The European Central Bank's pandemic bazooka: mandate fulfilment in extraordinary times

1. Introduction

The year 2020 has become the first in a hundred years when a pandemic broke out that both affected the world and effected a severe downturn in economic activity across the globe. Earlier outbreaks of deadly ultra-contagious diseases have been kept within a region of origin – the havoc and misery created by Ebola was certainly no less than what we have seen since the eruption of a world-wide pandemic of the COVID-19 virus ('coronavirus'). Less than twenty years after Ebola brought distress to people in West Africa[1], humanity faced a pandemic on global scale. After the outbreak of the disease in Wuhan (China), it spread globally, affecting first thousands, then millions of people whose lives were turned upside-down as they were asked, or compelled, to respect 'social distancing' to prevent contagion, stay at home, work at a distance, and self-isolate or go into quarantine. The social and economic effects of the pandemic have been huge.

Allow this sociologist cum lawyer to begin with the social disruption before focusing on the legal issues of the European Central Bank (ECB)'s response. Suddenly, values were resurfacing that, in the 'normal' economic life of many, had not figured prominently: family life; the environment and Planet Earth[2]; recognition of the vital roles of cleaners, teachers, health workers and other indispensable people for a society to conduct its business – their social status and earnings dismal compared to those of entrepreneurs, innovators and managers; the possibilities of working remotely from one's 'home office' for those whose jobs allow them to do so. One wonders what the effects of this re-evaluation will be over the long term. Early on during the pandemic, Simon Kuper already offered insights on the possible greening of our societies over time[3]. Of course, any serenity people may feel because of the sudden stillness of their daily lives and the opening of new modes of living only apply to those with the comfort to do so; for people relying on food banks that cease operating, and for refugees on Lesbos, times have become immeasurably harder even. As the pandemic and the health response progressed,

[1] Ebola is resurfacing from time to time, recently reportedly in the Democratic Republic of Congo: ***Fresh Ebola outbreak feared in Democratic Republic of Congo*** *New case emerges as country battles second wave of coronavirus that is stronger than first*, *Financial Times*, 8 February 2021.

[2] Which breathed afresh: air quality was reported to have improved significantly above areas closed down for work and transport, with a glimpse to what mankind needs to undertake to avoid a climate change catastrophe, as CNBC reported on 22 March 2020: "the pandemic's unintended climate impact offers a glimpse into how countries and corporations are equipped to handle the slower-moving but destructive climate change crisis".

[3] Column in the *Financial Times*, 19 March 2020, entitled: *Coronavirus could help push us into a greener way of life - For all its horror, the pandemic may change our habits when nothing else could*.

this great divide in ability, or competence, to address the many issues COVID-19 brought up has become only very much more visible.[4]

At policy level, choices that have been mainstream for long seemed reversable overnight: the idea of 'helicopter money' may have lost its 'taboo status', as Martin Sandbu[5] described.[6] The same holds for a basic income for all; the history of this idea, once considered mainstream and now utopian, has eloquently been described by Rutger Bregman[7]. The joint issuance of bonds by Euro Area governments was proposed by German economists in the *Frankfurter Allgemeine Zeitung*: "*Krisen-Anleihen mit einer gemeinschaftlichen Haftung*" (crisis bonds under joint liability).[8] And, after a bold initiative from French President Emanuel Macron and German Chancellor Angela Merkel, this idea has been put into practice, with the Next Generation Recovery Fund, an element of the EU's multi-annual budget which is to be financed through joint debt issuance by the European Union.[9]

Yet, national responses have prevailed. One nation goes into 'lockdown', the other belatedly orders social distancing. This may be due to local specificities: the severity of contagion, the availability of intensive care units or other considerations. Yet, it seems that governments rely on their own disease control centre's recommendations as if there were no experience with this abroad (in China, Taiwan, Singapore) or closer by (Italy) and as if there is no European Centre for Disease Prevention and Control (ECDC).[10] In their first televised speeches to the nation, neither Dutch Prime Minister Mark Rutte ("We really need to face this task with 17 million")[11] nor German Chancellor Angela Merkel[12] mentioned[13]

[4] For an overview of the global vaccination effort, see: *A Guide to Global COVID-19 Vaccine Efforts*, 5 February 2021 on the Council on Foreign Relations website. See, also: Sarah Boseley, *Global immunisation: low-income countries rush to access Covid vaccine supply*, *The Guardian*, 15 January 2021.
[5] *The Big Read* in the *Financial Times*, 20 March 2020, entitled: *Coronavirus: the moment for helicopter money - Economic taboos are being broken to finance the huge government deficits needed to fight the crisis*.
[6] As did Jonathan Freedland in *The Guardian* remarked in respect of Great Britain: *As fearful Britain shuts down, coronavirus has transformed everything* whose words merit citation: "Just as there are no atheists on a sinking ship, there are no free-marketeers in a pandemic.
[7] *Utopia for Realists*, 2017; see: https://www.rutgerbregman.com/books.
[8] Jens Südekum, Gabriel Felbermayr, Michael Hüther, Moritz Schularick, Christoph Trebesch, Peter Bofinger, Sebastan Dullien, *Europa muss jetzt finanziell zusammenstehen - Die Starken müssen den Schwachen helfen. Jetzt ist der Moment, wo die oft beschworene Schicksalsgemeinschaft Europa Flagge zeigen muss. Ein Aufruf führender Ökonomen* (Europe must now stand financially together - the strong must help the weak. Now is the time when Europe, often implored to be a community of destiny, has to fly the flag. A call from leading economists), *Frankfurter Allgemeine Zeitung*, 21 March 2020.
[9] The Recovery and Resilience Facility, adopted by regulation published in the EU's Official Journal (OJ) on the very day of finalising this contribution: Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57/17, 18.2.2021.
[10] Whose website carries a daily update on the COVID-19 outbreak.
[11] "(…) *we moeten dit echt met 17 miljoen mensen doen*" (official English translation: 'all 17 million of us will have to work together to overcome it'), television speech by Dutch Prime Minister Mark Rutte, 16 March 2020.
[12] Herself reportedly in quarantine as the first contribution was written: German Chancellor Angela Merkel is in quarantine after a doctor who gave her a vaccine tests positive for coronavirus, *The Guardian*, 22 March 2020, 17:51 GMT.
[13] An address to the nation by Federal Chancellor Merkel, 19 March 2020.

Europe or the need for international cooperation. Each referred to its own public health institute.[14] A joint closure of the external borders of the Schengen Area[15] succeeded border closures of the hitherto barely visible internal borders on which Member States allegedly did not inform each other or the Commission prior to the closures.[16] These tendencies, first described in March 2020, have only exacerbated, with the current situation at the moment of writing not much better: internal border closures and year-long efforts at coordinating a Schengen-wide response by the Commission seemingly futile and even leading it to open a Re-openEU site[17], with the Council coming not much further than recommendations on coordinated border closures.[18] Similarly, on the economic front, there was, at first, no European Union or Euro Area fiscal stimulus, at best a coordinated response.[19] The Eurogroup statement of 16 March 2020 summed up national responses and welcomed EU initiatives but did not (could not) release budgetary funds. The envisaged, dismally inadequate budgetary instrument for convergence and competitiveness that the Euro Area finally agreed upon last year was not yet activated in the Spring of 2020. The idea of a Euro Area min-budget is reported[20] to have been unceremoniously shelved in the context of the wider-than-Eurozone EU Recovery Fund, adopted in principle in the summer of 2020 and legally finalised at the time of updating this contribution (mid-February 2021).[21]

2. EU response is crucial and forthcoming

As in the 2008 Great Financial Crisis (GFC), and the subsequent sovereign debt crisis in the Euro Area, effective federal action is needed, and still – mostly – lacking. As said, there is no fiscal stimulus from the centre, as there is no competence to enact such a measure which, just as in 2008, shows that Europe cannot act swiftly as the trans-Atlantic currency union (the US) can.[22] In the GFC, the European

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[14] The Robert Koch Institute and the *Rijksinstituut voor Volksgezondheid en Milieu* (RIVM), respectively.

[15] Proposed by the Commission on 19 March 2020; see its Communication *COVID-19: Temporary Restriction on Non-Essential Travel to the EU*, COM(2020) 115 final.

[16] An overview of border closures which Member States effected under the Schengen Borders Code is here.

[17] See, also: *Travel during the coronavirus pandemic* at the European Commission website.

[18] Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic, OJ L 337/3, 14.10.2020, amended by Council Recommendation (EU) 2021/119 of 1 February 2021, OJ L 36I/1 , 2.2.2021. See, also: Commission Recommendation (EU) 2020/2243 of 22 December 2020 on a coordinated approach to travel and transport in response to the SARS-COV-2 variant observed in the United Kingdom, OJ OJ L 436/72, 28.12.2020.

[19] Which the Polish Prime Minister questioned as really a new effort or just a relabelling of existing money flows: *Poland criticises EU 'smoke and mirrors' coronavirus response - Brussels' measures insufficient and help for workers should be priority, says finance minister*, *Financial Times*, 20 March 2020.

[20] A reference to this revocation cannot be easily found; the *Consilium* page on the issue has been archived and not updated since 16 November 2020.

[21] See footnote 9 above.

[22] See a recent update: *Here's what's in Biden's $1.9 trillion economic rescue package*, at CNN, 14 January 2021. See, also, the post by Erik F. Nielsen, Group Chief Economist of UniCredit Bank: *The risks around the US-European fiscal divide*, 14 February 2021.

Commission and the ECB acted in tandem to save as much as possible the single market and the single currency.[23] They both now have acted rapidly, as well, each within its own field of competences.

The European Commission adopted a *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* which brings back memories of the adoption of its 2008 Bank Guarantee Communications, ultimately resulting in the 2013 Banking Communication, which the European Court of Justice interpreted in the *Kotnik* judgment[24]. The first decisions approving coronavirus outbreak-related state support measures had been reported on the day of writing the EULawLive blogpost, a Sunday.[25]

On 12 March 2020, the ECB already adopted three major measures[26]:

- Increased provision of liquidity to the markets through Longer-Term Refinancing Operations (LTROs)[27]
- An increase of € 120 billion in its programme of asset purchases ("a temporary envelope of additional net asset purchases of €120 billion will be added until the end of the year")
- Extra favourable conditions on Targeted Longer-Term Refinancing Operations[28]; under this TLTRO III, funds that banks report to have on-lent to the real economy, notably to Small and Medium Enterprises, can benefit from an interest rate of up to 25 basis points below the average ECB deposit facility rate.

As banking supervisor, the ECB also adopted measures[29] on 12 March 2020, allowing banks to use capital buffers, to get relief in the composition of capital for Pillar 2 Requirements (i.e., the additional capital a bank needs to hold over the statutory capital under Capital Requirements Regulation as a result of the Supervisory Review and Evaluation Process (SREP) pursuant to Article 97 ff. of the Capital Requirements Directive). After announcing on 12 March that it would "consider operational flexibility in the implementation of bank-specific supervisory measures", the ECB followed up on 20 March with new measures to permit "flexibility in prudential treatment of loans backed by public support measures" and by "introduce[ing]supervisory flexibility regarding the treatment of non-performing

[23] See my *European supervisors in the credit crisis: issues of competence and competition*, in Mario Giovanoli and Diego Devos (eds.), *International Monetary an Financial Law in the light of the Global Crisis*, 2010, 305-327.
[24] Judgment of 19 July 2016 in Case C-526/14 (*Kotnik*); ECLI:EU:C:2016:570.
[25] In favour of two German state aid schemes, and one Italian scheme to support production and supply of medical devices.
[26] Press release, Monetary policy decisions, 12 March 2020.
[27] Press release, ECB announces measures to support bank liquidity conditions and money market activity, 12 March 2020.
[28] Press release, ECB announces easing of conditions for targeted longer-term refinancing operations (TLTRO III) 12 March 2020.
[29] Press release, ECB Banking Supervision provides temporary capital and operational relief in reaction to coronavirus, 12 March 2020.

loans (NPLs)". Furthermore, the ECB wanted banks to avoid possibly procyclical effects of capital requirements and financial reporting. More importantly perhaps, the ECB postponed for six months the enforcement of major supervisory decisions, such as deadlines for remedial actions imposed as a result of on-site inspections, in the context of the review of internal models to calculate banks' risk-weighted assets, and other supervisory measures.[30] More prudential measures in response to the corona crisis are mentioned in section 4 below.

The ECB's main announcement in March was on a new Pandemic Emergency Purchase Programme (PEPP)[31], explained by ECB President Christine Lagarde.[32] The ESCB will purchase "private and public sector securities" up to € 750 billion. Eligible securities are the marketable instruments that can be purchased under the current Asset Purchasing Programmes (APP). Flexibility is to be the hallmark of the new programme: whereas "the benchmark allocation across jurisdictions will continue to be the capital key of the national central banks", the buying operations will see fluctuations "over time, across asset classes and among jurisdictions". Instruments issued by non-financial companies will be included in the commercial paper purchased under the Corporate Sector Purchase Programme (CSPP). The

"main risk parameters of the collateral framework" will be adjusted to allow for wider collateral to be posted at the ESCB. A 'whatever it takes' sentence is added, with the necessary reference to the mandate, as in ECB President Mario Draghi's 2012 statement.[33] The ECB states: "The Governing Council will do everything necessary within its mandate". This comes right after a wide-ranging statement that includes all sectors of European society:[34]

> "The Governing Council of the ECB is committed to playing its role in supporting all citizens of the euro area through this extremely challenging time. To that end, the ECB will ensure that all sectors of the economy can benefit from supportive financing conditions that enable them to absorb this shock. This applies equally to families, firms, banks and governments."

Below, I will explore what can be said about the legality of the ECB's PEPP (section 3). The programme, as set out in ECB announcements, will be set against the TFEU provisions on the ECB's mandate as interpreted by the Court of Justice of the European Union (CJEU). As, in the stressful year of 2020, the German Constitutional Court also pronounced on the ECB's mandate, a next subsection will touch upon this German judgment on the ECB's Public Sector Purchasing Programme (PSPP) and the incidence it may have on the PEPP (section 5). But, before turning to Karlsruhe, I will discuss the legal documents

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[30] See: FAQs on ECB supervisory measures in reaction to the coronavirus, accessed 22 March 2020.
[31] Press release, ECB announces €750 billion Pandemic Emergency Purchase Programme (PEPP), 18 March 2020.
[32] On the PEPP see, also: *Analysis: "Fighting the fallout: the ECB adopts a purchase programme in response to the coronavirus"* by Marijn van der Sluis in EULawLive, 24 March 2020.
[33] "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough." Verbatim of the remarks made by Mario Draghi at the Global Investment Conference in London 26 July 2012.
[34] Quotes from the ECB's press release introducing the PEPP, 18 March 2020.

that have been adopted since the early announcements on which my initial appraisal was based and include the developments since (section 4). Before concluding (in section 7), I will briefly set out how, after the pandemic, a green recovery is needed in view of the climate change emergency (section 6).

3. PEPP and other ECB measures are legal: preliminary assessment

The primary law legal basis for the emergency response of the ECB is Article 127(1) and (2) TFEU. This provision mandates the ESCB to conduct ('define and implement') the monetary policy of the Union[35] and entrusts them to strive for price stability as a primary objective and, as a secondary objective ("Without prejudice to the objective of price stability"), to support the economic policies in the Union "with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 [TEU]"[36]. Article 3(1)(c) TFEU makes clear that monetary policy is an exclusive Union competence, just as "competition rules necessary for the functioning of the internal market" are an exclusive EU competence pursuant to Article 3(1)(b) TFEU.

The reference to the secondary objective of the ESCB is relevant for several reasons. First, it puts the support of (hitherto largely national)[37] economic policies in a wider, Union perspective. Second, it makes clear what the Union stands for and which objectives its monetary authority ultimately needs to support, while respecting its prime mandate to maintain price stability. In the current context, special attention is warranted for: the well-being of Europeans (no further explanation needed), their security (which includes physical and mental security, and health)[38], full employment and social progress (which are under severe threat now), combatting social exclusion (think: food banks, refugees), promoting social justice and protection (relevant in the context of mass unemployment; the same holds for:) economic and social cohesion. Furthermore, the Union's role on the global stage is set in the perspective of, again, the protection of EU citizens an security, the sustainable development of the Earth (which must include conditions that are not conducive to pandemics and which guarantee health for all sentient beings)[39], solidarity and mutual respect among peoples (relevant for

[35] In the context of the non-adherence to the monetary union of Denmark, which has an opt-out (Protocol (No 16) on certain provisions relating to Denmark), and of eight other Member States that have a derogation under Article 140 TFEU or their respective accession treaties, for 'Union' read: 'Euro Area'. Article 139 TFEU and Article 42 ESCB Statute regulate the applicability of EMU law provisions to the <out> Member States.

[36] See Box for the full text of Article 3 TEU with the most relevant terms underlined by me.

[37] Articles 2 (3) and 5 TFEU make clear that economic policies are coordinated at Union level while national (i.e., State) competences remain prevalent. These competences are exercised in the context of a number of Union directions (Articles 120 and 121 TFEU) and prohibitions (Articles 123-125 TFEU) and procedures (Articles 126 and, for the Euro Area, 136 TFEU). Post-crisis economic governance strengthening have shifted the balance somewhat towards Union competences which, nevertheless, are focused on overseeing *national* policies.

[38] See, also, Article 9 TFEU, one of the 'integration clauses', quoted below.

[39] See Article 13 TFEU which recognises animals as sentient beings whose welfare requirements need respecting.

international health cooperation) and the protection of human rights (among which the right to life[40] and the right of access to health care[41]).

Box – Article 3 Treaty on European Union

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. The Union shall establish an economic and monetary union whose currency is the euro.

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

6. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.

Relevant for the context of the ECB's mandate are the so-called integration clauses of the TFEU. These provisions call for consistency among EU policies (Article 7) and notably require adherence to objectives of equality between men and women (Article 8), employment, social protection and health (Article 9), non-discrimination (Article 10), the environment (Article 11), consumer protection (Article 12) and animal welfare (Article 13). This consistency requirement is an additional argument for the ECB's mandate to be interpreted not as 'standing aloof' of the Union's wider objectives. In the context of the pandemic, Article 9 is especially relevant:

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

[40] Article 2 Charter of Fundamental Rights of the European Union ('Charter').

[41] Article 35 Charter which specifies that "[a] high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and practices."

This perspective makes clear that the ECB's mandate includes measures that it considers conducive to the exercise of monetary policy and the support of economic policies with a view to the achievement of the Union's objectives. A further word on each of these elements.

A further legal basis for the ECB's PEPP can be found in Article 18.1 ESCB Statute which, as a protocol attached to the TFEU, has Treaty status. It gives the ECB and National Central Banks (NCBs) the power, in order to achieve the ESCB's objectives[42] and carry out its tasks[43], *inter alia*, to buy and sell "claims and marketable instruments" and to conduct credit operations with credit institutions and other market participants, on the basis of adequate collateral.

There have been precedents for extraordinary monetary policy measures which have been tested in court. In two references by the German Constitutional Court to the CJEU, the mandate of the ESCB to undertake unconventional measures has been explored when (draft) instruments were reviewed. In *Gauweiler*[44], the ECB's announced Outright Monetary Policy Transactions (OMT)[45] were at issue. In *Weiss*[46], the Public Sector Purchasing Programme (PSPP) of the ECB was assessed as falling within its mandate. The PSPP is the quantitatively most significant of the Asset Purchasing Programme (APP), the Quantitative Easing (QE) the ECB engaged in rather late compared to other major central banks (the Bank of Japan, the US Federal Reserve System and the Bank of England). Broadly speaking, under the PSPP, NCBs purchase bonds issued by their own Member States and the ECB buys bonds issued by Euro Area supranational organisations. From these judgments, support for the PEPP can be derived.

Let us recall how the ECJ described how monetary policy influences the economy at large:

> "The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the 'impulses' which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB's decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article 127(1) TFEU." [paragraph 50 *Gauweiler*]

And:

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[42] Article 127(1) TFEU, Article 2 ESCB Statute.

[43] Article 127(2) TFEU; see, also, Articles 127(4) and (5) and 128 TFEU; Article 3 ESCB Statute; see, also Articles 4, 5, 16 and 25 ESCB Statute.

[44] Judgment of 16 June 2015 in Case C-62/14 (*Peter Gauweiler and Others* v *Deutscher Bundestag*), ECLI:EU:C:2015:400.

[45] Announced in a press release of 6 September 2012, *Technical features of Outright Monetary Transactions*, at: https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

[46] Judgment of 11 December 2018 in Case C-493/17 (*Proceedings brought by Heinrich Weiss and Others*), ECLI:EU:C:2018:1000.

> "(…) the transmission of the ESCB's monetary policy measures to price trends takes place via, inter alia, facilitation of the supply of credit to the economy and modification of the behaviour of businesses and individuals with regard to investment, consumption and saving." [paragraph 65 *Weiss*]

So, the ESCB, having exclusive competence to conduct monetary policy, has a pivotal role to play in the economic conditions of business and individuals, even when economic policies affecting the companies and citizens is primarily in the hands of national governments.

It is important in this context to recall that the Court wisely commented upon the division of competences, with monetary policy an EU matter and economic policies an issue for the Member States: while each sphere belongs primarily to one level of governance, there is no absolute separation:

> "(…) the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies." [paragraph 60 *Weiss*]

The case law makes clear that the ESCB's mandate includes the option to ensure that the transmission mechanism functions smoothly:

> "the aim of the programme is to safeguard both 'an appropriate monetary policy transmission and the singleness of the monetary policy'." [paragraph 47 *Gauweiler*]

And:

> "the objective of safeguarding an appropriate transmission of monetary policy is likely both to preserve the singleness of monetary policy and to contribute to its primary objective, which is to maintain price stability." [paragraph 49 *Gauweiler*]

The smooth functioning of the monetary policy transmission channels was core to address the market disturbances in the first weeks of the pandemic. ECB executive directors have squarely tackled this issue in their comments. "We will not tolerate any risks to the smooth transmission of our monetary policy in all jurisdictions of the euro area", wrote ECB Executive Board Member Philip Lane on 12 March 2020.[47] In her interview with the *Frankfurter Allgemeine Zeitung* (*FAZ*) published on 21 March 2020, Isabel Schnabel said:

> "Our actions are always determined by our mandate of price stability. And for this we need a functioning transmission mechanism so that monetary policy is passed on to the real economy. That mechanism had recently become impaired, as manifested by the sudden rise in euro area government bond yields. It was affecting all euro area countries, even Germany. When that happens, monetary policy has to step in." (emphasis added, RS)

Further down, she reiterated that "[t]he central bank must act (…) when the transmission of monetary policy to the real economy is at risk." Isabel Schnabel's reasoning may indicate that the ECB's motivation of the PEPP is still squarely within the first leg of the ESCB's mandate (price stability). My approach would be that the secondary mandate is also clearly supportive of the PEPP.

[47] Philip R. Lane, *The Monetary Policy Package: An Analytical Framework*, ECB Blog, 13 March 2020.

Speaking of reasoning, whereas the above preliminary assessment of the legality of the PEPP was based on the ECB's pronouncements before the legal instruments that the ECB had adopted had yet been published, the legality of the programme requires one to evaluate the motivation for the PEPP. The case law makes clear that such reasoning will be scrutinised by the Court based on the preamble of the relevant legal act(s) but can also be found in other communication from the ECB:

> "(…) the successive decisions of the ECB relating to the PSPP have consistently been clarified by the publication of press releases, introductory statements of the President of the ECB at press conferences, accompanied by answers to the questions raised by the press, and by the accounts of the ECB Governing Council's monetary policy meetings, which outline the discussions within that body." [paragraph 37 *Weiss*; see, also, paragraph 39 with references to press conferences of the ECB President]

On the PEPP legal acts which may be reviewed by the Court, it is noteworthy to remark that the CJEU has interpreted a press release and has assessed draft legal acts on the OMT, while it also has based its findings on non-published ECB legal acts in the context of the PSPP. This is clear from:

> "Although an examination of whether the obligation to provide a statement of reasons has been satisfied may be undertaken only on the basis of a decision that has been formally adopted, in this case it must none the less be found that the press release, together with draft legal acts considered during the meeting of the Governing Council at which the press release was approved, make known the essential elements of a programme such as that announced in the press release and are such as to enable the Court to exercise its power of review." [paragraph 71 *Gauweiler*; see, also paragraph 28 on the admissibility of a request for a preliminary ruling based on a press release]

and from the *Weiss* judgment which refers to an unpublished ECB Guideline adopted in the context of the PSPP.[48] As one may feel uncomfortable with the judiciary basing its findings on unpublished legal acts of an active programme such as the PSPP one may expect the ECB to publish the full array of legal acts supporting the PEPP (as it did subsequent to the initial writing of these lines; see under 4 below).

There is currently no indication that the PEPP will be used in a selective manner, i.e. to effect interest rates in certain jurisdictions of the Euro Area in particular. The only State-specific measure announced concerns the eligibility of Greek government bonds[49], hitherto excluded from the PSPP.[50] Should this become so, the case law provides a precedent to support such an outcome:

> "As regards the selective nature of the programme announced in the press release, it should be borne in mind that the programme is intended to rectify the disruption to the monetary policy transmission mechanism caused

[48] Paragraphs 85, 88, 95, 114, 115, 119, 121, 125, 135, 137, 139, 142, 148 refer to Guideline on a secondary markets public sector asset purchase programme (ECB/2015/NP3).

[49] For which a waiver will be granted according to the ECB's press release of 18 March 2020.

[50] See the letter of 16 January 2019 from ECB President Mario Draghi to MEP Stelios Kouloglou referring to Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60) as the relevant legal instrument to determine whether Greek government bonds meet the minimum credit requirements, specifying that "eligibility for the PSPP is a decision for the ECB Governing Council to take on the basis of its own independent debt sustainability assessment and other risk management considerations. In this regard, a central precondition for PSPP eligibility of Greek government securities is that they fulfil the ECB's minimum credit requirements".

by the specific situation of government bonds issued by certain Member States. In those circumstances, the mere fact that the programme is specifically limited to those government bonds is thus not of a nature to imply, of itself, that the instruments used by the ESCB fall outside the realm of monetary policy. Moreover, no provision of the FEU Treaty requires the ESCB to operate in the financial markets by means of general measures that would necessarily be applicable to all the States of the euro area." [paragraph 55 *Gauweiler*]

When confronted with extraordinary, once-in-a-century circumstances, it is clear that the discretion which the European Court allows policy-makers will be widely drawn. In *Weiss*, the Court made five references to the ESCB's "broad discretion".[51] Discretion also figured in *Gauweiler*.[52] Such broad discretion will not prevent the judiciary from exercising review, when asked. Judicial review will include – beyond adequate reasoning – whether there has been a manifest error of assessment, or a misuse of powers, and whether proportionality has been upheld. Article 5(4) TEU provides:

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

In both *Gauweiler*[53] and *Weiss*[54], the CJEU extensively explored the proportionality of the measures, recognising in this review the ECB's broad discretion.

"(…) the principle of proportionality requires that acts of the EU institutions be appropriate [should be suitable] for attaining the legitimate objectives pursued by the legislation at issue and do [should] not go beyond what is necessary in order to achieve those objectives" [paragraph 67 *Gauweiler*, paragraph 72 *Weiss*, with [slightly different wording] between square brackets]

On proportionality, Isabel Schnabel rightly pointed out that this is a core issue when assessing the legality of measures.[55]

4. The PEPP legal acts and developments since 23 March 2020

In its reasoning for the introduction of the PEPP[56], the ECB was crystal clear about the severity and uniqueness of the situation and the potential threat to its mandate to maintain price stability:

> The COVID1-9 pandemic "has produced an extreme economic shock that requires an ambitious, coordinated and urgent reaction on all policy fronts to support businesses and workers at risk. As a consequence of the pandemic, economic activity across the euro area is declining and will inevitably suffer a considerable contraction, especially as more countries are faced with the need to intensify containment measures. These measures place acute strains on the cash-flows of businesses and workers and put the survival of businesses and jobs at risk. It is also clear that this situation hampers the

[51] In paragraphs 24, 30, 73, 91 and 92.
[52] In paragraphs 68, 69 and 75.
[53] In paragraphs 67-92.
[54] In paragraphs 72-100.
[55] When the *FAZ* asks: "The German Constitutional Court might put a spanner in the works when it rules on the legality of the bond purchases in May", she answers: "Against this backdrop, it's important that our measures are proportionate. (…)".
[56] Recital 4 of Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L91/1, 25.3.2020.

> transmission of the monetary policy impulses and adds severe downside risks to the relevant inflation outlook."

The ECB reflected on the proportionality of the measure as follows:

> "the PEPP is a measure which is proportionate to counter the serious risks to price stability, the monetary policy transmission mechanism and the economic outlook in the euro area, which are posed by the outbreak and escalating diffusion of COVID-19."

And, in Article 3 of the PEPP decision, the following is stated:

> "Purchases shall be carried out under the PEPP to the extent deemed necessary and proportionate to counter the threats posed by the extraordinary economic and market conditions on the ability of the Eurosystem to fulfil its mandate."

This very Article 3 also provides that the limits on "the consolidated holdings under Article 5 of [the ECB's PSPP Decision] should not apply to PEPP holdings" since:

> "The Eurosystem will not tolerate any risks to the smooth transmission of its monetary policy in all jurisdictions of the euro area".[57]

Thus, the holdings of Member State debt purchased under the PEPP will not be kept below 33% per ISIN and the same limit for all outstanding debt issued by a single sovereign borrower, as under the PSPP. This is reasoned with a reference to the exceptional nature of the trigger for the programme and the need to safeguard the monetary policy transmission:

> "Due to these exceptional, fast-evolving and uncertain circumstances, the PEPP requires a high degree of flexibility in its design and implementation compared with the APP and its monetary policy objectives are not identical to that of the APP."

This motivation seems amply well-founded, also considering the speed with which the ECB had to act.

A subsequent decision[58] makes clear that the ECB has widened the scope of its pandemic interventions in the sphere of its **monetary policy** mandate

– in numbers: from 0.6 billion to 1.35 billion euros of purchases,

– in time horizon: "to (…) at least the end of June 2021, or beyond, if necessary, and in any event until the Governing Council considers that the COVID-19 crisis phase is over"

– in 'roll-over': "maturing principal payments from securities purchased under the PEPP will be reinvested in full until at least the end of 2022".

On the extension of the PEPP, the ECB reflected in the preamble to the amending decision as follows:

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[57] Recital 6 of the PEPP Decision.

[58] ECB Decision (EU) 2020/1143 of 28 July 2020 amending Decision (EU) 2020/440 on a temporary pandemic emergency purchase programme (ECB/2020/36), OJ L 248/24, 31.7.2020.

> "On 4 June 2020, the Governing Council decided, in line with its mandate to ensure price stability, to revise certain of the PEPP's design features. These revisions are aimed at ensuring the necessary degree of monetary accommodation as well as a smooth transmission of monetary policy over time, across asset classes and among jurisdictions, thereby contributing to offset the exceptionally steep and rapid pandemic-related deterioration of the expected inflation path."

The monetary policy objectives were explained in these words:

> "Specifically, the Governing Council decided to increase the overall separate envelope for the PEPP by EUR 600 billion to a total of EUR 1 350 billion. In response to the pandemic-related downward revision to inflation over the projection horizon, the PEPP expansion will further ease the general monetary policy stance, supporting funding conditions in the real economy, especially for businesses and households. The purchases will continue to be conducted in a flexible manner over time, across asset classes and among jurisdictions. This will make it possible to effectively stave off risks to the smooth transmission of monetary policy."

Finally, after further extension decisions in December 2020 when the pandemic and consequential lockdowns struck Europe again, a second amendment to the PEPP Decision was adopted.[59] A revision was undertaken of "certain of the PEPP's design features with a view to preserving favourable financing conditions over the pandemic period, thereby underpinning the economic recovery and helping to offset the downward impact of the pandemic on the projected path of inflation"[60] Another 0.5 bn. was added to the "the overall separate envelope for the PEPP" to reach a total of EUR 1. 85 bn., whereas "the horizon of net purchases under the PEPP until at least the end of March 2022". Again, the ECB emphasises that it will continue PEPP purchase "until it judges that the coronavirus crisis phase is over".[61] Crystal-clear in the monetary policy reasoning is recital 3 which deserves to be quoted in full:

> "Purchases under the PEPP will continue to be conducted flexibly according to market conditions and with a view to preventing a tightening of financing conditions that is inconsistent with countering the downward impact of the pandemic on the projected path of inflation. In addition, the flexibility of purchases over time, across asset classes and among jurisdictions will continue to support the smooth transmission of monetary policy. If favourable financing conditions can be maintained with asset purchase flows that do not exhaust the envelope over the net purchase horizon of the PEPP, the envelope need not be used in full. Equally, the envelope can be recalibrated, if required, to maintain favourable financing conditions to help counter the negative pandemic shock to the path of inflation."

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[59] Decision (EU) 2021/174 of the European Central Bank of 10 February 2021 amending Decision (EU) 2020/440 on a temporary pandemic emergency purchase programme (ECB/2021/6)
OJ L 50/29, 15.2.2021.
[60] Recital 2 of the preamble to the ECB's Decision 2021/74.
[61] Quotes from recital 2 of the preamble to the ECB's Decision 2021/74.

Citing the roll-out of vaccines and updated economic policy forecasts, the ECB reasons[62] that:

> "Preserving favourable financing conditions over the pandemic period will help to reduce uncertainty and bolster confidence, thereby encouraging consumer spending and business investment, and, ultimately, underpinning the economic recovery and helping to offset the downward impact of the pandemic on the projected path of inflation."

The ECB further motivates[63] that

> "principal payments from maturing securities purchased under the PEPP will be reinvested in full until at least the end of 2023 and, furthermore, maintained its view that, in any case, the future roll-off of the PEPP portfolio will be managed in such a way as to avoid interference with the appropriate monetary policy stance."

Recital 6 then elaborates on the proportionality of the programme and its extension. A robust stance on the risks to price stability resulting from the pandemic starts off the ECB's assessment:

> "The Governing Council considers the full range of measures adopted on 10 December 2020 necessary and proportionate to counter <u>the serious risks to price stability</u>, the monetary policy transmission mechanism and the economic outlook in the euro area, which are posed by the continued severe pandemic conditions." (underlining added, RS)

Frankfurt then replies to Karlsruhe (see under 5 below) by stating as follows:

> "The Governing Council remains of the view that the PEPP, in combination with all other monetary policy measures, is a <u>suitable</u> tool to preserve favourable financing conditions over the pandemic period. Furthermore, a recalibration of the PEPP, on the basis of an additional purchase envelope that remains flexible in its usage, is <u>more efficient than alternative monetary policy instruments</u> to maintain the required <u>monetary accommodation</u> in the current pandemic environment characterised by high uncertainty." (underlining added, RS)

One reads the suitability and necessity tests (is there an appropriate, less far-reaching alternative?) that a proportionality tests requires clearly back in the considerations.

Finally, any side-effects on economic policy variables is weighed:

> "the Governing Council judges that the positive impact of additional asset purchases in the context of the PEPP, in combination with the full range of monetary policy measures adopted on 10 December 2020, on achieving the European Central Bank's price stability mandate, <u>clearly outweighs any potential negative effects on other economic policy areas</u>."

Before elaborating, in the following section, on the proportionality issue that was central in the ruling by the German Constitutional Court, which will shed light on this elaborate reasoning in the most recent PEPP extension, let me recall the further ECB measures adopted in the face of the pandemic.

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[62] Recital 4 of the preamble to the ECB's Decision 2021/74.
[63] Recital 5 of the preamble to the ECB's Decision 2021/74.

In the **monetary policy** area, further flexibility in relation to collateral was adopted. After very early measures to widen the scope of eligible collateral, a temporary further set of "collateral easing measures" became law and is to last until September 2021. The ECB's 2014 Guideline on collateral[64] has been temporarily amended for the acceptance of a wider circle of instruments as collateral.[65]

On the **micro-prudential** front, the ECB has taken a number of further measures of '**supervisory flexibility**', some early on, others later during the pandemic times we live in, extensively 'summarised' in FAQs updated on 1 February 2021, which state that no further measures to address the COVID-19 pandemic favouring banks are expected.[66] The main elements of the prudential response have been: supervisory forbearance by not pursuing enforcement of supervisory decisions for six months[67]; urging restraint in dividend policies[68] and remuneration policies,[69] extension of the time in which new accounting standards need to be implemented (IFRS9),[70] and allowing banks to use capital to support the economy.[71] In a similar vein, the ECB temporarily allowed banks not to include certain exposures to central banks in the calculation of the leverage ratio, in application of Article 500b of CRR2.[72]

As for the annual SREP process,[73] the pillar-2 of the Basel Framework, the ECB has taken "a pragmatic approach towards conducting its annual core activities on account of the coronavirus (COVID-19)

[64] Guideline of the European Central Bank of 9 July 2014 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9 (recast) (ECB/2014/31) (2014/528/EU), OJ L 348/27, 4.12.2014, consolidated version here.

[65] Guideline (EU) 2020/634 of the European Central Bank of 7 May 2020 amending Guideline ECB/2014/31 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral (ECB/2020/29), OJ L 148/10, 11.5.2020.

[66] *FAQs on ECB supervisory measures in reaction to the coronavirus*. See, also: *Our response to the coronavirus pandemic*.

[67] A 6-months pause in enforcement concerning on-site inspections, TRIM investigations and internal model investigations.

[68] It recommended no pay-out of dividend until 1 October 2020 (Recommendation ECB/2020/19 of the European Central Bank of 27 March 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/1 (OJ C 102I/1, 30.3.2020), later extended to 1 January 2021 (Recommendation of the European Central Bank of 27 July 2020 on dividend distributions during the COVID-19 pandemic and repealing Recommendation ECB/2020/19 (ECB/2020/35), OJ C 251/1, 31.7.2020).

[69] The ECB expected banks "to adopt extreme moderation with regard to variable remuneration payments until 1 January 2021, especially to identified staff (so-called "material risk takers")" in its Letter of 28 July 2020 on **Remuneration policies in the context of the coronavirus (COVID-19) pandemic**.

[70] See the Letter of 1 April 2020 on **IFRS 9 in the context of the coronavirus (COVID-19) pandemic**.

[71] A combination of measures on the Pillar 2 Guidance (P2G) buffer and the Pillar 2 Requirements (P2R) are said to "have provided banks with aggregate relief of roughly €120 billion of CET1 capital". The ECB estimated that "the capital released by the two measures could enable banks to potentially finance up to €1.8 trillion of loans to households, small businesses and corporate customers in need of extra liquidity, taking into account that the average risk of lending to households, small businesses and corporates would most likely increase from current levels as a result of the shock." (Quotes from the FAQs mentioned in footnote 66 above)

[72] Decision (EU) 2020/1306 of the European Central Bank of 16 September 2020 on the temporary exclusion of certain exposures to central banks from the total exposure measure in view of the COVID-19 pandemic (ECB/2020/44), OJ L 305/30, 21.9.2020.

[73] Based on Article 97 CRD5 and Article 16(2)(a) and (b) SSM Regulation.

pandemic”.[74] The speed at which the ECB adapted to the circumstances, from recommending contingency measures[75] (such as “assessing whether alternative and sufficient back-up sites can be established in light of possible pandemic”, “assessing and urgently testing whether large scale remote working or other flexible working arrangements for critical staff can be activated and maintained to ensure business continuity”, and “assessing risks of increased cyber-security related fraud, aimed both to customers or to the institution via phishing mails, etc.;” to actual relief measures ten days later[76]), one can only marvel at the action preparedness in times of extreme stress. Forward-looking, to the end of the pandemic and its incidence on banks’ balance sheets and solvency, the ECB began early on to encourage banks to face distressed debtors[77] and, beyond allowing “banks to fully benefit from guarantees and moratoriums put in place by public authorities to tackle the current distress”[78], started to advise banks publicly to proactively manage credit risks that will become clear in banks’ balance sheets and announced it would not tolerate a repeat of history with regard to asset quality.[79] Supervisory Board Chair Andrea Enria emphasised the urgent need to address pre-crisis structural weaknesses, favouring a European network of asset management companies and called for consolidation, on which the ECB has issued guidance.[80]

In the area of **systemic risk** and **macro-prudential supervision**, the European Systemic Risk Board (ESRB) issued recommendations[81] which the ECB supported.[82] The ECB, in its macro-prudential supervisory role pursuant to Article 5 SSM Regulation, keeps track of these national measures[83] which are also published by the ESRB.[84]

[74] ECB Press Release, 28 January 2021, *ECB asks banks to address credit risk and improve efficiency*.
[75] Letter of 3 March 2020 on **Contingency preparedness in the context of COVID-19**.
[76] See text accompanying footnote 27 above.
[77] Letter of 28 July 2020, **Operational capacity to deal with distressed debtors in the context of the coronavirus (COVID-19) pandemic**.
[78] See the language on public-sector guarantess in the ECB’s Press Release of 20 march 2020, *ECB Banking Supervision provides further flexibility to banks in reaction to coronavirus*.
[79] Andrea Enria, *Supervisory challenges of the pandemic and beyond*, keynote speech by the Chair of the Supervisory Board at the Handelsblatt European Banking Regulation Conference, Frankfurt am Main, 3 November 2020.
[80] ECB’s *Guide on the supervisory approach to consolidation in the banking sector*, 12 January 2021.
[81] See*: General Board of the ESRB: actions to address coronavirus-related systemic vulnerabilities*, EULawLive 18 May 2020.
[82] ECB Press Release, 15 April 2020, *ECB supports macroprudential policy actions taken in response to coronavirus outbreak*.
[83] See the overview *Macroprudential measures taken by national authorities since the outbreak of the coronavirus pandemic*, last update: 25 January 2021.
[84] See: https://www.esrb.europa.eu/national_policy/html/index.en.html.

Beyond the ECB's own actions, on the **legislative** front, a super fast-track amending regulation to the CRR2 was adopted: the CRR "quick fix".[85] This legal acts acknowledges the key role credit institutions need to play in the recovery and seeks to allow capital to be used where it is most needed, "ensur[ing] that the prudential regulatory framework interacts smoothly with the various measures that address the COVID-19 pandemic".[86] An array of measures was adopted[87], ranging from (again) delayed application of accounting standards (IFRS 9), deferring the date of application for the leverage ratio buffer requirement to 1 January 2023, bringing forward a relaxation in credit risk rules for collateralised loans to pensioners or employees,[88] to favourable prudential treatment of software (read: including this in a bank's capital) brought forward.[89] The CRR "quick fix" legal act was adopted with "the objective of this Regulation, namely maximising the capacity of institutions to lend and to absorb losses related to the COVID-19 pandemic, while still ensuring the continued resilience of such institutions".[90]

On the **fiscal** front, an EU measure to support the budgetary outlays by Member States faced with rising unemployment due to the pandemic was adopted early on: the SURE mechanism.[91] The acronym stands for "support to mitigate unemployment risks in an emergency". SURE can support Member States for up to €100 billion, and is funded through bonds issued by the Commission,[92] with € 90.3 billion in support disbursed as of now.[93] The bonds issued are 'social bonds':[94] a special EU SURE Social

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[85] Regulation (EU) 2020/873 of the European Parliament and of the Council of 24 June 2020 amending Regulations (EU) No 575/2013 and (EU) 2019/876 as regards certain adjustments in response to the COVID-19 pandemic, OJ L 204/4, 26.6.2020.

[86] Recitals 5 and 6 in the preamble to Regulation 2020/873.

[87] Well set-out in the ECB's Opinion of 20 May 2020 on amendments to the Union prudential framework in response to the COVID-19 pandemic (CON/2020/16) 2020/C 180/04, OJ C 180/4, 29.5.2020.

[88] Recital 18 in the preamble to Regulation 2020/873 and Article 123 CRR2.

[89] See recital 27 in the preamble to Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012, OJ L 150/1, 7.6.2019. This measure allows "prudently valued software assets, the value of which is not materially affected by the resolution, insolvency or liquidation of an institution, should not be subject to the deduction of intangible assets from Common Equity Tier 1 items". This relaxation, in Article 36 CRR2, has recently been criticised by Bank of England Governor Andrew Bailey as a deviation from Basel standards that the UK authorities would not follow: *The case for an open financial system*, 10 February 2021.

[90] Recital 23 in the preamble to Regulation 2020/873.

[91] Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L159/1, 20.5.2020.

[92] By 27 January 2021, the Commission had issued €53.5 billion social bonds.

[93] See: https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/sure_disbursements_tables_30.11.pdf.

[94] See: https://ec.europa.eu/info/sites/info/files/about_the_european_commission/eu_budget/eu_sure_social_bond_framework.pdf.

Bond Framework in accordance with the ICMA Social Bond Principles.[95] Focusing back on the ECB, it has issued a decision to exempt deposits to be held at the ECB for repaying SURE support from negative interest rates.[96]

This chapter, focusing on the legality of the ECB's pandemic response, cannot go into the Next Generation EU Recovery fund other than mentioning that, on the **budgetary** side, a new element in the EU's multi-annual budget will consist of a programme for recovery that I will briefly discuss below.

Finally, in this bird's eye overview of EU responses to the pandemic in the areas of economic and monetary policy, the State aid sequel to the original Commission activity should be mentioned.[97]

5. The PEPP's proportionality in the light of 'Karlsruhe'

This chapter is not intended to discuss the judgment of the *Bundesverfassungsgericht* (*BVerfG*, German Constitutional Court) of 5 May 2020 in the *Weiss* case, concerning the ECB's PSPP. Others have contributed a deeper analysis than this contribution can make.[98] The reader is referred to these.[99] Yet, as the PEPP was adopted in the same year that the German Constitutional Court declared the ECB's PSPP *ulta vires* and, indeed, also considered the CJEU's judgment in the *Weiss* case as having been adopted *ultra vires*, one cannot pass by Karlsruhe in this essay on the legality of the PEPP. One may even expect a judicial challenge against the PEPP. So, how to – briefly – assess the proportionality of the PEPP in the light of the *BVerfG*'s judgment?

First and foremost, the ultimate interpretation of the legality of ECB measures lies in Luxembourg, not in Karlsruhe or elsewhere. This follows from the CJEU's mandate to "ensure that in the interpretation and application of the Treaties the law is observed"[100] and in the precedence of Union law, established by judicial precedent[101] as early as 1964 and confirmed by the authors of the Treaty[102] in 2007.

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[95] See: https://www.icmagroup.org/assets/documents/Regulatory/Green-Bonds/June-2020/Social-Bond-PrinciplesJune-2020-090620.pdf.

[96] See: *ECB Decision exempting deposits for SURE from negative interest rates officially published*, EULawLive, 11 September 2020; and: Decision (EU) 2020/1264 of the European Central Bank of 8 September 2020 amending Decision (EU) 2019/1743 of the European Central Bank on the remuneration of holdings of excess reserves and of certain deposits (ECB/2020/38), OJ L 297/5, 11.9.2020.

[97] I refer to Pablo Biscari García, *Measures adopted by the European Commission to mitigate the impact of COVID-19 in the banking sector*, EULawLive, 29 April 2020.

[98] See, e.g., Heiko Sauer, *Substantive EU law review beyond the veil of democracy: the German Federal Constitutional Court ultimately acts as Supreme Court of the EU* and Daniel Sarmiento, *Requiem for Judicial Dialogue – The German Federal Constitutional Court's judgment in the Weiss case and its European implications*, in EULawLive, weekend edition №16, 9 May 2020.

[99] See other authors, mentioned in the weekend edition of EULawLive, 9 May 2020 in the preceding footnote.

[100] Article 19 TEU.

[101] Judgment of the Court of 15 July 1964 in Case 6/64 (*Flaminio Costa* v *E.N.E.L.*); ECLI:EU:C:1964:66.

[102] Declaration concerning primacy, No. 17, attached to the TEU which reads in part as follows: "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties

Yet, a challenge from the highest constitutional court of the largest Member State, risking the non-applicability, according to that State's law, of a legal act adopted by the ECB and possibly resulting in one of the NCBs finding itself unable to comply with instructions of the ECB's Executive Board[103] in implementing unconventional monetary policy measures, is a relevant fact. The *BVerfG* focused on the limitations of the ECB's mandate resulting from a strict separation between monetary policy (for which the EU has exclusive competence)[104] and economic policies (where competences are largely national and not even labelled 'shared').[105] Finding that the ECB's Quantitative Easing programme, in so far as it concerns secondary-market purchases of government bonds, has side-effects of an economic nature which the ECB, in the eyes of the Karlsruhe judges, had not adequately taken into account in its reasoning when adopting the PSPP decision, the German Constitutional Court considered the ECB's PSPP decision to have potentially exceeded its mandate. Further motivation on the proportionality of the PSPP was needed and the German Government and Parliament (*Bundestag*) should ensure that such a proportionality assessment is – in the eyes of the German judges – belatedly undertaken.

19 The ECB dryly observed in its press release[106] of the same day as the *BVerfG*'s judgement, that the CJEU had ruled that it "is acting within its price stability mandate" in the *Weiss* judgment, given at the request of the German Constitutional Court in the same proceedings that now led the German judges to adopt a different stance. Also, the ECB's Governing Council declared it "remains fully committed to doing everything necessary within its mandate to ensure that inflation rises to levels consistent with its medium-term aim and that the monetary policy action taken in pursuit of the objective of maintaining price stability is transmitted to all parts of the economy and to all jurisdictions of the euro area." The CJEU itself issued a press release[107] in which the uniform application of EU law and the binding nature of its preliminary rulings took central place.

Barely a month later, the Governing Council discussed the proportionality of its asset purchasing programmes. In the account of its monetary policy meeting[108] early June 2020, notably the following considerations were devoted to the proportionality of the APP:

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and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."

[103] Article 12.1, fourth sentence, Article 14.3 ESCB Statute.

[104] Article 3(1)(c) TFEU.

[105] Articles 2(3) and 5(1) and (2) TFEU; see, also, Articles 119(1) and 120-126 TFEU (and footnote 43 above).

[106] ECB Press release, 5 May 2020, *ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate*.

[107] *Press release following the judgment of the German Constitutional Court of 5 May 2020*, No 58/20.

[108] Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 3-4 June 2020.

"(…) Accordingly, the PEPP and the APP were proportionate measures under the current conditions for pursuing the price stability objective, with sufficient safeguards having been built into the design of these programmes to limit potential adverse side effects, including risks of fiscal dominance, and to address the monetary financing prohibition."

And, while including the upcoming monetary policy review in the rationale for this in-depth discussion of the asset purchases, the need to explain them to the general public is stressed:

"Members also put forward some broader considerations with regard to the **effectiveness** and **efficiency** of using asset purchases as a monetary policy tool in the pursuit of the ECB's price stability objective, including in the light of the upcoming review of the monetary policy strategy and **with a view to explaining the Governing Council's monetary policy deliberations in a more comprehensive way to the public**. It was argued that **the proportionality assessment of any monetary policy measure** had to consider, among other things, the degree to which the measure contributed to achieving the monetary policy objective, on the one hand, and possible unintended side effects, on the other hand. It required a judgement as to whether other policy measures were available that were as effective and efficient while offering **a better balance between intended and unintended effects**." (bold added, RS)

The Governing Council recalled its rationale for the PSPP back in 2015, thereby rebutting the *BVerfG*'s reasoning on low interest rates and emphasising the empirical evidence on this phenomenon:

"It was recalled that the decision to implement a large-scale asset purchase programme in January 2015 had been taken in response to **two major challenges**, namely **strong disinflationary headwinds** in the aftermath of the financial and sovereign debt crises in the euro area and **the global phenomenon of declining equilibrium (or "natural") interest rates** that ultimately determined the degree of accommodation that a given level of policy rates would deliver. There was **vast empirical evidence documenting the decline in the level of equilibrium interest rates over the past three decades** which was broadly related to a decrease in potential output growth in many industrial countries, reflecting factors such as demographic trends or low productivity growth. Therefore, with policy interest rates close to their effective lower bound, unconventional instruments were needed to provide the degree of monetary accommodation that was consistent with the ECB's inflation aim." (bold added, RS)

They explained the low-interest environment that so concerned the German complainants before Karlsruhe:

"At the same time, it was noted that the low interest rate environment in which central banks had to navigate was associated with a number of challenges. **Low interest rate**: excessive risk-taking behaviour/strain the profitability, and hence the capitalisation, of banks/scenarios in which banks financed inefficient firms, which implied a misallocation of resources and could ultimately lead to a decrease in overall productivity in the economy/savings of households and insurance companies/ "(…) **the challenges of a low interest rate environment mainly arose from the structural factors driving the decline of interest rates, while monetary policy had only contributed to these effects and was clearly not the main factor behind them**."

> "In **assessing the benefits and costs of asset purchases, the relevant benchmark was not the status quo, but a counterfactual situation in which policy accommodation through asset purchases had not been provided.** There was ample evidence that the euro area economy would have fared much worse without the policy stimulus from asset purchases. The Eurosystem's asset purchases had created financial conditions that countered disinflationary forces and helped to avert deflationary risks in the euro area. In overall macroeconomic terms, **asset purchases had made a very significant positive contribution to both economic growth and inflation in the euro area.** " (bold added, RS)

I consider these reflections of the Governing Council an excellent example of how an independent central bank may answer its critics, be they constitutional complainants or national courts. It is only regrettable that this account is not available in German on the website of the ECB. The proportionality considerations, apparently also forwarded to the defendants in the Karlsruhe proceedings (the German government and parliament)[109] to comply with the *BVerfG*'s ruling,[110] would seem applicable in the context of the pandemic asset purchasing programme, as well, with the added argument that the urgency of the steep economic decline and the need for immediate, strong action to fulfil the ECB's price stability mandate in utterly unstable times would lend strength to the conclusion that the PEPP falls squarely within the ECB's mandate.

6. The way out of the pandemic: a green recovery & addressing climate change, biodiversity loss

This analysis of the legality of the ECB's PEPP annex description of its context is already long enough. Yet, remarks are in order on the issue for which this pandemic has been a dress rehearsal. The Earth has now been confronted with a globally expanding disease of a zoonotic nature and seen sudden economic and social hardship at unprecedented scales. Without comparing misery, it is clear that the illness and the societal impact have been differently played out: between socio-economic status, regions, citizen status (asylum seeker, refugee or settled status, to use a Brexit term), and even ethnicity.[111] And, economic distress translates in unemployment and poverty here, while it leads to hunger, malnutrition and starvation there. The World Food Programme, a United Nations arm, estimates that 690 million people are hungry.[112] Progress towards achieving the Sustainable Development Goals (SDGs), adopted[113] by the UN General Assembly in 2015 as objectives to reach in 2030, which include a 'no hunger' objective, seems to be backtracking. The effects of COVID-19 may

[109] See the article in the *Frankfurter Allgemeine Zeitung* of 3 August 2020: *Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an* (Weidmann considers demands of the constitutional court to have been fulfilled).
[110] See: Dolores Utrilla, "Three months after Weiss: Was nun?", EULawLive, 5 August 2020.
[111] See: COVID-19 Hospitalization and Death by Race/Ethnicity at the website of the US Centers for Disease Control and Prevention.
[112] See: Zero Hunger at the WFP website.
[113] General Assembly Resolution 70/1, 25 September 2015.

be mild compared to what awaits humanity with climate change and loss of biodiversity. Major risks are likely to substantiate and incisive transitions towards a carbon-free, circular economy respecting non-human life are on the agenda. In the current context, this means two things: the recovery needs to be green, and central bank action will be needed in this area, as well.

The greening of the economy is already part-and-parcel of the recovery programme on the fiscal side. 'Green' is central to the Recovery and Resilience Facility (RRF) adopted by the Council[114] on 11 February 2021, a € 672.5 billion facility which forms of the larger (€750 billion) Next Generation EU (NGEU) plank in the EU's multi-annual budget.[115] Once the 'Own Resources Decision'[116] has been ratified by all Member States, the Commission can start borrowing on the capital markets for the RRF. The RFF seeks to stimulate the European economy overcoming the pandemic slump and easing the way to the green economy that the EU has set itself as objective. As part of the Green Deal, which sets out the triple ambitions of (i) no net emissions of greenhouse gases in 2050, (ii) economic growth decoupled from resource use and (iii) making Europe the first climate-neutral continent by 2050, an EU Climate Law is being legislated.[117] It seeks "to set in legislation the EU's 2050 climate-neutrality objective", which would be "a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal set out in Article 2 of the Paris Agreement"[118]. The Climate Law requires that "[EU]-wide emissions and removals of greenhouse gases regulated in [EU] law shall be balanced at the latest by 2050, thus reducing emissions to net zero by that date". It provides that "[t]he relevant [EU] institutions and the Member States shall take the necessary measures at [EU] and national level respectively, to enable the collective achievement of the climate-neutrality objective".

[114] See: https://www.consilium.europa.eu/en/policies/eu-recovery-plan/.
[115] See footnote 9 above.
[116] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424/1, 15.12.2020.
[117] Regulation of the European Parliament and of the Council on establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law); see the Commission's proposal and the Council's position.
[118] See the Paris Agreement, 12 December 2015, OJ L 282/4, 19.10.2016, p. 4.

The political will to address climate change and biodiversity loss, expressed by the Commission[119], European Council[120], and the European Parliament[121] makes clear that the transition to a green economy will be undertaken. And it provides ample political justification for the ECB to follow up and 'green' its policies, both on the monetary as well as on the prudential side of its functions. The on-going Monetary policy strategy review[122] will provide ample room for such greening to be effected. Hopeful signals from three Executive Board members (Christine Lagarde[123], Isabel Schnabel[124] and Frank Elderson[125]) may lead to expectations that the ECB will act decisively to green its monetary policy measures. In spite of hitherto meagre prudential provisions in the Single Rulebook, the ECB has taken the risk element of the micro-prudential standards as a firm basis to address climate change risks at the banks it supervises by adopting its *Guide on climate-related and environmental risks*.[126]

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Active and far-reaching measures, properly reasoned and well-explained, must be forthcoming from the ECB in the coming years of green recovery and addressing climate change and biodiversity loss. As in the pandemic, the burden cannot fall on the ECB alone, and firm, decisive action by federal and State authorities is needed, including a clear taxonomy of what is 'green'. To this end, the following legislation has already been adopted and is in the process of elaboration into technical standards:

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[119] See its Action Plan on the Green Deal, 11.12.2019 (COM(2019) 640 final).
[120] See the conclusions of the 12-13 December 2019 meeting ("EU leaders endorsed the objective of making the EU climate-neutral by 2050, in line with the Paris Agreement. They underlined that the transition to climate neutrality will bring significant opportunities for economic growth, markets, jobs and technological development"); and the conclusions of the meeting on 10-11 December 2020 ("To meet the objective of a climate-neutral EU by 2050 in line with the objectives of the Paris Agreement, the EU needs to increase its ambition for the coming decade and update its climate and energy policy framework. To that end, the European Council endorses a binding EU target of a net domestic reduction of at least 55% in greenhouse gas emissions by 2030 compared to 1990. It calls on the co-legislators to reflect this new target in the European Climate Law proposal and to adopt the latter swiftly").
[121] Specifically with regard to the ECB's monetary policy measures, see the European Parliament resolution of 12 February 2020 on the European Central Bank Annual Report for 2018.
[122] See: ECB Press *Release ECB launches review of its monetary policy strategy*, 23 January 2020.
[123] Christine Lagarde, *Climate change and central banking*, keynote speech by the President of the ECB at the ILF conference on Green Banking and Green Central Banking Frankfurt am Main, 25 January 2021.
[124] Isabel Schnabel, *Never waste a crisis: COVID-19, climate change and monetary policy*, speech at a virtual roundtable on "Sustainable Crisis Responses in Europe" organised by the INSPIRE research network, 17 July 2020; Isabel Schnabel, *When markets fail – the need for collective action in tackling climate change*, speech at the European Sustainable Finance Summit, Frankfurt am Main, 28 September 2020:
[125] Frank Elderson, *Greening monetary policy*, THE ECB BLOG 13 February 2021.
[126] *Guide on climate-related and environmental risks Supervisory expectations relating to risk management and disclosure*, November 2020.

- Taxonomy Regulation: Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198/13, 22.6.2020;
- Sustainable Finance Disclosure Regulation (SFDR): Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector OJ L 317/1, 9.12.2019;
- Non-financial Reporting Directive (NFRD): Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups OJ L 330/1, 15.11.2014;
- Benchmark Regulation & Benchmark Regulation Amendment: Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks OJ L 317/17, 9.12.2019.

7. Conclusion

This analysis in this chapter strongly supports the legality of the ECB's response to the coronavirus pandemic. One hopes that the CJEU will not be requested to assess this legality, by a Member State or by concerned citizens who have access to constitutional review mechanisms. This is not the time for legal quibbling. Yet, the legality is core to the idea of a society under the rule of law[127]. And it will co-determine the next steps to take: when extraordinary times allow for extraordinary measures they also must lead to reflection on the next steps to avoid a recurrence of unpreparedness. This applies to the health policies: as already set out by Daniel Sarmiento, the protective clause to keep health care a national prerogative may have to be amended. The contours of a EU Health Union[128] might include not only common standards for medical professions but, also, extensive interactions on health research, making the ECDC an authoritative and effective agency in times of health hazards, ensuring the availability of medicines across Europe, and a joint approach to the pharmaceutical industry in price-setting and the availability of medicine for all EU citizens alike, while acknowledging the necessary local character of health care, close to those very citizens.

But let me stick to my field of expertise, the law of the Economic and Monetary Union. Unfinished business is to be taken up once the crisis is over:

- How to treat sovereign risk on banks' balance sheets equitably and prudently;
- Adopting a European Deposit Insurance System, stalled in the Council;
- Revamping and extending the European Stability Mechanism (ESM), beyond the current re-vamp which has only recently led to the adoption of a new ESM Treaty and,

[127] See my *The ECB and the rule of law*, ECB Legal Conference 2019.
[128] See the Commission's webpage on a Health Union.

ultimately, integration of the ESM in the Union legal framework, proposed but, again, stalled.

History will not judge lightly those who, between the crises, have organised obstruction to the construction of a stronger union (e.g., joint action in the fiscal field to allow automatic stabilisers to work across the currency union and linking deposit insurance and unemployment insurance schemes)[129], or those *outre-Rhin* who chose to be deaf to Emmanuel Macron's recurrent insistence on shaping European sovereignty including in EMU affairs. But quarantine has odd effects of self-reflection on people who suddenly find themselves isolated, '*en exile*' as Albert Camus eloquently describes in *La Peste* (1947). Redemption is still possible. Alas, the *Bundesverfassungsgericht* (German Constitutional Court, *BVerfG*) has indeed wished to mark the 75th anniversary of the end of the Second World War with its judgment in sequel to *Weiss* by questioning the proportionality and, hence the legality, of massive buying of government bonds after first deferring its judgment from 24 May to exactly 5 May. Beyond Europe, as Yuval Noah Harari rightly points out[130], the pandemic leaves us two choices, "between totalitarian surveillance and citizen empowerment" and "between nationalist isolation and global solidarity". Thus, beyond Europe, solidarity and cooperation are paramount, now and in the face of climate change. A return to core value of the European integration project[131] is called for.

These are contemplations for the longer term, reflecting on what the coronavirus crisis teaches us as European and as global society, also by way of 'dress rehearsal' for the incisive changes in the economy, in transport and food patterns, in short: in our daily living, that the on-going climate change catastrophe will forcefully invite us to make soon. For now, still not out of the COVID-19 crisis, Europe's two federal executive institutions implement their mandates strongly and timely. Focusing on the ECB's pandemic purchasing programme: its mandate implementation is firmly within the law of the European Union.

René Smits, 18 February 2021

René Smits is Professor *emeritus* of the Law of the Economic and Monetary Union at the University of Amsterdam; a Member of the ECB's Administrative Board of Review; an assessor at the Belgian Competition Authority and a consultant on banking regulation and sustainable finance. He wrote this contribution in a personal capacity: his academic views cannot be attributed to the ECB.

[129] Dutch Finance Minister Wopke Hoekstra is quoted in the *Financial Times*, 3 December 2018, and in 2018 parliamentary proceedings of 12 December 2018, to have boasted that the proposed budgetary capacity for the Eurozone was an elephant that he managed to turn into a mouse, and a caged mouse at that.

[130] *Yuval Noah Harari: the world after coronavirus*, *Financial Times*, 20 March 2020.

[131] René Smits, The Invisible Core of Values in the European Integration Project, (2018) 45 Legal Issues of Economic Integration, Issue 3, 221–227.