

## How Can EU Law Contain Economic Discretion?

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### 1. Introduction

‘The better part of valor is discretion’.<sup>1</sup> Those who are wise avoid unnecessary risks. In legal systems, however, discretion is unavoidable. Law is plagued, as catalogued by the American critical legal studies movement, with indeterminacy.<sup>2</sup> It is left to judges to fill the gaps produced by technological change, legislative ambiguity, and diverse factual circumstances. What is interesting, therefore, is not whether legal systems produce discretion—all of them do—but how discretion is controlled. By answering that question, a whole host of further questions; about the role of judges in our societies, about their techniques of interpretation, and about the accountability of our legal and political systems; are revealed. Through analysing the management of discretion we reveal some of the fundamental components of legal orders.

This chapter focuses on the control of discretion in one particular system of rules: EU economic governance. By focusing on the EU, and on the

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<sup>1</sup> W Shakespeare, 1 Henry IV, Act V, sc. iv.

<sup>2</sup> See R Unger, ‘The Critical Legal Studies Movement’ (1980) 96 Harv L Rev 570.

economic example, two further potential amplifiers of discretion are introduced. On top of the inevitable indeterminacy of all legal texts, EU legal sources are complicated by the multi-level nature of the EU legal order. Many EU legal sources are of a particularly vague and contested character, from the abstract norms of EU primary law to the confusing and potentially contradictory rules of secondary law (the product of compromises and competing views between 28 Member States). As also outlined in other chapters in this volume, EU policy making is a highly discretionary space. In EU economic governance, the intersection of different social systems must be added to that mix. Norms in economic governance attempt to regulate a field—the EU economy—that is governed largely via economic concepts and mechanisms, which are not easily reducible to legal categories. Economic governance expands the EU discretionary space even further.

To this extent, there seems little point in writing an analysis evidencing the prevalence of discretion in the application of the rules of EU economic governance. The evidence—discussed briefly in Section 2—is indisputable.<sup>3</sup> While authors may disagree on the extent of freedom that policy makers in the economic field enjoy, few would contest the idea that the control of economic decision makers is a perilous and difficult task.

This chapter's purpose is therefore a different one. Assuming that the basic rules of EU economic governance provide policy makers with an extremely large margin of manoeuvre, what kind of strategies can the European judiciary, and other actors such as the EU's political institutions, use to control discretion? How can they ensure adherence to a basic level of legal accountability, i.e. faithfulness to the overall 'rules of

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<sup>3</sup> For other examples cataloguing this phenomenon, see D Chalmers, 'The European Redistributive State and a European Law of Struggle' (2013) 18 *ELJ* 5; A Menendez, 'The Crisis of Law and the European Crisis: From the Social and Democratic Rechtsstaat to the Consolidating State of Pseudo-Technocratic Governance' (2017) 44 *J Law Soc* 1; P Leino and T Saarenheimo, 'Sovereignty and Subordination: On the Limits of EU Economic Policy Coordination' (2017) 42 *ELR* 166

the game’ in the economic field? The chapter therefore aims to be inductive, exploratory, and forward looking. Rather than critique a particular judicial approach to the control of economic policy making over others, its purpose is to categorize and lay out different methodologies to control discretion in the economic field. The rationale, advantages, and disadvantages of each approach will be examined as openly as possible. It is ultimately for judges and policy makers to determine which of these approaches to choose.

Having discussed the main causes and challenges of economic discretion in Section 2, the chapter then examines four strategies for the control of discretion. Section 3 discusses strategies of deference; functional varieties of what in the human rights field is termed a ‘margin of appreciation’ in policy making. Section 4 discusses prescription, i.e. the idea of containing discretion through the production, via soft law or other instruments, of more detailed rules to prescribe economic conduct. Section 5 covers proceduralism, i.e. subjecting economic decision makers to forms of process-based and political accountability. Finally, Section 6 discusses interdisciplinary justification—the use by judicial actors in particular of (economic) knowledge as a means of limiting the space for discretionary action. The chapter concludes by analysing the political and constitutional values that underpin each of these strategies. As argued there, the choice of one strategy over another is likely to reflect back on the weight particular actors give to one value over another.

## 2. Discretion in EU Economic Governance

From where does discretion in EU economic governance emerge? While this is a complex question that could be approached from many angles, much of the answer derives from the complexity and dynamism of the economic system that EU economic governance attempts to regulate. Part of the core vocabulary of European Monetary Union (EMU) is the extent to which it ought to be ‘rules-based’. In this debate, the German finance minister has been a particularly stout advocate of strict rule

following in banking and fiscal regulation.<sup>4</sup> This, however, is a peculiar form of rule following. The rules to be adhered to are not universal and abstract rules of conduct, but often quantitative, state-specific targets, the fulfilment of which depends on meeting particular economic criteria.<sup>5</sup> These criteria are themselves contested between actors and depend on fluctuating economic cycles. As such, the idea of a 'rules-based' EMU is rather misleading. For most of the EMU's rules, there is no 'automaticity' that easily connects a state's fiscal performance with a clear outcome. Instead, we have a complex system of decision making and evaluation.

This can be illustrated through the commonly cited example of the excessive deficit procedure (EDP). While the secondary legislation governing this procedure seems to carry relatively clear quantitative boundaries—for example, the 3 per cent deficit target, or the setting of Medium-Term Budgetary Objectives (MTBOs) for states—this certainty is illusory. The terms of the applicable legislation, for good reasons, do not specify in precise detail what does or does not 'count' for the purposes of calculating deficits. Where they do—for example, via the definition of a 'structural deficit'—they rely on economic concepts with unclear boundaries.<sup>6</sup> Which items of expenditure, then, should count as

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4 See, e.g. 'Germany's Schäuble says Eurozone Must Stick to Fiscal Rules', Wall Street Journal, 28 October 2016, <<https://www.wsj.com/articles/germanys-schauble-says-eurozone-must-stick-to-fiscal-rules-1477658559>> accessed 17 May 2018.

5 On this point, see Leino-Sandberg and Saarenheimo Chapter 7 in this volume, and P Leino-Sandberg and T Saarenheimo, 'Sovereignty and Subordination: On the Limits of EU Economic Policy Coordination' (2017) ELR 2.

6 A further example is the definition of 'macro-economic imbalances' given in Art. 2 of Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306 [2011]), which is 'means any trend giving rise to macroeconomic developments which are

‘structural’ and which are fluctuations or one-off investments that can be expected as part of the economic cycle?<sup>7</sup> The same difficulty applies to the question of whether states are making adequate progress towards MTBOs in the context of the EDP’s corrective arm. The legal framework allows the Commission to take into account a number of vague factors in determining ‘progress’ towards MTBOs, from whether a state is implementing ‘major structural reforms’<sup>8</sup> to whether ‘temporary measures’ apply. What do these terms mean?

As Damian Chalmers has argued, these provisions seem less like rules than ‘decisions’: norms which are of a sufficiently vague character to allow the actor executing them unfettered discretion in determining how they might be applied to a concrete case.<sup>9</sup> They also rely on a complex determination of effects, e.g. of whether a particular structural reform really is ‘major’, and if so, whether it will have a positive budgetary effect. In this sense, while the ‘Six-Pack’ and ‘Two-Pack’ regulations were heralded as ‘tightening’ fiscal regulation, they had little option but to create a significant discretionary decision-making space into which a

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adversely affecting, or have the potential adversely to affect, the proper functioning of the economy of a Member State or of the economic and monetary union, or of the Union as a whole’. It is difficult to identify the outer limits of such a broad definition.

7 See also M Dawson, ‘The Legal and Political Accountability Structure of “Post-Crisis” EU Economic Governance’ (2015) 53 J Common Mark Stud 5, 987–8.

8 See Art. 5 of Council Regulation (EC) 1466/9 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies(amended): ‘When defining the adjustment path to the medium-term budgetary objective[..] the Council and the Commission shall take into account the implementation of major structural reforms which have direct long term positive budgetary effects.’

9 Chalmers (n 3) 682–4.

diverse array of Eurozone economies, and a highly fluctuating economic environment, could fit. For judicial actors, this discretionary space creates a real quandary. If the rules of the EDP, like other rules of economic governance, are open, nested in economic concepts, and reliant on uncertain future effects, how can judges ensure that economic decision makers (in the EDP case, the Commission) have exercised their functions faithfully?<sup>10</sup> Law seems to be playing catch-up with an economic and fiscal decision-making system able to easily evade its control.

### 3. Strategy 1: Deference

One answer to the quandary is not to play the game of ‘catch-up’ at all. Typically, when reviewing the actions of the EU institutions when engaging in policy making, and particularly when making complex technical assessments, the CJEU has adopted a highly deferential approach. This often involves checking merely whether a ‘manifest error of assessment’ or ‘abuse of power’ can be observed.<sup>11</sup> As Joana Mendes argues, a more expansive understanding of the CJEU’s approach in cases involving the supervision of executive discretion would involve anchoring judicial review in a (thin) conception of the public interest.<sup>12</sup> When making decisions of an economic nature, the Commission carries a duty of care to examine all of the relevant facts impartially, to accurately state those facts and to base their decisions on ‘the fullest information possible’.<sup>13</sup> The EU executive is thus provided with a broad margin of discretion, provided that it can demonstrate that it had adhered to principles of sound administration—based on accurate information and

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<sup>10</sup> Dawson (n 7) 888.

<sup>11</sup> E.g. Case C-42/84 Remia and Others v Commission [1985] ECLI:EU:C:1985:327; Case T-13/99 Pfizer Animal Health v Council [2002] ECLI:EU:T:2002:209

<sup>12</sup> J Mendes, ‘Discretion, Care and Public Interests in the EU Administration: Probing the Limits of EU Law’ (2016) 53 CML Rev 419.

<sup>13</sup> See also Hofmann Chapter 10 in this volume.

orientated towards the public interest. Once this basic threshold of reasonable conduct has been met, the Courts are prepared to give the institutions the benefit of constitutional doubt.

It is not challenging to read recent case-law in the field of economic governance in this light. In the infamous *Gauweiler* judgment, the CJEU's response to a reference by the German Constitutional Court allowed the ECB a high margin of discretion.<sup>14</sup> This allowance concerned two aspects of the judgment—firstly, the determination of whether the OMT programme of the European System of Central Banks (ESCB) had lain within the ECB's monetary and price stability mandate, and secondly, the proportionality of the programme. The *Gauweiler* judgment illustrates starkly some of the difficulties of adjudicating economic governance discussed in Section 2. Assessing whether OMT lay within the price stability mandate required a close analysis both of the purpose of the OMT programme and its likely effects.<sup>15</sup> For the CJEU, the purpose of OMT was to ensure the smooth functioning of the Monetary Transmission mechanism, i.e. the ability of central interest rate setting to filter into the wider economy, and into pricing and lending practices in particular.<sup>16</sup> Addressing whether or not the OMT programme was necessary to ensure the proper functioning of this mechanism is clearly an empirical question. Was the ECB's argument—that widening bond yields between EU states and economic uncertainty was acting as a decisive hindrance to the ability of monetary policy to be effective—convincing and observable?

This speaks to the most powerful argument for favouring deference as an approach to dealing with economic discretion. Clearly, empirical

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14 Case C-62/14, *Gauweiler and Others v Deutscher Bundestag* [2015] ECLI:EU:C:2015:400 (hereafter *Gauweiler*).

15 On effects-based reasoning in *Gauweiler*, see A Steinbach, 'Effects-Based Analysis in the Court's Jurisprudence on the Euro Crisis' (2017) 2 ELR 254.

16 *Gauweiler* (n 14) 51–2.

questions require empirical answers. For all the qualities of the CJEU Justices, they are not economists and are unlikely to carry as sophisticated an understanding of the transmission mechanism as the institution entrusted with this task under the EU Treaties.<sup>17</sup> The CJEU therefore—in answer to the question of whether OMT was within the ECB’s mandate—largely takes the ECB at its word, accepting the objectives and justification of the programme given by the ECB itself. In its proportionality review, the Court follows many of the traditional steps mentioned here, arguing that the OMT programme requires the making of complex technical assessments for which the ECB and ESCB are themselves competent, thus demanding a broad margin of discretion.<sup>18</sup> As there was no obvious error of assessment, as there was evidence that evidence-based, reasoned decisions had been given, and as limitations on the programme’s scope had been made, the ECB’s programme was consistent with Treaty rules.<sup>19</sup> Deference in this sense could be seen as a tool to preserve institutional balance, and the proper demarcation of institutional functions in the EU constitutional order.<sup>20</sup> A court that went beyond the limited thresholds demanded in *Gauweiler* could lay accused of over-stepping its constitutional mandate to apply rules of law, rather than to second-guess the judgments of institutions with explicitly non-legal tasks.

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17 The judgment has been defended on this basis, i.e. as allowing for a pluralist form of what Mathias Goldmann has playfully termed ‘mutually assured discretion’. See M Goldmann, ‘Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the Federal Constitutional Court and the ECB’ (2016) 23 *Maastricht J Eur Comp Law* 1.

18 *Gauweiler* (n 14) 68.

19 *Gauweiler* (n 14) 82–92.

20 See M Goldmann, ‘Constitutional Pluralism’ (n 17); see also M Goldmann, ‘Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review’ (2014) 15 *Ger Law J* 2.



The difficulty of course—a long-held obsession of administrative law<sup>21</sup>—is that such reasoning tends to make a mockery of the very purpose of judicial review of administrative action, which is to ensure that executive actors remain within their constitutional mandates. In simple terms, if the legality of the ESCB’s action rests on a determination of the OMT programme’s effects, and only the ESCB is competent to assess those effects, judicial review of its action seems a formalistic and perhaps even pointless exercise. Examining manifest errors and evidence gathering, and requiring a statement of reasons, seems to do little to mitigate this concern. A powerful and well-tasked EU institution seems unlikely to be careless enough—when conducting a programme of the size and significance of the OMT programme—to commit the kind of egregious mistakes judicial checks of this nature could remedy. Similarly, one need not be a cynic to suppose that the ECB’s Governing Council consulted its legal service before issuing the press releases and other documents signalling the objectives of the OMT programme. By this reading, strategies of deference do not protect but rather upend the institutional balance by abrogating the role of the CJEU in ensuring that this balance is maintained (e.g. by checking substantively, and not merely procedurally, whether EU institutions have respected the limits of their powers).<sup>22</sup>

The purpose of this analysis is not to criticize deference or the Gauweiler judgment, but rather to point to the trade-offs that deferential approaches to economic discretion pose. The uneasiness of these tensions may demand other strategies, including more extensive use of ex ante rule-making (a practice to which the next section now turns).

#### 4. Strategy 2: Prescription and Soft Law

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<sup>21</sup> See, for a classical account, JL Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law* (2005) 5 ILS 1.

<sup>22</sup>, C Joerges, ‘Pereat Iustitia, Fiat Mundus: What is Left of the European Economic Constitution after the OMT Litigation’ (2016) 23 Maastricht J Eur Comp Law 1.

The short analysis of Gauweiler discussed in the previous section makes the case seem much easier than it in fact was. The ESCB is not only bound by its formal Treaty mandate, but also by a plethora of other rules and standards.<sup>23</sup> Such standards—in both hard and soft law forms—abound in economic governance and could be seen as a further means of limiting the discretion of the actors who apply them.

A useful example is the one introduced in Section 2—the rules surrounding the EDP. Many of the vague standards referenced there, e.g. the definitions of a structural deficit or progress towards MBTOs—have been clarified by more detailed rules in delegated acts or soft law instruments. An example is the Commission’s publication in 2015 of a Communication clarifying some of the main rules of the Stability and Growth Pact (SGP).<sup>24</sup> As the Commission acknowledges, many of the SGP’s rules are unclear and hence carry the potential to create unpredictability and opacity.<sup>25</sup> In this light, the Communication provides some key criteria determining the circumstances under which the Commission will enforce provisions of the SGP without, the Commission insists, ‘changing or replacing the existing rules’.<sup>26</sup>

In respect to, for example, some of the vague provisions of the EDP discussed in Section 2, the Communication clarifies that significant structural investments or payments to European investment funds, such as the European Fund for Strategic Investments (EFSI), will not ‘count’

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23 On soft law in banking and financial regulation, see, J Schemmel, ‘The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market: Capturing the Administrative Influence’ (2016) 23 Ind J Global Legal Stud 455.

24 Commission Communication, ‘Making the Best Use of the Flexibility within the Existing Rules of the Stability and Growth Pact’, COM (2015) 12.

25 Ibid., 5.

26 Ibid., 3.

towards assessing thresholds for the activation of sanctioning procedures.<sup>27</sup> Equally, when measuring progress towards MTBOs, the Commission will take into account whether Member States have implemented recommendations made under the European Semester and will consider closing a deficit procedure early if any excess is due to structural reforms with likely positive budgetary effects.<sup>28</sup>

The Communication is a form of ‘soft law’. It nevertheless could be seen as an example—pursued by the Commission itself—of placing what would otherwise be unfettered discretion within particular bounds. By defining or providing criteria for terms that are unclear in legislative acts, i.e. what constitutes a ‘one-off payment’ or a ‘major structural reform’<sup>29</sup>, guidance is given to the addressees of the SGP (i.e. the Member States) and to citizens on how particular rules will be applied. If the problem of discretion in economic governance is one of how to assess executive conduct *ex post*, a solution could in this sense be encouraging executive actors to produce more detailed rules of conduct to guide their action *ex ante*.

Such rules or norms could be seen as ‘self-binding’ standards that could then be used to assess the limits of executive action by reviewing Courts. While the SGP Communication is a soft law instrument, some of its content could be seen as sufficiently precise to create legal obligations.<sup>30</sup>

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<sup>27</sup> Ibid., 5–7.

<sup>28</sup> Ibid., 13.

<sup>29</sup> See, e.g. the tests for this listed under page ten of the Communication: that structural reforms must be major, must have long-term budgetary effects and must be implemented (including via a submitted structural reform plan).

<sup>30</sup> On the judicial review of soft law in the EU more generally, see O Stefan, ‘Helping Loose Ends Meet: The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance’ (2014) 21 Maastricht J Eur Comp Law 359

In recent case-law, the CJEU has significantly limited the ability of the EU institutions to avoid judicial review on the basis that obligations were laid out in non-binding policy instruments. In *UK v ECB*,<sup>31</sup> on the Euro area clearing system, the UK had challenged before the General Court (GC) elements of an ECB policy framework, particularly rules that credit institutions holding certain product categories denominated in euros had to be incorporated in Euro area. Was this an annulable act? According to settled case-law, regardless of the form in which an act appears, ‘an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.’<sup>32</sup> As this act was published, used words of a mandatory nature, and carried specific content and a specific addressee, it was deemed an act of hard rather than soft law and hence was reviewable. By establishing a policy framework that was relied upon by those to whom it was addressed, the ECB had bound its own discretion (even if such a framework would not bind other EU institutions). Perhaps, in this way, soft law can be used to address the challenge of discretion by encouraging economic actors to create more detailed standards for themselves (i.e. standards that Courts could later patrol).

There remain, however, profound difficulties with the use of prescription or soft law to meet the challenge of discretion in economic governance. Some of these challenges are simply new variants of long-held problems with regard to rationale attempts to codify legal standards. One of the core concerns of efforts to codify continental civil law in the nineteenth century was to rationalize disparate legal standards and place the political branch at the centre of legal reform.<sup>33</sup> More detailed rules,

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31 Case T-496/11, *United Kingdom of Britain and Northern Ireland v European Central Bank (ECB)* [2015] ECLI:EU:T:2015:133.

32 *Ibid.*, para. 30.

33 On this rationale, see the earlier justifications put forward by Bentham in *Of Laws in General*, HLA Hart (ed), (Athlone Press, 1970), Ch. 19.

covering a wide range of circumstances, would better guide judges and administrators and avoid unwarranted discretion.

The difficulty was the mismatch between the complexity of social relations and the goal of ‘simplicity’ in rule making.<sup>34</sup> As technologies and social circumstances changed, drafters of legal codes had two options: either they had to create increasingly detailed rules to proscribe conduct—rules which began to conflict with each other, to grow, and ultimately to defeat the goals of rationale simplification; or, they were forced to couch rules in broad language and categories—duties of care or ‘reasonableness’ that did little to meaningfully constrain administrative or judicial discretion. Either way, new pathways of discretion were revealed.

While the current corpus of soft law in economic governance is limited, such a dilemma is not unimaginable in the economic governance case. To take the example given here, while the Euro clearing case provided some criteria regarding when a policy framework would tie the ECB’s hands, it remains unclear how these criteria could be transferred to other cases. To apply the CJEU’s criteria to the example of the Commission’s Communication on the SGP, this guidance is public and has a specific set of thresholds and addressees (Member States). However, the Commission also repeatedly states that it does not intend to ‘change or replace existing rules’ and that the guidance is tied to the political guidelines for the new Commission and hence part of policy making.<sup>35</sup>

While the Communication narrows the Commission’s discretion, it is still likely to be overtaken by new events (e.g. changes in EU programmes such as the EFSI, or an altered economic landscape), requiring new guidelines to which the obligations are unlikely to be clear. As the body of soft law governing economic governance grows, so will grow the ability of economic decision makers bound by one rule to simply point to another

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<sup>34</sup> For an overview of some of these criticisms, see M Reimann, ‘The Historical School Against Codification: Savigny, Carter and the Defeat of the New York Civil Code’ (1989) 37 Am J Comp L 1.

<sup>35</sup> On the latter, see SGP Communication (n 24) 3

more favourable to their chosen decision. The growth of soft law is thus just as likely to create a morass of unclear obligations, unknowable to the ordinary public, as it is to lead to the precision and clarity which animated the original rationale stated in the Commission's SGP Communication.

Finally, one could wonder what kind of incentives a shift towards prescriptive rule making, particularly a form of rule making policed by the European Courts, will create. By judicially reviewing acts, such as the ECB's policy framework or the SGP Communication, we may encourage institutions not to create such norms in the first place. In the case of the SGP Communication, the Commission had already been applying many of its provisions in practice in any case<sup>36</sup>; adopting a relatively flexible and hands-off approach to the corrective arm of the SGP in particular. By adopting the Communication, the Commission made transparent the norms guiding its activities; at the same time, by raising the spectre of judicial review of these norms, a future Commission may be reluctant to publicize such evaluative frameworks again, on the basis that policy documents could tie its hands in future activities. By using soft norms to limit discretion, transparency in policy making may, in fact, be reduced, encouraging the EU institutions to keep private and away from public view the detailed criteria guiding its decision making.<sup>37</sup> Like strategies of deference, the use of prescription may also involve trade-offs between limiting discretion and encouraging open and transparent policy making.

## 5. Strategy 3: Proceduralism and Political Accountability

Section 3 analysed deference as a means of dealing with economic discretion. It described how forms of deference create a dilemma between, on the one hand, the need to respect the principle of institutional balance and, on the other hand, the need to ensure that

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<sup>36</sup> On the Commission's lenient application of the SGP, see, D Adamski, 'Economic Policy Coordination as a Game Involving Economic Stability and National Sovereignty' (2016) 22 ELJ 2.

<sup>37</sup> On potential trade-offs between transparency and judicial review in EU law, see D Adamski, 'Access to Documents, Accountability and the Rule of Law: Do Private Watchdogs Matter?' (2014) 20 ELJ 4.

Treaty rules are properly fulfilled. One question is whether procedural requirements, particularly those guaranteeing greater political scrutiny and deliberation of economic decisions, could provide a way out, or a compromise position, regarding this dilemma.

To sketch the compromise requires making a detour to other areas of EU policy. One of the key developments in EU policy making in 2015–16 was the announcement by the Commission of an extensive ‘better regulation’ package.<sup>38</sup> While extensively watered down in the eventual inter-institutional agreement on better law-making agreed between the three political institutions,<sup>39</sup> the purpose of the agenda was to simplify the EU regulatory process and agree on a common method for forming, evaluating, and implementing EU proposals. A central tool in this regard has been the generalization of impact assessment (IA) as a means of measuring the costs and benefits of EU policy and its effects on different actors. For its proponents, IA is a means of rationalizing policy making, ensuring that EU policies are based on evidence and incorporate different viewpoints in the decision-making process.<sup>40</sup> For sceptics, IA also carries a political purpose: while its emphasis on costs and benefits places an undue burden on social and environmental proposals with high implementing costs, IA could also be used as an instrument to make amendment of Commission proposals by the other EU institutions more difficult.<sup>41</sup>

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38 Commission Communication, ‘Better Regulation for Better Results: An EU Agenda’, COM (2015) 215.

39 Inter-institutional Agreement of 13 April 2016 on Better Law-making (OJ 2016 L 123/1)

40 On this academic debate over IA in the context of better regulation, see M Dawson, ‘Better Regulation and the Future of EU Regulatory Law and Politics’ (2016) 53 CML Rev 5, 1214–28.

41 See, e.g. Corporate Europe Observatory, ‘“Better Regulation”: Corporate-friendly Deregulation in Disguise’ (2016)

One of the more interesting aspects of the discussion over better regulation is whether IA could be used by the European Courts as a tool to control executive discretion and to ensure compliance requirements demanded by EU primary law.<sup>42</sup> For example, one demand of the Commission's package is that IAs provide a clear assessment of the legal basis for EU action, including an account of how requirements of subsidiarity and proportionality have been met.<sup>43</sup> This requirement—as the inter-institutional agreement on Better Regulation states—extends to all 'legislative and non-legislative initiatives, delegated acts and implementing measures which are expected to have significant economic, environment or social effects'.<sup>44</sup> Other elements of the better regulation package are also of relevance in this regard: the Commission's better regulation guidelines require a minimum 12-week stakeholder consultation period for EU measures, widening the scope of consultation requirements to include delegated and implementing acts.<sup>45</sup> These elements of better regulation could be seen as significantly contributing to the ability of EU officials to meet constitutional requirements, such as the duty to give reasons protected under Art. 296 TFEU or the commitment under Art. 11 TEU to participatory democracy.

Importantly for our question, better regulation also provides Courts with tools to assess whether constitutional requirements have been

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<<https://corporateeurope.org/power-lobbies/2016/06/better-regulation-corporate-friendly-deregulation-disguise> > accessed 17 May 2018.

42 See A Alemanno, 'A Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control' (2011) 17 EPL 3.

43 Commission Staff Working Document, European Commission, 'Better Regulation Guidelines' (SWD, 2015) 111: 29.

44 Inter-institutional Agreement (no 39), 13.

45 Ibid., 52.



fulfilled.<sup>46</sup> IAs have increasingly found their way into the CJEU's case-law.<sup>47</sup> For example, in *Vodafone* the CJEU accepted that the Commission had demonstrated via its IA that variations in roaming charges constituted a meaningful barrier to the internal market and that harmonization of these charges constituted a proportionate measure without obvious alternatives.<sup>48</sup> Similarly, in *Afton*, while the CJEU acknowledged that IAs were not binding on the Council or Parliament, they could act as an indicator of the evidence base used by the Commission when proposing legislative measures.<sup>49</sup> The President of the Court himself has argued that IAs could form the basis of a 'process-oriented' form of judicial review in which the European Courts do not 'second guess the intentions of the legislator' but confine themselves to assessing whether basic procedural requirements of good governance have been met.<sup>50</sup> In this sense, IA and better regulation could be part of an enhanced form of the strategies of deference discussed earlier: while the substantive decisions of policy makers should not be assessed judicially, the EU Courts should enlarge their review of the procedural and political steps decision makers undertake prior to adopting policy.

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46 See, on this question, A Meuwese and P Popelier, 'Legal Implications of Better Regulation: A Special Issue' (2011) 17 EPL 455

47 See for a fuller account, D Keyaerts, 'The Impact of Better Regulation in the Case-law of the European Court of Justice' (2012) 2012 Eur J Risk Regul 241

48 Case C-58/08, *Vodafone and Others* [2010] ECLI:EU:C:2010:321, para. 45.

49 Case C-343/09, *Afton Chemical Limited v Secretary of State for Transport* [2010] ECLI:EU:C:2010:419

50 See K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 1 Research Papers in Law 1

Law thus acts, under this model, as a guarantor of a rigorous and pluralistic decision-making process.<sup>51</sup>

How could this apply to the economic governance example? A thin reading of procedural review in economic governance may simply be a beefed-up version of the existing requirement that decision makers give reasons for their decisions and base them on impartial evidence. The CJEU could require, for example, that actors such as the ECB demonstrate the necessity of their policies, or their link to the ECB's Treaty-based mandate, through more than mere press releases and abstract reasons; rather, it could insist on more detailed forms of evidence, e.g. IAs (which would then be necessary to establish a presumption for more lenient forms of judicial review based on the notion of 'manifest error'). A thicker reading would be the requirement for decisions to be based not only upon evidence, but also upon the integration, depending on the type of economic decision, of affected stakeholders. This radical departure could involve the development of an EU equivalent to the American interest representation model of administrative review, whereby Courts require decision makers to demonstrate the inclusion in policy making of either directly affected actors or public interest advocacy groups able to demonstrate a legitimate interest in decision making.<sup>52</sup> Discretion is narrowed not by demanding responsiveness to substantive legal standards per se, but rather through demanding the inclusion in economic decision making of a wider range of affected actors.

What would be lost if the 'thin' or 'thick' models of procedural review were adopted? Taking the thin model first, it potentially falls into exactly the same trap—of reducing judicial review to formal 'box-ticking'—as

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<sup>51</sup> Lenaerts relies in his article on broader theories of judicial review particularly the defence offered by the American constitutional theorist, John-Hart Ely. See J-H Ely, *Democracy and Distrust* (Harvard University Press, 1980).

<sup>52</sup> See RB Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harv L Rev 1711.

strategies of deference. It is notable that the Commission itself, when providing guidance to policy officers on IA, explicitly points to the use of IA as a method to guard against judicial challenges to the validity of EU policy.<sup>53</sup> IA, just as it could assist the judge in checking executive discretion, could also act as a shield against judicial scrutiny.<sup>54</sup> The danger, unacknowledged in Lenaerts' conception of process-orientated review, is that the mere presence of IA becomes an indicator that compliance with constitutional requirements has been fulfilled and thereby that judicial scrutiny of economic decisions, such as whether they carry a legal base or meet subsidiarity and proportionality requirements, is unnecessary (or can be conducted under a lower threshold of scrutiny).

At the very least, the incorporation of IA into judicial review places greater pressure on the adequacy of the IA process itself. The better regulation package contains some measures to improve IA, e.g. creating a regulatory scrutiny board, staffed by external members, to review the IA process and veto poor-quality assessments.<sup>55</sup> At the same time, the IA process carries plenty of critics, not least those who accuse it of carrying

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53 'Properly assessing any impact on fundamental rights in the preparatory stages of new legislation will therefore not only contribute to finding the most appropriate solution to a given problem, but will also strengthen the defence of EU legislation against legal challenges before the European Court of Justice.' Commission Staff Working Document, European Commission, 'Operational Guidance on Taking Account of Fundamental Rights in Commission Impact Assessments', (SEC, 2011) 567, 5.

54 Dawson (n 40).

55 See Decision on the Establishment of an Independent Regulatory Scrutiny Board, C (2016) 3263, <[https://ec.europa.eu/info/sites/info/files/decision-on-the-established-of-an-independent-regulatory-scrutiny-board\\_may2015\\_en.pdf](https://ec.europa.eu/info/sites/info/files/decision-on-the-established-of-an-independent-regulatory-scrutiny-board_may2015_en.pdf) > accessed 17 May 2018

a deregulatory bias,<sup>56</sup> or of being easily ‘gamed’ by evidence constructed around a policy decision that has already been hierarchically agreed (and therefore is immutable to consultation or change via the IA process itself).<sup>57</sup> These criticisms seem to suggest that, rather than rely on IA as a tool to limit discretion, the EU’s judiciary needs to play a role in scrutinizing, rather than deferring to, the IA process.

The thicker version of procedural review faces challenges of its own. Some of these can be discerned from the US debate.<sup>58</sup> While stakeholder and public interest inclusion can provide a new circle of actors to check and hold accountable administrative action, it is questionable whether courts carry the tools to properly police this process. One question, for example, is whether economic decision makers will include a fair balance of affected interests and whether those unfairly excluded can remedy their exclusion.<sup>59</sup> Another is the balance of power, resources, and knowledge between civil society actors, which may narrow discretion but does so in favour of more privileged and resourced

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56 See, e.g. the view of organized labour on the better regulation agenda and the use of IA, ‘ETUC Declaration on Better Regulation’, 18 June 2015, <<https://www.etuc.org/documents/etuc-declaration-better-regulation#.WN4tsYXI04A>> accessed 17 May 2018.

57 See K Wegrich, ‘Which Results? Better Regulation and Institutional Politics’ (2016) 6 Eur J Risk Regul 369.

58 On some criticisms and alternatives to the US public interest model, J Freeman, ‘Private Parties, Public Functions and the New Administrative Law’ (2000) 52 Adm Law Rev 3

59 See, by analogy, the role of the EU judiciary in policing representativeness in the context of the European social dialogue in N Bernard, ‘Legitimising EU Law: Is the Social Dialogue the Way Forward? Some Reflections Around the UAEPME Case’ in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart, 2000).

participants.<sup>60</sup> Finally, there is the always uncertain relation between participatory and representative models of democracy: what should economic decision makers, and judges checking administrative actors, do when duties towards civil society participants and towards general electoral processes (in the EU case, the views of the European Parliament, for example) conflict?

Other challenges more specifically relate to the EU, and economic governance, case. The final problem—of a conflict between representative and participatory democracy—does not apply in the case of many aspects of economic governance, principally because economic decision makers may be intentionally insulated from both forms of democratic input. To take Gauweiler as an example, the ECB's mandate provides, with good reason, a high level of political independence from other institutions, and from national political opinion. To what extent, therefore, should one expect or want actors in the banking field to be responsive to, or include, civil society input in their decision making? By providing the ECB with a fixed mandate via the Treaty, its writers seemingly excluded the responsiveness of that mandate to the accountability of interest groups (with ECB accountability restricted to formal dialogue mechanisms, with no sanctioning measures, such as the Monetary Dialogue undertaken between the ECB and the European Parliament).<sup>61</sup> 'Thick' proceduralism simply sits uneasily with the very functions and design of the system of EU economic governance (or at least particular aspects of it).

Procedural forms of judicial review and political accountability offer some mechanisms for judges to use political institutions as intermediaries in

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<sup>60</sup> On this critique in the EU context, see P Magnette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?' (2003) 51 *Political Stud* 144.

<sup>61</sup> On this form of ECB accountability, see S Collignon and S Diessner, 'The European Central Bank's Monetary Dialogue with the European Parliament: Efficiency and Accountability during the Euro Crisis?' (2016) 54 *J Com Mar St* 6.

narrowing economic discretion; at the same time, they carry the risk of doing too little or too much—either of retreating into formal box-ticking or conflicting with the very *raison d'être* of the EU's economic functions. A final alternative may be to look elsewhere—at the process via which economic decisions are justified and defended.

#### 6. Strategy 4: Interdisciplinary Justification

To illustrate the fourth and final approach, it may be useful to again return to the Gauweiler decision. At the decision's heart was the Court's acceptance that the OMT programme was a necessary element of the ECB's monetary transmission mechanism and therefore part and parcel of the ECB's core monetary policy mandate. As those who have defended the decision have argued, how could the Court have done otherwise? To deny the centrality of the OMT to the transmission mechanism would have been to substitute the judgment of the Court for that of the ECB on a fundamentally economic question: one which lawyers are ill-equipped to judge.

How well does this reasoning hold up? For all their limitations, judges rule on empirical and economic questions all the time. The EU's judiciary is no different. In determining whether national regulation constitutes a barrier to the four freedoms, the EU Courts face no choice but to wade into questions of what constitutes a market barrier, and how such a barrier may be proportionality designed.<sup>62</sup> In competition law, the Court must ask, when adjudicating Articles 101 and 102 of the Treaty, whether certain agreements 'distort' the market or constitute an 'abuse' of a dominant position. In doing so, they are inevitably drawn into the domain of general economics. 'The market'—essentially an economic concept—may also be a central, if not the central, concept of substantive EU law.<sup>63</sup>

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<sup>62</sup> See Nehl Chapter 6 in this volume.

<sup>63</sup> On the EU Court's evolving and contested conception of the market, see C Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart, 2016).

The behaviour of judges in domains like competition law may in this sense offer a guide as to how judges may seek to limit discretion in the field of economic governance. In competition law, too, the EU judiciary often limits its engagement with general economics. Tools to do this include the idea that certain practices or agreements necessarily distort competition regardless of their substantive effects on competitors.<sup>64</sup> Many cases, however, are not so easy. Given the immense power the Commission, in particular, wields in this field—as a first instance arbiter of competition infringements—the Courts require tools to check whether the Commission itself may be abusing its own position, or overstepping the mandate that Articles 101 and 102 provide.

One of the tools the Courts use to police the Commission's enforcement powers is to demand that the Commission justify its enforcement decisions. Decades of judicial prodding of the Commission to give transparent reasons for competition decisions has led the Commission to itself adopt standards to guide its decisions under Art. 101 and 102.<sup>65</sup> While these standards could be seen as akin to the soft law guiding the SGP mentioned in Section 4, they also incorporate standard economics into the process of competition review. This 'more economic approach' is particularly used to prioritize intervention. In its 2009 paper on priorities for the enforcement of competition infringements, the Commission promises to intervene to prohibit anticompetitive and exclusionary conduct only 'where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant under-taking.'<sup>66</sup> Via the

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64 See, e.g. exclusivity rebates as such an example in Case T-286/09, *Intel v European Commission* [2014] ECLI:EU:T:2014:547 (as rejected by the subsequent opinion of A-G Wahl on appeal).

65 See Commission Communication on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, COM (2009) 45.

66 *Ibid.*, 23

‘as-efficient’ comparator approach, the Commission must utilize evidence, drawn from standard welfare economics that, absent the practice deemed illegal, an efficient competitor would be able to compete with the pricing or marketing strategy of the dominant market actor.

Some scholars have considered whether such a test should also inform judicial review.<sup>67</sup> Even if judges are not economists, mainstream economics can act as a means of guiding judicial review of Commission discretion. The Courts in this sense should check which impacts an anticompetitive practice surveyed by the Commission is likely to have on consumers, and assess whether tests like the ‘as-efficient comparator’ have been adequately fulfilled. Certain features of the EU Courts, such as the concentration of competition cases in the GC, could assist this function, encouraging the selection for competition cases of judges with familiarity with the essential requirements of competitive markets. By incorporating standard economics into judicial reasoning, the Courts could send a simple message: while the Commission carries discretion, that discretion is not unlimited, with substantive economic knowledge used as a baseline from which the Commission’s use of discretion can be assessed.

The fourth strategy for dealing with economic discretion would involve generalizing the ‘more economic-based’ approach to the broader economic governance case. To return to Gauweiler, if the crux of the case is the ECB’s insistence that OMT is a necessary element of the monetary transmission mechanism rather than a tool of general economic policy, we require an EU judiciary that carries the disciplinary tools to verify that claim. This requires, for example, reasoning in the alternative—what would be the likely impact on the euro area, and on the ability of interest rate setting to affect prices, were an OMT scheme absent? The Court’s approach would move from one of deference to what Ronald Reagan

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67 See, e.g. M Albert and S Voigt, *The More Economic Based Approach to Competition Law* (Mohr, 2007); P Ibanez-Colomo, ‘Beyond the More Economics-based Approach: A Legal Perspective on Article 102 Case-law’ (2016) 53 CML Rev 5.



once dubbed, 'trust but verify', i.e. the assumption that other EU institutions act in good faith combined with the requirement that empirical claims are vigorously assessed and evidenced.

Clearly, such an approach would require more than a change in judicial reasoning. It may require further tools or institutional reforms. One could be providing judges with heightened training in the economics of Monetary Union. Another could be permitting greater use of *amicus curiae*, i.e. briefings from high-level economists and think tanks (the Bruegels or Institutes for Fiscal Study of this world), providing up-to-date economic knowledge to scrutinize the empirical claims forming the basis of economic decisions.<sup>68</sup> Finally, a more radical approach would be to make use of the possibility, envisaged under Art. 257 of the TFEU, to attach judges to a specialized tribunal of the Court. The rationale for such a tribunal would be to assess decisions under EU economic governance via judges with a narrower background and specialization in the law and economics of EU economic governance. Such an approach would have a single aim: to bridge the gap between the legal and economic worlds. By doing so, it would narrow the enormous discretion that this gap currently affords to actors such as the ECB.

Clearly, such an approach would not be plain sailing. Even in the field of competition law, the 'more economics-based' approach faces plenty of criticisms, particularly as it applies to judicial review. One is that such an approach encourages a disinterested weighing of costs and benefits to consumers, undervaluing process-based elements of Treaty rules (e.g. in the competition field, the idea of equality of opportunity between competitors regardless of any 'pro-competitive effects' of actions by dominant undertakings).<sup>69</sup> Similarly, in the economic governance field,

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68 On this more dialectical approach to judicial reasoning in the EU Courts, see V Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 *Va J Intl L* 307.

69 See WPJ Wils, 'The Judgment of the EU General Court in Intel and the so-called 'More Economic Approach' to Abuse of Dominance' (2014) 37 *World Competition* 4.

Treaty rules, such as the ‘no bail-out clause’ of Article 125 TFEU, may serve certain goals—like avoiding moral hazard—irrespective of their overall impact on the welfare of citizens.

A further difficulty is that—by using mainstream economics to control discretion—we treat mainstream economics as natural and uncontested. The EU Courts could end up forcing the EU’s institutions to adopt a mainstream approach to economics even where evidence points to its failure in dealing with regulatory problems. One criticism of judgments like *Gauweiler* or *Pringle* is that it engages in too much mainstream economics, rather than too little.<sup>70</sup> By elevating austerity and conditionality in these cases to the status of a constitutional principle, the Court legalizes an economic approach to Article 125 in particular that has caught Greece in a vicious spiral of stagnation and debt.

If we accept that economics, like law, is a pluralist discipline, and that different economists may have different views on how something like the monetary transmission mechanism or the ‘no bail-out’ rule ought to be applied, we also might accept that the ECJ should not privilege one approach of economics over others.<sup>71</sup> At the very least, a justification-based approach based on mainstream economics would place the ECJ itself at the centre of a battle between economists (in a world where many EU citizens distrust the notion of economics as a neutral scientific discipline, able to objectively resolve particular social problems). By distancing judges from the task for which they are qualified—the ‘objective’ application of rules—an approach based on economic justification could also distance the EU judiciary from two of the central planks of their legitimacy: their expertise in the law and their ability to apply that expertise impartially. Justification seems the most rigorous means of limiting economic discretion; at the same time, it seems the most radical and risky approach of all four approaches to tackling the adjudication of discretion in the EU economy.

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<sup>70</sup> On this, see M Bartl, ‘Contesting Austerity: On the Limits of EU Knowledge Governance’ (2017) 44 J Law Soc 1.

<sup>71</sup> Kaupa (n 63).

## 7. Conclusion

This chapter has presented four alternative methods of limiting economic discretion. Certainly, there are tensions and trade-offs between them. At the same time, the European Courts are likely to mix and combine methods, and to do so differently in different areas of EU policy. To take the first approach—deference—as an example, a more deferential approach may be justified precisely in circumstances where the conditions present in other approaches have been met (e.g. where *ex ante* procedural or political requirements have been fulfilled). There seem good reasons to be less demanding of the ECB, for example, in circumstances where it is acting in an area of high complexity yet has consulted relevant actors and interests than in those where it explicitly contradicts its own established guidelines or has failed to justify and consider alternatives to its economic decisions.

To conclude, it is worth reflecting precisely on the assumptions and values lying behind different approaches to controlling discretion. In the case of deference, we have already discussed its rationale, namely, to protect the values of institutional balance, and of a division between legal and policy-making bodies, established by the Treaty. In the case of the strategies of prescription and proceduralism, quite different rationales presents themselves (to which different actors may attach varying importance). Here an assumption may be that Courts should allow less discretion where economic decision makers are acting alone and are therefore more likely to make error-laden or biased decisions. Another assumption may be that Courts should be more active in policing economic authority where that authority strays into politically sensitive areas where bodies closer to the preferences of the general public should have greater input in decision making. More broadly, these strategies place a high value on inclusivity and principles of good governance within the political process, positing EU law as a mechanism to ensure that the

policy process meets standards of democratic and political accountability.<sup>72</sup>

Finally, the strategy of interdisciplinary justification, by grounding its review in welfare economics, places a stronger emphasis on the need for policy makers to make economically rational decisions. The value sought under this form of review is less inclusivity or respect for the Treaties than high-quality output, capable of objective justification. To this extent, while this chapter merely attempts to offer some 'options' for the control of economic discretion, choosing between these options requires a clear understanding of what kind of economic executive the EU is building and what kind of priority the EU should give to one rationale for judicial review over others.<sup>73</sup>

Those who place a high value on institutional balance, for example, may posit executive actors in the economic field, such as the ECB, as authoritative and legitimate actors in their own right whose decisions carry an intrinsic legitimacy.<sup>74</sup> Alternatively, those who place value on political inclusivity may see ECB action as authoritative only insofar as it can be tied to other forms of authority, provided via national governments, via electoral processes, or via the direct participation of those affected by its decisions. Alternatively, those who see the role of judges in policing discretion in terms of rationale outputs may be less open to using judicial review to tie economic decision makers to predefined 'mandates' and more open to seeing those mandates as incomplete tasks to be refined as the EU economy evolves and according to institutional judgment as to what the European economy requires to develop and thrive in the future. Each strategy is, in this sense, also tied

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72 On such a conception of the role of the EU Courts in EU governance more broadly, see J Corkin, 'Constitutionalism in 3D: Mapping and Legitimizing our Lawmaking Underworld' (2013) 19 *ELJ* 5.

73 See, e.g. A Vauchez, 'Fielding Supranationalism: The European Central Bank as a Field Effect' (2016) 64 *Sociol Rev* 2.

74 See, on this, the opinion of AG Cruz Villalon in *Gauweiler* (n 14).

to an idea of what judicial review in EU law, and in the EU economy, should be trying to achieve.

Developing a fuller theory of judicial review of economic discretion require something beyond the scope of this chapter—a theory of political authority and accountability in European economic governance, and an idea of why one rationale for judicial review ought to be chosen over another.<sup>75</sup> The EU Courts need both better strategies, and better criteria for determining which strategy to choose.

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<sup>75</sup> This constitutes one of the broader goals of the Leviathan project based at the Hertie School of Governance. See: <https://www.hertie-school.org/en/research/research-directory/research-project-pages/leviathan/> accessed 17 May 2018.