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Introduction

The evolving landscape of European monetary policy continues to present complex legal and economic challenges. Since the global financial crisis (2007) and the sovereign debt crisis in the euro area (2010), the European Central Bank (ECB) has implemented a range of non-standard monetary policy measures (NSM), such as the Outright Monetary Transactions (OMT), the Public Sector Purchase Programme (PSPP), and the Pandemic Emergency Purchase Programme (PEPP) or Targeted Longer-Term Refinancing Operations (TLTROs). These measures supplement traditional instruments such as interest rate adjustments. The announcement of the Transmission Protection Instrument (TPI) in July 2022 shows that the era of NSM has not come to an end.

Against the background of an expanding policy toolkit, the ECB adopted a new monetary policy strategy in 2021,[1] signaling a shift in priorities. Notably, the ECB has committed to integrating climate change considerations into its policy framework.

Beyond the internal evolution of ECB policies, global developments also shape the legal and economic landscape of the Eurozone. Central bank digital currency (CBDC) projects around the world raise issues of money sovereignty. Meanwhile, the ongoing economic consequences of Russia's war in Ukraine have resulted in persistent financial sanctions, which, in turn, affect the ECB's decision-making and broader monetary governance.

All of these measures highlight the broader legal and institutional challenges confronting the ECB as it seeks to adapt to a rapidly changing economic environment while remaining within the legal framework established by the Treaties. The legal yardsticks set forth in *Gauweiler and Others*[2] and *Weiss*[3] play a crucial role in determining the extent to which these measures are consistent with the ECB's mandate. A key issue is whether the ECB's expanding role remains within the boundaries set by the Treaties, particularly with regard to its primary and secondary objectives, the demarcation between monetary and economic policy, and the demands of the open-market and the proportionality principle.

The following contributions stem from the second workshop of a project funded by the Anniversary Fund of the Austrian National Bank (OeNB),[4] held at the Johannes Kepler University of Linz on the 17th of October 2024, which centered on the theme "Prometheus Unbound? A Legal Analysis of Recent ECB Monetary-Policy Measures". They examine different facets of these pressing legal issues.

I would like to extend my sincere gratitude to our contributors, *Armin Ahari, Benjamin Letzler and Michael Waibel, Sara Dietz, Fabian Amtenbrink, Thibault*

1 See *ECB*, The ECB's monetary policy strategy statement, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (25/3/2025).
2 ECJ, Case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:400.
3 ECJ, Case C-493/17, *Weiss and Others*, ECLI:EU:C:2018:1000.
4 Austrian Central Bank, Anniversary Fund, project number: 18778.

Martinelli, *Marijn van der Sluis*, *Julia Kreuzhuber* and *Gülşah Erbilen*, for their valuable insights and analyses. Their work provides an essential foundation for further discussions on the legal framework governing European monetary policy in times of rapid transformation.

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Judicial review of the ECB and the Federal Reserve: contrasting approaches

Benjamin Letzler and Michael Waibel*

Contents

Abstract

This article compares the availability of judicial review in principle and practice for the European Central Bank (ECB) and the US Federal Reserve (the Fed). The central focus is on these two central banks as monetary policymakers, leaving aside their role as lenders of last resort and as regulators, for which the assessment of judicial review differs. Our main finding is that judicial review is much less important for the Fed, where it has not played a significant role to date, compared to the ECB. This divergence to date notwithstanding, we explore the possibility of major legal challenges to both the ECB and the Fed in the future.

Keywords: central banks, central bank independence, European Central Bank, Federal Reserve, judicial review, *Weiss*

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A. Introduction

This paper compares the availability of judicial review in principle and practice for the European Central Bank (ECB) and the US Federal Reserve (the Fed). The central focus is on these two leading central banks as monetary policymakers, leaving aside their role as lenders of last resort and as regulators, for which the assessment of judicial review differs.[1]

Our main finding in this article is that judicial review is much less important for the Fed, where it has not played a significant role to date, compared to the ECB. The Fed is a Prometheus unbound by judicial review, whereas the ECB is a Prometheus bound by judicial review. This marked difference may also be a product of the time when the Fed and the Eurosystem were established. When the Fed was established in the early twentieth century, judicial review of the administrative state was much less developed and extensive than when European Monetary Union was created in the late twentieth century.

This availability of judicial review of the ECB before the Court of Justice counterbalances the ECB's supranational character and its high degree of independence. Unlike the Fed and almost uniquely among central banks, the ECB is not embedded in a national system of checks and balances, and in particular, the accountability of the ECB to the legislature is less developed than the Fed's, being primarily a matter of submitting regular reports to the European Parliament.[2] In exercising its monetary policy mandate, the ECB is intended to be subject only to the jurisdiction of the Court of Justice of the European Union (CJEU).[3] This has not stopped enterprising courts from asserting jurisdiction over the ECB indirectly, in particular the German Federal Constitutional Court (FCC), in a series of cases relating to the ECB's asset purchase programs culminating in *Weiss.* The result has been that the ECB has been subjected to an exceptional level of judicial review for a central bank.

This article proceeds as follows. It begins by considering commonalities and contrasts in the structure and oversight of the ECB and the Fed. It then examines, first in respect of the ECB, then in respect of the Fed, key cases of judicial review, including the legal standards applied, and possible ramifications. In respect of the Fed, it considers non-judicial limitations on decision-making and discretion in monetary policy, including legislative influence and institutional legal culture. Lastly, it concludes with a look at the road ahead for judicial review of the Fed and the ECB.

1 See, e.g., *Goodhart/Lastra,* SUERF Policy Note 2018/32, pp. 1–8 (surveying various policy considerations) and *International Law Association*, Committee on International Monetary Law, Report to the Athens Conference (2024), VI. Judicial Review of Banking Supervision (by *Michael Waibel*).

2 See, e.g., *Dreher* et al., ECB Economic Bulletin 2024/7, pp. 75 et seq.

3 Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB/ECB), OJ C 202 of 7/6/2016, Art. 35, para. 1: "The acts or omissions of the ECB shall be open to review or interpretation by the Court of Justice of the European Union in the cases and under the conditions laid down in the Treaty on the Functioning of the European Union."

B. Commonalities and contrasts

A commonality between the ECB and the Fed is that both have engaged in large-scale asset purchase programmes since the transatlantic financial crisis in 2007-2008. Both central banks consider these programmes to be part of their monetary policy mandate.

There are also several points of contrast that are directly relevant to judicial review of monetary policymaking.

First, the primary objective of the ECB's monetary policy is to maintain price stability.[4] The difference between the ECB's mandate and the Fed's broader one is the first and the most widely known point of contrast with the Fed.[5]

Second, the ECB is a supranational central bank and enjoys a higher degree of *de jure* independence than the Fed.[6] A detailed EU law framework underpins this independence, which enjoys primacy over the national laws of each Member State. This framework includes the prohibition on monetary financing, the non-bailout clause and the availability of judicial review before the CJEU.[7] Even though the Fed's legal framework is also detailed, it is entirely domestic.[8] It is part of a domestic system of checks and balances, and the executive, namely the president, may constrain the chair and the other board members in practice in the exercise of their functions.[9]

4 Art. 127 para. 1 TFEU provides: "The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general 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 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119."

5 We examine the Fed's mandate below at section E.

6 Notwithstanding the nominally superior legal protections of the ECB, certain rankings of central bank independence have found the ECB to be comparable in independence to, or marginally less independent than, the Fed. See, e.g., *Forschner/Weber*, Intereconomics 2014/1, pp. 45 et seq.

7 See Art. 123 (prohibition on monetary financing) and 125 (non-bailout clause) TFEU as well as Art. 35 para. 1 Statute of the ESCB/ECB (judicial review).

8 Key legislation on the Fed is codified at 12 United States Code (U.S.C.) Chapter 3 (Federal Reserve System).

9 By statute, members of the Board of Governors of the Fed can only be removed for "cause". Whether the president has authority to demote the Fed chair to a regular board member without cause is legally uncertain. See, e.g., *Conti-Brown,* What happens if Trump tries to fire Fed chair Jerome Powell?, available at: https://www.brookings.edu/articles/what-happens-if-trump-tries-to-fire-fed-chair-jerome-powell/ (10/1/2025). At the same time, while suggesting that he will not fire Chair *Jerome Powell,* President *Trump* has identified a variety of options he may pursue to pressure *Powell*, including naming a "shadow Fed chair" to serve alongside him. See *Hyatt,* Powell Defends Federal Reserve Independence, available at: https://www.investopedia.com/powell-defends-fed-independence-8756337 (10/1/2025).

Third, the Eurosystem[10] does not have a unified legal culture, and the legal culture within the Eurosystem may vary more than within the Fed system. The legal cultures of the various national central banks in the Euro area and the ECB may differ more than the legal cultures of the Board of Governors of the Federal Reserve Board and the Federal Reserve Bank of New York, a point to which we will return. Diverse legal cultures within the Euro area deserve special mention. For example, there is the question of to what extent the legal cultures of the ECB and the German *Bundesbank* differ and how these differences have played out in assessing legality internationally, for example in the context of the ECB defending asset purchase programmes against constitutional complaints before Germany's FCC. Different degrees of *de jure* independence of central banks could be an important contributing factor to these cultures.[11]

C. Judicial review of the ECB's asset purchase programs

It has been observed that "central banks are the first responders of economic policy. They hold the reins of the global economy."[12] The 2010s in Europe witnessed a trend towards more influence for executives at the national and EU level, including the Eurozone's independent central bank, and away from parliaments. This shift has been particularly visible in the crisis of the euro area from 2010 onwards and manifested itself in an increase in intergovernmental action, such as the establishment of the European Stability Mechanism by treaty outside the EU treaty framework.[13] A series of constitutional complaints and inter-institutional complaints (so-called *Organstreit* proceedings) before the German FCC arose as a reaction against this trend and amidst strident criticism by some groups of the ECB's asset purchase programmes. In particular, the ECB's critics in Germany and elsewhere alleged that the ECB's asset purchase programmes were for the benefit of crisis-hit debtor countries, such as Ireland and Greece, at the expense of "frugal" creditor countries, such as Germany and the Netherlands.

An early such intervention by the ECB was its programme on Outright Monetary Transactions (OMT), the announcement of which via press release in August

10 The Eurosystem is comprised of the ECB and the national central banks of Member States having the euro as their currency. Each national central bank is subject to its own domestic law, and disputes between the ECB and any entity "shall be decided by the competent national courts, save where jurisdiction has been conferred upon the Court of Justice of the European Union." See Art. 35 para. 2 Statute of the ESCB/ECB.

11 The influential index of measuring central bank independence from the early 1990s puts Germany, Switzerland, Austria in the top three spots in the ranking. The *Bundesbank*'s index of independence is 0.21 points higher than the Fed. See *Cukierman/Webb/Neyapti,* The World Bank Economic Review 1992/3, pp. 353–358.

12 *Tooze,* The Death of the Central Bank Myth, available at: https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/ (10/1/2025).

13 *Hinarejos,* Cambridge Law Journal 2013/2, pp. 237 et seq.

2012 was enough to calm financial markets.[14] Although the ECB had not bought a single bond under the OMT, the German FCC subjected the programme to detailed scrutiny all the same. On that occasion, the FCC granted the ECB a substantial margin of appreciation, albeit reluctantly, after the CJEU–in response to the German FCC's first ever request for a preliminary reference–had found that the OMT programme complied with EU law.[15]

The FCC was less sanguine when returning to the ECB's asset purchase programmes in *Weiss,* a case regarding the ECB's Public Sector Purchase Programme (PSPP) initiated in 2015. In *Weiss,* the FCC engaged in proportionality review of the German government's, parliament's and the *Bundesbank*'s conduct vis-à-vis the ECB, purporting to arrogate judicial review of the ECB from the CJEU and subjecting the ECB to *de facto* judicial review by a national high court.

The PSPP involved Eurosystem central banks purchasing government securities of euro area Member States on the secondary market. The complainants in *Weiss* challenged the PSPP, alleging that the decisions of the ECB that established the PSPP were *ultra vires* acts under the German Basic Law (*Grundgesetz*) and German constitutional organs, including the *Bundesbank*, could play no part in their implementation. They also alleged that the PSPP breached the prohibition of monetary financing in Art. 123 para. 1 TFEU[16] and the principle of conferral in Art. 5 para. 1 TEU[17] and were incompatible with German constitutional identity insofar as they limited the *Bundestag*'s overall budgetary responsibility.[18]

The FCC referred four questions to the CJEU for a preliminary ruling. In *Weiss*, the CJEU found in 2018 that the ECB had not exceeded its monetary policy mandate.[19] Applying a standard of manifest error, the CJEU found that the PSPP did not manifestly exceed what was necessary to achieve the ECB's mandate. As regards the proportionality of the PSPP, the CJEU highlighted the broad discretion the ESCB enjoys with respect to asset purchases, given their technical character and the complexity of forecasts. Disagreement about the goals and means of monetary policy was a normal feature of central banking. The PSPP was suitable for achieving its objective of lifting the rate of inflation closer to the ECB's target to maintain

14 *ECB*, Technical Features of Outright Monetary Transactions, available at: www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (10/1/2025).
15 German Federal Constitutional Court, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13.
16 Art. 123 para. 1 TFEU provides: "1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments."
17 Art. 5 para. 1 TEU provides: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality."
18 For in-depth treatment, see *Dietz*.
19 ECJ, Case C-493/17, *Weiss*, judgment of 11 December 2018, ECLI:EU:C:2018:1000.

price stability in the euro area. The CJEU referred to the practices of other central banks and research on the effects of asset purchase programmes. Considering persistently low inflation and the lack of alternative monetary policy tools, the CJEU found that the PSPP did not manifestly exceed what was necessary to achieve the ECB's objective.

After the CJEU's judgement, the FCC ruled the complaints admissible only to the extent that they challenged the inaction of the German Federal Government and the *Bundestag*. The FCC regarded itself as generally bound by the CJEU on matters of EU law, but not bound in exceptional cases, such as *Weiss,* in which the CJEU's reasoning was "simply untenable", "not comprehensible" and "objectively arbitrary",[20] faulting the CJEU for not assessing the proportionality of the PSPP when delimiting the competences of the ECB and Member States. The FCC found the judgement of the CJEU and the PSPP programme itself to be *ultra vires*[21] and that ECB decisions have no legal effect on the *Bundesbank*, forbidding the *Bundesbank* from participating in the implementation of the PSPP unless the ECB's Governing Council adopted a new decision within three months including a proportionality analysis meeting the proportionality requirements of the FCC, not the CJEU, by that time.[22]

The ECB reacted unusually with a press release on the judgement, underscoring that the CJEU had already found the ECB within its mandate for price stability.[23] The CJEU, even more unusually, issued a press release as well, emphasizing that preliminary rulings are binding in the interest of the uniform application of EU law, that the Court has exclusive jurisdiction to rule on whether an act of the ECB is contrary to EU law to safeguard the unity of the EU legal order, that Member States are obliged to ensure that EU law takes full effect, and that it will not comment further on the matter.[24]

Five days after the judgement, *Ursula von der Leyen*, President of the European Commission, also issued a statement, underscoring that "the Union's monetary policy is a matter of exclusive competence", "EU law has primacy over national law", and CJEU rulings are final and "binding on all national courts". She also

20 German Federal Constitutional Court, Judgement of the Second Senate of 5 May 2020–2 BvR 859/15, paras. 117–118.
21 *Ibid.,* para. 119.
22 *Ibid.,* para. 235.
23 *ECB*, ECB Takes Note of German Federal Constitutional Court Ruling and Remains Fully Committed to its Mandate, available at: www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html (10/1/2025).
24 *CJEU*, Press Release Following the Judgment of the German Constitutional Court of 5 May 2020, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (10/1/2025).

raised infringement proceedings as a possible reaction to the judgement, which were subsequently instituted and closed.[25]

D. Weiss and the Consequences

As a practical matter, *Weiss* has had limited consequences to date. The ECB has expanded the proportionality analysis contained in its decisions, and the FCC has not upheld further claims against other ECB asset purchase programmes. Yet *Weiss* may still prove momentous. Given the structure of the Eurosystem, the German FCC's ruling amounted to judicial review of the ECB and the *Bundesbank* through the back door. Whereas other jurisdictions, such as the United States, to which we will return below, set a high bar for standing to demand judicial review of central banks, the FCC has set the bar solely at having the right to vote in Germany, permitting actions to be brought by any voter alleging an abstract loss of democratic sovereignty.[26] That the FCC has purported to adjudicate political, rather than legal, questions is clear from the astonishing numbers of "little attorney general" complainants in the home state of the *Bundesbank*, which accounts for approximately one quarter of the ECB's capital. The *Gauweiler*[27] case involved 11,692 unnamed complainants, the *Weiss* case 1,729.

Constitutional complaints before the German FCC and similar cases before other national courts could constrain the ambition, scale and modalities of asset purchase programmes and other ECB decisions in the future. Indeed, challenges remain pending before the FCC on the ECB's Next Generation EU programme (ended 2023)[28] and PEPP (ended 2024).[29] Although the resolution of these challenges to now-concluded programmes may have little practical significance, they stand as a reminder to, and potentially as pressure on, ECB decisionmakers to bear in mind threats of intervention by Member States. At a policy level, key questions include whether such review improves decision-making by the ECB and whether such judicial review is necessary for democratic societies to improve the ECB's

25 *European Commission*, Statement by President VON DER LEYEN, available at: https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846 (10/1/2025). The Commission brought infringement proceedings against the Federal Republic of Germany on 9 June 2021, infringement case number INFR (2021) 2114, which were closed on 2 December 2021. The response provided by the federal government of Germany to the Commission on 3 August 2021 is available at: https://fragdenstaat.de/anfrage/korrespondenz-zwischen-europaischer-kommission-und-der-bundesrepublik-deutschland-im-vertragsverletzungsverfahren-az-infr20212114/668051/anhang/doc2DEreplytoLFN_de.pdf (10/1/2025). The German federal government notes in section 1 of its response that the FCC rejected further applications brought in 2021 for execution of *Weiss* and has permitted the *Bundesbank* to continue supporting the ECB without restriction.

26 For a critical perspective, see *Wiederin,* Österreichische Juristen-Zeitung 2010/48, pp. 398–406.

27 ECJ, Case C-62/15, *Gauweiler*, judgement of 16 June 2015, ECLI:EU:C:2015:400.

28 German Federal Constitutional Court, 2 BvR 547/21.

29 German Federal Constitutional Court, 2 BvR 547/21 (Next Generation EU) and 2 BvR 420/21 (PEPP).

accountability. The existing survey evidence does not suggest that the cases before the FCC in Germany have improved trust in the ECB and belief in its legitimacy among the European public.[30]

Judicial review by national courts could undermine the ECB's independence and its ability to act as the monetary policy maker for the entire Eurozone, particularly if national courts carry out intrusive proportionality review, as opposed to the CJEU's highly deferential standard of review of "manifest error" in *Weiss*. The CJEU effectively applied a rational basis review, highlighting the broad discretion the ESCB enjoys with respect to asset purchases, given their technical character and the complexity of forecasts. The FCC opted for an intermediate standard of review, undertaking the three-stage proportionality analysis established in its constitutional rights adjudication and taking issue with the CJEU's approach for not balancing the economic effects of the PSPP against the expected benefits of the monetary policy objectives defined by the ECB. One possibility for future judicial review of the ECB could be that the CJEU will feel pressured to apply a stricter standard of review than they would otherwise find legally appropriate, to avoid conflict with the FCC and other national courts. This outcome would be problematic in respect of the independence of central banks and the independence of courts.

At times, the mandate of a central bank can require it to act in a manner that may seem disproportionate, doing, in *Mario Draghi*'s phrase, "whatever it takes" to protect the integrity of the financial system.[31] Countermajoritarian institution–courts[32]–ought to accord decisions of another countermajoritarian institution greater deference than a non-countermajoritarian institution that enjoys little or no independence from the executive or legislative branches. It should be careful not to substitute its own assessment that an expert decision to fulfil the central bank's mandate was purportedly disproportionate

The German FCC's approach is an outlier in respect of the judicial review of leading central banks. A more mainstream approach is that taken to judicial review in respect of the Fed in the United States, to which we will turn now.

30 Data gathered by *Dreher*, ECB Economic Bulletin 2024/3, pp. 79 et seq., shows that trust levels in the ECB had already recovered after the Euro area crisis that reached its crescendo in 2011-12 and prior to the FCC's judgment in *Weiss*. However, trust remains at a lower level than during the first decade of European Monetary Union. The survey does not disaggregate results at the level of individual Member States, and thus does not show how the trust level has evolved specifically in Germany over time (which is the trust that the FCC is most likely to influence).

31 On the impact of this pronouncement, see *Waibel,* European Journal of International Law 2020/1, pp. 345–352.

32 There is a large literature on the countermajoritarian underpinning of judicial review, see, e.g., *Bickel,* pp. 16–17; *Shugerman,* Harvard Law Review 2010/5, pp. 1061–1151; *Barroso,* The American Journal of Comparative Law 2019/1, pp. 109–143. By contrast, central banks are not as regularly cast as countermajoritarian institutions. Central bank independence serves the objective of freeing monetary policymakers from the short-term concerns of politicians. *Tooze,* The Death of the Central Bank Myth, available at: https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/ (10/1/2025).

E. Judicial review of the Fed's dual mandate

As discussed, the ECB's single mandate of price stability has been subjected to detailed scrutiny by courts, especially by the CJEU but also by national courts such as the FCC. By contrast, the Fed's dual mandate of price stability and maximum employment has been subjected to very limited judicial examination. The original Federal Reserve Act of 1913 did not mention monetary policy or provide criteria for setting discount rates. Instead, the Act required the Reserve Banks to maintain gold reserves equal to a percentage of outstanding note and deposit liabilities, which was intended to limit the amount of currency and loans the Fed could issue and thus limit inflation.[33] The current statutory mandate of the Fed dates from 1977 and is contained in Section 2A of the Federal Reserve Act:

> "The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, *so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.*"[34]

The insertion of "maximum employment" into the Fed's mandate by the US Congress in 1977 coincided with stagflation and was soon followed by high interest rates under Fed chair *Paul Volcker*, who deflected congressional criticism that he was ignoring the employment component of the Fed's mandate. Just as members of Congress have failed to convince the Fed to prioritize employment, in spite of a statutory text in which "maximum employment" comes before "stable prices", so have members of Congress failed in legislative initiatives to take employment back out of the Fed's mandate.[35]

F. Judicial review of the Fed's monetary policy

The Fed has been subject to judicial challenges in a variety of ways, including in respect of its functions as a (i) regulator, (ii) enforcer and (iii) lender, as well as in respect of constitutional challenges to its agency structure, but to date there has been no significant judicial review of the Fed as a monetary policymaker.

US courts have applied different standards of review and deference depending on the function in question and whether the challenge relates to a specific case or fundamental questions of policy and structure. On broad questions, US courts typically treat the Fed as uniquely independent and unreviewable, a technocratic

33 See generally *Wheelock,* Overview: The History of the Federal Reserve 1913 to today, Federal Reserve History, available at: https://www.federalreservehistory.org/essays/federal-reserve-history (10/1/2025).

34 12 U.S.C. § 225a (emphasis added).

35 *Steelman,* The Federal Reserve's "Dual Mandate": The Evolution of an Idea, Richmond Fed Economic Brief, December 2011, EB11-12, available at: https://www.richmondfed.org/publications/research/economic_brief/2011/eb_11-12 (10/1/2025).

expert agency that requires independence both from the executive branch and from the judicial branch, given the slowness of the courts and judges' lack of expert training.[36]

Monetary policy is doubtless among the most fundamental matters for central banks. To date the monetary policy of the Fed has not been subject to significant judicial challenges, and those which have been brought have been unsuccessful. The leading case on judicial review of the Fed has long been *Raichle v. Federal Reserve Bank of New York,*[37] denying judicial review of monetary policy. The plaintiff *Raichle* alleged that he was harmed by the Fed's tight money supply, namely "a course of conduct [...] which has had for its object and purpose an arbitrary reduction in the volume of collateral or brokers' loans." *Raichle* invoked the 1921 Supreme Court decision of *American Bank & Trust Co. v. Federal Reserve Bank.*[38] In that case, state banks chose to stay outside the Federal Reserve system to charge fees higher than those permitted by the Fed. The plaintiff alleged that the Fed was actively trying to run it out of business, or in any event force it to join the Federal Reserve system, by "accumulating checks of country banks and presenting them in large quantities"[39] that potentially exceeded the small banks' cash reserves. Justice *Holmes* wrote, "We do not need aid from the debates upon the statute under which the Reserve Banks exist to assume that the United States did not intend by that statute to sanction this sort of warfare upon legitimate creations of the states."

In 1929, eight years later, Judge *Augustus Hand* distinguished the facts of *Raichle* from those of *American Bank & Trust:*

> "In the case at bar the 'principles of policy' point the other way. It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made."[40]

This 95-year-old appeals court decision, not reviewed by the Supreme Court, generally still reflects the state of the law today. US courts continue to regard judicial interference in monetary policy as bad public policy, and they have consistently avoided intervening, including in response to legal actions brought by members of Congress, on grounds including lack of standing and "equitable discretion to dismiss". One appeals court wrote that "if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action."[41]

36 *Ostrowski,* Yale Law Journal 2021/2, pp. 370 et seq.
37 *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910 (2d Cir. 1929).
38 *American Bank & Trust Co. v. Federal Reserve Bank*, 256 U.S. 350 (1921).
39 As glossed in *Raichle v. Federal Reserve Bank of New York,* 34 F.2d 915 (2d Cir. 1929).
40 *Ibid*.
41 *Melcher v. Federal Open Market Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987).

G. Legal standards applied to judicial review of the Fed

In sum, as one scholar has written, the US "judiciary is simply disengaged from the project of oversight of the" Federal Open Market Committee. This body sets interest rates at the Fed.[42] The FOMC is subject to judicial review only theoretically. The FOMC must in theory adhere to rationality review under the Administrative Procedure Act. The orders issued by the Committee at its eight annual meetings do not fit within the traditional concepts of administrative rulemaking and adjudication. The orders amount to guidance to the Fed's open market trading desks as to what sort of federal funds rate they should target. Potentially these orders are "informal adjudications" under the APA, but courts simply do not review the orders and defer instead to the agency's discretion.

H. Limitations on decision-making and discretion in monetary policy and open market transactions

As we have noted, US courts do not play a significant role in guiding or influencing the decision-making and discretion of US government actors in monetary policy and open market transactions. Influence comes from other sources, including the legislature and institutional legal culture and custom.

1. Legislative influence

The US Congress has kept a close eye on the Fed throughout its history, and multiple members of Congress have been outspoken critics of US monetary policy and market interventions. Congress regularly receives testimony from officials from the Fed and the Treasury, and it also intervenes in policy. One example involving the US Treasury, rather than the Fed, comes from the transatlantic financial crisis in 2007-2008, when the Treasury used its Exchange Stabilization Fund to prop up struggling money-market funds.[43] The Congress promptly passed a law the same year to prohibit the Treasury from establishing guarantee programs for the money market fund industry in the future. This prohibition was then suspended by the so-called CARES Act, the Coronavirus Aid, Relief, and Economic Security Act*Donald Trump*[44] That same act also authorized the Fed to lend to non-financial businesses in the real economy. This power is not clearly provided for in the Federal Reserve Act itself.[45]

42 *Zaring,* Law and Contemporary Problems 2015/78, pp. 157 et seq.
43 See *Humpage,* A New Role for the Exchange Stabilization Fund, available at: https://www.clevelandfed.org/-/media/project/clevelandfedtenant/clevelandfedsite/publications/economic-commentary/2008/ec-20080801-a-new-role/ec-20080801-a-new-role-for-the-exchange-stabilization-fund-pdf.pdf (10/1/2025).
44 15 U.S.C. Chapter 116.
45 *Menand,* Stanford Journal of Law, Business & Finance 2021/26, pp. 295, 332.

2. Institutional legal culture

Beyond the role of Congress in passing laws giving instructions to the Fed, it is worth paying attention to the work of the Fed lawyers who interpret these legislative instructions. There are long legal traditions at different levels of the Fed. There is the Legal Division of the Federal Reserve Board in Washington as well as the Legal & Compliance Group of the Federal Reserve Bank of New York. These specialist lawyers have been elaborating legal guidance and conclusions on US banking laws for over a century.

Although these legal views are for the most part not public, this has not prevented a good deal having been written on these views and the Fed lawyers who prepare them. One author on the Fed, *Peter Conti-Brown*, argues that, after the 2008 global financial crisis,

> "the Fed's lawyers were responsible not just for interpreting law, but also making policy. And they do so behind a veil of secrecy that makes it difficult, even impossible to evaluate their work. [...] [B]ecause the Fed's lawyers are the staff primarily in charge of overseeing [legal] implementation, the ideologies and values of the Fed's chief lawyer is *[sic]* highly relevant to understanding how the Fed will define the space within which it makes its policies."[46]

In his book, *Conti-Brown* is highly critical of *Scott Alvarez*, who spent a total of 36 years as a Fed lawyer and whose tenure as general counsel of the Federal Reserve Board from 2004 to 2017 included the 2008 global financial crisis. *Conti-Brown* seeks to link *Alvarez* to banking deregulation, which he ties to *Alvarez's* legal interpretations, and also to refusing to bail out *Lehman* Brothers in 2008, since Section 13 para. 3 of the Federal Reserve Act authorizes bailout lending only if the borrower posts collateral "to the satisfaction of the Federal reserve bank". However, practicing lawyers outside of academia are instructed by their clients to make possible the outcomes the clients want. It stands to reason that the "ideologies and values of the Fed's chief lawyer" will be more or less the same as the "ideologies and values" of the Fed governors and staff. The Fed bankers would seem to have stipulated to their lawyers that Lehman Brothers lacked collateral satisfactory to the Fed and thus did not meet the legal requirements for a bailout. They then blamed their lawyers for the legal outcome they had just chosen.

The influence of the general counsel of the Federal Reserve Board should also not be overstated. In December 2023, the Fed responded to a public records request by providing limited excerpts from its "Doomsday Book", a compendium of internal legal authorities on the Fed's powers during financial crises. *Imre Kuvvet*, the finance professor who obtained the Doomsday Book in 2023, notes that the Doomsday Book "exposes an apparent split in perspective between the New York Fed and the Fed Board of Governors", in particular on the Fed's emergency lending

46 *Conti-Brown*.

and open market operations under the Federal Reserve Act.[47] The Federal Reserve Bank of New York supports a more expansive reading, including basing legal authorities on "practice" without clear statutory authority; the Federal Reserve Board is more conservative and cautious. The New York Fed's flexible position has tended to prevail during financial crises. *Kuvvet* writes:

> "While this proactive stance might be practical in times of crisis, the board's cautious approach seeks to prevent potential overreach to maintain the integrity of the Fed's mandate. [...] With these and other disclosures, we can understand why the Fed has avoided transparency: It isn't able to speak with a single voice during emergencies."[48]

In sum, there is a voluminous body of institutional legal guidance on the powers of the Fed—or rather there are voluminous bodies of legal guidance from multiple institutions within the Fed, including the Federal Reserve Board and the Federal Reserve Bank of New York—and this material remains largely secret. Since *Conti-Brown* published his book, evidence has emerged suggesting that many leading views are coming from lawyers at the New York Fed, not the Federal Reserve Board. Ultimately the Fed's own views on its legal authority remain a black box. Authors who suggest otherwise should be taken with a grain of salt, bearing in mind that they may overemphasize, positively or negatively, the importance of individuals who have given interviews.

I. The road ahead for judicial review of the Fed and the ECB

Until now we have described the history and the status quo of the legal framework governing the actions of the Fed, including the near-total absence of judicial review of monetary policy and asset purchase programs. The future, however, may look different from the past. In May 2024, *Daniel Tarullo*, a former Fed governor and now a professor at Harvard Law School, published a long article on "The Federal Reserve and the Constitution", noting that the US Supreme Court is increasingly restricting the authority and independence of federal agencies and that the Court's reasoning could result in the structure or the mandate of the Fed (in respect of full employment) being declared unconstitutional. *Tarullo* discusses strategies available to the Court to avoid such an outcome while still permitting the Court to shape its jurisprudence according to its conservative political philosophy.[49]

Then in June and July 2024, the US Supreme Court handed down three major decisions. In the twin decisions *Loper Bright Enterprises v. Raimondo*[50] and *Relentless, Inc. v. Department of Commerce,*[51] the Court struck down the so-called *Chevron*

47 *Kuvvet,* Sun Shines on Fed 'Doomsday Book', available at: https://www.wsj.com/articles/sun-shines-on-new-york-fed-doomsday-book-foia-central-banking-financial-crisis-13d41d51 (10/1/2025) refers "particularly [to] Sections 13(3) and 14(b)(1)" [*sic;* presumably 14(2)(b)(1) is meant].

48 *Ibid.*

49 *Tarullo,* Southern California Law Review 2024/1, pp. 1 et seq.

50 *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

51 *Relentless, Inc. v. Department of Commerce,* et al., 603 US __ (2024).

deference, the basis of deference to administrative agency decisions in US law, which has also provided the doctrinal basis for deference to the Fed since being decided in 1984. In dissent, Justice *Elena Kagan* predicted that the decisions "will cause a massive shock to the legal system." A week later, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,*[52] the Supreme Court changed the limitations period for challenging rules made by administrative agencies—indeed, rules made by the Fed—from six years from the date of rulemaking to six years from the date on which any rule injures any litigant. In dissent, Justice *Jackson* wrote,

> "The Court's baseless conclusion means that there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face. Allowing every new commercial entity to bring fresh facial challenges to long-existing regulations is profoundly destabilizing for both Government and businesses."

With these three decisions in two weeks, the US Supreme Court significantly expanded the scope of challenges to agency action it will hear and the period in which it will hear them. We must consider whether *Raichle* and its progeny are still good law, and if not what kinds of demands for judicial review of Fed policies and actions may be forthcoming. It is conceivable that litigants may wish to repeat *Raichle* and challenge interest rates. Banks may consider suing to demand Fed bailouts, seeking to have judges second-guess the requirement in Section 13(3) to post collateral "to the satisfaction of the Federal reserve bank". Before this June, it was clear that any such determination by the Fed would enjoy deference from the courts. The Court's recent decisions have cast doubt on whether this continues to apply.

Lastly, there are the structural challenges to the Fed. Scholars and politicians have long debated whether the US Constitution permits a central bank at all, whether the Fed's mandate constitutes an unconstitutionally broad delegation by Congress, whether the Fed, with its mixed public-private character, is in fact an unconstitutional delegation of government power to a private entity, and whether the appointments clause of the Constitution requires the President to have greater power over the appointment and in particular the removal of members of the Federal Open Market Committee. A decade ago, *David Zaring* wrote:

> "Because of what I would characterize as the 'settled expectations' check on the logic of constitutional law, the FOMC is probably too old and too important to be vulnerable to life-threatening constitutional challenge. It has been accepted in almost all corners of the Washington establishment; the FOMC has been playing a surpassingly important monetary policy role since passage of the Banking Act of 1933. It is difficult to raise constitutional questions now about something that has been part of the furniture of government for so long."[53]

52 *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,* 603 U.S. 799 (2024).

53 *Zaring,* Law and Contemporary Problems 2015/78, p. 181.

This passage is from 2015. With new justices on the Supreme Court, a new administration and new and different doctrines in 2025, the judicial future of the Fed may be open to question. As we have adumbrated, expanded judicial review and greater legal uncertainty may await the ECB as well. Although the CJEU has arguably shown a more technocratic and consistent approach to jurisprudence than the US Supreme Court in recent decades, the FCC's decision in *Weiss* showed the willingness of the highest national court in the EU's largest economy to diverge from the CJEU's authoritative interpretation of EU law, to require national institutions to comply with its own interpretation and to pressure the ECB to follow its interpretation. *Weiss* is unlikely to be the last word on judicial review of the ECB, nor the FCC the last national constitutional court to (purport to) have its say.

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The role of Central Banks in the European Union regarding EU Sanctions due to the war in Ukraine

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Contents

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Abstract

With regard to the preceding destabilizing actions of Russia against Ukraine, the EU had already taken measures in 2014 by enforcing the Council Regulations (EU) 269/2014 and 833/2014. However, since the invasion of Russia in Ukraine in the beginning of 2022, this has resulted in the implementation of an additional seventeen extensive sanctions packages. This publication shall focus on the role of the members of the European System of Central Banks (ESCB) in relation to these sanctions. It is of particular interest how the EU sanctions affected the ESCB in its work, for example in the implementation of the monetary policy framework. A major topic is the handling of Central Bank of Russia's (CBR) reserves and assets by the EU sanctions in light of international law. The EU sanctions may also affect the work of the supervisory authorities. Several EU central banks have specific tasks in the surveillance and enforcement of EU sanctions.

Keywords: EU sanctions, Russia, Central Bank of Russia, European Central Bank, European System of Central Banks (ESCB), monetary policy, scope of sanction policy

A. Introduction

With the start of Russia's war against Ukraine at the beginning of the year 2022, sanctions law moved into the focus of different stakeholders in the European Union (EU) (including the members of the European System of Central Banks [ESCB])[1].[2] The EU (Council of the EU) introduced directly applicable sanctions regulations which where gradually tightened as a primary instrument to economically, in a targeted manner, weaken Russia and certain individuals – who are considered supporters of the war.[3] Although sanctions are not a new instrument and have been imposed on other countries in the past (e.g. Iran and Syria), the EU sanctions against Russia are extensive and affect numerous economic sectors.[4]

This publication focuses on the role of the members of the ESCB with regard to EU sanctions against Russia. The first part gives an overview of the individual

1 The ESCB comprises the ECB and national central banks (NCBs) of all EU Member States, whether they have adopted the euro or not.
2 See for a general overview regarding the EU sanctions against Russia *Ahari/Lobnik*, in: Droschl-Enzi (ed.), pp. 117 et seq.; *Ahari/Lobnik*, ecolex 2023(8), pp. 642 et seq.
3 *Engbrink*, in: Ruhmannseder/Lehner/Beukelmann (eds.), para. 1.
4 These economic sanctions are regulated in Council Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 271 of 12/9/2014, p. 3 as amended (Council Regulation [EU] 833/2014) and include the prohibition to export certain goods (e.g., dual-use goods, luxury goods, etc.) as well as a prohibition to import certain goods (e.g., wood, gold, steel, oil, etc.).

and sectoral financial sanctions against Russia. The following section shows, which individual and sectoral financial sanctions are especially relevant for the members of the ESCB, given that they are addressees as established entities in the EU to directly applicable EU sanctions regulations. The treatment of the Central Bank of Russia (CBR) and the immobilisation of its assets is of particular interest, and the further confiscation of these assets is discussed in this paper. In a next step, the publication evaluates the role of the supervisory authorities overseeing the compliance of supervised entities with EU sanctions and the effect on their supervisory activity. Finally, a few central banks in the ESCB (e.g., *Oesterreichische Nationalbank* (OeNB), *Deutsche Bundesbank*, *Central Bank of Ireland*, *Banca Națională a României*, *Banka Slovenije*)[5] have a special role in implementing the EU sanctions, since they are the competent authorities for implementing the financial sanctions and supervising the compliance with EU sanctions of certain institutions (e.g. credit institutions).

B. Overview of the individual and sectoral financial sanctions

EU sanctions[6] are an important instrument of the EU's Common Foreign and Security Policy (CFSP) to bring about change in the policies or actions of those against whom the measures are directed, and thus achieve objectives of the CFSP.[7] Directly applicable EU sanctions regulations are always preceded by a CFSP decision of the Council of the EU (Art. 29 TEU).[8] CFSP decisions need a unanimous agreement of the Council of the EU and are in turn implemented by the Council of the EU in the form of regulations, in accordance with Art. 215 TFEU, which are applied directly and harmonized throughout the EU.[9] The EU sanctions regulations against Russia, adopted since 2022, are amendments to Council Regulations (EU) 269/2014[10] and 833/2014, which have been in place since 2014 due to the Russian invasion of Crimea. Since the start of the war against Ukraine in February 2022, the Council of the EU established seventeen sanctions packages that constantly expanded the EU

5 See in this regard the national competent authorities for the implementation of EU restrictive measures (sanctions), available at: https://finance.ec.europa.eu/document/download/803d74d5-84a0-4bf4-a735-30f1fe5ae6dd_en?filename=national-competent-authorities-sanctions-implementation_en.pdf (5/5/2025).

6 The term *sanction* will be used in this publication to refer to an *EU restrictive measure*. The terms are used synonymously throughout the publication.

7 See for the impact of financial sanctions *Drott/Goldbach/Nitsch,* Journal of Economic Behavior and Organization 2024/219, pp. 38 et seq.

8 Council Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (2014), OJ L 229 of 13/7/2014, p. 13 (Council Decision 2014/512/CFSP) and its further amendments.

9 According to Art. 215 TFEU the Council's decision-making quorum is a qualified majority. However, since the two proposals for the CFSP decision and the decision regarding the Council Regulation typically are discussed and adopted together, the requirement for a unanimous agreement in reality also applies for the Council Regulation.

10 Council Regulation (EU) 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 86 of 21/3/2014, p. 27 as amended (Council Regulation [EU] 269/2014).

sanctions regulations.[11] The judicial control of these regulations lies with the Court of Justice of the European Union (CJEU) in accordance with Arts. 263 et seq. TFEU and must be based primarily on the wording, system and purpose of the provisions. The role of the European Parliament in this legislative process is limited, since the Council of the EU only needs to inform the European Parliament according to Art. 215 para. 1 TFEU. The procedure does not provide for any explicit consultation of the European Central Bank (ECB). The ECB only needs to be consulted "on any proposed Union act in its fields of competence" (Art. 127 para. 4 TFEU) and "[w]ithin the areas falling within its responsibilities" (Art. 282 para. 5 TFEU). The ECB has so far not been officially consulted on the topic of EU sanctions, however, certain informal cooperation in the field of the expertise of the ECB and the central banks may be provided by the ECB (e.g., on sanctions against the CBR).[12]

C. Application of EU sanctions by EU central banks

The Council Regulations implementing the EU sanctions are directly applicable and thus oblige all EU citizens and legal persons, entities or bodies that have their registered office within the EU or were founded as legal entities in the Union to comply with them.[13] This includes all members of the ESCB. The principle of independence[14] of central banks does not exempt central banks from the obligation to comply with the EU sanctions regulations.[15]

I. Individual sanctions

1. Overview of individual sanctions in Council Regulation (EU) 269/2014

The most severe form of sanctions are targeted individual sanctions. They specifically address certain natural or legal persons, entities or bodies who are attributable to – in case of the sanctions against Russia – the Russian regime or who are to be re-

11 At the same time, EU sanctions against Belarus were extended in response to the country's involvement in Russia's aggression against Ukraine; see Council Regulation (EC) 765/2006 concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine, OJ L 294 of 25/10/2006, p. 25, as amended. This publication, however, focuses on the sanctions against Russia: Council Regulations (EU) 269/2014 and 833/2014.

12 See for further reasoning, e.g., *Zilioli,* in: Zilioli/Bismuth/Thévenoz (eds.), pp. 256, 257.

13 See Art. 17 of Council Regulation (EU) 269/2014 and Art. 13 of Council Regulation (EU) 833/2014.

14 Art. 282 para. 3 TFEU and Art. 7 Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB/ECB).

15 *Zilioli,* in: Zilioli/Bismuth/Thévenoz (eds.), p. 259 referring to ECJ, Cases C-11/00 and C-15/00, *Commission v. European Central Bank*, judgment of 3 July 2003, para. 126.

garded as significant sources of funding the war activities.[16] Individual sanctions are regulated in Council Regulation (EU) 269/2014 and imposed on those individuals by listing them in Annex I of this Regulation via Council Implementing Regulations. In addition to the listing of these so-called *designated persons*, the regulations also contain a reasoning for each listing. The designated persons are to be cut off from access to their funds and economic resources in the EU. This is ensured in two ways: Article 2 para. 1 Council Regulation (EU) 269/2014 stipulates a freezing requirement for all funds and economic resources that are attributed to a designated person, also known as an *asset freeze*. Art. 2 para. 2 Council Regulation (EU) 269/2014 provides a prohibition on making funds and economic resources available. This applies to designated persons listed in Annex I and persons associated with them (personal scope of application). It extends to all funds and economic resources that are owned, held or controlled by designated persons (material scope of application).

The "EU Best Practices for the effective implementation of restrictive measures" by the Council of the EU (EU Best Practices) are non-exhaustive recommendations of a general nature for effective implementation of restrictive measures of EU sanctions,[17] including guidance to assess the ownership and control of designated persons. This is specifically relevant for legal persons, which may be directly or indirectly owned or controlled by designated persons. If a legal person is owned or controlled by a designated person, the assets of the legal person need to be frozen as well, and no economic resources or funds shall be made available to this legal person.

In terms of ownership, the relevant criterion is whether a designated person directly or indirectly owns 50% or more of the legal person.[18] The EU Best Practices outline non-exhaustive criteria under which a legal person can be considered as being controlled by a designated person.[19] This can be the case, if, e.g., the designated person has the right or is exercising the power to appoint or remove a majority of the members of the administrative management or supervisory body; the designated person has the right to use all or part of the assets of a legal person or entity, etc. With the update of the EU Best Practices in 2024, several non-exhaustive examples were added illustrating circumstances that may qualify as indications that a designated person has control over a legal person.

16 Art. 3 of Council Regulation (EU) 269/2014 explicitly lists the possible reasons for being listed under Annex I of the Regulation.

17 *Council of the EU,* Restrictive measures (Sanctions) – Update of the EU Best Practices for the effective implementation of restrictive measures, available at: https://data.consilium.europa.eu/doc/document/ST-11623-2024-INIT/en/pdf (5/5/2025).

18 EU Best Practices, para. 63.

19 EU Best Practices, para. 64.

To name a few of these examples:[20]

- A designated person is the largest shareholder of a company compared to other shareholders;
- a transfer of a relevant number of shares in the non-designated legal person to a new owner shortly before or after a person has been sanctioned;
- a new owner is closely connected to the designated previous owner, e.g., a family member or former employee/business partner, and, possibly, the sale price was remarkably low or otherwise atypical;
- an entity is part of a needlessly complex corporate structure, potentially involving entities such as shell companies, limited liability companies and/or trusts linked to a designated person. Some of these entities were set up or changed their identity shortly before or after the adoption of the sanctions regime or the person's designation, and/or have no credible business activity.

By the time the listing of designated persons comes into force, the addressees of the Council Regulation (EU) 269/2014[21] – including central banks – are obliged to freeze any assets owned by designated persons and everything else in their ownership or control. The listing takes place by means of a Council Implementing Regulation,[22] which typically comes into effect on the day of its publication in the Official Journal of the European Union. This means that the assets of a person listed in Annex I must *ex lege* be frozen, and no funds are allowed to be made available immediately from the moment of publication in the Official Journal, without the need for a further national implementing act. To implement the sanctions correctly, the addressees need to know their customers and counterparties and who exercises ownership or control over these entities.

2. Consequences of individual sanctions (Council Regulation [EU] 269/2014) against a counterparty of the ESCB

The individual sanctions may have significant consequences for the operations of the members of the ESCB (including the ECB) and their operations with certain counterparties.

a. Implementation of the Eurosystem's monetary policy framework

In implementing the ECB's monetary policy, the Eurosystem offers a set of monetary policy instruments (e.g., liquidity providing refinancing operations, deposit

20 EU Best Practices, para. 67.
21 Art. 17 of Council Regulation (EU) 269/2014.
22 Each listing is imposed via a Council Implementing Regulation which updates the Annex I in Council Regulation (EU) 269/2014.

facility, etc.) to its counterparties,[23] whereby the Guideline (EU) 2015/510 establishes uniform rules for the implementation of the ECB's monetary policy. The legal relationship between the relevant national central banks (NCB) is established via contractual or regulatory arrangements.[24] The counterparties are obliged to comply with these national contractual or regulatory arrangements implementing the Guideline (EU) 2015/510, which lists harmonised events of default (EoD) categorised either as automatic[25] or discretionary[26] EoDs. Each NCB can, in case an EoD is triggered, suspend, limit or exclude the relevant counterparty with regard to the monetary policy operations provided to that counterparty.[27] In case of an automatic EoD, the NCB is even required to either suspend or exclude the counterparty from open market operations and its access to standing facilities.[28]

If "the counterparty becomes subject to freezing of funds and/or other measures, including restrictive measures, imposed by the Union under Article 75 or Article 215 or similar relevant provisions of the Treaty restricting the counterparty's ability to use its funds", it is regarded as an automatic EoD,[29] meaning that the relevant NCB needs to suspend or exclude a sanctioned counterparty from the abovementioned monetary policy operations. This EoD is necessary to comply with the EU sanctions regulation and the possible listing of counterparties. In such a case, all monetary policy operations conducted with the affected counterparty need to be stopped immediately. By continuing to provide liquidity to that counterparty, the Eurosystem would make funds available to the designated person, which is prohibited under Art. 2 para. 2 of Council Regulation (EU) 269/2014. Additionally, the Eurosystem needs to freeze all funds of the counterparty, meaning that any deposit the counterparty may have with the Eurosystem must be frozen immediately.

Counterparties established in the EU are usually not directly subjected to sanctions under Council Regulation (EU) 269/2014. However, these counterparties could be owned or controlled by a designated person, e.g., a sanctioned Russian credit institution. If a credit institution is not listed in Annex I of Council Regulation (EU) 269/2014 but is owned or controlled by a designated person, the result is the same as if the credit institution was listed itself. The Eurosystem does not

23 See definition in Art. 2 para. 11 of Guideline (EU) 2015/510 of the European Central Bank on the implementation of the Eurosystem monetary policy framework (General Documentation Guideline) ECB/2014/60) (recast), OJ L 91 of 2/4/2015, p. 3 (as amended) (Guideline [EU] 2015/510).

24 See Art. 1 para. 3 of Guideline (EU) 2015/510. For example, in Austria the OeNB is establishing the contractual relationship with the counterparties via the terms and conditions of the OeNB (*Geschäftsbestimmungen der OeNB für geldpolitische Geschäfte und Verfahren)*, which is referring to the provisions of the Guideline (EU) 2015/510; see *OeNB*, Terms and conditions of the OeNB, available at: https://www.oenb.at/en/About-Us/legal-framework/terms-and-conditions-of-the-OeNB.html (5/5/2025).

25 Art. 165 para. 2 of Guideline (EU) 2015/510.

26 Art. 165 para. 3 of Guideline (EU) 2015/510.

27 Art. 166 para. 1 of Guideline (EU) 2015/510.

28 Art. 166 para. 1a lit. a of Guideline (EU) 2015/510.

29 Art. 165 para. 2 lit. b of Guideline (EU) 2015/510.

have any discretion to continue to provide any funds to a sanctioned counterparty,[30] which is owned or controlled by a designated person. Only the existence of a specific exemption or derogation provided by the Council Regulation (EU) 269/2014 would allow the Eurosystem to provide liquidity to the counterparty. Derogations in the sanctions regulations require a decision by the competent sanctions authority, which can only be provided positively after examining the facts of the case. Only an *ex lege* exemption to further provide monetary policy operations to the designated person would allow the continued provision of liquidity to the credit institution owned or controlled by a designated person. This is because the exclusion or suspension of a counterparty needs to take place immediately with its designation, which means that the counterparty would typically encounter a *failing or likely to fail* within a very short time due to the lack of liquidity, since no refinancing operations can be provided and the deposits with the Eurosystem of this counterparty are frozen (NB: Also other actors on the interbank market would be barred from providing funds to such counterparty). Under the current EU regulation, a counterparty owned and controlled by a designated person could only apply for a so-called *firewall* according to Art. 6b para. 5d of Council Regulation (EU) 269/2014. Once established, certificated and assessed, a firewall removes the control exercised by a designated person over the assets of a non-listed EU entity owned or controlled by the designated person and ensures that the latter does not benefit from its relationship with the non-listed EU entity, so that the latter can continue its business activities.[31] The establishment of a firewall is intended to enable EU subsidiaries of a designated person to maintain their business operations despite the designated person owning or controlling them[32] and requires the approval by the competent sanctions authority on a case-by-case basis.

The Council Regulation (EU) 269/2014 also includes specific derogations to release frozen funds or make funds available to certain listed Russian credit institutions and their owned or controlled entities, but only for specific reasons and under strict conditions (e.g., to terminate operations, contracts, or other agreements,

30 *Zilioli*, in: Zilioli/Bismuth/Thévenoz (eds.), p. 260 argues that there is a difference between directly sanctioned banks and those which are owned and controlled by sanctioned non-EU banks. From a practical point this argument is understandable, because this could have a negative impact on the financial stability in the EU. However, the EU sanctions do not differentiate between directly designated persons and owned or controlled legal entities. Therefore, an explicit exemption or derogation in the Council Regulation for the benefit of EU banks that are not themselves sanctioned but owned or controlled by a designated person would be necessary for the Eurosystem to be able to provide liquidity to an EU credit institution in such situation.

31 Recital (3) Council Regulation (EU) amending Council Regulation (EU) 269/2014, OJ L 159 of 23/6/2023, p. 330.

32 See in detail *European Commission*, Guidance Note – Implementation of Firewalls in cases of EU entities owned or controlled by a designated person or entity, available at: https://finance.ec.europa.eu/document/download/6aacaf09-97e5-46c3-ad38-de760f0e8baf_en?filename=guidance-firewalls_en.pdf (5/5/2025).

including correspondent banking relations).[33] Still, such derogations require the approval of the competent sanctions authority, before a transaction can be facilitated.

The events triggered by the listing of *Sberbank* Russia *(ПАО Сбербанк России)* in Annex I of Council Regulation (EU) 269/2014 on 21 July 2022 could be regarded as a possible example of the consequences of terminating monetary policy operations with a counterparty owned or controlled by a designated person.[34] *Sberbank Europe AG*[35] (*Sberbank Europe*), established in Austria, was a fully owned (100%) subsidiary of *Sberbank Russia* with further subsidiaries *Sberbank banka d.d.* (Slovenia) and *Sberbank d.d.* (Croatia). *Sberbank Europe* was therefore owned by a designated person, leading to the freezing of all assets and the prohibition of making funds available to the *Sberbank Europe*. However, *Sberbank Europe* already experienced significant deposit outflows and therefore liquidity outflows after the start of the war (i.e., before its sanctioning on 21 July 2022) due to reputational damage. *Sberbank Europe* was considered a significant institution and therefore under the supervision of the ECB and the resolution competence of the Single Resolution Board (SRB).

On 27 February 2022, the ECB decided that *Sberbank Europe* was failing or likely to fail (FOLTF).[36] On 1 March 2022, the SRB decided, in line with the resolution framework (SRMR), not to place *Sberbank Europe* under resolution and the credit institution should be wound down in an orderly manner according to Austrian law.[37] Therefore, *Sberbank Europe* was not allowed to continue its business operations and a government commissioner was appointed by the Austrian Financial Market Authority (*Österreichische Finanzmarktaufsichtsbehörde,* FMA).[38] As opposed to *Sberbank Europe*, resolution actions (sale of business tool) were taken for the subsidiaries of *Sberbank Europe*, the *Sberbank banka d.d.* (Slovenia)[39] and *Sber-*

33 See for example Art. 6b para. 2d of Council Regulation (EU) 269/2014, whereby the release of frozen funds and making funds available from and to the sanctioned *Alfa Bank*, *Rosbank* and *Tinkoff Bank* can be approved by the sanctions authority which deems this appropriate and "after having determined that such funds or economic resources are necessary for the termination by 26 August 2023 of operations, contracts, or other agreements, including correspondent banking relations […]".

34 See Annex I number 108 of Council Regulation (EU) 269/2014.

35 For details regarding the *Sberbank Europe* case see *Gortsos,* in: Zilioli/Bismuth/Thévenoz (eds.), pp. 281 et seq.

36 *ECB*, 'Failing or Likely to Fail' Assessment of Sberbank Europe AG, available at: https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.FOLTF_assessment_of_Sberbank_Europe_AG~144fd77e46.en.pdf (5/5/2025).

37 *SRB*, Assessment of the conditions for resolution in respect of Sberbank Europe AG, available at: https://www.srb.europa.eu/system/files/media/document/2022-06-10_SRB-Non-confidential-version-of-the-decision-in-respect-of-Sberbank-Europe-AG.pdf?destination=/en/admin/content/media (5/5/2025).

38 Art. 70 para. 2 nos. 2 and 4 of the Austrian Banking Act.

39 *SRB*, Adoption of a resolution scheme in respect of Sberbank banka d.d, available at: https://www.srb.europa.eu/system/files/media/document/2022-06-10%20SRB_Non-confidential-version-of-the-resolution-decision-in-respect-of-Sberbank-banka-d.d._1.pdf (5/5/2025).

bank d.d. (Croatia),[40] and the shares were transferred to the *Nova Ljubljanska Banka d.d.* (Slovenia) and the *Hrvatska Poštanska Banka* (Croatia) respectively. *Sberbank Europe* was wound down in an orderly manner and no insolvency procedure was required. On 21 July 2022, *Sberbank Russia* and, as a consequence thereof, *Sberbank Europe* (then already under liquidation) were sanctioned and all their assets were frozen and funds could no longer be made available. Art. 6b para. 2a of Council Regulation (EU) 269/2014 provided for the possibility to apply for a derogation to release funds and make funds available explicitly to terminate operations, contracts, or other agreements, including correspondent banking relations. However, since *Sberbank Europe* was not allowed to continue its business operations and was wound down from 1 March 2022 onwards, it did not have counterparty status under of Guideline (EU) 2015/510 anymore and had already been excluded by the Eurosystem from any monetary policy operations. Still, all funds, which would have been or were handled by the Eurosystem, were frozen, unless an administrative decision by the competent sanctions authority made it possible to release these funds under specific conditions (Art. 6b para. 2a of Council Regulation [EU] 269/2014). On 15 December 2022, the banking license of *Sberbank Europe* was returned and expired.[41]

By the time of the sanctioning of *Sberbank Russia* and therefore of *Sberbank Europe*, which the former owned, *Sberbank Europe* was already no counterparty for Eurosystem monetary policy operations anymore. Therefore, an exclusion or suspension of the counterparty from the Eurosystem's monetary policy operations on the grounds of being sanctioned was not necessary.

b. Payment Systems (TARGET)

The sanctioning of an individual owning or controlling an EU credit institution as in the case outlined above may also have an impact on the EU credit institution's

40 *SRB*, Adoption of a resolution scheme in respect of Sberbank d.d, available at: https://www.srb.europa.eu/system/files/media/document/2022-06-10_SRB-Non-confidential-version-of-the-resolution-decision-in-respect-of-Sberbank-d.d_1.pdf (5/5/2025).

41 *FMA*, Sberbank Europe AG hat alle Bankgeschäfte abgewickelt – Konzession erlischt rechtswirksam mit 15. Dezember 2022 – Regierungskommissär abberufen, available at: https://www.fma.gv.at/sberbank-europe-ag-hat-alle-bankgeschaefte-abgewickelt-konzession-erlischt-rechtswirksam-mit-15-dezember-2022-regierungskommissaer-abberufen/ (5/5/2025).

access to the Eurosystem payment system TARGET.[42] TARGET is owned and operated by the Eurosystem, where central banks and commercial banks can submit payment orders in euro, which are then processed and settled in central bank money. In TARGET, payments related to the Eurosystem's monetary policy operations as well as bank-to-bank and other commercial transactions are settled.[43]

The Guideline (EU) 2022/912 provides for the requirement for participating and accessing the TARGET-system. According to Art. 15 para. 1 of Guideline (EU) 2022/912, the responsible Eurosystem central bank "shall immediately terminate without prior notice or suspend a participant's participation" if insolvency proceedings are opened in relation to a participant, or a participant no longer meets the access criteria for participation. The respective Eurosystem central bank can also suspend or terminate the participation on the grounds of prudence (Art. 17 of Guideline [EU] 2022/912). The access criteria are defined in Annex I Part 1 Art. 4 of Guideline (EU) 2022/912, according to which credit institutions do not fulfil the eligible criteria, if they are "subject to restrictive measures adopted by the Council of the European Union or Member States pursuant to Article 65 para. 1 lit. b, Article 75 or Article 215 of the Treaty, the implementation of which, in the view of [the responsible central bank] after informing the ECB, is incompatible with the smooth functioning of TARGET".[44] In contrast to the implementation of monetary policy (Guideline [EU] 2015/510), the provisions on TARGET do not provide for an automatic suspension or termination of the participant, if it becomes subject to EU sanctions. Council Regulation (EU) 269/2014 calls for the freezing of assets and the prohibition of making funds available. Still, the Eurosystem does not have a discretionary power in complying with the EU sanctions. Therefore, as with monetary policy operations, access to TARGET also needs to be stopped for the participant owned or controlled by a designated person – unless an *ex lege* exemption or an administrative decision by a competent sanctions authority derogate such operations from the freezing obligation and the prohibition of making funds available.

42 Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET). The Guideline (EU) 2022/912 of the European Central Bank on a new-generation Trans-European Automated Real-time Gross Settlement Express Transfer system (TARGET) and repealing Guideline ECB/2012/27 (ECB/2022/8), OJ L 295 of 16/11/2022, p. 50 (Guideline [EU] 2022/912) establishes to rules to use and set up TARGET. There are other TARGET-services, however, this publication focuses on TARGET. These services consist of TARGET2-Securities (T2S, securities settlement platform), TARGET Instant Payment Settlement (TIPS, instant payment settlement service), which are regulated as well in the Guideline (EU) 2022/912. In the future, a further service will be added with the Eurosystem Collateral Management System (ECMS, system for managing assets used as a collateral in Eurosystem credit operations).

43 See *ECB*, What is TARGET2?, available at: https://www.ecb.europa.eu/paym/target/target2/html/index.en.html (4/5/2025).

44 There are similar provisions in the Guideline (EU) 2022/912 according to which participants, which are subject to restrictive measures are seen as incompatible with the smooth functioning of TARGET and are therefore, e.g., not eligible for intraday credit or auto-collateralisation (Art. 10 para. 3 of Guideline (EU) 2022/912).

Moreover, the participants of TARGET need to comply with EU sanctions, since they are addressed by the EU sanctions regulations.[45] This is explicitly mentioned in Annex I Part I Art. 29 para. 3 of Guideline (EU) 2022/912, where participants, when "acting as the payment service provider of a payer or payee, shall comply with all requirements resulting from […] restrictive measures". Likewise, the participants must comply with the prohibition of circumvention[46] and their due diligence obligation to implement the EU sanctions effectively.[47]

II. Sectoral Financial Sanctions (Council Regulation [EU] 833/2014)

In contrast to individual sanctions, sectoral financial sanctions do not target a specific designated person, but essential sectors of the Russian economy. The sectoral financial sanctions in Council Regulation (EU) 833/2014 are intended to restrict capital and payment transactions between Russia and the EU. Specific provisions regarding the sectoral financial sanctions are of special interest for central banks.

1. Prohibition of trading specific securities

Pursuant to Art. 5 of Council Regulation (EU) 833/2014, access to the European capital market is restricted for certain credit and financial institutions in Russia. Accordingly, it is prohibited to directly or indirectly buy or sell transferable securities and money market instruments in relation to certain institutions with certain maturities (depending on the time of their issuance), to provide investment services or ancillary services in connection with the issue or to trade in them in any other way. This ban on security tradings relates primarily to certain Russian state owned or state-related credit institutions.[48] Subsidiaries of these institutions outside the EU and persons acting on behalf of or on the instructions of the group of individuals concerned are also covered by the restrictions. In a similar way, Art. 5a of Council Regulation (EU) 833/2014 prohibits to directly or indirectly purchase, sell, provide investment services for or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments of Russia and its government, the CBR or legal persons, entities or bodies acting on behalf of or at the direction of the CBR issued after a certain date.

Therefore, the EU central banks (including the ECB) need to take these security bans into account, when executing their investments. The ban is also relevant when taking assets as collateral for monetary policy operations.

45 See *Zilioli,* in: Zilioli/Bismuth/Thévenoz (eds.), p. 261.
46 Art. 9 of Council Regulation (EU) 269/2014.
47 See in more detail, e.g., *Ahari/Lobnik,* in: Droschl-Enzi (ed.), pp. 125 et seq.
48 See Annex III of Council Regulation (EU) 833/2014.

2. Prohibition of providing banknotes to Russia

Article 5i of Council Regulation (EU) 833/2014 established the prohibition to sell, deliver, transfer or export banknotes denominated in an official currency of an EU Member State to Russia or to natural or legal persons, entities or bodies in Russia (including the Government and the CBR) or for use in Russia.[49] This prohibition is intended to prevent foreign exchange transactions in the currencies of EU Member States. According to Art. 5i para. 2, the export of banknotes is only exempted if it is necessary for the personal use of natural persons travelling to Russia or their accompanying immediate family members or for official activities of diplomatic missions, consular posts or international organisations in Russia that enjoy immunity under international law.[50]

The circulation of euro banknotes is conducted by the national central banks of the ESCB, whereby usually credit institutions order banknotes from different national central banks of the ESCB, which then provide the credit institutions with banknotes, typically via money service providers. Credit institutions, as well as any other natural person and legal entity addressed by the Council Regulation (EU) 833/2014, need to comply with Art. 5i of Council Regulation (EU) 833/2014.[51] However, the central banks need to decline the supply of banknotes, if they are of the opinion that this would result in a breach of sanctions on the part of the credit institution.[52]

3. Prohibition of transactions with the Central Bank of Russia (CBR)

According to Art. 5a para. 4 of Council Regulation (EU) 833/2014 "[t]ransactions related to the management of reserves as well as of assets of the Central Bank of Russia, including transactions with any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia, such as the Russian National Wealth Fund, are prohibited." The foreign exchange reserves of the CBR are therefore immobile and blocked in the EU. In practice, this measure has the effect of an asset freeze within the meaning of Art. 2 para. 1 Council Regulation (EU) 269/2014. The difference in approach is that the assets are not technically frozen, but any transaction related to the management of reserves and assets of the CBR is prohibited. This means that funds cannot be moved, because no EU counterparty is allowed

49 According to *Zilioli,* in: Zilioli/Bismuth/Thévenoz (eds.), p. 261 "the ECB may also restrict exports of banknotes to non-sanctioned third countries when, in the consideration of the ECB, those exports may imply a significant risk of circumvention of the EU restrictive measures".

50 Art. 5i para. 2 of Council Regulation (EU) 833/2014.

51 Art. 13 of Council Regulation (EU) 833/2014.

52 See for example in Austria, Art. 4 para. 7 of the Terms and conditions for the Austrian Settlement & Transaction Interface (ASTI), *OeNB*, ASTI, available at: https://www.oenb.at/en/Payment-Processing/Services-for-Financial-Institutions/Terms-and-Conditions/asti.html (5/5/2025).

to do any transaction with the CBR.[53] These targeted sanctions against the CBR are intended to restrict the possibility of carrying out important monetary policy transactions for Russia (e.g., foreign exchange transactions) that could have a positive and stabilising effect on the exchange rate of the Russian ruble.

Eurosystem central banks can provide reserve management services in euro to (*inter alia*) central banks via the Eurosystem reserve management service (ERMS).[54] The ERMS provider may limit, suspend or exclude a customer from ERMS, if "the customer and/or its reserves are subject to any sanctions or restrictive measures imposed by Union and/or national legislation".[55]

D. Confiscation of immobilised reserves of the Central Bank of Russia (CBR)

The sanctions against the CBR led to legal discussions.[56] One of the most controversial topics in terms of sanctions is the immobilisation of the assets of the CBR and whether or not those assets or parts of it could be used to support Ukraine. Even though an in-depth analysis cannot be provided in this publication, the topic should not be left out, due to its potential future impact on the reserves of central banks overall.

I. Immobilisation of the reserves of the CBR

On 28 February 2022, Art. 5a para. 4 of Council Regulation (EU) 833/2014 was introduced, thereby imposing a transaction ban concerning the management of reserves and assets of the CBR.[57] As a consequence, all reserves and assets of the CBR were immobilised in the EU from that moment onwards.

This leads to the question whether assets of a foreign central bank can be immobilised or frozen without affecting the immunity of central banks. There are two forms of immunity:[58] immunity from jurisdiction and immunity from enforcement.[59] Both kinds of immunity apply to state-owned property, situated in a foreign

53 See regarding the difference of freezing, confiscation, seizing and immobilisation, *Webb,* Study European Parliamentary Research Service, p. VII.
54 Guideline (EU) 2024/1211 of the European Central Bank on the Eurosystem's provision of reserve management services in euro to central banks and countries located outside the euro area and to international organisations (ECB/2024/13) (recast), OJ L 1211 of 3/5/2024, p. 1 (Guideline [EU] 2024/1211).
55 Art. 6 para. 2 lit. b of Guideline (EU) 2024/1211.
56 See for example *Moiseienko*, EJIL 2023/4, pp. 1010 et seq.; critical legal analysis by *van der Horst*, EJIL 2023/4, pp. 1021 et seq.; *Kamminga*, NILR 2023/70, pp. 1 et seq.
57 Council Regulation (EU) 2022/334 concerning restrictive measures in view of Russia`s actions destabilising the situation in Ukraine, OJ L 57 of 28/2/2022, p. 1. On 9 March 2022 with Council Regulation (EU) 2022/394 concerning restrictive measures in view of Russia`s actions destabilising the situation in Ukraine, OJ L 81 of 9/3/2022 the transaction ban on the Russian National Wealth Fund was added.
58 State immunity is customary international law. See, e.g., *Fox/Webb,* p. 2.
59 See in more detail with further references *Webb*, Study European Parliamentary Research Service, p. 5; *Brunk*, in: Zilioli/Bismuth/Thévenoz (eds.), p. 173.

country, including central banks and their property. Immunity from jurisdiction means that a state (as well as its central bank) cannot be sued before the courts of another state. Immunity from enforcement protects a state's property, including the assets of its central bank from any constraint or execution.[60] Therefore, the state's property cannot be subject to execution following a judgement by a foreign jurisdiction's court.[61] However, this immunity does not exceed to constraining the assets of a central bank by actions of legislation or the executive branch, which do not involve the judicial authority. As outlined by *Brunk,*[62] the immobilisation of the CBR's assets by banning any transaction with the CBR are considered as legally sound and not interfering with the immunity of the CBR. According to *Brunk,*[63] sanctioned states or central banks do not argue that the immobilisation or freezing of their assets via an executive or legislative act contradict their immunity.[64] It seems quite paradoxical[65] that even though the same result is achieved (immobilisation or freezing of assets), the used instrument (jurisdiction versus executive act) makes a difference in terms of immunity.[66] It is, however, an outcome of purpose of immunity to prevent one state being convicted by the judgements of another state.[67] Still, it is not the purpose of the law on immunity to restrict the foreign policy

60 The protection does not apply to assets held for commercial purposes, however, the reserves and assets held by a central bank usually are presumed to be of non-commercial purpose and therefore under the protection of immunity, see *Webb*, Study European Parliamentary Research Service, p. 6 and Art. 21 para. 1 lit. c United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS), whereby property of central bank is seen as property of a state shall not be considered as property specifically in use or intended for use by the state for other than government non-commercial purposes. See further to the application of immunity to central bank assets *van der Horst*, EJIL 2023/4, pp. 1028 et seq.

61 See concerning the definitions *Brunk*, in: Zilioli/Bismuth/Thévenoz (eds.), p. 174; *Webb*, Study European Parliamentary Research Service, p. 5.

62 *Brunk*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 175 and 186 et seq.

63 *Brunk*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 186 et seq.

64 See also *Webb*, Study European Parliamentary Research Service, p. 12; *Moiseienko*, EJIL 2023/4, p. 1008 referring also to Russia invoking the argument of state immunity, however the reaction took half a year. Still no diplomatic steps were taken to object to the freezing see *Kamminga*, NILR 2023/70, p. 9.

65 This paradox situation is referred to by *Webb*, Study European Parliamentary Research Service, p. 12 fn. 110, whereby several commentators who refer to this paradox situation are cited, e.g., *Timor-Leste* in its Questions Relating to Seizure and Detention written submissions. See International Court of Justice, Certain Questions Relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v. Australia*), Memorial of Timor-Leste, 2014, para. 5.18.

66 Similar *Kamminga*, NILR 2023/70, p. 6.

67 Other opinion by *van der Horst*, EJIL 2023/4, pp. 1030 et seq. who argues that state immunity is also applicable for executive actions.

options of a state.[68] Either way, the issue of confiscation of a state's assets is in any way "sharply contested"[69] independently of the use of either instrument.

To see the effect of the transaction ban on the CBR's reserves and assets, a provision was introduced in Art. 5a para. 4a of Council Regulation (EU) 833/2014 on 25 February 2023, according to which the counterparties of the CBR are obliged to report data on the CBR's assets and reserves that were immobilised in the respective accounts to the competent sanctions authority of the Member State and to the European Commission.[70]

Apart from the EU, many other countries such as the United States, the United Kingdom, Switzerland, Japan and Canada introduced freezing or immobilisation provisions against the CBR. Leading to an estimate of USD 300 billion of frozen or immobilised assets in those countries and the EU.[71] In the EU, an estimated amount of EUR 200 billion are currently immobilised, more than half of which are cash and deposits.[72] Most assets are held by central securities depositories (CSDs), only smaller amounts are held by commercial and central banks.[73] A total of about EUR 191 billion of these assets are held by a Belgian CSD.[74] A substantial amount of assets has already matured and are therefore cash holdings, a sizeable amount of the remaining assets is held in the form of securities, which will gradually transform into cash holdings as they mature in the next two to three years.[75]

Due to the high amount of assets immobilised in the EU, the discussion whether these assets could be confiscated and made available to Ukraine to finance its reconstruction started at an early point in time.[76] However, such confiscation of the CBR's assets faces several legal obstacles.

68 *Moiseienko*, Seizing Foreign Central Bank Assets: A lawful response to aggression, Working Paper on SSRN (2023) p. 23 summarizing and citing this paradox situation; see, e.g., *Moiseienko*, EJIL 2023/4, p. 1014 with further references to this debate, that the scholars are divided on the subject, if there is a difference in freezing state assets via judicial or an executive act. *van der Horst*, EJIL 2023/4, p. 1025 favours the opinions of several scholars that state immunity also applies to executive action.
69 *Brunk*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 187 et seq.
70 Council Regulation (EU) 2023/427 concerning restrictive measures in view of Russia`s actions destabilising the situation in Ukraine, OJ L 59 of 25/2/2023, p. I/6.
71 *IISS*, Sanctions on Russia's central bank, available at: https://www.iiss.org/publications/strategic-comments/2023/sanctions-on-russias-central-bank (5/5/2025).
72 *Council of the EU*, Ad hoc Working Party on the use of frozen and immobilised assets to support Ukraine's reconstruction, 10669/23, p. 3. (*Council of the EU*, 10669/23).
73 *Council of the EU*, 10669/23, p. 3.
74 *Steinbach*, How to harvest the windfall profits from Russian assets in Europe, available at: https://www.bruegel.org/analysis/how-harvest-windfall-profits-russian-assets-europe (5/5/2025).
75 *Council of the EU*, 10669/23, p. 3.
76 See possible reconstruction costs of estimated USD 411 billion in *Webb*, Study European Parliamentary Research Service, p. 4.

II. Confiscation of the reserves and/or proceeds of the CBR

1. Legal Obstacles

a. EU Charter of Fundamental Rights

The right to property is established in Art. 17 of the Charter of Fundamental Rights of the EU (CFR). It can be limited according to Art. 52 para. 1 CFR, but such limitations have to be provided "by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". This right can also be invoked by legal persons that are governmental organisations or state bodies,[77] consequently also by the CBR. The right to property is, however, not absolute and therefore can be limited as long as those *restrictions* "do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed."[78] According to *De Gregorio Merino*[79] a confiscation is basically possible, "but only if provided by law – whether under criminal, civil or administrative law – and following a judicial decision. Because such confiscation substantially affects fundamental rights and is of a punitive nature, it should comply with specific legal safeguards and judicial remedies, i.e., with a high threshold of legal protection".

b. Temporary EU sanctions

According to *De Gregorio Merino,*[80] the EU sanctions can – due to their nature of supporting EU foreign policy (Art. 21 TEU) and their aim to bring change in policy of other states – only be of temporary character and can, therefore, not be irreversible. The CJEU pointed out that "freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property".[81] However, in this judgement, a specific case of freezing was considered and weighed against the reasoning of limiting the right to property. So, in the end, even confiscation would need to be weighed in a case-by-case manner. Further, the provisions regarding the EU sanctions (Art. 29 TEU, Art. 215 TFEU) do not explicitly provide that sanctions imposed on this legal basis have to be only of temporary nature.

77 General Court, Case T-262/12, *Central Bank of Iran v. Council*, judgment of 18 September 2014, ECLI:EU:T:2014:777, para. 72.
78 ECJ, Cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission (Kadi),* judgment of 3 September 2008, ECLI:EU:C:2008:461, para. 355.
79 *De Gregorio Merino,* in: Zilioli/Bismuth/Thévenoz (eds.), pp. 193 et seq.
80 *De Gregorio Merino,* in: Zilioli/Bismuth/Thévenoz (eds.), pp. 195 et seq.
81 ECJ, Cases C-402/05 P and C-415/05 P, *Kadi v. Council and Commission (Kadi),* judgment of 3 September 2008, ECLI:EU:C:2008:461, para. 358.

c. Immunity of the property of the CBR

The immunity from enforcement protects the CBR's assets from confiscation. This protection of assets of central banks is explicitly regulated in Art. 21 para. 1 lit. c UNCIS,[82] whereby property of the central bank is regarded as property of a state and shall not be considered as property specifically in use or intended for use by the state for other than government non-commercial purposes. There are no known cases where foreign currency reserves have been subject to enforcement measures.[83] The confiscation of the CBR's assets would be a violation of the international law of state immunity,[84] unless the assets would lose their protection under state immunity rules.[85] This could be the case either by avoidance, justification, evolution or exception.[86]

The term *avoidance* means to avoid the engaging in immunity. Since the immunity from enforcement only protects the CBR from judicial actions, a legislative or executive action without the involvement of any judicial powers is, strictly speaking, not interfering with immunity. This is quite surprising, since the factual result is the same as with the confiscation based on judicial powers.[87] In the past, assets from different central banks were frozen,[88] the confiscation of these assets is another step and will not be as easily accepted, even if it is a legislative or executive action.

The confiscation could also be *justified* by being either a countermeasure or an act of self-defence and therefore being in line with international law.[89] However, the countermeasure needs to be proportionate.[90] Freezing CBR's assets as a countermeasure to Russia's waging war against Ukraine should definitely be seen as a proportionate countermeasure, especially since this would be a non-military response.[91] Still, a confiscation is taking it a step further, but a confiscation of assets as a countermeasure to military action against another sovereign state seems justified. But the EU is not under direct attack by Russia, Ukraine is. Since the EU, and its Member

82 As outlined by *De Gregorio Merino,* in: Zilioli/Bismuth/Thévenoz (eds.), p. 196 with references that the UNCIS although not in force, is increasingly considered to reflect customary international law. According to *Ahmed/Butler,* EJIL 2006/4, p. 776 with further references to the result, that the EU as intergovernmental organisation is subject to international law.

83 *Webb*, Study European Parliamentary Research Service, p. 8 referring to *Brunk-Wuerth,* in: Ruys/Angelet/Ferro (eds.), p. 282.

84 *Webb*, Study European Parliamentary Research Service, p. 11.

85 *Webb*, Study European Parliamentary Research Service, p. 11.

86 *Webb*, Study European Parliamentary Research Service, p. 11.

87 See for further details *Webb*, Study European Parliamentary Research Service, pp. 11 et seq. and p. 16.

88 See above *Brunk*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 187 et seq.

89 The United States took measures or froze assets of the central banks of Afghanistan, Cuba, Iran, Syria, and Venezuela, see *Moiseienko*, EJIL 2023/4, p. 1012.

90 Art. 51 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).

91 *Moiseienko*, EJIL 2023/4, p. 1016; *Kamminga*, NILR 2023/70, p. 7.

States, are not direct injured states in accordance with Art. 42 ARSIWA,[92] they can only justify third-party countermeasures based on Art. 48 ARSIWA. Countermeasures, however, need to be temporary and reversible.[93] The confiscation of assets is neither temporary nor reversible. Still, Art. 54 ARSIWA is leaving room for future developments which are "lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached."[94] The provision refers to *lawful measures* and not *countermeasures* "as not to prejudice any position concerning measures taken by States other than the injured State in response to breaches of obligations for the protection of the collective interest".[95] As outlined by *Kamminga*:[96] "The exceptional circumstances of a war of aggression waged by a permanent member of the Security Council (so that the Security Council is unable to act) combined with the availability of its financial assets on the territory of third states may be regarded as sufficient ground for such a 'future development' anticipated by the [International Law Commission]".[97] Furthermore, Art. 54 ARSIWA explicitly refers to reparation, which is the objective of using CBR's assets. To be a lawful countermeasure the applied action needs to induce compliance with international law and to cease the unlawful behaviour of the infringing state.[98]

Another way to argue against the protection of the property of the CBR by immunity could be the *evolution* of international law, thereby developing a new exception to immunity, since international law is not static.[99] However, this way would be full of legal uncertainty.

There could be an *exception* if, e.g., an international court (like the ECtHR),[100] which the wrongdoing state has consented to exercising judicial power, would decide, that the wrongdoing state needs to pay compensation to another state. Currently, there is no decision by such international court to cease Russian assets or to oblige Russia to pay reparations to Ukraine. At least the jurisdiction of ECtHR was accepted by Russia at the start of the war against Ukraine. However, Russia ceased to be a member of the European Convention on Human Rights as of September 16, 2022.[101]

92 Art. 42 ARSIWA.
93 Art. 49 ARSIWA in more detail, see *Kamminga*, NILR 2023/70, p. 10.
94 Art. 54 ARSIWA.
95 *Kamminga*, NILR 2023/70, p. 11.
96 *Kamminga*, NILR 2023/70, p. 11.
97 The International Law Commission (ILC) established the ARSIWA.
98 See in detail the challenges of arguing that the confiscation is a lawful countermeasure *Brunk*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 187 et seq.; *De Gregorio Merino*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 196 et seq.; *Webb*, Study European Parliamentary Research Service, pp. 24 et seq.; *Kamminga*, NILR 2023/70, pp. 10 et seq.
99 *Webb*, Study European Parliamentary Research Service, pp. 14 et seq. and p. 16.
100 European Court of Human Rights.
101 *Council of Europe*, Russia ceases to be party to the European Convention on Human Rights, available at: https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights (5/5/2025).

In the end, the confiscation of the CBR's assets in compliance with international law would only be possible, if the assets lose their protection under state immunity rules. The most promising ways to confiscate the assets of the CBR would be avoidance and justification, but even those exceptions from immunity leave the EU with obstacles and legal uncertainty in terms of international law, when confiscating the assets of the CBR.

2. Introduction of confiscation provisions (Council Regulation [EU] 833/2014)

Despite the legal risks, the Council of the EU and the European Commission sought for a way forward to confiscate the assets of the CBR. However, the confiscation of the entire assets was not pursued anymore due to the legal obstacles described above.[102] Nonetheless, since a substantial amount of assets were immobilised in the EU, these assets generated profits, which according to the EU, should be used for the reconstruction of Ukraine. Initially, two models to get hold of these profits were suggested by the Ad Hoc Working Party (AHWP) on the use of frozen and immobilised assets to support Ukraine's reconstruction.[103] Either the assets would be transferred to a central entity, which then would carry out investment operations (centralised option), or the current holders of the assets would be obliged to reinvest the cash balances and then transfer the profits to the EU (decentralised option).[104]

The reports based on Art. 5a para. 4a of Council Regulation (EU) 833/2014 provided by the holders of the CBR's assets led to the conclusion that most assets were held by a single CSD (EUR 191 billion).[105] Therefore, the decentralised option was favoured by the Council of the EU. The centralised option would have led to further legal risks, because the CBR's assets would have had to be transferred to a custodian managing and investing the assets. The ownership of the assets, therefore, would have needed to be changed. Even though the plan was to implement a reversible measure, only using the profits of the assets, whereas the assets themselves could be retransferred, in case Russia ceased its attack and contributed to the reconstruction of the Ukraine, the measure of changing the ownership would still need justification under international law. Furthermore, the EU would have to establish a special purpose vehicle[106] with a governance structure and sufficient (human and financial) resources to manage and invest the assets. Additionally, the EU and its Member States would have to take the risk of any losses incurred by the invest-

102 See above and *Council of the EU*, 10669/23, p. 2.
103 See the process taken by the *Council of the EU*, 10669/23, pp. 1 et seq.
104 *Council of the EU*, 10669/23, pp. 4 et seq.; *De Gregorio Merino,* in: Zilioli/Bismuth/Thévenoz (eds.), p. 198.
105 See *Steinbach*, How to harvest the windfall profits from Russian assets in Europe, available at: https://www.bruegel.org/analysis/how-harvest-windfall-profits-russian-assets-europe (5/5/2025).
106 Alternatively, an already existing international financial organisation (e.g., the European Investment Bank) could have been used.

ments.[107] For these reasons, the Council of the EU did not pursue the centralised option further and preferred the decentralised option.

The ECB, however, criticised both models, arguing *vis-á-vis* the AHWP[108] that the euro is the second most widely held reserve currency in the world and the key appeal of the euro is its liquidity, reliability and predictability. In the ECB's view, "using interest rate proceeds from immobilized central bank assets may encourage official reserve holders to turn their back on the euro." The ECB emphasised that the centralised model would be an unprecedented move and "could be perceived as interference with contractual agreements and with the freedom to invest official reserves. This risk would be lower under the windfall contribution option, but still significant. It should also be considered that such a measure could fragilize European custodians if custodians in other jurisdictions are not subject to comparable measures."

On 21 May 2024, the Council of the EU introduced amendments to Council Regulation (EU) 833/2014,[109] thereby implementing the obligation for CSDs in the EU holding assets of the CBR exceeding EUR 1 million to contribute the net profits of CBR's cash balances to the EU budget.[110] The CSDs are obliged keep the cash balances in a separate account; from 15 February 2024 onwards revenues from these cash balances should be registered separately; net profits[111] shall not be disposed by way of distribution in the form of dividends or in whatever form to the benefit of shareholders or any third party.[112] These net profits shall be subject to a financial contribution by the CSD due to the budget of the EU. The rate of financial contribution shall be 99,7%[113] of those net profits. The contribution to the EU budget shall take place bi-annually.[114] The CSDs have the option to provisionally retain a share not exceeding 10% of the financial contribution to comply with statutory capital and risk management requirements in view of the impact due to the war in

107 See to the different disadvantages *Council of the EU*, 10669/23, pp. 4 et seq.; *De Gregorio Merino,* in: Zilioli/Bismuth/Thévenoz (eds.), p. 200; *Webb*, Study European Parliamentary Research Service, pp. 44 et seq.

108 See *Council of the EU*, 10669/23, p. 6.

109 Council Regulation (EU) 2024/1469 concerning restrictive measures in view of Russia`s actions destabilising the situation in Ukraine, OJ L 1469 of 22/5/2024, p. 1.

110 See Art. 5a paras. 8–14 of Council Regulation (EU) 833/2014.

111 Deduction of all relevant expenses linked to or resulting from the management of the immobilised assets and the risk management associated with the immobilised assets and after deduction of corporate tax under the general regime of the Member State concerned.

112 Art. 5a para. 8 of Council Regulation (EU) 833/2014.

113 The rate below 100% is justified with "the responsibilities of the central securities depositories and the role they are playing in handling the immobilised assets, it is […] appropriate to provide that they can retain a limited percentage of the net profits to ensure the efficiency of their work." See Recital (26) of Council Regulation (EU) 2024/1469.

114 Art. 5a para. 9 of Council Regulation (EU) 833/2014.

Ukraine with regard to the assets held by CSDs.[115] The amounts of the financial contribution paid to the Union budget shall be used to support Ukraine.[116]

The Council is justifying its measures, arguing that the profits of the CBR's assets are only possible due to the immobilisation of the assets. Due to this immobilisation cash balances that usually are "transferred out of the central securities depositories before the end of the day", have to be managed by the CSDs and therefore gain revenues.[117] "Unexpected and extraordinary revenues do not have to be made available to the Central Bank of Russia under applicable rules, even after the discontinuation of the transaction prohibition. Thus, they do not constitute sovereign assets. Therefore, the rules protecting sovereign assets are not applicable to these revenues".[118] On basis of international law, the Council argues that "[it] is also appropriate to take additional exceptional measures aiming at supporting Ukraine and its recovery and reconstruction as well as its self-defence against the Russian aggression, in line with the objectives of the Common Foreign and Security Policy, in particular preserving the Union's values, fundamental interests, security, independence and integrity, the consolidation of and support for democracy, the rule of law, human rights and the principles of international law, including international humanitarian law, the right to self-defence and the prohibition of aggression under the UN Charter, the preservation of peace, prevention of conflicts and strengthening of international security and the protection of civilian populations as well as assisting populations confronting man-made disasters, such as those inflicted upon Ukraine and its population by Russia's war of aggression".[119]

Summing up, the Council of the EU argues that the profits accruing from the CBR's frozen assets are not owned by the CBR and therefore do not fall within immunity at all (*avoidance*). Furthermore, even if immunity was applicable the confiscation would be a countermeasure to Russia's war against Ukraine (*justification*).

It remains to be seen if Russia accepts this measure or will take any legal action against this measure and/or will introduce countermeasures against the EU. Currently, an estimated amount of USD 194 billion of foreign assets remain in Russia, whereof approximately USD 90 billion is owned by EU companies.[120] From an ESCB perspective, it will be interesting to observe if these measures will have an effect on the euro as the second reserve currency of the world.

115 Art. 5a para. 10 of Council Regulation (EU) 833/2014.

116 Art. 5a para. 14 of Council Regulation (EU) 833/2014 is referring to Annex XLI (which shall be reviewed yearly), which provided for a contribution to the Ukraine Loan Cooperation Mechanism (established by Regulation [EU] 2024/2773).

117 Recital (17) of Council Regulation (EU) 2024/1469.

118 Recital (18) of Council Regulation (EU) 2024/1469.

119 Recital (23) of Council Regulation (EU) 2024/1469.

120 See data: *Steinbach*, How to harvest the windfall profits from Russian assets in Europe, available at: https://www.bruegel.org/analysis/how-harvest-windfall-profits-russian-assets-europe (5/5/2025).

E. Role of supervisory authorities regarding the compliance of supervised entities with EU sanctions

The ECB and several central banks are the prudential supervisory authorities under the SSM-Regulation regarding credit institutions.[121] In this role as a supervisory authority, they are interested in the compliance of credit institutions – although the prudential supervisory authority is not necessarily also the competent sanctions authority – with the EU sanctions regulations. Should the credit institutions not comply with the EU sanctions regulations, this could represent a risk based on possible fines for the breach of EU sanctions as well as a reputational risk. Consequently, there is a certain interest by the prudential supervisory authorities that their supervised entities have sufficient "knowledge, methods and governance in place"[122] to properly comply with the EU sanctions. Furthermore, potential Russian exposure may affect a supervised credit institution and thereby raising the interest of the supervisory authorities.[123]

If prudential supervisory authorities take note of relevant information in terms of the EU sanctions, they are obliged to report this information to the competent sanctions authorities. This obligation derives either from national provisions[124] or directly from the EU sanctions regulations. Article 8 para. 1 Council Regulation (EU) 269/2014 foresees that "[w]ithout prejudice to the applicable rules concerning reporting, confidentiality and professional secrecy, natural and legal persons, entities and bodies shall […]" supply immediately any information which would facilitate compliance with the Council Regulation (EU) 269/2014. Such relevant information, e.g. on accounts and amounts frozen, need to be also submitted by prudential supervisory authorities to the competent sanctions authority of the Member State (or the European Commission) where the supervisory authority is resident or located. Furthermore, prudential supervisory authorities shall cooperate with the competent sanctions authority to verify such information.

F. Central banks as competent sanction authorities

A few central banks in the ESCB have a special role in implementing the EU sanctions, since these central banks (OeNB, *Deutsche Bundesbank*, *Central Bank of Ireland, Banca Națională a României, Banka Slovenije*) are the competent authori-

121 See Council Regulation (EU) 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287 of 29/10/2023, p. 63 (SSM-Regulation).

122 *Zilioli*, in: Zilioli/Bismuth/Thévenoz (eds.), p. 264.

123 See in detail *Zilioli*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 266 et seq.; *Zilioli*, in: Zilioli/Bismuth/Thévenoz (eds.), pp. 264 et seq. generally points out several implications for the ECB as supervisory authority; General Court, Case T-324/24 R; *UniCredit SpA v. ECB*, Order of the President of 22 November 2024, ECLI:EU:T:2024:858.

124 See Art. 12 para. 6 and Art. 19 para. 4 of the Austrian Sanctions Act 2024. Also, the FMA needs to report any suspicious activity in connection with EU sanctions.

ties for implementing the financial sanctions and supervising the compliance with EU sanctions of certain institutions (e.g., credit institutions).

Taking Austria as an example: On 11 February 2025 a new Sanctions Act entered into force in Austria. The OeNB is the competent authority to supervise financial market participants (whereby, e.g., insurance companies and crypto asset service providers are not included in this definition) concerning their compliance with the national and European sanctions framework.[125] All others tasks fall within the residual competence of the Austrian Federal Ministry of the Interior (acting through the Directorate State Protection and Intelligence Service [DSN]).[126] However, as of 1 January 2026, the OeNB will not be the competent financial sanctions authority anymore. The competent authority will henceforth be the FMA, which also takes over the supervision of sanctions compliance for insurance companies and crypto asset service providers.

Currently, the competencies of the OeNB[127] include the obligation to take administrative decisions on derogations based in the EU sanctions regulations (e.g. Art. 4–6f of Council Regulation [EU] 269/2014), whereby certain funds can be released if the conditions of the relevant derogation are fulfilled. The OeNB is responsible for deciding on the release of frozen funds held by Austrian credit, financial or payment institutions only based on provided derogation provisions. Similarly, the OeNB decides over certain derogations under Council Regulation (EU) 833/2014. In this regard, the OeNB must decide, for example, on requests regarding the acceptance of deposits exceeding EUR 100,000 per credit institution from Russian citizens, natural persons residing in Russia, or legal entities based in Russia.[128] The derogation must be requested from the OeNB, as the deposits are held by credit institutions. At the same time, requests regarding a derogation from the prohibition to provide crypto-asset wallet, account or custody services to Russian citizens, natural persons residing in Russia or legal entities based in Russia have to be decided by the DSN, since crypto-asset service providers[129] are not included by the current definition of financial market participants.

The OeNB is also supervising financial market participants' compliance with the applicable sanctions framework and whether they have implemented policies, controls and procedures for effective compliance with sanctions in place.[130] The OeNB uses different tools to supervise these obligations of financial market participants, e.g., on-site inspections or ad hoc requests for information. Furthermore, there

125 Art. 12 para. 2 of the Austrian Sanctions Act 2024.
126 Art. 12 para. 1 of the Austrian Sanctions Act 2024.
127 Art. 12 para. 2 of the Austrian Sanctions Act 2024.
128 Art. 5c and 5d of Regulation (EU) 833/2014.
129 See definition in Art. 2 para. 15 in connection with Art. 59 of Regulation (EU) 2023/1114 of the European Parliament and of the Council on markets in crypto-assets, OJ L 2869 of 20/12/2023, p. 1 (MiCAR).
130 Art. 12 paras. 2 and 3 in conjunction with Art. 7 of the Austrian Sanctions Act 2024.

are several reporting obligations which must be complied by the financial market participants.[131]

That being said, the OeNB is not the law enforcement agency in case of a breach of EU sanctions regulations. If the OeNB substantiates its suspicion of a breach of sanctions, it has, pursuant to Art. 16 et seq. Austrian Sanctions Act, submit a description of the facts to the public prosecutor (suspected breaches with transactions exceeding EUR 100,000) or to the competent criminal administrative authority (suspected breaches below that threshold and of reporting obligations in general).

G. Conclusion

With the beginning of the war in Ukraine and the measures taken against Russia via EU sanctions, the compliance with the EU sanctions got more complex for obliged entities, since the sanctions are extensive. This publication presents the different roles the central banks of the ESCB have in terms of EU sanctions. The central banks themselves must comply with the EU sanctions regulation, since they are also addressees of the directly applicable EU sanctions regulations. A major topic concerning the sanctions against Russia was the question of how to deal with the CBR's reserves and assets, which were immobilised after the beginning of the war, particularly with CSDs in the EU. In the end, the Council decided to confiscate certain profits originating from these assets by requiring CSDs to pass the profits to the Union. The ECB criticised these plans before they were implemented, as doing so could have an effect on the euro in its role as the second reserve currency of the world. Central banks, which are also prudential supervisory authorities, are affected by the EU sanctions in their work as well, on one hand by the obligation to provide information to the sanctions authorities, on the other hand, they have to assess the impact of EU sanctions on their supervised credit institutions as part of their daily work. On the other side of the spectrum a few EU central banks, e.g., OeNB or *Deutsche Bundesbank* are competent authorities for implementing the financial sanctions and supervising the compliance with EU sanctions of certain entities (e.g., credit institutions).

The political instrument of sanctions is here to stay and is nowadays seen as an important tool of the CFSP of the EU. The further development of EU sanctions can also be seen in other legislative projects of the EU. Recently, the Anti-Money Laundering-package (AML-package) – although not fully applicable yet – entered into force, whereby several provisions[132] provide that the compliance of obliged entities with targeted financial sanctions must be ensured, and the newly established

131 For example, in Art. 12 para. 8 of the Austrian Sanctions Act 2024; Art. 8. and Art. 9 of Council Regulation (EU) 269/2014; Art. 5g and Art. 5r of Council Regulation (EU) 833/2014.

132 See, e.g., Art. 20 para. 1 or Art. 26 para. 4 of Regulation (EU) 2024/1624 of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 1624 of 19/6/2024, p. 1 (AMLR).

AMLA (Authority for Anti-Money Laundering and Countering the Financing of Terrorism) will amongst other tasks have to verify that obliged entities have in place adequate systems to implement requirements related to targeted financial sanctions.[133]

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133 See Art. 5 of Regulation (EU) 2024/1620 of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism, OJ L 1620 of 19 June 2024, p. 1 (AMLAR).

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Central Bank Digital Currency: Facilitating its understanding from a comparative global perspective

Rainer Palmstorfer and Gülşah Erbilen*

Contents

Abstract

The aim of this paper is first to elucidate the concept of monetary sovereignty to establish its pivotal significance to the thematic framework of Central Bank Digital Currencies (CBDC). Building upon this analysis, three global players, each with their own distinct approaches and implementations of digital currency, have been selected for a contrastive analysis: The People's Republic of China with its e-CNY, the United States' push and pull over a Digital Dollar and, lastly, the ambitions of a Digital Euro in the European Monetary Union (EMU).

Keywords: Central Bank Digital Currency, CBDC, monetary sovereignty, digital banknotes, digital currency, digital euro, digital dollar, e-CNY

A. Introduction

Recent years saw a rapid growth in projects aiming at the creation of a Central Bank Digital Currency (CBDC). A CBDC is commonly defined as a digital payment instrument, denominated in the national unit of account, that is a direct liability of

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the central bank.[1] It constitutes a form of central bank money (CBM). If a CBDC can be used by the general public as an equivalent to cash, it is referred to as "retail CBDC"; if it can only be used between certain actors (e.g., banks), it is referred to as "wholesale CBDC".[2] A retail CBDC, in essence, is central bank cash[3] available in digital form (digital banknotes), acting as an additional payment method.[4] Being a form of CBM, a CBDC is to be distinguished from private digital currencies (e.g., *Bitcoin, Ethereum*).[5]

As of February 2025, 134 countries and currency unions are exploring a CBDC—a development which is also framed as a "race for the future of money".[6] Much like the AI Act,[7] heralded as "the first of its kind in the world",[8] the European Union (EU), with its ambitions to establish a Digital Euro (DE), once again appears to be entering a global regulatory competition. This time, the focus is on how money—or, more precisely, CBM—should look like in a world marked by the growing importance of digitalization. With the publication of the Report on a DE[9] by the European Central Bank (ECB) in October 2020, and, more recently, the European Commission's proposal for a "Regulation on the establishment of the digital euro"[10] (DER proposal) presented in June 2023, the EU has stepped into the regulatory race. The DE raises a variety of questions and can be viewed from different perspectives. This paper will shed some light on the DE from a comparative global perspective for a better understanding of the EMU's attempt to create its own CBDC.

In order to fully grasp the implications of a CBDC, it is essential to first introduce monetary sovereignty (section B), as this concept lies at the core of CBDCs. The concrete concept of a CBDC, further explained in section C, widely discussed and acknowledged in the international community across various disciplines (by

1 See, e.g., *BIS*, Central bank digital currencies: foundational principles and core features, available at: https://www.bis.org/publ/othp33.htm (25/3/2025).
2 For an in-depth analysis, see, e.g., *Boar/Wehrli*, BIS 2021/114, p. 4; *Bossu* et al., IMF Working Paper 2020/254, p. 9.
3 See, e.g., *Ahmat/Bashir*, Central bank digital currency: A monetary policy perspective, available at: https://www.bnm.gov.my/documents/20124/826874/CB_Digital+Currency_Print.pdf (25/3/2025); *Juhro*, in: Warjiyo/Juhro (eds.), pp. 263 et seq.
4 See, e.g., *BIS*, Central bank digital currencies: foundational principles and core features, available at: https://www.bis.org/publ/othp33.htm (25/3/2025).
5 See, e.g., *Raskin/Saleh/Yermack*, Journal of Financial Stability 2024/101281, p. 2.
6 *Atlantic Council*, Central Bank Digital Currency Tracker, available at: https://www.atlanticcouncil.org/cbdctracker/ (25/3/2025).
7 Regulation (EU) 2024/1689 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), OJ L 2024/1689 of 12 July 2024.
8 *Council of the EU*, Artificial intelligence (AI) Act: Council gives final green light to the first worldwide rules on AI, available at: https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/artificial-intelligence-ai-act-council-gives-final-green-light-to-the-first-worldwide-rules-on-ai/ (25/3/2025).
9 *ECB*, Report on a digital euro, available at: https://www.ecb.europa.eu/euro/html/digitaleuro-report.en.html (25/3/2025).
10 *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, COM(2023) 369 final.

economists, computer scientists, engineers, and legal scholars), holds the potential to facilitate the inclusion of the financially excluded[11] while concurrently adapting to an increasingly advanced approach in dealing with daily purchases. As a form of currency with legal tender character, it would enable individuals to carry out transactions without a commercial bank account, strengthening the monetary sovereignty of the state to govern its own money while reducing external influence. Following this foundational discussion, the paper examines CBDCs in three distinct regions: the People's Republic of China (PROC) (section D. I), characterized by an open and advanced implementation of the e-CNY;[12] the United States (section D. II), following a conservative stance and exhibiting reluctance to embrace its own Digital Dollar (DD); and the EU (European Monetary Union [EMU]) (section D. III), which remains in the process of developing its own digital currency, the DE, having yet to take a definitive step but showing clear signs of interest in establishing its own CBDC.

By analysing these different approaches, the paper highlights diverse implementations of CBDCs and their broader implications, given the significant differences in cultural, economic, and geopolitical factors. These analyses are structured into three subsections, followed by a conclusion (section E), offering a comparative perspective.

B. Addressing Monetary Sovereignty

After law itself, *Bodin* (1576) observes that in every well-ordered state there is nothing of greater consequence than the title, value, and measure of coins. And it is the sovereign alone, who is endowed with the power of coining money.

> "[…] [o]r il n'y a rien de plus grande consequence apres la loy, que le tiltre, valeur, et pied des monnoyes, comme nous avons monstré en un traicté àpart: et en toute Republique bien ordonnee, il n'y a que […] souverain qui ayt ceste puissance".[13]

Reflecting the assertion made by *Cipollone*, this dogma is still in practice today: the state holds the regulatory power over the use of money while (most) legislators have entrusted central banks with issuing public money and maintaining confidence in the monetary system.[14]

11 See also, in this regard, e.g., *Bossone*, CBDC and financial inclusion: Changing the paradigm (Part 1), available at: https://blogs.worldbank.org/en/allaboutfinance/cbdc-and-financial-inclusion-changing-paradigm-part-1 (25/3/2025).

12 The e-CNY often being referred to as the "longest-running and most advanced large-scale CBDC pilot globally"; see *Digital Euro Association*, Ahead of the digital euro: Public Digital Euro Working Group – The Chinese digital yuan, available at: https://7869715.fs1.hubspotusercontent-na1.net/hubfs/7869715/The%20Chinese%20digital%20yuan%20Article.pdf (25/3/2025).

13 *Bodin*, p. 78.

14 *Cipollone*, Monetary sovereignty in the digital age: the case for a digital euro, available at: https://www.ecb.europa.eu/press/key/date/2024/html/ecb.sp240927~11ed8493a4.en.html (25/3/2025).

There are many differing opinions in literature regarding the scope of this principle (in the words of *Lô Diatta,* "[i]l est plus facile d'affirmer le principe de souveraineté monétaire de l'Etat que de préciser son contenu reel").[15]

For example, *Treves,* has defined it as principle, which "includes the power to define a monetary unit, to define notes and coins in multiples of that unit and to require that payments in such notes and coins be accepted as legal tender at nominal value",[16] whereas *Fawcett* extends the definition to enabling the State "to issue money in defined units of account; to regulate its use as currency in the territory of the State, and in particular the conditions, including rates, of its exchange there [within the state's territory] for foreign currencies; to control the operation of currency balances by non-residents; and to control also transactions involving the currency entered into by its residents when abroad".[17]

Martha, similar to *Fawcett*, recognizes monetary sovereignty as "[…] a State's undeniable power, recognized by international law[[18]], to regulate its own currency, i.e. the power to issue or designate money with legal tender character, to impose exchange control and exchange restrictions and to select the mechanisms through which the internal and external value of the money is determined and maintained".[19]

Burdeau[20] and *Carreau*[21] take a similar approach, considering monetary sovereignty to be more than just defining monetary units and giving them legal tender value. In a more comprehensive sense, it also encompasses regulation and control of the national money supply by means of the supervision of credit to the economy.

Lastly,[22] *Mann* extends the meaning of monetary sovereignty in the broadest sense, including "much more than the mere issue of money in the legal sense. It comprises the whole of monetary, credit, fiscal, and budgetary policy as well as

15 For an in-depth analysis, see, e.g., *Lô Diatta*, IV. Effets juridiques des Unions monétaires § 1 Les effets sur les Membres paras. 10 et seq., who explores the scope of the term *monetary sovereignty* in detail.

16 *Treves*, in: Giovanoli (ed.), p. 117.

17 *Fawcett*, British Year Book of International Law 1964/40, p. 49.

18 See in this regard also *Zimmermann*, EJIL 2013/3, p. 799 with further reference provided in footnote 6.

19 *Martha*, Common Mkt. L. Rev. 1993/4, p. 752.

20 *Burdeau* defines it as a sovereign right that is not limited to the strict power of issue but which extends more generally to the regulation of the entire national monetary system, which consequently includes the control of the volume of the money supply; see *Burdeau,* in: Kahn (ed.), p. 412.

21 *Carreau* understands it in relation to fixing the value of its currency by determining the rate–or price–at which it is exchanged for other national currencies and the use that can be made of its currency, in doing so fixing its convertibility, controlling the national money supply by means of the supervision of credit to the economy; see *Carreau*, Recueil des Cours de l'Académie de droit international de La Haye 1998/274, pp. 371–372.

22 The selected authors and their approaches to the interpretation of monetary sovereignty are not exhaustive. Addressing all interpretations would exceed the scope of this paper, but it is important to emphasize that this concept is broader than a single perspective and is discussed extensively in the interdisciplinary literature (see also, in this regard, e.g., *Prates*, in: *Bonizzi/Kaltenbrunner/Ramos* (eds.) pp. 233 et seq.).

those measures which economists tend to include in the concept of money, […] its supply and use, the control of inflation, interest rates, exchange control […]".[23] A detailed exploration of these different approaches can be found in the works of *Lô Diatta*[24] and *Prates*,[25] who critically examine the various definitions and their implications.

The ability to determine and/or evaluate the extent of a sovereign's wealth, to identify characteristic features of it, but also to determine the conditions for the printing and denomination of its monetary units and relations with foreign currencies are all essential features of monetary sovereignty.[26] As *Zimmermann* has pointed out, the nature of monetary sovereignty is "essentially dynamic, with both its positive and normative components being subject to constant evolution, thereby enabling the concept to adjust to the changing economic environment brought about by increasing globalization and financial integration."[27]

C. Currency in Transition: Facilitating the Understanding of a CBDC

A closer analysis requires clarifying the purpose and role of central banks. Central banks issue two types of money, physical cash (widely accessible and peer-to-peer) and electronic central bank deposits (reserves or settlement balances and typically only accessible to qualifying financial institutions). They also provide infrastructure to support private money, which is available through electronic commercial bank deposits.[28] Central banks support commercial banks by settling interbank payments, using CBM,[29] enabling convertibility between the latter and commercial bank money through banknote provision and being offered contingent liquidity through the lender of the last resort function.[30]

And this is where CBDC takes centre stage: As shown above, a CBDC is a digital form of CBM. Forms of CBM, banknotes, coins and also, if introduced, a CBDC, are issued by a central bank and express the monetary sovereignty of a country, representing a public good (therefore also referred to as public money).[31]

23 *Mann*, p. 509, although his perspective has been subject to criticism by *Lô Diatta*, § 1 Les effets sur les Membres, para. 34.
24 *Lô Diatta*, § 1 Les effets sur les Membres, paras. 10 et seq.
25 *Prates*, in: *Bonizzi/Kaltenbrunner/Ramos* (eds.), pp. 230 et seq.
26 See, e.g., *Biankola/Nzaou-Kongo*, African Review of Law and Critical Thinking 2020/1, pp. 30 et seq.
27 *Zimmermann*, EJIL 2013/3, p. 806.
28 See, e.g., *BIS*, Central bank digital currencies: foundational principles and core features, available at: https://www.bis.org/publ/othp33.htm (25/3/2025).
29 See, e.g., *Adrian/Mancini-Griffoli*, Annual Review of Financial Economics 2021/13, pp. 72 et seq.
30 See, e.g., *BIS*, Central bank digital currencies: foundational principles and core features, p. 4, available at: https://www.bis.org/publ/othp33.htm (25/3/2025). In times of financial crisis (e.g., liquidity issues), a national central bank can act as a safety net for commercial banks to provide the funding needed and bears costs and risks that may arise.
31 *BIS*, Central bank digital currencies: foundational principles and core features, p. 4, available at: https://www.bis.org/publ/othp33.pdf (25/3/2025).

At this point, it is worth emphasizing, once and for all, how a CBDC differs from existing commercial bank money and what specific purpose it serves. While commercial bank money requires the specific user to own a bank account in order to access the digital money transfer service,[32] a CBDC, by contrast, is regarded as a form in which no institutional linkage or point of reference to a commercial bank is necessary. Rather, it may enable individuals the possibility to hold a direct account with the central bank. Transactions can be carried out directly through the use of CBDC, which serves as legal tender.[33]

A CBDC is characterized by the full control of a central bank over its issuance, interest rates, and circulation.[34] In light of this, various forms of CBDCs (account-based vs. token-based,[35] wholesale vs. retail,[36] direct vs. indirect,[37] and centralized vs. decentralized[38]) are being explored both in scholarly discourse and in global practice.[39]

32 Commercial bank money is created by commercial banks through lending. When a bank issues a loan, it credits the borrower's account with an amount, thereby creating new money. Therefore, it is not money directly issued by the central bank. This money exists as electronic entries in bank accounts. For an in-depth analysis, see, e.g., *Mancini-Griffoli* et al., IMF Staff Discussion Notes 2018/8, pp. 7 et seq.; *Ahmat/Bashir*, Central bank digital currency: A monetary policy perspective, available at: https://www.bnm.gov.my/documents/20124/826874/CB_Digital+Currency_Print.pdf (25/3/2025).

33 See, e.g., *Jiang*, Seton Hall Law Review 2023/54, pp. 81 et seq.

34 See, e.g., *Adrian/Mancini-Griffoli*, Annual Review of Financial Economics 2021/13, pp. 72 et seq.; *BIS*, Central bank digital currencies: foundational principles and core features, available at: https://www.bis.org/publ/othp33.htm (25/3/2025).

35 For an in-depth analysis, see, e.g., *Bossu* et al., IMF Working Paper 2020/254, p. 9; *Garratt* et al., Token- or Account-Based? A Digital Currency Can Be Both, available at: https://libertystreeteconomics.newyorkfed.org/2020/08/token-or-account-based-a-digital-currency-can-be-both/ (25/3/2025); *Birne*, Zeitschrift für Europäisches Privatrecht 2024/2, pp. 407 et seq.: The main difference between account- and token-based models lies in the verification process. The token-based system entails an authentication verification, while the account-based model requires an identity verification.

36 See, e.g., *Birne*, Zeitschrift für Europäisches Privatrecht 2024/2, pp. 407 et seq.; *Panetta*, Demystifying wholesale central bank digital currency, available at: https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220926~5f9b85685a.en.htm%20l (25/3/2025). While a wholesale CBDC is designed specifically for financial institutions for use in interbank transactions and securities trading, a retail CBDC is intended to be accessible to the general public, including consumers and non-bank entities.

37 See, e.g., *BIS*, Central bank digital currencies: foundational principles and core features, available at: https://www.bis.org/publ/othp33.htm (25/3/2025). In a direct access model, end users have the ability to manage their retail CBDC units themselves without the involvement of third parties; conversely, an indirect access model involves end users accessing and conducting transactions with their retail CBDC units through intermediaries.

38 See, e.g., *Birne*, Zeitschrift für Europäisches Privatrecht 2024/2, pp. 407 et seq.; *Rahman*, Munich Personal RePEc Archive 2022/111361, pp. 2 et seq.; *BIS*, Central bank digital currencies: foundational principles and core features, available at: https://www.bis.org/publ/othp33.htm (25/3/2025). In a centralized infrastructure, the central bank provides, operates, and processes all transactions, whereas in a decentralized infrastructure, end users or intermediaries execute transactions without the central bank's direct intervention.

39 At this point, it cannot be ruled out that other forms may emerge, or that CBDCs could develop or change into other forms. See also, in this regard, *Anthony/Michel*, A Breakdown of the Different CBDC Models, available at: https://www.cato.org/blog/breakdown-different-cbdc-models (25/3/2025).

There are several possible reasons for introducing a CBDC, including internal needs as well as external pressures.[40] Arguably the most important objective is that CBDCs are seen as a tool to safeguard monetary sovereignty against emerging threats posed by private currencies or foreign CBDCs, that is, the threat that the domestic population "shift from using the official currency to an alternative denominated in a different unit of account".[41] Furthermore, there is a growing concern that the domestic population is increasingly resorting to digital forms of payment to the detriment of cash. While individuals may rely on their own domestic currency, the payment tools they turn to are becoming increasingly digital (e.g., credit cards, online payment service providers, etc.).[42]

Further considerations also play a significant role: A CBDC could increase payment efficiency,[43] reduce transaction costs,[44] facilitate cross-border payments,[45] and reduce maintenance costs of physical money.[46] It has the potential to make a substantial impact in combating illicit payments,[47] the state staying competitive and resilient in the ever-evolving payment market,[48] improve the financial inclusion of a segment of a population without a bank account[49] target the lower bound policy and clamp down on counterfeiting. The aspect of monetary sovereignty can be categorized here as both an internal need and an external pressure: the internal aspect reflects the need for a state to enforce monetary sovereignty over its own territory and people, while the external pressure represents the requirement to uphold the independence of the currency choice without interference from foreign policies.

40 See, e.g., *Jiang*, Seton Hall Law Review 2023/54, pp. 83 et seq.

41 *Brooks*, Staff Discussion Paper/Bank of Canada 2021/17, p. 3; see also *Diez de los Rios/Zhu*, CBDC and Monetary Sovereignty, available at: https://www.bankofcanada.ca/2020/02/staff-analytical-note-2020-5/ (25/3/2025).

42 See, e.g., *Hilpert/Tokarski*, SWP Comment 2024/48, p. 6.

43 See, e.g., *Bindseil*, ECB Working Paper Series 2020/2351, pp. 5 et seq.

44 As a transfer from a bank deposit into a CBDC would not require the individual to withdrawal money at an ATM and the central bank would not charge a transaction fee due to the omission of a commercial bank as an intermediary; see also, in this regard, *BIS*, Central bank digital currencies: financial stability implications, available at: https://www.bis.org/publ/othp42_fin_stab.pdf (25/3/2025).

45 See, e.g., *BIS*, Central bank digital currencies for cross-border payments, available at: https://www.bis.org/publ/othp38.pdf (25/3/2025): Cross-border payments are often costly due to the involvement of a high number of intermediaries, experience long transaction delays, suffer from low traceability and a lack of transparency, and there is a high possibility of certain jurisdictions having inadequate access to the global financial systems.

46 See, e.g., *Bindseil*, ECB Working Paper Series 2020/2351, pp. 5 et seq. (25/3/2025).

47 *Ibid.*, pp. 4 et seq.

48 See, e.g., *Jiang*, Seton Hall Law Review 2023/54, pp. 89 et seq.: "Introducing a CBDC can diversify domestic payment systems [addressing issues associated with a concentrated market]. […] [As] private payment systems benefit from strong network effects such as benefits of aggregating data to provide additional services [resulting in] monopolies, high barriers to entry, and high costs for merchants." CBDCs could disrupt these monopolies "by introducing more actors into the payment market".

49 *Ibid.*, pp. 86 et seq.

While a CBDC system has its merits, privacy risks for citizens[50] (specifically data protection issues relating to digital payments) and the risk of potential cyber-attacks must not be disregarded. Relying on digital systems entails significant dangers (and at present, the extent of these dangers cannot be fully assessed), owing to the fast-paced digitalization of financial services. A CBDC cannot "be bulletproof to cyber-attacks";[51] nowadays, nothing is exempt from this threat. Yet, delaying action purely based on fear paralysis or following the proverb, "out of sight, out of mind", is also not the right course of action. Inaction will lead to stagnation, missed opportunities, and a failure to adapt to changing circumstances–taking action, even with the awareness of all the potential risks, provides valuable insights in practice, not just theoretical dogma.

It should not be overlooked that the implications of a CBDC extend to the influence within which private and/or foreign currencies can exert influence on the domestic financial system. As mentioned above, a CBDC could, on one hand, safeguard a country's monetary sovereignty and, on the other, enable it to remain assertive in the financial sector.[52] The nature of monetary sovereignty has adapted once again in its dynamic feature, evolving in the digital realm.

D. CBDC approaches in a comparative global perspective: Contrasting Goals

There has been much debate over which country was the first to introduce a CBDC. Some consider it to be the Bahamas, which introduced a CBDC (*the Sand Dollar*) in 2020,[53] while others claim that Finland, whose central bank introduced the Avant Smart Card (*Avantin-kortti*) in 1993, should be considered as the first to do so.[54] If the latter is the case, the fact that the Avant Smart Card was eventually abandoned in the early 2000s, is, at first glance, alarming for future CBDCs. However, it must be considered that the digital timeline and financial behaviour of citizens has drastically changed over the last two decades.

Out of 134 countries, only three have, at present, fully launched a CBDC (Jamaica: *Jam-Dex*,[55] the Bahamas: *Sand Dollar*[56] and Nigeria: *e-Naira*),[57] whilst 44 countries

50 *Ibid*, pp. 105 et seq., defining the term of *privacy* in this sense and examining its relevance to CBDCs.
51 See also, in this regard, e.g., *Tian/Zhao/Ong*, Finance Research Letters 2023/53, p. 2.
52 See also, in this regard, e.g., *Brauneck*, EuZW 2024/9, pp. 397 et seq.
53 See, e.g., *Dorst*, Digital Dollars for Online Tea, available at: https://www.imf.org/external/pubs/ft/fandd/2021/03/fighting-pandemic-disruption-with-innovation-dorst.htm (25/3/2025).
54 See, e.g., *Stanley*, The Ascent of CBDCs, available at: https://www.imf.org/en/Publications/fandd/issues/2022/09/Picture-this-The-ascent-of-CBDCs (25/3/2025).
55 For further information on the *Jam-Dex*, see *Bank of Jamaica*, CBDC FAQs, available at: https://boj.org.jm/core-functions/currency/cbdc/cbdc-faqs/ (25/3/2025).
56 For further information on *the Sand Dollar*, see the official homepage, available at: https://www.sanddollar.bs/about (25/3/2025). For a more in-depth discussion of the launch of the Sand Dollar, see *Digital Euro Association*, Lessons from the first implemented CBDC: the Sand dollar, available at: https://blog.digital-euro-association.de/lessons-from-the-sand-dollar (25/3/2025).
57 For further information on the *e-Naira*, see the official homepage, available at: https://enaira.gov.ng (25/3/2025).

are in a pilot phase (among those are the EMU and the PROC) and 20 countries are still in the development phase (including the United Kingdom, Canada and Taiwan).[58] Among these countries, the launched CBDCs have a relatively low adoption rate and fell flat with consumers.[59]

This paper will focus, however, on three selected global players, exhibiting drastically contrasting policies and approaches to CBDCs: The PROC, the EU (EMU) and the United States, as they present divergent trajectories of their approaches to CBDCs—one having achieved remarkable success within its pilot phase (e-CNY), while the EU is currently working on the introduction of a CBDC for its EMU and lastly, a domestic CBDC being banned by President *Trump*.

I. The People's Republic of China and the Digital Yuan: A hands-on and practical approach fit for a fast-paced society

The PROC belongs to the pioneers in the field of CBDCs. The Digital Yuan (e-CNY) is already an effective payment method as legal tender[60] in 29 pilot[61] areas within the PROC. A key strength of the e-CNY is its ease of access: while transactions can be made using an account-based e-wallet (digital wallet),[62] where the registration (on Chinese app stores) is only available to those living in pilot cities (a similar system to *Alipay* or *WeChat Pay* [*Tenpay*], by scanning QR codes), offline transactions by e-CNY are also supported.[63]

58 An overview is provided by the *Atlantic Council*, Central Bank Digital Currency Tracker, available at: https://www.atlanticcouncil.org/cbdctracker/ (25/3/2025).

59 See, e.g., *Digital Euro Association*, Lessons from the first implemented CBDC: the Sand dollar, available at: https://blog.digital-euro-association.de/lessons-from-the-sand-dollar (25/3/2025); *Aurazo et al.*, BIS Papers 2024/151, p. 3; *Noll*, Observations from the Retail CBDCs of the Caribbean, available at: https://www.kansascityfed.org/research/payments-system-research-briefings/observations-from-the-retail-cbdcs-of-the-caribbean/ (25/3/2025).

60 See, e.g., *People's Bank of China*, Progress of Research & Development of E-CNY in China, available at: www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021072014364791207.pdf (25/3/2025).

61 Whereas the e-CNY is "past the 'pilot' stage [...] with active deployments large-scale across many of the largest cities in China and active encouragement of its use". For pilot areas, added in chronological order, see *Huang,* A Comprehensive Guide to e-CNY/Digital Yuan, available at: https://chinabitcoinbook.com/?p=126 (25/3/2025); see also *Huang*, A 2024 Overview Of The E-CNY, China's Digital Yuan, available at: https://www.forbes.com/sites/digital-assets/2024/07/15/a-2024-overview-of-the-e-cny-chinas-digital-yuan/ (25/3/2025).

62 See, e.g., *People's Bank of China*, Progress of Research & Development of E-CNY in China, available at: www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021072014364791207.pdf (25/3/2025).

63 See, e.g., *People's Bank of China*, Progress of Research & Development of E-CNY in China, available at: www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021072014364791207.pdf (25/3/2025); *Yunyun,* 中国央行推出带有动态二维码的实体 CBDC 卡，推动数字人民币应用 (English translation: China's central bank has launched a physical CBDC card with a dynamic QR code to promote the adoption of the digital yuan), available at: https://www.longhuayiyongyang.com/3093.html (25/3/2025).

The introduction of the e-CNY is motivated by four main reasons. First, it aims to provide a secure retail payment system for an economy in which technological development plays a pivotal role; second, against the background of the importance of tech companies (i.e. *Alipay* and *WeChat Pay* [*Tenpay*]) offering retail payment infrastructures,[64] it shall provide backup or redundancy to the retail system to meet systematic risks stemming from these infrastructures; third, it shall foster financial inclusion and, fourth, it shall improve cross-border payments.[65] Looking at the second reason, it becomes evident that the e-CNY serves the objective of monetary sovereignty, as the e-CNY is seen as a tool to safeguard the well-functioning of the Chinese monetary system consisting of the PROC and the commercial banks.[66] But also the fourth reason is marked by this objective, as the e-CNY is perceived as a tool to support China's global ambitions. It is hoped that the e-CNY is also used in foreign countries.[67] In this context, the e-CNY could serve as a means to extend China's monetary sovereignty internationally. While these several official reasons have been put forward, it is also argued that the implementation of the e-CNY serves the purpose of social control.[68]

Although an official CBDC law has not yet been issued, the Central Bank of the PROC (PBOC) adopted strict compliance with regulations[69] on the administration of the *Renminbi* (RMB) as one of its key principles of the institutional design of its CBDC system.[70] To protect privacy and user information in its CBDC design, the institutional design of a managed anonymity has been implemented:[71]

64 See, e.g., *Soderberg et al.*, IMF Fintech Note 2022/4, p. 6.

65 See, e.g., *BIS*, E-CNY: main objectives, guiding principles and inclusion considerations, available at: https://www.bis.org/publ/bppdf/bispap123_e.pdf (25/3/2025).

66 *Ibid*.

67 See, e.g., *Kshetri*, Journal of Contemporary China 2023/139, p. 94.

68 See, e.g., *Kshetri*, Journal of Contemporary China 2023/139, p. 104; *Subrahmanyam*, China's Digital Currency: The hopes and fears of the e-CNY, China Currents 2023/1, available at: https://www.chinacenter.net/2023/china-currents/22-1/chinas-digital-currency-the-hopes-and-fears-of-the-e-cny/ (25/3/2025).

69 In particular regulations regarding anti-money laundering and countering the financing of terrorism, the administration of foreign exchange, and data and privacy protection; *People's Bank of China*, Progress of Research & Development of E-CNY in China, available at: www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021072014364791207.pdf (25/3/2025). See also, e.g., Order No. 5 [2020] of the People's Bank of China (Implementation Measures of the People's Bank of China for Financial Consumer Protection), available at: www.pbc.gov.cn/en/3688253/3689009/3788480/4121916/index.html (25/3/2025), which already establishes a legal framework regarding the data and privacy protection of financial consumers within the Chinese financial system.

70 *People's Bank of China*, Progress of Research & Development of E-CNY in China, available at: www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021072014364791207.pdf (25/3/2025).

71 In the words of *Changchun Mu*, the Director-General of the Digital Currency Institute at the People's Bank of China, referring to *Agustín Carstens*, General Manager of the BIS, a completely anonymous CBDC may not be feasible; see *Mu*, Balancing Privacy and Security: Theory and Practice of the E-CNY's Managed Anonymity, available at: www.pbc.gov.cn/en/3935690/3935759/4696666/2022110110364344083.pdf (25/3/2025); see also *Jiang*, Seton Hall Law Review 2023/54, p. 73.

According to the PBOC, "[t]he e-CNY system collects less transaction information than [a] traditional electronic payment system and does not provide information to third parties or other government agencies unless stipulated otherwise in laws and regulations […] [by setting up] an information firewall, and […] implement[ing] information security and privacy protocols, such as appointing responsible persons for maintenance, establishing business China wall, applying a tiered authorization system, putting in place checks and balances, and conducting internal audits. Any arbitrary information requests or use are prohibited".[72] Only when the legal threshold of Anti-Money Laundering- or Combating the Financing of Terrorism-regulations are met, can user data be accessed.[73]

Even though the PBOC has experimented with decentralized ledger technology, it has opted for a standard centralized ledger, meaning full control and surveillance for the state over the issuance, regulation and management of its currency. A centralized software maintained by a government provider has access to user data and is able to track and monitor transactions (such as periodic transaction reports).[74] This way, regulators can also incorporate the e-CNY into legal enforcement action such as the restriction on spending and the possession of a certain number of account-based wallets.[75] This ties together with the so-called "Dishonest Persons subject to Enforcement" (DPE) system. Under Chinese law, if a citizen is incapable of meeting "legal obligations arising from a court judgment, and deliberately evades liability without justification, the Court can include that person in the [DPE-]list".[76] The government is able to regulate financial capabilities of its citizens, when certain legal thresholds are met. Ultimately, this makes the e-CNY a surveillance tool for the state and shows that the aforementioned information firewall is subordinate to legislation on social control and public security.

72 *People's Bank of China*, Progress of Research & Development of E-CNY in China, available at: www.pbc.gov.cn/en/3688110/3688172/4157443/4293696/2021072014364791207.pdf (25/3/2025), emphasising the right of users to revoke relevant permissions at any time, causing the e-CNY app to stop processing activities related to personal information. See also *Mu*, Balancing Privacy and Security: Theory and Practice of the E-CNY's Managed Anonymity, available at: www.pbc.gov.cn/en/3935690/3935759/4696666/2022110110364344083.pdf (25/3/2025).

73 *Mu*, Balancing Privacy and Security: Theory and Practice of the E-CNY's Managed Anonymity, available at: www.pbc.gov.cn/en/3935690/3935759/4696666/2022110110364344083.pdf (25/3/2025).

74 See, e.g., *Wang*, Computer Law & Security Review 2023/50, pp. 7 et seq.

75 See, e.g., *Huang/Li,* Banking and Finance Law Review 2023/3, p. 19; *Upstox News Desk,* Beyond cash: Will the digital yuan redefine money?, available at: https://upstox.com/news/upstox-originals/investing/beyond-cash-will-the-digital-yuan-redefine-money/article-144477/ (25/3/2025); *Huang*, A 2024 Overview Of The E-CNY, China's Digital Yuan, available at: https://www.forbes.com/sites/digital-assets/2024/07/15/a-2024-overview-of-the-e-cny-chinas-digital-yuan/ (25/3/2025); *Digital Euro Association*, Ahead of the digital euro: Public Digital Euro Working Group: The Chinese digital yuan, available at: https://7869715.fs1.hubspotusercontent-na1.net/hubfs/7869715/The%20Chinese%20digital%20yuan%20Article.pdf (25/3/2025).

76 See *Huang/Li,* Banking and Finance Law Review 2023/3, p. 19 with further references provided in footnotes 56 et seq.

It is no surprise that the PROC already has a well-established pilot program considering the fact that, according to the research conducted by *iiMedia*[77] (2024), mobile payments[78] are heavily favoured (73.2% of transactions) in comparison to cash payments (63.46%) and physical bank card swiping (46.4%) among consumers in the PROC,[79] demonstrating the demand for convenience and payment efficiency. This is in line with the latest study by China Internet Network Information Center (CNNIC), which shows that the number of online payment users in China has reached a record high (954 million users), resulting in an increasing usage rate of e-CNY.[80] The transition to the e-CNY has been facilitated by enabling users to download the official e-CNY wallet within the well-established platforms *Alipay* and *WeChat Pay*[81] and providing incentives to the citizens in pilot areas (free giveaways of e-CNY),[82] which generated further interest in the population. The use of e-CNY is also not limited to citizens of the PROC.[83] Moreover, cross-border e-CNY initiatives (such as between Shenzhen and Hong Kong) and are particularly noteworthy.[84] It should also be emphasized that the PROC constitutes an essential

77 For more info regarding the research institute *iiMedia*, a Chinese market research and data analytics firm, available at: https://www.iimedia.cn/about (25/3/2025).

78 The most prominent mobile payment providers are *Alipay* by *Ant*, based in Hangzhou, and *WeChat Pay* (*Tenpay*) by *Tencent*, based in Shenzhen; in this regard also *Digital Euro Association*, Ahead of the digital euro: Public Digital Euro Working Group: The Chinese digital yuan, available at: https://7869715.fs1.hubspotusercontent-na1.net/hubfs/7869715/The%20Chinese%20digital%20yuan%20Article.pdf (25/3/2025).

79 See *Lee*, 艾媒咨询 | 2024 年中国移动支付行业发展状况与消费行为调查数据 (English translation: iiMedia Consulting | Survey data on the development status and consumer behavior of China's mobile payment industry in 2024), available at: https://www.iimedia.cn/c1061/103479.html (25/3/2025). Since consumers use more than one payment method, the survey results show overlapping percentages, with mobile payment, cash, and bank card usage each being counted separately.

80 *CNNIC*, The 53rd Statistical Report on China's Internet Development, available at: https://www.cnnic.com.cn/IDR/ReportDownloads/202405/P020240509518443205347.pdf (25/3/2025). As of December 2023, the user size of online payment in PROC had reached 954 million, up 42.43 million from December 2022.

81 See *Hirschfield*, Alipay and WeChat Install e-CNY Wallet Function, available at: https://www.paymentsjournal.com/alipay-and-wechat-install-e-cny-wallet-function/ (25/3/2025).

82 See, e.g., *Aguignier*, China's Digital Currency (I): A Sailing Ship, available at: https://www.institutmontaigne.org/en/expressions/chinas-digital-currency-i-sailing-ship (25/3/2025): For example, Shenzhen issued 50,000 e-CNY red envelopes, a total of 10 million RMB, for a one-week trial in October 2020.

83 See, e.g., *huaxia*, China issues e-CNY user guide to optimize mobile payment for foreigners, available at: https://english.news.cn/20240318/90ab82bc01444d34b0649c42010bb253/c.html (25/3/2025): Since 2024, the e-CNY can also be accessed by non-Chinese citizens, through the implementation of the e-CNY in the App Store and Google Play to download and install the digital yuan app, where a registration can be completed using mobile phone numbers from over 210 countries.

84 See, e.g., *Hong Kong Monetary Authority*, Hong Kong Monetary Authority welcomes pilot launch of the Shenzhen-Hong Kong cross-boundary data validation platform, available at: https://www.hkma.gov.hk/eng/news-and-media/press-releases/2024/05/20240506-4/ (25/3/2025).

pillar of *Multiple CBDC Bridge* (m-Bridge), a project for cross-border payments.[85] The international use of the e-CNY has led to concerns that this might facilitate a sanction proof payment system or even an alternative to SWIFT.[86] Not surprisingly, for some the PROC "is on track to becoming the world's top country for cash-free transactions".[87] And yet, it is questionable whether such transactions are made by means of the e-CNY, given that the e-CNY still has a low usage rate compared to *Alipay*.[88] Moreover, there still appears to be some scepticism of the e-CNY prevailing in the Chinese population.[89] This may also be the reason for the fact that the PBOC "is using a mix of persuasion and arm-twisting to roll out the digital currency".[90]

II. Push and Pull: The United States' frozen CBDC ambitions (If you can't beat them, join them?)

In global competition, the United States dominates trade and finance–and a need to further push its growth by introducing a CBDC (while bearing the risk of harming commercial banks) has been questioned by the Federal Reserve (Fed): could a CBDC truly "improve […] [an] already safe and efficient U.S. domestic payments system"?[91] More than doubting the usefulness of issuing a Digital Dollar (DD), the Fed recognized the potential (geo-)political disruption and data security risks it might cause, and refrained from immediate action (beside conducting extensive research in this matter). The DD has nevertheless stayed on its radar for many years, as the possibility of strengthening the USD by facilitating international transactions was on the table.

85 *BIS*, Central banks of China and United Arab Emirates join digital currency project for cross-border payments, available at: https://www.bis.org/press/p210223.htm (25/3/2025).
86 *Chimits*, The e-CNY will not help the yuan displace the dollar any time soon, available at: https://merics.org/en/comment/e-cny-will-not-help-yuan-displace-dollar-any-time-soon (25/3/2025).
87 See, e.g., *huaxia*, China leads race to become world's top cashless society, says British expert, available at: https://english.news.cn/20230706/5c897da92ff1453b93aa4f63a840b297/c.html (25/3/2025), citing *Kent Matthews*.
88 See, e.g., *Rawat*, The Lackluster Past and Promising Future of China's Central Bank Digital Currency, available at: https://business.cornell.edu/hub/2024/04/17/lackluster-past-promising-future-chinas-central-bank-digital-currency/ (25/3/2025): Since the inception of the e-CNY, only 260 billion USD of value has been processed through it, compared to 17 trillion USD processed by *Alipay* each year.
89 See, e.g., *Von Carnap*, The digital yuan struggles to find Chinese shoppers willing to spend it, available at: https://merics.org/de/kommentar/digital-yuan-struggles-find-chinese-shoppers-willing-spend-it (25/3/2025).
90 See, e.g., *Subrahmanyam*, China's Digital Currency: The hopes and fears of the e-CNY, China Currents 2023/1, available at: https://www.chinacenter.net/2023/china-currents/22-1/chinas-digital-currency-the-hopes-and-fears-of-the-e-cny/ (25/3/2025).
91 *Board of Governors of the Federal Reserve System*, Central Bank Digital Currency (CBDC), available at: https://www.federalreserve.gov/central-bank-digital-currency.htm (25/3/2025).

While the Fed's hesitancy in expressing a firm position on the implementation of a DD ["without clear support from the executive branch and from Congress, ideally in the form of a specific authorizing law"] maintained the momentum of the CBDC research,[92] President *Trump* presented a firm stance regarding this matter. Honouring his campaign promise as a pro-crypto president back in July 2024,[93] he decided that the risks of the DD might outweigh the benefits and signed an executive order (EO) titled "Strengthening American Leadership In Digital Financial Technology". Aiming at the creation of a Strategic Bitcoin Reserve (SBR), the EO banned the creation and issuance of a CBDC in the United States (for the current election period, at least, as an EO can be reversed by the next administration).[94] Pursuant to Section 5 lit. a of the EO, "agencies are hereby prohibited from undertaking any action to establish, issue, or promote CBDCs within the jurisdiction of the United States or abroad [except to the extent required by law]". The EO further orders in Section 5 lit. b of the EO that "any ongoing plans or initiatives at any agency related to the creation of a CBDC within the jurisdiction of the United States shall be immediately terminated, and no further actions may be taken to develop or implement such plans or initiatives". To sum up, the administration of President *Trump* seems to have considerable mistrust in digital CBM, whilst having high hopes in (private) digital assets such as cryptocurrencies.

Before the EO, there was already fierce political opposition to the idea of introducing a DD, which ultimately culminated in a bill that prohibits the Fed banks from issuing a CBDC (Anti-CBDC Surveillance State Act).[95] The bill is based on the assumption that the DD is a financial surveillance tool, posing a threat to financial privacy. At the time of writing, the legislative procedure is still in progress. The further developments remain intriguing. This being said, the chances for a DD are rather low.

III. Plans for The Digital Euro: Still in search for mission?

Since the ECB's Report on a DE[96] presented in October 2020, plans for creating the EMU's own CBDC, the DE, have become more and more concrete. In June 2023,

92 *Board of Governors of the Federal Reserve System*, Money and Payments: The U.S. Dollar in the Age of Digital Transformation, available at: https://www.federalreserve.gov/publications/january-2022-cbdc.htm#:~:text=The%20Federal%20Reserve%20does%20not,of%20a%20specific%20authorizing%20law (25/3/2025).

93 See, e.g., *Sigalos*, Trump proposes strategic national crypto stockpile: "Never sell your bitcoin", available at: https://www.cnbc.com/2024/07/27/trump-bitcoin-conference-harris.html (25/3/2025).

94 U.S. President, Strengthening American Leadership in Digital Financial Technology: Executive Order (23 January 2025); available at: https://www.whitehouse.gov/presidential-actions/2025/01/strengthening-american-leadership-in-digital-financial-technology/ (25/3/2025).

95 H.R.5403 – CBDC Anti-Surveillance State Act of 3 June 2024.

96 *ECB*, Report on a digital euro, 2 October 2020, available at: https://www.ecb.europa.eu/euro/html/digitaleuro-report.en.html (25/3/2025).

the European Commission, in parallel with the ECB efforts, presently in the preparatory phase (November 2023–October 2025), has presented a legislative package (i.e. "Digital euro package") that also includes the DER Proposal.[97] This regulation shall be based on Art. 133 TFEU, which raises competence issues, as it is still questionable whether and, if so, on what legal basis the EU may introduce a DE.[98]

By complementing, not replacing, physical cash,[99] the DE would act as a digital form of CBM, issued by the ECB, for retail. Pursuant to Art. 7 DER Proposal, the DE "shall have legal tender status" (para. 1), which "entail[s] its mandatory acceptance" (para. 2). The DER Proposal elaborates on the DE's legal tender status and provides for a tight system of exceptions to the mandatory acceptance of the DE (Art. 9–11 DER Proposal). The use of the DE requires digital payment accounts with payment service provides (e.g., commercial banks), which shows that the user does not have an account with the ECB itself.

The DE can be seen from different angles, for example, as a tool for financial inclusion[100] or as a possible threat to commercial banks.[101] However, looking at the reasons put forward by the Commission and the ECB, it becomes obvious that the DE is, ultimately, about safeguarding monetary sovereignty. At the project's core lies the threat to the role of the euro in payments, in the EU and outside posed by a shift in payment habits to private digital means of payments (offered by non-European payment providers) and by the emergence by other CBDCs and stablecoins.[102] Whilst innovative e-payments solutions (e.g., e-payment wallets and mobile apps), new forms of financial assets (e.g., stablecoins) and new digital ecosystems (e.g., *Alibaba* and *Alipay*) gain more and more importance, the use of actual cash by the public is decreasing.[103] These reasons are similar to those underlying the e-CNY.[104] Against this background, the underlying concern is that "[l]acking a form of a CBM that can be used in the digital economy and is convertible at par with commercial bank deposits may undermine the monetary anchor role of CBM, weakening financial stability and monetary sovereignty in the EU".[105]

Thus, the DE lines up in a series of measures at EU level aiming at the strategic autonomy of the EU. According to *Lane*, the DE "would play a crucial role in strengthening the strategic autonomy of Europe in an increasingly fragmented

97 COM(2023) 369 final.
98 In a recent contribution, it has been argued that such a DE regulation can be based on Art. 133 TFEU, see *Palmstorfer*, Eur. L. Rev. 2025/1, p. 107.
99 Recital (6) DER Proposal.
100 Recital (5) DER Proposal.
101 See, e.g., *Bindseil/Cipollone/Schaaf*, Digital euro: Debunking banks' fears about losing deposits, ECB Blog, 19 February 2024, available at: https://www.ecb.europa.eu/press/blog/date/2024/html/ecb.blog20240219~ccb1e8320e.en.html (25/3/2025).
102 COM(2023) 369 final, p. 1.
103 See, e.g., *Lane*, The digital euro: maintaining the autonomy of the monetary system, available at: https://www.ecb.europa.eu/press/key/date/2025/html/ecb.sp250320_1~41c9459722.en.html (25/3/2025).
104 See, e.g., *Hilpert/Tokarski*, SWP Comment 2024/48, p. 6.
105 COM(2023) 369 final, p. 1.

geopolitical landscape".[106] Given doubts regarding the benefits of the DE in day-to-day reality and the costs of its introduction,[107] it is not particularly surprising that the ECB places special emphasis on the DE's (assumed) importance of Europe's strategic autonomy.

In brief, beyond digital trends, the reasoning put forward by the ECB and the European Commission puts the two-tier monetary system at risk, revealing a broad understanding of the concept of monetary sovereignty.[108] Here the term "monetary sovereignty" is not merely understood as the EU's power to lay down a legal framework for the euro as its currency; rather, it is understood as a term describing the factual requirements for the EMU's monetary system based on the interplay between the ECB and, in particular, commercial banks. But it is not only Europe's reliance on foreign payment providers of card schemes (e.g., *Visa, Mastercard*) and mobile app payments (e.g., *Apple Pay, Google Pay, PayPal*) that concerns the ECB. In addition, platforms linking CBDCs to support cross-border payments such as the *BRICS Pay*[109] are seen as a challenge.

This geopolitical dimension of the DE finds its expression in provisions on the distribution of the DE to persons residing or established in third countries (Art. 19 DER Proposal) and, more importantly, on cross-currency payments (Art. 21 DER Proposal), both of which require agreements with respective third countries.

Resorting to monetary sovereignty, both the ECB and the Commission put forward a weighty reason for creating a DE. What is more, assessing the prospective effects of private digital payment systems and foreign CBDCs on the well-functioning of the EMU's monetary system is far from an easy task. The line of reasoning is somewhat reminiscent of the emphasis placed on the importance of price stability in justifying the monetary policy programmes, Outright Monetary Transactions and Public Sector Purchase Programme, before the ECJ.[110] Given the significance and complexity of the matter, the DE, if realized, will possibly stand its ground against a possible future challenge in the ECJ, although some scholars have held that monetary sovereignty can be defended also by other means (such as regulating the use

106 *Lane*, The digital euro: maintaining the autonomy of the monetary system, available at: https://www.ecb.europa.eu/press/key/date/2025/html/ecb.sp250320_1~41c9459722.en.html (25/3/2025).

107 See, e.g., *Bofinger/Haas*, The Digital Euro: Benefits, Costs and Risks, Expert opinion commissioned by the Bank and Insurance Division of the Austrian Economic Chambers, July 2023, p. 31, available at: https://www.wiwi.uni-wuerzburg.de/fileadmin/12010109/2023/CBDC_Gutachten_WKO__english_version_.pdf (25/3/2025).

108 See, e.g., *Martino*, Computer Law & Security Review 2024/52, pp. 1 et seq.

109 For more info regarding *BRICS Pay*, a joint venture developed by the BRICS member states to receive and make payments in their own local currencies, see the official homepage, available at: https://www.brics-pay.com (25/3/2025).

110 See ECJ, Case C-62/14, *Gauweiler and Others*, judgment of 16 June 2015, ECLI:EU:C:2015:400; ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000. Also see the contribution by *Fabian Amtenbrink* in this issue, "The ECB's public sector securities purchase programmes – time for a final EU (legal) assessment?", revisiting the abovementioned decisions, which inter alia, address the delineation of monetary and economic policy in the European Economic and Monetary Union.

of private digital payment systems or foreign CBDCs.[111] Interestingly enough, the EU seems to share the same considerations as the PBOC, as both see private digital means of payments as a challenge. That said, the EU might be well advised to take into consideration that the use of the e-CNY has, so far, been limited. It remains to be seen whether the DE, if realized, can constitute an attractive alternative to other means of payment. There is reason for doubt.

E. Conclusion

Every state can unilaterally determine the scope and limits of its own national monetary management and policy. The essence of sovereignty is that the autonomy to make monetary decisions concerning one's own currency is confined to the judicial sovereignty's national territory, with exclusive competence resting with the sovereign to make such determinations. Those present in the sovereign's territory (with specified exceptions, as defined by international treaties) must adhere to the domestic monetary policy. Yet, this authority is weakened when private entities attempt[112] to create a network and occupy areas of unchartered realms (such as the digital sphere), outside the sovereign's direct control. Digital payments are not an alien concept, and in the case of commercial banks, the money used is directly sourced from the central banks.

Regardless of this discussion, it is undisputed that private entities have shaken the entire currency system and demonstrated that a market gap exists, which could challenge and even weaken monetary sovereignty. Against this, the creation of a CBDC can be seen as a step to reclaim this digital domain. A CBDC would require that the central bank holds and protects its role as the primary authority over the nation's money supply and monetary policy decisions, resulting in maintaining control and power. The question arises, if this is about reclaiming what originally belonged to central banks, or taking space for a novel idea, discovered by non-state-stakeholders, and rivalling it.

Due to the proliferation of CBDC prototypes in the international arena (see section D), the conversation to respect privacy and user data while monitoring cybersecurity standards (prevention of illicit financing or money laundering), safeguarding financial stability (of, for example, the euro area)[113] and also political

111 See, e.g., *Brooks*, Staff Discussion Paper/Bank of Canada 2021/17, p. 19; *Bofinger*, IMK Study 2024/95, p. 16.

112 See, e.g., *Facebook* with its (already halted) own currency project *Libra/Diem*: *Berger*, How Diem became crypto's sacrificial lamb, available at: https://www.politico.eu/article/diem-crypto-sacrificial-lamb/ (25/3/2025); *Sutton/Guida*, Facebook's crypto project sold after political backlash, available at: https://www.politico.com/news/2022/01/31/diem-facebook-cryptocurrency-meta-00003871 (25/3/2025).

113 See, e.g., *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on the establishment of the digital euro, COM(2023) 369 final, p. 3; *Juhro,* in: *Warjiyo/Juhro* (eds.) p. 264.

unions questioning the US dollar as the world's principal reserve currency,[114] the conversation around CBDCs has progressed globally, and caught also the attention of the EU legislator.[115]

In a comparative perspective, it is undeniable that the PROC has a practice-beats-theory approach, meeting demands and ambitions of both its domestic economic system (adapting to the digital era, ensuring payment efficiency) and protecting its own monetary sovereignty by challenging global financial dynamics without being intimidated by tech giants or global competitors. The driving forces behind the e-CNY development stem from social, economic, (geo-)political and regulatory factors.

In the meantime, the BRICS+ are actively challenging the USD's global currency dominance: Their de-dollarisation-projects efforts moving full steam ahead, by relying more on foreign digital currencies, such as the RMB, in cross-border trade.[116] Congress is well aware of that, having adopted the Chinese CBDC Prohibition Act prohibiting "money services businesses (e.g., currency exchange providers or money order issuers) from engaging in transactions involving a central bank digital currency issued by China".[117]

The question remains, whether the "Fed is falling behind as other central banks leap ahead on digital currencies"[118]–or if this was a deliberate, more effective manoeuvre in order to protect the privacy and financial autonomy of its citizens, limiting the risk of state control over one's use of money while attempting to fight other global competitors head-on and taking side with private entities. For now, the Unites States has cleared the path for the BRICS+ and EU to push on with their CBDCs. Concerns of more than just privacy protection remain, as the USD has responsibilities on a global (not to mention domestic) scale. Holding a special position as the backbone of the global financial system, the world's current reserve currency[119] is under close scrutiny. The present policies explicitly delivered a firm

114 See, e.g., *Honderich*, Trump threatens 100% tariff on Brics nations if they try to replace dollar, available at: https://www.bbc.com/news/articles/cgrwj0p2dd9o (25/3/2025); see also *Jones*, Trump's digital dollar ban gives China and Europe's CBDCs free rein, available at: https://www.reuters.com/markets/currencies/trumps-digital-dollar-ban-gives-china-europes-cbdcs-free-rein-2025-01-28 (25/3/2025).

115 In particular to ensure *monetary sovereignty* (a nuanced analysis is provided in section B).

116 *Dolgin/Turner*, De-dollarisation: More BRICS in the wall, available at: https://think.ing.com/articles/de-dollarisation-more-brics-in-the-wall/ (25/3/2025).

117 U.S. Congress (2023) Chinese CBDC Prohibition Act of 2023, H.R. 804, 118th Congress, available at: https://www.congress.gov/bill/118th-congress/house-bill/804#:~:text=This%20bill%20prohibits%20money%20services,a%20government-backed%20central%20bank (25/3/2025).

118 *Lipsky/Kumar*, The Fed is falling behind as other central banks leap ahead on digital currencies, available at: https://www.atlanticcouncil.org/blogs/new-atlanticist/the-fed-is-falling-behind-as-other-central-banks-leap-ahead-on-digital-currencies/ (25/3/2025).

119 Even though it has been questioned due to global debt concerns, see, e.g., *Bridges*, Why the US dollar will be indispensable as the world's reserve currency–until it's not, available at: https://www.weforum.org/stories/2025/01/us-dollar-will-be-indispensable-until-not/ (25/3/2025).

statement that, rather than engaging in competition with private digital currency entities, trust is being placed in them.

Comparatively, the European legislative agenda suggests that the DE might be coming. However, it leaves the impression that numerous issues remain unsettled and ambiguous, likely influenced by (geo)political and economic views, as this matter is inherently interdisciplinary. To avoid contradicting the existing legal frameworks within the Union and to address privacy concerns, more time might be required. The hesitancy of the legislator also evokes the idea that the latter is deliberately taking time to acquire insights from real-world CBDC-practice, rather than just from the theoretical domain where much research has already been done. This is essential for establishing a system that operates effectively. At its core, this relates to money, a particularly sensitive matter. It must also not be overlooked that the Union has recently been criticized for doing too much (overregulation). A recent study for the European Parliament on the impact of EU legislation in the area of digital and green transition, particularly on small and medium-sized enterprises, has revealed that "stakeholders are very concerned about the introduction […] of a large number of new EU rules driving the digital and green transition. Concerns are raised in this context about the cumulative impact of the changes and the perception that rules may not be fully consistent in all cases."[120]

The issue of CBDCs requires an interdisciplinary approach. Collaboration between lawyers, computer scientists, and economists (as they must work together to build a stable, secure, and well-functioning system) is essential—if the legislator wishes to protect its own monetary sovereignty in the competition against (in particular) private entities in the long run[121] and wants to rely less on international payment networks or foreign banks.

The state can choose its own monetary system, regulate its currency and govern its economy effectively in doing so by, for example, imposing exchange control, exchanging restrictions and selecting the mechanisms through which the internal and external value of the money is determined and maintained.[122]

Only time will reveal which approach to a CBDC was the right one to choose. Perhaps, in the end, each analysed monetary sovereign will be proven right in their own decision of this matter. Time is ticking—also for the EU, which is currently facing a decision-making deadlock: should the legislator proceed with the DER proposal, or would it be better to significantly scale back the project? The answer differs depending on the approach or belief, as there is no one-size-fits-all approach.

120 *Rzepecka* et al., The impact of EU legislation in the area of digital and green transition, particularly on SMEs, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2024/754213/IPOL_STU(2024)754213_EN.pdf (27/2/2025).

121 See also, in this regard, e.g., *Cipollone*, Monetary sovereignty in the digital age: the case for a digital euro, available at: https://www.ecb.europa.eu/press/key/date/2024/html/ecb.sp240927~11ed8493a4.en.html (25/3/2025).

122 See, e.g., *Biankola/Nzaou-Kongo*, African Review of Law and Critical Thinking 2020/1, pp. 30 et seq.; *Martha*, Common Mkt. L. Rev. 1993/4, p. 752.

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The ECB's public sector securities purchase programmes – time for a final EU (legal) assessment?

Fabian Amtenbrink*

Contents

Abstract

The contribution revisits the three landmark decisions of the European Court of Justice in *Pringle*, *Gauweiler and Others*, and *Weiss and Others* that mainly address the delineation of monetary and economic policy in the European Economic and Monetary Union and the scope of judicial review of monetary policy decisions, with the aim of assessing the significance of these decisions for the legal evaluation of current and future public sector securities purchase programmes, such as the recently completed Pandemic Emergency Purchase Programme (PEPP) and the Transmission Protection Instrument (TPI). What is argued is that despite the undeniable significance of these decisions, they fall short of providing an irrefutable (legal) guide to assessing the nature and legality of current and future public sector securities purchase programmes, mainly when it comes to determining the

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monetary policy nature of a measure and the applicable standard of review of its proportionality.

Keywords: European Central Bank, monetary policy, judicial review, European Court of Justice, scope of monetary policy, proportionality, manifest errors, prohibition of monetary financing, no bail out clause

A. Introduction

The title of the workshop that inspired this special issue of the "ZEuS – Prometheus Unbound? A Legal Analysis of Recent ECB Monetary-Policy Measures"– begs the question what parallels can be drawn between the famous Titan from Greek mythology and his role in the battle for control over the heavens between the Titans and the Olympian Gods, and the European Central Bank (ECB) and its role during the Global Financial Crisis (GFC) and European sovereign debt crisis (hereafter: sovereign debt crisis), as well as during the COVID-19 pandemic. While the meaning of the word *Prometheus*–forethought–is an attribute that a central bank will probably quite happily embrace, the deeds ascribed to Prometheus are certainly less flattering. He is often essentially depicted as a trickster, deceiver, and a thief, albeit perhaps with a sympathetic cause, as the intention is to rescue mere mortals, which it is said he has created himself, from earth and water.[1] When transferring this image to the ECB, one cannot help but be reminded of the heavy criticism of its approach to monetary policy during the various crises and the way in which this policy stands has been justified with reference to the lethal danger in which the European monetary union found itself at times.

Ironically, it was central banks themselves who, along with other observers, distinguished these crises measures in their communication[2] from previously employed monetary policy measures by referring to them as *unconventional,* thereby–consciously or not–signalling that these measures in the truest sense of the word cannot be considered conventional, that is "not following what is done or considered normal or acceptable by most people".[3] Although certainly not the cause of the legal disputes that have derived from some of these measures, this choice of words seems to have played into the hands of those who have opposed them, be it for legal, economic, or ideological reasons.

In the European Union (EU) context, perhaps the most controversial crisis measures have been the interventions by the ECB and the euro area national central

1 *Smith*, keyword *Prometheus*.
2 See, e.g., *ECB*, Conventional and unconventional monetary policy, available at: https://www.ecb.europa.eu/press/key/date/2009/html/sp090428.en.html (13/2/2025); *Engen/Laubach/Reifschneider,* The Macroeconomic Effects of the Federal Reserve's Unconventional Monetary Policies, available at: https://www.federalreserve.gov/econresdata/feds/2015/files/2015005pap.pdf (13/2/2025); *Joyce*, Bank of England Quarterly Bulletin 2012/Q1, pp. 48–56.
3 See *Oxford Learner's Dictionaries*, available at: https://www.oxfordlearnersdictionaries.com/definition/english/unconventional (13/2/2025).

banks (hereafter also referred to as the Eurosystem) in the sovereign bond markets through the announcement and thereafter purchase of public sector securities. This is highlighted by the two landmark cases that were brought before the European Court of Justice (CJEU) against the ECB's 2012 announcement of the Outright Monetary Transactions program (OMT), and thereafter, against its 2015 decision on the establishment of a public sector asset purchase program (PSPP). On a fundamental level these cases have addressed the vertical division of monetary policy and economic policies in the European economic and monetary union,[4] the scope and limits of discretion of the ECB's exclusive monetary policy competence, the legal implications of the Member State's obligation under Union law to conduct sound budgetary policies for the conduct of monetary policy, as well as the standard or intensity of judicial review of the ECB's monetary policy decisions.

What will be argued hereafter is that despite the undeniable significance of the existing case law for the legal assessment of ECB measures, the CJEU falls short of providing an irrefutable (legal) guide to assessing the nature and legality of current and future public sector securities purchase programmes. To this end, section B first explains the controversy surrounding the ECB's public securities purchase programs that has exceeded that of other (un-)conventional monetary policy. Thereafter, in section C the existing case law of the CJEU is analysed regarding its usefulness for the legal assessment of present and any future public sector securities purchase programmes of the ECB. Section D draws conclusions.

B. The ECB's sovereign bond markets interventions

In response to economic and financial market developments in the euro area, triggered or at least exacerbated by the GFC and the sovereign debt crisis, the ECB adjusted its monetary policy stands through various crisis-related measures that were at least partially in line with those of other major central banks, albeit not necessarily in terms of their timing.[5] This, first of all, entailed very significant adjustments of key interest rates and other measures unrelated to asset purchases, such as the expansion of the ECB's collateral framework,[6] (targeted) longer-term refinancing operations, and the adoption of a "fixed rate full allotment" tender procedure for central bank credit.[7] Between 2009 and 2023 the ECB also implemented

4 To be sure, this issue was also already addressed in ECJ, Case C-370/12, *Pringle*, judgment of 27 November 2012, ECLI:EU:C:2012:756 regarding the Member State's competence to conclude the intergovernmental Treaty establishing the European Stability Mechanism.

5 *Fischer*, Comparing the Monetary Policy Responses of Major Central Banks to the Great Financial Crisis and the COVID-19 Pandemic, available at: https://mitsloan.mit.edu/sites/default/files/2022-01/Monetary-Policy-Research-Paper-Stanley-Fischer-Nov2021.pdf (13/2/2025).

6 See, e.g., *ECB*, Measures to further expand the collateral framework and enhance the provision of liquidity, available at: https://www.ecb.europa.eu/press/pr/date/2008/html/pr081015.en.html (13/2/2025).

7 For an overview of measures during the GFC and sovereign debt crisis see *Cour-Thimann/Winkler,* ECB Working Paper No. 1528, pp. 1 et seq.

a considerable number of asset purchase programmes, including for covered bonds (CBPP 1–3), corporate sector securities (CSPP, PEPP), asset-backed securities (ABSPP), and for public sector securities (PSPP, PEPP). Moreover, on two occasions the ECB has announced, but not (yet) operationalized, asset purchase programs, namely the before mentioned OMT and, more recently, TPI.

The Eurosystem purchases of public sector securities, approximately 90% of which consisted of euro area Member State’s central government bonds and bonds issued by recognised agencies, regional and local governments,[8] have surpassed all other security purchase programmes by a wide margin, explaining the heightened interest by politicians and academics, as well as the public at large.[9] Focusing on “the potential drawbacks and unintended side-effects”[10] of such central bank interventions, economists and lawyers have been at least partially aligned in taking the existing EU economic governance framework as an initial point of reference for their critical assessment. Economists have pointed to the risk of public sector securities purchases removing the incentive for Member States to pursue sound fiscal policies, including the implementation of necessary structural economic reforms. Moreover, the potential (long-term) impact of the holding by the ECB of large volumes of public sector securities of euro area Member States on its position as an independent monetary policy authority and the risk of fiscal dominance has been pointed out, as has been the danger of the creation of new common liabilities in the euro area through the expansion of the euro area central bank balance sheets. Closely related to these concerns by economists, legal experts have questioned the compatibility of the ECB’s actions with its mandate found in primary Union law (Art. 3 para. 1 lit. c and 127 para. 1 TFEU), with the prohibition of monetary financing (Art. 123 para. 1 TFEU), and the prohibition of fiscal bailouts (Art. 125 TFEU).

For many observers the purchase of public sector securities issued by euro area Member States has also been difficult to reconcile with the principle of sound budgetary policies underlying the Union’s economic governance framework, as agreed upon by the Member States at the time of the establishment of the Treaty on European Union (Treaty of Maastricht). This concerned especially the purchase of sovereign debt bonds of those Member States in financial distress that had a mixed track record in avoiding excessive government deficit and debt levels[11] and in

8 The remaining 10% concerned bonds issued by international organisations and multilateral development banks located in the euro area; see *ECB*, Asset purchase programmes, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html#pspp (13/2/2025).

9 As of 7 February 2025, the PSPP holdings of the Eurosystem were reported as being Euro 2,105,122 million, making up the vast majority of the stock of Eurosystem asset purchases. See *ECB*, Asset purchase programmes, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html#pspp (13/2/2025).

10 *Beckmann* et al., The ECB’s Asset Purchase Programmes: Effectiveness, Risks, Alternatives, available at: https://www.europarl.europa.eu/cmsdata/211391/2_KIEL%20final.pdf (13/2/2025).

11 As required pursuant to Art. 126 para. 1 TFEU and Protocol (No. 12) on the Excessive Deficit Procedure.

undertaking long overdue structural reforms. After all, the purpose of the primary EU law provisions was considered to "ward off"[12] moral hazard in a currency union and to subject the participating Member States to market discipline by means of the costs associated to their borrowing on capital markets, i.e. the sovereign risk premium, for the purpose of budgetary financing. Next to the novelty of the ECB's measures, it is this understanding of the rationale of the supranational economic governance framework that can explain why the ECB approach to monetary policy during the crisis has been considered transformatory.[13]

By contrast, valid legal questions arising in the context of other ECB asset purchase programmes, such as the corporate securities purchases and their compatibility with the (self-proclaimed) principle of market neutrality,[14] have remained in relative obscurity and have in any event not been subject to judicial scrutiny.

C. The CJEU's rulings in Pringle, Gauweiler and Others and Weiss and Others: providing an irrefutable (legal) guide to assessing current and future public sector securities purchase programmes?

Starting with its ruling in the case *Pringle*[15] which did not focus on an ECB monetary policy measure as such, the CJEU has identified and interpreted the legal framework applicable to the assessment of the compatibility with EU law of the purchase of public sector securities. Main issues addressed in the existing case law are the nature and scope of what constitutes a monetary policy measure under Union law, the scope of judicial review of the ECB's action by the CJEU, and the limits on the ECB's power to act set by specific Treaty prohibitions included in Title VIII TFEU on economic and monetary policy.

I. Fathoming the Union exclusive competence for monetary policy in the euro area

The nature and scope of the supranational monetary policy competence in the euro area has been first and foremost determined through its delineation from economic policy. In *Pringle*, which in essence deals with the compatibility with EU law of the conclusion by a majority of EU Member States of the intergovernmental Treaty establishing the European Stability Mechanism, the CJEU has derived the scope of monetary policy in reverse from its determination of the scope of the Member

12 *Tuori*, EUI Working Papers Law 2012/28, p. 23.
13 See, e.g., *Borger*, in: *Beukuers/Fromage/Monti* (eds.), p. 29.
14 Critically: *van 't Klooster/Fontan*, New Political Economy 2019/6, pp. 865 et seq.; *Colesanti Senni/Monnin*, Central Bank Market Neutrality is a Myth, available at: https://www.cepweb.org/central-bank-market-neutrality-is-a-myth/(13/2/2025). Market neutrality also takes centre stage in the discussion to what extent central banks can and should engage in climate change mitigation measures (Greening).
15 ECJ, Case C-370/12, *Pringle*, judgment of 27 November 2012, ECLI:EU:C:2012:756, para. 56.

States' remaining competence for economic policy.[16] After all, from the supranational perspective the latter is effectively limited by the scope of the Union's exclusive competence for monetary policy in the euro area pursuant to Art. 3 para. 1 lit. c and 127 para. 1 TFEU.

In *Pringle,* the CJEU, for the first time, stated that in the context of the observance of the principle of conferral the economic or monetary policy nature of a measure must be determined based on the objectives attained by it (e.g. price stability), while also considering the instruments applied to that end (e.g. purchase and sale of outright marketable instruments). This approach was subsequently upheld in *Gauweiler and Others* and *Weiss and Others* for the classification of OMT and PSPP as monetary policy measures within the meaning of primary Union law.[17] The CJEU has also stressed that the fact that a measure which, based on the objective pursued and instrument deployed, must be characterized as economic policy, can have indirect effects in an area that is attributable to monetary policy, such as the stability of the euro in the case of financial assistance to a Member State, does not change its basic character as economic policy. Conversely, the European judges have also pointed out that "a monetary policy measure cannot be treated as equivalent to an economic policy measure merely because it may have indirect effects on the stability of the euro area", which as such is not an objective of monetary policy under primary Union law.[18] The question that arises in this context is whether the CJEU's approach offers a sufficiently clear legal framework to objectively assess the nature of any current or future Eurosystem measure on public sector securities purchases that is moreover also persuasive from an economic point of view.

By relying on the objective pursued with and instrument applied for the implementation of a given measure, it is effectively up to the institution whose measure is the subject of judicial review to determine whether a measure can be attributed to monetary policy. In doing so, the ECB can first rely on its self-chosen quantification of the general and abstract primary monetary policy objective included in Art. 127 para. 1 TFEU, i.e. price stability.[19] Moreover, it can rely on the CJEU's broad interpretation of this mandate, which considers that measures that have as an objective the safeguarding of the singleness of monetary policy and the safeguarding of an appropriate transmission of monetary policy must be considered to contribute

16 Arts. 5, 119, and 120 TFEU.

17 ECJ, Case C-370/12, *Pringle*, judgment of 27 November 2012, ECLI:EU:C:2012:756, para. 55; ECJ, Case C-62/14, *Gauweiler and Others*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 51; ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 53.

18 ECJ, Case C-370/12, *Pringle*, judgment of 27 November 2012, ECLI:EU:C:2012:756, para. 56; ECJ, Case C-62/14, *Gauweiler and Others*, judgment of 16 June 2015, ECLI:EU:C:2015:400, paras. 52, 59.

19 To be sure, in *Weiss and Others*, the ECJ does briefly consider whether the ECB's own definition of price stability is "vitiated by a manifest error of assessment and goes beyond the framework established by the FEU Treaty". This is however considered not to be the case. See Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 56.

the objectives of monetary policy as described in Art. 119 para. 2 and 127 para. 1 TFEU.[20] As has been observed elsewhere, by taking the ECB's own assessment as a point of reference "the Court creates a somewhat circular argument that the qualification of a measure – the purpose of which is to control whether the acting Union institution has crossed the limits of Union competences – is based on a self-assessment by the very acting Union institution", which raises the question "whether such a test can ever lead to the conclusion that the ECB has acted outside its monetary policy mandate."[21] The rejection of an ECB measure as falling outside its Treaty mandate seems all the more unlikely given the broad secondary objective laid down in Art. 127 para. 1 TFEU in conjunction with Art. 3 para. 3 TEU, according to which the ESCB is to support the general economic policies in the Union. The CJEU referred to this secondary objective in defence of the qualification of OMT as a monetary policy measure.[22]

The distinction between direct and indirect effects of monetary policy does not offer a useful tool to determine the nature of an ECB measure. In *Gauweiler and Others* the CJEU defined such indirect effects of monetary policy in very abstract terms with reference to what it considered matters of economic policy; in the given case the potential contribution of OMT to the stability of the euro area. Yet, from an economic point of view, the question is how useful a differentiation of effects is for the characterization of the nature of ECB measures. In principle, different channels can be observed through which monetary policy affects household consumption, namely direct channels, such as the effect of the adjustment of key interest rates on debtors and savers, and indirect channels such as in the shape of effects on employment, wages, and government taxes. The indirect effects are not an unintended side effect of monetary policy. Rather, by its very nature monetary policy affects economic policy and with it also the choices of economic policy makers. As observed elsewhere, "monetary policy leaves consequential 'fiscal footprints'", making "central banks and treasuries […] inseparably intertwined".[23] This is all the more the case when considering that monetary policy can function as "a substitute for failing fiscal policy",[24] namely by providing a backstop in the capital markets for sovereign debt bonds, as has been observed for the Eurosystem's public sector securities purchases.[25]

20 ECJ, Case C-62/14, *Gauweiler and Others,* judgment of 16 June 2015, ECLI:EU:C:2015:400, paras. 48–49.
21 *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, pp. 774–775, *inter alia* referring to *van der Sluis*, Legal Issues of Economic Integration 2019/3, p. 273.
22 ECJ, Case C-62/14, *Gauweiler and Others,* judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 59.
23 *Kaplan* et al., The Very Model of Modern Monetary Policy, IMF Finance & Development Magazine, available at: https://www.imf.org/en/Publications/fandd/issues/2023/03/modern-monetary-policy-kaplan-moll-violante (13/2/2025).
24 Referring to "quasi-fiscal" policy are *Gros/Shamsfakhr,* CEPS 2022/4, pp. 1 et seq. See also *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, p. 761, *inter alia* with reference to *Afonso/Alves/Balhote*, Journal of Applied Economics 2019/1, pp. 132–151.
25 *Gilbert*, De Nederlandsche Bank Working Paper 2019/636, p. 5.

From an EU constitutional perspective, the CJEU is bound to uphold the legal fiction of a clear separation of monetary from economic policy in line with Arts. 3 and 5 TFEU. At the same time, the European judges have themselves recognized that "the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies", observing that "in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy, which might also be sought — to different ends — in the context of economic policy."[26] This coincides with the observation made elsewhere that "the economic interdependency, interactions, and mutual direct and indirect effects of measures pursued by different actors to ultimately achieve different economic objectives defy the notion of a clear-cut delineation of monetary policy from economic policy that is based on the effects that a given measure (potentially) has on one or the other policy field."[27] What derives from these observations is that while European legal doctrine assumes a legally enforceable distinction between monetary and economic policy measures, the nature of monetary policy and its effects let any legal distinctions appear rather artificial and "built on quicksand",[28] as "[a]t the intersection of monetary and economic policy the exercise of the monetary policy competence encroaches upon the national competences to pursue – under the conditions of national democratic decision-making procedures – autonomous economic policies".[29]

At the level of the division of competences the CJEU only applies what has been described as an "arbitrariness test" that "ultimately allows to conclude that the ECB overstepped the Union's monetary policy competence only in instances in which the act pursues openly objectives other than those that can objectively be linked to the monetary policy objective of art.127(1) TFEU or in which instruments other than those provided for in the Statute of the ESCB and of the ECB are used."[30] It is thus hardly surprising that the CJEU's existing case law does not offer a satisfactory pathway to a substantive judicial review of the limits of the exclusive monetary policy competence of the Union in a way that can unrestrictedly preserve the competence for all matters pertaining to economic policy to the Member States and shield national policy makers from having to adjust to the consequences of a shifting supranational monetary policy.

To be sure, the application of the EU principle of proportionality does not offer a viable pathway to a more meaningful delineation of competences. Different to the position of the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) in its final decision in *Weiss and Others*,[31] primary Union law and namely

26 ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, paras. 60 and 66. On the backstop function of monetary policy on sovereign bond market volatility and sovereign spreads see *Broeders/de Haan/van den End,* DNB Working Paper 2019/636, pp. 1 et seq.

27 *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, pp. 762–763.

28 *Amtenbrink*, Maastricht Journal of European and Comparative Law 2019/1, p. 168.

29 *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, p. 777.

30 *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, pp. 766–767.

31 BVerfGE 2 BvR 859/15, para. 119.

the wording of Art. 5 para. 1 TEU does not support the view that this principle can be applied at this level.[32] Such a review would also relativize the scope of the Union's exclusive competences pursuant to Art. 3 TFEU in that the existence of the competence would effectively depend on the necessity and appropriateness of a given Union measure.[33]

II. The scope and limits of the ECB's discretion in preparing and implementing public sector securities purchasing programmes

With the CJEU's case law highlighting the practical difficulties in legally distinguishing two policy fields that are by their very nature closely linked, the focus shifts to the review of the legality of the exercise by the ECB of the Union's exclusive monetary policy competence.

Already in *OLAF* the CJEU established that the ECB's statutory independence under primary Union law "does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law."[34] In *Gauweiler and Others* and subsequently in *Weiss and Others* the CJEU has confirmed that this Union institution does not occupy a special position in the European constitutional order when it comes to the judicial review of its acts and namely their compatibility with the Union principle of proportionality. At the same time the Court has stressed that "since the ESCB is required, when it prepares and implements an open market operations programme […] to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion."[35] To be sure, this broad discretion does not release the ECB of its duty to comply with certain procedural guarantees, namely the adequate statement of the reasons for a decision and the careful and impartial analysis by the decision-making body of all the relevant elements of the situation in question.[36] Correspondingly, in its review of the proportionality of OMT and PSPP, the CJEU has assessed "whether the ESCB made a manifest error of assessment in that regard."[37] The CJEU thus effectively accommodates for "uncertainty and incompleteness" in the implementation of monetary policy resulting from imperfect economic models and ever-changing macroeconomic conditions to which monetary

32 *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, p. 773; *Lenaerts*, in: ECB (ed.), pp. 28–29.
33 See *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, p. 773.
34 ECJ, Case C-11/00, *Commission v. ECB (OLAF),* judgment of 10 July 2003, ECLI:EU:C:2003:395, para. 127.
35 ECJ, Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, paras. 66–68; Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 24.
36 ECJ, Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 69.
37 ECJ, Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 74; Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 24.

policy must adapt.[38] This is in line with the approach that has been observed more broadly for the judicial review of legal acts entailing discretionary policy choices, as "courts are likely to apply the concept less intensively […] and will only overturn the policy choice if it is clearly or manifestly disproportionate", whereby "[t]his is more especially so where the policy choice required the weighing of complex variables."[39] Applied to the legal review of monetary policy decisions this has been considered by the CJEU to imply that the fact that a reasoned economic analysis that forms the basis of an ECB decision is disputed "does not, in itself, suffice to establish a manifest error of assessment on the part of the ESCB, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it uses its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy."[40]

Yet, what is the scope of the ECB's duty of care when it comes to the considerations that must go into the assessment of the proportionality of an envisaged measure and namely, at what point must it be concluded that the ECB has fallen short of this duty in making a manifest error of assessment?[41] As is displayed in *Gauweiler and Others* and in *Weiss and Others*, the CJEU in principle applies the manifest error review to all stages of the proportionality test, i.e. suitability, necessity, and proportionality stricto sensu of a given measure.[42] In both cases the CJEU came to the conclusion that no manifest errors of assessment had been made by the ECB as regards the suitability and necessity of the decisions in question. This conclusion was based on an assessment of the arguments submitted by the ECB in defence of the appropriateness and necessity of the measures in question. These arguments were essentially based on the latter's own appraisal of the complex economic and monetary conditions, as well as its own assessment on how, in applying the monetary policy instruments at its disposal, the measure would contribute to achieving its price stability objective. For the second stage of the proportionality test it has been observed that in *Weiss and Others,* the CJEU seems to waver back and forth between subjecting the PSPP decision to a thin reasonability test and a much thicker "least restrictive means test" that does entail a review of possible alternatives,[43] albeit not to the extent that it would cast doubt on the ECB's choice of measure. The CJEU can also be seen reviewing the proportionality stricto sensu of the measures in question, briefly in *Gauweiler and Others*, and more extensively

38 *Phedon/Kool*, Eur. L. Rev. 2021/6, p. 764.
39 *Craig* (2018), p. 644.
40 ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 91, with reference to the ECJ's judgment in *Gauweiler and Others*.
41 On the notion of "manifest error" in the context of proportionality, see already *Kosta*, in: ECB (ed.), pp. 98 et seq.
42 *Galetta*, in: ECB (ed.), pp. 769–770.
43 *Tuominen*, in: ECB (ed.), p. 87.

in *Weiss and Others*.[44] In the latter case it refers to the ESCB's obligation to weigh up "the various interests involved so as effectively to prevent disadvantages which are manifestly disproportionate" to the monetary policy measure in question.[45]

It becomes clear from the application of the manifest error of assessment review of the proportionality of decisions involving complex choices of a technical nature, which entail economic forecasts and complex assessments, that the CJEU intents to avoid substituting the economic assessment of the ECB with its own. This level of judicial restraint in the review of approach monetary policy decisions begs the question under what objective circumstances and based on what economic evidence the CJEU would ever assume an error of assessment that exceeds the threshold of *manifest* and whether this should be reserved to instances in which the ECB's decision "lack a rational basis."[46] This question also arises because the CJEU's approach in *Gauweiler and Others* and *Weiss and Others* appears to be even more restrictive than what has been observed for other EU policy areas in which decisions by EU institutions are based on complex economic assessments, namely in the field of EU competition law. In discussing the CJEU's intensity of review regarding manifest errors in modern case law, *Craig,* among others, refers to *Terta Laval*, a case concerning the legal review of several merger decisions by the European Commission.[47] Here, the CJEU on appeal upheld a decision by the then Court of First Instance (now General Court) annulling that decision, pointing out that while the Commission had a margin of discretion regarding economic matters,

> "that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also *whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.* Such a review is all the more necessary in the case of a *prospective analysis* required when examining a planned merger with conglomerate effect."[48]

In the same judgment the CJEU suggests that the judicial review of decisions that are based on a wide margin of discretion entails reviewing whether the EU

44 For a more detailed analysis see *Tuominen*, in: ECB (ed.), pp. 83–90; *Galetta*, in: ECB (ed.), pp. 68–71.

45 ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 93.

46 As argued by *Lehmann*, in: ECB (ed.), p. 127, who is in favor of a "very light" standard of review. Generally, critic on attempts to define in abstract terms what "manifestness" amounts to is *Kalintiri*, Common Mkt. L. Rev. 2016/5, pp. 1294–1295. Tridimas, p. 305, observes that "The precise threshold remains elusive".

47 *Craig* (2012), p. 434.

48 ECJ, Case C-12/03 P, *Commission of the European Communities v. Tetra Laval BV*, judgment of 15 February 2005, ECLI:EU:C:2005:87, para. 39. See *Craig* (2012), p. 423, with references to subsequent corresponding case law (emphasis added).

institution's assessment is inaccurate in that it is based "on insufficient, incomplete, insignificant and inconsistent evidence."[49]

Relating to this, in analysing the CJEU's approach to the review of manifest errors in competition law cases, *Kalintiri* has identified four types of errors that may result in a European Commission decision involving complex economic appraisals to be considered subject to a manifest error: an erroneous assessment of the material facts underpinning its analysis, a failure to take into account key relevant factors in the decision, the considering of irrelevant factors, and the taking into account of evidence that "fails to satisfy the standard of proof".[50] What becomes clear from the research conducted by this author is that, in the case of competition law, "the manifest error of assessment test entails a far more thorough form of judicial scrutiny than what one might expect – or fear – based on the seemingly deferential language of the EU Courts."[51]

For the time being, neither the CJEU's decisions in *Gauweiler and Others* and *Weiss and Others,* nor statements of main representatives of this institution suggest that the European judges are prepared to apply a similarly differentiated approach to the assessment of the ECB's complex economic appraisals. Yet, a conclusive case must be made why the ECB must occupy a special position when it comes to the judicial review of its discretionary decisions that justifies a more limited review of manifest errors. One possible explanation for the greater self-restrain of the CJEU may lie in the fact that the complexity of assessments in the context of monetary policy is not only explained with reference to the complex choices of a technical nature that this entails, but also with what the CJEU refers to as the "controversial nature" of questions of monetary policy.[52] In fact, according to *Lenaerts,* monetary policy "provides a good illustration" for areas in which "a combination of political and technical aspects" regulates the scope of discretion.[53] Interestingly, in this context the author refers to cases before the CJEU involving the review of secondary Union law and thus, the action of Union legislative bodies. Yet, the question is whether the discretion enjoyed by the ECB can be equated with the discretion of the main Union political institutions, justifying an equally restricted density of judicial review. This is debatable, not least in the light of the democratic legitimacy of the ECB.[54]

49 ECJ, Case C-12/03 P, *Commission of the European Communities v. Tetra Laval BV*, judgment of 15 February 2005, ECLI:EU:C:2005:87, para. 48.

50 *Kalintiri*, Common Mkt. L. Rev. 2016/5, pp. 1299–1302.

51 *Kalintiri*, Common Mkt. L. Rev. 2016/5, pp. 1315–1316.

52 ECJ, Case C-62/14, *Gauweiler and Others*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 75; Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 91. In support of this approach: *Galetta*, in: ECB (ed.), p. 71.

53 *Lenaerts*, in: ECB (ed.), p. 32.

54 *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, pp. 774–776.

III. Applying the CJEU's standard of review to post-OMT and PSPP sector securities purchase programmes[55]

What are then the implications of the CJEU's above-described approach to the review of manifest errors in the context of the proportionality review of monetary policy decisions for the legal assessment of subsequent decisions on public sector securities programmes that have not (yet) been adjudicated before the CJEU, namely PEPP, initiated in March 2020, and TPI, approved in July 2022?

Firstly, it can be observed that the ECB has adopted a goal-oriented language geared towards signalling full compliance with the CJEU's frame of reference for the review of the legality of ECB measures concerning the delineation of monetary from economic policy and the principle of proportionality. With regard to the former, in the decision on PEPP, reference is mainly made to serious risks to price stability and the monetary policy transmission mechanism that have resulted from the outbreak and escalating diffusion of COVID-19.[56] A similar approach can also be observed for TPI, the aim of which according to the ECB is to ensure that the monetary policy stance is transmitted smoothly across all euro area countries, therewith securing the singleness of the ECB's monetary policy as a precondition for the ECB to be able to deliver on its price stability mandate. TPI is supposed to be activated in the case of "unwarranted, disorderly market dynamics that pose a serious threat to the transmission of monetary policy across the euro area."[57] The ECB is thus resorting to a tried and tested recipe, as with these justifications on record little in the CJEU's current case law would suggest that these measures would be considered to fall outside the Union's exclusive monetary policy competence in the euro area as far as the objectives pursued and the instruments applied are concerned.

With the 2020 strategic review "proportionality" has found its way into the standard vocabulary used in the ECB's monetary policy strategy: "The Governing Council bases its monetary policy decisions, including the evaluation of the proportionality of its decisions and potential side effects, on an integrated assessment of all relevant factors. This assessment builds on two interdependent analyses: the economic analysis and the monetary and financial analysis."[58] In more recent decisions on public sector securities programmes the ECB is seeking to pave the way for a positive outcome of a proportionality review. On PEPP the decision states that "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

55 This section builds on findings presented in: *Hoogduin* et al., chapters 3 (pp. 20 et seq.) and 4 (pp. 38 et seq.).

56 Decision 2020/400 of the ECB on a temporary pandemic emergency purchase programme, OJ L 91 of 25 March 2020, p. 1, preamble No. 4.

57 *ECB*, The Transmission Protection Mechanism, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html (13/2/2025).

58 *ECB*, The ECB's monetary policy strategy statement, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (13/2/2025).

market conditions on the ability of the Eurosystem to fulfil its mandate".[59] In the preamble to the decision it is concluded that "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."[60] For TPI the corresponding ECB press release states that "[a] decision by the Governing Council to activate the TPI will be based on a comprehensive assessment of market and transmission indicators, an evaluation of the eligibility criteria and a judgement that the activation of purchases under the TPI is proportionate to the achievement of the ECB's primary objective".[61] The CJEU is thus provided in advance with clear points of reference to reject, in the context of a low intensity review of these monetary policy decisions, the existence of a manifest error of assessment.

To be sure, it is ultimately for the CJEU to assess the legality of ECB measures that are challenged, as it has been rightly observed that "deference is surely not about the way the law is interpreted".[62] In applying its approach to the manifest error assessment the CJEU must thus assess each present and future public sector securities purchase programme on its own merits, thereby not only taking into account the objectives pursued, but also the applicable conditions of its application/operationalization, as well as the regulatory and economic environment in which these programmes and more concretely the purchase of public sector securities takes place. In this context, new questions arise, namely how the long duration of purpose-bound and temporary public sector securities purchases and the existence of previous purchase programmes that might have been used to achieve the same objectives should be assessed.

In terms of PEPP, the ECB discontinued net asset purchases at the end of March 2022. However, it was decided that the reinvestment of bond redemptions would continue until the end of December 2024. Given the above-described objective of PEPP, the question arises whether public sector securities purchases after May 2023, when COVID-19 was no longer considered a global public health emergency, could still be considered suitable to achieve the objective of PEPP. More concretely, to what extent can the ECB's implicit claim that until December 2024 potential risks to the maintenance of price stability in the euro area could be attributed to the effects of the pandemic be subject to a substantive review that could lead to a finding of the existence of a manifest error of assessment? It is at least doubtful that the CJEU would draw such a conclusion. Even if the European judges would decide to review the ECB's economic assumptions on which its decision to continue PEPP until the end of 2024 is based, they would be confronted with inconclusive economic evidence. As it has been observed, "it is difficult to prove empirically that countries have not experienced effects of the pandemic after 2021 […] [as]

59 Art. 4 of Decision 2020/440.
60 *Ibid.*, preamble No. 4.
61 *ECB*, The Transmission Protection Mechanism, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html (13/2/2025).
62 *Markakis*, p. 290, with reference to *Lehmann*, in: ECB (ed.), pp. 112 et seq.

[t]he public finances of all euro area countries changed substantially during the pandemic and this may have lasted longer than the pandemic itself" and, moreover, that the economic impact of the reinvestment of bond redemptions is "difficult to quantify".[63] There is, thus, no irrefutable evidence on which the CJEU could argue the existence of a manifest error of assessment. This is even more so since the ECB apparently has included such considerations in its decision-making, as derives from the account of the relevant monetary policy meeting of the Governing Council.[64]

The same also applies to the question of the necessity for the establishment of yet another public sector securities programme in the face of existing asset purchase programmes. The record shows this issue was indeed considered by the ECB's Governing Council and even that "[r]eservations were expressed by some members about the necessity of launching a new, dedicated asset purchase programme."[65] From the PEPP Decision it becomes clear that the ECB has assessed the necessity of this new measure in the light of existing asset purchase programmes, whereby it is considered that while PEPP shares various main features of previous programmes, the risks attached to the pandemic call for a higher degree of flexibility as regards the modalities of intervention.[66]

For TPI it must be noted at the time of writing of this contribution that this instrument has yet to be operationalized. As far as the announced instrument itself is concerned, whether the prevention of fragmentation (the declared objective of TPI) is a necessary condition for maintaining price stability is debated among economists.[67] Yet, considering that this debate is also inconclusive, it is unlikely that the CJEU in the context of a review for manifest errors would deviate from the ECB's own line of reasoning that TPI "will ensure that the monetary policy stance is transmitted smoothly across all euro area countries", thereby stressing the importance of the singleness of monetary policy for its overriding price stability mandate.[68] From the account of the relevant monetary policy meeting it derives that the ECB's Governing Council has undertaken an economic, monetary and financial analysis of the situation in the euro area in deciding on TPI as an instrument, even elaborating on the proportionality of the announcement itself. Interestingly, the ECB's own proportionality review is shrouded in economic language as the suitabil-

63 Own translation. See *Hoogduin* et al., pp. 21–22, 24, where doubts are raised about the economic rationale for the reinvestments and negative effects on inflation are pointed out.

64 *ECB*, Account of the monetary policy meeting of the Governing Council of the European Central Bank held by means of a teleconference on Wednesday, 18 March 2020, available at: https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200409_1~baf4b2ad06.en.html (13/2/2025).

65 *Ibid*.

66 Namely allowing for "[…] temporary fluctuations in the distribution of purchase flows both across asset classes and across jurisdictions". See *ECB*, Account of the monetary policy meeting of the Governing Council of the European Central Bank held by means of a teleconference on Wednesday, 18 March 2020, available at: https://www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200409_1~baf4b2ad06.en.html (13/2/2025).

67 *Hoogduin* et al., pp. 40 et seq.

68 *ECB*, The Transmission Protection Mechanism, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html (13/2/2025).

ity and necessity of TPI are discussed in the context of the *effectiveness* and *efficiency* of this instrument. Concerning the necessity of TPI considering possible equally effective alternatives that have been suggested, such as OMT or the European Stability Mechanism, it can be observed that the ECB's announcement does not explore alternative mechanism to deal with fragmentation in the euro area or why any other existing mechanisms cannot fulfil this function. Yet, the phrase "as the Governing Council continues normalising monetary policy", strongly suggest that TPI is designed to come in the place of the discontinued temporary asset purchase programmes, namely PSPP and PEPP. As would be the case if concrete decisions on public sector securities purchases under TPI would be challenged before the CJEU, the ECB has emphasizes that the proportionality of an operationalization of TIP would have to be determined "in the light of the specific shocks that needed to be addressed in any given situation" and "after conducting a comprehensive proportionality assessment to establish that activation was proportionate to the price stability mandate of the ECB."[69]

IV. Delineating permissible central bank public sector securities purchases from prohibited monetary financing and fiscal bailouts

Although, at least since *Gauweiler and Others*, the focus of legal discussions has been on the delineation of competences and the density of judicial review of monetary policy decisions, the compatibility of Eurosystem public sector securities purchases with other legal provisions included in Title VIII TFEU, and namely the prohibition of monetary financing and the prohibition of fiscal bailouts, also has to be considered in reviewing the legality of any current or future measures in this regard.

To be sure, the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB/ECB) and of the ECB lists the purchase and sale in the financial markets of outright marketable instruments in euro as one of the monetary policy instruments available to the Eurosystem.[70] Yet, primary Union law sets limits when it comes to the purchase of debt instruments issued by Member States, namely Art. 123 TFEU, which is commonly portrayed to preclude monetary financing in the euro area, and Art. 125 TFEU, which has been coined, albeit arguably somewhat misleadingly, the no bail-out clause.

It can be observed that the CJEU's approach to the interpretation of these prohibitions provides relatively clear guidelines for the assessment of any present or future public sector security purchase programmes. This is not to say however that existing case law is beyond criticism.

69 *ECB*, Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 20-21 July 2022, available at: https://www.ecb.europa.eu/press/accounts/2022/html/ecb.mg220825~162cfabae9.en.html (13/2/2025).

70 Art. 18 para. 1 Statute of the ESCB/ECB.

1. Prohibition of monetary financing

As an economic phenomenon, *Turner* describes monetary financing as "running a fiscal deficit (or a higher deficit than would otherwise be the case) which is not by the issue of interest-bearing debt, but by an increase in the monetary base – i.e. of the irredeemable fiat non-interest-bearing monetary liabilities of the government/central bank."[71] This may take the shape of privileged access to central bank or commercial bank money, e.g., by means of government current accounts, the purchase by a central bank of public sector securities for which the issuing sovereign does not have to pay (market conform) interest or which become non-redeemable, or that are perpetually rolled over.[72] Put differently, monetary financing amounts to "governments using the central bank to finance public expenditure when they were unable or unwilling to raise the money on capital markets or by increasing taxes."[73]

As has been confirmed by the CJEU in *Pringle*, and thereafter *Gauweiler and Others* and *Weiss and Others*,[74] Art. 123 para. 1 TFEU bans direct monetary financing, as Member States governments are prohibited from having overdraft facilities or any other type of credit facility with the ECB or NCBs. At the same time, the Eurosystem is prohibited from purchasing debt instruments on issue, i.e. directly from Member States governments.[75] Adding to this, Art. 124 TFEU unequivocally prohibits privileged access by Member States governments to financial institutions. The CJEU has considered that with the introduction of Art. 123 and 124 TFEU the drafters of the Treaties intended to ensure that Member States "follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficits."[76]

Yet, what Art. 123 para. 1 TFEU does not prohibit is the purchase by the Eurosystem of debt instruments on the secondary markets, that is the market in which sovereign debt bonds that have been issued are traded. This was what the ECB had

71 *Turner*, The Case for Monetary Finance – An Essentially Political Issue, available at: https://www.imf.org/external/np/res/seminars/2015/arc/pdf/adair.pdf (13/2/2025). Similar *Hülsewig/Steinbach*, International Review of Law and Economics, 2021/68, pp. 1 et seq.

72 *Turner*, The Case for Monetary Finance – An Essentially Political Issue, available at: https://www.imf.org/external/np/res/seminars/2015/arc/pdf/adair.pdf (13/2/2025).

73 *Tober*, Intereconomics 2015/4, p. 215.

74 ECJ, Case C-370/12, *Pringle*, judgment of 27 November 2012, ECLI:EU:C:2012:756, para. 123; Case C-62/14, judgment of 16 June 2015, ECLI:EU:C:2015:400,, para. 94; Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, paras. 101–104.

75 See also Council Regulation 3603/93 specifying definitions for the application of the prohibitions referred to in Art. 104 and 104b para. 1 of the Treaty, OJ L 332 of 31 December 1993, p. 1.

76 ECJ, Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 100; Case C-201/14, *Bara and Others*, judgment of 1 October 2015, EU:C:2015:638, para. 22.

announced with OMT and has thereafter implemented in the context of PSPP and PEPP. Such secondary market purchases have been considered compatible with primary Union law were they are of a selective nature, such as in the case of the announced OMT.[77] The difficulty lies in the fact that in practice such operations in the secondary capital markets may produce the same effect as primary market purchases of public sector securities directly from the issuing Member State, potentially resulting in a circumvention of the Union law prohibition.[78] In order to prevent such effects, interventions on the secondary market for public sector securities have to be accompanied by "sufficient safeguards", effectively ensuring that the potential purchasers of government bonds on the primary market cannot anticipate with certainty that the Eurosystem will purchase those bonds within a certain period and under certain conditions, which would allow those potential purchasers to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the Member States.[79]

In considering whether these safeguards are observed in the context of a given ECB measure or programme, the CJEU considers "the economic context in which that programme is adopted and implemented."[80] Safeguards that have so far been considered viable include blackout periods for secondary market purchases, non-disclosure of the volume and type of debt bonds (issuer, maturity) envisaged to be purchased by the ECB of the NCBs in a given month, setting of a maximum of a particular issue of bonds of a central government of a Member State or of the outstanding securities of one of those governments, and restrictions on the publication of information concerning the securities held by the ESCB.[81] In *Weiss and Others*, the CJEU has emphasized that if such safeguards are met, the purchase of public sector securities on the secondary market "*cannot* be equated with a measure granting financial assistance to a Member State".[82]

However, whether the purchase of public sector securities on the secondary market may effectively amount to financial assistance to Member States depends entirely on the definition of the notion of financial assistance and namely, whether this as a matter of principle must also rule out *indirect* financial support. In fact, the criticism of the ECB public sector security purchases as disguised financial assis-

77 That is, if the programme aims at correcting the disruption to the monetary policy transmission mechanism caused by the specific situation of bonds issued by certain Member States. See Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 55, where this point is discussed in the context of the scope of the monetary policy mandate of the ESCB.

78 The preamble to Council Regulation 3603/93 explicitly mentions the danger of such a circumvention. See ECJ, Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 97.

79 ECJ, Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 104.

80 ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 108.

81 *Ibid*., paras. 117–126, stating the Court's analysis of the safeguards in place for the PSPP.

82 ECJ, Case C-493/17, *Weiss and Others,* judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 104 (emphasis added).

tance finds its roots in the various direct and indirect effects that such secondary market purchases may produce. First, the purchase of securities by a central bank creates an "implicit guarantee" for the issuer as "[t]he central bank, unlike any other agent in the economy, is not subject to any insolvency risk. By purchasing risky securities, the central bank thus signals that it is extending an implicit guarantee on the issuers of these securities", whereby "[t]he ECB's purchases of government bonds and private assets provide stable financing, albeit indirect (that is, through the secondary market), for the relative issuers; moreover, they guarantee that the private investors acting as potential buyers on the primary market will find a strong institutional buyer on the secondary markets."[83] An important consequence of this is a reduction of the default risk of the debt issuer to the advantage of the Member State concerned.[84] To be sure, it can be argued that such effects describe one of the channels through which a central bank transmits its monetary policy and, more generally, that "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".[85] The lines between monetary and fiscal policy are thus somewhat blurred when it comes to the public sector securities purchases on the secondary market, even if the observance of primary Union law prohibition of monetary financing calls for a distinction between primary and secondary market public sector securities not in the least to rule out disguised financial support by the Eurosystem to euro area Member States.

What is more, the scope of Art. 123 para. 1 TFEU does not cover other forms of *indirect* monetary financing described in the economics literature that have also not been discussed by the CJEU. First, this provision does not prohibit so-called "remittance financing", whereby a central bank is required to transfer a proportion of its net profits to government.[86] In fact, Art. 33 of the Statute of the ESCB and of the ECB (Statute of the ESCB/ECB) foresees in this form of indirect monetary financing in the Eurosystem. A minimum of 80% of the ECB's profits has to be distributed to the national central banks (NCBs) in proportion to their paid-up shares.[87] The redistribution of the NCB profits is governed by the respective national (central bank) law, which can provide for a (partial) profit transfer to the treasury.[88] The dependency of Member States on this source of income became apparent from the negative reactions to the ECB's announcement that due to losses no profit distribution to the euro area national central banks would take place for 2023, soon followed by similar announcement by some major NCBs. These in the history of the

83 *Benigno/Canofari/Di Bartolomeo/Messori*, Journal of Economic Surveys 2023/37, p. 896.
84 *Ibid*., p. 897: "[…] lowering the yields concerning the risk premium component".
85 ECJ, Case C-62/14, *Gauweiler*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 110.
86 *Bateman*, Oxford Journal of Legal Studies 2021/4, p. 936.
87 According to this provision, an amount to be determined by the Governing Council, which may not exceed 20% of the net profit, must be transferred to the general reserve fund subject to a limit equal to 100% of the ECB's capital.
88 E.g. § 27 para. 2 Gesetz über die Deutsche Bundesbank (version from 19.7.2024); § 69 para. 3 Nationalbankgesetz (version from 7.10.2024).

Eurosystem unprecedented losses have been attributed to the ECB's unconventional monetary policy measures, including, but not limited to the very considerable raising of the deposit facility from -0.50 in September 2019 to 4.00 in September 2023 that led to higher payments of the ECB and NCBs to depositors.[89] Another form of indirect monetary financing comes in the shape of the reinvestment of the principal payments from maturing public sector securities through the purchase of additional securities, as this creates "additional demand [in the] primary markets for sovereign debt, thereby lowering the borrowing costs of debt-issuing sovereigns".[90] Until June 2023 this has been the practice for maturing PSPP securities and until the end of 2024 for PEPP securities.

2. Fiscal bailouts

Concerning Art. 125 TFEU, according to which neither the EU nor a Member State can be held liable for the commitments of another Member State or assume such a liability, it can first be noted that neither in *Gauweiler and Others* nor in *Weiss and Others* an extensive analysis of the compatibility of the purchase of euro area Member State's debt bonds with this provision has been provided by the CJEU. This can first of all be explained by the fact that the Court had previously clarified in *Pringle* that this provision does not stand in the way of the granting of financial assistance to a Member State "which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy" and thus, "remain subject to the logic of the market when they enter into debt".[91] This corresponds with the CJEU's approach to explaining the rational of the prohibition of monetary financing discussed above. Leaving aside the salient question raised above of whether the purchase of public sector securities by a central bank amount to a form of financial assistance or fiscal support, it is undisputed that in the context of the PSPP and PEPP neither the ECB nor the NCBs have taken on Member State's existing commitments to their creditors. This would be different if such public sector securities purchases would amount to the Eurosystem effectively becoming a guarantor of the government debts of the Member State in question. It could also be argued that by

89 *National Bank of Belgium*, Central bank losses: causes and consequence, available at: https://www.nbb.be/en/articles/central-bank-losses-causes-and-consequences-0 (13/2/2025): "[...] under quantitative easing programmes, central banks purchased assets, leading to a massive increase in commercial bank reserves on the liabilities side of their balance sheets. When policy rates were raised recently to contain inflationary pressures, the interest rate mismatch between low-yielding longer-term bonds and bank reserves remunerated at the policy rate started to materialise.".

90 See *Bateman*, Oxford Journal of Legal Studies 2021/4, p. 936, with reference to *Vlieghe*, Monetary Policy and the Bank of England's Balance Sheet, available at: https://www.bankofengland.co.uk/-/media/boe/files/speech/2020/monetary-policy-and-the-boes-balance-sheet-speech-by-gertjan-vlieghe.pdf (13/2/2025).

91 ECJ, Case C-370/12, *Pringle*, judgment of 27 November 2012, ECLI:EU:C:2012:756, paras. 135 and 137.

limiting purchases to the secondary market it is ensured that Member States remain subject to the logic of the market when they enter into debt. However, this standpoint may disregard the above-described effects of the "implicit guarantee" on risk premia.

A second reason that can explain the limited role given to Art. 125 TFEU in the judicial review mainly of PEPP are the risk sharing arrangements applicable for the Eurosystem. Differently to the hypothetical case presented by the German Federal Constitutional Court[92] in its preliminary reference in *Weiss and Others*, the CJEU has pointed out that "primary law includes no rules providing for the losses sustained by one of the central banks of the Member States in the course of open market operations to be shared between those central banks".[93] Indeed, to the extent that NCBs bought only their respective sovereign bonds[94] and not those of other jurisdictions, they are liable for losses resulting from those purchases, as well as from the small percentage of purchases of EU supranational bonds by a select group of NCBs.[95] In the context of the PSPP, the risk sharing is limited to those comparatively limited purchases conducted by the ECB itself.[96] Losses incurred by the ECB itself can be offset against its general reserve fund, but if necessary and based on a decision by the ECB's Governing Council, can be also offset against the monetary income of the relevant financial year in proportion and up to the amounts allocated to the NCBs in proportion to their paid up shares in the capital of the ECB.[97] In this context it should be recalled that the decision at the time of the establishment of the PSPP to limit the purchases by NCBs to debt bonds of their own sovereign was prompted by the politically sensitive question whether euro area countries should also purchase other euro area countries' debt bonds, thereby spreading the sovereign risks resulting from a possible default of euro area country with low(er) credit rating across several or all NCBs in the Eurosystem. It has turned out that the

92 In Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, paras. 159–167, the ECJ dismissed the fifth preliminary question by the German Federal Constitutional Court (BverfG) concerning the compatibility inter alia with Art. 125 TFEU of a situation in which the ECB would decide "to provide for the entirety of the losses that might be sustained by one of the central banks following a potential default by a Member State to be shared between the central banks of the Member States, in a context in which the scale of those losses would make it necessary to recapitalise that central bank" as hypothetical in nature.

93 Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 162.

94 Based on a monthly purchase allocation in the Eurosystem, aimed at the alignment of the NCB's share in the stock of PSPP purchases with the respective share of the ECB's capital key. See also Art. 6 of Decision 2015/774 on a secondary markets public sector asset purchase programme, OJ L 121 of 14 May 2015, p. 20.

95 *Eesti Pank, Bank of Greece, Banco de España, Banque de France, Latvijas Banka, Národná banka Slovenska, Banque centrale du Luxembourg.*

96 The ECB has purchased securities by international organisations and multilateral development banks, (originally foreseen: 12%) and securities issued by euro area sovereigns and allegeable agencies (originally foreseen: 8%). See Art. 6 paras. 1–2 of Decision 2015/774.

97 Art. 33 para. 3 Statute of the ESCB/ECB.

central banks of Member States with high credit ratings, resulting in lower yields, are relatively worse off than euro area central banks of countries with lower credit ratings.[98]

E. Conclusions

From a legal perspective, it goes without saying that every current and future decision by the ECB to purchase public sector securities must be assessed individually based on the specific reasons for the decision and the prevailing macroeconomic conditions. This means that the informative value of existing case law is somewhat limited and relates above all to reveal the main evaluation framework that the CJEU is likely to apply. It should also be noted that the CJEU has had comparatively little opportunity to refine its approach to the review of monetary policy decisions to date.

In Greek mythology a rebellious and immortal Prometheus was captured to be left to the gruesome fate of acting as food source for an eagle 'till the end of eternity. However, Prometheus was eventually released of this torture by the son of Zeus, Herakles.[99] To be sure, with its judgements in *Gauweiler and Others* and *Weiss and Others* the CJEU has certainly not set the ECB totally free from its chains when it comes to the conduct of monetary policy in the euro area. However, as becomes clear from the previous sections, the ECB's freedom in setting up public sector purchasing programs is considerable. This primarily applies to the question of what constitutes a monetary policy measure and under what circumstances–if at all–a decision on a particular monetary policy measure will be considered to be based on a manifest error of assessment on parts of the ECB. A closer examination of the Court's reasoning reveals just how accommodating it is for the position of the ECB. By essentially relying on the objectives pursed and instruments deployed by the ECB as the main points of reference for the constitutionally highly relevant distinction between the EU's exclusive monetary policy competence and the Member State's economic policy competence, the CJEU's makes itself vulnerable to criticism for effectively shifting the burden of proof to the Member States. Compared to other Union institutions taking discretionary decisions involving complex macroeconomic assessments, the ECB also appears to be granted a special status when it come to the review of manifest errors. It is unclear under what conditions the CJEU would dismiss an ECB measure with reference to insufficient, incomplete, insignificant and inconsistent evidence. The reason for this is that by and large, such evidence must derive from economic considerations on the effects of a given monetary policy measure. However, it needs to be recognized that economic evidence, such as on what influences price developments and what level of central bank intervention is necessary, is seldomly uncontested and thus, conclusive. So even if the CJEU should in the future engage in a high intensity review for manifest

98 *Hoogduin* et al., pp. 55 et seq.
99 *Evslin*, pp. 198–199.

errors, it will have to account for the fact that the economic evidence available to a monetary policy authority will often be incomplete and inconsistent, which then leaves the CJEU with an assessment of whether all the available evidence has been sufficiently considered.

While according to primary Union law and the case law of the CJEU the ECB is subject to the judicial review of its action as a monetary policy authority, in practice the risk of a legal challenge being successful seems rather limited, if the latter complies with the very generous conditions set by the CJEU. What are the implications of these findings more broadly then for the democratic legitimacy of the ESCB? It has been broadly acknowledged that *effective* mechanisms of political accountability are at large,[100] making courts "the only actors that can remedy an ECB decision".[101] After all, democratic legitimacy cannot only derive from the legal basis of the ESCB (input legitimacy) or a permissive consensus on the success of ESCB measures (output legitimacy), but rather calls for a continues review of the ESCB's action. However, the question is whether courts are well equipped to fulfil this role to a degree that they can effectively substitute for meaningful instruments of political accountability, namely involving the European Parliament. This is very doubtful even if courts would apply a high intensity review of monetary policy measures. As has been observed elsewhere, "[i]f judges act as counterbalances to expert bodies, they effectively substitute their judgment for that of experts. Or, to put it more bluntly, one non-majoritarian body (a court) replaces the decision by another non-majoritarian body (a central bank)."[102]

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100 *Amtenbrink*, Maastricht Journal of European and Comparative Law 2019/1, pp. 165 et seq.; Amtenbrink/Markakis, pp. 273-279; Tridimas, p. 316-317.

101 *Amtenbrink/Repasi*, Eur. L. Rev. 2020/6, p. 776.

102 *Ibid*.

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The Future for Asset Purchase Programmes and TLTROs

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Contents

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Abstract

Asset purchase programmes and LTROs are powerful monetary policy instruments in the ECB's toolkit to provide structural liquidity. They are also apt to be designed in a targeted manner to address secondary policy objectives – as it is currently the case within the ECB's "Green monetary policy" and the "Greening" of its Corporate Sector Purchases. The article analyses the monetary legal framework with regard to the validity of such targeted, discriminatory design features. It applies the principle of non-discrimination to the monetary policy context and concludes that the ECB has to provide a justification if it intends to diverge from it. Providing such a justification for discriminatory monetary policy measures in the pursuit of environmental objectives, as it is the case with Greening the CSPP, is, however, rather difficult. Nevertheless, using asset purchase programmes and TLTROs for the purpose of supporting the green transition would without a doubt be highly effective and is hence appealing to the ECB. *Isabel Schnabel*, Member of the Executive Board of the ECB, has already invoked such ideas with regard to Green TLTROs and Greening the public sector holdings.

Keywords: ECB, asset purchase programmes, (targeted) longer term refinancing operations, green monetary policy

A. Introduction

On March 13, 2024, the Governing Council decided on changes to the operational framework of its monetary policy.[1] These changes also address longer-term refinancing operations (LTROs)[2] and asset purchase programmes[3] which sit at the core of the European Central Bank's (ECB) monetary policy toolkit.

The Governing Council declared that the Eurosystem will continue to provide liquidity through a broad mix of instruments, consisting of main refinancing operations (short-term credit operations) and LTROs in the form of three-month LTROs. At a later stage, the Governing Council will also consider using structural monetary policy instruments in the form of structural longer-term credit operations and a structural portfolio of securities:

> "New structural longer-term refinancing operations and a structural portfolio of securities will be introduced at a later stage, once the Eurosystem balance sheet begins to grow durably again, taking into account legacy bond holdings. These operations will make a substantial contribution to covering the banking sector's structural liquidity needs arising from autonomous factors and minimum reserve requirements."[4]

1 *ECB*, Changes to the operational framework for implementing monetary policy (13 March 2024), available at: https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.pr240313~807e240020.en.html (13/1/2025).
2 In further detail *cf.* B.I.
3 In further detail *cf.* B.II.
4 *ECB*, Changes to the operational framework for implementing monetary policy (13 March 2024), available at: https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.pr240313~807e240020.en.html (13/1/2025).

During the Financial Crisis, structural liquidity measures were of outmost importance to provide liquidity to the markets and stimulate the economy. The ECB designed LTROs as targeted measures (targeted longer-term refinancing operations, TLTROs) and used asset purchase programmes in various modalities – buying not only asset backed securities and covered bond securities, but also corporate and public sector assets.

LTROs and asset purchase programmes do not only qualify as instruments that can provide ample liquidity on a structural basis, if needed, but can also be designed in ways to address – or in other words to *target* – specific market assets and market participants. Such design options allow the Eurosystem to tailor its monetary policy measures more closely to specific macroeconomic needs by targeting certain transmission channels more directly and effectively. In addition, refinancing operations and asset purchase programmes can be calibrated in a way to serve the Eurosystem's secondary objectives. The Governing Council also addressed the relevance of secondary objectives in its recent statement:

> "To the extent that different configurations of the operational framework are equally conducive to ensuring the effective implementation of the monetary policy stance, the operational framework shall facilitate the ECB's pursuit of its secondary objective of supporting the general economic policies in the European Union – in particular the transition to a green economy – without prejudice to the ECB's primary objective of price stability. In this context, the design of the operational framework will aim to incorporate climate change-related considerations into the structural monetary policy operations."[5]

LTROs and asset purchase programmes are exceptionally suitable for such design features to support the ECB's secondary objective and, in particular, the transition to a green economy. Accordingly, the Governing Council has used its corporate bond purchases since October 2022 to support climate-friendly issuers of corporate bonds.

This article wants to shed more light on the role of TLTROs and asset purchase programmes in the future of European monetary policy and explore conditions and scenarios, especially against the background of the ECB's latest commitment to support the fight against climate change and support the green transition as part of its secondary objective.

The first part of the paper outlines the basic design features and forms of TLTROs and asset purchase programmes (B.). It serves as the background for an in-depth analysis of how TLTROs and asset purchase programmes as structural liquidity operations are particularly well apt for targeted design features and serve secondary monetary policy objectives pursuant to Art. 127 para. 1 TFEU beyond price stability (C.). Greening of the Corporate Sector Purchase Programme (CSPP) is the most current and prominent example for such targeted measures in pursuit of the

5 *ECB*, Changes to the operational framework for implementing monetary policy (13 March 2024), available at: https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.pr240313~807e240020.en.html (13/1/2025).

ECB's secondary objective to support the green transition (C.I.). While the scope of the mandate of the ECB with regard to its secondary objective in Art. 127 para. 1 TFEU has been highly debated in the last years in academic literature, the discussions rarely touched upon the directly related and more general question of whether the ECB may use targeted design features – or, framed more trenchant – selective and hence discriminatory monetary policy measures. This article explores the monetary legal framework and concludes that the principle of non-discrimination is also applicable to monetary policy measures. In consequence, the ECB has to provide a justification if it intends to diverge from it. In the context of targeted, i.e., discriminatory monetary policy measures, such justification is difficult to provide for measures discriminating in the pursuit of environmental objectives as in the case of Greening the CSPP (C.II.).[6] Nevertheless, using asset purchase programmes and TLTROs for the purpose of supporting the green transition would be highly effective and is therefore appealing to the ECB. *Isabel Schnabel*, Member of the Executive Board of the ECB, has already invoked such ideas with regard to Green TLTROs and Greening the public sector holdings – though still music of the future, interesting food for thought (D.).

B. Targeted Long Term Refinancing Operations (TLTROs) and Asset Purchase Programmes as Structural Liquidity Operations

I. TLTROs

TLTROs[7] were introduced in June 2014 by the ECB as a key element of its broader monetary policy framework to provide credit to financial institutions on favourable conditions in order to support the pass-through of liquidity by bank lending to the real economy.[8] This direction of liquidity to the real economy is ensured by the targeted nature of the refinancing operations in so far as the amount that banks can borrow from the Eurosystem is linked to the amount of loans handed out to non-financial corporations and households.[9] With TLTROs, the ECB is offering banks long-term funding at attractive conditions, thereby ensuring favourable borrowing conditions for the banks on the one hand and stimulating bank lending to the real economy on the other hand.

The TLTROs thereby serve as an effective tool to reinforce an accommodative monetary policy stance and strengthen the transmission of monetary policy by

6 Parts of this article are based on considerations laid out in *Dietz*, Common Mkt. L. Rev. 2023/5, pp. 1349 et seq.; *Dietz*, Common Mkt. L. Rev. 2022/2, pp. 395 et seq.

7 TLTROs qualify as credit operations pursuant to Art. 18 para. 1 of the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB/ECB).

8 Recital (2) of Decision (EU) 2014/541 of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations (ECB/2014/34), OJ L 258 of 29/8/2014, p. 11.

9 *ECB*, Targeted longer-term refinancing operations (TLTROs), available at: https://www.ecb.europa.eu/mopo/implement/omo/tltro/html/index.en.html (13/1/2025).

further incentivising bank lending to the real economy especially in situations, where the financial system is facing stress and banks are more hesitant to pass on liquidity.[10]

The borrowing conditions under TLTROs are conceptualized in a way that the interest rate to be applied is linked to the participating banks' lending patterns. In a nutshell, the more loans participating banks issue to non-financial corporations and households (with the exception of loans to households for the purpose of house purchases), the lower the interest rate on their TLTRO borrowing and hence their funding costs.[11] TLTROs overall received positive reactions albeit with some criticism addressing the proximity to fiscal policy by providing liquidity to specific sectors in a targeted manner.[12]

Overall, the Eurosystem implemented in total three series of TLTROs.

TLTRO-I, launched in June 2014, consisted of a total of eight four-year refinancing operations with relatively high interest rates (equivalent to the main refinancing rate at 0.15% at the time). There was also a limit on the total amount that could be borrowed from the ECB. However, banks could borrow more if they exceeded certain individually calculated net lending benchmarks. TLTRO-I also included a penalty mechanism: the borrowed amounts were subject to early repayment if the respective benchmark was not met.[13]

TLTRO-II, launched in June 2016, provided four operations extending into 2021. It included no longer a penalty mechanism. Instead, banks were able to further reduce their interest rate on additional borrowing if they exceeded their benchmark, with the rate potentially dropping as low as the deposit facility rate, which was 0.40% at the time.[14] Thanks to these more favourable conditions, participation in TLTRO-II was approx. 30% higher compared to TLTRO-I.[15]

The third and largest tranche, TLTRO-III, has been initiated in September 2019 and has provided for a total of ten operations with interest rates as low as the ECB's deposit facility rate (which stood at -0.50% during much of the COVID-19 pandemic), effectively allowing banks to only borrow at negative rates.[16] The

10 See also *ECB,* Targeted longer-term refinancing operations (TLTROs), available at: https://www.ecb.europa.eu/mopo/implement/omo/tltro/html/index.en.html (13/1/2025).

11 *ECB,* What are targeted longer-term refinancing operations (TLTROs)?, available at: https://www.ecb.europa.eu/ecb-and-you/explainers/tell-me/html/tltro.en.html (13/1/2025).

12 See, e.g., *Gros/Valiante/de Groen*, CEPS Policy Brief 2016/341, pp. 1–6.

13 Decision (EU) 2014/541 of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations (ECB/2014/34), OJ L 258 of 29/8/2014, p. 11.

14 Decision (EU) 2016/810 of the European Central Bank of 28 April 2016 on a second series of targeted longer-term refinancing operations (ECB/2016/10), OJ L 132 of 21/5/2016, p. 107.

15 *ECB*, The slowdown in euro area productivity in a global context, available at: https://www.ecb.europa.eu/pub/pdf/ecbu/eb201703.en.pdf (pp. 42 et seq.) (13/1/2025); *Universität Leipzig,* (T)LTRO-Tracker, available at: https://www.wifa.uni-leipzig.de/institut-fuer-wirtschaftspolitik/forschung/tltro-tracker (13/1/2025).

16 Decision (EU) 2019/1311 of the European Central Bank of 22 July 2019 on a third series of targeted longer-term refinancing operations (ECB/2019/21), OJ L 204 of 2/8/2019, p. 100.

TLTRO-III facilities were designed with maturities extending up to 2024 to ensure medium-term liquidity support to the banking sector, particularly in the light of the disruptions caused by the pandemic.[17] TLTRO-III was supplemented during 2020 and 2021 by seven additional pandemic emergency LTROs (PELTROs) with an aggregated volume of over €22 billion, which ended in September 2021.[18] Different to TLTROs, PELTROs were not designed as targeted measures but also conceptualized to support the functioning of the money markets by providing a liquidity backstop to the Euro area banking systems during the COVID-19-pandemic.[19]

By 31 December 2023, the cumulative outstanding borrowing under TLTRO-III amounted to €396 billion, having declined substantially from more than €1.3 trillion by 31 December 2022.[20]

In December 2024, the final TLTRO-III operations reached their date of maturity.[21] Given the central role of TLTROs within the ECB's monetary policy strategy over the past decade, the question arises how the future of ECB liquidity assistance will look like. The financial sector seems to be preparing for a period without TLTROs[22] with the liquidity coverage ratio (LCR) of Eurozone banks having declined throughout 2022 and 2023 and remaining at 159.39% in the second quarter of 2024, compared to 173.43% at the end of 2021.[23]

As cited above, the Governing Council considers to resort to LTROs again "at a later stage" if and when a structural liquidity need stemming from autonomous factors and minimum reserve requirements arises.[24] The fact that the Governing Council remained open regarding the prospect of structural long-term operations opens up room for speculation whether a future series of such operations might

17 Some argued that TLTRO-III operations contributed substantially to minimizing the economic cost of the COVID-19 pandemic, see, e.g., *Altavilla* et al., Eur. Econ. Rev. 2023/156, Article 104478, pp. 1 et seq.

18 *ECB*, ECB announces new pandemic emergency longer-term refinancing operations, available at: https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200430_1~477f400e39.en.html (13/1/2025). See also *Universität Leipzig,* (T)LTRO-Tracker, available at: https://www.wifa.uni-leipzig.de/institut-fuer-wirtschaftspolitik/forschung/tltro-tracker (13/1/2025).

19 *ECB*, Monetary policy decisions (30 April 2020), available at: https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp200430~1eaa128265.en.html (13/1/2025).

20 *ECB*, Consolidated balance sheet of the Eurosystem as at 31 December 2023, available at: https://www.ecb.europa.eu/press/annual-reports-financial-statements/annual/balance/html/ecb.eurosystembalancesheet2023~ca350ad75e.de.html (13/1/2025).

21 *ECB*, Indicative calendar for the third series of targeted longer-term refinancing operations (TLTROs-III): Operations 1 to 7, available at: https://www.ecb.europa.eu/mopo/implement/omo/pdf/TLTRO3-calendar-2021.en.pdf (13/1/2025).

22 *Platerink/Kosonen,* Life after TLTROs: Bank liquidity and funding will be tested in 2024, available at: https://think.ing.com/articles/life-after-tltros-comes-with-challenges-for-both-bank-liquidity-and-funding-in-2024/ (13/1/2025).

23 *ECB*, Liquidity coverage ratio, SIs, EU countries participating in the Single Supervisory Mechanism (SSM) (changing composition), Quarterly, available at: https://data.ecb.europa.eu/data/datasets/SUP/SUP.Q.B01.W0._Z.I3017._T.SII._Z._Z._Z.PCT.C (13/1/2025).

24 *ECB*, Changes to the operational framework for implementing monetary policy (13 March 2024), available at: https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.pr240313~807e240020.en.html (13/1/2025).

also be put at service of the Governing Council's articulated commitment on its secondary objective. This could mean that the ECB might be contemplating "Green TLTROs",[25] an unprecedented version of TLTROs, which has gained some attention in recent discussions.[26]

II. Asset Purchase Programmes

Asset purchase programmes[27] were initiated by the ECB in mid-2014 as the key instrument of the ECB's quantitative easing strategy in a situation where monetary policy had reached the effective zero lower bound on policy rates. With different nuances, all asset purchase programmes aimed at supporting the ECB's monetary policy transmission mechanism thereby addressing persistently low inflation and stimulating economic activity in the Euro area.

The ECB's so-called Expanded Asset Purchase Programmes (APP)[28] consisted of several sub-programmes targeting different types of assets and hence transmission channels, including the Public Sector Purchase Programme (PSPP),[29] the Corporate Sector Purchase Programme (CSPP),[30] the Asset-Backed Securities Purchase Programme (ABSPP),[31] and the Covered Bond Purchase Programmes (CBPP1,[32] CBPP2[33] and CBPP3).[34][35] Since the initiation of its asset purchases, the ECB has recalibrated the volume and pace of the purchases and its reinvestments to accommodate specific macroeconomic needs.

25 *Brzeski/Schroeder/Tukker/Platerink Kosonen,* The ECB's operational framework review formalises the status quo, available at: https://think.ing.com/articles/formalising-the-status-quo-ecb/#a5 (13/1/2025).
26 *van 't Klooster/van Tilburg*, pp. 1 et seq.; *Colesanti Senni/Pagliari/van 't Klooster*, pp. 1 et seq.
27 Asset purchase programmes constitute outright transactions pursuant to Art. 18 para. 1 Statute of the ESCB/ECB, i.e., the outright purchase and sale of securities on the market.
28 *ECB*, ECB announces expanded asset purchase programme (22 January 2015), available at: https://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html (13/1/2025).
29 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121 of 14/5/2015, pp. 20–24.
30 Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16), OJ L 157 of 15/6/2016, pp. 28–32.
31 Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the implementation of the asset-backed securities purchase programme (ECB/2014/45), OJ L 1 of 6/1/2015, pp. 4–7.
32 Decision of the European Central Bank of 2 July 2009 on the implementation of the covered bond purchase programme (ECB/2009/16), OJ L 175 of 4/7/2009, pp. 18–19.
33 Decision of the European Central Bank of 3 November 2011 on the implementation of the second covered bond purchase programme (ECB/2011/17), OJ L 297 of 16/11/2011, pp. 70–71.
34 Decision (EU) 2020/187 of the European Central Bank of 3 February 2020 on the implementation of the third covered bond purchase programme (ECB/2020/8) (recast), OJ L 39 of 12/2/2020, pp. 6–11.
35 *ECB,* Asset purchase programmes, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html (13/1/2025).

The PSPP accounts for the largest part of asset purchases under the APP. From March 2015 onwards, the Eurosystem purchased sovereign bonds and other public sector securities, including bonds issued by central governments, regional and local governments, amounting to 90% of the total volume of the programme, and European institutions such as the European Investment Bank (EIB), making up 10% of the total volume. At the end of December 2023, cumulative net purchases under the PSPP amounted to €2.529 trillion, making up more than 80% of the total volume of the APP.[36]

Launched in June 2016, the CSPP expanded the ECB's asset purchases to the corporate sector. Within the CSPP, the ECB bought investment-grade bonds issued by non-financial corporations established in the Euro area. The ECB focused on corporate bonds with maturities of up to 30 years, aiming to lower corporate financing costs and encourage investment.[37] The CSPP included bonds from a wide range of industries, including utilities, telecommunications, and manufacturing, but excluded financial sector bonds to avoid conflicts of interest according to the ECB.[38] Purchases under the CSPP made up for 7% of total purchases under the APP, a total of ca. €300 billion in net purchases at the end of 2023.[39]

The ABSPP, the first asset programme announced in 2014 and effective from November of that year, involved the purchase of asset-backed securities (ABS). By buying these ABS, the ECB aimed to restore their marketability as a viable refinancing tool, thus improving credit flows to households and businesses.[40] Cumulative net purchases under the ABSPP amounted to approx. €36 billion at the end of 2023, playing a minor role in the overall volume of the APP (~1% of total APP purchases).[41]

36 *ECB*, Asset purchase programmes, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html (13/1/2025).

37 Decision (EU) 2020/187 of the European Central Bank of 3 February 2020 on the implementation of the third covered bond purchase programme (ECB/2020/8) (recast), OJ L 39 of 12/2/2020, p. 6.

38 Art. 2 para. 1 lit. b et seq. of Decision (EU) 2016/948 of the European Central Bank of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16), OJ L 157 of 15/6/2016, p. 29.

39 See the chart on cumulative net APP purchases on the ECB's website, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html#cspp (13/1/2025); available separately at: https://www.ecb.europa.eu/mopo/pdf/ecb.APP_cumulative_net_purchases_by_programme.en.png?erty (13/1/2025).

40 Recital (2) of Decision (EU) 2015/5 of the European Central Bank of 19 November 2014 on the implementation of the asset-backed securities purchase programme (ECB/2014/45), OJ L 1, p. 4; *ECB*, ECB announces monetary policy measures to enhance the functioning of the monetary policy transmission mechanism, available at: https://www.ecb.europa.eu/press/pr/date/2014/html/pr140605_2.en.html (13/1/2025). For details on eligibility of assets etc., see *ECB*, FAQ on the asset-backed securities purchase programme, available at: https://www.ecb.europa.eu/mopo/implement/app/html/ecb.faq_abspp.en.html (13/1/2025).

41 See the chart on cumulative net APP purchases on the ECB's website, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html#cspp (13/1/2025); available separately at: https://www.ecb.europa.eu/mopo/pdf/ecb.APP_cumulative_net_purchases_by_programme.en.png?erty (13/1/2025).

The CBPPs focused on purchasing covered bonds. The last series of the CBPPs, CBPP3, was initiated in October 2014. CBPP3 was designed to provide funding relief for banks and to improve liquidity in the covered bond market, which is a crucial source of long-term financing for European banks.[42] By the end of 2023, the ECB had purchased over €320 billion in covered bonds under this programme.[43]

Between March 2015 and December 2018, the ECB implemented monthly purchases – including all sub-programmes – averaging €60 billion, which later increased to €80 billion per month during the height of the programme. The APP was temporarily halted at the end of 2018, as inflation showed signs of recovery. However, it was reactivated in November 2019 with renewed monthly purchases of €20 billion to counter economic slowdown and worsening inflationary trends.[44] By the end of 2022, cumulative purchases under the APP reached over €3.2 trillion, with public sector bonds purchased under the PSPP making up the bulk of the portfolio (approx. 80%). Since then, the bonds held by the ECB have gradually declined. In August 2024, the holdings under the APP still amounted to €2.79 trillion.[45]

Between 2015 and February 2023, the ECB regularly reinvested the redemptions from maturing securities to maintain favourable liquidity conditions and smooth the monetary policy transmission. In line with the Governing Council's decision announced on 9 June 2022,[46] the ECB discontinued net asset purchases in July 2022 but kept reinvesting the principal payments from maturing bonds in full. This lasted until March 2023, when, following another decision by the Governing Council on 15 December 2022,[47] the ECB gradually began reducing its APP portfolio, marking a shift towards normalizing monetary policy in the face of rising inflation.[48]

During the COVID-19 pandemic, the ECB had introduced the Pandemic Emergency Purchase Programme (PEPP)[49] in March 2020 as a temporary measure, which was conceptualized as a separate and additional purchase programme to the APP. PEPP – comprising the same asset categories as the APP – was designed to provide a flexible response to the acute economic crisis brought about by the

42 Recital (2) of Decision (EU) 2014/828 of the European Central Bank of 15 October 2014 on the implementation of the third covered bond purchase programme (ECB/2014/40), OJ L 335 of 22/11/2014, p. 22.

43 See the chart on cumulative net APP purchases on the ECB's website, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html#cspp (13/1/2025); available separately at: https://www.ecb.europa.eu/mopo/pdf/ecb.APP_cumulative_net_purchases_by_programme.en.png?erty (13/1/2025).

44 See comprehensive chart below.

45 *ECB,* Asset purchase programmes, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html (13/1/2025).

46 *ECB*, Monetary policy decisions (9 June 2022), available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.mp220609~122666c272.en.html (13/1/2025).

47 *ECB*, Monetary policy decisions (15 December 2022), available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.mp221215~f3461d7b6e.en.html (13/1/2025).

48 *ECB,* Asset purchase programmes, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html (13/1/2025).

49 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91 of 25/3/2020, pp. 1–4.

pandemic, which jeopardised the price stability and functioning of the monetary policy transmission mechanism.[50] Net purchases under the PEPP, which were mainly conducted by the national central banks and accumulated to €1.85 trillion during its existence, were terminated by end of March 2022 and reinvestment seized at the end of 2024.[51]

Overall, these figures demonstrate the potential scope and magnitude of asset purchase programmes and LTROs making them a particularly powerful instrument in the monetary policy toolkit.

C. Targeted Design Features of LTROs and Asset Purchase Programmes

As LTROs and APPs are structural liquidity operations providing high levels of liquidity to specific market participants, they represent a particular powerful tool to steer monetary policy and influence market conditions. Combined with the conceptual possibility to design them as targeted measures, they are able to provide ample liquidity directed to specific transmission channels and market participants thereby ensuring much more tailored and at the same time strong macroeconomic monetary policy effects.

With TLTROs, the ECB had already implemented targeted design features in the form of linking structural liquidity supply to microeconomic objectives situated within its price stability mandate. However, the targeted design features can be used even more extensively to include objectives outside the ECB's primary mandate by linking structural liquidity to secondary monetary policy objectives enshrined in Art. 127 para. 1 sentence 2 TFEU – as it is the idea behind Green TLTROs.

While Green TLTROs are still music of the future, the Eurosystem has already embarked on such a journey in the realm of its asset purchases in form of Greening its corporate holdings under the CSPP (see C.I.). Greening the CSPP shall serve as an example to explore the legal framework for such targeted design features in pursuit of secondary monetary policy objectives (see C.II.).

I. Greening of CSPP

Greening the CSPP took its starting point in July 2022, when the ECB declared its commitment to support the fight against climate change and to consider "the implications of climate change and the carbon transition for monetary policy and central

50 Recital (3) 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 L 91, p. 1.

51 *Deutsche Bundesbank*, Pandemic Emergency Purchase Programme (PEPP), available at: https://www.bundesbank.de/de/aufgaben/geldpolitik/geldpolitische-wertpapierankaeufe/pandemic-emergency-purchase-programme-pepp--830356 (13/1/2025).

banking".[52] Accordingly, the Governing Council declared that the "Eurosystem aims to gradually decarbonize its corporate bond holdings, on a path aligned with the goals of the Paris Agreement".[53] However, until then, the ECB subscribed to the so-called principle of market neutrality as a guideline for the allocation of its corporate sector purchases explicitly refraining from any adherence to secondary policy objectives when implementing asset purchases.

The following section will first describe the ECB's commitment to the principle of market neutrality and its implementation in its asset purchases until 2022 (see C.I.1.a)) and then explore the legal basis of this principle within the monetary policy context (see C.I.1.b)). While the principle of market neutrality serves the objective of ensuring that monetary policy shall not interfere with market forces and not enhance any other secondary objectives besides price stability, it also enforces market mechanisms that are inherently less *neutral* than the principle suggests at first sight. In fact, certain market biases are perpetuated by such seemingly market neutral monetary policy which, in addition, negatively impacts environmental objectives (see C.I.2.a)). Therefore, the ECB started to move away from the principle of market neutrality and shifted to the so-called principle of market efficiency in order to correct such biases enshrined in the principle of market neutrality (see C.I.2.b)).

1. CSPP as Conventionally Market Neutral Corporate Sector Purchases

Corporate sector purchases had been used conventionally as non-targeted measures trying not to enhance any policy objectives besides price stability. In consequence, the ECB tried to mirror existing market structures within its allocation of asset purchases thereby ensuring to act – what it called – *market neutral*.

a) The ECB's Commitment to its Market Neutral Implementation of Asset Purchases

For the first time in 2015, the concept coined *market neutrality* was explicitly referred to by *Benoît Cœuré*, as a general principle guiding asset purchases (though interestingly in the context of the launch of the ECB's PSPP):

> "The concept of market neutrality means that, while we do want to affect prices, we do not want to suppress the price discovery mechanism. We will operationalize this

52 *ECB*, The ECB's monetary policy strategy statement, available at: www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (13/01/2025). See also *ECB*, ECB takes further steps to incorporate climate change into its monetary policy operations, available at: www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220704~4f48a72462.en.html (13/1/2025).

53 *ECB*, ECB takes further steps to incorporate climate change into its monetary policy operations, available at: www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220704~4f48a72462.en.html (13/1/2025).

> principle by ensuring a high degree of transparency around our interventions and by closely monitoring their impact on liquidity and collateral availability."[54]

In 2017, the ECB then applied this principle directly to the allocation of asset purchases under the APP:

> "In pursuing its objective of maintaining price stability, the ECB is mandated to act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources. Consequently, the ECB aims for a market-neutral implementation of the APP, and therefore CSPP purchases are conducted according to a benchmark that reflects proportionally the market value of eligible bonds."[55]

The ECB also elaborated more explicitly on the role of secondary objectives – as environmental or social goals – when implementing asset purchases, making clear that there is no room for such objectives within a market neutral monetary policy approach:

> "To ensure the effectiveness of monetary policy while maintaining a level playing field for all market participants and avoiding undue market distortions, *there is no positive or negative discrimination in the CSPP-eligible bond universe on the basis of environmental or social criteria.* While the ECB shares the view that an awareness of environmental issues, together with ethical and socially responsible behaviour, are important for society, it is nevertheless up to political decision-makers (in the first instance) to agree on, define and promote appropriate policies and measures. It is not, however, possible to embed these into a large-scale asset purchase programme that is carried out as a temporary monetary policy measure over a relatively short period of time. To do so would limit the effectiveness of the APP in its contribution to fulfilling the ECB's mandate of maintaining price stability."[56]

Until July 2022, the ECB had adhered to these guidelines as confirmed by the composition of the CSPP holdings. The CSPP holdings generally mirrored the composition of bonds of the CSPP-eligible bond universe with green bonds purchased under the CSPP by the Eurosystem corresponding to their weightings in the benchmark.[57]

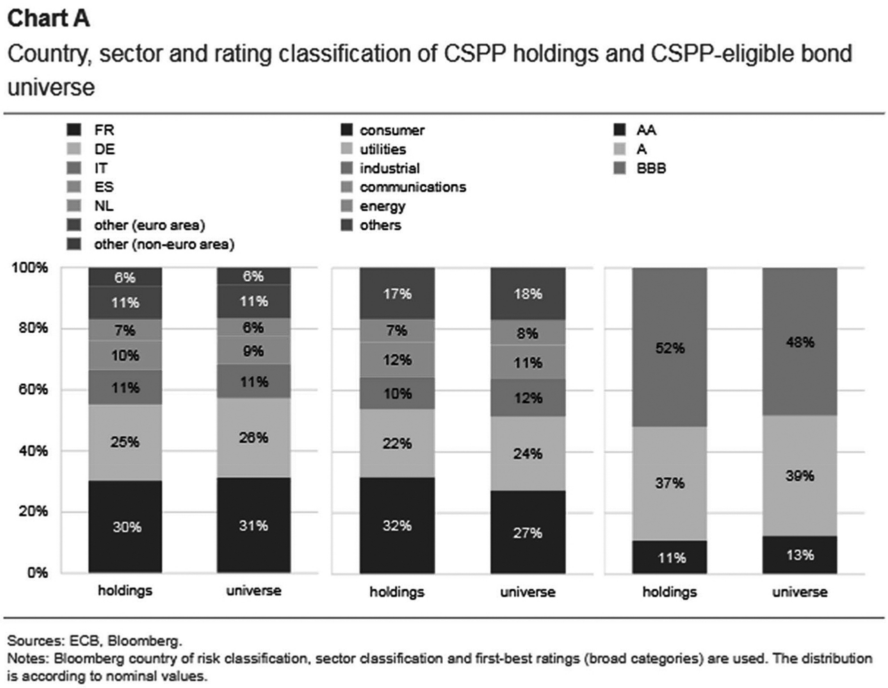
54 *ECB*, Embarking on public sector asset purchases, Speech at the Second International Conference on Sovereign Bond Markets, Frankfurt, 10 March 2015, available at: https://www.ecb.europa.eu/press/key/date/2015/html/sp150310_1.en.html (13/1/2025).

55 *ECB*, Economic Bulletin, 2017/4, p. 40.

56 *ECB*, Economic Bulletin, 2017/4, p. 41 (emphasis added).

57 *ECB*, Economic Bulletin, 2017/4, p. 41, Chart 1; *Dafermos/Gabor/Nikolaidi/Pawloff/van Lerven,* pp. 14 et seq.

Chart: Country, sector and rating classification of CSPP holdings and CSPP-eligible bond universe[58]



b) The Principle of Market Neutrality and the Principle of an Open Market Economy in EU Law

The principle of market neutrality is not explicitly spelt out in the EU treaties nor in secondary law. However, it is closely linked to the principle of an open market economy[59] enshrined in Art. 127 para. 1 sentence 3 TFEU, which stipulates that the "ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119".[60]

With formulating the principle of an open market economy, the drafter of the Treaties intended to ensure that, as a general rule, the ECB would refrain from interfering with market forces or disrupting market dynamics when implementing

58 *ECB*, Economic Bulletin, 2017/4, p. 41.
59 See also Opinion of AG Wathelet, Case C-493/17, *Weiss and others*, judgment of 11 December 2018, ECLI:EU:C:2018:815, para. 74; *Nees*, EuR 2021/2, p. 130.
60 Opinion of AG *Wathelet*, Case C-493/17, *Weiss and others*, judgment of 11 December 2018, ECLI:EU:C:2018:815, para. 74; *Nees*, EuR 2021/2, p. 130.

its monetary policy.[61] This perspective was based on the ordoliberal understanding of the functioning of the markets and state interference with market mechanisms: free market forces lead to the most efficient allocation of resources and any interference by the regulator should be kept to a minimum.[62] In consequence, the ECB's monetary policy strategy should focus on influencing aggregate variables such as employment or nominal growth aiming to affect the price level. It should refrain from affecting market participants and financing conditions on a microeconomic level.[63]

As outlined above, the ECB derived the principle of market neutrality from Art. 127 para. 1 sentence 3 TFEU. According to the interpretation of the ECB, this principle entails that the ECB may not allocate its asset purchases according to environmental or social criteria thereby avoiding discrimination of certain market participants based on such criteria.

In consequence, the ECB should only mirror existing market structures by replicating the existing bond issuance behaviour of market participants within its purchases – thereby acting (presumably) *market neutral*. This perspective rests on the premise that the existing market structures and bond issuance behaviour of market participants are yielding an efficient allocation of resources (see Art. 127 para. 1 sentence 3 TFEU).[64]

2. Greening the CSPP – Targeted Design Feature in the Pursuit of the ECB's Environmental Objective

a) Why Market Neutrality is not Environmentally Neutral

However, the principle of market neutrality is itself by far not as neutral as the name implies. To the contrary, it encapsulates inevitably inherent biases due to its reference point – the bond markets. Only such market participants active on the financial markets can participate and, in turn, fall within the reach of any asset purchases. Small and medium-sized enterprises (SMEs) regularly don't issue bonds but instead resort to other means of financing more suitable to their size, such as bank loans. Also, the credit requirements stipulated by the purchase programmes

61 Objections to the principle of market neutrality were raised by *van Tilburg/Simić,* pp. 23 et seq.

62 *van Tilburg/Simić*, p. 23; *Selmayr*, in: Von der Groeben/Schwarze/Hatje (eds.), Art. 282 AEUV, paras. 52 et seq. with further references; *Wutscher*, in: Schwarze/Becker/Hatje/Schoo (eds.), Art. 282 AEUV, para. 13; *Zilioli/Ioannidis,* Common Mkt. L. Rev. 2022/2, pp. 389 et seq.; *Smits*, p. 32 et seq.

63 See also *Steinbach*, Common Mkt. L. Rev. 2022/2, p. 352; *van 't Klooster/Fontan*, New Political Econ. 2020/6, p. 865 et seq. Critical regarding the principle of market neutrality as disguising an actual politicization of the Central Bank are *van 't Klooster/Fontan,* New Political Econ. 2020/6, pp. 865 et seq.

64 Critical regarding the principle of market neutrality as disguising an actual politicization of the Central Bank are *van 't Klooster/Fontan*, New Political Econ. 2020/6, pp. 865 et seq.

can often not be fulfilled by such SMEs.[65] These limitations of the bond markets are likewise mirrored within the concept of market neutrality resulting in inherent limitations of this principle.

These limitations of the principle of market neutrality also become apparent with regard to the ECB's CSPP resulting into an emission bias of the CSPP holdings due to a high correlation between bond issuance and carbon emission.[66] The underlying reason is in essence the existence of market failures embodied in the bond markets due to externalities which are not adequately digested by market forces and result in a less efficient allocation of resources:[67] Certain industries (manufacturing, utility, automobile, and transportation) are overrepresented on the bond markets compared to other economic sectors.[68] This over- and underrepresentation in turn correlates with an increase in emissions by sector. Exactly those sectors overrepresented on the bond markets and hence within the ECB's holdings are very high in emissions as evidenced by Eurostat's air emission accounts by sector. This correlation is due to the fact that large firms in emission-intensive sectors regularly issue more bonds than firms in other sectors. As a result, the companies issuing the most bonds happen to be the market participants most detrimental to environmental sustainability.

Markets are, however, not adequately reacting to this phenomenon with regard to a long-term efficient allocation of resources due to a number of reasons, including, *inter alia*, the fact that the rising costs of climate change are not fully priced by market participants. Despite the EU's efforts to price CO2 emissions, financial markets still continue to overestimate the returns on carbon-intensive assets, leading to suboptimal capital allocation.[69]

65 *van 't Klooster/Fontan*, New Political Econ. 2020/6, pp. 865 et seq.

66 *Papoutsi/Piazzesi/Schneider,* pp. 1 et seq.; *Hauser*, It's not easy being green – but that shouldn't stop us: How central banks can use their monetary policy portfolios to support orderly transition to net zero, speech at Bloomberg, 21 May 2021, available at: https://www.bankofengland.co.uk/-/media/boe/files/speech/2021/may/its-not-easy-being-green-but-that-shouldnt-stop-us-speech-by-andrew-hauser.pdf (13/1/2025); *Dafermos/Gabor/Nikolaidi/Pawloff/van Lerven,* pp. 5 et seq.

67 See also *Wutscher,* in: Busch/Ferrarini/Grünewald (eds.), p. 435; *Banque de France*, The role of central banks in the greening of the economy: Speech by François Villeroy de Galhau, available at: https://www.bis.org/review/r210211g.pdf (13/1/2025); *Knot*, Getting the Green Deal done – How to mobilize sustainable finance, available at: https://www.bis.org/review/r210217d.pdf (13/1/2025).

68 *ECB*, From green neglect to green dominance? Intervention by Isabel Schnabel, Member of the Executive Board of the ECB, at the "Greening Monetary Policy – Central Banking and Climate Change" online seminar, organised as part of the "Cleveland Fed Conversations on Central Banking", 3 March 2021, available at: https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210303_1~f3df48854e.en.html (13/1/2025); see also *Solana*, EBLR 2019/4, p. 556; *Schoenmaker*, Clim. Policy 2021/4, p. 583, especially Figure 1, who therefore proposes to steer the allocation of the Eurosystem's assets and collateral towards low-carbon sectors in order to reduce the cost of capital for these sectors relative to high-carbon sectors.

69 *Hong/Li/Xu,* J. Econom. 2019/1, pp. 265 et seq.

By merely replicating existing bond issuance structures, the ECB therefore unintentionally reinforces this emission bias, exacerbating underlying market failures.[70] This approach hinders the transition to a carbon-neutral economy and obstructs the efficient allocation of resources.[71]

In general, the principle of market neutrality has less normative value with regard to the concept of *neutrality* as its name might suggest. It only warrants to mirror any given existing market structure – including its inherent biases and market failures. The concept is not capable of ensuring any neutrality beyond and above the financial market's situation at the time of reference. The principle of market neutrality as interpreted by the ECB is also restricted to the perimeter of bond markets and therefore does not include market participants not active on the bond market. However, at least in theory, broader market concepts could be conceptualized to better reflect all sectors of the real economy.

b) The Principle of Market Efficiency – Correcting Inefficiencies of Market Neutrality

In order to correct these market inefficiencies, the ECB decided to gradually decarbonize its corporate bond holdings, thereby moving away from the principle of market neutrality to market efficiency.[72] From October 2022 onwards, it started to increase the share of assets on the Eurosystem's balance sheet issued by companies with a better climate performance compared to those with a poorer climate performance within the ECB's CSPP holdings, called tilting measures.[73] As the ECB points out, tilting shall help mitigate climate-related financial risks on the Eurosystem's balance sheet, incentivize issuers to improve their disclosures, and reduce their carbon emissions in the future.[74]

70 *Schoenmaker*, Clim. Policy 2021/4, pp. 582 et seq.; *Schnabel*, From market neutrality to market efficiency: Welcome address at the ECB DG-Research Symposium "Climate change, financial markets and green growth", available at: https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210614~162bd7c253.en.html (13/1/2025); *Solana*, EBLR 2019/4, p. 556.

71 *Papoutsi/Piazzesi/Schneider*, pp. 1 et seq.; *ECB*, From market neutrality to market efficiency: Welcome address at the ECB DG-Research Symposium "Climate change, financial markets and green growth", available at: https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210614~162bd7c253.en.html (13/1/2025).

72 *ECB*, From market neutrality to market efficiency: Welcome address at the ECB DG-Research Symposium "Climate change, financial markets and green growth", available at: https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210614~162bd7c253.en.html (13/1/2025).

73 *ECB*, ECB takes further steps to incorporate climate change into its monetary policy operations, available at: www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220704~4f48a72462.en.html (13/1/2025); *ECB*, ECB provides details on how it aims to decarbonise its corporate bond holdings, available at: www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220919~fae53c59bd.en.html (13/1/2025).

74 *ECB*, ECB provides details on how it aims to decarbonise its corporate bond holdings, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220919~fae53c59bd.en.html (13/1/2025).

The ECB therefore created a climate score ranking in order to assess the climate performance of issuers of corporate bonds. The issuer's rank determines the amounts of bonds to be purchased by the ECB in the process of reinvestment of CSPP redemptions. The climate score consists of a combination of three sub-scores:[75] (i) A backward-looking emissions sub-score, based on the issuers' past greenhouse gas emissions, compared with their peers in a specific sector. The lower the past emissions have been, the more favourable the result in this sub-score; (ii) a forward-looking target sub-score which takes the issuers' self-set objectives for future emission reduction into account – the more ambitious the target, the better this sub-score; and (iii) a climate disclosure sub-score, evaluating the issuers' reporting of greenhouse gas emissions. Higher-quality disclosures lead to a better score.[76]

The resulting score is weighted according to a *tilting parameter* to determine the benchmark allocation for new purchases.[77] Through this scoring system, the ECB aims to incentivize corporations to set themselves ambitious emission reduction targets and to improve their climate related disclosures.

The Governing Council reinforced its commitment to the green transition efforts in February 2023, when it announced to intensify the tilting of corporate bond purchases in the period of partial reinvestment between March and July 2023.[78] After the discontinuation of reinvestment within the CSPP in July 2023, the climate score is still being utilized in the reinvestment process of PEPP redemptions in the corporate sector.[79]

The second set of climate-related disclosures published by the ECB in June 2024 shows that the tilting framework has had a notable impact in reducing financed emissions associated with corporate assets in 2022 and 2023.[80] According to the ECB's assessment, around one fifth of the total emission reduction in relation to

75 In further detail *cf. Byttebier/De Troyer*, EBLR 2024/1, p. 81.
76 *ECB*, ECB provides details on how it aims to decarbonise its corporate bond holdings, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220919~fae53c59bd.en.html (13/1/2025).
77 *ECB*, Monetary policy tightening and the green transition: Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the International Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230110~21c89bef1b.en.html (13/1/2025).
78 *ECB*, ECB decides on detailed modalities for reducing asset purchase programme holdings, available at: https://www.ecb.europa.eu/press/pr/date/2023/html/ecb.pr230202~1a4ecbe398.en.html (13/1/2025).
79 *ECB*, ECB provides details on how it aims to decarbonise its corporate bond holdings, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220919~fae53c59bd.en.html (13/1/2025).
80 *ECB*, Eurosystem and ECB portfolios steadily decarbonising, climate-related disclosures show, available at: https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.pr240625~94de5e0780.en.html (13/1/2025).

assets held by the Eurosystem in 2022 and 2023 is linked to the ECB's tilting efforts in reinvestment.[81]

This preferential treatment of issuers with a better climate score corrects the emission bias attributed to the principle of market neutrality within the ECB's corporate bond holdings. At the same time, this targeted design feature supports the ECB's secondary policy objective with regard to environmental sustainability pursuant to Art. 127 para. 1 sentence 2 TFEU.

II. Targeted Monetary Policy Operations – a New Design Feature?

Targeted – or one could also call them *selective* or *discriminatory* – design features as such are not a new invention that started with Greening the CSPP. Also, Outright Monetary Transactions (OMT)[82] envisaged selective bond purchases of only those Member States that experienced – according to the ECB's assessment – irregular and unwarranted deteriorations in their bond prices, which hampered policy transmission. While selectivity was highly disputed with regard to OMT,[83] the ECB already foresaw and implemented selective public bond purchases via the Securities Markets Programme (SMP)[84] – the pre-runner programme of OMT – and envisaged such potential targeted design features also within the Transmission Protection Instrument (TPI).[85]

81 *ECB*, Eurosystem and ECB portfolios steadily decarbonising, climate-related disclosures show, available at: https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.pr240625~94de5e0780.en.html (13/1/2025); *Schnabel* suggested in: Monetary policy tightening and the green transition, speech at the International Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230110~21c89bef1b.en.html (13/1/2025) to move away from a "flow-based tilting approach", which affects (only) the adjustment of the reinvestments of corporate bond holdings according to the climate score of the issuers and instead move to a "stock-based tilting approach" adjusting the portfolio towards greener issuers also absent any reinvestments.

82 *ECB*, Technical features of Outright Monetary Transactions, available at: https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (13/1/2025).

83 BVerfG, 2 BvR 2728/13, Order of the Second Senate of 14 Jan. 2014, DE:BVerfG:2014:rs20140114.2bvr272813, para. 73; Opinion of AG *Cruz Villalón*, Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:7, para. 153; ECJ, Case C-493/17, *Weiss and others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 89. Also in the PSPP proceedings the argument was brought forward that the non-selectivity of the programme would contribute to its admissibility (see Opinion of AG *Wathelet*, Case C-493/17, *Weiss and others*, ECLI:EU:C:2018:815, para. 105; ECJ, Case C-493/17, *Weiss and others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 82). See also *Thiele*, EuZW 2014/18, p. 698; *Dornacher/Thiele*, in: Pechstein/Nowak/Häde (eds.), Art. 123 AEUV, paras. 23 et seq.; *Mayer*, NJW 2015/28, pp. 2001, 2003; *Borger*, Common Mkt. L. Rev. 2015/1, pp. 154 et seq., 158 et seq., 175 et seq.

84 Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme (ECB/2010/5), OJ L 124 of 20/5/2010, pp. 8–9.

85 *ECB*, The Transmission Protection Instrument, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html (13/1/2025).

This raises the more general question if the ECB's legal framework allows for such targeted, selective measures. The article will therefore explore in more detail the validity of selective and targeted monetary policy design features from a legal perspective. It will develop the legal conditions under which selective monetary policy measures are in conformity with EU law (C.II.1. and C.II.2.). This legal framework shall then serve as the benchmark for assessing the validity of Greening of CSPP as a targeted monetary policy measure (C.II.3.).

1. The Principle of Non-Discrimination in Monetary Policy

As the following analysis will demonstrate, the legal framework of the Monetary Union is based in general on a non-discriminatory design of monetary policy instruments. Selective design features are not the premise monetary policy is built upon. Rather, the monetary policy framework rests upon the principle of non-discrimination (see C.II.1.a)), which the Court of Justice of the European Union (CJEU) also applied within the monetary policy context (see C.II.1.b)).

a) Monetary Policy Framework

The monetary policy framework is built on the principle of a single monetary policy in the Monetary Union.[86] There is only "one and indivisible"[87] monetary policy for and in the Euro area within the exclusive competence of the Union.[88] The single monetary policy for the Eurozone has to take a holistic view and – at least in theory – be blind to the needs of single Member States, regions or industries.[89] Preferential treatment of certain Member States is contrary to the concept of the Monetary Union. This is in line with the principle of non-discrimination on grounds of nationality as a cornerstone of the EU legal order (see Art. 4 para. 2 sentence 1 TEU) prohibiting any discriminatory treatment of Member States unless there is an objective reason for its justification.[90]

However, the principle of non-discrimination within the monetary policy conduct is by far not only confined to Member States as market participants, but encompasses also private actors, as demonstrated in the Eurosystem's monetary

86 Art. 119 para. 2 TFEU.
87 *Lastra*, p. 6.
88 Art. 3 para. 1 lit. c. TFEU; see, e.g., *Wutscher*, in: Schwarze/Becker/Hatje/Schoo (eds.), Art. 127 AEUV, para. 16.
89 *Berger/De Haan*, Atl. Econ. J. 2002/3, pp. 263 et seq.; *Enderlein*, Central Banking Journal, 2005/4, pp. 24 et seq.; *Sapir/Wolff*, Bruegel Policy Brief 2015/01, pp. 1 et seq.; *Wyplosz*, Econ. Policy 2016/87, pp. 559 et seq.; different, e.g., *Fritsche/Harms*, pp. 1 et seq. In addition, Art. 123 and 125 TFEU shall ensure that monetary policy is not used as a means to support the political interests (and especially fiscal needs) of Member States.
90 *Streinz*, in: Streinz (ed.), Art. 4 EUV, para. 13; *Obwexer*, in: Von der Groeben/Schwarze/Hatje (eds.), Art. 4 EUV, para. 21, who speaks of a ban on arbitrariness in this context.

policy framework with regard to the rules on eligible counterparties, eligible assets, and the procedures for the implementation of open market operations in general.[91]

Guideline 2015/510 for example explicitly declares that the principle of equal treatment is a guiding principle regarding eligibility criteria for assets: "[a]ll risk control measures applied by the Eurosystem shall ensure consistent, transparent and *non-discriminatory conditions* for any type of mobilized eligible asset across the Member States whose currency is the euro".[92]

The tender procedures for implementing its monetary policy operations shall likewise ensure that the ECB is not making voluntary choices when allocating credit, but instead provide for fair competition among potential counterparties to avoid interference with market forces. The principle of non-discrimination is also referenced in the rules governing minimum reserve requirements concerning potential exceptions and deviations from the minimum reserve obligation.[93]

The principle of an open market economy in Art. 127 para. 1 sentence 3 TFEU (see above C.I.1.b)) can also be interpreted and has been read by the ECB to encompass the principle of market neutrality as a nuanciation of some form of non-discrimination.

The monetary policy framework is also informed by general provisions of EU law including those relating to equality and non-discrimination. In particular, the ECB is bound by Art. 8, 10 and 18 TFEU which substantiate the equality-related objectives in Art. 3 para. 3 TEU. They serve as guiding principles for all EU institutions when implementing EU policies, and likewise for the ECB.[94] In addition, equality also bears an individual rights dimension, as explicitly acknowledged by the Charter of Fundamental Rights (CFR) in its Title III (see Art. 20, 21), which is also binding for the ECB.

91 BVerfG, 2 BvR 2728/13, Order of the Second Senate of 14 Jan. 2014, DE:BVerfG:2014:rs20140114.2bvr272813, para. 73; Opinion of AG *Cruz Villalón*, Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:7, para. 73; *Beukers*, GLJ 2014/2, pp. 349 et seq.

92 Art. 127 of Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (recast) (ECB/2014/60), OJ L 91/3 of 02/04/2015 (emphasis added). Already in its earlier version, Guideline of the ECB of 31 Aug. 2006 amending Guideline ECB/2000/7 on monetary policy instruments and procedures of the Eurosystem (ECB/2006/12), O.J. 2006, L 352/1., Chapter 2.1 on general eligibility criteria for counterparties stated that the general eligibility criteria "are defined with a view to giving a broad range of institutions access to Eurosystem monetary policy operations, enhancing *equal treatment* of institutions across the euro area and ensuring that counterparties fulfil certain operational and prudential requirements" (emphasis added).

93 Guideline (EU) 2015/510 of the European Central Bank of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (recast) (ECB/2014/60), OJ L 91/3 of 02/04/2015, para. 5, annex I: "Pursuant to Article 2 para. 2 of Regulation (EC) No. 1745/2003 (ECB/2003/9), the ECB may exempt, on a non-discriminatory basis, the institutions listed in points (a) to (c) thereof from reserve requirements.".

94 Regarding Art. 8 TFEU: *Kocher*, in: Pechstein/Nowak/Häde (eds.), Art. 8 AEUV, para. 1; regarding Art. 10 TFEU: *Schorkopf*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 10 AEUV, paras. 12, 18; in general, see *Jacqué*, in: Von der Groeben/Schwarze/Hatje (eds.), Art. 3 EUV, para. 1 with further references.

b) CJEU Case Law

Since the inception of the Union, the CJEU has made clear that the principle of equality and non-discrimination present fundamental principles of the EU legal order.[95] Concerning the content of the principle of equality, the CJEU elaborates:

> "Moreover, the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, to that effect, judgment of 18 April 2024, Dumitrescu and Others v Commission and Court of Justice, C-567/22 P to C-570/22 P, EU:C:2024:336, paragraph 67 and the case-law cited)."[96]

The CJEU also elaborated on its conceptual understanding of the principle of non-discrimination, recognizing it as a manifestation of the broader principle of equality.[97] It explicitly refers to Art. 20 CFR as informing the general principle of equality from a fundamental rights perspective.[98]

Moreover, the General Court (GC) directly invoked the principles of non-discrimination and equal treatment in the context of assessing monetary policy measures. It confirmed in *Accorinti* the applicability of the principle of non-discrimination and equal treatment. The case dealt with the status of the ECB as a preferred creditor within the debt restructuring of Greece. The applicants alleged that the fact that the ECB enjoyed this preferred creditor status presented a violation of the principle of equal treatment of private creditors with regard to Art. 20 and 21 CFR.[99] The GC ruled that the ECB, as an EU institution, is required to observe the CFR provisions as superior rule of EU law and that the principle of equal treatment is also applicable to the case at hand. However, the GC did not find a violation of the principle of equal treatment,[100] since the situation of private investors who followed private pecuniary interests with their purchases of Greek bonds was not

95 ECJ, Joined Cases 117/76 and 16/77, *Ruckdeschel*, judgment 19 October 1977, ECLI:EU:C:1977:160, para. 7.

96 See, for example, ECJ, Case C-601/22, *Umweltverband WWF Österreich and Others v. Amt der Tiroler Landesregierung*, judgment 11 July 2024, ECLI:EU:C:2024:595, para. 33.

97 ECJ, Joined Cases 117/76 & 16/77, *Ruckdeschel*, judgment 19 October 1977, ECLI:EU:C:1977:160, para. 7. With regard to the fundamental rights dimension and Art. 20 in relation to Art. 21 CFR see also ECJ, Joined Cases C-567/22 P to C-570/22 P, *Dumitrescu and Others v. European Commission and CJEU*, ECLI:EU:C:2024:336, para. 66: "In that regard, it should be recalled that the principle of equal treatment [enshrined in Article 20 of the Charter] is a general principle of EU law of which the principle of non-discrimination laid down in Article 21 para. 1 of the Charter is a specific expression (judgment of 14 July 2022, Commission v VW and Others, C-116/21 P to C-118/21 P, C-138/21 P and C-139/21 P, EU:C:2022:557, paragraph 140 and the case-law cited).".

98 ECJ, Joined Cases C-567/22 P to C-570/22 P, *Dumitrescu and Others v. European Commission and CJEU*, judgment 18 April 2024, ECLI:EU:C:2024:336, paras. 65 et seq.

99 GC, Case T-79/13, *Accorinti*, judgment of 19 June 2018, ECLI:EU:T:2015:756, para. 85.

100 GC, Case T-79/13, *Accorinti*, judgment of 19 June 2018, ECLI:EU:T:2015:756, para. 88.

comparable to that of the Eurosystem which was serving the public interest with its monetary policy.[101]

2. Modifications of the Principle of Non-Discrimination and Room for Selective Design Features

The principle of non-discrimination is, however, not a strict rule, but allows for exemptions – both under general EU law, as outlined by the CJEU throughout its case law,[102] and within the monetary policy context. In *Accorinti*, the GC explicitly made reference to the possibility of deviations from the principle of equal treatment:

> "The general principle of equal treatment requires that comparable situations are not treated differently and that different situations are not treated in the same way *unless such treatment is objectively justified*. The comparability of different situations must be assessed with regard to all the elements which characterize them. Those elements must in particular be determined and assessed *in the light of the subject-matter* and purpose of the European Union act which makes the distinction in question. *The principles and objectives of the field to which the act relates must also be taken into account*".[103]

This understanding is in line with the principle of market neutrality, which also contains a dimension of non-discrimination. The principle of market neutrality was derived as a conceptual enunciation of the principle of an open market economy with free competition allowing for an *efficient allocation of resources*. If market neutrality is not serving the latter, the principle lost its justification.

Therefore, in general, deviations from the principle of non-discrimination are conceivable, but must be in conformity with the mandate of the ECB and the objectives and principles underlying monetary policy.

General provisions of EU law also come into play here. These general provisions of EU law include the principles of equality and non-discrimination (Art. 3 para. 3 TFEU, see above)[104] as well as other general principles and objectives including environmental protection and sustainability (Art. 11 TFEU) as potential secondary monetary policy objectives. Articles 7–17 TFEU serve as so-called cross-sectoral

101 GC, Case T-79/13, *Accorinti*, judgment of 19 June 2018, ECLI:EU:T:2015:756, paras. 91 et seq.

102 ECJ, Joined Cases 117/76 & 16/77, *Ruckdeschel*, judgment 19 October 1977, ECLI:EU:C:1977:160, para. 7.

103 GC, Case T-79/13, *Accorinti*, judgment of 19 June 2018, ECLI:EU:T:2015:756, para. 87, with reference to ECJ, Case C-127/07, *Arcelor Atlantique and Lorraine and Others*, judgment 16 December 2008, ECLI:EU:C:2008:728, paras. 23, 25, 26 and the case law cited; ECJ, Case C-176/09, *Luxembourg v. Parliament and Council*, judgment of 12 May 2011, ECLI:EU:C:2011:290, paras. 31, 32 and the case law cited (emphasis added).

104 ECJ, Case 31/74, *Galli*, judgment of 23 January 1975, ECLI:EU:C:1975:8, para. 14; ECJ, Case 1/69, *Italy* v. *Commission*, judgment 9 July 1969, ECLI :EU:C:1969:34, paras. 4 et seq.; see also *Terhechte*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 3 EUV, paras. 8 et seq. with further references.

tasks, which underlie all Union policies, including monetary policy.[105] Also, Art. 127 TFEU bridges the gap to the general provisions in EU law via its reference to Art. 3 TEU in Art. 127 para. 1 sentence 2 TFEU. In consequence, the ECB has to take environmental considerations into account and pursue environmental objectives when implementing its monetary policy.[106] Primary and secondary EU law have to be interpreted in a way that supports the objective of environmental protection, as also demanded for by Art. 127 para. 1 sentence 2 TFEU in conjunction with Art. 3 TEU, Art. 11 TFEU.[107]

Yet, at the same time, the general provisions of EU law are not conceptualized to override the detailed articulation and structure of the ECB's mandate and tasks. The ECB's primary mandate is to safeguard price stability which is not altered by any reference to secondary objectives in Art. 127 para. 1 sentence 2 TFEU and the incorporation of further Union objectives in Art. 3 para. 3 TEU.[108] This understanding corresponds to the conceptualization of Art. 127 para. 1 sentence 2 TFEU as a "contributory competence" (*Unterstützungskompetenz*) of the ECB. The ECB's secondary objective to support the general economic policies in the Union shall not serve as a legal basis for measures which are predominantly economic in nature or predominantly in pursuit of any other secondary objective enshrined in Art. 3 para. 3 TEU.[109]

This nuanced competence structure is also warranted by democratic considerations, since it is not for the ECB as an independent institution to conduct economic policies and to decide and choose among the many potential economic policy objectives. The ECB's independence is functionally tied to its task to safeguard price stability. This reduced democratic legitimacy, however, in turn also warrants its clearly circumcised mandate with regard to its secondary objective in the realm of economic policy in Art. 127 para. 2 TFEU. The ECB is not equipped to take distributional decisions beyond monetary policy and decide which economic policy objective – be it the fight against unemployment, the fight against climate change, or the support of gender equality – to prioritize over others. The fact that the European Commission and the Member States have expressed their normative preferences with the Green Deal initiative and the implementation of EU standards, such as the Taxonomy Regulation or the EU Green Bond Standard, cannot compensate the missing

105 Regarding Art. 8 TFEU: *Kocher*, in: Pechstein/Nowak/Häde (eds.), Art. 8 AEUV, para. 1; regarding Art. 10 TFEU: *Schorkopf*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 10 AEUV, paras. 12, 18; in general see *Jacqué*, in: Von der Groeben/Schwarze/Hatje (eds.), Art. 3 EUV, para. 1 with further references.

106 *Calliess/Tuncel*, GLJ 2023/5, p. 806.

107 See, e.g., ECJ, Case C-513/99, *Concordia Bus Finland*, judgment of 17 September 2002, ECLI:EU:C:2002:495, para. 57; *Sjåfjell*, in: Ippolito/Bartoloni/Condinanzi (eds.), p. 112; also *Krämer*, in: Von der Groeben/Schwarze/Hatje (eds.), Art. 11 AEUV, para. 34; *Heselhaus*, in: Pechstein/Nowak/Häde (eds.), Art. 11 AEUV, paras. 20, 23, 29 et seq.; *Nettesheim*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 11 AEUV, paras. 30 et seq.

108 *Dietz*, Common Mkt. L. Rev. 2022/2, pp. 413, 414 with further references.

109 See also *Zilioli/Ioannidis*, Common Mkt. L. Rev. 2022/2, pp. 363 et seq.

democratic legitimacy of the ECB to take such decisions.[110] While these regulatory decisions show a certain democratically founded societal preference for specific economic policy objectives, as currently environmental protection, they do not entail the democratic decision to implement these objectives via discriminatory monetary policy measures. Also, at the moment, combating climate change stands as the top priority, but this focus may shift in the future. There are numerous initiatives at EU level which address various policy objectives that the ECB could potentially support through its monetary policy measures. This raises additional questions of which initiatives to prioritize and what to do in case of potentially conflicting interests.

In consequence, the necessary justification for discriminatory, i.e. targeted measures must fulfil certain conditions. First and foremost, it must be in line with the mandate of the ECB, i.e. serve a monetary policy objective *stricto sensu* as laid down in Art. 127 para. 1 sentence 1, 2 and para. 5 TFEU.[111] Any targeted design feature must be in conformity with the nuanced mandate structure as laid out above, taking into account also limitations on the ECB's mandate especially with regard to secondary monetary policy objectives. In addition, the mandate of the ECB must be read against the background of its reduced democratic legitimacy. Lastly, the justification needs to be in conformity with the principle of proportionality applicable to all monetary policy measures[112] and may not contravene the price stability objective.[113]

3. Targeting Environmental Objectives via the CSPP

Coming back to the example of Greening corporate sector purchases referred to at the beginning of the article (see C.I.2.), the ECB justified its tilting measures with two reasons: (i) the mitigation of climate-related financial risks on the Eurosystem balance sheet, and (ii) the fight against carbon emissions and the objective to contribute to a CO2-neutral, sustainable economy.[114]

Counteracting financial risks for the Eurosystem balance sheet is a legitimate objective and justification for discriminatory measures, as it relates to the ECB's contributory mandate to support the stability of the financial system (Art. 127 para. 5 TFEU) and the ECB's financial independence (Art. 282 para. 3 TFEU).

Also, as outlined above, the ECB may and shall also make recourse to sustainability objectives in Art. 3 para. 3 TEU and Art. 11 TFEU when conceptualizing its as-

110 However, *Zilioli/Ioannidis* suggest that the EU's preference for environmental goals may serve as a justification for the ECB's preference to prioritize environmental objectives, see *Zilioli/Ioannidis*, Common Mkt. L. Rev. 2022/2, pp. 384 et seq.

111 In a similar direction *Thiele*, EuZW 2014/18, p. 698.

112 *Zilioli/Ioannidis*, Common Mkt. L. Rev. 2022/2, pp. 389, 391.

113 See also *Steinbach*, Common Mkt. L. Rev. 2022/2, p. 352.

114 *ECB*, ECB provides details on how it aims to decarbonise its corporate bond holdings, available at: https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220919~fae53c59bd.en.html (13/1/2025).

set purchases. But does the ECB's secondary objective in Art. 127 para. 2 TFEU in conjunction with the Union's environmental objectives warrant for preferential asset purchases of climate friendly bond issuers? Or, more generally speaking, may the ECB support certain environmental, social, economic, and other non-monetary policy objectives contained in the EU's agenda in Art. 3 TEU via its contributory function to support the economic policies in Art. 127 para. 1 sentence 2 TFEU if it results into discriminatory measures?[115]

The ECB made recourse to the concept of market efficiency to argue for its tilting measures. However, also this line of argumentation cannot overcome the lack of competence when it comes to discriminatory measures based on the ECB's secondary objective. From a microeconomic standpoint, allocating resources to polluting industries may in fact appear efficient as long as these industries deliver high returns. This is due to the fact that the firms most responsible for emissions do not bear a proportional share of the costs associated with climate change. When, however, taking a medium or long-term macroeconomic perspective, this assessment changes since investing financial resources in polluting and carbon-intensive sectors will not be efficient – in line with the ECB's reasoning. This raises another competence question: Is it really within the competence of the ECB to decide on the benchmark to assess market efficiency with regard to non-monetary policy objectives?[116]

D. Music of the Future–Green TLTROs and Greening the PSPP?

The ECB has not yet announced it would actually pursue a strategy of targeted longer-term refinancing operations aimed specifically at *green* businesses. In January 2023, ECB's Executive Board Member *Isabel Schnabel* dismissed green TLTROs at least as an option for the immediate future because of the "current need for a restrictive monetary policy".[117] This does not rule out, however, that Green TLTROs could be introduced once monetary policy tightening is fading in favour of a more expansive monetary policy stance including liquidity measures, as

115 In similar fashion, *Zilioli/Ioannidis* concede that potential interference with market functions might be legally more constrained if undertaken in pursuit of the ECB's secondary objective; see *Zilioli/Ioannidis*, Common Mkt. L. Rev. 2022/2, p. 390.

116 See also *Wutscher*, in: Busch/Ferrarini/Grünewald (eds.), p. 438; *Steinbach*, Common Mkt. L. Rev. 2022/2, p. 353.

117 *Schnabel* had dismissed green TLTROs in her speech in Stockholm on 10 January 2023 as an option for the immediate future because of the "current need for a restrictive monetary policy", see *ECB*, Monetary policy tightening and the green transition: Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the International Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230110~21c89bef1b.en.html (13/1/2025).

also *Isabel Schnabel* suggests.[118] In light of the Governing Council's commitment with regard to the ECB's secondary objective on the one hand and the potential for structural LTROs on the other hand, Green TLTROs could serve as a powerful tool to boost the ECB's contribution to support the green transition.[119] The argumentation in favour of Green TLTROs could be similar to that justifying tilting measures: Market failures to adequately price the risk of climate change are still impeding sufficient private sector investments in green economic activities. By offering more favourable funding to banks that, in turn, offer credit for projects aligned with the EU's Green Taxonomy, the ECB could incentivize green lending and correct existing misallocations of capital, which often favour high-carbon activities (the so-called carbon bias, as discussed above).[120]

In addition, Green TLTROs could reduce climate-related financial risks in the banking sector that threaten long-term financial stability and thereby serve its contributory task in the field of financial stability (Art. 127 para. 5 TFEU). By incentivizing green investments, banks would be less exposed to high-emission sectors, which are themselves confronted with climate and transition risks. Despite efforts to adequately price these risks, they are not yet fully internalised by market participants, so that Green TLTROs would contribute to safeguarding the banking system by promoting environmentally sound investments.[121]

Again, the ECB would need to justify such selective design features, as Green TLTROs directly and indirectly favour certain banks and certain real economy market participants interfering with the principle of market neutrality and the existing allocation of capital via bank lending across industries.[122] In addition, each bank has a different capacity for green lending so that certain financial institutions with a higher proportion of lending activities in sectors like renewable energy would benefit disproportionately compared to banks which – for various reasons – mainly operate with less climate-friendly sectors and potentially cannot change their business concept in the short- and medium-term.

In any case, there is not yet a fully comprehensive system in place to define what constitutes a *green* investment across all sectors which the ECB could adhere to as

118 *ECB*, Monetary policy tightening and the green transition: Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the International Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230110~21c89bef1b.en.html (13/1/2025): "Green targeted lending operations, for example, could be an instrument worth considering in the future when policy needs to become expansionary again, provided the underlying data gaps are resolved".

119 See also *Wutscher*, in: Busch/Ferrarini/Grünewald (eds.), p. 451; *Colesanti Senni/Pagliari/van 't Klooster*, p. 14 and *Dafermos*, p. 12 with further references.

120 *van 't Klooster/van Tilburg*, p. 11; in greater economic depth see the propositions in *Böser/Colesanti Senni*, pp. 2, 18 et seq.; *Batsaikhan/Jourdan*, p. 15.

121 *van 't Klooster/van Tilburg*, p. 12; *Colesanti Senni/Pagliari/van 't Klooster*, p. 14 with further references; in greater economic depth see the propositions in *Böser/Colesanti Senni*, pp. 21 et seq.

122 See also *Wutscher*, in: Busch/Ferrarini/Grünewald (eds.), p. 452; *van 't Klooster/van Tilburg*, p. 19.

a benchmark for Green TLTROs.[123] Without such a coherent system aligned with existing sustainable finance regulation frameworks, there is a risk of inconsistent implementation and a lack of standardization in assessing which loans are truly in line with environmental objectives – a problem at large discussed within the current ESG regulation.[124]

Even more controversy than Green TLTROs might raise another idea *Isabel Schnabel* invoked as part of the ECB's endeavour to support the green transition: Greening the public sector bond holdings.[125]

Since the ECB's public sector bond holdings account for about half of the Eurosystem's balance sheet, expanding the tilting measures to also include these asset purchases would certainly prove to be a very efficient tool to support environmentally friendly economic activities.[126] In addition, the ECB would treat private and public market participants equally when it comes to incentivizing the financial markets actors to support the green transition.

However, as *Isabel Schnabel* points out, such Greening of the public sector purchases raises many questions: How is an allocation according to the climate related benchmarks compatible with the capital key which presents the decisive allocation mechanism for public sector purchases so far? Furthermore, how should the climate score, as used within corporate sector bond holdings, be tailored to Member States as market participants?[127]

In addition, one might again raise the question, whether it is for the ECB to use monetary policy measures to foster Member States' commitment to the Paris Agreement. A divergence from the capital key as yardstick for the allocation of asset purchases has to be justified in line with the monetary policy framework and monetary policy objectives, first and foremost price stability. Public sector purchases are

123 Also *Wutscher*, in: Busch/Ferrarini/Grünewald (eds.), p. 452 refers to the "uncertainties relating to the modelling of climate risks in general and the shortcomings of existing valuation models in particular" and points out that any unjustified discrimination can be raised by affected parties under the CFR.

124 *van 't Klooster/van Tilburg*, p. 12; see also *Colesanti Senni/Pagliari/van 't Klooster*, p. 26.

125 *ECB*, Monetary policy tightening and the green transition: Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the International Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230110~21c89bef1b.en.html (13/1/2025).

126 A less controversial option than reshuffling the sovereign bond portfolio could be to target green bonds of supranational institutions and agencies, which also form part of public sector purchase programmes. They already account for a substantial amount of green bonds, and their allocation is not tied to any capital key, see *ECB*, Monetary policy tightening and the green transition: Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the International Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230110~21c89bef1b.en.html (13/1/2025).

127 *ECB*, Monetary policy tightening and the green transition: Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at the International Symposium on Central Bank Independence, Sveriges Riksbank, Stockholm, available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230110~21c89bef1b.en.html (13/1/2025).

crucial for ensuring monetary policy transmission and have been considered and used in the past as selective monetary policy instruments when monetary policy transmission was distorted. The allocation of such sovereign bond purchases was conceptualized to be tailored to the perceived need to target unwarranted rises in sovereign bond yields resulting into distortions of the transmission channels. Against that background and depending on the specific macroeconomic situation, a conflict of objectives might arise between allocating bond purchases in order to correct sovereign bond yield spreads (as perceived unwarranted) on the one hand and the climate performance of the respective Member States on the other hand.

These questions are only exemplary for the operational and legal difficulties which arise if the ECB continues its path of embarking on such a form of targeted asset purchases and TLTROs in pursuit of secondary objectives. From a political perspective, it will be interesting to see if Member States are willing to be assessed by the ECB on their climate performance. It would also bring about a change in the political dynamics between the ECB and the Eurozone Member States. The financial markets audience will hear with interest whether this music of the future will be harmonic.

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Using minimum reserves and taxes on banks to tame the redistributive effect of ECB's interest rate hikes: a legal assessment

Thibault Martinelli*

Contents

Abstract

To fight off the inflationary wave that followed the Covid pandemic, the European Central Bank (ECB) has gradually increased the interests earned by banks on their excess liquidity. These interest rate hikes have resulted in temporary but consequential financial transfers from the public to the private sector. While commercial banks have, for a time, enjoyed high returns on their excess liquidity, central banks within the Eurosystem have made unprecedented losses that Member States' budgets must ultimately bear. This episode raises a question of institutional choice. Should the ECB, as some economists have argued, proactively mitigate these financial transfers by increasing the ratio of the unremunerated minimum reserves that commercial banks must maintain? Or should Member States—or possibly the EU institutions—intervene ex post and correct those transfers through taxation or regulatory interventions? To tackle these questions, this article investigates the extent to which the ECB's mandate and the principles governing the conduct of monetary policy both constrain and enable interventions by the ECB or the Member States to prevent or correct the redistributive effect of interest rate hikes.

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A. Introduction

In the aftermath of the Global Financial Crisis, the European Central Bank (ECB) increasingly relied on non-standard measures to conduct its monetary policy. With the post-pandemic inflationary shock that erupted in 2022, interest rates made a comeback as the central instrument of monetary policy. To absorb excess liquidity and tighten the money supply, between July 2022 and September 2023, the ECB Governing Council gradually increased its interest rates up to four percentage points.[1] This shift in monetary policy has come with a temporary side-effect: sizable transfers from the public to the private sector. Commercial banks have enjoyed high returns on their excess liquidity, increasing their profitability. At the same time, the Eurosystem's central banks have made record losses that ultimately fall on the Member States, as the Eurosystem's primary shareholders. While this side-effect is transient, it is very consequential. According to some estimates, they reached around EUR 140 billion in 2023, approximating the total yearly spending of the EU.[2]

In September 2023, to mitigate this side-effect marginally, the ECB stopped remunerating the minimum reserves that commercial banks must keep on accounts with the Eurosystem's central banks. *De Grauwe* and *Ji* have argued that the ECB should have gone further by increasing the ratio of unremunerated minimum reserves.[3] Between Autumn 2023 and the first half of 2024, there was a window of opportunity for such a move, which the ECB did not use. Member States, for their part, adopted or are considering adopting various measures to tax or limit commercial banks' windfall. This article investigates the extent to which the ECB's mandate and the principles governing its conduct enable and constrain these interventions by the ECB or the Member States to prevent or correct the redistributive effect generated by interest rate hikes. Section B highlights the origins of this redistributive effect. Section C discusses and assesses *De Grauwe* and *Ji*'s proposal to use the minimum reserve requirement more actively. This article argues that their proposal would have entailed a significant deviation from the principle of an open market economy, which is difficult to justify under the ECB's mandate. It would also have required making difficult trade-offs that would have carried significant reputational risks for the ECB at a time when its ability to tame inflation was being tested in

1 In July 2022, the ECB Governing Council increased the interest rate from the Deposit Facility from -0,5 to 0%. Over the following year, the rate was gradually increased, reaching 4% in September 2023. For the last decision of the ECB Governing Council that increased the interest rate, see *ECB*, Press Release – Monetary Policy Decisions – 14 September 2023, available at: https://www.ecb.europa.eu/press/pr/date/2023/html/ecb.mp230914~aab39f8c21.en.html (9/3/2025).

2 *De Grauwe/Ji*, Journal of International Money and Finance 2024/143, pp. 2 et seq.

3 *Ibid.*

an unprecedented manner. Perhaps, more crucially, raising the minimum reserve ratio beyond 2% would have unlawfully interfered with EU-wide prudential rules. Section D considers the tax and regulatory measures that Member States adopted or are considering adopting to correct the financial transfers produced by ECB's monetary policy.

B. The redistributive effect of ECB interest rate hikes: context

To implement its monetary policy, the ECB relies on an operational framework composed of two types of tools: (1) market-based instruments, which include the two Eurosystem standing facilities and open market operations (Art. 18 Statute of the European System of Central Banks and of the European Central Bank [Statute of the ESCB/ECB]) and (2) a regulatory instrument, the minimum reserve requirement (Art. 19 Statute of the ESCB/ECB).

The open-market and credit operations are the ECB's central tools of monetary policy implementation. They steer short-term money market rates in line with the ECB's monetary stance, guiding price developments in the broader economy. These market operations are conducted in a decentralized fashion by National Central Banks (NCBs) of the Eurosystem, based on guidelines issued by the ECB.[4] The minimum reserve requirement, for its part, is an instrument of liquidity control used by the ECB to complement open-market and credit operations.[5]

In accordance with Art. 19 of the Statute of the ESCB/ECB, the Council, by regulation, grants the ECB the power to require commercial banks to hold a minimum reserve of liquidity on account with Eurosystem central banks. The Council Regulation defines the scope of the ECB's regulatory power, including the basis for minimum reserves, their maximum permissible ratio, and the appropriate sanctions for non-compliance.[6] Within the room of maneuver granted by the Council, the ECB, by regulations, primarily determines two key features of the minimum reserve requirement: the level of remuneration and the reserve ratio, which is defined as a percentage of short-term deposits and securities on commercial banks' balance sheets.[7]

Before the Global Financial Crisis, in a financial system characterized by scarce liquidity, the ECB's operational framework followed a corridor system based on three policy rates. The two policy rates of the Eurosystem standing facilities – the Marginal Lending Facility and the Deposit Facility – defined the upper and

4 Guidelines (EU) No. 2015/510 of the European Central Bank, OJ L 91 of 2/4/2015, p. 3.
5 Art. 19 Statute of the ESCB/ECB; Regulation (EU) No. 2021/378 on the application of minimum reserve requirements, OJ L 73 of 3/3/2021, p. 1.
6 Council Regulation (EC) No. 2531/98 concerning the application of minimum reserves by the European Central Bank, OJ L 318 of 27/11/1998, p. 1.
7 Art. 4, Regulation (EC) No. 2818/98 of the European Central Bank on the application of minimum reserves, OJ L 356 of 30/12/98, p. 1. See then, subsequently, Art. 4, Regulation (EC) No. 1745/2003 of the European Central Bank on the application of minimum reserves OJ L 250 of 2/10/2003, p. 10.

lower bounds within which short-term money market rates fluctuated. The Deposit Facility's function is to absorb commercial banks' excess cash. Banks can access this facility at their discretion to deposit overnight their end-of-day surplus liquidity.[8] These deposits are remunerated at the deposit facility rate, which set the floor for the corridor within which money market rates fluctuated. Conversely, the Marginal Lending Facility's function is to lend cash to banks in liquidity shortage at a higher penalty rate, the marginal lending facility rate, which acted as the ceiling of the corridor system.[9] The ECB then used main refinancing operations to steer money market rates within the corridor set by the two standing facilities. Through those refinancing operations, the ECB periodically supplied liquidity to banks against collaterals based on a predefined estimate of their cash shortage. The interest rate on the main refinancing operations was set between the floor and the ceiling rates of the standing facilities and signaled the ECB's monetary policy stance.

Within this operational framework, the minimum reserve requirement fulfilled two supporting functions that enhanced the effectiveness of market-based instruments.[10] First, minimum reserves must be kept on average over a monthly maintenance period. Commercial banks can temporarily withdraw or add funds to their accounts held with NCBs in reaction to short-term changes in the money market. This helps smooth out the money market rate around the rate of the main refinancing operations. Second, minimum reserves created a structural liquidity shortage, enabling the ECB to more accurately predict how much liquidity to supply to commercial banks via its main refinancing operations. This allowed the ECB to retain greater control over money market rates through its periodic refinancing operations. In that framework, the ECB had set the minimum reserve ratio at 2% of commercial banks' short-term liabilities. To align it with money market conditions, the remuneration of banks' minimum reserves was set at the same level as its main refinancing operations.[11]

The ECB responded to the Global Financial Crisis and the resulting collapse of the money market activity by easing commercial banks' access to liquidity. Interest rates were lowered, and from June 2014 onwards, the deposit facility rate was negative, meaning that commercial banks had to pay the Eurosystem to deposit their excess liquidity. In addition, the Eurosystem turned to quantitative easing (QE) to ease financial conditions further and counter disinflation risks. With QE, the Eurosystem expanded its balance sheet by buying large amount of financial assets from market participants, including commercial banks, which became the holders of substantial excess liquidity. By 2014, as liquidity became increasingly abundant, the

8 Guidelines (EU) No. 2015/510 of the European Central Bank on the implementation of the Eurosystem monetary policy framework, OJ L 91 of 2/4/2015, p. 3.

9 *Ibid.*

10 *ECB*, The Single Monetary Policy in Stage Three – General Documentation on ESCB monetary policy instruments and procedures, available at: https://www.ecb.europa.eu/pub/pdf/other/gendoc98en.pdf?ce78c77a8dfd9f57408f0e3f628edefb (18/2/2025), p. 52.

11 Regulation (EC) No. 2818/98 of the European Central Bank on the application of minimum reserves, OJ L 356 of 30/12/98, p. 1.

money market rate gradually stabilized around the deposit facility rate, effectively transforming the ECB's corridor system into a de facto floor system.

Once inflation surged in 2022, the ECB raised interest rates, primarily using the deposit facility rate to signal its monetary policy stance. Between July 2020 and September 2023, the deposit facility rate was steadily increased from 0% to 4%. This move has resulted in significant financial transfers from the public to the private sector. Commercial banks have benefited from high remuneration on their abundant excess liquidity. As their net interest income has surged, banks have grown in profitability, likely leading to higher payouts to banks' equity shareholders.[12]

Meanwhile, the Eurosystem's central banks are facing significant losses. Through QE, the Eurosystem had bought low-yield financial assets while financing these purchases through short-term deposits of commercial banks' excess liquidity, which were then remunerated at negative rates. This strategy initially generated profits but carried substantial interest rate risks. In 2022, these risks started materializing. With interest rates rising, the Eurosystem had to pay commercial banks high interest for their excess liquidity while earning much less from the low-yield assets on their balance sheet. The resulting losses have been considerable. In 2024, the German and Belgian NCBs reported a loss of EUR 19.8 billion and 3.7 billion respectively.[13] The ECB itself reported a loss of EUR 7.9 billion.[14] Since Member States are the primary shareholders of the Eurosystem's central banks, they will have to bear the fiscal costs of these losses, mainly through reduced profit distributions, and if necessary, through a recapitalization, should an NCB fall into deep negative equity.

However, the redistributive effect of the ECB interest rate hikes is transitory. The surge in commercial banks' profitability is not lasting.[15] Banks recorded higher profits primarily because they were slow to raise the interest rates paid to their customers on their deposits while benefiting from higher interest earnings on the loans they supply. At the same time, the Eurosystem will return to profitability as quantitative tightening gradually reduces the size of its balance sheet. As the inflationary wave is fading, the ECB Governing Council has begun lowering interest rates. The ongoing decline of the deposit facility rate reduces the remunerations earned by banks on their excess liquidity.

12 *Couaillier* et al., ECB Economic Bulletin 2023/6, p. 88 (noting that the surge in net interest income earned by banks is likely to have contributed to higher payout to banks' equity shareholders).

13 *Bundesbank*, Annual accounts for 2024, available at: https://www.bundesbank.de/en/press/speeches/annual-accounts-for-2024-951884 (9/3/2025); *Banque national de Belgique*, Communiqué au marché de la Banque nationale de Belgique, available at: https://www.nbb.be/doc/ts/enterprise/press/2025/cp20250116_fr.pdf (9/3/2025).

14 *ECB*, Financial statements of the ECB for 2024, available at: https://www.ecb.europa.eu/press/pr/date/2025/html/ecb.pr250220~eca25e4e21.en.html (9/3/2025).

15 *Chen* et al., IMF Working Paper 2024/142, pp. 1 et seq.

C. Minimum reserves requirement as cost-saving device? Potential and constraints

In the Eurosystem's current floor system, the role of minimum reserves as money market stabilizer has diminished, as it is now the deposit facility rate that primarily defines the ECB's monetary stance.[16] In reaction to this evolution, the ECB has made only modest adjustments to the features of minimum reserves. Amid the Global Financial Crisis, the ECB decreased the reserve ratio from 2% to 1% to enhance liquidity provision to commercial banks, maintaining this level ever since.[17] In 2022, as the excess liquidity caused the money market to align more closely with the deposit facility rate, the ECB adjusted the remuneration of the minimum reserves, lowering it from the main refinancing rate to the deposit facility rate to align it with market conditions.[18]

In July 2023, the ECB Governing Council took the unprecedented step of stopping remunerating the minimum reserves.[19] This decision was deemed "a proportional response to some of the side effects that were arising from the rapid monetary policy tightening in an environment of high excess liquidity".[20] According to estimates, this measure saved the Eurosystem approximately EUR 6,6 billion.

De Grauwe and *Ji* contend that the ECB should have turned the minimum reserve requirement into an active monetary policy tool to counteract the redistributive effect of interest rate hikes. They pleaded for an expansion of the minimum reserve ratio to 10% – the limit set out in the Council Regulation – which, according to their estimates, would have reduced transfers to banks by roughly EUR 60 billion.[21] In their view, the ECB could have extended the cost-saving function of the minimum reserve requirement without altering the core feature of its operating procedure, as it could still rely on the deposit facility rate to signal its monetary policy stance. This proposal sparked speculation as to whether the ECB would follow this

16 On this point, see *Ceccacci* et al., Banca d'Italia-Mercati, infrastrutture, sistemi di pagamento 2024/46, pp. 7 et seq.

17 Regulation (EU) No. 1358/2011 of the European Central Bank, OJ L 338 of 21/12/2011, p. 51.

18 Regulation (EU) No. 2022/2419 of the European Central Bank, OJ L 317 of 12/12/2022, p.7.

19 Regulation (EU) No. 2023/1679 of the European Central Bank, OJ L 216 of 1/9/2023, p. 96.

20 *ECB*, Meeting of 26-27 July 2023: Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 26-27 July 2023, available at: https://www.ecb.europa.eu/press/accounts/2023/html/ecb.mg230831~b04764f45f.en.html (5/1/2025).

21 *De Grauwe/Ji,* Journal of International Money and Finance 2024/143, pp. 2 et seq.; *De Grauwe/Ji*, The role of central bank reserves in monetary policy: Bundesbank Invited Speakers Series, available at: https://www.bundesbank.de/en/service/dates/the-role-of-central-bank-reserves-in-monetary-policy-913968 (5/1/2025); *De Grauwe/Ji*, Central banks can fight inflation without massive handouts to banks, available at: https://www.omfif.org/2023/09/central-banks-can-fight-inflation-without-massive-handouts-to-banks/ (9/3/2025).

approach, leading to concerns in the banking community.[22] While some members of the ECB Governing Council expressed openness to the idea, others voiced their opposition.[23] Meanwhile, discussions over *De Grauwe* and *Ji*'s proposal extended beyond the ECB, fueling discussions in the Monetary Dialogue, parliamentary questions by MEPs, and debate with NCB governors within national parliaments.[24]

Legally, the ECB enjoys broad discretion when conducting its policy. But, as discussed below, the ECB may only marginally account for the redistributive effect of its policy. Legal constraints remain as to what the ECB can do. The losses incurred by the Eurosystem and the interest income earned by commercial banks are the result of a market-based monetary policy. Increasing unremunerated minimum reserves, as suggested by de *De Grauwe* and *Ji*, by contrast, entails a significant deviation from the principle of an open market economy – one that is difficult to justify under the ECB's mandate.

I. Cost-efficiency in ECB monetary policy

At the press conference following the ECB's decision to stop remunerating minimum reserves, President *Christine Lagarde* justified the move by stating that the Governing Council has a public duty to make its monetary policy as efficient as possible.[25] This statement is hardly surprising; cost-efficiency has been a guiding principle of monetary policy design since the start of EMU.

Ahead of Stage Three of EMU, the European Monetary Institute (EMI) – the ECB predecessor – identified cost-efficiency as one of the key principles deriving from the provisions of the Treaties and the Statute of the ESCB/ECB, which should guide the design of the ECB's operational framework.[26] According to the EMI, "the

22 *Kosonen*, Increase in minimum reserves would hit bank liquidity at crucial moment, available at: https://www.omfif.org/2023/09/central-banks-can-fight-inflation-without-massive-handouts-to-banks/ (5/1/2025).

23 See *Canepa/Koranyi*, ECB to tackle excess liquidity in next stage of inflation fight -sources, available at: https://www.reuters.com/markets/europe/ecb-tackle-excess-liquidity-next-stage-inflation-fight-sources-2023-09-18/ (5/1/2025); *Koranyi*, No strong case for jacking up bank charges: ECB's Wunsch, available at: https://www.reuters.com/markets/rates-bonds/no-strong-case-jacking-up-bank-charges-ecbs-wunsch-2023-09-21/ (5/1/2025).

24 E.g., *Committee on Economic and Monetary Affairs*, Monetary Dialogue with Christine Lagarde, President of the European Central Bank (pursuant to Art. 284(3) TFEU), available at: https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230605_annex_2~5c31f6fb6a.en.pdf; see also, for example, the discussions in the Belgian Parliament, Rapport annuel 2022 de la Banque Nationale de Belgique (BNB), available at: https://www.lachambre.be/FLWB/PDF/55/3410/55K3410001.pdf (18/2/2025), p. 23.

25 *ECB*, Monetary Policy Statement, Frankfurt am Main, 27 July 2023, available at: https://www.bde.es/f/webbe/GAP/Secciones/SalaPrensa/ComunicadosBCE/DecisionesPoliticaMonetaria/23/2023-07-27-MonetaryPolicyStatement.en.pdf (18/2/2025).

26 *European Monetary Institute*, Progress towards Convergence, available at: https://www.ecb.europa.eu/pub/pdf/othemi/emiprogresstowardsconvergence199511en.pdf (18/2/2025), pp. 72–73; *ECB*, "Annual Report 1995, April 1996", available at: https://www.ecb.europa.eu/pub/pdf/annrep/ar1996en.pdf (18/2/2025), p. 52.

decision on the operational framework has to take into account budgetary considerations, of both the ESCB and its counterparties".[27] The operational framework adopted in March 2024 reaffirmed cost efficiency as a guiding criterion and clarified its legal foundations: the principle of proportionality and the principle of central bank independence.

Under this reading, the principle of proportionality (Art. 5 para. 2 TFEU) requires the ECB, when choosing between monetary policy options equally effective to achieve price stability, to select the one that minimizes financial burdens for itself and for its counterparties. Art. 130 TFEU, which protects the financial independence of NCBs and the ECB, also provides normative guidance for the design of monetary policy. The financial independence of a central bank may be defined as the probability that it will have to request additional capital injection from the state to be able to carry out its monetary policy functions. If the probability is remote, the central bank does not depend on the government's consent for additional funding and may carry out its monetary missions autonomously.[28] Monetary policy should be cost-effective to minimize losses, thereby sustaining the central bank's financial independence by reducing the risk of political pressures.

II. The ECB's price stability mandate as a constraint

Cost-effectiveness, however, is not a central consideration in the design of monetary policy – and rightly so. As the accounts of ECB Governing Council meetings reveal and as *Lagarde* has acknowledged, the side effects of the ECB's monetary policy on banks' profits and Eurosystem's losses are secondary to the fight against inflation.[29] A central bank is not a for-profit undertaking, but a public institution with the primary objective to maintain price stability (Art. 127 para. 1 TFEU). The ECB has a duty to make its policy as cost-effective as possible, but only within the parameters of its mandate.

As the Court of Justice of the EU recognized in *Gauweiler* and *Weiss*, given its mission's technical and complex nature, the ECB enjoys a broad discretion in assessing the suitability and proportionality of its action, but remains bound to provide adequate reasons for its decisions.[30] In the 2022 inflationary wave context, justifying a significant increase in unremunerated reserves would have been challenging. For three reasons, this measure may undermine the ECB's ability to steer price developments. It may weaken the transmission of monetary policy (1), impede

27 *Ibid.*
28 See, e.g., *Nordström/Vredin*, Staff Memo 2022, p. 14; *Wessels/Broeders*, in: De Nederlandsche Bank (ed.), pp. 20 et seq.
29 See, e.g., *Christine Lagarde*, Monetary Dialogue – 5/6/2023, available at: https://multimedia.europarl.europa.eu/de/video/monetary-dialogue-with-christine-lagarde-president-of-the-european-central-bank-questions-answers-part-2_I242081 (9/3/2025).
30 ECJ Case C-62/14, *Gauweiler and others v. Deutscher Bundestag*, judgment of 16 June 2015, ECLI:EU:C:2015:400, paras. 68–69; ECJ, Case C-493/17, *Weiss and others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, paras. 30–32.

the effectiveness of future monetary policy (2) and affect the credibility of its action as a monetary authority (3).

First, banks serve as financial intermediaries in the transmission of ECB monetary policy. They act as a "pass-through", adjusting the interest rates on deposits and loans to the ECB policy rates. The effectiveness of this transmission mechanism is crucial for the ECB's ability to affect price developments. The Court held in *Gauweiler*, that safeguarding this mechanism is part of the ECB price stability mandate (Art. 127 para. 1 TFEU).[31] Yet, depending on how commercial banks react, increasing unremunerated minimum reserves may impede monetary policy transmission.

De Grauwe and *Ji* contend that during the peak inflation in 2022-2023, the high remuneration of excess liquidity set by the ECB incentivized banks to increase lending to firms and households, contradicting its monetary tightening efforts. In their view, raising unremunerated reserves would have curtailed this incentive and reinforced the contractionary effect of high policy rates.[32] But this assumption is debatable. To preserve profitability, banks might have responded by lowering the interest rates they offer on deposits – weakening the ECB's efforts to curb inflation by discouraging saving.[33] Alternatively, banks could have sought to evade the higher minimum reserve requirement, for example, by offering higher earning deposits through their English subsidiaries.[34] Such disintermediation would have weakened the monetary transmission mechanism, ultimately undermining the ECB's ability to curb inflation.

Second, according to some economists, increasing unremunerated reserves may pose risks to the effectiveness of the ECB's future monetary policy.[35] During the period of ECB balance sheet expansion, banks sold some of their assets to the Eurosystem in exchange for liquidity, under the assumption that they could always deposit this liquidity with the ECB's Deposit Facility and earn interests. Banks may perceive high unremunerated reserves as an unexpected policy shift that affects their risk calculations. If the ECB were to rely on QE again, banks would increase their liquidity buffers to factor in this risk when they sell their assets to the Eurosystem. This, in turn, could reduce the effectiveness of QE in easing financing conditions.

Third, another critical factor is the credibility of monetary policy. A central bank's credibility hinges on its ability to manage markets' inflationary expectations, which in turn influence actual inflation.[36] If the markets believe that a central bank cannot tame inflationary trends, prices will tend to rise in anticipation of future inflation, making the job of maintaining price stability harder. Credibility is primar-

31 ECJ, Case C-62/14, *Gauweiler and others v. Deutscher Bundestag*, judgment of 16 June 2015, ECLI:EU:C:2015:400, paras. 49–50.

32 *De Grauwe/Ji*, Journal of International Money and Finance 2024/143, pp. 12 et seq.

33 *McCauley/Pinter*, Unremunerated reserves in the Eurosystem, part 2: Tax incidence and deposit relocation risks, available at: https://cepr.org/voxeu/columns/unremunerated-reserves-eurosystem-part-2-tax-incidence-and-deposit-relocation-risks (5/1/2025).

34 *Ibid.*

35 *Ibid.*

36 *Mackiewicz-Lyziak*, Acta Oeconomica 2016/1, pp. 125 et seq.

ily built by a central bank through a track record of consistent and effective action to attain its inflation target.[37] In this regard, the 2022 inflationary shock, given its unexpected magnitude, represents a major test of public trust in the ECB's ability as an inflation-fighting institution – one that could have long-lasting effects on its credibility.[38]

At the onset of the inflationary surge, the ECB's credibility had already been somewhat undermined by its delayed response in raising policy rates. Like many other central banks, the ECB failed to consider the severity of the inflation to come.[39] This initial slow reaction made the ECB's subsequent action, as well as its consistency and its communication around it, even more critical to preserve markets' trust. The July 2023 decision to stop remunerating minimum reserves sparked debates within the ECB Governing Council, seemingly due to concerns about its impact on the ECB's credibility. This may help explain why the Governing Council refrained from increasing unremunerated reserves in the following months.

Increasing unremunerated reserves may have affected the ECB's credibility for three interrelated reasons. First, in March 2023, to enhance the predictability of its actions, the Governing Council decided to make public the three elements of its monetary reaction function – the factors guiding its monetary policy decisions to ensure a return to its target inflation rate.[40] These factors were the inflation outlook, the dynamics of underlying inflation and the strength of the monetary policy transmissions. Repeated adjustments to monetary policy driven by cost-efficiency concerns that are unrelated to these factors could signal inconsistency in the ECB's actions. This may suggest a growing preoccupation for the state of the Eurosystem's profits and losses, potentially distracting the ECB from its price stability mission. In other words, market participants might believe that the ECB uses its monetary policy operations to limit its losses rather than to combat inflation. Transparent and effective communication from the ECB on its policies may not entirely address these markets' concerns.

Second, markets' perception of the Eurosystem's financial independence may be affected. In principle, a cost-effective monetary policy strengthens a central bank's financial autonomy. But adjusting monetary policy to reduce losses – especially when some of those losses have already materialized – could suggest that the poor state of the Eurosystem's finances limit the ECB's room of maneuver. This could undermine the appearance of the ECB's independence in the eyes of market participants.

Finally, adjustments to the ECB monetary tools for cost-efficiency reasons may give the impression that the Euro area monetary system is entering an era of fiscal

37 *Blinder*, The American Economic Review 2000/90, pp. 1421 et seq.

38 On the inflation shock of 2021-22 as a test for the ECB's credibility and the public trust in the money it issues, see *Tuori*, Maastricht Journal of European and Comparative Law 2023/4, pp. 491 et seq.

39 *Ibid.*

40 *ECB*, Monetary policy decisions, Press Release, available at: https://www.ecb.europa.eu/press/pr/date/2023/html/ecb.mp230316~aad5249f30.en.html (18/2/2025).

dominance, a perception that ECB's representatives have sought to dispel in their communication.[41] Losses of the Eurosystem's central banks result in reduced profits distributions to Member States, which, in turn, strain their budget. Measures that mitigate the impact of monetary policy on national treasuries could reinforce the idea that fiscal concerns constrain Eurosystem's actions or that the budgetary deficits and debt levels of Member States partly drive the ECB's policy.

III. The principle of an open market economy as a constraint

In advocating for an increased use of minimum reserves, *De Grauwe* and *Ji* point to the historical practice of central banks.[42] In the 1970s and 1980s, many central banks in the Western world used minimum reserves requirements extensively to combat inflation, and few remunerated those reserves. However, by the late 1980s, the prevailing norm in central banking practice shifted. Transactional instruments became the primary tools for achieving price stability. Art. 127 para. 1 TFEU, which mandates the ECB to act in line with the principle of an open market economy, has partially entrenched this market-based approach in primary law. A return to greater reliance on regulatory instruments, in deviation from this provision, would require solid justifications from the ECB.

The Statute of the ESCB/ECB distinguishes between the remuneration of bank excess liquidity via the Deposit Facility, on one hand, and the requirement for commercial banks to hold minimum reserves. The Deposit Facility is part of the regular ECB's market-based instruments (Art. 18 Statute of the ESCB/ECB). Commercial banks may access at will to make overnight deposits, under terms they accept. The minimum reserve requirement, however, stands out among the ECB monetary policy instruments because it is regulatory in nature. Through this device, the ECB exerts coercive powers over commercial banks. While the Statute of the ESCB/ECB grants significant leeway to the ECB in using market-based instruments, its authority to impose minimum reserve is further constrained by secondary law.

The Treaty framers felt that more forceful interventions in the operation of the markets by regulations that may impose obligations on third parties require further

41 See, e.g., *ECB*, Is monetary policy dominated by fiscal policy? – Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at a conference organised by Stiftung Geld und Währung on 25 years of the euro – Perspectives for monetary and fiscal policy in an unstable world, at a panel on "Inflation and public budget. Is monetary policy dominated by fiscal policy?", available at: https://www.ecb.europa.eu/press/key/date/2024/html/ecb.sp240607~c6ae070dc0.en.html (5/1/2025).

42 *De Grauwe/Ji*, The extraordinary generosity of central banks towards banks: Some reflections on its origin, available at: https://cepr.org/voxeu/columns/extraordinary-generosity-central-banks-towards-banks-some-reflexions-its-origin (9/3/2025).

backing from an EU institution with more solid democratic credentials.[43] For that reason, unlike market-oriented instruments, the Statute of the ESCB/ECB provides that it is for the Council to grant to the ECB the authority to introduce minimum reserves and to condition the exercise of that authority by defining the basis for minimum reserves, its maximum permissible ratio, and the applicable sanctions for non-compliance.[44] The Council Regulation adopted for that purpose grants broad discretion to the ECB. But Art. 19 para. 1 of the Statute of the ESCB/ECB further limits this discretion by requiring the ECB to follow the principle of an open market economy when defining the function and the features of the minimum reserve requirement.

Imposing high unremunerated minimum reserves on banks affects the operation of market forces, although the economic characterization of this impact remains debated. Most view unremunerated reserves as a hidden tax on banks' deposits.[45] *De Grauwe* and *Ji*, however, reject this traditional view. They argue that the regular operation of the market involves a trade-off between liquidity and profitability. Liquid assets tend to generate lower returns, while more profitable assets are generally less liquid.[46] From this perspective, a high remuneration of excess liquidity resulting from the ECB interest rate hikes would defy market logic. Regardless, imposing high unremunerated reserves generates opportunity costs for commercial banks, as it prevents them from allocating liquidity to more productive uses. In this way, it necessarily interferes with normal market dynamics.

The Court of Justice of the EU has never clarified the legal content of the principle of an open market economy. What is clear, however, is that this principle is not absolute and may be subject to justified deviations.[47] Despite the absence of judicial guidance, some core normative implications can be drawn from that principle.[48] First, it establishes a hierarchy among the ECB's monetary policy instruments: the ECB should prioritize a market-based approach before resorting to a regulatory tool like the minimum reserve requirement. The preparatory discussions that led to Stage Three of EMU make clear that minimum reserves should be a subsidiary

43 *Committee of Governors of the Central Banks of the Member States of the European Economic Community*, Draft Statute of the European System of Central Banks and of the European Central Bank, available at: https://www.ecb.europa.eu/ecb/access_to_documents/document/cog_pubaccess/shared/data/ecb.dr.parcg2019_0109draftstatutecommentary19910412.en.pdf (5/1/2025), p. 11 ("This instrument does not rely on the voluntary response of willing counterparties, but imposes an obligation on market participants. The conditions and terms under which minimum reserves can be applied will have to be established by the Council").

44 Council Regulation (EC) No. 2531/98 concerning the application of minimum reserves by the European Central Bank, OJ L 318 of 27/11/1998, p. 1.

45 See, e.g., *Hardy,* IMF Working Paper 1997/35, pp. 41–93.

46 *De Grauwe/Ji*, The extraordinary generosity of central banks towards banks: Some reflections on its origin, available at: https://cepr.org/voxeu/columns/extraordinary-generosity-central-banks-towards-banks-some-reflexions-its-origin (9/3/2025).

47 See, e.g., *Dietz*, Common Mkt. L. Rev. 2022/2, p. 405; *Weismann*, Eur. L. Rev. 2024/5, p. 555.

48 *Solana/Goldoni*, European Law Open 2024/1, p. 31.

instrument. The ECB should first consider "the extent to which these functions [of minimum reserves] can be fulfilled by alternative instruments".[49] In its practice, the ECB has adhered to this view, relying primarily on standing facilities and open market operations to steer the money market rate while using the minimum reserve requirement only as an accompanying measure. Second, the principle of an open market economy should be accounted for in the level of minimum reserves and their remuneration. Unless convincingly justified, minimum reserves should be remunerated at an interest rate that reflects market conditions.[50]

IV. Minimum reserves, prudential rules, and the ECB "financial stability" mandate

The minimum reserve requirement regulates the liquidity that commercial banks must keep. As such, it is partly a hybrid tool. Besides the monetary policy function it officially fulfills, it may also have an effect equivalent to that of prudential rules. Before 2011, there was no extensive liquidity regulation at the EU level. At that time, minimum reserves have, unofficially at least, filled part of that regulatory void.[51] But the rise of extensive prudential regulation has since then rendered that role obsolete.[52]

De Grauwe and *Ji* plead for reawakening the macroprudential function of minimum reserves. In their view, higher minimum reserves would address long-term financial stability concerns, in addition to saving costs.[53] There are flaws, they argue, in the rules on banks' liquidity agreed by the Union co-legislators as part of the EU Single Rulebook. The liquidity requirements that commercial banks must fulfil rely on a definition of liquid assets that *De Grauwe* and *Ji* view as too loose.[54] In crisis times, the value of assets classified as "highly liquid" may plummet, leaving troubled commercial banks unable to meet liquidity demands. Minimum reserves, for their part, do not count towards banks' liquidity requirements. They do not

49 *European Monetary Institute*, Annual Report 1995, April 1996, available at: https://www.ecb.europa.eu/pub/pdf/annrep/ar1996en.pdf (18/2/2025), p. 54.
50 *Smits*, p. 275; *Reinesch* et al., p. 281.
51 This seems to be the thinking of the ECB Governing Council. See *ECB*, Account of the monetary policy meeting of the Governing Council, Frankfurt am Main, 26-27 July 2023, available at: https://www.ecb.europa.eu/press/accounts/2023/html/ecb.mg230831~b04764f45f.en.html (10/3/2025) ("[...] it was mentioned that the very rationale for minimum reserve requirements was now less clear, in view of the prudential liquidity regulations for banks that had been introduced in response to the global financial crisis").
52 On the macroprudential function historically fulfilled by minimum reserves requirements, see *Gray*, IMF Working Paper 2011/36, pp. 1 et seq.
53 *De Grauwe/Ji*, The extraordinary generosity of central banks towards banks: Some reflections on its origin, available at: https://cepr.org/voxeu/columns/extraordinary-generosity-central-banks-towards-banks-some-reflexions-its-origin (5/1/2025).
54 For the definition of liquid assets under EU prudential rules, see Art. 416, Regulation (EU) No. 575/2013, OJ L 176 of 27/6/2013, p. 1.

qualify as "highly liquid assets" because banks cannot withdraw them at will.[55] For *De Grauwe* and *Ji*, the ECB should increase the ratio of minimum reserves to tighten the liquidity control to which banks are subject beyond current regulatory requirements. If a financial crisis hits, the ECB could lower minimum reserves to free up additional liquidity. In other words, minimum reserves would be used to compensate for the weaknesses of the EU prudential rules and increase the financial system's resilience.

However, using a monetary tool for macroprudential reasons in this way would run afoul of the founding Treaties. Primary law restricts the types of financial stability-related measures the ECB may adopt as part of its monetary policy.[56] Pursuant to Art. 127 para. 5 TFEU, the ECB shall "contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system". The primary responsibility for financial stability thus lies with national and European regulators and supervisors. The merely contributory role assigned by the Treaties to the ECB does not allow it to turn itself into a complementary financial regulator. The minimum reserve requirement remains a monetary policy instrument, not a prudential tool. The primary price stability mandate of the ECB laid down in Art. 127 para. 1 TFEU also allows the adoption of measures related to financial stability, if they aim at safeguarding the proper functioning of the monetary policy transmission mechanism.[57] But this provision may not be used to expand the ECB's powers in relation to financial stability beyond the scope of the contributory competence conferred by Art. 127 para. 5 TFEU.[58] In any case, there would also be serious democratic objections to an independent monetary authority, like the ECB, using its monetary toolbox to partly supplant or correct prudential rules agreed by the EU co-legislators.

More generally, the advent of unified EU prudential rules and the establishment of the Banking Union have de facto limited the ECB's freedom to increase the ratio of minimum reserves. In theory, as explained above, the Council Regulation adopted in 1998 set the upper limit of the minimum reserve ratio at 10%.[59] The co-legislators devised the EU-wide liquidity requirements at the time when the ECB had set the minimum reserve ratio around the 1% or 2% mark. Any increase beyond this 2% threshold may arguably interfere with – or at least affect – the operation of pru-

55 See Art. 10 para. 1 lit. b sublit. iii of the Commission Delegated Regulation (EU) 2015/61, OJ L 11 of 17.1.2015, p. 1; *ECB*, Treatment of central bank reserves with regard to the Liquidity Coverage Requirement (LCR): Common understanding between the ECB and National Authorities, available at: https://www.bankingsupervision.europa.eu/press/letterstobanks/shared/pdf/2015/150930communication_LCR_treatment_of_central_bank_reserves_for_LSIs.en.pdf (12/2/2025).

56 *ECB*, Financial stability and the ECB: Speech by Yves Mersch, Member of the Executive Board of the ECB, ESCB Legal Conference, Frankfurt, 6 September 2018, available at: https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180906.en.html (12/2/2025).

57 *ECB*, The ECB's monetary policy strategy statement, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (12/2/2025).

58 *Ioannidis* et al., ECB Occasional Paper Series 2021/276, pp. 1 et seq.

59 Art. 4 para. 1, Council Regulation (EC) No. 2531/98, OJ L 318 of 27.11.1998, p. 1.

dential rules. The principle of institutional balance (Art. 13 para. 2 TEU) requires the ECB to act "with due regard for" the policies devised by other EU institutions.[60] In light of this, the ECB should calibrate its monetary policy to minimize interference with prudential regulation and supervision. It should thus consider other viable ways of achieving price stability before considering an increase of minimum reserves beyond the 2% threshold.

In addition, the Baking Union's legal framework has erected a so-called "Chinese wall" between the ECB's tasks of banking supervision and its mission as a monetary authority. Under the SSM Regulation, the ECB must conduct its supervisory function "without prejudice to and separately from its tasks relating to monetary policy".[61] Given the interplay between financial stability and price stability, one may argue that the separation between supervisory and monetary functions does not have to be read strictly.[62] Whilst this may be true, monetary policy decisions that actively meddle with prudential regulation and supervision would, in any case, be the source of conflicts of interests that the decoupling of monetary policy and financial supervision is, by design, meant to prevent.

D. A corrective role for Member States or EU Institutions?

Member States have adopted or consider adopting various ex post interventions to limit commercial banks' windfall. These corrective measures have been piecemeal and do not follow a concerted pan-European strategy. This may be due partly to the fact that the redistributive effect of the ECB's interest rate hikes has been unequal across the Euro area. On the hand, the fiscal costs of ECB's monetary policy are unevenly distributed across the Euro area. Overall, Northern European NCBs shoulder more sizeable losses than their Southern counterparts. The reason is that some of the bond purchase programmes launched by the ECB were not organized under a loss-sharing scheme: NCBs primarily bought sovereign bonds issued by their own government. In comparison with Southern European NCBs, the bond portfolios of Northern European NCBs have much lower yields, reflecting the higher creditworthiness of their government.[63] On the other hand, despite the advent of the euro and the establishment of the Banking Union, banking markets remain organized along national borders.[64] As a result, the rise in banks' profitability has varied from Member State to Member State, depending on the prevailing practices in the local banking market and its competitiveness. Generally, banks would enjoy higher

60 See, e.g., ECJ, Case C-73/14, *Council v. Commission*, judgment of 6 October 2015, ECLI:EU:C:2015:663, para. 61; Case C-425/13, *Commission v. Council*, judgment of 16 July 2015, ECLI:EU:C:2015:483, para. 69.

61 Art. 25 para. 2, Council Regulation (EU) No. 1024/2013, OJ L 287 of 29.10.2013, p. 63.

62 *Goldmann*, European Constitutional Law Review 2018/2, pp. 283 et seq.

63 For statistics on interest rates on government bonds issued by Member States, see the *ECB*, Interest rates' statistics for convergence purposes, available at: https://data.ecb.europa.eu/data/data-categories#interest-rate-statistics-convergence-purposes (9/3/2025).

64 See, e.g., *Enria*, VIEWS 2023, pp. 56 et seq.

profitability in national markets where loans supplied to households and companies have variable interest rates. In many jurisdictions, banking markets in the retail sector are oligopolistic, leaving banks under little competitive pressure to swiftly adjust the interests earned by depositors to ECB's interest rate hikes.

In that context, some Member States are considering regulatory measures to improve the competitiveness of the retail banking sector, such as easing the formalities for transferring deposits from one bank to another.[65] The EMU legal framework constrains, to an extent, their freedom of action in that respect. The regulation of deposit and savings accounts should not interfere with the transmission of the ECB monetary policy. Belgian lawmakers, for example, envisaged tying interest rates on deposits to the ECB's deposit facility rate.[66] Such a measure would short-circuit the channelling of ECB monetary impulses.[67] It could even make inroads into the domain of monetary policy because it potentially falls within the category of dirigiste measures of monetary control that the ECB could hypothetically take, with the assent of the Council, in case of monetary emergency (Art. 20 Statute of the ESCB/ ECB).

What most Member States have turned to, however, is taxation. In 2023 and 2024, around half of them introduced additional levies on banks, with differing characteristics, in terms of base, rate and duration.[68] Taxing banks' excess profits after they have been realized comes with downsides and raises policy dilemmas. To capture those excess earnings, taxation may have to be retroactive. How much would a retroactive tax affect banks' risk calculations and business strategies? How can one devise a tax scheme that specifically targets this windfall? How can this tax produce significant budgetary resources without endangering financial stability? Member States have taken different approaches with varying degrees of success. For example, via tax measures, Latvia recouped more than the losses incurred by the public sector because of interest rate hikes. An increase in corporate income tax combined with the levy of an additional mortgage borrower protection fee raised EUR 210 million in revenues. At the same time, *Latvijas Banka* – the Latvian NCB – made EUR 54 million in losses.[69] By contrast, Italy imposed a 40% tax on banks' increased interest

65 See, e.g., in Belgium and the Netherlands: *Autorité belge de la Concurrence*, Communiqué de presse: L'Autorité belge de la Concurrence publie son avis relatif aux services bancaires de detail, available at: https://www.abc-bma.be/sites/default/files/content/download/files/20231110_ComPres_52_ABC.pdf (18/2/2025); *Autoriteit Consument & Markt*, ACM: spaarrentes blijven achter door te weinig concurrentie, available at: https://www.acm.nl/nl/publicaties/acm-spaarrentes-blijven-achter-door-te-weinig-concurrentie (18/2/2025).

66 Proposition de loi relative au rattachement du taux d'intérêt de base minimal des comptes d'épargne réglementé au taux de la facilité de dépôt de la BCE, Ch., 2022-2023, n°3405, p. 1.

67 *ECB*, Opinion of 28 June 2023 on tying the minimum base interest rate on regulated savings accounts to the deposit facility rate and introducing a protected interest rate on savings deposits, CON/2023/18.

68 For an overview, see *Maneely/Ratnovski*, IMF Working Paper 2024/143, pp. 1 et seq.

69 *Ibid*.; *Latvijas Banka*, On the performance of Latvijas Banka in 2023, available at: https://www.bank.lv/en/news-and-events/news-and-articles/news/16918-on-the-performance-of-latvijas-banka-in-2023 (5/1/2025).

margins but allowed banks to avoid the levy if they allocated their excess earnings to non-distributable reserves.[70] All Italian banks chose the latter option.[71] Ultimately, while the measure enhanced the financial resilience of Italian banks by compelling them to expand their capital buffers, it failed to generate additional revenues for the Italian budget.

Beyond policy considerations, the EMU framework arguably imposes some – albeit loose – constraints on how Member States may tax their banks. In the absence of harmonization, Member States retain their competence on taxation but they must exercise this power in a manner consistent with Union law, including the principle of sincere cooperation (Art. 4 para. 3 TEU).[72] As such, Member States should refrain from enacting taxation measures that may undermine price stability. As the ECB has noted, taxation should not erode the capital base of commercial banks in a way that hampers their ability to transmit the ECB's monetary policy impulses to the broader economy.[73]

However, there is no clear legal benchmark to determine when bank taxation would unlawfully undermine ECB's policies. This is because it is difficult to ascertain the precise effect that taxing banks' excess profits may have on monetary policy transmission. This effect depends not only on the legal design of the tax but also on economic factors, the business cycle and the overall state of the relevant banking market. Depending on the circumstances, taxing banks' excess profits may, at the margin, enhance the interest rate pass-through, as credit institutions might opt to raise their deposit rates more quickly to attract additional deposits rather than incur higher tax costs.[74] But, as the ECB has noted, with higher interest rates, banks may face declining profitability in the medium term because their lending volume may diminish and their portfolio of non-performing loans may increase. In that scenario, a tax on excess profits may prevent commercial banks from building up the required capital buffers to cover those additional risks, potentially undermining their capital base in the long run.[75]

In the absence of a clear substantive legal benchmark, Member States arguably still have a procedural obligation under the principle of sincere cooperation to conduct an adequate impact assessment that considers the effect of projected taxes

70 Art. 26, decreto legge 10 agosto 2023, n. 104, G.U. n. 186, 10/8/2023; Legge 9 ottobre 2023, n. 136, di conversione in legge, con modificazioni, del decreto legge 10 agosto 2023, n. 104, G.U. n. 236, 9/9/2023.

71 *Greco*, Il paradosso delle tassa sugli extraprofiti, available at: https://www.repubblica.it/economia/2024/02/13/news/tassa_extraprofitti_banche_guadagni-422118883 (9/3/2025).

72 See, e.g., ECJ, Case C-80/94, *G.H.E.J. Wielockx v. Inspecteur der Direct Belastingen*, judgment of 11 August 1995, ECLI:EU:C:1995:271, para. 16. See also ECJ, Case 208/80, *The RT Hon. Lord Bruce of Donington v. Eric Gordon Aspden*, judgment of 15 September 1981, ECLI:EU:C:1981:194, para. 14.

73 See, e.g., *ECB*, Opinion of 4 April 2023 on the imposition of a temporary solidarity contribution, CON/2023/9, p. 4.

74 See *Maneely/Ratnovski*, IMF Working Paper WP 2024/143, pp. 1 et seq.

75 See, e.g., *ECB*, Opinion of 4 April 2023 on the imposition of a temporary solidarity contribution, CON/2023/9, p. 4.

on the stability of their banking market and the functioning of the monetary transmission mechanism.[76]

Ultimately, only dialogue between economic policymakers and the ECB can resolve potential tensions between bank taxes and monetary policy. The Treaties provide for two communication channels that facilitate this dialogue. Representatives of the ECB – most often its President and an Executive Board member – participate in Eurogroup meetings and, in this context, may raise concerns with finance ministers regarding potential interferences between fiscal and monetary policies.[77]

Furthermore, according to the founding Treaties and Council Decision 98/415/EC, Member States must consult the ECB on national draft laws that apply to financial institutions insofar as they affect financial stability.[78] The ECB opinions on draft tax measures adopted on that basis are the central medium through which a dialogue between national authorities and the ECB takes place regarding the suitability and legality of national interventions designed to mitigate the redistributive effects of monetary policy.[79]

Another downside of this heterogeneous set of taxation schemes is that it further fragments the European banking market and carries risks of discrimination and double taxation.[80] Some of these tax schemes may even run afoul of internal market law.[81] An EU-wide tax on banks' excess profits could have been considered to avoid such fragmentation. In 2022, the Council, based on Art. 122 TFEU, agreed on an EU solidarity contribution to be levied on the excess profits earned by energy companies due to a surge in energy prices.[82] An EU tax on banks' excess profits could have been modeled after the EU solidarity contribution. However, such a measure would have faced significant political and legal obstacles. First, it is unclear whether Art. 122 TFEU is a suitable legal basis for enacting tax measures. The EU solidarity contribution is currently being challenged before EU courts for this reason.[83] Second, under this Treaty provision, the Council acts on its own, by qualified majority voting, and without involving the European Parliament. It is questionable whether a

76 The ECB has at times called upon Member States to conduct impact assessment when they consider adopting tax on banks. See *ECB*, Opinion of 2 November 2022 on the imposition of temporary levies on certain credit institutions, CON/2022/36.

77 Art. 1, Protocol No. 14 on the Euro Group.

78 Art. 127 para. 4 TFEU, Art. 282 para. 5 TFEU, Art. 2 para. 1, sixth indent of Council Decision 98/415/EC, OJ L 189 of 3/7/1998, p. 42.

79 See *ECB*, Opinion of 2 November 2022 on the imposition of temporary levies on certain credit institutions, CON/2022/36; Opinion of 4 April 2023 on the imposition of a temporary solidarity contribution, CON/2023/9; Opinion of 2 November 2023 on the imposition of a temporary tax on banks, CON/2023/35; Opinion of 12 September 2023 on the imposition of an extraordinary tax on credit institutions, CON/2023/26; Opinion of 15 December 2023 on the imposition of a tax on credit institutions, CON/2023/45.

80 See, e.g., *ECB*, Opinion of 15 December 2023 on the imposition of a tax on credit institutions, CON/2023/45, p. 4.

81 For an analysis of the compatibility with EU law of the Spanish windfall tax, see *García* et al., Nordic Tax Journal 2024, pp. 1 et seq.

82 Council Regulation No. 2022/1854 on revenue cap and solidarity contribution as an emergency intervention to address high energy prices, OJ L 261 of 7/10/2022, p. 1.

83 See, e.g., (pending) Case T-802/22, *ExxonMobil v. Council*, OJ C 54 of 13/2/2023, p. 23.

procedure with such weak democratic credentials should be used for enacting tax measures. Third, some Member States, including Germany, were reportedly opposed to a tax on banks' excess profits and could have formed a blocking minority in the Council.[84]

Instead, what may be most needed at the EU level is the completion of the Banking Union, accompanied by additional regulatory interventions to dismantle persistent differences in the structure of banking markets across the Euro area. This would intensify competitive pressure on banks to adjust their deposit rates to ECB policy rates, thereby accelerating the transmission of monetary policy and mitigating the transfer that results from interest rate hikes.

E. Conclusion

Monetary policy operations inherently have distributional consequences. By nature, central banks' transactions may generate windfalls for the credit institutions that act as their counterparties. They also carry risks for the central banks, with potential fiscal consequences that impact state budgets. What is troubling in the current context is the sheer size of those distributional consequences, which some may argue raise democratic concerns. How can an independent monetary authority like the ECB, without any prior democratic deliberations, conduct a policy generating transfers from the public to the private sector that approach the total yearly spending of the EU?[85]

The ECB is ill-equipped and ill-positioned to significantly mitigate the side-effect of its own policy beyond the measure it has already implemented. Minimum reserves may only be used marginally for that purpose. It is true that, within the current operational framework, the function of this monetary tool is unclear, and the ECB has not fully elucidated it. But prudential rules, the open market principle and the scope of its price stability mandate seriously constrain how the ECB may mobilize this instrument to mitigate Eurosystem's losses and banks' excess profits.

At the core, the difficult-to-draw division between economic and monetary policies, on which the EMU framework relies, is to blame.[86] The sizeable financial transfers from the public to the private sector are an aftereffect of the ECB unconventional monetary policy, which has had far-reaching economic consequences and has left commercial banks with vast amounts of excess liquidity. But the separation between economic and monetary policy also guarantees the democratic legitimacy of the EMU framework: political authorities in control of economic policies, at the national and the EU level, retain several tools to offset the economic effects of monetary policy as long as they do not endanger the effectiveness of ECB's actions.

84 *Reuters*, "European countries differ over windfall taxes on banks", available at: https://www.reuters.com/markets/europe/european-countries-differ-over-windfall-taxes-banks-2023-09-13/ (13/2/2025).
85 *De Grauwe/Ji*, Journal of International Money and Finance 2024/143, p. 1.
86 On the difficult-to-draw distinction between economic and monetary policy, see *Waibel*, in: Govaere/Gaben (eds.), pp. 90 et seq.

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Who needs accountability?

The limited usefulness of accountability for researching the ECB

Marijn van der Sluis*

Contents

Abstract

Accountability is a central concept in legal studies of the European Central Bank (ECB). It is seen as necessary to improve the democratic legitimacy of the bank. This article presents two arguments why the emphasis on (democratic) accountability is problematic with regard to the ECB. First, accountability does not offer a clear normative standard, as it is not constitutionally embedded. The discussions on ECB accountability therefore do not engage with the issue that a low level of accountability is itself the result of democratic decision-making. Second, accountability-studies neglect the intertwinement of tasks of the monetary and fiscal policy makers and thereby neglect the key mechanism through which an independent central bank is connected to other public entities.

Keywords: European Central Bank; accountability; democratic legitimacy; over-constitutionalization; monetary dialogue; fiscal dominance.

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A. Introduction

The monetary policies of the European Central Bank (ECB) are difficult to comprehend, in terms of the types of actions it encompasses, the scale of the activities and their impact. The Public Sector Purchases Programme of the ECB, for example, involved the purchase of over 2 trillion euro of bonds of Member States.[1] But this two trillion-euro intervention was perhaps less important for the Eurozone than the statement by ECB president *Draghi* during the euro-crisis: "within our mandate, we will do whatever it takes [to protect the integrity of the Eurozone]".[2] With a few words, *Draghi* changed the dynamics in the Euro-crisis. However, this influence or power of the ECB appears problematic, given its independence. Other EU institutions and national governments cannot give instructions to the ECB regarding its monetary policy. How can the independent exercise of such important competences be squared with the requirements of democracy? Should the ECB not be under the control of the European Parliament, or other officials that have a clear democratic mandate? This question gained prominence during the euro-crisis, stayed on the agenda during the COVID19-pandemic and the current discussion on the climate transition, but has been part of academic and political discussions since the inception of the ECB in the Maastricht Treaty. But where the question is phrased in terms of democracy or democratic legitimacy, the answer is often phrased in terms of accountability.[3] I argue that that is the wrong way to answer the question.

Starting with the book by *Amtenbrink*[4] in 1999 on the democratic accountability of the ECB from a comparative perspective, the central argument in the legal literature on the ECB has been that accountability of the ECB, especially towards the European Parliament, is crucial for the democratic legitimacy of the ECB. An example of accountability is the monetary dialogue, in which the President of the ECB comes to a committee of the European Parliament to explain the choices made in the exercise of the competences of the ECB and to answer questions from members of the European Parliament. Accountability supposedly is the other side of the coin of the independence of the ECB.[5] Accountability is what makes the independent exercise of competences by the ECB acceptable from the perspective of democracy, although most scholars working on this topic readily acknowledge

1 *ECB*, Asset purchase programs, available at: https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html (17/1/2025).
2 *ECB*, Verbatim of the remarks made by Mario Draghi: Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012, available at: https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html (17/1/2025).
3 See e.g. *Lastra/Skinner*, Virginia Journal of International Law 2023/63:3, pp. 405–406. For critical accounts, see *Puntscher Riekmann*, Comparative European Politics 2007/5, pp. 121–137 and *Heidelberg*, in: Dawson (ed.), pp. 45–62.
4 *Amtenbrink,* pp. 1 et seq.
5 *Petit*, Maastricht Journal of European and Comparative Law 2019/1, p. 18, with further references.

that the accountability of the ECB is deficient in its current form and requires improvement.[6] Especially the expansion of the responsibilities of the ECB during the euro-crisis, and the formulation of mitigating climate change as a goal of monetary policy are seen as triggering the need to improve the accountability of the ECB. As *Grünewald* and *van 't Klooster* recently wrote: the "ECB's fundamental transformation […] must be counterbalanced by a strengthening of the institutional structures for its democratic accountability".[7] To be clear, most arguments that are about improving ECB accountability are not legal arguments in the sense that they seek to explore what the law, as it currently stands, requires.[8] They are about holding the current institutional arrangements of the ECB against the yardstick of accountability to measure the democratic legitimacy and if the required level is not reached, to make policy proposals or other types of recommendations.

This article argues, firstly, that accountability is a bad yardstick to measure the democratic legitimacy of the ECB. Consequently, most suggestions to improve the accountability of the ECB would do little to improve the democratic legitimacy of the ECB. The reason for this is that calls for more ECB accountability to improve democratic legitimacy are paternalistic, in the sense that they disregard what has already been democratically decided when the Maastricht Treaty was approved. The fact that parliaments approved the Maastricht Treaty and subsequent EU Treaties, and thus, the institutional arrangements of the ECB, does of course not mean that the ECB is beyond reproach in this regard. However, it does mean that in order to challenge the democratic legitimacy of the ECB, we primarily need to examine the democratic legitimacy of the EU Treaties.

The second part of this article examines accountability not as a way to evaluate the ECB, but as a way to understand the ECB. Accountability-studies have led to a certain way of looking at the institutional relations of the ECB that ignores the peculiarities of the European Monetary Union (EMU), in particular the fact that whilst the monetary union is highly integrated and centralized, the economic union is not. The lopsided nature of EMU affects the institutional relations of the ECB, which is so far largely ignored by the accountability studies of the ECB. A comparison with the German *Bundesbank* (pre-euro) will show the historical background of this argument. Although the second part of the paper focuses on the analytical side of academic work (understanding rather than evaluating), it deepens the problems described in the first part.

Before going further, a short comment on the definition of accountability is in order. Accountability-studies have developed various conceptions of accountability, many of them highly nuanced and applicable to various situations. Also with regard to the ECB, there are attempts to develop the concept in a more critical direction.[9]

6 See, e.g., *Amtenbrink/Markakis,* in: Beukers/Fromage/Monti, pp. 265–291.
7 *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/4, p. 962.
8 An interesting counter-example is found in *Tuori*, Maastricht Journal of European and Comparative Law 2024/4 who argues for "accountability to the public", which appears to consist of the ECB focusing on its primary objective of maintaining price stability.
9 See on this *Dawson/Bobić/Maricut-Akbik*, European Law Journal 2019/1, pp. 75–93.

However, the emphasis is here on the dominant strain of ECB accountability research, which builds on the view of accountability as a structured relationship between an actor and a forum, where the actor explains its actions to the forum, which may ask questions and pass judgement as a result of which the actor can face sanctions.[10] Where relevant, it will be shown how different approaches to accountability impact arguments presented in the rest of this article. Since this article is concerned with the relation with democracy, the focus here is on political or democratic accountability, meaning accountability towards institutions with a democratic mandate.[11] This means parliaments, which, in most cases, are directly elected, and governments, as they either hold a direct democratic mandate (presidential system), or are supported by parliament (parliamentary system). It must also be noted that there are several concepts closely associated with accountability, but which should not be wholly subsumed under it. For example, accountability and transparency are closely linked, with the latter often being seen as a precondition for the former.[12] However, this does not mean that legal requirements regarding transparency must necessarily be seen from an accountability perspective, as transparency can also serve other goals, such as the rule of law.

B. Accountability and the democratic legitimacy of the ECB

I. Accountable independence

In the discussions leading up to the Maastricht Treaty and the creation of a single currency it was clear that central bank independence would be a key feature of the new single currency.[13] Especially for Germany, but also for other Member States such as the Netherlands, it would have been unacceptable to join a monetary union if the central bank responsible for the new currency would not enjoy a high level of independence.[14] As a result, the Maastricht Treaty not only stated in clear terms the independence of the ECB in what is now Art. 130 TFEU, it also regulated many other aspects of the new central bank. These include its primary and secondary objective (Art. 127 TFEU), its competences, its organizational structure, its finances, its hierarchical relation with the national central banks, and its relations with other EU bodies and institutions. These latter rules include the provision that the President of the Council and a member of the Commission are allowed to participate in meetings of the Governing Council of the ECB[15] and that the president of the ECB

10 *Bovens*, West European Politics 2010/5, p. 951. Most authors on ECB accountability start with this definition, but then modify it, in various ways, in relation to the ECB. See, e.g., *Petit*, Maastricht Journal of European and Comparative Law 2019/1, p. 20 and *Markakis,* p. 9.
11 See Art. 10 para. 2 TEU.
12 *Markakis,* p. 14, with reference to *Amtenbrink*.
13 A comprehensive analysis of the history of the monetary union is provided by *James*.
14 For a Dutch perspective on the negotiations of the Maastricht Treaty, see the account by *Szász*.
15 Art. 283 para. 2 TFEU.

may be heard by a committee of the European Parliament.[16] One of the things that was not settled in the Maastricht Treaty was the exact legal status of the ECB within the EU/EC, which lead to the question whether secondary legislation that was adopted by the Council and the European Parliament could be applicable to the ECB. After the CJEU ruled in 2000 that secondary legislation could be applicable to the ECB,[17] but should respect its independence, the legal status of the ECB was clarified in the Nice Treaty. The ECB is now listed as one of the institutions of the EU.[18] Otherwise, the Treaty provisions on the ECB and monetary union have seen very few changes.

The high level of independence of the ECB in the Maastricht Treaty raised concerns. In its famous Maastricht-judgement, in which the German Constitutional Court expressed its vision on the Member States being the *Herren der Verträge,* the Court also discussed the independence of the ECB, calling it an exception to the principle of democracy.[19] That exception was justified according to the Court, based among other things on the experience in Germany with the independence of the *Bundesbank* (the German Central Bank). (Legal) scholars also expressed concern regarding the independence of the ECB, with the lack of accountability being part of their analysis. For example, *Verdun* highlighted several aspects of the democratic deficit of the ECB, such as that the independence and objectives of the ECB were part of the Treaty, and thus, difficult to change.[20] The lack of accountability of the ECB towards the European Parliament was another issue in her analysis. In their article on the democratic deficit of the ECB, *Gormley* and *De Haan* discussed several elements that are important for the setup of central bank independence and accountability, but mentioned the democratic legitimacy of the ECB only in light of the inability of the European Parliament to change the legal framework of the ECB.[21] The main conclusion was that the European Parliament should have control over the "rules of the game", with the ECB being responsible for playing the game. In other words, in both articles, accountability plays a role in the overall analysis of the ECB, but the connection to democratic legitimacy is far from clear.

Through several academic works, most notably those by *Amtenbrink* and *Lastria*, a clear connection was established between democratic legitimacy and accountability.[22] This starts with the observation that independent central banks are often created through an act of the legislator (usually involving parliament):

16 Art. 283 para. 3 TFEU.
17 ECJ, Case 11/00, *Commission v. ECB*, judgement of 10 July 2003, ECLI:EU:C:2003:395, paras. 67, 135–137.
18 Art. 13 TEU.
19 BVerfGE 2 BvR 2134/92, 2159/92, para. 96. On judicial approaches to central bank independence, also see in this issue the contribution by *Benjamin Letzler* and *Michael Waibel*.
20 *Verdun*, Journal of Public Policy 1998/2, p. 108.
21 *Gormley/De Haan*, Eur. L. Rev. 1996/2, p. 112.
22 See, e.g., *Amtenbrink,* p. 32; also *Lastra,* Harvard International Law Journal 1992/2, p. 481; *Markakis*, pp. 13–17.

> "Legitimacy starts with the inception of an independent institution: independent central banks are generally created within a democratic process as a result of legislation bringing alive the institution itself and granting it independence. In the case of the ECB, this democratic process was ultimately rooted within the parliamentary processes within all Member States and resulted in the adoption of the EU Treaties which established the ECB as an independent institution."[23]

However, it is then noted that the act of creating the independent institution is not, in itself, sufficient for democratic legitimacy.

> "While this first source of legitimization addresses the establishment of the independent institution, it is not sufficient to ensure that the exercise of power of this institution is also legitimate."[24]

As the legal act that creates the central bank cannot provide sufficient legitimacy, accountability enters the picture. The focus here is on the book from 1998 by *Amtenbrink*,[25] in which he connected central bank accountability to central bank independence through the objective of monetary policy. Firstly, central bank independence was justified by *Amtenbrink* through its connection to price stability.[26] Elected politicians have short time-horizons, as they want to be re-elected. Monetary policy must be set with a longer time-horizon, and thus be kept out of the hands of elected politicians to secure price stability. Independent central banking contributes to price stability. Secondly, central bank accountability would then be about evaluating the performance of the central bank against its objective.[27] For the ECB, this objective was included in the Maastricht Treaty: price stability. Preconditions for accountability are then the existence of a specified goal, and transparency about the how, why and effects of monetary policies. The actual holding a central bank to account then occurs through instruments or mechanisms, such as dismissal of the central bank director or through an override mechanism by a parliament or government.[28] The focus is always on evaluating the performance of the central bank, in light of its objective. *Amtenbrink* warned that "mechanisms of accountability lose their purpose where the central bank is effectively prevented from pursuing sound monetary policy without the danger of being overridden on

23 *Lastra/Dietz*, Maastricht Journal of European and Comparative Law 2023/4, p. 388. Also see *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/4, p. 975. They argue that "[t]he fundamental basis for the ECB's democratic legitimacy is the legal mandate conferred upon it by the 1992 Maastricht Treaty.".

24 *Lastra/Dietz*, Maastricht Journal of European and Comparative Law 2023/4, p. 388.

25

26 *Amtenbrink*, pp. 11 and 379.

27 Also see *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/4, pp. 979–980.

28 The override mechanism means that the "central bank may be overridden in case of sub-optimal performance", or if the Government needs to assert its overall responsibility for economic policy. See *Amtenbrink*, p. 354.

any grounds".[29] If properly conceived, accountability thus has the same purpose as central bank independence. The two concepts do not (necessarily) conflict with each other, giving rise to the notion of accountable independence.[30]

This approach had several benefits. Firstly, it structured the search for accountability to several specific conditions and instruments and provided a clear framework how the different components of accountability relate to each other.[31] Secondly, it connected political-economic research on central bank independence to the legal framework of EMU, whilst allowing some critical distance to the law. The approach was not a mere explanation or description of the law, but offered a separate tool to evaluate the construction of the EMU. For example, *Amtenbrink* criticized the Maastricht Treaty, as the primary objective of price stability was not precise enough: "it is easier to control a narrowly defined target than a broadly defined objective".[32] Moreover, in his view, the instruments for accountability were underdeveloped in the treaty.[33] For example, by including the provisions on the ECB in the Maastricht Treaty, the use of legislation as an instrument of the European Parliament and the Council to hold the ECB accountable had been disabled. A third benefit of this approach is that it provides a clear answer to the question of what exactly is problematic with the setup of the ECB, and how it can be remedied: the democratic "problem" of the ECB lies in its lack of accountability.

The euro-crisis muddled the picture but left the message intact.[34] Price stability could no longer be at the centre of the relationship between accountability and independence, as the ECB also assumed the objective of protecting the integrity of the Eurozone.[35] The objectives of monetary policy became more complex. The ECB moreover had started using different instruments for its monetary policy, such as the large-scale purchase of government and private bonds. The use of these instruments highlighted the re-distributive effects of monetary policy,[36] raising the question why accountability should be limited to only monitoring the achievement of price stability. This breakdown of the original model of the connection between accountability and independence explains the surge of new publications on ECB ac-

29 *Amtenbrink,* p. 61. A very similar warning is issued by *Lastra/Dietz,* Maastricht Journal of European and Comparative Law 2024/4, p. 388: "Accountability mechanisms may never be construed in a way to allow the executive to de facto instruct the institution with regard to those aspects and tasks for which the institution enjoys independence and/or discretion. Accountability mechanisms are no substitution for executive command and control, but ensure that the institutions acts within its mandate and the existing legal framework according to the given objectives and tasks, while safeguarding its independence.".

30 *Lastra,* Harvard International Law Journal 1992/2, pp. 475–519. For a critical note, see *Amtenbrink*, p. 60.

31 *Dawson/Maricut-Akbik/Bobic,* European Law Journal 2019/1, p. 77.

32 *De Haan/Amtenbrink,* West European Politics 2000/3, p. 181.

33 *Amtenbrink,* pp. 359 and 370.

34 See, e.g., *Amtenbrink,* Maastricht Journal of European and Comparative Law 2019/1. Also see *Fromage* et al., Maastricht Journal of European and Comparative Law 2019/1, pp. 3–16.

35 ECJ, Case C-62/15, *Gauweiler*, judgement of 16 June 2015, ECLI:EU:C:2015:400.

36 *Dermine,* Maastricht Journal of European and Comparative Law 2019/1, p. 120.

countability.[37] Some of these publications focus on individual measures, such as the recent decision by the ECB to pursue climate change mitigation as a secondary objective under Art. 127 TFEU. From the model of accountability as sketched above, the use of the secondary objective is problematic, as it is questionable why it is the ECB that defines this goal,[38] and because it becomes more difficult to check how and whether the ECB achieves its goals. Others seek to re-examine the purpose of accountability,[39] or use accountability to examine the whole setup of EMU, beyond the ECB.[40] What remains unquestioned is the assumption that accountability is key to the democratic legitimacy of the ECB.

II. Accountability and legislation

As mentioned above, a strength of *Amtenbrink's* conceptualization of the connection between accountability and independence was that it focused on the same theme as the Maastricht Treaty: price stability. It was the Maastricht Treaty itself that set price stability as the primary objective of the ECB. But this "initial legitimation" of the ECB supposedly cannot justify the absence of accountability mechanisms.[41] Accountability then is necessary for the democratic legitimacy of the ECB. This section examines the claim that there is a gap in the democratic legitimacy resulting from the insufficiency of the original legal act. The next section examines the claim that accountability fills the gap.

The argument about the insufficiency of the original legal act is not convincing, as it merely focuses on the creation of the independent central bank, and disregards considerations about the necessity of accountability. As described above, the provisions on the ECB included rules on the relations with the European Parliament and the Council. These provisions might have created a low level of accountability, but that was not by accident or coincidental; it was key to the setup of the ECB. This is not only the case for the ECB (to which I return below), but for many independent bodies and agencies that have been created through legislation. The argument that accountability is necessary because the original legal act is insufficient to legitimize the central bank is paternalistic. It discounts the opinion of parliament, as a (co-)legislator, to strengthen the position of parliament as a check on the independent institution. At the risk of simplifying the legislative procedure and the creation of legitimacy in the legislative process, parliaments are often involved in passing legislation that creates independent bodies, and can therefore take a position on the manner in which such a body should relate to other institutions, including parliament itself. Accountability mechanisms may support parliaments in their con-

37 *Amtenbrink,* Maastricht Journal of European and Comparative Law 2019/1.
38 *van 't Klooster/De Boer*, Journal of Common Market Studies 2023/3, pp. 730–746.
39 *Akbik/Dawson*, in: Dawson (ed.); see also *Dawson/Bobić/Maricut-Akbik*, European Law Journal 2019/1, pp. 75–93.
40 See *Markakis.* The research on the democratic accountability of the ECB is moreover complemented by research on the judicial accountability of the ECB. See *Bobic.*
41 *Amtenbrink*, p. 35.

trol of the executive or executive agencies, such as central banks, but that does not mean they are necessary as such from the perspective of democratic legitimacy. It remains unclear why parliaments should not be trusted with making the assessment about the level of accountability of an independent central bank when it helps to create that central bank. The paternalism is unwarranted.

Within political science, a focus on the creation of new forms of governance and the level of accountability therein is quite common. *Kelemen*, for example, studied the wave of new agencies being created throughout the 1990's in the EU, examining why new agencies were created in comparison to attributing greater powers to the Commission. In doing so, he considered the role of the European Parliament and its preferences regarding accountability.[42] Gaps in accountability, or low levels of accountability, are often the result of a conscious choice in the construction of independent agencies or bodies.

III. Accountability as a constitutional value?

By connecting accountability to the democratic legitimacy of the ECB, the suggestion is made that accountability is part of our constitutional values, more specifically, the value of democracy.[43] Accountability is necessary for democratic legitimacy, and since democracy is a core aspect of our constitutional system, problems with the accountability of the ECB must be remedied. Hence, most legal contributions on the accountability of the ECB are normative, in the sense that they stress that accountability *must* or *should* be improved, but without referencing a specific legal rule that would require such action.[44] Instead, the requirement appears to flow, often implicitly, from the value or principle of democracy.

One implication of the argument that accountability is a part of the constitutional value or principle of democracy is that it would also entail a limitation of the discretion of parliaments, in their capacity as (co-)legislators, to create an independent central bank with a low level of accountability. The argument would be that a legal act that creates a central bank but which does not provide for sufficient accountability would not respect a foundational value of our constitutional system. Hence, the legislator should not adopt such an act. Below, I discuss the specific situation of the ECB being created not through an ordinary act of legislation, but by Treaty. Here, I first discuss whether accountability should indeed be seen as being part of the constitutional value of democracy, and therefore as a limitation of the powers of parliaments.

A large part of constitutional theory is already devoted to the question of defining the boundaries of the power of democratic majorities. Without doing justice to the depth of constitutional theory, limits can generally be found in the following areas: the preservation of democracy itself, human rights, the rule of

42 *Kelemen,* West European Politics 2002/4, pp. 102–104.
43 *Amtenbrink*, pp. 32–33.
44 See, e.g., *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/4, p. 995.

law and federalism.[45] Although accountability may touch upon many of these areas,[46] it is doubtful whether accountability on its own can be framed as a general requirement of constitutional or liberal democracy, and thus, as a restriction upon the discretion of democratic majorities in parliament.[47] Rather, the arguments for restricting the discretion of parliamentary majorities to create independent and unaccountable organizations must be connected to other lines of argumentation about the restriction of majoritarian authority. Creating an institution or agency with a low level of accountability is thus not – by itself – problematic from a constitutional point of view, in the sense that it does not go against the value or principle of democracy. Parliaments can decide for themselves if they want to create a central bank without accountability-mechanisms in place. Only when it can be shown that unaccountability affects constitutional values or rules, should limits be imposed on the discretion of the legislator.

Not coincidentally, this is also how EU law engages with the issue. EU constitutional law does not *directly* address the issue of accountability as a foundational norm.[48] The EU Treaties mention accountability twice, both times only with regard to the qualities of national actors participating in European bodies.[49] Likewise, the CJEU does not refer to accountability as a foundational or general principle of EU law.[50] As mentioned above, accountability-mechanisms can be used to support the position of parliament in relation to executive agencies, and secondary legislation therefore does include references to it. Prominent examples are the Regulation 1049/2001 regarding public access to documents and the more recent Regulation 1024/2013 on the Single Supervisory Mechanism (SSM).[51] Whereas the former finds, in a recital, a connection between transparency and accountability, the latter uses accountability as the key mechanism to describe the relation between the ECB on

45 See, e.g., *Kumm*, International Journal of Constitutional Law 2016/3, pp. 710–711.
46 To see how several concepts of constitutional law relate to accountability see *Harlow*, in: Bovens/Goodin/Schillemans (eds.), pp. 199, 205.
47 For two critical accounts of the connection between democracy and accountability, see *Heidelberg,* in: Dawson (ed.), pp. 45–62 and *Mansbridge*, Against Accountability, available at: https://cadmus.eui.eu/handle/1814/15164 (17/01/2025).
48 *Fromage* et al., Maastricht Journal of European and Comparative Law 2019/1, p. 12. They argue that the lack of a reference to accountability is surprising but might be explained by the fact that the concept of accountability is difficult to translate.
49 Art. 10 para. 2 TEU and Art. 300 para. 3 TFEU.
50 But see ECJ, Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR,* judgement of 9 November 2010, ECLI:EU:C:2010:662, para. 68. The ECJ discusses accountability here in light of the principle of transparency as found in Art. 1 TEU. However, it appears to approach accountability as the *rationale* for transparency, and not as a separate legal principle. Also see ECJ, Case C-41/00, *Interporc,* judgement of 6 March 2003, para. 39. Also see on this *Lenaerts*, International & Comparative Law Quarterly 2013/2, p. 277.
51 Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents, 2001 OJ L 145/43; Council Regulation (EU) 1024/2013 on the SSM conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 2013 OJ L 287/63.

the one hand and the European Parliament and the Council on the other hand.[52] Nevertheless, the SSM Regulation could have been adopted without the specific chapter on accountability without violating EU law, demonstrating that the level of accountability is primarily a political question (to be decided by democratic majority) and not a constitutional question. The fact that accountability is not explicitly mentioned in the EU Treaties does not mean that there are no restrictions regarding the creation of independent institutions in the EU legal order. With regards to EU agencies, the *Meroni*-doctrine limits the delegation of discretionary powers to independent agencies and thus sets a limit to the discretion of the Union legislator. Central to the *Meroni* doctrine is the institutional balance, as enshrined in the EU Treaties. Hence, *Meroni* protects the principle of conferral.[53] As a result, it only affects delegation *by* Union institutions, not delegation *to* Union institutions by the Member States through primary law, which is why it is of little concern for the set-up of the ECB. With regards to national agencies and bodies whose independence and competences are protected by Union law, the CJEU at first sight does appear to require some form of accountability, as it finds "the absence of any parliamentary influence over those authorities [to be] inconceivable".[54] However, upon closer inspection it does not appear that the Court speaks of accountability here, as the requirement can be satisfied according to the Court by making parliament responsible for appointing the management of the agency or body, and by imposing regular reporting requirements.[55] More importantly, even these very minimal requirements flow from the Court's concern for the constitutional structures of the MS, rather than a need for accountability as such.

The main consequence of accountability not being part of the constitutional value of democracy, in that it is neither a value of constitutional democracy, nor of EU constitutional law as such, is that it challenges the notion that accountability is *necessary* for independent agencies and bodies, such as central banks. Several problems follow from this: firstly, the lack of legal foundations causes the definition of accountability to become blurry, as there are no *legal* arguments against unwarranted divergences from a strict or pure approach to accountability. As noted in the introduction, there is a stable practice in the strict application of the concept of accountability, especially by a core group of authors.[56] However, the concept

52 Recital 2 Regulation 1049/2001; Art. 20 Regulation 1024/2013 on the SSM.

53 See, however, the Opinion of the Advocate General Jääskinen, Case C-270/12, delivered on 12 September 2013, para. 85: "The principle of democracy, enshrined in Art. 2 and 10 TEU, necessarily dictates that any power to adopt an EU measure that can alter the non-essential elements of an EU legislative act must be exercised by an EU institution that is democratically accountable, in other words by the Commission, which is ultimately accountable to the European Parliament.".

54 ECJ, Case C-518/07, *Commission* v. *Germany,* judgement of 9 March 2010, EU:C:2010:125, para. 43. Also see ECJ, Case C-718/18, *Commission* v. *Germany*, judgement of 2 September 2021, ECLI:EU:C:2021:662, para. 126.

55 ECJ, Case C-518/07, *Commission* v. *Germany,* judgement of 9 March 2010, EU:C:2010:125, paras. 44–45.

56 See *Amtenbrink*, Maastricht Journal of European and Comparative Law 2019/1.

is easily seized and modified by others, such as the ECB itself,[57] with the result that the ECB is then seen to have "accountability of a special kind"[58] or that accountability is "tailor-made".[59] From a legal perspective, there is no reason why alternative interpretations of the concept of accountability are mistaken, yet it leads to a broad array of standards being applied to critique the ECB.

The second, more pertinent, problem is the identification of a responsible institution for remedying problems with accountability. Even if the level of accountability is found to be problematic in a specific situation, it remains unclear who should resolve the situation, on what legal ground, and to what extent. Hence, the practice of accountability studies is to offer policy proposals, rather than legal advice, meaning here advice on what the law requires.[60] Lastly, the lack of a clear institutional responsibility with regard to accountability further compounds the problem of the lack of a clear standard, as, in constitutional law, the problem of what the appropriate standard should be may be intertwined with the question of who should enforce that standard.[61]

The misunderstanding might arise here that the argument presented in this part of the article–that accountability lacks constitutional foundations–disappears if we take a slightly broader definition of accountability. The argument here has focused on the supposed need of accountability for executive agencies, such as central banks, towards parliaments. However, numerous relations within constitutional law may be described as a form of accountability.[62] For example, in parliamentary systems, the relation between the government and parliament can be seen as a form of accountability.[63] Even the ability to adopt legislation in order to circumscribe or abolish the powers of an independent agency may be seen as a form of accountability. If various forms of checks and balances between branches of government are a form of accountability, then surely accountability must be seen as a requirement of constitutional democracy? Even if we take such a broad perspective–rephrasing constitutional relations as accountability mechanisms–the issue identified above does not disappear. If we include, for example, the adoption and withdrawal of legislation (or treaties) as a possible avenue of accountability, so that agencies are seen as accountable to parliament because parliament may initiate or adopt legislation concerning that agency, then the question becomes why *that specific form of accountability* is not sufficient to legitimize the exercise of public powers by an independent body.

57 *Fraccaroli/Giovanni/Jamet,* ECB Economic Bulletin 2018/5, p. 47: "the evolution of its [the ECB's] role during the crisis was accompanied by a commensurate evolution in its accountability practices".
58 *Fromage/Ibrido*, Journal of European Integration 2018/3, p. 297.
59 *Bovenschen/Ter Kuile/Wissink,* Common Mkt. L. Rev. 2015/1.
60 See, e.g., *Markakis*, p. 141, and *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/4, pp. 959, 982.
61 *Maduro*, p. 104.
62 For a broader account of accountability, see *Olson,* pp. 53–55.
63 *Amtenbrink*, p. 28. *Harlow*, p. 205.

IV. The over-constitutionalization of the ECB

The focus in the previous section has been on legislation creating independent agencies and bodies, such as central banks. The ECB is, of course, somewhat special in this regard. The creation of the ECB flows from the Maastricht Treaty, and not from ordinary legislation. The principal features of the ECB are regulated in primary law and can only be changed through the unanimous agreement of 27 Member States.[64] Although several treaty-based features of EMU have been subject to creative re-interpretation during the crisis, the independence of the ECB remains unchanged.

These distinct legal foundations of the ECB complicate the argument about the use of accountability as a normative standard in several ways. Firstly, the democratic legitimacy of the EU Treaties does not flow from the European Parliament, but from the national ratification procedures that either involved the electorate directly through referendums, or indirectly, through ratifying acts adopted by national parliaments.[65] Hence, the European Parliament has not been involved in the creation of the ECB, nor in many other parts of EMU. It was therefore the national parliaments that accepted the low level of accountability of the ECB towards the European Parliament.

Secondly, the involvement of all Member States in the creation and adoption of the Maastricht Treaty, or later the accession to the EU, bestows, prima facie, a high level of democratic legitimacy upon the Treaties, and thus, the ECB. Rather than the result of a *majoritarian* decision-making procedure, the ECB is the product of a form of constitution-making. The argument presented above is that the paternalistic approach to accountability is without a proper justification. That argument applies even more forcefully in relation to the ECB, as the Maastricht Treaty was subject to national ratification procedures. Any argument about the lack of democratic legitimacy of the ECB must engage with the fact that the EU Treaties are collectively approved by national electorates and/or the national parliaments, first in the twelve Member States who were the parties to the Maastricht Treaty, and later by those joining the European Union.

The question then is if these parliaments or electorates went beyond what they should have been allowed to decide, based on specific constitutional values or rules. This issue–what may be regulated on the EU primary law level–is indeed gathering attention amongst EU and constitutional law scholars.[66] *Davies* has argued that "purposive competences", i.e., EU competences that must be used for a specific

64 Note that several parts of EU primary law concerning the ECB can be amended through ordinary legislation. See Art. 129 para. 3 TFEU and Art. 140 paras. 1, 2 Statute of the European System of Central Banks and of the European Central Bank (Statute of the ES-CB/ECB).

65 As discussed above in section B.I.

66 *Cruz*, p. 173. For the effects of the constitutionalisation of EMU, see *van der Sluis*, In Law we Trust: The role of EU Constitutional Law in European Monetary Integration, pp. 1 et seq.

goal, frustrate a genuine political debate in the EU.[67] Especially in the case where it concerns exclusive competences, where national authorities are prohibited from taking action, connecting the use of a competence to a specific goal is problematic, as it prevents *any* legislator in the EU from achieving certain goals through a specific competence. The issue here is not which competences may or may not be transferred to the EU, but the legal technique of such a transfer. *Grimm* has voiced a similar complaint, as he argued that the over-constitutionalisation of EU law has the effect of insulating the executive and judicial bodies from public pressure.[68]

The main question is then whether those who adopted and ratified the Maastricht Treaty acted within the boundaries of their discretion to create a body with such a high level of independence and a specific set of objectives. The legal standard for such a review can be found either in national constitutional law, which often includes references to the principle of democracy, or, more speculatively, to the notion of unconstitutional constitutional amendments in EU law.[69] *Grimm* has argued that there "are no universally applicable principles for determining what belongs in a constitution and what does not."[70] As I have discussed elsewhere, the notion of inter-generational legitimacy can be used as a starting point for discussing such principles.[71] The argument would be that a (super)majority is not allowed to speak for future generations by empowering future minorities to block the amendment or repeal of constitutional provisions. Only provisions aimed at securing the conditions under which future majorities can legitimately express themselves are then suitable to be elevated to the constitutional level. Over-constitutionalization is thus a restriction of democracy and must be avoided on that ground. In this view, the detailed regulation of the independence of the ECB in the Maastricht Treaty was an abuse of the treaty-making powers of the MS. Independent central banking then is only permissible if it is based on ordinary legislation, so that future democratic majorities can reorganize monetary affairs as they see fit.

C. Mapping the institutional relations of the ECB

The previous section discussed the limited usefulness of accountability as a normative standard for the ECB. This section looks at accountability as an analytical tool to understand how central banks relate to other public bodies.[72] A key element of accountability-studies of the ECB is that the focus is primarily on the relationship between the ECB and the European Parliament.[73] Numerous studies focus then on

67 *Davies*, European Law Journal 2015/1, pp. 2–22.
68 *Grimm*, p. 100.
69 See *Passchier/Stremler*, Cambridge Journal of International and Comparative Law 2016/2.
70 *Grimm*, p. 87. He goes on to acknowledge on p. 88 that "[t]he function of constitutions is to legitimate and to limit political power, but not to replace it. Constitutions are a framework for politics, not the blueprint for all political decisions".
71 *van der Sluis*, International Journal of Constitutional Law 2016/2, pp. 480–485.
72 This section builds on earlier work. See *van der Sluis,* in: Arcuri/Coman-Kund, pp. 91 et seq.
73 See, e.g., *Grünewald/van 't Klooster*, Common Mkt. L. Rev.2023/4, p. 975.

how this accountability-relationship is used in practice by the ECB and the EP. Although these studies are often normative in nature, as they aim to examine whether the accountability in practice is sufficient to give it democratic legitimacy, they have also shaped our understanding of the institutional environment of the ECB. The effect of accountability studies is that the EP appears to be the main institution for the ECB to interact with. This section aims to correct this understanding and set out a different line of research for the ECB. The suggestion is that the institutional relations of the ECB must be examined by looking at the intertwinement of competences, as they create interdependencies between institutions.[74] Central banks do not operate in a policy-vacuum, not even the independent ones; to achieve their goals they are dependent on other public bodies and therefore seek to maintain relations with them.

This section proceeds as follows: in the first part, the intertwinement of fiscal and monetary policy is briefly explained in rather general terms. The second part provides historical examples through an analysis of the position of the *Bundesbank* (pre-euro), before explaining in the third part the situation for the ECB.

I. Monetary and fiscal dominance

To understand the interdependencies between economic and fiscal policies on the one hand, and monetary policies on the other hand, it is instructive to start with a quote from ECB Executive Board member *Schnabel* about monetary and fiscal dominance:

> "The euro has been built on the principle of *monetary dominance*. This means that the European Central Bank (ECB) pursues its monetary policy objectives, as defined by its mandate in the European Treaties, without being constrained by other considerations. (…) At the time of the Maastricht Treaty, high government debt was seen as a major threat to central bank independence, and it was feared that *fiscal dominance* could induce a central bank to deviate from its monetary policy objectives, endangering price stability."[75]

Monetary dominance thus refers to a situation where monetary policy effectively sets the conditions for fiscal policy. Fiscal policy is no constraint on monetary policy. Reversely, in a situation of fiscal dominance, the decisions of the fiscal policy maker effectively steer or determine the course of action for the monetary policy maker. It is important to note that these are not legal terms. The fiscal policy maker does not formally coerce the monetary policy maker but changes the conditions

74 The focus of this article is on the relation with other public bodies. Hence, the (problematic) relationship of the ECB with private entities is not examined here.

75 *Schnabel*, The shadow of fiscal dominance: Misconceptions, perceptions and perspectives, available at: https://www.ecb.europa.eu//press/key/date/2020/html/ecb.sp200911~ea32bd8bb3.en.html (17/01/2025).

in which monetary policy is conducted.[76] In this scenario, monetary policy makers *react* to fiscal policy.

To understand these interdependencies, we must look at monetary policy and fiscal and economic policy in (slightly) more detail.[77] Monetary policy generally seeks to affect the cost of money (interest rates) over the short and medium term and thereby influence the rate of inflation. It does this by, among other things, setting the interest rate that banks receive on the reserves they are obliged to hold at the central bank. This will influence the interest rates that banks charge their customers, and therefore how willing those customers are to take out loans for mortgages or investment. By stimulating or depressing such economic activities, central banks have an impact on the level of inflation. As the actions by central banks are mediated through banks, their effects are commonly aimed at the medium term. The goal of most central banks is then to maintain price stability, interpreted as a low level of inflation as deflation is seen as more harmful than inflation. Sometimes the goal of price stability is combined with other goals, such as a low level of unemployment.

Economic and fiscal policies are very diverse in their goals and functioning. Some economic policies target specific goods, such as housing, whilst fiscal policy can be used for lowering inequality and the stability of the economy as a whole. As a result, economic and fiscal policies interact with monetary policy in various ways.[78] Economic policies can also affect the demand for money, for example through the tax-benefits connected to interest paid over a mortgage. Fiscal policies also interact with monetary policy. When central bankers raise interest rates, it can limit economic growth and increase the costs of borrowing, both of which may have an effect on economic and fiscal policy. For example, recent interest rate rises of the ECB particularly affected green investments.[79] Conversely, expansive fiscal policies can stimulate economic growth and thereby lead to inflation. For example, the fiscal stimulus packages adopted in response to the pandemic contributed to the surge in inflation.[80] Due to the overlap in how monetary and economic/fiscal policy tools achieve their goals, monetary policy makers and fiscal/economic policy makers are co-dependent.

76 In *Schnabel's* account of fiscal dominance, central bankers would deviate from their monetary policy objectives. In other descriptions of fiscal/monetary dominance, central bankers are not seen as deviating from their objectives, but as being prevented from attaining their objectives due to the fact that certain pre-conditions for effective monetary policy are not met.

77 See also *Padoa-Schoppa*, p. 3.

78 The economic impacts of monetary policy are also highlighted in the German Constitutional Court decision on the ECB's Public Sector Purchase Programme (PSPP) initiated in 2015. See also BverfGE, 2 BvR 859/15.

79 *Jourdan/van Tilburg/Simić/Kramer/Bronstering*, Sustainable Finance Lab Working Paper 2024, p. 13.

80 *Ascari* et al., Fiscal Policy and Inflation in the Euro Area, available at: https://www.dnb.nl/media/uf1fw2kc/working_paper_no-820.pdf (17/01/2025).

Obviously, these interdependencies sketched out above are rather crude descriptions of the complex interaction between economic and fiscal policy and monetary policy. In reality, the interactions are complex, capricious and contested. In the speech quoted above, *Schnabel* argues that in a situation where interest rates reach the effective lower bound, meaning that they cannot go lower, fiscal policy becomes more important "to lift the economy out of a low-growth, low-inflation trap". Obviously, this speech occurred before the recent surge in inflation, which started in 2021 and was then exacerbated by (the European response to) the Russian invasion in Ukraine as energy prices soared. Geo-political affairs and foreign policy also affect monetary policy.[81]

The interdependency between monetary policy and other policies is what drives the institutional relations of central banks. The emphasis is then on the relationship between central banks and the fiscal policy maker (usually embodied by the Minister of Finance).

II. The institutional relations of the Bundesbank[82]

In the discussions on European monetary integration prior to the Maastricht Treaty it was clear that the new central bank would have to resemble the *Bundesbank*.[83] Famous for its independence, the *Bundesbank* had acquired a reputation for strict monetary policy, aiming at low inflation. In combination with the post-war economic miracle, the policies of the *Bundesbank* lead to a strong currency in comparison with many other currencies in the European Economic Community. As hyper-inflation had contributed to the downfall of the *Weimar*-republic, the independence of the *Bundesbank* was seen as a crucial pillar of the German political system.

From a legal perspective, and especially in comparison with the ECB, the independence of the *Bundesbank* was not particularly strong. The German Basic Law *(Grundgesetz)* did not require independence of the central bank, and allowed the legislator to decide on the competences, goals and institutional shape of the central bank. Moreover, the *Bundesbank*'s monetary policies or institutional characteristics were rarely subject to judicial scrutiny.[84] This means that two key pillars of the German state in the aftermath of WWII, the strong constitution and the strong currency, had few *direct* connections. This only changed with the rulings of the *Bundesverfassungsgericht* on the constitutionality of the Maastricht Treaty.

The independence of the *Bundesbank* was regulated in Art. 12 of the Bundesbank Act. It stipulated that the *Bundesbank* was not subject to instructions from the Federal Government. A caveat to this independence was the right of the Government to postpone decisions by the *Bundesbank* by two weeks. The *Bundesbank* was fur-

81 Also see the contribution by *Armin Ahari* in this issue about the role of central banks in the EU in the EU sanctions following the Russian invasion of Ukraine.

82 This section and the next one build on my earlier work: *van der Sluis*, in: Adams/Fabbrini/Larouche (eds.).

83 *Verdun*, Journal of Public Policy 1998/2, p. 109.

84 *Stern*, in: Bundesbank (ed.), p. 136.

thermore obliged to provide information to the Government upon request and support the Government's economic policy insofar that it did not conflict with its monetary objectives. The relation between the *Bundesbank* and the German Parliament was minimal. The *Bundesbank* was not obliged to provide information, nor did it appear regularly in Parliament to give an account of its policies.[85]

In public conflicts with the government, the *Bundesbank* often had the upper hand. *Marsh* attributes the resignation of three Chancellors to actions by the *Bundesbank*.[86] The *Bundesbank* moreover continuously sought to strengthen its position by educating the German public about the dangers of inflation, or to be more precise, to keep the memory of hyper-inflation alive. The aim of these campaigns, other than maintaining public support, was to strengthen its hand in conflicts with the government. By arguing for its restrained position and mandate, the *Bundesbank* tried to put the onus of accommodation on the government. As the *Bundesbank* often succeeded in this strategy, it attained its reputation as highly independent.

However, the independence of the *Bundesbank* did not always lead to a situation of monetary dominance. Often, the *Bundesbank* accommodated governmental policies to resolve conflicting positions.[87] As monetary policy is most effective when it is in unison with fiscal and economic policies; it is thus in the interest of the monetary policy maker to seek a positive relationship with the relevant policy makers (most often the Minister of Finance), whilst maintaining an aura of independence.[88] For the policy makers, this meant that attempts to influence monetary policy would be most successful if they would not appear to infringe on the *Bundesbank*'s independence. In other words, both sides had an incentive to work together smoothly and resolve tensions before they became public.

Accountability mechanisms have played only a marginal role in its political embedding as an independent central bank in the German *body politic.* The relations with the parliament were minimal; relations with the government cannot be described as an accountability mechanism, as it was a reciprocal relationship rather than a unidirectional one. Moreover, this reciprocal relationship with the government was not primarily concerned with holding the other to account, but with achieving closely related goals. Examining the accountability mechanisms of the *Bundesbank* thus offers very little insight into its institutional position. From a normative perspective, the *Bundesbank* shows that a lack of accountability is not problematic.

85 *Amtenbrink,* pp. 304–305.
86 *Marsh,* p. 146. Another important factor, not discussed here for reasons of brevity, in the relations between the *Bundesbank* and the Government was German external monetary policy.
87 *Berger/Schneider,* in: De Haan, p. 17.
88 *Marsh*, p. 7.

III. The institutional loneliness of the ECB

The ECB stands out as a central bank. In the previous section it was already discussed how the fact that the ECB was created through a treaty with constitutional characteristics affects the assessment of the democratic legitimacy of the ECB's actions. Here, another peculiar aspect of EMU is discussed, namely the imbalance between the economic and the monetary side of EMU. Whereas for monetary integration the Union would get an exclusive competence, for economic integration the Union would only get coordinating competences, in the form of the multilateral surveillance procedure and the excessive deficit procedure.[89] The powers of the Union would be strictly circumscribed in this area. The Treaties regulated the procedures already in detail, with limited opportunities for secondary legislation to deepen integration. The Member States surrendered their ability to conduct their own monetary policies, but they would remain in charge of their own economic and fiscal policy. This imbalance has been one of the most heavily discussed topics in EMU, both in the period before the adoption of the Maastricht Treaty and afterwards.[90] The point of contention in these discussions is whether or to what extend monetary integration requires economic and fiscal integration. Can a monetary union survive without a fiscal union? Less attention is paid to what the imbalance means for the institutional environment of the ECB, although it certainly has not escaped the notice of prominent scholars of EMU.

Padoa-Schioppa wrote in this regard about the "institutional loneliness" of the ECB, noting firstly that it creates a risk for the ECB as the only macro-economic policy player on the European level it could get blamed for adverse economic conditions. Secondly, he noted that the strength of a currency ultimately depends on the political system that carries it: "A strong currency requires a strong economy and a strong polity, not only a strong and capable central bank".[91] As noted by *Louis*, the ECB is missing a political counterpart: "the ECB has an interest in having an interlocutor in economic affairs", in order to achieve a proper policy mix of monetary and fiscal policy.[92] This means that the relationship between the monetary policy and fiscal policy makers is rather different in the Eurozone than in national contexts (prior to the euro). The lopsidedness of EMU does not only affect the economic developments of the euro area, it also greatly affects the institutional relations.[93] As the provisions of EMU have protected the primary responsibility for economic and fiscal policies of the Member States, the ECB engages with a plurality of policy-makers. A single monetary policy, set for the entire Eurozone, faces the economic conditions created by twenty different economic policies.[94] A single member of the Eurozone will therefore not easily be persuaded to align its policies

89 Art. 121 and 126 TFEU.
90 See *James* and *Szasz*.
91 *Padoa-Schioppa*, pp. 180–181.
92 *Louis*, in: Louis (ed.), p. 365.
93 *Smits*, Fordham International Law Journal 2007/6, pp. 1617–1618.
94 *Padoa-Schioppa*, p. 57.

with a single monetary policy set for the entire Eurozone and vice-versa. This does not mean fiscal and monetary policies in the Eurozone do no longer respond to one another, but that the institutional dynamics connected to this interaction is different in the Euro area.

The changes brought by the euro-crisis and subsequently by the COVID19-pandemic show the relevance of these two aspects of the position of the ECB, in the form of two exceptions to the standard functioning of EMU. First, there was the limited localization of monetary policy, combined with a limited centralization of economic policy. During the euro-crisis, the ECB employed several tools that were directed at Member States individually, most notably the supervision of Emergency Liquidity Assistance and the Securities Markets Programme.[95] The use of these tools led to a deepened interaction between the ECB and some Member States. Suddenly, individual Member States listened closely to the ECB and *vice-versa*. Secondly, the bailouts and the attached conditionality-packages led to a situation where economic policies for a significant part of the Eurozone were co-determined on the European level. Suddenly, and for a short period of time, there was an institutional re-connection between economic and monetary policy. This dual movement led to an institutional re-connection of monetary and fiscal policy makers, but only in relation to the use of specific tools. The creation of the Recovery Fund as part of the Next Generation EU in response to the corona crisis presents another opportunity for a better articulated European economic policy, and thus for a renewal of the relationship between economic and monetary policy makers.[96]

As a result, the institutional loneliness of the ECB has been somewhat relieved, meaning that for the accomplishments of its tasks, the ECB engages in direct relations with a European economic policy maker, usually through the Eurogroup.[97] In this environment, both the independence and accountability of the ECB have acquired a different connotation. To achieve its goals and maintain its status as premier central bank on the world stage, the ECB has acted as a strategic actor throughout the crisis. This meant that in its interaction with other European bodies, it acted based on the premise that a) it needed their cooperation, and b) that its own actions influenced the degree to which other actors were willing to cooperate.[98]

95 See *Beukers*, Common Mkt. L. Rev. 2013/6, pp. 1594 and 1600.
96 Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility, OJ L 57 of 18 February 2021.
97 See *Torres*, who credits *Padoa-Schioppa* for coining the phrase “institutional loneliness”: *Torres*, Journal of European Integration 2013/3, p. 294.
98 The most famous example is the Outright Monetary Transactions program by the ECB, which followed the decision to start banking union by the European Council. See *Véron*, Europe’s radical banking union, available at: https://www.bruegel.org/system/files/wp_attachments/essay_NV_CMU.pdf (17/01/2025).

D. Conclusion

The euro is a bold experiment; a currency shared by 20 Member States, governed by a supranational central bank, and part of a Union that comprises 27 Member States. Fiscal and economic policies mostly remained in the purview of the Member States. The euro now stands as key pillar of European integration, having withered an intense crisis between 2010 and 2015. To setup the experiment, the Member States used the Maastricht Treaty to lay down the main the rules of Economic and Monetary Union. These rules guaranteed a high level of independence for the new central bank and included few rules on how the new central bank should interact with other institutions of the EU and the governments of the Member States. The first and foremost concern was the independence of the ECB. If anything, accountability was an afterthought. *Brentford* argued in 1998 that "[i]f we consider the costs of inflation, the price of reduced accountability in the form of a highly independent European Central Bank may be worth having".[99] This was the deal struck with the Maastricht Treaty.

To argue now that the democratic legitimacy of the ECB depends on improving its accountability and that the ECB should participate in various accountability mechanisms would be to ignore these key features of the Maastricht Treaty. Instead, one can argue that the Maastricht Treaty itself is problematic from the perspective of democratic legitimacy. As of the 1980s, there had been a discussion in EU law about the constitutional nature of the European project. One can argue that it is a bad idea to constitutionalize economic ideas. The drafters should not have embedded their economic views on monetary union so deeply into the Treaties, and the various parliaments across the EU should not have ratified the Treaty.

There is certainly room for another perspective. Constitutions can have a wide variety of objectives, and so the charge of over-constitutionalization should not be used lightly. However, accepting the democratic legitimacy of the Maastricht Treaty precludes complaints about the democratic legitimacy of the ECB, whenever it acts within the boundaries set by the Treaties.

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99 *Brentford*, International and Comparative Law Quarterly 1998/1, p. 109.

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Legal considerations regarding the European Central Bank's (new) monetary policy strategy

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Contents

Abstract

Since the monetary policy strategy of the European Central Bank (ECB) is not mentioned in the Treaties of the European Union (EU), questions arise regarding its legal nature, its legal effects, and the possibilities of its implementation. Therefore, this contribution focuses on establishing the European legal framework of the monetary policy strategy, as this topic has notably received limited attention thus far. For a comprehensive assessment, the study addresses the question of the monetary policy strategy's limits and explains why the ECB's discretion regarding the goals set in the monetary policy strategy is substantial.

Keywords: ECB, new monetary policy strategy 2021, price stability, supporting the general economic policies in the Union, judicial review, *Gauweiler*, *Weiss*

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A. Introduction

Immediately after the completion of the second stage of the Economic and Monetary Union (EMU), culminating in the founding of the European Central Bank (ECB)[1] on June 1, 1998, the Gouverning Council introduced its first monetary policy strategy in October 1998.[2] In the strategy of 1998, the main element was the quantitative definition of price stability. It stated, that "[p]rice stability shall be defined as a year-on-year increase in the Harmonised Index of Consumer Prices (HICP) for the euro area of below 2%."[3] After more than four years of satisfactory implementation, the monetary policy strategy of 1998 underwent a thorough evaluation in May 2003, namely, a minor adoption of the definition of price stability, which was to be maintained over the medium term.[4]

Eighteen years after its previous review, the ECB announced a new monetary policy again in July 2021,[5] introducing significant amendments that were deemed unavoidable due to various reasons. First, the economic landscape was very different from that of the last review in 2003. The rapid global changes and ongoing crises ultimately made a realignment of the monetary policy strategy inevitable, which was recognized not only by the ECB. The Federal Reserve (Fed), the central bank of the United States, had already adjusted its strategy a year earlier in 2020, as "the economy is always evolving, and the FOMC's [Federal Open Market Committee] strategy for achieving its goals must adapt to meet the new challenges that arise".[6] A further reason stems from low inflation rates. In the years before 2021, inflation had fallen, and instead of preventing inflation from rising too high, the ECB had to prevent it from falling too low; therefore, it felt forced to adapt the definition of its inflation target.[7] The Governing Council changed the 2% target to a symmetric one. Symmetry means that the Governing Council considers negative and positive deviations from this target as equally undesirable. Moreover, the age of digitalization and the expanded possibilities for communication have motivated the ECB to prioritize and enhance its monetary policy communication with the public, aiming

1 The European System of Central Banks (ESCB) which is made up of the ECB and the national central banks of all the Member States of the European Union (EU). The article refers to ECB exclusively and does not distinguish between ESCB and ECB.
2 See *ECB*, A stability-oriented monetary policy strategy for the ESCB, available at: https://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html (20/3/2025).
3 See *ECB*, A stability-oriented monetary policy strategy for the ESCB, available at: https://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html (20/3/2025).
4 See *ECB*, The ECB's monetary policy strategy, available at: https://www.ecb.europa.eu/press/pr/date/2003/html/pr030508_2.en.html (20/3/2025).
5 See *ECB*, The ECB's monetary policy strategy statement, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (20/3/2025).
6 The Fed, in particular, altered its policy framework to achieve its inflation target, see *FED*, Federal Open Market Committee announces approval of updates to its Statement on Longer-Run Goals and Monetary Policy Strategy, available at: https://www.federalreserve.gov/newsevents/pressreleases/monetary20200827a.htm (20/3/2025).
7 See *ECB*, Our price stability objective and the strategy review, available at: https://www.ecb.europa.eu/home/search/review/html/price-stability-objective.en.html (20/3/2025).

to ensure public understanding and to build trust in the ECB's actions.[8] However, the biggest novelty is the fact that the ongoing climate change and its associated consequences for the Euro area have compelled the ECB to announce future actions against climate-related issues.[9]

In light of the above, the monetary policy strategy has undoubtedly played a crucial role in the ECB's monetary policy since the very beginning. This can probably also be expected in the future, as the next assessment of the monetary policy strategy is scheduled for 2025.[10] Moreover, the above highlights that the aims of the strategies have shifted over time. Comparing the latest monetary policy strategy of 2021 with the strategy of 2003, which is largely the same as that of 1998, it is noticeable that the strategy of 2021 generally provides more flexibility to the ECB,[11] or, rather, the ECB is expanding its own scope of action, although the definition of the inflation target has become somewhat narrower.

All this shows the high importance of the ECB's strategy. This being said, it is worthwhile to have a look at the ECB's strategy from a legal perspective. To do so, this contribution will, first, examine the legal framework of the ECB's strategy, the possibilities for its implementation, its relationship to the objectives of the ECB's mandate and its role within it (B.-C.). Second, this contribution will also shed some light on the possible legal limits for the ECB when designing its strategy (D.). As an EU institution, the ECB, too, has to adhere to the principle of conferral.[12] Moreover, as with any other EU institution, ECB measures may be subject to judicial review. Undeniably, the ECB has a special role owing to its independence according to Art. 130 TFEU. However, what role does the Court of Justice of the EU (CJEU) play? And does accountability restrict the ECB? This contribution addresses these and other questions, explaining why the ECB has substantial discretion regarding the goals outlined in its monetary policy strategy.

B. Legal framework of the monetary policy strategy

Since October 1998, the newly founded ECB has formulated the EMU's monetary policy within its strategy. It provides a comprehensive and initial framework for implementing monetary policy predominantly to reach the ECB's objectives enshrined in the Treaties, guiding the ECB's Governing Council, the main decision-making

8 See *ECB*, The ECB's monetary policy strategy statement, point 11, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (20/3/2025).

9 See *ECB*, The ECB's monetary policy strategy statement, point 10, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (20/3/2025).

10 See *ECB*, The ECB's monetary policy strategy statement, point 12, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (20/3/2025).

11 See *Tuori*, Maastricht Journal of European and Comparative Law 2023/4, pp. 503 f; *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/60, pp. 960, 973.

12 Art. 13 para. 2 TEU.

body of the ECB, which consists of the six members of the Executive Board and the governors of the national central banks of the Euro-area countries,[13] to make and communicate its policy decisions to the public;[14] in particular, to maintain price stability in the euro area, which is enshrined in Art. 127 para. 1 sentence 1 TFEU,[15] at least, that has been the focus thus far.

Given the critical role of the monetary policy strategy in monetary policy, it is essential to examine the legal framework that governs it, namely its legal nature and legal effects, and to assess the extent of the ECB's autonomy in policymaking, particularly regarding the formulation of its goals within the monetary policy strategy. The difficulty in this examination arises from the fact that the Treaties provide only limited guidance on this matter, as they neither mention nor define the monetary policy strategy.

I. Legal nature of the monetary policy strategy

Art. 130 TFEU as well as Art. 7 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB/ECB) declare the ECB as an independent European institution, "[w]hen exercising the powers and carrying out the tasks and duties conferred upon […] by the Treaties and the Statute of the ESCB and ot the ECB". One of the basic tasks of the ECB is "to define and implement the monetary policy of the Union."[16] The Statute of the ESCB/ECB further states in Art. 12.1. that the Governing Council of the ECB "[…] shall formulate the monetary policy of the Union […]". Therefore, while the Treaties clearly assign the competence to define, implement, and formulate monetary policy to the ECB's Governing Council, they remain silent on the manner in which the ECB must carry out these tasks. However, there are several reasons to suggest that the ECB has significant discretion in determining how to implement monetary policy, as long as it takes action, since the phrase "shall formulate the monetary policy" can likely be interpreted as a mandatory requirement.

First, the wording of Art. 12.1. sentence 2 Statute of the ESCB/ECB[17] suggests that, when formulating the monetary policy of the Union, the Governing Council acts through a measure that serves as the basis for subsequent decisions and further guidelines to implement those decisions. This implies that the Treaties make the

13 Art. 283 para. 1 TFEU.

14 See *ECB*, Monetary policy strategy, available at: https://www.ecb.europa.eu/mopo/strategy/html/index.en.html (20/3/2025).

15 See *ECB*, A stability-oriented monetary policy strategy for the ESCB, point 4, available at: https://www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html. (20/3/2025).

16 Art. 127 para. 2 first indent TFEU and Art. 3 para. 3.1. first indent Statute of the ESCB/ECB.

17 Art. 12.1 sentence 2 Statute of the ESCB/ECB reads as follows: "The Governing Council shall formulate the monetary policy of the Community including, as appropriate, decisions relating to intermediate monetary objectives, key interest rates and the supply of reserves in the ESCB, and shall establish the necessary guidelines for their implementation."

Governing Council competent to formulate or, better, shape monetary policy of the Union, which implies considerable discretion for it. The wording of Art. 12.1. ("shall") suggests an obligation of the ECB's Governing Council to act but does not tell us in which manner the Governing Council has to do so.

Second, the Treaties do not provide a definition or the specifics for implementation, nor do they specify the choice of legal act or form to be used. Consequently, the Treaty legislator has left the choice of legal instruments and the form of implementation of Art. 127 para. 1 TFEU to the ECB. As a result, the ECB enjoys considerable independence in policymaking and the selection of appropriate tools to achieve its objectives. However, this room of action is not without limits. The ECB must operate within the confines of its mandate and respect the principle of conferral.[18] Moreover, the actions of the ECB are subject to judicial oversight by the CJEU, although, as we will see later, this oversight is limited (more so in Section D.I.).

Third, the definition and formulation of monetary policy within the framework of a published strategy is not a tool exclusively used by the ECB. The formulation of monetary policy through a published strategy is a common approach adopted by other central banks such as the Bank of Japan,[19] the Bank of England,[20] and the Fed.[21] The publication of the monetary policy strategy, thus making it available to the public, was not always the case globally, but it is now a common practice.[22]

Fourth, the ECJ has already referenced the price stability objective outlined and defined in the monetary policy strategy in its case law, thereby indirectly affirming the ECB's competence to set monetary policy in the form of a strategy.[23] The Court stated as follows: "It does not appear that the specification of the objective of maintaining price stability as the maintenance of inflation rates at levels below, but close to, 2% over the medium term, which the ESCB chose to adopt [by its strategy] in 2003, is vitiated by a manifest error of assessment and goes beyond the framework established by the TFEU."[24] Based on this statement, two conclusions can be drawn: (i) the specification of the objective of maintaining price stability is the task of the ECB and (ii) the decision on how to formulate and, thus, shape monetary policy falls within the ECB's responsibility, as demonstrated by its choice to adopt a specific strategy.

18 See Art. 5 para. 1 TEU.
19 See *Bank of Japan*, Outline of Monetary Policy, available at: https://www.boj.or.jp/en/mopo/outline/index.htm (20/3/2025).
20 See *Bank of England*, Monetary policy, available at: https://www.bankofengland.co.uk/monetary-policy#:~:text=Monetary%20policy%20affects%20how%20much,for%20us%20by%20the%20Government (20/3/2025).
21 See *Fed*, Monetary Policy, available at: https://www.federalreserve.gov/monetarypolicy.htm (20/3/2025).
22 See *Tuori*, in: Amtenbrink/Herrmann (eds.), p. 616.
23 See ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 56.
24 See ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 56.

II. Legal effects of the monetary policy strategy

Given the reasons outlined previously, the ECB is required to establish a framework for monetary policy, but has considerable freedom in determining how it formulates, defines, and implements this policy. Since 1998, the ECB has adopted it through a strategy. Nevertheless, questions arise regarding how this monetary policy strategy should be classified: Is it considered an EU legal act, and does it have binding effects?

In principle, pursuant to Art. 132 para. 1 TFEU, the ECB has various types of EU legal acts at its disposal to fulfill the tasks assigned to it by the Treaties and the Statute of the ESCB/ECB, namely regulations, decisions, recommendations, and opinions. However, the issuance of regulations may only occur in the expressly mentioned cases to determine and implement monetary policy (according to Art. 3 para. 1 first indent Statute of the ESCB/ECB and Art. 132 para. 1 second indent TFEU). Therefore, the ECB, with the exception of directives, has access to the full range of EU legal acts, as defined in Art. 288 TFEU, to determine and implement the monetary policy strategy.[25] However, the legal consequences of EU acts vary.

Regulations and decisions are binding in their entirety, whereas recommendations and decisions have no binding force. In addition, there are also other forms of non-binding measures such as the aforementioned guidelines (Art. 12.1. Statute of the ESCB/ECB). These non-binding acts are often described as EU *soft law*[26] Since *soft law* is not explicitly mentioned in the Treaties, there is no single accepted definition.[27] The individual acts that are considered as *soft law* are diverse in their designation, but have at least in common that they are non-binding and organs provide expectations of behavior and points of orientation, but also include tools that concretize norms or serve to interpret norms.[28]

The fact that the monetary policy provides the ECB with behavioral expectations and points of orientation supports the assumption that the monetary policy strategy can be classified as *soft law*, meaning that it initially does not produce binding effects. However, *soft law* can, under certain circumstances, produce legal effects that affect legal enforcement (see Section D.I.).[29]

The monetary policy strategy was unanimously approved by the ECB's Governing Council and was subsequently announced on the homepage.[30] Due to its publi-

25 See *Zahradnik/Richter-Schöller,* in: Jaeger/Stöger (eds.), para. 1.

26 More on *soft law*, see *P. Ionescu/Eliantonio*, Journal of Contemporary European Research 2021/17, pp. 1-23.

27 See *P. Ionescu/Eliantonio*, Journal of Contemporary European Research 2021/17, p. 46.

28 See *Stocker/Vcelouch*, in: Jaeger/Stöger (eds.), para. 121.

29 See *Klamert/Loewenthal*, in: Kellerbauer/Klamert/Tomkin (eds.), p. 2532, para. 59; *Fromage/Eliantonio/Wright*, Journal of Banking Regulation 2022/23, p. 2.

30 See *Banco de España*, The European Central Bank's new monetary policy strategy* Anuario del euro 2022/2022 Euro YearBook, available at: https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/Articulos%20Prensa/art-hdc170222en.pdf (20/3/2025), as for example: *ECB*, Strategy review key topics, available at: https://www.ecb.europa.eu/home/search/review/html/workstreams.en.html (20/3/2025).

cation on the homepage, it can also be seen as an instrument, an act of informing the public, that strengthens transparency. By contributing to the effectiveness of monetary policy and signalling the central bank's commitment to price stability, the monetary policy strategy contributes to the credibility of the ECB in financial markets. This is not a contradiction; rather, it signals the importance of strategy within the ECB's monetary policy. The ECB also acts in this manner when implementing its monetary policy strategy, such as by communicating decisions that involve changes in key interest rates[31] or by publishing press releases.[32] These forms of announcement are permissible since, as previously noted, the ECB is not obliged to use any specific legal form.

C. Implementation of the monetary policy strategy

The ECB sets the monetary policy framework in the form of a strategy, thus fulfilling the task of defining and formulating the monetary policy in the Union, which the Treaties assign to it (Art. 127 para. 2 first indent TFEU and Art. 3.1. first indent as well as Art. 12.1. Statute of the ESCB/ECB). Therefore, expectedly, the monetary policy strategy is covered by the ECB's mandate and is compatible with Union Law.

However, what options are available to the ECB for adopting the monetary policy strategy? To avoid misunderstandings, it is important to clarify that the focus should not be on the individual operational instruments, such as the change in the key interest rate, unconventional measures, or the Eurosystem collateral framework. Rather, the focus should be on the possible competence bases and objectives that the ECB can rely on to achieve the various goals set in the monetary policy strategy, as well as on the appropriate (legal) acts for its implementation. To address this, we must examine the ECB's mandate and the specific objectives it aims to achieve, namely, maintaining price stability, supporting the general economic policies in the Union, and ensuring financial stability and its role in this regard.

I. Legal bases for implementing the monetary policy strategy

The Treaties explicitly assign the ECB the mandate to maintain price stability, as enshrined in Art. 127 para. 1 sentence 1 TFEU. The monetary policy strategy and goals of ensuring price stability cannot be seen separately; on the contrary, when formulating the monetary policy strategy, maintaining price stability is inevitably of highest priority, since it is the primary objective.[33] However, according to Art. 127 para. 1 TFEU, the ECB has the discretion to formulate its policy indepen-

31 See, e.g., through the ECB's press release: *ECB*, Monetary policy decisions, available at: https://www.ecb.europa.eu/press/pr/date/2024/html/ecb.mp240606~2148ecdb3c.en.html (20/3/2025).

32 See *ECB*, Press Releases, available at: www.ecb.europa.eu/press (20/3/2025).

33 See, e.g., ECJ, Case C-370/12, *Pringle*, judgment of 27 November 2012, ECLI:EU:C:2012:756, para. 54.

dently provided that it aims to achieve price stability. Therefore, it can serve as a competence basis for the ECB's authority to make concrete decisions to implement the monetary policy,[34] as long as it is necessary to guarantee price stability. Consequently, this also applies to climate change related measures, insofar as it affects price stability.

The ECB's mandate comprises a further objective that it is obliged to pursue[35], namely to "support the general economic policies in the Union", as enshrined in Art. 127 para. 1 sentence 2 TFEU. It is understood as the second objective, as it is to guarantee it "without prejudice to the objective of price stability".

Given the ECB's mandate regarding its "supporting objective", for many reasons, the question arises as to what extent the ECB can rely on the second sentence of Art. 127 para. 1 TFEU when implementing its monetary policy strategy and associated goals. Furthermore, it must be examined whether Art. 127 para. 5 TFEU constitutes a suitable legal basis for the ECB's competence.

1. Maintaining price stability vs. supporting the general economic policies in the Union

The monetary policy strategy is commonly acknowledged as serving the objective of maintaining price stability. While price stability is included among the objectives of the EU and its Member States under Art. 119 para. 2 TFEU, and prominently set in Art. 3 para. 3 TEU as an expression of the common European interest,[36] the ECB is bound by this goal in accordance with Art. 127 para. 1, Art. 219 para. 2 and Art. 2 of the Statute of the ESCB/ECB. Within the realm of monetary policy, the ECB acts as the policymaker responsible for specifying the measures necessary to achieve price stability. Whether the ECB also holds a policymaking role in the field of general economics or in relation to the objectives pursued by general economic policies under Art. 127 para. 1 sentence 2 TFEU, in conjunction with Art. 3 TEU (e.g., supporting full employment, social progress, or improving environmental quality), is largely denied, and in the author's view, correctly so. According to the prevailing opinion, the ECB's competence does not lie in policymaking, but rather only in supporting the general economic policies,[37] as the wording shows, since the Treaties assign the ECB a supporting role in achieving a broad range of general eco-

34 See, for example, Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91 of 25/03/2020, pp. 1–5.

35 See *Ioannidis/Hlásková Murphy/Zilioli*, Occasional Paper Series 2021/276, pp. 13, 16; *Wutscher*, in: Schwarze et al (eds.), p. 2048, para. 12.

36 See *Klamert,* in: Jaeger/Stöger (eds.), para. 13.

37 See *Ioannidis/Hlásková Murphy/Zilioli*, Occasional Paper Series 2021/276, pp. 13, 16; *Zilioli/Ioannidis*, Common Mkt. L. Rev. 2022/2, p. 370; *Steinbach*, Common Mkt. L. Rev. 2022/2, p. 348; *de Boer/van 't Klooster*, PositiveMoney Europe 2021, p. 18; *Palmstorfer*, in: Blanke/Mangiameli (eds.), pp. 727 et seq.; *Dietz*, Common Mkt. L. Rev. 2022/2, p. 414; *Grünewald*, in: Gortsos/Ringe (eds.), pp. 275 et seq.; *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/60, p. 981.

nomic policy objectives, as outlined in Art. 127 para. 1 sentence 2 TFEU in conjunction with Art. 3 TEU. Moreover, following a systematic interpretation, it can also be said that Art. 127 para. 1 sentence 2 TFEU does not include the competence of the ECB to priorize the goals mentioned in Art. 3 TEU. It is widely argued that establishing these objectives in Art. 3 TEU within different policies in the EU is not the task of the ECB; rather, it is the responsibility of the relevant authorities.[38] This view is justifiable, as a closer examination of the specific objectives outlined in Art. 3 TEU, the EU's competences, and the legislative process reveal that neither the policies nor Art. 3 TEU suggest that any competence of the ECB justifies such prioritization. For example, economic policy is a coordinating competence between the Member States and the EU,[39] while environmental policy is a shared competence between the Member States and the EU and within the EU, it is determined by the European Parliament and the Council.[40] Employment policy is coordinated between the Member States and the EU, implemented by the European Parliament and Council.[41] The adoption of policy-related measures falls within the competence of the institutions entrusted with the respective policy areas (policies). This also includes the interpretation of the relevant Union objectives that guide the use of the respective competences pursuing these objectives.[42] Hence, according to this view, it would not be for the ECB to formulate or prioritize these policies and their associated objectives. Of course, this does not answer the question of who is the policymaker responsible for prioritizing the goals in Art. 3 TEU and the contribution cannot and does not aim to deliver an answer. This may require broader examination. It can at least be said that there is a view suggesting that the Council, in accordance with Art. 121 para. 2 TFEU could be entitled to prioritize the relevance of these objectives, at least as regards the general economic policies to ensure democratic legitimacy.[43] Yet the Treaty provides the Council only with a weak instrument, as the "broad guidelines of the economic policies of the Member States and of the Union" are recommendations[44] and, thus, not legally binding.

This being said, the ECB, on the one hand, enjoys a broad margin of appreciation but, on other, does not find itself in the role of a policymaker aiming at the second objective.[45] By the same token, the policymakers to be supported by the ECB may not instruct the ECB or the national central banks how to make use of the secondary mandate. Against this, the view that, for example, the European Parliament

38 See *Steinbach*, Common Mkt. L. Rev. 2022/2, p. 348; *Dietz*, Common Mkt. L. Rev. 2022/2, p. 414; *Palmstorfer*, in: Blanke/Mangiameli (eds.), pp. 727, 728.
39 Art. 5 para. 1, 119 para. 1, 120 para. 1 TFEU; see *Ioannidis/Zilioli*, Common Mkt. L. Rev. 2022/59, p. 348; *Dietz*, Common Mkt. L. Rev. 2022/2, p. 414.
40 Art. 4 para. 2, 11, 191 para. 1, 192 para. 1 TFEU.
41 Art. 5 para. 2, 145 para. 1, 149 TFEU.
42 See *Ioannidis/Hlásková Murphy/Zilioli*, Occasional Paper Series 2021/276, pp. 13, 19; *Ioannidis/Zilioli*, Common Mkt. L. Rev. 2022/59, pp. 371 et seq.
43 See *Thiele*, in: ECB (ed.), p. 38; with a critical view on this: *van der Sluis*, in: Beukers/Fromage/Monti (eds.), pp. 392–408.
44 Art. 121 para. 2 subpara. 3 TFEU.
45 See *Dietz*, Common Mkt. L. Rev. 2022/2, p. 414.

may provide guidance to the ECB on the secondary objective,[46] seems problematic, because this may be tantamount to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.

Bearing the above in mind, the ECB can still refer to Art. 127 para. 1 sentence 2 TFEU, when implementing its monetary policy strategy's objectives. Rather, it indicates that the ECB must consider two factors. First, the ECB assures that general economic policies are supported; however, it is designed not to jeopardize the maintenance of price stability.[47] Second, the policymaker responsible must first set the direction.[48] Therefore, Art. 127 para. 1 sentence 2 TFEU in conjunction with Art. 127 para. 2 first intend TFEU may serve as an adequate competence basis for the implementation of the monetary policy strategy.[49]

2. Financial stability

Given the differing views on the role of financial stability (Art. 127 para. 5 TFEU), it is pertinent to briefly examine whether this provision can serve as a legal basis for implementing the monetary policy strategy. The ongoing debate likely stems from the ambiguity surrounding whether financial stability falls within the scope of monetary policy.[50] On the one hand, it has been argued that Art. 127 para. 5 TFEU provides itself as an objective and can serve as a legal basis for measures aimed at ensuring financial stability.[51] On the other hand, it is contended that safeguarding financial stability is achievable only through the monetary policy mandate, with Art. 127 para. 5 TFEU playing only a complementary role. Consequently, measures addressing financial stability would need to be instrumental to the primary objective of maintaining price stability as set forth in Art. 127 para. 1 TFEU. The ECB appears to support the latter view as it has not cited para. 5 in its monetary policy decisions.[52] Therefore, if financial stability is at risk, it generally necessitates measures aimed at achieving the primary objective of maintaining price stability, in accordance with Art. 127 para. 1 TFEU. Hence, it is more convincing that financial stability is not an objective or legal competence in itself, but rather a means to achieve price stability.[53]

46 See *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/60, p. 982.
47 See ECJ, Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 51.
48 See *Zilioli/Ioannidis*, Common Mkt. L. Rev. 2022/2, p. 370; *Steinbach*, Common Mkt. L. Rev. 2022/2, p. 365.
49 This view is also held by the ECB, as it based its decision (Decision (EU) No. 2022/1613 of the European Central Bank of 9 September 2022 amending Decision (EU) No. 2016/948 on the implementation of the corporate sector purchase programme (ECB/2016/16) (ECB/2022/29) [2022] OJ L 241 of 9/09/2022) on this norm.
50 See *Palmstorfer*, in: Blanke/Mangiameli (eds.), p. 729.
51 See *Ohler*, p. 313; *Dietz*, Common Mkt. L. Rev. 2022/2, p. 414; *Ioannidis/Hlásková Murphy/Zilioli*, Occasional Paper Series 2021/276, p. 20; basically, too: *Zilioli/Ioannidis*, Common Mkt. L. Rev. 2022/2, p. 370; *Steinbach*, Common Mkt. L. Rev. 2022/2, p. 375.
52 See *Ohler*, p. 313.
53 See *Ioannidis/Hlásková Murphy/Zilioli*, Occasional Paper Series 2021/276, p. 20.

II. Possible (legal) instruments for implementing the monetary policy strategy

As mentioned before, in order to fulfill the tasks assigned to the ECB by the Treaties and the Statute of the ESCB/ECB, the ECB has pursuant to Art. 132 para. 1 TFEU various types of EU legal acts for action, namely, regulations, decisions, recommendations, and opinions, to implement its monetary policy.[54] The ECB issues both non-binding announcements and binding decisions, the latter particularly when implementing "non-standard monetary policy measures"[55] (also called "[un-]conventional monetary policy measures")[56] as part of its strategy. Most of the ECB's measures that fall within its mandate to maintain price stability are based on Art. 127 para. 2 first indent TFEU and take the form of legally binding decisions. For example, the Public Sector Purchase Programme (PSPP) was implemented by Decision (EU) No. 2015/774, in which the ECB decided to adopt these measures in order to achieve price stability, namely to contribute "[…] to a return of inflation rates to levels below but close to 2% over the medium term"[57], which was the target inflation rate at that time. However, the ECB measures to implement the monetary policy strategy's goals of maintaining price stability are of a vastly varied legal nature.[58] Measures are also issued in the form of an internal administrative nature.[59] Consequently, the same must apply to the second objective. Therefore, it appears that the necessary measures to support general economic policies in the Union could be issued not only in the form of regulations and decisions but also through non-binding *soft law*.

D. Limits of the monetary policy strategy

Even though the ECB is an independent institution,[60] it must operate within certain limits to ensure compliance with Union law. On the one hand limits of the ECB's mandate regarding monetary policy result from the listed objectives assigned to the ECB by the Treaties, namely the obligaton to maintain price stability, and the obligation that the ECB "[…] shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Art. 3 of the Treaty on European Union."[61] Additionally, from the hierar-

54 See Section B.II. for details.
55 See *ECB*, Monetary policy decisions, available at: https://www.ecb.europa.eu/mopo/decisions/html/index.en.html (20/2/2025).
56 See *Schnabel*, Unconventional fiscal and monetary policy at the zero lower bound, available at: https://www.ecb.europa.eu/press/key/date/2021/html/ecb.sp210226~ff6ad267d4.en.html (20/3/2025).
57 Recital 3 of the Decision (EU) No. 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), OJ L 121 of 14/05/2015, p. 20.
58 Art. 12.1. Statute of the ESCB/ECB.
59 See *Waldhoff*, in: Siekmann (eds.), p. 268, para. 22.
60 Art. 282 para. 3 TFEU.
61 Art. 127 para. 1 sentence 2 TFEU.

chy of those objectives, the latter may only be pursued if the former does not suffer from it.[62] However, the scope of action in monetary policy is restricted by the principles of conferral (Art. 5 paras. 1 and 2 TFEU)[63] and proportionality (Art. 5 para. 4 TEU).[64] Additionally, through the principle of an open market economy (Art. 127 para. 1 sentence 3 TFEU),[65] non-discrimination[66] and the prohibition of monetary financing (Art. 123 para. 1 TFEU).

The central issue here is how to ensure the ECB's legality of ECB measures. In instances where a violation of the aforementioned principles occurs—for example, if the ECB establishes a framework and formulates objectives that exceed its conferred mandate by prioritizing general economic policies over the primary objective of price stability, or assumes a policymaking role by prioritizing the Union's objectives under Art. 3 TEU, which fall outside its primary mandate as outlined in Section C.I.1.—legal scrutiny is necessary to avoid undermining the EU legal system.

I. Judicial review

Art. 282 para. 3 TFEU provides the ECB with legal personality and Art. 35 para. 1 Statute of the ESCB/ECB subjects it to judicial oversight by the CJEU. However, the questions are (i) which legal procedure can be considered and whether the admissibility of challenging the monetary policy strategy is established, and (ii) whether there is a realistic chance of successfully contesting the monetary policy strategy.

(i) First, an action for annulment against the ECB pursuant to Art. 263 TFEU, brought before the CJEU by privileged, semi-privileged, and non-privileged applicants, may be of relevance. One argument could be that the goals in the monetary policy strategy undermine the objective of maintaining price stability or that the ECB exceeds the limits of its mandate (such as a lack of competence or misuse of powers according to Art. 263 para. 2 TFEU). If the Court finds the action to be well founded, it declares the contested act null and void, which typically means it is considered invalid from the time it was originally adopted. However, this provides that the ECB's action can be challenged by an action for annulment.

According to Art. 263 para. 1 TFEU, legislative acts (as defined in Art. 289 para. 3 TFEU), as well as acts of the Council, the European Commission, and the ECB, can be challenged through an action for annulment, provided they are not mere recommendations or opinions, as they have no binding force according to Art. 288

62 Art. 127 para. 1 sentence 2 TFEU: "Without prejudice to the objective of price stability […]".
63 Art. 5 para. 1 TEU.
64 According to Art. 119 para. 2 and Art. 127 para. 1 TFEU in conjunction with Art. 5 para. 4 TEU. See ECJ, Case C-62/14, *Gauweiler and Others*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 66 and Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 71.
65 On that topic see *Weismann*, Eur. L. Rev. 2025/5, pp. 554–556; *Dietz*, Common Mkt. L. Rev. 2022/2, pp. 404–406.
66 See *Dietz*, Common Mkt. L. Rev. 2023/5, pp. 1358 et seq.

para. 5 TFEU. In principle, the same applies to *soft law*.[67] Nonetheless, when an action for annulment is brought by a privileged applicant, such as a Member State or an EU institution, legally non-binding acts—including announcements made by the institutions and published solely on the internet—can directly be the subject of an action for annulment,[68] provided that they produce legal effects.[69] However, the limits of admissibility are reached when an act merely demonstrates the institution's intention to behave in a certain way[70] or concerns only the internal organization of the institution, as these are not intended to have legal effects and therefore, are not subject to legal challenge under Art. 263 TFEU.[71] To enhance legal protection against EU *soft law*, it is proposed to adopt a more liberal, constitutionally oriented interpretation of Art. 263 and 288 TFEU.[72] This approach advocates moving away from the Court's formalistic stance and supports direct judicial review of such acts through annulment actions.[73]

According to case law, determining the legal effects of the act in question depends on its true essence or substance, regardless of its form or legal nature.[74] The ECJ determines this by examining the wording and context in which it appears, its substance, and the intention of the author.[75] At this point, a case worth mentioning is *United Kingdom v. ECB*.[76] The General Court declared the admissibility of the non-binding[77] Eurosystem Oversight Policy Framework by the ECB, as the requirements were considered to be present, with the consequence that the framework created legal effects.[78] The ECB published the Eurosystem Oversight Policy Framework on its website, which it presents as having the purpose of describing

67 See *Klamert/Loewenthal*, in: Kellerbauer/Klamert/Tomkin (eds.), p. 2532, para. 59; *P. Ionescu/Eliantonio*, Journal of Contemporary European Research 2021/17, pp. 49 et seq.
68 See *Schima/Eisendle*, in: Kellerbauer/Klamert/Tomkin (eds.), pp. 2410 et seq., para. 6.
69 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, paras. 30 et seq.; ECJ already in its early case law: C-22/70, *Commission v. Council*, judgment of 31 March 1971, ECLI:EU:C:1971:32, para. 42.
70 Such as the European Commission's issuance of a reasoned opinion in the context of infringement proceedings, see ECJ, Joined Cases C-593/15 P and C-594/15 P, *Slovak Republic v. Commission*, judgment of 25 October 2017, ECLI:EU:C:2017:800, para. 63.
71 See *Schima/Eisendle*, in: Kellerbauer/Klamert/Tomkin (eds.), pp. 2411, paras. 8 et seq.
72 See *Gentile*, Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach, pp. 491 et seq.
73 See *Gentile*, Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: a Plea for a Liberal-Constitutional Approach, pp. 491 et seq.
74 See ECJ, Joined Cases C-551/19 P and C-552/19 P, *ABLV Bank v. ECB*, judgment 6 May 2021, ECLI:EU:C:2021:369, para. 40 and the case-law cited.
75 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, paras. 31 et seq. with further references.
76 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133.
77 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 29.
78 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 54.

the role of the Eurosystem in the oversight of payment, clearing and settlement systems.[79] The monetary policy strategy is non-binding and was also merely published on the ECB's website. Given these similar circumstances, the monetary policy strategy should be evaluated in light of the judgment's findings on legal effects. However, in the case of *United Kingdom v. ECB*, the ECJ determined that, for a non-binding act to produce legal effects, it must meet certain requirements.

To assess the way in which the parties concerned perceive the wording and context of the contested act, first, it should be examined whether the act was publicized outside the author itself.[80] This can be answered affirmatively since the monetary policy strategy was published on the ECB's homepage. From the perspective of the parties concerned, the wording of the act is also relevant for determining whether it is phrased in mandatory terms.[81] In the case *United Kingdom v. ECB*, it should be noted that the introductory provisions of the Oversight Policy Framework showed that its purpose was to set the monetary policy framework. To apply this to the monetary policy strategy, it clearly restates the powers conferred by the Treaties on the ECB and mentions them.[82] The monetary policy strategy is far from being seen as a mere expressly indicative proposal.

It should be determined whether the objective pursued by the adoption of the monetary policy strategy, as resulting in particular from its wording and substance, was to determine a definitive position of the ECB or, on the other hand, to prepare a subsequent act, which alone was intended to have legal effects.[83] This must probably be denied since the monetary policy strategy merely sets out the ECB's intention to behave in a certain way in the future (in the next few years, until the monetary policy strategy is amended). Unlike the Oversight Policy Framework, the ECB's monetary policy strategy does not address the behaviour of others. It cannot be perceived by others "as an act which they must comply with, despite the form or designation favoured by its author".[84]

Based on the findings in the case *United Kingdom v. ECB* concerning the legal effects of the Oversight Policy Framework, it can be can be concluded that the ECB's monetary policy strategy might not produce legal effects and, therefore, cannot be the subject of an action for annulment.

79 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 1.
80 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 33.
81 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 35.
82 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 36; *ECB*, The ECB's monetary policy strategy statement, point 8, available at: https://www.ecb.europa.eu/home/search/review/html/ecb.strategyreview_monpol_strategy_statement.en.html (20/3/2025).
83 See GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 52.
84 GC, Case T-496/11, *United Kingdom v. ECB*, judgment of 4 March 2015, ECLI:EU:T:2015:133, para. 32.

The situation might be different when legally binding decisions are made on the basis of the monetary policy strategy, which may very well be the subject of an action for annulment. Of course, further requirements must be met, namely, a ground for annulment, the right to bring an action, and the action must be brought within two months of the publication or notification of the contested measure.

Second, the preliminary ruling pursuant to Art. 267 TFEU should be considered. Given that the legal nature of the strategy is non-binding and does not produce legal effects, it may oppose an action for annulment. Legal protection in the preliminary ruling procedure is broader than in the case of an action for annulment; for example, the ECJ, through preliminary rulings, does indeed have the authority to discuss and interpret the validity of recommendations and opinions (*soft law*),[85] as Art. 267 TFEU does not provide a review limitation comparable to that of Art. 263 TFEU.[86] However, the case of *Gauweiler and Others*[87] also provided valuable insights. Among other things, the question of the admissibility of an ECB act was the subject of the preliminary ruling procedure.

The case *Gauweiler and Others* was about the ECB's Outright Monetary Transactions Programme (OMT Programme), which was only announced in a press release on the homepage and was therefore not implemented. The ECJ decided that this act would be the subject of a preliminary ruling procedure.[88] In particular, the argument of Advocate General *Cruz Villalón* is noteworthy, as it provides arguments for the admissibility of the monetary policy strategy. The General Advocate saw two valid reasons why the Governing Council's OMT decision, despite its *preparatory* nature, must be subject to judicial review,[89] which, however, were not dealt with in the ruling itself.

The first reason relates to the fact that the programme forms an act setting out the broad features of a general programme for action by a union institution and the case law of the ECJ. According to the General Advocate, the condition for challenging, their binding nature, and the production of the legal effects of those acts should be interpreted more flexibly compared to those that establish the rights and obligations of third parties.[90] He further argued that the working method of modern central banks should be taken into account, since communication strategy is a central instrument of monetary policy and announcements, which all play

85 See ECJ, Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles,* judgment of 13 December 1989, ECLI:EU:C:1989:646 paras. 8 et seq.; See *Schima/Eisendle*, in: Kellerbauer/Klamert/Tomkin (eds.), p. 2439, para. 11.

86 To explore the possibilities of challenging EU *soft law* through actions for annulment and preliminary rulings, see: *Scholz*, Soft Law: Rechtsschutzpotenzial von Nichtigkeitsklage und Vorabentscheidungsverfahren, EuZW 2022/10, pp. 454 et seq.

87 ECJ, Case C-62/14, *Gauweiler and Others,* judgment of 16 June 2015, ECLI:EU:C:2015:400.

88 See ECJ, Case C-62/14, *Gauweiler and Others,* judgment of 16 June 2015, ECLI :EU:C:2015:400, paras. 18–31 (in particular para. 31).

89 See Opinion of AG *Cruz Villalón*, Case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:7, para. 73; *Borger*, Common Mkt. L. Rev. 2016/1, p. 157.

90 See Opinion of AG *Cruz Villalón*, Case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:7, paras. 73, 75–83.

important roles in influencing and managing market expectations and are therefore key to an effective monetary policy.[91] Denying the actionability of such acts merely because they have not been formally adopted and published in the Official Journal risks excluding important monetary policy tools from judicial review,[92] which could seriously undermine the Union's system of legal review.

Building upon the compelling arguments presented by the Advocate General *Cruz Villalón* in the case *Gauweiler and Others*, applying these perspectives to the ECB's monetary policy strategy would necessitate initiating a preliminary ruling procedure. As already explained, the monetary policy strategy has no legal effects on third parties but is nevertheless an important tool of monetary policy with far-reaching consequences. Although the monetary policy strategy, therefore, might be *soft law*, it must be amenable to legal protection, due to its important roles in influencing and managing market expectations, and different rules apply to the ECB in many respects. This must not lead to the ECB running the risk of depriving legal control of compliance with the limits of its mandate, with the consequence that the ECB would not be subject to any obligation to provide reasons, even in the event of manifest errors of assessment.

ii) However, there are other obstacles in the possibility of judicial review of the monetary policy strategy and its prospects for success in the preliminary ruling.

First, Art. 127 para. 1 TFEU has no direct effect on private individuals and does not confer any subjective rights. If a party therefore felt that its rights had been violated due to the monetary policy strategy and non-compliance with the guarantee of price stability and other rights such as fundamental rights, this would have to be asserted in the course of a national procedure. The court itself might have doubts regarding the interpretation of Art. 127 para. 1 TFEU or fundamental rights and could then submit a question to the ECJ and, if necessary, indirectly refer to the monetary policy strategy.[93]

Second, the ECB enjoys wide discretion when it comes to its monetary policy mandate.[94] The ECJ grants the ECB a wide margin of discretion in ensuring price stability, as complex decisions must be made, provided it fulfills its obligation to state reasons and no manifest error of assessment occurs.[95] Although the ECJ has not yet defined the terms "complex decisions" nor "decisions of a technical nature", based on its statements in the two cases *Gauweiler and Others* and *Weiss and*

91 See Opinion of AG *Cruz Villalón*, Case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:7, paras. 84–90.
92 See Opinion of AG *Cruz Villalón*, Case C-62/14, *Gauweiler and Others*, ECLI:EU:C:2015:7, para. 89.
93 See *Waldhoff*, in: Siekmann, p. 266, paras. 17 et seq.
94 See ECJ, Case C-62/14, *Gauweiler and Others*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 68 and Case C-493/17, *Weiss and Others*, judgment of 11 December 2018, ECLI:EU:C:2018:1000, para. 24.
95 See ECJ, Case C-62/14, *Gauweiler and Others*, judgment of 16 June 2015, ECLI:EU:C:2015:400, para. 24.

Others, it can be stated that the formulation of long-term goals in the monetary policy strategy requires complex technical and economic decisions.[96]

If these decisions are sufficiently justified by the ECB, and as long as the ECJ does not identify a manifest error of assessment on the part of the ECB, they are likely to be upheld. This being said, the ECB's actions will probably be within its mandate. Therefore, there are ways to subject the monetary policy strategy to judicial review in the course of a preliminary ruling procedure, but these are extremely limited. To conclude, the fight against the monetary policy strategy in the course of the preliminary ruling procedure will hardly be crowned with success.

II. Accountability

Another potential issue that could push the ECB to the limits of its mandate is accountability. A principle in EU law holds from the ECB to guarantee checks and balances,[97] which is enshrined in Art. 284 para. 3 TFEU in accordance with Art. 15.3 Statute of the ESCB/ECB[98] and hotly debated within the last years.[99]

The Eurpean Parliament is the main institution holding the ECB accountable, and the ECB shall report annually to the European Parliament, to the European Council of the EU and to the European Commission. In practice, this way of accountability takes the form of a quarterly monetary dialogue between the president of the ECB and the European Parliament Economic and Monetary Affairs Committee (ECON).[100] The monetary dialogue does not restrict the rights of the ECB or curtail its independence (Art. 130 TFEU), neither the European Parliament nor the Council of the EU has legal power for sanctions, and the requests are not legally

96 Regarding complex assessments in detail, see *Kreuzhuber*, Eur. L. Rev. 2024/49, pp. 651–664.

97 See *ECB*, Accountability, available at: https://www.ecb.europa.eu/ecb/our-values/accountability/html/index.en.html (20/3/2025).

98 Art. 284 para. 3 TFEU says: "The European Central Bank shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament, the Council and the Commission, and also to the European Council. The President of the European Central Bank shall present this report to the Council and to the European Parliament, which may hold a general debate on that basis. The President of the European Central Bank and the other members of the Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent committees of the European Parliament."; Art. 15 para. 3 Statute of the ESCB/ECB says: "In accordance with Art. 284 (3) of the Treaty on the Functioning of the European Union, the ECB shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and the current year to the European Parliament, the Council and the Commission, and also to the European Council.".

99 See *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/60, pp. 959-998; *Lastra/Dietz*, Maastricht Journal of European and Comparative Law 2023/4, p. 378; also see the contribution by *Marijn van der Sluis* in this issue on the topic, "Who needs accountability? The limited usefulness of accountability for researching the ECB".

100 See *Delaude*, in: Kellerbauer/Klamert/Tomkin (eds.), p. 2505, para. 5; *Clayes/Hallerberg/Tschekassin*, Bruegel Policy Distribution 2014/4, p. 1.

binding.[101] Art. 284 para. 3 TFEU serves to strengthen the exchange and improve the flow of information. Internal cooperation also supports cooperation between the ESCB, which is responsible for monetary policy, and the Council, which is responsible for coordinating general economic policy in the Union (Art. 121 para. 1 TFEU).

Even in the early days of the ECB, relatively much attention has been paid to the second objective in the monetary dialogue.[102] Given that the ECB invoked this second objective for the first time in 2022,[103] many questions are likely to arise that can be addressed in the context of Art. 284 para. 3 TFEU. In practice, however, it plays a less important role than in the earlier days of the ECB,[104] although the ECB's broad interpretation of its mandate would probably require a more intense exchange with the European Parliament and the Council to ensure demogratic legitimacy. This is why there is also a call to reassess the issue of accountability,[105] as the principle of accountability has not adapted to the expansion of the ECB's mandate. The broader its discretion, the more crucial it becomes to uphold a strong system of accountability, as ECB's power necessitates accountability to ensure democratic legitimacy.[106]

E. Conclusion

As the contribution demonstrates, the ECB—more precisely, the ECB's Governing Council—possesses significant discretion in implementing monetary policy, primarily because the Treaties neither mention nor define the monetary policy strategy. This can also be said when it comes to implementing the goals of the monetary policy strategy. The ECB has a choice of legal instruments of Art. 288 TFEU (with the exception of the directive) to set concrete measures, and it is within EU law to base them on both Art. 127 para. 1 sentence 1 and sentence 2 TFEU, depending on the desired goal. However, the monetary policy strategy itself must be declared as a guideline (as *soft law*), with the result that it creates no binding effects, which makes access to legal protection (almost) impossible. Limits arise from judicial control, but, as the contribution shows, the monetary policy strategy being subject to judicial oversight by the CJEU is hardly crowned by success. This applies under the premise of different reasons: non-binding *soft law* with no legal effects cannot be subject to the action for annulment and private individuals cannot derive any subject rights from Art. 127 para. 1 TFEU, as well as the broad discretion of the ECB

101 See *Amtenbrink/van Duin*, Eur. L. Rev. 2009/4, p. 569.
102 See *Amtenbrink/van Duin*, Eur. L. Rev. 2009/4, pp. 575 et seq.
103 Decision (EU) No. 2022/1613 of the European Central Bank of 9 September 2022 amending Decision (EU) 2016/948 on the implementation of the corporate sector purchase programme (ECB/2016/16) (ECB/2022/29) [2022] OJ L 241 of 9/09/2022, p. 13.
104 See *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/60, pp. 961 et seq.; for a detailed analysis for the years from 1998 to 2009, see *Amtenbrink/van Duin*, Eur. L. Rev. 2009/4, pp. 561-583.
105 See *Grünewald/van 't Klooster*, Common Mkt. L. Rev. 2023/60, pp. 981, 994.
106 See *Lastra/Dietz*, Maastricht Journal of European and Comparative Law 2023/4, p. 378.

when it comes to monetary policy, significantly limits the possibilities for a preliminary ruling. Another potential issue that could push the ECB to the limits of its mandate when it comes to the monetary policy strategy is the principle of accountability enshrined in Art. 284 para. 3 TFEU in accordance with Art. 15.3 Statute of the ESCB/ECB. Currently, it does not effectively ensure the ECB's accountability. However, the discussion about the extent to which accountability limits the ECB's actions is expected to continue.

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