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The justiciability of ECB 'soft' measures against the financial crisis

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Abstract: Despite the Treaties confer on the ECB mere technical tasks, since the outbreak of the financial crisis the ECB has been taking several policy actions, partly filling the lack of a strong political authority in the Economic and Monetary Union. In doing so, the ECB has also been relying on soft law or simply on communication strategies, in order to manage the expectations of market operators without – formally – breaching its constitutional limits. For the time being, the soft law acts adopted for this purpose have been brought before European (i.e. national and purely EU) Courts mainly in three cases. Two cases deal, from different perspectives, with the (in)famous question of illegality of the Outright Monetary Transactions (OMTs), which involved both national and EU judges. The third case is related to the ECB's policy location of central counterparts, challenged before the General Court of the EU. The approach showed by some of the involved Courts appears rather intrusive and, therefore, raises interesting question on the role of the national and supranational judiciaries in relation to soft law and, more generally, on the development of the EU system of judicial protection. In particular, this paper highlights how EU limits to individuals' *locus standi* might well become dangerous, exacerbating further legal debates between top national and supranational judiciaries, and draws the attention on the peculiar, and potentially unlawful, procedure of preventive legal control that both national and EU Courts have ensured in the specific context of OMTs.

1. Introduction

Despite what the Treaties provide with regard to the mere technical tasks of the European Central Bank (hereinafter, ECB), since the outbreak of the financial crisis the ECB has been taking several policy actions, partly filling the lack of a strong political authority in the Economic and Monetary Union (hereinafter, EMU). In doing so, the ECB has also been relying on soft law or simply on communication strategies, some of which have generated a quite harsh legal battle before national and EU Courts.

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While the topic of the soft law measures enacted in the field of the EMU and, more broadly, of the European economic integration has already been dealt quite extensively[1], less attention has been dedicated to the soft law acts enacted by the ECB[2] and, in particular, to the justiciability of those acts. This research aims at clarifying this issue, focusing in particular on the recognition by EU Courts of the soft law measures enacted by the ECB to counteract the financial crisis.

After a brief analysis of the political and institutional dynamics that can be observed in this sector (at § 2), the legal challenges before EU and national Courts regarding the soft law measures enacted by the ECB in this policy field will then be introduced from a general perspective (§ 3). Despite its rather limited quantitative amount, this case law shows interesting features from a qualitative perspective, having involved both national and supranational top constitutional judiciaries, having questioned fundamental principles of the EU legal order and having introduced fundamental innovations in the EU system of judicial protection.

The selection of the case law for the present study has been made by narrowing the research to the issues decided by EU Courts; for the time being, mainly three cases stand out. Since one of the cases has been decided in the context of a preliminary ruling, the approach of the national Court in the recognition of the soft law measure has been taken into account as well.

The first and the second case deal with the same issue, namely the (in)famous question of illegality of the Outright Monetary Transactions (hereinafter, OMTs; § 4). The first case, which has not gained much attention among scholars, is an action of annulment brought by several German citizens before the General Court of the Court of Justice of the European Union (hereinafter, GC). The second one is related to the very well known constitutionality complaints brought by other German individuals and by a parliamentary group before the German Federal Constitutional Court (hereinafter, FCC). The FCC has then referred the matter to the Court of Justice of the EU (hereinafter, CJEU), presenting its first (and quite aggressive) request for a preliminary ruling. The third case is related to the ECB's policy location of central counterparts (§ 5), which has been challenged by the United Kingdom before the GC.

[1] See, ex multis, the special issue "Revising the rules: the Stability Pact and the construction of European economic governance" of the Journal of European Public Policy, 2004, n. 11 and in particular D. HODSON, I. MAHER, *Soft law and sanctions: economic policy co-ordination and reform of the Stability and Growth Pact*, ivi, p. 798. The justiciability of those measures has been analysed also with regard to CJUE, 13 July 2004, C-27/04, *Commission v. Council*, I-6649. Moreover, from a general perspective, see the thorough assessment made by L. SENDEN, *Soft Law in EC Law*, Oxford and Portland, 2004, where the definition of 'soft law' used in the present study has been taken

[2] It is worth mentioning, by way of exception, C. ZILIOLI, M. SELMAYR, *The Law of the European Central Bank*, Oxford and Portland, 2001, p. 97 et seq., which however consist in an institutional research on the ECB and not on soft law or its justiciability, and the recent analysis made by S. ADALID, *La Banque centrale européenne et l'Eurosystème*, Bruxelles, 2015, p. 354 et seq.

All these cases raise extremely delicate problems, which possibly constitute the most controversial issues that the EU institutions and the Member States have to tackle to reform the EMU. The several actions for annulment directed against the OMT's clearly demonstrate the opposition, at the very least, of some constituencies of the German society to a more integrated (and, therefore, with a more shared liability) Eurozone. The case related to the location policy for the central counterparts is highly intertwined with the fear of the Member States that lie outside the Eurozone to be left out from the European integration process (an issue that, as shown by the outcome of the British referendum, can bring to very dangerous situations).

The approach showed by some of the involved Courts appears rather intrusive and, therefore, raises interesting question on the role of the national and supranational judiciaries in relation to soft law and, more generally, to the development of the process of European integration. These points will be developed in the conclusions (§ 6).

2. Setting the institutional and political context: a brief analysis of the role of the ECB in the financial crisis

In order to better assess the recognition (and non-recognition) by the European Courts of the soft law measures enacted by the ECB to counteract the financial crisis, it is worth highlighting some specific dynamics that constitute the legal and political background of the case-study presented here and that have contributed, to some extent, to shape the soft measures under scrutiny[3].

In the last few years, the EU institutions have adopted a broad set of provisions as means to counter with the financial crisis and with those inefficiencies in cross-border supervision that have enhanced the negative effects of financial speculative trading. However, these steps towards a closer integration in the economic and financial fields seem to have increased the gap between countries inside and outside the Eurozone, as well as the fear of the latter to be excluded from the European integration process. Indeed, given its differentiated participation, the EMU is a source of perhaps even unavoidable[4] conflicts between

[3] A detailed examination of the role of the ECB during the financial crisis and the subsequent eurocrisis fall outside the scope of this research. See, for a broader perspective on this point, ex multis, C. ZILIOLI, *The ECB's Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice of the European Union*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 171; A. HINAREJOS, *The Euro area crisis in constitutional perspective*, Oxford, 2015; K. TUORI, K. TUORI, *The Eurozone Crisis – A constitutional Analysis*, Cambridge, 2014; P. TOLEK, *Legal implications of the euro zone crisis: debt restructuring, sovereign default and euro zone exit*, Alphen aan den Rijn, 2014; A. ADINOLFI, M. VELLANO (eds.), *La crisi del debito sovrano degli stati dell'area euro: profili giuridici*, Torino, 2013; F. ALLEMAND, F. MARTUCCI, *La nouvelle gouvernance èconomique européenne, in Cahiers de droit européen*, 2012, p. 17 (part 1) e p. 409 (part 2); G. PERONI, *La crisi dell'euro: limiti e rimedi dell'Unione economica e monetaria*, Milano, 2012.

[4] See the interesting ex ante evaluation by M. LLOYD, *EMU: relations between "Ins" and "Outs"*, Economic Affairs Series, European Parliament working paper, ECON-106 EN, 1998, paragraph 5, 7, 8.

the Member States that lie inside the Eurozone and those that remain outside. The ECB lies at the institutional crossroad of these divergences and it is highly exposed to them in the implementation of monetary policies.

Furthermore, it has to be highlighted that during the recent crisis the political authorities of the EMU have often proven inadequacy and inefficiency, being not always able to take quick and far-reaching decisions[5]. In this context, the ECB has partially filled the lack of vision, leadership and decision-making ability of the Member States, supporting them with a flexible and extensive interpretation of its competences and its main objective of price stability. In so doing, the ECB has also been perceived as acting *ultra vires*, encroaching upon national sovereignty and extending its mandate from purely monetary policies to the economic ones and violating the prohibition of monetary financing laid down in Art. 123 (1) TFEU[6]. It bears noting that this 'proactive role' was also due to the unprecedented and potentially destabilising events that happened sometime between 2011 and 2012. As concisely reported by Allemand and Martucci, in that period "*la fin de l'euro n'est […] plus un tabou. Elle est ouvertement évoquée dans des cercles qui ne sont plus nécessairement l'apanage des eurosceptiques*"[7]. Therefore, in fulfilling its tasks during the financial crisis the ECB has been facing the paradoxical situation to make sure that its *raison d'être* (namely, the common currency) keep on existing.

In any case, assessing whether the ECB has been acting *ultra vires* is not relevant for the present study. For our purposes, it is sufficient to highlight that the ECB has evolved its role in order to face the different situation created by the financial crisis, and that this institutional evolution has not been matched with the adoption of specific legal provision to this end[8].

In this context, the ECB has also been relying on soft ways of regulation, adopting formally non-binding acts which however have had (and were intended to have) a huge impact on financial market participants.

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[5] The literature on this point is quite rich. For recent and interesting analyses, see L. DANIELE, R. CISOTTA (eds.), *Democracy in the EMU in the aftermath of the crisis*, Torino, 2017; A. HINAREJOS, *The Euro area crisis in constitutional perspective*, Oxford, 2015; K. TUORI, K. TUORI, *The Eurozone crisis. A constitutional analysis*, Cambridge, 2014; G. MAJONE, *Rethinking the Union of Europe post-crisis: has integration gone too far?*, Cambridge, 2014.

[6] See, for an interesting perspective on this point, the analysis made by T. BEUKERS, *The new ECB and its relationship with the eurozone Member States: Between central bank independence and central bank intervention*, in *Common Market Law Review*, 2013, p. 1579–1620. S. CAFARO, *L'azione della BCE a favore della stabilità finanziaria alla luce del diritto dell'UE*, in A. ADINOLFI, M. VELLANO (eds.), *La crisi del debito sovrano degli stati dell'area euro: profili giuridici*, cit., in particular at p. 65; D. WILSHER, *Ready to do whatever it takes? The legal mandate of the European Central Bank and the economic crisis*, in *The Cambridge yearbook of European legal studies*, 2013, p. 503 et seq., at p. 505.

[7] F. ALLEMAND, F. MARTUCCI, *La nouvelle gouvernance èconomique européenne*, cit., p. 17.

[8] After all, it bears reminding that, according to D. WILSHER, *Ready to do whatever it takes? The legal mandate of the European Central Bank and the economic crisis*, cit., at p. 504, 'given the complexity and unpredictability of events during the crisis, no legal rule could have met every exigency because central banks must act with a large degree of discretion in such situations'.

On the one hand, this is not surprising, being to some extent a physiological circumstance of any monetary system. Since the beginning of the 1990s, communication strategies have become fundamental for central banks in order to manage expectations of market participants[9]. According to the economic literature, monetary policies can be transmitted through the so called 'signalling channel', which is "activated through central bank's communications informing the public about its intentions regarding the future evolution of short-term interest rates, the purchase of financial assets, or the implementation of other measures targeted at counteracting market dysfunctions"[10]. Communications can then be used by central banks both as tools for conventional monetary policies, when they are "aimed at sharing with the public central bank views about the macroeconomic outlook and, in some cases, about the future evolution of short-term interest rates" and for unconventional ones, when they are used "to convey information or pursue objectives that go beyond [the central bank's] standard practice"[11]. Thus, according to the economic literature, central banks' announcements are a transmission channel of monetary policies to the same extent as true actions like the purchase of financial securities are.

On the other hand, it seems that the recourse to soft law by the ECB might also be regarded as 'pathological', signalling the ECB's difficulty to tackle the eurocrisis in an outdated legal framework that does not provide the central bank with a strong political counterpart and with an adequate degree of discretion for managing unpredicted events.

Therefore, one may wonder whether the use of soft law by the ECB in the current crisis has not also been a way to 'circumvent' the constitutional limit to its mandate, steering behaviours and managing expectations of market participants without, formally, exercising powers and functions that had not been explicitly endowed upon itself[12]. Indeed, relying (also) on soft ways of regulation, the ECB has to some extent contributed to offer a vision on the future of the common currency, without waiting for those legislative amendments that were (and still are) needed by the EMU to tackle the challenges given by the current crisis. The announcement of bond-buying schemes or the suggestion of policy location with regard to central counterparts, which will be discussed in detail below, provide interesting examples in this regard.

[9] See, in particular, A. BLINDER, M. EHRMANN, M. FRATZCHER, J. DE HAAN, D. J. JANSEN, *Central Bank Communication and Monetary Policy: A Survey of the Evidence*, in *Journal of Economic Literature*, 2008, p. 910 et seq.

[10] M. CECIONI, G. FERRERO, A. SECCHI, *Unconventional monetary policy in theory and in practice*, in *Banca d'Italia Occasional papers*, 2011, p. 16.

[11] Ibidem (both quotations).

[12] In a perhaps more pragmatic way, S. ADALID, *La Banque centrale européenne et l'Eurosystème*, Bruxelles, 2015, p. 339 notes that, in the peculiar case of the OMTs, the fact that the ECB has avoided to take a formal decision on the point can be explained with its intention to avoid direct judicial challenges.

In any case, this evolution of the role of the ECB – *rectius*: the soft law measures adopted in this context by the ECB – have been challenged before different European Courts, putting to the test the coherence of the EU system of judicial protection and, in some cases, the sound relation between national and supranational legal orders.

3. The ECB's soft law measures against the financial crisis before European Courts

Given the peculiarity of the policy sector and its rather recent appearance, the case law related to the soft law measures adopted by the ECB to face the financial crisis is rather limited, from a quantitative perspective.

Indeed, those measures have arisen before EU Courts mainly in three cases, two of which involve the GC and one involves both the CJEU and a national Court, namely the FCC. Despite its limited amount, these cases present several interesting features from a qualitative point of view. Indeed, in all these cases soft law is at the heart of the attention of the judges, since the questions of legality concerned directly the soft law measures. Furthermore, this case law involves several Courts at different levels. On the one hand, the involvement of the CJEU and the GC give a broad picture of EU Courts' approach; on the other hand, the involvement of the FCC enables to take into consideration a judicial authority which has taken very careful positions vis-à-vis the European integration process and which has often demonstrated its intention to provide an accurate judicial protection in relation to EU acts.

The first soft law measures whose judicial recognition (or non-recognition) needs to be assessed are the OMTs, which have been challenged in the first two cases dealt with in the present study.

In order to acquire the abovementioned proactive role, the ECB has introduced several unconventional monetary policy measures with the aim to ensure an appropriate monetary policy transmission mechanism, while safeguarding its primary objective of price stability. They have been mostly taken through binding acts: this has been the case for the Covered Bond Purchase Programme[13], the Securities Market Programme[14], the Targeted Longer-Term Refinancing Operations[15] and the decisions related to the Emergency Liquidity Assistance Programme[16].

[13] Decision of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme (ECB/2014/40), OJ L 335, 22.11.2014, p. 22.

[14] Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5), OJ L 124, 20.5.2010, p. 8.

[15] Decision of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations (ECB/2014/34), OJ L 258, 29.8.2014, p. 11.

[16] For the Emergency Liquidity Assistance Programme the legal basis can directly be found in primary law, namely in Art. 14 (4) of the Statute of the ECB and the ESCB.

However, at the highest peak of intensification of the financial crisis, *what the ECB was ready to do to preserve the euro* was the adoption of a soft law measure.

This was the OMT Programme, which consists in the intention of the ECB to purchase secondary markets government bonds, with no specific amount limit set *ex ante*, issued by the Eurozone Member States subject to a financial support programme in the context of the European Financial Stability Facility or of the European Stability Mechanism. Its 'soft' nature[17] comes from the fact that it has actually never been stated in any kind of legal act and it is included only in a press release[18] that sets out its basic features; moreover, it has never been implemented and, thus, it still lacks detailed provisions for its application. By way of consequence, for the time being no government bond has ever been bought by the ECB in application of this programme.

This measure has been challenged before several different judicial authorities.

On the national level, an appeal has been filed by a few thousand of German politicians and academics and by a political group in the *Bundestag* before the FCC, claiming that the ECB has acted *ultra vires* and has violated the prohibition of monetary financing set forth in Art. 123 (1) TFEU. This judicial authority has then referred the matter to the CJEU through a preliminary ruling procedure; this is the very first referral to the CJEU made by the Court of Karlsruhe.

Meanwhile, it is worth highlighting – this indeed is something rarely mentioned by commentators – that the OMT Programme had also been challenged by other German individuals before the GC with an action for annulment. This action had been dismissed before the CJEU was invested by the preliminary ruling requested by the FCC.

The questions of illegality of the OMT Programme are by far the most famous example of judicial challenge of ECB's soft law measures in this policy field, given the positive impact of their announcement on the euro and, thus, the threats on the future of the common currency raised by their challenge in such an important Member State. However, the ECB has faced the financial crisis also with other tools, mainly aimed at enhancing the oversight on financial markets and thus at preventing possible negative effects of trading speculation.

[17] It is well known that the literature has proposed several different definition of soft law: see, in particular, G. M. BORCHARDT, K. C. WELLENS, *Soft Law in European Community Law*, in *European Law Review*, 1989, p. 267 et seq.; F. SNYDER, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, in *Modern Law Review*, 1993, p. 32; L. SENDEN, *Soft Law in European Community Law*, Oxford and Portland, 2004, at p. 112. As already mentioned, for the purposes of the present study the definition of 'soft law' of this latter Author has been taken into account; however, it seems that the OMTs press release can be regarded as 'soft law' also on the basis of other Authors' definition.

[18] European Central Bank, Press release, Technical features of Outright Monetary Transactions, 6 September 2012.

In this regard, the third case, which deals with the Eurosystem Oversight Policy Framework, provides an interesting example. In this case, the United Kingdom (hereinafter, UK) challenged before the GC the policy location of central counterparts made by the ECB in this formally non-binding measure, arguing (again) that the ECB had acted *ultra vires* and in violation of the fundamental freedoms enshrined in Art. 48, 56 and 63 TFEU, as well as of Art. 101 and 102 TFEU, read in conjunction with Art. 106 TFEU and Art. 13 TEU, and of the non-discrimination principle that constitute the basis of the Internal Market. It bears noting that the ECB had eventually taken the same policy choice also through a reference in a binding act; however, the appeal related to this act has interestingly been dismissed, since the General Court had already accepted the action for annulment of the soft law measure.

4. The judicial (non) recognition of the OMT Programme

4.1. Individual actions before the EU Courts: a classic (but dangerous) dismissal

Few months after the ECB's declaration of its willingness to purchase government bonds in the framework of the OMT Programme, Mr. von Storch and other 5216 applicants challenged this 'decision' (*rectius*: the press release on OMTs) before the GC.

The GC dismissed the action as inadmissible on grounds of lack of direct concern, because "*à supposer que les actes attaqués produisent des effets juridiques obligatoires, ces actes ne sauraient en aucun cas être regardés comme produisant directement des effets sur la situation juridique des requérants. En effet, les actes attaqués requièrent, en tout état de cause, des actes d'exécution pour pouvoir produire d'éventuels effets sur la situation des requérants, ce que ces derniers ne contestent d'ailleurs pas*"[19].

The subsequent appeal has been dismissed too since the CJEU confirmed that the challenged act was not of direct concern to the applicants according to Art. 263 (4) TFEU, as it was considered not capable of directly affecting their legal sphere[20]. It bears noting that the applicants had tried to demonstrate the fact that OMTs were of direct concern to them also claiming the right, pursuant to Art. 47 of the Charter of Fundamental Rights of the EU, to effective judicial remedies. Indeed, according to the applicants "*l'achat par la BCE et les BCN d'obligations d'État entraînera des distorsions sur les marchés financiers, ce qui nuira à la stabilité des prix et diminuera la valeur de leurs actifs*"; therefore, if they had to wait for implementing measures for challenging the ECB's intention, "*leur droit à un contrôle juridictionnel des «décisions de principe» de la BCE serait réduit de manière intolérable*"[21].

[19] GC, case T-492/12, Order of 10 December 2013, *von Storch and others v. ECB*, at para. 38.
[20] CJEU, case C-64-14/P, Order of 29 April 2015, *von Storch and others v. ECB*.
[21] GC, case T-492/12, Order of 10 December 2013, *von Storch and others v. ECB*, at para. 40.

Both the GC and the CJEU fully dismissed this request for preventive judicial protection; in particular, the CJEU argued that "*l'article 47 de la Charte […] n'a pas pour objet de modifier le système de contrôle juridictionnel prévu par les traités, et notamment les règles relatives à la recevabilité des recours formées directement devant la juridiction de l'Union*"[22].

This case is a rather classic application of the well-known principles and rules regarding individuals' *locus standi* before EU Courts. Commentators rarely focus on this judgment, being fully in line with the previous jurisprudence of EU Courts on standing of private parties in annulment actions.

However, this case becomes much more interesting in relation to the other action proposed against the same 'act', namely the preliminary ruling referred to the CJEU by the FCC. Indeed, the approach shown by the GC and then confirmed by the CJEU becomes quite dangerous, demonstrating that preventing individuals to challenge highly disputed soft measures does not prevent (and, on the contrary, exacerbates) further legal debates on the same issues, as shown by the *Gauweiler* case.

4.2. The (aggressive) 'preventive legal protection' offered by the German Federal Constitutional Court

The legitimacy of the OMT Programme has been challenged also by a former member of the *Bundestag* (and other 11.000 individuals) presenting additional pleas in law in the context of a constitutional complaint pending before the FCC and related to the lawfulness of the so called 'Fiscal Compact' and of the European Stability Mechanism. The parliamentary group *Die Linke* has also supported this action.

The national context of this case has been immediately made subject of several studies and researches[23]; for our purposes, it is sufficient to highlight that the applicants contested the inertia of the German government and of the German Parliament in taking actions against the announcement of the OMTs. The legal arguments were based on the fact that the ECB had allegedly acted *ultra vires*, violating the principle of conferral and the principle of legality. More specifically, acting beyond the power that is has been granted, the ECB had allegedly threatened the German Parliament's power relating to public finances and Art. 88 of the German Basic Law that, albeit indirectly, is committed to the objective of price stability.

[22] CJEU, case C-64-14/P, Order of 29 April 2015, *von Storch and others v. ECB*, at para. 55.

[23] See, ex multis and among others, an interesting Editorial Comment, *An unintended side-effect of Draghi's bazooka: An opportunity to establish a more balanced relationship between the ECJ and Member States' highest courts*, in *Common Market Law Review*, 2014, p. 375–387; a special issue by the *German Law Journal*, No. 4, 2014; A. DI MARTINO, *Le Outright Monetary Transactions tra Francoforte, Karlsruhe e Lussemburgo. Il primo rinvio pregiudiziale del BVerfG*, in this *Journal*, 2014; A. DE PETRIS, *Un rinvio pregiudiziale sotto condizione? L'ordinanza del Tribunale Costituzionale Federale sulle Outright Monetary Transactions*, ibidem.

The FCC has treated these new pleas in law separately and, after having declared the legitimacy of the ESM and of the Fiscal Compact, it has decided – for its very first time – to suspend the procedure to refer a preliminary question to the CJEU.

In particular, the FCC has made a reference for a *ruling on the validity* of the OMT Programme, deeming it in violation of: *i*) Art. 119 TFEU, Art. 127 TFEU and Art. 17-24 of the Statute of the ESCB and of the ECB, affirming that OMTs exceeds the monetary policy mandate of the ECB and encroaches upon the competence of the Member States; *ii*) Art. 123 TFEU, affirming that OMTs breach the prohibition of monetary financing enshrined in that provision. It bears noting that the same questions have also been formulated as references for a *ruling on the interpretation* of the same provisions of primary law, in the event that the CJEU does not consider the OMT Programme an act of an EU institution.

This reference for a preliminary ruling has been done in the context of the so called '*ultra vires* review' procedure[24], where the FCC reviews the validity of EU acts when is "*manifest that these acts have taken place outside the competences [transferred from the Federal Republic of Germany to the EU]*"[25]. It is worth noting that, in this case, in order to safeguard a manifest violation of the principle of conferral, the FCC has added a "procedural element"[26] to its '*ultra vires* review', providing citizens the power to demand, by filing an appeal before the FCC, "*that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored, and that they decide which options they want to use to pursue this goal*"[27].

Thus, the conditions under which the FCC has decided – not unanimously, since two dissenting opinions have been given[28] – to refer the case to the CJEU clearly demonstrate that the FCC has made somehow a 'pre-judgment' of invalidity of the EU act at stake. Moreover, such a position has been taken with, at the very least, a rather "unusual tone"[29]. Indeed, the referring order has provided the CJEU with the (sole?) interpretation of EU primary law that, according to the FCC, is consistent with the German Basic Law. Under this interpretation, the OMT Programme would have needed an incisive amendment and

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[24] For the jurisprudence of the FCC on the '*ultra* vires review' prior to the *Gauweiler* case, see German Federal Constitutional Court, Judgment of 30 June 2009 - 2 BvE 2/08, and German Federal Constitutional Court, Order of 06 July 2010 - 2 BvR 2661/06. On this point, *ex multis*, see W. FRENZ, *National Report – Germany*, in J. CZUCZAI, P. DARÁK, P. LÁNCOS, M. SZABÓ, A. Zs. VARGA (eds.), *Regulatory Powers between the EU and the Member States*, FIDE Conference Proceedings Nr. 3, Budapest, 2016, p. 1098 et seq.

[25] German Federal Constitutional Court, Order of 06 July 2010 - 2 BvR 2661/06, at para. 61.

[26] German Federal Constitutional Court, Order of 14 January 2014 - 2 BvR 2728/13, at para. 53.

[27] Ibidem.

[28] See the Dissenting Opinion of Justice LÜBBE-WOLFF on the Order of the Second Senate of 14 January 2013 - 2 BvR 2728/13 - 2 BvR 2729/13 - 2 BvR 2730/13 - 2 BvR 2731/13 - 2 BvE 13/13 and the Dissenting Opinion of Justice GERHARDT on the Order of the Second Senate of 14 January 2014 - 2 BvR 2728/13 - 2 BvR 2729/13 - 2 BvR 2730/13 - 2 BvR 2731/13 - 2 BvE 13/13.

[29] See J. SNELL, *Gauweiler: some institutional aspects*, in *European Law Review*, 2015, p. 133.

thus it would have drastically reduced its impact on financial markets. Even though national judicial authorities may well "*briefly state [their] view on the answer to be given to the questions referred for a preliminary ruling*"[30], the way in which the FCC has done it in the *OMT* referring order raises several doubts. Indeed, as it has been rightly observed, "*the [FCC] is not actually seeking interpretative guidance by the Court. It is rather dictating the preliminary ruling that the latter must give, setting the precise conditions that need to be met in order for the principle of conferral to be respected*"[31].

As it will be discussed below, the CJEU's preliminary ruling avoids any conflicts with the FCC as much as possible. In its final decision on the case, only recently adopted, the FCC has accepted the validity of the OMT Programme as stated by the CJEU, even though it has not avoided several criticisms to the latter's judgment[32]. In any case, for our purposes it has to be highlighted that the FCC has fully recognised the OMT Programme (namely, the press release that sets out its basic features) as a legal act potentially affecting the German Basic Law and it has permitted its justiciability despite the lack of a national implementing measure.

Such a full recognition of the soft measure has been made in the name of the 'preventive legal protection', namely on the idea that judicial protection has to be granted while it is still feasible to prevent the possible negative outcome of the challenged act. Thus, the '*ultra vires* review' becomes a kind of interim measure that cannot fully suspend, but at least can put in serious troubles, EU acts which cannot be directly challenged before EU Courts – or, as taught by the abovementioned *von Storch* case, which the CJEU deems as not challengeable by private parties. Indeed, from the referring order of the FCC it can be inferred that the principle of preventive legal protection has to be read also in light of the 'closed' approach shown by the GC with the rejection for inadmissibility of the action brought by Mr. von Storch and other individuals for the annulment of the same soft measure[33].

Therefore, after being dismissed in the framework of an action for annulment, the same issue on the validity of an EU Law measure has come back to Luxembourg as a preliminary ruling. This would be

[30] See the Recommendations to national courts on the initiation of preliminary ruling proceedings, in OJ C 338/01, 6.11.2012, at para. 24.

[31] G. ANAGNOSTARAS, *In ECB we trust... the FCC we dare! The OMT preliminary ruling*, in *European Law Review*, 2015, p. 744 et seq, at p. 757.

[32] The German Federal Constitutional Court has released the judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13. For the first doctrinal comments, see W. FRENZ, *No Juridical Brexit by the German Federal Constitutional Court*, in *Eurojus*, Issue 3, 2016; M. NETTESHEIM, *Ultra-vires-Kontrolle durch Bundesregierung und Bundestag – Für eine materielle Subsidiarität des Vorgehens gegen das Parlament*, in *Verfassungsblog*, 24 June 2016; M. RUFFERT, *Das OMT-Urteil des BVerfG: Europarechtlich überzeugend, verfassungsprozessrechtlich fragwürdig*, in *Verfassungsblog*, 22 June 2016.

[33] German Federal Constitutional Court, Order of 14 January 2014 - 2 BvR 2728/13, at para. 35.

perfectly in line with the EU system of judicial protection[34], if only it did not lack a national act based upon the challenged EU measure. However, this is only one of the several anomalies that the CJEU had to deal with in the preliminary ruling.

4.3. The preliminary ruling of the Court of Justice

Despite the rather aggressive reference made by the FCC, the CJEU deemed the OMT Programme fully compatible with the Treaties[35] without, however, making any further "*step in a process where the eurocrisis becomes a constitutional crisis*"[36]. Thus, the Court of Luxembourg – following the Advocate General's advice[37] – has taken a decision on the substantive matters and has not accepted the several pleas of inadmissibility raised by the ECB and the (many) Member States that have participated in the procedure (interestingly enough, there was no Member State, not even Germany, supporting the FCC's view).

It bears noting that the admission of the preliminary reference is to a large extent due to the fact that the CJEU has clearly, albeit only implicitly, dismissed the reference on the validity of OMTs and has adopted a preliminary ruling on the interpretation of the Treaties[38]. Even though the CJEU can review, in the context of a preliminary ruling on validity, also non-binding EU measures, it is nonetheless required that these measures produce legal effects[39]. Thus, rejecting the question of validity and focusing only on that of interpretation has given to the CJEU the possibility to avoid entering in the (complex, as shown by the AG conclusion[40]) discussion on the legal nature of the OMT press release. Therefore, from this dismissal it seems reasonable to assume that the CJEU has taken the opposite position vis-à-vis the FCC, *denying the recognition of the OMT Programme as an act with legally binding effect*.

Unfortunately, the CJEU has neither explicitly stated nor has given any motivation for the dismissal of the validity reference[41] and, thus, it has not explained the reasons why the OMTs cannot be seen as an

[34] It is worth mentioning that the same GC noted in the *von Storch* case, at par. 47, that '*eu égard au fait que les actes attaqués nécessitent, en tout état de cause, des mesures d'exécution par les BCN, les requérants ont, le cas échéant, la possibilité d'attaquer ces mesures d'exécution devant le juge national et, dans le contexte de ce contentieux, de faire valoir l'invalidité des actes attaqués, amenant ainsi le juge national à adresser une question préjudicielle à la Cour*'.

[35] CJEU, 16 June 2015, case C-62/14, Gauweiler.

[36] J. SNELL, *Gauweiler: what next?*, in *European Law Review*, 2015, p. 473.

[37] Opinion of Advocate General CRUZ VILLALÒN, delivered on 14 Jan. 2015, Case C-62/14, *Gauweiler*, at para. 37.

[38] For a similar conclusion, see T. TRIDIMAS, N. XANTHOULIS, *A legal analysis of the Gauweiler case. Between Monetary Policy and Constitutional Conflict*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 17 et seq., at p. 22.

[39] For a brief but thorough analysis of the case law on this point, see the Opinion of Advocate General CRUZ VILLALÒN in the case, at para. 72-73.

[40] See on this point the Opinion of Advocate General CRUZ VILLALÒN, at para. 70-91.

[41] See CJEU, 16 June 2015, case C-62/14, *Gauweiler*, at para. 30. Moreover, the fact that the preliminary ruling relates to the interpretation of some provision of the Treaties is also demonstrated by the final ruling of the judgment, which is clearly the one of a preliminary ruling on interpretation.

act producing legal effects. It has given explanations only on the upper logical step[42], namely the reasons why such an anomalous preliminary reference can be examined by the CJEU. This point is nonetheless very interesting for our purposes, since it sheds some light on the limits and the benefits of multi-level justiciability of soft law in such an important policy field.

As pointed out by several intervening Member States[43] as well as by legal scholars[44] and by an FCC's dissenting judge[45], the CJEU should have not even examined the request of the FCC, because of the latter's intention to possibly declare OMTs illegal for a violation of the German constitutional identity, regardless of the response of the CJEU. Moreover, the same request had an abstract and hypothetical nature and, according to the assertive way in which it had been referred, it did not reveal any *doubt* concerning the validity of the act in the referring judge.

The CJEU rejected these reasons developing a two-pronged argumentation.

Firstly, it *held the FCC responsible*, reminding that "*any assessment of the facts of the case is a matter for the national court*" and that *"is not […] for the CJEU to call that assessment into question*"[46]. Indeed, the CJEU specified (echoing but not quoting its precedents *Foglia v. Novello*[47]) that in this case "*is not quite obvious that the interpretation, or the determination of validity, of the 'rule' of EU law that is sought bears no relation to the actual facts of the main action or its purpose*"[48]. Secondly, the CJEU has somehow endorsed the principle of 'preventive legal protection' that the FCC had based its recognition of OMTs upon, in contrast with what the same CJEU stated[49] only few months before, in the *von Storch* case. In particular, in *Gauweiler* the CJEU argued that the lack of implementation of the OMT Programme "*does not — as the referring court states — render the actions in the main proceedings devoid of purpose since under German law preventive legal protection may be granted in such a situation if certain conditions are met*" [50].

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[42] The CJEU divided its judgment in three parts: preliminary observations, admissibility and substance. However, the reasons why the preliminary reference made by the FCC should not be fully reviewed by the CJEU are addressed and dealt with both in the first and in the second part. In the paragraph on the admissibility, indeed, the CJEU deal with arguments according to which the preliminary ruling should not be reviewed at all; only at para. 23 and 30-31, the CJEU deals with an issue of admissibility of a reference (namely, that on the validity of OMTs). However, despite it is not coherently reflected by the paragraphs composition, the legal reasoning of the CJEU clearly follow three logical steps one after the other: 'reviewability' of the preliminary reference as such, admissibility and substance.

[43] CJEU, 16 June 2015, case C-62/14, Gauweiler, at para. 11 and 18-22.

[44] See, ex multis, F. C. MAYER, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT*, in *German Law Journal*, 2014, p. 111 et seq., at. 119.

[45] See the Dissenting Opinion of Justice LÜBBE-WOLFF, cit.

[46] CJEU, 16 June 2015, case C-62/14, *Gauweiler*, at para. 15 (and then repeated at 24) and 26 (both citations).

[47] CJEC, 11 March 1980, case 104/79, *Pasquale Foglia v Mariella Novello* and 16 December 1981, case 244/80, *Pasquale Foglia v. Mariella Novello*.

[48] CJEU, 16 June 2015, case C-62/14, *Gauweiler*, at para. 25.

[49] CJEU, case C-64-14/P, Order of 29 April 2015, *von Storch and others v. ECB*, at para. 55.

[50] CJEU, 16 June 2015, case C-62/14, *Gauweiler*, at para. 27-28.

Even though the trustful approach shown by the CJEU to the FCC seems worthy, having mitigated the aggressive reference made by the Court of Karlsruhe, these arguments raise some doubts.

While it is fully appreciable that the CJEU restrains itself from assessing questions falling within the jurisdiction of national courts, like evaluating whether an action seeking to avoid the infringement of rights allegedly under threat might be permitted under German constitutional law, it has to be highlighted that in this peculiar case the CJEU withheld completely the fact that the FCC was acting beyond its jurisdiction. The CJEU treated the case pending before the FCC as a normal controversy, even if it involved the review of the legality of an EU act, with no national measures being at stake. The CJEU addressed this point only partially, focusing only on the possible intention of the FCC to declare the illegality of OMTs and thence delivering its preliminary ruling assuming (correctly, as we have recently seen from the FCC judgment) that this would not happen[51].

However, the point would have perhaps needed a more careful assessment. Claiming jurisdictions over EU acts, the FCC has clearly operated beyond the EU system of judicial protection enshrined in the Treaties; having accepted its reference for a preliminary ruling, the CJEU has legitimised this amendment of the system. Yet, as the same CJEU pointed out, "while it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures […] different from that established by the founding Treaty […], it is for the Member States, if necessary, in accordance with Article 48 TEU, to reform the system currently in force"[52]. Therefore, one may wonder why it is sometimes up to the Member States to reform the system of judicial protection, and some other times – even of a much greater importance – the Courts (*in casu*, both the CJEU and a Constitutional Court of a single Member State) can act autonomously for reforming the system of judicial protection established by the Treaties, without asking for Member States' intervention[53].

Furthermore, one may wonder whether in *Gauweiler* – as, few decades ago, in the *Foglia v. Novello* cases – there was "*a procedural device arranged […] in order to induce [the CJEU] to give its views on certain problem of [EU Law] which do not correspond to an objective requirement inherent in the resolution of a dispute*"[54]. Indeed, the '*ultra vires* review' of the FCC has clearly been a way to circumvent the EU limits to individuals' *locus standi* –

[51] See CJEU, 16 June 2015, case C-62/14, *Gauweiler*, at para. 16.
[52] CJEU, 25 July 2002, case C- 50/00P, *Unión de Pequeños Agricultores*, at para. 45.
[53] Obviously, the *Gauweiler* case is not the first occasion in which the CJEU has amended the EU system of judicial protection without asking for Member States' intervention: see, for instance, the European Parliament's capacity to sue (CJEC, 29 may 1990, case C-70/88, *Parliament v Council* [1990], I-02041) and to be sued (CJEC, 23 April 1986, case 294/83, *Parti écologiste "Les Verts" v European Parliament* [1986], 1339), as well as EU agencies' capacity to be sued (GC, 8 october 2008, case T-411/06, *Sogelma* [2008], II-2771) and the obligation to refer preliminary references on the validity of EU acts imposed also on national courts against whose decision there is a judicial remedy under national law (CJEC, 22 October 1987. case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987], 4199).
[54] CJEC, 16 December 1981, case 244/80, *Pasquale Foglia v. Mariella Novello*, at para. 18.

as, at the beginning of the 80ies, the preliminary ruling asked by Pasquale Foglia and Maria Novello was aimed at circumventing the lack of an infringement proceeding against the French tax system.

On the one hand, this potential circumvention of EU rules on individuals' *locus standi* might be seen as a positive improvement. When applied to soft law measures, the '*ultra vires* review' can improve justiciability and thus legitimacy of EU authorities, since it can provide an alternative way to challenge formally non-binding acts whose enforceability by individuals is very difficult at EU level.

However, it cannot be underestimated that the '*ultra vires* review' also entails a high risk of violation of the primacy of EU Law and of its uniform application, in particular if it inspires analogous behaviours by other Constitutional Courts[55]. Moreover, it has also to be considered that not in every Member State there can be a judicial authority willing to establish analogous procedure – for instance, this might be the case in those States where there is no Constitutional Court or where there is no possibility of submitting direct constitutional complaints by individuals. Furthermore, as it has been rightly pointed out, "the *Gauweiler* case cogently poses the question whether such an exercise of power – today by Germany ('s highest court), but tomorrow by any other EU Member States (' highest court) – could be consistent with the nature of the EU, and compatible with the principle of the equality between the Member States"[56]. Indeed, the '*ultra vires* review' entails a decentralization of the judicial scrutiny on the legality of EU acts before a national Court *in absence of any national measure of implementation*. This seems something that goes beyond the EU system of judicial protection established by the Treaties and that can undermine the autonomy of the EU legal order.

Moreover, leaving aside the issues related to the multilevel judicial protection, the peculiar case of the judicial contestation of the OMT Programme raises also important questions with regard to the role of the judiciary vis-à-vis soft-law.

It bears noting that the FCC, accepting the justiciability of the ECB press release, has actually replaced with its own judicial proceeding the decision-making processes that are usually needed in the adoption and in the implementation of rules. Indeed, the ECB has *de facto* detailed the implementation of the OMT Programme in the course of (and for the purposes of) the judicial procedure before the FCC (and, subsequently, the CJEU), answering to the judges' demand for detailed information regarding the possible

[55] As well known, other Constitutional Courts over the last years have threatened to deny the primacy of EU Law: think, for instance, the Italian Constitutional Court in the *Taricco* cases (see, *ex multis*, C. AMALFITANO (ed.), *Il primato del diritto dell'Unione europea e i controlimiti alla prova della c.d. saga Taricco*, Milano, 2018) and the Danish Supreme Court in the *Ajos* case (see R. HOLDGAARD, D. ELKAN, G. K. SCHALDEMOSE, *From cooperation to collision: the ECJ's Ajos ruling and the Danish Supreme Court's refusal to comply*, in *Common market law review*, 2018, p. 17-54).

[56] F. FABBRINI, *The European Court of Justice, the European Central Bank, and the Supremacy of EU Law*, in *Maastricht Journal of European and Comparative Law*, 2016, p. 3 et seq., at p. 8.

application of the programme. In its written and oral observations both before the FCC[57] and the CJEU[58], the ECB has been called to specify the conditions under which the OMT Programme would have been possibly activated in future. These conditions are of a paramount importance for the existence of the OMT Programme; they have not been transposed in a legal act yet, but this will certainly happen if the ECB will decide to implement the OMT Programme. Indeed, these conditions are exactly the same under which the OMT Programme has been deemed fully compatible with EU Law and with the German Basic Law by the CJEU and the FCC respectively[59].

Therefore, it seems interesting to reflect whether the judicial participation in the *de facto* implementation of the OMT Programme has effectively enhanced the legitimation of this soft measure. On the one hand, the answer seems positive: a soft measure with a great importance for the future of the integration process has been clearly provided with an *ex ante* evaluation of its legality with the EU (and German) legal order by the intervention of the FCC and the CJEU. On the other hand, however, the implementation of the soft measure (or, its transformation into a legal act: it has to be borne in mind that the OMT Programme was simply a press release) has *not* been done within an institutionalized process devoted to the principle of participatory governance and taking into account the different perspectives of stakeholders, interest groups and political authorities. On the contrary, the conditions of applicability of the OMT Programme have been defined answering to the issues raised by judges and counterparties in an extremely conflictual judicial context, with a national constitutional Court threatening not to respect the primacy of EU Law.

5. Privilege matters. The General Court's different approach in relation to the Eurosystem Oversight Policy Framework

In the two cases related to the OMTs, EU Courts have always avoided a full recognition of soft law, taking a different position from that of the FCC. The CJEU, in its preliminary ruling, has only made few steps towards the different approach shown by the FCC, without considering the OMT Programme as a legal act, however considering admissible a preliminary reference that did so.

[57] See the FCC's referring order (German Federal Constitutional Court, Order of 14 January 2014 - 2 BvR 2728/13) at para. 100.

[58] See the Opinion of Advocate General CRUZ VILLALÓN (delivered on 14 January 2015, Case C-62/14, *Gauweiler*) at para. 191, 199, 212; and the CJEU's judgment (16 June 2015, case C-62/14, *Gauweiler*) at para 105-106.

[59] The conditions under which the future implementation of the OMT Programme will be subject are the following: limited volume of a possible purchase of government bonds; no participation in a debt cut; observance of certain time lags between the emission of a government bond and its purchase; no holding of the bonds to maturity. See CJEU, 16 June 2015, case C-62/14, *Gauweiler*, *passim* and German Federal Constitutional Court, judgment of 21 June 2016 - 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, at para. 174.

On the contrary, in the *Clearing houses* case[60] the GC has fully recognised a soft law measure enacted by the ECB, namely the Eurosystem Oversight Policy Framework, as an act producing legal effects, thus it has annulled it deeming that the ECB had acted *ultra vires* by adopting it. This judgement has not been appealed before the CJEU.

By way of introduction, it bears noting that this is (for the time being) the last action brought by the UK against EU measures in the field of financial supervision. As mentioned above, after the outbreak of the financial crisis in 2008 the EU has adopted a broad set of acts and institutional innovations in order to strengthen the cross-border supervision of financial markets and to reduce the systemic risk. This strong enhancement of integration in financial matters was certainly more needed by those Countries that shared the common destiny given by the common currency. On the contrary, the non-euro Member States, especially the UK, have felt this rapid integration in such a sensitive field as a threat to their sovereignty (and, with respect to the UK, to its main national industry)[61], as recently demonstrated by the outcome of the British referendum.

It is thus no coincidence that London has engaged a 'legal battle' in Luxembourg[62], seeking the annulment of several provisions adopted in the field of financial supervision. All the actions but the very last, namely the one relevant for this study, saw the UK defeated[63].

In particular, in this case the UK challenged an ECB policy related to the location of central counterparts. These are key components of the financial system, as they facilitate the trade of derivatives and minimize the risks related to the latter. In particular, in its Eurosystem Oversight Policy Framework (a formally non-binding act) of 5 July 2011 the ECB stated that the central counterparts (also known as 'clearing houses') holding "*on average more than 5% of the aggregated daily net credit exposure of all central counterparts for one of the main euro-denominated product categories […] should be legally incorporated in the euro area*"[64]. Even though

[60] GC, 4 March 2015, case T-496/11, UK v. ECB.

[61] For an interesting overview on British position, see The Chancellor's speech at Open Europe Conference in London, Jan. 15th, 2014.

[62] On the British activism in Luxembourg see P. SCHAMMO, *Protecting the City of London? UK challenge to EU agency law*, in *Company Lawyer*, 2014, p. 33-34 and A. BARKER, *Barnier vs the Brits*, *Financial Times*, Nov. 8th, 2011. See also the brief introduction made by M. RANDALL, L. LU, *Capping of Bankers' Bonuses? Case C-507/13 UK v. Parliament and Council*, in *Legal Issues of Economic Integration*, 2015, p. 383 et seq.

[63] See CJEU, 14 January 2014, case C-270/12, *UK v. Parliament and Council* (on the attribution to a EU agency the power to ban or impose certain condition to short sale, in case of inertia of the national authorities); 30 April 2014, case C-209/13, *UK v. Council* (on the so called 'Tobin Tax'); case C-507/13, *UK v. Parliament and Council* (on bankers' bonus cap, removed on 17 April 2015).

[64] ECB, Eurosystem Oversight Policy Framework, published on 5 July 2011.

the ECB had already expressed this preference regarding the location of the clearing houses several other times in the past[65], this was the first time that it clearly stated specific thresholds for this purpose.

The aim of the ECB in affirming this location policy for the clearing houses was to have the possibility to directly supervise their activity, avoiding dangerous speculation and providing liquidity, if necessary. It must be highlighted that the ECB has reported this location preference also in other acts[66], even with a formal binding effect[67], which have also been challenged by the UK before the GC. These actions, however, have been removed by the Court's Registry on the applicant's request after the successful conclusion of the first appeal.

In the *Clearing houses* case, the GC has admitted the UK action against the Eurosystem Oversight Policy Framework and has annulled this act, despite its formally non-binding nature, affirming that the ECB had no power, neither explicitly nor implicitly, to adopt rules that ensure efficient and sound clearing and payment systems related to transactions in securities.

It bears noting that, differently from the action for annulment in the *von Storch* case, the applicant had the well-known privilege, according to Art. 263 (2) TFEU, to challenge EU acts without demonstrating any direct interest in the challenged decision. Thus, the GC had only to check whether the challenged act was intended to produce legal effects vis-à-vis third parties, without analysing whether it was of direct concern to the applicant.

This assessment has been done with a rather classic interpretation of the settled case law. The judgment seems quite in line with the previous jurisprudence and does not raise many doubts. However, the evaluation of the production of legal effects is based on an assumption that reveals a quite interesting approach by the GC relating to the recognition of soft law and that, therefore, deserves a specific analysis. First of all, the GC has assumed as a constitutive element of its assessment of the production of legal effects the fact that the national authorities will follow the soft measure adopted by the ECB, even if they

[65] See the Policy statement on euro payment and settlement systems located outside the euro area, 3 November 1998; the Eurosystem's policy line with regard to consolidation in central counterparty clearing, 27 September 2001; the Eurosystem policy principles on the location and operation of infrastructures settling in euro-denominated payment transactions, 19 July 2007; the Eurosystem policy principles on the location and operation of infra-structures settling euro-denominated payment transactions, 20 November 2008; the Eurosystem Oversight Policy Framework of February 2009. This policy had also been expressed in binding acts: see the Decisions taken by the Governing Council of the ECB (in addition to decisions setting interest rates) of December 2008.

[66] See the Standards for the use of central counterparties in Eurosystem foreign reserve management operations of November 2011, challenged by the UK in case T-45/12, and the ECB Guideline on a Trans-European automated real-time gross settlement express transfer system of 5 December 2012, challenged by the UK in case T-93/13.

[67] See Art. 1 (1) (1) of the Decision ECB/2012/31, in OJ L 13 of 17.1.2013, p. 8, which has been challenged in the case mentioned at footnote above T-93/13.

have no duty to act in accordance with it[68]. In particular, the GC has stated that "*the euro area Member States' regulatory authorities […] are liable, in the exercise of their powers, to impede clearing services activity carried out by central counterparts situated outside the euro area*"[69]. This approach seems quite innovative, since in other fields (see, for instance, in competition law) the assumption usually goes the other way around, stating that national authorities are not bound by soft law acts enacted by the Commission[70]. The General Court, unfortunately, does not provide any information on the reasons of such a different approach, which can perhaps be explained on the basis of the wide systemic risk that a default of a central counterpart might create on the financial system[71].

Moreover, the GC has affirmed that the soft law measure enacted by the ECB produces legal effects because national authorities may well think that the ECB has the competence to adopt that act – even if, in the same judgement, the GC will annul that act since the ECB has no competence to adopt it[72]. Therefore, the GC seems to stress the fact that also the 'illegitimate expectations' of public bodies have to be taken into consideration as a possible effect of soft law and as a constitutive element of the production of (il)legal effects. In the eyes of the GC, public bodies expect that an EU authority acts legally; the fact that the latter might also go wrong does not devalue the public bodies' expectations, that have to be taken into account in any case.

Lastly, it is worth highlighting that the GC, despite the annulment of the ECB's formally non-binding act, has somehow endorsed the possibility to adopt it again in the form of hard law. As mentioned above, also in this case the ECB had relied on soft law to circumvent its constitutional limits. Thus, the GC has invited the EU institutions to adopt a specific legislation[73] in order to formally grant the ECB the power to adopt the policy choice that the latter, lacking a formal competence for this purpose, has tried to affirm through soft law.

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[68] It bears noting that the ECB has the power to adopt other acts, even of a programmatic nature, that bound national central banks: see, for instance, the ECB guidelines provided for by Art. 14 (3) of ESCB/ECB Statute.

[69] GC, 4 March 2015, case T-496/11, UK v. ECB, at para. 42.

[70] See the analysis on this point made by Z. GEORGIEVA, *Soft Law in EU Competition Law and its Judicial Reception in Member States: A Theoretical Perspective*, in *German Law Journal*, 2015, p. 224 et seq., in particular at p. 244-247; O. STEFAN, *Helping loose ends meet? The Judicial acknowledgement of soft law as a tool of multilevel governance*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 359 et seq., in particular at p. 374-375.

[71] See, on this point, E. ANANIADIS-BASSIAS, *The ECB's "location policy" for central counterparties: is the General Court drawing a line, or taking one step back to take two steps forward?*, in *European Law Review*, 2016, in particular at p. 125-126.

[72] GC, 4 March 2015, case T-496/11, *UK v. ECB*, at para. 48.

[73] It is worth noting that a possible legislation on this point would probably have as a legal basis the Art. 129 TFEU, which provides for the ordinary legislative procedure and which, therefore, does not attribute to any Member State a veto-power.

6. The role of the European Courts in judging on the soft measures adopted by the ECB to counteract the financial crisis

Given the limited quantitative extension of the case law related to this policy field, it does not seem possible, for the time being, to take a definitive position on the impact of the judicial recognition (and non-recognition) of the soft measures mentioned so far. However, some interesting features can be already highlighted.

In the *clearing houses* case the GC has followed a rather classic approach, directly recognising the soft law measure as an act having legal effects. This conclusion has been reached also because of the privileged nature of the applicant. Thus, in this case the enforceability of the Eurosystem Oversight Policy Framework simply needed to demonstrate that the location policy affirmed in it constituted the ECB's definitive position. Moreover, the same policy choice had also been taken in several other acts (also with formally binding nature) that had all been challenged by the same applicant before the same judicial authority, though in different proceedings. This has certainly pushed the GC in reaching its decision. In this case, the recognition of soft law by the GC has definitely enhanced the transparency of the decision making process and the respect of the rule of law. Since the ECB has relied on soft law in order to circumvent a shaky legal basis for the adoption of the challenged policy choice, the GC has annulled the soft law act for lack of competence. Moreover, it has invited the EU institutions to extend ECB's mandate through the decisional procedures (namely, the ordinary legislative procedure) provided for by the Treaties.

Also in the first case related to OMTs, the *von Storch* case, the GC and then the CJEU have followed a classic legal reasoning; however, due to the non-privileged nature of the applicants, this has brought to the opposite conclusion. This case clearly shows how EU limits to individuals' *locus standi* might well become dangerous, exacerbating further legal debates on the same issues.

Indeed, in the subsequent *Gauweiler* case the CJEU had to face the same problem, albeit in a much more complex context. It bears noting that in this case a very interesting actor comes in the scene, namely the German Federal Constitutional Court, because of a rather unusual constitutional procedure for '*ultra vires* review' that might have led the latter to declare the incompatibility of EU Law with the German constitutional identity. In its referring order, the FCC has fully recognised the same soft law act that the EU Courts did not take into consideration in the first case; moreover, on the basis of the principle of preventive legal protection, the FCC has permitted its judiciability despite the lack of implementation of the measures at national level.

On the one hand, the approach shown by the FCC seems similar to what is usually done by EU Courts in the field of competition law. As Stefan pointed out, in that sector EU Courts usually do not

automatically recognise legal effects to soft law, but rather indirectly, through a mechanism based on the general principles of law[74]. However, on the other hand, the peculiar national procedure that has brought the matter before the FCC seems to constitute a rather more nuanced mechanism of soft law supervision. Indeed, the FCC seems to have used the principle of preventive legal protection as a way to add a procedural element to its '*ultra vires* review' that, pursuant to its previous jurisprudence, was made only of a substantive element. Therefore, the FCC seems to have used a general principle of law in order to grant soft law a stronger *enforceability*, despite the lacks of national implementing measures, and not as a legal tool to permit its *recognition*, that would have taken place in any case.

On the contrary, in the *Gauweiler* case the CJEU has not recognised the legal effects of the soft law measure at stake, having implicitly rejected the reference on the validity of the OMT Programme and having dealt only with the reference on the interpretation of some provisions of the Treaties. However, despite this lack of recognition, in *Gauweiler* the CJEU has taken an approach towards soft law that is *de facto* quite open and innovative.

Indeed, admitting the preliminary reference raised by the FCC, the CJEU has generated some incoherencies in its case law related to the non-hypothetical nature of the reference and to the non-consultative function of the mechanism provided for by Art. 267 TFEU. Moreover, the CJEU has *de facto* legitimated the unusual procedure provided for by the German legal order for the review of EU Law before national constitutional courts. Even though this procedure has shown interesting possibilities to enhance individuals' *locus standi* with regard to the judiciability of soft law, the '*ultra vires* review' also entails a high risk of violation of the primacy of EU Law and of its uniform application. This would happen in particular if other Constitutional Courts follow the example provided for by the FCC, establishing similar procedures for decentralizing EU Law supervision.

Both the CJEU and the FCC have played, in *Gauweiler*, an extremely political role. The FCC has recognised the press release on the OMTs as an act having legal effects, generating several criticisms among scholars and its own judges, in order to challenge the recent evolution of the EMU after the financial crisis. On the contrary, the CJEU has accepted a rather unusual preliminary ruling in order to provide an explicit legal endorsement to the ECB 'proactive role' and in order to support the credibility of the common currency. It seems reasonable to argue that the coherence of the EU system of judicial protection has been partly sacrificed for the sake of alleviating the conflictual relationship with the Court of Karlsruhe and, moreover, to legitimate explicitly the ECB's action with a ruling on the substance of the matter. Even though such an approach has brought to some legal anomalies, its spirit is fully

[74] O. Stefan, *Helping loose ends meet? The Judicial acknowledgement of soft law as a tool of multilevel governance*, cit., p. 371.

appreciable. The fact that the decision of the ECB to purchase government bonds in the context of a quantitative easing programme has been adopted only few days after the positive conclusion of the Advocate General in the *Gauweiler* case seems an interesting coincidence that should not be underestimated.

However, it has also to be highlighted that the interest shown by the FCC and the CJEU in the OMT Programme has not only fostered the substantive legitimation of this soft measure. Indeed, the judicial procedure before both Courts has actually replaced the political decision-making processes that are usually needed in the adoption and in the implementation of rules. The ECB has *de facto* decided the details of the OMT Programme (which, it bears reminding, is simply a press release) before the FCC and the CJEU, in order to provide judges with detailed information regarding the possible application of OMTs. This does not seem the function that judicial authorities are made for. Therefore, it appears that the full recognition of the OMT Programme before the FCC and its partial recognition before the CJEU has undermined, to some extent, the principle of institutional balance and thus, somehow paradoxically, it has badly affected the overall legitimacy of the measure.