



EU AND COMPETITION LAW

ADVOCATE GENERAL CRUZ VILLALÓN'S OPINION ON THE OUTRIGHT MONETARY TRANSACTIONS CASE

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On 14 January 2015, Advocate General Cruz Villalón ("AG") delivered his much anticipated Opinion on the Outright Monetary Transactions case¹. Although the AG's Opinion is not binding on the Court of Justice ("ECJ"), it is likely to influence the Court's ruling, which should be issued in 4 to 6 months.

The first interesting feature of this case is that it results from a preliminary reference made by the German Constitutional Court. It is the first time that the German Constitutional Court engages in this judicial dialogue with the ECJ, which is not without significance.

Furthermore, the subject-matter of the case is of utmost importance for the Euro area.

The Outright Monetary Transactions programme ("OMT programme") was an exceptional measure announced by the European Central Bank ("ECB") on 6 September 2012. In the midst of the European sovereign debt crisis, when interest rates on the government bonds of some Member States were no longer sustainable due to investors' doubts about the survival of the single currency, the ECB undertook to buy government bonds of Member States under financial assistance of the European Financial

Stability Facility or the European Stability Mechanism without setting any *ex ante* quantitative limits to said purchases.

This announcement proved to be effective and the pressure to which some Member States were subject significantly decreased as a result. However, the OMT programme was never formally adopted nor applied to any specific case.

In the present case, the German Constitutional Court made a preliminary reference to the ECJ on the validity of the OMT programme under EU law. Firstly, the referring Court asked whether the OMT programme was an economic policy measure rather than a monetary policy measure, which would make it fall outside the scope of the ECB's mandate. Secondly, the referring Court asked whether the programme is in line with the prohibition of monetary financing of Member States laid down in Article 123(1) TFEU.

¹ Opinion of Advocate General Cruz Villalón on Case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*.

The AG started by emphasising that the ECB must be afforded a broad margin of discretion for the purpose of framing and implementing the Union's monetary policy, since it has unique expertise and experience on such highly technical matters. Accordingly, judicial review of its activity must be exercised with a 'considerable degree of caution'².

Then, as regards the first question, the AG stressed that this unconventional policy ought to be analysed in its exceptional context, in which the usual monetary transmission channels used by the ECB were proving to be inefficient.

Also, bearing in mind that the measure adopted by the ECB belongs to the category of instruments provided for in the law for carrying out monetary policy, the AG took the stance that there ought to be an initial presumption that the measure is indeed of monetary and not economic policy.

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

However, the AG considered that there were two conditions that needed to be fulfilled in case the OMT programme were to be implemented in order for it to remain a monetary policy measure:

- (i) The ECB must refrain from any direct involvement in the financial assistance programmes to which the OMT programme is linked, without prejudice of being kept informed by the other institutions involved and possibly even being consulted;
- (ii) The ECB must strictly comply with the obligation to state reasons for the adoption and implementation of the OMT programme and the measures adopted must be in line with the proportionality principle.

Regarding the second question, the AG considered that the prohibition of monetary financing, whereby a central bank uses its power to issue money for the purpose of buying State's debt instruments and thus financing it, served the attainment of a higher goal, namely maintaining the financial stability of the monetary union. As such, mere hypothetical risks assumed by the ECB in the context of the implementation of the OMT programme were not sufficient for the substance of this prohibition to be breached.

In addition, the AG took the view that, provided that a sufficient 'embargo period' is observed before the ECB buys bonds in the secondary market, the prohibition of monetary financing enshrined in the Treaties would be respected.

This 'embargo period' allows a market price to form and thus preserves an actual difference between the primary and secondary markets – which would be blurred if, e.g., the ECB purchased government bonds seconds after they reached the primary market.

In conclusion, the AG considered that the OMT programme was compliant with EU law provided that certain conditions are respected upon its implementation.

The AG's opinion comes at an opportune time since the ECB is likely to decide on the adoption of quantitative easing measures at one of its upcoming policy meetings.

² *Idem*, par. III.

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