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### **Legal opinion:**

## **Legal options for implementing climate criteria in the monetary policy of the European Central Bank**

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## I. Introduction

Climate protection is a human right, and Article 20a of the Basic Law for the Federal Republic obligates the state to protect the climate, that is, to achieve climate neutrality. At the same time, Article 2 (1) of the Basic Law obligates the German state not to delay climate action until tomorrow, and to do so in a way that safeguards the fundamental freedoms of future generations.

The recent landmark decision by order of the German Federal Constitutional Court on the unconstitutionality of the Federal Climate Change Act (*Bundesklimaschutzgesetz*, KSG)<sup>2</sup> has led to a veritable competition in German politics to find the best and quickest way to comply with the Basic Law through a new Climate Change Act.<sup>3</sup> The international dimension, however, which the court expressly attributes to Article 20a of the Basic Law, requires that we look beyond emissions generated in Germany itself. But only these are addressed in the new draft of the Climate Change Act. In fact, the decision requires every state institution to examine its own actions to determine whether it is promoting the protection of the personal liberties of future generations by initiating the transition to climate neutrality in a timely manner – as this is also an obligation inferred by Article 20a of the Basic Law.

The court did not examine the climate impacts of the European monetary policy, nor did it examine the role of the Deutsche Bundesbank in it. However, as the reasoning of the German Court is generally transferrable to an interpretation of the EU Charter of Fundamental Rights, it might shed a different light on these actors and the consequences of their actions in the context of EU monetary policy. For despite openly acknowledging their own relevance, effective course changes have so far failed to materialise:

“Climate change has a massive impact on the economy – for example, because of natural disasters – and thus, price stability. If we ignore this, we would not be fulfilling our mandate. In addition, the ECB’s mandate is to support the EU’s economic policy. In this, climate protection plays a crucial role.”<sup>4</sup>

Despite this statement, a recent study by Greenpeace, the New Economics Foundation, SOAS University of London, the University of the West of England and the University of Greenwich proves that there is a glaring contradiction between the democratically defined goals of the Paris Climate Agreement, the European Union’s Green Deal and the monetary policy of the European Central Bank (ECB).<sup>5</sup>

Climate protection targets are diametrically opposed to the central bank’s current asset purchasing policy: the share of carbon-intensive corporate bonds purchased by the ECB under its Corporate Sector Purchase Programme<sup>6</sup> (CSPP) is disproportionately high.<sup>7</sup> More than

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<sup>2</sup> Decision by order of 24 March 2021, Ref. 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20. The author was the legal representative for constitutional complaint 288/20.

<sup>3</sup> The draft was approved by the Cabinet on 12 May 2021. See <https://www.bundesregierung.de/breg-de/themen/klimaschutz/klimaschutzgesetz-2021-1913672>

<sup>4</sup> SPIEGEL interview with Isabel Schnabel of 9 April 2021, <https://www.ecb.europa.eu/press/inter/date/2021/html/ecb.in210409~c8c348a12c.de.html>

<sup>5</sup> Dafermos/Gabor/Nikolaïdi/Pawloff/van Lerven, *Greening the Eurosystem collateral framework*, March 2021, [https://www.greenpeace.de/sites/www.greenpeace.de/files/studie\\_greening\\_the\\_eurosystem\\_collateral\\_framework-report-final\\_0.pdf](https://www.greenpeace.de/sites/www.greenpeace.de/files/studie_greening_the_eurosystem_collateral_framework-report-final_0.pdf)

<sup>6</sup> Legal basis of the CSPP: Decision (EU) 2016/948 of the ECB of 1 June 2016.

<sup>7</sup> Matikainen et al., *The Climate Impact of Quantitative Easing*, Policy Paper, May 2017, [https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2017/05/ClimateImpactQuantEasing\\_Matikainen-et-al-1.pdf](https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2017/05/ClimateImpactQuantEasing_Matikainen-et-al-1.pdf)

62% (equivalent to EUR170 billion) of the ECB's CSPP portfolio involves direct financing of the sectors with the worst environmental impact.<sup>8</sup> That is because only big companies or companies that are well established on the capital markets meet the ECB's eligibility criteria. Sectors that are particularly harmful to the climate and have high capital requirements, such as the automobile industry and coal and oil companies, are given preference despite their poor climate performance, while small companies that adhere to climate standards and even operate in a greenhouse gas-neutral manner are excluded.

Both European and national authorities are subject to the principle of administrative legality. The ECB is a fully-fledged EU institution and the monetary authority of the Union. At the same time, however, it has a special position, as it is bound by the principle of independence and the primary objective of its monetary policy is to safeguard and maintain price stability. Therefore, according to the European Treaties, it should be operationally, institutionally and financially independent.

The ECB describes itself as “market neutral” and maintains that it acts objectively. Relative price determination must not be distorted by political considerations; it is necessary to act exclusively in the interest of price stability.

However, the practical experience of recent years paints a very different picture.<sup>9</sup> During the banking crisis, the ECB became the ultimate crisis manager and continuously developed new instruments to keep the financial sector afloat. The same applies to member states since the euro crisis. With its multi-billion financing programmes, including the programme to purchase government bonds, Public Sector Purchase Programme (PSPP)<sup>10</sup>, the ECB has proved that EU monetary policy is not in fact neutral but exercises a strong influence on pricing on the capital markets. When it comes to establishing climate action measures, however, ECB decision-makers do not tire of emphasising that the ECB is far removed from short-term political considerations;<sup>11</sup> it has, however, always been and still is a political institution.

Those responsible are very well aware of the dangers of climate change for the global financial system and the primacy of price stability.<sup>12</sup> The ECB has also recognised that climate change directly affects price stability.<sup>13</sup> We are currently feeling the impact of natural disasters through the seemingly never-ending COVID-19 pandemic,<sup>14</sup> the economic costs of which cannot yet be fully assessed, but which will continue to burden future generations for decades to come.

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[Dafermos/Gabor/Nikolaïdi/Pawloff/van Lerven, in: Decarbonising is easy: Beyond Market Neutrality in the ECB's Corporate OE, 10/2020, S. 10. https://neweconomics.org/2020/10/decarbonising-is-easy](https://www.neweconomics.org/2020/10/decarbonising-is-easy)

<sup>8</sup> *ibid.*

<sup>9</sup>

<https://www.handelsblatt.com/meinung/gastbeitraege/gastkommentar-die-ezb-braucht-ein-klares-mandat/25529540.html?tick-et=ST-1643428-4ixkWdFRCOELGWif355O-ap2>

<sup>10</sup> See the highly contentious judgement of the German Constitutional Court on this programme here: BVerfG, Judgement of 5 May 2020, [2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15](https://www.bverfg.de/entscheidungen/20200505_1.html)

<sup>11</sup> According to Mario Draghi in 2012: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120829.de.html>

<sup>12</sup> On 27 November 11.2020 the ECB Banking Supervision published a new guide on climate-related and environmental risks, intended to describe how to manage risks, what changes institutions can make to their business strategies and how they can enhance transparency (it is, however, not binding for companies, see p. 3), <https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.202011finalguideonclimate-relatedandenvironmentalrisks~58213f6564.en.pdf>

<sup>13</sup> Blog post by Frank Elderson, Member of the Executive Board of the ECB, 13 February 2021, <https://www.ecb.europa.eu/press/blog/date/2021/html/ecb.blog210213~7e26af8606.en.html>

<sup>14</sup> <https://www.ecb.europa.eu/press/inter/date/2021/html/ecb.in210316~930d09ce3c.en.html>

Experts agree that traditional risk management is no longer effective enough in the case of so-called green swan events such as climate change and the physical and economic consequences it triggers.<sup>15</sup> These phenomena are marked by a considerable, uncontrollable force and could lead directly to the next financial crisis.<sup>16</sup> It is therefore in the central banks' own interest to mobilise all available forces against climate change, precisely *because* price stability is to be maintained.<sup>17</sup>

The ECB is currently undergoing a transformation process as part of its strategy review.<sup>18</sup> It began reviewing its monetary policy strategy in early 2020 and plans to present results in September 2021. The views of representatives of the central banks on the role of the ECB when it comes to climate change issues differ,<sup>19</sup> although there is now a general consensus that it wants to do more to mitigate climate change.<sup>20</sup>

Can and must the ECB reposition itself?

## II. Objective

This legal opinion focuses on the question of whether it is legally permissible or possible for the ECB to base its monetary policy, in particular the purchase of corporate bonds, on climate-related risk criteria and thus support environmental policy goals.

The objective is to work out whether such action is covered by the ECB's monetary policy mandate and, if so, why the ECB has not acted accordingly to date. This paper will examine whether taking climate criteria and effects into account – especially against the background of price stability and the 2015 Paris Climate Agreement with its clear target of keeping global average temperature increase to well below 2°C above pre-industrial levels and limiting its increase to 1.5°C above pre-industrial levels – is not only possible but perhaps even imperative.

First, the institutions will be presented, and the monetary policy tools of the ECB and the ESCB (European System of Central Banks) will be introduced on the basis of their central principles and legal regulations. The international and European legal bases will then be analysed, which show that the legislator (here: the EU Member States in the TFEU) has already specified a mandate with regard to environmental and climate protection, which the central bank must also adhere to when making discretionary decisions.

This paper will then take an in-depth look at why, in particular, the goal of price stability argues in favour of considering climate-relevant criteria when purchasing corporate bonds; who has what authority to implement new risk criteria, and why this would not necessarily compromise independence. Before presenting a conclusion, this opinion will shed light on the democratic legitimacy of the ESCB, and on the question of whether intervention by the EU legislator is possible.

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<sup>15</sup> "Climate-related risks will remain largely uninsurable or unhedgeable as long as system-wide action is not undertaken."  
<https://www.ecosystemmarketplace.com/articles/coronavirus-is-dangerous-but-the-green-swan-is-worse/>

<sup>16</sup> "Brown assets might be the next subprime", <https://voxeu.org/article/brown-assets-might-be-next-subprime>.

<sup>17</sup> Bolton et al., *The green swan: Central Banking and financial stability in the age of climate change*, January 2020, <https://www.bis.org/publ/othp31.pdf>

<sup>18</sup> <https://www.ecb.europa.eu/home/search/review/html/index.en.html>

<sup>19</sup> Quitzau/Broders, *Grüne* "Geldpolitik: Stand der Diskussion", Berenberg Makro, 14 April 2021, [https://www.berenberg.de/fileadmin/web/economics/documents/geld\\_waehrung/2021-04-14\\_MAKRO\\_Geld\\_Waehrung\\_Gruene\\_Geldpolitik\\_-\\_Update.pdf](https://www.berenberg.de/fileadmin/web/economics/documents/geld_waehrung/2021-04-14_MAKRO_Geld_Waehrung_Gruene_Geldpolitik_-_Update.pdf)

<sup>20</sup> <https://www.zeit.de/news/2021-01/25/biz-und-ezb-verstaerken-kampf-gegen-klimawandel>

This paper is a legal opinion that focuses on the corporate purchase programme (CSPP) of the QE programme of the ECB and is therefore largely limited to legal considerations, but includes analyses from an economic perspective in its references and covers the facts.

### **III. The European System of Central Banks and its tools for monetary and economic policy**

#### **1. The European Central Bank and its decision-making bodies**

The ECB is the common monetary authority of the EU Member States and, pursuant to Article 13 (1) TEU, a fully-fledged EU institution.

Together with the national central banks, it constitutes the European System of Central Banks (ESCB), see Article 282 (1) TFEU. All national central banks are equally bound by the European Treaties. The ESCB itself is not an independent legal entity and can therefore not be assigned independent tasks and powers; rather, it is an intergovernmental association.<sup>21</sup> The *Eurosystem* comprises the ECB and the national central banks of the States that have adopted the euro. The national central banks of the Member States that do not yet belong to the euro area, are part of the ESCB, but not of the Eurosystem.<sup>22</sup> The Deutsche Bundesbank, for example, which plays an active role in the CCSP purchase programme, is thus part of the ESCB.

The ECB is made up of three decision-making bodies that govern the ESCB: the Governing Council, the General Council as the “transitional body”, and the Executive Board as the executive body, (Article 282 (2) TFEU).

The supreme decision-making body is the Governing Council of the ECB, which, as set out in Article 283 TFEU, consists of the members of the Executive Board and the governors of the central banks of those Member States that have adopted the euro. It adopts the guidelines and takes decisions necessary to ensure the performance of the tasks entrusted to the Eurosystem and establishes key interest rates. Its organisation is largely governed by the Rules of Procedure of the ECB,<sup>23</sup> which supplement the EU Treaties (TFEU and TEU) and the Statute of the ESCB. Dr Jens Weidmann (President of the Deutsche Bundesbank) is also currently a member of the ECB Governing Council.

The Executive Board of the ECB consists of the president, the vice-president and four other members, who are selected and appointed by the European Council by a qualified majority.

#### **2. Tasks under the Treaties and the Statute of the ESCB**

According to Article 3 (1) c) TFEU, the Union has exclusive competence for monetary policy. According to Article 127 (2) TFEU, one of the basic tasks of the ESCB is to define and implement the monetary policy of the Union (so-called “monetary policy mandate”).

Art 127 TFEU defines the objective of the ESCB in general terms:

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<sup>21</sup> Häde: Calliess/Ruffert, *EUV/AEUV*, 5th edition, Art. 282 TFEU, para. 2, 3.

<sup>22</sup> For an explanation of basic terms, see: <https://www.ecb.europa.eu/ecb/orga/escb/html/index.de.html>

<sup>23</sup> Decision ECB of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (ECB/2004/2), amended by Decision (EU) 2016/1717 of the European Central Bank of 21 September 2016 (EZB/2016/27), <https://eur-lex.europa.eu/eli/dec/2016/27/oj/deu>

(1) The primary objective of the European System of Central Banks (hereinafter referred to as ‘the ESCB’) 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 Art. 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 Art. 119.

The ECB manages the monetary resources in the European economic area and thus controls the supply and demand for money.<sup>24</sup> The conditions under which a measure becomes one of monetary policy remain unclear in the legal literature and also in economics. There is no generally accepted or legal definition.<sup>25</sup> Whether a measure falls under the term depends primarily on the objective and less on the instrument.<sup>26</sup>

**Article 127 (1) sentence 2 TFEU** stipulates that the ESCB shall *support* the general economic policies of the Union with a view to contributing to the *achievement of the objectives as laid down in Article 3 TEU*, to the extent that this can be done without prejudice to the objective of price stability. The division of labour between the ECB in defining monetary policy and the national central banks in implementing it marks, on the one hand, the ECB’s leadership role and, on the other, the decentralisation of tasks that is typical in multilevel systems.<sup>27</sup> The Treaty does not specify who is to make the final decision on which policies are “without prejudice to the objective of price stability”.

Concurrently, **Article 120 TFEU** lays down the same objectives for the Member States of the Union with regard to economic policy. The concept of economic policy has been deliberately formulated very broadly and, in the opinion of the CJEU, cannot be separated from monetary or currency policy.<sup>28</sup> The way the obligations laid down in Art. 120 TFEU are worded, indicates that, in principle, they apply to the entire economic policy of the Member States.<sup>29</sup> The objectives are not only to receive general attention, but the Member States are to contribute to their achievement by being proactive and deliberately shaping their policies accordingly.<sup>30</sup>

**Article 3 TEU** sets out the following objectives in paragraphs 3 and 5:<sup>31</sup>

“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 contribute (...) to the strict *observance and the development of international law*, including respect for the principles of the United Nations Charter.”  
(*emphasis added by the author*)

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<sup>24</sup> See tasks of the ECB [https://www.europarl.europa.eu/factsheets/en/sheet/13/die-europaische-zentralbank-etz-](https://www.europarl.europa.eu/factsheets/en/sheet/13/die-europaische-zentralbank-etz)

<sup>25</sup> See also Thiele, *Die EZB als fiskal- und wirtschaftspolitischer Akteur? Zur Abgrenzung der Geld- von der Fiskal- und Wirtschaftspolitik*, EUZW 2014, 694.

<sup>26</sup> Ibid.

<sup>27</sup> Manger-Nestler/Böttner, *Zur gewandelten Rolle der EZB*, EuR, issue 6, 2014, p. 622,

[https://www.nomos-elibrary.de/10.5771/0531-2485-2014-6-621.pdf?download\\_full\\_pdf=1](https://www.nomos-elibrary.de/10.5771/0531-2485-2014-6-621.pdf?download_full_pdf=1)

<sup>28</sup> *Bank- und Kapitalmarktrecht: Anleihenkaufprogramm der EZB zulässig*, EuZW 2019, 162, para. 60.

<sup>29</sup> Bandilla in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, AEUV, 71st edition. August 2020, Art. 120, para. 9.

<sup>30</sup> Wittelsberger in: von der Groeben/Schwarze/Hatja, *Europäisches Unionsrecht*, AEUV, 7th edition. 2015, para. 3; Bandilla in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, AEUV, 71st edition. August 2020, Art. 120, para. 9.

<sup>31</sup> Treaty on European Union, 7 June 2016, Official Journal of the European Union,

[https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0020.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0020.02/DOC_1&format=PDF)



According to this, Europe's economic development should be "sustainable". The formulation thus refers to the concept of sustainable development in international environmental law.<sup>32</sup> It reflects the understanding that economic, ecological and social developments must be seen as an internal unity.<sup>33</sup>

The TFEU does not contain a precise definition of the concept of sustainable development, only specifying the means and objectives for it which the ESCB has at its disposal; see Article 119 (2) TFEU.<sup>34</sup> That the term is meant operationally and is to be promoted by all EU institutions is also evident in **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."

The "Union's policies and activities" generally include monetary and currency policies.

It is therefore difficult to justify an interpretation of the Treaty according to which price stability is supposedly the sole objective of central bank policy and measures. Nevertheless, there are few indications that the ECB adopts and implements this legal opinion.

Under **Article 129 (2) TFEU**, the ESCB has its own statutory powers to regulate its tasks. These are laid down in a protocol<sup>35</sup> reiterating the requirements of the Treaties and containing specifics.

Pursuant to Article 12.1 of the Statute, the Governing Council of the ECB shall adopt the guidelines and take the decisions necessary to ensure the performance of the tasks of the ESCB. It thus defines the monetary policy of the Union and, under Article 14.3, takes the necessary measures to ensure compliance with the guidelines and instructions of the ECB.

Art. 17 lays down the possibility for the ECB and for the national central banks to receive collateral to conduct their operations. Article 18.1 of the Statute grants them the right to act in the financial markets and to buy and sell securities. These are intended to support the market through the purchase of corporate bonds under the CSPP. The national central banks can enter into credit operations with credit institutions and other market participants based on adequate collateral. This collateral is subject to certain conditions, which are regulated in the European Guideline.<sup>36</sup>

Recital 19 of the Guideline states that collateral must fulfil certain uniform criteria to ensure the equal treatment of counterparties. Recital 22 states that all eligible assets for credit operations are subject to certain risk control measures. The credit standards are specified in the Eurosystem credit assessment framework (ECAAF).

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<sup>32</sup> Calliess in: Calliess/Ruffert, *EUV/AEUV*, 4th Edition, Art. 11 TFEU, para. 12.

<sup>33</sup> Calliess in: Calliess/Ruffert, *EUV/AEUV*, 4th Edition, Art. 11 TFEU, para. 12.

<sup>34</sup> *Bank- und Kapitalmarktrecht: Anleihenkaufprogramm der EZB zulässig*, EuZW 2019, 162, para. 50.

<sup>35</sup> Protocol (no. 4) on the statute of the ESCB and the ECB, Official Journal of the EU, C 202/230 of 7 June 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12016E%2FPRO%2F04>

<sup>36</sup> See section 4 of the Guideline (EU) 2015/510 of the ECB of 19 December 2014 on the implementation of the Eurosystem monetary policy framework (ECB/2014/60), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014O0060> most recently amended by Guideline (EU) 2020/1690 of the ECB of 25 September 2020 (EZB/2020/45), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020O1690&from=EN>

Corporate bonds eligible for purchase under the CSPP are also subject to the following requirements (among others):<sup>37</sup>

- they must qualify as collateral for Eurosystem credit operations
- they must be denominated in euro
- they must have a certain minimum rating (BBB or equivalent)
- they must have a minimum period of validity
- the issuer must be domiciled in the euro area and must not be a bank

According to Recital 11 of the Guideline, the Governing Council of the ECB has decided to amend the general eligibility criteria for external credit assessment institutions (ECAIs) in the ECAF to ensure greater transparency.<sup>38</sup> However, on the whole, their assessment process is intransparent for the public and dependent on many different factors. Despite being bound by law, the independence of the ECB is thus considerably influenced by private bodies: the ECB depends on rating agencies to ascertain the risks associated with a purchase of assets.

Depending on the risk assessment, eligible collateral is subject to valuation haircuts in accordance with a further guideline.<sup>39</sup> Their amount depends, among other things, on the category allocated to the asset, the issuer group, the type of asset and its residual maturity. To ensure equal treatment of companies, they are deliberately formulated in very general terms. The purpose of haircuts is to protect the existing central bank system against possible financial losses and liquidity risks in the event of default.

The ease with which additional criteria can be implemented or amended under the Guideline is evident in its most recent amendment of 25 September 2020.<sup>40</sup> According to Recital 3, contractual covered bonds shall no longer be accepted as collateral so as to reduce the complexity of the Eurosystem's collateral framework, the risks it is exposed to, and the operational burden on the eligibility assessment.

Moreover, according to Recital 6, in view of recent financial innovations in the area of sustainable finance, the Eurosystem intends to accept certain marketable debt instruments with coupon structures linked to the issuer's fulfilment of predefined sustainability targets. Just recently, the Eurosystem also agreed on a common stance for climate-related sustainable investments in non-monetary portfolios over the next two years.<sup>41</sup>

These modifications demonstrate very clearly that the authority of the Governing Council to amend the Guideline with respect to the types of collateral gives it leeway to promote certain objectives without unequal treatment, or compromising independence and the objective of price stability.

According to Article 18.2 of the ECB Statute, the ECB can establish general principles for its own open market and credit operations and those of the national central banks. In doing so,

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<sup>37</sup> Monnin, *Integrating Climate Risks into Credit Risk Assessment – Current Methodologies and the Case of Central Banks Corporate Bond Purchases*, Council on Economic Policies, Discussion note 2018/4, p. 16, <file:///C:/Users/49176/Downloads/SSRN-id3350918.pdf>

<sup>38</sup> <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32020O1690&from=EN>

<sup>39</sup> Guideline (EU) 2016/65 of the ECB of 18 November 2015 on the valuation haircuts applied in the implementation of the Eurosystem monetary policy framework (ECB/2015/35), [https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv%3AOJ.L\\_.2016.014.01.0030.01.DEU&toc=OJ%3AL%3A2016%3A014%3ATOC](https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=uriserv%3AOJ.L_.2016.014.01.0030.01.DEU&toc=OJ%3AL%3A2016%3A014%3ATOC)

<sup>40</sup> Guideline (EU) 2020/1690 of the ECB of 25 September 2020 (EZB/2020/45), <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32020O1690&from=EN>

<sup>41</sup> [https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210204\\_1~a720bc4f03.en.html](https://www.ecb.europa.eu/press/pr/date/2021/html/ecb.pr210204_1~a720bc4f03.en.html)



the Governing Council can change the instruments, conditions and criteria for conducting monetary policy operations at any time. The Council also has the power, under Article 20 of the ECB Statute, to decide whether to use other instruments of monetary policy, provided that this is decided by a two-thirds majority. It can therefore de facto also “create” new instruments.

### 3. Objectives and principles

#### *a) Price stability and market neutrality*

**Article 127 (1) sentence 1 TFEU** provides that the primary objective is to maintain *price stability* in the Union. The intention is to avoid large fluctuations in the value of money to keep the inflation target as low as possible and to prevent economic instability.<sup>42</sup> Price stability prevails when the prices of consumer goods and services in units of a given currency – and therefore the value of money – remain constant.<sup>43</sup> The ECB currently aims to keep inflation below, but close to, two percent to achieve price stability.<sup>44</sup> The primary measure for inflation is the Harmonised Index of Consumer Prices (HICP). It is clear that the concept of price stability requires interpretation due to its ambiguity.<sup>45</sup> The ECB is free to set another inflation target. This in itself shows that the definition of “price stability” is largely at the ECB’s discretion.<sup>46</sup>

Moreover, the variability of the rate of inflation must not adversely impede the predictability of prices.<sup>47</sup> The primacy of price stability is thus an essential guiding principle of the Union’s economic policy. For the ESCB, it takes precedence over other economic policy objectives in accordance with Article 127 (1) sentence 1, TFEU.<sup>48</sup> But the inclusion of other objectives makes it clear that price stability is not the only objective of the ECB’s activities.<sup>49</sup> Article 127 (5) and (6) TFEU also require the ESCB to contribute to the prudential supervision of credit institutions and the monitoring and assessment of the stability of the financial system, as evidenced by its banking supervision activities (e.g. the creation of the European Systemic Risk Board as a macro-prudential body to oversee systemic risks).<sup>50</sup>

In addition, there is the principle of market neutrality, which is derived from price level stability and the principle of an open market economy with free competition set out in Article 119 TFEU. The principle does not appear in the wording of the legal bases. Interest rates are to be broadly influenced, but not to the detriment of individual enterprises or sectors. Enterprises are to be treated according to the principle of equality. The fact that the principle can be undermined in special situations is impressively demonstrated by the government bond purchase programme and the current coronavirus pandemic relief programme. The ESCB has always been involved in political processes. Its emergency aid programmes clearly demonstrate this. In crisis situations, the ESCB is and has been forced to react swiftly and

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<sup>42</sup> Griller in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 71st edition, August 2020, TFEU Art. 127, para. 18-21

<sup>43</sup> Häde in: Callies/Ruffert, *EUV/AEU*, 4th edition, Art. 119, para. 21.

<sup>44</sup> <https://www.ecb.europa.eu/ecb/tasks/monpol/html/index.de.html>

<sup>45</sup> Häde in: Callies/Ruffert, *EUV/AEU*, 4th edition, Art. 119, para. 21.

<sup>46</sup> Griller in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 71st edition, August 2020, TFEU Art. 127, para. 22.

<sup>47</sup> Palm, *Das Recht der Europäischen Union*, 71st edition, August 2020, Art. 219 TFEU, para. 45.

<sup>48</sup> Manger-Nestler, Böttner, *Zur gewandelten Rolle der EZB*, EuR, issue 6, 2014, p. 622, [https://www.nomos-elibrary.de/10.5771/0531-2485-2014-6-621.pdf?download\\_full\\_pdf=1](https://www.nomos-elibrary.de/10.5771/0531-2485-2014-6-621.pdf?download_full_pdf=1)

<sup>49</sup> Dutzler, *The European System of Central Banks*, p. 34 f.; Häde in: Callies/Ruffert, *EUV/AEU*, 4th edition, Art. 119, para. 24.

<sup>50</sup> Manger-Nestler/Böttner, *Zur gewandelten Rolle der EZB*, EuR, issue 6, 2014, p. 626, [https://www.nomos-elibrary.de/10.5771/0531-2485-2014-6-621.pdf?download\\_full\\_pdf=1](https://www.nomos-elibrary.de/10.5771/0531-2485-2014-6-621.pdf?download_full_pdf=1)

flexibly to respond to emergencies, and to guarantee financial stability or pursue it as an optimal value.<sup>51</sup>

This flexibility became doubly clear in the case of the purchase of government bonds under the PSPP: to ensure compliance with Article 123 TFEU (prohibition of monetary financing of Member State budgets), the neutrality principle was de facto suspended because the purchases were not made based on volumes of outstanding government bonds, but according to the ECB's capital key – i.e., Member State shares in the Eurosystem. Strict implementation of the neutrality principle would have meant that sovereign bonds would have been bought according to their outstanding sovereign debt, thus favouring large debtors.

## *b) Independence*

**Article 130 TFEU** sets out the independence of the ESCB and very clearly emphasises that principle. The independence of the ECB, founded in 1998, was modelled after the Deutsche Bundesbank.<sup>52</sup>

According to the principle of independence, neither the ECB nor a national central bank, nor any member of their decision-making bodies may seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. In other words, monetary and exchange rate policy may not be instrumentalised for economic policies that run contrary to price stability.<sup>53</sup> An example of this is the influence on employment policy, which Helmut Schmidt also considered more important than price stability in 1972.<sup>54</sup> The purpose is to ensure that the ESCB is not controlled by a political majority will. The intention is to secure the necessary freedom for a monetary policy beyond short-term considerations, for example to win elections. It is therefore not an end in itself,<sup>55</sup> and is committed to the sustainability and stability of economic policy – an idea that strengthens rather than contradicts the consideration of certain criteria to increase the sustainability and stability of the EU, such as fighting climate change. The independence of a central bank is not to be taken for granted, as can be seen in other countries whose central banks are more strongly influenced and controlled by politics.<sup>56</sup>

Moreover, this institutional independence does not mean complete freedom from justiciability of the measures taken, instead, the ECB is subject to judicial control by the CJEU. The Court of Justice emphasised in the OLAF Judgment that the independence of the ECB was not intended to exempt it completely from the provisions of Community law. The ECB must, in particular, contribute to achieving the objectives of the European Community.<sup>57</sup> In the Gauweiler judgment, the Court emphasised that in cases where Union institutions enjoy wide discretion, the control of compliance with certain procedural safeguards is essential, including the obligation to examine all the individual facts of the case and to provide adequate

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<sup>51</sup> Griller, *Das Recht der Europäischen Union*, 71st edition, August 2020, Art. 130 TFEU, para. 25.

<sup>52</sup> Wrobel, *Die Unabhängigkeit der Deutschen Bundesbank: Eine Erfolgsgeschichte*, Ordnungspolitische Diskurse, no. 2018-01, p. 2, <https://www.econstor.eu/bitstream/10419/181282/1/1028877277.pdf>

<sup>53</sup> Häde in: Callies/Ruffert, *EUV/AEUV*, 4<sup>th</sup> edition, Art. 119, para. 22.

<sup>54</sup> “Lieber 5 % Inflation, als 5 % Arbeitslosigkeit!” [5% inflation is better than 5% unemployment!] <https://www.spiegel.de/wirtschaft/helmut-schmidt-der-oeconom-im-kanzleramt-a-1062143.html>

<sup>55</sup> Griller, *Das Recht der Europäischen Union*, 71st edition August 2020, Art. 130 TFEU, para. 28 ff.

<sup>56</sup> Under the Federal Reserve Act, for example, one of the objectives of the US Federal Reserve is also to maximise employment. [https://de.wikipedia.org/wiki/Federal\\_Reserve\\_System](https://de.wikipedia.org/wiki/Federal_Reserve_System)

<sup>57</sup> CJEU, Judgment of 10 July 2003 – C-11/00 and C-15/00 and in principle: Braun, *Two sides of the same coin? Independence and Accountability of the European Central Bank*, p. 12, [https://transparency.eu/wp-content/uploads/2017/03/TI-EU\\_ECB\\_Report\\_DIGITAL.pdf](https://transparency.eu/wp-content/uploads/2017/03/TI-EU_ECB_Report_DIGITAL.pdf)

reasoning for decisions.<sup>58</sup> ECB measures can only be legally adopted if they are proportionate.<sup>59</sup>

This all shows that operational or institutional independence does not mean that the ECB is permitted to move outside the sphere of society and its needs. The question is not whether the ECB is committed to the common good, but to what extent its individual measures must reflect this commitment.

A further distinction must be made between target independence on the one hand and instrumental independence on the other. In addition, there are the criteria of personal and financial independence, to which the Bundesbank also refers in principle, but which are less relevant in this case.<sup>60</sup>

Target independence means that a central bank is free to set its monetary policy target. It already exists when a central bank can define when price stability has been achieved. In addition to this primary objective, it may act in a supportive manner in an area of economic policy, as explained above.<sup>61</sup> Furthermore, within the framework of instrumental independence, it is up to the bank to decide which monetary policy tools it wants to use to achieve the target, as long as it observes the TFEU and its Statutes. The ECB's independence would therefore not be compromised if it were to take greater consideration of environmentally relevant criteria.

#### 4. Monetary policy tools

The ECB has several monetary policy measures at its disposal. In addition to classic monetary policy operations, special crisis-related tools have been developed in recent years.

A classic instrument of the ECB has always been the setting of the key interest rate at which banks refinance themselves from the central bank. However, the key interest rate has been at zero or below for several years, so the ECB has taken extraordinary measures to continue to be able to act in the area of monetary policy.

The most important monetary policy tools used by the ECB are refinancing operations with commercial banks and open market operations through which the central bank provides the economy with liquidity (sometimes via commercial banks). While the refinancing operations are collateralised credit agreements with banks for a limited period of time, the open market operations primarily involve the purchase and sale of securities for the ECB's own account on the capital market.<sup>62</sup> These tools play a central role in controlling interest rates.<sup>63</sup>

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<sup>58</sup> CJEU, Judgment of 16 June 2015 – C-62/14.

<sup>59</sup> See CJEU, Judgment of 11 December 2018 – C-493/17, para. 71 ff., whereby the Federal Constitutional Court in the *ultra vires* decision of 5 May 2020 even criticised the proportionality assessment carried out by the CJEU as not strict enough (see BVerfG, Decision of 5 May 2020 – 2 BvR 859/15, para. 127 ff.).

<sup>60</sup> Wrobel, *Die Unabhängigkeit der Deutschen Bundesbank: Eine Erfolgsgeschichte*, Ordnungspolitische Diskurse, no. 2018-01, p. 5, <https://www.econstor.eu/bitstream/10419/181282/1/1028877277.pdf>

<sup>61</sup> Thiele, *Die Unabhängigkeit der EZB; Gründe, Grenzen und Gefährdungen*, Berliner Online-Beiträge zum Europarecht, no. 98, p. 9, [https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner\\_online\\_beitraege/Paper98-Thiele/Paper98---Alexander-Thiele---Die-Unabhaengigkeit-der-EZB.pdf](https://www.jura.fu-berlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper98-Thiele/Paper98---Alexander-Thiele---Die-Unabhaengigkeit-der-EZB.pdf)

<sup>62</sup> Häde in: Calliess/Ruffert, *EUV/AEUV*, 4th edition, Art. 127, para. 17.

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<https://www.europarl.europa.eu/factsheets/de/sheet/86/europaische-geldpolitik#:~:text=Die%20wichtigsten%20Instrumente%20der%20herk%C3%B6mmlichen,und%20das%20Unterhalten%20von%20Mindestreserven.>

The political reach of monetary instruments became apparent in March 2015, when the ECB first started the Public Sector Purchase Programme (PSPP), also referred to as the *quantitative easing programme*.<sup>64</sup>

This non-standard policy measure serves to resolve the dilemma described above when the conventional monetary policy measure of lowering the key interest rate is no longer possible; it is also intended to contribute to achieving the inflation target. The ECB purchases securities on the capital markets. These securities specify the terms and conditions of the money lending, such as interest rates and maturities. A security can also be sold to new holders (in the secondary market).

On the other hand, there is monetary public finance, where a central bank purchases bonds directly from the state on the primary market and then provides it with funds. This is prohibited under Article 123 TFEU if a direct purchase from the issuer takes place. However, opinions are not as clear as to whether an equivalent action on the secondary market, that is, the purchase of government bonds via commercial banks, is permitted. That is because the purchases of bonds have an indirect effect on the refinancing conditions on the primary markets with regard to the developing interest rates.<sup>65</sup> This is in conflict with an explicitly defined standard monetary policy measure, which, at the same time, is the subject of a fundamental prohibition under primary law.<sup>66</sup>

The ECB's Outright Monetary Transactions (OMT) programme is a different matter. It authorises the ECB to support individual countries in a targeted manner through bond purchases if their membership in the Eurozone were otherwise endangered.<sup>67</sup> To date, OMTs have only been announced to calm the sovereign bond markets during the euro crisis and to ensure monetary policy transmission in all Member States. No state has made use of the programme so far. In June 2016, in light of the zero-bound interest rate, the ECB went a step further and started directly purchasing *corporate bonds* under the Corporate Sector Purchase Programme (CSPP).<sup>68</sup> Here, the goal is also to counteract deflation through continuous purchases of euro securities.<sup>69</sup> Purchases are carried out by selected European central banks, including the Deutsche Bundesbank. In April 2020, the Pandemic Emergency Purchase Programme (PEPP) was additionally established to counter the consequences of the COVID-19 pandemic.<sup>70</sup>

This goes to show that the ECB can in fact react flexibly to special economic and crisis situations. To this day, the ECB regularly implements new monetary policy tools, as it has been granted exceptionally broad normative leeway.<sup>71</sup> In the opinion of some economists, this may be necessary given the complexity of transmission processes, different economic schools and the general difficulty of predicting future economic conditions.

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<sup>64</sup> The ECB's extended Asset Purchase Programme (APP) comprises the Public Sector Purchase Programme (PSPP), the Asset Backed Securities Purchase Programme (ABSPP), the Corporate Sector Purchase Programme (CSPP) and the third Covered Bond Purchase Programme (CBPP3), see <https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html>

<sup>65</sup> <https://www.wirtschaftsdienst.eu/inhalt/jahr/2019/heft/8/beitrag/staatsfinanzierung-durch-geldpolitik.html>

<sup>66</sup> Sander, *Validierbare geldpolitische Finalität: Zur Auslegung des Mandats der EZB nach Art. 127 AEUV*, DÖV 2020, p. 759.

<sup>67</sup> <https://www.zdf.de/nachrichten/wirtschaft/coronavirus-ezb-staatsanleihen-100.html>

<sup>68</sup> Decision (EU) 2016/948 of the ECB of 1 June 2016 on the implementation of the corporate sector purchase programme (ECB/2016/16).

<sup>69</sup> [https://www.bundesbank.de/Redaktion/DE/Downloads/Presse/EZB\\_Pressemitteilungen/2016/2016\\_03\\_10\\_ankaufprogramm\\_m.pdf?\\_\\_blob=publicationFile](https://www.bundesbank.de/Redaktion/DE/Downloads/Presse/EZB_Pressemitteilungen/2016/2016_03_10_ankaufprogramm_m.pdf?__blob=publicationFile).

<sup>70</sup> <https://www.ecb.europa.eu/mopo/implement/pepp/html/pepp-qa.en.html>

<sup>71</sup> Thiele, *Die EZB als fiskal- und wirtschaftspolitischer Akteur? Zur Abgrenzung der Geld- von der Fiskal- und Wirtschaftspolitik*, EUZW 2014, 694.

As outlined above,<sup>72</sup> the ECB's room for manoeuvre is, however, ultimately limited by general principles of law and the Treaties.<sup>73</sup> Furthermore, despite having passed the scrutiny of the ECJ, in a judgement issued on 5 May 2020, the German Federal Constitutional Court has subjected ECB policies to legal critique with regard to fundamental internal constitutional principles. On 9<sup>th</sup> June 2021, the EU Commission has opened infringement procedures against Germany with regard to that judgement,<sup>74</sup> in which the German Court for the first time declared an EU legal act unconstitutional.<sup>75</sup> Independently of its serious institutional implications with regard to relations between the jurisdiction of the ECJ and that of German and other national courts, this decision revealed the tension that can exist between the EU monetary policy and constitutional principles and has prompted the ECB to present detailed deliberations regarding the proportionality of the programme.<sup>76</sup> The implementation of the *ultra vires* judgement by the ECB has been deemed sufficient by German Federal Constitutional Court on the occasion of an application of enforcement.<sup>77</sup>

## 5. The German central bank

### *a) Constitutional law*

Article 109 (2) of the Basic Law provides that the Federation and the Länder shall jointly fulfil the obligations of the FRG arising from legal acts of the European Community to observe budgetary discipline and, within this framework, shall take account of the requirements of macroeconomic equilibrium.

This means that price stability also governs the budgetary policy of the Federation and the Länder in the sense of its expression in Union law, and parallels the regulations of the European Treaties. In Article 88 of the Basic Law, which regulates the establishment of the Bundesbank, the concept of price stability appears again on page 2 and reference is also made to the independence of the ECB.

However, the primacy of price stability does not apply generally, but only within the framework of monetary and exchange rate policy. Specifically, the primacy of price stability as a state objective emerges as part of "macroeconomic equilibrium" state objective, especially through the involvement of the President of the Bundesbank in the monetary policy of the Governing Council of the ECB.<sup>78</sup> This state objective, however, must also be compared to Article 20a of the Basic Law. According to the current decision of the BVerfG, the Bundesbank is also required to contribute to effective climate protection and greenhouse gas neutrality as a state objective.

Price stability thus acquires a prominent position as a matter of constitutional concern and influences the budgetary policy of the Federation and the Länder.<sup>79</sup>

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<sup>72</sup> See 3. b) "Independence"

<sup>73</sup> See CJEU Judgement of 11 December 2018, C-493/17. The CJEU held that the PPSP neither exceeded the ECB's monetary policy mandate nor violated the prohibition of monetary financing of Member State budgets.

<sup>74</sup> [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_2743](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743) (paragraph 4).

<sup>75</sup> See BVerfG, Judgment of 5 May 2020 - 2 BvR 859/15, para. 127 ff.

<sup>76</sup> See BVerfG, Order of 29 April 2021 - 2 BvR 1651/15 para. 6 ff.

<sup>77</sup> See BVerfG, Order of 29 April 2021 - 2 BvR 1651/15 para. 89 ff.

<sup>78</sup> Herdegen in: Maunz/Dürig, *Grundgesetz GG*, 92nd edition, August 2020, Art. 88 para. 36.

<sup>79</sup> Herdegen in: Maunz/Dürig, *Grundgesetz GG*, 92nd edition, August 2020, Art. 88 para. 38.

## *b) National law*

The Bundesbank has existed since 1957 as the German central bank. Legal regulations on its status as well as its tasks can be found in the Bundesbank Act (BBankG).

Under Section 3 (1) BBankG, the Bundesbank, as the central bank of Germany, is an integral part of the ESCB. Pursuant to sentence 2, it participates in the performance of its tasks while observing the primary objective of maintaining price stability. This is based on Article 14.1 of the Statute, which requires national central banks to ensure that their national legislation, including their statutes, are in line with the Treaty and the Statute of the ESCB.

With regard to the programme relevant here, the CSPP, it should be noted that some central banks of the ESCB, including the Deutsche Bundesbank, are active in the market itself, that is, they conclude contracts with the companies or commercial banks. The “provision of services” in the form of specific monetary policy operations is thus based on contracts concluded under private law. The monetary policy (refinancing) transactions conducted by the Bundesbank are “to be predominantly qualified as (purchase / loan) contracts under civil law, the details of which are set out in the Bundesbank’s General Terms and Conditions”.<sup>80</sup>

In general, a considerable share of the tasks is performed by the national central banks, Article 12.1 UA 1 ESCB/ECB Statute. They are bound by the guidelines and instructions issued by the ECB Governing Council, Article 14.3 in conjunction with Article 12.1 UA 1 ESCB/ECB Statute. For despite the decentralised performance of tasks, only a single monetary policy should exist in a currency area. The Executive Board is also empowered to issue instructions to the national central banks.<sup>81</sup> However, a certain amount of discretion remains with the bank, depending on the programme and how specific the guideline is.

The Bundesbank is administered and managed by the Directorate (See section 7 BBankG), which has the status of a supreme federal authority pursuant to Section 29 (1) BBankG. Under Section 12 BBankG, the Bundesbank is also independent of instructions from the Federal Government in exercising its powers. This is also reflected in the fact that its budget is separate from that of the German Bundestag. As far as possible while maintaining its task as a part of the ESCB, the Bundesbank supports the general monetary policy of the Federal Government.

The question arises as to what possibilities the Bundesbank would have to conduct independent monetary policy, and to what extent its tasks differ from those of the ECB. Article 14.4 of the Statute of the ESCB clearly states that the national central banks may perform tasks other than those specified in the Statute, unless the Governing Council of the ECB determines by a two-thirds majority that this is not compatible with the objectives. However, such tasks would then have to be carried out by the German Bundesbank on its own responsibility and for its own account. Unlike the ECB, it is not obligated to report to the Bundestag. Such regulations have not been implemented in German law, although it would be permissible to standardise them within the limits of Article 130 TFEU.<sup>82</sup>

In view of the current order of the BVerfG on the Climate Change Act, it appears necessary for the Deutsche Bundesbank to examine – even independently of amended ECB guidelines –

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<sup>80</sup> Manger-Nestler, *Die Rolle der Bundesbank im Gefüge des ESZB*, EuR 2008, 577.

<sup>81</sup> Sachs/Siekmann, 9th edition. 2021, *Grundgesetz GG* Art. 88, para. 41.

<sup>82</sup> Häde in: Calliess/Ruffert, *EUV/AEUV*, 5th edition 2016, Art. 284 TFEU, para. 12.



what discretionary powers it has to better enforce the specific requirements of Article 20a of the Basic Law, as Article 20a of the Basic Law sets out an objective duty to protect the environment and future generations an all organs and authorities of the state.<sup>83</sup>

#### **IV. Legal framework for the inclusion of climate change considerations**

The European legislator has long since normatively determined which specific measures it intends to implement to achieve the objectives set out in Article 3 TEU and the mandate to achieve a high level of protection (Article 191 (2) TFEU) with regard to climate action. To this end, a broad network of regulations and directives has been adopted in recent decades. Since the publication of the Green Deal in December 2019, the EU climate law has been passed and other specific goals of the EU's climate change policy are currently being negotiated.

Which contexts and objectives the ECB has to consider when making a discretionary decision within the framework of its monetary policy, to not to go against the legislative values and to act in coherence with other European institutions, should therefore be determined. In doing so, the EU legal framework is guided by international law, and by the Treaties. These basic decisions – which are not isolated from monetary policy and capital markets – will be briefly outlined here.

##### **1. UNFCCC and the Paris Climate Agreement**

In the United Nations Framework Convention on Climate Change of 1992, the now 197 Parties to the Convention committed themselves to reducing human impact on the climate and slowing down global warming. Article 3 (3) UNFCCC already calls for measures to be taken to mitigate climate change that involve various social contexts and affect all economic sectors.<sup>84</sup> It is clear from the Convention itself that public financial resources and capital markets must help to achieve the goals of the Convention.

The Kyoto Protocol of 1997, which was based on the UNFCCC, could not be negotiated any further and was ultimately replaced by the Paris Climate Agreement of 12 December 2015. For the first time in the history of the global climate regime, the Paris Agreement contains a quantified long-term temperature target to limit global warming to well below 2 °C and, if possible, to 1.5 °C above pre-industrial levels, as well as the goal of climate neutrality. Unlike other environmental agreements, the agreement does not contain clear reduction commitments, but establishes a mechanism of rotating obligations to act: Countries must prepare and submit nationally determined contributions (NDCs), review them every five years and continuously upgrade them.

The question of whom exactly the agreement commits to what keeps coming up, because the agreement consists of a mixture of binding and non-binding principles that are addressed to different stakeholders.<sup>85</sup> With regard to the NDCs, it takes a “bottom-up” approach. That means that the governments of the member states can establish their own commitments. In addition, however, the climate agreement also provides a specific normative direction, which the targets make clear.<sup>86</sup>

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<sup>83</sup> See BVerfG Decision of 24 March 2021, BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20 para. 193.

<sup>84</sup> <https://unfccc.int/resource/docs/convkp/conveng.pdf>

<sup>85</sup> Franzius/Kling in: Kahl/Weller, *Climate Change Litigation: A Handbook*, p. 200, para.6.

<sup>86</sup> Voigt in: Kahl/Weller, *Climate Change Litigation: A Handbook*, p. 15, para. 71 f.

According to Article 2 (1) (a), the main objective is to hold the increase in the average temperature of Earth well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels.

Art. 2 No. 1 c) states that the Convention aims *to make financial flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*.

Thus, the area of finance and investment is prominently placed and highlighted, and the flow of funds is explicitly addressed. According to the European Commission and the Parliament, the ECB itself is directly bound by the Paris Climate Agreement, because as an institution of the EU, it is a contracting party.<sup>87</sup> This target margin would have to be considered in discretionary decisions by the ECB. The target is not limited to certain types of “financial flows”, but applies to them in general.

## **2. Horizontal clause, Article 11 TFEU**

The objectives in Article 3 TEU are supported by the horizontal clause in Article 11 TFEU, which stipulates that the EU must integrate environmental protection requirements when pursuing its objectives and formulating the measures to be taken. The addressees are the EU institutions, which act on the basis of treaty competences, irrespective of their executive, legislative or governance function.<sup>88</sup> This, therefore, also applies to the ECB.

The impact of any action on the natural environment must be considered; the objective of adequate environmental protection must be given sufficient weight when pursuing the policies and other measures listed in Article 3 TEU.<sup>89</sup> The provision fits into an overall context in which environmental protection has long been recognised as one of the essential objectives of the Community. The inclusion must relate in particular to the concerns addressed in Article 191 TFEU (including preserving, protecting and improving the quality of the environment, promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular combating climate change), but also considerations not mentioned in the provision.<sup>90</sup> In the interpretation of the Federal Constitutional Court, Article 191 TFEU at this point effectively seems to be a state objective in primary law.

Here, too, the broad scope provided by the EU legislator becomes clear: Article 11 does not specify a doctrine on the weighting of values; rather, it wants to oblige the institutions to include certain issues in their considerations given the open horizon of objectives.<sup>91</sup> However, consideration is limited by the non-negotiable natural limits of the environment and its load-bearing capacity. A balancing of priorities must take place within these limits.<sup>92</sup>

No conclusion can be drawn from the provision itself as to its absolute or relative priority. However, the consequence of the obligation of inclusion is that the interests of environmental protection would have to be included in considerations within the framework of practical

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<sup>87</sup> *The ECB and climate change: outlining a vision for success*, Policy briefing, April 2020, <https://neweconomics.org/uploads/files/ecb-climate-change1a.pdf>

<sup>88</sup> Nettesheim in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 71st edition, August 2020, Art. 11 TFEU, para. 16.

<sup>89</sup> Nettesheim in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union*, 71st edition, August 2020, Art. 11 TFEU, para. 1.

<sup>90</sup> *Ibid.* para. 20.

<sup>91</sup> *Ibid.* para. 20.

<sup>92</sup> Sjäfjel, *The Greening of European Business under EU Law: Taking Art. 11 TFEU Seriously, The Legal Significance of Art. 11 TFEU for EU Institutions and Member States*, Research paper series no. 2014–38, p. 56.

concordance with conflicting interests. The norm does not only concern the legislative activity of the EU in individual cases, but every specific action taken by the institutions. These must be designed in an environmentally compatible manner and be able to pass a “strategic environmental impact assessment”.<sup>93</sup> This interpretation, in turn, corresponds exactly to the current interpretation of the Federal Constitutional Court of Article 20a of the Basic Law.

Consequently, Article 11 TFEU clearly addresses not only the legislature, but the ESCB as well. This is backed by Article 7 TFEU, according to which the Union shall ensure consistency between its policies and activities in the different areas, taking all of its objectives into account, and in accordance with the principle of conferral of powers.

Given the severity of the climate crisis, an even broader interpretation is possible: the clause can be interpreted as an obligation to take specific measures to protect the environment in the respective policy area.<sup>94</sup> This can be supported by a parallel interpretation of the human rights contained in the EU Charter, as well as from Art 191 of the TFEU- For as the Federal Constitutional Court rightly concluded recently: there is extremely little time left to secure the goals of the Paris Agreement.

### **3. Environmental protection, Article 37 Charter of Fundamental Rights**

Article 37 of the CFR – the binding Charter of Fundamental Rights for the EU since 2009 – also sets out a legal requirement for the institutions.

According to Article 51 (1), the European Charter of Fundamental Rights is applicable to institutions, bodies, and other offices and agencies of the Union. This also includes the ESCB – at least the ECB as a fully-fledged EU institution. In addition, the framework conditions from the Treaties continue to apply. The Charter has the same rank as the European Treaties, according to Article 6 (1) TEU.

According to Article 37 CFR, a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development. The principle requires cross-generational protection and a proper balance of economic and social concerns.

The provision is based on Article 3 (3) TEU and Articles 11, 191 TFEU according to the Charter explanations, which are to be considered in the interpretation pursuant to Article 52 (7) CFR.<sup>95</sup> Article 11 TFEU shows substantial parallels with Article 37 CFR, which constitutes the central regulation on environmental protection in the Charter and standardises the granting of benefits in the form of an obligation to protect.<sup>96</sup> It is relevant, as is the judgment of the ECJ, according to which environmental protection is an essential task of the Union.<sup>97</sup>

As a “principle”, the standard is characterised by its need for completion and implementation and represents only an objective legal requirement, but not a subjective right.<sup>98</sup> Therefore, although this provision does not grant an individual right to a clean environment, it does

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<sup>93</sup> Calliess in: Calliess/Ruffert, *EUV/AEUV*, 4th edition 2014, Art. 11 TFEU, para. 9.

<sup>94</sup> Calliess in: Calliess/Ruffert, *EUV/AEUV*, 4th edition 2014, Art. 11 TFEU para. 10.

<sup>95</sup> See Charta explanations, OJ, 2007, C 303/27.

<sup>96</sup> Jarass, *Der neue Grundsatz des Umweltschutzes im primären EU-Recht*, ZUR 12/2011, p. 563.

<sup>97</sup> ECJ Judgement of 19 May 1992, C-195/90.

<sup>98</sup> Jarass, *Kommentar zur EU-GrCh*, 4th edition, 2021, Art. 37 para. 3.

provide an obligation for EU institutions.<sup>99</sup> The term “policy” is not to be understood in a technical sense, but also as referring to the implementation of legal acts. That is also reflected in Article 11 TFEU, which explicitly includes the term “implementation”.<sup>100</sup>

An impairment is present when an obligated party prevents a high and sustainable level of environmental protection or – if it has the competences – does not actively promote an improvement of environmental quality.<sup>101</sup> The provision does not specify how environmental protection is to be promoted; the obligated parties are granted wide room for manoeuvre.<sup>102</sup> However, that leeway becomes smaller the greater the risk or environmental damage.

In the case of the ESCB, in the view of the author, there is not only a lack of improvement in the level of environmental quality, but rather an impairment of environmental protection policies, and/or of the other EU policies to a degree which causes the EU to remain inactive despite its abundance of power and substantial steering possibilities, and in fact actively favours greenhouse gas-intensive sectors. Other EU institutions are prevented from carrying out economic policy activities consistent with the ECB, as they must respect the independence of the ECB. The ESCB is the only body to take due account of environmental protection in the field of monetary policy within the scope of its competence.

#### 4. The European Green Deal and “Green Finance”

As part of the European Green Deal, the European Commission announced that it will implement a new sustainable finance strategy which, together with the European Green Deal Investment Plan, is meant to help establish a framework for private investors and the public sector to facilitate sustainable investment.<sup>103</sup>

In addition, up to EUR 1 trillion from the EU budget<sup>104</sup> will be used to support sustainable investments to make the EU climate-neutral by 2050:

„Long-term signals are needed to *direct financial and capital flows to green investment* and to avoid stranded assets.

(...) climate and environmental risks will be managed and *integrated into the financial system*. This means better integrating such risks into the EU prudential framework and assessing the suitability of the existing capital requirements for green assets.”

The secondary legal framework for the EU targets has now also been largely laid down in the EU’s new climate change law, the amended Governance Regulation 2018/1999.<sup>105</sup> After the final tripartite negotiations, the new EU climate protection goal for 2030 is a net reduction of 55%, with greenhouse gas neutrality reached by 2050.<sup>106</sup> However, like the German KSG, these targets only apply to emissions or sinks from EU territory.

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<sup>99</sup> Krämer, *Climate Change Liability*, 14.58, p. 371.

<sup>100</sup> Jarass, *Der neue Grundsatz des Umweltschutzes im primären EU-Recht*, ZUR 12/2011, p. 564.

<sup>101</sup> Jarass, *Der neue Grundsatz des Umweltschutzes im primären EU-Recht*, ZUR 12/2011, p. 565.

<sup>102</sup> Jarass, *Kommentar zur EU-GrCh*, 4th edition 2021, Art. 37 para. 8.

<sup>103</sup> Communication from the commission to the European Parliament, the council, the European economic and social committee and the committee of the regions, The European Green Deal,

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN>

<sup>104</sup> [https://ec.europa.eu/clima/policies/eu-climate-action/law\\_en](https://ec.europa.eu/clima/policies/eu-climate-action/law_en)

<sup>105</sup> [https://ec.europa.eu/clima/policies/eu-climate-action/law\\_en](https://ec.europa.eu/clima/policies/eu-climate-action/law_en)

<sup>106</sup>

<https://www.consilium.europa.eu/de/press/press-releases/2021/05/05/european-climate-law-council-and-parliament-reach-visual-agreement/>

Apart from the above-mentioned legal steps, the legislative is taking further steps to support the sustainability of investments. Recital 9 of Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 (which establishes a framework to facilitate sustainable investment) states:

Achieving the sustainable development goals in the Union requires the channelling of capital flows towards sustainable investments. It is important to fully exploit the potential of the internal market to achieve those goals. In that context, it is crucial to remove obstacles to the efficient movement of capital into sustainable investments in the internal market and to prevent new obstacles from emerging.”<sup>107</sup>

The draft directives do not contain any specific provisions for the ECB, see below.

## V. The necessity for a climate-neutral monetary policy?

The previous chapter showed that the European legislator grants the ECB extensive freedom in shaping monetary policy, but at the same time, has set itself legally binding regulations and targets to achieve climate protection goals. From a legal point of view, however, there is no conflict between the two; in fact, the Treaties and secondary law provide sufficient grounds for arguing in favour of a “climate-neutral” monetary policy. In fact, price stability could be compromised, for example, precisely if the central banks do continue their business as usual.

### 1. Jeopardising price stability and neglecting environmental protection

According to the World Economic Forum’s Global Risks Report 2020, environmental degradation is the greatest threat to global prosperity. All of the long-term risks to the global economy mentioned in the report are related to the environment.<sup>108</sup> There are two types of impacts: climate-related damage to physical capital, and the transition measures in place or to be implemented in order to actively reduce greenhouse gas emissions, which have a strong influence on the functionality and stability of the macroeconomy.

And the indirect consequences are also considerable, particularly in terms of inflation. In 2021, the reversal of the German VAT rate cut and the introduction of a carbon surcharge are expected to drive up prices.<sup>109</sup> The introduction of a carbon surcharge is expected to increase HICP inflation by up to 1.2 percentage points in 2021.<sup>110</sup> Studies also show that dependence on fossil energy makes the EU vulnerable to price fluctuations and also dependent on unstable regions.<sup>111</sup>

Market interactions are dependent on a multitude of different developments, not all of which can be conclusively predicted, as the example of the current pandemic shows. In addition, the global financial world is now inextricably linked. Economic crises in a region are never limited to certain countries, but rattle markets everywhere.

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<sup>107</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (OJ L 198/13, 22 June 2020), <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32020R0852&from=EN>

<sup>108</sup> “Extreme weather, Climate action failure, Natural disaster, Biodiversity loss, Human-made environmental disasters”, see Global Risk Report 2020, figure 1.2: Long-term Risk Outlook, p. 12

<https://www.weforum.org/reports/the-global-risks-report-2020>

<sup>109</sup> Deutsche Bundesbank, Monthly Report, December 2020, p. 17

<https://www.bundesbank.de/resource/blob/853746/3cb6d416659a2def403dadbd04dfb82f/mL/2020-12-prognose-data.pdf>

<sup>110</sup> Nöh, Rutkowski, Schwarz, *Auswirkungen einer CO<sub>2</sub>-Bepreisung auf die Verbraucherpreisinflation*, Arbeitspapier, no. 03/2020, Sachverständigenrat zur Begutachtung der Gesamtwirtschaftlichen Entwicklung, Wiesbaden.

<sup>111</sup> For a general outline see: Weyzig et al., *Green European Foundation, The Price of Doing Too Little Too Late*, Green New Deal Series, no. 11, 2014, [https://gef.eu/wp-content/uploads/2017/01/The\\_Price\\_of\\_Doing\\_Too\\_Little\\_Too\\_Late\\_pdf](https://gef.eu/wp-content/uploads/2017/01/The_Price_of_Doing_Too_Little_Too_Late_pdf)

The sector itself has already identified the considerable risk posed by climate change. Back in February 2016, the European Systemic Risk Board (ESRB) – an integral part of the European System of Financial Supervisors and responsible for the early detection and mitigation of systemic risks within the EU financial market – had already pointed out the potential threat posed by the current situation in view of climate change and emphasised that even small shocks to the markets could produce a domino effect.<sup>112</sup>

In the event of a temperature increase of at least five degrees, the ESRB forecasts a slump in annual economic output of up to -23% for 2100.<sup>113</sup> At the same time, the ESRB points out that the data available is insufficient to be able to make precise estimates.<sup>114</sup>

In a statement of June 2020, experts once again emphasised:

“Climate Risk does *not appear to be fully reflected* in asset prices so far. (...) Moreover, *transitory losses are paltry compared with the potential economic losses* associated with the manifestation of potentially broad geographical and sectoral physical risk over the medium term, particularly if systemic amplifications are taken into account. This suggests that *early action to tackle climate risk*, including adaptation and mitigation measures, should have net benefits.”

The ESRB also clearly signals that there are economic and financial parallels between the risks of the coronavirus pandemic and the risks of climate change,<sup>115</sup> with the latter being even more unpredictable and difficult to calculate. The pandemic, with its extremely high financing needs, has already considerably shaken the EU’s economic and monetary union and financial system, and created a state of financial fragility.<sup>116</sup> But price stability is not just compromised in the long run: the estimated costs could be even higher should abrupt, sudden shock scenarios arise and action be either delayed or not taken.

Economic losses due to natural events have risen constantly in recent years. Extreme weather events have impacted the insurance sector in particular.<sup>117</sup> Costs resulting from extreme weather events amounted to EUR 537 billion between 1980 and 2018.<sup>118</sup> The ECB itself has recognised that early intervention is necessary to prevent the dangerous momentum caused by the interaction of physical consequences and significant transition risks.<sup>119</sup> Although there was a drop in emissions in 2020 due to the pandemic, it was far too slight to have any noticeable impact on climate change and to achieve the 1.5-degree target of the Paris Climate Agreement.<sup>120</sup> Losses caused by transition risks affect individual financial institutions and the stability of the financial system at several levels. These include sudden changes in policy or

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<sup>112</sup> ESRB, *Too late, too sudden: Transition to a low-carbon economy and systemic risk*, February 2016, p.12 f., [https://www.esrb.europa.eu/pub/pdf/asc/Reports\\_ASC\\_6\\_1602.pdf](https://www.esrb.europa.eu/pub/pdf/asc/Reports_ASC_6_1602.pdf)

<sup>113</sup> ESRB, *Positively green: measuring climate change risks to financial stability*, June 2020, p.10, [https://www.esrb.europa.eu/pub/pdf/reports/esrb.report200608\\_on\\_Positively\\_green\\_-\\_Measuring\\_climate\\_change\\_risks\\_to\\_financial\\_stability~d903a83690.en.pdf?c5d033aa3c648ca0623f5a2306931e26](https://www.esrb.europa.eu/pub/pdf/reports/esrb.report200608_on_Positively_green_-_Measuring_climate_change_risks_to_financial_stability~d903a83690.en.pdf?c5d033aa3c648ca0623f5a2306931e26)

<sup>114</sup> *Ibid.*, p. 14.

<sup>115</sup> Normand, *From pandemics to climate catastrophes: Hedging options as environmental tail risks become recognized as baselines*, JP Morgan Mimeo, May 2020, quoted in: ESRB, *Positively green: Measuring climate change risks to financial stability*, June 2020, p. 5.

<sup>116</sup> Ruffert, *Europarecht für die nächste Generation*, NVwZ 2020, 1777.

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<https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/publication/impact-of-climate-change-on-the-uk-insurance-sector.pdf?la=en&hash=EF9FE0FF9AEC940A2BA722324902FFBA49A5A29A>

<sup>118</sup> ESRB, *Positively green: Measuring climate change risks to financial stability*, June 2020, p. 2,

[https://www.esrb.europa.eu/pub/pdf/reports/esrb.report200608\\_on\\_Positively\\_green\\_-\\_Measuring\\_climate\\_change\\_risks\\_to\\_financial\\_stability~d903a83690.en.pdf?c5d033aa3c648ca0623f5a2306931e26](https://www.esrb.europa.eu/pub/pdf/reports/esrb.report200608_on_Positively_green_-_Measuring_climate_change_risks_to_financial_stability~d903a83690.en.pdf?c5d033aa3c648ca0623f5a2306931e26)

<sup>119</sup> *Ibid.*

<sup>120</sup> United Nations Environment Programme (2019), *Emissions Gap Report 2019*.



changes in consumer or investor preferences which can lead to losses in carbon-intensive sectors of the economy or cause businesses to “lag behind” due to missed opportunities.<sup>121</sup>

Southern Europe could be facing tropical temperatures and regular heat waves, which it is already experiencing now. A rise in sea levels would threaten countries like the Netherlands and fundamentally change coastal zones that are below sea level.<sup>122</sup> Consequences could also be felt in the form of food shortages due to crop failures.

Currently, according to the Commission, the EU requires EUR 260 billion per year in additional green investment to reach the 2030 climate goals.<sup>123</sup> Once the *tipping points* are reached, it could be either too late for effective countermeasures, or the amount of coordination, energy and money required would be so great that considerable loss of prosperity would become inevitable.<sup>124</sup>

All this shows that climate change is a serious threat to economic stability and with it also to price stability. Therefore – even assuming an absolute primacy of price stability in the ECB’s mandate – a review of the monetary policy strategy and/or its specific areas of application, such as the CSPP company purchase programme, is necessary and obviously legally required. In fact, this would also be possible and appropriate even without the EU legislator’s intervention – on the basis of the ECB’s own mandate.

## 2. Independence despite climate action?

If the ECB does not act on its own, the possibility of legislative intervention should be considered. For it seems against all reason, when the EU, on the one hand, purports to commit itself and its member states to a (hopefully) Paris-compatible reduction path towards carbon neutrality, but its central bank continues to subsidise extremely carbon-intensive sectors and industries through purchases.

There is no doubt that the independent status of the ESCB granted under current law must be respected. Political interests must not exert any direct or indirect influence. The European legislator is not permitted to impose specific guidelines on the ESCB as to which criteria its monetary policy should be based on. That would constitute overstepping the limits. The limits are reached when economic policy directly or indirectly prescribes to the Central Bank how price stability is to be achieved.<sup>125</sup>

However, an argumentative invocation of the principle of independence portrays the ECB as a depoliticised institution, which is neither conceptually nor factually correct.<sup>126</sup> It also begs the question of how long central banks can ignore and act against the political will of the majority. So, does considering climate criteria really jeopardise independence? What could the European legislator do without violating the principle of independence?

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<sup>121</sup> Hilgers, National Bank of Belgium: Belgian Financial Forum, Colloquium on Sustainable Finance, Keynote Address, 11/2018, p. 8 ff. [https://www.nbb.be/doc/ts/enterprise/conferences/sustainable-finance-2018/jean-hilgers\\_presentation.pdf](https://www.nbb.be/doc/ts/enterprise/conferences/sustainable-finance-2018/jean-hilgers_presentation.pdf)

<sup>122</sup> Krämer, *Climate Change Liability*, 14.20, p. 358

<sup>123</sup> European Commission, 11 December 2019, [https://ec.europa.eu/info/sites/info/files/european-green-deal-communication\\_en.pdf](https://ec.europa.eu/info/sites/info/files/european-green-deal-communication_en.pdf).

<sup>124</sup> See also Lange, *Sustainable Finance: Nachhaltigkeit durch Regulierung?* (Part 1), BKR 2020, 216; see also IPCC, *Climate Change 2014: Synthesis Report*, pp. 14 f., 17 ff., 22 ff.; IPCC, *Global warming of 1.5°C (2019)*, pp. 12 ff., 18 ff., 95 ff., 104 ff., 262 ff., 315 ff., 372 ff.

<sup>125</sup> Thiele, *Die EZB als fiskal- und wirtschaftspolitischer Akteur? Zur Abgrenzung der Geld- von der Fiskal- und Wirtschaftspolitik*, EUZW 2014, 696.

<sup>126</sup> Sander, *Validierbare geldpolitische Finalität: Zur Auslegung des Mandats der EZB nach Art. 127 AEUV*, DÖV 2020, p. 766.

One could say that the legislator has already taken this path. In regard to financial markets, Recital 4 in the current draft of the EU Climate Law of 5 May 2021<sup>127</sup> states:

... (4) The Paris Agreement sets out a long-term temperature goal, and aims to strengthen the global response to the threat of climate change by increasing the ability to adapt to the adverse impacts of climate change and by making capital flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. As the overall framework for the Union's contribution to the Paris Agreement, this Regulation should ensure that both the Union and Member States contribute to the global response to climate change as referred to in the Paris Agreement.

However, the regulation does not instruct the ECB to do anything operationally as there is no legal basis for this in the TFEU.

That politics and the ECB have indeed always had an interactive relationship is obvious given the ECB's role in recent years (see above), and is illustrated by the fact that ECB representatives meet informally with policymakers and the ECB is represented in economic committees; at the working level, it maintains close contact with the Commission.<sup>128</sup> Critics, however, often use the argument that if central banks concerned themselves with the deeply political issue of climate action, they could also be used to support other policy areas.<sup>129</sup> But this argument is flawed. Climate protection is a human right and ultimately affects *all other* areas of policy, such as trade, social affairs and health. Climate protection has become a constitutive principle of the European Union.

In the end, this question can be disregarded, as the goal of maintaining price stability and combating climate change are concurrent in the medium and long term.

## VII. Democratisation of the ESCB?

From a legal point of view, the principle of democracy, at least *prima facie*, contradicts the independent position of the ESCB.<sup>130</sup> However, in view of the economic connection between independence and price stability, most constitutional law doctrine assumes that no violation has occurred as a result,<sup>131</sup> although the subject continues to spark debate among legal experts.<sup>132</sup>

The ECB's instruments and policies have little or no democratic legitimacy, which weakens it as an institution, and it may be working at odds with the European legislator and the relevant

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<sup>127</sup> <https://data.consilium.europa.eu/doc/document/ST-8440-2021-INIT/en/pdf>

<sup>128</sup> Tokarski, *Die Europäische Zentralbank als politischer Akteur in der Eurokrise*, SWP study, July 2016, p. 14 ff.

<sup>129</sup> Quitzau, EZB: *Wird die Geldpolitik grün? Themenseite Volkswirtschaft*, Berenberg Makro, 16 December 2019, [https://www.berenberg.de/fileadmin/web/economics/documents/geld\\_waehrung/2019-12-16\\_MAKRO\\_Waehrungen\\_Gruene\\_Geldpolitik.pdf](https://www.berenberg.de/fileadmin/web/economics/documents/geld_waehrung/2019-12-16_MAKRO_Waehrungen_Gruene_Geldpolitik.pdf) and Kronberger Kreis, p. 46, chap. 5.1, no. 77.

<sup>130</sup> See also Thiele, *Die Unabhängigkeit der EZB; Gründe, Grenzen und Gefährdungen*, *Berliner Online-Beiträge zum Europarecht*, no. 98, p.7,

[https://www.jura.fuberlin.de/forschung/europarecht/bob/berliner\\_online\\_beitraege/Paper98-Thiele/Paper98---Alexander-Thiele---Die-Unabhaengigkeit-der-EZB.pdf](https://www.jura.fuberlin.de/forschung/europarecht/bob/berliner_online_beitraege/Paper98-Thiele/Paper98---Alexander-Thiele---Die-Unabhaengigkeit-der-EZB.pdf)

<sup>131</sup> See Maastricht Judgement of the BVerfG, 12 October 1993, 89, 155 (208).

<sup>132</sup> "The safeguarding of primary law thus does not change the fact that the ECB's performance of tasks must be qualified in terms of content as an exception to the principle of democracy, insofar as this requires that all 'political' decisions be taken by the citizens or their representatives. In this respect, the allocation of tasks to the ESCB is a variant of the difficult quest for balance between political control by democratic decision-making bodies and their compromise in conceding broad discretion for executive action." See Griller in: Grabitz/Hilf/Nettesheim, *Das Recht der Europäischen Union* 71st edition, August 2020, TFEU Art. 127, para. 30.

legal acts. This indeed seems to be the case with regard to climate change at present. The ECB is continuing a policy that can no longer stand under the objectives of the EU climate change law.

So, can the ECB be further “democratised” to promote and achieve the EU transformation goal without compromising its independence? What legal bases could be changed if the ESCB upholds its current stance?

The ESCB is fundamentally removed from the control of the democratic legislature. The other EU institutions are only kept informed by the ESCB through reports. It is obligated under Article 284 (3) TFEU to submit regular annual accountability reports to the European Parliament, the Council, the Commission and the European Council. These reports are meant to provide information on the activities of the ESCB and its monetary policy. Additional reporting obligations arise from Article 15 of the Statute of the ESCB, which requires the ECB to publish quarterly activity reports on the activities of the entire ESCB, and a weekly consolidated statement.<sup>133</sup> The ECB is thereby supposed to “defend” its actions to the general public while forcing it to think about the usefulness of its instruments. The independence granted to the ECB thus acquires a counterbalance.

However, the Parliament cannot exert any further influence due to the independent position of the Central Bank, which is why the relationship with other EU institutions is described as “asymmetrical”.<sup>134</sup> Only Article 132 (1) TFEU allows for the submission of opinions and resolutions in which the decisions of the decision-making bodies may be criticised. Furthermore, the President and the Executive Board may be heard.<sup>135</sup>

According to Article 129 (2) TFEU, the European Parliament and the Council may jointly amend selected articles of the Statute of the ESCB in accordance with the ordinary legislative procedure, which includes Article 18 of the Statute. It would also be legally possible to assign further tasks to the ECB under primary law. If primary law, as in the case of banking supervision under Article 127 (6) TFEU, expressly permits it, a secondary law assignment of tasks to the ECB can also be made.<sup>136</sup>

Furthermore, the Governing Council has the competence to amend the Guideline, which determines the relevant acceptance criteria for securities. The most recent amendment of 2020 clearly shows that sustainability goals can be considered while respecting the principle of equality. Conversely, it follows that the type and quality of the accepted securities can also be subject to other criteria, such as criteria related to greenhouse gases.

Other proposals included one that stipulated that the purchase or acceptance of securities should require their issuers to fulfil specific climate-related reporting obligations. Consideration was also given to only using ratings from credit rating agencies that adequately consider climate-related financial risks.<sup>137</sup>

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<sup>133</sup> Häde in: Calliess/Ruffert, *EUV/AEUV*, 5th edition, Art. 284 TFEU, para. 7.

<sup>134</sup> Tokarski, *Die Europäische Zentralbank als politischer Akteur in der Eurokrise*, SWP Study, July 2016, p. 16, quoted from Dermot Hodson, *Governing the Euro Area in Good Times and Bad*, Oxford: Oxford University Press, 2011, p. 168.

<sup>135</sup> Häde in: Calliess/Ruffert, *EUV/AEUV*, 5th edition, Art. 284 TFEU, para. 9.

<sup>136</sup> Häde in: Calliess/Ruffert, *EUV/AEUV*, 4th edition, Art. 127 TFEU, para. 60 ff.

<sup>137</sup> <https://www.bundesbank.de/de/presse/reden/zu-viel-naeche-die-beziehung-zwischen-geld-und-fiskalpolitik-850220#tar-5>

Should the ESCB, despite the current, very open legal situation, decide against the implementation of climate criteria in the future, the European legislator or the Member States as contracting authorities would certainly have the possibility to intervene.

## VIII. Conclusion

This legal opinion demonstrates that the ECB's current policy on corporate bonds (especially the CSPP) is not in line with the EU's climate protection goals and policies. Not only does the ECB not promote achieving targets, that is, reducing emissions in the EU member states, but it actively promotes enterprises that do not follow the transition path or do so only very slowly.

The ECB currently does not act in accordance with the European Treaties, as these also give it as an institution a clear environmental protection and sustainability mandate. The ECB largely ignores this mandate, or at least completely when it comes to CSPP.

This situation is untenable and can be changed by the ECB itself by redrafting the guidelines. It is permissible and necessary to base the ECB's monetary policy on climate-relevant criteria. The treaties provide the legal scope to do so.

The ECB may act and must act to prevent further economic damage because climate change poses a serious threat to economic performance and hence to maintaining price stability – in other words, the ECB's very own mandate. Climate change also threatens to cause an economic crisis. In the worst case, the central banks would intervene as a last resort, as they have done in the past when it was already too late to implement financial countermeasures. This must be avoided. This was also emphasised by the Vice-President of the ECB on 18 March 2021:

“Preliminary results show that in the absence of further climate policies, the costs to companies arising from extreme weather events rise substantially, and greatly increase their probability of default. The resulting ‘hot house world’ will be particularly challenging for certain regions projected to become markedly more vulnerable to events such as heatwaves and wildfires in the future. Climate change thus represents a major source of systemic risk, particularly for banks with portfolios concentrated in certain economic sectors and, even more importantly, in specific geographical areas.”<sup>138</sup>

The ECB has a central role in shaping European economic policy, which it should also exercise vis-à-vis other actors and, in doing so, act as a coordinator. Monetary policy, fiscal policy and financial market regulation should be coordinated in order not to reduce the Paris Climate Agreement and the EU Climate Act, the targets of the Treaties and the values of the European Charter of Fundamental Rights to absurdity.

Other countries and institutions have already recognised the signs of the times. The French Energy Transition Law, which has been in place since 2016, impressively shows that national initiatives are possible. Clear ESG criteria for investors, reporting obligations and targets for the reduction of greenhouse gases have been formulated. The European Investment Bank (EIB), for example, also shows that things can be done differently. As of 2022, it will no longer invest in fossil fuels and will align all its financing activities within the goals of the Paris Climate Agreement.<sup>139</sup>

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<sup>138</sup> <https://www.ecb.europa.eu/press/blog/date/2021/html/ecb.blog210318~3bbc68ffc5.de.html>

<sup>139</sup> ECB, Report on institutions' climate-related and environmental risk disclosures, November 2020, chap. 3.1.2 <https://www.eib.org/en/press/all/2019-313-eu-bank-launches-ambitious-new-climate-strategy-and-energy-lending-policy#>.

However, only the ECJ can make landmark and authoritative statements on the alleged tension between the primacy of price stability and neutrality/independence and climate protection as an indicator of sustainability. This may be imminent: The non-governmental organisation ClientEarth recently sued the Belgian central bank before a Belgian court, demanding that it take environmental protection into account when purchasing corporate bonds under the CSPP.<sup>140</sup> The case is expected to be referred to the ECJ.

Beyond Europe, New Zealand is taking a new approach and obligating financial institutions to provide information about climate risks. Every business enterprise has an impact on the climate, which is why a new law aims to encourage the financial sector to consider the effects of climate change in financial transactions and to identify risks.<sup>141</sup>

Observing the physical facts of the greenhouse gas budget and embarking upon coherent and effective reduction paths are no longer just (short-term) political goals but the sword of Damocles hanging over everything.<sup>142</sup> Central banks must act in coherence with democratically legitimised governments as set out in Article 7 TFEU. The methodology for calculating emissions intensity and the absolute climate impact of corporate bonds exists and has been widely described in multiple scenarios and in multiple variations.

A possible solution would be to implement a Paris-compliant benchmark for the CSPP portfolio, whose carbon footprint would decrease in line with the European Parliament's reduction targets. To remain eligible for purchase by the ECB, enterprises would have to achieve the communicated reduction targets for their sector. Otherwise, they would no longer qualify for purchase.<sup>143</sup> Only the ECB can currently take the step of incorporation into the Statute and Guidelines without amending the treaty.

The obligations described above also apply to the national central banks acting within the ESCB and to their representatives in the Governing Council of the ECB. And: as shown above, under current guidelines the Deutsche Bundesbank is already obligated to take due account of the state objective provision in Article 20a of the Basic Law. So far, it has refused to do so, citing a lack of regulatory scope or the need for political neutrality. In refusing to do so, however, it fails to recognise the duality of state objectives to which it too is committed. The current decision of the BVerfG on the KSG puts the behaviour of the Deutsche Bank in a new light and requires a quick realisation that “business as usual” can no longer be an option.

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<sup>140</sup>

<https://www.clientearth.org/latest/documents/letter-from-clientearth-to-christine-lagarde-president-of-the-european-central-bank/>

<sup>141</sup>

<https://www.spiegel.de/wirtschaft/unternehmen/neuseeland-finanzunternehmen-muessen-ueber-klimarisiken-aufklaeren-a-5af95c79-9e72-41b0-a139-09c47491744f>

<sup>142</sup> See also Goulard, *Grüner Schwan*, 14 October 2020, Ifo-Schnelldienst, vol. 73, issue 10, p. 15,

<https://search.proquest.com/openview/4554cb8b19692a4777f5ea9c1faeb987/1?pg-origsite=gscholar&cbl=43807>

<sup>143</sup> Comprehensive proposals by Volz et al. (2020): *Net-zero central banking: A new phase in greening the financial system* <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/03/Net-zero-central-banking.pdf>