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Advocate General's Opinion in Case C-62/14  
Peter Gauweiler and Others v Deutscher Bundestag

## **According to Advocate General Cruz Villalón, the ECB's Outright Monetary Transactions programme is compatible, in principle, with the TFEU**

*If the programme is implemented, its compatibility will depend on certain conditions being met*

By 2010 the international financial crisis that began in 2008 had become a sovereign debt crisis in various States of the euro area. When, in the summer of 2012, investors' doubts about the continued survival of the euro became increasingly widespread, that prompted apparently unstoppable increases in the risk premia for the government bonds of those States, leading to a critical financial situation.

In that exceptional situation, the ability of the European Central Bank ("ECB") to properly carry out its monetary policy mandate was put at risk. By a press release of 6 September 2012, the ECB announced that a decision had been taken concerning a programme for purchasing government bonds issued by States of the euro area, which was to be known as the "OMT programme".<sup>1</sup> Details of the basic features of the programme were given in the press release but the legal instruments for regulating the OMT programme have not yet been adopted.

The ECB stated that it was ready to use the programme to purchase on secondary markets government bonds issued by States of the euro area, subject to certain conditions: (i) the States concerned had to be subject to a financial assistance programme of the European Financial Stability Facility ("EFSF") or the European Stability Mechanism ("ESM"),<sup>2</sup> a programme that had to include the possibility of EFSF or ESM purchases on the primary market; (ii) transactions would be focused on the shorter part of the yield curve; (iii) no quantitative limits would be set in advance; (iv) the ECB would receive the same treatment as private creditors, and (v) the ECB undertook that liquidity created would be fully sterilised.

In Germany a number of politicians, professors of law and of economics, a journalist and an NGO brought proceedings before the Bundesverfassungsgericht (Germany's Federal Constitutional Court; "BVerfG") against the Bundesregierung (Federal German Government): they complained that their fundamental rights had been infringed as a result of the failure of the German Government to challenge the announcement concerning the OMT programme in an action for annulment before the Court of Justice of the European Union. The parliamentary group Die Linke brought proceedings before the BVerfG on the ground of a conflict between constitutional bodies, seeking a declaration that the Bundestag should work to achieve the annulment of the OMT programme.

For the first time in its history, the BVerfG has made a reference to the Court of Justice for a preliminary ruling and has done so to raise the question of the legality of the OMT programme. The BVerfG asks, first, whether the programme, rather than being a monetary policy measure, is in fact an economic policy measure, which would fall outside the scope of the ECB's mandate. Secondly, the German court is doubtful whether the measure complies with the prohibition of monetary financing of the Member States laid down in the TFEU. The BVerfG's concerns highlight, in more

<sup>1</sup> "Outright monetary transactions".

<sup>2</sup> The objective of the ESM, which was established on a permanent basis in response to the sovereign debt crisis in various Member States, is to safeguard the financial stability of the euro area by granting financial assistance to States participating in the ESM.

general terms, the question of the limits to which the powers of the ECB are subject in exceptional circumstances such as those of the summer of 2012.

The ECB has argued that, although the OMT programme is an “unconventional” instrument and entails some risks, it none the less falls within the Bank’s mandate. According to the ECB, the indirect aim of the OMT programme is to enable the Bank to restore the efficient use of its monetary policy instruments. Its immediate aim is to reduce the interest rates demanded for a Member State’s bonds in order to normalise the situation. The complainants in the German proceedings and the BVerfG itself consider, however, that the true purpose of the programme is to make the ECB a “lender of last resort” for the States of the euro area.

In his Opinion today, Advocate General Pedro Cruz Villalón observes that the framing and implementation of monetary policy are the exclusive competence of the ECB. In order to carry out its task, the ECB has at its disposal technical expertise and valuable information, which, together with its reputation and communications strategy, enable it to manage expectations in such a way that its monetary policy “impulses” actually reach the economy. Therefore, **the ECB must have a broad discretion when framing and implementing the EU’s monetary policy, and the courts must exercise a considerable degree of caution when reviewing the ECB’s activity, since they lack the expertise and experience which the ECB has in this area.**

The Advocate General finds that the OMT programme is an **unconventional monetary policy measure**. Unconventional measures of that kind must, however, comply with certain provisions of primary law (for example the prohibition of monetary financing of the Member States) and especially with the principle of proportionality.

The Advocate General also points out that the OMT programme is a measure that is incomplete, given that, in the press release of 6 September 2012, only its basic technical features were set out, it has not been formally adopted and it has not been implemented in any specific case. His analysis is thus carried out on that basis.

As regards the first question referred for a preliminary ruling, which concerns whether the OMT programme is in reality an economic policy measure rather than a monetary policy measure, the Advocate General takes the view that the objectives of the programme are in principle legitimate and consonant with monetary policy. However, given the significant role which the ECB plays in financial assistance programmes (design, approval and regular monitoring), its actions might in certain circumstances be perceived as being more than mere “support” for economic policy. Thus, in the event of the OMT programme being implemented, **the ECB must, if the programme is to retain its character of a monetary policy measure, refrain from any direct involvement in the financial assistance programme that applies to the State concerned.**

The Advocate General considers that **the ECB must give a proper account of the reasons for adopting an unconventional measure such as the OMT programme, identifying clearly and precisely the extraordinary circumstances that justify the measure.** Given that no such justification is to be found in the press release of 6 September 2012, **if the programme is put into practice, both the legal act which gives it form, and its implementation, will have to satisfy those requirements relating to reasons.**

The Advocate General considers that **the OMT programme is suitable** for bringing about a reduction in the interest rates on government bonds of the States concerned; such a reduction would make it possible to return to a certain degree of financial normality in those States, thus enabling the ECB to conduct its monetary policy in conditions of greater certainty and stability. He also considers that the OMT programme is **necessary** as well as **proportionate in the strict sense**, since the ECB does not assume a risk that will necessarily make it vulnerable to insolvency. The Advocate General points out that his finding is conditional upon how the OMT programme is actually implemented, his analysis being limited to the matters contained in the press release of 6 September 2012.

**Therefore, in Advocate General Cruz Villalón's view, the OMT programme decided upon by the ECB, as it results from the technical features described in the press release, does not infringe the principle of proportionality and may be considered lawful, provided that, in the event of the programme being implemented, the obligation to state reasons and the requirements deriving from the principle of proportionality are strictly complied with.**

As regards the second question referred for a preliminary ruling, which concerns the prohibition of monetary financing laid down in the TFEU, the Advocate General considers whether the OMT programme, in permitting the ECB to purchase on secondary markets bonds of euro area States, infringes the prohibition on purchasing debt instruments directly from the Member States. He observes that that prohibition is a fundamental rule of the "constitutional framework" which governs economic and monetary union and that exceptions to it must therefore be interpreted restrictively. The TFEU does not prohibit transactions on the secondary market (since if it did the Eurosystem would be deprived of a vital tool for the ordinary conduct of monetary policy), but it does require that, when the ECB intervenes on that market, it does so with sufficient safeguards to ensure that its intervention does not infringe the prohibition of monetary financing.

The Advocate General considers that, although implementation of the OMT programme may to some extent inevitably act as an incentive to investors to purchase bonds on the primary market, the ECB will proceed with particular caution when intervening on the secondary market, in order to prevent speculative behaviour that would severely undermine the efficacy of the OMT programme. It is essential that this incentive to purchase bonds should not be disproportionate in relation to the objectives of the measure.

Finally, the Advocate General observes that, in order to comply with the prohibition of monetary financing, the OMT programme will, in the event of its being activated, have to be implemented in such a way that a market price can form in respect of the government bonds concerned, so that there continues to be a real difference between a purchase of bonds on the primary market and a purchase on the secondary market (given that a purchase on the secondary market made seconds after the issue of the bonds on the primary market could completely blur the distinction between the two markets).

Advocate General Cruz Villalón thus concludes that **the OMT programme is compatible with the TFEU, provided that, in the event of the programme being implemented, the timing of its implementation is such as to permit the actual formation of a market price in respect of the government bonds.**

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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