Is the European Union going to help us overcome the COVID-19 crisis?

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Key points

- The author discusses the most noteworthy measures taken or yet to be taken by the European Union (EU) to combat the coronavirus crisis.
- The measures fall into four categories: (i) flexible application of EU rules that could hinder Member States in their strenuous efforts to save their national economies; (ii) a financial support package put in place by the EU itself; (iii) monetary action by the ECB; and (iv) action by European financial regulators, including the ECB (albeit in its capacity of banking regulator rather than monetary authority).
- This is followed by some comments on the impact of the coronavirus crisis on (i) the intended completion of the European Banking Union, (ii) the plans for a European Capital Markets Union, (iii) Brexit and (iv) the EU climate plans.
- The author concludes that it is clear that the crisis has once again laid bare the divisions between north and south in Europe. These divisions are particularly apparent in relation to the issue of financing the European recovery fund and the power struggle that has now flared up between the German Constitutional Court on the one hand and the CJEU and the ECB on the other. Hard times lie ahead for the EU.

1. Introduction

In the blink of an eye, the coronavirus (COVID-19) has completely paralysed the world economy. Restaurants, hotels, bars, theatres, cinemas and concert halls have closed their doors and their income has dried up. Events have been cancelled, and the aviation and tourism industries have come to an almost complete standstill. Demand for oil has largely dried up. As businesses in the directly affected sectors have suddenly ceased to generate income, they are no longer able to pay their employees, banks, landlords and suppliers, throwing the economy into a downward spiral. This, in turn, is reducing tax revenue, putting extra pressure on government finances. The consequent uncertainty has caused extreme volatility in the financial markets.

The lockdown restrictions are currently being cautiously lifted again, but the economic impact will be felt for a long time to come. A deep global recession seems inevitable. This

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is, in any event, the provisional analysis of the International Monetary Fund (IMF), as it believes the global economy will shrink this year by 3 per cent and the economy of the eurozone by 7.5 per cent. This would make it the worst crisis since the 1930s, and for Europe possibly the worst crisis ever. And this is just the mild scenario, predicated on the IMF’s assumption that the pandemic will gradually recede in the second half of this year (despite the fact that a good many leading virologists expect a second and even a third wave of the coronavirus). The ECB now expects the eurozone economies to contract by between 5 per cent and 15 per cent.

Feverish consultations are under way at all levels of our globalized world order to decide on measures to tackle this unprecedented crisis. As always, a great deal of consultation and advice is being provided at the international level, for example, by the World Health Organization (WHO) and at the meetings of the G20 and G7. The IMF and its sister organization the World Bank are providing concrete financial support as well. The IMF’s current lending capacity is USD 1000 billion. No fewer than 189 countries are members of the IMF. Over 100 countries have already applied for emergency financial aid. The World Bank focuses largely on providing aid to Africa and developing countries elsewhere, and has currently made a maximum of USD 160 billion available.

No matter how mind-boggling these amounts may be, the concrete actions are being taken mainly at the national level. Examples are the various forms of financial support for businesses and people currently sitting at home jobless, as well as tax payment deferrals. According to IMF estimates, national governments have already spent about USD 8000 billion on containing the crisis, and this amount is certain to rise as the various national rounds of emergency support are now following one another in quick succession.

Governments are not shunning unconventional measures to finance all their additional expenditure. For example, the Bank of England has already switched to monetary

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1 The New York Times, ‘EU Is Facing Worst Crisis Ever. Watch Out, World’ (6 May 2020).
2 <https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020> accessed 21 May 2020, (14 April 2020). See, for example, HLN 5 May 2020, ‘Duitse autoriteit op vlak van infectieziekten verwacht tweede en derde besmettinggolf’ [German Infectious Diseases Authority Expects Second and Third Wave of Infections] <https://www.hln.be/nieuws/buitenland/duitse-autoriteit-op-vlak-van-infectieziekten-verwacht-tweede-en-derde-besmettinggolf~a00e92c8/> accessed 21 May 2020.
3 See FD, ‘Coronacrisis deelt mokerslag uit aan economie’ [Corona Crisis Delivers Sledgehammer Blow to the Economy] (24 April 2020).
4 See <https://www.imf.org/en/News/Articles/2020/04/07/sp040920-SMa2020-Curtain-Raiser> accessed 21 May 2020, (9 April 2020); <https://www.linkedin.com/feed/news/half-of-countries-seek-imf-loans-4811820/> accessed 21 May 2020, (16 April 2020); <https://www.imf.org/en/News/Articles/2020/04/15/pr20163-imf-adds-liquidity-line-to-strengthen-covid-19-response> accessed 21 May 2020, (15 April 2020).
5 See <https://www.worldbank.org/en/news/feature/2020/04/02/the-world-bank-group-moves-quickly-to-help-countries-response-to-covid-19> accessed 21 May 2020, (2 April 2020).
6 For an overview of the measures taken by the European Union (EU) and its Member States, see <https://www.esrb.europa.eu/home/coronavirus/html/index.en.html> accessed 21 May 2020, (17 April 2020); for a list of the measures worldwide, see <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19> accessed 21 May 2020, (17 April 2020).
7 See <https://www.imf.org/en/News/Articles/2020/04/07/sp040920-SMa2020-Curtain-Raiser> accessed 21 May 2020, (9 April 2020).
financing. In other words, the British central bank is lending money to the British government to finance measures to combat the coronavirus crisis. Normally, the UK would have to borrow money for this by selling government bonds to the investing public through the capital markets. Monetary financing is highly controversial, since it increases the total amount of money in circulation. In extreme cases, this can lead to hyperinflation of the kind that affected Zimbabwe (2006–2009) and Venezuela (since 2018). Monetary financing can also undermine the independence of the central bank.

And what action has the EU taken to deal with the coronavirus crisis? Public health and national security may be areas of national policy, but a lot of hard work is also going on at the European level. But, as ever, this is being done in typical Brussels fashion. That is to say, much is done by a process of trial and error, and the really important decisions are put off until the pressure becomes so great that they have to be taken to avert the disintegration of the Union. The obvious comparison is to the eurozone debt crisis (2009–2012), although then the process of taking important European decisions proved excruciatingly slow. Clearly, however, this was another ‘sink or swim’ moment for the EU, or in any event for the eurozone. Unlike its British counterpart, the ECB does not have the power to directly finance national governments or the EU by purchasing government bonds as soon as they are issued, but it was and still is able to do something very similar. The ECB managed to save the euro in 2012 by declaring that it was willing to buy government bonds of the eurozone countries on a massive scale through the secondary markets (this was the famous ‘whatever it takes’ pronouncement of the then ECB president Mario Draghi). The ECB actually started implementing this policy in 2015. In this way, interest rates on these government bonds were kept under control, and the government deficits run-up as a result of the massive financial support for ailing national banking sectors could continue to be financed by the eurozone countries on reasonable terms through the issuance of government bonds. Since then, the ECB has never actually stopped its indirect purchases of eurozone government bonds. On 24 March, the ECB decided to take matters a stage further by waiving certain restrictions imposed by previous asset purchase programmes, on this occasion to ensure that the Member States were able to continue financing their

8 See <https://www.gov.uk/government/news/hm-treasury-and-bank-of-england-announce-temporary-extension-of-the-ways-and-means-facility> accessed 21 May 2020, (9 April 2020). The Bank of England is also taking all kinds of other measures to deal with the coronavirus crisis; see <https://www.bankofengland.co.uk/coronavirus> accessed 21 May 2020. It should be noted that monetary financing is now spreading rapidly throughout the world. See, for example, FD, ‘Britse centrale bank gaat bestrijding coronacrisis direct financieren’ [British Central Bank to Finance Anti-coronavirus Crisis Measures Directly] (9 April 2020).

9 See FD, ‘Britse centrale bank gaat bestrijding coronacrisis direct financieren’ [British Central Bank to Finance Anti-coronavirus Crisis Measures Directly] (9 April 2020).

10 See Art 123(1) of the Treaty on the Functioning of the European Union (TFEU).

11 For the speech, see <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> accessed 21 May 2020 (26 July 2012).

12 For a list of all the asset purchase programmes, see <https://www.ecb.europa.eu/mopo/implementation/omt/html/index.en.html> accessed 21 May 2020.
massive support programmes during the pandemic (the Pandemic Emergency Purchase Programme (PEPP), which is dealt with below in Section 12). 13

The procedure adopted by the ECB for this type of asset purchase programme is roughly as follows. In cooperation with the national central banks of the eurozone, it purchases government bonds on the secondary market from the commercial banks, which in turn buy them from their government upon issuance. Not only does this keep interest rates on government bonds low, but it also creates room on commercial bank balance sheets to issue new loans to businesses and households. In this way, the ECB hopes to stimulate economic activity and raise the rate of inflation up to its target figure of just under 2 per cent. This constitutes price stability, which is the main objective of the monetary policy with which the ECB is charged. 14 That, at any rate, is the theory, but it by no means goes unchallenged, because there remains considerable doubt about the effectiveness of this type of asset purchase programme. 15

Be that as it may, the Court of Justice of the European Union (CJEU) confirmed, in response to requests from the German Constitutional Court (Bundesverfassungsgericht) for a preliminary ruling on previous asset purchase programmes, that they are, in principle, permitted, basically because their primary purpose is maintaining price stability. The mere fact that such purchase programmes also provide economic support for the eurozone countries does not necessarily mean that they violate the monetary financing prohibition. In its final judgment in the Gauweiler case, the German Constitutional Court had accepted—albeit reluctantly—this judgment of the CJEU, and many hoped that it would do the same in the Weiss case. 16 However, things turned out differently because on 5 May 2020 the Constitutional Court ruled that the ECB had exceeded its mandate by initiating an asset purchase programme known as the Public Sector Purchase Programme (PSPP), or alternatively as the Quantitative Easing (QE) Programme, in 2015. The German Constitutional Court arrived at this judgment, in brief, because the underlying ECB decision was not assessed sufficiently rigorously by reference to the European principle of proportionality. The Constitutional Court has given the ECB three months in which to adopt a new decision based on better reasoning. If the ECB fails to do so, the Bundesbank will no longer be allowed to participate in the PSPP. 17 This is a historic ruling because it is the first time the German Constitutional Court has declared a judgment of the CJEU to be invalid. This means that the long-dormant power struggle between the German Constitutional

13 See <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1-3949d6f266.en.html> accessed 21 May 2020, (18 March 2020); Decision (EU) 2020/440 of the ECB of 24 March 2020.
14 See Arts 119(2) and 127(1) of the TFEU.
15 For more about this, see, for example, W Boonstra, ‘Over kwantitatieve verruiming, monetaire financiering en helikoptergeld’ <https://economie.rabobank.com/publicaties/2016/juni/over-kwantitatieve-verruiming-monnaire-financiering-en-helikoptergeld/> accessed 21 May 2020, (23 June 2016).
16 See CJEU judgment of 16 June 2015, Case C-62/14 (Gauweiler); CJEU 11 December 2018, Case C-493/17 (Weiss). In these cases, the CJEU was asked to consider whether EU organs, including the ECB, had acted ultra vires. For more about this, see: VPG de Serière, Ondernemingsrecht 2020/IX; VPG de Serière, Ondernemingsrecht 2019/172 (both with further references).
17 BVerfG, Urteil des Zweiten Senats vom 06. Mai BVG 2020 BV, Rn 116 ff. <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2020/05/rs20200505_2bvr085915.html> accessed 21 May 2020.
Court, on the one hand, and the CJEU and the ECB, on the other, has now flared up in all its intensity. If the ECB complies with the Constitutional Court’s request, this will undermine not only the independence of the ECB but also the supremacy of the CJEU. Generally speaking, the CJEU never comments on judgments of national courts, but following the judgment delivered by the German Constitutional Court it issued a press release on 8 May in which it recalled that (i) preliminary rulings of the CJEU are binding on national courts, and (ii) the CJEU alone has jurisdiction to rule that an act of an EU institution is contrary to EU law, as the unity of the EU legal order and legal certainty would otherwise be placed in jeopardy.18 Shortly afterwards the European Commission announced that it considers infringement proceedings against Germany.19 The ruling of the Constitutional Court in any event also calls into question the legitimacy of the recently started PEPP (see Section 12 below).

Another point that should be noted here is the rapid creation of the European Banking Union (EBU) in response to the eurozone crisis. This meant that the significant banks in the eurozone were placed under the direct prudential supervision of the ECB (first pillar of the Banking Union). In the event of their failure, a European authority (the Single Resolution Board) is responsible for their orderly resolution (second pillar).20 Had it not been for the eurozone crisis, this historic transfer of competences from the national to the European level would never have occurred. So a crisis can also result in greater centralization. It is not for nothing that the idea of Eurobonds now features prominently once again on the European political agenda. But there are also important differences between the present crisis and the eurozone crisis. The eurozone crisis had its origins in the 2008 crisis in the financial sector, which subsequently impacted national governments and the rest of the economy. In contrast, the current crisis is a healthcare crisis, which is engulfing the economy as a whole, including the financial sector. Moreover, according to the IMF, the losses are now much greater than in 2008.21

What follows is a discussion of the most noteworthy measures taken or yet to be taken by the EU to combat the coronavirus crisis. Basically, the measures fall into the following categories: (i) flexible application of EU rules that could hinder Member States in their strenuous efforts to save their national economies (Sections 2–4); (ii) a financial support package put in place by the EU itself (Sections 5–11); (iii) monetary action by the ECB (Section 12); and (iv) action by European financial regulators, including the ECB (albeit in its capacity of banking regulator rather than monetary authority) (Section 13).22 This is followed by some comments on the impact of the coronavirus crisis on the intended completion of the EBU (Section 14), the plans for a European Capital Markets Union (CMU;

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18 Press release following the judgment of the German Constitutional Court of 5 May 2020 (No 58/20) (8 May 2020).
19 See <https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_20_846> accessed 21 May 2020, (10 May 2020).
20 For more about this, see, for example, D Busch and G Ferrari, European Banking Union (2nd edn, OUP 2020).
21 <https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020> accessed 21 May 2020, (14 April 2020).
22 As regards the various measures dealt with below in Sections 2–13, see also CV Gortsos, ‘The EU Policy Response to the Current Pandemic Crisis Through the Lens of the Eurogroup Report of 9 April 2020: Overview and Assessment’ <https://ssrn.com/abstract=3579010> accessed 21 May 2020; de Serière (n 16).
Section 15), Brexit (Section 16) and the EU climate plans (Section 17). Lastly, I make some concluding remarks (Section 18).

2. Relaxation of the Stability and Growth Pact

In the 1997 Stability and Growth Pact (SGP), EU Member States agreed that their national budgets should always be in balance. Eurozone Member States agreed on stricter rules to ensure the stability of the euro. After all, Eurozone countries in which public sector deficits rise will have to pay higher interest rates on their government bonds, thereby possibly weakening the euro due to excessive inflation. Specifically, it was agreed that a budget deficit should not exceed 3 per cent of gross domestic product (GDP) and the total public debt should not exceed 60 per cent of GDP. It is no secret that these rules are regularly breached. Sanctions can then be imposed, for example, in the form of a fine, but in practice, this never happens. Usually, the European Commission (and the other eurozone countries) make do with issuing a warning, making recommendations and, above all, engaging in a lot of grumbling. So on that score, anyway, there seems little cause for disquiet. Moreover, no matter how strict the budget rules may be in theory, they can be temporarily suspended in periods of severe economic difficulty for the euro area or the Union as a whole. Given the gravity of the coronavirus crisis, this is undoubtedly now the case. On 20 March, the European Commission, therefore, announced that in its view the conditions for activating this general escape clause had been met. And on 9 April, the Eurogroup signalled its agreement. Member States thus have the requisite flexibility, even under the SGP, to support the national economy.

3. Relaxation of EU rules on state aid

But these are not the only EU rules with which Member States are currently having to contend. In the absence of an adequate EU budget, the bulk of the financial aid must be provided by the Member States themselves. This inevitably brings EU state aid rules into play. To ensure that national governments can act swiftly and know what is allowed during the coronavirus crisis, the European Commission published a specific temporary state aid framework on 19 March, setting out, among other things, what measures do ‘not’ constitute prohibited state aid in the current circumstances: (i) liquidity support for businesses that do not exceed EUR 800,000; (ii) state guarantees on bank loans to businesses; (iii) direct state loans to businesses at reduced interest rates; and (iv) the provision of

23 See Arts 121, 126 and 136 of the TFEU and the accompanying Protocol (No 12). There is also a certain amount of secondary legislation.
24 COM (2020) 123 final.
25 See Points 19–21 of the Eurogroup’s press release of 9 April 2020 <https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/> accessed 21 May 2020. The Eurogroup is an informal consultative body consisting of the finance ministers of the nineteen eurozone countries. On 9 April, however, the Eurogroup met ‘in its inclusive format’, in other words augmented by the finance ministers of the non-eurozone Member States. For more about this, see Gortsos (n 22) s I.
26 See Arts 107–109 TFEU.
short-term export credit insurance by the state if such cover is no longer available from private insurers.27

On 4 April, the Temporary Framework was extended to include the following types of measures that do ‘not’ constitute state aid: (i) support for coronavirus-related research and development (vaccines and medicines); (ii) support for the construction and upscaling of testing facilities; (iii) support for the production of vaccines and medicines; (iv) targeted support in the form of deferral of tax payments and/or suspensions of social security contributions; and (v) support in the form of wage subsidies for employees.28 On 8 May, the Commission extended the scope of the Temporary Framework still further to allow for the recapitalization of ailing companies, albeit subject to strict conditions.29

Since in times of crisis the main concern is safeguarding the national interest rather than the smooth functioning of the internal market, it seems certain that, despite this relaxation, the European rules on state aid will not always be fully complied with during the crisis. Moreover, the fact that the northern Member States have deeper pockets than their southern neighbours means that the inequality is bound to increase.30 It should be noted, by the way, that the Commission is currently handling applications under state aid rules with unprecedented speed and applying the rules in a generous spirit.31

4. Relaxation of EU rules on public procurement

Member States are currently making every effort to purchase face masks, protective gloves, ventilators and other medical supplies on a large scale in order to tackle the pandemic. In doing so, they must comply with European rules on public procurement. To enable governments to act quickly and know what is and what is not permitted, the European Commission published guidance on 1 April to explain how the EU public procurement framework can be used as flexibly as possible in this emergency.32

5. Coronavirus Response Investment Initiative

All the EU measures I have described above are intended to facilitate the provision of state aid at the national level as much as possible. In addition, the EU is deploying its own resources to combat the crisis (which are, of course, paid for indirectly by the Member States). First, there is the Coronavirus Response Investment Initiative (CRII), which has been in force since 1 April. This allows EUR 37 billion of cohesion policy funding to be used to tackle the consequences of the coronavirus crisis.

27 COM (2020) 1863 final.
28 2020/C 112 I/01.
29 C (2020) 3156 final.
30 See FD, ‘Brussel vreest groeiende kansenongelijkheid voor Zuid-Europese bedrijven’ [Brussels Fears Growing Inequality of Opportunity for South European Businesses] (1 May 2020).
31 For the ever longer list of coronavirus-related state aid decisions, see <https://ec.europa.eu/competition/state_aid/what_is_new/covid_19.html> accessed 21 May 2020.
32 2020/C 108 I/01.
In addition, the scope of the EU Solidarity Fund has been broadened to such an extent that it can also be used in public health crises. Since 1 April, the worst-affected countries have thus been given access to additional financial assistance of up to EUR 800 million for 2020.33

On 2 April, the Commission made proposals to allow EU funds to be used even more flexibly (CRII+), for instance, by (i) enabling transfers between cohesion policy funds, categories of region and policy objectives, (ii) waiving the obligation for national co-financing, and (iii) supporting the most vulnerable in society, for example, by providing food packages.34 CRII+ entered into force on 24 April.35

6. Emergency Support Instrument and rescEU medical equipment capacity

Also, the European Commission supports healthcare directly in the Member States.36 The Commission has made available for this purpose a sum of EUR 3 billion from the EU budget, of which EUR 2.7 billion will be spent through reactivation of the Emergency Support Instrument (ESI) and EUR 300 million through the rescEU medical equipment capacity. The Commission is encouraging the individual Member States to help maximize the effectiveness of these instruments. Individuals and foundations can also contribute to this, possibly through crowdfunding. The Commission will use the funds for a variety of purposes, including (i) central procurement and distribution of medical supplies such as face masks and respiratory equipment, (ii) transport of medical equipment and patients in cross-border regions and (iii) construction of mobile field hospitals. In the medium and long term, the Commission intends to use the funds to increase coronavirus testing capacity and fund coronavirus research.37

7. Eurobonds and corona bonds

As already noted, just as in 2012 during the eurozone crisis, the idea of Eurobonds once again features prominently on the European political agenda, albeit this time in the form of ‘corona bonds’. Eurobonds are bonds issued jointly by the euro countries. The participation of very creditworthy countries such as Germany and the Netherlands would mean that the interest on such bonds would be relatively low and therefore attractive to south European countries such as Italy and Spain. The north European countries have so far

33 <https://ec.europa.eu/regional_policy/en/newsroom/coronavirus-response/> accessed 21 May 2020.
34 <https://ec.europa.eu/regional_policy/en/newsroom/news/2020/04-04-2020-coronavirus-response-investment-initiative-plus-new-actions-to-mobilise-essential-investments-and-resources> accessed 21 May 2020.
35 See <https://www.consilium.europa.eu/en/press/press-releases/2020/04/22/covid-19-more-flexibility-for-deploying-eu-budget-money/?utm_source=dsms-auto&utm_medium=email&utm_campaign=COVID-19%3a+More+flexibility+for+deploying+EU+budget+money> accessed 21 May 2020.
36 See <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/emergency-support-instrument_en> accessed 23 May 2020.
37 The underlying draft legislation and other relevant information can be accessed at <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_577> accessed 21 May 2020, (2 April 2020). See also the Commission’s contribution to the Coronavirus Global Response Pledging Event: <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_797> accessed 21 May 2020, (4 May 2020).
always blocked the issuance of Eurobonds. Not only would they then have to pay a higher interest rate than on their own government bonds, but they would also be exposed to the tax risks of other countries. This is because if one of the participating countries defaults on its repayment or interest obligations, the other eurozone countries would be saddled with these costs.

Corona bonds are a specific form of Eurobonds because they are limited in time, scope and type of expenditure. The issuance of corona bonds would allow countries such as Italy and Spain to borrow money at a lower interest rate than by issuing their own government bonds. South European countries could only use the proceeds from such issuance to finance national measures designed to mitigate the damage caused by the pandemic, such as financial support for businesses. Although the Eurogroup finally managed, with the utmost difficulty, to reach agreement on a support package in the evening of 9 April, corona bonds were not part of it. The Netherlands, Germany, the Baltic States, Finland and Austria were unwilling to agree to this proposal. So does this mean that the idea of corona bonds is definitely off the table? Certainly not, because countries such as Italy and France have decidedly not yet given up their fight to introduce corona bonds. Moreover, the Eurogroup final statement contains an ominous reference to ‘innovative financial instruments’. The Dutch Minister of Finance Wopke Hoekstra maintains that this is in any event not a reference to Eurobonds, but, according to his French counterpart Bruno Le Maire, the only innovative instrument that does not yet exist is joint debt.38 In other words, in typical Brussels fashion, the truly sensitive decisions have been postponed until some future date. See Section 11 below.

8. Pandemic crisis support

If the main components of the support package decided by the Eurogroup on 9 April are not Eurobonds, what are they? First, the conditions on which eurozone countries can borrow money through the ESM have been partially relaxed. Countries that need money can borrow it from the ESM without conditions, as long as it is used for healthcare. The southern countries, led by Italy, also wanted to be able to borrow money without conditions to aid the recovery of their economies after the pandemic ends, but this is allowed on the usual conditions only if the borrower promises to reform its economy. A country drawing on the ESM can borrow an amount of 2 per cent of its GDP at end of 2019. If all nineteen eurozone countries were to use the ESM credit line, the total amount available for healthcare (pandemic crisis support) would be EUR 240 billion.39 However, the northern countries will not avail

38 See <https://nos.nl/artikel/2330008-dit-zijn-de-winnaars-en-verliezers-van-het-europees-akkoord.html?utm_campaign=Brussel%20Inside&utm_medium=email&utm_source=Revue%2020 newsletter> accessed 21 May 2020, (10 April 2020).
39 Point 16 of the Eurogroup press release of 9 April 2020 (see n 25); <https://www.esm.europa.eu/content/europe-response-cor ona-crisis>; <https://www.consilium.europa.eu/nl/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/> accessed 21 May 2020, (8 May 2020).
themselves of this credit line because they do not need it. And whether the southern eurozone countries will draw on this credit line remains to be seen. In his first statement about the support package to his national parliament, Italy’s prime minister Giuseppe Conte said that he would not apply for ESM support and would continue to press for Eurobonds.

9. Pan-European guarantee fund

The second main component of the Eurogroup’s support package is a pan-European guarantee fund of EUR 25 billion created by the European Investment Bank (EIB). A total of EUR 200 billion in entrepreneurial loans can be provided under this fund. This is in addition to the EUR 40 billion already made available by the EIB on 16 March. The EIB formally approved the operationalization of the new guarantee fund on 16 April. It is primarily (but not exclusively) intended to support SMEs in the EU. The credit granted on the basis of these guarantees is to be provided, in part, through the intermediary of the national banking sector and the national authorities (national promotional institutions).

10. Support to mitigate unemployment risks in an emergency

The third main component of the Eurogroup’s support package is a fund of EUR 100 billion for short-time working and unemployment benefit. Social security is, in fact, a national competence, but because the coronavirus crisis is an ‘exceptional occurrence’ within the meaning of Article 122(2) of the TFEU, the EU may nevertheless provide financial assistance. On 2 April, the European Commission made a proposal on this legal basis for a Council Regulation ‘on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak’. Support to mitigate unemployment risks in an emergency works roughly as follows. Affected Member States can borrow money through this fund on favourable terms. Part of the fund, equal to 25 per cent of the loans granted, is covered by guarantees issued by the Member States, which contribute in line with their share in the EU’s GDP. This proposal too was welcomed by the Eurogroup on 9 April, although the final statement does emphasize that it is a temporary measure and should not be seen as the prelude to a European social security system.
11. Recovery Fund

The support package agreed by the Eurogroup on 9 April and confirmed by the European government leaders at their special summit on 23 April\(^{45}\) thus amounts in total to a maximum of EUR 540 billion, but little if any use is likely to be made of the EUR 240 billion that can theoretically be lent through the ESM (see Section 8). This leaves an amount of EUR 300 billion. While that may sound a lot, in reality it is little more than a drop in the ocean. The financial situation is becoming increasingly acute, especially for southern eurozone countries such as Italy, Spain and Greece. So much so, in fact, that they may possibly be unable to overcome the coronavirus crisis on their own. Their national debt was already high and is now rising further at breathtaking speed (although this is also true, of course, of the northern countries). Despite the ECB’s PEPP (see Section 12 below), the interest rates that these Member States have to pay on their government bonds are still rising,\(^{46}\) while their tax revenues will continue to fall as the economy slumps. Moreover, these countries depend for a considerable part of their GDP on tourism, and tourists are staying away for the time being. Not only because they are currently not welcome on account of the lockdowns, but also out of fear of the virus. Another factor is the impact of the crisis on the incomes of the hordes of holidaymakers from the northern Member States, many of whom will stay away for that reason as well.\(^{47}\) The Eurogroup too is aware of this, which is why the final statement included a passage that a European reconstruction fund (Recovery Fund) should be created. The Eurogroup remains vague about the exact legal structure, the relationship with the new European multiannual budget (2021–2027) and, especially, the manner of financing. And, as already noted, the final statement contains a reference to the use of ‘innovative financial instruments’.\(^{48}\)

The knives were already out in the run-up to the summit of European government leaders on 23 April. European Commissioner Valdis Dombrovskis announced in the German business newspaper *Handelsblatt* that the European Commission was contemplating the idea of a reconstruction fund of EUR 1500 billion. This short-term fund would have to raise money on the capital markets through bonds guaranteed by the eurozone countries. The fund could then lend the money on favourable terms to those Member States that need it to restore their corona-ravaged economies.\(^{49}\) France is one of the

\(^{45}\) See <https://www.consilium.europa.eu/en/press/press-releases/2020/04/23/conclusions-by-president-charles-michel-following-the-video-conference-with-members-of-the-european-council-on-23-april-2020/> accessed 21 May 2020, (23 April 2020).

\(^{46}\) *FD*, ‘Renteverzinnen lopen op, Europese aanpak ontbreekt’ [Interest Rates Rising. European Approach Lacking] (18 April 2020); *FD*, ‘Forse renteopslag Italië wekt massale interesse beleggers’ [Big Italian Interest Rate Hike Arouses Massive Interest among Investors] (22 April 2020).

\(^{47}\) See <https://nos.nl/artikel/2330959-zo-kijken-de-vijf-populairste-europese-vakantielanden-naar-komende-zomer.html> accessed 21 May 2020, (19 April 2020).

\(^{48}\) Point 15 of the Eurogroup press release of 9 April 2020 (see n 25).

\(^{49}\) *Handelsblatt*, ‘Schlimmer als nach der Finanzkrise—EU plant billionenschweren Wiederaufbaufonds’ [Worse Than after the Financial Crisis—EU Plans Multi-billion Dollar Reconstruction Fund] (14 April 2020); *FD*, ‘Brussel broedt op groot “wederopbouwfonds” via uitgifte eurobonds’ [Brussels Brooding on the Idea of a Large ‘reconstruction fund’ Through Issuance of Eurobonds] (15 April 2020).
countries that endorses this plan.\textsuperscript{50} In a non-paper issued prior to the summit, Spain put forward the idea that the Recovery Fund should provide grants rather than loans to Member States in need so as to avoid raising their national public debt to excessive levels. It argued that the fund should be financed through the issue of perpetual EU debt, ie through bonds that never have to be redeemed and on which only interest is payable.\textsuperscript{51}

After the summit, the government leaders announced that (i) they were working to establish a recovery fund, (ii) they recognized the urgency of it, (iii) the fund should be of sufficient size, (iv) the fund should be targeted towards the sectors and geographical parts of Europe most affected and (v) the Commission should now come up with concrete proposals.\textsuperscript{52}

At the press conference after the summit, Commission President Van der Leyen immediately announced that she wanted to raise at least EUR 1000 billion in loans through the capital markets, with the Member States being required to guarantee the loans. On 18 May, France and Germany tabled a joint proposal that the Commission should borrow EUR 500 billion through the capital markets and channel the proceeds to the affected Member States as grants. The money would be borrowed by raising the EU’s Own Resources ceiling (i.e. the maximum amount that can be called upon from the member states) and using it as a guarantee. This arrangement would be given a fixed expiration date and the loans would be paid back after the next long-term budget, which ends in 2027. On 23 May Austria, Denmark, the Netherlands and Sweden published a counter-proposal opposing grants and endorsing a ‘loans for loans’ approach. On 27 May the Commission formally proposed a EUR 750 billion recovery fund, which would provide EUR 500 billion in grants to countries hit hardest by the crisis, and make another EUR 250 billion available as loans. The grants portion largely tracks the Franco-German proposal outlined above. It remains to be seen whether the Commission’s approach will meet with the approval of both the northern and the southern Member States.\textsuperscript{53}

\section*{12. PEPP}

As already noted in the introduction, the ECB began the PEPP, a new asset purchase programme, on 24 March, on this occasion to ensure that the massive COVID-19 support

\textsuperscript{50} FD (18 April 2020) (n 46).

\textsuperscript{51} See <https://english.elpais.com/politics/2020-04-20/spain-proposes-a-15-trillion-coronavirus-recovery-fund-financed-through-perpetual-eu-debt.html> accessed 21 May 2020, (20 April 2020).

\textsuperscript{52} See n 45.

\textsuperscript{53} See FD, ‘Brussel wil de markt op om coronacrisis te bestrijden’ [Brussels Wants to Enter the Market to Combat the Coronavirus Crisis] (24 April 2020); on the German-French proposal see Politico, ‘France, Germany propose EUR 500B EU recovery fund’ (18 May 2020) <https://www.politico.eu/article/france-germany-propose-e500beu-recovery-fund/> accessed 27 May 2020; on the joint counter-proposal made by Austria, Denmark, the Netherlands and Sweden, see <https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-paris-1-berlin-0-cummings-going-spotlight-on-china/> accessed 27 May 2020, (25 May 2020); on the Commission’s proposal, see Politico, <European Commission proposes EUR 750B EU recovery package> (27 May 2020) <https://www.politico.eu/article/commission-to-propose-recovery-instrument-of-e750-billion/> accessed 27 May 2020.
operations mounted by the Member States could continue to be financed. As the ECB is purchasing the government bonds on the secondary market from the commercial banks, this is also creating lending capacity on the balance sheets of commercial banks for the provision of new loans to businesses and households. As already noted, significant doubts remain as to the effectiveness of this type of asset purchase programme. Although this is indeed a way of creating lending capacity on the balance sheets of commercial banks, it is to be hoped that they will lend only to parties that are essentially creditworthy, for one thing because they may otherwise be in danger of breaching their duty of care on account of imprudent lending (overextension of credit). Naturally, however, the situation may be very different if the loans are fully covered by government guarantees. In any event, the creditworthiness of many businesses and households in the eurozone is in a parlous state as a consequence of the crisis, despite all the financial support offered by the Member States and the EU. According to the IMF, it is quite possible that lending may be impaired by a global credit crunch if the pandemic does not fade away in the second half of this year, as assumed in the IMF’s baseline scenario.

Be that as it may, the PEPP’s current maximum size is EUR 750 billion and the programme is available, for the time being, until the end of 2020. It is important to note that certain restrictions that applied to previous purchase programmes have been waived in the case of the PEPP. The absence of these restrictions is precisely why the ECB’s PEPP decision is even more vulnerable to new legal proceedings brought before the German Constitutional Court. This is because the Constitutional Court, in its judgment of 5 May, held that one of the reasons why the PSPP, which was the subject of the litigation, did not circumvent the European prohibition on monetary financing was because these restrictions were observed in that programme. It remains to be seen whether the Constitutional Court decides otherwise in any proceedings regarding the PEPP, given that this programme’s express purpose is to deal with the economic impact of the coronavirus crisis.

54 See <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6266.en.html> accessed 21 May 2020, (18 March 2020); Decision (EU) 2020/440 (n 13). To ensure that banks can continue to lend money to the real economy, the ECB has also relaxed the conditions on which banks, in turn, can borrow money from the ECB. See <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200312_2~06c32dab1.en.html> accessed 21 May 2020, (12 March 2020); <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200312_1~39db50b717.en.html> accessed 21 May 2020, (12 March 2020); <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200407~2472a8ccda.en.html> accessed 21 May 2020, (7 April 2020); <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200422_1~95e062a2b.en.html> accessed 21 May 2020, (22 April 2020); Guideline (EU) 2020/XX of the ECB of 7 May 2020 amending Guideline ECB/2014/31 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral (ECB/2020/29). See on the package of monetary measures taken by the ECB: PR Lane, ‘The Monetary Policy Response to the Pandemic Emergency’ (1 May 2020) <https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200501~a2d8514a0.en.html> accessed 21 May 2020.

55 For more information about banks’ duty of care and the overextension of credit, see, for example: D Busch, ‘The Future of the Special Duty of Care in the Dutch Financial Sector’ EBI WP No 63 (2020), s 5.4(iii) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3586931> accessed 21 May 2020.

56 <https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020> accessed 21 May 2020, (14 April 2020); FD, ‘IMF vreest voor kredietcrisis als virus aanhoudt’ [IMF Fears Credit Crisis If Pandemic Continues] (15 April 2020).

57 BverfG (n 17) Rn 216ff.
Whatever the case, according to the ECB decision on the PEPP, the purchase of government bonds no longer has to take place in a neutral manner, in other words more or less in proportion to the size of the eurozone economies.\textsuperscript{58} This suggests that the ECB could purchase mainly Italian, Greek and Spanish government bonds because those are the countries in greatest need. Moreover, the ECB is now also willing to buy Greek sovereign bonds, despite their junk-rating.\textsuperscript{59}

Another noteworthy relaxation is that the ECB no longer considers itself bound by the self-imposed limit that it may not purchase more than a third of a country’s total sovereign debt and no more than a third of the outstanding amount per bond.\textsuperscript{60} Whether this relaxation will find favour with the German Constitutional Court remains to be seen. The ECB had previously imposed these limits on itself in order to avoid becoming a blocking minority in the event of a bondholder vote on a possible debt restructuring. The position is as follows. In economic terms, a restructuring amounts to a partial cancellation of sovereign debt. If the ECB cancels sovereign debt, it violates the prohibition on direct monetary financing.\textsuperscript{61} After the problems with Greece in 2013, it was decided that government bonds issued by the eurozone countries should contain a restructuring clause. Clauses of this kind (collective action clauses\textsuperscript{62}) provide that a given percentage (often 33 per cent) of the outstanding amount of the bond constitutes a blocking minority. So if the ECB holds 33 per cent or more of this type of debt, it may not agree to a proposed restructuring since this would constitute a breach of the prohibition on monetary financing. This would, therefore, block the restructuring. However, market parties do expect the ECB to adhere to the 33 per cent limit as much as possible in order to avoid problems.\textsuperscript{63}

In brief, these are fairly far-reaching relaxations compared with previous asset purchase programmes and it is very debatable whether they will meet with the approval of the German Constitutional Court. But quite apart from this, the PEPP is not a miracle cure, not only because banks will hopefully lend money only to basically creditworthy parties (see above), but also because the interest that Member States such as Italy have to pay on their government bonds will still continue to rise.\textsuperscript{64}

\textsuperscript{58} <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200318_1~3949d6f266.en.html> (18 March 2020); Decision (EU) 2020/440 (n 13) Recital 5, art 5, paras 2 and 3.

\textsuperscript{59} See Decision (EU) 2020/440, ibid, Recital (7) and Art 3.

\textsuperscript{60} See Decision (EU) 2020/440, ibid, Recital (6) and Art 4.

\textsuperscript{61} See Art 123(1) of the TFEU.

\textsuperscript{62} As regards collective action clauses, see VPG de Serie, ‘Een korte verhandeling over pari passu clausules en collective action clauses’ [A Brief Consideration of pari passu Clauses and Collective Action Clauses] in D Busch and MP Nieuwe Weme (eds), Christels Koers (SOR 79) (Kluwer 2013) 647–62.

\textsuperscript{63} See FD, ‘Limiiten ECB bieden kans’ [ECB Limits Provide Opportunities] (6 April 2020). See also S Grund, ‘The Legality of the European Central Bank’s Pandemic Emergency Purchase Programme’ <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3558677> accessed 21 May 2020, (2020). He argues that abandoning the 33% limit need not be a problem (9ff).

\textsuperscript{64} FD (18 April 2020) (n 46); FD (22 April 2020).
13. Measures taken by EU financial regulators

General

The European financial regulators too are trying to do their bit to fight the coronavirus crisis. I am primarily referring here to the ECB in its capacity of prudential supervisor of significant banks in the eurozone, and also to the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA). I would note here that, in practice, the EBA, ESMA and EIOPA carry out little, if any, actual supervision of financial institutions, and instead mainly assist in the creation of European financial supervision law, while also providing authoritative but often formally non-binding interpretations of that law. I will confine myself here to mentioning a few notable measures that have been taken so far.

Capital requirements, non-performing loans and international accounting rules

On 12 March, the ECB announced in a press release that banks were permitted temporarily to hold lower capital buffers. On the same day, the EBA indicated that the ECB and the national bank regulators in the EU would have to be flexible in applying the capital requirements. Not much later (on 20 March), the ECB announced further relaxations, such as favourable prudential treatment of non-performing loans (NPLs) if covered by government guarantees and flexible application of the IFRS 9 international accounting rules. The EBA and ESMA issued advice along similar lines a few days later. As a result of all these measures, the banks are theoretically able to extend more credit to businesses and households than would normally be the case. But, once again, it is to be hoped that banks will lend only to parties that are basically creditworthy, although things may be different if the loans are fully covered by government guarantees. In addition, the banks’

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65 See <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312~43351ac3ac.en.html> accessed 21 May 2020, (12 March 2020); <https://eba.europa.eu/eba-statement-actions-mitigate-impact-covid-19-eu-banking-sector> accessed 21 May 2020, (12 March 2020). On 16 April, the ECB also temporarily relaxed the capital requirements for market risk. See <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200416~c1270ba8.en.html> accessed 21 May 2020. On this point, see FD, ‘De ECB versoepelt kapitaalseisen zakenbanken’ [The ECB Relaxes Capital Requirements for Commercial Banks] (16 April 2020).

66 See <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200320~4cddbcf466.en.html> accessed 21 May 2020, (20 March 2020).

67 See EBA, ‘Statement on the Application of the Prudential Framework Regarding Default, Forbearance and IFRS9 in Light of COVID-19 Measures’ (25 March 2020) <https://eba.europa.eu/coronavirus媛 accessed 21 May 2020; ESMA, ‘Accounting Implications of the COVID-19 Outbreak on the Calculation of Expected Credit Losses in Accordance with IFRS 9’ (25 March 2020) (ESMA32-63-951).

68 See <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312~43351ac3ac.en.html> accessed 21 May 2020, (12 March 2020); <https://eba.europa.eu/eba-statement-actions-mitigate-impact-covid-19-eu-banking-sector> accessed 21 May 2020, (12 March 2020). On 17 March, the Dutch central bank (DNB) issued a press release announcing two measures designed to sustain lending to the real economy. First, the systemic buffers would be lowered, from the current 3% of global risk-weighted exposures to 2.5% for ING, 2% for Rabobank and 1.5% for ABN AMRO. And, secondly, the introduction of a floor for mortgage loan risk weighting would be postponed. The capital released as a result should enable the banking sector to continue lending to households and businesses. See <https://www.dnb.nl/nieuws/nieuwsberichten-2020/dnb387870.jsp> accessed 21 May 2020, (17 March 2020); <https://www.dnb.nl/consumenten/corona/index.jsp> accessed 21 May 2020. For more information on this, see EPM Joosen and CWM. Lieverse, Ondernemingsrecht 2020/VIII.
balance sheets must continue to give a true and fair view of the financial position. By letter of 1 April, the ECB asked the significant eurozone banks, when applying the international accounting rules, to take into account a potential rebound of the economy in 2020.69 Financial reporting specialists warn that guidance of this kind from regulators is extremely dangerous because IFRS 9 requires banks to predict their own financial health, and that of the money they lend, by reference to independent macroeconomic measures such as GDP or unemployment rates.70 Be that as it may, the various measures taken by the European financial regulators were confirmed on 28 April and elaborated in an Interpretative Communication issued by the European Commission.71 On the same day, the Commission published a proposal for a Regulation to relax the EU banking rules in connection with the coronavirus crisis.72

**Dividend distribution, share buybacks and bonuses**

In addition to all these relaxations, the ECB, EBA and Commission are urging banks to suspend dividend distributions, share buybacks and bonuses. Here too, the idea is that this will release capital to support the real economy in these difficult times (but see the previous section).73 The financial sector seems to be heeding these calls.74

**Postponement of various supervision deadlines**

Anyone who works in the financial sector knows just how much time and effort goes into complying with the increasingly complex web of financial supervision law, mostly emanating from the EU. For example, there is a long laundry list of reporting obligations with which financial institutions must comply, not only in relation to national and European regulators but also in relation to the financial markets. The coronavirus crisis has increased the pressure on staff. Things are not fundamentally different in the financial sector. Staff who are still healthy have to do not only their own work but also that of their sick colleagues, while their own productivity decreases due to all the lockdown measures, such as working from home while looking after children. And the crisis is also generating a lot of extra work. European financial regulators have, therefore, postponed numerous

69 See the ECB’s letter of 1 April 2020 (SSM-2020-0154), 5 <https://www.bankingsupervision.europa.eu/press/letterstobanks/html/index.en.html> accessed 21 May 2020.
70 See FD, ‘Boekhoudregel moet buigen voor crisis’ [Accounting Rule Must Yield to Crisis] (16 April 2020).
71 COM (2020) 169 final (28 April 2020).
72 COM (2020) 310 final.
73 ECB, 2020/C 102 I/01 (27 March 2020); EBA, ‘Statement on Dividends Distribution, Share Buy Backs and Variable Remuneration’ (31 March 2020) <https://eba.europa.eu/coronavirus> accessed 21 May 2020. See n 71 at point 4. EEIOPA has urged insurers and reinsurers to do the same. <https://www.eiopa.europa.eu/content/eiopa-statement-dividends-distribution-and-variable-remuneration-policies-context-covid-19_en> accessed 21 May 2020, (2 April 2020). DNB issued similar appeals on 27 March and 2 April. See <https://www.toezicht.dnb.nl/7/50-238213.jsp> accessed 21 May 2020 (banks); <https://www.toezicht.dnb.nl/7/50-238217.jsp> accessed 21 May 2020 (insurers).
74 See <https://www.cityam.com/ecb-financial-supervisor-calls-on-banks-to-cut-bonuses-due-to-coronavirus/> accessed 21 May 2020, (31 March 2020).
supervision deadlines to relieve pressure in the financial sector wherever possible, thereby allowing the sector to focus on its core activities.\footnote{See, for example, (i) ECB (12 March 2020) <https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312-43351a3ac.en.html> accessed 21 May 2020; (ii) ‘ESMA Postpones the Publication Dates of the Annual Transparency Calculations for Non-equity Instruments and for the Quarterly Systematic Internaliser Data for Non-equity Instruments Other Than Bonds’ (9 April 2020) (ESMA70-155-9817); (iii) EBA (12 March 2020) <https://eba.europa.eu/eba-statement-actions-mitigate-impact-covid-19-eu-banking-sector> accessed 21 May 2020; EBA, ‘Further Actions to Support Bank’s Focus on Key Operations: Postponed EBA Activities’ (25 March 2020) <https://eba.europa.eu/eu/coronavirus> accessed 21 May 2020; (iv) EIOPA, ‘EIOPA Statement on Actions to Mitigate the Impact of Coronavirus/COVID-19 on the EU Insurance Sector’ (17 March 2020) (EIOPA 20-137); EIOPA, ‘Recommendations on Supervisory Flexibility Regarding the Deadline of Supervisory Reporting and Public Disclosure Coronavirus / COVID-19’ (20 March 2020) (EIOPA-BoS-20/236); DNB has announced similar measures. See, for example, (i) <https://www.toezicht.dnb.nl/7/50-238204.jsp> accessed 21 May 2020, (insurers); (ii) <https://www.dnb.nl/nieuws/dnb-nieuwsbrieven/nieuwsbrief-pensioenen/nieuwsbrief-pensioenen-nen-april-2020/index.jsp> accessed 21 May 2020, (pension funds); (iii) <https://www.toezicht.dnb.nl/7/50-238233.jsp> accessed 21 May 2020, (banks). The same is true of the Dutch financial markets regulator AFM: <https://www.afm.nl/nl-nl/professionals/nieuws/2020/mrt/afm-schort-uitvragen-deels-op-tot-1-juni> accessed 21 May 2020.}

**Curbs on short-selling**

In times of crisis, the volatility of the financial markets sometimes encourages investors to speculate on falling share prices by selling short. Now this is happening once again. And if investors go short on a large scale, share prices may fall extra sharply. European financial market supervisor ESMA can prohibit short-selling throughout Europe in the event of exceptional market circumstances.\footnote{See Art 28 of Regulation (EU) No 236/2012 (Short Selling Regulation).} And national regulators can prohibit short-selling in their own Member State for the same reason.\footnote{See Art 20 of Regulation (EU) No 236/2012.} So far, the competent regulatory authorities in Spain, Italy, France, Belgium, Greece and Austria have done so.\footnote{See <https://www.esma.europa.eu/about-esma/covid-19> accessed 21 May 2020. As of 19 May the national bans on short selling were lifted again, see <https://www.esma.europa.eu/press-news/esma-news/esma-%E2%80%93-non-renewal-and-termination-short-selling-bans-austrian-fma-belgian-fisma> accessed 21 May 2020, (18 May 2020).} As yet, ESMA sees no reason to introduce an EU-wide ban on short-selling. However, it has lowered the threshold for reporting net short positions to supervisors to ensure that developments can be monitored even more closely than usual.\footnote{See ESMA70-155-9546 (16 March 2020).}

14. Completion of the EBU

The coronavirus outbreak probably spells trouble for some important ongoing European projects. For example, the EBU is not yet complete as the third pillar—an EU-funded Deposit Guarantee Scheme (DGS)—is not yet in place. Under the existing European Deposit Guarantee Directive, it is already the case that if a bank in the EU is unable to meet its payment commitments, an aggrieved depositor (saver) can recover up to a maximum of EUR 100,000 from the deposit guarantee fund. Each Member State has (or should have) set up such a fund, which is jointly financed by the banks in that Member State. The idea now is for the financing of the DGS within the eurozone to be raised to the European level.\footnote{For the Commission’s initial proposal, see COM (2015) 586 final. For more information, see: V Colaert, ‘European Deposit Insurance System (EDIS): Third Pillar of the Banking Union or Dead End?’ in Busch and Ferrarini (n 20) ch 14.} But the response from the Netherlands and Germany in particular has
been lukewarm. If an Italian, Spanish, Portuguese or Greek bank goes bankrupt, the
Dutch and German banks would have to contribute. The Netherlands and Germany have
always indicated that they will only agree to an EU-funded DGS if the NPLs on the balance
sheets, particularly of the south European banks, are reduced to an acceptable level. As
Spain, Italy and Portugal were well on the way to reducing the size of the NPLs on their
banks’ balance sheets, there was some prospect of introducing the third pillar of the EBU.
However, the coronavirus outbreak has caused the volume of NPLs on bank balance sheets
across Europe to rise sharply again. Unfortunately, Greece has made insufficient progress in
cleaning up bank balance sheets, and the current crisis has now added to the problems. An
EU-funded DGS, therefore, seems further away than ever. However, a crisis can also result
in greater centralization. Greek central bank president Stournaras has already called for the
establishment of a European bad bank to which all non-performing exposures should be
transferred.81 Whether this form of European solidarity is feasible remains to be seen.

15. The European CMU

The plans for a European CMU are intended to make it easier to marry supply and de-
mand for capital in Europe, especially across borders. This can be done through the inter-
mediary of a bank, the capital markets or alternative channels such as crowdfunding. In
addition, more non-bank funding reduces dependence on the traditional banking sector,
allowing economic shocks to be absorbed more effectively. The theory is splendid, but as
matters stand a European CMU is unfortunately proving by no means easy to achieve.82
Of course, this project had already been badly affected by Brexit, because the City of
London—Europe’s financial heart—is no longer participating. Now the coronavirus crisis
has added to the woes. Investors and the business community are being hit hard. And if
investors have capital available, there is a good chance that they would prefer to invest it
in their own country rather than elsewhere in Europe. After all, in times of uncertainty,
people still opt to stay close to home.

16. Brexit

Brexit was already causing the UK to slip into recession, but the coronavirus outbreak
means that the economic consequences are likely to be even more dramatic. According to
the UK Office for Budget Responsibility, the economy may shrink by 35 per cent in the se-
cond quarter of this year, the largest contraction in the UK economy since World War

81 See FD, ‘Greek Central Bank President Advocates Creation of a European Bad Bank’ (19 April 2020); FD, ‘Moet politiek
ingrijpen om banken van giftige leningen af te helpen?’ [Must Politicians Intervene to Help Banks Jettison Toxic Debts?] (22
April 2020). For more about NPLs, see E Avgouleas, ‘The EU Framework Dealing with Non-performing Exposures’ in Busch
and Ferrarini (n 20) ch 8.

82 For more about this, see D Busch, ‘Capital Markets Union’ in F Fabbrini and M Vento (eds), Research Handbook on EU
Economic Law (Edward Elgar 2019) 474–6; D Busch, E Avgouleas and G Ferrarini, Capital Markets Union in Europe (OUP
2018) (both with further references).
II. Naturally, the EU too is currently suffering from the disastrous consequences of the coronavirus outbreak. Both parties, therefore, have every incentive to conclude a favourable future trade deal. Unfortunately, time is running out. The parties have until 31 December of this year to conclude a trade deal, unless they decide by 1 July 2020 to extend the current transition period for a maximum of one or two years. However, extension would not appear to be an option for the British. Moreover, the negotiations are reported to have reached a total deadlock.

17. The European climate plans

The EU has launched ambitious climate plans. According to the action plan on sustainable finance, the financial sector must play a key role in this green transition by bringing together supply and demand for green capital. But as the current crisis has reduced the amount of capital available generally (see Section 15), less capital is also available for the transition to a greener society. This applies not only to the private sector but certainly also to the national governments and the EU. Implementation of the climate plans is likely to be delayed by the coronavirus crisis. This is particularly tragic since a link may exist between climate change and the outbreak of pandemics. A delay in the realization of the climate plans would, therefore, be unacceptable. However, two rather more positive notes may perhaps be made. First, the coronavirus crisis may help us to realize that a video link, despite all its limitations, works quite well, and that flying around the world for face-to-face meetings is not really necessary. And, secondly, the massive state aid provided by governments to their corporate sector (eg KLM-Air France) gives them the opportunity to impose green conditions.

18. Conclusion

This overview shows that the EU is doing its best to make a worthwhile contribution to tackling the coronavirus crisis. As always, however, this is being done in typical Brussels
fashion, and primary responsibility for tackling the crisis lies with the Member States themselves. It is also clear that the crisis has once again laid bare the divisions between north and south in Europe. These divisions are particularly apparent in relation to the issue of financing the European recovery fund and the power struggle that has now flared up between the German Constitutional Court on the one hand and the CJEU and the ECB on the other. Hard times lie ahead for the EU, and the situation is exacerbated by the attributional Brexit negotiations and the need to face up to the challenges posed by other nationalist forces within Europe and by various external threats such as President Trump’s ‘America First’ policy (although the President may be tripped up by his handling of the coronavirus crisis) and China’s economic emergence (although that may be somewhat slowed by the pandemic).89 Whatever happens, the EU seems likely to be scapegoated by certain political forces in both northern and southern Europe for all the misery caused by the huge economic slump triggered by the crisis. Naturally, the risk of disintegration is ever-present in times of crisis, but it is to be hoped that the EU will, as always, succeed in preventing this at the 11th hour. To be continued.

89 For more about this, see D Busch, NJR (2019) 1116ff.