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Abstract [En]: The aim of this paper is to present a cross-sectional analysis of the Transmission Protection Instrument (TPI) of the European Central Bank. In this regard, after having deepened the technical features of this mechanism, we carry out an assessment of the economic reasons behind the launch of the TPI and, then, we study the legal issues that emerge from this tool. In particular, we propose a comparison with the ruling of the European Court of Justice (ECJ) about the Outright Monetary Transactions (OMTs) in order to evaluate the compliance of this new instrument with the provisions of the European Treaties.

Titolo: Un'analisi trasversale dello Strumento di protezione della trasmissione: tra esigenze economiche e trattati obsoleti

Abstract [It]: La finalità del presente scritto è quella di offrire un'analisi trasversale del *Transmission Protection Instrument* (TPI) della Banca Centrale Europea. In tal senso, nell'articolo *de quo*, dopo aver approfondito le caratteristiche di questo nuovo strumento, si propone una riflessione relativa alle esigenze economiche che hanno portato alla creazione del TPI, per poi focalizzare l'attenzione sulle questioni giuridiche derivanti dalla nascita di questo nuovo meccanismo. A tal proposito, in particolare, si avanza un parallelo con la sentenza della Corte di Giustizia dell'Unione Europea in merito alle *Outright Monetary Transactions* (OMTs) al fine di valutare la legittimità del suddetto strumento rispetto a quanto previsto dai Trattati euro-unitari.

Keywords: Transmission Protection Instrument, ECB, OMTs, European Court of Justice, Treaties

Parole chiave: Transmission Protection Instrument, BCE, OMTs, Corte di Giustizia dell'Unione Europea, Trattati

Summary: **1.** Introduction. **2.** The features of the instrument and the differences with the Outright Monetary Transactions. **3.** The economic impulses behind the TPI. **4.** The outdated, but still alive, juridical constraints. **5.** Conclusion: approaching the limits of the “grey areas”.

1. Introduction

The European Central Bank, in the press conference of 21 July 2022¹ - situation in which was declared the first interest rate hike since 2011² – announced the launch of a new monetary tool: the Transmission Protection Instrument (TPI). This mechanism, according to the words expressed by President Lagarde, has been designed in order to «support the effective transmission of monetary policy» and, following the

* Articolo sottoposto a referaggio.

¹ See the [ECB website](#).

² The Governing Council of the ECB deliberated a rise of 50 basis points. The previous increase decided by Frankfurt took place on 7 July 2011, under the presidency of Jean-Claude Trichet. Consider J. TREECK, *ECB lifts rates for first time in more than a decade*, in *Politico.eu*, 21 July 2022.

standpoint expressed by the former French minister, it will ensure that the monetary policy stance decided by the Governing Council will be «transmitted smoothly across all euro area countries». The TPI, basically, will allow the ECB to purchase, on secondary markets, an unlimited amount of public sector securities issued by a specific Member State that experiences difficulties to obtain funds on the financial markets³; in this regard, this new monetary tool has been quickly rebranded by some analysts⁴ as “anti-spread shield”, due to its possible capability to lower the interest rates paid by the most indebted Countries of the Eurozone.

The aim of this paper is to analyse the Transmission Protection Instrument under a cross-sectional approach which combines economics and law. In this sense, we will start describing the features of this instrument and its differences with the Outright Monetary Transactions (I), we will continue examining the economic reasons behind the TPI (II), then, we will deepen the juridical legitimacy of this mechanism (III), and, finally, we will conclude with an overall evaluation that mixes the considerations presented previously and that tries to present some critical aspects related to the upcoming scenario (IV).

2. The features of the instrument and the differences with the Outright Monetary Transactions

According to the words of President Lagarde, the TPI main target is to preserve a smooth, and uniform, transmission of monetary policy throughout the Eurozone. Hence, this instrument seems to follow the same *ratio* that was at the basis of the Securities Markets Programme (SMP)⁵ and, especially, of the Outright Monetary Transactions (OMT's)⁶, but, considering some features, the final design of these three mechanisms results partially different. Due to the fact that the SMP is no longer operational, in this chapter we will focus our attention exclusively on the diversities between the Transmission Protection

³ The TPI is mainly addressed towards public sector securities (emitted by central or regional Governments, even by agencies determined by the ECB) but, according to the Central Bank, it could also target private sector securities. See the [ECB website](#).

⁴ Consider, for example, A. BAGLIONI, *Scudo anti-spread: bisognerà meritarselo*, in *LaVoce.info*, 21 July 2022 and M. CHARREL, *The European Central Bank unveils new anti-crisis shield*, in *Le Monde*, 22 July 2022.

⁵ The Governing Council of the ECB decided to launch this instrument on 10 May 2010. The goal of this programme was «to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism». The SMP was “closed” with the creation of the Outright Monetary Transactions, in 2012. See, regarding the technical features of the SMP, the [ECB website](#), while, about the effects of the Securities Markets Programme, consider F. ESER – B. SCHWAAB, *Assessing Asset Purchases within the ECB's Securities Markets Programme*, in *ECB Working Paper Series*, n. 1587, September 2013.

⁶ The Outright Monetary Transactions were launched by the ECB in 2012 and their objective is to «safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy». So far, this instrument has never been used; anyway, according to the researches carried out by some scholars, it is logical to claim that the announcement of the birth of this mechanism has had positive effects on the interest rates paid by Member States with a relevant debt to GDP ratio. On this topic, consider C. ALTAVILLA – D. GIANNONE – M. LENZA, *The Financial and Macroeconomic Effects of OMT Announcements*, in *ECB Working Papers*, n. 1707, 6 August 2014; while, taking into account the technical characteristics of the OMT's, refer to the [ECB website](#). Both the SMP and the OMT's are considered a result of the, so-called, economic governance reform that took place in the aftermath of the sovereign debt crisis. On this issue, see, *ex plurimis*, F. DONATI, *Crisi dell'euro, governance economica e democrazia nell'Unione Europea*, in *Rivista AIC*, n. 2, 2013.

Instrument and the OMTs. In this regard, the variations between the TPI and the Outright Monetary Transactions are mainly related to three domains:

- A) The remaining maturity of the bonds that could be purchased by the ECB;
- B) The conditions that the Member States have to observe in order to benefit of the resources of these two programmes;
- C) The existence of “reabsorption mechanisms” aimed at preserving the overall distribution of liquidity in the Eurozone.

First of all, considering the maturity of the bonds (A), the OMTs appear narrower than the TPI. Indeed, the Outright Monetary Transactions can involve securities with a remaining maturity between one and three years, while the Transmission Protection Instrument allows the Central Bank to buy bonds with a “residual life” between one and ten years.

The second element of difference, probably the most relevant, is related to the conditions that the Member States have to respect in order to benefit of the two mechanisms (B). Even in this case, it is logical to claim that the OMTs result more stringent than the TPI. In fact, with the Outright Monetary Transactions, the ECB can only provide financial assistance to a State that is undertaking a programme of macroeconomic adjustment under the supervision of the European Stability Mechanism (ESM). Moreover, the Central Bank can proceed to use the OMTs only if the programme conditionality continues to be fully respected, otherwise, it has to stop the purchase of bonds.

The Transmission Protection Instrument, instead, does not require the existence of a macroeconomic adjustment programme in order to be activated. In this sense, the ECB has to consider four *criteria* before deciding to act in favour of a specific Member State:

- a) the beneficiary Country has to be compliant with the EU fiscal framework. This means that the Member State must not have failed to follow a recommendation of the EU Council (under article 126.7 TFEU) and, likewise, it has to be not subject to an excessive deficit procedure;
- b) the State *de quo* must not present severe macroeconomic imbalances and, in this sense, it has to be not subject to an excessive imbalance procedure or having failed to undergo the corrections planned by an EU Council recommendation (under article 121.4 TFEU);
- c) the Country must show an overall fiscal sustainability. In this perspective, the trajectory of the public debt has to be assessed as bearable on the basis of evaluations carried out by the ECB, the European Commission, the European Stability Mechanism, the International Monetary Fund and other (unspecified) institutions⁷;

⁷ The decision to involve several players in the assessment of the sustainability of the public debts of the Member States seems to represent an attempt of the ECB to “technify” its evaluation, in order to avoid possible allegations of biased decisions taken on the basis of political evaluations. This provision, as suggested by some scholars (see, for example, G.

d) the Member State has to undertake «sound and sustainable macroeconomic policies». In light of this, the Country *de quo* must have followed the specific recommendations received during the European Semester and, moreover, it has to result compliant with the measures agreed in the Recovery and Resilience Plan related to the Recovery and Resilience Facility.

The third difference between the OMTs and the TPI is represented by the existence, or not, of “reabsorption mechanisms” (C). On one side, in fact, the Outright Monetary Transactions imply the sterilisation of the purchases conducted with this programme in order to preserve the overall monetary policy carried out by the ECB (which has to be mainly focused on price stability); on the other side, instead, the activation of the Transmission Protection Instrument requires “only” to control that the programme does not have negative impacts on the monetary policy stance. Even on this issue, hence, the Outright Monetary Transactions result more stringent than the TPI.

3. The economic impulses behind the TPI

The “economic assessment” of the TPI is basically related to the long-standing discussion about the necessity to have, or not, a Lender Of Last Resort (LOLR)⁸ allowed to finance private institutions and to buy public securities. Indeed, the ECB, creating this instrument, gets closer to the role that was first theorized by Thornton and Bagehot, by acquiring the possibility to finance Member States unable to find resources on the markets⁹.

CLAYES – M. DEMERTZIS, *A new European tool to deal with unjustified rising spreads*, in *Bruegel Blog*, 20 June 2022), could also represent a way in which the Central Bank creates a sound juridical backdrop aimed at preventing accusations of violating the Treaties providing monetary financing to a Member State. In the continuation of this paper we will deepen the “juridical side” of the issue, while, here, we can do a quick focus on the “political side” of the matter. In this sense, we present some concerns about the involvement of multiple institutions in the assessment *de quo*. Indeed, we argue the necessity to have a single evaluator in order to avoid a situation in which could emerge different outcomes from different institutions, creating therefore a context in which the ECB should decide what assessment should be followed: a decision that, inevitably, would be done on the basis of a political evaluation. In light of this, we would like to underline a key aspect: the nature of the Central Bank can no longer be considered completely a-political and, in this sense, any allegation of “politicization” of the monetary policy should be labelled as a simple *acknowledgement* of something that cannot be denied (and must not be hidden). On this topic, allow us to refer to M. BURSI, *Il rischio stagflazione: un nuovo incentivo a riformare la BCE*, in *Federalismi.it*, n. 16, 2022, pp. 45-52.

⁸ With regard to the definition, and the history, of this concept, consider, *ex plurimis*, X. FREIXAS – C. GIANNINI – G. HOGGARTH – F. SOUSSA, *Lender of Last Resort, What we have learned since Bagehot?*, in *Journal of Financial Services Research*, n. 18, 2000, pp. 63-84. The discussion about the existence of a Lender Of Last Resort, for many decades, was related to private financial entities, without considering the role that this institution could play in favour of the State. Indeed, due to the subordinate position of Central Banks towards Governments and Parliaments (until the '70s of the 20th Century), it was quite improbable that the LOLR could refuse to act on the markets in order to buy public securities. However, in the aftermath of the two oil crisis, and with the surge of new economic theories (like monetarism), the major Central Banks of the Western World gained an important level of independence that provided them a relevant leeway that does not guarantee an intervention of the LOLR in support of the Governments finances. In this sense, see C.A.E. GOODHART, *The changing role of Central Banks*, in *Financial History Review*, n. 18 (2), 2011, pp. 135-154.

⁹ The ECB already had the possibility to act as Lender Of Last Resort in favour of the banking sector. Indeed, the European System of Central Banks, in case of shortage of liquidity of a private entity, can deploy the Emergency

On one side, the reason in favour of the existence of a LOLR in a financial system is notorious¹⁰: during a crisis, even institutions with sound fundamentals could face liquidity shortage and, in this sense, the action of a Lender Of Last Resort is fundamental with the purpose to support them and in order to avoid a dangerous snowball effect. On the other side, even the argument against the subsistence of a LOLR is well-known¹¹: ensuring financial assistance to institutions in trouble, the Central Bank would foster the moral hazard, paving the way for a deterioration of the currency and for an overall worsening of the economic scenario. The contrast between these two stances has affected the actions of Central Banks since their origin, prompting, over changing times, different strategies addressed towards the handling of financial crisis.

After the turmoil caused by the Lehman Brothers' default¹², the dominant economic thought has recognised some basilar issues: the free market is not capable to avoid financial bubbles and, at the same time, does not represent a guarantee against the widespread of investors' panic; moreover, there are some financial institutions, like relevant banks or the largest insurance companies, that should be closely overseen over time in order to avoid failures that could trigger dangerous domino effects¹³. In this sense, in the last decade, the international institutions and the Western Governments have reinforced regulatory mechanisms related to financial bodies and the Central Banks¹⁴, in particular during the first years following the Lehman Brothers' default, have acted as Lender Of Last Resort with the purpose of providing liquidity to private entities that struggled to find resources on the markets¹⁵. At the same time, during this period, many Central Banks of the, so-called, Western World started to buy a relevant amount of public securities in order, on one side, to avoid the risk represented by deflation, and, on the other, to sustain the expansionary policies carried out by Governments with the purpose of supporting the private economy¹⁶. In this way, the treasury bonds of these Countries did not experience a sharp increase of the interest rates and, consequently, the debt to GDP ratios remained sustainable.

In the Eurozone, however, the ECB started to buy public bonds with a certain delay in comparison with

Liquidity Assistance (ELA). In this regard, the ELA is provided by National Central Banks under the supervision of the ECB. See the [ECB website](#).

¹⁰ Consider X. FREIXAS – C. GIANNINI – G. HOGGARTH – F. SOUSSA, *Lender*, cit., pp. 63-73.

¹¹ *Ivi*, pp. 73-78.

¹² For a comprehensive analysis of this financial crisis, consider S. VERICK – I. ISLAM, *The Great Recession of 2008-2009: Causes, Consequences and Policy Responses*, in *IZA discussion paper*, n. 4934, 2010.

¹³ Regarding this topic, see O. J. BLANCHARD, *Where danger lurks: The recent financial crisis has taught us to pay attention to dark corners, where the economy can malfunction badly*, in *Finance & Development- IMF*, September 2014, pp. 28-31.

¹⁴ Take into account, for example, the Basel III agreement. About this topic, consider the [Bank for International Settlements website](#).

¹⁵ See D. DOMANSKI – R. MOESSNER – W. NELSON, *Central banks as lender of last resort: experiences during the 2007-10 crisis and lessons for the future*, in *Finance and Economic discussion series – Federal Reserve*, May 2014.

¹⁶ In this regard, consider B.S. BERNANKE, *The Effects of the Great Recession on Central Banks Doctrine and Practice*, in *The B.E. Journal of Macroeconomics*, vol. 2, n. 3, article 21, 2012.

other institutions¹⁷ like the Federal Reserve, the Bank of England or the Bank of Japan, and the reason at the basis of this different action was mainly juridical: indeed, the interpretation of the European Treaties given at the time by relevant members of the Governing Council, and by important Governments of the EU, was rooted on the idea that the Central Bank could not finance Governments in order to preserve the key target represented by price stability¹⁸. In the next paragraph of this paper we will deepen these “legal constraints” while, in the current one, we will analyse the economic consequences of this choice.

Then, in this regard, we can say that the Eurozone, in the aftermath of the “Great Recession”, differently from the other major Western economies, did not have a LOLR capable to acquire public securities in order to control the growth of interest rates. Consequently, the actions carried out by the European Governments were not backed by the possibility for the Central Bank to guarantee their debts and, in light of this, the most vulnerable Countries of the Euro Area¹⁹ were targeted by financial speculations related to their capability to remain creditworthy²⁰. Hence, without considering the Greek case, which is peculiar given the manipulation of the public accounts made by the Hellenic Governments²¹, a wide number of scholars claims that the, so-called, “sovereign debt crisis” was largely due to the impossibility for the ECB to act discretionally on the markets with the purpose of stopping the surge of the interest rates on public securities²²; this assertion results even more “mocking” bearing in mind that, at the time, the inflation rate was close to zero and that the other Central Banks that purchased a huge amount of public bonds in that period did not cause a significant increase of prices²³. Moreover, in the years after the announce of the creation of the OMTs and the launch of the Public Sector Purchase Programme (PSPP)²⁴, the concern about a possible surge of moral hazard proved to be overestimated. Indeed, the

¹⁷ In fact, the ECB only started to acquire a relevant amount of public bonds with the launch of the Public Sector Purchase Programme (PSPP), while the Federal Reserve, the Bank of England and the Bank of Japan initiated extensive buying programmes since the first months after the Lehman Brothers’ default. Actually, the European Central Bank, in May 2010, created the Securities Markets Programme but their scope was quite narrow and, moreover, all the purchases had to be sterilized in order to not change the overall liquidity handled by the institute.

¹⁸ On this issue, consider O. HÜLSEWIG – A. STEINBACH, *Monetary financing and fiscal discipline*, in *International Review of Law and Economics*, vol. 68, December 2021.

¹⁹ At that time, in order to sum up the European Countries involved in the sovereign debt crisis, the acronym PIIGS emerged (Portugal, Ireland, Italy, Greece and Spain).

²⁰ With regard to the sovereign debt crisis, see, *ex plurimis*, P.R. LANE, *The European sovereign debt crisis*, in *Journal of Economic Perspectives*, vol. 26, n. 3, 2012, pp. 49-68.

²¹ In order to deepen the Greek case, refer to M.G. ARGHYROU – J.D. TSOUKALAS, *The Greek Debt Crisis: Likely Causes, Mechanisms and Outcomes*, in *The World Economy*, vol. 34, n. 2, 2011, pp. 173-191.

²² This idea, for example, is supported by K. ARMINGEON – L. BACCARO, *Political Economy of the Sovereign Debt Crisis: the Limits of Internal Devolution*, in *Industrial Law Journal*, vol. 41, n. 3, 2012, pp. 254-275 and P. DE GRAUWE – Y. JI, *Self-fulfilling crises in the Eurozone: An empirical test*, in *Journal of International Money and Finance*, n. 34, 2013, pp. 15-36.

²³ See the data reported on the [IMF website](#).

²⁴ The PSPP is a massive Government bonds purchase programme that was launched in 2014; it was the most important pillar of the wider Asset Purchase Programmes (APP). The official goal of the APP was to push the low inflation rate of the time towards the medium term target set by the ECB. In this regard, consider the [ECB website](#).

economic governance framework designed by the European Union with the Maastricht Treaty, and reinforced during the sovereign debt crisis, showed its capability to limit the possibility for Member States to pursue irresponsible fiscal policies²⁵, posing, rather, some doubts about the constraints that could create for a strong economic growth²⁶.

Therefore, according to these considerations, the TPI seems to represent a necessary instrument for the toolkit of the European Central Bank, recalling that the purchase programmes that were launched in the past decade by the ECB were (officially) mainly designed with the aim of pushing the inflation rate towards the medium term target²⁷; likewise, the OMTs do not represent a sufficient instrument to manage a potential speculative attack on public securities, taking into account their strict conditionalities and the time needed in order to activate them. Moreover, the technical features of the TPI follow the concept of Lender Of Last Resort that was suggested by Bagehot²⁸: indeed, the Transmission Protection Instrument could only be activated in favour of Countries with a sustainable debt to GDP ratio and these States need to be compliant with the European fiscal framework and with the recommendations received by the European institutions. At the same time, the activation of the TPI is not automatic and, in this way, the European Central Bank demonstrates also of being adherent with the notorious sentence of Kindleberg: «the lender of last resort must exist, but its intervention must be doubted»²⁹.

Thus, in conclusion, from a mere economic perspective, we can affirm that the creation of the Transmission Protection Instrument results, according to our standpoint, shareable. Furthermore, the European Central Bank can already act as LOLR in favour of private institutions³⁰, hence, it seems logical to extend this option in favour of the Member States. Finally, it is relevant to underline that the other major Central Banks of the Western World have a power of this type and, even in the past years³¹, they did use it in order to avoid a stark deterioration in public finances: without considering legal issues,

²⁵ This standpoint is shared by O. HÜLSEWIG – A. STEINBACH, *Monetary*, cit.

²⁶ In this sense, consider, *ex plurimis*, J.E. STIGLITZ – J.P. FITOUSSI – P. BOFINGER – G. ESPING-ANDERSEN – J.K. GALBRAITH – I. GRABEL, *A call for policy change in Europe*, in *Challenge*, vol. 57, n. 4, 2014, pp. 5-17.

²⁷ This was the case for the PSPP and even for the Pandemic Emergency Purchase Programme (PEPP). Indeed, the PEPP had the goal to «maintain borrowing, spending and investment despite the pandemic crisis» and, consequently, to «boost growth and bring inflation back to» the «target of 2% over the medium term». On the Pandemic Emergency Purchase Programme, see the [ECB website](#).

²⁸ Bagehot, *inter alia*, claimed that the Lender Of Last Resort should act only in favour of solvent institutions capable to provide solid assets as collateral. Consider W. BAGEHOT, *Lombard street: a description of the money market*, Hyperion, Westport, 1979 (first publication 1873).

²⁹ C. KINDLEBERG, *Euforia e panico. Storia delle crisi finanziarie*, Laterza, Bari, 1981, p. 12.

³⁰ Refer to note number 9.

³¹ An important example is provided by the actions carried out by the Bank of England after the launch, by the Truss' Government, of the, so-called, “mini-budget”. Indeed, after a relevant increase of the interest rates on the British Gilts, the Central Bank started to buy an important amount of public securities in order to “calm” the financial markets and preserve the public finances. On this topic, see the [Bank of England website](#) and A. BAGLIONI, *Lezioni da Londra*, in *LaVocce.info*, 29 September 2022.

therefore, we would not see the reason why the ECB should represent an exception to this practice.

4. The outdated, but still alive, juridical constraints

At the end of the '70s, after the two oil crisis and the “stagflation period”, the concept of Central Banking started to change radically. Indeed, with the affirmation of new economic theories, the management of currency was addressed towards a main target: the price stability. In light of this, the monetary financing of public budgets began to be perceived as an improper function for a Central Bank, posing, according to the prevailing thinking of the time, important risks of moral hazard and fostering inflationary spirals³². Thus, since that period and until the 2008 crisis, the major institutes of the Western World have long followed this idea, “cutting the ties” with the national treasury departments.

This behaviour, in the case of the Bank of Japan, was generally embedded in the law but foresaw relevant exceptions to the rule³³ that ensured the BoJ significant room of manoeuvre, while, in the case of the Federal Reserve and the Bank of England, was not strictly dictated by any legal provision³⁴. In this sense, when the “Great Recession” came, these three Central Banks had the possibility to change their position, providing, if necessary, financial assistance to their respective States. The ECB’s situation, instead, was different.

In fact, the prohibition of monetary financing is rooted in the Treaties and the article 123 TFEU clearly states that the ECB cannot buy directly debt instruments related to Member States; moreover, the article 127 TFEU claims that the ECB’s main objective is the price stability and, only if this target is reached, the Frankfurt institute could pursue other goals. Therefore, due to these legal constraints, it is not surprising that, in the aftermath of the 2008 crisis, the ECB accumulated a certain delay before buying public bonds and, when it started to do so, it was inevitable that a broad debate would erupt concerning the legitimacy of this action³⁵. Consequently, even in the case of the Transmission Protection Instrument, the doubts about the legitimacy of this instrument basically reside in the interpretation of these two articles of the Treaties³⁶.

³² Regarding this “change of paradigm”, consider C.A.E. GOODHART, *The changing*, cit.

³³ This is what emerges from the conjunction of the article 5 of the Japanese Fiscal Act and the Bank of Japan Act. On this topic, see O. HULSEWIG – A. STEINBACH, *Monetary*, cit., pp. 2-3.

³⁴ About the FED and the Bank of England, refer to W. BATEMAN, *The Law of Monetary Finance under Unconventional Monetary Policy*, in *Oxford Journal of Legal Studies*, 2021, pp. 1-36.

³⁵ In this sense, for example, see, *ex plurimis*, A.L. HÖGENAUER – D. HOWARTH, *The democratic deficit and European Central Bank crisis monetary policy*, in *Maastricht Journal of European and Comparative Law*, vol. 26, 2019, pp. 81-93 and N. DE BOER – J. VAN’T KLOOSTER, *The ECB, the courts and the issue of democratic legitimacy after Weiss*, in *Common Market Law Review*, vol. 57, n. 6, 2020, pp. 1689-1724.

³⁶ In this regard, some scholars have already questioned the rightfulness of the TPI. See L.P. FELD – C. FUEST – V. WIELAND – J. HAUCAP – H. SCHWEITZER – B.U. WIGGER, *The ECB’s toxic Bond-Purchase Programme*, in *Project Syndicate*, 27 July 2022, E. KRECKÉ, *Is the European Central Bank still in control?*, in *GIS reports online*, 15 September 2022,

In the second paragraph of this paper we have presented a comparison between the TPI and the Outright Monetary Transactions. The parallel *de quo* is due to the almost equal objective of these two programmes and this benchmarking results useful in order to assess the juridical legitimacy of the Transmission Protection Instrument. Indeed, the OMTs were at the basis of a relevant sentence of the European Court of Justice (ECJ)³⁷, a ruling that represents a milestone of the debate, over monetary policy, that has occurred in the past years between the ECJ and the *Bundesverfassungsgericht* (BVerfG)³⁸. In fact, the German Federal Court, after having received several individual constitutional actions (*Verfassungsbeschwerde*) over the rightfulness of the OMTs, launched, on the basis of article 267 TFEU³⁹, a reference for a preliminary ruling to the ECJ, posing the following main questions:

- A) Did the OMTs violate the monetary policy mandate of the ECB exposed by the articles 119 and 127 TFEU?

In this regard, the German judges, *inter alia*, underlined also the potential legal breach represented by a selective purchase programme that could be addressed towards certain Member States, excluding, therefore, the others;

- B) Did the Outright Monetary Transactions represent, *de facto*, an infringement of the prohibition of monetary financing of public budgets required by article 123 TFEU?

PRINCE M. OF LICHTENSTEIN, *The ECB: broken rules, frivolous policy*, in *GIS reports online*, 1 August 2022 and O. ISSING, *The ECB's political overreach*, in *Project Syndicate*, 27 July 2022.

³⁷ ECJ Case C-62/14, *Gaumeiler et alii*. On this sentence, consider, *ex plurimis*, F. FABBRINI, *The European Court of Justice, the European Central Bank, and the Supremacy of EU Law*, in *Maastricht Journal of European and Comparative Law*, vol. 1, 2016 and S. SIMON, *Direct Cooperation Has Begun: Some Remarks on the Judgment of the ECJ on the OMT Decision of the ECB in Response to the German Federal Constitutional Court's First Request for a Preliminary Ruling*, in *German Law Journal*, vol. 16, n. 4, pp. 1025-1048.

³⁸ Since the beginning of the sovereign debt crisis, the BVerfG has initiated a “close confrontation” with the European Court of Justice in order to clarify the nature of new European instruments (like the European Stability Mechanism) and with the purpose of delimiting the boundaries of the ECB’s monetary policy. Actually, the “euro-activism” of the German Federal Court is not something new: indeed, since the *Solange* judgement, the BVerfG has played a pivotal role in the, so-called, “dialogue between the Courts”. The discussion between Karlsruhe and Luxembourg “produced” sentences that, with certain specifications, gave the green light to the actions carried out by the European institutions but, at the same time, it provoked an unprecedented ruling of the BVerfG that declared “*ultra-vires*” the Public Sector Purchase Programme, going against a previous sentence of the ECJ (Case C-493/17, *Weiss et alii*). Regarding the multiannual confrontation between Karlsruhe and Luxembourg, refer to P. FARAGUNA, *Il Bundesverfassungsgericht e l’Unione Europea, tra principio di apertura e controlimiti*, in *Diritto Pubblico Comparato ed Europeo*, n. 2, 2016, pp. 431-463; while, on the PSPP ruling, consider G. TESAURO – P. DE PASQUALE, *La BCE e la Corte di giustizia sul banco degli accusati del Tribunale costituzionale tedesco*, in *Osservatorio Europeo – Il Diritto dell’Unione Europea*, 11 May 2020, M. HÖPNER, *Karlsruhe verdient Anerkennung: Zum PSPP-Urteil des Bundesverfassungsgerichts vom 5. Mai 2020*, in *Wirtschaftsdienst*, 100(6), 2020, pp. 441-445, S. POLI, *The German federal Court and its ultra-vires review: a critique and a preliminary assessment of its consequences*, in *Eurojus*, n. 2, 2020, pp. 224-240 and M. BURSI, *La sentenza del BVerfG sul Public Sector Purchase Programme: un’Europa sempre più difficile*, in *Consulta Online*, n. 2, 2020, pp. 385-405.

³⁹ And according to what the BVerfG stated in the *Mangold/Honeywell* case. See C. MÖLLERS, *German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010*, 2 BvR 2661/06, *Honeywell*, in *European Constitutional Law Review*, n. 7, 2011, pp. 161-167.

As we know, the European Court of Justice gave a green light to the OMTs, even if the judges of Luxembourg stated some specifications aimed at ensuring the legitimacy of this new monetary tool. Regarding a possible violation of the mandate foreseen by the Treaties (A), the ECJ affirmed that the instrument *de quo* had to be considered rightful for several reasons. First of all, the European Court of Justice emphasised the autonomy that the Frankfurt institute possesses in determining the means by which it should achieve the primary objective constituted by price stability⁴⁰. Then, the ECJ underlined the goals set by the ECB with the creation of the OMTs, an instrument that was designed in order to safeguard «an appropriate monetary policy transmission and the singleness of the monetary policy». In light of this, the judges of Luxembourg stated that, on one side, the preservation of the singleness of the monetary policy finds its legal basis in article 119.2 TFEU (which affirms that monetary policy must be single), while, on the other, they claimed that the protection of its appropriate transmission is functional with the aim of achieving the price stability⁴¹. Finally, analysing the potential selectivity of the OMTs, the ECJ stressed that this instrument is addressed towards the uniformity of the monetary policy transmission and, in this sense, the decision to purchase only the bonds of some Member States is dictated by the need to recompose its singleness; moreover, the judges affirmed that no article of the Treaties imposes to the ECB to conduct only actions that must involve all the Countries that adopt the Euro⁴². With respect to the compliance of the OMTs with the prohibition of monetary financing of public budgets (B), the judges of Luxembourg, first of all, underlined that article 18.1 of the European System of Central Banks Statute allows the ECB to conduct operations on the financial markets, by buying and selling titles that could also include public bonds⁴³. Nevertheless, the ECJ stated that the actions carried out by the European Central Bank must not represent, *de facto*, a circumvention of article 123 TFEU, thus following the logic behind that provision: the necessity to avoid an increase of moral hazard and, consequently, the need to prevent Member States from conducting unsustainable fiscal policies⁴⁴. Therefore, the European Court of Justice affirmed that, in order to avoid the risks presented above, the public bonds purchase programmes launched by the ECB must require conditionalities that could guarantee the preservation of sound fiscal policies⁴⁵ and, at the same time, Member States have to be

⁴⁰ Even in the PSPP ruling (ECJ Case C-493/17, *Weiss et alii*), the ECJ emphasised this point (§50): «It must be pointed out in this regard that the FEU Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy».

⁴¹ ECJ Case C-62/14, *Gauweiler et alii*, §§47-49.

⁴² *Ivi*, §55.

⁴³ *Ivi*, §96.

⁴⁴ *Ivi*, §§97-100. In this regard, it is interesting to underline that the ECJ, in order to sustain its assertion, recalled the preliminary work that led to the drafting of the Maastricht Treaty.

⁴⁵ *Ivi*, §102.

uncertain about the “activation” of the Central Bank acquisitions⁴⁶. In this sense, hence, regarding the article 123 TFEU, the ECJ stated that the OMTs were rightful due to the features designed by the ECB⁴⁷. According to our view, the European Central Bank, creating the TPI, strictly followed the ruling just described. Indeed, taking into account the similar goal of the Transmission Protection Instrument with the OMTs, the ECB, in outlining the characteristics of this new mechanism, seems to have adhered step by step to the Court's verdict on the Outright Monetary Transactions; in fact, although the conditionalities attached to the TPI result “milder” than the ones related to the previous instrument (in light of what exposed in the second paragraph of this paper), they formally comply with all the conditions required.

In particular, it is relevant to deepen the issue related to the critical remarks expressed by some scholars⁴⁸ regarding the absence, in the case of the Transmission Protection Instrument, of a macroeconomic adjustment programme that involves the Country benefiting from the ECB's action (something that exists with the activation of the OMTs). On this topic it results fundamental to underline a key element of the ECJ's sentence on the Outright Monetary Transactions: the ECB, by buying Government bonds, must prevent an increase of moral hazard and a consequent deterioration of public finances. The Transmission Protection Instrument, in light of what affirmed by the European Central Bank, although it does not offer all the safeguards of the OMTs, could be activated only in favour of a Country that presents a sound macroeconomic situation that ensures the sustainability of the public debt: as some observers⁴⁹ suggests, hence, we can affirm that the Member States, in order to be eligible for the TPI, “must deserve” the action of the ECB, by carrying out solid and responsible fiscal policies; thus, according to our interpretation of the words of the European Court of Justice, this would be enough for the Frankfurt institute to be “allowed” to buy the Government bonds of the Eurozone State *de quo*. Therefore, it results reasonable to affirm that, if the OMTs were considered rightful by the judges of

⁴⁶ *Ivi*, §113.

⁴⁷ In relation to the interpretation of article 123 TFEU, it is relevant to underscore that, in the PSPP ruling (ECJ Case C-493/17, *Weiss et alii*), the European Court of Justice continued to consider the criteria set with the OMTs Case as main parameters for assessing the substantial compliance of the actions implemented by the ECB with the prohibition of monetary financing of public budgets (§§106-107).

⁴⁸ «What was not in question when the scheme - the OMTs - was introduced was that strict conditionality was required in order to prevent countries from being supported by the ECB despite unsustainable public finances or further expanding their debt», in light of this, in the case of the TPI «it is not acceptable that the ECB now wants to support individual eurozone countries with Government bond purchases, but without the conditionality of an ESM program». See L.P. FELD – C. FUEST – V. WIELAND – J. HAUCAP – H. SCHWEITZER – B.U. WIGGER, *The ECB's toxic*, cit.

⁴⁹ Consider, for example, A. BAGLIONI (*Scudo*, cit.), who claimed that the TPI requires «strict conditions, which will not allow a Country “deviating” from European public finance rules to benefit from the anti-spread shield». Moreover, some scholars, like I. CIPOLLETTA (*Il nuovo whatever it takes protegge anche l'Italia, ma la crisi politica è un problema*, in *Domani*, 21 July 2022) argue that the conditionalities contemplated by the Transmission Protection Instrument could represent an incentive for the Member States to carry out solid fiscal policies.

Luxembourg, this would be also the case for the Transmission Protection Instrument. Even if this implies a legitimisation of an action which is really close to monetary financing of public budgets: something that, it is logical to claim, was largely perceived as deleterious in the early years of the Eurozone⁵⁰.

5. Conclusion: approaching the limits of the “grey areas”

The Transmission Protection Instrument represents a relevant supplement in the toolkit of the ECB, providing to the Frankfurt institute a typical power related to Central Banking. This conferral, as we said before, results shareable from an economic perspective and can prevent new sovereign debt crisis that could provoke dangerous cleavages within the Eurozone. As we have just stated, from a legal standpoint, the precedent represented by the ECJ sentence on OMT's offers a guarantee about the legitimacy of this new instrument, bringing us to consider a censure by the judges of Luxembourg unlikely.

Nevertheless, being frank, we have to underscore that the TPI, like the Outright Monetary Transactions, resides in the, so-called, “grey areas”⁵¹ of the European Treaties, casting some doubts over the legitimacy of the instrument even in people (like us) who affirm the rightfulness of this choice. Indeed, the model on which was designed the European Central Bank was addressed towards a stark distinction between monetary and fiscal policy⁵², following economic theories that put a mere price stability above all the other targets⁵³. However, in the past fifteen years, this pattern has shown all its limits and, in a peculiar

⁵⁰ In this regard, a contribution of Otmar Issing, a former member of the Executive Board of the ECB, results iconic. Indeed, in this paper (O. ISSING, *Hayek, currency competition and European monetary union*, in *IEA occasional papers 111*, 2000), the Author depicts a *continuum* between the ideas expressed by Von Hayek about the management of currency and the mandate of the ECB. In fact, Issing claims that «monetary policy in the Euro 11 countries has been denationalised and is being conducted by a supranational central bank, which is politically independent of the Governments of the Member States. Furthermore, any monetary financing of the public sector or privileged access to financial institutions is prohibited. The separation between public finance and monetary policy is thereby ensured» (*ivi*, p. 31). In light of this, it is not surprising that the Author, today, stands in open contrast to an instrument like the TPI (see O. ISSING, *The ECB's*, cit.).

⁵¹ The expression “grey areas” is often used by analysis related to many fields in which the European Union operates. Consider, *ex plurimis*, M.C. MARCHETTI, *Cittadinanza europea e cittadinanza nazionale. Luci e ombre di un rapporto difficile*, in *Società, Mutamento e Politica*, 2016, p. 146.

⁵² On this issue, the standpoint expressed by W.F. DUISENBERG (*Economic and Monetary Union in Europe – the challenges ahead*, in *Speeches of symposium “New challenges for monetary policy”*, 27 August 1999, see the [ECB website](#)) results meaningful. Indeed, the former President of the ECB, in the very beginning of the Euro, affirmed «We are sometimes already hearing the argument that, given that price stability has been achieved, monetary policy should now be re-oriented away from its primary objective of price stability towards other goals. One of the challenges facing the Eurosystem is to maintain the support of the broad public constituency necessary to resist these calls, which [...] are misguided and ultimately counter-productive. [...] I am convinced that the best contribution monetary policy can make to sustainable growth and employment in the euro area is to maintain price stability in a credible and lasting manner, allowing the considerable benefits of price stability to be reaped over the medium term».

⁵³ In this regard, it is relevant to underline that, until the 2008 crisis, there was a large consensus around the idea that, by achieving the price stability, the economic system would also move towards the financial stability (see, for example, A.J. SCHWARTZ, *Why financial stability depends on price stability*, in *Econ. Affairs*, n. 154, pp. 21-25). However, the “Great Recession” clearly showed the instability of this relation, posing relevant doubts about possible *thaumaturgical effects* related to a low inflation rate; in this sense, consider C. BLOT – J. CREEL – P. HUBERT – F. LABONDANCE – F. SARACENO, *Assessing the link between price and financial stability*, in *Journal of financial stability*, vol. 16, 2015, pp. 71-88.

context like the EU, it contributed to an excessive deterioration of the public finances of some Member Countries, causing a wider gap from the budgetary parameters set at the creation of the Eurozone. Therefore, so far, the ECB has exploited the leeway allowed by the rules with the purpose of following the actions carried out by the other major Central Banks of the World, consequently abandoning the ideological model on which it was shaped at the time of the Maastricht Treaty. In light of this, it is logical to affirm that the OMTs and, even more, the TPI have to be considered as products of this “emancipation” of the ECB from a too narrow, and short-sighted, interpretation of the mandate. Nevertheless, this “empowerment”⁵⁴, in the forthcoming scenario, could become fragile and the reason at the basis of this assertion is linked to the boundaries of the “grey areas” mentioned above. In fact, in the past years, the European Central Bank had the possibility to conduct a certain type of monetary policy for a main reason: the persistence of an extremely low inflation rate⁵⁵. Indeed, in a scenario in which the risk posed by deflation was higher than the one related to inflation⁵⁶, the ECB was allowed to sustain the overall economy of the Eurozone in the light of continued price stability. However, with the explosion of the war in Ukraine and the disruption of the global supply-chains, the Eurozone experiences, for the first time in more than two decades, a high level of inflation that forces the European Central Bank to tighten its monetary policy⁵⁷.

In view of this, considering the main objective that, according to the European Treaties, the ECB should pursue, we pose ourselves a question: will the European Central Bank be legitimated to activate the TPI, with the consequent enlargement of the monetary base, in a context marked by a relevant inflation rate? This interrogative raises (unfortunately, according to our view) several concerns and clarifies something that, so far, has been largely neglected: as we affirmed above, the “grey areas” have limits and, once we reach them, inevitably, the interpretation of the rules becomes quite restricted⁵⁸.

⁵⁴ Even other scholars have used this expression in order to describe the policies implemented by the ECB during the past decade. Consider, for example, E.C. HELDT – T. MUELLER, *The (self-)empowerment of the European Central Bank during the sovereign debt crisis*, in *Journal of European integration*, vol. 43, n. 1, 2021, pp. 83-98 and the critical stance expressed on the topic by N. SCICLUNA, *Integration through the disintegration of law? The ECB and the EU constitutionalism in crisis*, in *Journal of European Public Policy*, vol. 25, n. 12, 2018, pp. 1874-1891.

⁵⁵ From January 2012 to January 2020 the inflation rate of the Eurozone never exceeded 2,7%, while, instead, it fell in negative territory more than once. Refer to the [ECB website](#).

⁵⁶ Consider, *ex plurimis*, P. DE GRAUWE, *The legacy of the Eurozone crisis and how to overcome it*, in *Journal of Empirical Finance*, vol. 39, 2016, pp. 147-155.

⁵⁷ In October 2022, the Eurozone inflation rate reached 10,6%, while, in January 2023, it was at 8,6%. In light of this, since July 2022, the ECB has undertaken a path of interest rate hikes aimed at readdressing the price level towards the medium term target and, with the same objective, it has decided to start a (moderate) quantitative tightening, by reducing its securities portfolio of 15 billion euro per month on average between March and July 2023. See the [ECB website](#) and G. CLAEYS, *Finding the right balance (sheet): quantitative tightening in the Euro Area*, in *European Parliament Monetary Dialogue Papers*, 2023.

⁵⁸ In this sense, the standpoint expressed by W.F. DUISENBERG (*Economic*, cit.) is quite stark: «In situations where monetary policy might face a short-term trade-off between adverse developments in real activity and deviations from



A reform of the Treaties, albeit difficult to achieve, remains the only possible way to definitively emancipate the ECB from outdated legal constraints⁵⁹.

price stability, the over-riding priority accorded to countering the latter must be made absolutely clear. Any ambiguity on this point will simply endanger the credibility, and therefore the effectiveness, of the monetary policy response».

⁵⁹ In this sense, allow us to refer to M. BURSI, *Il rischio*, cit. and M. BURSI, *La reazione europea alla sentenza sul PSPP del Bundesverfassungsgericht: il doveroso avvio di una procedura d'infrazione*, in *Federalismi.it*, n. 23, 2021, pp. 43-46.