

LEGAL LIMITS ON THE ECB'S ACTIONS: IS THE PEPP A BRIDGE TOO FAR?

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After the global financial crisis of 2008-2009, the role and monetary policy of the European Central Bank (ECB) underwent a profound evolution, with the turning point being the possibility for the institution itself to intervene on secondary markets to purchase government bonds of eurozone member states. However, this evolution took place within the legal framework established by the EU Treaties, which remained unchanged. The fact that these changes occurred within an unchanged legal context raised a fundamental issue: there was a need to verify whether these changes were compatible with the legal limits on the actions of the ECB under the EU Treaties. It is for this reason that, between 2012 and 2018, the Court of Justice of the European Union (CJEU) developed a case law aimed at (i) verifying whether the new monetary policy tools were compatible with the provisions of the EU Treaties and (ii) defining the legal limits of ECB intervention on secondary markets. Against this backdrop, this article analyses the extent to which the ECB's intervention on secondary markets during the COVID-19 crisis through the Pandemic Emergency Purchasing Programme (PEPP) complies with the criteria established by this case law in relation to Article 123 TFEU. To this end, the article first reviews the role and mandate of the ECB as defined by the EU Treaties. It then analyses both the evolution of the ECB's role over the years and the jurisprudence developed by the CJEU in relation to the legal limits on the ECB's actions, particularly in relation to the prohibition of monetary financing established by Article 123 TFEU. Finally, the article develops an analysis intended to verify whether PEPP can be considered compatible with the legal limits defined by the abovementioned jurisprudence of the CJEU.

1 INTRODUCTION

1.1 THE INCOMPLETE NATURE AND THE RESILIENCE OF THE EMU: THE EVOLUTION OF THE ECB'S ROLE

From its inception, it was clear that the EMU (Economic and Monetary Union) was an incomplete project that would need several adjustments over the years to ensure its full realisation. More specifically, the main source of this lack of completeness was related to the absence of fiscal union, with member states having maintained their fiscal sovereignty.¹ This asymmetry was in turn the source of a moral hazard problem: some EMU member states could have an incentive to implement suboptimal, unsound budgetary policies and then pass the costs on to other – more fiscally virtuous – partners within the mechanism.

Hence, it was necessary to act on the institutional design of the EMU in order to mitigate that risk by guaranteeing a sufficient degree of coordination and convergence of

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¹ On this issue, see Amy Verdun, 'An "Asymmetrical" Economic and Monetary Union in the EU: Perceptions of Monetary Authorities and Social Partners' (1996) 20(1) Journal of European Integration 59.

national budgetary policies. This goal has been pursued on the one hand through the introduction of fiscal rules² aimed at ensuring that national budgetary policy keeps to a sound path and on the other through a very precise definition of the mandate of and the limits on the actions of the European Central Bank (ECB).

However, the impact of the economic and financial crises occurring over the years has forced the ECB to introduce a significant evolution³ in the conduct of monetary policy, which has de facto changed its overall role within the institutional framework of the EMU. From this point of view, it is worth noting that the ECB has repeatedly proved to be extraordinarily resilient by taking – at the most difficult moments – crucial decisions that have guaranteed the stability of the eurozone, if not its own survival.

The resilience shown by the ECB as an institution should be considered even more valuable if we take into account the fact that the abovementioned process of evolution has occurred within a fundamentally unchanged legal and institutional framework. In fact, while the role and the actions of the ECB have evolved significantly, the provisions of the EU Treaties concerning the mandate of the ECB and the legal limits on its actions have remained unchanged.

Consequently, over the course of the years, it has become crucial to verify whether the actions undertaken in concrete terms by the ECB were compatible with the limits on its actions established by the EU Treaties. In this context, compliance by the ECB with the limits on its actions has become a very important topic that has been extensively analysed by the jurisprudence of the Court of Justice of the European Union (CJEU).

1.2 THE RESILIENCE SHOWN BY THE ECB IN THE CONTEXT OF THE COVID-19 CRISIS

An important example of the resilience shown by the ECB was provided during the initial phase of the economic crisis caused by the COVID-19 pandemic. In fact, on 12 March 2020, at the very beginning of the pandemic in Europe – when only Italy had implemented a national lockdown – the President of the ECB, Christine Lagarde, was asked a question by a journalist concerning the role of the ECB in relation to the probable future issuance of a large amount of public debt by several eurozone member states, and in particular by Italy. This is the answer provided by Lagarde:

My point number two has to do with more debt issuance coming down the road depending on the fiscal expansion that will be determined by policymakers. Well, we will be there, as I said earlier on, using full flexibility, but we are not here to close spreads. This is not the function or the mission of the ECB. There are other tools for that, and there are other actors to actually deal with those issues.

Such a strong statement seemed to suggest that the ECB was intending to adopt a conservative approach, which would largely leave the determination of the spreads between

² The reference is to the Stability and Growth Pact (SGP) first signed by EU member states in 1997 (and subsequently updated) and to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) signed by EU member states (except Czechia and the United Kingdom) in 2012.

³ An overview concerning the evolution of the ECB's role is provided in the articles contained in Dimitrios Argyroulis et al (eds), *Ditching the Maastricht Model? The Evolving Role of the European Central Bank in the Economic and Monetary Union* (2025) 13 Politics and Governance <<https://doi.org/10.17645/pag.i386>> accessed 11 October 2025.

government bonds of eurozone countries to market discipline. However, in the following days, the extreme gravity of the crisis forced the ECB to make an unprecedented U-turn, which led on 18 March – less than one week after the abovementioned statement – to the approval of the Pandemic Emergency Purchase Programme (PEPP).⁴

Between 2020 and 2022, the PEPP was the fundamental tool through which the ECB supported the expansionary fiscal policies implemented by national governments in eurozone countries in order to counter the impact of the economic and financial crisis caused by the COVID-19 pandemic. The PEPP played a crucial role in preserving the eurozone's stability and preventing a severe economic downturn from worsening further. Its conception and implementation in such a critical situation represented proof of incredible resilience by the ECB as an institution. Nevertheless, it is necessary to verify whether this programme falls within the legal limits on the actions of the ECB established by the EU treaties.

1.3 STRUCTURE AND CONTENT OF THE ARTICLE

In this article, I will first review the role and the mandate of the ECB as defined by the EU Treaties. I will then analyse the jurisprudence of the CJEU concerning the legal limits on the ECB's actions, particularly in relation to the prohibition on monetary financing of eurozone member states under Article 123 TFEU. Finally, I will develop an analysis aimed at verifying whether the PEPP can be considered compatible with the legal limits defined by the abovementioned jurisprudence.

2 THE ROLE AND MANDATE OF THE ECB UNDER THE EU TREATIES AND THE LEGAL LIMITS ON ITS ACTIONS

2.1 THE ROLE AND MANDATE OF THE ECB

The role and mandate of the ECB are defined by Articles 127 to 133 TFEU. As far as the overall role of the ECB is concerned, this is defined in terms of the fundamental characteristic that the ECB is independent from both national and EU institutions.

The ECB's independence is established by Article 130 TFEU:

When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to

⁴ European Central Bank, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (*European Central Bank*, 18 March 2020) <www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> accessed 11 October 2025.

influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.⁵

As far as the mandate of the ECB is concerned, this is defined by Articles 127 and 119 TFEU. In particular, Article 127 TFEU establishes a two-fold, hierarchical mandate in which price stability is clearly imposed as the primary objective:

The primary objective of the European System of Central Banks shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.⁶

In relation to the ECB's mandate, it is important to highlight how it differs structurally from those of other major central banks because of its clear hierarchical remit:

The ECB's mandate differs somewhat from other central banks' mandates. It establishes a hierarchy of objectives with price stability having priority. At the same time, it is rather open with regard to secondary objectives that are characterized broadly as 'supporting general economic policies of the Union'.

By contrast, the Federal Reserve Act lays down three goals for the monetary policy of the US Federal Reserve System. It instructs the Federal Reserve System (Fed) to maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.

For the Bank of England, s 11 of the Bank of England Act 1998 also sets the monetary policy objective in terms of a hierarchy but with particular emphasis on some secondary objectives: 'In relation to monetary policy, the objectives of the Bank of England shall be— (a) to maintain price stability, and (b) subject to that, to support the economic policy of Her Majesty's Government, including its objectives for growth and employment'.

There are other European central banks with mandates that emphasize price stability but also list other objectives to be supported. These include, for example, Norges Bank and Sveriges Riksbank.⁷

⁵ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU) Art 130.

⁶ Art 127 TFEU.

⁷ Lars P Feld and Volker Wieland, 'The German Federal Constitutional Court Ruling and the European Central Bank's Strategy' (2021) 7(2) *Journal of Financial Regulation* 217.

2.2 LEGAL LIMITS ON THE ECB'S ACTIONS

As far as the legal limits on the ECB's actions are concerned, these are defined by Articles 123 to 125 TFEU. The most important provision is undoubtedly the requirement concerning the prohibition of monetary financing established by Article 123 TFEU:

Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.⁸

This is the first of three provisions of the TFEU that define very strictly the discipline concerning financial assistance to eurozone member states. The following article, in fact, has a more general wording and prohibits

[A]ny measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.⁹

The third relevant provision is Article 125 TFEU, which introduces the 'no bailout clause'. This provision prevents both EU institutions (first sentence) and the Member States (second sentence) from assuming commitments on behalf of the central government or other public sector entities of a Member State:

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.¹⁰

To conclude here, the combined reading of Articles 123, 124 and 125 TFEU shows how strict the guidelines in the EU Treaties have been – and continue to be – when it comes to the possibility of any form of financial assistance to a Member State.

Over the course of the years, the CJEU has addressed this subject through a series of landmark judgments – particularly *Weiss* and *Gauweiler*¹¹ – aimed at defining the exact limits

⁸ Art 123 TFEU.

⁹ Art 124 TFEU.

¹⁰ Art 125 TFEU.

¹¹ Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400; Case C-439/17 *Weiss and others v Bundesregierung* EU:C:2018:1000.

of the ECB'S mandate and of its interventions on secondary markets. These judgments will be analysed in detail in Section 4.

3 THE EVOLUTION OF ECB'S ROLE AND MONETARY POLICY BETWEEN 2008 AND 2020

At this point, it is necessary to analyse the evolution of the ECB's role and the monetary policy approach introduced after the 2008 global financial crisis.

3.1 THE 2008 FINANCIAL CRISIS AND THE 2010-2012 EUROPEAN SOVEREIGN DEBT CRISIS

The global financial crisis of 2008 – the origins of which can be found between 2006 and 2007 in the United States, specifically in the ‘subprime mortgage market’¹² – had a heavy impact on eurozone member states, causing a significant GDP contraction, which was in turn followed by the resulting worsening in the position of public finances engendered by the need for huge bail-out interventions for the financial institutions affected by the crisis.

As far as the eurozone is concerned, the crisis had been imported from the United States and ultimately caused a huge and generalised increase in the public debt burden carried by the member states, which, it must be said, had not been the cause of the crisis in the first place.¹³ It was against this backdrop that – in particular after the announcement in 2011 of the so-called private sector involvement (PSI) introduced to alleviate Greece's debt burden – the eurozone experienced a ‘second crisis’, which was a sovereign debt crisis directly involving the periphery of the EMU.¹⁴

From the end of 2009 until well into 2012, the eurozone saw a period of growing financial instability characterised by a dramatic increase in interest rate spreads for government bonds of peripheral countries caused by investors' concerns about the sustainability of public debt. This ‘second crisis’ revealed once again the existence of several serious flaws in the institutional architecture of the EMU and in its operating mechanisms, potentially capable of putting its sustainability at risk in the medium-long term.

3.2 THE EVOLUTION OF THE ECB'S MONETARY POLICY BETWEEN 2008 AND 2020

Consequently, it is crucial to analyse the profound changes in the monetary policy of the ECB between 2008 and 2020. In this regard, it is important to distinguish between two phases: the

¹² In terms of the role played by the subprime mortgage market at the beginning of the crisis, see Francesco Giavazzi and Alessia Amighini, ‘La Crisi del 2007-2010’ in Olivier Blanchard, Alessia Amighini, and Francesco Giavazzi (eds), *Macroeconomia. Una prospettiva europea* (Il Mulino 2009).

¹³ On the fact that excessive levels of public debt were not the cause of the crisis, see Francesco Giavazzi and Richard Baldwin, ‘Towards a Consensus on the Causes of the EZ Crisis’ (*Voxeu*, 7 September 2015) <<https://cepr.org/voxeu/columns/towards-consensus-causes-ez-crisis>> accessed 11 October 2025;

¹⁴ For a description of the development of the European sovereign debt crisis and of the role played by the PSI in Greece, see Ignazio Visco, ‘La Crisi dei Debiti Sovrani e il Processo di Integrazione Europea’ (2013) <www.bancaditalia.it/pubblicazioni/interventi-governatore/integov2013/visco_010913.pdf> accessed 11 October 2025.

first phase corresponds to the final part of the presidency of Jean Claude Trichet, whereas the second was managed by his successor Mario Draghi.

In the first phase, the actions of the ECB were cautious and somehow contradictory. On the one hand, in fact, in May 2010, the ECB launched the Securities Market Programme (SMP), a mechanism intended ‘to ensure depth and liquidity in those market segments which are dysfunctional’.¹⁵ The objective of this programme was ‘to address the malfunctioning of securities markets and to restore an appropriate monetary policy transmission mechanism’.¹⁶ Through this programme, the ECB purchased government bonds for approximately 218 billion euros but at the same time ‘the impact of the interventions had been sterilised so that they do not change central bank liquidity’.¹⁷ On the other hand, however, in April and July 2011 – in the middle of the sovereign debt crisis – the ECB took the highly controversial decision to increase its main interest rate on two occasions, with that rate rising from 1% to 1.5%.¹⁸

In the second phase, the actions of the ECB became more incisive: between December 2011 and February 2012, the ECB decided to approve the mechanism of Long-Term Refinancing Operations (LTRO). These were two operations aimed at providing financing to credit institutions for a period of three years, through which the ECB injected liquidity of approximately 1,000 billion euros into 800 European banks in order to support the overall sustainability of the system and potentially allow banks to replace private investors in holding public debt. In total, 70% of these funds were absorbed by the banking systems of the countries in greatest difficulty (Greece, Ireland, Portugal, Spain and Italy).¹⁹ Notwithstanding those operations – and despite the fact that peripheral eurozone countries had already begun the implementation of structural reforms and restrictive fiscal policies – in the first half of 2012 the sovereign debt crisis was still continuing and the spreads between government bonds of eurozone countries continued to increase, up to a point that could have endangered the stability (and possibly the existence) of the eurozone.

It was in this context that, on 26 July 2012, during the Global Investment Conference in London, the President of the ECB made the famous statement that has represented a turning point in the history of the eurozone: ‘Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough’. Through this crucial announcement, Draghi intended to affirm the clear will of the ECB to act as guarantor of the stability – and of the very existence – of the eurozone.²⁰ Shortly after this major announcement, on 6 September 2012, the ECB announced the establishment of the Outright Monetary Transactions (OMT) programme.²¹

¹⁵ European Central Bank, ‘Monthly Bulletin May 2010’ (*European Central Bank*, May 2010), 8 <www.ecb.europa.eu/pub/pdf/mobu/mb201005en.pdf> accessed 11 October 2025.

¹⁶ *ibid.* 8.

¹⁷ Umberto Triulzi, *Le Politiche Economiche dell’Unione Europea* (Mondadori 2016) 333.

¹⁸ On the ECB raising interest rates twice in 2011, see Reuters ‘ECB Raises Interest Rates’ (*Reuters*, 7 July 2011) <www.reuters.com/article/business/ecb-raises-interest-rates-idUSTRE7662WZ/> accessed 11 October 2025.

¹⁹ Triulzi (n 17).

²⁰ Triulzi (n 17) 334.

²¹ On the establishment of the OMT by the ECB, see European Central Bank ‘Technical Features of Outright Monetary Transactions’ (*European Central Bank*, 6 September 2012) <www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 11 October 2025.

In a nutshell, through this monetary policy tool, the ECB was able to intervene on secondary markets by purchasing limitless quantities of government bonds of a eurozone country on the specific condition that this country had agreed with the ESM to implement a macroeconomic adjustment programme.²²

Both Mario Draghi's 'whatever it takes' announcement and the establishment of the OMT were considered by the markets to be sufficiently credible guarantees to stop the growth of the spreads between government bonds of eurozone countries. However, the eurozone continued to be exposed to the risks arising from a prolonged phase of low inflation and the ECB still did not manage to achieve an inflation rate below but close to 2% in the medium term. To tackle this issue effectively, the ECB joined several other central banks in 2015 in implementing a policy of so-called Quantitative Easing, through the Asset Purchase Programme (APP). Through this programme, the ECB was able to intervene on secondary markets by purchasing a wide range of securities to ensure that inflation reached the 2% target in the medium term.

The establishment of the APP marks another turning point in the history of the ECB, which finally started to play an active role on the markets much more similar to the role played by other major central banks, accepting the idea of expanding its own balance sheet.²³ The amount of the ECB's net purchases changed over the course of the years: initially it was 60 billion euros from March 2015 to March 2016, subsequently increasing to 80 billion euros from April 2016 to March 2017 and then falling back to 60 billion euros from April to December 2017. The amount fell again to 30 billion euros from January to September 2018 and to 15 billion euros from October to December 2018. After a period – from January to October 2019 – in which there were no net purchases but rather only reinvestments of redemptions, the ECB decided to make net purchases of 20 billion euros between November 2019 and March 2022 (a temporary envelope of 120 billion euros for net asset purchases was added from March to December 2020).²⁴ It is therefore in this context – with the APP significantly scaled back – that the eurozone was severely hit by the COVID-19 pandemic and the consequent economic and financial crisis.

To conclude on this point, it is worth noting how the role played by the ECB evolved under the presidency of Mario Draghi. Notwithstanding the abovementioned limits on its actions established by the EU Treaties, the ECB – which had maintained a rather cautious, neutral stance up to the end of Trichet's presidency – had managed to become an 'interventionist' central bank. The historical importance of such an evolution cannot be underestimated. In fact, it can be legitimately argued that without this change the eurozone would not have survived the sovereign debt crisis. However, this evolution is also the reason why Mario Draghi's presidency has been highly controversial, much more than the tenure of previous ECB presidents.²⁵

²² Triulzi (n 17) 334.

²³ On the historical importance of the decision taken by Mario Draghi, see Triulzi (n 17) 334.

²⁴ For further details on the evolution of the APP, see European Central Bank, 'Asset Purchase Programmes' (European Central Bank) <www.ecb.europa.eu/mopo/implement/app/html/index.en.html> accessed 11 October 2025.

²⁵ For an assessment of the controversial legacy of Draghi's presidency; see Peter Bofinger 'The ECB's Policy Under the Presidency of Mario Draghi: A Curse or a Blessing for Europe?' (2020) 17(2) *European Journal of Economics and Economic Policies: Intervention* (EJEEP) 171.

4 THE JURISPRUDENCE OF THE CJEU CONCERNING THE ECB'S ROLE AND THE LEGAL LIMITS ON ITS ACTIONS

Over the course of the years, the evolution of the ECB's role and monetary policy has been the subject of a series of very important judgments by the Court of Justice of the European Union.²⁶ At this point – before examining the technical features of the PEPP – it is crucial to provide an overview of the main theoretical questions addressed by those judgments, because the interpretative jurisprudence of the CJEU has established the limits in terms of the legitimacy of the ECB's actions.

From a general perspective, it is possible to affirm that the CJEU has defined three fundamental criteria for assessing compatibility between the monetary policy programmes implemented by the ECB and the limits established by the EU Treaties.²⁷

These criteria are:

- 1) Compliance by the monetary policy programme with the ECB's mandate as defined above;
- 2) Compliance by the monetary policy programme with the principle of proportionality, which stipulates that 'a monetary policy measure by the ECB [is proportionate if it] is (i) suitable to fulfil the price stability objective and (ii) necessary to achieve that objective';²⁸
- 3) Compliance by the monetary policy programme with the prohibition of monetary financing of eurozone member states under Article 123 TFEU.

This article is focused specifically on the third criterion, and consequently in this section I will analyse the arguments developed by the CJEU in relation to the prohibition established by Article 123 TFEU.

4.1 THE ECB'S INTERVENTION ON SECONDARY MARKETS AND THE 'SUFFICIENT SAFEGUARDS' NECESSARY TO ENSURE COMPLIANCE WITH ARTICLE 123 TFEU

The Court of Justice of the European Union has always acknowledged that the prohibition established by Article 123 TFEU does not prevent the ECB – and the European System of Central Banks (ESCB) – from intervening on secondary markets in order to fulfil its mandate.²⁹

²⁶ See the following CJEU judgments referred to here: 1) Case C-370/12 *Pringle v Government of Ireland* EU:C:2012:756; 2) Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* EU:C:2015:400; 3) Case C-439/17 *Weiss and others v Bundesregierung* EU:C:2018:1000.

²⁷ On these three criteria, see Sebastian Grund, 'Legal, Compliant and Suitable: The ECB's Pandemic Emergency Purchase Programme (PEPP)' (Hertie School – Jacques Delors Centre, Policy Brief, 25 March 2020), page 2/8 <www.delorscentre.eu/en/publications/detail/publication/legal-compliant-and-suitable-the-ecbs-pandemic-emergency-purchase-programme-pepp> accessed 11 October 2025.

²⁸ Grund (n 27) 3

²⁹ *Gauweiler* (n 26) paras 94–95.

However, the Court has also established that an intervention on secondary markets by the ECB should not be – in concrete terms – equivalent to a direct purchase of government bonds of a member state on the primary market:

Nevertheless, the ESCB does not have authority to purchase government bonds on secondary markets under conditions which would, in practice, mean that its action has an effect equivalent to that of a direct purchase of government bonds from the public authorities and bodies of the Member States, thereby undermining the effectiveness of the prohibition in Article 123(1) TFEU.³⁰

The consequence is that – according to the CJEU – any intervention on secondary markets should be implemented in practice in conjunction with a series of safeguards that can avoid a de facto infringement of Article 123 TFEU:

when the ECB purchases government bonds on secondary markets, sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU.³¹

According to the jurisprudence of the CJEU, those safeguards should be aimed at preventing two fundamental risks:

- 1) the risk that potential private investors on primary markets could have ‘de facto certainty’ that the government bonds they purchase will in turn be purchased by the ESCB on secondary markets;
- 2) the risk that an ECB intervention on secondary markets could in practice disincentivise eurozone member states from following a sound budgetary policy.

4.2 THE RISK OF POTENTIAL ‘CERTAINTY’ ABOUT ECB PURCHASES ON SECONDARY MARKETS

The first argument developed by the CJEU is that an intervention by the ECB on secondary markets should be accompanied by safeguards aimed at avoiding a situation where private investors on primary markets could have ‘de facto certainty that the bonds that they may acquire from the Member States will subsequently be purchased by the ESCB on the secondary markets’.³²

In fact, if private investors had this kind of ‘de facto certainty’, they would ultimately be acting as mere intermediaries between the issuers of bonds (the eurozone member states) on primary markets and the ESCB as purchaser on secondary markets.

If that were the case, it is worth noting that member states would de facto become able to determine their own budgetary policy by relying on the support of the ESCB through purchases on secondary markets:

That said, the point should be made, in the second place, that the ESCB’s intervention could, in practice, have an effect equivalent to that of a direct purchase

³⁰ *ibid* para 97.

³¹ *ibid* para 102.

³² *Weiss* (n 26) para106.

of government bonds from public authorities and bodies of the Member States if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, *de facto*, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned.³³

It is important to note that the CJEU has identified the ‘sufficient safeguards’ established by the ECB and aimed at avoiding such a risk in relation to both the OMT and the PSPP. On the one hand, for the OMT, the CJEU has stated that:

[T]he draft decision and draft guideline produced by the ECB in these proceedings indicate that the Governing Council is to be responsible for deciding on the scope, the start, the continuation and the suspension of the intervention on the secondary market envisaged by such a programme. The ECB has also made clear before the Court that the ESCB intends, first, to ensure that a minimum period is observed between the issue of a security on the primary market and its purchase on the secondary market and, secondly, to refrain from making any prior announcement concerning either its decision to carry out such purchases or the volume of purchases envisaged. Inasmuch as those safeguards prevent the conditions of issue of government bonds from being distorted by the certainty that those bonds will be purchased by the ESCB after their issue, they ensure that implementation of a programme such as that announced in the press release will not, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States.³⁴

On the other hand, in relation to the PSPP, the CJEU has ruled out the possibility that this mechanism could cause such ‘*de facto* certainty’ because of several specific technical features of the programme. First, the CJEU noted the fact that – in the implementation of the programme – the ESCB is required to observe a ‘blackout period’. The CJEU held that this blackout period ‘provided for in Article 4(1) of Decision 2015/774, which is monitored by the ECB pursuant to Article 9 of the Guideline, ensures that bonds issued by a Member State cannot be purchased by the ESCB immediately after they are issued’.³⁵ Even though Article 4(1) does not specify the actual length of this blackout period,

which is fixed in Article 15 of the Guideline,³⁶ the ECB has stated, in its written observations, that the length of the period is measured in days rather than weeks. Such a duration does not, however, give operators who are potential purchasers of government bonds on the primary markets the certainty that the ESCB is going to purchase those bonds very shortly thereafter.

The absence of any publication, either in advance or after the event, of information concerning the duration of the blackout period, and the fact that the period in

³³ *Gauweiler* (n 26) para 104.

³⁴ *Gauweiler* (n 26) paras 106–107.

³⁵ *Weiss* (n 26) para 114.

³⁶ It is worth noting that these guidelines are not public.

question is only a minimum period, on expiry of which the purchase of a security is permitted, avoid a situation in which a private operator is able to act, de facto, as an intermediary of the ESCB, since those factors limit the foreseeability, in terms of timing, of the ESCB's interventions on the secondary markets. The fact that a purchase may thus take place several months or several years after a bond has been issued increases the uncertainty of private operators all the more, given that the ESCB has the option of reducing the monthly volume of bond purchases under the APP and has, moreover, already made use of that option on a number of occasions.³⁷

Second, the Court highlighted the fact that

although the ESCB discloses the total volume of projected purchases under the APP, it does not disclose the volume of bonds issued by public authorities and bodies of a Member State which will in the normal course of events be purchased in a given month under the PSPP. In addition, the ESCB has laid down rules intended to ensure that that volume cannot be precisely determined in advance.³⁸

Third, the Court argued that

although Article 6(2) of Decision 2015/774 provides that purchases are to be distributed among the central banks of the Member States in accordance with the key for subscription of the ECB's capital, it cannot be deduced with certainty therefrom that the amount thus allocated to a central bank of a Member State will be used, to the extent provided for in Article 6(1) of that decision, for the purchase of bonds originating from public authorities and bodies of that Member State. Decision 2015/774 also includes various mechanisms that inject a degree of flexibility into purchases under the PSPP, in particular by permitting, in Article 3(3) and (4), substitute purchases to be carried out and, in Article 6(3), the Governing Council to allow ad hoc deviations from the specialisation scheme for the allocation of securities purchased under the PSPP.³⁹

Finally, the CJEU established that a fundamental safeguard is provided in the form of the quantitative limit represented by the fact that 'the Eurosystem central banks cannot purchase more than 33% of a particular issue of bonds of a central government of a Member State or more than 33% of the outstanding securities of one of those governments'.⁴⁰

4.3 THE RISK OF A DISINCENTIVE FOR MEMBER STATES TO FOLLOW A SOUND BUDGETARY POLICY

The second argument developed by the Court concerns the fact that intervention by the ECB on secondary markets could in practice represent a disincentive for eurozone member states in terms of following a sound budgetary policy:

³⁷ *Weiss* (n 26) paras 115–116.

³⁸ *ibid* para 118.

³⁹ *Weiss* (n 26) para 120.

⁴⁰ *ibid* para 124.

In the third place, a programme such as that announced in the press release [the OMT] would circumvent the objective of Article 123(1) TFEU, recalled in paragraph 100 of this judgment, if that programme were such as to lessen the impetus of the Member States concerned to follow a sound budgetary policy. In fact, since it follows from Articles 119(2) TFEU, 127(1) TFEU and 282(2) TFEU that, without prejudice to the objective of price stability, the ESCB is to support the general economic policies in the Union, the action taken by the ESCB on the basis of Article 123 TFEU cannot be such as to contravene the effectiveness of those policies by lessening the impetus of the Member States concerned to follow a sound budgetary policy.⁴¹

The rationale is that if ‘sufficient safeguards’ are not established, a member state could rely on the financing possibilities to which an intervention on secondary markets might give rise and thus abandon a sound budgetary policy. It is for this reason that the CJEU has identified the sufficient safeguards for both the OMT and the PSPP aimed at preventing this risk. The first safeguard is represented by the fact that a programme should have a ‘temporary nature’ and that its objective should in any case be consistent and proportionate with the ECB’s mandate of reaching an inflation rate below but close of 2%. In particular,

according to recital 7 of Decision 2015/774, the PSPP is intended to be implemented only until the Governing Council sees a sustained adjustment in the path of inflation which is consistent with its aim of achieving inflation rates below, but close to, 2% over the medium term. Although the actual period of anticipated application of the PSPP has nonetheless been extended on a number of occasions, that principle has never been called into question when it was decided to adopt those extensions, as is confirmed by recital 3 of Decision 2015/2464 and recital 5 of Decision 2017/100.

It follows that the ESCB has, in its successive decisions, provided for the purchase of government bonds only in so far as necessary for the maintenance of price stability, that it has regularly revised the PSPP volume and that it has consistently preserved the temporary nature of that programme.⁴²

To confirm the temporary nature of the programme, the Court also highlights the possibility for the ESCB to sell the bonds purchased through the PSPP at any time:

[U]nder Article 12(2) of the Guideline, the ESCB has retained the option of selling purchased bonds at any time, which enables it to adapt its programme according to the attitudes of the Member States concerned and means that the operators involved cannot be certain that the ESCB will not make use of that option (see, by analogy, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 117 and 118).⁴³

⁴¹ *Gauweiler* (n 26) para 109.

⁴² *Weiss* (n 26) paras 133–134.

⁴³ *ibid* para 135.

Second, the Court highlights the fact that the impact of a monetary policy programme on the financing condition of eurozone member states

is limited by the measures restricting the volume of Member State bonds eligible to be purchased under the PSPP (see, by analogy, judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 116).

In that regard, it can be seen from the considerations in paragraph 88 of this judgment that the total volume of those bonds is limited, *de jure*, both by the setting of a monthly purchase amount under the APP and by the subsidiary nature of the PSPP within the APP, as described in Article 2(2) of the Guideline.⁴⁴

Third, according to the CJEU, another important safeguard is represented by the requirement for compliance with the so-called capital key:

[T]he distribution, in accordance with Article 6(2) of Decision 2015/774, of those purchases between national central banks in accordance with the key for subscription of the ECB's capital, as referred to in Article 29 of the Protocol on the ESCB and the ECB, rather than in accordance with other criteria such as, for example, the level of the respective debts of each Member State, in conjunction with the rule set out in Article 6(3) of that decision that each national central bank is to purchase securities of public issuers of its own Member State, means that the considerable increase in a Member State's deficit resulting from the possible abandonment of a sound budgetary policy would reduce the proportion of that Member State's bonds purchased by the ESCB. Implementation of the PSPP does not therefore enable a Member State to avoid the consequences, so far as financing is concerned, of any deterioration in its budgetary position.⁴⁵

Moreover, the Court explicitly stated that a fundamental safeguard is represented by the quantitative limit on purchases by the ESCB. In fact, the CJEU established that 'the Eurosystem central banks cannot purchase more than 33% of a particular issue of bonds of a central government of a Member State or more than 33% of the outstanding securities of one of those governments'.⁴⁶ Finally, the Court highlighted the fact that

Article 3(2) of Decision 2015/774 lays down stringent eligibility criteria based on a credit quality assessment, from which it is possible to depart only if the Member State concerned is subject to a financial assistance programme. Article 13(1) of the Guideline provides in addition that, in the event of a downgrade of the rating of a Member State's bonds or of a negative review of a financial assistance programme, the Governing Council will have to decide whether to sell the bonds of the Member State concerned that have already been purchased.⁴⁷

⁴⁴ *ibid* paras 138–139.

⁴⁵ *Weiss* (n 26) para 140.

⁴⁶ *ibid* para 124.

⁴⁷ *ibid* para 142.

5 THE PANDEMIC EMERGENCY PURCHASING PROGRAMME (PEPP)

As mentioned in the introduction, on 18 March 2020, and thus less than a week after the ECB President's highly controversial statement, the ECB announced⁴⁸ the launch of the PEPP, taking the official decision⁴⁹ establishing its objectives and key features on 24 March 2020. It is therefore necessary to analyse the key technical features of this programme so as to understand whether it can be considered compatible with the criteria established by the jurisprudence of the CJEU.

5.1 PEPP: OBJECTIVES AND TECHNICAL FEATURES

The PEPP was an asset purchase programme – complementary to the ongoing APP – covering private and public sector securities and above all concerning government bonds. Following its initial announcement, the ECB explicitly clarified that there was a clear causal link between the COVID-19 pandemic and the need to launch the PEPP:

The Governing Council decided the following:

To launch a new temporary asset purchase programme of private and public sector securities to counter the serious risks to the monetary policy transmission mechanism and the outlook for the euro area posed by the outbreak and escalating diffusion of the coronavirus, COVID-19.⁵⁰

This point was reiterated in the official decision taken by the ECB on 24 March 2020:

Taking into account the exceptional economic and financial circumstances associated with the spread of coronavirus disease 2019 (COVID-19), on 18 March 2020, the Governing Council decided to launch a new temporary pandemic emergency purchase programme (hereinafter the 'PEPP').⁵¹

The range of government bonds eligible for purchase is established in Articles 1, 2 and 3 of the Decision 2020/440.

From this perspective, it is worth noting that, over time, there has been a gradual relaxation of the requirements for the purchase of public sector securities, as established by the original version of the PSPP:

[T]hroughout all eligibility and portfolio rules, there is a tendency to loosen the initial PSPP constraints. From the Governing Council's perspective, this loosening is a technical necessity, as, with the increasing purchase volumes, the Eurosystem would otherwise run out of eligible securities. However, the relaxation or full suspension of rules comes at the cost of shifting the Eurosystem further into the position of a crucial and strategic creditor for euro area governments. At the same

⁴⁸ ECB, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 4).

⁴⁹ European Central Bank, Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) OJ L91.

⁵⁰ ECB, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 4).

⁵¹ ECB, Decision (EU) 2020/440 (n 49).

time, legal risks are likely to increase as more and more precautions that have been stressed in the ECJ's PSPP verdict are being abandoned.

The list of relaxations is long. It includes the rules for eligible issuers, minimum credit quality, maturity restrictions, yield restrictions, the issue and issuer limits, and the binding character of the ECB capital key for country allocations alike. While the initial PSPP only invested in securities of national jurisdictions, purchases under PSPP and PEPP now encompass also regional and local jurisdictions. While the PSPP until today excludes Greek bonds due to their limited credit quality, the PEPP rules include an explicit waiver for the Hellenic Republic. Initial PSPP rules prohibited the purchases of bonds with maturities below two years while PEPP allows purchases almost until maturity (i.e., 70 days before). Central bank investments into bonds with a negative yield to maturity have been possible from the start of PSPP but, initially, not below the rate of the deposit facility. Today, both PSPP and PEPP allow negative yields to maturity further below. Issuer and issue limits have been lifted over the course of the PSPP programme and are fully suspended for the PEPP. The suspension of issue and issuer limits for the PEPP de facto also renders issue and issuer limits for PSPP irrelevant since the Eurosystem's aggregate holdings from both programmes are now allowed to increase above the PSPP limits. Hence, the Eurosystem has de facto accepted to become a strategic investor with a blocking minority in any possible future debt restructuring negotiation.⁵²

As far as the overall amount of the programme is concerned, Decision 2020/440 provided for an amount of 750 billion euros, which was then increased by 600 billion euros on 4 June 2020 and by a further 500 billion euros on the following 10 December, thus representing a final overall amount of 1,850 billion euros. In this regard, it should be emphasised that the ECB itself had declared on the 18 March – and then reiterated in Decision 2020/440⁵³ – that it was ready to increase the total amount of the programme:

The Governing Council is fully prepared to increase the size of its asset purchase programmes and adjust their composition, by as much as necessary and for as long as needed. It will explore all options and all contingencies to support the economy through this shock.⁵⁴

More generally, the ECB also made clear that it was ready to remove the 'self-imposed limits' which could represent an obstacle to its action:

To the extent that some self-imposed limits might hamper action that the ECB is required to take in order to fulfil its mandate, the Governing Council will consider revising them to the extent necessary to make its action proportionate to the risks

⁵² Annika Havlik and Friedrich Heinemann 'Sliding Down the Slippery Slope? Trends in the Rules and Country Allocations of the Eurosystem's PSPP and PEPP', EconPol Policy Report, No 21 (ifo Institute – Leibniz Institute for Economic Research at the University of Munich 2020) 8.

⁵³ ECB, Decision (EU) 2020/440 (n 49).

⁵⁴ ECB, 'ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)' (n 4).

that we face. The ECB will not tolerate any risks to the smooth transmission of its monetary policy in all jurisdictions of the euro area.⁵⁵

As far as the implementation of the PEPP is concerned, Decision 2020/440 established that ‘purchases under the PEPP will take place in accordance with the existing frameworks established for the APP, except as specifically set out in this Decision’.⁵⁶ In this regard, there are two main differences in relation to the APP’s implementation that it is important to highlight.

First, the fact that – according to Article 4 of Decision 2020/440 – the 33% limit, provided for in Article 5 of Decision 2020/188, both for a single issue of government bonds (‘issue share limit’) and for the outstanding securities of an issuer (‘aggregate limit’) does not apply to purchases made under the PEPP.

Second, the fact that under the PEPP, there has been a significant relaxation – compared to what was originally envisaged for the PSPP – of the limit concerning compliance with the capital key, namely the fact that the ECB’s purchases must be proportionate to its capital shares held by each euro area member state:

[T]he Governing Council has loosened the rules on the binding orientation of country allocations to the ECB capital key. The first PSPP ECB decision from March 2015 stipulates that the distribution of purchases across jurisdictions shall be according to the NCB’s subscriptions to the ECB’s capital. The first version of the rule did not make any explicit distinction between flows and stocks. This initially strong statement signaled a continuous relevance of the capital key in any phase of the programme’s operation. Today, the ECB only describes the capital key orientation of PSPP as referring to the stock of security holdings, opening leeway for temporary divergence in the flow of net purchases. The PEPP goes even further. It still upholds the principle importance of the capital key to guide the distribution ‘on a stock basis’. However, it explicitly states that purchase flows may fluctuate.

It is difficult to understand to which extent the new PEPP formulation still attributes any relevance of the capital key at all. The wording seems to suggest that, in the long run or towards the (unknown) end of PEPP, the distribution of stocks should converge to NCBs’ shares in the ECB’s capital, but is irrelevant until then.

The 2020 ECB Decision gives the following explanation (ECB Decision 2020/440 of 24 March 2020, recital (6)): ‘A flexible approach ... is nonetheless essential to prevent current dislocations in the aggregate euro area sovereign yield curve from being translated into further distortions in the euro area risk-free yield curve.’ Although this official formulation appears somehow cryptic, it seems to suggest that the divergence of PEPP’s country allocations from the capital key is justified by fighting sovereign risk spreads that appear distorted. ECB chief economist Philip Lane has confirmed that the ECB wants to prevent risk premia from diverging from their fundamentally justified level in the situation of the acute crisis. So far, however, the ECB has not made this risk premia targeting explicit nor has it made specific

⁵⁵ ECB, Decision (EU) 2020/440 (n 49) recital 6.

⁵⁶ *ibid* recital 10.

how it quantifies fundamentally justified risk spreads for countries with high and currently quickly increasing public debt levels that objectively point to a severe deterioration in fundamental creditworthiness.⁵⁷

6 THE POSSIBLE INFRINGEMENT OF ARTICLE 123(1) TFEU: IS THE PEPP A BRIDGE TOO FAR?

Having analysed the technical features of the PEPP, it is now necessary to try to understand whether (and to what extent) this programme is compatible with the jurisprudence of the CJEU, particularly in relation to the possible infringement of the prohibition of monetary financing established by Article 123 TFEU.

6.1 THE PEPP AND THE “SUFFICIENT SAFEGUARDS”: IS THERE STILL ANYTHING LEFT?

As explained above, the CJEU has repeatedly stated that the ECB has the option of intervening on secondary markets but that ‘sufficient safeguards must be built into its intervention to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU’.⁵⁸ The key point to highlight is that many of the ‘safeguards’ provided for over the years by the ECB’s decisions (and confirmed as relevant by the jurisprudence of the CJEU) have not been applied or have been significantly weakened in the case of the PEPP.

First, the PEPP does not envisage any ‘conditionality mechanism’ – represented by the signing of a structural macroeconomic adjustment programme with the ESM – as was established in relation to the OMT and explicitly identified by the Gauweiler judgment as a ‘relevant safeguard’.⁵⁹

Second, the decision establishing the OMT (and previously the decision establishing the SMP)⁶⁰ provided that the liquidity created through this mechanism would be totally sterilised so as to keep the monetary base unchanged. This guarantee has not been provided in the case of the PEPP, as confirmed by the growth in the monetary base recorded⁶¹ (growth that had begun previously with the PSPP).

Third, it is important to highlight the fact that, in the context of the PEPP, there has been a substantial relaxation – compared to both the OMT and the PSPP – of the criteria used to determine the eligibility of bonds for inclusion in the purchase programme, to the extent of including Greek bonds, which had been excluded by the PSPP. As stated above, these limits had been explicitly identified by the CJEU as a relevant ‘safeguard’.⁶²

Moreover, it is crucial to highlight that – in the implementation of the PEPP – the ECB has abandoned the ‘33% limit’ on the purchase of a particular issue of bonds or of

⁵⁷ Havlik and Heinemann (n 52).

⁵⁸ *Gauweiler* (n 26) para 102.

⁵⁹ *Gauweiler* (n 26) para 120.

⁶⁰ ECB, ‘Monthly Bulletin May 2010’ (n 15) 8.

⁶¹ For the data concerning the growth of the monetary base in the eurozone, see European Central Bank, ‘Base Money, Euro Area (Changing Composition), Monthly’ (*European Central Bank*, last updated: 18 September 2025) <<https://data.ecb.europa.eu/data/datasets/ILM/ILM.M.U2.C.LT00001.Z5.EUR>> accessed 11 October 2025.

⁶² *Gauweiler* (n 26) paras 116-117 and *Weiss* (n 26) para 138.

the outstanding securities of a member state. This limit had been considered relevant, and particularly important, by the CJEU in the *Weiss* judgment.⁶³

The decision to abandon this limit has opened the door to the possibility that the ESCB might become one of the main creditors, if not the main creditor, by holding a significant percentage of the public debt of a member state.

Lastly, it must be recalled that under the PEPP there has been a further relaxation of the limitation represented by observance of the so-called capital key, namely the fact that the ECB's purchases should be proportionate to its capital shares held by each eurozone member state. As explained above, while, on the one hand, there is still an explicit reference to the need to comply with the capital key at the end of the programme, this principle has lost any practical relevance in the implementation phase, allowing for significant deviations in both the flow and stock levels. This further relaxation concerning compliance with the capital key implies that the ECB's purchases can de facto assume a significantly 'selective nature'.

6.2 THE PEPP AND THE 'DE FACTO CERTAINTY' OF PURCHASE BY THE ESCB ON SECONDARY MARKETS

One of the criteria developed by the CJEU to establish the legitimacy of an ECB intervention on secondary markets is the criterion concerning the fact that the ECB is able to induce 'de facto certainty' in private investors that the ESCB will purchase on secondary markets the securities issued by member states (and purchased by them) on the primary market. If that were the case, private investors would find themselves acting on the primary market as mere intermediaries between the member states (as issuers of the government bonds) and the ESCB (as purchaser of the same bonds on the secondary market).

From this point of view, it is important to highlight the specific circumstances in which the PEPP was launched: unlike other monetary policy tools developed by the ECB over the years, the PEPP was conceived and implemented to address a specific crisis and the need for member states to implement highly expansionary fiscal policies within a specific time window. In fact, the existence of a causal link between the economic crisis caused by the COVID-19 pandemic and the need to implement the PEPP was explicitly recognised by the ECB both in its press release of 18 March 2020 and in the following official Decision. The PEPP was explicitly conceived as a tool intended to support the expansionary fiscal policies that member state governments were going to implement to deal with the economic crisis caused by the pandemic.

Moreover, the perception by private investors of the existence of such a link was amplified by the actual course of events in the initial phase of the crisis, and particularly by the statement from ECB President Christine Lagarde and the following U-turn described in the introduction to this Article.

Consequently, it is legitimate to argue that – in the specific circumstances of 2020 – private investors were in a position to believe rationally that there was a serious and strong commitment from the ESCB to repurchase on the secondary market almost all of the government bonds issued on the primary market by eurozone member states.

⁶³ *Weiss* (n 26) paras 124, 141.

A first argument in ruling out the existence of such ‘de facto certainty’ is the argument relating to the limit of 750 billion euros set as the maximum amount of the purchases originally envisaged in the decision establishing the PEPP. However, this argument seems weak, given that the ECB itself – since the statement of 18 March 2020 – declared that it was ready to increase the overall amount of purchases if necessary. This position was subsequently confirmed by Decision 2020/440. Furthermore, as will be shown below, the ECB’s decisions demonstrated how strong this commitment was. Still in relation to the existence of ‘de facto certainty’, it must be added that this reasonable ‘de facto certainty’ was in practice also fuelled by the absence or the weakening of the ‘safeguards’ described in the previous paragraph and indicated by the CJEU as relevant on this issue.

In particular, both the additional flexibility introduced in relation to compliance with the capital key and the non-application of the ‘33% limit’ have led to the disappearance of two specific and objective limits on the ECB’s actions that – had they existed – would logically have increased uncertainty on the part of private investors as to whether the securities they purchased on the primary market would actually be repurchased on the secondary market.

It is crucial to emphasise the ‘signalling function’ played by the removal of these two limits. The abandoning of the 33% limit and the further weakening of the capital key rule sent private investors the clear signal that the ECB did not feel ‘quantitatively constrained’ in the execution of the programme, either with respect to the overall scale of purchases or with respect to the allocation of purchases among the different member states. This perception was confirmed by subsequent decisions taken by the ECB.

In particular, on 4 June 2020 – less than three months after the programme was launched – the ECB decided to increase the maximum total amount of purchases by a further 600 billion euros, to 1,350 billion euros (+80%). It also decided to extend the programme’s deadline by six months (this was initially scheduled for December 2020) to at least June 2021.

Moreover, on the following 10 December, the ECB decided to increase the maximum total amount of purchases by a further 500 billion euros, to a total of 1,850 billion euros, more than double the original amount of 750 billion euros (+146%), at the same time extending the programme’s deadline to March 2022.

A few days later, on 16 December, in a largely underestimated decision, the ECB announced that ‘the maturing principal payments from securities purchased under the PEPP would be reinvested until at least the end of 2024’.⁶⁴ In this regard, it must be emphasised that these decisions were taken specifically in the months in which eurozone member states were required to determine their budgetary policies – by approving the relevant national budgets – and were clearly stating their intention to implement highly expansionary fiscal policies to cope with the economic consequences of the COVID-19 crisis.

Moreover, budgetary policy was determined in a broader context in which the application of the Stability and Growth Pact had been suspended specifically to allow member states to implement these expansionary fiscal policies. In this context, since the second half of 2020, it had become quite clear to private investors that the ECB had decided

⁶⁴ ECB, ‘ECB Announces €750 Billion Pandemic Emergency Purchase Programme (PEPP)’ (n 4); European Central Bank, ‘Combined Monetary Policy Decisions and Statement’ (*European Central Bank*, 16 December 2021) <www.ecb.europa.eu/press/press_conference/monetary-policy-statement/shared/pdf/ecb.ds211216.en.pdf> accessed 11 October 2025.

to become the ‘guarantor’ of expansionary fiscal policies put in place by member states – particularly of those highly indebted member states – through its commitment to repurchase securities issued on the secondary markets.

A second argument used to rule out the existence of the abovementioned ‘de facto certainty’ relates to the existence of a ‘blackout period’, a minimum waiting period that the ESCB was obliged to observe before repurchasing bonds on the secondary markets. In this regard, it is important to note that the ECB itself ‘stated, in its written observations, that the length of the period is measured in days rather than weeks’.⁶⁵ In noting this duration, the CJEU concludes that such a period is not conducive to giving potential purchasers in the primary markets ‘de facto certainty’ of repurchase by the ESCB on secondary markets. However, it is worth noting that such a ‘blackout period’ has not been included in the official decision that established the PEPP.⁶⁶ Moreover, even if a ‘blackout period’ was respected, it can be argued that i) ‘the mere existence of a blackout period does not justify the conclusion that purchases of government bonds were not foreseeable’⁶⁷ and ii) that in the case of PEPP it is at least legitimate to doubt about its ability to guarantee the legality of the programme.

The counterargument is quite simple and requires reasoning on a country-by-country basis by considering the key variable represented by the quantity of bonds purchased by the ECB for each country. If the ECB were to purchase on secondary markets a too large quantity of bonds of certain countries, private investors (who bought those bonds on primary markets) could become ‘de facto certain’ that – at a certain point in time – they will be able to exploit the ECB’s backstop to sell those specific bonds.

As Bobić and Dawson⁶⁸ pointed out:

Earlier ECB programmes, [...] were judged by the CJEU to be Treaty consistent only on the basis of a number of pre-conditions. In *Gauweiler*, the CJEU set out the necessary safeguards against the circumvention of Article 123(1) TFEU when the ECB is purchasing bonds: (1) a lack of certainty must exist concerning whether, when, which, and for how long the purchases will be made; (2) the buying programme must not disincentivize Member States from following a sound budgetary policy; (3) holding purchased bonds until maturity is allowed only as long as the market operators cannot be certain that this option will be used; and (4) the risk to which the ECB is exposed must be mitigated by the condition of compliance with the European Stability Mechanism financing, attached to potential purchases. These safeguards have been of particular importance to the German Constitutional Court.

The current COVID-19 programme poses challenges regarding each of these criteria. In terms of the first, PEPP signals a drastic increase in the volume of ECB

⁶⁵ *Weiss* (n 26) para 115.

⁶⁶ Annelieke A M Mooij, ‘The legality of the European Central Bank’s Pandemic Emergency Purchase Programme’ (BRIDGE Network - Working Paper 5, 2020). Available at SSRN:<<https://ssrn.com/abstract=3677152>> or <<http://dx.doi.org/10.2139/ssrn.3677152>>.

⁶⁷ That is exactly the argument developed by the German Constitutional Court in: BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15 -, paraf. 189.

⁶⁸ Ana Bobić and Mark Dawson, ‘COVID-19 and the European Central Bank: The Legal Foundations of EMU as the Next Victim?’ (*VerfassungsBlog*, 27 March 2020) <<https://verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/>> accessed 1 December 2025.

purchases: according to one recent analysis almost 68% of new Italian debt is likely to be purchased under the programme. While governments and investors, therefore lack complete certainty that particular bonds will be purchased, they are hardly in the dark either.

In other words, it seems reasonable to argue that a ‘de facto certainty’ is something qualitatively different from a ‘complete certainty’ or from a ‘legal certainty’ and that it may arise when the ECB overcomes a certain threshold of purchases for one or more member states.

As Mooij pointed out:

Flexibility does make it unpredictable which bonds will be purchased. If the ECB, however, starts to buy too large quantities of bonds this might result in a violation of article 123 TFEU. If large too many bonds are bought primary dealers are near certain their bonds will be bought and they become intermediaries.

This counterargument becomes even more relevant because the ECB itself signalled – since the beginning of the programme - its willingness to remove the quantitative limits to purchases on secondary markets.

Once again, Bobic and Dawson⁶⁹ get this critical point:

More important may be the long-term signaling implicit in this announcement: the PEPP press release ends by announcing that the ECB ‘is fully prepared to increase the size of its asset purchase programmes and adjust their composition, by as much as necessary and for as long as needed’. The Bank therefore retains the possibility of reviewing the size of its purchase programmes, their scope and length. This includes a promise to revisit ‘some self-imposed limits’ which might hamper action necessary for the ECB to fulfil its mandate. This approach is clearly at odds with the relevant case law. As much as the case law diverges on particular points, it converges on one point: limits on the ECB’s activities in the economic domain are not ‘self-imposed’ but follow from the Treaty itself and the principle of conferral (or of enumerated competences) it represents. The press-release’s wording thus casts legitimate doubt over whether the ECB takes into account possible legal requirements and/or barriers in its decision-making.

This commitment reinforced private investors’ expectations to benefit from a very large ECB’s backstop on secondary markets.

6.3 THE PEPP AND THE DISINCENTIVE FOR MEMBER STATES TO FOLLOW A SOUND BUDGETARY POLICY

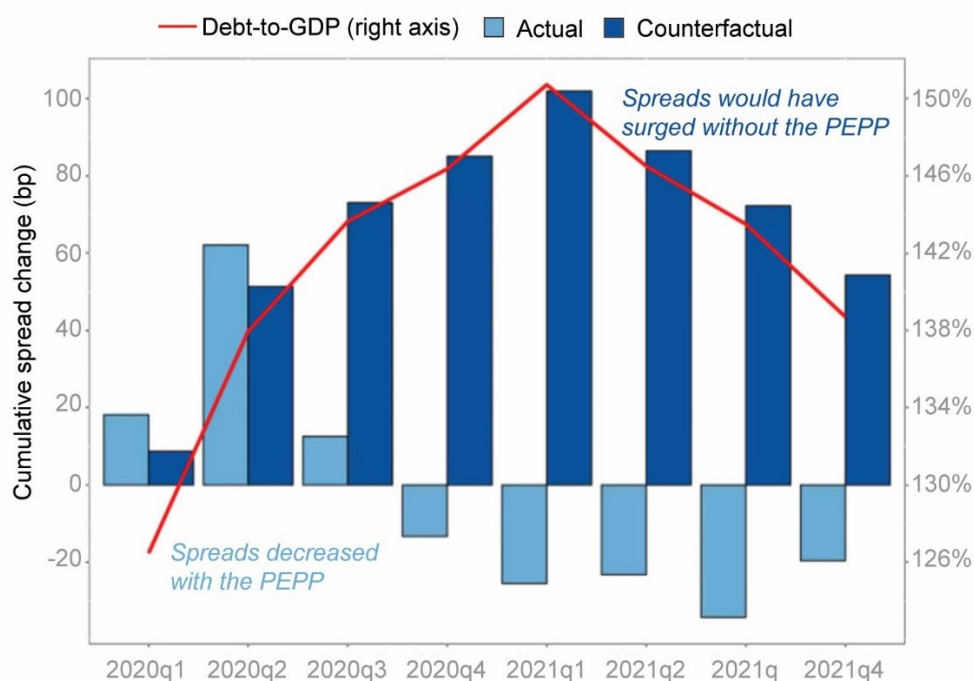
The second argument developed by the CJEU to assess the possible infringement of Article 123 TFEU concerns the fact that an ESCB intervention on secondary markets could constitute a disincentive for some eurozone member states to follow a sound budgetary policy. This second argument is logically connected to the previous one: the disincentive to

⁶⁹ Bobić and Dawson (n 68).

follow a sound budgetary policy could exist only if eurozone member states were in a position to calibrate their own budgetary policy according to the monetary policy tools implemented by the ECB. In turn, this could happen only to the extent that private investors acted as ‘de facto intermediaries’ between primary and secondary markets. In other words, member states could have calibrated their monetary policy on the PEPP only if, between 2020 and 2022, private investors – having the substantial certainty of repurchase on the secondary market by the ESCB – acted as mere intermediaries between the primary and secondary markets.

If that were the case, this intervention would have had the effect of disincentivising eurozone member states from following a sound budgetary policy. The best way to understand the mechanism described above is to consider a counterfactual perspective: if the ECB had not intervened through the PEPP – or if it had intervened to a significantly lesser extent – would member states (and particularly the most indebted ones) have been able to sustain the same fiscal deficits, under the same conditions in terms of interest rates?

A negative answer to this question – other than being suggested by common sense – has been provided by several recent studies: for example, Alberola et al⁷⁰ build a model to understand how spreads would have moved for three high debt countries (Italy, Spain and Portugal) in the counterfactual scenario in which the ECB had not intervened through the PEPP. The result is that ‘the debt surge at the onset of the pandemic would have caused an average increase in spreads of up to 100bp. Instead, we observed that spreads compressed as PEPP was rolled out’.⁷¹



⁷⁰ Enrique Alberola-Ila et al, ‘Debt Sustainability and Monetary Policy: The Case of ECB Asset Purchases’ (2022) BIS Working Papers, No 1034 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254184> accessed 11 October 2025. For a short version of the article, see Enrique Alberola-Ila et al, ‘How Effective Has the Pandemic Emergency Purchase Programme Been in Ensuring Debt Sustainability?’ (*Bruegel*, 12 September 2022) <www.bruegel.org/blog-post/how-effective-has-pandemic-emergency-purchase-programme-been-ensuring-debt-sustainability> accessed 11 October 2025.

⁷¹ *ibid.*

The graph is taken from the article 'Debt sustainability and monetary policy: the case of ECB asset purchases' by Enrique Alberola, Gong Cheng, Andrea Consiglio and Stavros A Zenios.

The graph shows what the eurozone's spreads would have been without the PEPP in the counterfactual scenario developed by the authors. It seems clear that the PEPP has resulted precisely in the harmonisation of interest rates that the CJEU considered should be avoided, because it created a disincentive to follow a sound budgetary policy.⁷² In this regard it must be emphasised that this dynamic is partly continuing through the PEPP reinvestments, which are having the effect of distorting the interest rate structure of the eurozone member states:

The euro area's interest rate structure plays a key role in the new debt sustainability framework at the centre of the European Union's refashioned stability and growth pact.

However, PEPP reinvestments, by distorting euro area capital market interest rates, appear to be obscuring the true cost of public debt in the euro periphery. In the interest of euro area stability, the ECB has clear reasons to bring about a precisely focused debate on Europe's fiscal rules. So that this can happen, PEPP reinvestments should end far earlier than the present cut-off of December 2024.

The debt sustainability framework at its centre has as its single most important variable, the interest rate, that will prevail on future debt issuance over the medium term. Typically, this interest rate is derived from the current term structure of interest rates. If interest rates are distorted by PEPP reinvestments, as appears to be the case, how is a balanced debate on debt sustainability supposed to take place?⁷³

It is now valuable to examine the arguments provided by the CJEU to identify a situation in which an intervention on secondary markets does not constitute a disincentive for member states to follow a sound budgetary policy.

The first argument concerns the temporary nature of the programme, and thus the fact that it is only implemented to the extent that it contributes to the achievement of the objectives identified by the ECB, and that within the framework of the programme the ECB retains the possibility of selling the securities purchased at any time. This argument, when applied to the PEPP, requires some clarification.

It is undoubtedly true that the PEPP had a temporary nature, having been introduced for a period of two years. However, it should be noted that the temporary nature of the programme does not automatically exclude the fact that it might temporarily act as a disincentive to follow a sound budgetary policy during its implementation. In other words, it cannot be ruled out that the 'disincentive effect' might be temporary, starting with the implementation of the programme and coming to an end with the end of that programme.

⁷² *Gauweiler* (n 26) para 113.

⁷³ Robin Brooks and David Marsh, 'ECB Bond Reinvestments Muddy Europe's Fiscal Rules' (*Official Monetary and Financial Institutions Forum*, 29 June 2023) <www.omfif.org/2023/06/ecb-bond-reinvestments-muddy-europes-fiscal-rules/> accessed 11 October 2025.

In the case of the PEPP, however, the issue of ‘PEPP reinvestments’ raises the point that this effect can last even after the programme has formally concluded.

Second, when it comes to assessing the temporary nature of the PEPP, it should be noted that it started after five years of implementation of the APP, which, moreover, continued between 2020 and 2022. Thus, in terms of the assessment of the possible disincentive to follow a sound budgetary policy, it would be incorrect to assess only the PEPP and it would be more appropriate to assess its effects by considering the broader framework of the ECB’s monetary policy.

Moreover, the CJEU – in relation to the temporary nature of the programme – emphasises the fact that the ECB has retained the option of selling the securities purchased under the programme at any time. However, if we consider the overall context in which the PEPP was activated, this option appears to be an ‘empty gun’: in fact, it seems clear that if this option had actually been exercised in the context of the economic crisis caused by the pandemic, the ECB would have jeopardised the smooth transmission of monetary policy and the stability of the euro area itself, and would thus have compromised the very objectives of the programme and increased the risks that its action was intended to prevent. In this case, there is a risk associated with validating the legitimacy of a monetary policy tool on the basis of an option that – if used – would undermine the goals of the tool itself.

The second argument concerns the fact that the ECB limits the volume of government bonds that can be purchased. However, in the case of the PEPP, this argument appears to be virtually inapplicable, to the extent that some of the constraints supporting it have been abandoned: specifically, on the one hand, the fact that purchases were limited only to the securities of countries engaged in a structural macroeconomic adjustment programme and, on the other hand, the ‘33% limit’.⁷⁴

The third argument concerns the fact that ‘stringent eligibility criteria’ are established to identify government securities eligible for purchase. However, this argument, in the case of the PEPP, seems to lose weight insofar as – as documented above – the programme was characterised by a substantial relaxation in the definition of securities eligible for purchase, culminating in the inclusion of Greek securities in the programme.

Lastly, the CJEU indicated the criteria concerning compliance with the capital key.⁷⁵ However, even in this case, as documented above, this safeguard was greatly relaxed, to the point of becoming virtually irrelevant during the implementation phase of the programme.

To sum up, three of the four main arguments put forward by the CJEU to argue that a monetary policy programme does not constitute a disincentive to following of a sound monetary policy are in fact severely weakened in the case of the PEPP. With reference to the argument concerning the temporary nature of the programme, this too, requires particular consideration in the specific case of the PEPP, which tends to support the idea of a weakening of the mechanism. Overall, the argument that the PEPP did not create a disincentive to follow a sound budgetary policy seems to be much weaker than it was in the case of the OMT and the PSPP.

⁷⁴ The fact that the ‘33% limit’ was not to be complied with in the context of PEPP is laid down in Decision 2020/440 art 4.

⁷⁵ *Weiss* (n 26) para 140.

7 THE MACROECONOMIC CONSEQUENCES OF THE PEPP

At this point, before concluding the analysis, there is a need to investigate what the ‘economic consequences’ of the PEPP were so as to verify whether the empirical evidence available is consistent with the analysis developed above.

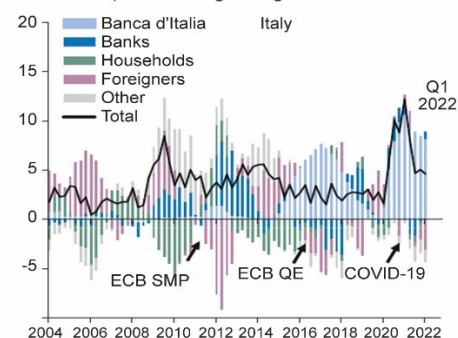
First, data show quite clearly that the new debt issuance of southern European countries between 2020 and 2022 was entirely absorbed by the ECB, with a consequent ‘crowding-out effect’ on private investors:

The bulk of funding for euro area periphery issuance in the past decade has come from the ECB. When the ECB announced the expanded asset purchase program to include sovereign bonds in early 2015, inflation was low and had remained low until recently (European Central Bank, 2015). With European inflation currently at its highest levels in history, the solidified dependence on ECB funding has become an issue. Figures 5 and 6 highlight the issuance of government debt versus demand by sector for Italy and Spain, respectively. As shown, the public sector purchase program (PSPP) and purchases during the pandemic have accounted for most of the demand for government debt in these two countries. During these periods, there has been little demand and even outflows from foreign and domestic private investors. Before ECB QE, new issuance was demanded by a healthy mix of sectors, while at lower yields, it has become dominated by ECB demand.

Figures 7 and 8 show the same issue in debt level terms. They show that net new issuance has been absorbed entirely by the ECB over the past decade, while foreign demand and demand from domestic sources has been weak. The overall picture is therefore that low yields can be somewhat deceptive. Yields are low, but that is due almost entirely to ECB buying, not strong private sector demand.⁷⁶

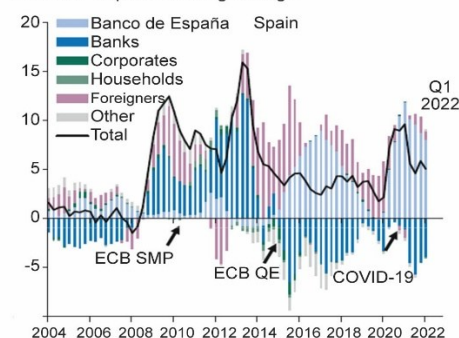
⁷⁶ Robin Brooks and Jonathan Pingle, ‘The Euro Area Periphery Debt Conundrum’ (2022) 57 *Intereconomics* 283.

Figure 5
Issuance of Italian government bonds vs demand by sector
in % GDP 4-quarter moving average



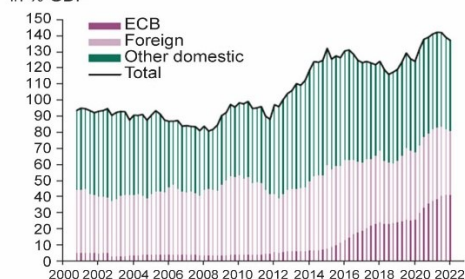
Source: Authors' calculations; Bank of Italy.

Figure 5
Issuance of Italian government bonds vs demand by sector
in % GDP 4-quarter moving average



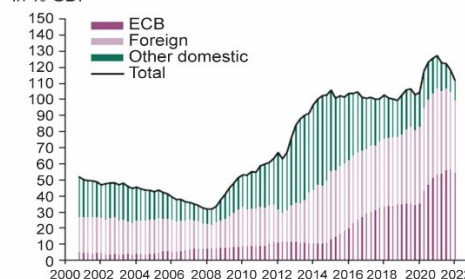
Source: Authors' calculations; Bank of Spain.

Figure 7
Italian government debt by holder
in % GDP



Source: Authors' calculations; Bank of Italy.

Figure 8
Spain government debt by holder
in % GDP



Source: Authors' calculations; Bank of Spain.

The four figures are taken from the article 'The Euro Area Periphery Debt Conundrum' by Robin Brooks and Jonathan Pingle.

Similar conclusions can be drawn by analysing the combined weight of the PSPP and the PEPP with respect to the GDP of the eurozone member states⁷⁷:

In Spain, Portugal, and Italy, total cumulated PSPP and PEPP purchases until December 2022 have surpassed 35% of GDP and that the PEPP-GDP holdings for Portugal, Spain, and Italy are far above the Euro area average.⁷⁸

Moreover, it is worth noting the particular situation of Greece, which had not benefited from purchases under the PSPP but which has benefited from (by far) the largest share of PEPP's purchases in relation to GDP. This is an important point because it underlines the country's significant dependence on the PEPP and its persistently poor reputation in international financial markets:

The Greek PEPP to GDP ratio with 18.4% is remarkable as it exceeds any other countries' by far and suggests a crucial role for the small Greek sovereign bonds market.⁷⁹

⁷⁷ Carlo Birkholz and Friedrich Heinemann, 'Magnitudes and Capital Key Divergence of the Eurosystem's PSPP/PEPP Purchase' Update April 2023, ZEW Expert Brief, No 23-02 (Leibniz Centre for European Economic Research 2023), 12.

⁷⁸ *ibid* 12.

⁷⁹ Birkholz and Heinemann (n 77) 12.

Second, another crucial issue concerns the deviations in the purchases made under the PEPP from the capital key. In this regard, as mentioned above, the ECB has applied even greater flexibility than it had already applied under the PSPP. It is therefore important to understand how the ECB has used this high level of flexibility in practice and which countries have benefited the most from this approach.

Here again, data⁸⁰ shows that Italy and Spain – and, specifically in relation to the PEPP, Greece also – were the countries that benefited the most from non-adherence to the capital key limits:

Countries receiving the biggest overweighting are Italy with +9% in PEPP and +5% in PSPP, Spain with +5% in both programmes and Belgium with +3% and +4% in PEPP and PSPP respectively. Austria and France are over indexed by +5% and +3% in the PSPP, whereas Germany received +2% of net purchases in the PEPP. France is a particular case with a significant overweight in the PSPP (+3%), and an equally significant underweight in the PEPP (-3%). On the other hand the Baltic States, as well as Slovakia, Netherlands and Luxembourg are strongly underrepresented in both the PSPP and PEPP portfolio. This partially reflects low availability of public bonds in these countries.

It appears that both PSPP and PEPP were applied with some flexibility in terms of deviations from the capital key, and that Italy and Spain are still most strongly overrepresented. In light of the particular severe economic consequences of the pandemic for Spain and Italy, their overweight corresponds to the PEPP's intention. But also for the PSPP, the results show that the ECB was not able to steer the programmes as originally intended with a strong capital key orientation. In our earlier analyses we have shown that the overweight to Italy and Spain has already existed as early as 2018, and thus well before the pandemic shock.⁸¹

These data raise critical questions in terms of compliance with the CJEU's jurisprudence concerning Article 123 TFEU. In fact, 'they are not inconsistent to a reaction function where the ECB – besides inflation objectives – also follows a fiscal policy agenda with the intention to support the financing needs of highly indebted euro countries'.⁸²

8 CONCLUSIONS: DESPERATE TIMES, DESPERATE MEASURES? THE (LIKELY) DIFFERENT PERSPECTIVES OF THE CJEU AND THE BVERFG

To conclude the analysis, it becomes necessary to reflect on what the CJEU's legal assessment of the PEPP would be if the Court had to rule on it. To answer this question, it is first necessary to briefly recall one fact: the economic context in which the ECB intervened in March 2020 on the PEPP was completely different from the one in which it intervened on the OMT and the PSPP, in 2012 and 2015 respectively.

⁸⁰ Birkholz and Heinemann (n 77) 7.

⁸¹ *ibid* 6.

⁸² *ibid* 14.

When the ECB implemented the PEPP, it did not intervene to remedy a break-down in the monetary policy transmission mechanism. The PEPP was implemented to deal with the need for member states – especially those with less fiscal space – to implement highly expansionary fiscal policies, within a specific time window, in order to face up to the Covid crisis.

Secondly, it is necessary to determine the theoretical framework that would be used by the CJEU to perform this assessment. In particular, the crucial point to understand is whether the peculiar economic and financial situation that occurred at the beginning of the pandemic could be ‘used’ by the Court to justify the assessment being excepted from the criteria it had previously outlined, particularly in the *Weiss* and *Gauweiler* judgments. A possible approach could be that of considering that the above-mentioned economic context does not justify the abandonment of such jurisprudence for the PEPP assessment. In this case, the legality of the PEPP would be determined by assessing whether its technical features comply with the criteria established in the above-mentioned cases.

A second approach might be that of considering the fact that the economic context of early 2020 was truly exceptional, and as such requires an exceptional response by the ECB. In this case, the assessment would not take into account the objective limits identified by CJEU case-law. The Court could argue that (i) if the ECB had not intervened in March 2020, the very existence of the eurozone would have been at risk, and that (ii) under no circumstances can the ECB’s mandate be interpreted in a way that ends up endangering the very existence of the eurozone itself.

This approach, however, would pose two relevant theoretical challenges: the first is that in the EU treaties, when it comes to the ECB’s mandate, there is no clause relating to ‘exceptional situations’. This would be a legal interpretation that manifestly goes beyond the letter of the Treaties, being driven by extralegal factors: namely the importance of preserving the European integration process. The second is that this approach would end up creating a sort of dual regime in relation to the ECB’s mandate: there would be ‘ordinary’ circumstances in which the ECB’s action should be assessed on the basis of the criteria defined by CJEU case-law, and ‘exceptional’ circumstances, in which the ECB would somehow be ‘free’ to act in order to preserve the existence of the eurozone. A consequence of this would be the need for the CJEU to define the perimeter of these exceptional circumstances.

The author’s opinion is that – even though it seems objectively difficult to reconcile the criteria in *Gauweiler* and *Weiss* with the PEPP’s technical features – the CJEU would choose, in order: (i) to adopt the first approach and (ii) to declare the legality of the PEPP. The reasons are those correctly recalled by Dawson and Bobić:

The CJEU is notoriously generous when reviewing the proportionality of measures adopted by the EU institutions – it has tended to give the ECB a particularly large margin of discretion. If part of the job of the EU Courts is to ‘limit’ in some way the EU’s executive institutions, the CJEU has tended in its monetary policy case law to accept limits on ECB activity of any kind, however remote and hypothetical, as demonstrating the necessity of ECB programs (or has simply not engaged in the ‘necessity’ element of the proportionality test). In so far as PEPP contains limitations on its overall size and could be terminated by the Bank at a time of its choosing, it is also limited in a formal sense. In short, the CJEU found creative ways

to find OMT and APP legal, developing relatively open and expansive tests. There is thus plenty of room to judicially endorse the PEPP too.⁸³

However, it is crucial to reflect on the consequences of this hypothetical decision. The author's opinion is that it would determine the *de facto* end of the ECB's mandate – as defined by the EU Treaties – by definitively recognizing the evolution of the ECB into a quasi-fully interventionist central bank. A central bank capable of intervening on secondary markets virtually without any significant constraint on member states' bonds purchases. A role that is completely different from that assigned to the ECB when the eurozone was created.

Against this backdrop, it is particularly interesting to highlight that the assessment of the German Constitutional Court (GCC) on the same monetary policy tool would probably be completely different. In this case, the author's opinion is that – given the criteria defined by its own case-law – the GCC would likely declare the program illegal, at least in relation to its compliance with Article 123 TFEU.

As Mooij pointed out:

the GCC found that the announcement of the volume of bonds together with the capital key creates an amount of certainty for the market players. If the GCC finds this to be the case for the PSPP it is likely to find the same for the PEPP. The PEPP volume is large [Author's note: since the publication of this article, it has increased significantly] and in addition to the other purchase programs. This combined with the earlier discussed fears about the amount of peripheral purchases makes the pandemic purchases unlawful under the GCC framework. The perhaps increased flexibility of the ECB might change the mind of the GCC. This is, however, unlikely as little is explained with the flexibility and the GCC seems attached to lengthy and detailed explanations from the ECB (see proportionality section). It attaches similar explanations regarding blackout period to prevent certainty from arising state bonds. In its decision in May the GCC considered that the 'mere existence of a blackout period does not justify the conclusion that purchases of government bonds were not foreseeable'. Considering the lack of further information on the blackout period in combination with the low maturity rate it is unlikely the GCC would consider art. 123 TFEU safeguarded.⁸⁴

To conclude, a possible judgment on the legitimacy of the PEPP might reopen the conflict between the CJEU and the GCC, raising it to a new, more dangerous, level. As the judgment of 2020 shows,⁸⁵ it is hard to believe that the GCC might end up accepting the ECB's evolution into a quasi-fully interventionist Central Bank.

⁸³ Bobić and Dawson (n 68).

⁸⁴ Mooij (n 66).

⁸⁵ BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15.

LIST OF REFERENCES

- Alberola-Ila E et al, 'Debt Sustainability and Monetary Policy: The Case of ECB Asset Purchases' (2022) BIS Working Papers, No 1034
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254184> accessed 11 October 2025
- Argyroulis D et al (eds), *Ditching the Maastricht Model? The Evolving Role of the European Central Bank in the Economic and Monetary Union* (2025) 13 Politics and Governance
<<https://doi.org/10.17645/pag.i386>> accessed 11 October 2025
DOI: <https://doi.org/10.17645/pag.i386>
- Birkholz C and F Heinemann, 'Magnitudes and Capital Key Divergence of the Eurosystem's PSPP/PEPP purchase' Update April 2023, ZEW Expert Brief, No 23-02 (Leibniz Centre for European Economic Research 2023)
- Ana Bobić and Mark Dawson, 'COVID-19 and the European Central Bank: The Legal Foundations of EMU as the Next Victim?' (*VerfassungsBlog*, 27 March 2020)
<<https://verfassungsblog.de/covid-19-and-the-european-central-bank-the-legal-foundations-of-emu-as-the-next-victim/>> accessed 1 December 2025
DOI: [10.17176/20200327-122939-0](https://doi.org/10.17176/20200327-122939-0)
- Bofinger P, 'The ECB's Policy Under the Presidency of Mario Draghi: A Curse or a Blessing for Europe?' (2020) 17(2) *European Journal of Economics and Economic Policies: Intervention* (EJEEP) 171
DOI: <https://doi.org/10.4337/ejeep.2020.02.06>
- Brooks R and J Pingle, 'The Euro Area Periphery Debt Conundrum' (2022) 57 *Intereconomics* 283
DOI: <https://doi.org/10.1007/s10272-022-1080-3>
- Feld LP and V Wieland, 'The German Federal Constitutional Court Ruling and the European Central Bank's Strategy' (2021) 7(2) *Journal of Financial Regulation* 217
DOI: <https://doi.org/10.1093/jfr/fjab006>
- Francesco Giavazzi and Alessia Amighini, 'La Crisi del 2007-2010' in Olivier Blanchard, Alessia Amighini and Francesco Giavazzi (eds), *Macroeconomia. Una prospettiva europea* (Il Mulino 2009)
- Grund S, 'Legal, Compliant and Suitable: The ECB's Pandemic Emergency Purchase Programme (PEPP)' (Hertie School – Jacques Delors Centre, Policy Brief, 25 March 2020)
<www.delorscentre.eu/en/publications/detail/publication/legal-compliant-and-suitable-the-ecbs-pandemic-emergency-purchase-programme-pepp> accessed 11 October 2025

Havlik A and F Heinemann, 'Sliding Down the Slippery Slope? Trends in the Rules and Country Allocations of the Eurosystem's PSPP and PEPP', EconPol Policy Report, No 21 (ifo Institute – Leibniz Institute for Economic Research at the University of Munich 2020)

Mooij A A M, 'The legality of the European Central Bank's Pandemic Emergency Purchase Programme' (August 19, 2020). BRIDGE Network - Working Paper 5, 2020. Published in European Law Review, n. 5, 2020 <<https://ssrn.com/abstract=3677152>>
DOI: <http://dx.doi.org/10.2139/ssrn.3677152>

Triulzi U, *Le Politiche Economiche dell'Unione Europea* (Mondadori 2016)

Verdun A, 'An "Asymmetrical" Economic and Monetary Union in the EU: Perceptions of Monetary Authorities and Social Partners' (1996) 20(1) *Journal of European Integration* 59
DOI: <https://doi.org/10.1080/07036339608429045>