The 'Financial Stability of the Euro Area as a Whole': Between Jurisdiction and Veridiction

Tomi Tuominen*

Abstract

Through the concepts of jurisdiction and veridiction, Foucault conceptualised the different relations that markets and law have had throughout times. During the pre-modern era, the market was heavily regulated. Legal-locution through politics (jurisdiction) defined, for example, what was the just price for a given product. During the modern era the role of markets changed. Now, markets function as a site of truth-locution (veridiction). The markets, through formation of market prices, define what is good government. This article takes the European Court of Justice's judgement in C-62/14 Gauweiler as an example of the interplay between the forces of legal-locution and market-veridiction. The case concerned the European Central Bank's government bond purchasing programme. A central element of this programme, and also the condition for its legality, was that it does not interfere with the logic of the markets and retains the Member States' impetus to follow sound budgetary policy. The analysis reveals how the European Central Bank had to use legal-locution to make market-veridiction work because the markets were acting irrationally. The case is thus a paramount example of Foucault's maxim: 'One must govern for the market, rather than because of the market.'

> In clear terms this means first of all that the main objective of regulatory action will necessarily be price stability, understood not as fixed prices but as control of inflation. Consequently all other objectives apart from price stability can only be secondary and, so to speak, adjuncts. At any rate, they can never be the primary objective. In particular, the primary objectives must not be the maintenance [sic] purchasing power, the maintenance of full employment, or even balancing the balance of payments.

* University Lecturer in Law, Faculty of Law, University of Lapland.

1. Introduction

When you read this quotation in 2019 – in the post-Eurozone crisis era – you would likely assume that it comes from a technocrat such as Mario Draghi, the President of the European Central Bank (the Bank) from 2011 to 2019. Or perhaps you had in mind a politician such as Herman Van Rompuy, who served as President of the European Council from 2009 to 2014. Both men were in office during the height of the Eurozone crisis and participated in crafting the European Union's responses to the crisis. However, the quotation is from Michel Foucault's 1978-1979 lectures at the Collège de France, later published as the seminal volume *The Birth of Biopolitics* (Foucault 2008, 138-139).

These lectures varied from Foucault's previous ones in that here he engaged with contemporary issues for the first time. Although Foucault commenced his analysis from the middle ages, he approached very close to the era of Thatcher and Reagan, a time that is usually taken as the starting point of modern neoliberalism. One of Foucault's points in these lectures was to show how the role of the markets has changed, and how, along with that, also the role of law and government changed. In fact, this change is central for his conceptualisation of *gouvernementalité*, as this transformation also affects the way in which power operates.

Foucault described the following shift: During the pre-modern era, the market was heavily regulated. There were rules on what could be sold, what the just price was, and the consequences of fraudulent action by the market participants. According to Foucault, this meant that the market functioned as a site of justice, 'a place where what had to appear in exchange and be formulated in the price was justice'. The market was therefore a site of *jurisdiction* (Foucault 2008, 31). This changed, however, in the modern era. The role of government within the markets changed. Central in this shift was a 'form of rationality' that made possible the self-limitation of governing. According to Foucault, it was political economy. The objective of political economy was the enrichment of states, and central to it was competition between states (Foucault 2008, 13-15), but now the value of governmental practices was determined at the markets – and thus by the markets – through the formation of market prices. The mechanism of price formation is therefore a form of truth-locution and thus 'good government' functions according to the truth that the market produces. The market is therefore now a site of *veridiction* (Foucault 2008, 32).[1] Thus, in practice, 'market principles frame every sphere and activity, from mothering to mating, from learning to criminality, from planning one's family to planning one's death' (Brown 2015, 67).

Regarding sovereignty, this signalled simultaneously an ontological, epistemological, and political reformulation, if not a complete revolution (Brown 2015, 57). The markets took over the role of law. It was not the law that legitimised the state anymore but rather the markets. But unlike liberal economic theorists of

1 The terms 'truth-locution' and 'legal-locution' as expressions of Foucault's idea on the relation between the market-system and political power are from Hurri 2014, 167-168.

the modern era had argued, the role of the state was not to leave the markets alone; rather, government must 'intervene on society so that competitive mechanisms can play a regulatory role at every moment and every point in society and by intervening in this way its objective will become possible, that is to say, a general regulation of society by the market' (Foucault 2008, 145). This means an activation of the state on behalf of the economy in order to facilitate economic growth and to economise the society as a whole (Brown 2015, 61-62).

Nevertheless, the contemporary relevance of these lectures stems from that which was missing from Foucault's analysis: the very fact that they were delivered at the dawn of modern neoliberalism. While Foucault was able to map out the fundamental ways in which neoliberal governance works, his analysis lacked two important features from a contemporary, European perspective: Foucault's neoliberalism was state-centric, and at the time, the economy was not as financialised as it is today (Brown 2015, 70-72). Thus, the 'markets' that Foucault described are very different to the 'markets' that are at the centre of this article. Foucault's conception was that markets are a domain in which goods are exchanged for a price that is based on supply and demand. The financial markets are different though. Financial markets are not about commodities as such, but specifically about money. Thus, the 'irrationality' of the markets, discussed later in this article, needs to be understood specifically from this perspective; we are talking about governing the market itself, not about governing some other aspect of society through the markets.

The opening quotation of this article describes what role monetary policy played in German ordoliberalism, in the form as it was conceived in the 1930s. The Eurozone crisis inspired ordoliberalism's return to academic debates, as many have claimed that the reactions that the European Union conducted to combat the crisis and to prevent new crises were clear expressions of ordoliberal thinking (see Blyth 2013).[2] As is widely known, the law has a specific function in ordoliberalism (see Tuori & Tuori 2014, 13-60), much like in its cousin neoliberalism too (see Gill & Cutler 21014). This is also clearly visible in the quotation from Foucault.

The purpose of this article is to analyse one specific contemporary instance in which the problematisation conceptualised by Foucault four decades ago, and recently updated by Wendy Brown (2015), is manifested in a very concrete and politically important way. On 16 June 2015, the Court of Justice of the European Union (the Court) delivered its judgement in the case of *Gauweiler*.[3] This was a paramount judgement for several reasons (see Tuominen 2018), but for our current purposes, its primary relevance lies in the fact that, together with the Court's earlier judgment in *Pringle*,[4] it condoned the approach that the European Union had adopted to solving the Eurozone financial and debt crisis: austerity induced from the outside as a precondition for financial assistance. States at the brink of bankruptcy, Greece

2 However, it has been seriously questioned whether German ordoliberalism has anything to do with current neoliberalism or what Germany itself has been doing. See Young 2014.
3 C-62/14 *Gauweiler* ECLI:EU:C:2015:400.
4 C-370/12 *Pringle* ECLI:EU:C:2012:756.

being the best example, had to introduce massive cuts to their government budgets and implement a host of 'reforms' regarding various policy fields, most notably to social security, education, employment and pension systems.

From its very inception, the logic of the Economic and Monetary Union had been to subject the participating states to the logic of the markets. This is due to the 'asymmetrical' structure of the currency union: monetary policy (the setting of interest rates) is centralised to the Bank, but economic policy (government taxing and spending, and policy issues related to the economy) remains a national issue. Crudely simplified, economic policy is about social welfare, whereas monetary policy is about the price of government financing; the latter is needed in order to secure the former. As each state was to remain responsible for their own economic policies, the currency union included mechanisms for making sure that states do not incur too much debt and become bankrupt, in which case the other states would need to come to their rescue. The purpose of these rules – the ban on central bank financing (Article 123 TFEU) and the no bail-out clause (Article 125 TFEU) – was to subject the Member States' economic policies to market-veridiction; the formation of government interest rate levels was to act as an incentive for states not to have budget deficits nor to incur more debt (see Lastra & Louis 2013). As we know now, these rules did not work. The adopted crisis response mechanisms aim to make market-veridiction work. States are subjected to the markets; states need to apply austerity in order to receive money from the markets.

Gauweiler brings into relief Foucault's main point about the role of the markets and also two related issues. The Court addressed each of them as a separate legal point. First, the Weberian rationality of modern law is central to the way in which the economy becomes the guiding force of society. One would assume that the individual legal mechanisms that the European Union enacted as a reaction to the Eurozone crisis would be the means to an economic situation that is seen as a desirable end. However, the means as such seem to contain policy choices and values. In other words, the ends are already inscribed into the means. Such means-ends rationality is visible in the first legal question that the case addressed: how do we delineate between 'economic' and 'monetary' policy, and what significance do we give to the stated objectives and the actual effects of such measures?

Second, within the realm of formally rational modern law, the legality of governmental actions is reviewed through their proportionality. Specifically, the proportionality review in *Gauweiler* hinged on the role of expert knowledge within economic governance, an issue that is central to many Foucauldian analyses and which is at the very core of *gouvernementalité*. Here, the point is that although expert knowledge is often purported to be objective and neutral – that politicians set the ends and then experts devise the means to reach them – with regards to the economy, this is definitely not the case. In fact, the role of economic expert knowledge remains highly disputed and it often makes it possible to masquerade policy choices behind a veil of technocracy.

Third, the case also concerned the operation of market-veridiction – how markets tell the truth (‘*dire le vrai*’; Foucault 2008, 32) about government policies. But as the markets were not functioning as market fundamentalists supposed they should, legal-locution needed to intervene in order to reinstate the possibility of market-veridiction. Market-veridiction is a form of knowledge production, which is then supposed to guide the actions of states; market-veridiction is thus a basis of power.

This article schematises *Gauweiler* as an example of Foucault’s maxim: ‘One must govern for the market, rather than because of the market’ (Foucault 2008, 121). This article’s contribution is in showing how the move to the post-state world and the large-scale financialisation of the economy affects our society – a point that was still missing from Foucault’s analysis, as these changes had not yet occurred forty years ago. Although there is an abundance of doctrinal analysis on *Gauweiler*, its significance from a Foucauldian perspective has not been analysed to date.[5] I show how the markets truly are at the ‘intersections between jurisdiction and veridiction’ (Foucault 2008, 34). As explained above, all three discussed issues relate to the Foucauldian power/knowledge nexus. This is because ‘the goals of power and the goals of knowledge cannot be separated: in knowing we control and in controlling we know’ (Gutting & Oksala 2019).

This article proceeds in the following manner: Sections 2 and 3 explain the background of the case and contextualise the subsequent analysis; Sections 4, 5 and 6 address the three legal questions that the case concerned, each containing a sub-section that explains the theoretical starting point for analysing the specific legal issues, and another sub-section that then analyses the specific part of the Court’s judgement; Section 7 concludes the article.

2. The crisis

The Eurozone crisis was a crisis in several respects (see Menéndez 2017). Of most concern to us here is the political crisis, or what Jürgen Habermas (2012) has called the crisis of European democracy. I will just briefly mention three instances that depict well the political sentiments that were prevalent during the height of the crisis. All three of these can be viewed as instances wherein experts produce knowledge about crises, which is then operationalised as a tool for purporting certain political ends. In other words, how crises are thus a technique of *gouvernementalité* (see Lawrence 2012).

First, the Heads of State or Government of the European Union issued a statement in which they pledged their allegiance towards the common currency and adopted ‘safeguarding the financial stability of the euro area as a whole’ as the new paramount policy objective.[6] This statement has been credited with having signalled

5 Cf. a Foucauldian analysis of the Eurozone crisis through the concepts of ‘pastorship’ and ‘discipline’, De Lucia 2016. The argument by Schepel 2017 is rather similar as to the one presented here, however he does not utilise a Foucauldian framework.

6 See Statement by the Heads of State or Government of the European Union, Brussels, 11 February 2010, <https://www.consilium.europa.eu/media/20485/112856.pdf> (accessed 31 May 2019): ‘All euro area

a transformation in the political contract between the Member States (see Borger 2018), and the aim is clearly visible in all of the different crisis response measures adopted in the wake of the crisis (see Tuominen 2017). To clarify, it is pertinent to mention that price stability is related to the broader conception of 'financial stability'. However, while we do have a clear definition for price stability (inflation), there is no clear definition of financial stability (Tuori & Tuori 2014, 131-133).

Second, Angela Merkel, then-Chancellor of Germany, expressed the political maxim: '*Scheitert der Euro, dann scheitert Europa*.'[7] Whether this was a notion that the European leaders actually believed in or it was merely a ploy to sell the rescue mechanisms and austerity politics to the public is questionable. Nevertheless, it is a clear expression of the sentiment that drove European politicians ahead – and when the stakes are this high, something as petty as the law should not be in the way of making important decisions!

Third, and this brings us to *Gauweiler* and to our actual case study, the then-President of the Bank Draghi announced that the Bank was serious about the crisis and the way it intended to combat it: 'Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.'[8] What became known as 'Draghi's bazooka' was the announcement of the ECB's Outright Monetary Transactions Programme (the Programme), a measure closely linked to the aim of safeguarding financial stability and the other crisis response measures. Next, we turn to our case study and the litigation that ensued from this announcement.

3. He who must not be named

The Programme was intended to be the Bank's tool for safeguarding the functioning of its monetary policy transmission mechanism and the singleness of its monetary policy. Under the Programme, the Bank would have purchased Member States' sovereign bonds from the secondary markets but not directly from the issuing state, that is, from the primary markets. In practice, through the Programme, the Bank pledged to purchase government bonds from the markets, with the intention that this pledge would result in private banks' purchasing them directly from the states (which the Bank is prohibited from doing). The Bank would then later purchase these bonds from the private banks. As this would result in an increased interest for private banks to purchase government bonds, the interest rates of these bonds would decrease, which in turn would reduce the loan refinancing costs of these states.

Since such purchases are not specifically regulated by the EU Treaties, the

members must conduct sound national policies in line with the agreed rules. They have a shared responsibility for the economic and financial stability in the area.'; 'Euro area Member states will take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole.'

7 Speech by Angela Merkel before the *Bundestag* on 19 May 2010, <https://www.bundestag.de/dokumente/textarchiv/2010/29826227_kw20_de_stabilisierungsmechanismus-201760> (accessed 31 May 2019).

8 Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> (accessed 31 May 2019).

conditions for the use of the Programme were drawn up by the Bank itself. According to the Bank, the necessity of the Programme stemmed from the magnitude that the Eurozone crisis had reached in 2012: the normal monetary policy tools of the Bank were not functioning; hence, in order to conduct its primary task of maintaining price stability, it had to resort to such unconventional monetary policy measures. No purchases were ever made through the Programme, as its mere announcement by Draghi was enough to calm the markets. Since then, the Bank has initiated several other programmes for conducting secondary market operations.[9]

Gauweiler[10] concerned the competences of the Bank: could the Bank adopt the Programme? The judgement of the Court addressed three legal issues. First, it addressed the delineation between economic and monetary policy (Articles 119 and 127 TFEU). As the Bank's mandate covers only monetary policy, if the Programme were about economic policy, then adopting it would breach the powers conferred onto the Bank. Second, the Court addressed whether the Programme was proportionate. Third, the Court questioned whether the Programme breached the ban on central bank financing (Article 123 TFEU) (see Borger 2016).

Each of the three legal questions relates to a central concern of neoliberal governance. First, when tackling the delineation between economic and monetary policy, we come face-to-face with the formal rationality of modern law and the distinction between means and ends. Second, the proportionality analysis conducted by the Court displays how political power is used behind a veil of technocracy. Third, the answer to whether the Programme is a form of banned central bank financing hinges on how it relates to the markets – specifically, whether it interferes with the logic of the markets, i.e., whether the markets retain their position as a site of veridiction. Next, we discuss each of these issues in turn.

4. Financial stability as a means or an end?

> The fact that [the Programme] might also be capable of contributing to the stability of the euro area, which is a matter of economic policy …, does not call … into question [the conclusion that it is a monetary policy measure].[11]

4.1 The formal rationality of modern law

Max Weber's ideas on rationality are closely linked to the main theme of this article: knowledge. Rational action as such presupposes knowledge. Modern Western civilisation is a culmination of a gradual process of disenchantment and intellectualisation. Religion, theology and metaphysics are no longer sources of

9 See <https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html> (accessed 31 May 2019).
10 *Peter Gauweiler* was a Member of Parliament in the German *Bundestag*. He was one of the people who initiated the case before the German Federal Constitutional Court, and he has done so also on other occasions. See <https://en.wikipedia.org/wiki/Peter_Gauweiler> (accessed 31 May 2019). Being an avid euro-sceptic, some circles of EU scholars see him as a *persona non grata*, a person whose name shall not be mentioned.
11 C-62/14 *Gauweiler*, para 51.

knowledge; instead we build on means-end relationships, and systematic and logical reasoning (Kim 2017).

This led Weber to distinguish between two forms of rational action: value rational and instrumentally rational. *Value rational action* is based on a belief in the value that the chosen course of action has regardless of its consequences. What matters is the behaviour itself, not the consequences. Here, ethical or aesthetic value is attached to the behaviour itself, not the consequences. Central is the idea that the actors choose the value themselves, and that it is not imposed or derived from authority, tradition or affect. *Instrumentally rational action*, conversely, is based on an assessment of the mutual relationship between ends and means. Everything is viewed as a precondition, means or obstacle to action. Action is directed towards ends, the consequences of the action. Instrumentally rational action may serve a purpose chosen through value rationality, but 'instrumentally rational action itself does not carry the value, and in this important respect, the means are distinct from the end'. Furthermore, from an instrumentally rational perspective, value-rationality is always irrational (Brown 2015, 115-121).

According to Kaarlo Tuori's reading of Weber's schemes of rationality, societal structures (as opposed to culture, action and personality) are *formally rational* when they represent instrumental rationality or create preconditions for it, whereas they can be said to represent *substantive rationality* if they further the realisation of some value(s). Whether something is formally rational – that is, effective in pursuing a given end – can be ascertained on the basis of *objective factual criteria*, while the assessment of substantive rationality is always done from the perspective of the adopted *value* (see Tuori 2002, 32-50).

As a result of disenchantment and intellectualisation, formal rationality is now embedded into social structures. This is perhaps most clearly visible in the capitalist economy and the bureaucratic state. Such formal rationality works in a highly intrusive manner: in addition to making it possible for us to act rationally from a means-ends perspective, formal rationality also imposes limits on whose ends our chosen means can be made to serve, most notably so in that the economic interests prevailing in the marketplace also condition our thinking in other realms. When our thinking becomes dominated by a market logic (and the underlying market values), this inevitably affects all of our actions. Because of this, we are forced into formally instrumental rational action, which rules out substantive instrumental rationality, as it presupposes conscientious value choices (Tuori 2002, 35-36). Or, in Foucauldian terms, the normalising power of market rationality affects our decisions, both the ends and means, without our even noticing it.

To sum up, pre-modern law was attached to such extra-legal values as ethics, utilitarian rules or political maxims, whereas modern law is detached from them and is thus autonomous and formally rational (Tuori 2002, 38-39). In light of our current theme, Tuori postulates the fundamentals in the following manner: 'In modern society, the formal rationality of the law is presupposed by, first of all, the *capitalist economy* and *bureaucratic administration*, both based on purposive-rational [instrumentally rational] action' (Tuori 2002, 43). Through formally rational law, governments make individuals act purpose-rationally, whereas here markets impose formal rationality onto governments.

4.2 A necessity for the maintenance of price stability

In answering the first question, the Court needs to return to the delineation between economic and monetary policy, which it had already previously addressed in *Pringle*. This time, however, the Court's predicament is to find the measure at hand to fall under monetary policy and not economic policy, which is the opposite of the case with the European Stability Mechanism (the Mechanism) in *Pringle* (see Borger 2013).

According to the Court, the starting point for defining whether the Programme is an economic or monetary policy measure must be the stated objectives of the Programme itself.[12] Here, the Court cites its earlier judgment in *Pringle*, so let us recount the logic the Court adopted there.

In *Pringle*, the Court's argumentation for delineating between economic and monetary policy was the following: First, that in the EU Treaties themselves, monetary policy is defined through its objectives, rather than through the instruments via which it is operated (Articles 3(1)(c) and 127 TFEU).[13] Second, the objective of the Mechanism is to safeguard the financial stability of the euro area as a whole, whereas the objective of monetary policy (as defined in the EU Treaties), is to safeguard price stability. From this, the Court draws the following conclusion: 'Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro'.[14] The Court does not, however, further specify this finding. Only later in the judgement, when discussing the possibility that the Mechanism would be a monetary policy measure, since its use might have effects on inflation (i.e. price stability), the Court opines that '[e]ven if the activities of the [Mechanism] might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted'.[15]

So, according to the Court, if the objective of a measure is economic policy, it is not turned into a monetary policy measure even if it affects price stability, as long as these effects are only indirect. I shall call this the *indirect effects doctrine*.

Coming back to *Gauweiler*, the Court then cites the objective of the Programme from the Bank's press release ('an appropriate monetary policy transmission and the singleness of the monetary policy'), and distinguishes two aims from it: safeguarding the singleness of monetary policy and safeguarding the monetary policy transmission

12 C-62/14 *Gauweiler*, para 46.
13 C-370/12 *Pringle*, para 53-54.
14 *Id*., para 56.
15 *Id*., para 97.

mechanism.[16] According to the Court, the first aim is legitimate as is stated in Article 119(2) TFEU ('a single currency, the euro, and the definition and conduct of a single monetary policy'). Regarding the second aim, the Court reasons that safeguarding the monetary policy transmission mechanisms is both 'likely' to contribute to the primary aim (a single monetary policy) and that it also contributes to the overarching objective of the Bank's monetary policy (price stability).[17] Here, the conflation of means and ends, to which the Court must revert in order to find the Programme to be a monetary policy measure, is starting to appear.

After having thus found that the Programme is about monetary policy, the Court then still needs to assess whether it is perhaps also about economic policy. If the Programme also contributes to 'the stability of the euro area', does this turn it into an economic policy measure?[18] Here, the Court returns to the indirect effects doctrine, established in *Pringle*: the fact that a measure might also have indirect effects within the realm of economic policy does not mean that it should be classified as an economic policy measure.[19]

After this conceptualisation, the Court then addresses the Programme in light of the facts of the case. In essence, here the Court must define how buying sovereign bonds (from secondary markets, so as not to breach Article 123 TFEU, which will be discussed below in section 6) is not an economic policy measure – although the reason why sovereigns issue bonds is to finance their government expenditures. Simply put, issuing sovereign bonds is about economic policy when viewed from the perspective of the issuing state.

The Court begins to unwind this issue by stating that '[i]t is clear' from Article 18(1) ESCB Statute that the Bank may deal with sovereign bonds on the financial markets.[20] Next, the Court tackles the problem of selectivity, raised by the German Federal Constitutional Court in its referral: if the Programme is used to purchase the bonds of specific states (i.e. crisis states), how can it be about a 'single' i.e. unitary monetary policy? First, the Court states that selectivity does not 'imply, of itself,' that the Programme would not be a monetary policy measure. Second, the Court states that the EU Treaties do not even necessitate non-selectivity.[21] From this follows the conclusion that 'it is apparent' that the Programme is a monetary policy measure.[22]

A second hurdle that the Court faces is the fact that the Programme is intricately linked with the Mechanism – a measure that the Court had itself judged to belong within the realm of economic policy in *Pringle*. As purchases through the Programme are conditional on the state's having accepted a bail-out from the Mechanism, and therefore also being subject to a macro-economic adjustment programme (i.e. austerity measures), does this mean that the Programme too is an

16 C-62/14 *Gauweiler*, para 47.
17 *Id.*, para 48-49.
18 *Id.*, para 51.
19 *Id.*, para 52, citing C-370/12 *Pringle*, para 56.
20 C-62/14 *Gauweiler*, para 54.
21 *Id.*, para 55.
22 *Id.*, para 56.

economic policy measure? Again, the Court reverts to its indirect effects doctrine: 'It is, of course, possible that' the Programme 'may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes'.[23] According to the Court, this does not, however, question the Programme's nature as a monetary policy instrument. The Court makes six arguments to back up this conclusion[24], only one of which I will highlight here. According to the Court, conditionality between buying bonds and following the imposed austerity measures ensures that Member States targeted with possible Programme purchases follow their macro-economic adjustment programmes, and from this follows the fact that the Bank 'thus ensures that the monetary policy measures it has adopted will not work against the effectiveness of the economic policies followed by the Member States'.[25]

So, succinctly: the Programme's indirect effects on economic policy support the austerity politics imposed onto the crisis states. Next, the Court needed to assess whether this was proportionate, and whether the Bank had used its economic expert knowledge correctly when deciding on the Programme and assessing the market situation that it was a reaction to.

5. Disproportionate proportionality?

> [I]n view of the [Bank's] broad discretion, nothing more can be required of the [Bank] apart from that it use its economic expertise and the necessary technical means at its disposal to carry out [its proportionality] analysis with all care and accuracy…[26]

5.1 The modern ephorate and proportionality review

In the modern state, various governmental agencies operate without direct input from electorally legitimised sources of authority. Central banks are an example par excellence, as a central aspect in designing how they function is to make them independent and to insulate them from political influence (see Smits 2008). The crucial point, however, is that such bodies often have more impact on the society than decisions by elected politicians.

Martin Loughlin has characterised such unaccountable institutions as 'the new ephorate'. Ephor (*ephoros*) was the title given to magistrates in ancient Sparta. Together with the king, the ephors formed the main governing body. According to Loughlin, central in the role and power of the modern ephorate is, first, the fact that their position is based upon a supposed expert knowledge, and second, that their decisions circumscribe the actions of elected officials (Loughlin 2010, 450). To this, we should also add the fact that the ephors were not subject to control and

23 C-62/14 *Gauweiler*, para 58.
24 See *id*., para 59-65.
25 *Id*., para 60.
26 C-62/14 *Gauweiler*, para 75.

accountability (see Nipple 1994, 10), which is contrary to what we nowadays expect from governmental institutions that use public power. Ultimately, then, the new ephorate poses a democratic concern.

In the ideal situation, the ephorate would contribute towards the quality of the decisions that our political system produces. The expert knowledge that the ephors possess would be first used to map out the alternative decisions and weigh out their pros and cons, whereas in the second phase the elected politicians would make the actual decision. Only if the ephorate are independent will they be able to use their expert knowledge objectively and without political influence (Loughlin 2010, 451). This is clearly the rationale behind making central banks independent – behind making them beyond the reach of political pressure and influence (see Smits 2008). However, it is this very same reason that creates the problem that is associated with their position from the perspective democratic accountability.

What the modern ephorate does and the types of policies they pursue are also central to the Foucauldian idea of *gouvernementalité*. As Loughlin explains, their actions result in 'the extension of the disciplinary mechanisms of police to the central questions of government: fiscal rules devised in the regulatory network discipline ministers, monetary policies laid down by central banks constrain governments…' (Loughlin 2010, 452). This quotation encapsulates the problem that the modern ephorate poses from the perspective of the critique of neoliberalism.

Yet modern law, although permeated by formal rationality and *gouvernementalité* through political economy, is not blind to the problems posed by the modern ephorate. In fact, modern law has devised a specific legal mechanism for controlling the powers used this way: proportionality. From a legal perspective, the shift from the pre-modern to the modern blurred the line between justice (law) and police (government): 'the juridical logic of legal/illegal blends into, and with respect to issues of administrative government tends to be supplanted by, the disciplinary logic of proportionate/disproportionate' (Loughlin 2010, 459-460). In the modern administrative state, the legality of all governmental action is reviewable on the basis of a 'means-ends rationality', whereas the criteria for this analysis are based on the position and competence of that particular agency. Thus, the basic type of law is a 'disciplinary law'; a law that determines whether the government could pursue the given action (Loughlin 2010, 460).

Joana Mendes (2016) has instigated a debate within EU legal scholarship on the issue of technical discretion left to administrative agencies. Whereas policy discretion concerns which policies the legislator can adopt and how to pursue them, technical discretion is about the actions that administrative agencies take on the basis of their technical expert knowledge. Simply put, the agency has been tasked with a certain duty and whilst pursuing its tasks, it needs to make technical assessments on which course of action is best suited for the situation at hand. Depending on the situation and the norm giving competence to the agency in an individual instance, the use of discretion can lead to two outcomes: either the expert knowledge can dictate one alternative that the agency must pursue, or the expert knowledge can map out several alternatives, from which the agency can then choose its preferred option.

With regards to policy discretion, it is easy to fathom why courts should exercise only a light proportionality review. If the review is stringent, then the courts will supplant the legislator's policy choice with their own. This is problematic from the perspective of the division of powers. To counter this, courts sometimes show deference towards the legislative branch; they respect decisions made by the democratically legitimate decision-maker and do not intrude by reviewing such decisions (see Henckels 2017). The situation is different, though, when it comes to technical discretion. Indeed in some situations, agencies make decisions based on 'objective' knowledge on the issue at hand, and courts do not have the capacity to understand these decisions and should therefore not replace them with their own (see Paloniitty & Kangasmaa 2018). However, there are also instances in which agencies make decisions with grave consequences and the nature of the knowledge on which they base these decisions is far from objective, perhaps even disputed. It is in these types of cases that we face the problem of the modern ephorate most directly.

The basic dilemma associated with government agencies' being given broad discretion is this: law grants powers to public administration, but it should also limit them. But how should law define these limits when oftentimes the 'best' decision for the administration to make cannot be defined through legal means (see Mendes 2016, 422)?

With regards to policy discretion, it is easy to understand why courts should not enforce a stringent level of review, as the purpose of policy discretion is to leave the decision-making body the room to balance out different public interests, and therefore courts should not replace these policy considerations with their own judgements. With respect to technical discretion, though, the argument is different, since technical discretion is based on the use of expert knowledge and should not entail policy choices as such. The use of technical expert knowledge either dictates the one right answer or the group of answers from which the administrative will then choose, but the latter is not an instance of proper discretion. In this case, questions on the legitimacy of judicial review do not arise, as here courts are simply ensuring that the decision complies with the criteria set by law, but there is no weighing of competing public interests (Mendes 2016, 423-424).

However, as explained by Mendes, the distinction between discretion proper (policy discretion) and technical discretion is often futile, since the two are entangled in a way that prevents us from realising the true stakes: 'whether discretion emerges from policy judgments or from choices that technical expertise does not preclude (in the sense that such expertise does not provide only one reasonable solution) may be a very thin line' (Mendes 2016, 425-426). In other words, focusing on the technical nature of a decision masks the truly political nature of such decisions. Let us next analyse the proportionality analysis of the Court in *Gauweiler* with this in mind.

5.2 The technical expertise of the bank

The Court frames its proportionality analysis of the Programme by stating that the assessment must be made in light of the objectives of the Bank's monetary policy.[27] The Court then repeats its standard phrase on proportionality: 'the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives'.[28] This leads the Court to conclude that since the use of the Programme requires the Bank 'to make choices of a technical nature and to undertake forecasts and complex assessments', the Bank must be allowed broad discretion when implementing the Programme.[29]

The Court thus reveals how it situates itself in relation to reviewing administrative decisions of a technical nature. This does not mean, however, that the Court would adopt a completely deferential attitude, since despite such broad discretion, certain procedural guarantees must be in place. This requires the Bank to give 'an adequate statement of the reasons' why it adopted the Programme, although the Bank is not 'required to go into every relevant point of fact and law'. Conversely, when the Court conducts its analysis in these types of cases, it must take into consideration the 'context and the whole body of legal rules governing the matter in question'.[30]

In the first part of its proportionality, concerning the appropriateness (suitability) of the Programme, the Court recounts how the Bank's view of the prevailing economic situation in the Eurozone during the adoption of the Programme was the following: there was high fluctuation and extreme spreads in the interest rates on government bonds of various euro area states. These spreads were 'not accounted for solely by macroeconomic differences' between these states, but rather were a result of 'the demand for excessive risk premia for the bonds issued by certain Member States, such premia being intended to guard against the risk of a break-up of the euro area'.[31] After having read this passage, it is important to remember that one of the original elements of the Economic and Monetary Union was that Eurozone Member States are responsible for their own economies and that the market mechanism of pricing government bonds exists to ensure that Member States have incentives to pursue sound public finances (see Lastra & Louis 2013). According to the Bank, these spreads in the bond yields were not caused by this market mechanism, but rather were due to speculation that the euro area might break up.[32] This condition of the markets was such that the functioning of the Bank's monetary policy transmission mechanism was 'severely undermined'. The Bank was no longer able to transmit impulses into parts of the economy of the euro area (through its normal monetary

27 C-62/14 *Gauweiler*, para 66.
28 *Id.*, para 67.
29 *Id.*, para 68.
30 *Id.*, para 69-70.
31 *Id.*, para 72.
32 For an analysis of such 'irrationality' of the markets, see Schepel 2017.

policy measures).[33]

Next, we come to the Bank's technical expert knowledge. According to the Court, this estimation of the economic situation by the Bank was not 'vitiated by a manifest error of assessment'.[34] This analysis by the Bank was questioned in the proceedings before the referring German court. However, the Court did not give much weight to such claims, but instead retreated behind the veil of technocracy: 'given that questions of monetary policy are usually of a controversial nature and in view of the [Bank]'s broad discretion, nothing more can be required of the [Bank] apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy'.[35] The nature of this statement is brought into relief when contrasted with the previous finding on the Bank's reading of the market situation: on one hand, the Bank's views on economic policy cannot be questioned, but on the other hand, the Bank itself states that the markets were functioning irrationally and that therefore it needed to take action. Here, the Court acknowledges the contested nature of economic knowledge and simultaneously concedes that courts of law should not intrude into such issues.

After having established this, the Court then explains why the Bank was correct in adopting the Programme. In essence, the Court is saying that the markets were acting irrationally, that there were 'unjustified fears about the break-up of the euro area'. To 'dispel' these irrational assumptions by the markets, the Bank had to 'play a part in bringing about a fall in — or even the elimination of — excessive risk premia', which it did by way of adopting the Programme, and that the Programme is 'likely' to help in fixing this problem.[36]

But what is this problem actually about? It is the taboo of the death of the markets. This leads us to the third issue, namely that of market-veridiction and how the markets are supposed to function.

6. Subjectivation to the veridiction of the markets?

> [The Programme] is accompanied by a series of guarantees that are intended to limit [its] impact on the impetus [of the Member States] to follow a sound budgetary policy.[37]

6.1 Formalisation of the state on the basis of the markets

In the introduction, Foucault's conceptualisation about the role of market power (veridiction) and political power (jurisdiction) was explained. The third legal issue of the case revolves around this juxtaposition. More specifically, we are concerned about the way in which the Court purports truth-locution by the markets to operate,

33 C-62/14 *Gauweiler*, para 73.
34 *Id*., para 74.
35 *Id*., para 75.
36 *Id*., para 76-77.
37 *Id*., para 115.

and what is actually at stake.

Foucault posed the question of whether neoliberalism will be able to bring about 'a general formalization of the powers of the state and the organization of society on the basis of the market economy' (Foucault 2008, 117). The purpose of such a shift is not to facilitate markets as a site of exchange, but rather to make markets a site of competition (Foucault 2008, 118). This would signal the superimposition of government to market mechanisms and competition. 'Government must accompany the market economy from start to finish' (Foucault 2008, 121). In the case of the Eurozone, this means that states are made to compete against one another; 'the markets' are the government bond markets. The formation of bond yields (the amount of interest that governments must pay for their debts) is thus both a constant judgement on governments' actions as well as a place of competition between them.

With this in mind, it will be intriguing to see how the Court argued why the Member States should have an impetus to follow 'sound budgetary policy',[38] and furthermore, why the Programme is not to bring about the harmonisation of government bond interest rates. By way of clarification, it is necessary to mention that the term 'budgetary policy' can here be understood as a synonym for economic policy – the Member State's overall economic policy affects the balance sheet of their government budget.

6.2 An impetus to follow sound budgetary policy

After having concluded that the Programme is proportionate, the Court then still had to address one legal concern, namely, whether the Programme breaches the ban on central bank financing stipulated in Article 123 TFEU. The Court begins its analysis by reading Articles 123 TFEU and 18(1) ESCB Statute together, and concludes from them that the Bank is not prohibited from taking action on secondary bond markets.[39] However, actions on the secondary markets are prohibited if they have 'an effect equivalent to that of a direct purchase', which would undermine the effectiveness of the ban in Article 123 TFEU.[40] Again, to determine what this means more specifically, recourse must be sought to the objectives of a measure.[41]

In *Pringle*, the Court was obliged to define what type of assistance (i.e. bail-out) is allowed under Article 125 TFEU. Adopting a 'two-order telos' argument (see Tuori & Tuori 2014, 120-136), the Court opined that the no bail-out clause of Article 125 TFEU 'ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline'.[42] The rationale of this rule is to safeguard the financial stability of the euro area – the same goal as that of the Mechanism. Therefore, although by literal interpretation, the Mechanism might seem to breach the no bail-out clause, under

38 *Id*., para 100.
39 *Id*., para 93-96.
40 *Id*., para 97.
41 *Id*., para 98, citing C-370/12 *Pringle*, para 133.
42 C-370/12 *Pringle*, para 135.

such reasoning it is nevertheless permitted.[43]

In *Gauweiler*, the Court conducts a similar analysis of Article 123 TFEU. According to the Court, 'the aim of Article 123 TFEU is to encourage the Member States to follow a sound budgetary policy'.[44] This means that the Programme should function in a way that does not compromise this objective. Specific safeguards are needed so that such endangerment does not occur. The Court identifies the following safeguards: First, the Programme operates only on secondary markets.[45] Second, there are enough measures in place that prohibit private actors, operating on the primary markets, from acting as intermediaries to the Bank: the blackout period between the issuing of bonds on the primary markets and when they are purchased on the secondary markets by the Bank, and the fact that the total amount of Programme purchases is not specified in advance.[46] Third, and most importantly, if the Programme nevertheless 'lessen[ed] the impetus of the Member States concerned to follow a sound budgetary policy', then it would be in breach of Article 123 TFEU.[47]

This third point is of most concern for us since here the Court is again faced with the effects that monetary policy measures have on economic policy. The Court concedes the following: 'the conduct of monetary policy will always entail an impact on interest rates and bank refinancing conditions, which necessarily has consequences for the financing conditions of the public deficit of the Member States'.[48] With this in mind, the Court proffered three reasons why the Programme nevertheless does not lessen the Member States' impetus to follow a sound budgetary policy. First, purchases through the Programme cease when its objectives have been achieved.[49] For this reason, Member States cannot 'rely on the certainty' that the Bank will purchase their bonds in the future. Furthermore, the Programme does not 'bring about a harmonisation of the interest rates applied to the government bonds of the Member States of the euro area regardless of the differences arising from their macroeconomic or budgetary situation'.[50] Second, the technical features of the Programme de facto limit its use, for which reason it does not lessen the Member States' impetus to follow sound budgetary policy.[51] Third, the link between the Programme and the Mechanism – 'the structural adjustment programmes to which the Member States concerned are subject' – also prevents the Programme from having adverse effects on the Member States' impetus to follow sound budgetary policy.[52] In other words, the austerity measures ensure that in return for the aid received

43 *Id*., para 133-147.
44 C-62/14 *Gauweiler*, para 100.
45 *Id*., para 103.
46 *Id*., para 104-106.
47 *Id*., para 109.
48 *Id*., para 110.
49 *Id*., para 112.
50 *Id*., para 113.
51 *Id*., para 115-119.
52 *Id*., para 120.

through the Mechanism and the Programme, a Member State adopts measures that market participants such as the international rating agencies would want them to take. This is perhaps a good example of how, during the euro crisis, institutions 'tended to internalise the interests of creditors' (Losada 2016, 837), i.e., institutions in charge of legal-locution start acting on the basis of market-veridiction.

So, what does it mean that there is no harmonisation of interest rates and that the Member States' impetus to follow sound budgetary policy is not lessened? According to the market mechanism that is embedded into Articles 123 and 125 TFEU, there are supposed to be differences in bond spreads – differences that reflect the states' chosen economic policies. But as these differences were irrational – as the Court argued in the first part of the judgement, following the Bank – the Bank had to adopt the Programme in order to fix the situation. Is the Court thus saying that the way in which the Programme would be used would return bond spreads to normal but would not harmonise them? In other words, the Programme would bring back the functioning of the market mechanism in the formation of government bond yields? Again, market-veridiction is not functioning, so therefore we need to intrude by way of jurisdiction – ordering by law for the sake of the markets. However, it is worth mentioning that such unconventional monetary policy measures as the Programme can actually impair the functioning of the markets as opposed to normalising them, which was the goal following the turmoil of the crisis years. If banks obtain their funding at a zero interest rate from the Bank, then there is no room for market determination (see Tuori 2016, 867).

7. Conclusion

With regards to the first legal questions, we can conclude that the Court delineates between economic and monetary policy, and it situates the Programme in relation to this line in the following manner: the objective (the end) of the Programme is to safeguard price stability (to make the monetary policy tool functional), but the effects that pursuing this causes (safeguarding financial stability through acting as a lender of last resort; see Borger 2016, 148-152) appear within the realm of economic policy. The Court's indirect effects doctrine is cognisant only of the ends of a given measure, whereas it seems to overlook the means through which the ends are pursued. Such *conflation of means and ends* obfuscates the delineation between economic and monetary policy. The objective of price stability, which falls under the EU's exclusive competence over monetary policy, is pursued through the means of austerity measures, which in fact are a form of economic policy.

As to the second legal questions, it seems somewhat paradoxical that the Court at the same time regards the Bank as an expert institution and therefore does not want to review its actions whilst still acknowledging that *the nature of the expert knowledge* that this position is essentially built upon is contested. Does this conclusion on the nature of economic knowledge not lead to the outcome that, in the end, it is all just politics? Remember, the answer to the first question hinged on the 'irrationality' of the markets, whereas the answer to the second question assumes that the Bank has some form of economic expert knowledge that cannot be questioned. Perhaps 'this is market fundamentalism loyal not to actual market behavior, but to some mysterious equilibrium reached by hypothetical markets that we have never actually witnessed in real life' (Schepel 2017, 96). In other words, governing for the market, not because of the market (see Foucault 2008, 121).

Finally, regarding to the third legal question, which was perhaps most intimately associated with Foucault's main point, we observed that the views adopted by the Bank and accepted by the Court appear to oscillate somewhere *between legal-locution through politics (jurisdiction) and truth-locution by the markets (veridiction)*. Is the role accorded to law during the neoliberal hour of the 21st century only that of substituting for the markets in case they do not work? Harm Schepel has argued that the 'Court's fundamental move, then, is to sanction the substitution of political decisions on austerity for the "logic of the market" and to force assisted states to behave as *if* they were headed for insolvency' (Schepel 2017, 88).[53] In other words, that through its judgments in *Pringle* and *Gauweiler,* the Court authorised the use of political power (jurisdiction) in disguise of what was required by market logic (veridiction). This reveals how the EU actually has an economic policy, although according to the asymmetrical structure of the Economic and Monetary Union, the EU (the Bank) should only have competence within monetary policy. However, the EU's economic policy is exactly the policy of no economic policy – the policy of the 'least state' (Foucault 2008, 54).

For a doctrinal legal scholar, it might seem that my analysis has been superficial and that many of the intricacies of the case have been brushed off lightly. For example, with regards to the second legal question on the nature of economic knowledge and the Court's proportionality review, I have disregarded the issue of central bank independence, which partly explains why the Bank has the power to define the content of its monetary policy measures and why the Court adopts a lenient attitude towards reviewing them (see Borger 2019). However, as doctrinal analysis has pointed out (Borger 2019, 130-131), there are no easy, clear-cut answers to what the Court should do in such situations, or how the economy should be governed legally. Therefore, the point of such scholarship as this article is to show how the economy is governed or how the society is governed through the economy and for the economy. As neoliberalism 'has pervasive effects on ways of thought to the point where it has become incorporated into the common-sense way many of us interpret, live in, and understand the world' (Harvey 2005, 3), we need constant reminders of the various ways in which it functions and affects the society. Only by making it visible can we understand it; only by understanding it will we be able to better the society.

53 In this passage Schepel is talking about *Pringle*, but his overall argument is the same with regards to *Gauweiler*.

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