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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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Table of contents:

1. Introduction 2
2. Degree of Judicial Review 2
3. Criticism to the degree of Review 3
4. COVID-19 and the ECB responses 8
5. Expert Witness 13
6. Conclusion 16

Abstract:
This article discusses the disagreement of the German Constitutional Court (GCC) and the Court of Justice of the EU (ECJ) over the degree of judicial review used by the ECJ to evaluate the non-conventional programmes set up by the ECB and the likelihood of a future impasse between the two courts over the Pandemic Emergency Purchase Programme (PEPP). The article first analyses the type of judicial control carried out by the Court during the euro crisis in the *Gauweiler* and *Weiss* cases based on the high degree of discretion enjoyed by the ECB to make decisions of a technical nature. It then explores the reasons for criticisms of the Court of Justice by the doctrine and the GCC. During the pandemic period the ECB has taken unprecedented steps and increased its monetary policy instruments. The potential confrontation between the GCC and the ECB over PEPP is however deemed limited as the ECB's response seems more conservative. The paper concludes analysing the possibility of adding a court-appointed expert to the ECJ's decision-making process.

Keywords: ECB, German Constitutional Court, ECJ, PEPP, Judicial Review, COVID19

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1. Introduction

In the *Weiss* case the German Constitutional Court (GCC) declared the judgment of the European Court of Justice as an *ultra-vires* act. In the GCC's words, the European Court of Justice in its Judgment of 11 December 2018 *"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*."[1] Though it is questionable whether the GCC legally could declare such a decision by the European Court as *ultra-vires*, the German tribunal is not the first to question the level of judicial review exercised by the ECJ vis-à-vis the ECB.

In this article we will examine whether the ECB's level of judicial review exercised by the European Court of Justice (ECJ) is appropriate. This article will do so by first briefly assessing the level of judicial review of the ECB against that of other EU organs. It will then continue by analysing why the level of judicial review has come under such scrutiny. This contribution will argue that the origins of the *Weiss ultra-vires* declaration can be found within the two underlying themes of criticism towards judicial review. The first one is lack of transparency and the second one is the changing nature of the ECB. This paper 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. It will end with proposing the possibility of introducing Court experts to increase the level of judicial review.

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; also today many economists think that central bank independence is the key to a successful monetary policy.[2] This independence is entrenched in article 103 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 as interfering with the monetary mandate and potentially leading to excessive inflation. The high level of independence was thus vested in the Treaties. This does not mean that the ECB is free from (judicial) oversight.

The first judgment that has confirmed that the ECB should be subject to judicial review is the important OLAF case decided in 2003. In this judgment the ECJ clarified that the ECB was independent of political influence with regard to its tasks. This however did not separate the ECB from all community rules and legislation, such as the anti-fraud regulation as in this case.[3] Despite its independence in pursuing its goals and tasks, the ECB still has to comply with the general rules of the European Union. However, this does not imply that the ECB can carry out a full judicial review. As later seen in the *Gauweiler* and *Weiss* cases, the ECB has the duty to state reasons, but it is granted a broad level of discretion. As the ECJ stated: "*As regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to*

[1] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, para. 162. See for a first comment, F. C. Mayer (2020), 'Der Ultra vires-Akt, Zum PSPP-Urteil des BVerfG v. 5. 5. 2020 – 2 BvR 859/15 u. a.', *JuristenZeitun*g, 14/2020, 725-734 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'., *JuristenZeitung*, 14/2020, 734-740.

[2] A. Cukierman, S. B. Web and B. Neyapti (1992), 'Measuring The Independence Of Central Banks And Its Effect On Policy Outcomes', 6 *The World Bank Economic Review*. For a review, see B. Hayo and C. Hefeker (2010), '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: Cambridge University Press, p. 179–217.

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

undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion".[4] This broad margin of discretion fits well with the ECB's independence granted within the Treaties. It is furthermore not the only EU organ that is granted a wide margin of discretion. In the *Commission v. Spain* case the Commission is given a similar broad discretion regarding fact finding.[5] The Court states that the Commission is given a broad discretion in its normative powers and thus the Court should withhold strict judicial review.[6] According to Athanassiou the broad discretion given to the ECB regarding monetary policy fits within the general approach of the Court.[7] He refers to the *Afton Chemicals Case* in which the Court gave broad discretion to the Commission.[8] In this case the Court states that broad discretion is given "*in particular as to the assessment of highly complex scientific and technical facts*". This is very much in line with the discretion later acknowledged in *Gauweiler* and *Weiss*, as the ECB too operates within a technical and complex area and has to make decisions by choosing among the technical-scientific solutions that it considers most suitable for the best realization of the public interest assigned to it.

3. Criticism of the degree of Review

The criticism of the degree of review intensified with the *Gauweiler* decision in 2015 on the open market transactions (OMT) due to the intervention of the GCC. The latter originally proposed a much stricter level of review whereby the technical advice of the Bundesbank would serve as evidence.[9] 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 would grant an excessive power to a single central bank and defeat the voting procedures established at ECB level. It is however noteworthy to analyse the criticism given after the *Gauweiler* decision.

An important part of the discussion on the level of control is transparency. Without transparency the Court is blind. As described by Hofmann, the ECJ reviews the instruments available to the ECB with reference to Articles 123 and 125 TFEU on prohibition of monetary financing and no bail-out. In his working paper he stresses the importance of transparent communication by the ECB but also the irony of the situation: the ECJ has to accept that the ECB itself establishes the level of transparency as otherwise Articles 123 and 125 would be infringed.[10] Only if the ECB leaves market participants uncertain on the time and the quantity of debt it would buy on the secondary market and the duration it would hold them would articles 123 and 125 TFEU not be violated.[11] The transparency of the ECB action is therefore limited by necessity.

The ECJ has acknowledged a high degree of discretion for the ECB. Let's consider its decision on the amount of securities that can be purchased. The Court has limited the amount to those necessary to attain the objective of the programme. This seems to be in line with the general proportionality review policy taken by the judges. As Pennesi points out, however, it is the ECB that judges how many bonds need to be bought in order to reach the goal of the programme.[12] The judgment therefore

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[4] European Court of Justice, Judgment of the Court (Grand Chamber) of 16 June 2015, *Peter Gauweiler and Others v Deutscher Bundestag*. Case C-62/14. ECLI:EU:C:2015:400.

[5] European Court of Justice, Judgment of the Court (Second Chamber) of 7 September 2006, *Kingdom of Spain v Council of the European Union*. Case C-310/04, ECLI:EU:C:2006:521, para. 121.

[6] Ibid.

[7] P.L. Athanassiou (2019), 'The institutional architecture and tasks of the European Central Bank' in F. Fabbrini & M. Ventoruzzo, Research Handbook on EU Economic Law, Edgar Elgar, p. 145.

[8] European Court of Justice, Judgment of the Court (Fourth Chamber) of 8 July 2010, *Afton Chemical Limited v Secretary of State for Transpor*t, Case C-343/09, ECLI:EU:C:2010:419para. 28.

[9] 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' *Perspectives on Federalism*, 8, p. 5-6

[10] H.C.H. Hofmann (2015), 'Gauweiler and OMT: Lessons for EU Public Law and the European Economic and Monetary Union', p. 15, https://orbilu.uni.lu/bitstream/10993/24134/1/SSRN-id2621933.pdf.

[11] Ibid.

[12] Pennesi 2016, p. 14.

does not seem to set a limitation, as the ECB will never buy more bonds than it will deem necessary and there is no external party checking the ECB's judgement. It therefore seems that the ECB has been given a large amount of freedom. In case of the OMT programme this freedom may not be of particular importance, but as Hinarejos warns, accumulation must be considered. The OMT programme, she states, does not make such changes to the Economic and Monetary Union as to be struck down.[13] The transition however from the ECB as a rule based and apolitical organ to a more policy focussed institution is one that should not take place via the judicial process.[14] Thus in the end of her reflections she calls for caution with respect to a cumulative process that is difficult to stop.[15] Hinarejos, however, finds no surprise in the adjudication as she considers that the actions of the OMT are fully within the legal limits set by the treaties. In her opinion, it is better to apply a light-touch review, looking at procedural safeguards.[16] The safeguards she refers to are the ECB not announcing what bonds they intend to purchase and the time lapse between the issuing of bonds and the purchase of bonds on the secondary market.[17] This limited level of review has been suggested by many scholars.

The level of review is difficult to establish and suggestions have been varied. As monetary policy requires predictions and involves judgement of uncertainties, Goldmann argues against a strict level of review.[18] Goldmann suggests that the Court use a rationality check. This check would allow the court to review whether the *'discursive requisites were in place'*, more specifically as a check upon whether the act can be rationally justified and legislative procedures were rational and have been adhered to.[19] Goldmann in his paper refers to the theorem put forward by Habermas about discourse analyses.[20] Habermas' theory on discourse analyses focusses on the discourse itself and explanation through discourse. Or as De Vera describes "*Firstly, Habermas' notion of discourse or argumentation may perhaps serve as an alternative model of understanding disputes, if not a way of resolving it [...] For another, it does not always demand argumentation in the literal sense. It also allows for discourse that leads to selfclarification or self-understanding*."[21] This indicates that Goldmann's discourse can take place at different levels without restriction to a single institution.

Pennesi too argues that when discretionary acts are involved the Judiciary must take precaution not to get too rigid. He, however, also states that the *Gauweiler* case has demonstrated that the *'singleness of monetary policy'* is too vague a standard. Additionally, he considers that the lack of constitutional review is strange.[22] This is especially so because, though the Court may not be an expert in economics, it is the expert body in law. The judges are the most qualified to conduct a constitutional review. This is more the case if we consider the transformation of the ECB into a lender of last resort. During the economic crisis, the ECB seemed willing to finance governments when markets were no longer willing to, using the OMT. This is the classic definition of 'lender of last resort',[23] a function that has now been accepted without the process of constitutional review. Though some may find the lack of review odd, Hinarejos argues that it is not the Court's place. In her paper, she argues that the debate

[13] *Ibid,* p. 576.
[14] Ibid, p. 575.
[15] Ibid, p. 576.
[16] A. Hinarejos, (2015) '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' *European Constitutional Law Review*, 11(3), p. 563-576.
[17] Ibid.
[18] M. Goldmann, Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial. *German Law Review* (2014)15, pp. 266-268.
[19] Goldmann, pp. 273-274.
[20] Ibid, footnote 49.
[21] Dennis A. De Vera, Habermas, Discourse Ethics, and Normative Validity, *Kritike* (2014) 8(2), pp. 161-162.
[22] Pennesi 2016, p. 11.
[23] Ibid, p. 12.

around the nature and evolution of EMU and the ECB's place in the solidarity regime is not for the Court to conduct.[24] The lack of review may however lead to clashes between the GCC and the ECB. Pennesi argues that if the GCC does not accept the mutation of the ECB, there will always be clashes. According to his views the ECB has mutated during the crisis: it has abandoned the old price stability philosophy and replaced it with a broader mandate. Furthermore, the ECB has shown itself not only to be the only true federal institution of the Union but also the one that it is capable of acting when a common response is needed.[25] The Central Bank is indeed well equipped to act in case of a crisis. It is an institution with national banks in every euro member state and has an efficient decision making process. The status of the European Union as confederation or federation is open for debate. The EU cannot be considered as a clear federation or confederation at this stage. The institutions therefore should not be judged as if part of a clear (con)federation but rather strictly according to the Treaties. Josselin and Marciano argued in 2007 that without checks and balances the Court would become a driving force furthering the federalization of Europe via the economic field "*Therefore, beyond the lack of checks and balances, the possible collusion among the European institutions or the role of bureaucracy (Salmon, 2003), we argue that the ECJ soon becomes a driving force towards the federalization and centralization of Europe*". It seems as if their prediction has come to pass. They, however, also stated that *"the sole existence of a Court of Justice does not suffice to transform a confederation into a federation"*.[26] Neither is the Court the place where this should be resolved.[27]

If one indeed agrees that the ECB has changed its nature, then the question should be asked how has it changed? The ECB has acted like a federal institution with a crisis-solving mandate and its role has been acknowledged by the ECJ. With such limited review one can argue that the new mandate was created by the ECB and accepted by the Court. Two institutions, one executive and the other judicial in nature, should not change the treaties. The Court, at best, could have tried to see if a crisis mandate could have been read into the treaties. This opinion is, however, not shared by all academics.

In his contribution Goldmann argues that the rationality check ensures proportionality without giving *carte blanche* to the ECB.[28] According to his views the vagueness allows a system of review whereby mutual discretion is tolerated. This slightly opposes the view given by Pliakos and Anagnostaras. In their article they consider that the Court relies on the explanations given by the ECB. As an illustration they provide the Court's agreement with the ECB on the effect of bond-buying at the secondary market. The Court relied on the explanation of the Bank in order to establish whether or not the OMT programme would generate the same effect as bond-buying on the primary market.[29] This statement has been explained rather narrowly by the ECB. Though it is difficult to test economic validity without stepping upon the discretionary nature of the mandate, it is not impossible. If Pliakos and Anagnostaras indeed are correct and the Court often relies on the explanations of the ECB, there is no question of strict or rational review. If this is the case, the Court cannot review. The lack of review is troublesome as it would theoretically allow the Bank to put forth any economic argument and the Court would accept it. The approach by the Court, however, seems to be fully in line with the discretion in fact finding. As discussed earlier, in complex issues the Council and Commission have a level of discretion as to how they conduct their fact finding.[30] It therefore makes for a more uniform approach to allow the ECB a similar level of discretion. Pliakos and Anagnostaras, however, consider that the judgement implied confidence that the ECB would remain acting within its competences.[31] However it is difficult to find agreement in this statement considering that the Court relies only on

[24] Hinarejos 2015b.
[25] Pennesi 2016, p. 17.
[26] Josselin & Marciano 2007, p. 68.
[27] Pennesi 2016, pp. 17-18.
[28] Goldmann 2014.
[29] A. Pliakos & G. Anagnostaras (2017), 'Saving Face? The German Federal Constitutional Court Decides Gauweiler', *German Law Journal*, 18:1, pp. 213 – 232.
[30] European Court of Justice, Judgment of the Court (Second Chamber) of 7 September 2006, *Kingdom of Spain v Council of the European Union*, Case C-310/04, ECLI:EU:C:2006:521121, para 121.
[31] Pliakos & Anagnostaras 2017, p. 218.

the statements and explanations given by the Bank. The authors also conclude that under the current form of the proportionality test the chances of getting a legislative measure to be considered invalid is slim.[32] In order to test whether the measure has indeed been effective the Court could examine the results of the decision.

Hofmann also considers that the *ex post* review is too vague: the mere observation that the Eurozone did not break apart and the channels of monetary transmission have been restored is considered as insufficient. This reasoning, in Hofmann's reasoning, relies on hind-sight 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.[33] In this case in particular was the nature of the decision at stake. As pointed out in the conclusion by AG Villalon, it is an act intended to bind the very author of the act, but with real economic consequences. These circumstances make it difficult for any court to review using traditional legal frameworks according to Hofmann.[34]

Joerges argues that there are no constitutional guarantees in the EU after the crisis.[35] In his article Joerges discusses the constitutional paradox concerning the ESM Judgement. He admits that the judgment put the markets at rest. He however describes the judgement to be 'highly-troublesome' and 'ambivalent'. In the decision the GCC judged the strict conditionality of financial aid to be in line with the German Budgetary Sovereignty. This conditionality is not democratic, as it was created by the ECB. [36] Therefore he argues there is no constitutional court or guardian within the European Union. The GCC did and should not get this role but neither did the CJEU take up this role in the *Pringle* decision. The EU is therefore left without constitutional guarantees.[37] Furthermore the judgements show their blessing to the European crisis policy, arguing that the philosophy of the non-bailout clause, that of autonomy, is being replaced by collective governance. In addition, he argues that the law is delegating problems to political systems without considering the legitimacy of such decision making.[38]

Not all responses to the Court's decision in *Gauweiler* were equally critical. In his article Goldmann criticizes the GCC for its judgement in the *Gauweiler* case.[39] He argues that the GCC should not have reviewed the actions of the ECB in the first place 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.[40] Interestingly, he argues that because the decision of the GCC affects the entire Union, a too high a standard of review may harm the principles of democracy just as much as a lack of judicial review.[41] This is an interesting and not unreasonable comment. There are, however, multiple actions taken by EU organs that start at national courts. It is then up to the national courts to refer cases to the ECJ, as is their duty under 267 TFEU. The GCC makes a very clear argument as to what answer is expected. The matter is then sent on via a preliminary question procedure. It can be argued that the strong opinion of the GCC is disrespectful towards the ECJ. In fact, the ECJ is the ultimate judge of the legitimacy of the ECB's actions. The strong review can be viewed therefore as nothing more than strong words as long as the GCC follows the ECJ in its final judgement.

In conclusion, the degree of review in the *Gauweiler* case seems to be limited. It is limited in the first place to reviewing procedural standards, second to proportionality; and finally, because the Court does not review the arguments put forward by the ECB. Though the judiciary has to be careful not to

[32] Ibid, p. 218-219.
[33] Hofmann 2015, p. 15.
[34] Hofmann 2015, p. 14-16.
[35] C. Joerges, (2014) 'Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration' *Constellations*, 21(2), pp. 249-261
[36] Joerges 2014, pp. 252-253.
[37] Ibid.
[38] Joerges 2014, p. 253.
[39] M. Goldmann, Adjudicating Economics: Central Bank Independence and the Appropriate Standard of Judicial. *German Law Review* (2014) 15, pp. 266-268.
[40] Ibid. p. 266.
[41] Ibid. p. 268; For more discussion on the supremacy of EU law see: Fabbrini 2015.

second-guess monetary policy decisions, its current level of review has been considered as 'residual at best'.[42] Neither extreme is good, nor does it seem that there has been found a golden middle. This lack of a golden middle may have led to the GCC's ultra-vires judgement in *Weiss*.

The judgement made by the GCC certainly threw the cat among the pigeons. The GCC stated that the ECJ acted beyond its mandate given in article 19(1) TEU.[43] The Court justified its statement declaring that the ECJ had taken the statements of the ECB without closer scrutiny.[44] According to the GCC the lack of scrutiny undermines the principle of conferral.[45] As demonstrated above the GCC is not the first to have commented upon the level of judicial review. There seem to be two underlying themes behind the criticism of 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 extend reflected upon by the GCC in its final *Weiss* judgement. The second theme is that of the changing nature of the ECB during the course of the euro-crisis.

In its *Weiss* 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 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.*"[46] With this statement the GCC confirms that it is wary of limited judicial review with regard to the potential conferral of powers. The conferral of powers was a central theme within the Euro-crisis, when scholars debated the legality of certain ECB measures such as its role within the Troika and the letters sent to the various governments. Taking such measures placed the ECB into the political arena whereby it was seen to make political choices.[47] By moving onto the political terrain the ECB seemed to be moving away from 'highly-technical' decision making. Whilst the highly technical decision-making was considered to be the reason for the ECJ to allow it previous wide margins of discretion. The increasingly political and economic nature of ECB decision taking would have required an increased degree of accountability. Though it is doubtful the Court would be the appropriate body to evaluate the ECB's action, as the judges are expert in law not in monetary policy. However, the changing nature of the ECB explains why by default the GCC turns to the ECJ asking for an increased judicial review.

The GCC criticises the light-touch approach taken by the ECJ. In support of its thesis, it makes reference to other cases decided by the ECJ, for instance the *Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V* where a church decided authoritatively which working activities constitute a genuine and legitimate occupational requirement and consequently decided not to hire a woman, infringing the principle of non-discrimination for reasons relating to religion.[48] According to the GCC, the same standard of review should apply in relation to the ECB.[49] 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 off-topic or difficult to relate to the case in question. The GCC cites numerous cases decided by the ECJ in the field of direct and indirect discrimination and

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[42] Pennesi 2016, p. 11.

[43] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras. (112-113), http://www.bverfg.de/e/rs20200505_2bvr085915en.html

[44] Ibid, para. 142.

[45] ECB Key interest rates, https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html [last accessed 23 September 2020]

[46] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 - 2 BvR 1651/15 - 2 BvR 2006/15 - - 2 BvR 980/16 -

[47] Stieglitz, the euro, p. 182.

[48] European Court of Justice, Judgment of 17 April 2018, *Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, C-414/16, EU:C:2018:257, para. 46.

[49] Ibid. para. 145.

the single market where the ECJ requires an objective examination based on statistical data or equivalent tools to evaluate if the means chosen are appropriate to achieve the objectives pursued.[50] Another group of cases cited by the GCC relate to some general principles, such as effectiveness and equivalence, and harmonisation measures for the internal market. In all these cases, the GCC stresses that the ECJ takes the effects caused by a contested measure into account in its review.[51] Why should it be different for monetary policy?

The independent status of the ECB is a first point that should be considered, although such a position does not separate the ECB from the EU institutional framework, as established in the OLAF case. In addition, the fact that monetary policy pertains to the exclusive competence of the EU introduces a qualitative difference in methodology that has to be used by the ECJ to exert its judicial review. Why should the same intensity of review be used for competences that pertain to exclusive and concurrent-type of powers? Should not the principle of proportionality be considered differently in the two cases? This type of differentiation is strengthened by the observation that the principle of subsidiarity does not apply to policies that are within the exclusive competence of the EU.

The remaining question is whether such stringent levels of review by the GCC are to be expected and whether with regard to the PEPP and other COVID-19 response mechanisms an increased level of review is warranted.

4. COVID-19 and the ECB responses

In order to answer whether the degree of judicial review is appropriate to evaluate the ECB's COVID-19 and future responses it is important to relate back to the previously mentioned issues. Firstly, whether the ECB has increased its transparency with regard to its duty to state reasons. Secondly, it is important to discover whether the ECB has further moved to the area of economic policy. To do so the following paragraphs will discuss the responses of the ECB to the COVID-19 pandemic.

The European Central Bank responded fast to mitigate the economic impact of the pandemic. The ECB had two over-arching principles in its policy response. The first objective was to stabilize the volatility of the markets, and the second was to ensure the mitigation of the recession in all areas of the economy.[52] The main response programme of the ECB has been the 'Pandemic Emergency Purchase Programme' (PEPP).[53] The PEPP was not the only programme implemented by the ECB. In addition to PEPP it introduced the 'Pandemic Emergency Long Term Operations' (PELTRO).[54] And furthermore it conducted the 'Targeted Longer-Term Refinancing Operations' (TLTRO).[55] The following paragraphs will start with a discussion of the PELTRO and TLTRO before discussing the PEPP.

The first TLTROs were introduced in June 2014.[56] 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 purchases.[57] The interest rates upon these loans was the Main Refinancing Operation (MRO) rate plus a fixed spread of 10 basis points.[58] The

[50] Ibid. para. 149.
[51] Ibid. para. 152.
[52] Isabel Schnabel, 2020. *The ECB'S Response To The COVID-19 Pandemic*. Remarks by Isabel Schnabel, Member of the Executive Board of the ECB, at a 24-Hour Global Webinar co-organised by the SAFE Policy Center on "The COVID-19 Crisis and Its Aftermath: Corporate Governance Implications and Policy Challenges". https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200416~4d6bd9b9c0.en.html.
[53] European Central Bank, 2020. *ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)*.
[54] Press Release ECB announces new pandemic emergency long-term finance operations, 30 April 2020.
[55] Press Release ECB recalibrates targeted lending operations to further support real economy, 30 April 2020.
[56] Press Release ECB announces monetary policy measures to enhance the functioning of the monetary policy transmission mechanism, 05 June 2014
[57] Ibid.
[58] Article 5, Decision of the European Central Bank of 29 July 2014 on measures relating to targeted longer-term refinancing operations (ECB/2014/34).

second line of TLTRO were announced on the 10th of March 2016 with a four year maturity rate and at an interest rate equal to the deposit facility rate.[59] The third line of Targeted Longer-Term Refinancing Operations was announced on the 22nd of July 2019 to contribute to the ECB's inflation aim.[60] The initial maturity rate was 2-years[61] but this was later amended to three-years.[62] The interest rate was set at the MRO rate plus 10 base points[63] but this also was decreased to the MRO rate.[64] Then the pandemic started to reach the European economy and the ECB reacted swiftly. It firstly increased the volume of TLTRO borrowing from 30% to 50%.[65] With a second amendment approved in April the ECB further reduced the 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*".[66] In addition to TLTRO, the ECB introduced its 'Pandemic Longer-Term Refinancing Operations' (PELTRO).

PELTRO was announced on the 30th of April 2020 with the aim of increasing 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 start with 16 months and decrease as the PELTRO progresses.[67] The programme is thereby injecting cheap liquidity into the financial sector. Both the TLTRO and PELTRO aim to increase the liquidity supply and are not unlike some of the other measures the ECB took at the beginning of the financial crisis.

At that time the ECB responded by using its power to set interest rates and different measures which it classified as "non-standard".[68] 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.[69] The ECB responded using the 'Enhanced Credit support'.

The Enhanced Credit support in mid-2007 filled a liquidity gap of €95 billion.[70] It was based upon five building blocks. Firstly, the ECB provided "*unlimited provision of liquidity through 'fixed rate tenders with full allotment'*".[71] Then it went on increasing the list of eligible collateral and the length of the maturity to a year. It also started to provide foreign currency.[72] Last but not least, the ECB began to purchase covered bonds.[73] It is interesting to note is that in his speech Trichet, then president of the ECB, clearly emphasized the separation of monetary and economic policy, whereby it was argued that these purchases did not violate that separation as they do not form an excessive burden of risk on the ESCB.[74]

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[59] Press Release ECB announces new series of targeted longer-term refinancing operations (TLTRO II), 10 March 2016.
[60] 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).
[61] Article 2 paragraph 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).
[62] Article 1, Decision (EU) 2019/1558 of the European Central Bank of 12 September 2019 amending Decision (EU) 2019/1311 on a third series of targeted longer-term refinancing operations (ECB/2019/28).
[63] Article 5 paragraph 1, 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).
[64] Article 1, Decision (EU) 2019/1558 of the European Central Bank of 12 September 2019 amending Decision (EU) 2019/1311 on a third series of targeted longer-term refinancing operations (ECB/2019/28).
[65] 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).
[66] 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).
[67] Press Release ECB announces new pandemic emergency longer-term refinancing operations, 30 April 2020
[68] Keynote address by Jean-Claude Trichet, University of Munich, Munich 13 July 2009.
[69] ECB Key interest rates, https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html.
[70] Supra 45.
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.

The TLTRO and PELTRO programmes aim at restoring the transmission mechanisms of the ECB. They increase the available liquidity against lower interest rates and reduce collateral demands. Tesche further observes that with PELTRO the ECB overcame another taboo by using dual interest rates, for deposit and borrowing, thus avoiding savers' grudge.[75] According to Tesche by using the dual interest rates the ECB has let go of its 'one-size fits all' policy. Though indeed the ECB hereby seems 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 than in others, using dual interest rates seems appropriate with the current negative interest rate policy. A further taboo that was broken was that of helicopter money. This debate was put on the table by the Governor of the French Central Bank who introduced the discussion on the possibility of the ECB to employ helicopter money.[76] This is considered a sensitive topic as some consider it fiscal policy. Discussing the possibility to use 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 EUR. There are four different types of assets eligible for purchase under the programme. The first type of bonds are marketable debt securities.[77] The others are: corporate bonds[78], covered bonds[79] and asset-backed securities.[80] The programme was announced on the 24th of March 2020 and later increased to include an additional 600 billion euros on June 4th.[81]

Interestingly, the operation of purchasing corporate bonds and covered bonds is of the same nature as that included in the Asset Purchasing Programme 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 Asset Purchasing Programmes. 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.[82] The assets purchased under the 'Public Sector Programme' required a minimum maturity rate of 2 years (and maximum of 30 years).[83] It is however not the first time the ECB has included shorter maturity rates. The Outright Monetary Transaction programme focused on bonds with shorter maturity rates of between one and three years.[84]

The size of the programme is furthermore interesting to compare. It comprises of a total of 1,350 billion euros. 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. Unlike with the OMT programme, the ECB decided to act before governments were fully cut-off from the market. In that aspect it is comparable to the Asset Purchasing Programme. Its size is however significantly different. At the time of writing (November 2020) the total cumulative purchases stand at 2.999 billion EUR.[85] Though a sum much larger than that of the PEPP, this was accumulated over more than five years. On August 21st the total

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[75] Tobian Tesche, (2020) 'The European Union's Response tot he Coronavirus Emergency: An Early Assessment' *LSE 'Europe in Question' Discussion Paper Series No. 157*, p. 3.

[76] Martin Arnold, French central banker floats printing money to hand to companies, *Financial Times* 08 April 2020

[77] 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.

[78] Ibid, section 1(2)(b), though the public asset purchases outweigh all other assets: ECB Pandemic emergency purchase programme (PEPP), https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html.

[79] Ibid, section 1(2)(c).

[80] Ibid, section 1(2)(d).

[81] Press Release ECB Monteray policy decisions, 4th of June 2020.

[82] Ibid, section 2.

[83] 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.

[84] Press Release ECB Technical features of Outright Monetary Transactions, 06 September 2012

[85] ECB Asset Purchasing Programme, https://www.ecb.europa.eu/mopo/implement/omt/html/index.en.html.

amount of PEPP holdings was 484 billion EUR, [86] whereas the total amount of APP holdings five months after the start of the PSPP purchases was roughly 100 billion less.[87] The size and pace at which the PEPP are conducted are swifter than in the previous programmes.

This increase in volume and speed 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 bonds 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.[88] The increased volume therefore indicates a competence creep, albeit a limited one as the PEPP is not completely new in comparison with the APP. Secondly 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 set of 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*."[89] This grants 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 the 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*."[90] 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 but rather a targeted measure. This is not unlike the Outright Monetary Transaction 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. This makes it unlikely that large amounts of debt from one or a small group of nations can be bought. Article 3 of the Decision endows the Executive Board 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*").[91] The aim of the PEPP is primarily to restore monetary transmission channels.[92] However it also aims to mitigate the economic consequences of the pandemic,

[86] Ibid.
[87] ECB Pandemic emergency Purchase Programme, https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html.
[88] Greek 10y bonds, Data obtained from investing.com; German 10y bonds, Data obtained from investing.com.
[89] 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).
[90] Above note 78, article 5(2).
[91] Above note 78, article 5(3).
[92] European Central Bank, 2020. *ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)*.

demonstrating the ECB's readiness to support economic recovery.[93] This is a transformation from its originally narrow mandate.

Other criticism regarding the legality of the programme focused on the amount of bonds bought. It has been estimated that 68% of Italian assets will be purchased.[94] As stated by Bobic and Dawson this could become an issue when considering article 123 TFEU.[95] 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.

These paragraphs discussed the response of the ECB to the COVID-19 pandemic. The intervention of the ECB seems to be more extensive than during the euro-crisis. With regard to the first issue raised in the *Weiss* case regarding 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 organise 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.[96] The debate showed that the anti-inflationary principle is not shared by all stakeholders, and that it is affirmed especially by citizens and generations who retain a connection to the historical memory of hyperinflation in the 1920s also from a cultural point of view. For example, trade unions consider deflation more dangerous than inflation.

The second issue is whether these responses 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 of 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 in the literature. Beukers argued that such change from the pre-crisis era can be inferred from the ability of the ECB to pressurize Member States, the conditionality placed upon the secondary market purchasing programmes and the negotiating powers it was granted in the Troika.[97] The pressure referred to by Beukers is witnessed by the letters sent during the crisis by the ECB to Ireland, Spain and Italy.[98] Such letters do not appear to have been sent however, nor are there other indications that the ECB has pressured countries into reform. The ECB furthermore has, during the COVID19 pandemic, not used more targeted programmes such as the OMT. Where country-specific measures targeting fiscal policy were accepted as they involved a form of conditionality. Nor has the ECB been involved in fiscal negotiations. Part of the reason might be the stimulus package agreed upon in July.

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[93] Schnabel, 2020.

[94] B. Hall, M. Arnold and S.Fleming, 'Coronavirus: Can The ECB'S 'Bazooka' Avert A Eurozone Crisis?' *Financial Times* (2020), https://www.ft.com/content/a7496c30-6ab7-11ea-800d-da70cff6e4d3.

[95] A. Bobić, 'COVID-19 And The European Central Bank: The Legal Foundations Of EMU As The Next Victim?', https://verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/.

[96] Siedenbiedel, Große Aussprache mit der Bundesbank, Frankfurter Allgemeine, 13.11.2020, https://www.faz.net/aktuell/finanzen/nah-am-buerger-grosse-aussprache-mit-der-bundesbank-17050980.html.

[97] Thomas Beukers, 'The new ECB and its relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' [2013] *CML* (50) p. 1580.

[98] Ibid.

The stimulus package agreed upon on July 21st entailed a new plan for the Member States to counteract the economic fallout of the COVID-19 pandemic.[99] According to Pernice 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.[100] This deal shows an interesting shift compared to the euro-crisis for two reasons. As described by Heldt and Mueller during the euro-crisis the ECB expanded its powers largely because the Member States could not find a solution themselves.[101] Though it took some negotiations, it seems that 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 destabilising issues.[102] 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 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 mitigating objective and is ready to act more swiftly. When the financial crisis hit the EU in 2007 and 2008 the ECB responded quite late. The PEPP instead was adopted rather quickly. The first COVID-19 case in the EU was reported in Italy on the 21st of February. The PEPP was in place by the 24th of March, hardly a month later. The first two presidents of the ECB, Duisenberg and Trichet, said the ECB would never participate in purchasing programmes.[103] 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 standard practice for central banks, but that was not the case for the ECB. The willingness to adopt new tools should be regarded with the necessary judicial oversight. While the adoption of quantitative easing does not seem to conflict with its mandate, new measures should nevertheless be adjudicated fully by the Court with regard to the legal constitution of the Treaties. The problem, however, remains that the Court is not willing nor capable to provide judicial review regarding proportionality. A potential solution could be found in the introduction of an 'expert witness'.

5. Expert Witness

The concept of expert witnesses is not new and is available in most European countries. In a recent report conducted by the Directorate General for Internal Policies it was concluded that these experts can be the eyes and brains for the court.[104] 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 decision making. And last but not least whether the inclusion of an expert would improve the Court's decision making.

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[99] 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.
[100] I. Pernice, 'The July 21 Big Deal: Towards an Ever Closer Union', *Bridge Network* 22 July 2020, https://bridgenetwork.eu/2020/07/22/ingolf-pernices-comment-european-council/.
[101] Supra note 9.
[102] Recovery plan for Europe agreed on 21 July 2020, https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/recovery-plan-europe_en
[103] V.A. Schmidt, (2015) 'The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?' *European Commission,* Discussion Paper 015, p. 32.
[104] A. Nuée, 'Civil-law expert reports in the EU: national rules and practicies', *Directorate-General Citizen's Rights and Constitutional Affairs Brussels* (2015) , p. 13.

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 costs, length of trial and dependence.[105] 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 witness this may distort decision making at ECB level. 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 Court's decision making a Court appointed expert seems the most appropriate solution. The second question is how the expert is integrated into the Court's decision making.

There are two levels of integration. The first is the advisory model in which the expert's advice becomes part of the proceedings; the second is one in which the expert becomes part of the judiciary.[106] Such a system can be found 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 are 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 greatly contributes to the court's expert decision making.[107] Additionally, the Ok has various possibilities of appointing experts to conduct research into specific wrongdoings.[108] The Ok thereby combines the experts from practice with judges.

This type of integration can be found in various judiciaries, most of which have a highly technical subject matter. 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 most appropriate. This leaves the question of whether such a system would solve the current issues.

As stated above, the main problem when adjudicating proportionality is that the Court 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 Court. There are, however, certain problems with the introduction of expert witnesses such as costs, time and objectivity. The question of how to gain objective experts is the most complex. The objectivity of Court appointed experts has been considered larger than the "hired guns" of party experts.[109] How to ensure the objectivity of experts is another question. Lessons can, however, be drawn from ECHR case law relating to judges. The ECHR considers that judges should be impartial and defines this as follows:

> *" 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 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*

[105] Ibid, p 13-14.

[106] G. de Groot & N.A. 'ElbersInschakelen van deskundigen in de rechtspraak Verslag van een onderzoek naar knelpunten en verbetervoorstellen' (2008) 3(4) *Raad voor de Rechtspraak RM,* p.6.

[107] 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; https://www.rechtspraak.nl/SiteCollectionDocuments/jaarverslag-ondernemingskamer-2018.pdf p.4

[108] i.e. 2:350 BW

[109] A. Champagne et al., 'Are court-appointed experts the solution to problems of expert-testimony', *Publications of the University of Nebraska Public Policy Center* (2001) 68., p. 181.

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."[110]

It will remain difficult to find objective experts, though the ECHR's definition can be a useful framework. Though a large part of both the objectiveness and time problem may be solved by the introduction of this expert into the advice given by the Advocate General. By including the advice into the opinion of the AG would not provide a significant time constraint on the judicial review process. Additionally the ECB and opposing party would be able to comment upon the advice if they would feel the expert is not objective.

The introduction of experts appointed by the Court or the AG would form an additional complication to the process. It may however improve the acceptability of the judgements if the Court relied upon more evidence than that provided by the ECB, as it has been demonstrated in other areas that decisions taken by a court composed of judicial and other experts are better accepted.[111] This may help the GCC in accepting the judgement in a potential PEPP case. Furthermore, the inclusion of experts can promote the right to fair trial by improving the equality of arms.[112] Currently the actions of the ECB action are difficult to evaluate 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, specialised research professionals and officials, which makes it unlikely that it will not be able to justify its decisions. However, it is not entirely impossible, since the ECB's decision not to apply OLAF legislation was annulled by the ECJ because it was contrary to the principles of the EU Treaties. From this point of view, greater transparency combined with the ongoing dialogue with the committees of the European Parliament could be sufficient to establish a system of checks and balances.

The introduction of expert testimony cannot interfere with the independence of the ECB. It should not be considered that the expert testimony is equal to that of the ECB. The expert could evaluate whether the ECB has made a clear error of judgement. The Court is unlikely to ever find a manifest error of judgement. Such an error must be clear to non-economists for the Court to notice and it is unlikely the ECB will ever make such an error. However, by having a court appointed expert evaluating whether a clear error has been made it 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 introduce the discursive requisites that Goldmann argues as necessary,[113] thereby improving judicial procedures at EU level.

The presence of an expert could also help the ECJ in finding mistakes or manifest errors in judgments of the national courts on the occasion of a preliminary ruling. For instance, the GCC in Weiss suggests a balancing of interests that takes into account economically questionable arguments. For example, the GCC maintains that the ECJ has neglected to consider that lower interest rates affect private savings and allow economically unstable companies to remain in the market. Why should 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 ECJ judgements, strengthening the arguments of the European judge and showing up manifest errors based on incorrect, controversial or superficial theories. 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 of economic thinking. The world of monetary economics is not that vast. The court should probably appoint a non-European expert. Such a choice would not be so easy.

[110] *Micallef v. Malta* (2009) ECHR, application no 17056/06, para. 93.
[111] De Groot 2008, pp. 151, 163.
[112] Ibid, p. 17-18.
[113] Goldmann 2014, pp. 273-274.

6. Conclusion

This paper has analysed the criticism towards the level of judicial review during the euro-crisis with the aim of establishing what level of judicial review is appropriate for the future. The two underlying issues were related to the ECJ's lack of engagement with the ECB reasoning and the increasingly political content of decisions taken by the ECB. This paper furthermore reflected on whether these issues would resurface during the COVID-19 crisis and what the suitable level of review would be.
In conclusion, the ECB has not become more transparent vis-à-vis its decision making. This might become an issue for the GCC if the PEPP programme is challenged. Curiously, the Bundesbank has instead started to engage in public discussions with its stakeholders. In its response to the COVID-19 pandemic the ECB has remained within its monetary domain and remained conservative. Though its response programmes might have increased in size they were very much in the monetary policy area. This development means that it has remained the technical decision-making body that the ECJ granted a wide margin of discretion. This technical decision making requires little judicial review with regard to its statement of reasons.
The adoption of quantitative easing as a permanent tool should however be open to full 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 quantitative easing policies should be considered outside the domain of monetary policy as they normally fall within a central bank's toolbox.
This paper has furthermore evaluated whether experts should become part of the Court's decision making. It found that the most time-efficient solution is one where the expert's advice is included in the AG's opinion. It further concludes that the expert should not focus on the general question of what policy is best but rather whether the ECB has made a clear error. This would allow the inclusion of discursive requisites without jeopardising the ECB's independence and strengthen the role of the ECJ vis-à-vis national Constitutional Courts.