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### The mandate of the ECB: Legal considerations in the ECB's monetary policy strategy review

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# Abstract

This paper offers an overview of the mandate of the European Central Bank (ECB), as defined by its objectives, the instruments available to achieve them and the constitutional framework that the ECB shall observe in pursuing them. The objectives include the primary objective of maintaining price stability and the secondary objective of supporting the general economic policies in the Union. The price stability objective enjoys primacy amongst the ECB objectives. The Treaties do not provide for a hierarchy of the “general economic policies” that the ECB shall support, although a number of criteria derived from primary law can help in guiding the ECB’s priorities in this respect. The ECB is also tasked with contributing to the “smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system”. As for the instruments available, these include both measures that directly pursue the objectives and measures that are instrumental in achieving them. Finally, the other constitutional rules that set out the framework within which the ECB pursues its objectives include the principles of conferral, institutional balance, proportionality, equal treatment and non-discrimination, as well as the principle of an open market economy and the prohibition of monetary financing.

**JEL Codes:** K23, G21, G28.

**Keywords:** ECB mandate, ECB objectives, price stability, principle of conferral, principle of proportionality.

## Executive summary

In line with the principle of conferral, the ECB must act only within the limits of the competences conferred upon it by the Member States in the Treaties<sup>1</sup> to attain the Treaties' objectives. All ECB action must fall within the limits of its competences, which are defined by the "objectives" and "tasks" set out in Article 127 TFEU, as well as by the instruments provided for in EU law.

According to Article 127(1) TFEU (first sentence), the primary objective of the ECB is to maintain price stability. There are three main ways in which the ECB may pursue the price stability objective: (i) the ECB may define "price stability"; and it may adopt measures to pursue the price stability objective both (ii) directly and (iii) indirectly, fostering the preconditions that are necessary for fulfilling this objective.

Since Article 127(1) TFEU identifies one objective as primary, all other potential objectives of the ECB are secondary to that objective. The ECB is not permitted to pursue one of the other objectives to the detriment of the objective of maintaining price stability.

Article 127(1) TFEU (second sentence) requires the ECB to "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".<sup>2</sup>

This "secondary objective" does not mandate the ECB to support directly the objectives of the Union as laid down in Article 3 TEU, but indirectly, by supporting the general economic policies through which the competent institutions seek to pursue these objectives.

There are two main limits to ECB action pursuing this secondary objective. The ECB may only support the general economic policies in the Union if (i) this does not prejudice or conflict with the objective of price stability; and (ii) the ECB does not engage in autonomous policymaking in the field of economic policy or in relation to any of the objectives it may serve.

The Treaties do not provide for any hierarchy, neither with respect to the general economic policies in the Union which the ECB is required to support, nor with regard to the objectives of the Union as laid down in Article 3 TEU. In the event not all general economic policies and objectives can be supported at the same time, and when it comes to selecting which of the "general economic policies" should be supported first, the ECB enjoys, in principle, discretion. However, a number of criteria derived from primary law should be considered to justify prioritisation.

When it comes to financial stability in the context of the ECB's monetary policy tasks, the actions of the ECB can be established on two legal bases: (i) financial stability

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<sup>1</sup> Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

<sup>2</sup> See also Article 119(2) TFEU, Article 282(2) TFEU, and Article 2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB and of the ECB).

could be a means necessary to achieve the primary objective of maintaining price stability; and (ii) Article 127(5) TFEU sets out a duty for the ECB to “contribute to the smooth conduct of policies pursued by the competent authorities relating to ... the stability of the financial system”.

The Treaties also contain certain “horizontal” or “cross-sectional” provisions that apply to the action of EU institutions in all their policies and activities.<sup>3</sup> In addition, Article 7 TFEU sets out a “consistency clause” requiring the Union to “ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”. These horizontal provisions do not alter the primacy of price stability over other objectives; however, they may help guide the prioritisation of the general economic policies that the ECB is to support.

When pursuing its objectives, the ECB is subject to the general provisions of EU primary law and the specific rules applicable to the ECB. These include the principles of conferral, institutional balance, proportionality, equal treatment and non-discrimination, as well as the principle of an open market economy and the prohibition of monetary financing.

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<sup>3</sup> Articles 8-13 TFEU, as well as in the Charter of Fundamental Rights of the European Union.



# 1 Introduction

The purpose of this paper is to analyse the general legal framework set down by the Treaties as interpreted by the Court of Justice of the European Union (CJEU) for carrying out the task of defining and implementing the Union's monetary policy.<sup>4</sup>

The mandate of the ECB<sup>5</sup> sets the outer limits of its competence to act (Section 2). The competences are conferred to achieve the “objectives” and “tasks” entrusted to the ECB in Article 127 TFEU.<sup>6</sup> The instruments to be used are also set down in the Treaty.<sup>7</sup>

This paper focuses on the first of these tasks, namely to define and implement the monetary policy of the Union. As the monetary policy of the Union is not defined in primary law, close regard must be had to the objectives of an ECB measure and the instruments used to determine whether it falls within the area of monetary policy. This paper therefore examines the primary objective of maintaining price stability (Section 3) and the secondary objective of supporting the general economic policies in the Union (Section 4). It also examines the possible relevance of the ECB's mandate for financial stability to its monetary policy task (Section 5). In particular, it examines the possible relevance of the Union's broader aims and objectives to the ECB's objectives, as defined in Article 3 TFEU (Section 6). It considers the role of the instruments available to the ECB to determine whether ECB action is within the area of monetary policy (Section 7). Lastly, the paper outlines certain basic constitutional rules that set out the framework within which the ECB pursues its objectives (Section 8).

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<sup>4</sup> Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

<sup>5</sup> In the following, references to the mandate and objectives of the ECB are meant to cover also the ESCB/Eurosystem. While the mandate and the objectives analysed in this paper are conferred by the Treaties on the ESCB/Eurosystem, the power to adopt legal acts through which this mandate is fulfilled and these objectives are pursued is granted to the ECB. The ESCB/Eurosystem are governed by the ECB, which shall ensure that the tasks conferred on the ESCB/Eurosystem are implemented. Therefore, the ultimate responsibility for the pursuit of the ESCB/Eurosystem mandate lies with the ECB and its Governing Council.

<sup>6</sup> See also Article 282(2) TFEU; Articles 2-4 TEU; and Article 25.2 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (Statute of the ESCB and of the ECB).

<sup>7</sup> *Pringle*, paragraphs 53 and 55; *Gauweiler*, paragraph 46; *Weiss*, paragraph 53.

## 2 Monetary and economic policy: a primer

In line with the general EU principle of conferral, the ECB must act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the Treaties' objectives.<sup>8</sup> All ECB action must fall within the limits of its competences, which are defined by the "objectives" and "tasks" set out in Article 127 TFEU, as well as by the instruments used. The first of the basic tasks to be carried out by the ECB is "to define and implement the monetary policy of the Union".<sup>9</sup> Although the Treaties do not define "monetary policy", it is well established that it is necessary to refer to the objectives of an ECB measure (and not to its secondary effects) and to the instruments employed<sup>10</sup> to determine whether it falls within the area of monetary policy. The ECB's objectives are set down in Article 127(1) TFEU, and the focus in the following two sections of this paper is on the scope of these objectives.

In this discussion, it is particularly important from a legal perspective to distinguish between monetary policy and economic policy not only to apply the correct legal basis but, most importantly, because of the distribution of competences between the Union and the Member States.<sup>11</sup> While monetary policy for the Member States whose currency is the euro falls within the exclusive competence of the Union under Article 3(1)(c) TFEU, economic policy is a competence that has remained with the Member States subject to close coordination within the Union.<sup>12</sup> At the same time, the CJEU has recognised in its interpretation of the second sentence of Article 127(1) that "the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies" in view of the institutional balance established by Title VIII on "Monetary and economic policy".<sup>13</sup>

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<sup>8</sup> Article 5 TEU.

<sup>9</sup> Article 127(2) TFEU. See also Article 282(1) which provides that the ECB "together with the national central banks of the Member States whose currency is the euro, which constitute the Eurosystem, shall conduct the monetary policy of the Union".

<sup>10</sup> *Pringle*, paragraphs 53 and 55; *Gauweiler*, paragraph 46; *Weiss*, paragraph 53.

<sup>11</sup> In accordance with Article 5(2), "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein".

<sup>12</sup> The Union's economic policy coordination is governed by Articles 2(3) and 5(1) and Article 119 TFEU and specified in a separate chapter (Articles 120 to 126 TFEU) which is part of a joint Title VIII dedicated to "Economic and monetary policy".

<sup>13</sup> *Weiss*, paragraph 60.

### 3 The primary objective of maintaining price stability

According to Article 127(1) TFEU (first sentence), the primary objective of the ECB is to maintain price stability.<sup>14</sup> The Treaty is therefore clear that, in the hierarchy of the ECB's objectives, price stability enjoys primacy. The primacy of price stability means two things: that it constitutes the ECB's primary focus and that, in the event of conflict with other objectives, it takes precedence. EU primary law does not give a definition of what is meant by "price stability". This leaves it open to the ECB to define the price stability constituting its primary objective and notably how it can be given concrete expression in quantitative terms. The ECB's definition of price stability is subject to judicial review by the CJEU, as are other measures which pursue the price stability objective. There are three main ways in which ECB measures may pursue the price stability objective, in line with the CJEU's reasoning: (i) the ECB may define "price stability"; and it may adopt measures to pursue the price stability objective both (ii) directly and (iii) indirectly, i.e. where the measures are instrumental to pursuing the price stability objective. The ECB's measures may have indirect effects in other policy fields, but these must be distinguished from the objective of the measures.

#### 3.1 Defining "price stability"

First, the CJEU has recognised that the ECB has a wide scope of discretion to define price stability. In the only case in which this issue has been discussed by the CJEU<sup>15</sup>, the CJEU concluded that defining inflation rates at levels below, but close to, 2% over the medium term, as adopted in 2003, is a valid exercise of the ECB's discretion. The CJEU accepted the ECB's submission that the choice can be properly based on "the fact that instruments for measuring inflation are not precise, on the appreciable differences in inflation within the euro area and on the need to preserve a safety margin to guard against the possible emergence of a risk of deflation".

The CJEU indicated that the ECB's specification of the objective as a numeric inflation target with a temporal limit would be judicially unacceptable only if "vitiating by a manifest error of assessment" or if it would go beyond the framework established by the Treaty. This "manifest error" test is applied by the CJEU when an institution is allowed broad discretion to make complex forecasts and assessments, notably in economic or technical matters. The CJEU's deferential approach is not, however, without its limits and does not imply an absence of judicial control. The CJEU has the power to "establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the

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<sup>14</sup> See also Article 282(2) TFEU and Article 2 of the Statute of the ESCB and of the ECB.

<sup>15</sup> *Weiss*, paragraphs 54-57.

information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it".<sup>16</sup> The CJEU has emphasised that a review of compliance with procedural and substantive safeguards, including its obligation "to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions" is of fundamental importance.<sup>17</sup> It has also stressed that the ECB has to "use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy".<sup>18</sup>

In conclusion, this suggests that the CJEU has accepted that setting a numeric inflation target, with a medium-term time horizon, falls within the competence of the ECB to define monetary policy in pursuit of the primary objective. Although the CJEU is likely to afford the ECB a wide scope of discretion in this respect, it is necessary to ensure compliance with the procedural and substantive safeguards that apply to ECB action when defining price stability.

### 3.2 Measures directly pursuing the primary objective and measures that are instrumental to pursuing price stability

The ECB may pursue the primary objective by taking measures which directly pursue the price stability objective. In *Weiss*, the CJEU accepted that the purpose of the ECB's decision on the public sector purchase programme (PSPP)<sup>19</sup> was to contribute to a return of inflation rates to levels below, but close to, 2% over the medium term, and that this specific objective could be attached to the primary objective.<sup>20</sup>

Under certain conditions, the ECB may also take measures which make an indirect contribution to the primary objective by fostering the preconditions which are necessary to achieve its price stability objective. The CJEU has specifically recognised that measures adopted by the ECB that aim at preserving the transmission mechanism may be regarded as pertaining to the primary objective. In *Gauweiler*, the CJEU reasoned that "The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the 'impulses' which the ESCB sends out across the money market to the various sectors of the economy ... Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price

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<sup>16</sup> See *Commission v Tetra Laval*, paragraph 39. See also *Netherlands v Commission*, paragraph 56; *Technische Universität München*, paragraphs 14 and 22; *Gauweiler*, paragraphs 68 and 69; and *Weiss*, paragraph 30. This power is often presented by the CJEU as a form of procedural scrutiny, but, depending on the case, it might consider the substance of the reviewed measure.

<sup>17</sup> *Gauweiler*, paragraph 69; *Weiss*, paragraph 30. The obligation to state reasons also arises under Article 296(2) TFEU.

<sup>18</sup> *Gauweiler*, paragraph 75.

<sup>19</sup> Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) (OJ, L 121, 14.5.2015, p. 20).

<sup>20</sup> *Weiss*, paragraphs 54 and 57.

stability”.<sup>21</sup> This was also relevant in the *Weiss* judgment when the CJEU relied on the ECB’s submission that “the transmission of the ESCB’s monetary policy measures to price trends takes place via, inter alia, facilitation of the supply of credit to the economy and modification of the behaviour of businesses and individuals with regard to investment, consumption and saving”.<sup>22</sup>

Measures which aim at preserving the transmission mechanism have been explicitly recognised by the CJEU as pertaining to the primary objective and thus falling within the ECB’s mandate. There could be other measures which foster the preconditions necessary to pursue the price stability objective. Indeed, it has long been established in the economic analysis that the ECB may take other considerations into account in determining how it goes about achieving the primary objective, i.e. these other objectives may be embodied in the framework for the pursuit of price stability. By analogy with the CJEU’s reasoning on the transmission mechanism, it may be possible to argue that measures which take into account other considerations because they necessarily affect the ECB’s ability to guarantee price stability are capable of being justified as falling within its mandate, provided they are instrumental to the primary objective laid down in Article 127(1) TFEU. In other words, the measure must be necessary to preserve the relevant intermediate objective and thus the singleness and effectiveness of monetary policy. This means that the ultimate objective of such measures should be the singleness of the monetary policy and the maintenance of price stability.

Based on this analogous reasoning, monetary policy strategy, or specific monetary policy measures, having the ultimate objective of maintaining price stability may therefore take into account other considerations. These might include, for example, full employment, a high level of protection and improvement of the quality of the environment, or financial stability, where these are a means necessary for pursuing price stability in accordance with Article 127(1) TFEU and the ECB’s decision and reasoning complies with the applicable procedural and substantive safeguards, including the proportionality test (see Section 8.3 below).

Such considerations are not necessarily identical to the broader objectives of the Union specified in Article 3 TEU or other provisions of the Treaties. The aim of preserving the transmission mechanism is not a Union objective, nor is financial stability explicitly included in the Union objectives, either generally in Article 3 TEU or in Article 119(1) and (2) TFEU<sup>23</sup>. By contrast, the objectives of “full employment and social progress” and “a high level of protection and improvement of the quality of the environment” are among the many objectives of the Union specified in Article 3 TEU. This does not, however, mean that there is a legal requirement for the ECB to take these objectives into account as a means necessary to pursue the price stability objective; the ECB has a wide discretion to identify the preconditions that are necessary for it to do so.

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<sup>21</sup> *Gauweiler*, paragraph 50.

<sup>22</sup> *Weiss*, paragraph 65.

<sup>23</sup> See, however, the references of the CJEU in *Ledra Advertising*, paragraph 74; and *Kotnik*, paragraph 50.

Ensuring the ECB's financial and operational risks are kept to a minimum is also an objective that is taken into account as a means necessary to pursue the price stability objective. Article 18.1 of the Statute of the ESCB and of the ECB provides a legal basis for the ECB and the national central banks (NCBs) to conduct credit operations with credit institutions and other market participants, with lending based on adequate collateral. This recognises that adequate collateralisation is a means necessary to support the smooth conduct of monetary policy, as the effectiveness of monetary policy transmission is also a function of the extensiveness of the ECB's collateral framework<sup>24</sup>. Risk management objectives are also taken into account in the context of asset purchase programmes by adopting a number of safeguards aimed at ensuring the programmes do not exceed what is necessary to achieve the objective of maintaining price stability.

In the context of the pursuit of the ECB's primary objective, no issues regarding the prioritisation of other considerations arise.<sup>25</sup> The Treaties do not provide guidance as to which preconditions may be taken into account in the pursuit of the primary objective. Rather, the ECB has a wide discretion and it must "use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy", in compliance with all relevant procedural and substantive safeguards, including its obligation "to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions".<sup>26</sup>

### 3.3 The indirect effects of monetary policy measures

ECB measures which aim at maintaining price stability may have "indirect effects" in other policy fields, such as economic policy. The CJEU has explicitly recognised that "in order to exert an influence on inflation rates, the ESCB necessarily has to adopt measures that have certain effects on the real economy". The fact that these effects might also be sought – for different purposes – in the context of economic policy does not change this conclusion. But if the ECB could not take such measures "when their effects are foreseeable and knowingly accepted, that would, in practice, prevent it from using the means made available to it by the Treaties for the purpose of achieving monetary policy objectives". Indeed, it might even represent an insurmountable obstacle to accomplishing the task assigned to it by primary law.<sup>27</sup> The CJEU also recognised that a monetary policy measure must not be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects in the context of economic policy.<sup>28</sup>

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<sup>24</sup> Bindseil, U., Corsi, M., Sahel, B. and Visser, A. (2017), "The Eurosystem collateral framework explained", *Occasional Paper Series*, No 189, ECB, May.

<sup>25</sup> By comparison, see the discussion on the secondary objective in Section 4 below.

<sup>26</sup> *Gauweiler*, paragraphs 69 and 75; *Weiss*, paragraphs 30 and 91. The obligation to state reasons also arises under Article 296 TFEU.

<sup>27</sup> *Weiss*, paragraphs 63-67.

<sup>28</sup> See *Pringle*, paragraph 56; *Gauweiler*, paragraph 52; and *Weiss*, paragraph 61.

The CJEU's reasoning recognises that the ECB's monetary policy strategy or measures may affect variables or indicators relating to economic policy, e.g. economic growth or employment. Arguably this might extend to certain other dimensions relating to social progress, such as wealth or income inequality. In this context, the ECB's strategy or measures may contribute to economic, employment or social objectives as a consequence, but their indirect effects are not the objectives of the strategy or measures. Moreover, such "indirect effects" should not be confused with measures which aim to support general economic policies in the Union to which different constraints and limitations apply.<sup>29</sup>

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<sup>29</sup> See also Section 4.1 below. The ECB should at a minimum check that its monetary policy does not undermine general economic policies that promote the achievement of the objectives of the Union – to ensure compliance with the obligation of consistency in Article 7 TFEU. The indirect effects of its monetary policy measures are therefore relevant in this context.

## 4 The secondary objective of supporting general economic policies in the Union

Article 127(1) TFEU (second sentence) requires the ECB to “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”.<sup>30</sup> Article 3(3) TEU provides, *inter alia*, that the Union shall work for “the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”.

### 4.1 The concept of “general economic policies”

The ECB has not to date relied on the secondary objective as an explicit legal basis for its monetary policy measures. The meaning and scope of the “general economic policies” that the ECB may support has not therefore been explored in depth in relation to the ECB’s measures. On the one hand, a narrow interpretation suggests that “economic policies” refers to Member States’ and EU policies directed at balanced economic growth. This would exclude policies which pursue other objectives, such as full employment and social progress or environmental protection, which are set out under other headings in the Treaty designating areas of competence (e.g. Employment (Title IX), Social Policy (Title X) and the Environment (Title XX)).

A broader interpretation suggests that “general economic policies in the Union” covers all EU and Member State policies which have a general economic dimension. The concept of “general economic policies” would include policies of the Member States and of the Union that predominantly have an impact on the economy in the broader sense. They are therefore wider than “fiscal policies”, which refer to taxing or spending and are exercised through budgetary means. Such economic policies also cover regulatory policies – first and foremost those connected to the internal market. Certain policy fields which fall within “general economic policies” may therefore be governed by more specific competences than those of Chapter I of Title VIII TFEU (Economic policy; Economic and monetary policy), such as Title I (Internal market) or Title IX (Employment). This allows for “economic policies” to cover regulatory policies, the objectives of which are closely related to the establishment of the

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<sup>30</sup> See also Article 119(2) and Article 282(2) TFEU; and Article 2 of the Statute of the ESCB and of the ECB.



internal market<sup>31</sup> and which may be based on dual competences for economic and other fields of policy.

The view that economic policies cover policies that have not only economic but also environmental and social objectives is explicitly supported by Article 120 and Article 121(2) TFEU. According to Article 120 TFEU, Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 TEU and in the context of the broad guidelines referred to in Article 121(2).<sup>32</sup> Read together, these provisions require the Union to take account of broader objectives when setting its broad economic guidelines, aiming at sustainable development based on economic, social and environmental grounds.<sup>33</sup>

In any case, “general” economic policies have a broad scope of application. They are not specialised or limited in their subject matter or application, e.g. to individual Member States or specialised industry sectors. Moreover, Article 120 TFEU recognises that economic policies must be conducted “with a view to contributing to the achievement of the objectives of the Union”. The issue of prioritising which general economic policies are appropriate for the ECB to support – and thereby to which EU objectives it will contribute – arises irrespective of whether a narrow or a wider interpretation of “general economic policies” is preferred (see further Section 4.3 below).

## 4.2 The relationship between “general economic policies” and “objectives”

As is evident from their wording, Articles 127(1) (second sentence) and 119(2) TFEU do not mandate the ECB to support directly the objectives of the Union as laid down in Article 3 TEU, but indirectly, by supporting the general economic policies through which the competent institutions seek to pursue these objectives. The indirect character of the ECB’s contribution to the objectives of the Union means that their concretisation, through the selection of the specific directions for action and the ways to realise them, is a matter for the authorities responsible for the general economic policies in the Union. The ECB’s mandate in this context is twofold. It has a positive obligation to support these policies in a way that further promotes the achievement of the objectives of the Union. Moreover, it entails a negative obligation in that the ECB

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<sup>31</sup> The objectives which are most closely related to the internal market are set out in Article 3(3) TEU (first subparagraph), which provides “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance”.

<sup>32</sup> Article 121(2) TFEU provides that the European Council “shall ... discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union” based on a draft formulated by the Council. On the basis of this conclusion, the Council shall then “adopt a recommendation setting out these broad guidelines”. The guidelines on macroeconomic and structural policies aim to coordinate the economic policies of Member States so as to pursue the objectives of the Union as defined in Article 3 TEU.

<sup>33</sup> See, for example, European Commission Recommendation for a Council recommendation on the economic policy of the euro area, COM(2020) 746 final.

should not support general economic policies in the Union that are incompatible with the Union's objectives and, in particular, the specific objectives as laid down for economic policy in Article 119(1)<sup>34</sup> and the guiding principles contained in Article 119(3) TFEU<sup>35</sup>. The ECB should at a minimum check that its monetary policy does not undermine general economic policies that promote the achievement of the objectives of the Union – to ensure compliance with the obligation of consistency in Article 7 TFEU.

The ECB should identify the relevant economic policies in the Union which it is seeking to support, rather than suggest that it is directly supporting the broader objectives of the policies.<sup>36</sup> This underlines that the ECB's role is to support policies that have been already shaped and defined by the competent institutions and not directly to support abstract objectives.

### 4.3 “Without prejudice to the objective of price stability”

As the ECB may only support general economic policies “without prejudice to the objective of price stability”, this secondary objective is hierarchically subordinate to the objective of maintaining price stability. The ECB may only support the general economic policies in the Union if this does not prejudice or conflict with the objective of price stability. The Treaties do not allow the ECB to weigh evenly its contribution to primary and secondary objectives. Instead, maintaining price stability remains the primary objective.<sup>37</sup> In practice, this means that if the ECB has a choice between policy options that contribute equally to the maintenance of price stability, but one of these provides more effective support for the general economic policies in the Union, it must prefer the latter, assuming all other relevant factors are equal. If the ECB has a choice between two policy options that do not contribute equally to price stability, the option which is more effective to maintain price stability must be preferred. The ECB's measures may pursue the primary objective at the same time as the secondary objective, in recognition of the close interaction between monetary and economic policies. According to one view, this de facto close interlinkage between primary and secondary objectives could suggest that support for general economic policies must always be coupled with action taken on the basis of the primary objective.<sup>38</sup>

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<sup>34</sup> Under Article 119(1) TFEU the adoption of economic policy is based on the “close coordination of Member States' economic policies, on the internal market, and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition”.

<sup>35</sup> The guiding principles are stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

<sup>36</sup> Although see Section 3.2 above on the possibility for the ECB to implement measures directly pursuing the primary objective and measures that are instrumental to pursuing price stability.

<sup>37</sup> There is, however, an argument that there is scope to give more weight to action that contributes to the secondary objective in circumstances where the price stability objective has been achieved, thereby only requiring action to ensure it is maintained.

<sup>38</sup> This argument relies on the formulation of the price stability objective as a permanent one (“maintain”) to suggest that the achievement of the objective to support the general economic policies in the Union “without prejudice to the objective of price stability” has to occur in the pursuit of and without compromising the primary objective, as well as on the requirement for such support to be carried out in accordance with the general tasks of the ECB and using the instruments available for “Monetary functions and operations of the ESCB”.

However, most plausible seems the interpretation according to which the ECB could rely on the secondary objective as an alternative legal basis for a monetary policy measure, provided this is without prejudice to price stability.<sup>39</sup> Although this is a line of argument that is untested by the jurisprudence of the CJEU, the reasoning is supported by the wording of Article 127(1) TFEU: the ECB “shall support the general economic policies”. This wording indicates that the authors of the Treaties considered that the ECB has, without prejudice to the objective of price stability, the obligation to pursue the secondary objective as well. Moreover, by establishing a priority rule between the primary and secondary objectives (“without prejudice to”), the Treaty authors imply that situations could arise where the two objectives might conflict. That could be read to mean that, according to the Treaties, it is not necessary that secondary objectives should always be pursued together with the primary objective. Provided the secondary objective is not in conflict with the primary objective, pursuing the former is not subject to the condition of actively pursuing the latter at the same time. This is of particular importance in a context in which the ECB no longer relies on a single instrument, i.e. the interest rate, but rather on a “package” of instruments to pursue its primary objective, which may potentially support the general economic policies in the Union.<sup>40</sup> This interpretation does not, however, imply that such an instrument would not relate to monetary policy. This is because the ECB’s instruments must be employed to carry out its task of defining and implementing monetary policy. However, it implies such instruments within the package may be calibrated to pursue the secondary objective, provided that this does not prejudice the maintenance of price stability.

In addition, this broader interpretation does not imply that the ECB must necessarily pursue a wide range of potentially conflicting political objectives as the ECB’s action in pursuit of the secondary objective is limited (see further Sections 4.4 and Section 8). Most importantly, the scope of action of the ECB with regard to the general economic policies in the Union is limited to “support”.

## 4.4 “Support” defines the scope of the ECB’s competence with regard to the secondary objective

Under Article 127(1) TFEU the ECB must support general economic policies but not autonomously make them. This provision does not therefore confer competence on the ECB to make policy autonomously in the field of economic policy or in relation to any of the objectives that general economic policies may serve (including full employment and social progress, or environmental protection). Communication on the ECB’s action in pursuit of the secondary objective should therefore clarify that

<sup>39</sup> This could suggest, for example, that the ECB could take action related to the protection of the environment if the action is covered by its competence to pursue the primary or secondary objectives.

<sup>40</sup> Historically, it was considered that there was only one overriding objective, price stability, which did not allow for goal sharing for the reason that the ECB would have to achieve two goals (price stability and support for economic policy) with only one instrument. This was argued to be problematic from the point of view of effectiveness and accountability: see van den Berg, C. (2005), *Making of the Statute of the European System of Central Banks: an application of checks and balances*, p. 55.

the action has the end effect of contributing to the achievement of the Union's objectives, rather than directly supporting them.

This also prevents the ECB from supporting “general economic policies” which are so broad that an effort by the ECB to concretise and support them would de facto require assessments that would amount to autonomous policymaking. For example, general economic policies that pursue the Article 3(3) TEU objective of “social justice and protection” which would require the ECB to make its own subjective judgement of what constitutes “social justice” in order to support them would not fall under the mandate of Article 127(1) TFEU.<sup>41</sup>

Last, the ECB's support for general economic policies in the Union may only be given in accordance with its basic tasks under Article 127(2) TFEU and Article 3 of the Statute of the ESCB and of the ECB. It must therefore support general economic policies in order to carry out the task of defining and implementing monetary policy (or to carry out other tasks defined by the Treaty).<sup>42</sup>

## 4.5 Selection and prioritisation of general economic policies

The Treaties do not provide for any hierarchy, neither with respect to the “general economic policies in the Union” which the ECB is required to support, nor with regard to the objectives of the Union as laid down in Article 3 TEU. The only clear hierarchical prioritisation of objectives is the primacy of price stability.

The ECB is called to support the “general economic policies” and only indirectly the objectives of the Union as laid down in Article 3 TEU. This suggests that the ECB is not required to select and prioritise certain of the objectives when fulfilling this specific mandate.<sup>43</sup> When it comes to selecting which of the “general economic policies” should first be supported, the ECB enjoys, in principle, discretion as long as it can justify its stance. To this end, a number of criteria derived from primary law should be considered to justify the prioritisation.

First, given that the role of the ECB in this context is to support the policies of other institutions, deferring to these policies would be warranted not only with regard to their content but also to the hierarchisation of priorities. The indirect character of the ECB's contribution to the objectives of the Union means that their concretisation, through the selection of the specific directions for action and the ways to realise them, is a matter for the authorities responsible for the general economic policies in

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<sup>41</sup> A distinction could in principle be drawn if the institutions competent to make general economic policy defined the means of achieving the policy's objective of “social justice and protection” or established other precise and unconditional criteria for the achievement of the objective.

<sup>42</sup> See further Section 7 below on the limitations implied by the use of the ECB's instruments.

<sup>43</sup> Although this does not exclude that certain objectives – in particular those in Article 3(3) TEU (first subparagraph) which relate to the establishment of the internal market – can have a particularly close relationship to monetary and economic policy, for example because they are more likely to be affected by monetary and economic policy, compared with other objectives of the Union.

the Union.<sup>44</sup> Policies that are given priority by the competent institutions should therefore be considered priorities also by the ECB alongside other criteria.

The institutions responsible for indicating priorities for the purpose of Article 127(1) TFEU are primarily the European Council, the Council of the European Union (the “Council”), and the European Parliament. According to Article 15(1) TEU, “The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof”. Moreover, according to Article 121(2) TFEU, the European Council shall “discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union”. The Council and the Parliament, as co-legislators, also express policy prioritisation through their legislative work. Last, the Council is responsible under Article 121(2) TFEU for formulating the draft broad guidelines of the economic policies of the Member States and of the Union and adopting the recommendation setting out these broad guidelines.

Deferring to these institutions is also justified by the fact that, according to Article 10(2) TEU, they represent Union citizens, directly or indirectly, and thus confer electoral accountability on the Union.<sup>45</sup> Priorities set out by the European Commission could also be relevant in view of the Commission’s competence to “promote the general interest of the Union” and its indirect electoral legitimacy.<sup>46</sup> All these institutions express priorities when acting within their competences as laid down by the Treaties. This includes primarily the adoption of legal acts and the assumption of international obligations, such as entering into the Paris Agreement, but also non-legal means. Of primary importance in this context are the instruments adopted under Article 121(2) TFEU. Considering that the secondary objective is “supportive”, involving the ECB deferring to policies adopted by other institutions, any clear prioritisation given by the institutions mentioned above to certain policies and objectives should guide the ECB’s priorities.

Second, a criterion for prioritising the support of certain “general economic policies” could be the potential impact of the policy on the primary objective or the proximity of the policy to the primary objective and the ECB’s main field of expertise. On the one hand, the requirement to support general economic policies in the Union “without prejudice to the objective of price stability” means that certain supportive policies that might be prejudicial to price stability or which might not be effective in the pursuit of price stability must be excluded. Where there is uncertainty, measures which are less likely to have a prejudicial impact on price stability should be preferred. On the other hand, general economic policies on which the ECB has expertise by reason of their close proximity to the pursuit of the primary objective could be prioritised.

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<sup>44</sup> The ECB’s mandate in this context is twofold. It has a positive obligation to support these policies in a way that further promotes the achievement of the Union’s objectives. Moreover, it entails a negative obligation in that the ECB should not support general economic policies in the Union that are incompatible with the Union’s objectives and, in particular, the specific objectives as laid down for economic policy in Article 119(1) and the guiding principles contained in Article 119(3) TFEU. It is noted that this may be difficult to establish in practice against the policies defined by the competent institutions.

<sup>45</sup> The members of the European Council and the Council are accountable to the parliaments of the Member States or their citizens while the European Parliament is directly elected by Union citizens.

<sup>46</sup> Article 17(1) TEU.

Third, an additional criterion is the degree of discretion left to the ECB when exercising its supportive competence. Policies which are more precise and unconditional than others and leave less discretion to the ECB in terms of the support to be provided are closer to the ECB's supportive role and may be prioritised.

Fourth, a criterion for prioritising certain general economic policies could be derived from the impact or importance of the measure for supporting the Union's objectives in Article 3 TEU. If certain policies are instrumental to achieving all other EU objectives, this will contribute to justify a prioritisation of support for such policies.

Fifth, a further criterion for prioritising certain general economic policies could be derived from the "horizontal" or "cross-sectional" provisions of general application in the Treaties. Although the Treaties are silent as to any ranking of the objectives that are set out in Articles 8 to 12 TFEU, the Union is required by Article 7 TFEU to "ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". The requirement to comply with these horizontal provisions may also support a decision to prioritise support for certain general economic policies which pursue the objectives set out in Article 3 TEU.

Ultimately, the choice as to which general economic policies the ECB should support falls within the responsibility of the Governing Council. The development of further criteria is also a matter for the Governing Council, exercising its discretion within the limits described in this paper.

## 5 Financial stability

The ECB's actions with regard to financial stability can be established on two legal bases enshrined in Article 127 TFEU, which concern the ECB's monetary policy tasks.<sup>47</sup>

First, financial stability could be a means necessary to achieve the primary objective of maintaining price stability, in accordance with Article 127(1) TFEU. Here, financial stability would not itself be the objective but rather a means to attain the price stability objective. Addressing issues of financial stability in order to promote price stability could only be possible under certain conditions. Financial stability-oriented measures would need to be instrumental to the primary objective laid down in Article 127(1) TFEU, being necessary to preserve the transmission mechanism and thus the singleness and effectiveness of monetary policy. Further, Article 127(1) TFEU could not be used to circumvent the only contributory competence entrusted to the ECB by the *lex specialis* of Article 127(5) TFEU by indirectly transferring direct responsibility for financial stability to the ECB.

Second, Article 127(5) TFEU sets out the ECB's duty to "contribute to the smooth conduct of policies pursued by the competent authorities relating to ... the stability of the financial system". It thereby confers a separate task on the ECB, having two characteristics. It cannot interfere with or jeopardise the attainment of the primary objective of maintaining price stability. Moreover, it has a contributory scope: this means that under Article 127(5) TFEU the ECB does not bear primary responsibility for financial stability and has no exclusive powers relating to it.

Neither the Statute of the ESCB and of the ECB nor the Treaties specify the concrete means through which the ECB shall exercise this contributory competence – unlike monetary policy, where some instruments are set out for that purpose. The ECB can use its typical tools or instruments to the extent pertinent to contribute to

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<sup>47</sup> A third possible legal basis for financial stability arises in the context of prudential supervision, namely Council Regulation (EU) No 1024/2013 (the "SSM Regulation") adopted under Article 127(6) TFEU. The SSM Regulation specifies the stability of the financial system within the Union and each Member State as one of the objectives of prudential supervision. Moreover, Article 5 SSM Regulation grants the ECB certain macroprudential tasks and tools. However, the SSM Regulation confers specific tasks on the ECB and does not give it a general competence with regard to financial stability. See Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63). Further discussion is beyond the scope of this paper, which focuses on monetary policy.

financial stability, and the ECB's advisory functions are also of relevance in this context.<sup>48</sup>

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<sup>48</sup> With regard to national authorities, Article 127(4) TFEU, in conjunction with Council Decision 98/415/EC (Article 2, sixth indent), provides that the ECB must be consulted on draft national legislation that materially influences the stability of financial institutions and markets. See Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (OJ L 189, 3.7.1998, p. 42). Regarding EU legislation, Article 25.1 of the Statute of the ESCB and of the ECB states that the ECB may offer advice to and be consulted by the Council and the Commission on the scope and implementation of EU legislation relating to the stability of the financial system. According to Article 141(2) TFEU, the ECB must hold consultations concerning issues falling within the competence of the national central banks of Member States with a derogation and affecting the stability of financial institutions and markets.



## 6 Horizontal provisions for the Union

The Treaties also contain certain “horizontal” or “cross-sectional” provisions that need to be taken into account by the Union in all its policies and activities.<sup>49</sup>

Article 7 TFEU also sets out a “consistency clause” requiring the Union to ensure consistency (or “coherence” in some language versions) “between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers”. Consistency, in this sense, would require EU institutions, on the one hand, to refrain from making decisions that counter policies promoted by other institutions and, on the other hand, to positively consider them in the design of their own policies.<sup>50</sup> When evaluating measures available to the ECB to implement monetary policy, the ECB must prefer a course of action which is consistent with EU policy over one which is less consistent, assuming the measures are equally effective to pursue its objectives.

Horizontal provisions do not alter the hierarchy of objectives, where the Treaty has explicitly provided for one, as with Articles 119(2), 127(1) and 282(2) TFEU, which establish, for the ECB, the primacy of price stability over other objectives. Thus, horizontal provisions<sup>51</sup> also set secondary objectives to the objective of maintaining price stability. Considering that horizontal provisions are not set out to apply specifically to the ECB, the role of the ECB in achieving them is arguably less prominent than with regard to the other secondary objectives, namely the support of general economic policies with a view to contributing to the achievement of the objectives of the Union and the contribution to financial stability. Moreover, in line with the principle of institutional balance, horizontal provisions should not be interpreted in such a way as to have the effect of transferring the responsibility for certain policy fields to the ECB.<sup>52</sup> This difference in the allocation of responsibilities with regard to policy fields other than monetary policy, such as the economy or the environment, is also reflected in the electoral accountability under which the EU institutions responsible for policymaking in such fields generally operate and the principle of independence with different channels of accountability under which the ECB carries out its tasks.

At the same time, the horizontal provisions require the EU institutions to take into account or consider certain objectives or aims of the Union in the definition and

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<sup>49</sup> Articles 8-13 TFEU as well as in the Charter of Fundamental Rights of the European Union.

<sup>50</sup> On the concept of “inconsistency”, see *Front Polisario*, paragraph 153.

<sup>51</sup> Amongst the horizontal objectives is environmental protection, provided for in Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the European Union. According to Article 11 TFEU “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”. Thus, “environmental protection requirements” are, in principle, to be “integrated” also into the EU’s monetary policy. “Integration”, in this context, does not require a concrete result (of actual effective incorporation) but rather establishes a requirement to “take into account” environmental objectives, considering and reflecting upon them in the performance of tasks. It is a duty requiring the decision-making bodies to take into consideration, amongst others, environmental objectives rather than an obligation of concrete result.

<sup>52</sup> With regard to environmental objectives in particular, Article 192 TFEU provides that the responsibility for attaining the objectives of EU policy on the environment under Article 191 TFEU lies with the Union’s legislator, namely the European Parliament and the Council.

implementation of policies and activities, including monetary policy.<sup>53</sup> A failure or inability to demonstrate how the ECB has taken these requirements into account in the context of its monetary policy measures gives rise to the risk that such measures be challenged on the grounds that they do not comply with the ECB's Treaty obligations.

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<sup>53</sup> These include the aim to eliminate inequalities, and to promote equality, between men and women (Article 8 TFEU); to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health (Article 9 TFEU); the aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 10 TFEU); as well as the provision that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development (Article 11 TFEU).

## 7 Monetary policy instruments

To determine whether a measure falls within the competence of the ECB, the instruments which the measure employs to attain its objectives are also relevant.<sup>54</sup>

The main instruments in respect of monetary policy are set out in Chapter IV of the Statute of the ESCB and of the ECB: “Monetary functions and operations of the ESCB”. They may take the form of formal legal acts comprising regulations, decisions, recommendations and opinions<sup>55</sup> or, for the internal governance of the Eurosystem, guidelines, decisions and instructions<sup>56</sup> directed to NCBs. They may also take the form of informal instruments, such as announcements or other kinds of communication.<sup>57</sup>

The ECB’s monetary policy may only be carried out to perform the basic tasks established in Article 127(2) TFEU and Article 3 of the Statute. This commits the ECB to use the instruments in Chapter IV of the Statute for the performance of its basic tasks, including defining and implementing monetary policy and accordingly for the “monetary functions and operations of the ESCB”. The instruments may be used to pursue the maintenance of price stability and/or to support the general economic policies in the Union, as the obligation to pursue the secondary objective is contained in the chapter on monetary policy and hence relates to the “monetary functions and operations of the ESCB”.<sup>58</sup>

In addition, the ECB has no separate instruments for standalone or protective measures which allow the ECB to autonomously pursue the support of general economic policies in the Union or the Union’s objectives in a manner which bears no relation to the monetary functions and operations of the ESCB. The specific functions and operations for which the instruments may be used therefore limit the means by which the ECB can support general economic policies in the Union with a view to contributing to their objectives. This reinforces the principle that the ECB must refrain from policymaking outside its fields of competence (see Section 4.4 above).

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<sup>54</sup> *Pringle*, paragraphs 53 and 55; *Gauweiler*, paragraph 46; *Weiss*, paragraph 53.

<sup>55</sup> Article 132 TFEU; Article 34 of the Statute of the ESCB and of the ECB.

<sup>56</sup> Article 12.1 of the Statute of the ESCB and of the ECB.

<sup>57</sup> As the Advocate General noted in his analysis in *Gauweiler*, the ECB uses its regular communication to the public of the broad lines of its policy, or of particular opinions which may indicate future courses of action on its part, as a monetary policy tool. Opinion of Advocate General Cruz Villalón in *Gauweiler*, paragraph 88.

<sup>58</sup> See Section 4.3 above for the view that the instruments may only be used to support the general economic policies in the Union at the same time as pursuing the price stability objective.

## 8 General constitutional framework for the pursuit of ECB objectives

When pursuing its objectives, the ECB is also subject to the general provisions of EU primary law and the specific rules applicable to the ECB. These include the principles of conferral, institutional balance, proportionality, and equality or non-discrimination, as well as the principle of an open market economy and the prohibition of monetary financing.

### 8.1 Principle of conferral

Pursuant to the principle of conferral set out in Article 5(2) TEU, the Union must “act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”<sup>59</sup> and using the instruments provided for in the Treaties. Competences not conferred upon the Union in the Treaties remain with the Member States. According to the principle of conferral, the ECB must act within the limits of the powers conferred upon it by primary law, and it cannot adopt measures that fall outside the area of competence assigned to it by primary law.<sup>60</sup>

### 8.2 Institutional balance

Moreover, in pursuing its objectives, the ECB must respect the principle of institutional balance. According to the CJEU, the principle of institutional balance, which is reflected in Article 13(2) TEU, requires that each of the EU institutions must exercise its powers with due regard for the powers of the other institutions.<sup>61</sup> In line with the principle of institutional balance, the secondary objectives of the ECB should not be interpreted in such a way as to have the effect of transferring to it responsibilities that the Treaties have conferred on other EU institutions, such as the Council and the European Parliament.

### 8.3 Proportionality

Under the principle of proportionality (Article 5(4) TEU), the content and form of Union action shall not exceed what is necessary to achieve the objective. The principle of proportionality requires that acts of the EU institutions should be suitable

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<sup>59</sup> This is also reflected in Article 3(6) TEU, according to which “objectives” are pursued by appropriate means commensurate with the “competences” which are conferred upon the Union in the Treaties.

<sup>60</sup> *Gauweiler*, paragraph 41; *Weiss*, paragraph 23.

<sup>61</sup> See, e.g. *Council v Commission (ITLOS)*, paragraph 61; *Commission v Council (ETS)*, paragraph 69; *Council v Commission (MoU)*, paragraph 32.

for attaining the legitimate objectives pursued by the legislation at issue and should not go beyond what is necessary to achieve those objectives.<sup>62</sup> The CJEU has applied the principle of proportionality also to the ECB's monetary policy, deriving from Articles 119(2) and 127(1) TFEU, read in conjunction with Article 5(4) TEU. The CJEU has ruled that ECB action "may be validly adopted and implemented only in so far as the measures that it entails are proportionate to the objectives of that policy".<sup>63</sup> Accordingly, the CJEU reviewed the ECB's monetary policy measures as regards, first, the suitability of those measures for attaining the ECB's objectives<sup>64</sup> and, second, whether the measures go manifestly beyond what is necessary to achieve those objectives<sup>65</sup>. The Court also noted that the ECB had weighed up the various interests involved so as to effectively prevent disadvantages which are manifestly disproportionate to the measures' objective from arising when implementing them.<sup>66</sup>

The standard of judicial review of monetary policy by the CJEU is not substantially different from those of other EU policies.<sup>67</sup> Indeed, in the field of monetary policy, the CJEU follows its well-settled case law, which grants broad discretion to EU institutions in situations where they have to make choices of a technical nature and undertake complex forecasts and assessments.<sup>68</sup> In this case law, the standard of reviewing broad discretion is mainly defined by the proportionality test.

When the CJEU reviews the proportionality of a monetary policy measure, it scrutinises the ECB's economic analysis against a "manifest error of assessment" test. This is the test which the Court applies when an institution is allowed by the legislator "broad discretion" to make complex forecasts and assessments, notably in economic or technical matters. The CJEU has recognised the ECB's broad discretion in the field of monetary policy, when it prepares and implements asset purchase programmes, which is justified on the ground that the ECB needs "to make choices of a technical nature and to undertake complex forecasts and assessments"<sup>69</sup>. This deference of the Court is not, however, unlimited, and the restrained intensity of the scrutiny of the EU Courts does not mean absence of control.<sup>70</sup> This control is both procedural and substantive.

In substance, when applying the "manifest error" test, the CJEU does not revisit in detail the scientific or technical merits of the reviewed decision, substituting its own assessment on the matter for that of the reviewed authority. As the Court has clarified, the fact that a reasoned analysis is disputed does not, in itself, suffice to establish a manifest error of assessment on the part of the ECB.<sup>71</sup>

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<sup>62</sup> *Gauweiler*, paragraph 67; *Weiss*, paragraph 72.

<sup>63</sup> *Gauweiler*, paragraph 66; *Weiss*, paragraph 71.

<sup>64</sup> *Gauweiler*, paragraph 72; *Weiss*, paragraph 74.

<sup>65</sup> *Gauweiler*, paragraph 81; *Weiss*, paragraph 79.

<sup>66</sup> *Gauweiler*, paragraph 91; *Weiss*, paragraph 93.

<sup>67</sup> Larsen, L.B. (2019), "Legal bridges over troubled waters? Standard of review of European Central Bank decisions by the EU Courts", in *Building bridges: central banking law in an interconnected world – ECB Legal Conference 2019*, ECB, p. 47.

<sup>68</sup> See, e.g. *Afton Chemical*, paragraph 28; and *Billerud Karlsborg and Billerud Skärblacka*, paragraph 35.

<sup>69</sup> *Gauweiler*, paragraph 68; *Weiss*, paragraph 73.

<sup>70</sup> *Commission v Tetra Laval*, paragraph 39.

<sup>71</sup> *Weiss*, paragraph 91.

When it comes to the procedural elements of the judicial control, like in all cases where an EU institution enjoys broad discretion, a review of compliance with certain procedural safeguards is of the essence. The CJEU has stressed that, in cases where the ECB enjoys broad discretion, a review of compliance with procedural safeguards, including its obligation “to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions”, is of fundamental importance.<sup>72</sup> The ECB needs to comply with the obligation to state reasons arising under Article 296(2) TFEU. The CJEU has also emphasised that the ECB has to “use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy”.<sup>73</sup> In the context of a measure based on the secondary objective of supporting the general economic policies in the Union, it should not be excluded that the burden of establishing the ECB’s motivation in order to comply with the proportionality principle may be more onerous, given the supportive role of the ECB in this context.

## 8.4 Equal treatment and the prohibition of discrimination

The principles of equal treatment and the prohibition of discrimination are set out in a number of Treaty articles, which establish the general principle of equality as a fundamental principle of EU law.<sup>74</sup> The formal principle of equal treatment requires that “comparable situations are not treated differently and that different situations are not treated in the same way unless such treatment is objectively justified. The comparability of different situations must be assessed with regard to all the elements which characterise them. Those elements must in particular be determined and assessed in light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account”.<sup>75</sup> The principle of equal treatment is relevant when assessing possible changes to the ECB’s monetary policy operational framework in relation to its treatment of counterparties or issuers of eligible assets.

## 8.5 Open market economy with free competition

Pursuant to Article 127(1) TFEU, the ECB shall “act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources”.<sup>76</sup> This provision imposes conditions and outer limits on the action of the ECB.<sup>77</sup> It is understood to imply that the ECB should refrain from policy measures

<sup>72</sup> *Gauweiler*, paragraph 69; *Weiss*, paragraph 30.

<sup>73</sup> *Gauweiler*, paragraph 75; *Weiss*, paragraph 91.

<sup>74</sup> See Article 2 and Articles 3(3) and 4(2) TEU; Articles 8, 10 and 18 TFEU.

<sup>75</sup> See *Accorinti*, paragraph 87; *Arcelor Atlantique*, paragraphs 23, 25, 26 and the case law cited; *Luxembourg v Parliament and Council*, paragraphs 31 and 32 and the case law cited.

<sup>76</sup> See also Article 119(2) TFEU.

<sup>77</sup> The principle of an open market economy has served as a basis for the operational concept of “market neutrality”. See Opinion of Advocate General Wathelet in *Weiss*, paragraph 74, which refers to the ECB’s and the European Commission’s submissions in respect of the fact that the principle of market neutrality forms part of the principle of an open market economy with free competition.

which would unduly disrupt the normal functioning of the markets or unduly restrict competition.

Article 127(1) expresses the assumption that, in general, the markets serve as the primary mechanism for efficient resource allocation in the Union.<sup>78</sup> However, the principle of an open market economy is not an absolute prohibition of ECB interference with market functioning. If required to pursue its primary or secondary objective, interference with the principle of an open market economy is possible as long as such interference is justified. The justification for such interference should meet proportionality standards. This means justifying the extent to which the attainment of monetary policy objectives requires measures that interfere with the current state of the market and assessing whether there are less onerous means. The principle of an open market economy does not commit the ECB to adopt an absolute operational concept of “market neutrality”, which does not find expression in the wording of the Treaties – at the same time, the ECB has no general mandate to remedy market failures.

## 8.6 Monetary financing prohibition

Article 123(1) TFEU prohibits the ECB and the NCBs from granting overdraft facilities or any other type of credit facility in favour of public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments. Although Article 123(1) TFEU reinforces central bank independence and the ability to maintain price stability, the CJEU confirms that its objective is “to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits ... to lead to excessively high levels of debt or excessive Member State deficits”<sup>79</sup>. It is therefore the objective of following a sound budgetary policy that guides the interpretation of the monetary financing prohibition.

The monetary financing prohibition requires the ECB and the NCBs to refrain from financing the public sector either directly<sup>80</sup> or indirectly, in a way that amounts to circumventing the objective of Article 123(1) TFEU<sup>81</sup>. According to the case law of the CJEU, measures of the ECB and the NCBs circumvent the objective of encouraging the Member States to follow a sound budgetary policy if they either have an equivalent effect to directly financing the public sector or otherwise reduce the impetus which Article 123(1) TFEU is intended to give to the Member States to follow a sound budgetary policy.<sup>82</sup>

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<sup>78</sup> See also Article 119(2) TFEU.

<sup>79</sup> *Gauweiler*, paragraph 100.

<sup>80</sup> Opinion of Advocate General Cruz Villalón, *Gauweiler*, paragraph 222.

<sup>81</sup> Recital 7 of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles [123 TFEU] and [125(1) TFEU] (OJ L 332, 31.12.1993, p. 1) states that purchases made on the secondary markets may not be used to circumvent the objective of Article 123 TFEU.

<sup>82</sup> *Gauweiler*, paragraphs 97, 104 and 109; *Weiss*, paragraphs 105 et seq.

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