

Master of Science in International Business and Politics

Master's Thesis

Transcending Contestation

The Outright Monetary Transactions Programme and the
Constitutionalization and Scientization of Monetary Policy
and Central Banking in the Eurozone

Hjalte Christian Lokdam

5 April 2016

Supervisor: Hubert Buch-Hansen

Pages: 77 (89 incl. front page, declaration of authorship and bibliography)

Characters (incl. spaces): 181.727 (202.607 incl. front page, declaration of authorship
and bibliography)

Copenhagen Business School 2016

Table of Contents

Abstract	4
Chapter 1 – Introduction	6
Chapter 2 – Method.....	10
Chapter 3 – The Outright Monetary Transactions Programme.....	19
Chapter 4 – The Power of a Promise	28
Chapter 5 - The Constitutionalization of Monetary Policy and the Scientization of Central Banking.....	53
Chapter 6 - Conclusion.....	77
Bibliography.....	80

Abstract

This thesis is a case study of the European Central Bank's (ECB) Outright Monetary Transactions (OMT) programme and its relation to the wider apparatus of central banking in the Eurozone. The OMT was announced at the height of the Euro Crisis in 2012 and sparked a heated public debate. It was also challenged before the German Federal Constitutional Court (GFCC), which referred the case to the European Court of Justice (ECJ) for a preliminary reference. In this thesis I analyse the development of the case and the different interpretations of the programme. In doing so, I will highlight how these relate to underlying understandings and theories about public law and the relationship between monetary policy and the political and economic order.

The thesis identifies two main positions on the case: one – the integrationist – sees the programme as a long overdue step towards closer European integration. This position, I argue, reflects Keynesian ideas about the necessity of the organic link between the central bank and the political government. The other – the conservationist – sees the programme as a manifest violation of the legal framework of the Economic and Monetary Union (EMU). This position, in turn, is based on ordoliberal ideas about the necessity of constitutionalizing monetary policy in order to eliminate political discretion to intervene in the economy. Both positions, however, agree that with the promise to conduct OMTs, the ECB, among other things, stepped in as a lender of last resort to sovereigns in the Eurozone and thus transgressed its narrow mandate.

The GFCC, closest to the conservationists, found the OMT programme to be outside the EMU framework and thus in violation of the German 'constitutional identity.' Contrary to the common wisdom, however, the ECJ ruled that the OMT programme was not in violation of the ECB's mandate. In the analysis of the justifications for this ruling, I emphasize the dual process of constitutionalizing and scientizing monetary policy and central banking and suggest that this has the effect of rendering both the means and the ends of monetary policy outside of the reach of legitimate political contestation.

In every republic there are two different tendencies, that of the people and that of the upper class ... all of the laws which are passed in favour of liberty are born from the rift between the two ...

Good laws [arise] from those disturbances that many people thoughtlessly condemn, and anyone who carefully examines the goal of these laws will find that they did not lead to exile or to violence against the common good, but instead brought forth laws and institutions for the benefit of civic liberty

Niccolò Machiavelli

Power ... cannot be checked, at least not reliably, by laws ... Power can be stopped *and* still be kept intact only by power

Hannah Arendt

Chapter 1 – Introduction

In the summer of 2012 the European Central Bank's (ECB) president, Mario Draghi, announced that the ECB would do "whatever it takes to preserve the euro". Doubting, perhaps, the force of the ECB's institutional authority he added his own signature to the announcement: "And believe me, it will be enough" (Draghi 2012). This statement in conjunction with the announcement of the plans for a Banking Union and the Outright Monetary Transactions (OMT) programme is widely considered to have worked as intended. Some have gone so far as to argue that it saved the Economic and Monetary Union (EMU) (Habermas 2015, De Grauwe and Ji 2013) and perhaps even the European Union in its entirety.

In an attempt to provide a "consensus narrative" that can serve as a starting point for agreeing on "the steps to be taken" (Baldwin et al 2015: 1), a collection of 16 renowned European economists assert that in the summer of 2012 the Euro Crisis

had become something that had the potential to blow up the Eurozone, and possibly the EU along with it. In short, the world economy was looking at another Lehman-sized shock. With [Eurozone] leaders manifestly incapable of mastering events, something had to be done. That something was a forceful intervention by ECB President Mario Draghi ... [This intervention] did the trick. It switched markets from the "doom is inevitable" expectations back to the old "we will get through this thing" expectations" (ibid: 11).

The OMT 'did the trick' by allowing the ECB to step in and act as a "debt buyer-of-last-resort" (ibid.) for the states of the Eurozone. The problem with the 'rescue,' however, is that such lender of last resort functions are outside the Treaty framework of the Union and the mandate of the ECB.

This sparked a legal controversy that is still ongoing. A case was filed at the German Federal Constitutional Court (GFCC) in which the claimants argued that the OMT programme was not only in violation of the Treaties but also in breach of German constitutional law. It violated, the claimants asserted, the 'no monetary financing' clause (Article 123 Treaty on the Functioning of the European Union (TFEU)) as well as the distinction between monetary policy (an exclusive competence of the Union) and

fiscal policy (a competence of the Member States), as stipulated in articles 119 and 127 TFEU. By violating EU primary law, the claimants argued, the OMT at the same time violated the ‘constitutional identity’ of the German state and the German people’s right to democratic self-government, since the German people could not have been said to have accepted this conferral of powers. The GFCC indicated that it was inclined to rule in the claimant’s favour but decided for the first time in its history to refer the question to the European Court of Justice (ECJ) for a preliminary ruling. Directly at odds with the GFCC, the ECJ, in June 2015, ruled that the OMT was within the mandate of the ECB.

At the time of writing (April 2016), the case is back in the German court and thus unresolved. Whatever the GFCC’s final judgment will be, the OMT has proved one of the most controversial acts in the history of the ECB. It was an exceptional measure in exceptional circumstances. In this thesis I will examine its place within the constitutional framework of the EU. In doing so I will examine competing interpretations of the programme and how these conceive of the relationship between law, politics and the economy.

The Euro Crisis quickly turned into an existential crisis of the EU (Menéndez 2013). In this economic state of exception the boundaries between legality, illegality and a-legality became (and remain) blurred if not completely indistinguishable (Žižek 2010, Kuo 2014, White 2015, Joerges 2014). Under such conditions, whatever distinctions might exist between the spheres of law, politics and economics are subject to contestation and reconfiguration and even what counts as law, politics and economics as such is thrown into disarray. The legal controversy concerning the OMT programme is a case in point and it has spurred conflicting interpretations not only about its legal status but equally and more significantly about the order and orientation of the European integration project.

One position in the debate (‘the integrationist’) argues that the OMT was a necessary first step towards the completion of the integration process, which is to be completed through the future constitution of a full-blown Political Union. This position recognizes that the OMT programme was outside the existing legal framework but since this legal framework is fragile and incomplete in the first place, the ECB was right in implementing it. The other position in the debate (‘the conservationist’) is adamant that

the OMT programme is illegal. And not only is it illegal, it was also unnecessary and undesirable. This position holds that the EU legal framework was not a mistake; it is not incomplete. It is a reflection of the wills of the States that constituted it. As such, the OMT programme is an illegitimate usurpation of powers by the ECB.

The ECJ could of course not concede to any of these two positions without dismantling either the OMT programme or the EU's claim to be a community based on the rule of law. This dilemma is the axis around which the thesis revolves. I will argue that the 'resolution' of this dilemma reveals a 'truth' about the relationship between law, politics and economics in the EU. In short, through the dual (historical) processes of constitutionalizing and scientizing the apparatus of central banking in the EU, the actions of the ECB are rendered untouchable by politics and by courts. In the OMT case, this status of the ECB is confirmed by the ECJ. Committed to the attainment of the constitutionalized 'European common good', the ECB is thus given 'broad discretion' to interpret the crisis as well its own measures based on its superior knowledge of the Eurozone economy. In this strategic move intended to defend the legality of an emergency measure that 'saved the euro', the ECJ constitutes a new state of things in which the ECB can take on new roles if and when *necessary* to achieve the common good. Neither the ends nor the means that the ECB employs are thus to be available for political, legal or even economic contestation. Structurally, I argue, this arrangement is similar to Plato's ideal republic, where the kings must become philosophers with privileged access to the truth and the good. In the EU it is the bureaucrat who must become a philosopher.

1.1 Research Question and Structure of Thesis

The basic question that this thesis seeks to answer is thus: How has the OMT programme and the controversy concerning it transformed the apparatus of central banking in the Eurozone as it is embodied in public law and what does this reveal about the fundamental political, legal and economic order and orientation of the European integration project?

In order to answer this general question a number of relatively straightforward sub-questions guide the structure of the thesis:

- 1) What is the OMT programme according to a) the ECB, b) the GFCC, c) scholars and commentators active public debates?
- 2) What is at stake in the question of the OMT programme's constitutionality?
- 3) How does the ECJ and its Advocate General justify the legality of the programme?

In chapter 2 I will outline my methodological approach through a discussion of the Foucauldian concept of the apparatus. Chapter 2 will also in general terms present the source material and my approach it. Chapter 3 will present the OMT programme through an analysis of the ECB's own presentation and interpretation of it (thus addressing sub-question 1.a). Chapter 4 presents and discusses the controversy over the programme. In section 4.1, I will present the OMT case at the GFCC and discuss what the GFCC takes to be the challenge that the OMT programme poses (thus addressing sub-questions 1.b and 2). Section 4.2 will present the two competing positions on the OMT programme in public debates (thus addressing sub-question 1.c). This section highlights that what is at stake in the controversy over the programme is not its legality per se but the political-economic order and orientation that it stands for (thus contributing to the discussion of sub-question 2). The final section of chapter 4 reflects on these competing positions. Chapter 5 analyses the OMT case at the ECJ. Section 5.1 discusses modalities of crisis government in relation to the ECJ's and the Advocate General's reasoning and judgment in the case. Sections 5.2 and 5.3, in turn, analyse the processes of constitutionalization and scientization. Chapter 6 concludes.

Chapter 2 – Method

The OMT programme was a speech act, which had effects just by virtue of being uttered. Draghi's words in conjunction with the institutional configuration of the Eurosystem coalesced to produce the desired result. In order to do so, the words conveyed the intended meaning because they were embedded in a system of knowledges related to the practice of central banking in the geographic area of the Eurozone. They were, in other words, embedded in discourses, systems of thought and an institutional architecture in a particular historical time and in a particular territory. The speech act was also an act of government; it was intended to influence the behaviour of others.

In order to try to capture the interrelationships between these various factors and how they interact and impact on each other, I will employ the Foucauldian concept of the apparatus (*dispositif*) and as such this thesis is in broad term what could be called an apparatus- or *dispositif*-analysis.

2.1 What Is an Apparatus?

The concept of *dispositif*, in English mostly rendered as apparatus, was developed in Michel Foucault's late work. A technical term (Agamben 2009: 11), it has been taken up, developed, and reformulated by numerous scholars and thinkers, most notably perhaps by the philosopher Gilles Deleuze (1992).

Foucault presents the apparatus in three stages: 1) the elements of the apparatus (the 'elemental' dimension), 2) the system of relations between these elements (the relational dimension), and 3) the historical dimension, i.e., the situatedness of the apparatus in relation to the past as well as the "urgent need" that it addresses and the "dominant strategic function" that it serves in the present (Foucault 1980: 195¹).

The elemental dimension relates to a "thoroughly heterogeneous ensemble consisting of discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical propositions ... in short,

¹ Until and unless otherwise noted, all page references in this section are to this text.

the said as much as the unsaid” (194). The elements of an apparatus are thus more or less perceptible social and material facts. In the context of the present thesis, the elements are: the speeches, the press conferences and press releases, the EU Treaties and the German Basic Law, the institutional architecture of the EU and the Eurozone, the empirical and theoretical scientific discourses, and the legal proceedings at the GFCC and the ECJ.

Without the relational dimension, however, these elements would remain disassociated. In fact, it is impossible to identify the individual elements and their significance without an awareness of the relationships between them. Starting from what is perhaps a vague intuition, the study of apparatuses consists of constant reiterations between refining and nuancing the understanding of the relations between elements and studying new, hitherto unknown or overlooked elements in their own right. “The apparatus,” in turn, “is the system of relations that can be established between these elements” (194). The apparatus is thus what makes the elements come together into a more or less coherent and meaningful set of propositions that can be named (‘madness,’ ‘sexuality’, or, as in this thesis, ‘central banking’).

The study of apparatuses is an inherently critical activity; it consists in analysing the way in which the apparatus structures what and how it is meaningful to think, speak, and act. As such, it goes to the centre of Foucault’s ‘analytics of power.’ This is closely linked to the third dimension: the historical. This dimension relates, on the one hand, to the origin, the ‘genesis,’ of the apparatus and the historical mutations that can be traced in its genealogy. On the other hand, there is a contemporaneous aspect to the historical dimension that involves the “perpetual process of strategic elaboration” (195), in the past as well as in the present. By tracing lineages, ruptures and changes in ways of thinking, speaking, and acting in historical time, the genealogy of the apparatus expands on the discourse analysis by focusing on how the apparatus (which also includes non-discursive elements) works on itself and its elements, so to speak, and changes in response to historical developments and events.

In this way, Foucault conceptualizes the apparatus as “a sort of ... formation which has as its major function at a given historical moment that of responding to an *urgent need*” (195, emphasis in original). Any given apparatus it is thus something that appears in historical time for a particular ‘urgent need’ and it can disappear again if or when it

no longer serves a purpose. The apparatus “thus has a dominant strategic function” (195). However, even though it comes into being in a relatively distinct manner with identifiable sources of origin, it can produce effects which have “nothing to do with any kind of strategic ruse on part of some meta- or trans-historic subject conceiving and willing it” (195); it is “a strategy without a subject” (202), responding to imperatives generated within society or one of its parts.

Crises, in this context, are moments of rupture, moments of ‘problematization’² where self-evident truths of a particular apparatus are put in question. The apparatus is thus re-“inscribed in a play of power” (196). In the crisis the apparatus is subject to “a certain manipulation of the relations of forces, either developing them in a particular direction, blocking them, stabilising them, utilising them, etc.” (196). As such, the apparatus is “always linked to certain coordinates of knowledge which issue from it but, to an equal degree, condition it” (196). The power/knowledge nexus is central to the analysis of apparatuses: command or even control of particular forms of knowledge is a fundamental precondition for the meaningful manipulation of the relations of forces of the apparatus. But power relations also work on knowledge: they “become constitute of forms of the subject as well as domains and objects of knowledge” (Oksala 2010: 447). Studying knowledges thus means study power and vice versa.

The apparatus in its relation to the analytics of power demands reflections on the question of the ontology of the political. Foucault’s oeuvre, as Johanna Oksala (2010: 445) has put it, ‘politicizes ontology’ by “showing how the ontological order of things is in itself the outcome of a political struggle: Ontology is politics that has forgotten itself.” A Foucauldian critique is thus one that attempts to challenge and unsettle what are otherwise taken as ontological truths and reveal them as products of a play of forces in historical time. This, however, is also an ontological claim, as Oksala points out: in Foucault’s work there is “a radical, ontological claim about the nature of reality: Reality as we know it is the result of social practices always incorporating power relations, but also concrete struggles over truth and objectivity in social space” (ibid: 447).

Deleuze’s rendition of the apparatus presents a slightly different, although compatible, ontological position. Deleuze emphasizes the indeterminacy of the reality

² ‘Problematization’ refers here to “the way that certain forms of behaviour, practices and actions can emerge as possible objects of politicization, redescription and, ultimately change” (Oksala 2010: 463).

constituted through power relations and struggles: reality is never settled; it is always in becoming, in a process of producing what is already here and yet not yet here. “In the first instance,” Deleuze (1992: 159) claims, the apparatus “is a tangle, a multilinear ensemble.” An apparatus is thus not a thing but consists of a multiplicity of lines (straight, broken, curved) without a natural centre towards which it gravitates (temporary ‘steady states’ with a centre can of course emerge).

Deleuze defines the apparatus as consisting of four dimensions: curves of visibility, curves of enunciation, lines of power and lines of subjectification. The first two dimensions Deleuze summarizes as “machines which make one see and speak” (ibid: 160). The curves of visibility can, he claims, be thought of as light and “[e]ach apparatus has its way of structuring light, the way in which it falls, blurs and disperses, distributing the visible and the invisible, giving birth to objects which are dependent on it for their existence, and causing them to disappear” (ibid.). There is thus a productive quality to the apparatus: it produces what we perceive, not necessarily materially but in our understanding of it. It structures reality in a particular way, which allows for some things to become real and knowable in a certain manner while excluding others.

In a similar way Deleuze defines the lines of enunciation as that “over which the differential positions” of affirmations “are distributed” (ibid.). Affirmations, in turn, are “curves which distribute variables and ... a science, at a given moment ... can be defined precisely by the regimes of enunciation to which [it] give[s] rise” (ibid.). Bringing the first two dimensions of the apparatus together, Deleuze claims that the regimes of enunciation “must be defined from the point of view of the visible and from the point of view of that which can be enunciated, with the drifting, transformations, and mutations which this will imply” (ibid.). The different dimensions of the apparatus thus build upon each other, the first two being the most fundamental. They refer to the system of the structured and meaningful relations between the elements of the apparatus. The productive capacity entails that the apparatus establishes the meaning, purpose and function of a given state of reality. This, at the same time, means that the apparatus itself produces the perception of ‘urgent needs;’ it structures, for example, the interpretation of crises.

Deleuze’s third dimension concerns the “lines of force” (ibid.). These work on the first two sets of curves, in that they straighten out, orient, “rectify” (ibid.), the lines of

visibility and enunciation. The lines of force thus “draw tangents, fill in the space between one line and another, acting as go-betweens between seeing and saying and vice versa, acting as arrows which continually cross between words and things, constantly waging battle between them” (ibid.). “This is the ‘dimension of power’” (ibid.) and it serves to give direction, to give purpose to the arrangement of the parts. It fills in the spaces between the lines of meaning. It is “formed, like power, out of knowledge” (ibid.).

Knowledge thus takes on an active, technical capacity. It functions as the more or less conscious strategic moulding of lines that might otherwise follow each their own trajectories. It makes these trajectories come together through an understanding of how things work and relate to each other. In this sense, the strategic function of the apparatus is dominant.

This raises the question of agency, often raised as a critique of Foucault. Who is it that engages in strategy? Who exercises force? What is the place of the subject capable of (creative) action in the apparatus? Deleuze (ibid: 161) addresses this issue by adding to the three other dimensions the “lines of subjectification”:

a line of subjectification is a process, a production of subjectivity in a social apparatus [*dispositif*]: it has to be made, inasmuch as the apparatus allows it to come into being or makes it possible ... The Self is neither knowledge nor power. It is a process of individuation which bears on groups and on people, and is subtracted from the power relations which are established as constituting forms of knowledge [*savoirs*]: a sort of surplus-value.

The subject (individual, group, organization, state, etc.) is thus not something that exists outside the apparatus: “We belong to apparatuses and act within them” (ibid: 164). The subject is constituted in the interplay of the lines of visibility, enunciation, and force, in the spaces between the different elements of the apparatus along with or against the rationalities of the apparatus, in the latter case “preparing for ‘lines of fracture’” (ibid: 161).

The lines of subjectification are thus concurrently the most unruly aspects of the apparatus and the most powerful in terms of its reproduction. As such, the lines of subjectification are those subject to the most comprehensive governmental techniques. In this dimension the apparatus coincides with Foucault’s analysis of ‘governmentality’,

which seeks “to show how the coupling of a set of practices and a regime of truth form an apparatus (*dispositif*) of knowledge-power that effectively marks out in reality that which does not exist and legitimately submits it to the division between true and false” (Foucault 2008: 19). According to Oksala, “governmentality takes the place of power-knowledge in functioning as the main theoretical tool for analysing the historical and political production of social reality” (2010: 459). But it is not simply a replacement of power-knowledge with a new term denoting the same thing. It is a naming of a particular constellation of the power-knowledge entity: “Governmentality denotes the underlying political rationality, the historical conditions ... for political thought and practice in the modern period” (ibid.). Governmentality is thus a modality of subjectivation, which works on and through that which becomes something (people, institutions, etc.). It is a particular way of governing that orders and arranges subjects, thus producing a social and political reality.

The apparatus is thus the intersection between “what we are (what we are already no longer), and what we are in the process of becoming: *the historical part and the current part*” (Deleuze 1992: 164, emphasis in original). The apparatus represents, in other words, the intersection between an ‘ontology of that which *is*,’ tied to the past and the sedimentations of power/knowledge visible in the present, and an ‘ontology of *becoming*,’ tied to the problematization and contestation of what *is*, which paves the way for a reconfiguration of the apparatus in question and thus of the processes of subjectivation which it engenders. ‘What we are’ thus refers to the historical formation of the present and the ‘current’ refers to “what we are in the process of becoming – that is the Other, our becoming-other” (ibid.).

2.2. Case Selection

The Euro Crisis constitutes a rupture. As such, the OMT programme and the controversy concerning it offer glimpses into the structures of the relations between the various elements of the apparatus of central banking in the Eurozone. More importantly, the OMT case (from Draghi’s ‘whatever it takes’ to the ECJ’s judgement and beyond) represents a significant transformation of the apparatus in response to an urgent need, within a relatively compressed timeframe. In studying the OMT case within the framework an ‘apparatus-analysis,’ I thus hope to be able to contribute to an

understanding of what central banking in the Eurozone was, is and is becoming. This perspective can, I hope, at the same time offer insights into what this strange political-economic community is and is becoming.

In this regard, one of the aspects of the OMT programme that makes it particularly interesting as a case study is the fact that it has become the subject of legal proceedings at two of the highest courts in the EU. Apart from the legal and political significance of this, it means that it has been subject to intense public scrutiny, critique, elaboration, and justification. As such, the source material is rich in scope and substance. While there is undoubtedly an even richer ‘hidden’ or non-public body of source material (accessible perhaps only through interviews), I have consciously relied only on publicly available sources. Not because I dismiss the significance of what happens behind closed doors and in hallways or the importance of ‘bringing it to light,’ but because I am interested in politics, public law, and the exercise power as a public activity. It is thus the public justifications for public acts that I look at, regardless of whether they are ‘really’ motivated by something else. It is that which is public which becomes part of the aesthetics and the knowledges common to the community. It is that which is public that contributes to the distribution or “partition of the perceptible” (Rancière 1999: 57). I look, in other words, for public justifications for certain ways of seeing, being and acting. In this specific sense I am studying the *political* thoughts embodied in particular ways of conceptualizing a particular policy within the broader framework of central banking and its place in the legal-political-economic order.

The OMT case itself is, however, contemporaneous and it is thus situated, if it is possible to make such a neat separation, within what I have called the ‘ontology of becoming.’ The apparatus-analysis, however, would be incomplete without some kind of grounding in the history of the becoming of that which is, what Foucault has called genealogy or “history of the present” (Foucault 1977: 31). While I do not venture into a detailed and comprehensive genealogy of central banking in Europe or even the Eurozone, I attempt to trace, if only superficially, an intellectual history of some of key elements of the justifications presented in the context of the OMT. This intellectual historical aspect of the thesis is, however, not merely intended to provide a context for the understanding of the contemporaneous but also to provide a canvas on which to make the transformations that the OMT represents intelligible.

My methodological guideline for this part of the analysis has been to ‘work my way back’ from discourses in the present. That is, I have tried to identify and trace lineages of key references to thinkers or ideas. Then I have read, analysed, and placed these texts in their theoretical as well as political-economic contexts, before finally ‘returning’ to the present to see what has been carried over, what has been modified, what has been lost. This, I think, allows for the identification of particular historical experiences or theoretical developments in the past on which a particular institutional structure or way of thinking in the present is based. Whether I stop too soon is up to the reader to judge. Given the limitations on space and time, however, I have ‘stopped digging’ when I found that I had sufficient leverage to make the argument about the present, not the past, that I am seeking to make.

2.3 Source Material

Some of the primary source material employed for the analysis requires little elaboration. Official documents concerning the OMT programme itself, for example, are obvious sources (ECB press releases, for example). The same is arguably true with regard to public announcements (press conferences) and speeches by ECB officials. These two categories of sources are my main primary sources for the presentation of the ECB’s own interpretation of the programme in chapter 3.

As discussed above, public controversy and conflict over something calls for, it requires, reasoned justifications. Court cases are in this respect a rich source. As such, the two court judgements, although the proceedings have not come to a final conclusion yet, were obvious choices. The GFCC’s judgement³ will be the main primary source for section 4.1 and the ECJ’s judgement⁴ will figure prominently as a primary source for chapter 5. Furthermore, since Advocate General Pedro Cruz Villalón’s opinion⁵ was referenced in important passages in the ECJ’s judgment, I have relied extensively on his rich analysis of the case as a primary source for the analysis in chapter 5.

These documents at the same time provide a starting point for the selection of sources for both the historical aspect of the analysis discussed above and the analysis of the public debate concerning the programme. As it would have been impossible to cover

³ From hereon cited within parenthesis as GFCC followed by the paragraph number.

⁴ From hereon cited within parenthesis as ECJ followed by the paragraph number.

⁵ From hereon cited within parenthesis as AG followed by the paragraph number.

the whole spectrum of the public debate, I have limited my discussion of it to two positions, which I have identified partly from the primary sources listed above, partly from literature searches, and partly from simply following the case in international media. As it were, I have tried to narrow the scope of sources for this aspect of the analysis by limiting the analysis to officials, scholars and commentators who are either 1) institutionally linked to the controversy, 2) cited or referred to in the official documents, or 3) referred to by authors in the former two categories. As such, all the primary sources employed for the analysis are interlinked in a relatively dense network. This category contains varied types of sources, including academic journal articles, blogs, opinion pieces in newspapers, and public speeches.

In terms of the general approach to the source material, I have refrained from passing judgement on whether something is 'right' or 'wrong,' 'correct' or 'incorrect.' I am, for example, not interested in determining whether the OMT programme, deep down, was 'really' a monetary policy or fiscal policy. What matters is how the programme and its position in relation to the wider apparatus of central banking in the Eurozone are conceptualized. Similarly, in terms of the theoretical literature that I refer to as part of the historical analysis, I am not interested in whether the economic theories are mistaken about or overlooked some crucial element or other. Rather, I want to look at the theories in question as social or political theories. In that sense, for example, I will not evaluate whether central bank independence 'really' leads to lower inflation. What interests me are the political implications, the lines of subjectivation, the (re)distributions of the perceptible, that the statements imply. As such, my general methodological approach is very much interpretive.

Chapter 3 – The Outright Monetary Transactions Programme

The OMT programme was announced in a speech, two press conferences and a press release. The programme, however, has never been implemented and as such there are no legal texts outlining the details of the programme. The few and brief documents that do exist have nevertheless received considerable attention.

The first part of the chapter analyses Draghi's famous 'whatever it takes'-speech act. The second turns to the press conferences at which the programme was presented and the press release outlining the 'technical features' of it. This chapter thus traces the becoming of the OMT programme.

3.1 Becoming a 'Real Bee', Becoming OMT

The pre-statement of the OMT programme was made at the Global Investment Conference in London on 26 July 2012 (Draghi 2012).⁶ In this speech, Draghi discussed the single currency's past, present, and, importantly, its future. The speech delivers four points. The first relates to the past of the euro, where Draghi introduces the curious metaphor of the bumblebee, that "mystery of nature because it shouldn't fly but instead it does." The flight of the euro-bumblebee, he suggests, must have owed its success in the first several years to "something in the atmosphere, in the air, that made the bumblebee fly." Now, however, "something must have changed in the air." With the advent of the financial-cum-sovereign debt crisis, the euro's honeymoon was over and "[t]he bumblebee would have to graduate to a real bee." Its metamorphosis into a 'real' currency must begin, "And that's what it's doing."

The truth of the euro is revealed not in the conducive times of economic stability and growth, when it is as if carried by the wind, but in the crisis, when the support provided by the general economic atmosphere collapses. However, Draghi claims, the economic fundamentals on which the euro's viability rests are "either like or better than US or Japan." The preconditions for the metamorphosis are thus in place for "all the

⁶ Until and unless otherwise noted, all citations in this section are to this speech.

structural reforms that will actually graduate the bumblebee into a real bee.” The euro’s past has paved the way for its transformation in the present.

But what does this transformation into a ‘real bee,’ a real, self-sustaining currency, consist in? Turning to the second point, Draghi cements his belief “that progress has been extraordinary in the last six months.” This progress has been at the national level, where economies “tend to converge much more than they have done in many years,” through “undertaking budgetary control, structural reform,” in a word: austerity. “A lot of progress,” however, “has been done at supranational level.” Particularly, Draghi claims, “The last summit⁷ was a real success because for the first time in many years, all the leaders ... said that the only way out of this present crisis is to have more Europe, not less Europe.” ‘More Europe’ in this context means: “A Europe that is founded on four building blocks: a fiscal union, a financial union, an economic union and a political union,” i.e., something that would require extensive treaty revisions and over which there is considerable if not insurmountable disagreement. And indeed, Draghi acknowledges that such a Europe would demand an extensive transfer of sovereignty to the supranational level: “These blocks ... mean that much more of what is national sovereignty is going to be exercised at supranational level, that common fiscal rules will bind government actions on the fiscal side.”

Progress towards transforming the euro into a real currency thus involves a significant transformation of the EU and an extensive relinquishing of *fiscal* sovereignty on part of the Member States. It involves, as it were, a development towards a state-like European structure. This, Draghi claims in his third “more political” point, is something that the Member States of the euro are strongly committed to: “When people talk about the 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.” This leads Draghi to conclude that “we [at the ECB] think the euro is irreversible.” The political costs of abandoning the euro would, in other words, be too great to bear for the Member States that have invested so much in the project.

⁷ Summit of the European Council on 28-29 June 2012. At this summit, the heads of state decided to establish the single supervisory mechanism as part of the Banking Union (European Council 2013).

The final point is what has made the speech the most famous in the history of the ECB: “Within our mandate, within our mandate,⁸ the ECB is ready to do whatever it takes to preserve the euro. [pause] And believe me, it will be enough [pause].” Rhetorically, the message is delivered with an attempt not to persuade the audience (investors) but to invoke confidence in the speaker himself (‘believe *me*’). Draghi thus invests his personal authority and credibility in the statement while at the same time underlining that it is the beliefs of the investors present and the public in general that needs to be addressed and shaped.

Continuing on from this bombastic ‘bazooka’ statement, Draghi goes on to outline the underlying factors that he thinks support his claim that the euro is not at risk of collapsing. First, he claims, the steps towards banking union will help stabilize the financial system. Second, Draghi claims the ECB has solved the problem of “risk aversion.” Finally, Draghi draws attention to the

premia that are being charged on sovereign states borrowings. These premia have to do ... with default, with liquidity, but they also have to do, more and more,⁹ with convertibility, with the risk of convertibility. Now to the extent that these premia do not have to do with factors inherent to my counterparty - they come into our mandate. They come within our remit.

Draghi thus directly addresses the situation in the middle of 2012 where the yields on sovereign bonds were increasingly diverging. Draghi acknowledges that these spreads are, theoretically speaking, potentially justified with reference to underlying economic fundamentals. However, as noted above, Draghi claims that the ‘fundamentals’ do not warrant such spreads. The spreads can only be explained by investors’ fear that some countries might potentially leave the euro and revert to national currencies (‘the risk of convertibility’). The euro, however, is irreversible and this fear is thus irrational, a misconception on part of investors. Since the “size of these sovereign premia,” according to Draghi, “hampers the functioning of the monetary policy transmission channel, they come within our mandate.” The risk-premia are thus a concern for monetary policy and thereby within the mandate of the ECB.

⁸ Draghi repeated this phrase but the repetition is not reproduced in the transcript on ECB’s website.

⁹ ‘More and more’ is omitted from the transcript.

The ‘urgent need’ of responding to the spreads in the sovereign debts markets relates back to Draghi’s point about transforming the euro into a real currency. The question is: how? How does the as yet undisclosed measure, OMT in becoming, play in with the broader project of completing the euro? What role does the speech play in the reconfiguration of central banking in the Eurozone? It clearly plays a part invested with ‘political capital,’ as Draghi puts it. The lines of force are in play to remould central banking in the Eurozone. Balancing the positive law of the ECB’s legal mandate and the law of necessity of the emergency situation, Draghi tries to navigate the rocky waters by simultaneously invoking a future to come (‘more Europe’) and a continuation of and respect for the order constituted in an ever more distant past (‘our mandate’). Thus caught between conservatism and activism, Draghi, the embodiment of the institutional authority of the ECB, speaks-acts in an indeterminate but forceful manner.

3.2 Announcing the OMT

The two press conferences in which the OMT programme was announced took place on 2 August 2012 (Draghi and Constâncio 2012a), a week after the speech in London, and on 6 September 2012 (Draghi and Constâncio 2012b), same day as the press release outlining the ‘technical features of Outright Monetary Transactions’ was issued (ECB 2012).

In the August conference Draghi¹⁰ picks up on a number of points made in the London speech. Among those, Draghi restates the argument that “Exceptionally high risk premia are observed in government bond prices in several countries and financial fragmentation hinders the effective working of monetary policy.” Furthermore, Draghi repeats the claim that “Risk premia that are related to fears about the irreversibility of the euro are unacceptable, and they need to be addressed in a fundamental manner.” Draghi thus repeats his claims that “the euro is irreversible.”

This claim is challenged in the Q&A following the September press conference: “Mr Draghi, you repeated that the euro is irreversible. What gives you the democratic legitimation, the authority to say that? Because I have looked it up in the Treaty. It does not say anywhere that it is the role of the ECB to decide what kind of currency the European countries have.” Interestingly, Draghi’s answer does not address these

¹⁰ In both press conferences, Draghi does most of the talking.

questions. He merely restates the claim adding that “we will do whatever it takes within our mandate – within our mandate – to have a single monetary policy in the euro area, to maintain price stability in the euro area and to preserve the euro.” The question of the democratic legitimacy and legality of the programme is thus bypassed with a simple assertion.

In order to secure these three objectives (single monetary policy, price stability, preserve the euro), Draghi, in the August press conference, introduces the idea that the ECB “may undertake outright open market transactions of a size adequate to reach its objectives ... Furthermore, the Governing Council may consider undertaking further non-standard monetary policy measures according to what is required to repair monetary policy transmission.” The language is still vague but it points to the development of the OMT as an unconventional monetary policy measure that reverses the trend towards financial fragmentation in the Eurozone. Positioning the OMT programme in the category of ‘non-standard monetary policy measures’ at the same places the OMT in continuation of the already broad array of measures introduced to handle the Euro Crisis.¹¹

These measures, however, are only one ‘leg,’ as Draghi puts it in the Q&A of the September press conference. The other ‘leg’ is composed of the economic policies of the Member States. This, however, introduces an important contradiction. On the one hand he says, in the August press conference, that the risk premia are based on “unfounded fears.” On the other he claims that “in order to create the fundamental conditions for such risk premia to disappear, policy-makers in the euro area need to push ahead with fiscal consolidation, structural reform and European institution-building.” The risk premia are thus simultaneously artificial/irrational and natural/real/rational. Draghi thereby tries to balance the EU’s (ideological) commitment to austerity while at the same time promising to provide a backstop.

The institutional structure in which the euro is embedded thus needs to be strengthened for the euro to be sustainable and become a ‘source of stability.’ There is thus an element of ‘functional spill-over’ at play and the currency is seen the driver necessitating institutional change in the Member States as well as the EU but also the

¹¹ For a discussion of such measures in the course of the Euro Crisis and their implication for understanding the relationship between ‘the new ECB’ and the Eurozone Member States, see Beukers 2013.

goal to be achieved. Equally, and more importantly in the context of this thesis, it is not merely a particular economic order that the euro is bound up with; it is a specific political order, albeit vaguely defined.

These interconnections between the monetary, economic and political order are equally apparent in the announcement of the OMT programme in the September press conference. Here Draghi, for the first time, uses the phrase “Outright Monetary Transactions” as a name for something specific and he presents the programme as one that will “enable us to address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors of the reversibility of the euro.” OMTs will, according to Draghi, provide a “fully effective backstop to avoid destructive scenarios with potentially severe challenges for price stability in the euro area.” Now the spreads are thus primarily destructive in terms of price stability. Draghi thus narrows his discourse down to focus strictly on the ECB’s mandate. No reference is made to other economic indicators at this point. In a further effort, perhaps, to anticipate a critique of the programme, Draghi continues almost mechanically: “we act strictly within our mandate to maintain price stability ... we act independently in determining monetary policy; and the euro is irreversible.”

Draghi thus continues his repetitive style, promising to preserve the euro within the narrow confines of the legal mandate. Similarly, Draghi repeats his conviction that “in order to restore confidence, policy-makers in the euro area need to push ahead with fiscal consolidation, structural reforms to enhance competitiveness and European institution-building.” While he gives little detail on what these structural reforms should be, some indications as to their objectives are to be found in both the August and the September statement. In the concluding remarks of the August statement, Draghi starts by announcing, “while significant progress has been achieved with **fiscal consolidation** over recent years, further decisive and urgent steps need to be taken to improve competitiveness” (emphasis in original). There is thus, supposedly, a link between fiscal retrenchment and competitiveness. Secondly, Draghi stresses that

structural reforms are as essential as fiscal consolidation efforts and the measures to repair the financial sector. Some progress has also been made in this area. For example, unit labour costs and current account developments have started to undergo a correction process in most of the countries strongly affected by the crisis. However, further reform measures need to be implemented swiftly and decisively. Product

market reforms foster competitiveness and the creation of efficient and flexible labour markets are preconditions for the unwinding of existing imbalances and the achievement of robust, sustainable growth (emphasis in original).

In terms of fiscal consolidation, the September statement reads:

it is crucial that governments undertake all measures necessary to achieve their *targets* for the current and coming years. In this respect, the expected rapid implementation of *the fiscal compact* should be a main element to help strengthen confidence in the soundness of public finances (emphasis added).

Draghi thus shifts his language slightly towards emphasising the legal framework already in place ('the fiscal compact'). Interestingly, the Fiscal Compact, which introduces the so-called 'golden rule' of balanced budgets into the constitutions of the Member States, arguably introduces a system of fiscal control and supervisions at the supranational level which "is much less respectful of state sovereignty than the U.S. federal one" (Fabbrini 2013: 4). Draghi thus shifts his discourse slightly from one centred on action ('whatever it takes') and necessity ('exceptional financial market circumstances') to one centred on already existing legal provisions that tend towards increasing centralization at the supranational level.

Prescient perhaps of the coming legal dispute, the third question of the Q&A following the September press conference addresses precisely the question of the legal mandate of the ECB and whether the OMT is in violation of the 'no monetary financing' clause. Draghi, however, defends the OMT programme by emphasising that "outright purchases of bonds are identified, in Article 18 of the Statute of the ECB, as one of the various possible tools that our monetary policy has and can use. So we are not creating anything new here". However, in response to the fifth question of the session, Draghi concedes that "[i]f the central bank were to intervene without any actions on the part of governments, without any conditionality, the intervention would not be effective and the Bank would lose its independence." The legality of the OMT interventions is thus premised on the condition that governments impose austerity measures to correct the economic fundamentals that led them into a "bad equilibrium" in the first place ("we should not forget why countries have found themselves in a bad equilibrium to start with. And this is because of policy mistakes"). However, the OMT

is justified with reference to “unfounded fears on the part of investors.” The tension inherent in the communication of the OMT thus permeates the press conference.

Faced with an existential crisis of the euro, the ECB must act before it is too late. The problem, however, is that it is the economic policies of the Member States that have introduced fears about the viability of the euro and the ECB is not mandated to intervene in the economic policies of the Member States. In this regard, the “conditionality element” comes in as a saviour. It is, Draghi emphasises, “the most important difference” between the OMT and all the ECB’s previous efforts to address the Euro Crisis: “it really puts together our intervention with an ownership of the economic programme that a certain country has, by the country’s government.” It is also, however, what makes the programme legally and politically contentious. Without conditionality the programme would violate the prohibition on monetary financing, induce ‘moral hazard, and compromise the ECB’s independence. With conditionality, the programme raises the question of whether the ECB is overstepping the boundary between monetary and economic policy by intervening in the economic policies of the Member States but more importantly because it indicates that the bond spreads are not unjustified but simply reflect the market’s pricing of the risks associated with the Member States’ economic policies.

The centrality of conditionality is underlined in the press release announcing the programme (ECB 2012). Under the first headline, ‘Conditionality,’ “strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme” is announced as a “necessary condition for [OMTs].” The ECB thus seeks to pre-emptively address the potential criticism that this is a circumvention of the ‘no monetary financing’ clause and the ‘no bailout’ clause (Article 125 TFEU). However, although a necessary condition, such programmes are not a sufficient condition and the press release emphasises that “the Governing Council will decide on the start, continuation and suspension of [OMTs] in *full discretion* and acting in accordance with its monetary mandate” (emphasis added). By underlining that the Governing Council retains the right to decide on whether the OMT programme will be triggered, the ECB asserts its independence and bureaucratic authority (and scientific integrity) vis-à-vis the other EU institutions as well as the governments of the Member States. As such, the ECB asserts its commitment to pursue the programme only in so far

as it is necessary for monetary policy purposes, i.e., only as long as it is necessary for “safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy.” By framing the programme in this way, the ECB tries to portray the programme as being primarily a monetary policy, but which at the same time supports “the general economic policies in the Union” without “prejudice to the objective of price stability” (Article 127(1) TFEU).

Chapter 4 – The Power of a Promise

The brevity of the press release and its lack of detail stand in stark contrast to its presumed effectiveness and the legal dispute that erupted in its wake. While the performance of monetary policy through declarations of intent and the ‘management of expectations’ is nothing new or unique to the ECB (AG: 87, see also Krippner 2007¹²), the controversy over this particular announcement is quite spectacular.

The promise to conduct OMTs at the height of the Eurozone crisis has been hailed as a “watershed” (Jakoby 2015: 82) and “one of the most effective announcements any central bank has ever made” (Gerner-Beuerle et al 2014: 282). As Mark Blyth (2013: 247) puts it, “Never has so much effect been gained by doing so little. Words alone, it seemed, calmed the markets.” During the OMT proceedings at the ECJ, the ECB and the Commission allegedly claimed that the programme’s “impact ... is still being felt more than two years later” (AG: 84, see also Altavilla et al 2014).

The ‘magic of the OMT’ is that it supposedly works as intended without being put to use. This, however, means that Member States such as Spain and Italy have benefitted from the OMT “without ever entering a structural adjustment program” (Wilkinson 2015: 1049, n. 4). As such, Wilkinson argues, the OMT strains the balance between “assistance and austerity because it potentially offers rescue without conditionality, doing its work without ever needing to be triggered. And it shifts control over the balance between assistance and austerity from the Member States to the EU institutions” (ibid: 1052). In this interpretation the promise to conduct OMTs threatens to undermine precisely those aspects of the OMT programme that Draghi asserts are what sets the programme apart from other unconventional monetary policy measures. This means that by introducing an effective backstop to the liquidity-cum-solvency problems of the Member States the OMT has the potential to have fiscal, redistributive effects that are independent of economic policy measures that Member States have implemented or agreed on.

¹² Krippner discusses the development of “*indirect* methods of policy implementation” (2007: 479, emphasis in original) as a means of having ‘markets do the work’ for policy-makers. One of the important modalities of such policy-making is the management of the market’s expectations about the future, as the Advocate General remarks (87).

This chapter discusses some of the dominant interpretations of the OMT programme as they are presented in the OMT case at the GFCC and in public debates. The GFCC's arguments against the OMT programme (discussed in the first section) are of central importance not merely to the debate about the OMT programme but also to the wider position of the ECB's emergency measures in the constitutional constellation of the EU. The second section discusses two competing perspectives on the OMT programme. The perspectives in important respects share the interpretation of the programme but they differ markedly in their normative evaluation of it. This difference, I argue, is rooted in different visions of the political-economic order and orientation of the EU. The third section of the chapter reflects on these differences.

4.1. On Trial: The OMT Programme and the Political Order

From the perspective of European public law, the OMT programme raises a number of challenging and deeply controversial issues. It brings to the fore some fundamental conflicts and tensions regarding the distribution of powers between the national and the supranational levels. One of the ways in which this conflict manifests itself is through the question of the relationship between the highest courts of the Member States and the ECJ. In this respect, as in many others in a 'German Europe' (Beck 2013, Wilkinson 2014), Germany's highest court enjoys a special power and status, which is in part derived from the country's economic and political might and in part from Germany's history and particular constitutional arrangement.

Based on ECJ case law, the GFCC ruled that the OMT programme "could only be regarded as an economic policy measure" (Petersen 2014: 324). Like the ESM, the OMT programme's goal was financial stability in the Eurozone (rescuing the euro) and its means were likewise the provision of financial assistance to Member States. With the announcement of the OMT programme, the GFCC argued, the ECB had acted *ultra vires* and committed an act amounting to a "unilateral usurpation of powers" (GFCC 2014: 3.b). As such, the GFCC found that the programme was most likely in violation of the German Basic Law. This, in turn, would mean that a) the German Bundesbank would be obliged "to refrain from buying bonds of Member States under the OMT framework" and b) the German government and parliament were to have "to take measures to challenge the OMT policy" (Petersen 2014: 323-4). However, instead of

going it alone, the GFCC referred the case to the ECJ for a preliminary ruling. “The [GFCC] is a strong court,” Petersen concludes (ibid: 326), “but it is not strong enough to take on the responsibility for such an important decision for the course of the economic policy by itself. For this reason, it seeks the cooperation of the” ECJ.

The GFCC suspended proceedings on 14 January 2014 and referred a number of questions to the ECJ. While the preliminary reference procedure is a normal aspect of the functioning of EU law, this particular referral was quite controversial, at least from the perspective of the ECJ (AG: 41-52). The preliminary reference procedure is intended to ensure the “uniform interpretation and application” (CJEU 2012: I.1) of EU law by allowing Member State courts to consult the ECJ. However, rather than utilizing it in the spirit of “active cooperation between the national courts and the Court of Justice,”¹³ the GFCC’s OMT referral, the first time the GFCC makes use of this procedure, has been seen as an act of ‘active provocation’: “the questions put to the [ECJ] ... are constructed in a manner that it requests the [ECJ] to confirm the legal view the GFCC has already decided to take and that the GFCC does not appear ready to change in any event” (Pernice 2014: 4). This is an issue, which was quite pressing for the Advocate General (52): “the preliminary ruling procedure was ... never conceived of as a mere ‘opportunity’ for the [ECJ] to ‘concur’ with the national court ... with the possible consequence that any ‘failure to concur’ on the part of the [ECJ] could render its answer nugatory.”

The controversy is thus over the fact that the GFCC reserves for itself the right to overrule the ECJ’s ruling and by doing so it challenges the ECJ’s monopoly on the correct interpretation of EU law. In the context of the OMT programme, this is a problem because the GFCC has explicitly stated the terms under which the OMT programme would *not* be “objectionable”: 1) “the possibility of a debt cut must be excluded,” 2) “government bonds of selected Member States are not purchased up to unlimited amounts,” and 3) “interferences with price formation on the market are to be avoided where possible” (GFCC: 100). The OMT press release, however, explicitly lists points 1) and 2) as means towards achieving point 3). The ECB will: 1) accept *pari passu* treatment (i.e., in case of defaults, the ECB would suffer the same losses as

¹³ EUR-Lex: “The reference for a preliminary ruling.” Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l14552&from=EN> [accessed 24 March 2016].

private creditors); 2) the ECB will set “no ex ante quantitative limits” on the size of OMTs (ECB 2012); and 3) the two factors are intended to contribute to the goal of restoring the functioning of the monetary policy transmission mechanism, which, according to Draghi, was stifled by the markets’ ‘irrational’ pricing of sovereign default risk. It was thus precisely the formation of prices on the market that the OMT was intended to interfere with.

The problem with this way of framing the case is that if the ECJ had conceded to the GFCC, the programme would, presumably, be ineffective. However, if the ECJ left the specificities of the OMT programme unchanged and unqualified, as it did, the GFCC might still consider the OMT programme to be illegal and as such unconstitutional according to the German Basic Law. At present, the GFCC finds itself in a difficult dilemma. The aggressive course of action would be to press on with its decision and ban the Bundesbank from participating in the programme and oblige the Bundestag to take measures against the ECB. This would effectively sow doubts about the OMT programme and significantly constrain the ECB’s discretion to manage crises in the future. This course of action would, according to the Advocate General (38, 52) at the same time challenge the “‘constitutional compact’ underlying the integration process.” If the GFCC maintains that its own interpretation of EU law is more valid than the ECJ’s, the principle of the ECJ’s supremacy would break down. Conversely, should the GFCC concede to the ECJ, this would undermine the court’s own standing and authority and the court would thereby effectively subjugate itself and thus the German Basic Law to the ECJ and the EU legal order.

While it is perhaps the GFCC’s own ‘fault’ to have framed the problem in this way (it could, as Justice Lübbe-Wolff argued in her dissenting opinion, have rejected the case as inadmissible), the GFCC’s framing of the OMT programme as an infringement on the constitutional identity of the German state should not come as a surprise. The GFCC has, according to Petersen (2014: 321), “never fully accepted the absolute supremacy of the ECJ in matters of EU law” (see also AG: 37, Craig 2011, Kumm 1999, Payandeh 2011). Closely related to this, the principle of ‘supremacy of EU law,’ established in an (revolutionary) act of judicial politics by the ECJ in the *Van Gend en Loos* case in 1963 (Vauchez 2010, Rasmussen 2014), is difficult to reconcile with the German Basic Law. This difficulty is related to the fact that the principles of supremacy

and ‘direct effect’¹⁴ effectively “appear as the *de facto* Constitution of Europe” (Vauchez 2010: 1). There is thus a constitutional overlap and it is unclear which constitution prevails in the case of conflict.

4.1.1 Carl Schmitt’s Theory of the Federation

This, according to Carl Schmitt (2008: 381-395¹⁵), is the fundamental condition of the federation as a political form: “The essence of the federation resides in a dualism of political existence” (389). “It is part of the essence of the federation ... that the question of sovereignty between federation and member states always remains open” (390). However, being based on a constitutional contract among the constitution-making powers of the member states, the federation itself “does not have its own constitution-making authority” (396). As such, any changes in the federal constitution must come from the member states; otherwise it will have transformed itself into a federal state like the US. However, while the member states are in this sense prior to the federation, federal law is supreme and takes precedence over member state law (397).

This arrangement, Schmitt argues, “necessarily leads to many conflicts, which must be decided” (389). If such conflicts are sufficiently existential they cannot be answered judicially but require a political decision. In case a court makes this decision, the court would no longer perform a juridical function: “This office would be sovereign. It would no longer be a court, but rather an existing political power” (389). A decision on the existential conflict between the federation and any one of its parts is thus a threat to the continued existence of the federation as such:

both types of political existence must continue to coexist as long as the federation is to remain in place. The collective existence of the federation must not subsume the individual existence of the member states, nor can the existence of the member states subsume that of the federation ... *The federation exists only in this existential connection and in this balance*” (ibid: 388, emphasis added).

What Schmitt predicts, therefore, is that in the case of a fundamental existential conflict between the two coexisting and overlapping constitutional orders, a decision will be made in favour of one or the other. If the national constitution prevails, the

¹⁴ Established in *Costa v ENEL* in 1964.

¹⁵ Until and unless otherwise noted, all references in this section are to this book.

federation collapses and the member states revert back to individual statehood. If, on the other hand, the federal constitution prevails, it will have mutated from a federation of sovereign states to a sovereign federal state.

4.1.2 The German Dilemma

There is little doubt that the GFCC sees this difficulty in the relation between Member State and Union. In discussing the relevant German legal framework within which to review the OMT programme, the GFCC explicitly asserts its right to review whether EU acts infringe upon the constitutional identity of the German state (GFCC: 17).

Constitutional identity, in turn, is defined with reference to the democratic constitution of Germany:

This substantive content of what is guaranteed by the right to vote is violated only, but always so, if this right is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e., if the democratic self-government of the people ... is permanently restricted in such a way that central political decisions can no longer be made independently” (GFCC: 19).

This does not mean that the German people cannot delegate the exercise of sovereign powers to the EU; this has been done throughout the history of European integration. The exercise of such delegated powers, however, must respect the “principle of conferral” (GFCC: 20), which means that EU acts only have binding effects on the German jurisdiction “within certain limits ... This implies that subsequent substantial changes to the programme of integration set out in the Union Treaty and to its powers to act are no longer covered by the Act of Assent to this Treaty” (GFCC: 21). In other words, should the GFCC consider an EU act to be *ultra vires*, “the organs of the German government would be prevented from applying these instruments in Germany” (GFCC: 21).

Directly asserting its supreme authority to review such German constitutional matters, the GFCC continues: the GFCC “examines whether the legislative instruments of European agencies and institutions remain within the limits of the sovereign powers conferred upon them or whether they transgress those limits” (GFCC: 21). To put it a bit crudely, the GFCC suspects that the OMT programme threatens to infringe on the German people’s sovereign right to decide on how it spends its money.

The question of whether an act is *ultra vires* is, however, not completely straight forward. The GFCC states that while it has the right to conduct *ultra vires* review, it “must in principle comply with the rulings of the [ECJ] as a binding interpretation of Union law” (GFCC: 24). This principle is the source of the present negotiations between the German and the European court: the ECJ is the supreme authority on the interpretation of EU law but the GFCC is the supreme authority on the interpretation of German constitutional law, but EU law is part of German constitutional law. In order to try to negotiate this tension, the GFCC states:

Ultra vires review can ... only be considered if it is manifest that acts of European institutions and agencies have taken place outside of the transferred powers ... This means that the act of authority of the [EU] must be manifestly in violation of powers and that the impugned act is highly significant for the allocation of powers between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law (GFCC: 24).

The act, in other words, needs to be of a nature that alters the status and identity of the state in relation to the Union (GFCC: 25). The *ultra vires* review is thus an essential aspect of the Member State’s ability to protect its continued political existence from the subversive forces of supranationalism and the right to perform it “cannot be waived” (GFCC: 26).

While such issues are obviously tricky in all Member States, the German case presents an added difficulty because of the so-called ‘eternity clause,’ Article 79(3) in the Basic Law. According to Ulrich K. Preuss (2011: 439), this article “incorporated [Carl] Schmitt’s idea that certain core elements of the constitution should remain unamendable.” While constitutional amendments as such are “necessary to preserve the flexibility and sustainability of the constitutional order” (ibid: 430); some constitutional provisions cannot be changed without transforming the identity of the state.

The unamendable provisions are: “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.” Of these principles, article 20 was considered of prime importance in the OMT case. This article stipulates the constitutional identity of the German state as being based on 1) democracy within a social, federal state, 2) popular sovereignty, and

3) the rule of law.¹⁶ In effect this means that should the GFCC find that an EU act is *ultra vires*, this would compromise the identity of the German state, since all public authority must emanate from the people and it must conform to the Basic Law.

While there are similar eternity clauses in other Member State constitutions, German history has inspired in the GFCC a certain vigilance in its defence of the Basic Law. This combined with the position of Germany within the EU has led commentators to argue that “[s]ome courts are clearly ‘more equal than others’” (Wilkinson 2014: 4). As I will return to in chapter 5, the ECJ did not concede to the GFCC’s demands and as such the relationship between the constitutional orders remains unsettled. If the GFCC intended the referral as an attempt to initiate dialogue and cooperation between the two courts, the ECJ did not take to it kindly and left little wriggle-room for the GFCC’s own final verdict in the case, which is due to arrive sometime in 2016.

4.2 In Debate: The OMT and the Economic Order

The legal controversy was and is still one of the issues around which the public debate about the OMT programme revolved and many of the texts analysed in this section take the case as their explicit point of departure. However, the emphasis is different in that here it is not a reasoned legal opinion but normative standpoints on the programme itself and the order and orientation of the Eurozone political economy. As such, I turn from a legal analysis to an analysis of the ideological stakes involved in the design of central banking and monetary policy.

I have, as noted, identified two competing perspectives: the ‘integrationist’ and the ‘conservationist’. The two perspectives, in turn, build on certain ideas about the nature of the market and the place of central banking and monetary policy in the wider economic order. The integrationists build on a certain Keynesian outlook whereas the conservationists are indebted to German ordoliberalism. In discussing each position I will start by briefly outline these theoretical positions.

The two perspectives agree on a number of aspects relating to the OMT programme. Both perspectives agree that with the OMT programme the ECB effectively acted as a lender of last resort. They also agree that the OMT is an act that modifies the existing institutional arrangement of the EU. On this account, the two

¹⁶ The fourth clause, the right to resistance, was not invoked in the OMT case.

perspectives thus agree with the GFCC. Their normative evaluation of it, however, differs widely.

4.2.1. The Integrationists and the Legacy of Keynes

The integrationist position on the OMT builds on the basic Keynesian idea that the market needs correcting interventions in order to function properly. As such, society needs strong public institutions capable of stepping in to direct the economy, especially in times of crisis. Within this Keynesian framework the central bank plays an important but limited role.

4.2.1.1 Make not the Central Bank Weaker, Make Government Stronger!

In a 1932 article, Keynes comments on a Labour Party proposal for restructuring the Bank of England. In doing so, Keynes advances a distinct conception of the structure and role of central banks in the economy. Sceptical of the gold standard, Keynes supports Labour's proposal to achieve a managed "sterling currency which would aim primarily at stability of value in terms of wholesale prices" (Keynes 1978a: 128).

Keynes in other words favoured a monetary policy that prioritizes domestic stability over the disciplining power of the gold standard. According to Keynes, the authorities at the time, however, remained committed to a return to gold because "they conscientiously disbelieve in the whole order of ideas for which the alternative policy stands for" (ibid.).

In contrast to the gold standard, which in theory should operate through automatic mechanisms, the new monetary system will "require the exercise of a new technique, including, especially, a large measure of control over the volume of new investment" (ibid: 130). An effective monetary policy, which aims at domestic price stability (as, for instance, in the Eurozone), thus needs to be considered in conjunction with the wider government of the economy; monetary and economic policy cannot be separated. In terms of the central bank's independence, Keynes argues that the central bank "should be ultimately subject to the Government of the day" and the guiding "principles of the currency system ... should be determined by Parliament" (ibid: 131). However, this does not mean that the treasury or parliament should dictate the activities and policies of the central bank: "The less direct the democratic control and the more

remote the opportunities for parliamentary interference with banking policy the better it will be (ibid.).

Keynes thus stresses that the general framework of monetary policy is a political issue that the elected representatives at any given time decide upon based on their popular mandate. As such, monetary policy is subject to the normal political processes of a parliamentary democracy. Despite this fundamental limit on central bank independence, Keynes maintains that the central bank should be as removed from democratic control as possible. But how are these propositions reconcilable?

Keynes justifies them on the grounds that “[i]f the Bank of England is to carry out the monetary policy which is proposed . . . it will be engaged in the practice of a very difficult technique, of which the Parliament will understand less than nothing” (ibid.). The expertise necessary for the government of money thus warrants the autonomy of the central bank; its “independence and its prestige are assets” (ibid: 132). Politicians (and the electorate for that matter) do not have the required knowledge to conduct or even understand the techniques of monetary policy properly. What Keynes seems to envision is a monetary policy, whose general outlines and orientation are defined through normal democratic political processes but which is executed by designated experts, servants to the democratically elected masters.

For Keynes the problem is thus not that the central bank is independent but rather that

More often than not . . . the country has possessed no defined standard and not even a defined monetary policy laid down by Parliament; with the consequence that the Bank of England has been left free to exercise . . . a wider discretion than it ought to have or has had in the past or will have in the future, on matters which go far beyond the practice of a technique for the attainment of a purpose, the general character of which has been laid down by a higher authority (ibid.).

The central bank is thus an autonomous bureaucratic organ within the state apparatus. If the central bank is acting too independently, this is not a problem of the central bank but a problem associated with a lack of will and authority on part of the government. “The widespread feeling that the Bank of England is an irresponsible body exercising arbitrary power without marked success“ (ibid.) is thus fundamentally misdirected. The problem is not so much the execution of monetary policy; the problem is that it has

largely been the central bank governor who has decided on what kind of monetary policy to pursue. *This* should be decided by the Government of the day and not by the central bank. The conclusion is thus: do not make the central bank weaker; make government and particularly the government of the economy stronger!

4.2.1.2 OMT as a Step towards a Eurozone Government

According to the monetary economist, Paul De Grauwe, the OMT programme “constituted a regime change in the Eurozone” (2013: 520), the ECB has hesitantly done “what had become inevitable, i.e. to become a lender of last resort in the government bond market” (2012). This ‘regime change’ refers to the ECB’s recognition that in order to be effective, it must prioritize its task of contributing to the stability of the financial system (Article 3(3) Protocol on ESCB and ECB) as much as it does its obligation to ensure price stability. In order to do so, “it is essential,” De Grauwe argues (2013: 530), “that the ECB maintains its full commitment to exert its function of lender of last resort.” According to De Grauwe, this function consists in assisting Member States in need through the provision of (indirect) credit facilities. As discussed above, this, however, is in violation of the ‘no monetary financing’ clause of the TFEU. While recognizing this legal problem, De Grauwe celebrates the programme as a necessary first albeit insufficient step in the process “towards further political unification” (2013: 530).

Implicit in De Grauwe’s understanding of the OMT programme is a conception of monetary policy as being organically linked to the general economic framework of a political community. Money and monetary policy is to be understood as something that is primarily intended to complement the general economic policies of a government. As De Grauwe’s conclusion suggests, the problem with the OMT programme is thus not that the ECB transgresses its mandate but that the mandate is too rigid, that there is no feasible legal procedure for altering it. De Grauwe thus also points to the problem of a lack of a common political body that defines economic policy. If a central bank is to support the “general economic policies in the community” (Article 127(1) TFEU), there needs to be some kind of uniform direction to such policies, there cannot be 19 or more different economic policies. Such consistency, however, is difficult if not impossible to attain without stronger centralization of economic decision-making power and a common budget.

In this, De Grauwe echoes Keynes' conclusion that the problem is not the strength of the central bank but rather that there is no political body that can give it directions; there is, in other words, no scope for directing the ECB's monetary muscle legitimately within the EMU. Any attempt to limit the ECB's power is therefore fundamentally misguided. Instead of trying to weaken the ECB, Germany and the EU in general should work towards building a political superstructure to match it.

The philosopher and sociologist Jürgen Habermas (2015¹⁷) has been vocal in the debate on the Euro Crisis and indeed the OMT programme has not escaped his attention. Shortly after the ECJ passed judgement on the OMT referral he claimed that the ruling “casts a harsh light on the flawed construction of a currency union without a political union.” However, like De Grauwe, Habermas defends the ECB's decision to transgress its mandate (and the ECJ's retroactive legalization of it) and claims that “[i]n the summer of 2012 all citizens owed Mario Draghi a debt of gratitude for uttering a single sentence that saved them from the disastrous consequences of the threat of an immediate collapse of their currency.” Draghi's ‘simulated fiscal sovereignty,’ as Habermas puts it, “shines a light on a gap in the construction of the currency union which the ECB has filled by means of emergency relief.” Repeating Keynes' analysis of the crisis of government in the interwar period which left the central bank with a much wider degree of discretion than would normally be desirable, Habermas claims that Draghi “had to press ahead alone because the heads of government were incapable of acting in the common European interest; they remained locked into their respective national interests and frozen in a state of shock.” Necessity, in other words, forced the ECB to take on the role of ‘political actor of last resort.’

The consequence of the ECJ's judgement, according to Habermas, is that now “the ECB can in fact, subject to a few restrictions, occupy the room for manoeuvre of ... a lender of last resort.” While recognizing the unconstitutionality of constituting such a room of manoeuvre through judicial politics, Habermas adds: “One is tempted to say that the law of the European Treaties must not be directly bent by its protectors but it can be tweaked even so in order to iron out, on a case by case basis, the unfortunate consequences of that flawed construction.”

¹⁷ Until and unless otherwise noted, all citations are to the English version of this article.

This, however, is untenable in the long run; the “flaw ... can only be rectified by a reform of the institutions.” This leads Habermas to argue that

This currency union will remain unstable as long as it is not enhanced by a banking, fiscal and economic union. [This means, however, that if we do not want to overtly declare democracy a mere decoration, the EMU must be extended to become a Political Union¹⁸].

Citing the controversy over the Greek referendum in the summer of 2015, Habermas argues that the whole process revealed “the unintentionally comic nature of the uniformly nation-state way of thinking” which “brought what is lacking unmistakably to the attention of European public opinion: a focus for a common decision-making process among citizens across national borders about weighty courses of political action in the core of Europe.” The whole Euro Crisis thus revealed, according to Habermas, the need to move towards further European integration and the construction of a transnational/supranational political body capable of meaningful political action, whose legitimacy is based on a European people, a European popular sovereign.

The necessary link between an elected government and the central bank is again emphasized and this link should be constituted at the transnational/supranational level. A currency such as the euro must be governed by a central bank, but in the final instance some kind of legitimate political authority must hold the ultimate responsibility for the direction of monetary policy. The ECB’s actions are both necessary and desirable but they are so only if they are the first steps in a broader and more comprehensive process towards a political integration that can imbue the comprehensive political and economic union that Habermas envisions with democratic legitimacy. The conflict between the federal/Union level and the Member State level discussed above is implicit in this conception but in contrast to the GFCC, Habermas seeks resolution in favour of the Union. In effect, Habermas, like De Grauwe, thus argues for the transformation of the EU or at least the Eurozone into a federal state with a unified governmental apparatus.

¹⁸ My own translation between brackets.

In a 2012 speech, Member of the Executive Board of the ECB, Benoît Cœuré (2012¹⁹), ventured to “explain how to interpret the latest decision to conduct [OMTs] in secondary markets for sovereign bonds.” In this context, Cœuré also addresses the question of “the democratic accountability of the central bank in these testing conditions.” According to Cœuré, “a central bank receives legitimacy when it is assigned a clear mandate by the people in its jurisdiction.” The ECB is thus legitimate based on its democratic constitution. This democratic constitution, in turn, “assigns the ECB the pursuit of a “primary objective of price stability over the medium term.””²⁰ According to this rendition of the ECB’s mandate, the ECB acts undemocratically if it does not pursue this objective. As such, the OMT is in line with the ECB’s democratic mandate in so far as it contributes to the primary objective of the ECB: price stability. It is the spirit of the law that matters, not the letter.

Cœuré then asks the question: “How should the ECB be held accountable?” and answers:

for the ECB, accountability to *the people of Europe* is not only a matter of good accountability practices. It is important for the central bank of a currency union to reach out to the whole euro area, to people in all parts of Europe and to spread trust in our currency, our institutions and our policies (emphasis added).

Given the controversy over the constitutionality of the OMT programme this answer is quite interesting in that it indicates the existence of a unified European political subject, ‘the people of Europe,’ a subject that does not exist in law. The stress on accountability thereby takes on a significance beyond mere transparency: if there is a collective political subject beyond, beneath or above the Member States and the European Parliament, this subject supposedly has the power to alter the mandate of the ECB or even to abolish it all together. The ECB therefore must ‘reach out’ to this ‘people’ in an effort to gain its trust, for without trust, there is no currency as “Money involves trust because it is a debt between society as a whole and each of its members,” as Cœuré cites the staunch critic of the euro, Michel Aglietta (cf. 2012), for saying.

¹⁹ Until and unless otherwise noted, all references are to this speech.

²⁰ Cœuré purports to cite from TFEU but the actual formulation, especially “medium term” is not to be found in the Treaties or in the Protocol of the ESCB and the ECB.

Accountability, however, is only one thing. Another is the legitimation of new tasks and roles. While Cœuré does not mention the OMT as a step in the direction of something new, he does emphasise that “trust in the euro as a project relies on a more complex framework and structures.” From this statement he goes on to refer to an article by Habermas, Peter Bofinger and Julian Nide-Rümelin, which, according to Cœuré, claims that

a rallying cry of the American War of Independence – “no taxation without representation” – has a new and unexpected resonance in today’s Europe. Once we create the scope in the euro area for policies that result in redistributive effects across national boundaries – they write – European legislators who represent the people must be able to decide and vote on these policies. I tend to sympathise with this view. European leaders have a great opportunity to rectify the now apparent failings of EMU’s institutional structures.

The problems of the euro area cannot, according to Cœuré, be solved “by going back to financial markets delimited by national borders.” “The only viable solution” is to move towards further European integration through concerted and concentrated efforts at transforming the “*de facto* solidarity” that the “euro area crisis has created” into institutional reforms. The governance of the Eurozone already involves redistribution, Cœuré suggests, now we need to make such redistribution democratically legitimate. In this regard, Cœuré seems to argue that “the general issue here is to clarify who does what, to establish a network of responsibilities.” Furthermore,

The notion that the euro is a currency without a state is in my view misguided. The euro is a currency with a state – but it’s a state whose branches of government are not yet clearly defined. The ECB is part of the construction of [EMU], with a very clear but very limited mandate. The other parts – I am thinking in particular of the delineation between the Commission and the Council – still require clarification. The proposal put forward by Jean-Claude Trichet of a “euro area Treasury” would be an important step in that direction. The ECB is independent and fully accountable, but it needs clearly identifiable and fully empowered interlocutors.

This statement is remarkable for many reasons. Cœuré clearly sees the EU as a state in becoming. Cœuré thus goes even further than Habermas by claiming that the Schmittian existential conflict between the Union and the Member States is already settled in

favour of the Union; the EU or, rather, the EMU is already a federal state. The ECB's position, furthermore, is already clearly demarcated and defined within this becoming-state framework; what is missing are "clearly identifiable and fully empowered interlocutors." It needs, in other words, a stronger delineation of the responsibilities of the other parts of the state apparatus that Keynes emphasised as being pivotal to a well-functioning monetary policy.

The three interpretations I have presented in this section thus all agree on echoing Keynes' call in the 1930s: do not make the European Central Bank weaker, make the government of the Union (stronger)! Create a centre of power capable of guiding an economic policy that the ECB can then support.

4.2.2 The Conservationists

According to the conservationists, the EMU framework is neither flawed nor incomplete; it is exactly as it should be. The problem is that Member States and EU institutions alike fail to respect it. Based on ordoliberalism, this position is traditionally associated with the austerity measures that the ECB purports to support with the OMT programme (Blyth 2013). As discussed above, however, the OMT can be interpreted to bypass the pressures to impose austerity (thus inducing 'moral hazard'). Not least therefore the programme has inspired serious concerns among conservationists.

4.2.2.1 The Comprehensive Ordering of the Economy

In a presenting the principles of the gold standard, Friedrich A. Lutz (1989 [1935])²¹ develops what an ordoliberal conception of the relationship between the monetary system and the general economic and political order.²² Lutz argues that in order to understand the gold standard properly, one must acknowledge that it "is a mechanism," a "machine" (220); it functions through automatic adjustment mechanisms. As such, the gold standard leaves little room for discretion in monetary policy. The central bank is bound by its gold reserves and cannot increase the money stock more than the underlying international movements in the standard dictate. The gold standard thus

²¹ Unless and until otherwise noted, all page references in this sub-section are to the English 1989 edition.

²² There are, indeed, certain structural similarities between the euro and the gold standard (Eichengreen and Temin 2010, Dellas and Tavlas 2013). Harold James (2012: 1), for example, notes: "The European Monetary Union, as many of its critics maintain, looks a lot like the pre-1913 gold standard, which imposed fixed exchange rates on extremely diverse economies."

“represents ... a strict order of international finance based ... on quite specific rules” (225). In contrast to Keynes’ managed currency, the gold standard thus “makes few rather than many demands on the human intellect ... the mechanism works less smoothly the more the logic of the mechanism is eschewed” (225). It is thus an inherently rational and “very sensible and wise construction” (226).

However, “the functioning of the gold standard is based on quite specific economic and general political conditions” (226). The central bank, for example, must refrain from exercising a “conscious influence on the trade cycle” (227), otherwise “the gold standard loses its meaning” and the “gold standard ceases to be a system and chaotic conditions result” (229). Monetary (and economic) policy must thus stick to the rules of the system and not intervene *against* its logic.

This does not mean that the central bank is entirely ‘condemned’ “to looking after its gold reserves in a not very ingenious way.” Rather, central banks can work in “the same direction as the gold standard” (229).²³ However, “There can be no question of any ‘independence of the human intellect’ ... it is not for the [central bank manager] to command but to obey even if this means obeying in the manner of a highly intelligent servant who deduces only from certain indications what his master wishes and then does the right thing without any express command” (230).

This notion of automatism and the truth about the economy being revealed in the market is closely related to the ordoliberal conception of the price mechanism as the structuring condition around which the market economy revolves (Eucken 1989: 27). The price in the market reveals, as it were, a truth (Foucault 2008). In this framework, exogenous disturbances of the price formation process “are intolerable” (231).

But how are such harmful governmental interventions to be avoided? As Polanyi argued (2001) and as the ordoliberals witnessed in the inter-war period, society might not tolerate the free reign of the ‘satanic mill’ of the market; people might not tolerate governmental inaction in economic crises. The gold standard, however, needs “‘confidence in stable conditions.’ By this is meant confidence in political stability at home and abroad and ... confidence in the maintenance of the currency” (233). In an argument that seems curiously related to the debate about the OMT programme, Lutz

²³ This principle, Lutz acknowledges, echoes the logic of Alexander Rüstow’s ‘liberal interventions,’ which “work in the same direction as the rules of the market” (241, n. 7).

argues that if there is a lack of confidence concerning the future, “credit flows are not governed by the level of interest rates but by the real or supposed general security or financial security of the countries concerned” (233). Capital movements will thus take place not because of shifts in patterns of productivity and consumption but because of risks associated with non-economic factors such as political stability in a country or, as in the Euro Crisis, convertibility risks. ‘Political stability’ in any one country, i.e., a political commitment to a free market economy, is thus of fundamental concern for the entire system of countries subject to the standard.

While the system itself is automatic, it does not emerge spontaneously. Deciding on a monetary system involves a comprehensive decision on the principles on which a community is to be organized and once a decision has been made, the community must follow through with its decision and accept the full consequences of it. This decision is first and foremost ideological and according to Lutz, “[t]he ideological basis of the gold standard is precisely the same as that of an economy which is based on free competition” (236). This, however, does not address the question of how such an order is to be maintained, i.e., what kind of legal and political system will be able to secure the competitive market order and its corresponding monetary order. This, according to Lutz, raises “a far greater problem”: “the problem of the relationship between the economic order and the political order” (Lutz 1935: 247).²⁴ Lutz raises two questions in this regard: “Is it not the case that not only is a specific monetary system adjoined to a specific economic system but also that perhaps this economic system is in turn adjoined to a specific political system? Does the economic balance of the free market economy presuppose a political balance?” (237).

This theme is taken up more explicitly in Lutz’ *Das Grundproblem der Geldverfassung*. In this essay, Lutz suggests that the monetary constitution should be subjected completely to the general economic constitution, a concept developed extensively by Franz Böhm, to whom Lutz refers. This constitution is to be governed by the principle of free competition and the State is to assume an important role of assuring “compliance with the rules” of the competitive order (Lutz 1936: 95, my translation). What emerges from this conception is thus that the question, ‘what kind of monetary system?’ involves the fundamental political question of what kind of general political

²⁴ I have relied on my own translation of the German original for this specific passage.

and economic order a community wants for itself. Does it want a “free economy” or does it want a “planned economy” (241)? This, however, is a constitutional question and economic and monetary policy is to be removed from the sphere of ordinary politics once the constituent decision has been taken.

According to Draghi (2013), “the monetary constitution of the ECB is firmly grounded in the principles of ‘ordoliberalism.’” Indeed, prominent scholars on the legal framework of the EMU claim that ordoliberalism is the theoretical foundation on which it was built:

[the EMU] was a political project, but one that was constituted and sustained by law as a legal project, a more stringent version and vision of “integration through law” as advocated by German Ordoliberalism. The new common currency was not to be entrusted to a political union, but to be bound to legal rules. Only an economic policy “that could be bound by constitutional law aligned with actionable criteria”²⁵ was to be practiced in Europe – that was the creed of German Ordoliberalism (Joerges 2014: 250).

Reflecting Lutz’ conception of the monetary constitution, Joerges argues that the ordoliberal casting of economic policy in terms of constitutional law served to “immunize Europe against Keynesian impulses and macroeconomic policies,” primarily, perhaps, because it requires “continuous assessment of economic and social parameters” and “in the last instance” it rests on a “political decision about priorities” (ibid.).

4.2.2.2 Stop Intervening Against the Economic Order!

Irrespective of Draghi’s claims, the OMT has been criticized precisely for being in violation of the basic principles of ordoliberalism. One of the OMT programme’s most fervent critics is Jens Weidmann, president of the Bundesbank, who was the only member of the ECB’s Governing Council who voted against the programme (Steen 2012). In his Walter Eucken Lecture in 2013²⁶, Weidmann claimed that

The entire Maastricht framework reflects key ordoliberal and social market economy principles.

- It is geared to the principle of open markets ...

²⁵ Joerges attributes the citation to a prominent advocate of ordoliberalism, Ernst-Joachim Mestmäcker.

²⁶ Unless and until otherwise noted, all citations are to this lecture.

- It is geared to the principle of liability, which was incorporated as a “no bail-out” clause into the EU Treaties ...
- And it is geared to the primacy of monetary policy.

This, according to Weidmann, reflects Eucken’s understanding of the centrality of monetary policy: “All efforts to achieve a competitive system are in vain unless a certain monetary stability is assured. Thus, there is a primacy of monetary policy in competition [sic] order” (Eucken as cited by Weidmann). In a thinly veiled²⁷ attack on his ‘boss’ at the ECB, Weidmann claims that “by buying government bonds or imposing lax standards on collateral, the Eurosystem ... is contributing to a redistribution of risks among the euro-area countries’ tax-payers.” Concurring with the GFCC, Weidmann argues that this is a democratic problem in that “in principle, only parliaments and governments, with democratic legitimacy, should be redistributing wealth – not politically independent central banks.” Weidmann continues: “this creeping or even open politicisation of central banks is causing me concern.” In conclusion he argues that ordoliberalism is far from being “outdated” but faces the problem of how “to give the principle of liability renewed heft.” This challenge, he suggests, can only be addressed if we “preserve and protect the role of central banks as independent, clearly focused guarantors of monetary stability.”

Commenting on the GFCC’s preliminary reference, the economist Hans-Werner Sinn (2014²⁸) has argued that the OMT programme was not only a transgression of the ECB’s legal mandate, its objective was also misguided:

interest-rate premiums are the main mechanism by which excessive debt in the eurozone can be avoided. If states borrow too much, the probability that they will be able to repay falls, and creditors demand higher interest rates in exchange. This, in turn, reduces their inclination to borrow.

The economic crisis in southern Europe stemmed from an inflationary credit bubble that resulted from the absence of interest-rate premiums, and that robbed the afflicted countries of their competitiveness. Interest-rate differentials – including premiums reflecting the heightened risk of a eurozone exit and exchange-rate realignment to

²⁷ The veil consists in Weidmann citing the HSBC’s Stephen King for stating it in the first place.

²⁸ Unless and until otherwise noted, all citations are to this article.

reestablish competitiveness – are crucial for the monetary union’s long-term existence, stability, and allocative efficiency.

With the OMT, the ECB has thus, according to Sinn, intervened in the market’s pricing of risk, an intervention that can only bring about distortions to the price mechanism that Eucken and Lutz hailed as the preeminent allocative device in an industrialized economy. Risk premia are, in other words, the market’s way of disciplining states into being competitive. The short-term risk to the stability of the Eurozone is nothing, according to Sinn, compared to the long-term danger that such interventions pose to the European economic order. The OMT introduces a ‘moral hazard’ in the sense that in the future, governments can expect that the ECB will step in to alleviate their debt burdens, should they become too heavy. Thereby they will not only refrain from implementing the reforms intended to improve competitiveness, they will also tend to use deficit spending for populist purposes, which in turn will mean that the state will take on a more activist/interventionist role in the economy. In such a situation, the free market economic order will have collapsed. The ‘road to serfdom’ is thus paved with OMTs.

This, as indicated, reflects the ordoliberal commitment to the economic constitution, which “should respect the interdependence of a system of undistorted competition, individual freedoms and the rule of law – and protect this precious balance against discretionary political influence” (Joerges 2004: 13). But Sinn is not only concerned about the politics of the measure, he at the same time criticises the economics of it. The ECB is simply wrong in its analysis of the economic situation. The bond spreads are not irrational. How can they be? They are, after all, a product of the price mechanism.

The ordoliberal commitment to the conservation of the existing legal order is exemplified in brief comment on the GFCC’s referral by a former Justice of the GFCC, Udo Di Fabio. Referring to the breach of the ‘stability criteria’ in a number of Eurozone countries before the financial crisis, Di Fabio (2014: 109) argues that the “crisis ... was largely caused by massive violations of the law.” In other words, if only the Member States, including Germany, had remained within the confines of the existing legal framework, the crisis might not have occurred. A proper, legally guaranteed economic order is, it seems, without (severe) crises. As such, breaches of this legally entrenched

economic order are to be considered “promiscuous” and “a return to individual responsibility and stability criteria established and enforced by European law must be the ultimate goal” (ibid: 110).

Like Sinn, Di Fabio agrees with the GFCC in declaring that the OMT announcement was “a “blatant” violation of the rules necessary for maintaining a stable currency union” (ibid: 108). Again, the ECB’s transgression of its mandate was neither necessary nor desirable. Furthermore, reflecting the status of the constitutional decision identified in Lutz, Di Fabio argues: “The [GFCC] is enforcing exactly that version of the European project that politics have managed to achieve by way of international law” (ibid: 109). With regard to the referral Di Fabio warns the ECJ to “not behave in the manner of a political institution” (ibid.). Independent institutions such as a court and a central bank must respect the principle of conferral and refrain from going beyond what has been politically decided. Contrary to the integrationist understanding of the OMT programme, the ECB’s push towards further integration is thus seen not as part of the solution to the problems of the EMU but as a symptom of them. It is a danger to the European project because by moving beyond what has been politically decided, it not only undermines its legitimacy; it also introduces a logic, which is foreign to the constituted order.

This relates to the identification of the underlying cause of the crisis. Di Fabio argues that the OMT programme discourages Member States from pursuing “the ultimate goal,” which, as discussed above, is a return to austerity and fiscal discipline enforced by a strict legal regime (ibid: 110). Responding, it seems, to a critique advanced by Paul Krugman (2014), Di Fabio (2014: 110) continues in a somewhat moralistic manner: “The fiscal discipline of the participants in the common currency is a decisive prerequisite for the success of this fascinating European project. The truly “bad Europeans” were those who fudged their budgetary numbers or watered down, sometimes even disregarded, the stability criteria.” Di Fabio concludes that the ECB “would be thankful if its mandate as monetary policy maker were clearly delimited” (ibid.).

4.2.3 The Crisis in Keynesian and Ordoliberal Thought

The integrationists and the conservationists disagree on a number of things but one of the fundamental issues that they disagree on is how to conceive of the emergency

situation. The conservationist conceptualization reflects a conviction that it is possible to create a legal order that takes care of all issues that might arise. The crisis is thus one of illegality: it erupts because the legal order is disregarded and there is nothing but chaos outside it. In line with the GFCC's position in the OMT case, the conservationists argue that what has been constituted legitimately once must be conserved as long as something new has not been legitimately constituted.

The integrationists, on the other hand, see the crisis emerging from the existing structures. Or rather, the crisis as such has nothing to do with legality or the institutional structure but is a condition inherent in the capitalist system. As such, it is something that any constituted order should expect and make provisions for. The *severity* of the Euro Crisis, however, *is* a product of an ill-conceived and/or incomplete institutional order. The integrationists thus, like the ECB officials, call for 'institution building' in order to improve the institutional structure's ability to withstand, mitigate and manage crises in the future. Much in line with Jean Monnet's famous dictum – 'l'Europe se fera dans les crises' – the crisis, in all its misery, is thus seen as opening a window of opportunity. It unsettles the existing state of things and the necessity of doing something can be harvested for institutional reforms that may or may not have been on the agenda prior to the crisis.

The underlying understanding of the functioning of the capitalist market system shines through in these differing understandings of the crisis. To the conservationist, markets are, if properly constituted and observed, inherently rational and any failures are failures of government. While disagreeing with the Hayekian notion that a market economy can emerge spontaneously (it must, as noted above, be constituted through law based on a political decision), this position builds on an understanding of the mechanisms of the economy in the (neo-)classical tradition. Public authority of some kind is necessary in order to protect the economy from various kinds of threats (monopolies, cartels, labour unions) but based on the inter-war experience in Germany, the conservationists are fundamentally sceptical of discretionary government.

Furthermore, from this perspective, a government with an unconstrained mandate from the people is liable to succumb to pressures for economic planning and other interventions against the logic of the market. While promising to alleviate the hardships of the population, such measures, it is argued, will inevitably lead to a totalitarianism á

la Nazi-Germany (Foucault 2008: 110). In order to avoid such dangerous irrationalities, democratic government must be constrained (cf. Müller 2011: 128).

The European integration project is intriguing in this regard. As Werner Bonefeld (2015: 1) has suggested, the ordoliberalists call “for a rule-based system of federated forms of economic governance to secure a free labour economy in conditions of mass democratic aspirations for a freedom from want.” In this context the EU constitutes a limit on the European peoples’ control over their economies. To Bonefeld this limitation on national sovereignty is at the same time a limitation on the ability of the people, the popular sovereign, to govern itself. The ordoliberalists, however, see this problem in a different manner. Limiting the sovereignty of the state means liberating people to pursue their own ends in a free market economy. The sovereignty of ‘the people’ is thus replaced with the ‘sovereignty’ of the market and the individual as a consumer.

At the heart of the ordoliberal scepticism regarding (democratic) government is thus a fear of the sovereignty of the masses. Wilhelm Röpke (1954: 250) put this succinctly: “To diminish national sovereignty is most emphatically one of the urgent needs of our time. But the excess of sovereignty should be abolished instead of being transferred to a higher political and geographical unit.” While the transfer of state sovereignty to the international level for reasons of peace and security can be a benefit, he argues, the sovereignty to intervene in and control the economy must not: “there would be little advantage in taking away from national Governments the sovereign right of collectivist economic control for the sole purpose of transferring it to an international authority” (ibid: 250). It is thus the sovereignty to collectively decide on and govern the economic order that must be abolished.

Conversely, the integrationists, as noted, recognize that capitalist markets are inherently crisis prone and liable to underperform for sustained periods of time. This was one of the key insights that informed Keynes’ *General Theory*: what may be perfectly rational for the individual capitalist may be highly irrational for capitalist society as a whole. As such capitalism is liable to market failures, panics, and economic crises and it needs a strong collective agent, a government, to correct the irrationalities of the market and direct its forces towards socially desirable ends. While any strong

public actor is better than none,²⁹ from a purely functional perspective a democratically legitimated one is more sustainable. It is simply less liable to become the object of popular discontent and hatred. In this regard, the ECB is perhaps powerful enough to correct some of the most blatant irrationalities but it is certainly not democratic enough to be able to do so in a more comprehensive and sustainable manner. Therefore the establishment of a political union with a democratically mandated government to match the powers of the ECB is the logical conclusion.

From the perspective of the ordoliberal, such a democratic European government threatens to institute an economic Leviathan much more formidable than any Member State. This threatens the constitutional balance in the EU and thus the constraints that the EU introduces for governments. Relatedly but more significantly, it opens up the possibility, however distant, of a European electorate legitimately deciding on a different order for the EU economy.

²⁹ In the preface to the 1936 German edition of the *General Theory*, Keynes (1978b: xix) explicitly suggests that his theory is “much more easily adapted to the conditions of the totalitarian state, than is the theory of the production and distribution of a given output produced under conditions of free competition and a large measure of laissez-faire.”

Chapter 5 - The Constitutionalization of Monetary Policy and the Scientization of Central Banking

The OMT announcement was, as it were, a promise. And yet, it became the subject of a legal controversy that is still unsettled and which may reconfigure the constitutional balance between the supranational and the national level in the EU. In all the interpretations presented in the preceding chapter (even Cœuré all but admits it), the ECB transgressed its mandate and became lender of last resort to the sovereigns of the Eurozone. In these interpretations, the ECB thus, in the economic state of emergency, committed an act of sovereignty, an act that reconstituted or, rather, is reconstituting the political and economic order of the EU and its Member States.

This chapter analyses how the ECJ and the Advocate General handled these claims. The ECJ, as noted, rubberstamped the programme without any reservations and as such refused to accommodate the GFCC's demands. The question is how the ECJ justified its disregard for what seems to be the common understanding of the programme. One could, in political realist terms, say that political necessities, identified by EU institutions as well Member State governments, trump the strict observance of the letter of the law. It is, one could argue, surely not the spirit of the law to be so strict as to lead to the destruction of the community. In such an interpretation the emergency justifies the abrogation of the strict rule of law. While there is undoubtedly something to this, the importance of the ECJ's judgement goes beyond the particular case: the ECJ is not just a passive adjudicator of legal disputes, it actively creates law (Vauchez 2010). At the very least, its judgements become precedent and thus the binding interpretation of EU primary law. If there is indeed a shift in the ECB's mandate, as the interpretations discussed above indicate, it is through the judgement of the ECJ that this shift will be codified.

In analysing the two main documents related to the case, the Advocate General's opinion and the ECJ's ruling, this chapter will argue that two key strategic moves are involved in this justification: the constitutionalization of monetary policy on the one

hand and the scientization of central banking on the other. These two discourses, seen in conjunction with the institutional architecture of the EU, serve in a very concrete way to depoliticize and render monetary policy and central banking in the Eurozone beyond the reach of legitimate political and legal scrutiny. This conceptualization of monetary policy and central banking has a significant intellectual pedigree in theories of central bank independence and of rule-based monetary policy, but in important ways it departs from them and produces a consequential mutation in the apparatus of central banking in the Eurozone.

The Advocate General delivered his opinion on the OMT case on 14 January 2015. Although not legally binding, in this case as in others the opinion of the Advocate General offers a thoroughly reasoned evaluation of the facts of the case, a detailed outline of the relevant legal EU (case) law, and a suggestion for how it should be interpreted and adjudicated by the ECJ. As such, the opinion serves as the groundwork for the deliberations of the ECJ's judges. There is thus a "dialectic interplay between opinions and judgments" which has shaped "the evolution of the case law" of the ECJ (Tridimas 1997: 1386). Furthermore, as an object of study the opinion is more detailed and 'thick' in its account of the case than the ECJ's judgment. I have therefore taken the Advocate General's opinion as my starting point for the analysis of the justifications for why the OMT programme is within the mandate of the ECB and referred to the judgment where relevant.

5.1 Monetary Policy in the State of Exception

Throughout his opinion, the Advocate General presents the context of the announcement of the OMT programme as one of existential crisis for the euro ("situation regarded as exceptional" (AG: 3), "whether the euro could survive" (3), "possible disintegration of the euro area" (7)).³⁰ Given the exceptional circumstances, the Advocate General argues that in its deliberations the ECJ "is confronted with the difficulties which extraordinary circumstances have long presented for public law" (7). The difficulty concerns "the powers of the ECB" (7). On this question, there are two positions. On the one hand, is the ECB's position:

³⁰ Although less outspoken on the issue, the ECJ ruling also makes reference to existential threats (e.g., "the risk of a break-up of the euro area" (ECJ: 72)).

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 (7, emphasis added).

On the other hand,

the complainants and the applicant 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 object of that programme is to transform the ECB into a ‘lender of last resort’ for the States of the euro area (7).

The ECB’s position highlights that the OMT is a necessary (‘what has to be done’) emergency instrument for bringing about the normal state of things. As such, its modality of government belongs to the sphere of state of exception but with a strong emphasis on restoring the pre-existing order. The claimants’ position, however, holds that by introducing the OMT programme the ECB is effectively transforming itself into a lender of last resort and as such, the ECB institutes a new order rather than restoring the existing one. In terms of modalities of emergency rule, these two positions, respectively, correspond roughly to Carl Schmitt’s (2014) distinction between commissarial and sovereign dictatorship.

5.1.1 The Economic State of Exception and Dictatorship

Extraordinary circumstances have indeed presented great difficulties for public law at least since Republican Rome. In trying to resolve this difficulty, the Romans developed the institution of dictatorship. To Machiavelli, this institution was one of the main instruments through which Rome acquired its greatness (*Discourses on Livy*, bk. 1, ch. 34). Through this institution the normal functioning of government (slow and with many ‘veto players’ in order to incorporate a multiplicity of interests) could be temporarily suspended in order that one person could act with absolute discretion in a state of extreme peril. Dictatorship is thus a legal institution for the state of exception. While it has fallen into disrepute this has not always been so. In and around World War II this was different. In the 1940s, for example, a number of American political

scientists invoked dictatorship as a necessary and available institutional measure for democratic governments in a situation of crisis (Rossiter 1948, Watkins 1940).³¹

The notion of ‘the state of exception’ originates within the sphere of the military, designating an imminent threat to the survival of the community due to external aggression or internal strife. Particularly during the 20th century the concept and practice was extended to the economic sphere, not least by F.D. Roosevelt during the Great Depression, when he in 1933 declared his intention to take on “broad Executive power to wage war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe” (Roosevelt as cited by Agamben 2005: 22, see also Scheuerman 2000, Rossiter 1948).

One of the fundamental characteristics of the emergency situation is the temporal urgency that it introduced. This “compression of time,” according to William Scheuerman (2000: 4, 1891-1894), is taken to the extreme under conditions of globalized capitalism, where investors and markets respond to events in a matter of seconds. The Roman institution of dictatorship finds its relevance in this regard since, as Schmitt (2014: 4, emphasis added) describes it, “[t]he dictator ... being *independent of the influence of any other institution*, was able to issue orders and to execute them immediately.” An independent central bank could, in this regard, be considered well positioned to assume dictatorial powers. Furthermore, the dictatorial institution “is entitled to do everything that is appropriate in the actual circumstances” (ibid: 8). Accordingly, “the way to judge these matters is only related to the question whether the means, in a very technical sense, are appropriate or not – that is, whether they have achieved their goal” (ibid.). Thus, “especially in a dictatorship, only the goal governs, which is freed from restrictions imposed by the law and is only determined by the need to create a concrete situation” (ibid.).

The institution of dictatorship is thus characterized the way in which it responds to an immediate and urgent threat to the existing order. In order to address this threat, the

³¹ According to Watkins (1940: 325), “Legal restraints are bound at some time or other to stand in the way of effective political action”. Furthermore: “In the face of pressing dangers, any question as to the long-run consequences of absolutism becomes purely academic. There is no point in worrying about the future unless you are sure that you have a future to worry about (ibid: 326). Rossiter (1948: 301) similarly argued that “A constitution which fails to provide for whatever emergency action may become necessary to defend the state is simply defective.” In concluding his study of dictatorship he asserts: “no sacrifice is too great for our democracy, least of all the temporary suspension of democracy itself” (ibid: 314).

normal functioning of the law can be suspended and the means towards achieving it should only, retrospectively, be judged on whether or not they achieve the aim of restoring order. In other words, the limitations on governmental power are (temporarily) suspended in order to safeguard order itself.

This question of limits to governmental power is a key aspect of the OMT case at the GFCC. The Advocate General (93) summarizes the GFCC's concerns as highlighting "in more general terms, the question of the limits to which the powers of the ECB are subject in exceptional circumstances such as those in the summer of 2012." The Advocate General thereby indicates that what is at stake is not just whether the particular exercise of power on behalf of the ECB was *ultra vires* but rather the general question emergency competences: to what extent should the ECB be allowed to exercise dictatorial powers?

As discussed in section 4.1.2, the GFCC (24) recognizes that some emergency acts may be legitimate; only acts which are "manifestly in violation of powers and ... highly significant for the allocation of powers" should be considered *ultra vires*. As such, it is only the emergency act, which brings about a new order that is problematic. Within the vocabulary of dictatorship, the question is whether the exercise of dictatorship restores the existing order or constitutes a new one? This distinction is central to Schmitt's discussion of the differences between commissarial and sovereign dictatorship.

Commissarial dictatorship, corresponding to the Rome institution, is completely reliant on the existing powers. As such, it is a modality of rule that the powers that be revert to in situations of emergency, when the necessity of the situation dictates it. As such, it is a temporary delegation of the full powers of the state but the delegation ends as soon as the dictatorship has achieved its ends: "The omnipotence of the dictator rests on his being empowered by an existing organ with constitutional authority" (Schmitt 2014: 112). The goal of the dictatorship, furthermore, is to bring about "a condition in which the law can be realised" (ibid: 118). As such, "[t]he constitution can be suspended without ceasing to be valid, because the suspension only represents a *concrete exception*" (ibid., emphasis in original).

While the case of the EU is complicated by the fact that it is difficult to identify a constitutional authority of this kind, in the context of the Euro Crisis this would be if the Member States collectively delegated to the ECB, for example, the power to suspend

the mandate temporarily. Essentially, the ECB's position claims that it conformed to this modality of dictatorship. The ECB, in other words, holds that it is, implicitly or explicitly, empowered by the Member States to preserve the euro. If there is no euro, there can be no single monetary policy and there can, of course, not be any price stability for the euro. Saving the euro, 'whatever it takes,' in this sense involves actions to bring about the condition in which the law of the ECB can be realized.

The replacement of 'commissarial' with 'sovereign' indicates that sovereign dictatorship belongs to a different order of political power.³² It is still a delegated power, and as such the dictator is a representative, but it is not a power delegated by constituted powers such as parliaments but by the constituent power, that elusive but sovereign force which makes revolutions and brings about radical political change. The sovereign dictator is thus the body that acts in an unrestrained manner for and in the name of the constituent power.

From the perspective of sovereign dictatorship, the entire existing order is a situation that dictatorship will resolve through its own actions. Dictatorship does not *suspend* an existing constitution ... rather it seeks to create conditions in which a constitution – a constitution that it regards as the true one – is made possible. Therefore [sovereign] dictatorship does not appeal to an existing constitution, but to one that is still to come (Schmitt 2014: 119, emphasis in original).

This mirrors all the non-EU interpretations of the OMT programme presented in this thesis. From the perspective of the GFCC and the conservationists, the ECB is usurping this power: it has no claim to represent the constituent power. In fact, as the GFCC argued in its Maastricht judgement, there is no subject of the constituent power in Europe; there is no *demos* (Weiler 1995). As such, even though its actions resemble this modality of rule, the ECB can, in fact, not be considered a sovereign dictator. It is

³² The state of exception is closely linked to Schmitt's theory of sovereignty as developed in *Political Theology* (2005). The two concepts – sovereignty and sovereign dictatorship – should, however, according to Schmitt (2014: 116) not be confused. Dictatorship as a modality of crisis government, whether commissarial or sovereign, is always linked to a particular goal. The sovereign, on the other hand, needs no particular purpose. It is, as it were, the 'sovereign who decides on the exception' and as such it is the sovereign who decides to name (or make itself) a dictator. Sovereignty as a type of power is thus of the same order as the constituent power. However, as Agamben notes (2005), these distinctions are difficult to maintain and the thresholds between commissarial and sovereign dictatorship on the one hand and sovereign dictatorship and sovereignty on the other tend to collapse in both empirical and theoretical reflections.

simply an illegitimate usurper and as such its exercise of power is illegal. From the perspective of the integrationists, however, there might be some underlying constituent power, however vaguely understood and defined, that the ECB is acting in the name of. Indeed, the constant references to a constitution ‘that is still to come’ (most notably through the invocation of the need for institution building and, ultimately, a political union) are suggestive of this. Cœuré, as noted, even goes so far as to invoke “the people of Europe” as the subject that the ECB brings about the necessary conditions on behalf of.

The heart of the controversy concerning the OMT programme thus revolves around the issue of whether it is a dictatorial measure that restores the existing order of the EMU or whether it points towards a radically transformed constitutional order. To exaggerate and put it a bit provocatively, it seems that the task for the Advocate General and the ECJ is to frame the OMT programme in the manner of commissarial rather than sovereign dictatorship. In this regard, the Advocate General argues that the OMT was appropriate because it achieved the objective of allowing “the States concerned to return to some degree of financial normality” (AG: 175). The ECB thus merely acted in order to restore the normal functioning of the market (AG: 198). As such, the OMT was a legitimate emergency measure because it contributed to restoring the conditions necessary for the normal order of things: “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” (AG: 186). The Advocate General thereby frames the OMT programme in line with the logic of commissarial dictatorship. The question, however, is whether framing can be maintained and how it is justified.

5.2 Constitutional Independence and the Guardian of the Euro

The most significant aspect of the ECB’s position within the constitutional framework of the EMU is its independence. And indeed, as the Advocate General draws attention to in his opinion, the notion of an independent central bank figures prominently in EU primary law. In paragraph 12, the Advocate General cites one of the relevant treaty articles:

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 (Article 130 TFEU).

The wording of this article led many observers to conclude that the ECB is the most independent central bank³³ ever established (Zilioli and Selmayr 2001, Lamfalussy 1997, De Haan 1997).

In paragraphs 108-9 the Advocate General interprets what this independence means. In stressing the ECB's clear and narrow "objective of ensuring price stability" paragraph 108 starts by affirming the "high degree of functional as well as organic independence" that is "characteristic of the ECB." This status, furthermore, "is very difficult to amend," "since any amendment ... requires amendment of the Treaties." Referring to De Grauwe, the Advocate General claims that this sets the ECB apart from other central banks, whose "regulatory framework may be amended by the relevant national Parliaments," since treaty amendment requires unanimity among the Member States. The independence of the ECB is thus, in contrast to central banks such as the Fed, enshrined in primary law and cannot be changed through normal legislative procedures. In other words, in terms of the public law framework, the ECB takes "central bank independence to the extreme" (McNamara 2002: 47).

The Advocate General draws attention to the relevance of this independence in paragraph 109: "the ECB's independence is also intended to ensure that it is kept away from political debate, there being an absolute prohibition on any instructions from other institutions or from the Member States."³⁴ In this as well as in the preceding paragraph,

³³ Central bank independence is often measured as the ability to pursue price stability irrespective of the government's wants. Included in such measures are legal/policy independence to define monetary policy and economic/financial independence. Some of the most cited measures are those developed by Alesina (1989), Grilli et al (1991), Cukierman (1992), and Eijffinger and Schaling (1993). While developed before the ECB came into existence, subsequent work has established that the ECB is exceptionally independent on these measures (see for instance Baimbridge and Whyman 2008: 101-2 and De Haan and Eijffinger 2000: 396).

³⁴ The ECJ (40) similarly states that the ECB's independence is guaranteed in EU primary law in order to shield it "from external influences" and "all political pressure."

the Advocate General refers to Robert Sparve's chapter "Central bank independence under European Union and other international standards" from an anthology published by the ECB as a source. Sparve's chapter opens with a reference to Kydland and Prescott's influential 1977 article. This article, Sparve claims, demonstrated that "governments in democratic countries may have a *time consistency problem*" (2005: 272, emphasis in original). Sparve continues: "If economic policymakers lack the ability to commit in advance to a specific decision rule, they will often not implement the most desirable policy later on" (ibid.).

This, it would seem, is closely linked to the discussion of the ordoliberal conception of the irrationality of democratic government. In its essence, democracy is, in this understanding, inherently irrational and without constraints it will tend to produce sub-optimal if not catastrophic economic outcomes. This means that democracy will be 'better off' if it restrains its own power of intervention in the economy. In discussing central banking in Europe prior to the ECB, Sparve puts this 'insight' succinctly:

European politicians ... had for a long time tended to consider their respective central banks to be basically the bank of the government. This meant that the central bank should not only support the economic policy of the government and provide additional funds for the government's budget ... but also ... do so whenever this was *politically desirable*, even if *economically unwise or inappropriate* ... It may in many cases have been *tempting* (and perfectly understandable) for any government ... to order the central bank to conduct a *lenient* monetary policy to boost employment when *general elections* were approaching ... this practice had in many countries repeatedly proven to be *disastrous to the economy* and to its *long-run economic growth potential* (ibid: 275, emphases added).

In this remarkable passage, Sparve clearly places the political and the economic, democracy and economy, in oppositional terms. The political is irrational and full of *desires*. It is weak and feeble and is easily *tempted* to go down paths that lead to its undoing. The democratic will of the people, expressed in general elections, is short sighted and does not know what is best for itself. A central bank that is subject to such democratic politics is *lenient* on the irresponsible, spoiled demos. The economic, on the other hand, is characterized by *wisdom, propriety* and resolve. It is characterized by cold

and rational calculation of long-run growth potentials and not easily led astray from the true path towards prosperity.

The language is as patronizing as it is certain in its conclusions: when it comes to monetary policy, democratic politics must be subject to strict limits. Constitutionalizing the independence of the central bank is pivotal in this regard: a democratic polity should like Ulysses tie its own hands with regard to money in a moment of sanity, a constitutional moment, so that it will not act self-destructively in pursuing its (irrational) desires in the future.

5.2.1 The Ulysses Pact

The metaphor of the Ulysses Pact is common in the literature on central bank independence. Upon approaching the Sirens, Ulysses puts wax in the ears of his men and asks them to tie him to the ship's mast until it is well past the island. At the same time he orders them, while he is still sane, to disregard whatever orders he might give in his temporary insanity. In this way he is allowed to hear the beautiful song of the Sirens, famous for driving sailors mad and causing them to wreck their ships on the rocky shores, without leading himself and his men to their deaths. Even though Ulysses becomes temporarily insane with lust and desire upon hearing the song of the Sirens, his ship continues on course. Through this pact Ulysses is thus able to avoid the negative consequences of his irrational and hubristic desire.

The metaphor is commonly used to argue for the wisdom of constitutionally guaranteed central bank independence. As discussed above, such lines of reasoning argue that governments are prone to use monetary policy for short-term political objectives, whereby they are liable to cause 'political' or 'electoral business cycles' (Nordhaus 1975, Alesina et al 1993). However, if the hands of the government are tied during the "constitutional stage," a polity will be able to "get better long-run results even though [it] wouldn't feel so good about it in the short run" (Blinder 1996: 11). The argument suggests that a democratic government may become temporarily 'insane' in a situation of crisis or simply in a period leading up to an election. In order to shield the economy from such irrationalities, the central bank must be guaranteed independence from political interference.

As discussed in relation to Lutz' conception of the relationship between the monetary system and the economic order, ordoliberalism sees the gold standard as a way of

tying the hands of government. In the absence of a gold standard, a constitutional law framework with an independent central bank with a narrow mandate to pursue price stability can be seen as a second best solution in an attempt to introduce some of the same disciplinary mechanisms as the gold standard entailed.³⁵ In a slightly different manner, Milton Friedman's monetarism envisions a system of central banking based on a strict monetary rule of moderate, stable increases of the money base, the so-called 'k-percent rule' (Friedman 1960, 1968).

The notion of central bank "independence" presented by these two dominant strands of thinking about central banking is thus one that leaves no room for central bank discretion in the conduct of monetary policy. The central bank is, rather, to be bound by a strict mandate and/or a strict rule. It must, in other words, have wax in its ears and stick to the course.

There is, however, an important difference between monetarism and ordoliberalism. As discussed above, the ordoliberals stress the need for a comprehensive and irreversible political decision, which decides between what are, in principle, equally valid alternative ways of ordering the monetary, economic, and political systems of society: the 'gold standard,' a free market economy and the rule of law vs. a managed currency, a planned economy and totalitarianism. While Friedman recognizes that these are the alternatives, he considers the proposition that there is a *choice* between them meaningless:

there are only two ways of co-ordinating the economic activities of millions. One is central direction involving the use of *coercion* – the technique of the army and the modern totalitarian state. The other is *voluntary* co-operation of individuals – the technique of the market place (2002 [1962]: 13, emphases added).

The ordoliberal notion of the political decision in favour of the planned economy is thus, according to Friedman, flawed. Any such decision would require a comprehensive collective subject capable of deciding such a question. This subject, however, does not exist: "society consists of a number of independent households—a collection of Robinson Crusoes" (ibid.). Furthermore, the planned economy is, in Friedman's understanding, by definition coercive. As such, individuals cannot voluntarily decide on

³⁵ For a discussion of this point see Wilsher 2014. See Bibow 2009 for a critique of the 'conventional wisdom' that central bank independence is an ordoliberal idea.

or choose it, unless, of course, literally everyone agreed. Through this methodological individualism Friedman reduces the notion of a collective political subject to insignificance. This, in turn, allows for a social theory that stresses not social dynamics but the natural law-like dynamics of the economy.

The notion of the economic being guided by identifiable (if not identified) natural forces is arguably the assumption guiding Friedman and Schwartz' *A Monetary History*. And indeed, the main argument of the book revolves around what they, drawing explicitly on a physics analogy, call a "crucial experiment" (1963: 688): "The establishment of the Federal Reserve System provides the student of money a closer substitute for the controlled experiment to determine the direction of influence than the social scientist can generally obtain" (ibid: 687). Further underlining the 'naturalness' of the forces of the economy even when they go wrong, they use the analogy of a 'contagious illness' (ibid: 690) to explain the causal direction that they identify (monetary policy has an independent and significant effect on economic output). Not surprisingly, government action is portrayed as the strongest source of contagion.

For a theory of central banking this means that the best institutional framework is one that makes monetary policy as unassuming and unobtrusive as possible. The natural order of the economy, it seems, will emerge spontaneously as long as the state's coercive powers are not employed for its disruption. To Friedman there are thus not two or more competing monetary orders. There is one natural order, which can be observed either in a good/Pareto-optimal way – allowing the economy to function according to its own natural logic – or it can be disturbed in a bad/sub-optimal way – in which case a naturally occurring business cycle will, as in the case of the Great Depression, be converted from a "moderate contraction into a major catastrophe" (Friedman 1962: 38). This leads Friedman to conclude that "The Great Depression ... is a testament to how much harm can be done by mistakes on the part of a few men when they wield vast power over the monetary system of a country" (ibid: 50).

This, according to Friedman, "is the key political argument against an "independent" central bank" (ibid.). To Friedman, the problem of central banking is thus not only to isolate the central bank from political influence; the problem is to isolate it from the influence of men and women. Monetary policy is something that should neither be governed politically nor through the discretion of central bankers.

What should be striven for is “a government of law instead of men by legislating rules for the conduct of monetary policy” (ibid: 51).

Interestingly, Friedman adds that this “will have the effect of enabling the public to exercise control over monetary policy through its political authorities, while at the same time it will prevent monetary policy from being subject to the day-to-day whim of political authorities” (ibid.). Friedman, in a manner that is reminiscent of Keynes, thus reintroduces democratic decision-making into the question of what kind of monetary policy. This opening, however, is limited since the public must choose to authorize the political authorities to enshrine a monetary rule in law. The control that the public is to have over monetary policy is thus limited to updating the rule “as we [learn] more about monetary matters” (ibid: 55).

5.2.2 The Paradox of Beginnings

Here, however, Friedman’s theory reaches a difficulty: how is it possible to ensure that the people/public, if coercion and manipulation is excluded, elects to institute a rule? This is a recurring problem in political thought, formulated most poignantly, perhaps, by Rousseau, who in the *Social Contract* introduced the figure of the Legislator in order to solve the “paradox of democratic legitimacy” (Benhabib 1994) or, simply, the “paradox of politics” (Honig 2009). The problem is how to make the multitude of people choose a *particular* order for themselves. The problem, in other words, is how to make people choose ‘good’ laws, which are in their collective best interest, even though they do not (in whole or in part) see or know what this interest is (yet). The people, to make the paradox complete, might, as Rousseau suggested³⁶, need precisely the ‘good’ laws in question in order to even perceive what their best interest is. Rousseau, in other words, introduced a classical chicken-and-egg problem into political thought, which continues to be discernible in the work of contemporary thinkers (Honig 2009: 14-16).

To thinkers such as Hobbes (and the Hobbes of the 20th century: Carl Schmitt), this problem did not arise. To Hobbes it was neither important how nor what particular order was instituted as long order was instituted. As such, he can with complete indifference assert that the commonwealth is created by the multitude conferring “all their power and strength upon one Man, or upon one Assembly of men” (*Leviathan* part II, ch. 17),

³⁶ The paradox in Rousseau is that in order for the people to make ‘good’ laws, the people need to be ‘good.’ But in order to have ‘good’ people, you need ‘good’ laws.

which then has undivided and unlimited sovereignty to issue laws as the commands of the sovereign. While the multitude of people is the constituent power in Hobbes' theory, it is of no particular importance to him whether they constitute monarchy, aristocracy or democracy or whether the order is 'free' or not.

The difficulty arises once a normative position is attached to the order that is to be constituted. For Rousseau, it was not enough to constitute any kind of political order. It needed to be a political order that, in line with the enlightenment ideals of the time, was rational and free. The new beginning that Rousseau envisioned and which inspired the French revolutionaries needed also to put an end to the condition where "Man is born free; and everywhere he is in chains" (*Social Contract* bk. 1, ch. 1).

In relation to monetary policy, Kydland and Prescott's theory of time inconsistency can be said to provide Friedman's monetary rule with a 'Lawgiver.' Like Friedman, Kydland and Prescott operate with a "well-defined and agreed-upon, fixed social objective function" (1977: 473). In other words, the public good or, stretching the Rousseauian concept a little bit, the general will is assumed to be known. In relation to monetary policy this could be price stability. The question is, then, how to achieve it in "dynamic economic systems" (ibid: 474). Kydland and Prescott's genius is that they, for the sake of argument, assume not that government is inherently fallible but that government "discretion implies selecting the decision which is best, given the current situation" (ibid: 487). In contrast to Friedman's theory, governments are thus assumed to be rational and forward-looking, announcing to the public what their future policies will be. And yet, unless otherwise checked, the policy of such a government "either results in consistent but suboptimal planning or in economic instability" (ibid.).

The problem, according to Kydland and Prescott, arises because "[c]urrent decisions of economic agents depend in part upon their expectations of future policy action" (ibid: 474). This means, first, that economic actors anticipate future governmental policies – in response to crises or other changes – in making economic decisions in the present: "agents may expect tax rates to be lowered in recessions and increased in booms" (ibid.). Taking such things into account in economic decisions means that the effects will be evened out by the economic actors and society will derive no macroeconomic benefit from the government adjusting (optimally) to the current situation. Second, and perhaps more importantly,

since optimal decision rules vary systematically with changes in the structure series relevant to the decision maker, any change in policy will alter the structure of these rules. Thus changes in policy induce changes in structure, which in turn necessitates reestimation and future changes in policy, and so on (ibid.).

This ‘feedback loop’ is what leads to either “consistent but suboptimal” policy or to a scenario where “stabilization efforts have the perverse effect of contributing to economic instability” (ibid.).

Kydland and Prescott explicitly use the example of monetary policy to illustrate the theory. The attempt to use monetary policy to stimulate employment, they argue, is pointless because economic actors with rational expectation take the expected future inflation into account in current economic decisions. Contrary to the Philips curve, they claim, this means that a change in monetary policy will have no effect on employment but a negative effect on inflation (ibid: 477-480), thus compromising the public good of price stability.

Kydland and Prescott emphasize that this “analysis also has implications for constitutional law” (ibid: 486). As noted, the theory indicates that governments in general and democratic governments in particular have a time inconsistency problem. Thus, instead of giving policymakers the discretion to select which policies to pursue, Kydland and Prescott propose to use economic theory in the constituent moment “to evaluate alternative policy rules and that one with good operating characteristics be selected” (ibid: 487), i.e., one that maximizes the socially desirable outcome of price stability.

In other words, Kydland and Prescott propose a scientific approach to binding the hands of Ulysses. In practice, this would mean that democracy within the constitutional order would be reduced to accountability, i.e., to evaluating whether “a policymaker deviates from the policy,” which, in turn, should be “simple and easily understood” (ibid.). From a different angle, Kydland and Prescott’s “Rules Rather than Discretion”-argument – which, as they indicate, is a sophistication of Friedman’s monetary rule theory (ibid: 474) and which is directly cited as the justification for the ECB’s independence by Robert Sparve and thus by the Advocate General – arrives at the same conclusion as the ordoliberal: political power to control economic and monetary policy must be as limited as possible. However, instead of relying on a political decision by the

constituent power, as the ordoliberal theory at least implicitly entails, Kydland and Prescott rely on economic science as their *législateur* in the founding moment.

5.3 The Scientization of the Ends and Means of Central Banking

The Ulysses Pact of central banking thus contains two elements. First, the (derived) constituent power (or powers, as in the case of the Eurozone) ties its own hands by delegating the exclusive competence to conduct monetary policy to an independent central bank. Second, in doing so it issues strict instructions to the central bank (legal restrictions) in order to ensure that the bank does not develop an independent will of its own ('puts wax in its ears'). This is, in general terms, the constitutional status of the ECB and broadly speaking it is in line with the theories discussed above. However, seen in conjunction with the economic state of exception, the introduction of science into the equation, which is inherent in both Friedman and Kydland and Prescott, but to lesser extent in ordoliberalism³⁷, introduces a problem for the theory of central bank independence within strict constraints, particularly when those limits are constitutionalized.

Immediately following his interpretation of the meaning and importance of central bank independence from politics and political debate discussed above, the Advocate General enlists another reason for why the ECB must be as independent as it is: "the detachment from political activity is necessary because of the extremely technical nature and high degree of specialization characteristic of monetary policy" (AG: 109). The constitutionalization of central bank independence from politics is thus justified with reference to the technical skills that are a prerequisite for engaging not only in the practice but also in debates about monetary policy. Monetary policy, in other words, involves the exercise of 'an extremely difficult techniques of which the ordinary political actors know less than nothing,' to paraphrase Keynes. The Advocate General thereby seems to introduce the Keynesian logic about the scientific means into the justification for the central bank's independence when carrying out monetary policy.³⁸

³⁷ While perhaps the most 'scientized' of the all, Keynes' central bank does not run into problems of this kind because Keynes subjects it to the government of the day.

³⁸ The ECJ (68) essentially confirms this: "since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion."

However, the technical justification for central bank independence did not, according to Keynes, justify the constitutionalization of a narrow and strict mandate that was to be outside the influence of ordinary politics. The ECB is thus, in the Advocate General's interpretation of the ECB's legal status as well as the ECB's contributions to the proceedings and its general practices, some sort of mutant between the strict constraints and disciplinary mechanisms of the ordoliberalists, Friedman, and Kydland and Prescott on the one hand, and Keynes' detached and highly specialized independent governmental agency performing a Very Difficult Technique, on the other.

In terms of central banking in general, this is a unique position.³⁹ The Advocate General underlines the importance of this arrangement – strict mandate and broad discretion – repeatedly in his opinion. In total, the phrase 'broad discretion' is used seven times in the text of the opinion whereas the term 'independence' or 'independent' in relation to the ECB's status is only used twice, not counting the two references to the Treaties and one reference to the German Basic Law.⁴⁰ This reference to 'broad discretion' is used strategically for a number of purposes, most importantly, perhaps, in relation to judicial review. Due to its responsibilities, the Advocate General claims, the ECB

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 (AG: 110).

Through its practices the ECB thus builds up a formidable technocratic/scientific authority. According to the Advocate General, this, in turn, means that the ECB

must accordingly be afforded a broad discretion for the purpose of framing and implementing the Union's monetary policy. The Courts, when reviewing the ECB's

³⁹ Ben Bernanke, in the context of the Fed, has spoken about the notion of inflation targeting as a kind of "constrained discretion" (2003, see also Bernanke and Mishkin 1997). This might bear some resemblance to the notion of broad discretion to achieve a narrowly defined mandate, as is the case with the ECB. However, in terms of the broader institutional arrangement, the Fed differs significantly from the ECB. It has a dual mandate (full employment and stable prices), it is not prohibited from buying government bonds directly from the sovereign, and it is, ultimately, subject to the US government. The ECB, on the other hand, has a single overriding mandate, it cannot buy bonds directly from the sovereigns and there is no government at European federal level.

⁴⁰ There is no reference to the ECB having 'discretion' in the Treaties or in the Statute.

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 (AG: 111).

This message is emphasized even more starkly in the press release summarizing the Advocate General's findings. In bold letters, the press release states that

the ECB must have a broad discretion when framing and implementing the EU's monetary policy, and the courts must exercise a considerable degree of caution when reviewing the ECB's activity, since they lack the expertise and experience which the ECB has in this area (CJEU 2015).

The highly technical nature of monetary policy and the near monopoly on scientific authority that the ECB is supposed to enjoy within Europe in this area of public policy not only means that the ECB must be isolated from the influences of politics; it also means that it is simply outside what can be considered the courts' meaningful scope of competences. While judicial review of the ECB's actions is mandatory (it is, in fact, the only legal way of challenging the ECB, apart from the symbolic appearances of the ECB's president before the European Parliament), in practice courts do not have the required knowledge to carry out this task.

In addition to this general consequence of the scientization of monetary policy, the text of the Advocate General's opinion contains three more specific indications as to what this 'broad discretion' entails: 1) the ECB is given a broad discretion to define the boundaries between monetary and economic policy (AG: 103, this is the German government's view but the Advocate General seems to concur), 2) it is given broad discretion to assess the proportionality of the programme (AG: 187), and 3) it is to be afforded "a broad discretion with regard to the precise definition" of the time period that is supposed to elapse between the bond is issued by the government in the primary market and the purchase of it on the secondary market by the ECB (AG: 253). The ECB, in other words, is to be afforded 'broad discretion' on some of the most contentious issues in the OMT case at the GFCC.

The ECB is likewise to be afforded a ‘broad discretion’ in interpreting the crisis situation. As the ECJ puts it, unless “a manifest error of assessment” (ECJ: 74) can be shown, one must accept the ECB’s interpretation of the situation:

the fact, mentioned by the referring court, that that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB’s broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy (ECJ: 75).

To put it a bit bluntly, unless it is plain for everyone to see that the analysis is idiotic, one must accept the ECB’s interpretation as valid. The Advocate General similarly argues with regard to the ECB’s understanding of the crisis situation and the objectives of the measures implemented that “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” (AG: 138).

Given its scientific expertise, the ECB, in other words, should be trusted and given the benefit of the doubt as long as it clarifies its analysis of the situation and states what its objectives are. In short, the ECB is to be afforded ‘broad discretion’ to ‘decide in and on the state of exception,’ as Schmitt would perhaps put it. Reviewing whether its means violate the mandate is not only difficult for anyone but the ECB; it might also be dangerous for the objectives that the ECB has been given the responsibility to pursue.

Such scientization of monetary policy clearly serves the strategic objective of depoliticizing monetary policy. Indeed, since the ECB is explicitly not a political institution and is not subject to the directions of a political institution, its activities must be considered “exterior to the ‘democratic passions’ of partisanship and the ‘national egotisms’ of political diplomacy” (Vauchez 2014: 34-5, my translation). In other words, the independent ECB (the same goes for the Commission and the ECJ) must be cast as serving the common, incontestable European good. As Antoine Vauchez puts it, “the ‘mandates’ of the Court and the Commission [and the ECB] find neither their source nor the imperativity in the general will of the peoples ... the mandate that the ‘independents’ invoke is merged with the realization of a continent-wide ‘common good’” (ibid: 42, my translation). The common good thus takes the place of the

democratic general will, and it is best achieved through the work of impartial technocrats.

5.3.1 Constituting Scientific Authority

The scientization of central banking is not unique to the ECB. According to Martin Marcussen (2006), there has been a broad development towards an increasing scientization of central banking. Marcussen (ibid: 90) describes this as a “tendency for central bankers to simply transcend politics by forming an increasingly exclusive network of (scientific) experts within the monetary and financial fields.” This “kindred network,” he claims, “is tied together by the kind of organic solidarity to be found in professions with a strong sense of community” (ibid.). The trend towards establishing an independent central bank that can function as a “guardian against any misuse of power by the political authorities” (Allen 1989 as cited in Blyth 2013: 140) entered, in Marcussen’s analysis, a new stage of “liberal rationalism” in the 2000s; a stage characterized by increased scientization, central bank autonomy, and central banks being on the political back-stage (Marcussen 2006: 88).

Marcussen suggests that in addition to well-respected economics professors in senior positions in central banks, the scientization process is reproduced through the establishment of “cutting-edge” research divisions, that employ almost as many (if not more) researchers as leading economics departments (2006: 93). In the EU and the ECB the external manifestations of this process of scientization is taken to the extreme in both scope and intensity. Mudge and Vauchez (forthcoming) call the ECB’s development a process of “*hyper-scientization*.” It involved establishing a dedicated research directorate within the bank and a significant investment and a conscious effort to bolster its scientific credentials. Within a very short amount of time, the ECB managed to put itself in a position comparable with the highest-ranking central banks (the Fed) and international financial institutions (IMF).

Mudge and Vauchez argue that this hyper-scientization of the ECB is a product of its “cross-location within at least three systems of relations: the world of central banks and other financial institutions, the European political order, and the internationalized economics profession” (forthcoming). As a newly founded and structurally unique and thus unknown central bank, the ECB simply had to become scientifically acknowledged in order to become credible vis-à-vis financial markets and other central banks.

Furthermore, and perhaps more importantly, Mudge and Vauchez argue that the process of scientization was an exercise in building bureaucratic authority vis-à-vis the other EU institutions and the Member States.

However, whether there is a direct link between the research being carried out within the bank and the monetary policies conducted by it is not of the greatest importance. What matter is the appearance, the aesthetics, of the scientific grounding of monetary policy:

The goal of economic research at the ECB is to provide a strong conceptual and empirical basis for policy-making and to better communicate policy to the markets and the public. High-quality research is essential to ensure that the ECB is well equipped to cope with the unprecedented challenges associated with conducting a single monetary policy for a group of sovereign countries (ECB 2016).

This is a very different way of presenting research than that found on the Fed's corresponding website:

Board economists conduct cutting edge research, produce numerous working papers, and are among the leading contributors at professional meetings and in major journals. Our economists also produce a wide variety of economic analyses and forecasts for the Board of Governors and the Federal Open Market Committee (Fed 2016).

The ECB presentation is solely focussed on the utility of the research for policy making and as such indicates that monetary policy is in fact based on the research. The Fed, on the other hand, emphasizes to a larger extent the research for its own sake. The utility for actual policy-making is a secondary and, it seems, different concern.

This difference reflects probably three things: 1) the relative youth of the ECB and thus its lack of 'traditional' authority based on a solid track record, as for instance the Bundesbank and the Fed could/can boast. 2) The peculiar institutional position that the ECB is in, in that it is the organization coordinating the actions of the 19 Member State central banks that comprise the Eurosystem. Scientization is in this context a kind of leverage in power struggles within the Eurosystem. Furthermore, as the ECB is positioned 'above' any political authority its legitimacy rests entirely on its performance ('output legitimacy'). Linking this performance to science might serve to strengthen such legitimacy claims. 3) The architecture of the euro and the EMU was heavily

criticized at its birth by economists especially in the US, who considered the EMU to be more about political goals than about getting the ‘economics right.’ There was thus, as Mudge and Vauchez point out, already from the very beginning an urgent need to justify the euro scientifically. It could not rest on being a political project of the European elites. In a very concrete way, scientization is thus an effort to depoliticize the EMU and the euro by grounding it in ‘economic science.’

5.3.2 Making Science Law

This grounding of monetary policy in science produces, however, an indistinction between the reign of the artificial (politics and law/*nomos*) and the reign of the natural (science/*phusis*) (Rancière 1999). Perhaps more precisely, it tends towards a state where the ‘natural,’ the scientific, is continuously becoming law. In other words, what passes as scientific, and thus based on natural or quasi-natural processes and mechanisms, is not only constituted as the common good it is also the means towards achieving it. As such, the distinction between the norm and the exception collapses and the words of the ECB, the authority within the relevant science, becomes “living law” (Agamben 2005: 69).

The two orders, the artificial and the natural, correlate to some extent to the distinctions between the norm and the state of exception and the constituted and the constituent powers. However, the latter two distinctions are, in a sense, rendered meaningless. One can perhaps say, with the German legal scholar Adolph Nissen, that “exceptional measures disappear[.] because they [have] become the rule” (Nissen 1877: 140 as cited in Agamben 2005: 69). But also this is not fully precise, for it is the full realization of a higher or, as it were, more basic law, which finally comes into being after having been corrupted by the forces of politics and special interests. The ‘necessity’ of the exceptional circumstances no longer creates, annuls or suspends the law, where law is understood as that which is constituted through political/social/artificial processes. Rather, the necessity is the law; it carries within itself a “living logos” (Rancière 1999: 67), words of ‘reason’ that become law by being uttered. But by being uttered they neither constitute something new nor bring about the conditions necessary for the exercise of the constituent power. They are merely bringing to being that which was supposedly already there in nature, in the spirit of the community, in the maxims of the people’s behaviour. The laws thus being are the

essence, the nature, of the community, the common good. If they were not in being before, it is because irrational and unreasonable interests and desires led the community astray and distorted its ‘true nature.’

What is thus brought into being is not constituted as such, this would require an act of the will but the will is arbitrary. What comes into being is not a restoration of something that used to be. It is, rather, the realization of the ideal, the good, the beautiful, the realization of the community itself.

This is more or less how Jacques Rancière describes Plato’s republic: “that community in which the law (the *nomos*) exists as living logos” (ibid.). This modality of rule, which Rancière calls ‘archipolitics,’

amounts to full achievement of *phusis* as *nomos*—which presupposes eliminating certain elements of the polemical apparatus of politics and replacing them with community law’s various forms of sensitization and conscious-raising. Replacing an empty qualification (the *freedom* of the people) with an equally empty virtue (the *sôphrosunê* of the artisans) is the pivotal point of such a process. The result is the total elimination of politics as a specific activity” (ibid: 70).

The Greek concept of *sôphrosunê* is interesting in this regard. Rancière (1999: 67) defines it as:

The virtue of minding your own business is called *sôphrosunê*, which we are forced to translate as “temperance” or moderation,” words that mask the strictly logical relationship expressed by this lower-class “virtue” behind pallid images of controlling appetites. *Sôphrosunê* is the strict answer to the “liberty” of the demos. Liberty was the paradoxical *axia* of the people, the common entitlement that the demos arrogated “to itself.”

In the context of the present thesis, one is tempted to render the concept as designating a form of being in the world in a state of content austerity. It is the quiet moderation of those (the Member States) who knows their place in the order of things, guided as it is by powers (the ‘independents’) that have privileged access to knowledge of the common good.

Relating this to the discussion throughout this chapter, one might say that in contemporary social theory, ‘political philosophy’ in the Platonic tradition as the quest

for grounding politics in truth and an idea of the good, or, rather, as the quest for replacing politics with truth, finds its expression in economic theories practices that seek to ground policy and even constitutional law in the logic and rationality of the market. Concurrently, Plato's 'philosopher king' has been replaced with disinterested 'philosopher bureaucrats' carrying out the commands of the market, spoken in the language of dismal science, in the name of the common good. 'We, the desirous, irrational people,' a constant 'moral hazard' to good society, must have no part in government; we are better off minding our own business.

Chapter 6 - Conclusion

The Euro Crisis has again raised the age-old question: ‘does necessity have no law?’ This question, of course, is closely related to the wider TINA-doctrine. The ‘alternativelessness’ of the contemporary condition, however, manifests itself not only in its content (austerity, market imperatives, inequality, etc.) but also in its form. It is the latter that has been the principal subject of this thesis. But, of course, form and content cannot be disassociated.

While the integrationist vision of reconstituting the Eurozone constitutional order to include a political government responsive to the needs and wants of the Eurozone people might, to some extent, serve to alleviate such conditions, the political will to do so among peoples and states seems absent for the time being. As Wolfgang Streeck (2014: 55) has put it, in the context of globalized markets “voting no longer makes a difference in the eyes of those who would have the most to gain from political change.” Indeed, the defeat of the Greek referendum in the summer of 2015 hardly inspires hope for the future of (social-)democracy in the Eurozone, whether on a national or supranational level.

The conservationist insistence on preserving the ‘substance’ of democracy in Germany, seconded by the GFCC, rings hollow in this regard. Particularly if it results in protracting or exacerbating an economic crisis that has left millions of people across the currency union in a situation of prolonged precariousness if not outright poverty. In this context the insistence on ‘constitutional identity’ seems misguided. If the aim is rather to preserve the existing economic order of austerity, liberalization and deregulation underlying the EMU, the attempt is not only outrageous but probably also fundamentally misguided: in order to discipline the sovereigns to complying with the order of the EMU, into ‘market conforming’ behaviour, there must be an existing market order to comply with.

The OMT case at the GFCC, however, draws attention to a fundamental problem in the EMU’s public law architecture: in terms of contesting the actions as well as the order and orientation of EU institutions such as the ECB the constitutional courts are some of the few legitimate channels. As such, national constitutional courts appear as

the last resort for voicing concern and resistance about and against developments in a “supranational constitutional law that has mutated and tilted in favor of capital holders in ways that are incompatible with the Social and Democratic *Rechtstaat* (Menéndez 2013: 525). The ‘constitutional court-strategy’, however, comes up against certain limits and the resolution to the ‘existential crisis’ that Menéndez suggests constitutional courts can contribute to seems not only to be undemocratic (as the dissenting opinion of Justice Lübbe-Wolff in the OMT case at the GFCC suggests), it might also jeopardize the integration project as such. Can the EU legal order remain such if 28 constitutional courts assert their supremacy against it? Alternatively, if it could, it would most certainly not be an ‘integration project’ anymore but rather a full blown state apparatus, albeit of a different kind than the constitutional democratic state apparatus that still informs (and limits) our political imaginary.

The ECB’s OMT programme and the way in which the ECJ retrospectively legalized it reveal that within the limited field of monetary policy – but this is already a great deal since its borders are constantly in flux– the ‘independents’ consider themselves and each other to enjoy a remarkable competence: the competence to understand and act according to the common European good (Vauchez 2014). This common good, however, is not understood politically but rather ‘scientifically,’ through enlightened rationality. The justification of the ECB’s actions was based on its scientific expertise and integrity and as a result of this its actions can almost by definition not be outside of its mandate. Through the ECJ’s judgement, this interpretation became the law of the Eurozone. However, even before the ECJ’s judgement the OMT programme had become law, the announcement itself had the force of law and achieved its goal simply by being uttered. The ECJ did not need to confirm the ECB’s role as lender of last resort; the ECB was already always a lender of last resort in potentiality, the urgent need to perform this function had just not arisen yet.

While perhaps put a bit on edge, this analysis points to the tendency in the Eurozone, especially in the context the crisis, to blur completely the distinction between legality, illegality and a-legality in the name of the security of the Union (White 2015). But in the analysis of the OMT case at the ECJ I have tried to show that it is not only securitizing discourses but also and in very important ways scientization discourses, which serve to ‘naturalize’ and make monetary policy politically

incontestable. The collapse of politics, law, and (economic) science that results from this resembles Plato's ideal Republic where the word of the philosopher bureaucrat is, by definition, law; there is no alternative.

Apart from the fact that this is thoroughly undemocratic, it seems also to be at least one of the sources of the anger currently directed towards the EU. Constituted in the name of stability – perhaps *the* political and economic “lodestar” “of the post-war Western European political imagination” (Müller 2011: 128) – this arrangement of the apparatus of central banking in the Eurozone risks generating precisely the political trends and instabilities that it was intended to eliminate. As it were, the ECB has been thrust onto the political front stage and it finds itself in the uncommon position of being the target, for example, of protests in the streets. As recent events in Europe have suggested, the question of the order and orientation of the European political economy is not uncontested, it is not universally accepted, and it is not necessarily irreversible. Forces on the radical right and left seem determined to prove this point. The popular sovereigns of Europe seem willing and capable of striking back. The question is whether this will not vindicate the original scepticism about a popular sovereign grounded in the nation.

Bibliography

- AG (Advocate General to the Court of Justice of the European Union Pedro Cruz Villalón). *Opinion of Advocate General Cruz Villalón, delivered on 14 January 2015, Case C-62/14*. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CC0062&from=EN> [accessed 4 April 2016].
- Agamben, Giorgio. 2005. *State of Exception*. Translated by Kevin Attell. Chicago and London: The University of Chicago Press.
- Agamben, Giorgio. 2009. "What is an Apparatus?" In *What is an Apparatus? and Other Essays*. Translated by Stefan Pedatella and David Kishik. Stanford: Stanford University Press.
- Aglietta, Michel. 2012. "The European Vortex." *New Left Review* 75: 15-36.
- Alesina, Alberto. 1989. "Politics and business cycles in industrial democracies." *Economic Policy* 8: 55-98.
- Alesina, Alberto, Gerald D. Cohen and Nouriel Roubini. "Electoral business cycles in industrial democracies." *European Journal of Political Economy* 9 (1): 1-23.
- Altavilla, Carlo, Domenico Giannone and Michele Lenza. 2014. "The Financial and Macroeconomic Effects of OMT Announcements." *ECB Working Paper Series* No. 1707.
- Baimbridge, Mark and Philip B. Whyman. 2008. *Britain, the Euro and Beyond*. Hampshire: Ashgate.
- Baldwin, Richard, Thorsten Beck, Agnès Bénassy-Quéré, Olivier Blanchard, Giancarlo Corsetti, Paul De Grauwe, Wouter den Haan, Francesco Giavazzi, Daniel Gros, Sebnem Kalemli-Ozcan, Stefano Micossi, Elias Papaioannou, Paolo Pesenti, Christopher Pissarides, Guido Tabellini and Beatrice Weder di Mauro. 2015. "Rebooting the Eurozone: Step 1 – agreeing a crisis narrative." *Center for Economic Policy Research Policy Insight* No. 85.
- Beck, Ulrich. 2013. *German Europe*. Translated by Rodney Livingstone. Cambridge: Polity Press.
- Benhabib, Seyla. 1994. "Deliberativ rationality and models of democratic legitimacy." *Constellations* 1 (1): 26-52.

- Bernanke, Ben. 2003. "A Perspective on Inflation Targeting" [speech]. Remarks at the Annual Washington Policy Conference of the National Association of Business Economists, Washington, D.C. 25 March 2003. Available at: <http://faculty.georgetown.edu/mh5/class/econ102/readings/Bernanke--A%20perspective%20on%20inflation%20targeting.pdf> [accessed 31 March 2016].
- Bernanke, Ben and Frederic S. Mishkin. 1997. "Inflation Targeting: A New Framework for Monetary Policy?" *Journal of Economic Perspectives* 11 (2): 97-116.
- Beukers, Thomas. 2013. "The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention." *Common Market Law Review* 50 (6): 1579–1620.
- Bibow, Jörg. 2009. "On the origin and rise of central bank independence in West Germany." *European Journal of the History of Economic Thought* 16 (1): 155-190.
- Blinder, Alan S. 1996. "Central Banking in a Democracy." *Federal Reserve Bank of Richmond Economic Quarterly* 82 (4): 1-14.
- Blyth, Mark. 2013. *Austerity: The History of a Dangerous Idea*. Oxford: Oxford University Press.
- Bonefeld, Werner. 2015. "European economic constitution and the transformation of democracy: On class and the state of law." *European Journal of International Relations* 21 (4): 867-886.
- Bosoni, Adriano and Mark Fleming-Williams. 2014. "Germany Fights on Two Fronts to Preserve the Eurozone" [internet article]. *Stratfor Geopolitical Weekly*. 30 September 2014. Available at: <https://www.stratfor.com/weekly/germany-fights-two-fronts-preserve-eurozone> [accessed 3 April 2016].
- CJEU (Court of Justice of the European Union). 2012. "Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. 2012/C 338/01." *Official Journal of the European Union* 6 November 2012.
- CJEU. 2015. "Advocate General's Opinion in Case C-62/14" [press release]. 14 January 2015. Available at: <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-01/cp150002en.pdf> [accessed 3 April 2016].

- Cœuré, Benoît. 2012. "Restoring trust in Economic and Monetary Union" [speech]. At Forum Eco Libération ESCP, "Reprendre confiance en (l')Europe," panel discussion: "L'Euro méfiance, c'est fini?" Paris, 1 December 2012. Available at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp121201.en.html> [accessed 25 March 2016].
- Craig, Paul. 2011. "The ECJ and ultra vires action: A conceptual analysis." *Common Market Law Review* 48 (2): 395–437.
- Cukierman, Alex. 1992. *Central Bank Strategy, Credibility, and Independence: Theory and Evidence*. Cambridge, MA: MIT Press.
- De Haan, Jakob. 1997. "The European Central Bank: Independence, accountability and strategy: A review." *Public Policy* 93: 395-426.
- De Haan, Jakob and Sylvester C.W. Eijffinger. 2000. "The Democratic Accountability of the European Central Bank: A Comment on Two Fairy-tales." *Journal of Common Market Studies* 38 (3): 393-407.
- De Grauwe, Paul. 2013. "The European Central Bank as Lender of Last Resort in the Government Bond Markets." *CESifo Economic Studies* 59 (3): 520-535.
- De Grauwe, Paul. 2012. "The ECB was right to intervene as lender of last resort, but structural reforms are still needed to save the Eurozone" [blog]. *European Politics and Policy*. 12 September 2012. Available at: <http://blogs.lse.ac.uk/europpblog/2012/09/12/ecb-eurozone/> (accessed 5 February 2016).
- De Grauwe, Paul and Yuemei Ji. 2013. "From Panic-Driven Austerity to Symmetric Macroeconomic Policies in the Eurozone." *Journal of Common Market Studies* 51 (S1): 31-41.
- Deleuze, Gilles. 1992. "What is a *dispositif*?" In *Michel Foucault: Philosopher*. Translated by Timothy J. Armstrong. New York: Routledge.
- Dellas, Harris and George S. Tavlas. 2013. "The Gold Standard, the Euro, and the Origins of the Greek Sovereign Debt Crisis." *Cato Journal* 33 (3): 491-520.
- Di Fabio, Udo. 2014. "Karlsruhe Makes a Referral." *German Law Review* 15(2): 107-110.
- Draghi, Mario. 2012. Verbatim of the remarks made by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012. Available at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> [accessed 25 February 2016]. A recording of the speech is available at: <https://www.youtube.com/watch?v=hMBI50FXDps> [accessed 25 February 2016].

- Draghi, Mario. 2013. "Opening remarks at the session "Rethinking the Limitations of Monetary Policy." Speech at the farewell conference honouring Governor Stanley Fischer, The Israel Museum, Jerusalem. 18 June 2013. Available at: <https://www.ecb.europa.eu/press/key/date/2013/html/sp130618.en.html> [accessed 26 March 2016].
- Draghi, Mario and Vítor Constâncio. 2012a. Introductory statement to the press conference (with Q&A), Frankfurt am Main, 2 August 2012. Available at: <http://www.ecb.europa.eu/press/pressconf/2012/html/is120802.en.html> [accessed 25 February 2016].
- Draghi, Mario and Vítor Constâncio. 2012b. Introductory statement to the press conference (with Q&A), Frankfurt am Main, 6 September 2012. Available at: <http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html> [accessed 25 February 2016].
- ECB (European Central Bank). 2012. "Technical features of Outright Monetary Transactions" [press release]. 6 September 2012. Available at: http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html [accessed 2 April 2016].
- ECB. 2016. "Economic research" [website]. Last updated 2016. Available at: <https://www.ecb.europa.eu/pub/economic-research/html/index.en.html> [accessed 1 April 2016].
- ECJ (European Court of Justice). *Judgment of the Court (Grand Chamber), 16 June 2015, Case C 62/14 (Gauweiler and others vs. Deutscher Bundestag)*. Available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d55bd9154ad11f495cb03fa31ff55c3bff.e34KaxiLc3eQc40LaxqMbN4OchiRe0?text=&docid=165057&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=239304> [accessed 4 April 2016].
- Eichengreen, Barry and Peter Temin. 2010. "Fetters of gold and paper." *Oxford Review of Economic Policy* 26 (3): 370-384.
- Eijffinger, Sylvester and Eric Schaling. 1993. "Central Bank Independence in Twelve Industrial Countries." *BNL Quarterly Review* 184: 49-89.
- Eucken, Walter. 1989. "What Kind of Economic and Social System." In *Germany's Social Market Economy: Origins and Evolution*. Edited by Alan Peacock and Hans Willgerodt. Basingstoke: Macmillan.
- European Council. 2013. *The European Council in 2012*. Luxembourg: Publications Office of the European Union.

- Fabbrini, Federico. 2013. "The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism." *Boston College International and Comparative Law Review* 36 (1): 1-38.
- Fed (Federal Reserve Board). 2016. "The Economists" [website]. Last updated 26 March 2016. Available at: <https://www.federalreserve.gov/econresdata/theeconomists.htm> [accessed 1 April 2016].
- Foucault, Michel. 1977. *Discipline and Punish. The Birth of the Prison*. Translated by Alan Sheridan. New York: Vintage Books.
- Foucault, Michel. 1980. "The Confessions of the Flesh." In *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*. Edited by Colin Gordon. New York: Pantheon Books.
- Foucault, Michel. 2008. *The Birth of Biopolitics*. Translated by Graham Burchell and edited by Arnold I. Davidson. Basingstoke: Palgrave Macmillan.
- Friedman, Milton. 1960. *A Program for Monetary Stability*. New York: Fordham University Press.
- Freidman, Milton. 1968. "The Role of Monetary Policy." *The American Economic Review* 58 (1): 1-17.
- Friedman, Milton. 2002 [1962]. *Capitalism and Freedom*. Chicago: Chicago University Press.
- Friedman, Milton and Anna Schwartz. 1963. *A Monetary History of the United States 1867-1960*. Princeton: Princeton University Press.
- Gerner-Beuerle, Carsten, Esin Küçük and Edmund Schuster. 2014. "Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial." *German Law Journal* 15 (2): 281-320.
- GFCC (German Federal Constitutional Court). *Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13* [translation from the German]. Also known as *Gauweiler and Others v Deutscher Bundestag*. Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html [accessed 25 March 2016].
- GFCC. 2014. "Principal Proceedings ESM/ECB: Pronouncement of the Judgment and Referral for a Preliminary Ruling to the Court of Justice of the European Union." *Press release No. 9/2014*. 7 February 2014. Available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2014/bvg14-009.html> [accessed 25 March 2016].

- Gold, Marie-Therese. 2015. "The ball is back in the FCC's 'court' [The CJEU's OMT-decision of 16 June 2015]" [blog]. *Maastricht Law News and Views*. 23 June 2015. Available at: <http://law.maastrichtuniversity.nl/newsandviews/the-ball-is-back-in-the-fccs-court-the-cjeus-omt-decision-of-16-june-2015/> [accessed 25 March 2016].
- Grilli, Vittorio, Donato Masciandaro and Guido Tabellini. 1991. "Political and monetary institutions and public financial policies in the industrial countries." *Economic Policy* 13: 341-392.
- Habermas, Jürgen. 2015. "Habermas: Warum Merkels Griechenland-Politik ein Fehler ist" [online article]. *Süddeutsche Zeitung*. 22 June 2015. Available at: <http://www.sueddeutsche.de/wirtschaft/europa-sand-im-getriebe-1.2532119> [accessed 5 February 2016]. English version available at: <https://www.socialeurope.eu/2015/06/why-angela-merkels-is-wrong-on-greece/> [accessed 5 February 2016].
- Honig, Bonnie. 2009. *Emergency Politics: Paradox, Law, Democracy*. Princeton: Princeton University Press.
- Jacoby, Wade. 2015. "Europe's New German Problem: The Timing of Politics and the Politics of Timing." In *The Future of the Euro*. Edited by Matthias Matthijs and Mark Blyth. Oxford: Oxford University Press.
- James, Harold. 2012. *Making the European Monetary Union. The Role of the Committee of Central Bank Governors and the Origins of the European Central Bank*. Cambridge, MA and London: The Belknap Press of Harvard University Press.
- Joerges, Christian. 2014. "Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration." *Constellations* 21 (2): 249-261.
- Joerges, Christian. 2004. "What is Left of the European Economic Constitution?" *EUI Working Paper Law* No. 2004/13.
- Keynes, John Maynard. 1978a. "The Monetary Policy of the Labour Party." In *The Collected Writings of John Maynard Keynes*. Edited by Elizabeth Johnson and Donald Moggridge. 1st edition. Volume 21. Cambridge: Royal Economic Society.
- Keynes, John Maynard. 1978b. "The General Theory of Employment, Interest and Money." In *The Collected Writings of John Maynard Keynes*. Edited by Elizabeth Johnson and Donald Moggridge. 1st edition. Volume 7. Cambridge: Royal Economic Society.
- Krippner, Greta R. 2007. "The Making of U.S. Monetary Policy: Central Bank Transparency and the Neoliberal Dilemma." *Theory & Society* 36 (6): 477-513.

- Krugman, Paul. 2014. "Being Bad Europeans" [op-ed]. *New York Times*. 30 November 2014. Available at: http://www.nytimes.com/2014/12/01/opinion/paul-krugman-being-bad-europeans.html?_r=0 [accessed 26 March 2016].
- Kumm, Matthias. 1999. "Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship Between the German Federal Constitutional Court and the European Court of Justice." *Common Market Law Review* 36 (2): 351–386.
- Kuo, Ming-Sung. 2014. "The Moment of Schmittian Truth: Conceiving of the State of Exception in the Wake of the Financial Crisis." In *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance*. Edited by Christian Joerges and Carola Glinski. Oxford: Hart Publishing.
- Kydland, Finn E. and Edward C. Prescott. 1977. "Rules Rather than Discretion: The Inconsistency of Optimal Plans." *The Journal of Political Economy* 85 (3): 473–492.
- Lamfalussy, Alexandre. 1997. "The European Central Bank: independent and accountable" [speech]. At the Oesterreichische Nationalbank, Vienna. 13 May 1997. Available at: <https://www.ecb.europa.eu/press/key/date/1997/html/sp970513.en.html> [accessed 29 March 2016].
- Lutz, Friedrich A. 1936. *Das Grundproblem der Geldverfassung*. Stuttgart and Berlin: Verlag von W. Kohlhammer.
- Lutz, Friedrich A. 1989 [1935]. "The Functioning of the Gold Standard." In *Germany's Social Market Economy: Origins and Evolution*. Edited by Alan Peacock and Hans Willgerodt. Basingstoke: Macmillan. Originally published in German as "Goldwahrung und Wirtschaftsordnung" in *Weltwirtschaftliches Archiv* 41: 224–251.
- Marcussen, Martin. 2006. "Institutional Transformation? The Scientization of Central Banking as a Case Study." In *Autonomy and Regulation: Coping with Agencies in the Modern State*. Edited by Tom Christensen and Per Lagreid. Cheltenham, UK & Northampton, MA: Edward Elgar.
- McNamara, Kathleen. 2002. "Rational Fictions: Central Bank Independence and the Social Logic of Delegation." *West European Politics* 25 (1): 47–76.
- Menéndez, Agustín José. 2013. "The Existential Crisis of the European Union." *German Law Review* 14 (5): 453–526.
- Mudge, Stephanie L. and Antoine Vauchez. Forthcoming. "Fielding Supranationalism: The European Central Bank as a Field Effect." *Sociological Review*.

- Müller, Jan-Werner. 2011. *Contesting Democracy: Political Ideas in Twentieth-Century Europe*. New Haven: Yale University Press.
- Nordhaus, William D. 1975. "The Political Business Cycle." *The Review of Economic Studies* 42 (2): 169-190.
- Oksala, Johanna. 2010. "Foucault's politicization of ontology." *Continental Philosophy Review* 43: 445-466.
- Payandeh, Mehrdad. 2011. "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* 48 (1): 9–38.
- Pernice, Ingolf. 2014. "A Difficult Partnership Between Courts: The First Preliminary Reference by the German Federal Constitutional Court to the CJEU." *Maastricht Journal of European and Comparative Law* 21 (1): 3-13.
- Petersen, Niels. 2014. "Karlsruhe Not Only Barks, But Finally Bites - Some Remarks on the OMT Decision of the German Constitutional Court." *German Law Review* 15 (2): 321-328.
- Polanyi, Karl. 2001. *The Great Transformation. The Political and Economic Origins of Our Time*. Boston: Beacon Press.
- Preuss, Ulrich K. 2011. "The Implications of "Eternity Clauses": The German Experience." *Israel Law Review* 44: 429-448.
- Rancière, Jacques. 1999. *Disagreement: Politics and Philosophy*. Translated by Julie Rose. Minneapolis: University of Minnesota Press.
- Rasmussen, Morten. 2014. "Revolutionizing European law: A history of the *Van Gend en Loos* judgment." *International Journal of Constitutional Law* 12 (1): 136-163.
- Rossiter, Clinton. 1948. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Princeton: Princeton University Press.
- Röpke, Wilhelm. 1954. *Economic Order and International Law*. Academie de Droit International de la Haye, Recueil de Cours, Volume 86/II. The Hague: Kluwer International Law.
- Scheuerman, William E. 2000. "The Economic State of Emergency." *Cardozo Law Review* 21: 1869-1894.
- Schmitt, Carl. 2005. *Political Theology: Four Chapter on the Concept of Sovereignty*. Translated by George Schwab. Chicago and London: The University of Chicago Press.

- Schmitt, Carl. 2008. *Constitutional Theory*. Translated and edited by Jeffrey Seitzer. Durham and London: Duke University Press.
- Schmitt, Carl. 2014. *Constitutional Dictatorship. From the origin of the modern concept of sovereignty to proletarian class struggle*. Translated by Michael Heolzl and Graham Ward. Cambridge: Polity Press.
- Sinn, Hans-Werner. 2014. “Outright Monetary Intractions” [online article]. *Project Syndicate*. 9 February 2014. Available at: <https://www.project-syndicate.org/commentary/hans-werner-sinn-applauds-the-german-constitutional-court-s-ruling-on-the-ecb-s-bond-purchase-scheme?barrier=true> [accessed 26 March 2016].
- Sparve, Robert. 2005. “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*. Frankfurt: European Central Bank.
- Steen, Michael. 2012. “Weidmann isolated as ECB plan approved” [online article]. *Financial Times*. 6 September 2012. Available at: <http://www.ft.com/cms/s/0/3651b028-f846-11e1-b0e1-00144feabdc0.html#axzz41qwzELYJ> [accessed 3 March 2016].
- Streeck, Wolfgang. 2014. *Buying Time: The Delayed Crisis of Capitalism*. London and New York: Verso.
- Tridimas, Takis. 1997. “The Role of the Advocate General in the Development of Community Law: Some Reflections.” *Common Market Law Review* 34 (6): 1349–1387
- Vauchez, Antoine. 2010. “The transnational politics of judicialization. *Van Gend en Loos* and the making of EU polity.” *European Law Journal* 16 (1): 1-28.
- Vauchez, Antoine. 2014. *Démocratiser l'Europe*. Paris: Seuil - République des idées.
- Watkins, Frederick M. 1940. “The Problem of Constitutional Dictatorship.” *Public Policy* 1: 324-379.
- Weidmann, Jens. 2013. “Crisis management and regulatory policy” [speech]. Walter Eucken Lecture at the Walter Eucken Institut, Freiburg. 11 February 2013. Available at: http://www.bundesbank.de/Redaktion/EN/Reden/2013/2013_02_11_weidmann_eucken.html [accessed 26 March 2016].
- Weiler, Joseph H.H. 1995. ““The State Über Alles.” Demos, Telos and the German Maastricht Decision.” *Robert Schuman Centre for Advanced Studies Working Paper* 1995/19.

- White, Jonathan. 2015. "Emergency Europe." *Political Studies* 63 (2): 300-18.
- Wiegandt, Manfred H. 1995. "Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops." *American University International Law Review* 10 (2): 889-916.
- Wiley, Norbert F. 1983. "The Congruence of Weber and Keynes." *Sociological Theory* 1: 30-57.
- Wilkinson, Michael. 2014. "Economic Messianism and Constitutional Power in a 'German Europe': All Courts are Equal, but Some Courts are More Equal than Others." *LSE Law, Society and Economy Working Papers* 26/2014.
- Wilkinson, Michael. 2015. "The euro is irreversible! ... or is it? on OMT, austerity and the threat of 'Grexit.'" *German Law Journal* 16 (4): 1049-1072.
- Wilsher, Daniel. 2014. "Law and the Financial Crisis: Searching for Europe's New Gold Standard." *European Law Journal* 20 (2): 241-283.
- Zilioli, Chiara and Martin Selmayr. 2001. *The Law of the European Central Bank*. Oxford: Hart Publishing.
- Žižek, Slavoj. 2010. "A Permanent economic emergency." *New Left Review* 64, July-August: 85-95.