵⁹ And this would still

Sawyer, *The Tragedy of the Fiscal Compact*, Conference Paper, Call to Europe III, Foundation of European Progressive Studies, Brussels, 2013, <http://www.feps-europe.eu/en/publications/details/79>, accessed June 2015.

⁵⁵ Section 2A, Federal Reserve Act.

⁵⁶ See Objective of Monetary Policy, <http://www.pbc.gov.cn/publish/english/970/index.html>, accessed June 2015.

⁵⁷ Section 2A and 9C, Bank of England Act.

⁵⁸ Danish Central Bank, *Monetary and Exchange Rate Policy*, March 12, 2014, <http://www.nationalbanken.dk/en/monetarypolicy/implementation/Pages/default.aspx> (accessed June 2015).

⁵⁹ F. Saraceno, *The Case for a Dual Mandate for the European Central Bank?*, <http://www.progressiveeconomy.eu/content/case-dual-mandate-european-central-bank-en>, accessed June 2015; S. Wren-Lewis, *Why a Dual Mandate is Essential* <http://mainlymacro.blogspot.co.uk/2013/04/why-dual-mandate-is-essential.html>, accessed June 2015.

remain within the boundaries of monetary policy and the range of tools that central banks have. The goal of financial stability, which is certainly amongst the concern behind the OMT programme, could also be enriched. For as long as the ECB intervenes in the financial and money markets to achieve the set macroeconomic goals there is, in principle, no limit to what it can do⁶⁰.

Importantly, none of these changes needs to tackle the issue of central bank independence. Independence of a central bank implies instrument independence but its degree of goal independence varies⁶¹. In other words, the extent to which central banks goals should be set by governing bodies does not in itself question the independence of the central bank. For example, in the UK, the government sets the inflation target, and the governor of the Bank of England has to report to the Chancellor of the Exchequer in case this is not met, but the Bank can independently choose how to manipulate interest rates, or using different tools, to achieve it. Broadening the ECB policy goals will keep it independent in its ability to choose the best way to achieve such goals. Still within an independent central bank framework would be the decision to increase the ECB's accountability to democratically elected or representative EU institutions, in a similar fashion to what happens in the UK.

In sum, the ECB is adopting different tools to achieve its policy goal. These could certainly be enriched, and their accountability enhanced. And none of these would question its independent nature or the fact that it is conducting monetary policy.

In light of these considerations, it is clear that such a rigid separation between monetary and economic policies is at least questionable from an economic perspective. It creates an artificial rigid boundary, which *de facto* seeks to make it impossible for the ECB to act in a way that goes beyond pure inflation targeting, and makes the coordination between different strands of economic policies complicated. Moreover, it creates cases where courts are called to make judgements on economic theories, about which they may not always be sufficiently competent, as it shown in the previous sections. Finally, such boundaries reinforce the imbalance of powers within the EU: the power of the ECB over member states

⁶⁰ There may be of course practical limits to targeting multiple goals at once.

⁶¹ C.E Walsh, "Central Bank Independence" in Durlauf, S. N. and Blume, L. E. (eds) *The New Palgrave Dictionary of Economics*, Basingstoke, Nature Publishing Group 2008, pp. 728-731.

– the so-called monetary dominance – originates from the necessity to find a solution to the coordination problems between monetary and economic policies⁶².

Progressively overcoming such a division is therefore necessary. A less controversial separation would be between fiscal and monetary policy, within the broader common framework of macroeconomic policies. Although this remains problematic in the EU, with fiscal policy undertaken at the State-level and monetary policy by the ECB, it would still be more meaningful from an economic perspective to coordinate fiscal and monetary policies to achieve consistent macroeconomic objectives.

6. Conclusions and policy recommendations

After the onset of the economic and public debt crisis, the ECB started to act as the paramount and most strenuous guardian of the single currency - an attitude epitomised by the notorious and somewhat bold statement of its President.⁶³ One of the most prominent manifestations of this newly acquired role of the ECB, the OMT programme, was scrutinised by the CJEU.⁶⁴ The Court upheld this unconventional measure by referring to the *Pringle* judgment, where it had previously validated another controversial emergency measure, the ESM.

However, this judgement does not clear up all doubts as to whether the OMT is in line with the EU Treaties. In fact, the implementation of such programme will be conditional upon the fulfilment of the adjustment plans imposed on the recipients of the ESM's financial assistance. Characterised by little or no democratic legitimacy, these plans foist on Member States crucial economic policy choices thereby

⁶² R. Mazzocchi, *Il potere della BCE: Politica Monetaria e Politica Fiscale*, [in :] Pandora Rivista di Teoria e Politica, Bologna, N° 2, 2015, pp. 76-80.

⁶³ M. Draghi, Speech given at Global Investment Conference, London, July 26, 2012, <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>, accessed May 2015.

⁶⁴ See D. Wilsher, *Law and the Financial Crisis*, pp. 252-273.

operating at the limit of the mandate of the ECB.⁶⁵ This undeniably uncloaks the inadequateness of the artificial division between economic and monetary policy laid down in the EU Treaties.⁶⁶

For this reason, it is high time for a comprehensive reflection on the possible alternatives to the current model of economic governance. Europe has to learn an important lesson from the past: elitism and technocracy have created a flawed system of economic governance and brought Europe in the troubled waters it currently finds itself in. A real change in EU economic governance will be possible only by adopting a more democratic and open process, where the role of politics is recognised and enhanced.

The various options should be discussed in a thorough and healthy public debate and supported by the majority of European citizens. The starting point of this debate should be to recognise that Europe is currently at a crossroads: it can address the flaws of its economic governance either by allocating the competence over economic policy at EU level, or else by reallocating the monetary policy at Member States level.

“Centralisation” of economic policy

The current mechanism for the correction of macroeconomic imbalances⁶⁷ is considerably lax and ineffective. Unlike the excessive debt procedure, it is not backed up by a credible enforcement mechanism. It thus seems necessary to go beyond the existing instruments of macroeconomic coordination,⁶⁸ as only the allocation of economic policy at EU level would permit an effective coordination of Member States economies.

⁶⁵ J.H.H. Weiler, *Editorial: Integration through Fear*, *European Journal of International Law*, Florence, N° 23, 2012, pp. 1–5. F.W. Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, [in :] *European Law Journal*, London, N° 21(3), 2015, pp. 384-405. Two authoritative economists have recently maintained that this evolution has led the EU to internalize the basic tenets of the Washington Consensus. See J.P. Fitoussi and F. Saraceno, *European economic governance: the Berlin–Washington Consensus*, [in :] *Cambridge Journal of Economics*, Cambridge, N° 37, 2013, pp. 479-496.

⁶⁶ G. Cozzi, *Gagner pour durer: zone euro, un changement fondamentale s'impose*, FEPS, Brussels, 2013.

⁶⁷ See Articles 3, 4 and 5 of the Regulation of the European Parliament and of the Council No 1176 of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306/8 [2011].

⁶⁸ For instance, they should introduce or increase unemployment benefits and clamp down on low-wage jobs. See N. Holinski, C. Kool and J. Muysken, 'Persistent Macroeconomic Imbalances in the Euro Area: Causes and Consequences', 2012, 94(1) *Fed Reserve Bank of St. Louis Review*, pp. 6-10.

To this end, EU Treaties should be amended, and a EU institution should be entrusted with the power to chart the economic policy for all the Eurozone members.⁶⁹ The Commission seems to be the most suitable institution to carry out this task, as it exercises its functions to “promote the general interest of the Union”⁷⁰. Whereas the diversity of national interests represented in the Council could easily lead to a stalemate and elicits conflicts between Member States. The Council could nonetheless retain a veto power with respect to these economic policy guidelines: for instance, the Commission guidelines could be adopted unless a qualified majority of States votes against it.⁷¹

The Member States should be in charge of the implementation of the Commission’s guidelines. A sanction regime modelled on the one introduced for strengthening budgetary surveillance should ensure the enforcement of the economic policy decided in Brussels.⁷² Therefore, in case of violation of the guidelines, the Commission should have the power to impose substantial fines on the Member States concerned.

Having said that, without the power to allocate resources to address endemic imbalances between the Member States and stimulate growth across Europe, the “centralisation” of competence over economic policy would not be complete.⁷³ To do this, the Union would need a larger budget completely independent from Member States contributions and partly financed through the issuance of EU bonds.

Such a fundamental change of the EU economic governance should, in turn, induce a serious debate about restructuring the decision-making process, both as regards its functioning and its democratic legitimacy. In particular, centralisation should go hand in hand with a further democratisation of the EU, with a clearer political role of the Commission and a strengthened “confidence relationship” between the Commission and the Parliament.

“Decentralisation” of competence over monetary policy

⁶⁹ The Commission has currently the power to issue such recommendations. See Article 7 of the Regulation No 1176 of 2011.

⁷⁰ Article 17 of the TEU.

⁷¹ Needless to say, the vote of the Member State to whom the recommendation is addressed should not be taken into account. See Article 12 of the Regulation No 1176 of 2011.

⁷² See Article 4, 5 and 6 of the Regulation 1173 of 2011.

⁷³ B. Eichengreen, *The Breakup of the Euro Area* [in :] A. Alesina and F. Giavazzi, *Europe and the Euro*, Chicago : Chicago University Press, 2010, p. 41.

Failing to achieve a more coherent framework for the coordination of economic policy at the EU level would, instead, entail the need of taking a step back, giving back to Member States some room to conduct their own monetary policy, although in coordination with each other. This should not be regarded as the end of the EU but as a new era for European integration.⁷⁴ The fact that not all EU Members adopted the Euro proves that the single currency is not indispensable for integration.⁷⁵ Furthermore, such a move would probably be less costly both in economic and political terms than the withdrawal of an individual Member State from the Eurozone.⁷⁶

An orderly dismantlement of the EU would require an accurate and coordinate planning. The Council and the Commission should adopt a roadmap including, amongst others, the reintroduction of the national currencies and the redenomination of government bonds and contracts. Furthermore, Member States should introduce limitations to free circulation of capital within the Union in order to prevent capital flight.

In any event, the collective withdrawal from the Eurozone would be everything but simple and costless. The EU Member States would certainly incur substantial litigation and administrative costs. For example, the redenomination of contracts and government bonds could infringe investor protection standards contained in one of the many bilateral investment treaties ratified by EU Member States.⁷⁷

Be that as it may, the dismantlement of the EMU could nonetheless bring about important advantages. For one thing, Member States could absorb macroeconomic imbalances by charting their monetary policy according to the situation of their balance of payments. For instance, Member States running large trade deficits could devalue their currency to increase their exports. In addition, they could design their economic policy free from the constraints of EU budgetary discipline. In sum, Member States could deploy monetary and economic policy to reverse their gloomy prospects for growth.

⁷⁴ See K. H. O'Rourke, Moving on from the Euro, 22 July 2015, <http://www.project-syndicate.org/commentary/eurozone-failed-experiment-by-kevin-o-rourke-2015-07>.

⁷⁵ B. Eichengreen, *The Breakup of the Euro area*, op.cit., p. 18.

⁷⁶ B. Eichengreen, *The Breakup of the Euro area*, op.cit., pp. 36-37.

⁷⁷ Foreign investors initiated arbitral proceedings against Argentina after the unpegging of the Peso from the Dollar and the *de facto* redenomination of all contracts. See J. Alvarez and K. Khamsi, *The Argentine crisis and foreign investors: a glimpse into the heart of investment regime*, [in :] K.P. Sauvant, *Yearbook on International Investment Law and Policy*, Oxford: Oxford University Press, 2011.

Time to step in: a last call for action

“La crisi consiste appunto nel fatto che il vecchio muore e il nuovo non può nascere” (A crisis is the moment in which the old is dying, and the new cannot be born).⁷⁸ With these words, Antonio Gramsci felicitously defined the concept of crisis.

Europe is still waiting for the birth of *something new*. The disappointing results of the European Parliament Elections of June 2014 should not soothe the debate on a fairer Europe. Nor should they reduce the efforts of progressive governments, parties and activists throughout Europe.

European socialists should lead this movement for reform of the European construction, because a European Union trapped in its fiscal straightjacket is the terrain where nationalist and *anti-political* movements can flourish. And European socialist and progressive parties who are deaf to the cry of pain of European people are their first allies. Hence, if we do not engage immediately in an ambitious project of reform, other social forces and political movements will do so in a way that might be extremely dangerous for democracy and peace in Europe.

⁷⁸ A. Gramsci, *Quaderni del Carcere*, Turin : Einaudi, 2014, p. 34.

LITERATURE

Alvarez, J. and Khamsi, K. (2011)	<i>The Argentine crisis and foreign investors: a glimpse into the heart of investment regime</i> , [in :] K.P. Sauvant, <i>Yearbook on International Investment Law and Policy</i> , Oxford: Oxford University Press
Amato M. and Fantacci, L. (2014)	<i>Idee per un'altra finanza</i> . Rome, Donzelli editore.
Aizenman, J., Hutchison, M. and Jinjara, Y. (2013)	<i>What Is the Risk of European Sovereign Debt Defaults? Fiscal Space, CDS Spreads and Market Pricing of Risk</i> , [in :] <i>Journal of International Money and Finance</i> , N° 34, 37–59.
Beechey, M., Gruen, D. and Vickery, J. (2000)	The Efficient Market Hypothesis: A Survey, RBA Research Discussion Paper, Reserve Bank of Australia, Sydney.
Bernoth, K., von Hagen, J. and Schuknecht, L. (2003)	Sovereign Risk Premia in the European Government Bond Market, ZEI Working Paper, Bonn.
Bonefeld, W. (2015)	<i>European economic constitution and the transformation of democracy: On class and the state of law</i> , [in :] <i>European Journal of International Relation</i> , London, pp. 1-20.
Cozzi, G. (2013)	<i>Gagner pour durer: zone euro, un changement fondamentale s'impose</i> , FEPS, Brussels.
D'Antoni, M. and Mazzocchi, R. (2013)	<i>L'Europa non è finita. Uscire dalla crisi rilanciando il modello sociale europeo</i> , Roma: Editori Internazionali Riuniti.
De Grauwe, P. (2011)	Balanced Budget Fundamentalism, CEPS, Brussels, http://www.ceps.eu/
De Grauwe, P. (2013)	<i>The European Central Bank as Lender of Last Resort in the Government Bond Markets</i> , [in :] <i>CESifo Economic Studies</i> , Oxford, N° 59, pp. 520-535.
De Grauwe, P. (2013)	<i>Design Failures in the Eurozone: Can they be fixed?</i> , [in:] <i>LEQS Paper</i> , N° 57, http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper57.pdf
Eichengreen, B. (2010)	<i>The Breakup of the Euro Area</i> [in :] A. Alesina and F. Giavazzi, <i>Europe and the Euro</i> , Chicago : Chicago University Press,
De Santis, R. A. (2012)	<i>The Euro Area Sovereign Debt Crisis: Safe Haven, Credit Rating Agencies and the Spread of the Fever from Greece, Ireland and Portugal</i> , Working Paper Series, European Central Bank, Frankfurt
Di Martino, A. (2014)	<i>Le Outright Monetary Transactions tra Francoforte, Karlsruhe e Lussemburgo. Il primo rinvio pregiudiziale del BVerfG</i> , [in:] <i>Federalismi.it</i> , Rome, N° 4, http://www.federalismi.it/ .
Draghi, M. (2012)	Speech given at the Global Investment Conference, London 26 July 2012, at https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html .
Fabbrini, F. (2013)	<i>The Fiscal Compact, the "Golden Rule," and the Paradox of European</i>

	<i>Federalism</i> , [in :] Boston College International & Comparative Law Review, Boston, N° 36 (1), pp. 1-38.
Fama, E. F. (1970)	<i>Efficient Capital Markets: A Review of Theory and Empirical Work</i> , [in :] The Journal of Finance, Malden, N° 25, pp. 383–417.
Feldstein, M. (2012)	<i>The Failure of the Euro : The Currency that Couldn't</i> , [in :] Foreign Affairs, London, N° 91, pp. 105-118.
Fitoussi, J.P. and Saraceno, F. (2013)	<i>European economic governance: the Berlin–Washington Consensus</i> , [in :] Cambridge Journal of Economics, Cambridge, N° 37, pp. 479-496.
Gärditz, K. F., 2014	<i>Beyond Symbolism: Towards a constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court</i> , [in:] German Law Journal, Lexington, N° 15, pp. 183-202.
Gerner-Beuerle, C., Küçük, E. and Schuster, E. (2014)	<i>Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial</i> , [in:] German Law Journal, Lexington, N°15, pp. 281-320
Goldmann, M. (2014)	<i>Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review</i> , [in:] German Law Journal, Lexington, N° 15, pp. 265-280.
Goodhart, C. (1999)	<i>Myths about the Lender of Last Resort</i> , [in :] International Finance, London, N° 2, pp. 339–360.
Gramsci, A. (2014)	<i>Quaderni del Carcere</i> . Turin, Einaudi.
Halberstam, D. and Möllers, C. (2009)	<i>The German Constitutional Court says “Ja zu Deutschland!”</i> , [in :] German Law Journal, Lexington, N° 10.
Holinski, N. Kool, C. and Muysken, J. (2012)	<i>Persistent Macroeconomic Imbalances in the Euro Area: Causes and Consequences</i> , [in :] Fed Reserve Bank of St. Louis Review, Saint Louis, N° 94.
Il sole 24 ore (2015)	<i>L’esposizione di banche e Stati europei verso la Grecia</i> , February 18, 2015, http://www.infodata.ilsole24ore.com/2015/02/18/lesposizione-di-banche-e-stati-europei-verso-la-grecia/
IMF (2012)	<i>World Economic Outlook</i> . Washington DC: International Monetary Fund.
Jancic, D. (2010)	<i>Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon?</i> , Columbia Journal of European Law, New York, N°16.
Klamert, M. (2014)	<i>The Principle of Loyalty in EU Law</i> . Oxford : Oxford University Press.
Kumm, M. (2014)	<i>Rebel Without a Good Cause: Karlsruhe’s Misguided Attempt to Draw the CJEU into a Game of “Chicken” and What the CJEU Might do About It</i> , [in :] German Law Journal, Lexington, N° 15, pp. 2013-216.
Leino, P. and Salminen,	<i>Should the Economic and Monetary Union Be Democratic After All? Some</i>

J. (2012)	<i>Reflections on the Current Crisis</i> , [in:] German Law Journal, Lexington, N°14, pp. 844-868.
Mayer, F.C. (2014)	<i>Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference</i> , [in :] German Law Journal, Lexington, N° 15, pp. 111-146.
Mazzocchi, R. (2015)	<i>Il potere della BCE: Politica Monetaria e Politica Fiscale</i> , [in :] Pandora Rivista di Teoria e Politica, Bologna, N° 2, pp. 76-80.
Meyer-Rix, U. (2012)	<i>Germany A Europe of Growth and Solidarity</i> , [in :] Renaissance, Brussels, N°2, pp. 211-215.
Minsky, H. (1975)	<i>John Maynard Keynes</i> , New York, McGraw-Hill
Pernice, I. (2014)	<i>A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU</i> , [in:] Maastricht journal of European and comparative law, Maastricht, N°21, pp. 3-14
Rochet, J.-C. and Vives, X. (2004)	<i>Coordination Failures and the Lender of Last Resort: Was Bagehot Right After All?</i> , [in :] Journal of the European Economic Association, Malden, N° 2, pp. 1116–1147
Rodrigues, M.J. (2012)	<i>Shaping the Economic Union – For a Progressive Reform of the EU Economic Governance</i> , [in :] Renaissance, Brussels, N°2, pp. 211-239.
Sardo, D. (2015)	<i>Democrazia e distribuzione del potere nell'Unione Europea: tra sostanza e procedura</i> , [in:] Pandora Rivista di Teoria e Politica, Bologna, N° 2.
Sawyer, M. (2013)	<i>The Tragedy of the Fiscal Compact, Conference Paper, Call to Europe III</i> , Foundation of European Progressive Studies, Brussels.
Siekman, H. and Volker, W. (2014)	<i>The German Constitutional Court's Decision on OMT: Have Markets Misunderstood?</i> , Policy Insight- Centre for Economic Policy Research, London
Scharpf, F.W. (2015)	<i>After the Crash: A Perspective on Multilevel European Democracy</i> , [in :] European Law Journal, Malden, N° 21, pp. 384-405.
The Economist,(2014)	<i>Fiddling while Europe burns</i> , November 29, 2014, http://www.economist.com/news/leaders/21635017-jean-claude-junckers-investment-package-laughably-inadequate-fiddling-while-europe-burns .
Ungerer, H. (1997)	<i>A Concise History of European Monetary Integration: From EPU to EMU</i> . Portsmouth : Greenwood Publishing.
Walsh, C. E. (2008)	<i>Central Bank Independence</i> , in Durlauf, S. N. and Blume, L. E. (eds) <i>The New Palgrave Dictionary of Economics</i> , Basingstoke, Nature Publishing Group,. 728–731.
Weiler, J.H.H. (2012)	<i>Editorial: Integration through Fear</i> , [in :] European Journal of International

	Law, Florence, N° 23, pp. 1-5.
Wendel, M. (2014)	<i>Exceeding Judicial Competence in the Name of Democracy: The German Constitutional Court's OMT Reference</i> , [in :] European Constitutional Law Review, Cambridge, N° 10, pp. 263-307.
Whelan, K. (2012)	<i>Golden Rule or Golden Straightjacket?</i> , 25 February 2012, http://www.voxeu.org/article/golden-rule-or-golden-straightjacket-critique-europe-s-fiscal-compact
Winkler, A. (2013)	<i>EZB-Krisenpolitik: OMT-Programm, Vollzuteilungspolitik und Lender of Last Resort</i> , [in :] Wirtschaftsdienst, Hamburg, N° 93, pp.678–685.
Wilsher, D. (2014)	<i>Law and the Financial Crisis: Searching for Europe's New Gold Standard</i> , [in :] European Law Journal, Malden, N° 20, pp. 241-283.
Woodruff, D.M. (2014)	<i>Governing by Panic: The Politics of the Eurozone Crisis</i> , [in :] LSE Europe in Question-Discussion Papers, London, N° 8.