



ARTICLES

LEGAL AND ACCOUNTABILITY ISSUES ARISING FROM THE ECB'S CONDITIONALITY

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ABSTRACT: The aim of this research is to clarify the legal framework under which the ECB applies its conditionality policy, by making a distinction between *implicit* and *explicit* conditionality. In the first years of the sovereign debt crisis, the ECB resorted to an *implicit* form of conditionality, driving Euro area Member States towards acceptance of an economic adjustment programme or the adoption of significant economic, fiscal and structural reforms. Implicit conditionality has been applied in the context of the ECB's collateral policy, to the provision of Emergency Liquidity Assistance (ELA), to the purchase of sovereign bonds under the Securities Markets Programme (SMP), as well as to the transfer of profits deriving from these purchases (the so-called SMP profits). Eventually, the ECB decided to shift to *explicit* conditionality. Under the Outright Monetary Transactions programme (OMT) and the Public Sector Purchase Programme (PSPP), sovereign bonds purchases became subject to compliance with the EU/IMF strict and effective conditionality. The temporary framework for collateral eligibility was modified following the same approach. While the shift to explicit conditionality has to be welcomed, it does not lessen concerns about the ECB's democratic accountability and its *interference* in domestic reform processes. Some regards the ECB's conditionality as a true political action departing from the standards of neutrality and independence that central banks should meet. This paper describes the set of policy instruments through which conditionality has been applied, with a view to assess the legitimacy of the ECB's actions.

KEYWORDS: ECB – conditionality – collateral – SMP – ELA – OMT – PSPP.

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I. INTRODUCTION

In 2012, at the peak of the European sovereign debt crisis, the President of the European Central Bank (ECB) Mario Draghi pledged that: “Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough”.¹

This paper aims at analysing the meaning of the ECB’s commitment to do “whatever it takes” (probably the three most effective words in the history of central banking), focussing in particular on the evolution of the ECB’s conditionality policy and its tools.

During the crisis, *assistance* to countries in distress was often provided by the ECB on the condition that EU/IMF financial assistance was requested or comprehensive structural reforms adopted.

The depth of the ECB’s interference in the domestic policy-making of weak Euro area members was justified in terms of *raison d’euro*: the need to safeguard the EMU and its stability – perceived as a supreme good – made extreme measures not only necessary, but almost inevitable.

Although technocratic in nature, the ECB exerted its power not only to protect the integrity of its monetary policy, but also to achieve clearly political goals.

Even if it has to be acknowledged that central banks inevitably inhabit a *world of policy*, where the law plays a rather limited role,² the issue deserves careful consideration, especially for the legal and democratic accountability concerns it raises.

II. THE ECB’S CONDITIONALITY IN CONTEXT

Since the 1970s, a substantial body of literature has developed on the subject of conditionality. Political science and legal studies have focussed on conditionality applied by States (the USA in particular) or international organizations (the European Union, the IMF and the World Bank) to influence the behaviour of other countries through various incentive instruments.

Initially, conditionality was mainly applied in the fields of trade and development cooperation and by international financial institutions when providing their financial assistance. Over the years, due to its effectiveness, the scope of conditionality expanded to other external policy sectors like international investments, foreign affairs and security, environment and energy. Moreover, it was used to achieve a broader set of objectives including human rights protection, democracy, good governance, and the introduction of labour and environmental standards.

¹ Speech by M. DRAGHI, *President of the European Central Bank at the Global Investment Conference in London*, 26 July 2012, www.ecb.europa.eu.

² R.M. LASTRA, *International Financial and Monetary Law*, Oxford: Oxford University Press, 2016, para. 2.01.

Academics have sought to identify the many types of conditionality instruments and incentive mechanisms, which were classified in: negative and positive, *ex ante* and *ex post* conditionality.³

Negative conditionality was first defined by Stokke while studying the development policy of the USA during the post-Cold War period as “the use of pressure, by the donor government, in terms of threatening to terminate aid, or actually terminating or reducing it, if conditions are not met by the recipient”.⁴ Negative conditionality was later associated with the use of sanctions in a number of policy areas.

Positive conditionality, instead, can be described as a mechanism to induce in the addressee a *voluntary* behaviour that fulfils a set of conditions, in return for benefits or *rewards* (in terms of aid, preferential treatment or access).

When conditionality is applied *ex ante*, conditions are used as a leverage and have to be fulfilled by the addressee before the promised benefits can be enjoyed.

On the contrary, *ex post* conditionality applies to on-going institutionalised relationships, and the recipient has to stay compliant with pre-set conditions in order to continue receiving the benefits which would otherwise be reduced, suspended or cancelled.

The EU conditionality policy has been studied extensively especially in the field of the external relations. In this context, the EU has always been treated as a single actor, taking into account only the final outcome and ignoring the different views expressed by its institutions or the inter-institutional debate.

More recently, scholars have turned their attention to the austerity measures to which the provision of EU/IMF financial assistance is conditioned. Thus, the focus has shifted from EU outward conditionality, concerning third States, to EU internal conditionality, applied to its members.

With this research, we wish to contribute to the debate by analysing the conditionality policy of the ECB, one of the EU institutions which is also a member of the so-called Troika together with the European Commission and the IMF.

Notably, for the first time, a central bank used its monetary policy powers as instruments of conditionality.

³ As a reference, also for a detailed bibliography, see S. KOCH, *A Typology of Political Conditionality Beyond Aid: Conceptual Horizons Based on Lessons from the European Union, in World Development*, 2015, pp. 97-108. According to the Author (at pp. 101-102), the traditional types of conditionality form a matrix and can be combined in four different configurations: *ex-ante/positive*, *ex-post/positive*, *ex-ante/negative* and *ex-post/negative* conditionality, the former and the latter being the most frequently used. *Ex-ante/positive* conditionality refers to the fact that a set of pre-defined conditions has to be met by the addressee before benefits can be granted. *Ex-post/negative* conditionality applies in pre-established relationships and makes the continuous access to benefits dependent on the recipient's level of performance; in this case, benefits are terminated, suspended or withdrawn should the recipient no longer implement pre-set conditions.

⁴ O. STOKKE, *Aid and Political Conditionality*, London: Frank Cass, 1995, p. 12.

We contend that the ECB's conditionality policy presents many distinctive features. It is directed to Euro area members and thus it is aimed internally. It pursues institution-specific goals, even if for the benefit of the whole Euro area and it shows the ECB's strong commitment to preserve the euro. Furthermore, alongside the *traditional* negative/positive and *ex ante/ex post* instruments, the ECB applied its incentive mechanisms in an *implicit* and *explicit* way.

Implicit conditionality entails a tacit understanding of benefits and sanctions, outside the confines of written law, and it is based on a clear power asymmetry.

According to Stefano Sacchi,

"Although instances of conditionality are usually embodied in formalized agreements, and their terms – including the sanctions for non-compliance – explicitly specified through detailed covenants, [...] this is not necessary for conditionality to be operational and effective in influencing a party's behaviour. Conditionality can be based on an implicit understanding between the two parties involved that a particular behaviour is expected in order for the good to be made available, even in the absence of detailed covenants".⁵

While it is widespread in the realm of international relations, recourse to *implicit* conditionality is rather uncommon for a supranational institution. In fact, conditionality is usually applied by international organizations in the exercise of their conferred powers and its terms are *explicitly* established in binding legal provisions.

At the beginning of the sovereign debt crisis, the ECB applied this form of conditionality in the context of its collateral policy, the Emergency Liquidity Assistance (ELA) and the Securities Markets Programme (SMP).

In these instances, the Central Bank made (large) use of its discretionary monetary powers, formally pursuing risk-mitigating objectives, in order to safeguard the EMU and its stability. However, well beyond that, the ECB's conditionality contributed to drive Euro area crisis countries to adopt urgent and crucial reforms or even to seek EU/IMF financial assistance.

Unlike in the case of conditionality attached to EU/IMF lending, which has clear legal bases⁶ and is defined in Memoranda of Understanding and EU Council Decisions (and,

⁵ S. SACCHI, *Conditionality by Other Means: EU Involvement in Italy's Structural Reforms in the Sovereign Debt Crisis*, in *Comparative European Politics*, 2015, pp. 77-92, at p. 78.

⁶ The legal bases for conditionality attached to the Euro Area intergovernmental loans to Greece (the so-called Greek Loan Facility) are to be found in TFEU Arts 126 and 136. In the case of the European Financial Stabilisation Mechanism (EFSM), conditionality is based on Art. 3 of Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism. In 2011, a third paragraph was added to TFEU Art. 136 through the European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro adding; according to the new para. 3 of Art. 136 TFEU: "The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". Accordingly, Art. 13 of the European Stability Mechanism (ESM) establishes

in the case of the IMF, in Letters of Intent and Stand-By Arrangements), no legal document formalises the scope of the ECB's implicit conditionality.

Instead, pressure on governments in distress was exerted by the ECB through press releases and letters which were supposed to remain confidential. Market mechanisms further contributed to make the ECB's interventions effective.

Eventually, the ECB decided to shift to *explicit* conditionality.

Under the Outright Monetary Transactions programme (OMT), announced in September 2012 but never implemented, sovereign bonds purchases were subject to the "strict and effective conditionality" attached to a European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. The 2014 review of the temporary framework on collateral eligibility established that debt instruments issued by countries under an EU/IMF macro-economic adjustment programme could be accepted as collateral as long as they complied with the attached conditionality. More recently, under the Public Sector Purchase Programme (PSPP), the purchase of bonds issued by Euro area countries receiving EU/IMF financial assistance was conditioned to a positive outcome of the programme review.

In doing so, the ECB demonstrated its ability to respond to context. One might argue that, being the reform of the EU economic governance under the close scrutiny of the European Court of Justice (and of the German Federal Constitutional Court),⁷ the ECB adapted its policy to the evolving legal situation.

Explicit conditionality strengthens legal certainty and predictability. Providing it with a clear legal basis in ECB legal acts, conditionality becomes applicable to Euro area members according to standard criteria, thus reducing discretionality and avoiding selectivity. The whole process is made more transparent and open to judicial review.

The shift to explicit conditionality has therefore to be welcomed, even if it does not lessen concerns about the ECB's democratic accountability and its *interference* in domestic reform processes.⁸ Moreover, it does not address the several controversial is-

the procedure to define the conditions attached to financial assistance. See also Art. 2 of the European Financial Stability Facility (EFSF) Framework Agreement.

⁷ Reference is made to the claims that led to German Federal Constitutional Court, judgment of the of 12 September 2012, BvR 1390/12 *et al.*, on the ESM and on the so-called Fiscal Compact, to the Court of Justice, judgment of 27 November 2012, case C-370/12, *Pringle*, and to the Court of Justice, judgment of 16 June 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag* adopted following a preliminary ruling request from the German Federal Constitutional Court, Order of the Second Senate of 14 January 2014, BvR 2728/13 *et al.*

⁸ On the ECB's democratic accountability see in particular G. CLAEYS, M. HALLERBERG, O. TSCHEKASSIN, *European Central Bank Accountability: How the Monetary Dialogue could Evolve*, in *Bruegel Policy Contribution*, March 2014; F. SCHARPF, *Monetary Union, Fiscal Crisis and the Disabling of Democratic accountability*, in A. SCHÄFER, W. STREECK, *Politics in the Age of Austerity*, Cambridge: Cambridge University Press, 2013, p. 108 *et seq.*; F. AMTENBRINK, *The Democratic Accountability of Central Banks: A Comparative Study*, Oxford: Oxford University Press, 1999.

sues arising from the ECB's participation in the Troika and from the content of the EU/IMF adjustment programmes.⁹

The following paragraphs will analyse the scope of the ECB's conditionality, describing the set of policy instruments through which it has been applied and with a view to assess the legitimacy of the ECB's actions.

III. CONDITIONALITY APPLIED TO COLLATERAL ELIGIBILITY FOR EUROSISTEM CREDIT OPERATIONS

Since the onset of the financial crisis, central banks have been at the forefront of efforts to prevent economic collapse, providing liquidity to the financial system and to solvent individual banks experiencing funding difficulties.

As the crisis unfolded, the ECB engaged in "non-standard" (or unconventional) monetary policy measures, which deviate from traditional monetary policy operations and are of a temporary nature.

One of the ECB's non-standard measures was aimed at improving banks' funding and liquidity conditions.¹⁰ To this end, the collateral framework was changed to broaden the list of eligible assets against which counterparties may obtain liquidity in central bank refinancing operations.

Besides, it has to be noted that the ECB Governing Council – which includes the members of the Executive Board and the central bank governors of euro area Member States – decides on a *one member, one vote* basis, but a voting rights rotation system has been in place since January 2015. According to Art. 10, para. 2, of the ESCB Statute, until the total number of Governors exceeded 18, Executive Board members hold permanent voting rights; instead, euro area countries are assigned to two groups, which exercise their voting rights with different frequencies, according to their capital share in the ECB and the size of GDP and the financial sector. To determine group membership, a ranking was established. Governors from the first five countries – currently, Germany, France, Italy, Spain and the Netherlands – share four voting rights. All others (14 since Lithuania joined on 1 January 2015) share 11 voting rights. The Governors take turns using the rights on a monthly rotation. As a result, Governors from the five largest euro area economies may vote 80 per cent of times, with participation of other Governors significantly lower (see S. LEVASSEUR, *Rotation of Voting on the ECB Governing Council: More than Symbolic?*, in *ofce le blog. The Collective Blog of the French Economic Observatory*, 15 January 2015, www.ofce.sciences-po.fr). In response to criticism raised by the European Parliament, the ECB underlined that decisions are traditionally adopted by consensus (see European Parliament Legislative resolution P5_TA(2003)0094 of 13 March 2003 on the recommendation of the ECB for a proposal for a Council decision on an amendment to Art. 10.2 of the ESCB Statute. The minutes of the Governing Council monetary policy meetings, that the ECB started to publish only in January 2015, do not include details of discussions.

⁹ While monetary policy decisions (such as decisions on collateral, ELA ceilings, SMPs, OMTs and the PSPPP) falls within the mandate of the Governing Council, participation in the Troika is managed directly by the Executive Board.

¹⁰ The ECB's standard monetary policy tools are: open market and credit operations, standing facilities and minimum reserves requirements for credit institutions.

According to Art. 18, para. 1, of the ESCB Statute,¹¹ the ECB and Euro area national central banks (NCBs) can operate in financial markets and provide credit to counterparties only against *adequate collateral*.

The assumption is that central banks should only lend against high quality collateral. Collateral requirements are conceived to mitigate credit risk, ensure equal treatment of counterparties and enhance operational efficiency and transparency. Haircuts are applied to the market value of the collateral being pledged.

Criteria to determine assets adequacy, as well as entities that may act as counterparties in credit operations, are established by two sets of provisions: the ECB General and Temporary Frameworks.

The General Framework consists of decisions and guidelines¹² adopted by the ECB Governing Council and it establishes the monetary policy tools, operations, instruments and procedures of the Eurosystem. Its cornerstone is ECB Guideline 2015/510,¹³ which in its Part Four defines uniform eligibility criteria for assets that may be employed as collateral in Eurosystem credit operations, differentiating by type of asset type and its risk.¹⁴

The Temporary Framework complements, amends or overrules the General Framework. It allows the ECB to adopt additional derogatory measures that may become necessary under exceptional circumstances and are applicable until further notice. The two frameworks co-exist and the requirements of one framework do not override the other unless otherwise specified. This provides the ECB with sufficient flexibility to respond to market conditions and regulatory developments.

During the financial crisis, the ECB broadened the range of acceptable collateral through the Temporary Framework, thus allowing departures from the general eligibil-

¹¹ Protocol no. 4 on the Statute of the European System of Central Banks and of the ECB (the ESCB Statute), p. 230.

¹² The ECB Guidelines are binding legal acts addressed to the euro area NCBs only. They are not intended to directly or individually affect the rights of counterparties. "They are the tools with which the ECB can ensure the integration of the NCBs into the System and concern the power of the ECB to ensure compliance by the NCBs with decisions taken centrally" (R. SMITS, *The European Central Bank: Institutional Aspects*, The Hague: Kluwer Law, 1997, p. 104). See also S. ANTONIAZZI, *La Banca centrale europea tra politica monetaria e vigilanza*, Torino: Giappichelli, 2013, p. 114; A. MALATESTA, *La Banca centrale europea*, Milano: Giuffrè, 2003, p. 135 *et seq.*

¹³ Guideline (EU) 2015/510 of the ECB of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60), p. 3, as lastly revised and amended (see *ECB Monetary Policy Instruments, General Framework*, www.ecb.europa.eu).

¹⁴ One of the eligibility criteria consists in meeting the high credit quality requirements specified in the Eurosystem credit assessment framework (ECAAF). On the basis of the General Framework, the ECB publishes on its website a *single list* of collateral, specifying on a daily basis which assets may be used in liquidity-providing operations.

ity criteria. This was necessary to avoid a credit crunch and to guarantee the availability of sufficient bank liquidity in countries struck by the crisis.¹⁵

Notably, debt instruments issued or guaranteed by Euro area members in distress were either accepted through a waiver to the general criteria or rejected, depending on the ECB's risk assessment. In spite of their downgrading by credit rating agencies, sovereign bonds of these countries were considered eligible as collateral, provided that they complied with EU/IMF adjustment programmes. Greater haircuts compensated the consequent increase in risk.

Decisions on collateral eligibility were taken by the ECB in the exercise of its power to limit risks for the Eurosystem.¹⁶ In fact, according to ECB Guideline 2015/510, the Governing Council has the right to determine whether an issue, issuer, debtor or guarantor fulfils the Eurosystem credit quality requirements relying on any information it deems relevant for ensuring adequate risk protection (Art. 59, para. 6). Moreover, even assets eligible for ordinary Eurosystem credit operations may be subject to specific risk control measures (Arts 127 and 128).

Compliance with EU/IMF conditionality was therefore monitored by the ECB to assess the adequacy as collateral of sovereign bonds issued by crisis countries. As a matter of fact, the ECB formally exercised its risk management discretionary powers. However, by making collateral eligibility subject to the implementation of EU/IMF adjustment programmes, the ECB almost acted as an enforcer of the Troika's conditionality.

This stance was applied to Greece, Ireland, Portugal and Cyprus.

a) On 6th May 2010, following the worsening of the Greek crisis and fearing contagion to other countries, the Eurogroup Member States¹⁷ announced they were ready to provide financial assistance to Greece together with the IMF.¹⁸

On the same day, the ECB decided to continue accepting Greek sovereign debt debentures as collateral even though their rating had been written down to junk bond levels. To this end, for Greek sovereign bonds only, the ECB exceptionally and tempo-

¹⁵ Guideline 2014/528/EU of the ECB of 9 July 2014 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9 (ECB/2014/31), p. 28, as amended.

¹⁶ See ECB, *The Financial Risk Management of the Eurosystem's Monetary Policy Operations*, July 2015, www.ecb.europa.eu.

¹⁷ See *Statement by the Eurogroup on providing stability support to Greece*, 2 May 2010, www.consilium.europa.eu, as well as *Statement of the Heads of State or Government of the Euro Area*, 7 May 2010, www.consilium.europa.eu.

¹⁸ On 2nd May 2010, the Eurogroup agreed to provide 80 billion euros through the so-called Greek Loan Facility, a pool of bilateral loans to be managed and disbursed to Greece by the European Commission along a three-year period. The IMF adopted a Stand-by Arrangement under the Emergency Financing Mechanism to lend Greece 30 billion euros (equivalent to 3200 per cent of the country's quota). See IMF, *Greece: Request for Stand-By Arrangement*, in *Country Report n. 10/111*, May 2010.

rarily suspended the Eurosystem minimum requirements for credit quality thresholds (ECB Decision 2010/268/EU).¹⁹

The fourth recital of the ECB Decision 2010/268/EU stated the grounds on which the waiver was granted:

“The Governing Council has assessed the fact that the Greek Government has approved an economic and financial adjustment programme which it has negotiated with the European Commission, the ECB and the International Monetary Fund, as well as the strong commitment of the Greek Government to fully implement such programme. The Governing Council has also assessed, from a Eurosystem credit risk management perspective, the effects of such a programme on the securities issued by the Greek Government. The Governing Council considers the programme to be appropriate, so that, from a credit risk management perspective, the marketable debt instruments issued by the Greek Government or guaranteed by the Greek Government retain a quality standard sufficient for their continued eligibility as collateral for Eurosystem monetary policy operations, irrespective of any external credit assessment”.²⁰

At the same time, the ECB announced that it would monitor the implementation of the economic and financial reform programme behind the adoption of the ECB Decision 2010/268/EU.

This Decision remained in force until the end of February 2012, when Greece began its sovereign debt restructuring by launching a 200 billion euros exchange offer on its bonds.²¹ The so-called Private Sector Involvement (PSI) brought further distress to the country and, on 27th February 2012, Fitch, Moody's and Standard & Poor's awarded Greece a “selective default” rating. In this new context, the ECB considered the PSI impairing the adequacy of Greek sovereign bonds as collateral and therefore repealed its previous decision,²² only to reintroduce it shortly after, but with further conditionality

¹⁹ Decision ECB/2010/3 of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government, p. 102, no longer in force.

²⁰ *Ibidem*.

²¹ The exchange offer did not include Greek sovereign debt instruments held by the ECB, NCBs and the EIB in their portfolios. See J. ZETTELMEYER, C. TREBESCH, M. GULATI, *The Greek Debt Restructuring: An Autopsy*, in *Peterson Institute for International Economics Working Paper*, WP 13-8, August 2013, p. 10; J. BLACK, *Euro Central Banks Said to Swap Greek Investment-Portfolio Bonds*, in *Bloomberg*, 21 February 2012, www.bloomberg.com. See also A. VITERBO, *I meccanismi per la risoluzione delle crisi del debito sovrano: alla ricerca di un difficile bilanciamento tra interessi pubblici e privati*, in *Diritti umani e diritto internazionale*, 2014, pp. 351-370; A. VITERBO, *Supranational Creditors: A Threat to the Equal Status of Bondholders?*, in *Capital Markets Law Journal*, 2015, pp. 193-211.

²² Decision 2012/133/EU of the European Central Bank of 27 February 2012 repealing Decision ECB/2010/3 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government (ECB/2012/2), p. 36, no longer in force.

attached (ECB Decision 2012/153/EU).²³ A few days later, the Euro area Ministers of Finance approved the Second economic adjustment programme for Greece.²⁴

It is worth mentioning that a group of more than 200 Italian bondholders of Greek securities requested the annulment of ECB Decision 2012/153/EU before the CJEU. The applicants claimed that the additional conditionality required for the acceptance of Greek bonds as collateral breached the principles of equal treatment and proportionality. The CJEU however dismissed the case declaring it inadmissible because the applicants were not directly concerned by the ECB Decision 2012/153/EU.²⁵

The same group of applicants brought an action before the CJEU for the damage they had allegedly suffered from the adoption of ECB Decision 2012/153/EU and from other measures related to the Greek sovereign debt restructuring, arguing that the ECB had infringed their legitimate expectations, the principle of legal certainty and the principle of equal treatment of private creditors.²⁶ The CJEU ruled however that the ECB was not responsible for losses borne by private investors in the context of the Greek restructuring.

During 2012, the ECB intervened many other times to urge Greece to implement austerity measures. In July, following the general elections, the ECB suspended the acceptance of Greek securities as collateral until the completion of the first review of the second economic adjustment programme.²⁷ Commentators considered this decision as a way of stepping up pressure on the new government to confirm adherence to the

²³ The waiver was made conditional upon “the provision by the Hellenic Republic to NCBs of a collateral enhancement in form of a buy-back scheme” (Art. 1, para. 1, of the Decision ECB/2012/3 of the European Central Bank of 5 March 2012 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic’s debt exchange offer, p. 19, no longer in force). See also the Statements by the Heads of State or Government of the euro area and EU institutions, Brussels, of 21 July 2011 and 26 October 2011. On the credit enhancement see A. SÁINZ DE VICUÑA, *Legal Perspectives on Sovereign Default*, in BIS, *Sovereign Risk: A World Without Risk Free Assets?*, BIS Papers No. 72, July 2013, p. 117.

²⁴ Euro area members and the IMF committed the undisbursed amounts of the first programme plus an additional 130 billion euros for the years 2012-2014.

²⁵ See Tribunal, order of 25 June 2014, case T-224/12, *Alessandro Accorinti et al. v. ECB*. It is worth mentioning that, unlike ordinary decisions for which the ECB identifies the addressee of the act, decisions on collateral are atypical. In fact, although not specifying the addressee, they have an impact on the domestic law system of euro area members: NCBs are authorised to accept or reject as collateral debt instruments issued or fully guaranteed by a country in distress, waiving ordinary credit requirements.

²⁶ See Tribunal, judgment of 7 October 2015, case T-79/13, *Alessandro Accorinti et al. v. ECB*. See N. PIGEON, *La Banque centrale européenne n’est pas responsable des pertes subies par les créanciers privés de la Grèce dans le cadre du plan de restructuration de la dette publique grecque (Commentaire de Tribunal, arrêt du 7 octobre 2015, affaire T-79/13, Accorinti et al. c. BCE)*, in *European Papers*, 2016, www.europeanpapers.eu, pp. 231-243.

²⁷ See Decision ECB/2012/14 of the European Central Bank of 18 July 2012 repealing Decision ECB/2012/3 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic’s debt exchange offer, p. 26.

commitments previously undertaken with the EU/IMF.²⁸ A waiver to the general eligibility requirements was reinstated once the Eurogroup expressed its positive opinion on the reform programme implemented until then by the country.²⁹

More recently, following the January 2015 legislative elections and announcements by the new Prime Minister Alexis Tsipras that his government intended to renegotiate the reform programme agreed with the Troika, the ECB once again discontinued acceptance of Greek securities as collateral.³⁰ The ECB press release of 4th February 2015 explained that: "The Governing Council decision is based on the fact that it is currently not possible to assume a successful conclusion of the programme review and is in line with existing Eurosystem rules".³¹ Since Greece was no longer compliant with the programme, the temporary suspension of ordinary credit quality thresholds could not be maintained. As a result of the decision – adopted a few days before a crucial Eurogroup meeting – the spread soared,³² most Greek banks suffered severe capitalisation losses and their customers rushed to retrieve their money from bank accounts.

"If the ECB had let the politicians discuss first, and the Eurogroup had concluded that Greece is no longer under a programme, then the necessary conditions for the waiver on Greek government bonds would have disappeared. The waiver would have anyway needed to be cancelled, with the difference that the trigger in that case would have been a political decision from the Eurogroup rather than from the ECB. The ECB's pre-emptive move formally protects the central bank's independence, but it also forces the political game of next week, well beyond the limit of a central bank's remit".³³

On 18th February 2015, the Athens government requested a six-month extension of the adjustment programme. The Eurogroup and the EFSF agreed to four months but, in spite of exhausting negotiations, it was impossible to successfully conclude the last re-

²⁸ S. SUONINEN, M. JONES, *ECB Turns Screw on Greece, Stops Accepting Collateral*, in *Reuters*, 20 July 2012.

²⁹ See in particular the fourth and fifth recital of the Decision ECB/2012/32 of the European Central Bank of 19 December 2012 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic, p. 74, no longer in force.

³⁰ See in particular the fifth recital of the Decision ECB/2015/6 of the European Central Bank of 10 February 2015 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic, p. 29: "On the basis of the information available, the Governing Council has made an assessment, according to which it is not currently possible to assume a successful conclusion of the review of the European Union/International Monetary Fund programme for the Hellenic Republic. Consequently, the Hellenic Republic is no longer deemed to be in compliance with the conditionality of the programme".

³¹ ECB Press Release, *Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 4 February 2015, www.ecb.europa.eu.

³² J. Cox, *Greek Stocks and Bonds Sink After ECB Debt Decision*, in *The Wall Street Journal*, 5 February 2015, www.wsj.com.

³³ S. MERLER, *ECB Collateral Damages on Greece*, in *Bruegel Blog*, 5 February 2015, www.bruegel.org. See also P. KRUGMAN, *A Dance with Draghi*, in *The New York Times*, 5 February 2015, krugman.blogs.nytimes.com and *Greece and the ECB: The Enforcer. How the European Central Bank can dictate terms to the Greek government*, in *The Economist*, 4 February 2015.

view of the programme before its expiry on 30th June 2015.³⁴ To avoid bank runs and a collapse of the Greek banking system, the government was forced to introduce capital controls, limiting transfers outside the country and cash withdrawals. Only on the 14th of August, a political agreement was finally reached on a third economic adjustment programme.³⁵

Nonetheless, the ECB's negative decision on the adequacy of Greek debt securities as collateral remained in force for more than a year.³⁶ The waiver was reintroduced only after the adoption of all prior actions requested under the Memorandum of Understanding and the successful conclusion of the first review of the third adjustment programme.³⁷

b) A similar approach was adopted with Ireland (in 2010 and 2011) and with Portugal (in 2011), suspending the eligibility of their debt instruments for Eurosystem monetary policy operations, only to accept them again after the introduction of "appropriate" adjustment programmes "agreed" with the Troika.

Notably, in his letter dated 15th October 2010, the ECB President Jean-Claude Trichet reminded the Irish Minister for Finance Brian Lenihan that:

"The Eurosystem may limit, exclude or suspend counterparties' access to monetary policy instruments on the grounds of prudence and may reject or limit the use of assets in the Eurosystem credit operations by specific counterparties. The Governing Council indeed carefully monitors the Eurosystem credit granted to the banking system, in the Irish as well as in all other cases, and in particular the size of Eurosystem exposures to individual banks, the financial soundness of these banks, and the collateral they provide to the Eurosystem. The assessment by the Governing Council of the appropriateness of its exposures to Irish banks depends very much on progress in economic policy adjustment, enhancing financial sector capital and bank restructuring".³⁸

Eventually, the ECB Governing Council considered that both the Irish and Portuguese debt instruments met sufficient quality standards as collateral, irrespective of any external credit assessment, since "the Government [had] approved and [was] in the process of implementing an economic and financial adjustment programme, which it

³⁴ Eurogroup, *Statement on Greece*, 20 February 2015; EFSF Press Release, *EFSF Board of Directors extends the Master Financial Facility Agreement (MFFA) for Greece until 30 June 2015*, 27 February 2015.

³⁵ A new Memorandum of Understanding was signed on 19 August 2015 after the ESM Board of Governors approved the Third economic adjustment programme for up to 86 billion euros for the period 2015-2018.

³⁶ During this period, the Hellenic banking system was kept afloat by the Emergency Liquidity Assistance provided by the Bank of Greece (see *infra* para. 3).

³⁷ See Decision ECB/2016/18 of the European Central Bank of 22 June 2016 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic and repealing Decision, p. 14 and ECB Press Release, *ECB Reinstates Waiver Affecting the Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 22 June 2016.

³⁸ The so-called Irish letters are published on the ECB website (see *infra*, para. 3).

[had] negotiated with the European Commission, the ECB and the International Monetary Fund, and which [had] committed to fully implement".³⁹

c) In the case of Cyprus, after the March 2013 banking crisis and the partial bail-in of uninsured deposits, the country launched a one billion euros offer to exchange domestic-law bonds held by residents with new bonds having the same coupon rate but longer maturity. During the debt management exercise, Cypriot bonds were no longer accepted as collateral. Their eligibility was restored only after completion of the exercise and confirmation that Cyprus was complying with the conditionality of the economic and financial adjustment programme.⁴⁰

Eventually, in March 2013, to simplify the collateral framework, the ECB Governing Council withdrew its many decisions on assets issued or guaranteed by individual programme countries⁴¹ and adopted a Guideline addressed to all Euro area members.⁴²

The new Guideline contained temporary measures on collateral eligibility and marked a shift to explicit conditionality. It established the following general principle: debt instruments offered as collateral by Euro area members in distress are exempted from general credit quality requirements whenever the issuing or guaranteeing country is implementing a EU/IMF programme. However, it is within the powers of the ECB Governing Council to decide whether the Member State "comply with the conditionality of the financial support and/or the macroeconomic programme" and to revoke the waiver.⁴³

The ECB Guideline currently in force maintains the same approach.⁴⁴

³⁹ See the fourth recital of the following two ECB Decisions: Decision ECB/2011/4 of the European Central Bank of 31 March 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government, p. 33, no longer in force; and Decision ECB/2011/10 of the European Central Bank of 7 July 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government, p. 31, no longer in force.

⁴⁰ See Decision ECB/2013/13 of the European Central Bank of 2 May 2013 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus, p. 26; Decision ECB/2013/21 of 28 June 2013 repealing Decision ECB/2013/13 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus, no longer in force.

⁴¹ In March 2013, the ECB decisions concerning the eligibility of marketable debt instruments issued or guaranteed by Greece, Ireland and Portugal were repealed by the Decision ECB/2013/5 of the European Central Bank of 20 March 2013.

⁴² Guideline 2013/170/EU of the ECB of 20 March 2013 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9 (recast) (ECB/2013/4), p. 23, no longer in force.

⁴³ *Ivi*, Art. 7.

⁴⁴ See Art. 8, para. 2, of ECB Guideline 2014/528/EU, *cit.*, p. 28, as amended.

IV. CONDITIONALITY APPLIED TO THE PROVISION OF EMERGENCY LIQUIDITY ASSISTANCE

During the crisis, Emergency Liquidity Assistance (ELA) proved to be of critical importance for the operation of the banking system in crisis countries and was granted in many occasions.⁴⁵ In the case of Ireland, Cyprus and Greece, however, the provision of ELA was implicitly conditioned by the ECB to the acceptance of a EU/IMF programme of economic adjustment.

Since 1999, Euro area credit institutions facing temporary liquidity problems can receive ELA from their NCB, in addition or in place of the assistance provided by the Eurosystem.⁴⁶ In other words, ELA might be granted by NCBs even to banks which are unable to access ordinary Eurosystem refinancing operations, provided that they are otherwise solvent. All risks and costs are only borne by the NCB concerned.

Compared to ordinary monetary policy operations, ELA is provided against lower-quality collateral, with larger haircuts usually applied.⁴⁷ NCBs can autonomously design their own ELA framework, including eligibility criteria for collateral and the applicable risk control measures.

In fact, ELA falls within national competence and the legal basis for its disbursement is found in domestic law. Nevertheless, according to Art. 14, para. 4, of the ESBC Statute, the ECB Governing Council may restrict the performance of NCBs national functions, and consequently also of ELA operations, whenever they are deemed to interfere with the Eurosystem goals and tasks.⁴⁸

⁴⁵ Only in September 2015, the ECB authorized NCBs to disclose ELA figures, "in cases where they deem that such communication is necessary". See ECB Press Release, *Communication on Emergency Liquidity Assistance*, 16 September 2015, www.ecb.europa.eu.

⁴⁶ W. BUITER, *ELA: An Emperor Without Clothes*, in *Global Economics View*, 21 January 2011, www.willembuiter.com. See also K. WHELAN, *The ECB's Collateral Policy and Its Future as Lender of Last Resort*, November 2014, www.polcms.europarl.europa.eu.

⁴⁷ ELA may amount to State aid if it is not "fully secured by collateral to which appropriate haircuts are applied, in function of its quality and market value" (European Commission, *Communication on the application from 1 August 2013 of State aid rules to support measures in favour of banks in the context of the financial crisis*, 2013/C 216/01, 30 July 2013).

⁴⁸ See ECB, *The financial risk management of the Eurosystem's monetary policy operations*, cit., p. 34: "Interference with the objectives and tasks of the ESCB could, for instance, result from the following: (i) a threat to the singleness of monetary policy, (ii) a threat to the implementation of monetary policy, for example by making the steering of short-term rates more difficult, (iii) a threat to the financial independence of the NCB, for instance if ELA was not provided against sufficient collateral to safeguard such independence, (iv) an obvious concern about a possible breach of the monetary financing prohibition, or (v) provision of ELA at overly generous conditions, which, in turn, could increase the risk of moral hazard on the side of financial institutions or responsible authorities".

To this end, NCBs have to duly inform the ECB, which may object to the granting of ELA.⁴⁹ Restrictions are approved by the ECB Governing Council by a majority of two thirds of the votes cast.

Upon request of the NCB, the ECB Governing Council may even set a ceiling, refraining from vetoing ELA operations below a given threshold.

To avoid moral hazard, ELA cannot be provided to insolvent financial institutions. In fact, the purpose of ELA is to address banks' short-term liquidity problems and not to provide solvency support to credit institutions.

It has to be said though that "the distinction between [solvent but illiquid and insolvent institutions] is particularly difficult to make in periods of financial distress, which is exactly when central banks may have to use this tool. Consequently, careful judgment is necessary in providing emergency liquidity assistance".⁵⁰

When setting ELA ceilings and monitoring NCBs activities in the general interest of the Eurosystem, the ECB certainly applies a "careful judgement". However, for Ireland, Cyprus and Greece, this power was also exerted to drive the countries to seek the Troika's financial assistance.⁵¹ These cases in fact clearly epitomise the impact that a threat to veto ELA above a certain threshold may have on a country.

a) Irish banks, holding low rating assets unsuitable for direct ECB liquidity purposes, desperately needed ELA.⁵² In March 2009, the Central Bank of Ireland provided ELA for 11.5 billion euros to Anglo Irish Bank, which had been nationalized the previous January, for collateral that could not be pledged in ordinary monetary policy operations. At the end of 2010, Anglo Irish Bank owed 28.1 billion euros in ELA.⁵³ Overall, the Eurosys-

⁴⁹ In October 2013, for the first time, the ECB disclosed the ELA Procedures available at www.ecb.europa.eu. Below two billion euros, ELA may be granted by the relevant NCB without clearance by the ECB Governing Council (non-objection procedure). In practice, however, all ELA requests are communicated before disbursement. Timely information should be provided on the reasons for the ELA request, its beneficiaries, volume and duration, as well as on pledged collateral, its valuation and haircuts applied.

⁵⁰ Remarks by T. PADOA-SCHIOPPA, Member of the ECB Executive Board, Jakarta, 7 July 2003, www.ecb.europa.eu. In 2014, also the European Parliament expressed the view that the solvency concept employed by the ECB in the context of ELA is "lacking in transparency and predictability" (European Parliament Resolution P7_TA(2014)0239 of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, paras 26 and 94).

⁵¹ See 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, pp. 1579-1620, at 1593 *et seq.*

⁵² G.B. WOLFF, *Eurosystem Collateral Policy and Framework: Was It Unduly Changed?*, in *Bruegel Policy Contribution*, November 2014, p. 7.

⁵³ See K. WHELAN, *Briefing Paper on the IBRC, ELA and Promissory Notes*, 15 February 2012, prepared for the Oireachtas Joint Committee on Finance, Public Expenditure and Reform, p. 3. See also W. BUIJTER, *ELA: An Emperor without Clothes?*, in *CITI Global Economics View*, 21 January 2011; B. EICHENGREEN, *The Irish Crisis and the EU from a Distance*, in IMF, *Ireland: Lessons from Its Recovery from the Bank-Sovereign Loop*, 2015, p. 109.

tem was providing approximately 140 billion euros to Irish banks, around 85 per cent of the country's GDP.⁵⁴ Ireland was on the verge of a banking crisis, but EU/IMF financial assistance had not been requested yet.

On 15th October 2010, Jean-Claude Trichet, at the time President of the ECB, wrote to the Irish Minister of Finance demanding the timely adoption of a reform programme in the absence of which the ECB would suspend ELA support. The exchange was supposed to remain strictly confidential, but eventually the so-called Irish letters were published on the ECB's website following receipt of six requests under the public access regime.⁵⁵

In his letter, Trichet reminded that ELA was closely monitored by the Governing Council to prevent interference with the objectives and tasks of the Eurosystem. And "Therefore, if ELA is provided in significant amounts, the Governing Council will assess whether there is a need to impose specific conditions in order to protect the integrity of our monetary policy".⁵⁶ In addition, to ensure compliance with the monetary financing prohibition set forth in Art. 123 TFEU, it was essential to ensure that recipient institutions continued to be solvent.

Last but not least, Trichet warned that the "large provision of liquidity by the Eurosystem and the Central Bank of Ireland to entities such as Anglo Irish Bank should not be taken for granted as a long-term solution. [...] the Governing Council cannot commit to maintaining the size of its funding to these institutions on a permanent basis"⁵⁷ and concluded that in any decisions concerning liquidity provision to the Irish banking system, the ECB would "take into account appropriate progress in the areas of fiscal consolidation, structural reforms and financial sector restructuring".⁵⁸

In his reply, the Minister of Finance, Brian Lenihan, assured that the Irish government was prepared to adopt any measure to achieve budget sustainability within a four years economic strategy.⁵⁹

On 16th November 2010, although considered still inadequate, the Eurogroup welcomed the reform programme.⁶⁰

⁵⁴ See M. DRAGHI, *Letter to Mr. Matt Carthy, Member of the European Parliament*, Frankfurt: European Central Bank, 17 February 2015, which added that "This represented around one-quarter of the ECB's total lending at the time – an unprecedented level of exposure to any country, not least in the light of the fact that Ireland's share in the capital of the ECB was about 1%".

⁵⁵ On 6th November 2014, the ECB published on its website the letters exchanged at the end of 2010 between the former ECB President J.-C. Trichet and the Irish Finance Minister B. Lenihan (including a dedicated Q&A). See www.ecb.europa.eu.

⁵⁶ Letter of the ECB President Jean-Claude Trichet to the Irish Minister for Finance Brian Lenihan dated 15 October 2010, published on the ECB's website.

⁵⁷ *Ibidem*.

⁵⁸ *Ibidem*.

⁵⁹ Reply letter of the Irish Minister for Finance Brian Lenihan dated 4 November 2010, published on the ECB's website.

In a new letter, the ECB's President made it clear that:

"It is the position of the Governing Council that it is only if we receive in writing a commitment from the Irish Government vis-à-vis the Eurosystem on the four following points that we can authorise further provision of ELA to Irish financial institutions: 1) The Irish government shall send a request for financial support to the Eurogroup; 2) The request shall include the commitment to undertake decisive actions in the areas of fiscal consolidation structural reforms and financial sector restructuring, in agreement with the European Commission, the IMF and the ECB; 3) The plan for the restructuring of the Irish financial sector shall include the provision of the necessary capital to those Irish banks needing it and will be funded by the financial resources provided at the European and international level to the Irish government as well as by financial means currently available to the Irish government, including existing cash reserves of the Irish government; 4) The repayment of the funds provided in the form of ELA shall be fully guaranteed by the Irish Government, which would ensure the payment of immediate compensation to the Central Bank of Ireland in the event of missed payments on the side of the recipient institutions".⁶¹

As a result, on 21st November 2010, the Irish government submitted a formal request for EU/IMF financial assistance, in practice declaring that it was prepared to adopt the measures requested by the ECB.⁶²

On the same day, the Minister Lenihan replied to Trichet stating that:

"I would like to inform you that the Irish Government has decided today to seek access to external support from the European and international support mechanisms. This grave and serious decision has been taken in the light of [recent developments] and informed by your recent communications, and the advice you have conveyed to me personally and courteously in recent days. [...] I hope that this will provide some reassurance to the Governing Council and that you will be able to reiterate in a public way the continuing practical support of the ECB for the liquidity position of the Irish banks, to help reassure the market on this crucial point".⁶³

A few days later, the ECB Governing Council approved the disbursement of ELA by the Central Bank of Ireland.

⁶⁰ Eurogroup, *Statement on Ireland*, 16 November 2010, www.consilium.europa.eu.

⁶¹ Letter of the ECB President Jean-Claude Trichet, to the Irish Minister for Finance Brian Lenihan dated 19 November 2010 on the large provision of liquidity by the Eurosystem and the Central Bank of Ireland to Irish banks and the need for Ireland to agree to an adjustment programme, published on the ECB's website.

⁶² See *Statement by the Eurogroup and ECOFIN Ministers*, 21 November 2010, as well as *Statement by the Eurogroup and ECOFIN Ministers*, 28 November 2010, www.consilium.europa.eu.

⁶³ Reply letter of the Irish Minister for Finance Brian Lenihan dated 21 November 2010, published on the ECB's website.

b) The ECB conditioned ELA also in the case of the Cyprus crisis. In March 2013, as the Cypriot Parliament had rejected a number of conditions contained in the EU/IMF rescue programme, the ECB Governing Council announced it would soon stop ELA to Cypriot banks: “[further] ELA could only be considered if an EU/IMF programme is in place that would ensure the solvency of the concerned banks”.⁶⁴ However, to guarantee solvency, banks had to be recapitalised and to do so Cyprus needed financial assistance. As a consequence, Cyprus accepted all the conditions imposed by the Troika⁶⁵ and the ECB did not veto an increase in emergency liquidity assistance but continued to “monitor the situation closely”.⁶⁶

c) For what concerns the Hellenic Republic, in 2015, during the hectic negotiations between the newly elected Greek government and the Troika on a four-month extension of the second adjustment programme, the ECB agreed on a number of increases in ELA support.⁶⁷ At the time, Greek banks heavily relied on ELA. Amid massive deposit outflows and a deterioration in the quality of their assets, banks were operating under very tight liquidity conditions. The banks-sovereign nexus added further risk to financial stability in the country.

When, on 27th June 2015 – after five Eurogroup meetings in just ten days –, Prime Minister Alexis Tsipras submitted the implementation of austerity measures to a referendum, negotiations came suddenly to a halt. The following day, the ECB rejected a request by the Bank of Greece to increase ELA from 89 to 95 billion euros, while adjusting haircuts on collateral.⁶⁸ The ECB’s decision to cap ELA was followed by the imposition of a bank holiday and capital controls to stop withdrawals of savings.⁶⁹

The agreement on the third adjustment programme was finally reached in August 2015. Initially, ELA was maintained at pre-existing levels,⁷⁰ to be then gradually reduced as a consequence of improved liquidity conditions in the Greek banking sector and the stabilization of private deposit flows.⁷¹

⁶⁴ ECB Press Release, *Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus*, 21 March 2013, www.ecb.europa.eu.

⁶⁵ Eurogroup, *Statement on Cyprus*, 25 March 2013, www.consilium.europa.eu.

⁶⁶ ECB Press Release, *ECB’s Reaction to the Agreement on the Cypriot Macroeconomic Adjustment Programme*, 25 March 2013, www.ecb.europa.eu.

⁶⁷ BBC News, *ECB Offers Greek Banks Extra €3.3bn Emergency Cash*, 19 February 2015, www.bbc.com.

⁶⁸ See ECB Press Release, *ELA to Greek Banks Maintained*, 28 June 2015; G. GEORGIPOULOS, J. O’DONNELL, *ECB Rejects Bumper Greek Plea but Existing Support to Stay*, 29 June 2015, www.reuters.com.

⁶⁹ See President of the Hellenic Republic, *Act of Cabinet Having the Effect of Law: Bank Holiday of Short Duration (unofficial translation)*, Act No. 65, 28 June 2015, www.bankofgreece.gr.

⁷⁰ See ECB Press Releases, *ELA to Greek Banks Maintained*, 6 July 2015.

⁷¹ The further reduction of the ELA ceiling for Greek banks at 61 billion euros decided on 22 June 2016 also reflects the fact that the ECB Governing Council reintroduced the waiver on the eligibility as collateral of Greek debt instruments. See ECB Press Release, *ECB Reinstates Waiver Affecting the Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 22 June 2016 and Bank of Greece Press Release, *ELA Ceiling for Greek Banks*, 23 June 2016.

It is worth noting that an annulment procedure has been brought before the CJEU to challenge two ECB's decisions adopted in 2015 to keep the ceiling on ELA support unchanged despite the requests made by the Bank of Greece.⁷² The applicant claims to be directly and individually concerned, arguing that the ECB acted *ultra vires*, taking into account political considerations in spite of its independence duties and breaching Art. 14, para. 4, of the ESCB Statute, since an increase in ELA would not interfere with the ESCB's objectives or tasks. The case is still pending at the time of writing.

V. CONDITIONALITY APPLIED TO THE SECURITIES MARKETS PROGRAMME

In May 2010, the ECB Governing Council adopted a Decision introducing the Securities Markets Programme (SMP) with the aim of restoring an appropriate monetary policy transmission and safeguard price stability.⁷³ To this end, the ECB and NCBs were to purchase on the secondary market eligible debt instruments issued by central governments or public entities of the Euro area.

Purchases of sovereign bonds were to be decided by the Governing Council without being explicitly subject to any form of conditionality. However, the fourth recital of the SMP Decision pointed out that "The Governing Council has taken note of the statement of the Euro area Member State governments that they 'will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures' and the precise additional commitments taken by some Euro area Member State governments to accelerate fiscal consolidation and ensure the sustainability of their public finances".⁷⁴ Moreover, SMP purchases were used to put up pressure on some countries, contributing to their swift adoption of "appropriate" policies and reforms.

Initially, the SMP was only used to purchase sovereign bonds issued by Greece, Ireland and Portugal. However, after being dormant for a few months, the programme was reactivated in summer 2011 to include also Italy and Spain.⁷⁵

The situation had in fact rapidly worsened, with Italian and Spanish spreads soaring to 370 points and market operators starting to believe a request for financial assistance was imminent.

Of no avail was the solemn declaration made on 21st July 2011 by the Euro area Heads of State or Government in an attempt to reassure markets that they would "hon-

⁷² ECB's Decisions of 28 June and 6 July 2015 (see *supra*). See Court of Justice, case T-368/15, *Alcimos Consulting SMPC v. ECB*, pending. See also www.alcimos.com.

⁷³ Decision ECB/2010/5 of the European Central Bank of 14 May 2010 establishing a securities markets programme, p. 8.

⁷⁴ *Ibidem*.

⁷⁵ Purchases under the SMP were made between the 10th May 2010 and 25th March 2011 and between 4th August 2011 and the end of February 2012.

our fully their own individual sovereign signature and all their commitments to sustainable fiscal conditions and structural reforms".⁷⁶

Therefore, on 4th August 2011, amid serious financial turbulence, the ECB Governing Council decided to resort to the SMP buying programme again. However, the first purchases – made while Trichet's press conference was still in progress – disappointed markets since they were limited to Irish and Portuguese sovereign bonds.⁷⁷

The following day, Trichet wrote to the governments of Italy and Spain.⁷⁸ While no mention to the SMP was made, the timing of the letters was clearly deliberate.⁷⁹

In the letter addressed to the Italian government, it was underlined that the measures to achieve a balanced budget by 2014 and debt sustainability were deemed insufficient. The ECB was venturing into an unexplored territory, dictating detailed measures to be timely adopted through decree-laws to be followed by Parliamentary ratification in a tight schedule, with the ECB's implicit conditionality reaching new levels.

The following excerpt clearly shows the depth of reforms warmly requested to the Italian government:

"At the current juncture, we consider the following measures as essential: [...] a) A comprehensive, far-reaching and credible reform strategy, including the full liberalisation of local public services and of professional services is needed. This should apply particularly to the provision of local services through large scale privatizations. b) There is also a need to further reform the collective wage bargaining system allowing firm-level agreements to tailor wages and working conditions to firms' specific needs and increasing their relevance with respect to other layers of negotiations. [...]. c) A thorough review of the rules regulating the hiring and dismissal of employees should be adopted in conjunction with the establishment of an unemployment insurance system and a set of active labour market policies capable of easing the reallocation of resources towards the more competitive firms and sectors".⁸⁰

Mario Monti, who would soon become the new Prime Minister of Italy, commented that important domestic policy decisions were being taken by a "market-oriented su-

⁷⁶ See *Statement by the Heads of State or Government of the Euro Area and EU Institutions, Brussels*, 21 July 2011, para. 7, www.consilium.europa.eu.

⁷⁷ See Jean-Claude Trichet, President of the ECB and Vitor Constancio, Vice-President of the ECB, *Introductory Statement to Press Conference with Q&A*, 4 August 2011, www.ecb.europa.eu, during which J.-C. Trichet declared "I would not be surprised if, before the end of this press conference, you would see something in the market".

⁷⁸ The confidential letter from Jean-Claude Trichet to the Italian Prime Minister Silvio Berlusconi dated 5 August 2011 was leaked to the press and published by *Il Corriere* on 29 September 2011 (www.corriere.it). The letter from Jean-Claude Trichet to the Spanish Prime Minister José Luis Rodríguez Zapatero dated 5 August 2011 is published in J. ZAPATERO, *El Dilema: 600 días de vértigo*, Barcelona: Planeta, 2013, p. 405.

⁷⁹ See T. BEUKERS, *The New ECB and Its Relationship with The Eurozone Member States*, cit., p. 1600.

⁸⁰ From: *Il Corriere*, cit.

pranational technical government" and compared the ECB to a "*podestà forestiero*", an authoritarian figure appointed by the central government that, during the fascist regime, was introduced to replace elected mayors.⁸¹

Similarly, urgent measures were dictated by the ECB in a letter to the Spanish Government. The country was requested to reform its labour legislation, improve public finance sustainability, restructure and recapitalise the banking sector. The letter concluded that: "Overall, we trust that the Spanish government is aware of its very high responsibility for the smooth functioning of the Euro area at the current juncture and will decisively undertake all necessary measures to regain market confidence in the sustainability of its policies again".⁸²

The day after, the governments of both countries promptly replied that they were prepared to undertake the reform actions indicated by the ECB.⁸³ Subsequently, Trichet released a communiqué welcoming the new course of Italy and Spain, announcing that "on the basis of the above assessments, the ECB will actively implement its Securities Markets Programme".⁸⁴ Sizeable sovereign bonds purchases began the following week, with securities acquired under the SMP increasing by 22 billion euros, to reach 96 billion euros in total.⁸⁵ Spread rapidly dropped almost to pre-crisis levels, making a default or a financial assistance request only a remote possibility.⁸⁶

Even Trichet later admitted the extraordinary character of his letters, but he denied their conditional nature: "The letters were of an extraordinary nature. They listed the economic, fiscal and structural measures the ECB thought Rome and Madrid had to take if they wanted to regain the confidence of investors. [...] There were no negotiations between the ECB and the two governments; no promise, no quid pro quo conditions under which the ECB would act. The governments were, of course, free to do whatever they deemed appropriate".⁸⁷

VI. CONDITIONALITY APPLIED TO THE TRANSFER OF SMP PROFITS TO GREECE

At this point of our analysis, a digression concerning the so-called SMP profits is required.

⁸¹ M. MONTI, *Il podestà forestiero*, in *Il Corriere*, 7 August 2011.

⁸² From: J. ZAPATERO, *El Dilema*, cit., p. 405.

⁸³ See in particular S. SACCHI, *Conditionality by Other Means*, cit., p. 81 *et seq.*

⁸⁴ See *Statement by the President of the ECB*, 7 August 2011, www.ecb.europa.eu.

⁸⁵ Source: www.ecb.europa.eu.

⁸⁶ Eventually, in June 2012, Spain requested financial assistance to the European Stability Mechanism for the recapitalisation of its financial institutions.

⁸⁷ Source: asia.nikkei.com. See also the transcript of the ECB Press Conference of 8 September 2011 and of 6 October 2011, with Trichet affirming that the letters were to be regarded as messages and the ECB was not dictating or imposing anything.

The ECB is going to earn huge profits from SMP operations, not only for the differential between ECB's funding and the bonds interest rate, but above all because the bonds were bought at a discount to par.⁸⁸ Furthermore, these bonds yield considerable interest and are usually held until maturity.⁸⁹

At the beginning of 2013, when the ECB Governing Council finally disclosed details on SMP holdings, the Eurosystem had securities in portfolio nominally worth 218 billion euros, of which 33.9 billion in Greek bonds.⁹⁰

A first group of Greek sovereign bonds had already reached maturity by August 2012. Greece had to repay the ECB three billion euros just few months after the sovereign debt restructuring and while still struggling with austerity measures. This was only a small fraction of Greek bonds being held by the ECB and NCBs.⁹¹ In practice, part of the money provided by Euro area members (and the IMF) to Greece had to be used to pay back the ECB in a rather circular way.

Following a storm of criticism,⁹² the ECB committed to return any profits on its Greek bond holdings to its shareholders, in proportion to their capital subscription (i.e. both to euro and non-Euro area NCBs, with the latter receiving a smaller percentage).⁹³ In turns, Euro area Member States undertook to transfer to the Bank of Greece "an amount equivalent to the income on the SMP portfolio accruing to their NCBs".⁹⁴ These

⁸⁸ "Through its covered bond and securities market programmes, the ECB acquired €276bn in assets between 2009 and 2012, when it was superseded by OMTs. This includes substantial peripheral sovereign debt – more than 50 per cent of outstanding Greek debt and a quarter of Portuguese debt – as well as commercial paper. As these assets will typically be held to maturity, coupon is the main source of gains rather than capital appreciation. Assuming no further defaults, these programmes should generate a net gain of around €70bn–€80bn, including €9bn on the Greek debt" (A. UTERMANN, *Bailouts Can Turn a Profit for Central Banks*, in *Financial Times*, 22 July 2013, www.ft.com).

⁸⁹ On the basis of the ECB's Annual Accounts, the net interest income arising from securities purchased under the SMP amounted to 1,108 million euros for FY 2012, 962 million euros for FY 2013, 728 million euros for FY 2014.

⁹⁰ Besides, just days before the country's general election, it was revealed that Italy was by far the greatest beneficiary of the SMP, with the Eurosystem holding Italian debt securities for a nominal amount of 102.8 billion euros. See ECB Press Release, *Details on securities holdings acquired under the Securities Market Programme*, 21 February 2013, www.ecb.europa.eu. For early estimates, see IMF, *Euro Area Policies: 2012 Article IV Consultation - Selected Issues Paper*, in *IMF Country Report No. 12/182*, July 2012, p. 47; Morgan Stanley, *Trading After the PSI*, 8 March 2012.

⁹¹ Between 2015 and 2037, it was estimated that 20 billion euros of Greek bonds held by the ECB will reach maturity. See C. FORELLE, P. MINCZESKI, E. BENTLEY, *Greece's Debt Due: What Greece Owes When*, in *Wall Street Journal*, 19 February 2015, graphics.wsj.com.

⁹² See for instance D. KEOHANE, *A €5bn Greek Bond Imminently Falling Due? Did We Mention We Have Deckchairs by This Abyss?*, in *Financial Times*, 9 November 2012, ftalphaville.ft.com.

⁹³ On the transfer of the Bank of Greece's SMP income to the Greek State, see the ECB Opinion of 20 February 2013, CON/2013/15.

⁹⁴ See Eurogroup, *Statement on Greece*, 27 November 2012, www.eurozone.europa.eu. See also ECB *Monthly Bulletin*, December 2012, p. 44. Euro Area Member States receiving financial assistance by the EFSF/ESM were exempted from participation in the scheme.

transfers would be conducted in a phased manner and “conditional upon a strong implementation by the country of the agreed reform measures in the programme period as well as in the post-programme surveillance period”.⁹⁵

SMP profits were transferred on a segregated account with the Bank of Greece that had to be used exclusively for public debt servicing, subject to prior detailed reporting to the EFSF/ESM.⁹⁶ The account was established by Law 4063/2012⁹⁷ to meet one of the second economic adjustment programme requirements.⁹⁸ Greece had to ensure priority to debt servicing payments and adopt specific measures to this end.

Accordingly, Art. 4, para. 5, of Law 4063/2012 (as amended)⁹⁹ sets forth that the service of public debt is a “special goal of public nature” and that it has priority over any other expense. “These provisions prove that Greece now has departed from the [...] position adopted by the Greek government in 1938, when it used the doctrine of state of necessity to justify its choice of giving preference to meeting its internal vital needs (administration, defence, public health, etc.) over paying its debt to its foreign creditors”.¹⁰⁰ More radical views questioned this form of conditionality claiming that Greece was moving towards “a creditors’ constitution” with the Troika “interfering directly in the constitutional set-up of a sovereign State, to impose a duty to pay creditors to take precedence over all other human and citizen concerns, needs and rights”.¹⁰¹

⁹⁵ *Ibidem*. In parallel, Member States committed to transfer to Greece any future income accruing to their national central bank’s holdings of Greek government bonds until 2020. The amounts of the so-called ANFA payments (Agreement on Net Financial Assets) to be transferred each year, as well as the deadline for payment, are established and agreed in the context of the Eurogroup. In principle, they are not conditional on the implementation of MoU measures.

⁹⁶ Disbursements of EFSF’s loans, as well as the Hellenic Republic’s contributions to debt servicing, including all revenues from the privatization of State assets and at least 30 per cent of windfall revenues are deposited in the segregated account at the Bank of Greece.

⁹⁷ Law 4063/2012 of 30 March 2012 (ΦΕΚ Α’ 71/30-3-2012). The bill also authorized the ratification of the ESM and the Fiscal Compact as well as the amendment of Art. 136 TFEU. In Greece, for the implementation of Euro-crisis law recourse was usually made to ordinary legislation, which does not require a qualified majority vote. In some cases, objections of unconstitutionality were raised.

⁹⁸ Pursuant to para. 2.5.6.1 of the Memorandum of Understanding on Specific Economic Policy Conditionality, Greece was required to adopt measures to safeguard debt servicing and monitor cash flows, avoid diversion of official financing and secure a timely debt servicing. See *Statement by the Eurogroup*, 21 February 2012 and European Commission, *The Second Economic Adjustment Programme for Greece*, in *Occasional Papers* 94, March 2012, p. 165. See also European Commission, *The Second Economic Adjustment Programme for Greece: First Review*, in *Occasional Papers* 123, December 2012, p. 203.

⁹⁹ Para. 5 of Art. 4 of Law 4063/2012 was amended by Art. 2 of the Presidential legislative act of 18 July 2015 (ΦΕΚ Α 84/18-7-2015).

¹⁰⁰ D.V. SKIADAS, *Tackling Greece’s Financial Crisis: A Legal-Institutional Viewpoint*, in K.A. LAVDAS, S.N. LITSAS, D.V. SKIADAS, *Stateness and Sovereign Debt: Greece in the European Conundrum*, Lexington Books, 2013, pp. 83-173, p. 160.

¹⁰¹ J. SMITH, *Greece: Towards a Creditors’ Constitution?*, in *Socialist Lawyer*, July 2012, p. 14.

In July 2013, the Eurogroup approved a two billion euros transfer to the segregated account and mandated the ESM to make the disbursement in two instalments.¹⁰² The ESM was involved to avoid claims of breach of Arts 123 and 125 TFEU.¹⁰³ It is unclear though whether these transfers fall within the competence of the mechanism.

SMP profits came to the forefront again in February 2015, during the frantic negotiations to prolong the second adjustment programme. The Greek Finance Minister Yanis Varoufakis requested bridge financing to meet the obligations towards the IMF and the ECB, falling due in the following months.¹⁰⁴ “We ask the Eurogroup to disburse to Greece the outstanding 1.9 billion euros SMP bond-related Eurosystem income, in accordance with its previous commitments. We are, in fact, open to the idea that the ECB transfers these funds directly to the IMF in lieu of Greece outstanding repayments”.¹⁰⁵

The Eurogroup decided, however, that “Only approval of the conclusion of the review of the extended arrangement by the institutions [...] will allow for any disbursement of the outstanding tranche of the current EFSF programme and the transfer of the 2014 SMP profits. Both are [...] subject to approval by the Eurogroup”.¹⁰⁶

On 30th June 2015, at the expiry of the programme, Greece was formally declared in arrears with the IMF as it was unable to repay 1.5 billion euros.¹⁰⁷

Only on 17th July 2015, with banks still closed and swift legislative steps taken to rebuild trust, the Council decided to grant Greece short-term financial assistance to allow it to honour its debt obligations until agreement on a new ESM programme was reached.¹⁰⁸

To safeguard non-Euro area members from possible losses deriving from the EFSM bridge financing, the Eurogroup decided to deposit, this time on an ECB account, the SMP profits accrued in 2014.¹⁰⁹ If not needed, allocations would be returned to Euro area members. To our knowledge, since then, no other transfer has been made.

¹⁰² Eurogroup, *Statement on Greece*, 8 July 2013, www.eurozone.europa.eu. See also EFSF Press Release of 31 July 2013 and EFSF Press Release of 17 December 2013, both available at www.efsf.europa.eu.

¹⁰³ See *Pringle*, cit., paras 125-126: “Art. 123 is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition. [...] even if the Member States are acting via the ESM, the Member States are not derogating from the prohibition laid down in Art. 123 TFEU, since that article is not addressed to them”. On Art. 125 TFEU, see *Thomas Pringle*, cit., paras 136-139.

¹⁰⁴ Between February and June 2015, Greece was to reimburse 5.2 billion euros to the IMF and in July/August, it was to repay 6.7 billion euros to the ECB as holder of SMP Greek bonds.

¹⁰⁵ See Y. VAROUFAKIS, *Talk in the 11th February 2015 Eurogroup Meeting*, www.tovima.gr.

¹⁰⁶ See Eurogroup, *Statement on Greece*, 20 February 2015, www.consilium.europa.eu.

¹⁰⁷ See IMF Press Release, *Statement by the IMF on Greece*, 30 June 2015, www.imf.org. Arrears with the IMF were cleared on 20 July 2015.

¹⁰⁸ See Eurosummit, *Statement*, 12 July 2015 and Eurogroup, *Statement on Greece*, 17 July 2015.

¹⁰⁹ Eurogroup, *Statement on Greece*, 17 July 2015.

While the Troika describes the remittance of SMP profits as “additional financing sources”,¹¹⁰ these transfers do not have to be reimbursed. Notably, they were discussed at first under the heading Official Sector Involvement.¹¹¹ Incidentally, it has to be noted that SMP profits were only transferred to Greece, while they are being retained in the case of Ireland, Italy, Portugal and Spain.

VII. THE SHIFT TO EXPLICIT CONDITIONALITY IN THE OUTRIGHT MONETARY TRANSACTIONS AND THE PUBLIC SECTOR PURCHASE PROGRAMMES

In August 2012, the ECB announced the new Outright Monetary Transactions programme (OMT), under which the application of conditionality was finally made explicit. The programme concerns only government bonds issued by Euro area members receiving financial assistance from the EFSF or the ESM and are subject to full compliance with the attached “strict and effective conditionality”.¹¹²

The ECB explained the need for explicit conditionality stating that without domestic policy reforms parallel to sovereign bonds purchases, its monetary policy would not be effective. In the words of the ECB's President Mario Draghi: “we should not forget why countries have found themselves in a bad equilibrium to start with. And this is because of policy mistakes. [...] If 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”.¹¹³

According to the CJEU, the introduction of explicit conditionality in the OMT programme is legitimate,¹¹⁴ since it guarantees that OMT purchases, as monetary policy

¹¹⁰ See, for instance, European Commission, *The Second Economic Adjustment Programme for Greece: Third Review*, in *Directorate-General for Economic and Financial Affairs, Occasional Papers 159*, July 2013, p. 49, ec.europa.eu.

¹¹¹ See European Commission, *The Second Economic Adjustment Programme for Greece*, cit., p. 27.

¹¹² The ECB decision establishing the Outright Monetary Transactions programme has not been published yet. The technical features of the OMT are described in the ECB Press Release, *Technical Features of Outright Monetary Transactions*, 6 September 2012, www.ecb.europa.eu. See also: ECB, *Monthly Bulletin*, September 2012, pp. 7-11 and ECB, *Monthly Bulletin*, October 2012, pp. 7-9. On the atypical nature of the OMT, see the Opinion of AG Cruz Villalón delivered on 14 January 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*, paras 82-91.

¹¹³ M. DRAGHI, ECB Press conference, 6 September 2012, available at ec.europa.eu. See also T. BEUKERS, *The New ECB and Its Relationship with The Eurozone Member States*, cit., p. 1607: “The ECB's intervention in order to restore the proper functioning of the monetary policy transmission mechanism may have the effect of buying a Member State time, but the intervention itself cannot solve the underlying structural problems. The ECB is only willing to buy this time, if the Member State is willing to deal with the problems that have caused the malfunctioning of the mechanism. Conditionality should thus guarantee that the exceptional ECB intervention is temporary”.

¹¹⁴ Cfr. *Pringle*, cit., and *Gauweiler*, cit. On the *Pringle* case see: S. ADAM, F.J. MENA PARRAS, *The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle*, in *European Law Review*, 2013, p. 848 et seq.; G. BECK, *The Legal Reasoning of the Court of Justice and the Euro*

measures, “would not work against the effectiveness of the economic policies followed by the member States”.¹¹⁵

The ECB relies on explicit conditionality to ensure that the implementation of its monetary policy measures will prevent Member States from departing from the adjustment programmes they have subscribed. In addition, by making OMT purchases conditional, an incentive is provided to improve a State’s financial and budgetary situation.¹¹⁶

Crisis – The Flexibility of the Court’s Cumulative Approach in the Pringle Case, in *Maastricht Journal of European and Comparative Law*, 2013, p. 635 et seq.; V. BORGER, *The ESM and the European Court’s Predicament in Pringle*, in *German Law Journal*, 2013, p. 113 et seq.; P. CRAIG, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 3 et seq.; P. CRAIG, *Pringle and the Nature of Legal Reasoning*, in *Maastricht Journal of European and Comparative Law*, 2014, p. 205 et seq.; B. DE WITTE, T. BEUKERS, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, in *Common Market Law Review*, 2013, p. 805 et seq.; L.M. HINOJOSA MARTÍNEZ, *La Compatibilidad Del Mecanismo Europeo De Estabilidad Con El Derecho Europeo: Jurisprudencia Para Tiempos De Crisis*, in D.J. LIÑÁN (ed.), *Las Crisis Políticas y Económicas: Nuevos Escenarios Internacionales*, Madrid: Tecnos, 2014, pp. 212-240; O. PORCHIA, *Il ruolo della Corte di giustizia dell’Unione europea nella governance economica europea*, in *Diritto dell’Unione europea*, 2012, p. 593 et seq.; D. THYM, M. WENDEL, *Préserver le respect du droit dans la crise; la Cour de justice, le MES et le mythe du déclin de la Communauté de droit (arrêt Pringle)*, in *Cahiers de droit européen*, 2012, p. 733 et seq.

On the *Gauweiler* case see, in particular, the two special issues of the *German Law Journal*, n. 2/2014 and n. 3/2015 and the special issue of the *Maastricht Journal of European and Comparative Law*, n. 1/2016. See also: F. BASSAN, *Le operazioni non convenzionali della BCE al vaglio della Corte costituzionale tedesca*, in *Rivista di diritto internazionale*, 2014, p. 361 et seq.; T. BEUKERS, *The Bundesverfassungsgericht Preliminary Reference on the OMT Programme: In the ECB We Do Not Trust. What About You?*, in *German Law Journal*, 2014, 343 et seq.; S. CAFARO, *Della legittimità del programma OMT della BCE, per ora... ovvero: le conclusioni dell’avvocato generale Cruz Villalón nel caso Gauweiler et alii c. Deutscher Bundestag*, in *SIDIBlog*, 18 January 2015, www.sidi-isil.org; S. CAFARO, *L’azione della BCE nella crisi dell’area dell’euro alla luce del diritto dell’Unione europea*, in G. ADINOLFI, M. VELLANO (a cura di), *La crisi del debito sovrano degli Stati dell’area dell’euro. Profili giuridici*, Torino: Giappichelli, 2013, pp. 49-68; M. GOLDMANN, *Friend or Foe? The German Federal Constitutional Court’s Request for a Preliminary Ruling on the ECB’s OMT Program*, in *SIDIBlog*, 19 February 2014, www.sidiblog.org; M. GOLDMANN, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, in *German Law Journal*, 2014, p. 265 et seq.; M. IOANNIDIS, *How Strict is “Strict Conditionality”? The New Eurozone Agreement on Greece*, in *SIDIBlog*, 13 March 2015, www.sidi-isil.org; A. MIGLIO, *Il primo rinvio pregiudiziale del Tribunale costituzionale federale tedesco: dialogo o conflitto?*, in *Osservatorio AIC*, September 2014, www.osservatorioaic.it; T. PETCH, *The Compatibility of Outright Monetary Transactions with EU Law*, in *Law and Financial Markets Review*, 2013, p. 13 et seq.; A. VITERBO, *Oh My ...OMT! Some Thoughts About the German Constitutional Court’s Decision to Refer the Outright Monetary Transactions Programme to the Court of Justice of the European Union*, in *SIDIBlog*, 13 February 2014, www.sidi-isil.org; M. WENDEL, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court’s OMT Reference*, in *European Constitutional Law Review*, 2014, p. 263 et seq.

¹¹⁵ *Gauweiler*, cit., para. 60; see also *ivi*, paras 104 and 120. A similar reasoning can be applied to the PSPP.

¹¹⁶ C. ZILIOLO, *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, pp. 171-184, at 174.

Besides, even if necessary, compliance with an EFSF/ESM programme does not automatically guarantee purchases. In fact, the ECB Governing Council has full discretion over the start, continuation or suspension of OMTs.¹¹⁷

Explicit conditionality also features in the Public Sector Purchase Programme (PSPP), introduced by the ECB in May 2015.¹¹⁸

The PSPP is part of the so-called 'quantitative easing' and includes the possibility to purchase debt securities issued by any Euro area member, irrespective of its financial assistance status. Actually, the PSPP rationale differs from that of the OMTs: while the OMT programme aims at safeguarding an appropriate monetary policy transmission and the singleness of the euro monetary policy, the PSPP aims at facilitating credit provision, stimulating economic activities and contributing to keep inflation rates close to 2 per cent in the whole Euro area. OMTs therefore can be selectively (and proportionately) applied where necessary. On the contrary, PSPP purchases target the whole Euro area.

To mitigate potential financial risks, several cumulative safeguards were included in the PSPP. Purchases are in fact restricted to debt securities complying with collateral eligibility rules (as recently reformed)¹¹⁹ and limits apply to the maximum amount of debt securities that the Eurosystem may hold.¹²⁰ Furthermore, purchases of public sector assets issued by countries receiving EU/IMF financial assistance are subject to compliance with programme conditionality: "In the event of a review of an ongoing financial assistance programme, eligibility for PSPP purchases shall be suspended and shall resume only in the event of a positive outcome of the review".¹²¹

A "positive outcome of a review" entails the approval of a further disbursement under the financial assistance programme by the ESM Board of Directors and, in case of IMF co-financing, approval by the Fund's Executive Board as well.¹²²

However, even after the conclusion of a review, purchases of central government bonds under the PSPP can be carried out – prudentially – only for a period of two months (unless there are exceptional circumstances justifying a suspension or a con-

¹¹⁷ ECB Press Release, *Technical features of Outright Monetary Transactions*, cit.

¹¹⁸ Decision ECB/2015/10 of the EBC of 4 March 2015 on a secondary markets public sector asset purchase programme. A complaint against the PSPP programme was filed in front of Germany's Federal Constitutional Court soon after; the brief is available in German language at www.jura.uni-freiburg.de.

¹¹⁹ The new temporary framework for collateral contains an explicit reference to EU/IMF conditionality. See *supra*, at the end of para. 1.

¹²⁰ The issue limit refers to the maximum share of a single PSPP-eligible security that the Eurosystem may hold. The issuer limit refers to the maximum share of an issuer's outstanding securities that the ECB may buy. The issuer limit of 33 per cent is a means to safeguard market functioning and price formation as well as to mitigate the risk of the ECB becoming a dominant creditor of Euro Area governments. The issuer limit includes/takes into account also bonds purchased under the SMP programme.

¹²¹ Art. 3, para. 2, let. d), of the PSPP Decision.

¹²² Art. 2 of the PSPP Decision.

tinuation of purchases).¹²³ It is in the ECB Governing Council's discretionary powers to determine whether such circumstances exist.

In the context of the PSPP, therefore, explicit conditionality serves the purpose of ensuring that purchases are proportionate to the monetary policy aims pursued by the programme and that the related financial risks are reduced through adequate risk management measures.

It is revealing that, as a result of the risk-limitation measures put in place, no purchases of Greek sovereign bonds were undertaken under the PSPP up to the time of writing.¹²⁴

VIII. CONCLUSIONS

During the crisis, to safeguard the EMU and its stability, the ECB deployed all its monetary policy instruments, prompting Member States to adopt urgent and crucial reforms (sometimes even driving them to seek EU/IMF financial assistance) or pushing programme countries to comply with the Troika's conditionality.

As the survival of the EMU was the ECB's ultimate goal, it can be argued that its actions were justified, even if many issues are being raised not only from a purely legal perspective.

To assess whether the ECB acted within the scope of its mandate, although close to the edge, an analysis of ECB's policy instruments was performed, keeping implicit and explicit conditionality separate.

Decisions on collateral eligibility were taken by the ECB in the exercise of its power to limit the assumption of risks for the Eurosystem. As such, the ECB Governing Council considered compliance with EU/IMF conditionality relevant to assess the adequacy as collateral of sovereign bonds issued by Euro area countries in distress. However, even if collateral decisions can be considered a legitimate exercise of discretionary power, it may be argued that the latter was stretched to the point of becoming a true political action.

A similar reasoning applies in the case of ELA. The ECB Governing Council may prudentially establish ceilings on ELA whenever the assistance is deemed to interfere with the objectives and tasks of the Eurosystem. However, confidential letters, threatening caps on ELA unless financial assistance is requested and structural reforms are implemented, seem to depart from the institutional role of a central bank.

¹²³ Art. 4, para. 2, of the PSPP Decision.

¹²⁴ In June 2016, the ECB Governing Council declared that it will examine the possibility of future purchases of Greek government bonds under the PSPP "taking into account the progress made in the analysis and reinforcement of Greece's debt sustainability, as well as other risk management considerations" (see ECB Press Release, *ECB Reinstates Waiver Affecting the Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations*, 22 June 2016).

For what concerns the SMP, although no reference to conditionality was contained in the relevant legal framework, sovereign bond purchases were conditioned to the timely adoption of economic, fiscal and structural reforms by the country issuing the bonds. In this context, therefore, one might regard the use of confidential letters to put pressure on the governments of Italy and Spain as an alarming signal.

In the light of the above, the introduction of explicit conditionality in the decisions introducing the OMT and PSPP programme can be considered a turning point. Compliance with programme conditionality became one of the eligibility requirements for the purchases of sovereign bonds issued by crisis countries. The new approach contributed to enhance legal certainty and predictability.

Notably, in the *Gauweiler* decision, the European Court of Justice found the inclusion of explicit conditionality in the OMT programme legitimate.¹²⁵

Nevertheless, many pointed out that the CJEU showed a high degree of deference towards the ECB, leaving enormous discretion to the European monetary authority. Remarkably, despite the different view expressed by Advocate General Cruz Villalón, the CJEU refrained from scrutinizing the ECB's activity within the Troika.¹²⁶

The issue deserves careful consideration: on the European political arena, the ECB plays a *dual role*, at the same time acting as a member of the group of institutions negotiating financial adjustment packages and as an enforcer of conditionality.¹²⁷

On the one side, it has been argued that the ECB only provides advice and expertise, in line with the tasks conferred upon it by the EU Treaties and the ESCB Statute.¹²⁸

¹²⁵ See *Gauweiler*, cit., para. 60.

¹²⁶ See Opinion of AG Cruz Villalón, *Gauweiler*, cit., para. 145: "Unilaterally making the purchase of government bonds subject to compliance with conditions when those conditions have been set by a third party is not the same as doing so when the 'third party' is not really a third party. In those circumstances, the purchase of debt securities subject to conditions may become another instrument for enforcing the conditions of the financial assistance programmes. The mere fact that the purchase may be perceived in that way — as an instrument which serves macroeconomic conditionality — may be sufficient in its impact to detract from or even distort the monetary policy objectives that the OMT programme pursues".

¹²⁷ On the ECB's role within the Troika see D. SARMIENTO, *The advocate General's Opinion and the Judgement in the Gauweiler Case*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 40-54, at 52-53; 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, pp. 17-39, at 34. See also the European Parliament Resolution P7_TA(2014)0239 of 13 March 2014 on the enquiry on the role and operations of the Troika (ECB, Commission and IMF) with regard to the euro area programme countries, in particular para. 54. The European Parliament pointed to the potential conflict of interest between the role of the ECB within the Troika as "technical advisor" and as 'enforcer of conditionality' exerting pressure on programme countries through purchases of their sovereign bonds.

Benoît Coeuré, Member of the ECB Executive Board, underlined that under the difficult circumstances that led to the establishment of the Troika, the ECB's particular expertise and Euro Area focus were compelling reasons for requesting its participation in the Troika. See B. COEURÉ, *Introductory Remarks: Exchange of Views of Benoît Coeuré with ECON on Troika Matters*, 13 February 2014, www.ecb.europa.eu.

Support to this point of view can be found in the relevant legal framework.

Art. 13 of the ESM Treaty entrusts the European Commission, “in liaison with” the ECB, with the task of negotiating a Memorandum of Understanding (MoU). The MoU is signed by the Commission “on behalf of the ESM” and “subject to approval by the ESM Board of Governors” (that is the Finance Ministers of the Euro area). It follows that the MoU solely originates from and commits the ESM.¹²⁹ Art. 2, para. 1, let. a), of the EFSF Framework Agreement (a private law instrument) and Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the Euro area experiencing or threatened with serious difficulties with respect to their financial stability contain similar provisions.¹³⁰

However, even if formally it does not participate in the decision-making concerning adjustment programmes, “the ECB has been very much part of the decision-shaping process”.¹³¹

On the other side, the ECB’s conditionality is regarded by some as a true political action departing from the standards of neutrality and independence that central banks should meet.

Beyond this, it was argued that, with the *Gauweiler* decision, the CJEU supported “the establishment of a technocratic regime with unlimited discretionary powers and without credible accountability”.¹³²

It is the contention of this paper that, to address these concerns, the ECB should limit itself to provide technical assistance and advice, avoiding any involvement in the design and monitoring of future adjustment programmes. Only in this way we would

¹²⁸ See C. ZILIOLO, *The ECB’s Powers and Institutional Role in the Financial Crisis: A Confirmation from the Court of Justice of the European Union*, cit., p. 177 et seq., as well as ECB, *Replies to the questionnaire of the European Parliament supporting the own initiative report evaluating the structure, the role and operations of the ‘troika’ (Commission, ECB and the IMF) actions in euro area programme countries*, www.europarl.europa.eu.

¹²⁹ The CJEU expressed this position in *Thomas Pringle*, cit., para. 161 et seq. See also Tribunal, order of 10 November 2014, case T-289/13, *Ledra Advertising Ltd v. European Commission and ECB*, as well as Opinion of AG Wahl delivered on 21 April 2016, joined cases C-8/15 P, C-9/15 P and C-10/15 P, *Ledra Advertising Ltd et al. v. European Commission and ECB*, para. 50 et seq.

¹³⁰ The same applies under the European Financial Stability Mechanism, through which the EU provides financial assistance also to non-euro area members. Pursuant to Art. 3, para. 3, of Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, general economic policy conditions are defined by the Commission “in consultation with the ECB”.

¹³¹ D. GROS, *Countries under Adjustment Programmes: What Role for the ECB?*, in *CEPS Special Report no. 124*, December 2015.

¹³² C. JOERGES, *A Disintegration of European Studies?*, in *European Papers*, 2016, www.europeanpapers.eu, p. 9. See also C. JOERGES, *Pereat Iustitia, Fiat Mundus: What is Left of the European Economic Constitution after the Gauweiler Litigation?*, in *Maastricht Journal of European and Comparative Law*, 2016, pp. 99-118.

reach a balance between the ECB's democratic accountability and its technocratic expertise, while ensuring the Euro area financial stability.

