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What kind of judicial review for the European Central Bank?

All institutions are equal but some are more technical than others

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Abstract

This article examines the judicial review used by the CJEU in assessing the ECB's non-standard monetary policy measures and the dispute between the German Constitutional Court and the CJEU over the standard of review to be used. In addition, it discusses the possibility of a future clash between the two courts in the post Covid-19 era. It first analyses the type of judicial control carried out by the CJEU during the Euro crisis in the Gauweiler and Weiss cases. It then explores the reasons for criticism of the CJEU reasoning by the doctrine. During the pandemic period the ECB has taken unprecedented steps and increased its monetary policy instruments, such as the Pandemic Emergency Purchase Programme (PEPP). The potential confrontation between the GCC and the ECB over PEPP is, however, deemed limited. It concludes analysing the possibility to add a court-appointed expert to the CJEU's decision-making process. Indeed, the presence of an expert could improve judicial review and increase the depth of the judgments also against national courts that have asked for preliminary ruling. However, the independence of the ECB should not be affected.

Keywords

Judicial review, Court of Justice of the EU, European Central Bank, expert witness, pandemic emergency purchase programme, Gauweiler, Weiss

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1. Introduction

In the *Weiss II* case (5 May 2020), the German Constitutional Court (GCC) declared that the decision taken by the Court of Justice of the EU (CJEU) on the European Central Bank (ECB)'s Public Sector Purchase Programme (PSPP) was an *ultra vires* act.[1] The judgment of the Karlsruhe court came after the CJEU, at the request of the GCC for a preliminary ruling, had issued the *Weiss* case.[2] In the GCC's words, the CJEU in its *Weiss* judgment 'largely abandoned the distinction between economic policy and monetary policy given that, for the purposes of reviewing the PSPP's proportionality, it simply accepted the proclaimed objectives of the ECB and its assertion that less intrusive means were not available'.[3] The German tribunal is not the first to question the level of judicial review used by the CJEU vis-à-vis the ECB.

This article will examine whether the ECB's level of judicial review exercised by the CJEU can be considered appropriate. It will do so by first briefly assessing the level of judicial review used against the ECB compared to other EU bodies (section 2). It will then continue by analysing why the level of judicial review has come under such scrutiny. It will argue that the origins of the *Weiss ultra vires* declaration can be found within two underlying themes of criticism towards judicial review. The first one is lack of transparency while the second one is related to the changing nature of the ECB (section 3). It will then continue with an assessment of the impact of the pandemic crisis and the level of judicial review appropriate in the post Covid-19 era (section 4). It will then conclude by proposing the introduction of court experts to increase the level of judicial review (section 5).

2. Degree of judicial review

The ECB was created as an independent institution after the ideas of economists such as Cukierman, Neyapti and Webb and having as a point of reference the German Bundesbank. Even today, many economists think that central bank independence is the key to a successful monetary policy.[4] This independence is entrenched in Article 130 TFEU, which states that the ECB shall not 'seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body.' The idea of independence is simple. The ECB has a narrow and technical mandate, thus requiring little overview. Furthermore, influence from politicians was seen by economists as distorting the monetary

1 BVerfG, Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15 (*Weiss II*). The decision of the GCC to ask for a preliminary ruling to the CJEU is: BVerfG, Order of the Second Senate of 18 July 2017 – 2 BvR 859/15 (*Weiss I*).

2 Case C-493/17 *Heinrich Weiss and Others. Request for a preliminary ruling from the Bundesverfassungsgericht (Federal Constitutional Court, Germany)*, EU:C:2018:1000 (*Weiss*).

3 *Weiss II*, para. 162. See for an overview of the dispute, F.C. Mayer, 'Der Ultra vires-Akt, Zum PSPP-Urteil des BVerfG v. 5. 5. 2020 – 2 BvR 859/15 u. a.', 14 *JuristenZeitung* (2020), p. 725 and F. Schorkopf, 'Wer wandelt die Verfassung? Das PSPP-Urteil des Bundesverfassungsgerichts und die Ultra vires-Kontrolle als Ausdruck europäischer Verfassungskämpfe – zugleich Besprechung von BVerfG, Urteil v. 5. 5. 2020 – 2 BvR 859/15 u. a.', 14 *JuristenZeitung* (2020), p. 734.

4 A. Cukierman, S.B. Webb and B. Neyapti, 'Measuring the Independence of Central Banks and its Effect on Policy Outcomes', 6 *The World Bank Economic Review* (1992). For a review, see B. Hayo and C. Hefeker, 'The Complex Relationship Between Central Bank Independence and Inflation', in P.L. Siklos, M.T. Bohl, and M.E. Wohar (eds.), *Challenges in Central Banking* (Cambridge University Press, 2010), p. 179.

mandate and could lead to hyperinflation.[5] The high level of independence was thus vested in the treaties. This however does not mean that the ECB is completely free from judicial or political oversight.

The first judgment that has confirmed that the ECB should be subject to judicial review is the important OLAF case decided in 2003.[6] In this judgment the CJEU clarified that the ECB was independent of political influence with regard to its tasks. This, however, did not amount to separating the ECB from all community rules and legislation, such as the anti-fraud regulation as in this case.[7] Despite its independence in pursuing its goals and tasks, the ECB still has to comply with the general rules of the European Union, in particular with Article 35 of the ECB Statute, which explicitly provides for judicial review of ECB measures. Nevertheless, this does not imply that the ECB should be subject to full judicial control.

As later seen in the *Gauweiler* and *Weiss* cases decided by the CJEU following a request for a preliminary ruling by the GCC, the ECB has the duty to state reason, but it is granted a broad level of discretion.[8] As specified by the CJEU, 'As regards judicial review of compliance with those conditions, 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'.[9] This wide margin of discretion fits well with the independence of the ECB, which is guaranteed to it by the treaties. Moreover, the ECB is not the only EU institution that is granted a wide margin of discretion. In the case of *Commission v. Spain*, for example, the Commission is given a similar kind of discretion with regard to fact-finding. [10] Indeed, the CJEU states that the Commission has a wide discretion in exercising its regulatory powers. Therefore, the CJEU should refrain from strict judicial review.[11]

According to Athanassiou, the wide discretion enjoyed by the ECB in monetary policy matters is part of the general approach of the CJEU.[12] In the *Afton Chemicals* case the CJEU recognized a broad discretion to the Commission 'in particular as to the assessment of highly complex scientific and technical facts'.[13] This is very much in line with the discretion later acknowledged in the *Gauweiler* and *Weiss* cases decided by the CJEU. The ECB also operates in a technical and complex domain and has to take decisions by choosing among the solutions that it considers most suitable for the best realization of the public interest pursued using a technical and scientific point of view. The question thus becomes why the GCC in *Weiss II* considered the wide margin of discretion given by the CJEU to be *ultra vires*.

5 A. Alesina and L. Summers, 'Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence', 25 *Journal of Money, Credit and Banking* (1993), p. 151.

6 Case C-11/00 *Commission of the European Communities v. European Central Bank*, EU:C:2003:395 (*OLAF*).

7 See for further details: S. Baroncelli, 'Monetary Policy and Judicial Review' in F. Fabbrini and M. Ventoruzzo, *Research Handbook on EU Economic Law* (Edgar Elgar, 2019), p. 205.

8 Case C-62/14 *Peter Gauweiler and Others v. Deutscher Bundestag*, EU:C:2015:400 (*Gauweiler*). Case C-493/17 Heinrich Weiss and Others. Request for a preliminary ruling from the Bundesverfassungsgericht (Federal Constitutional Court, Germany).

9 Case C-62/14 Peter Gauweiler and Others v. Deutscher Bundestag, para. 68.

10 Case C-310/04 *Kingdom of Spain v. Council of the European Union*, EU:C:2006:521, para. 121.

11 Ibid.

12 P.L. Athanassiou, 'The Institutional Architecture and Tasks of the European Central Bank', in F. Fabbrini and M. Ventoruzzo, *Research Handbook on EU Economic Law* (Edgar Elgar, 2019), p. 145.

13 Case C-343/09 *Afton Chemical Limited v. Secretary of State for Transport*, EU:C:2010:419, para. 28.

3. Criticism to the degree of review

A. The *Gauweiler* cases

The criticism on the degree of review is central in the *Gauweiler I* decision of the GCC.[14] The GCC originally proposed a much stricter level of review. Whereby the technical advice of the Bundesbank would serve as evidence.[15] This approach is in itself doubtful considering that the Bundesbank takes part in the ECB meetings and has a (shared) voting right as member of the Governing Council. To allow the Bundesbank's opinion to serve as contradictory to that of the ECB's would grant an excessive power to a single central bank and defeat the voting procedures established at ECB level.

It is noteworthy to analyse the criticism made by the legal commentators after the *Gauweiler* case was decided by the CJEU on preliminary ruling.[16] The case centres on the legality of an instrument of monetary policy announced by the ECB, the 'Outright Monetary Transactions' (OMT) programme. An important part of the discussion on the level of control focussed on transparency. Without transparency, it is often said, the CJEU is blind. In *Gauweiler* the CJEU reviews the instruments available to the ECB with reference to Article 123 TFEU on prohibition of monetary financing and Article 125 TFEU on no bail-out. As argued by Hofmann, it is crucial that the ECB ensures transparent communication when carrying out these operations, but there is a certain irony to the situation as the CJEU has to accept that the ECB itself sets the level of transparency, otherwise Articles 123 and 125 TFEU would be infringed. [17] Only if the ECB leaves market participants uncertain as to when and how much debt it would buy on the secondary market and how long it would hold it, would Articles 123 and 125 TFEU not be violated.[18] The transparency of the ECB's action is therefore limited by necessity.

The concept of discretion has been discussed with reference to specific and instrumental aspects of the ECB action and how they are assessed by the CJEU in the *Gauweiler* case. One example is the amount of securities that can be purchased by ECB. The CJEU has limited such amount to what is necessary to attain the objective of the programme. This seems to be in line with the general proportionality review policy taken by the CJEU judges. As Pennesi points out, however, it is the ECB who judges how many bonds need to be bought in order to reach the goal of the programme.[19] The *Gauweiler* judgment therefore does not seem to set a limitation, considering that the ECB will never buy more bonds than it will deem necessary and there is no external party checking the ECB's judgment. In the case of the OMT programme, the freedom granted to the ECB may not be of particular importance, as it does not make such changes to the Economic and Monetary Union as to be struck down. However, as Hinarejos points out, the accumulation process must also be

14 BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13, para. 1 (*Gauweiler I*).

15 F. Pennesi (2016), 'The Impossible Constitutional Reconciliation of the BVerfG and the ECJ in the OMT Case. A Legal Analysis of the First Preliminary Referral of the BVerfG', 8 *Perspectives on Federalism* (2016), p. 5.

16 Case C-62/14 Peter Gauweiler and Others v. Deutscher Bundestag. The judgment of the CJEU was followed by the decision of the GCC: BVerfG, Judgment of the Second Senate of 21 June 2016 – 2 BvR 2728/13, para. 1 (*Gauweiler II*).

17 H.C.H. Hofmann, 'Gauweiler and OMT: Lessons for EU Public Law and the European Economic and Monetary Union', (June 19, 2015), https://ssrn.com/abstract=2621933 or http://dx.doi.org/10.2139/ssrn.2621933.

18 Ibid.

19 F. Pennesi, 8 *Perspectives on Federalism* (2016), p. 14.

considered.[20] The transition from the ECB as a rule based and apolitical organ to a more policy-focused institution (as a consequence of the use of non-conventional monetary policy tools) is one that should not take place via the judicial process.[21] Thus she calls for caution of a cumulative process that is difficult to stop.[22] Hinarejos, however, finds no surprise in the adjudication as she considers the OMT programme fully within the legal limits set by the treaties. In her view, it is better to apply a light-touch review, looking at procedural safeguards, such as the ECB not announcing what bonds it intends to purchase and the time lapse between the issuing of bonds and the purchase of bonds on the secondary market.

The level of revision is difficult to determine and suggestions from the doctrine are varied. Since monetary policy requires forecasting and involves judging uncertainties and values, Goldmann opposes a full level of review. [23] Indeed, the judiciary not only cannot judge decisions made under conditions of great uncertainty, but is not even equipped for it. Goldmann suggests that the CJEU use a 'rationality check', something halfway between full review and simple procedural control. The reference is to the theorem proposed by Habermas on discourse analysis and the 'discursive requirements' established by the standard.[24] The 'discursive requirements' in this case are the moral, ethical and pragmatic discourses enshrined in the treaties. The rationality check on the ECB's act, Goldmann argues, would allow the CJEU to verify whether the ECB's decision complies with the 'discursive requirements' enshrined in the treaties, and in particular the ethical and pragmatic discourses expressed in Article 127(1) TFEU on monetary policy competences and subsequent rules. In general, it can be argued that in a pluralistic society the courts can set limits to legislative or administrative decisions. However, in this specific case, where the treaties give the ECB a mandate and powers whose limits are not precise and justify them with numerous pragmatic and ethical reasons, the Judge must limit himself to assessing whether the ECB acts in accordance with this reasoning in a rational manner, taking into account that there may also be rational contrary opinions.[25]

Another strand of discussion focuses on the changing role of the ECB. During the crisis, the ECB has mutated: it has abandoned the old price stability philosophy and replaced it with a broader mandate becoming lender of last resort. Furthermore, it has been shown not only to be the only true federal institution of the Union but also that it can act when a common response is needed.[26] The ECB is indeed well equipped to intervene in case of a crisis. It is an institution with national central banks in every Euro member state and an efficient decision-making process. If one agrees that the ECB has changed its nature, then one should ask how this affects judicial review. The ECB acted as a federal institution with a resolution mandate and its role was recognized by the CJEU. Considering the limited nature of judicial review, it can be argued

20 A. Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union: European Court of Justice, Judgment of 16 June 2015, Case C-62/14 Gauweiler and others v Deutscher Bundestag' 11(3) *European Constitutional Law Review* (2015), p. 563.

21 Ibid, p. 575.

22 Ibid, p. 576.

23 M. Goldmann, 'Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial Review', 15 *German Law Review* (2014), p. 266.

24 J. Habermas, *Faktizität und Geltung* (FuG, 1992). See also D.A. De Vera, 'Habermas, Discourse Ethics, and Normative Validity', 8 *Kritike* (2014), p. 161.

25 Ibid., p. 273.

26 F. Pennesi, 8 *Perspectives on Federalism* (2016), p. 17.

that the ECB's new mandate was created by the ECB itself and accepted rather passively by the CJEU. Two institutions, one executive and the other judicial, cannot change the treaties. The CJEU, at most, could have tried to see if a crisis mandate could have been read into the treaties. On the other hand, it is also true that the ECB has done no more than adopt the measures already taken by other central banks around the world. From this point of view, monetary policy measures no longer seem unconventional.

Pliakos and Anagnostaras point out that the CJEU relies fully on the explanations given by the ECB. As an illustration they provide the CJEU's agreement with the ECB on the effect of bond-buying in the secondary market: the CJEU accepted fully the reasons given by the ECB in order to establish whether the OMT programme would not generate the same effect as bond-buying on the primary market.[27] As a matter of fact this justification has been explained rather narrowly by the ECB. Though it is difficult to test the economic validity of an argumentation without stepping upon the discretionary nature of the ECB mandate, it is, however, not impossible. If Pliakos and Anagnostaras are right that the CJEU relies on the ECB's explanations, there is no point in discussing the possibility of full or rational scrutiny. This outcome can be troublesome as it would theoretically allow the ECB to put forth any economic argument and the CJEU would accept it. The approach by the CJEU, however, seems to be fully in line with the discretion in fact finding. As discussed earlier, in complex issues the Council and the Commission have a level of discretion as to how they conduct their fact finding.[28] From this point of view, the discretion enjoyed by the ECB would not be different from that exercised by other EU institutions.

The authors themselves emphasize that the CJEU in *Gauweiler* relies only on the ECB's statements and restrictions on the announced bond purchase programme. They also highlight how the judgment shows confidence in the ECB's ability to apply the measure within the limits of its competence.[29] This analysis, the authors explain, is supported by the scheme used by the CJEU in the proportionality test, which is similar to the one used in judicial review against acts of the EU legislature (the so-called 'manifestly inappropriate test'). The legislative act can only be annulled if it is obviously inappropriate to achieve the objective pursued. Applying this principle, Pliakos and Anagnostaras underline, the chances of annulling a legislative measure are slim.[30] The only way for the CJEU to ascertain whether the measure is actually legal would therefore be to examine the results of the decision.

Even Hofmann emphasizes the vagueness of the standard used. He considers that the mere ex-post observation that the Eurozone did not break apart and the channels of monetary transmission have been restored – as argued by the ECB in *Gauweiler* – is insufficient. This justification, according to Hofmann, relies on hindsight bias and does not answer the question of proportionality. He argues that in general there should be a clearer relationship between the criteria of full review, scientific expertise and discretion.[31] A further difficulty concerned the type of act subject to judicial control: a press release. This act was intended not only to bind the ECB but also to have real economic consequences, considering the special circumstances in which the measure was

27 A. Pliakos and G. Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides Gauweiler', 18 *German Law Journal* (2017), p. 218.

28 Case C-310/04 Kingdom of Spain v. Council of the European Union, para. 121.

29 A. Pliakos and G. Anagnostaras, 18 *German Law Journal* (2017), p. 218.

30 Ibid, p. 218.

31 H.C.H. Hofmann, SSRN, p. 15.

adopted.[32] These circumstances make it difficult for any court to carry out a judicial review using traditional legal instruments.[33]

The fact that there is a connection between the CJEU's jurisprudence and the ECB's monetary policy choices shows how the court supports the unconventional monetary policy choices that were made in response to the Eurozone crisis and to save the euro. In doing so, however, the CJEU has replaced the philosophy of no bail-out and non-intervention against states enshrined in the Maastricht Treaty with a more progressive attitude whose boundaries are difficult to identify in the Treaties, which remain anchored to 1992 as far as the monetary union is concerned. This leads to a flaw in the system of the EMU, which may also re-emerge in the future, since it is not clear who has the democratic legitimacy for this new approach. It certainly does not belong to the GCC, which is a judge of Germany alone, and which cannot judge European legislation on the basis of German constitutional principles. It does not belong to the CJEU either, since its task is to ensure that EU law is applied through the interpretation and implementation of the Treaties. This aspect is explored by Joerges, with reference to the measures taken during the Eurozone crisis to help the most indebted states. The more general problem, argues Joerges, is that there are no constitutional guarantees in the EU after the crisis.[34]

Not all responses to the Court's decision in *Gauweiler* were equally critical. In his article Goldmann criticizes the GCC's position.[35] He argues that in the *Gauweiler I* case the GCC should not have reviewed the actions of the ECB because full judicial review is not required. In support of this argument, he refers to Article 130 TFEU and Article 88 of the German Basic Law.[36] Interestingly, he argues that because the decision of the GCC affects the entire Union, a too high standard of review may harm the principles of democracy just as much as a lack of judicial review.[37] Other authors are in favour of judicial deference, as the info available to the CJEU were limited, the emergency circumstances required immediate intervention, and the detailed parameters established by the Court granted that there will be a future scrutiny.[38]

In conclusion, the degree of review in the *Gauweiler* case seems to be limited. Limited in the first place to reviewing procedural standards, second to proportionality; and finally, because the CJEU does not review the arguments put forward by the ECB. Though the judiciary has to be careful not to second-guess monetary policy decisions, its current level of review has been criticized by several authors for being 'residual' at best.[39] The extremes are not good, nor does it seem that the golden middle has yet been found. This lack of a golden middle may have led to the GCC's *ultra vires* judgment in *Weiss II*.

32 On this point read especially the opinion of Advocate General Villalón in Case C-62/14 *Gauweiler*, EU:C:2015:7, para. 90: 'the ECB's objective was to "intervene" in the markets, perhaps in an unconventional way, solely by making an announcement about the programme'.

33 H.C.H. Hofmann, SSRN, p. 14.

34 C. Joerges, 'Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration', 21(2) *Constellations* (2014), p. 252.

35 M. Goldmann, 15 *German Law Review* (2014), p. 266.

36 Ibid., p. 266.

37 Ibid., p. 268; For more discussion on the supremacy of EU law see F. Fabbrini, 'Guest Editor's Introduction. The European Court of Justice, the European Central Bank, and the Supremacy of EU Law', 23 *Maastricht Journal of European and Comparative Law* (2016), p. 3.

38 T. Tridimas and N. Xanthoulis, 'A Legal Analysis of the Gauweiler Case, 23 *Maastricht Journal of European and Comparative Law* (2016), p. 32.

39 F. Pennesi, 8 *Perspectives on Federalism* (2016), p. 11.

B. The Weiss cases

The judgment of the GCC in the *Weiss II* judgment caused a deep shock in the legal scholarship, media and politics. The GCC stated that the CJEU acted beyond the limits of its mandate given in Article 19(1) TEU as, at least in Germany, the decision lacked the democratic legitimation necessary under the German Basic Law.[40] The GCC justified itself by stating that the CJEU had accepted the ECB's statements without conducting a more thorough examination, thus undermining the principle of conferral.[41]

There seem to be two underlying themes behind the disapproval to the level of judicial review. The first is the amount of discretion the ECB gets when it comes to fact finding and statement of its reasons. This argument is to a certain extent reflected upon by the GCC in its final *Weiss II* judgment. The second theme is that of the changing nature of the ECB during the course of the Euro-crisis.[42] If the CJEU crosses the limit set out in the Treaties, its actions are no longer covered by the mandate conferred in Article 19(1), second paragraph, TEU in conjunction with the domestic Act of Approval; at least in relation to Germany, its decision then lacks the minimum of democratic legitimation necessary under Article 23 §1, second sentence, in conjunction with Article 20 §1 and §2 and Article 79 §3 of the German Basic Law.[43]

In its *Weiss II* decision the GCC often refers to the principle of conferral and the European integration agenda. It considers that the 'combination of the broad discretion afforded to the institution in question together with the limited standard of review applied by the Court of Justice of the European Union clearly fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of Member State competences'.[44] With this statement, the GCC confirms that it does not justify limited judicial review with respect to the potential consequences of the conferral of powers. Such a theme was central during the Euro crisis, when scholars debated on the legality of certain ECB measures such as its role within the Troika and the letters asking for reform sent to the governments of some Euro-area Member States. Taking such measures placed the ECB into the political arena.[45] By moving onto the political terrain the ECB seemed to be shifting away from 'highly technical' decision making to politics. Whilst the highly technical decision making was considered to be the reason for the CJEU to allow previous wide margins of discretion, the increasingly political and political-economic nature of ECB decision taking would have required an increased degree of accountability. The changing nature of the ECB is thus the reason why the GCC turns to the CJEU asking for an increased judicial review.

The GCC in the *Weiss II* judgment criticizes the light-touch approach taken by the CJEU towards the public sector asset purchase programme (PSPP) of the ECB. In support of its thesis, it makes reference to other cases decided by the CJEU, for instance *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V*, a case of non-discrimination for reasons relating to religion.[46]

40 *Weiss II*, para. 112.

41 Ibid., para. 142: 'judicial review may not simply accept positions asserted by the ECB without closer scrutiny'.

42 T. Beukers, 'The new ECB and its relationship with the Eurozone Member States: between central bank independence and central bank intervention', 50 *Common Market Law Review* (2013), p. 1579.

43 *Weiss II*, para. 112.

44 Ibid., para. 156.

45 J. Stiglitz, *The Euro: And its Threat to the Future of Europe* (Penguin Books, 2017), p. 182.

46 *Weiss II*, para. 145; Case C-414/16, *Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.*, EU: C:2018:257, para. 46.

According to the GCC, the same standard of review should apply in relation to the ECB.[47] However, the values and rights behind the two cases are of different weight (a non-discrimination right with an immediate effect on a person's rights recognized by the EU Charter, on the one side, and the decision of the ECB on the type of tools that can be used to achieve price stability at the EU-level, on the other side).

Other cases cited by the GCC seem to be difficult to relate to the case in question. The GCC cites numerous cases decided by the CJEU in the field of direct and indirect discrimination and the single market where the CJEU requires an objective examination based on statistical data or equivalent tools to evaluate whether the means chosen are appropriate to achieve the objectives pursued.[48] Another group of cases cited by the GCC relates to some general principles, such as effectiveness and equivalence, and harmonization measures for the internal market. In all these cases, stresses the GCC, the CJEU takes the effects caused by a contested measure into account on the occasion of its review.[49] Why should it be different for monetary policy?

We can argue that monetary policy pertains to the exclusive competence of the EU. This introduces a qualitative difference in methodology that has to be used by the CJEU to exert its judicial review. Why should the same intensity of review be used for competences that pertain to exclusive and concurrent types of powers? Should not the principle of proportionality be considered differently in the two cases? After all, the principle of subsidiarity does not apply to policies that are within the exclusive competence of the EU.

The independent status of the ECB is also an important point to be considered.[50] As stated earlier, the independence of the ECB is based upon a monetarist perspective which is reflected in the ECB's strict mandate: price stability as the primary objective. The narrow mandate on which it is based, however, is no longer as narrow as considered by economic theory. As pointed out by De Boer and Van 't Klooster, the decisions taken by the ECB suffer from some 'democratic authorisation gaps' as the ECB takes fundamental decisions for the EU without a clear legal basis in the Treaties.[51] These policy choices provide the ECB with a less defined mandate than originally considered. Notwithstanding this, the GCC's decision to declare the CJEU's judgment *ultra vires* appears excessive. In an earlier publication, one of the authors of this article argued that the ECB's mandate did not change from the *Gauweiler* to the *Weiss* case, since the cumulative process that Hinarejos warned against did not occur through the PSPP.[52] The main contribution of the *Weiss* case is the definition of indirect effects: monetary policy may have indirect effects upon economic policy. Such effects do not need to be unforeseen (as maintained by the GCC) as otherwise the ECB would be prevented from reaching its monetary objectives. Thus, the CJEU granted a large amount of discretion to the ECB. However, it is difficult to generate a framework for indirect effects as such a framework will be de facto vague

47 Ibid., para. 145.

48 Ibid., para. 149.

49 Ibid. para. 152.

50 S. Lombardo, 'Riflessioni sulla indipendenza della Banca Centrale Europea alla luce dei contrasti Corte di Giustizia/BVerfG fra variabile indipendente e dipendente', *Rivista di diritto bancario* (2021), p. 345 and S. Baroncelli, 'The Gauweiler Judgment in View of the Case Law of the European Court of Justice on European Central Bank Independence: Between Substance and Form', 23 *Maastricht Journal of European and Comparative Law* (2016), p.79.

51 N. de Boer and J. Van 't Klooster, 'The ECB, the Courts and the Issue of Democratic Legitimacy After *Weiss*', 57(6) *Common Market Law Review* (2020), p. 1689.

52 A. Mooij, 'The *Weiss* Judgment: The Court's Further Clarification of the ECB's Legal Framework: Case C-493/17 Weiss and Others, EU:C:2018:1000', 26(3) *Maastricht Journal of European and Comparative Law* (2019).

and broad.[53] Annunziata furthermore considers that the reasoning of the GCC in *Gauweiler* and *Weiss* was similar.[54] Considering that the circumstances and the GCC's reasoning were similar, it was quite logical to expect a decision of the sort adopted by the GCC in *Gauweiler II*.

On the other hand, Amtenbrink considers that both *Gauweiler* and *Weiss* are examples of judicial restraint. However, the ECB's status as an apolitical body had decreased significantly in the meanwhile.[55] The broad definition of indirect effects in *Weiss* was perhaps the straw that broke the camel's back. Annunziata, furthermore, considers that the GCC misinterpreted the facts of the case. In his article he indicates that the GCC had not weighed all the available information of the PSPP programme: the economic questions raised by the GCC had in fact been taken into consideration.[56] Furthermore, according to Annunziata, the ECB cannot be considered to take all economic possibilities into account.[57] Bobić and Dawson take a different view on this point and argue that the reasons given by the ECB are not related to the objective features of the PSPP. Rather, so they argue, they are used as a process of reason-giving to justify the features of the PSPP.[58] They further consider that the CJEU did not conduct a substantive review of the economic facts. On the contrary, when the CJEU adjudicates other technical issues it does conduct such a review. They provide the example of competition law where the CJEU demanded objective evidence.[59] This argument indicates another reason for the GCC to declare the decision *ultra vires*. By avoiding a substantive review the CJEU, they sustain, also avoided examining the availability of less drastic measures.[60] Even the AG only praises the explanations given by the ECB without examination, thus indicating an opposite approach to that of the GCC, which does try to substantively engage with the economic assessments. Tuori, furthermore, criticises the conflict between PSPP and Article 123 TFEU, which prohibits the ECB from direct lending to Member States. Whilst the ECB has not directly provided funds to the Member States, the PSPP resulted in the ECB holding the largest amount of public debt.[61] This statement indicates that the spirit of Article 123 TFEU is perhaps undermined. This economic circumstance was not taken into consideration by the CJEU in the *Weiss* judgement. On this point Van der Sluis argues that by not engaging in the discussion on the volume of debt purchasing, the CJEU shies away from settling the debate concerning the role of the Eurosystem in debt restructuring.[62] The independence of the ECB furthermore does not separate the ECB from the EU institutional framework, as established in the OLAF case.[63]

53 Ibid.

54 F. Annunziata, 'Cannons Over the EU Legal Order: The Decision of the BVerfG (5 May 2020) in the *Weiss* case', 28(1) *Maastricht Journal of European and Comparative Law* (2021).

55 F. Amtenbrink, 'The European Central Bank's Intricate Independence Versus Accountability Conundrum in the Post-crisis Governance Framework', 26(1) *Maastricht Journal of European and Comparative Law* (2019).

56 Ibid.

57 Ibid.

58 M. Dawson and A. Bobić, 'Quantitative Easing at the Court of Justice – Doing Whatever it Takes to Save the Euro: *Weiss and Others*', 56(4) *CML Rev* (2019), p. 1036.

59 Ibid, p. 1023.

60 Ibid.

61 K. Tuori, 'The ECB's Quantitative Easing Programme as a Constitutional Game Changer', 26(1) *Maastricht Journal of European and Comparative Law* (2019).

62 M. Van Der Sluis, 'Similar, Therefore Different: Judicial Review of Another Unconventional Policy in Weiss (C-493/17)', 46(3) *Legal Issues of Economic Integration* (2019), p. 281.

63 N. de Boer and J. Van 't Klooster, 57(6) *Common Market Law Review* (2020), p. 10.

Considering the more recent developments in the EU and global level, it is useful to verify whether such stringent levels of review required by the GCC are to be justified with regard to the 'Pandemic Emergency Purchase Programme' (PEPP) and other Covid-19 response mechanisms.

4. Covid-19 and the ECB responses

In order to assess whether the degree of judicial review is appropriate for the measures taken by the ECB during the Covid-19 pandemic, it is necessary to refer back to the analysis presented above. First, we need to see whether the ECB has increased its transparency with respect to its duty to motivate. Second, we should find out whether the ECB's action has shifted further by acquiring powers in the area of economic policy. To do so, the following paragraphs will discuss the ECB's responses to the Covid-19 pandemic.

To mitigate the economic impact of the pandemic the ECB responded fast and adopted some specific programmes. The aims pursued by the ECB were twofold. On the one side, it tried to stabilize the volatility of the markets. On the other side, it intervened to ensure the mitigation of the recession in all areas of the economy.[64] The main response programme has been the 'Pandemic Emergency Purchase Programme' (PEPP).[65] In addition, the 'Pandemic Emergency Long Term Operations' (PELTRO)[66] and the 'Targeted Longer-Term Refinancing Operations' (TLTRO) were carried out.[67] After analysing the PELTRO and TLTRO programmes, the PEPP will be examined.

The first TLTROs were introduced in June 2014.[68] These operations were aimed at improving the monetary transmission channels. Under the first-tier, banks were allowed an initial TLTRO borrowing allowance equal to 7% of the total amount of their loans to the Euro area non-financial private sector, excluding loans to households for house purchase.[69] The interest rate upon these loans was the Main Refinancing Operation (MRO) rate plus a fixed spread of 10 basis points.[70] The second line of TLTRO was announced on 10 March 2016 with a 4-year maturity rate and at an interest rate equal to the deposit facility rate.[71] The third line of TLTRO was announced on 22 July 2019 to contribute to the achievement of the ECB's inflation aim.[72] Then the pandemic started to reach the European economy. The ECB firstly increased the volume of TLTRO borrowing from 30% to 50%.[73] With a second amendment approved in April 2020 the ECB further reduced the

64 I. Schnabel, The ECB'S Response To The COVID-19 Pandemic, European Central Bank.

65 Press Release, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)', 18 March 2020, https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html.

66 Press Release, 'ECB Announces New Pandemic Emergency Long-term Finance Operations', 30 April 2020, https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200430_1~477f400e39.en.html.

67 Press Release, 'ECB Recalibrates Targeted Lending Operations to Further Support Real Economy', 30 April 2020, https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200430~fa46f38486.en.html.

68 Press Release, 'ECB Announces Monetary Policy Measures to Enhance the Functioning of the Monetary Policy Transmission Mechanism', 5 June 2014, https://www.ecb.europa.eu/press/pr/date/2014/html/pr140605_2.en.html.

69 Ibid.

70 Article 5, Decision of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations (ECB/2014/34).

71 Press Release, 'ECB Announces New Series of Targeted Longer-term Refinancing Operations (TLTRO II)', 10 March 2016, https://www.ecb.europa.eu/press/pr/date/2016/html/pr160310_1.en.html.

72 Recital 2, 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).

interest rate to 'the average interest rate on the deposit facility over that period minus 50 basis points. The resulting interest rate shall not, in any case, be higher than minus 100 basis points'.[74]

PELTRO was announced on 30 April 2020 with the aim to increase the liquidity available on the market. The programme included a series of loans to the financial sector with a fixed rate set at 25 below basis points. The maturity rates of the programme started with 16 months and decreased as the PELTRO progressed.[75] The programme was thereby injecting cheap liquidity into the financial sector. Both the TLTRO and PELTRO aimed to increase the liquidity supply and have continued during the pandemic period.

TLTRO and PELTRO are not unlike the other measures the ECB took in the past to face the financial crisis. At that time the ECB responded by using its power to set interest rates and to establish different measures which it classified as 'non-standard'.[76] Its first tool, that of interest rates, was adjusted downwards both during the financial crisis and the pandemic. The interest rates continued to decrease during the Euro crisis until they became negative. A second tools was the 'Enhanced Credit support'.[77] It was based upon five building blocks. Firstly, the ECB provided 'unlimited provision of liquidity through 'fixed rate tenders with full allotment'.[78] Then it increased the list of eligible collateral and the length of the maturity to a year. It also started to provide foreign currency. And, last but not least, it began to purchase covered bonds.[79] Interestingly, Trichet, then President of the ECB, clearly emphasized the separation between monetary and economic policy.[80] So it was argued that these purchases did not violate this separation as they did not constitute an excessive risk burden for the ESCB.

The aim of TLTRO and PELTRO programmes is to restore the transmission mechanisms of the ECB. They increase the available liquidity against lower interest rates and reduce collateral demands. For PELTRO, the ECB uses dual interest rates, distinguishing between deposits and borrowings. Tesche observes that the ECB using this mechanism avoids resentment from savers. It also overcomes the taboo of the 'one-size fits all' policy for deposit and borrowing.[81] Though the ECB does indeed hereby seem to respond to the worries in the countries where interest rates on savings are zero or close to zero, it does not let go of the one-size fits all policy. The ECB uses these interest rates for the whole Eurozone and though it responds to a concern that is greater in some countries compared to others, using dual interest rates seems appropriate with the current negative interest rate policy. A further taboo that was broken is that of helicopter money. This debate was put on the table by the Governor of the French Central Bank, who introduced the discussion of the possibility of the ECB engaging in such instrument.[82] Helicopter money is considered a sensitive topic as some consider it fiscal policy due to its redistributing effects.[83] Discussing the possibility of using

73 Article 1, Decision (EU) 2020/407 of the European Central Bank of 16 March 2020 amending Decision (EU) 2019/1311 on a third series of targeted longer-term refinancing operations (ECB/2020/13).

74 Article 1, Decision (EU) 2020/614 of the European Central Bank of 30 April 2020 amending Decision (EU) 2019/1311 on a third series of targeted longer-term refinancing operations (ECB/2020/25).

75 Press Release, 'ECB Announces New Pandemic Emergency Long-term Finance Operations', 30 April 2020, https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200430_1~477f400e39.en.html.

76 Keynote address by Jean-Claude Trichet, University of Munich, Munich, 13 July 2009.

77 The 'Enhanced Credit support' filled a liquidity gap of €95 billion in mid-2007.

78 Ibid.

79 Ibid.

80 Ibid.

81 T. Tesche, 'The European Union's Response to the Coronavirus Emergency: An Early Assessment', 157 *LSE, 'Europe in Question' Discussion Paper Series* (2020), p. 3 and 15.

82 *Financial Times*, 'French Central Banker Floats Printing Money to Hand to Companies', 8 April 2020.

this policy is the first step towards a potential path of implementation. The helicopter money policy might not be implemented soon or ever, but it breaks taboos that might warrant increased judicial review.

The PEPP is the most important ECB response to the Covid-19 economic crisis. It is an asset-buying programme of €750 billion. There are four different types of assets eligible for purchase under the programme. The first type of bonds are marketable debt securities.[84] The others are: corporate bonds[85], covered bonds[86] and asset-backed securities.[87] The programme was announced on 24 March 2020 and later increased to include an additional €600 billion on 4 June and €500 billion on 20 December of the same year to a total of €1,850 billion.[88] In December 2020 the horizon for net purchases under PEPP has been extended until at least the end of March 2022.

Interestingly, the operation of purchasing corporate bonds and covered bonds is of the same nature as that included in the 'Asset Purchasing Programme' (APP) conducted by the ECB during the Euro crisis. The eligibility of those assets is determined by the same decision as the implementation decisions of the APP. The marketable debt securities and the asset-backed securities, on the other hand, are different from those purchased by the ECB on earlier occasions. The assets eligible for purchase must have a maturity rate of between 70 days and 30 years.[89] The assets purchased under the 'Public Sector Programme' required a minimum maturity rate of 2 years (and maximum of 30 years).[90] It is, however, not the first time the ECB has included shorter maturity rates. The OMT programme focused on bonds with shorter maturity rates of between one and three years.[91]

The size of the programme is also interesting to compare. The PEPP comprises a total of €1,850 billion. The OMT programme had no *ex ante* limits but was conditional upon receiving ESM or EFSF aid and being cut off from the private market. Different from the OMT programme, the ECB decided to act before governments were fully cut off from the market. In that aspect the PEPP is comparable to the APP. Its size is, however, significantly different. At the end of December 2021 the total cumulative purchases stand at € 3,287 billion.[92] Though a sum much larger than that of the PEPP, this was accumulated over more than six years. On 21 August the total amount of PEPP holdings was €484 billion, [93] the total amount of APP holdings five months after the start of the PSPP purchases was roughly 100 billion less.[94] The size and pace at which the PEPP are conducted are swifter than in the previous programmes.

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83 J. Gali, 'Helicopter Money: The Time is Now', in R. Baldwin and B. Weder di Mauro (eds) *Mitigating the COVID Economic Crisis: Act Fast and Do Whatever It Takes*, London, CEPR (2020), p. 59.

84 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), section 1(2)(a): marketable debt securities are government debt securities.

85 Ibid, section 1(2)(b), though the public asset purchases outweigh all other assets. European Central Bank, 'Pandemic Emergency Purchase Programme', https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html.

86 Ibid, section 1(2)(c).

87 Ibid, section 1(2)(d).

88 Press Release, ECB, Monetary policy decisions, 4 June 2020 and 20 December 2020.

89 Ibid, section 2.

90 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), Article 3(3).

91 ECB, 'Technical Features of Outright Monetary Transactions', 6 September 2012, https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

92 ECB, 'Asset Purchasing Programme', https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html.

93 Ibid.

This increase in volume and speediness of the PEPP shows an indication that the ECB wishes to increase the impact of its policies. A comparison of 10-year German and Greek bond demonstrates that the spreads were more volatile during the Euro crisis. However, the spreads were at an extreme low when Covid-19 hit, thus hindering potential transmission signals.[95] The increased volume therefore indicates a slow competence creep, not rapid as the PEPP is not completely new in comparison with the APP. In addition, the PEPP's large volume demonstrates the ECB's continued willingness to implement large-scale policies to restore the financial markets. It thus would indicate that quantitative easing is part of its permanent tools.

The ECB has furthermore decided to include Greek assets without public credit rating conducted by an external credit assessment institution. These assets were exempted from previous ECB programs. The Hellenic assets, however, are only eligible for purchase if they can comply with Article 3(4) of Decision (EU) 2020/188 (ECB/2020/9). This Article states that '[p]urchases of nominal marketable debt instruments at a negative yield to maturity (or yield to worst) equal to or above the deposit facility rate are permitted. Purchases of nominal marketable debt instruments at a negative yield to maturity (or yield to worst) below the deposit facility rate are permitted to the extent necessary',[96] thereby granting the purchasing powers to central banks to buy Greek bonds at negative rates. The Governing Council based this decision upon the necessity to relieve the financial pressure caused by Covid-19. The Council furthermore took into consideration the commitments made by the Greek government and the dependence of ESM support upon those commitments. Additionally, the ECB has taken into account its direct access to information and the recently gained market access. The inclusion of the Hellenic bonds demonstrates the growing reach of the ECB's programme. It should, however, not be confused with an outright competence creep. The ECB most likely decided to include these bonds because Covid-19 is the cause of the economic fallout, rather than deficits in government budgets. The blame could not be attributed only to some Member States this time, as Covid-19 affected all of them and was not due to the negligence of some of them.

The PEPP Decision furthermore emphasizes the flexible purchase of these assets. Article 5 leaves the allocation of purchases open, stating that '[p]urchases under the PEPP shall be conducted in a flexible manner allowing for fluctuations in the distribution of purchase flows over time, across asset classes and among jurisdictions'.[97] In theory this could mean a large purchase of peripheral assets and other limited purchases, thereby significantly deviating from previous ECB policies as it would not be a pan-Eurozone measure but rather a targeted measure. This is not unlike the OMT, with the exception that it does not require a country to be part of an economic recovery programme. It should, however, be emphasized that the capital subscription key is guiding, thus making it unlikely that large amounts of debt from one or a small group of nations can be bought. Article 5(3) of the Decision endows the Executive Board with the power to deviate from the capital subscription key ('to allow for fluctuations in the distribution of purchase flows, over time, across asset classes and among jurisdictions').[98] The aim of the PEPP is primarily to

94 European Central Bank, 'Pandemic Emergency Purchase Programme' (PEPP), https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html.

95 Greek 10y bonds, Data obtained from investing.com; German 10y bonds, Data obtained from investing.com.

96 Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9).

97 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) Article 5(2).

restore monetary transmission channels.[99] However, it also aims to mitigate the economic consequences of the pandemic, demonstrating the ECB's readiness to support economic recovery.[100] This is a transformation from its originally narrow mandate.

Another specific feature of the PEPP is the amount of bonds bought. As stated by Bobić and Dawson, this could become an issue when considering Article 123 TFEU on direct credit facility to institutions by the ECB.[101] It is, however, unlikely that the Executive Board will be allowed to deviate from the capital subscription key for too long a period of time or too large a volume. The potential for an abrupt increase in the ECB's powers by (largely) deviating from the capital subscription key is therefore minimal, thus not warranting a high level of judicial review.

The intervention of the ECB during the Covid-19 pandemic has been more extensive than during the Euro crisis. What has been the impact of these monetary policy instruments on the ECB's way of operating and type of activity based on the principles highlighted by the case law? With regard to the first issue raised in the *Weiss II* case on transparency, there seems to be little change. The ECB communicates through press releases and speeches but has not published any additional documents. The latter might not be in line with the GCC's wishes. Interestingly, the German Central Bank has recently started to organize dialogues with external stakeholders, especially with savers, to discuss issues of monetary policy that have an impact on people's living standards, such as low interest rates, retirement pensions and rising house prices.[102] The debate showed that the anti-inflationary principle is not shared by all stakeholders, and that it is affirmed especially by older citizens who experienced hyperinflation in the 1920s. For example, trade unions consider deflation more dangerous than inflation.

The second issue is whether these monetary policy instruments have pushed the ECB further towards an economic and thereby political terrain. This question is more complicated. The transformation of the role of the ECB can be inferred from the volume and swiftness of the PEPP and the increasingly better conditions recognized to the PELTRO and TLTRO. The expansion of these responses is a form of self-empowerment that mainly arises from a crisis scenario. Based purely on this observation one can argue that the ECB has expanded its powers through self-empowerment and the judicial review should be considered accordingly. This observation would be incomplete as it is only based on what the ECB has done and not on what it has not done.

As mentioned in the earlier section on the ECB and the Euro crisis, the issue of the changing nature of the ECB's powers has been analysed by the doctrine. Beukers argued that this change from the pre-crisis era can be deduced from the ECB's ability to put pressure on Member States, the conditionality placed upon the secondary market purchasing programmes and the negotiating powers it was granted in the Troika.[103] The pressure referred to by Beukers is witnessed by the

98 Ibid., Article 5(3).

99 Press Release, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)', 18 March 2020, https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html.

100 I. Schnabel, The ECB's Response to the COVID-19 Pandemic, European Central Bank.

101 A. Bobić and M. Dawson, 'COVID-19 and the European Central Bank: The Legal Foundations of EMU as the Next Victim?' *Verfassungsblog* (2020), https://verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/.

102 *Frankfurter Allgemeine*, 'Große Aussprache mit der Bundesbank', 13 November 2020.

103 T. Beukers, 50 *Common Market Law Review* (2013), p. 1579.

letters sent during the crisis by the ECB to Ireland, Spain and Italy.[104] Such letters do not appear to have been sent, however, nor are there other indications that the ECB has put pressure on other countries into reform. The ECB furthermore has not used more targeted programmes such as the OMT, where country-specific measures were accepted as they involved a form of conditionality showing that the ECB had not participated to the enactment of such specific policies. Nor has the ECB been involved in fiscal negotiations. Part of the reason might be the stimulus package agreed upon in July 2020.

The package agreed upon on 21 July 2020 entailed a new plan for the Member States to counteract the economic fallout of the Covid-19 pandemic.[105] This deal has taken several taboos off the table as it takes a pragmatic approach to the crisis by strengthening the integration link between member States.[106] This deal shows an interesting shift compared to the Euro-crisis for two reasons. During the Euro-crisis the ECB expanded its powers largely because the Member States could not find a solution themselves. Though it took some negotiations, the Member States have now reached an agreement and thus limited the need for ECB interference. Secondly, the Recovery Plan focuses on creating a more resilient EU and is a blueprint to address further economically destabilizing issues.[107] If this intention is indeed pursued, it would permanently limit the need for the ECB's intervention in stabilizing the markets.

It thus seems that whilst the programmes of the ECB have increased in size and reach, the role of the ECB in the economic field during the pandemic has decreased. The main financial recovery plan was negotiated between the Member States and there is no indication that the ECB has interfered with national fiscal policy. Therefore, though the circumstances of an unresolved Euro-crisis and global fallout of the pandemic may have increased the scope of the programme and confirmed the ECB's role in mitigating the crisis, the programmes conducted by the ECB seem to have become more conservative, thereby returning the ECB to the technocratic institution that it was intended to be and that would warrant limited judicial review. There is, however, one objection to this conclusion.

The PEPP confirms that the ECB has adopted a crisis mitigation objective and is ready to act promptly. When the financial crisis hit the EU in 2007 and 2008, the ECB responded rather late. The PEPP, on the other hand, was adopted rather quickly. The first Covid-19 case in the EU was reported in Italy on 21 February 2020. The PEPP was in place by 24 March, hardly a month later. The first two presidents of the ECB, Duisenberg and Trichet, said the ECB would never participate in purchasing programmes.[108] With the introduction of the PEPP the adoption of quantitative easing programmes seems to be permanently added to the ECB toolbox. The adoption of quantitative easing policies might be regular use for central banks, but it was not the case for the ECB. The willingness to adopt new tools should be regarded with the necessary judicial oversight. The adoption of quantitative easing does not seem to conflict with its mandate. New measures should, however, be adjudicated more in depth by the CJEU with regard to the legal constitution of

104 Ibid., p. 1598.

105 General Secretariat of the Council, Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.

106 I. Pernice, 'The July 21 Big Deal: Towards an Ever Closer Union', *Bridge Network*, 22 July 2020.

107 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the Covid-19 crisis.

108 V.A. Schmidt, 'The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?', 15 *European Commission, Discussion Paper* (2015), p. 32.

the Treaties. The problem, however, remains that the CJEU undertakes an extremely limited scope of judicial review regarding proportionality.

5. Expert witness

The CJEU is an expert in law rather than in monetary economics. Including macro-economic expertise in the CJEU, however, could have beneficial effects on the economy. Listokin argues that courts can be effective in promoting economic growth.[109] This is especially so under severe economic circumstances such as when the 'Zero Lower Bound' on interest rates is hit, a situation that is known also as 'liquidity trap'.[110] In such a situation, where the interest rate is close to zero, courts and legislators can be more effective in promoting economic growth than monetary policy. This is so because legislative and administrative measures taken during a recession to stimulate the aggregate demand will have no effect if they are not understood and approved by judges. The court can stimulate economic growth by adopting an interpretation that stimulates the aggregate demand. On the contrary, a judgment that blocks aggregate demand during period of recession can have a high negative social impact even in terms of individuals' lives. Of course, in order to achieve this, it is necessary for jurists, especially judges and legislators, to be familiar with the principles of macroeconomics.

It is beyond the scope of this article to examine the potential benefits of macroeconomic expertise on the economy as a whole, as its scope is limited to the CJEU's review of the monetary mandate of the ECB. It will therefore only examine the impact of an expert upon the quality of the CJEU's judgments. A potential solution could be found in the introduction of 'expert witness'.

The concept of expert witnesses is not new and is available in most European countries. A recent report by the Directorate-General for Internal Policies concluded that these experts can be the eyes and brains of the court.[111] When introducing an expert witness system three questions must be answered. The first question is on the appointment of the expert. The second question is how to integrate this expert into the court's procedure. And last but not least is the question of whether the inclusion of an expert would improve the court's quality of decision making.

The report on internal policies concludes that there are two dominant systems in Europe regarding experts. The first is where the court appoints an expert and the second one is whereby each party can nominate an expert. The second is criticized on multiple accounts such as high costs, length of trial and dependence.[112] With regard to adjudicating the ECB this system seems the least effective. The ECB is its own expert and allowing opposing experts by other parties has several objections. As mentioned before, if national central banks (NCBs) are called as opposing witnesses, this may distort the decision-making process established in the Treaties for the Governing Council of the ECB. Secondly, an alternative party witness cannot get equal status to the ECB. Most experts would not have the time and resources to conduct market review. Nor does it seem desirable to generate a system whereby the ECB would have to please all experts. In order to improve the CJEU's

109 Y. Listokin, 'Law and Macroeconomics: The Law and Economics of Recessions', 34(3) *Yale Journal on Regulation* (2017), p. 838.

110 In a 'Zero Lower Bound' situation, where interest rate is close to zero, the central bank cannot lower the interest rate any further to pursue its goals of monetary policy.

111 A. Nuée, 'Civil-law Expert Reports in the EU: National Rules and Practices', Directorate-General Citizen's Rights and Constitutional Affairs Brussels, 2015, p. 13.

112 Ibid, p. 13.

decision making a CJEU appointed expert seems the most appropriate solution. The second question is how the expert can be integrated into the CJEU's procedure.

There are two levels of integration. The first is the advisory model whereby the expert's advice becomes part of the proceedings, the second is where the expert becomes part of the judiciary.[113] The latter system can be found for instance in the Netherlands. The '*Ondernemingskamer*' (Ok) is part of the High Court of Amsterdam. It adjudicates on conflicts that occur within legal entities. The Ok consists of 3 judges and 2 '*raden*'. The *raden* are not members of the judiciary but experts in business. The inclusion of these members to the court is evaluated as generally positive. In the annual report of 2018, the Ok stated that though these *raden* are not legal experts, their expertise in the area of business management and financial matters highly contributes to the court's expert decision-making.[114] Additionally, the Ok has various possibilities of appointing experts to conduct research into specific wrongdoings.[115] The Ok thereby combines the experts from practice with judges.

This type of integration can be found in various judiciaries, most of which deal with highly technical subjects. The most common type of model is, however, the advisory model. In this system the expert provides a view upon the technical matter. This testimony can be used by the court but does not have binding status.

The integration model is used most often for courts continuously dealing with technical matters on a single terrain. Because the CJEU does not adjudicate only on monetary and economic matters, this system seems inappropriate. The advisory model therefore seems to be preferable. This leaves the question of whether such a system would solve the current issues.

As stated before, the main issue when adjudicating proportionality is that the CJEU relies upon the statements given by the ECB. To introduce expert testimony to evaluate the statements given by the ECB may prove of value. It would allow an expert in monetary economics to evaluate proportionality and advise the CJEU. There are, however, certain problems with the introduction of expert witnesses such as costs, time, and objectivity. The third question – how to gain objective experts – is the most complex to solve. The objectivity of the court-appointed experts is considered greater than the 'hired guns' of the party experts.[116] How to ensure their objectivity is another question. Lessons can, however, be drawn from the European Court of Human Rights (ECtHR) case law relating to judges. The ECtHR considers that judges should be impartial and defines this as:

> Impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's constant case-law, the existence of impartiality for

113 G. de Groot and N.A. Elbers, 'Inschakelen van deskundigen in de rechtspraak Verslag van een onderzoek naar knelpunten en verbetervoorstellen', 3(4) *Raad voor de Rechtspraak RM* (2008), p. 6.

114 'Hun deskundigheid op onder meer financieel terrein, medezeggenschap en op het punt van corporcite governance speelt een cruciale rol in de rechtspraak van de Ondernemingskamer. De Ondernemingskamer behandelt en beslist de aan haar voorgelegde zaken, een enkele uitzondering daargelaten, steeds in meervoudige samenstelling: 3 beroepsrechters en 2 raden. Uitspraken van de Ondernemingskamer kunnen diep ingrijpen in rechtspersonen en ondernemingen.' ('Their expertise in areas such as finance, employee participation and corporate governance plays a crucial role in the case law of the Enterprise Chamber. Apart from a few exceptions, the Enterprise Chamber always deals with and decides on cases submitted to it in a plurality of members: three professional judges and two raden. Rulings by the Enterprise Chamber can have a profound effect on legal entities and companies.'), https://www.rechtspraak.nl/SiteCollectionDocuments/jaarverslag-ondernemingskamer-2018.pdf, p. 4.

115 I.e., they have been given the power to appoint a business expert ex article 2:350 BW (Dutch Civil Code).

116 A. Champagne et al., 'Are Court-appointed Experts the Solution to Problems of Expert-testimony?', 68 *Publications of the University of Nebraska Public Policy Center* (2001), p. 181.

> the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.[117]

Objective experts will remain difficult to find, although the ECtHR definition may be a useful framework. Issues of objectivity and timing could be resolved by the introduction of an expert in the opinion of the Advocate General (AG). Including expert advice within the AG's opinion would not increase the time for the judicial review process significantly. Moreover, the ECB and the opposing party would be able to comment on the advice if they believe the expert is not objective.

The introduction of experts appointed by the CJEU or the AG would form an additional complication to the process. It may, however, improve the acceptability of the judgments if the CJEU relied upon more evidence than that provided by the ECB. In fact, it has been shown in other areas that decisions made by a tribunal composed of judges and other experts are better accepted.[118] This may help the GCC in accepting a judgment in a potential PEPP case. Furthermore, the inclusion of experts can promote the right to fair trial by improving the 'equality of arms'.[119] At current the ECB's action is difficult to be evaluated except in the case of a manifest error of judgement. It should also be considered that the ECB has at its disposal a staff of high-level, specialized research professionals and officials, which makes it unlikely that it will not be able to justify its decisions. However, not entirely impossible, since the ECB's decision not to apply OLAF legislation was annulled by the CJEU as contrary to the principles of the EU Treaties.

The introduction of a system of expertise is also complicated by the independent status of the ECB. Expert testimony cannot interfere with the independence of the ECB. The expert's testimony should not be taken to be the same as that of the ECB. The expert could evaluate whether the ECB has made a manifest error of judgement. The CJEU alone is unlikely to ever find such error. It also must be clear to non-economists for the CJEU to notice and it is unlikely the ECB will ever make such an error. A court-appointed expert could review the merits of the evidence provided by the ECB.[120] Such a review would add balance to the ECB decisions. This balance should not distort its independence. The experts evaluate whether an error is made, not whether the ECB could have better chosen a different policy. This process could evaluate the 'discursive requisits' that Goldmann argues as necessary, thereby improving judicial procedures at the EU level.

The presence of an expert could also help the CJEU in finding mistakes or manifest errors in judgments of the national courts on the occasion of preliminary ruling. For instance, the GCC in *Weiss II* suggests a balancing of interests that takes into account economically questionable arguments. The GCC maintains that the CJEU has neglected to consider that lower interest rates affect private savings and allow economically unstable companies to remain in the market.[121] Why should

117 ECtHR, *Micallef v. Malta*, Judgment of 15 October 2009, Application No. 17056/06, para. 93.

118 G. de Groot and N.A. Elbers, 3(4) *Raad voor de Rechtspraak RM* (2008), p. 151, 163.

119 Ibid., p. 17.

120 E. E. Deason, 'Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference', 77 *Oregon Law Review* (1998), p. 89.

121 *Weiss II*, para. 173. According to the GCC: 'As the PSPP lowers general interest rates, it allows economically unviable companies to stay on the market since they gain access to cheap credit'.

lower interest rates be negative for households? Why should they be proportionally more advantageous for unstable businesses than for the economy as a whole? The presence of experts could improve the quality and technical depth of CJEU judgments, strengthening the arguments of the European judge and showing up manifest errors based on incorrect, controversial or superficial theories. There are, however, limits to what a court appointed expert can do. Whilst the expert's opinion could allow for a more balanced judgement, it would not democratically legitimize ECB policy. The GCC's desire for a review of the balancing of economic arguments could be satisfied using an expert witness. As argued by De Boer and Van 't Klooster, such a weighing of arguments by a non-elected judiciary does not provide democratic legitimacy to the ECB policymaking.[122] Adding a court appointed expert to the judiciary should not be considered the 'silver bullet' to legitimacy concerns.

Certainly, special care must be taken in the appointment, since the nomination of an academic from a certain university or a certain State or a certain central bank could lead one to assume a preference for a certain type of school or economic thinking. The world of monetary economics is not that vast. The CJEU should probably appoint a non-European expert. Such choice would not be so easy. A non-European expert would provide an external opinion. Such an external opinion could counterbalance some of the voting imbalances currently present in the ECB Governing Council. Berger and De Haan argued in 2002 that the small states had too much power if compared to the larger states.[123] Similar research done in 2013 by Hayo and Méon confirms the arguments of Berger and De Haan. Hayo and Méon also conclude that the smaller nations have a larger influence. Their article furthermore considers the decision-making of the ECB to be of regional rather than federal interest.[124] Decision making at the ECB level therefore theoretically favours the smaller regions. The GCC's fears concerning German economic interests not taken into careful consideration is therefore not without cause. A non-EU expert could provide a balanced view on the economic effects on different regions.

6. Conclusion

This article analysed the reasons for criticism of the level of judicial review by the CJEU of the ECB's unconventional monetary policy instruments during the Euro crisis with the aim of establishing what level might be appropriate for the future. The underlying issues were related to the CJEU's passive acceptance of the ECB's technical arguments and the increasingly political content of the ECB's decisions. This article also reflected on whether these issues would re-emerge during the Covid-19 crisis and what would be the appropriate level of review.

During the pandemic, the ECB did not become more transparent about its decision-making process. This could become a problem for the GCC if the PEPP programme is challenged. The article pointed out, however, that the chances of a successful challenge to the ECJ are slim. Although the programmes increased in size during the pandemic, the ECB remained within its monetary mandate and conservative. This development means that the ECB has remained the technical

122 N. De Boer and J. Van 't Klooster, 57(6) *Common Market Law Review* (2020), p. 18.

123 H. Berger and J. de Haan, 'Are Small Countries Too Powerful Within the ECB?', 30 *Atlantic Economic Journal* (2002), p. 280.

124 B. Hayo and P.-G. Méon, 'Behind Closed Doors: Revealing the ECB's Decision Rule', 37 *Journal of International Money and Finance* (2013), p. 135.

decision-making body with respect to which a wide margin of discretion is justified by the CJEU. Such a technical decision-making process requires little judicial control with regard to its reasoning.

The adoption of quantitative easing (QE) as a permanent tool should, however, be open to a deeper judicial scrutiny. The adoption of new measures is one that concerns the legal constitution of the ECB rather than monetary expertise. This, however, does not mean that QE policies should be considered outside the domain of monetary policy as they normally fall within a central bank's toolbox.

This article also considered whether experts should become part of the CJEU's decision-making process. The solution considered most time-efficient and respectful of the parties is the one where the expert's opinion is included in the AG's opinion. The expert should not focus on the general question of what is the best policy, but rather whether the ECB has made a clear error. This would allow for the inclusion of 'discursive requirements' without endangering the independence of the ECB and would strengthen the role of the CJEU vis-à-vis the national constitutional courts.

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