Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 14 January 2015 [1]

Case C-62/14

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Wilhelm Hankel
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Joachim Starbatty
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Johann Heinrich von Stein and Others
and
Fraktion DIE LINKE im Deutschen Bundestag
v
Deutscher Bundestag

(Request for a preliminary ruling from the Bundesverfassungsgericht (Germany))

(Economic and monetary policy — Validity of the decision of the Governing Council of the European Central Bank of 6 September 2012 — Technical features of Outright Monetary Transactions (OMTs) — National review of the constitutionality of European Union acts — Ultra vires acts — Constitutional identity — Sincere cooperation — Admissibility — Nature of an act open to legal challenge in the context of preliminary ruling proceedings — Communications strategy of the European Central Bank — Powers of the European Central Bank — Price stability — Restoring the monetary policy transmission channels — Articles 119 TFEU and 127(1) and (2) TFEU — Exceptional circumstances — Unconventional monetary policy measures — Principle of proportionality — Article 5(4) TEU — Article 123 TFEU — Prohibition of monetary financing of Member States in the euro area)

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1 — Original language: Spanish.

1. By a press release issued after the meeting of its Governing Council on 5 and 6 September 2012, the European Central Bank gave details of a decision outlining a programme for the purchase of government bonds issued by States of the euro area — transactions which were to be known as Outright Monetary Transactions (OMTs). The press release set out the basic features of the programme for purchasing government bonds. However, adoption of the legal instruments regulating the programme was postponed and those instruments have still not been adopted today.

2. In its press release, the European Central Bank ('the ECB' or 'the Bank') gave notice of its intention to purchase on secondary markets, subject to certain conditions, government bonds issued by States in the euro area. In brief, the ECB made application of the programme conditional upon the States concerned being subject to a financial support programme of the European Financial Stability Facility or the European Stability Mechanism, provided that such a programme included the possibility of primary market purchases. It was also announced that transactions under the OMT programme were to be focused on the shorter part of the yield curve, with no *ex ante* quantitative limits being set, and that the Eurosystem accepted the same (*pari passu*) treatment as private creditors, whilst an undertaking was given that liquidity created would be fully sterilised.

3. The OMT programme was thus created in the context of, and in response to, a situation regarded as exceptional for the viability of the ECB's monetary policy. The international financial crisis which started in 2008 had, by 2010, become a sovereign debt crisis for various euro area States. In the summer of 2012, faced with investors' lack of confidence in whether the euro could survive, the financial situation of various Member States of the euro area was becoming unsustainable as a result of the apparently unstoppable increases in the risk premia applied to their government bonds. The 'reversibility' of the euro and the consequent return to national currencies seemed destined to become a self-fulfilling prophecy. It was in that precise context that the ECB made its announcement about the OMT programme, which was generally perceived as giving concrete expression to the pledge which its President, Mr Draghi, had given a few weeks beforehand to do, within the ECB's mandate, 'whatever it takes' to restore confidence in the single currency.

4. For the first time in its history the Bundesverfassungsgericht (Germany's Federal Constitutional Court; 'the BVerfG') has made a reference to the Court of Justice under Article 267 TFEU and has done so in order to raise the question of the legality of the OMT programme. As will be seen below, the questions raised by the BVerfG give rise to difficulties of interpretation of utmost importance, which the Court of Justice will have to resolve.

5. A first point that should be made about this case is that the BVerfG has made its request for a preliminary ruling in the context of what it classifies as an ultra vires review of European Union (EU) acts which have consequences for the 'constitutional identity' of the Federal Republic of Germany. The BVerfG's starting point is an initial finding that the act of the ECB at issue is unlawful under national constitutional law, as well as under EU law, but, before proceeding any further with its assessment, it has decided to bring the matter before the Court of Justice so that the latter may give a ruling on that act from the perspective of EU law.

6. The Court of Justice must also address a question of admissibility, which concerns the actionable nature of a decision only the basic features of which were set out in a press release. Although it may, on the face of it, appear to be a simple press release which it is hard to imagine forming the subject-matter of a review of validity, the circumstances of the present case, together with the special role played by public communication in central bank activity, might be grounds for reaching a different conclusion.

7. As regards the substance of the case, the Court of Justice is confronted with the difficulties which extraordinary circumstances have long presented for public law. Against a background of the possible disintegration of the euro area, it is faced with a question about the powers of the ECB, an institution which, unlike other central banks, is subject to a particularly restricted mandate. The ECB has argued that the OMT programme is a proper instrument for dealing with exceptional circumstances, since, despite its 'unconventional' nature and the risks it entails, its objective is merely to do what has to be done in order to restore the ECB's ability to make effective use of its monetary policy instruments. By contrast, the complainants and the applicant in the main proceedings (hereinafter referred to together as 'the applicants in the main proceedings'), like the referring court itself, have doubts as to whether that is the real aim of the OMT programme, since in their view the ultimate objective of that programme is to transform the ECB into a 'lender of last resort' for the States of the euro area.

8. This situation has led the BVerfG to share with the Court of Justice its doubts as to whether the OMT programme is compatible with the Treaties. First, it asks whether that programme is an economic policy measure — and therefore beyond the scope of the ECB's mandate — rather than a monetary policy measure. Second, it questions whether the measure in issue observes the prohibition on monetary financing laid down in Article 123(1) TFEU.

I – **Legal framework**

A – *EU legal framework*

9. Title VIII of Part Three of the FEU Treaty, which is entitled 'Economic and Monetary Policy', opens with the following overarching provision:

'Article 119

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.'

10. The FEU Treaty then lays down a provision prohibiting the monetary financing of the Member States, which is worded as follows:

'Article 123

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.'

11. The objectives and basic tasks of the ECB are set out in the FEU Treaty in the following terms:

'Article 127

1. The primary objective of the European System of Central Banks (hereinafter referred to as "the ESCB") shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

— to define and implement the monetary policy of the Union,

— to conduct foreign-exchange operations consistent with the provisions of Article 219,

— to hold and manage the official foreign reserves of the Member States,

— to promote the smooth operation of payment systems.

…'

12. Article 130 TFEU provides for and ensures the independence of the ECB as follows:

'When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.'

13. Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank sets out the instruments of monetary policy available to the ECB; the following of which should be highlighted for the purposes of the present case:

'Article 18

Open market and credit operations

18.1. In order to achieve the objectives of the ESCB and to carry out its tasks, the ECB and the national central banks may:

— operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals;

— conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral.

18.2. The ECB shall establish general principles for open market and credit operations carried out by itself or the national central banks, including for the announcement of conditions under which they stand ready to enter into such transactions.'

14. In 1993, before the ECB was established and in the course of the process of transition to economic and monetary union, the Council adopted Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty [Article 123 TFEU] (OJ 1993 L 332, p. 1). For the purposes of these proceedings, attention should be drawn to the following statements and provisions of that regulation:

'…

Whereas Member States must take appropriate measures to ensure that the prohibitions referred to in Article 104 of the Treaty are applied effectively and fully; whereas, in particular, purchases made on the secondary market must not be used to circumvent the objective of that Article;'

…

Article 1

1. For the purposes of Article 104 of the Treaty:

(a) "overdraft facilities" means any provision of funds to the public sector resulting or likely to result in a debit balance;

(b) "other type of credit facility" means:

(i) any claim against the public sector existing at 1 January 1994, except for fixed-maturity claims acquired before that date;

(ii) any financing of the public sector's obligations vis-à-vis third parties;

(iii) without prejudice to Article 104(2) of the Treaty, any transaction with the public sector resulting or likely to result in a claim against that sector.

…'

B – *National legal framework*

15. For the purposes of these proceedings, attention should be drawn to the following provisions of the Basic Law of the Federal Republic of Germany:

'Article 1

1. Human dignity shall be inviolable. It shall be the duty of every public authority to observe and protect it.

2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

3. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

…

Article 20

1. The Federal Republic of Germany is a democratic and social federal state.

2. All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

3. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

…

Article 23

1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its founding Treaties and in comparable regulations which amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs 2 and 3 of Article 79.

…

Article 79

…

3. Amendments to this Basic Law which affect the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

…

Article 88

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.'

16. The BVerfG has developed a body of case-law pursuant to which it carries out a review of the constitutionality of acts of the institutions and bodies of the European Union when the acts concerned are obviously ultra vires or affect 'constitutional identity', as it results from the 'eternity clause' in Article 79(3) of the German Basic Law.

17. As regards the review of ultra vires acts, referred to as an 'ultra vires review', the BVerfG stated, in its judgment of 6 July 2010 in *Honeywell*, that it is to be conducted in a manner that is amicable to EU law. The BVerfG has also pointed out that in an ultra vires review decisions of the Court of Justice are to be recognised as a binding interpretation of EU law.

18. For the BVerfG, an ultra vires review of an EU act takes place only when it is apparent that, in adopting an act, the European institutions and bodies have acted in a way that is beyond the scope of the powers conferred on them, provided that, taking account of the principle of conferral and the principle of legality that is a feature of a State governed by the rule of law, the breaches of those powers are 'sufficiently serious'. [2]

2 — Judgment 126, 286, pp. 303 and 304.

II – **The facts and proceedings before the national court**

19. Between early 2010 and early 2012, the Heads of State and Government of the European Union and of the euro area adopted a number of measures intended to counter the severe effects of the financial crisis afflicting the world economy. As the financial crisis turned into a sovereign debt crisis in various Member States, it was decided, amongst other initiatives, to establish on a permanent basis the European Stability Mechanism, the purpose of which is to safeguard the financial stability of the euro area by granting financial assistance to any of the States participating in the Mechanism.

20. Despite the efforts of the European Union ('the Union') and the Member States, the risk premia for bonds of various euro-area States rose sharply in the summer of 2012. In the face of investors' doubts about the survival of monetary union, the representatives of the Union and of the States of the euro area repeatedly stressed that the single currency was irreversible. It was at that time that the President of the ECB, in words that were subsequently repeated over and over again, stated that he would, within his mandate, do whatever it took to preserve the euro. [3]

21. Some weeks later, according to the minutes of the 340th meeting of the Governing Council of the ECB on 5 and 6 September 2012, the Council approved the main parameters of the programme of outright monetary transactions in the secondary sovereign bond markets, formally to be known as 'Outright Monetary Transactions'. As is clear from the written observations submitted by the ECB in these proceedings, approval was also given at that meeting to a draft Decision on outright monetary transactions and repealing Decision ECB/2010/5, as well as to a draft Guideline on the implementation of outright monetary transactions. Both drafts were subsequently amended at the meetings of the Governing Council on 4 October and 7 and 8 November 2012.

22. On 6 September 2012 at the press conference after the meeting of the Governing Council, the President of the ECB gave details of the main parameters of the OMT programme, which were also set out in the press release of the same date made available in English on the ECB's website. That press release is the document in which the technical features of the OMT programme were set out; those features are described as follows:

'As announced on 2 August 2012, the Governing Council of the European Central Bank (ECB) has today taken decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework:

Conditionality A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme. The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or

3 — The actual wording of Mr Draghi's speech was as follows: 'When people talk about the fragility of the euro and the increasing fragility of the euro, and perhaps the crisis of the euro, very often non-euro area Member States or leaders underestimate the amount of political capital that is being invested in the euro.
And so we view this, and I do not think we are unbiased observers, we think the euro is irreversible …
But there is another message I want to tell you.
Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.'
For the full text of Mr Draghi's speech, see http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

when there is non-compliance with the macroeconomic adjustment or precautionary programme. Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

Coverage Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access. Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years. No *ex ante* quantitative limits are set on the size of Outright Monetary Transactions.

Creditor treatment The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (*pari passu*) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation The liquidity created through Outright Monetary Transactions will be fully sterilised.

Transparency Aggregate Outright Monetary Transaction holdings and their market values will be published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.'

23. Various German individuals brought proceedings for the protection of fundamental rights (constitutional complaints) before the BVerfG, which they based on the failure of the Federal German Government to bring an action for annulment before the Court of Justice against the announcement of 6 September 2012 concerning the OMT programme.

24. Similarly, Fraktion DIE LINKE im Deutschen Bundestag ('Die Linke'), a political group with parliamentary representation in the Bundestag, 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 announced by the ECB on 6 September 2012.

III – **The request to the Court of Justice for a preliminary ruling**

25. The request for a preliminary ruling from the BVerfG, which was lodged at the Court Registry on 10 February 2014, was made in the proceedings brought by the individual applicants referred to above and by the parliamentary group Die Linke.

26. The following questions have been raised by the referring court:

'(1) (a) Is the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with Article 119 TFEU and Article 127(1) and (2) TFEU and with Articles 17 to 24 of the Protocol on the

Statute of the European System of Central Banks and of the European Central Bank because it exceeds the monetary policy mandate of the European Central Bank laid down in the abovementioned provisions and encroaches upon the competence of the Member States?

Is the mandate of the European Central Bank exceeded in particular because the decision of the Governing Council of the European Central Bank of 6 September 2012

(aa) is linked to economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

(bb) provides for the purchase of government bonds of selected Member States only (selectivity)?

(cc) provides for the purchase of government bonds of programme countries in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?

(dd) could undermine the limits and conditions laid down by assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (circumvention)?

(b) Is the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 TFEU?

Is compatibility with Article 123 TFEU precluded in particular by the fact that the decision of the Governing Council of the European Central Bank of 6 September 2012

(aa) does not provide for quantitative limits for government bond purchases (volume)?

(bb) does not provide for a time gap between the issue of government bonds on the primary market and their purchase by the European System of Central Banks on the secondary market (market pricing)?

(cc) allows all purchased government bonds to be held to maturity (interference with market logic)?

(dd) does not contain any specific requirements for the credit standing of the government bonds to be purchased (default risk)?

(ee) provides for the same treatment of the European System of Central Banks as private or other holders of government bonds (debt cut)?

(2) In the alternative, in the event that the Court does not consider the decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical features of Outright Monetary Transactions, qua act of an EU institution, to be an appropriate object for a request pursuant to point (b) of the first paragraph of Article 267 TFEU:

(a) Are Article 119 TFEU and Article 127 TFEU and Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

(aa) to make government bond purchases conditional on the existence of and compliance with economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

(bb) to purchase government bonds of selected Member States only (selectivity)?

(cc) to purchase government bonds of programme countries in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?

(dd) to undermine the limits and conditions laid down by assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (circumvention)?

(b) Having regard to the prohibition of monetary financing, is Article 123 TFEU to be interpreted as permitting the Eurosystem, alternatively or cumulatively,

(aa) to purchase government bonds without quantitative limits (volume)?

(bb) to purchase government bonds without a minimum time gap from their issue on the primary market (market pricing)?

(cc) to hold all purchased government bonds to maturity (interference with market logic)?

(dd) to purchase government bonds without minimum credit standing requirements (default risk)?

(ee) to accept the same treatment of the European System of Central Banks as private and other holders of government bonds (debt cut)?

(ff) to influence pricing, by communicating the intention to purchase or otherwise, coinciding with the issue of government bonds by Member States of the euro area (encouragement to purchase newly issued bonds)?'

27. Written observations have been submitted by the individual complainants in the main proceedings for the protection of basic rights and by Die Linke, as well as by the Federal Republic of Germany, the Hellenic Republic, the Republic of Cyprus, the Portuguese Republic, the Republic of Poland, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Kingdom of Spain, Ireland and the Republic of Finland, the ECB, the European Parliament and the European Commission.

28. As a preliminary matter, I must point out that the European Parliament, although it has submitted written and oral observations, is not entitled to do so in proceedings such as these. Since these proceedings involve a reference for a preliminary ruling concerning validity in which the act in issue has not been adopted by the European Parliament, Article 23 of the Statute of the Court of Justice does not enable the Parliament to participate in these proceedings. I therefore take the view that the Court of Justice should not take into account the written and oral submissions put forward by the European Parliament.

29. The hearing was held on 14 October 2014. Apart from the Republic of Cyprus and the Republic of Finland, all the interested persons that had previously submitted written observations participated in the hearing.

IV – **Preliminary consideration: The 'functional' difficulty of the request for a preliminary ruling, when placed in the context of the relevant case-law of the BVerfG**

30. A singular feature of the order for reference in these proceedings is that it devotes an extensive introductory section to national legislative provisions and national case-law which are considered to be relevant. That singularity naturally does not lie in the fact that national legislation is cited — in this case a small number of constitutional provisions (Articles 20, 23, 38, 79 and 88 of the Basic Law of the Federal Republic of Germany; 'the BL') — but rather in the very full presentation of the BVerfG's case-law concerning the constitutional basis and limits of the Federal Republic of Germany's integration in the European Union. In a section of the order for reference dealing with the 'case-law of the BVerfG',[4] the latter interprets the scope of its own previous case-law as contained essentially in the judgments of 12 October 1993 (*Maastricht*),[5] 30 June 2009 (*Lisbon*)[6] and 6 July 2010 (*Honeywell*),[7] a direct precedent for the order under consideration here.

31. It might be thought that, as in so many other cases, this introductory section of the order for reference serves no purpose other than to help the Court of Justice to place the questions raised in their proper context. The section in question certainly does that, although it cannot be said that it confines itself to summarising the national case-law concerned. It also contains appraisals that cannot be regarded as being of minor importance.[8]

32. The fact that the background of national case-law is presented in that way, with its significance being explained as a preliminary matter to the Court of Justice, has, to my mind, immediate consequences for the *function* of the present request for a preliminary ruling. I would stress at the outset that all that case-law is sufficiently complex for me to frame my own reading of it in extremely cautious terms. The dissenting opinions that are attached to the order for reference show that there are different views on how the rules in *Honeywell* are to be applied to the present case.[9]

33. Stated in the simplest possible way, the following points may be gleaned from the section of the order for reference dealing with national case-law. In certain circumstances, which it is not essential to consider in detail at this point, when the Court of Justice answers a question raised in respect of a given EU act, as would be the case here, that answer is not necessarily a determining factor in deciding the case in the main proceedings. Rather, if the criterion constituted by EU law has been satisfied, *another* criterion for assessing validity, which is a matter for the BVerfG, could possibly be applied to the same contested act: that of the national constitution itself.

34. More specifically, a constitutional criterion of that kind, which is subsequently used by the BVerfG in its assessment, is said to consist in both the unalterable core content of the national constitution ('constitutional identity', as enshrined in Article 79(3) BL), and the principle of conferral of powers (with the logical consequences for 'ultra vires' EU acts that follow from that principle implicit in Article 23(1) BL). It seems that these two constitutional criteria, far from being mutually exclusive, are each able to provide support for the other,[10] as appears to be the case here. Such criteria for reviewing validity (the so-called 'identity review' and the 'ultra vires review'), by definition, may be applied only by the BVerfG itself.[11]

4 — Points 17 to 32.

5 — BVerfGE, 89, 155 (1992).

6 — 123 BVerfGE 267 (2009).

7 — 2 BvR 2661/06.

8 — It is enough to refer, by way of example, to the arguments explaining why the concept of 'constitutional identity' under national law cannot be equated with 'national identity' under Article 4(2) TEU (point 29 of the order for reference).

9 — See the dissenting opinions of Judge Lübbe-Wolff and Judge Gerhardt in respect of the decision to make the present reference for a preliminary ruling. In particular, see the arguments of Judge Lübbe-Wolff (point 28) and those of Judge Gerhardt (points 14 to 18)

10 — Point 25 of the order for reference.

11 — Points 26 and 27 of the order for reference.

35. That being so, it is not surprising that various Member States participating in these proceedings (the Kingdom of the Netherlands, the Italian Republic and the Kingdom of Spain) have, more or less emphatically, questioned, or even denied, the admissibility of the present reference. Simplifying matters once again, it is argued that a reference for a preliminary ruling is not a procedural mechanism intended to make it easier for national courts or tribunals to carry out their own review of the validity of EU acts, such as the review by the BVerfG in the present case, but is instead intended to ensure that the review of validity is carried out before the judicial body having exclusive jurisdiction for that purpose: namely the Court of Justice. In the same vein, it has been argued that, if a national court or tribunal were to reserve for itself the last word on the validity of an EU act, the preliminary ruling procedure would then be merely advisory in nature, and its function in the scheme of actions provided for by the Treaties would thus be severely undermined. [12]

36. In short, a national court should not be able to request a preliminary ruling from the Court of Justice if its request already includes, intrinsically or conceptually, the possibility that it will in fact depart from the answer received. The national court should not be able to proceed in that way because Article 267 TFEU cannot be regarded as providing for such a possibility. [13]

37. Having thus explained what I am classifying as the 'functional' difficulty of the present request for a preliminary ruling, I would add that, in my view, the Court of Justice must address this difficulty when responding to the questions raised. I should, however, also point out that it must do so only in so far as is essential for the purposes of the present case, that is to say, in so far as this difficulty has consequences for whether the reference may proceed. Neither the significance nor the possible consequences of the aforementioned case-law of the BVerfG can be denied, as has long been made abundantly clear in a wide range of academic writing. [14] By way of example, it is sufficient to refer to the matters mentioned in point 30 of the order for reference, according to which the concepts of 'constitutional identity' and 'ultra vires review' are part of the constitutional traditions of many Member States.

38. As regards the last-mentioned point, it is the case that a number of national constitutional and supreme courts, in quite different ways but with an essentially precautionary aim, have found it appropriate to discuss or allude to the possibility, normally conceived of as a last resort, [15] of — stated in the most general possible terms — a breakdown in the European 'constitutional compact' underlying the integration process, specifically because of the conduct of one of the EU institutions.

39. As with other questions of similar significance, it does not seem to me to be essential for the purposes of these proceedings for the Court of Justice to go into the reasons why those courts have made such statements, which, I repeat, normally pertain to a situation envisaged as a last resort; nor is it necessary to go into the extent to which they are general at Member State level or the extent to which they overlap with the views put forward by the BVerfG. The cautious approach of 'one case at a time' [16] should also be adopted on this occasion. I shall try to explain why I believe that is so.

12 — To this effect, see also the observation made in point 11 of the dissenting opinion of Judge Lübbe-Wolff, referred to above.

13 — The Court of Justice has stated on many occasions that the preliminary ruling procedure cannot be used as a procedure for the delivery of advisory opinions. According to the case-law, the rationale for a request for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, inter alia, judgments in *Djabali*, C-314/96, EU:C:1998:104, paragraph 19, *Alabaster*, C-147/02, EU:C:2004:192, paragaph 54, and *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 42).

14 — See, inter alia, Craig, P., 'The ECJ and ultra vires action: A conceptual analysis', *Common Market Law Review* (2011) 48; Kumm, M., 'Who Is the Final Arbiter of Constitutionality in Europe?', *Common Market Law Review* (1999), 36; Millet, F.-X., 'L'Union européenne et l'identité constitutionnelle des États membres', LGDJ, Paris, 2013; Payandeh, M., 'Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice', *Common Market Law Review* (2011) 48.

15 — See, inter alia, in addition to the decisions of the BVerfG cited above in footnotes 5 to 7, the judgments of the French Constitutional Council of 27 July 2006 and 9 June 2011 (Decisions Nos 2006-540 DC and 2011-631); the declaration of the Spanish Constitutional Court of 13 December 2004, 1/2004; the judgments of the Italian Constitutional Court 183/1973 and 168/1991; the judgment of the Danish Supreme Court of 6 April 1998 (I 361/1997); the judgment of 11 May 2005 of the Polish Constitutional Court (K 18/04) or the judgment of the Supreme Court of the United Kingdom of 22 January 2014 ([2014] UKSC 3).

16 — Sunstein, C., *One Case at a Time. Judicial Minimalism on the Supreme Court*, Ed., Harvard University Press, Cambridge, 2001.

40. First of all, the fact that, in the course of a long history, this is the first time that the BVerfG has made a reference to the Court of Justice for a preliminary ruling does not call for particular comment on my part, except to observe that it provides confirmation of something which is starting to become more normal. The *intensification*, as it were, of the EU legal order is prompting the courts of the Member States with a specifically constitutional role to behave increasingly as courts or tribunals within the meaning of Article 267 TFEU.[17] The unique position of the constitutional court in most Member States has in the past been a sufficient explanation of why the cases in which such courts have brought matters before the Court of Justice have been exceptional, both for the purposes of judicial assistance and for the purposes of cooperation to ensure the uniform interpretation of EU law. The general picture is starting to change and the present reference perhaps bears that out.

41. At the same time, however, the introductory section of the order for reference reveals the 'exceptional nature' of the BVerfG's initiative. It is not at all clear that the making of this request for a preliminary ruling is to be seen as part of the process of 'normalisation' in the sense I have indicated above.

42. In fact, it follows from the case-law concerned that the present request for a preliminary ruling can be said to be the inevitable consequence of a situation regarded as 'exceptional' which may for now, to state matters simply, be classified as ultra vires: namely a finding that an EU body or authority has seriously breached the limits of the competences derived from the Treaties, the basis and prior conditions for that finding being the national constitution. I shall, for the time being, confine myself to the ultra vires aspect of this case-law, leaving to one side the 'constitutional identity' aspect.

43. The present case corresponds precisely to the situation I have just described: the national court starts from a finding of principle that there has been an ultra vires act on the part of an EU body.[18] More specifically, under national law, it is a question of 'an obvious and structurally significant ultra vires act',[19] with additionally, in this case, consequences for core provisions of the national constitutional order.[20]

44. So far as the function of the present request for a preliminary ruling is concerned, the BVerfG had stated in *Honeywell* that, in a situation of that kind and in the framework of an ultra vires review to a certain extent already under way, the Court of Justice is to be 'given the opportunity' to rule on the validity of the act at issue, a ruling which the BVerfG will regard as 'in principle … a binding interpretation of EU law'.[21]

45. For the moment we may leave to one side the issue as to whether the referring court's turn of phrase adequately reflects the duty incumbent on national courts of last instance under Article 267 TFEU. What matters is that proceedings before the Court of Justice concerning the validity of a contested act are in this way 'inserted' in a main action whose object has, since the commencement of the action, been an ultra vires review of that act. It is true that this entails recognition of the principle that it is for the Court of Justice to give its interpretation of EU law — which is binding for national courts — in the course of the review of the contested act. The issue is, however, somewhat more problematic.

17 — On this point, see Martinico, G., 'Preliminary Reference and Constitutional Courts: Are You in the Mood for Dialogue?', in Fontanelli, F., Martinico, G., and Carrozza, P., *Shaping Rule of Law through Dialogue: International and Supranational Experiences*, Europa Law Publishing, Groningen, 2010; Alonso García, R., *Justicia Constitucional y Unión Europea*, 2nd ed., Thomson-Civitas, Madrid, 2014; Ukrow, J., 'Von Luxemburg lernen heißt Integrationsgrenzen bestimmen (Anmerkungen zur Vorlage-Entscheidung des Bundesverfassungsgerichts vom 14. Januar 2014)', *Zeitschrift für Europarechtliche Studien*, 2014, p. 122; Mayer, F., 'Multilevel Constitutional Jurisdiction', in Bogdandy, A., and Bast, J. (ed.), *Principles of European Constitutional Law*, 2nd ed., Hart-Beck-Nomos, 2010; and Komárek, J., 'The Place of Constitutional Courts in the EU', (2013) 9 *European Constitutional Law Review*.

18 — See the case-law of the BVerfG cited in point 24 of the order for reference.

19 — Point 33 of the order for reference.

20 — Point 28 of the order for reference and the references therein to 'constitutional identity'.

21 — This is the literal wording of *Honeywell*, as reproduced by the referring court in point 24 of its order for reference.

46. That is because recognition of that principle does not exclude — as the case-law immediately adds (and if I have understood it correctly) — a subsequent review ('in addition') by the BVerfG when it is 'obvious' that the contested act has infringed the principle of conferral, such an infringement being taken to be 'obvious' when it takes place 'in such a way as specifically infringes' that principle, and when, in addition, the infringement may be regarded as 'sufficiently serious'.[22] If my interpretation of the passage in question is correct, it is clear that the 'insertion', so to speak, of the request for a preliminary ruling in the course of a final assessment by a national court of an ultra vires act gives rise to problems which I shall describe as functional.

47. That request, which is considered to be necessary, that the Court of Justice give a preliminary ruling on the contested act, albeit solely from the perspective of EU law, is for its part presented as an expression of the 'cooperative relationship' which must obtain between the two courts, a notion that was created by the referring court itself.

48. This 'cooperative relationship' is far from being precisely defined but it is clear that it purports to be something more than the imprecise 'dialogue' between courts. It is said to derive ultimately from the notion that the obligation of the BVerfG to safeguard the basic order under the national constitution must always be guided by an open and receptive attitude to EU law ('europarechtsfreundlich'), a notion which it might also have been possible to derive from the principle of sincere cooperation (Article 4(3) TEU).

49. Therein lies all the ambiguity with which the Court of Justice is faced in this reference for a preliminary ruling: there is a national constitutional court which, on the one hand, ultimately accepts its position as a court of last instance for the purposes of Article 267 TFEU, and does so as the expression of a special 'cooperative relationship' and a general principle of openness to the so-called 'integration programme' but which, on the other hand, wishes, as it makes clear, to bring a matter before the Court of Justice without relinquishing its own ultimate responsibility to state what the law is with regard to the constitutional conditions and limits of European integration so far as its own State is concerned. That ambivalence runs all through the request for a preliminary ruling, so that it is extremely difficult to disregard it entirely when analysing the case.

50. Confining myself to the problem which I am classifying as that of the function of the present request for a preliminary ruling, I think it appropriate to start by examining whether the present request is founded on the basic premisses on which the so-called preliminary ruling procedure before the Court of Justice has been developed in successive Treaties and on which the judicial guarantee of EU law has strategically been built up.[23]

51. If the only way of interpreting the present reference for a preliminary ruling were the one emphatically proposed by the Republic of Italy,[24] the only possible conclusion would be that, appearances aside, this is not *actually* an 'Article 267' reference for a preliminary ruling but something else — something which in any event is difficult to locate in the Treaty.

52. As some of the interested persons participating in these proceedings have rightly observed, the preliminary ruling procedure was, in fact, never conceived of as a mere 'opportunity' for the Court of Justice to 'concur' with the national court, either on a finding of ultra vires or on something else, with the possible consequence that any 'failure to concur' on the part of the Court of Justice could render its answer nugatory. It is also clear that that view is not invalidated by the fact that there is an

22 — *Honeywell*, paragraph 61.

23 — On the reference for a preliminary ruling and its role in the EU judicial system, see Lecourt, R., *L'Europe des juges*, Bruylant, Brussels, 2008, and Ruiz-Jarabo Colomer, D., *La Justicia de la Unión Europea*, Thomson-Civitas, Madrid, 2011.

24 — Points 5 to 12 of the Italian Government's written observations.

attitude which is in principle receptive to an interpretation of the act at issue in conformity with EU law. Finally, in such circumstances, a request to the Court of Justice to give a preliminary ruling could even end by having the undesirable effect of embroiling the Court in the chain of events ultimately leading to the breakdown in the 'constitutional compact' underlying European integration. [25]

53. If the present request for a preliminary ruling is understood in that way, the referring court appears to suggest, still within the sphere of the ultra vires review, that its criterion or benchmark for assessing the act in issue could be *different* from that of the Court of Justice (they might not 'entirely coincide'). [26] That would mean that the dispute before the BVerfG would to some extent be *different* from the previous proceedings before the Court of Justice. However, on the basis of both the caution with which the BVerfG expresses itself and the nature of the arguments that it advances, [27] I am inclined to think that, in substantive terms, the criterion for ultra vires review would to a large extent be the same.

54. In this respect the present reference may be a good indication that that is so. Whilst the assessment of the validity of the contested decision of the ECB will to a great extent be determined by the interpretation given to the scope of the Bank's mandate, in particular the primary objective of 'price stability', that concept is an integral part of both the Treaty (Article 127(1) TFEU) and the national constitution (Article 88, BL, in fine). In both cases, it would be a question of interpreting the scope of a single concept, that of 'price stability' as the overriding objective of the ECB, regardless of whether that concept is to be found in one or other of the basic provisions, or in both of them.

55. According to the order for reference, however, it is not only the principle of conferral (ultra vires) which is in issue in the main proceedings but also the 'constitutional identity' of the Federal Republic of Germany; that is so because of the consequences which the contested act is said to entail for the national constitutional body which is first and foremost responsible for expressing the will of the citizens. 'Ultra vires review' and 'identity review', to use the terms employed by the BVerfG itself, are said to converge in the main proceedings.

56. The question of the different review criteria to be applied by each of the courts arises again in this part of the order for reference. Thus, as regards specifically the 'identity review', the BVerfG expressly proposes that 'in the cooperative relationship which exists, it is for the Court of Justice to interpret the measure. On the other hand, it is for the BVerfG to determine the inviolable core of constitutional identity and to review whether the measure (as interpreted by the Court of Justice) encroaches on that core'. [28]

57. At this point it would once again be appropriate to include a number of considerations of some importance. I shall merely point out, however, without it being necessary to examine other possibilities, that in the present case — in which everything seems to suggest that the 'ultra vires review' and the 'identity review' are inextricably linked — the difficulties, alluded to above, connected with recognising a difference in review criteria as between the task of the Court of Justice and that of the BVerfG remain relevant.

25 — See Funke, A., *Virtuelle verfassungsgerichtliche Kontrolle von EU-Rechtsakten: der Schlussstein?: Anmerkung zu BVerfGE 126, 286 (Honeywell bzw. Mangold-Urteil EuGH), Zeitschrift für Gesetzgebung*, 26, No. 2, 2011, p. 172. See also Hobe, S., 'Abkehr von Solange? — Die Entscheidungen des Bundesverfassungsgerichts zur Vorratsdatenspeicherung und zu Honeywell', in Sachs, M., and Siekmann, H., *Der grundrechtsgeprägte Verfassungsstaat Festschrift für Klaus Stern zum 80. Geburtstag*, Duncker & Humblot, Berlin, 2012, p. 753.

26 — Point 26 of the order for reference.

27 — According to the BVerfG, in 'borderline cases' of transgressions of competence by the Union, the perspectives of each of those courts may not 'fully' coincide given that, on the one hand, the Member States remain the 'masters of the Treaties' and, on the other, EU law does not have a position (primacy or priority application) which is the same as that of the law of the Federal State vis-à-vis that of the Länder (supremacy).

28 — Point 27 of the order for reference.

58. In any event, at this stage of my reflections, I should like to make two observations of a general nature.

59. The first is that it seems to me an all but impossible task to preserve *this* Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as 'constitutional identity'. That is particularly the case if that 'constitutional identity' is stated to be different from the 'national identity' referred to in Article 4(2) TEU.

60. Such a 'reservation of identity', independently formed and interpreted by the competent — often judicial — bodies of the Member States (of which, it need hardly be recalled, there are currently 28) would very probably leave the EU legal order in a subordinate position, at least in qualitative terms. Without going into details, and without seeking to pass judgment, I think that the characteristics of the case before us may provide a good illustration of the scenario I have just outlined.

61. Second, I think it useful to recall that the Court of Justice has long worked with the category of 'constitutional traditions common' to the Member States when seeking guidelines on which to construct the system of values on which the Union is based.[29] Specifically, the Court of Justice has given preference to those constitutional traditions when establishing a particular culture of rights, namely that of the Union. The Union has thus acquired the character, not just of a community governed by the rule of law, but also of a 'community imbued with a constitutional culture'.[30] That common constitutional culture can be seen as part of the common identity of the Union, with the important consequence, to my mind, that the constitutional identity of each Member State, which of course is specific to the extent necessary, cannot be regarded, to state matters cautiously, as light years away from that common constitutional culture. Rather, a clearly understood, open, attitude to EU law should in the medium and long term give rise, as a principle, to basic convergence between the constitutional identity of the Union and that of each of the Member States.

62. Returning now to the functional difficulty of the request for a preliminary ruling, I consider that the risk of the latter being 'manipulated', in the context of a *national* assessment in the event of an '*ultra vires* review' in conjunction with an 'identity review', is sufficiently real to ask whether an alternative interpretation would be possible which would allow the difficulty in question to be overcome. In my view, an alternative reading would be possible, having regard to what appears to have been at the origin of this line of case-law, whilst at the same time making use of the possibilities afforded by the principle of sincere cooperation (Article 4(3) TEU). Ultimately, it would involve taking advantage of the virtues of the ambiguity that seems to be inherent in the request for a preliminary ruling, to which I have already alluded.

63. It must be borne in mind that the commitment, so to speak, to refer a question to the Court of Justice for a preliminary ruling appears to have been an innovation introduced in the judgment of the BVerfG of 6 July 2010 (*Honeywell*) with the intention, as has been widely acknowledged, of keeping open the dialogue between the courts, in such a way that that dialogue may continue as long as the importance of the case requires.[31] Seen in that light, the fact of providing for a reference for a preliminary ruling to be made could be said to entail a sincere intention that the interpretation that

29 — See Pizzorusso, A., *Il patrimonio costituzionale europeo*, Il Mulino, Bologna, 2012, Chapters IV and V.

30 — See Vosskuhle, A., 'Der Europäische Verfassungsgerichtsverbund', TranState Working Papers No 16, Staatlichkeit im Wandel – Transformations of the State, Bremen, 2009, p. 22, citing Häberle, P., *Europäische Verfassungslehre*, 6th Ed., Nomos, Baden-Baden, 2009, p. 478 et seq.

31 — See the initiative taken some months ago by a group of 35 lawyers proposing that a provision be included in the Law on the BVerfG as a reaction to the fact that no reference was made to the cooperative relationship in the judgment of 30 June 2009. That proposal is available at www.europa-union-de/fileadmin/files_eud/Appell_Vorlagepflicht_BVerfG.pdf.

may be given by the Court of Justice of EU law should serve as a sufficient basis for resolving the claims raised in the proceedings before the national court. It is to be hoped that, in the end, any subsequent review on the basis of the constitutional criteria would not, in the circumstances of the case, reach conclusions that were in open contradiction with the answer given by the Court of Justice.

64. Furthermore, it is clear that the principle of sincere cooperation also applies to courts and tribunals, including the two courts concerned in these important proceedings. [32] That mutual loyalty is all the more important in those cases in which the supreme court of a Member State, responsibly exercising its constitutional jurisdiction, and without going into other considerations, raises, in a spirit of sincere cooperation, its concern about a given decision of an EU body. The principle of sincere cooperation is of course binding on the national court, as it is part of its own responsibility to give that principle form and effect. As far as the Court of Justice is concerned, that principle, in the circumstances of this case, entails a two-fold obligation.

65. In the first place, substantively, that principle requires the Court of Justice to respond in the greatest spirit of cooperation possible to a question which has itself been referred to it in the same spirit; there cannot be the least doubt about that. In particular, if the national court, in explaining the extent to which the act in question causes it to have serious doubts as to validity or interpretation, has been particularly plain-spoken, that will have to be interpreted as an expression of its level of concern in that regard. I understand that that is the sense of the German Government's appeal for 'constructive' treatment of the present case. [33]

66. In the second place, and this is above all what is in issue now, the principle of sincere cooperation requires a particular effort on the part of the Court of Justice to provide an answer on the substance to the questions referred, notwithstanding all the difficulties to which ample reference has been made here. That would require the Court of Justice to proceed on the basis of a particular assumption regarding the ultimate fate of its answer.

67. In concrete terms, that means that the Court of Justice, rather than immediately excluding such a possibility, would in fact trust the national court — once it has considered the answer provided by the Court of Justice to the question raised and without prejudice to the exercise of its own duties — to accept that answer as decisive in the proceedings before it. Sincere cooperation involves an element of trust and that trust may take on a particular meaning in this case. It must be borne in mind that the present request for a preliminary ruling appears to have been cast by the BVerfG in terms which permit the Court of Justice to expect, within the limits of what is reasonable, that the BVerfG will accept as sufficient and final the answer it receives and as providing it with sufficient criteria to enable it to decide on the claims raised in the main proceedings. [34] The 'road map' which the BVerfG itself outlined in *Honeywell* could support this approach. [35]

32 — See, to this effect, Streinz, R., 'Der Kontrollvorbehalt des BVerfG gegenüber dem EuGH nach dem Lissabon-Urteil und dem Honeywell-Beschluss', in Sachs, M., and Siekmann, H., *Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstag*, Duncker & Humblot, Berlin, 2012, p. 978.

33 — That is how the German Government has expressed itself in its written and oral submissions in these proceedings when emphasising the need for the Court of Justice to interpret the Treaties in this case in such a way that a conflict is avoided between the essential components of the constitutional order of the Member States and EU law.

34 — The effects of the clause concerning respect for national identity (Article 4(2) TEU) in the context of a possible reference for a preliminary ruling from the BVerfG are a matter of debate (see Dederer, H.-G., 'Die Grenzen des Vorrangs des Unionsrechts', *JuristenZeitung*, 7/2014). See, in this regard, the Commission's suggestion concerning a precautionary extension of the European framework for review, perhaps by means of a further reference for a preliminary ruling in the unlikely event that the BVerfG, even if the legality of the EU act were confirmed by the Court of Justice's answer, should decide to declare that act ultra vires (point 37 of the Commission's observations).

35 — In this regard, the BVerfG considers (point 66 of *Honeywell*) that the ultra vires review should not be detrimental to the principle of integration and should be exercised, to use its own words, 'cautiously' or 'moderately' ('zurückhaltend'). Above and beyond that, the particular nature of the interpretive methods of the Court of Justice should lead the national court itself not to substitute its own interpretive methods for those of the Court of Justice. That is the sense of the national court's statement that it would be legitimate for the Court of Justice to have an 'expectation' that possible mistakes should, to a certain degree, be tolerated ('Anspruch auf Fehlertoleranz').

68. In so far as that analysis of the situation is acceptable, I take the view that the Court of Justice should, in approaching the functional problem to which this request for a preliminary ruling gives rise, disregard possibilities other than the one I have just outlined, inasmuch as they can only be regarded as extreme cases, scarcely conceivable, and, ultimately, an insufficient basis for refusing to give an answer on the substance in response to the questions raised in the present request for a preliminary ruling.

69. Accordingly, as an intermediate conclusion, I propose that the Court of Justice should declare that this request for a preliminary ruling may be answered on the substance.

V – **Admissibility**

70. A number of Member States, as well as the institutions which have submitted observations in the present case, have raised the issue of admissibility in relation to the BVerfG's principal questions, maintaining that they concern a question of validity that affects an act, the OMT programme, which does not have legal effects vis-à-vis third parties.

71. Stated very briefly, those interested parties emphasise the non-final, even 'preparatory', nature of the act of 6 September 2012, by which the Governing Council decided to adopt the essential criteria that would govern the OMT programme and whose final adoption is still pending. As the ECB has confirmed, certain criteria were decided upon at that meeting but not the OMT programme as such. It will be possible to review the validity of that programme only when the Governing Council formally adopts the programme and publishes it, in accordance with the rules pertaining to legal acts laid down in the Statute of the ESCB and of the ECB.

72. It is argued that the case-law of the Court of Justice lends support in principle to that interpretation. The case-law concerning actions for annulment precludes challenges to acts which have no legal effects.[36] In the precise context of references for preliminary rulings, the Court of Justice has in the past declared inadmissible references entailing a review of the validity of an 'atypical' act, which has not been published and which does not have binding effects.[37] Various parties participating in these proceedings submit that that is the case of the OMT programme, which was announced by the President of the ECB at the press conference on 6 September 2012 and whose principal technical features were subsequently described in a press release.

73. For the reasons which I shall set out below, it none the less seems to me that the OMT programme is an act whose validity may be examined in preliminary ruling proceedings. There are two separate reasons for that conclusion. In the first place, I believe that it is decisive that the act in question is one which sets out the broad features of a general programme for action by an EU institution. In the second place, it seems to me necessary to take into account the particular importance which public communication has assumed for the ECB in the implementation of monetary policy today.

74. From the very beginning the Court of Justice has required that, for an act to be actionable, two conditions must be met: the act must be binding and must be capable of producing legal effects.[38] Those conditions are cumulative, although sometimes, for example when the validity of recommendations is reviewed in preliminary ruling proceedings, they are presented as alternatives.[39]

36 — See, inter alia, judgments in *CBR and Others* v *Commission* (8/66 to 11/66, EU:C:1967:7), paragraph 91; *Sucrimex and Westzucker* v *Commission* (133/79, EU:C:1980:104), paragraphs 12 to 19; and *Gauff Ingenieure* v *Commission* (182/80, EU:C:1982:78), paragraph 18.

37 — Judgment in *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312), paragraphs 38 to 41.

38 — See the case-law cited in footnote 36.

39 — See the judgments in *Grimaldi* (322/88, EU:C:1989:646), paragraphs 8 and 9, and *Deutsche Shell* (C-188/91, EU:C:1993:24), paragraph 18.

75. I consider, however, that those two conditions are assessed differently depending on who is the direct addressee of the contested act. As I shall now explain, the case-law has, in the application of those conditions, adopted a more flexible approach where the impugned act is a measure outlining a general programme of action, intended to bind the actual authority which is the author of the decision, than where the act contains a measure which creates rights and obligations with regard to third parties. The reason for that is that general action programmes of public authorities may take atypical forms and yet still be capable of having a very direct impact on the legal situation of individuals. On the other hand, measures whose direct addressees are individuals must meet particular conditions as to substance and form if they are not to be treated as non-existent.

76. A general programme of action, such as that at issue here, may be presented using atypical techniques, it may be addressed to the authority which is itself the author of the act, it may be in formal terms non-existent so far as concerns the world outside the authority, but the fact that it is capable of having a decisive impact on the legal situation of third parties justifies taking a non-formalistic approach when considering whether it should be treated as an 'act'. Otherwise, there would be a risk that an institution could undermine the system of acts and the corresponding judicial safeguards by disguising acts that are intended to produce external effects as general programmes.

77. The case-law of the Court of Justice has been particularly flexible when dealing with general action programmes of this kind which are capable of producing external effects.

78. The judgment in *Commission* v *Council* ('*ERTA*'),[40] given in 1971, is an important starting point since it considers, inter alia, the status of the proceedings of the Council relating to the negotiation and conclusion by the Member States of an international agreement. In the Council's view, those proceedings did not constitute, either by their form or by their subject-matter or content, an act open to legal challenge but were nothing more than a coordination of policies amongst Member States within the framework of the Council, without any intention to create rights, impose obligations or alter any legal position.

79. When it analysed the Council's arguments the Court of Justice stated that judicial review must be available in the case of 'all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.[41] Having examined the decision in issue, the Court of Justice principally drew attention to two characteristics: first, it was not simply the expression of a voluntary coordination, but reflected a course of action that was binding;[42] and, second, the provisions adopted in that decision were capable of 'derogating … from the procedure laid down by the Treaty'.[43]

80. Similarly, and as a supplement to its ruling on the substance in the *ERTA* judgment (EU:C:1971:32), the Court of Justice took particular account of the *circumstances* in which the contested act was adopted. In addition to the objective aspect referred to above, the context in which an act is adopted may provide further indications which confirm either the author's intention that the act should produce effects vis-à-vis third parties or the fact that the author was aware of the potential external impact of the measure. The significance of the surrounding circumstances was highlighted by the Court of Justice in *France* v *Commission*,[44] in which it was accepted that an action could be brought in respect of an internal Commission instruction because it was distinguished from an ordinary service instruction 'both by the circumstances in which it was adopted and by the conditions under which it was prepared, drawn up and published'.[45]

40 — 22/70, EU:C:1971:32.

41 — Ibid., paragraph 42.

42 — Ibid., paragraph 53.

43 — Ibid., paragraph 54.

44 — C-366/88, EU:C:1990:348.

45 — Ibid., paragraph 10.

81. Against the background of that case-law, I shall now go on to consider whether the act whose validity is questioned by the referring court is open to legal challenge.

82. At least in terms of its formal presentation, the OMT programme is a measure with atypical features. It was drawn up in the Governing Council of the ECB on 5 and 6 September 2012 and was recorded in the minutes of that meeting, which indicated that a description of its technical features would subsequently be given in a press release. Thus, details of the programme's technical features were given at a press conference held by the President of the ECB and a press release was subsequently published in English on the ECB's website. The publication and disclosure of the programme on the internet is the only 'official' written text available about the OMT programme if one discounts the draft Decision and Guideline, which the ECB has produced to the Court in these proceedings but which are still internal Bank documents awaiting final adoption and subsequent publication in the *Official Journal*. Those drafts describe in detail what had been spelled out in general terms, albeit with considerable precision, in the press release.

83. There is no doubt that the OMT programme is a decision with specific content, which was the subject of discussion over two days, and that the principal features of the programme were adopted within the Governing Council. Furthermore, the fact that the basic features of the programme were made public, both at the press conference and in written form on the ECB's website, confirms the obvious willingness of the ECB to make public what had previously been decided upon within the Governing Council. The measure in question is a general programme of action since it lays down the conditions on which the ECB will act in a situation in which the monetary policy transmission channels have become blocked but it is also a measure which aims to have an immediate external effect. Otherwise, it would not have been announced with the widest publicity possible at a press conference and its technical features would not have been published on the ECB's website.

84. Moreover, the circumstances surrounding the OMT programme appear to confirm that the ECB's objective was to 'intervene' in the markets, perhaps in an unconventional way, solely by making an announcement about the programme. The speech given by the President of the ECB on 26 July 2012 in London, referred to above, which stated that all the necessary measures would be taken to 'save the common currency', the press conference on 2 August 2012 following the meeting of the Governing Council of the same day and the situation affecting the government bond markets of various Member States at that time all confirm that the ECB's intention in making an announcement about the OMT programme was not just to give an account of internal work on an initiative that was still at the discussion stage but also to produce an effect by making an announcement about the creation of a potentially ambitious programme intended, so it is claimed, to put an end to some of the difficulties that the monetary policy transmission mechanism was experiencing at that time. The proof of that is the significant impact which there is every indication that that announcement of the programme had on the financial markets, an impact which, according to the ECB and the Commission, is still being felt more than two years later.

85. It is also important to point out that the OMT programme entailed not the publication of a simple individual act but rather the announcement of a full normative programme, for the future, which included relatively precise conditions and whose purpose was regulatory. In view of the content of the programme, it may be added that on 6 September 2012 the ECB was not making an announcement about some decision of little consequence. On the contrary, details were published on that day of a measure which was clearly of great significance for the euro area and which was intended, although it was not yet complete, to last over time.

86. At this point it is appropriate to refer to the second of the circumstances which seem to me relevant for the purpose of rejecting the objections to admissibility. Account must be taken of the fact that the present case concerns an act of public communication on the part of a central bank, under which approval is given to a monetary-policy programme. Central bank communications are not comparable to those of other institutions, whether they be political or technical. Over the last 30 years, central banks have undergone significant developments that have affected their instruments of monetary policy, which the experts all agree now include public communication.

87. It is a fact that the communications strategy of central banks has become one of the central pillars of contemporary monetary policy. Given the impossibility of predicting rational behaviour on the markets, an effective way of managing expectations and, therefore, of ensuring the effectiveness of monetary policy is to exploit all the possibilities of public communication (communications strategies) open to central banks. [46] Taking account not only of the reputation of central banks and the information available to them but also of the powers afforded them by conventional monetary policy instruments, announcements, opinions or statements by the representatives of central banks generally play a crucial role in the development of monetary policy today. [47]

88. There is no doubt that the ECB now also includes communication among its key monetary policy tools. The ECB has in the past acknowledged that itself and nobody would deny that the regular communication to the public by the ECB of the broad lines of its policy, or of particular opinions which may indicate future courses of action on its part, represents a central pillar of its activities. [48] To my mind, this element, which is very particular to the ECB and characteristic of it, plays a highly significant role in defining the nature of an act like the announcement of the OMT programme on 6 September 2012.

89. Finally, and in view of the great importance of the ECB's communication strategy, it is appropriate to bear in mind that the alternative — namely declaring an act such as the OMT programme not to be actionable — would entail the risk of excluding a significant number of decisions of the ECB from all judicial review merely on the ground that they have not been formally adopted and published in the Official Journal. If a measure does not need to be published officially in its standard form in order to produce effects — because it is enough to publicise it at a press conference or through a press release for it to have an impact outside the institution –, the system of acts and judicial review provided for in the Treaties could be seriously undermined if it were not possible to review the legality of that measure.

90. Accordingly, I take the view that, in the specific case of actions of this kind by the ECB, in which acts of public communication assume special significance for the effectiveness of monetary policy, an act such as the one called in question by the BVerfG, as it was announced on 6 September 2012, constitutes — having regard not only to its content and the actual effects that it may produce but also to the circumstances in which the measure was adopted — an act of an institution whose validity may be called in question in the framework of proceedings for a preliminary ruling under Article 267 TFEU.

91. I therefore consider that the objections to admissibility raised against the questions referred for a preliminary ruling on validity must be rejected. It will therefore not be necessary to rule on the question on interpretation which the referring court has put forward in the alternative.

46 — See Blinder, A.S., Ehrmann, M., Fratzscher, M., de Hann, J, Jansen, D.-J., *Central Bank Communication and Monetary Policy. A Survey of Theory and Evidence*, and Woodford, M., *Fedspeak: Does It Matter How Central Bankers Explain Themselves*?, Columbia University, April 2013.

47 — In the opinion of the current Chairman of the United States Federal Reserve, Ms Yellen, 'The effects of monetary policy depend critically on the public getting the message about what policy will do months or years in the future'. Speech at the Society of American Business Editors and Writers 50th Anniversary Conference, Washington D.C., available at http://www.federalreserve.gov/newsevents/speech/yellen20130404a.htm.

48 — Central European Bank, *The Monetary Policy of the ECB*, Frankfurt, 2011, p. 94 et seq.

VI – **The questions referred for a preliminary ruling**

A – *The first question referred: Articles 119 TFEU and 127(1) and (2) TFEU and the limits of the ECB's monetary policy*

92. By its first question, the BVerfG airs its doubts about the validity of the OMT programme announced by the ECB on 6 September 2012, specifically asking the Court of Justice whether it is a measure that is incompatible with Articles 119 TFEU and 127(1) and (2) TFEU and whether it encroaches upon the competence of the Member States.

93. In its order for reference, the BVerfG, after extensive and detailed reasoning, concludes that there are sufficient grounds to support the view that the ECB has adopted an economic policy measure rather than a monetary policy measure. The BVerfG also finds there to be an ultra vires act in breach of the principle of conferral, which must determine the ECB's conduct. The BVerfG points to four aspects of the OMT programme which, in its view, confirm the aforementioned ultra vires act: conditionality, selectivity, parallelism and circumvention. The concerns of the referring court highlight, in more 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.

1. Position of the interested parties

94. All the applicants in the main proceedings in essence concur that the Treaties should be interpreted as meaning that a programme such as that announced by the ECB on 6 September 2012 constitutes a measure of economic policy. In their opinion, the OMT programme disregards the mandate which primarily constrains the ECB to the objective of maintaining price stability, since it is a measure that has a direct impact on the financing sources of the Member States concerned, which places it in the area of economic policy. In their submissions, they refer repeatedly to the judgment in *Pringle*,[49] in which the Court stated that the creation of the ESM was an economic policy measure and refused to classify it as a monetary policy. The applicants in the main proceedings submit that, in view of the features common to the ESM and a programme such as OMT, the latter must also be classified as an economic policy measure.

95. Both Mr Gauweiler and Mr Huber place particular emphasis on the fact that the true objective of the OMT programme is, in their view, not to re-establish the monetary policy transmission channels but rather to 'save the euro' by means of the 'communitisation' or pooling of the debt of certain Member States, which in their submission is incompatible with the Treaties since it puts some Member States at risk of assuming the debts of other Member States. They submit that such a measure clearly goes beyond the 'support' for the economic policies of the Union and the Member States which the ECB may give under the Treaties.

96. Mr von Stein rejects the proposition that interest rates on sovereign debt markets were at artificial levels in the months preceding the announcement about the OMT programme. He submits that those interest rates merely reflected a genuine market price, in respect of which the ECB intervened, manipulating that price artificially, by announcing its willingness to buy the bonds of certain Member States. He argues that distorting the market in that way is not consistent with the mandate which the Treaties confer on the ECB, which is to maintain price stability.

49 — C-370/12, EU:C:2012:756.

97. Mr Bandulet emphasises that the OMT programme cannot make up for the structural shortcomings in the design of monetary union. He argues that that is not at all a competence that has been conferred on the ECB since, if it were otherwise, the democratic principle and the principle of the sovereignty of the people would be infringed.

98. The parliamentary group Die Linke also disputes that the ECB is competent to adopt the OMT programme, although it deploys different arguments. Die Linke emphasises the economic consequences which have followed from the successive financial assistance programmes in various Member States. The group maintains that those effects confirm that the ECB, in supporting those rescue packages through the implementation of the OMT programme, is involving itself in the economic policy of the Member States. Die Linke also invokes various provisions of the Charter of Fundamental Rights of the European Union in order to challenge the intervention of the Union and the ECB in the States that are subject to financial assistance programmes.

99. All the States that have participated in these proceedings, together with the ECB and the Commission ('the States and the institutions'), submit, in variously nuanced ways, that the OMT programme, as it was made known through the press release, is a monetary policy measure that is compatible with the competences conferred on the ECB by the Treaties.

100. The States and the institutions are also agreed on the fact that the ECB enjoys a broad discretion in the definition and implementation of monetary policy. The Court of Justice should acknowledge that broad discretion and recognise the objectives which the ECB set forth when announcing its OMT programme. The States and the institutions accept that, in the framework of those objectives, the ECB may adopt unconventional monetary policy measures, provided that that is strictly necessary to achieve the objectives set. Specifically, both the Republic of Poland and the Kingdom of Spain submit that the OMT programme is consistent with the various aspects of the principle of proportionality.

101. The States and the institutions also all deny, contrary to the view expressed by the referring court, that it follows from the judgment in *Pringle* (EU:C:2012:756) that the OMT programme is an economic policy measure. In their view, *Pringle* recognises that economic policy and monetary policy are closely linked, with the result that an economic policy measure may have an impact on monetary policy and vice versa, without that altering the nature of the measure. In the present case, the fact that the OMT programme may have an impact on economic policy does not, in itself, convert that programme into an economic policy measure.

102. As regards the fact that the OMT programme may bring about artificial changes in prices on the government bond market, the Government of the Republic of Poland, the Commission and the ECB submit that all monetary policy has the aim of altering prices since it is an inherent function of monetary policy to have an effect on the markets by means of measures that modify certain patterns of behaviour, although always with the objective of fulfilling the mandate conferred on the Bank, in this case the maintenance of price stability.

103. The Federal Republic of Germany defends in principle the position that the OMT programme in the terms in which it is known is lawful. It has, however, stressed that currently all that exists is an announcement giving notice of that programme and that it will be necessary to wait until the programme is actually implemented in order to determine whether it is in fact a measure of economic policy or monetary policy. In any event, the Federal Republic of Germany submits that the ECB enjoys a broad discretion and that a measure would transgress the boundaries set by the Treaties only if it was obviously an economic policy measure. It also suggests that it would be helpful if the Court of Justice were to provide criteria that would permit the OMT programme to be implemented in a way compatible with the Treaties and, so far as possible, with the fundamental constitutional structures of the Federal Republic of Germany.

104. The ECB defends the legality of the OMT programme by referring to the events that occurred in the summer of 2012. At that time fears that the euro was reversible were spreading among investors, bringing about a marked spike in the interest rates paid in respect of the government bonds of various Member States. In that situation the ECB argues that it had lost its ability to implement monetary policy through the usual channels for monetary policy transmission. The resulting fragmentation of the sovereign debt markets, together with the financing difficulties experienced by various Member States (and also, by extension, the financial institutions of those States), was preventing the proper transmission of the 'impulses' or signals which the ECB normally sends out. In the ECB's submission, those circumstances were grounds for adopting an unconventional monetary policy measure, such as the OMT programme. In short, the aim of the programme, according to the ECB, is not to facilitate the financing conditions of certain Member States, or to determine their economic policies, but rather to 'unblock' the ECB's monetary policy transmission channels.

105. The ECB denies that the technical features of the OMT programme mask an economic policy measure. The programme's 'conditionality' is, in the Bank's view, essential in order to prevent implementation of the programme providing an incentive to the States concerned to cease carrying out the structural reforms necessary to improve their economic fundamentals. Similarly, the ECB argues that the 'selectivity' of the measures is inherent in the OMT programme since the disruption of the monetary policy transmission channels arose as a result of increases in the interest rates for the government bonds of certain Member States. In short, the ECB submits that the OMT programme contains safeguards that ensure it is linked to monetary policy and remains within the scope of the powers which the Treaties confer on the Bank.

2. Analysis

a) Preliminary observations

106. Before embarking on the analysis specific to the question raised by the BVerfG, it is appropriate to pause to consider two decisive aspects of the present case: (i) the status and mandate of the ECB, as defined in the Treaties, and (ii) the concept of 'unconventional monetary policy measures'. Those two areas will provide us with the basic elements for assessing the legality of a programme such like OMT, which, according to the ECB, is among those unconventional monetary policy measures.

i) The status and mandate of the ECB

107. The ECB is the institution on which the Treaties confer responsibility for the exercise of the Union's exclusive competence in respect of monetary policy. The ECB and the national central banks constitute the ESCB, whose principal task, notwithstanding any measures that may be taken in 'support of economic policy', is to ensure 'price stability'.[50] Therefore, unlike other central banks, the ECB is characterised by the fact that it is constrained to a clear mandate that is closely linked to anti-inflationary goals. Both the *travaux préparatoires* relating to the Treaty of Maastricht[51] and studies of the history of monetary policy[52] confirm the importance of that mandate in the negotiations that culminated in the creation of the ECB.

50 — Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU and Articles 2 and 3, paragraph 3.3, of the Statute of the ESCB and of the ECB.

51 — In particular, see the *Report on Economic and Monetary Union in the European Community*, better known as the *Delors Report*, of 17 April 1989, in particular point 32.

52 — See, inter alia, Dyson, K., and Featherstone, K., *The Road to Maastricht. Negotiating Economic and Monetary Union*, Oxford University Press, Oxford, 1999, p. 378 et seq., Ungerer, H., *A Concise History of European Monetary Integration. From EPU to EMU*, Quorum Books, Westport-London, 1997, p. 209 et seq., and Viebig, J., *Der Vertrag von Maastricht. Die Positionen Deutschlands und Frankreichs zur Europäischen Wirtschafts- und Währungsunion*, Schäffer-Poeschel, 1999, p. 150 et seq.

108. Besides the fact that it must strictly adhere to the objective of ensuring price stability, a further characteristic of the ECB is that it has a high degree of functional as well as organic independence. [53] The Treaties stress on numerous occasions the independent nature of all the actions undertaken by the ECB, which should be considered in conjunction with the fact that the Statute of the ESCB and of the ECB is very difficult to amend, something which differentiates the Bank from the central banks around it, whose regulatory framework may be amended by the relevant national Parliaments. [54] That is not the case of the ECB, since any amendment of its Statute requires amendment of the Treaties. [55]

109. Just as is the case with national central banks, the ECB's independence is also intended to ensure that it is kept away from the political debate, there being an absolute prohibition on any instructions from other institutions or from the Member States. [56] Moreover, that detachment from political activity is necessary because of the extremely technical nature and high degree of specialisation characteristic of monetary policy. [57]

110. In fact, the Treaties confer on the ECB sole responsibility for framing and implementing monetary policy, for which purpose it is given substantial resources with which to undertake its functions. On account of those resources the ECB also has access to knowledge and particularly valuable information, which permits it to perform its tasks more effectively whilst also, over time, bolstering its technical expertise and reputation. Those features are essential for ensuring that monetary policy signals actually reach the economy since, as has previously been stated, one of the functions of central banks today is the management of expectations, and technical expertise, reputation and public communication are basic tools for carrying out that function.

111. The ECB must accordingly be afforded a broad discretion for the purpose of framing and implementing the Union's monetary policy. [58] The Courts, when reviewing the ECB's activity, must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution. [59]

53 — Article 282(3) TFEU: 'The European Central Bank shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence.'

54 — De Grauwe, P., *Economics of Monetary Union*, 10th ed., Oxford University Press, Oxford, 2014, pp. 156 to 159.

55 — See Sparve, R., 'Central bank Independence under European Union and other international standards' in *Legal Aspects of the European System of Central Banks. Liber Amicorum Paolo Zamboni Garavelli*, ECB, Frankfurt am Main, 2005.

56 — Ibid.

57 — Concerning the independence of the ECB and its limits, see, in particular, Zilioli, C., and Selmayr, M., 'The European Central Bank: An Independent Specialised Organisation of Community Law', *Common Market Law Review*, No 37, 3, 2000, p. 591 et seq.; Dernedde, I., *Autonomie der Europäische Zentralbank. Im Spannungsfeld zwischen demokratischer Legitimation der Europäischen Union und Währungsstabilität*, Dr. Kovac, Hamburg, 2002; and, for a comparative perspective, Amtenbrink, F., *The Democratic Accountability of Central Banks. A Comparative Study of the European Central Bank*, Hart, Oxford-Portland, 1999.

58 — See, although in different spheres from monetary policy, the judgments in *Sison* v *Council* (C-266/05 P, EU:C:2007:75), paragraphs 32 to 34, *Arcelor Atlantique et Lorraine and Others* (C-127/07, EU:C:2008:728), paragraph 57, and *Vodafone and Others* (C-58/08, EU:C:2010:321), paragraph 52.

59 — In this regard, see Louis, J.-V., *L'Union européenne et sa monnaie, Commentaire J. Mégret*, 3rd ed., Université de l'Université de Bruxelles, Brussels, 2009, p. 211; Craig, P., 'EMU, the European Central Bank and Judicial Review', in Beaumont, P., and Walker, N. (eds.), *Legal Framework of the Single European Currency*, Hart, Oxford-Portland, 1999, pp. 97 to 114, and Malatesta, A., *La Banca Centrale Europea*, Giuffrè, Milan, 2003, p. 183 et seq.

112. Finally, it is important to point out that the ECB's monetary policy is implemented, as has been noted, through various 'transmission channels or mechanisms', by means of which the Bank intervenes in the market and fulfils its mandate of ensuring price stability. [60] In order to carry out its monetary policy, the ECB controls the monetary base of the euro area economy, which it does by transmitting the appropriate 'impulses' or signals, chiefly through the setting of interest rates, which will subsequently pass from the financial sector to firms and households. [61]

113. In this respect, to ensure the proper functioning of these transmission channels, the Statute of the ESCB and of the ECB confers on the ESCB an express competence to adopt a set of 'monetary functions and operations'. Of those operations, the ones provided for in Article 18(1) of the Statute are particularly relevant for the purposes of this case: Article 18(1) permits the ECB and the national central banks to 'operate in the financial markets by buying and selling outright (spot and forward) or under repurchase agreement and by lending or borrowing claims and marketable instruments, whether in euro or other currencies, as well as precious metals'.

114. However, as will be seen, a programme like OMT cannot be said to be among the ECB's ordinary monetary policy instruments. The OMT programme formally deploys one of the monetary operations mentioned above, but does so in a sufficiently unusual manner to warrant classification as an 'unconventional monetary policy measure'. I shall explain below to what that concept more specifically refers, how it has been justified by the ECB and the extent to which it is a means duly provided for in the Treaties.

ii) Unconventional monetary policy measures and classification of the OMT programme as such

– The ECB's view of unconventional monetary policy measures

115. The ECB defends the lawfulness of the OMT programme on the basis that it is a measure intended to 'unblock' the Union's monetary policy transmission channels. As has been explained above, those monetary policy transmission channels do not function as mechanisms producing immediate effect but as a framework through which the ECB sends out a series of 'impulses' or signals with a view to them reaching the real economy. According to the ECB, monetary policy may be affected by factors external to the transmission channels, factors which are liable to disrupt the proper functioning of the signals sent out by the ECB: an international political or economic crisis, or a significant change in oil prices, amongst other factors, may severely interfere with the 'impulses' that the ECB sends out via the monetary policy transmission channels.

116. When a situation of that kind occurs, the ECB considers it has competence to intervene using its own instruments with the aim of 'unblocking' those channels. In such a case the actions it takes are different from those which are part of the ECB's normal practice, since they can be said not to involve so much a 'standard' operation but rather an operation to 'unblock' and subsequently restore monetary policy instruments properly so-called. [62]

60 — 'The process through which monetary policy decisions affect the economy in general, and the price level in particular, is known as the transmission mechanism of monetary policy.' *The Monetary Policy of the ECB*, ECB, Frankfurt am Main, 2011, p. 62. In this respect, see Angeloni, I., Kashyap, A., and Mojon, B. (eds.), *Monetary Policy Transmission in the Euro Area*, Cambridge University Press, Cambridge, 2003, and Suardi, M., 'Monetary Policy Transmission in EMU', in: Buti, M., and Sapir, A., *EMU and Economic Policy In Europe. The Challenge of the Early Years*, E. Elgar, Cheltenham-Northampton, 2002.

61 — 'The transmission of monetary impulses to the real sector involves a number of different mechanisms and actions by economic agents at various stages of the process. As a result, monetary policy action usually takes a considerable time to affect price developments. Furthermore, the size and strength of the different effects can vary according to the state of the economy, which makes the precise impact difficult to estimate. Taken together, central banks typically see themselves confronted with long, variable and uncertain lags in the conduct of monetary policy', *The Monetary Policy of the ECB*, ECB, Frankfurt am Main, 2011, pp. 62 and 63. See also Angeloni, I., Kashyap, A. and Mojon, B. (eds.), op. cit.

62 — On this point, see Cour-Thimann, P., and Winkler, B., 'The ECB's Non-Standard Monetary Policy Measures. The Role of Institutional Factors and Financial Structure', *Oxford Review of Economic Policy*, 2012, 28, p. 72 et seq.

117. Both the ECB and the Member States that have participated in these proceedings maintain that it is legitimate to have recourse to unconventional measures of this kind as part of monetary policy. In fact, according to the documents before the Court, intervention of this sort has been used by the majority of central banks throughout the international financial crisis that began in 2008,[63] including, as is apparent from the present proceedings, by the ECB itself.[64] In the view of the ECB and those Member States, the Treaties do not prevent the ECB from exercising its powers to restore its monetary policy instruments when circumstances arise which significantly disrupt the normal functioning of the transmission channels. In the Commission's submission, action of that kind is compatible with the Treaties, provided that it is carried out prudently and is subject to safeguards.

118. On the basis of the foregoing considerations, it is appropriate to consider the precise nature of the OMT programme, as it was announced in the press release of 6 September 2012.

– The OMT programme as an unconventional monetary policy measure

119. The OMT programme belongs, formally, among the operations provided for in Article 18.1 of the Statute of the ESCB and of the ECB. It is clear that, in conferring power on the ESCB to buy claims and marketable instruments, that provision seeks, first and foremost, to ensure that tools are available to the ECB for controlling the monetary base, as a conventional means of maintaining price stability.

120. It should, however, immediately be added that the OMT programme uses the powers set out in Article 18.1 of the Statute in a way which is at some remove from the ECB's standard practice in carrying out its operations. It is clear that a selective measure, which is directed at one or more States of the euro area and which entails purchasing their bonds, without any previous quantitative limit being set, in the expectation that market financing conditions will improve, is at some remove from the ECB's standard practice.

121. As is stated in the press release of 6 September 2012, the OMT programme provides for intervention by the ECB on the secondary government bond market, enabling the Bank to purchase government bonds of euro area States that are subject to a financial assistance programme and that are presumably experiencing difficulties in raising loans. The premiss on which the OMT programme is based is the occurrence of an exogenous shock that disrupts the monetary policy transmission channels. That disruptive factor comprises, so the ECB reasons, a relatively sudden and virtually unbearable increase in the risk premia of certain euro area States, an increase which in principle does not reflect the macroeconomic reality of those States and which, as a result, prevents the ECB from transmitting its signals effectively and, therefore, from fulfilling its price stability mandate.

122. In view of the foregoing, I therefore consider that the OMT programme may be classified as an unconventional monetary policy measure, with the consequences that that will entail for the purposes of reviewing the measure.

b) The ECB's competences and the OMT programme

123. Having made the foregoing observations, I shall focus on two matters to which consideration must be given if the first question raised by the BVerfG is to be answered comprehensively.

63 — See the comparison carried out by Lenza, M., Pill, H., and Reichlin, L., 'Monetary Policy in Exceptional Times', *Economic Policy* (62) 2010, and García-Andrade, J., 'El sistema Monetario en una Unión Europea de Derecho', in Salvador Armendáriz, M.A. (Ed.), *Regulación bancaria: transformación y Estado de Derecho*, Aranzadi, Cizur Menor, 2014.

64 — The ECB has used various unconventional measures in the past, such as a fixed-rate liquidity injection with full allotment, extension of the list of assets accepted as a guarantee, a longer-term liquidity injection or the purchase of specific debt securities. Concerning these measures, see Hinarejos, A., *The Euro Area Crisis in Constitutional Perspective*, Oxford University Press, Oxford, 2014, Chapter 3, point 3.1.

124. In the first place it is necessary to consider whether a programme such as OMT may be classified as a monetary policy measure or is, instead, an economic policy measure and, therefore, prohibited so far as the ECB is concerned. In undertaking that assessment, the technical features pointed out by the BVerfG will each be individually considered. Thereafter, if it is possible to classify the OMT programme as a monetary policy measure, as I shall propose, it will be necessary to examine the programme in the light of the principle of proportionality within the meaning of Article 5(4) TEU.

i) The OMT programme and the economic policies of the Union and the Member States as a limit on the ECB's competences

– The Union's economic and monetary policies

125. As I have indicated, the BVerfG is asking whether the ECB, in approving the OMT programme, adopted an economic rather than a monetary policy measure, thereby encroaching upon the competence which Article 119(1) TFEU confers on the Council and the Member States.

126. If we consider primary EU law, Article 119(1) TFEU gives a brief description of the main components of the economic policy of the Union, stating that it is to be based 'on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition'. Although the provision is general and thus ambiguous, it none the less provides the basic, defining, elements of those aspects of economic policy which fall within the Union's competence.

127. The Treaties are silent, however, when it comes to defining the exclusive competence of the Union in relation to monetary policy. The Court of Justice established that in its judgment in *Pringle* when it found itself obliged to use, as the sole point of reference, the monetary policy objectives laid down by the FEU Treaty.[65] The primary objective of EU monetary policy, price stability, and support for the general economic policies in the Union, form the principal criterion for defining monetary policy (Articles 127(1) TFEU and 282(2) TFEU). The Court of Justice confirmed that this was so in *Pringle*, in which the objectives ascribed to that policy were the sole criterion it used when determining whether or not an amendment of the Treaty fell within the sphere of monetary policy.

128. Despite the fact that, on the face of it, the Treaties provide only limited criteria, EU law has a number of useful interpretative tools at its disposal for the purpose of determining whether a decision falls within the sphere of the Union's economic policy or its monetary policy.

129. Although it may appear self-evident, it is important to make the point that monetary policy forms part of general economic policy. The division that EU law makes between those policies is a requirement imposed by the structure of the Treaties and by the horizontal and vertical distribution of powers within the Union, but in economic terms it may be stated that any monetary policy measure is ultimately encompassed by the broader category of general economic policy. That connection between the two policies was highlighted by the Court of Justice itself, and by Advocate General Kokott in her View, in *Pringle*, when it was stated that 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 euro.[66] That reasoning is entirely valid if turned around, as has been pointed out by the ECB, the Commission and the majority of the Member States that have participated in these proceedings, 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.

65 — *Pringle* (EU:C:2012:756), paragraph 55.

66 — *Pringle* (EU:C:2012:756), paragraph 56, and View of Advocate General Kokott (EU:C:2012:675), point 85.

130. The fact that the Treaty refrains from providing a precise definition of the monetary policy of the Union is consistent with a functional view of the role of monetary policy, according to which every measure that is given effect through monetary policy instruments constitutes monetary policy. Therefore, if a measure belongs to the category of instruments which the law provides for carrying out monetary policy, there is an initial presumption that such a measure is the result of the Union's monetary policy being carried out. That is clearly a presumption that could be rebutted if, for example, the measure were to pursue objectives other than those specifically listed in Articles 127(1) TFEU and 282(2) TFEU.

131. Similarly, other provisions of the Treaty that relate to monetary policy provide relevant indications which serve to define that policy more fully. Thus, Articles 123 TFEU and 125 TFEU, which I shall consider more closely when addressing the second question referred for a preliminary ruling, lay down strict prohibitions of the financing of States, whether by means of monetary financing measures or by means of transfers between Member States. Those prohibitions confirm that monetary union, although it is an integral part of a Union founded on the value of solidarity (Article 2 TEU),[67] also seeks to maintain financial stability, for which purpose it is based on a principle of fiscal discipline and the principle that there is no shared financial liability (the 'no-bailout' rule).[68]

132. Therefore, in order for a measure of the ECB actually to form part of monetary policy, it must specifically serve the primary objective of maintaining price stability and it must also take the form of one of the monetary policy instruments expressly provided for in the Treaties and not be contrary to the requirement for fiscal discipline and the principle that there is no shared financial liability. If there are isolated economic-policy aspects to the measure at issue, the latter will be compatible with the ECB's mandate only as long as it serves to 'support' economic policy measures and is subordinate to the ECB's overriding objective.

– The OMT programme in the light of the criteria for defining the Union's economic and monetary policies

133. Focusing now on the criteria which have been discussed above, it is appropriate to consider whether the OMT programme is, in nature, a monetary policy measure or an economic policy measure. The referring court has drawn attention to a number of matters that could show that the measure in question is one of economic policy and I shall focus individually on each of them. However, as a preliminary point, it is important to consider the objectives which the ECB has advanced to justify the OMT programme and which have been called in question by the BVerfG and rejected by the applicants in the main proceedings. After considering those grounds and how they should be classified legally, I shall examine the matters singled out by the referring court: conditionality, parallelism, selectivity and circumvention.

– The objectives of the OMT programme

134. As the ECB has explained in detail in its written observations, in the summer of 2012 a number of exceptional circumstances converged in the euro area economy: excessive risk premia applied to various Member States, high volatility in government bond markets, fragmentation of credit on the interbank market and an increase in the financing costs of firms as a result of all the foregoing factors. Those events were also strongly influenced by the increased nervousness of the markets in the

67 — View of Advocate General Kokott in *Pringle* (EU:C:2012:675), points 142 and 143.

68 — *Pringle* (EU:C:2012:756), paragraph 135, states that '[c]ompliance with [budgetary] discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'.

face of a possible disintegration of the single currency, whether as a result of one or more of the countries of the euro area leaving the currency or as a result of the direct dissolution of the euro and a return to national currencies. Those facts have not, in essence, been denied by the parties that have participated in these preliminary ruling proceedings.

135. According to the ECB, the circumstances described above disrupted the conventional instruments of monetary policy. Interest rates on government bonds were being set on the basis not of the quality of the security, but of the location of the debtor. Territorial fragmentation of the interest rates applied to bonds issued by States of the euro area, on conditions that in some cases did not reflect the underlying macroeconomic situation of the States concerned, was, so the ECB argues, a serious obstacle to its monetary policy, which depended on the use of various means or channels of transmission. When the sovereign debt market, one of the central monetary policy transmission channels, was so seriously disrupted, the ECB claims that it lost a lot of the scope available to it for carrying out the task conferred on it by the Treaties.

136. In view of the situation mentioned above, the OMT programme has, so the ECB continues, 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.

137. Some of the applicants in the main proceedings contend that the ECB's objective was not as described above but was rather to 'save the single currency' by making the ECB into a lender of last resort for the Member States, thereby redressing some of the design faults of monetary union. I do not believe that there are conclusive arguments which support that contention. The fact that in the ECB's *Monthly Bulletin* for August 2012, attention was drawn, in connection with the measures that were subsequently announced on 6 September 2012, to the relationship between the programme and the 'irreversibility of the euro' does not appear to me sufficient to call in question the ECB's defence of the objectives of the OMT programme which it put forward when the programme was announced and which it has consistently restated up to the time of these proceedings. [69]

138. Consequently, in view of the facts and the objectives put forward by the ECB, there are, to my mind, sufficient grounds for considering that the stated objectives of the OMT programme may in principle be accepted as legitimate. Both the events of the summer of 2012 and the situation of various States on the sovereign debt markets appear to be beyond dispute: it should also be acknowledged that, in any evaluation of its assessments as to matters of fact, the ECB should be afforded a considerable degree of deference.

139. Accordingly, I take the view that the objectives of the OMT programme as they are explained by the ECB may be accepted, starting from the acknowledgement that, in announcing the OMT programme, it was the ECB's intention to pursue a monetary policy objective. Whether an analysis of the content of the OMT programme will lead to the opposite conclusion is another matter. The BVerfG draws attention in that regard to various matters which, in its view, mean that the OMT programme is an economic policy measure: I shall now turn my attention to those matters.

69 — As the Commission points out in its written observations, the ECB's *Monthly Bulletins* for September and October 2012 affirm on more than one occasion that the ultimate objective of the OMT programme is to restore the monetary policy transmission channels.

– Conditionality and parallelism

140. The BVerfG deals with two aspects that may be examined together. The fact that the OMT programme is made conditional upon the existence of a financial assistance programme of which one or more States whose bonds will be purchased on the secondary market are beneficiaries, with the ECB linking the objectives of the OMT programme to those of the financial assistance programme, confirms, according to the BVerfG, that the ECB's action falls within the sphere of economic policy and not that of monetary policy.[70] That is the stance taken by all the applicants in the main proceedings and although their reasoning is not always the same, they are agreed as to the conclusion.

141. The ECB argues that the OMT programme will be activated only if a euro area State is subject to an ESM or EFSF financial assistance programme, so that the conditionality imposed in that programme will ensure that implementation of the OMT programme does not lead Member States to be dilatory in adopting the necessary structural reforms, a phenomenon commonly described as 'moral hazard'.[71] According to the ECB, it will not be possible to interpret the purchase of government bonds in the secondary market as a measure offering unconditional support because, in essence, the ECB's intervention will take place only as long as the structural reforms prescribed by the relevant financial assistance programme are being undertaken. For the ECB, any risk of interference in economic policy is offset by the neutralising effect on the 'moral hazard' to which a substantial intervention by the ECB on the secondary government bond market might give rise.

142. The argument of the applicants in the main proceedings is not without merit. Although the ECB has argued that linking the OMT programme to compliance with the financial assistance programmes is a condition that is set by the ECB itself, from which it is possible to be released at any time, the applicants in the main proceedings, particularly Die Linke, have stressed that the ECB is not referring simply to compliance with an assistance programme from which it is wholly detached. On the contrary, the ECB actively takes part in those financial assistance programmes. Those applicants submit that the ECB's argument is seriously undermined by its 'dual role', as (i) holder of a claim the basis for which is a government bond issued by a State and (ii) supervisor and negotiator of a financial assistance programme applied to the same State, with macroeconomic conditionality included.

143. I am substantially in agreement with that position. Although in the press release of 6 September 2012 the ECB links implementation of the OMT programme to effective compliance with the obligations in the context of a financial assistance programme, the ECB's role in such programmes goes beyond its simply unilaterally endorsing them. The rules of the ESM,[72] but also the experience of financial assistance programmes which have been implemented or which are still ongoing, amply demonstrates that the ECB's role in the design, adoption and regular monitoring of those programmes is significant, not to say decisive.[73] Moreover, as Die Linke have submitted in their written and oral arguments, the conditionality imposed in the framework of the financial assistance programmes which have hitherto been granted and in which the ECB has been actively involved has had a considerable macroeconomic impact on the economies of the States concerned, as well as in the euro area as a whole. That finding confirms, so Die Linke argues, that the ECB, in participating in the assistance programmes concerned, has been actively involved in measures which, in certain circumstances, might be perceived as going beyond 'support' for economic policy.

70 — In so far as the conditions to which the purchase of bonds is subject may not be the same as those set by the EFSF/ESM, the programme is said to operate as a sort of 'parallel rescue'. It is therefore my understanding that the two areas of uncertainty may be examined together.

71 — According to Krugman and Wells, the expression 'moral hazard' refers to how, when making decisions, individuals are prepared to take greater risks when a third party, rather than they themselves, assumes responsibility for the possible negative consequences of their acts. On this point and in greater detail, see Krugman, P. and Wells, R., *Microeconomics*, 3rd ed., Worth Publishers, 2012.

72 — See, specifically, Articles 4(4), 5(3) and (5)(g), 6(2), 13(1), (3) and (7) and 14(6) of the Treaty establishing the ESM.

73 — For the ECB's institutional role in bailouts, see Beukers, T., 'The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention', *Common Market Law Review* (2013) 50, Issue 6, p. 1588 et seq.

144. The ESM Treaty does in fact confer multiple responsibilities on the ECB in the course of a financial assistance programme, including participation in negotiations and monitoring.[74] The ECB is therefore involved in the elaboration of the conditionality imposed on the State requesting assistance whilst, subsequently, it also takes part in the task of monitoring compliance with conditionality, which is crucial if the programme is actually to continue and eventually to come to an end. The ECB shares this task with the Commission, although it is the latter on which the ESM Treaty confers even more important functions.

145. For the OMT programme to be classified as a monetary policy measure, it is essential, as has already been pointed out, that the objectives come within the framework of that policy and that the instruments used are those proper to monetary policy. Linking the OMT programme to compliance with financial assistance programmes may be justified by the, undoubtedly legitimate, interest there is in eliminating any hint of 'moral hazard' that may result from a significant intervention by the ECB on the government bond market. However, the fact that the ECB plays an active part throughout the course of financial assistance programmes may make the OMT programme, inasmuch as it is unilaterally linked to those programmes, into something more than a monetary policy measure. Unilaterally making the purchase of government bonds subject to compliance with conditions when those conditions have been set by a third party is not the same as doing so when the 'third party' is not really a third party. In those circumstances, the purchase of debt securities subject to conditions may become another instrument for enforcing the conditions of the financial assistance programmes. The mere fact that the purchase may be perceived in that way — as an instrument which serves macroeconomic conditionality — may be sufficient in its impact to detract from or even distort the monetary policy objectives that the OMT programme pursues.

146. It is true that the ECB will always be able to bring pressure to bear on a State subject to a financial assistance programme by making, albeit unilaterally, the OMT programme subject to compliance with the conditionality agreed under the ESM. However, it is necessary to draw a distinction between (i) a measure intended to exclude 'moral hazard', such as a unilateral requirement to comply with the conditionality imposed in a financial assistance programme, and (ii) a measure which, when considered in its context, includes the ECB as one of the institutions negotiating and, above all, directly co-supervising that conditionality.[75]

147. In short, in so far as the OMT programme is part of the broader context in which the ECB participates in financial assistance programmes agreed under the ESM, I consider that the ECB, in creating and announcing the OMT programme, did not properly weigh up the impact of its involvement in those financial assistance programmes on the monetary nature of the OMT programme.

148. That being so, it is appropriate to consider what immediate consequences follow for the classification of the OMT programme as part of the monetary policy of the Union.

149. To my mind, the conclusion reached above does not prevent the ECB from regularly participating in financial assistance programmes as they are provided for in the ESM Treaty. The fact that a financial assistance programme is adopted in no way predetermines the future existence of the necessary conditions for the ECB to activate the OMT programme.

74 — See, specifically, Article 13(3) and (7) of the ESM Treaty.

75 — See, by way of example, the general terms for financial assistance agreements, adopted by the ESM Board of Directors on 22 November 2012 (available at www.esm.europa.eu), confirming the ECB's supervisory role in financial assistance programmes (see, specifically, Articles 3.3.2, 3.4.2, 5.3.4, 5.12.1, 6.2.6, 9.6, 9.8.2 and 12.2).

150. However, if exceptional circumstances were to arise which were grounds for activating the OMT programme, it would, for that programme to retain its function as a monetary policy measure, be essential for the ECB to detach itself thenceforth from all direct involvement in the monitoring of the financial assistance programme applied to the State concerned. Nothing would prevent the ECB from being kept informed and even from being heard,[76] but under no circumstances would it be possible for the ECB, in a situation in which a programme such as OMT is under way, to continue to take part in the monitoring of the financial assistance programme to which the Member State is subject when, at the same time, that State is the recipient of substantial assistance from the ECB on the secondary government bond market. Accordingly, it is my view that this functional distance between the two programmes must be maintained if the OMT programme is to retain its character of a monetary policy measure, aimed exclusively at restoring the monetary policy transmission channels.

151. In sum, and from the angle that has just been analysed, I consider that the OMT programme is to be regarded as a monetary policy measure, provided that the ECB refrains — once the time has come to put that programme into effect — from any direct involvement in the financial assistance programmes of the ESM or the EFSF.

– Selectivity

152. The second feature which casts doubt on the monetary nature of the OMT programme is, according to the BVerfG, the programme's so-called 'selectivity', which is taken to mean a measure that is applicable to one or more States, but in any event not to all the States of the euro area. This feature is not consistent with the usual practice of the ECB, whose measures are directed at the euro area as a whole and are not targeted at territorial segments of the economy. Moreover, selectivity, according to the BVerfG, will distort financing conditions on the market, which may place the government bonds of other Member States at a disadvantage.

153. I do not find that objection convincing since it does not demonstrate that selectivity in itself makes the OMT programme an economic policy measure. The ECB has argued persuasively that interest rate differentials with the capacity to block the monetary policy transmission channels were to be found in the government bonds of one group of States. That situation is at the basis of the OMT programme since otherwise it would not be necessary to link implementation of OMT to a financial assistance programme. Therefore, selectivity is merely the logical consequence of a programme seeking to remedy a situation in which the monetary policy transmission channels are blocked in various Member States. The fact that there may be changes in the market or that the government bonds of other States may be placed at a disadvantage does not affect the classification of the OMT programme as a monetary policy measure, since it is only by targeting the programme at the bonds of the States concerned that the efficacy of the programme can be ensured.

154. I therefore consider that the fact that the OMT programme applies selectively to one or more States of the euro area does not call in question the programme's classification as monetary policy within the meaning of Article 127(1) TFEU and Article 282(2) TFEU.

76 — In fact, the literal wording of the ESM Treaty would permit action of that kind. The words 'in liaison with the ECB', used by the ESM Treaty in Articles 13 and 14, would allow the ECB to undertake a wide range of actions in the course of a financial assistance programme, including the 'passive' ones advocated here.

– Circumvention

155. Finally, the BVerfG considers that the OMT programme may circumvent the requirements and conditions laid down in the financial assistance programmes, since the requirements to which the ESM's purchase of government bonds in the secondary market are subject, which are laid down in Articles 18 and 14 of the ESM Treaty, are stricter than those imposed by the OMT programme. In the BVerfG's view, that permits the ECB to purchase government bonds in market conditions that are more advantageous for the State concerned, thereby circumventing the conditions to which the ESM is subject.

156. It is difficult to accept that argument in the wake of the examination of the objections relating to conditionality and parallelism that has been undertaken above. Once it has been shown, as I have done above, that the independence of the OMT programme vis-à-vis the financial assistance programmes, as described above, operates as an element guaranteeing the monetary-policy nature of the measure in question, it is logical, as a consequence of that guarantee, that it should be the ECB which establishes its own requirements in respect of the purchase of government bonds.

157. In my view, problems may arise not so much from the abstract fact that the requirements may be different for each institution but rather from the specific requirements that the ECB may establish. However, considered exclusively from the perspective which the BVerfG has adopted, it is my view that the fact that the ECB is not subject to the same requirements as those to which the ESM is subject does not convert the OMT programme, as a matter of principle, into an economic policy measure.

– Intermediate conclusion

158. In the light of the reasoning set out, I take the view that the OMT programme, as described in the press release of 6 September 2012, falls within the monetary policy for which the Treaty makes the ECB responsible and does not constitute an economic policy measure, provided that, throughout the whole period of implementation of any OMT programme, the ECB refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked.

ii) Review of the proportionality of the OMT programme (Article 5(4) TEU)

159. The conclusion that the OMT programme, as it has been announced, is an integral part of the ECB's monetary policy says nothing about whether the measure is proportionate. In that regard, a number of the parties taking part in these proceedings have defended the programme, referring to the constituent elements of the proportionality test.

160. Where a competence is exercised in a way that is recognised to be unconventional, two conditions, as a minimum, must be met. In the first place, that exercise, above all, must not infringe other provisions of primary law. The answer to the second question referred, which concerns the prohibition of monetary financing of the Member States, will focus on that issue.

161. In the second place, a review of whether the principle of conferral has been complied with from the perspective of the principle of proportionality (Article 5(4) TEU) is essential in the case of a measure which is presented as unconventional and as being justified on account of exceptional circumstances. Whilst the Union must always observe the principle of proportionality when exercising its competences deriving from the principle of conferral (Article 5(4) TEU), observance of the principle of proportionality is particularly important in a case which concerns the exercise of competences that are being exercised on account of exceptional circumstances.

162. That said, the point should be made here that the present case gives rise to a particular difficulty when it comes to assessing the proportionality of the measure at issue. As has been explained above, the OMT programme is a measure that is *incomplete*, not only because its formal adoption has been put off until an unspecified point in the future, but also because, apart from that consideration, the measure has not yet actually been implemented in an individual case. It is true that the basic features of the programme are available to us, but it is clear that they are far from achieving the degree of completeness that would be appropriate if they were regulated in a legal act. A full review of proportionality will be possible only in the light of any such regulation.

163. That being so, the review which the Court of Justice carries out in this regard will have to focus principally on the measure as it was announced in September 2012, although it may on occasion be necessary to give certain pointers, in relation to the technical features set out by the ECB, to address the possibility of the OMT programme actually being put into effect.

164. Having made those observations, I shall begin my analysis by drawing attention to a matter which to my mind is fundamental and must be addressed prior to the review of proportionality: the statement of reasons that is essential for the OMT programme. Only after that shall I conduct a thorough analysis of the technical features of the OMT programme in the light of the three components of the principle of proportionality: suitability, necessity and proportionality *stricto sensu*.

– Statement of the reasons concerning the circumstances justifying the OMT programme, the premiss of proportionality

165. All the EU institutions have a duty to state the reasons on which their legal acts are based (Article 296(2) TFEU). Underlying that duty are reasons of transparency but also reasons relating to judicial review: effective judicial review will be possible only if there is an explanation of the reasons on which a public decision is based. The Court of Justice has referred on many occasions to the dual purpose of the duty to state reasons,[77] which is also applicable in the case of a measure such as that in issue in these proceedings.

166. In fact, the ECB, if it is to apply a programme like OMT in conformity with the principle of proportionality, will have to present all the elements necessary to justify the Bank's intervention on the secondary government bond market. In other words, it is essential that the ECB starts by identifying the exceptional and extraordinary circumstances that led it to adopt an unconventional measure such as the one with which we are concerned here.

167. In that respect, the ECB will, in the first place, have to provide precise information showing there to be a significant change in market conditions giving rise to external disruption affecting the monetary policy transmission channels. Likewise, the ECB has to show to what extent its transmission channels have been blocked, it not being sufficient merely to make a statement to that effect. The ECB must put forward matters which show that such a blockage exists. Finally, it is necessary to make those reasons publicly known, ensuring that the aspects which are strictly necessary and whose disclosure might jeopardise the effectiveness of the programme remain confidential, but starting from the basis that, as a general rule, the reasoning will be fully transparent.

168. Those criteria will have to be scrupulously observed by the ECB, as they form the essential basis for any subsequent judicial review.

77 — According to the case-law of the Court of Justice, the obligation to state reasons provided for in the Treaty does not entail 'merely taking formal considerations into account, but seeks to give an opportunity to the parties of defending their rights, to the Court of Justice of exercising its supervisory function, and to Member States and all interested nationals of ascertaining the circumstances in which the [institution] has applied the Treaty'. See, inter alia, judgments in *Germany* v *Commission* (24/62, EU:C:1963:14), p. 69, and *DIR International Film and Others* v *Commission* (C-164/98 P, EU:C:2000:48), paragraph 33.

169. Applying those criteria, it is clear that the press release of 6 September 2012, which in essence is intended to describe the features of the OMT programme, includes almost no references to the specific circumstances that justify adopting a programme such as OMT. It is only the introductory remarks with which the President of the ECB, Mr Draghi, opened the press conference on 6 September 2012 which make it possible to ascertain what the emergency is that might justify adopting the programme.[78] That means that, as regards the reasons stated for the measure as it was announced, we shall have to work with the data which were made available at that time. For the rest, the ECB has, in the context of the present proceedings, provided ample additional information on the emergency with which it claimed to be confronted, as has been described in points 115, 116, 117, 134, 135 and 136 of this Opinion.

170. Accordingly, for the purposes of the review of the proportionality of the OMT programme, I shall use the information that has been provided in these proceedings, subject to the important caveat that, should the programme be implemented, both the legal act which gives it form, and its implementation, must satisfy the requirements relating to the statement of reasons, as they have been described in points 166 and 167 of this Opinion.

– The suitability test

171. Turning now to the individual components of the principle of proportionality, it should first be ascertained whether an unconventional measure such as the OMT programme is, objectively, an appropriate measure for achieving the monetary policy aims which it pursues. It is therefore a question of examining the coherence of the measure, taking account of the causal connection between the means and the objectives.[79]

172. None of the parties that have participated in these proceedings has denied that the announcement of the OMT programme brought about a significant reduction in the interest rates for the bonds of certain Member States. That consequence confirms, in their view, the suitability of the programme, since, if the mere announcement of its existence produced an almost immediate effect in the markets, it is to be expected that implementation of the OMT programme in one or more Member States would have at least a similar impact. That assertion is obviously subject to all kinds of contingencies, which at this time it is impossible to predict, but, as a starting point, the effect of the announcement of the OMT programme is an indication of the effectiveness of the measure.

173. It is clear, however, that the effects of the announcement of the OMT programme cannot form the sole criterion by reference to which the appropriateness of the measure is to be assessed, since they are only indicative, although of some significance. It is therefore necessary to examine in greater detail (whilst recognising that the ECB has a broad discretion) whether the various components of the OMT programme are objectively appropriate for achieving the objectives sought.

174. While the immediate objective of the OMT programme is the reduction of the interest rates paid in respect of the government bonds of certain Member States, the means employed is a purchase of the government bonds of certain States of the euro area on the conditions set out in the press release of 6 September 2012. The purchase in question is subject to the precondition that either a full or a precautionary financial assistance programme is already in existence and the ECB restricts itself to buying bonds on the shorter part of the yield curve, in particular those with a maturity of between one and three years.

78 — Statement by the President of the ECB, Mr Draghi, at the press conference on 6 September 2012, available at http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html.

79 — See, to this effect, judgments in *National Panasonic* v *Commission* (136/79, EU:C:1980:169), paragraphs 28 to 30, and *Roquette Frères* (C-94/00, EU:C:2002:603), paragraph 77.

175. Looked at objectively, a programme like the OMT programme, which is centred on the purchase of government bonds, is, to my mind, appropriate for achieving a reduction in the interest rates on the government bonds of the States concerned. None of the parties taking part in these proceedings has denied that that is so. The reduction in question permits the States concerned to return to some degree of financial normality and, as a result, the ECB is able to carry out its monetary policy in conditions of greater certainty and stability. That finding does not mean that such financial normality does not entail risks, a matter which will be considered below. However, what falls to be analysed in the appropriateness test is the logical coherence between the means and the objective, something which, in my view, has been achieved in the present case.

176. I therefore consider that the OMT programme, as it was announced on 6 September 2012, is an appropriate measure for achieving the objectives pursued by the ECB.

– The necessity test

177. Although the measure under consideration here may pass the suitability test, the means used may none the less be excessive if compared with the other options that would have been available to the ECB.[80] Considered from this angle, it is appropriate to examine whether the ECB has adopted a measure that was strictly necessary in order to achieve the objectives set by the OMT programme.

178. In the first place, the fact that the OMT programme is confined solely to those cases in which a Member State has had recourse to a financial assistance programme lends credence to the idea that the measure in question is limited and restricted to specific cases. The OMT programme is not a measure for intervening generally and in every circumstance in the secondary government bond market. Even when the monetary policy transmission channels have become blocked, it will be possible to activate the OMT programme only when a Member State is subject to a macroeconomic adjustment programme or a precautionary programme of the EFSF/ESM. That condition already considerably limits the number of possible cases in which the ECB will take action in the secondary government bond market: that is consistent with the fact that we are dealing here with an unconventional monetary policy measure, which is in itself exceptional and restricted to specific cases. The fact that the ECB has made activation of the programme conditional upon the previous adoption of a financial assistance programme confirms the exceptional nature of the measure and, moreover, makes it conditional — in my view correctly — upon a situation which is also exceptional.

179. Moreover, it is apparent from the documents before the Court that implementation of the OMT programme will, because of the very nature of the programme, be limited in time. As the French Republic has rightly pointed out, a programme such as OMT can only be short term in nature.[81] It is clear both from the press release and from the ECB's observations that the programme will apply, should the need arise, throughout the period of time necessary for the interest rates of the State or States concerned to return to the levels regarded as normal market levels.[82] The purpose of the OMT programme is not simply to reduce a State's financing costs but rather to return them to levels that reflect the macroeconomic reality of that State. Once that objective has been achieved, and once the transmission channels have been unblocked, implementation of the OMT programme comes to an end, in keeping with the fact that the measure is to be used only when strictly necessary.

80 — See, inter alia, judgments in *Fédesa and Others* (C-331/88, EU:C:1990:391), paragraph 13, and *Netherlands* v *Commission* (C-180/00, EU:C:2005:451), paragraph 103.

81 — Written observations of the French Republic, which refer to the 'targeted and provisional' ('*ciblée et provisoire*') nature of the OMT programme (point 40).

82 — The press release of 6 September 2012, as well as referring to the conditionality attached to the financial assistance programmes as a 'necessary condition', draws attention to the fact that suspension of the OMT programme will be decided upon by the Governing Council 'in full discretion' but 'in accordance with its monetary policy mandate'.

180. Moreover, in a situation as delicate as the one in issue here, any change in the circumstances and, therefore, in their exceptional nature assumes significance for the purposes of the necessity test. In that respect, I take the view that the ECB's conduct in September 2012, which was limited to announcing the technical features of the programme, reflects an assessment of the development of the situation on the financial markets which is consistent with the requirements of the necessity test.

181. Finally, reference should be made to the possibility mentioned by the BVerfG that the OMT programme, if interpreted in conformity with EU law, could be subject to different technical characteristics from those set out in the press release of 6 September 2012, which could dispel the referring court's doubts as to the validity of the measure. It is appropriate to consider that possibility at this juncture, when applying the necessity test, since the existence of other, less restrictive, measures, such as those suggested by the referring court in point 100 of its order for reference, would result in the OMT programme failing that test.

182. It seems to me, however, that the other options suggested by the BVerfG would entail the risk of seriously calling into question the effectiveness of the OMT programme. As the ECB and the Commission have explained, it has to be accepted that setting an *ex ante* quantitative limit on purchases of government bonds would seriously undermine the effects which the intervention on the secondary market seeks to achieve, with the risk of triggering speculation.

183. Similarly, it seems to be correct that, if the status of preferential creditor were granted to the ECB, that would call into question the position of other creditors and, indirectly, the final impact on the value of the bonds on the secondary market. As the Commission has pointed out, the fact that the bonds of the State concerned are attractive to investors, rather than the opposite, would also increase demand for the bonds, with the resulting reduction in interest rates. Acknowledgment that the ECB does not have preferential creditor status contributes to ensuring a more effective normalisation of market prices for government bonds, which, in turn, contributes to ensuring their solvency in the medium and long term, with the resulting reduction in the risks entailed.

184. I therefore consider that the precautions introduced by the ECB are sufficient to support the conclusion that the OMT programme, in the terms described in the aforementioned press release, passes the necessity test, independently of the question whether the legal act that may ultimately adopt the programme confirms that finding.

– The test of proportionality *stricto sensu*

185. Lastly, it is appropriate to consider whether all the components of the measure at issue have been properly weighed up against one another, so as to ensure that the measure is not disproportionate.

186. In applying the test of proportionality *stricto sensu*, this third stage calls for a weighing-up exercise which, in the circumstances of the case, requires an analysis of whether the 'benefits' of the measure at issue outweigh the 'costs'.[83] It obviously involves an examination that requires an assessment of all the benefits and costs, which may be represented as follows: on the one hand, the OMT programme permits the ECB to intervene in an exceptional situation in order to restore its monetary policy instruments and thus ensure that its mandate is effective; on the other hand, it is a measure which exposes the ECB to a financial risk, together with the moral hazard arising from the artificial alteration of the value of the bonds of the State concerned.

83 — See Tridimas, T., *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford, 2010, Chapter 3.

187. I would once again recall that the review of proportionality that is to be carried out in this case must acknowledge that the ECB enjoys a broad discretion. That means — particularly at the third stage of the review of proportionality — that the weighing-up exercise which the ECB is required to undertake in a situation such as that to which the OMT programme gives rise allows the ECB a broad margin of assessment, provided that no imbalance arises which is obviously disproportionate.

188. It must also be observed that it will be possible to make a definitive assessment of the proportionality *stricto sensu* of a programme such as OMT only once the programme has been activated and, in particular, in the light of the scale it may have. The observations made below are based on the information about the programme which was given in the press release.

189. The applicants in the main proceedings, like the BVerfG, have emphasised that implementation of the OMT programme exposes the ECB, and, in the last resort, the taxpayers of the Member States, to an excessive risk which could ultimately even lead to the institution becoming insolvent. That is obviously a high and extremely heavy cost which is capable of outweighing the benefits of the OMT programme.

190. As Mr Gauweiler's representative has explained in some detail, implementation of the OMT programme would entail the ECB including in its balance sheet very large quantities of securities of dubious credit standing which, in the event of default, would lead to the ECB becoming insolvent. Thus, in placing no cap at all on the purchase of bonds, the OMT programme, so it is argued, makes that hypothesis into a real possibility, which confirms the disproportionate nature of the measure.

191. In that regard the ECB has argued in both its written and oral submissions that its intervention in the secondary government bond market will be subject to quantitative limits, albeit limits that are not set in advance or previously determined by law. According to the ECB, the OMT programme cannot be presented as a channel for limited purchases, since, if it were, that would contribute to provoking a bout of speculation which would severely undermine the programme's objective. Likewise, if the ECB were to announce *ex ante* the exact volume of purchases, the measure would also be emasculated. Therefore, the ECB's solution is to announce that no *ex ante* quantitative limits will be established as regards the volume of purchase, although without prejudice to the fact that it has its own quantitative limits internally, the amount of which cannot be disclosed for strategic reasons which, in essence, seek to ensure that the OMT programme is effective.

192. From the point of view of proportionality *stricto sensu*, I consider that the absence of any *ex ante* quantitative limit is not a factor which is sufficient in itself for the measure to be considered disproportionate.

193. Indeed, every transaction on a financial market involves a risk, which is assumed by all the actors taking part in the transaction. The returns which the financial markets offer investors are proportionate to the risks assumed, which are generally related to the scale of the likely success or failure of the investment. The government bond market, like any other financial market, is subject to the same logic. All the investors who are active on that market know that the success of their investment may depend on uncertain and unpredictable factors.

194. It is common knowledge that the central banks intervene in the sovereign debt market, since purchases of government bonds, or repurchase agreements in respect of those bonds, are among the monetary policy instruments which are a means of controlling the monetary base. When they intervene in that market, the central banks always assume a degree of risk, a risk which was also assumed by the Member States when they decided to create the ECB.

195. On that basis, the objections concerning the excessive risk assumed by the ECB would be founded if the Bank were to undertake a volume of purchases that would *inevitably* lead it to a situation in which it is facing insolvency. However, for reasons which I shall now go on to explain, it does not seem that that is a situation to which the OMT programme will give rise.

196. As the OMT programme is designed, the ECB is admittedly exposed to a risk, but not necessarily to a risk of insolvency. A risk undoubtedly exists because the Bank will buy the bonds of a State which is in financial difficulties and whose capacity to meet the obligations on its debts is compromised. It is clear that the ECB assumes a risk when it acquires bonds from a State that is in such a situation but, to my mind, that risk is not, qualitatively, any different from other risks which the ECB may assume at other times in the course of its usual activity.

197. It is widely accepted that the fact that a State has liquidity problems does not necessarily mean that it is going to default on its debt. A State may be subject to temporary liquidity problems and, at the same time, be a solvent State. The successive crises throughout the 1980s and 1990s confirm that that is the case.[84] Therefore, the fact that the OMT programme is targeted at bonds issued by a State or States that are subject to a financial assistance programme does not automatically mean that those States are going to default, in full or in part, on their debt. The fact that the States concerned are subject to a conditionality intended to improve their macroeconomic fundamentals, together with the fact that they are integrated in an internal market in the framework of a Union based on a spirit of cooperation and loyalty amongst its members, rather tends to confirm that a financial assistance programme provides the State concerned with sufficient support to enable it to meet its obligations in the future.

198. Moreover, the indirect objective of the OMT programme, the repair of the monetary policy transmission mechanism, is achieved by the interest rates on government bonds being reduced to levels regarded as consistent with the market and the macroeconomic situation of the State concerned. The ECB has stated on many occasions that the objective of the OMT programme is not to reduce interest rates on government bonds to a point where they are on a par with those of other Member States but rather to reduce them to levels regarded as consistent with the market and the macroeconomic situation, which, in turn, will permit the ECB to make effective use of its monetary policy instruments. That means that, precisely because of activation of the OMT programme, it may be assumed that the State concerned will be able to issue debt on terms which are more sustainable for its finances and which, as a consequence, will increase its chances of meeting its obligations. In other words, the ECB's intervention should contribute, objectively, to ensuring that the State is able to meet its financial obligations in the future, thereby reducing the risk which the ECB assumes in activating the OMT programme.

199. Finally, the existence of objective quantitative limits on the volume of purchases would tend to confirm the limited scale of the risk. As the ECB itself has acknowledged, those limits will exist; they are not made public for strategic reasons but they serve to reduce the Bank's exposure. Similarly, the ECB has made clear that if it detects an excessive increase in the volume of debt issued by a Member State covered by the OMT programme, it will suspend operations under the programme. In other words, if a State decides to take advantage of the opportunity afforded it by the ECB's secondary-market bond purchases to take on excessive debt — albeit on conditions that are more advantageous that those obtaining before the ECB's intervention —, the Bank will not assume that risk. All that tends to confirm that, if the ECB itself were facing possible insolvency, the OMT programme would be discontinued. In other words, the ECB will not assume risks which expose it to the danger of insolvency.

84 — In that regard, see Sunkel, O., and Griffith-Jones, S., *Debt and Development Crises in Latin America: The End of an Illusion*, Oxford University Press, Oxford, 1989.

200. Obviously that is an assessment that relates to a scenario in which the OMT programme is implemented. However, I consider it essential, if the strict proportionality of that programme is to be confirmed, that the limitation of risks as explained by the ECB should actually be put into practice once the time comes to implement the programme.

201. That said, and taking account of the reasoning set out above, I consider that the ECB, in announcing the OMT programme, weighed up the benefits and costs appropriately.

– Intermediate conclusion

202. In summary, and in view of the considerations set out above, 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. Accordingly, the OMT programme may be considered lawful, provided that, should the programme be implemented, the requirements regarding the statement of reasons and proportionality are strictly complied with.

c) Answer to the first question referred for a preliminary ruling

203. Accordingly, in response to the first question referred by the BVerfG, I consider the OMT programme to be compatible with Article 119 TFEU and Article 127(1) and (2) TFEU, provided that, in the event of that programme being implemented, the ECB

— refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked, and

— complies strictly with the obligation to state reasons and with the requirements deriving from the principle of proportionality.

B – *The second question referred: compatibility of the OMT programme with Article 123(1) TFEU (prohibition of monetary financing of the States of the euro area)*

204. By its second question, the BVerfG asks whether the OMT programme, in authorising the purchase on the secondary market by the ECB of bonds of States that are members of the euro area, infringes the prohibition laid down in Article 123(1) TFEU, under which the purchase directly from the Member States of debt instruments is prohibited.

205. According to the BVerfG, although the OMT programme formally complies with the condition expressly set out in Article 123(1) TFEU, which concerns solely the purchase of debt instruments in the primary market, the programme none the less, in its view, may circumvent the prohibition concerned, since the ECB's interventions on the secondary market, just like purchases on the primary market, in fact represent financial assistance by means of monetary policy. In support of that view, the BVerfG refers to various technical features of the OMT programme: the waiver of rights, the risk of default, the retention of the bonds until maturity, the possible time of purchase and the encouragement to purchase in the primary market. According to the BVerfG, those are all clear indications that the effect is to circumvent the prohibition laid down in Article 123(1) TFEU.

1. Position of the parties taking part in these proceedings

206. The applicants in the main proceedings submit, deploying arguments which to a large extent coincide, that the OMT programme infringes Article 123(1) TFEU. In that respect, they share the doubts of the referring court concerning those specific aspects of the programme which are said to confirm that the programme circumvents the prohibition laid down in Article 123(1) TFEU.

207. Mr Huber's particular concern is that the purchase of government bonds on the secondary market gives rise to circumvention of the prohibition in Article 123(1) TFEU, specifically the prohibition in the last part of the provision. Mr Bandulet stresses what he regards as the excessive risk assumed by the ECB in making purchases such as those provided for in the OMT programme, whilst also criticising the 'collectivisation' of losses that it involves, which entails a breach of the Treaties and of the 'no bail-out principle'.

208. Mr von Stein also contends that the effect of the programme is to circumvent the prohibition, further pointing to the impact of a measure such as the OMT programme on the EU market. He submits that a massive purchase of government bonds would distort competition in the internal market and would also entail an infringement of Article 51 TFEU and of Protocol No 27 on the internal market and competition.

209. All the States that have participated in these proceedings, together with the Commission and the ECB, contend that the OMT programme is compatible with Article 123(1) TFEU, maintaining that purchases of government debt instruments are expressly provided for in the Treaties. They point out that Article 123(1) TFEU prohibits only purchases of government debt instruments directly from a Member State, whilst Article 18.1 of the Protocol of the ESCB and of the ECB expressly empowers the ECB and the central banks of the Member States to carry out operations of that kind.

210. At the same time, however, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Poland and the Portuguese Republic, together with the Commission and the ECB, recognise that the final part of Article 123(1) TFEU also includes a prohibition on circumvention, in other words a prohibition on entering into transactions which have the same effect as a direct purchase of government bonds. That interpretation is confirmed, so they argue, by Regulation No 3603/93, specifically by the seventh recital in the preamble thereto.

211. In that respect, various States, such as the Republic of Poland, the French Republic and the Kingdom of the Netherlands, together with the Commission submit that the ECB would not circumvent the prohibition in Article 123(1) TFEU if it were guaranteed that the bond issued by the State concerned had reached a price under market conditions. In those circumstances, provided that the measure had a monetary policy objective, there would be no infringement of Article 123(1) TFEU.

212. In that respect, the States participating in these proceedings, the Commission and the ECB deny that the features of the OMT programme referred to result in the programme being incompatible with Article 123(1) TFEU. The terms in which those technical features are described in the press release and the drafts of a decision concerning the OMT programme which the ECB has drawn up but whose adoption is still pending, confirm the ECB's particular concern to avoid any distortion of the market contrary to Article 123(1) TFEU. Specifically, attention is drawn, as evidence of the precautions taken by the ECB, to the fact that the purchase of debt is subject to the requirements of monetary policy, to the fact that there is no prior announcement indicating the time or the volume of the purchase, to the fact that it is possible to suspend or limit purchases depending on the volume of debt issued by the State concerned, to the ECB's refusal to accept debt restructurings and to the existence of an 'embargo period' between the issue date and the date of purchase by the ECB on the secondary market.

213. Finally, the Federal Republic of Germany seeks from the Court of Justice an interpretation of Article 123(1) TFEU which may be reconciled with the constitutional identity of the Member States. After drawing attention to the context in which this reference has been made, the Federal Republic of Germany submits that the interpretation of Article 123(1) TFEU must also comply with the constitutional requirements of the Member States.

2. Analysis

214. Taking a similar approach to the one adopted in my answer to the previous question, I shall start by placing the prohibition in Article 123(1) TFEU in the broader context of its position in the scheme of economic and monetary union. I shall then address the question of the compatibility of the OMT programme with that provision, considering individually each of the technical features to which the referring court draws attention.

a) The prohibition of monetary financing of the Member States (Article 123(1) TFEU) and the purchase of government bonds by the ECB

215. The economic and monetary union which comprises the Union today is governed by a set of principles relating both to its objectives and to its boundaries, which overall represent its 'constitutional framework'. Because of the significance of those principles, the Treaties expressly entrench them, making them into mandatory provisions that are inviolable by the institutions and the Member States, which may be amended only by means of an ordinary Treaty-amendment procedure. Although, from among those objectives, attention should be drawn to the mandate of maintaining price stability and achieving financial stability (Articles 127(1) TFEU and 282 TFEU), the most relevant restrictions are the prohibition on assuming the commitments of Member States (Article 125 TFEU) and the prohibition of monetary financing of the Member States (Article 123 TFEU).

216. It is the second of those prohibitions with which we are concerned here but, obviously, a precise understanding of that prohibition can be achieved only if consideration is given to its origin, the system of which it forms part and the objectives which underlie it. I shall briefly consider matters below, while drawing for support on the findings which the Court of Justice and the Advocate General (EU:C:2012:675) have already made in respect of Article 123 TFEU in the *Pringle* case (EU:C:2012:756).

217. The preparatory documents which culminated in the Treaty of Maastricht, in which the provision that is now Article 123 TFEU (formerly Article 104 of the Treaty establishing the European Community) first appeared, show that the main concern of the negotiators responsible for fashioning the institutional framework of economic and monetary union was the maintenance of sound budgetary discipline which would not undermine the smooth functioning of the single currency.[85] The possibility of there being Member States with very fragile public finances was regarded as a situation that was scarcely compatible either with stable growth in the euro area or with the limited monetary policy tools available to the ECB. As the States of the euro area transferred their monetary policy competences to a common institution whilst at the same time retaining their competences in economic matters, it was essential to provide for the means necessary to ensure strict financial discipline in the States of the euro area.[86] That concern gave rise to the rules on budgetary discipline provided for in Article 126 TFEU, whereby the Member States are subject to certain budgetary deficit objectives, and also to the prohibitions in Articles 125 TFEU and 123 TFEU, which prevent, respectively, the financing of Member States by other States or their financing by the ECB or the central banks of the Member States.

218. Article 123 TFEU therefore reflects a very real concern on the part of those who drew up the institutional framework for economic and monetary union, which is why it was decided to introduce into primary law an absolute prohibition on any forms of financing States which could jeopardise the objectives of fiscal discipline laid down in the Treaties. One of those prohibited forms is so-called 'monetary financing', whereby a central bank, the institution with power to issue money, purchases a

85 — See the Delors Report, cited in footnote 51, in particular point 30.

86 — See Siekmann, H., 'Law and Economics of Monetary Union', in Eger, T., and Schäfer, H.-B., *Research Handbook, on the Economics of European Union Law*, E. Elgar, Cheltenham-Northampton, 2012, p. 370 et seq.

State's debt instruments. It is clear that this form of financing may jeopardise that State's ability to meet its financial obligations in the medium and long term, while it may also be a significant source of price inflation. Since a common economic and monetary policy presupposes the existence of States with healthy public finances and a policy whose priority is the maintenance of price stability, it is obvious that, in such circumstances, a monetary financing mechanism significantly impairs those objectives.

219. The foregoing considerations lead me to think that the prohibition of monetary financing contributes, at Union level, as the Court of Justice has already stated in *Pringle* when referring to Article 125 TFEU, 'to the attainment of a higher objective, namely maintaining the financial stability of the monetary union'.[87] In short, the prohibition in question assumes the status of a fundamental rule of the constitutional framework that governs economic and monetary union, exceptions to which must be interpreted restrictively.

220. Similarly, a reading of Article 123 TFEU in its context confirms not only the importance of the principle underpinning the prohibition, but also its restrictive nature. In contrast with Article 125 TFEU, which prohibits Member States from being 'liable for' or 'assuming' the commitments of another Member State, Article 123 TFEU is drafted in stricter terms. That contrast between the two provisions was highlighted by the Court of Justice in *Pringle*,[88] which confirmed the compatibility with Article 125 TFEU of measures for the granting of credit between Member States, an activity which, by contrast, is expressly prohibited by Article 123 TFEU, as it rules out 'overdraft facilities or any other type of credit facility'.

221. However, when Article 123 TFEU is interpreted contextually, that also results in a significant qualification regarding the scope of the prohibition. That concerns, as will be explained below, the particular treatment prescribed for transactions whereby the ECB and the central banks of the Member States purchase government bonds of the Member States.

222. An issue of government securities is one of the principal financing sources available to a State. A person who acquires government bonds from an issuing State is, by definition, financing that State, directly or indirectly, and does so for consideration that makes the legal transaction into a sort of loan. The holder of the government bond has a right to seek repayment of a debt from the issuing State, thus converting it into a creditor of the State. The State issues the instrument subject to an interest rate initially set at the time of issue and determined on the basis of supply and demand. The transaction entered into by the two parties, the issuing State and the purchaser of the government bond, therefore has the same structure as the granting of a loan. All that explains sufficiently why Article 123(1) TFEU includes a final clause, which also prohibits 'the purchase directly from [the Member States] by the European Central Bank or national central banks of debt instruments'.

223. That part of the provision was originally added in the final stage of the drafting of the Treaty of Maastricht,[89] and its inclusion can be understood only if regard is had to Article 18.1 of the Statute of the ESCB and of the ECB. As has been explained above, that provision of the Statute enables the ECB and the central banks to operate in the financial markets by buying and selling outright or under

87 — *Pringle* (EU:C:2012:756), paragraph 135.

88 — Ibid., paragraph 132.

89 — Compare the proposed wording of what was then Article 104a(1)(a) of the draft Treaty amending the Treaty establishing the European Economic Community with a view to establishing economic and monetary union, *Bulletin of the European Communities*, supplement 2/91, with the final wording of the provision, which is the same as the wording currently in force in Article 123 TFEU. Concerning the negotiations that culminated in the wording of the current Article 123 TFEU, see Conthe, M., 'El Tratado de la Unión Europea: la Unión Económica y Monetaria', in VVAA, *España y el Tratado de la Unión Europea. Una aproximación al Tratado elaborada por el equipo negociador en las Conferencias Intergubernamentales sobre la Unión Política y la Unión Económica y Monetaria*, Colex, 1994, pp. 295 to 297.

repurchase agreement and by lending or borrowing claims and marketable instruments. Operations of that kind are fundamental and essentially serve the purpose of control by the ESCB of the monetary base of the euro area; they include operations relating to the purchase of government bonds in the secondary market. [90]

224. Therefore, the final part of Article 123(1) TFEU must — as the ECB affirmed in response to questions raised at the hearing — be interpreted in conjunction with Article 18.1 of the Statute of the ESCB and of the ECB, since only in that way is there legal cover for a traditional monetary policy measure consisting in the purchase of government bonds on the secondary market. Without the final part of Article 123(1) TFEU, Article 18.1 of the Statute of the ESCB and of the ECB would have to be interpreted as precluding transactions in government bonds on the secondary market, which would deprive the Eurosystem of a vital tool for the ordinary conduct of monetary policy.

225. That said however, it is clear that, given the importance of Article 123 TFEU, it would not be sufficient for the ECB to confine itself to purchasing government bonds on the secondary market in order to avoid infringing the prohibition in that provision. I rather take the view that, in the interpretation of Article 123 TFEU, the focus must be particularly on the substance of the measure. That approach, frequently used by the Court of Justice in interpreting provisions of the Treaties, should also be applied in the case of Article 123 TFEU, as has, moreover, been acknowledged by all the Member States participating in these proceedings, by the Commission and by the ECB itself.

226. That concern is also reflected in secondary legislation, specifically in Regulation No 3603/93, which was adopted before the establishment of the ECB and which makes express mention of the prohibition on circumventing the rule in the provision concerned. The seventh recital to Regulation No 3603/93 states that the Member States must take appropriate measures to ensure, in particular, that 'purchases made on the secondary market [are not] used to circumvent the objective of that Article'. [91]

227. Accordingly, I take the view that Article 123(1) TFEU not only prohibits direct purchases on the primary market but also prevents the ECB and the national central banks from undertaking operations on the secondary market whose effect is to circumvent the abovementioned prohibition. In other words, the Treaty does not prohibit operations on the secondary market 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 fall foul of the prohibition of monetary financing.

228. Having clarified those points, consideration should now be given to whether the OMT programme, under which the ECB intervenes on the secondary government bond market, may, despite observing the letter of the final part of Article 123(1) TFEU, entail a measure which circumvents the prohibition set out in that provision.

b) The OMT programme and its compatibility with the prohibition laid down in Article 123(1) TFEU

229. As a preliminary point, before examining the OMT programme specifically from the angle of the prohibition on monetary financing of the Member States laid down in Article 123(1) TFEU, I should like to make clear that this answer starts from the assumption that, in any future implementation of the OMT programme, the principle of proportionality will, as I have explained in my proposed answer to the first question, be observed. That is the basis on which a number of the considerations which I put forward below are to be understood.

90 — Concerning open market operations authorised by Article 18.1 of the Statute, see the Guideline of the ECB of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem (recast) (ECB/2011/14).

91 — Article 1(1)(b) of Regulation No 3603/93 adds, in point (ii), that 'other type of credit facility' is also to include 'any financing of the public sector's obligations vis-à-vis third parties'.

230. As I have already noted, the BVerfG, like the applicants in the main proceedings, is of the view that the OMT programme infringes Article 123(1) TFEU since it circumvents the prohibition laid down therein. In that regard, the referring court points to a series of technical features which, in its view, bear out that conclusion. The States participating in these proceedings, the Commission and the ECB challenge the BVerfG's assessment, relying on those very same technical features.

231. As will be seen below, the doubts of the BVerfG are based on a particular interpretation of the press release of 6 September 2012. The ECB has rejected that interpretation and has produced evidence in support of its arguments. In its view, the point of those technical features is in fact that they should operate as a set of guarantees intended to prevent circumvention of Article 123 TFEU.

232. Having made those points, I shall now examine individually the technical features to which the referring court has drawn attention.

i) Waiver of rights and *pari passu* status

233. The full or partial waiver of claims securitised in government bonds of the State subject to the OMT programme is the first feature which, according to the BVerfG, could render the programme contrary to Article 123(1) TFEU. In the referring court's view, as in that of a number of the applicants in the main proceedings, the fact that the ECB and the central banks do not have the status of preferential creditor but rank *pari passu* and may be obliged to accept a full or partial waiver in the context of a restructuring agreement,[92] makes the measure into an indirect means of financing the debtor State.

234. I do not find that argument convincing. In the first place, it must be borne in mind that the risk of a full or partial waiver relates only to a future and hypothetical situation entailing the restructuring of the debtor State's debt and is not, so to speak, an intrinsic component of the OMT programme. As I have already explained in points 193 and 194 of this Opinion, the assumption of risk is inherent in a central bank's activity, so that an event such as that described by the referring court cannot become, merely because it might conceivably occur, a necessary consequence of implementation of the programme.

235. Moreover, the ECB has stated in its written observations that, in the context of a restructuring subject to CACs, it will always vote against a full or partial waiver of its claims. In other words, the ECB will not actively contribute to bringing about a restructuring but will seek to recover in full the claim securitised on the bond. The fact that the ECB acts with a view to preserving its claim in full confirms that the aim of its conduct is not to grant a financial advantage to the debtor State but to ensure that the latter meets the obligation it has entered into.

236. Finally, I think that the point should also be made that a purchase by the ECB, as a non-preferential creditor, of the debt securities of a Member State will inevitably involve a degree of distortion of the market, which appears to me, however, to be tolerable from the point of view of the prohibition in Article 123(1) TFEU. By contrast, as has been explained in point 183 of this Opinion, purchases made with the status of preferential creditor deter other investors, since they send out the message that a significant creditor, in this case a central bank, will be given preference over other creditors in the recovery, with the impact that that will have on demand for bonds. Accordingly, I take the view that *pari passu* clauses may be regarded as a means that seeks to ensure that the ECB disrupts the normal functioning of the market as little as possible, which, ultimately, involves a further guarantee of compliance with Article 123(1) TFEU.

92 — Under the collective action clauses ('CAC') provided for in the event of restructuring, the restructuring is subject to the approval of a majority of the creditors. See, concerning CACs and the role of the ECB, Hofmann, C., 'Enfranchisement and Disenfranchisement in Collective Action Clauses', in Bauer, K-A., Cahn, A., and Kenadjian, S. (eds.), *Collective Action Clauses and the Restructuring of Sovereign Debt*, Institute for Law and Finance Series, De Gruyter, 2013, p. 56 et seq.

237. I therefore consider that the fact that the ECB might be obliged — in the hypothetical event of a restructuring of a Member State's debt — to waive, in full or in part, its claims securitised in government bonds, as a result of the OMT programme being activated, does not mean that the programme amounts to a monetary financing measure contrary to Article 123(1) TFEU.

ii) Default risk

238. The BVerfG also points out that a purchase of government bonds with a, to some extent foreseeably, low credit rating exposes the ECB to an excessive default risk and is therefore incompatible with Article 123(1) TFEU. Although the referring court itself recognises that the assumption of risk is inherent to the activity of a central bank, it considers that the Treaties do not authorise exposure to losses of a significant amount.

239. Once again, I refer to the reasoning set out in points 193 to 198 of this Opinion, in which I dealt in some detail with the assumption of risks by the ECB. To my mind, that reasoning may perfectly well be applied to the present aspect of the case, since, as has been observed above, the fact that there is a possibility — which purely on principle cannot be discounted — of the ECB's insolvency or a Member State's default does not convert the risk, on that ground alone, into a certainty. The fact that a programme for the purchase of government bonds exposes the ECB to a risk is, as one might expect, inherent in this kind of operation and, consequently, doubts as to legality need arise only when the technical conditions of the programme, or its subsequent specific implementation, confirm that the ECB is clearly faced with a default scenario.

240. In fact, the technical features of the OMT programme do not suggest that the ECB is exposed, with any degree of foreseeability, to a scenario like the one depicted by the BVerfG. It should be recalled that the central objective of the OMT programme is to stabilise the interest rates applicable to certain government bonds with the ultimate aim of restoring the instruments of monetary policy. However, the immediate objective (the reduction of the financing costs of the State concerned) itself contributes to that State recovering its ability to meet its obligations in the medium and long term. The framework in which the OMT programme would be accorded is intended to eliminate or at least reduce such a risk. As I have already pointed out in point 197 of this Opinion, the fact that, considered as a whole, the transactions announced in the OMT programme confirm the ECB's intention of guarding against or preventing more or less irrational processes which generate or significantly increase risks, tends to establish that a measure such as that at issue does not entail circumvention of the prohibition in Article 123 TFEU.

241. I consider, in short, that that intention on the part of the ECB has been sufficiently established for it to be concluded that a purchase of government bonds — even ones with a low credit rating — which may expose the ECB to a degree of risk of default, is not as such contrary, in the circumstances described, to the prohibition of monetary financing laid down in Article 123(1) TFEU.

iii) Holding the bonds until maturity

242. The BVerfG also asserts that holding government bonds until maturity may conflict with Article 123(1) TFEU, since it reduces the number of bonds circulating on the secondary market, thereby disrupting the normal development of market prices.

243. It is true, as the BVerfG has argued, that if the ECB were to purchase government bonds under an obligation to hold them until maturity, that would give rise to a significant distortion on the secondary market for government securities. The secondary government bond market would have to reckon with the presence of an investor — the ECB — holding a substantial portfolio of government bonds which would not circulate on that market, regardless of the way in which their market price developed.

244. The ECB has, in response, emphasised that at no point in the press release of 6 September 2012 is it stated that government bonds purchased under the OMT programme will be held until maturity. [93]

245. The ECB's arguments appear to me to be conclusive. That is not only because the Bank has declared that it is not its intention to hold the government bonds it purchases until maturity but also because it is established that that was the practice followed in earlier programmes in which the ECB was active on the secondary government bond market. [94] It is logical that that should be the case, since the ECB has explained that intervention on the secondary market must be characterised by a considerable degree of flexibility, which permits it to implement the OMT programme and, at the same time, carry out transactions which do not result in it making losses and which do not distort the market overmuch. To my mind, the flexibility with which the ECB wishes to proceed, as it is described in the draft Decision, is consistent with the requirements referred to above. Furthermore, the fact that the OMT programme concerns exclusively transactions in bonds with a maturity of between one and three years tends to confirm that the ECB has taken precautions to avoid both the risk of losses and the distortion of the market.

246. Finally, it is clear that the OMT programme in the form we know it does not contain anything which suggests that there is an express obligation, either in the press release of 6 September 2012 or in the event of the programme being implemented, to hold the government bonds until maturity. The BVerfG's misgivings in that regard are thus unfounded.

iv) Time of purchase

247. The referring court also points out that the fact that the ECB purchases government bonds on the secondary market on a large scale and only a short time after their issue has an effect similar to that of a direct purchase in the primary market: it submits that that is contrary to Article 123(1) TFEU.

248. Admittedly, a purchase on the secondary market that is made seconds after the issue of the bonds on the primary market could completely blur the distinction between the two markets, although, formally, the purchase has taken place on the secondary market. This is not a possibility that can entirely be ruled out, since, as has been explained in various written and oral observations submitted in these proceedings, a transaction on the secondary market may in fact take place barely moments after the purchase made directly from the issuing State.

249. The ECB has insisted that the BVerfG's concern in this regard is unfounded since transactions under the OMT programme will be subject to a so-called 'embargo period', by virtue of which the Eurosystem will not carry out any transactions until a given number of days have passed since the issue, although that number will not be announced in advance. The ECB argues that the embargo period permits a market price to form for the relevant bonds and that it will thus not intervene at the time of issue but some days later, once a market price has formed.

250. It seems to me that the BVerfG's concern is not unfounded in view of the possibility, to which Mr Bandulet alludes, of the transactions taking place at virtually the same time: proceeding in that way would, in practice, circumvent the prohibition in Article 123(1) TFEU. The ECB itself appears to share that view, as it has repeatedly asserted that it has not made purchases of that kind in the past and that it will not make them under the OMT programme. [95]

93 — According to the ECB, not only is no obligation to hold the bonds until maturity laid down but, rather, the draft Decision relating to OMTs expressly provides for the possibility of the ECB selling the bonds at an earlier point.

94 — That is the case, according to the ECB, of the *Securities Market Programme* ('SMP'), under which securities were not necessarily held until maturity.

95 — The ECB has stated in its written observations that the SMP programme, which predates the OMT programme, also provided for an embargo period.

251. There is nothing in the press release, however, which permits the conclusion to be drawn that a particular 'embargo period' will be observed.

252. In my view, any implementation of the OMT programme must, if the substance of Article 123(1) TFEU is to be complied with, ensure that there is a real opportunity, even in the special circumstances in issue here, for a market price to form in respect of the government bonds concerned, in such a way that there continues to be a real difference between a purchase of bonds on the primary market and their purchase on the secondary market.

253. Lastly, however, the point should be made that it is not essential for the 'embargo period' in question to be precisely determined and publicised in advance. On the other hand, as the ECB has rightly pointed out, while it is necessary to avoid an extremely short period which would contravene Article 123(1) TFEU, it is also necessary to avoid a period that is too prolonged, which might result in an overlap with other ongoing operations, with the result that the OMT programme would be rendered much less effective. It seems permissible that the ECB should have a broad discretion with regard to the precise definition of those periods, provided that those periods actually provide an opportunity for the price of the bonds to be substantially in line with market values.

254. It is therefore my view that, if the OMT programme is to be compatible with Article 123(1) TFEU, it must, in the event of it being activated, be implemented in such a way that it is possible for a market price to form in respect of the government bonds concerned.

v) Encouragement to purchase newly issued bonds

255. Finally, the BVerfG points out that an announcment that the OMT programme is to be activated in a particular case will have the effect of encouraging purchases of newly issued bonds, thus acting as a magnet to investors, which would make the ECB into a 'lender of last resort', with the consequent assumption of the risks which that would entail.

256. Both the ECB and the Commission contend that this assessment is based on an incorrect premiss, since it presupposes that there will be a public announcement before the ECB starts buying bonds. The press release of 6 September 2012 does not indicate that the ECB will proceed in that way; it is rather the reverse, since a prior, detailed announcement specifying the exact point at which such purchases are to be undertaken would severely undermine the objectives of the OMT programme.

257. I concur with the position taken by the ECB and the Commission. There is nothing in the press release of 6 September 2012 which indicates that the ECB will give detailed notice in advance either of the features of the specific programme it intends to implement or of the exact point at which its operations will commence. On the contrary, the previous practice of the ECB in the context of similar programmes, as well as the part of the draft Decision on the OMT programme concerning 'embargo periods', show that the Bank will proceed with particular caution when intervening on the secondary market, in order to forestall speculative behaviour that would severely undermine the efficacy of the OMT programme.

258. The referring court's objection could be more readily accepted if the ECB were actually pursuing a strategy of detailed public communication which would provoke immediate changes on the market at a given time, as the result of the ECB's previous announcement. In my view it is unlikely that that course of action will be taken and the ECB's previous practice bears that out.

259. That said, it should, however, be pointed out again that it is almost inevitable, in view of the characteristics of the OMT programme, that implementation of the programme to some extent includes an incentive to investors to purchase bonds on the primary market. Although the immediate objective of the OMT programme is to reduce to normal levels the interest rates required of certain Member States, with the indirect aim, of course, of unblocking the monetary policy transmission channels, it is obvious that such normalisation presupposes an increased demand on the primary market. That is why the incentive to purchase is practically inherent in the OMT programme.

260. It is thus of fundamental importance that such effects on economic operators are compatible with the objective which the OMT programme, were it implemented, would be expected to achieve: that brings us once again to the importance of compliance with the principle of proportionality, including from the perspective of the prohibition under consideration here.

261. Accordingly, I consider that, on the basis of the press release of 6 September 2012, there are not sufficient grounds to suggest that putting the OMT programme into effect will, as a result of its activation and announcement, amount to a disproportionate encouragement to purchase newly issued bonds.

3. Answer to the second question referred for a preliminary ruling

262. In conclusion, and in response to the second question referred by the BVerfG, I consider that the OMT programme is compatible with Article 123(1) 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.

VII – **Conclusion**

263. In the light of the foregoing, I propose that the Court of Justice answer the questions referred for a preliminary ruling by the Bundesverfassungsgericht as follows:

(1) The Outright Monetary Transactions (OMT) programme of the European Central Bank, announced on 6 September 2012, is compatible with Article 119 TFEU and Article 127(1) and (2) TFEU, provided that, in the event of that programme being implemented, the ECB

— refrains from any direct involvement in the financial assistance programmes to which the OMT programme is linked, and

— complies strictly with the obligation to state reasons and with the requirements deriving from the principle of proportionality.

(2) The OMT programme is compatible with Article 123(1) 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.