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

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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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