

# COMMON MARKET LAW REVIEW

## CONTENTS Vol. 56 No. 4 August 2019

Editorial comments: *The Court of Justice in the Archives* 899-904

### Articles

S. Buriak and I. Lazarov, Between State aid and the fundamental freedoms: The arm's length principle and EU law 905-948

S. Bogojević and M. Drenovak-Ivanović, Environmental protection through the prism of enlargement: Time for reflection 949-978

E. Olmedo-Peralta, The evidential effect of commitment decisions in damage claims. What is the assumptive value of a pledge? 979-1004

### Case law

#### A. Court of Justice

Quantitative easing at the Court of Justice – Doing whatever it takes to save the euro: *Weiss and Others*, M. Dawson and A. Bobić 1005-1040

The detention of asylum seekers pending transfer under the Dublin III Regulation: *Al Chodor*, N. Vavoula 1041-1068

The European Citizens' Initiative and Greek debt relief: *Anagnostakis*, A. Karatzia 1069-1092

Differential tax burdens of undertakings and internal market law: The way forward after *ANGED*, M. Szydło 1093-1118

Independence Day for the Services Directive: *Visser*, J. Snell 1119-1136

**Book reviews** 1137-1164

**Survey of literature** 1165-1188

**Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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### Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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## CASE LAW

### A. Court of Justice

#### **Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro: *Weiss and Others***

Case C-493/17, *Weiss and Others*, Judgment of the Court (Grand Chamber) of 11 December 2018, EU:C:2018:1000.

#### **1. Introduction**

The unconventional monetary policy activities of the European Central Bank have played a significant role in tackling the euro crisis and stabilizing the euro area. They have also, however, triggered a fierce debate about both the position of the ECB in the EU's constitutional system and the proper role of courts in supervising independent institutions. This debate is the context for the ECJ's *Weiss* decision, handed down in response to the second ever preliminary reference of the *Bundesverfassungsgericht* (Federal Constitutional Court) to the ECJ. That its first ever reference also concerned an earlier ECB programme provides the *Weiss* decision with an additional significance. By framing its reference through the lenses and safeguards established by the ECJ in its earlier *Gauweiler* decision, the *Bundesverfassungsgericht* not only sought a clarification of EU law, but also engaged in an open challenge to the ECJ as to whether it is willing to act consistently in reviewing ECB action.

In delivering its judgment, the ECJ indeed anchors its reasoning in numerous standards elaborated in its earlier *Gauweiler* ruling. In doing so, however, it struggles with many of the unique features of the ECB's later Public Sector Purchase Programme (PSPP), such as its (in)transparency, the scale of the securities purchased, and the programme's economic effects. Nonetheless, the Court concluded that PSPP is a proportionate programme that both fits within the ECB's monetary mandate and respects the prohibition on monetary financing provided under Article 123(1) TFEU. It is now for the *Bundesverfassungsgericht* to determine whether this interpretation breaches its *ultra vires* standard of review.

In this case note, the judgment is analysed according to some of the difficulties faced by the ECJ in reconciling PSPP with constitutional standards. The judgment particularly illustrates the ECJ's reluctance to engage in intensive and meaningful proportionality review, demonstrating some of the difficulties in grounding such review in procedural devices (or a thin duty to state reasons). In spite of these limitations, the Court's reply, demonstrates lasting advantages (as well as some pitfalls) of the preliminary reference procedure.

## **2. Factual and legal background to the dispute**

### *2.1. The Public Sector Purchase Programme*

On 22 January 2015, the ECB's Governing Council initiated a secondary markets PSPP in response to strong downward pressure on inflation in the euro area.<sup>1</sup> The PSPP formed part of the ECB's extended asset purchase programme (APP) alongside the asset-backed securities purchase programme (ABSSP), the third covered bond purchase programme (CBPP3) (both introduced in September 2014), and the corporate sector purchase programme (introduced in March 2016).<sup>2</sup> Altogether, the ECB anticipated that these asset purchase programmes would serve to ease financial and monetary conditions and support a return to a 2 percent inflation rate in the medium-term, thus contributing to the ECB's primary objective of maintaining price stability.<sup>3</sup>

Decision 2015/774 of the ECB of 4 March 2015 formalized the PSPP and outlined its features, amended by Decisions 2015/2101,<sup>4</sup> 2015/2404,<sup>5</sup> 2016/702<sup>6</sup> and 2017/100.<sup>7</sup> As the PSPP currently stands, a number of features distinguish it from the ECB's never operationalized Outright Monetary Transactions (OMT) programme. Under the PSPP, Eurosystem central banks can purchase euro-denominated securities issued by "... central, regional or local governments of a Member State whose currency is the euro, recognized

1. ECB Decision 2015/774 of 4 Mar. 2015 on a secondary markets public sector asset purchase programme, O.J. 2015, L 121/20, Recital 3.

2. ECB Decision 2017/100 of 11 Jan. 2017 on amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2017, L 16/51, Recital 1.

3. *Ibid.*, Recital 4.

4. ECB Decision 2015/2101 of 5 Nov. 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2015, L 303/106.

5. ECB Decision 2015/2464 of 16 Dec. 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2015, L 344/1.

6. ECB Decision 2016/702 of 18 Apr. 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, O.J. 2016, L 121/24.

7. Decision 2017/100, cited *supra* note 2.

agencies located in the euro area, international organizations located in the euro area and multilateral development banks”.<sup>8</sup> Eligible securities must have a remaining maturity of between 1 and 30 years at their time of purchase and come from an issuer with a credit quality assessment of at least Step 3 in the Eurosystem’s harmonized rating scale.<sup>9</sup> The ECB also allows for a blackout period, to be determined by the Governing Council, during which no eligible securities may be bought.<sup>10</sup> In contrast, under the OMT, only assets of countries participating in a macroeconomic adjustment programme under the European Stability Mechanism, and with a maturity of between 1 and 3 years, were eligible for purchase.<sup>11</sup>

The PSPP limits the amount of shares the Eurosystem can hold of any one security.<sup>12</sup> In terms of portfolio allocations, 10 percent of eligible securities should be towards securities issued by eligible international organizations and multilateral development banks, and the remaining 90 percent towards all other eligible issuers.<sup>13</sup> PSPP also provides for a sharing of securities between the national and EU levels, with Eurosystem central banks taking a 90 percent share of eligible securities with the remaining 10 percent purchased by the ECB, and distribution according to the subscription key of the ECB’s capital.<sup>14</sup> According to the ECB’s Governing Council, a risk-sharing regime applies to 20 percent of additional asset purchases, with each member central bank responsible for its own risks regarding the remaining 80 percent of purchases.<sup>15</sup>

Initially, combined monthly purchases under the APP were authorized to the amount of EUR 60 billion.<sup>16</sup> This amount was increased to EUR 80 billion in April 2016 and decreased again to EUR 60 billion from April 2017

8. Decision 2015/2464, cited *supra* note 5, Art. 1(1), amending Decision 2015/774 Art. 3(1).

9. Decision 2016/702, cited *supra* note 6, Art. 1(1), amending Decision 2015/774 Art. 3(2); Art. 3(3).

10. Decision 2015/774, cited *supra* note 1, Art. 4(1).

11. ECB, Press Release: Technical Features of Outright Monetary Transactions, 6 Sept. 2012 <[www.ecb.europa.eu/press/pr/date/2012/html/pr120906\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html)> (last visited 25 Jan. 2019).

12. Decision 2016/702, cited *supra* note 6, Art. 1(1)(2), amending Decision 2015/774 Art. 5.

13. *Ibid.*, Art. 1(3), amending Decision 2015/774 Art. 6(1).

14. *Ibid.*, Art. 1(4), amending Decision 2015/774 Art. 6(2).

15. ECB, Press Release: ECB Adds Corporate Sector Purchase Programme (CSPP) to the Asset Purchase Programme (APP) and Announces Changes to APP, 10 Mar. 2016 <[www.ecb.europa.eu/press/pr/date/2016/html/pr160310\\_2.en.html](http://www.ecb.europa.eu/press/pr/date/2016/html/pr160310_2.en.html)> (last visited 25 Jan. 2019); ECB, Press Release: ECB announces expanded asset purchase programme, 22 Jan. 2015 <[www.ecb.europa.eu/press/pr/date/2015/html/pr150122\\_1.en.html](http://www.ecb.europa.eu/press/pr/date/2015/html/pr150122_1.en.html)> (last visited 25 Jan. 2019).

16. Decision 2015/774, cited *supra* note 1, Recital 7.

onwards.<sup>17</sup> Following a further extension until December 2017,<sup>18</sup> net purchases under the APP would be reduced to EUR 15 billion from October to December 2018, after which they would end (reflecting the return of inflation rates to close to the 2 % target).<sup>19</sup>

## 2.2. Preliminary reference of the *Bundesverfassungsgericht*

Generally, the *Bundesverfassungsgericht* performs three different heads of review in relation to questions of constitutionality connected<sup>20</sup> to EU law: *ultra vires* review, identity review, and fundamental rights review. For the purposes of the present analysis, the first two are relevant. Introduced in its *Maastricht* decision and confirmed in its review of the Lisbon Treaty, the *Bundesverfassungsgericht* defined *ultra vires* review as the “jurisdiction to assert the responsibility for integration if obvious transgressions of the boundaries occur when the European Union claims competences”.<sup>21</sup> Beyond the test itself, there are two further qualifications added in the *Honeywell* decision that restrict the applicability of *ultra vires* review: first, the *Bundesverfassungsgericht* is the only German Court allowed to carry out the review; and second, “the Court of Justice has a right to tolerance of error”.<sup>22</sup> In addition, in its *Lisbon* decision,<sup>23</sup> the *Bundesverfassungsgericht* added constitutional identity as another head of review, measured against the standards set out in the unamendable core of the German Basic Law.

Despite its crucial role in the development of EU law through its indirect interactions with the Court of Justice,<sup>24</sup> the German Court did not engage

17. Decision 2017/100, cited *supra* note 2, Recital 5.

18. *Ibid.*

19. ECB, Press Release: Monetary Policy Decisions, 14 June 2018 <[www.ecb.europa.eu/press/pr/date/2018/html/ecb.mp180614.en.html](http://www.ecb.europa.eu/press/pr/date/2018/html/ecb.mp180614.en.html)> (last visited 28 Jan. 2019).

20. Early case law reviewed only national acts implementing EU law, whereas later on the *Bundesverfassungsgericht* applied the same heads of review in relation to Treaty amendments pending national ratification, as well as individual European arrest warrants issued pursuant to the EAW Framework Decision. See German *Bundesverfassungsgericht* 2 BvR 2735/14 *Mr R*. Order of 15 Dec. 2015, <[www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-004.html)> (last visited 5 Mar. 2019).

21. German *Bundesverfassungsgericht* Case 2 BVerfG 2/08 *Lisbon Treaty*, Judgment of 30 June 2009, <[www.bverfg.de/e/es20090630\\_2bve000208en.html](http://www.bverfg.de/e/es20090630_2bve000208en.html)> (last visited 5 Mar. 2019), para 240.

22. German *Bundesverfassungsgericht* Case 2 BvR 2661/06 *Honeywell*, Order of 06 July 2010, <[www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706\\_2bvr266106en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html)> (last visited 5 Mar. 2019), para 66.

23. German *Bundesverfassungsgericht* Case 2 BVerfG 2/08 *Lisbon Treaty*, *supra* note 21, para 240.

24. Vranes, “German constitutional foundations of, and limitations to, EU integration: A systematic analysis”, 14 GLJ (2013), 75.

in the preliminary reference procedure until 2014. The *Bundesverfassungsgericht* submitted its first preliminary reference to the ECJ in order to ascertain whether an EU act was *ultra vires*, doubting the compatibility of the OMT mechanism with primary EU law, and more specifically, its provisions on the scope of the ECB's monetary policy mandate and the prohibition of monetary budget financing.<sup>25</sup>

In its reply, the Court of Justice chose to preserve the OMT programme. It first concluded that indirect effects of monetary policy on economic policy do not make them equivalent, leading to the conclusion that the ECB was acting within the boundaries of its mandate,<sup>26</sup> and setting out conditions for the programme's compliance with the prohibition of monetary financing.<sup>27</sup> In its final decision, the *Bundesverfassungsgericht* accepted the conditions attached to the OMT programme as defined by the ECJ,<sup>28</sup> as well as the standard of review of Union acts it exercises.<sup>29</sup> Should the ECB, in a potential use of the OMT mechanism, transgress any of these conditions, such an action will be considered *ultra vires*.<sup>30</sup>

It is against this background that the German Court submitted its second preliminary reference to the ECJ, now questioning the ECB's PSPP as described in section 2.1. First, the PSPP is, according to the applicants in the case, in breach of the prohibition of monetary financing in Article 123 TFEU. The applicants argue that the specified amounts, timescales, as well as the allocation key for monthly purchases of securities prevent the formation of a market price and result in direct purchasing of government bonds.<sup>31</sup> Second, the applicants argued that the ECB exceeded its monetary policy mandate by enacting the PSPP. Taken together, this results in a breach of German

25. German *Bundesverfassungsgericht* Case 2 BvR 2728/13 *Gauweiler*, Judgment of 21 June 2016, <[www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621\\_2bvr272813en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2016/06/rs20160621_2bvr272813en.html)> (last visited 5 Mar. 2019), paras. 36, 39, 63 and 80. For a wide array of opinions and analyses of the preliminary reference, see the *Special Issue: The OMT Decision of the German Federal Constitutional Court*, 15 GLJ, (2014).

26. Case C-62/14, *Gauweiler and others v. Deutscher Bundestag*, EU:C:2015:400, paras. 52 and 56, relying on its findings in Case C-370/12, *Pringle*, EU:C:2012:756.

27. *Ibid.*, paras. 30–31.

28. BVerfG *Gauweiler*; *supra* note 25, para 174. The *Bundesverfassungsgericht* did however mention the arguments it found to be important for the review of the OMT programme, which were not taken into account by the ECJ, and the question submitted in the preliminary reference on the independence of the ECB that the ECJ did not answer (paras. 181–189).

29. *Ibid.*, para 179. The *Bundesverfassungsgericht* mentioned specifically that the standard of review is now more explicit in relation to the ECB (para 180).

30. *Ibid.*, paras. 193 and 205.

31. German *Bundesverfassungsgericht* Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss and Others*, Order of 18 July 2017, (hereinafter: BVerfG *Weiss*) <[www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html](http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html)> (last visited 5 Mar. 2019), paras. 25–31.



constitutional identity found in the right to vote and the subsequent budgetary powers of the Bundestag.<sup>32</sup>

The *Bundesverfassungsgericht* began its analysis by referring to its case law concerning *ultra vires* and identity review, underlining that the right to vote is based on human dignity and thus forms part of the inviolable core of the German constitution,<sup>33</sup> and reserved for itself the right to review EU acts against this standard. The *Bundesverfassungsgericht*, referring to the standards from *Gauweiler*, noted that the PSPP (given its volume and effects) has more than indirect economic policy effects, which, in the absence of justification, amounts to an excess of the monetary policy mandate of the ECB.

The reference cites the ECJ's decision in *Gauweiler* for the relevant standard in relation to the possible circumvention of the prohibition of Article 123 TFEU:

“[The] ESCB's [European System of Central Banks] intervention could, in practice, have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States if the potential purchasers of government bonds on the primary market knew for certain that the ESCB was going to purchase those bonds within a certain period and under conditions allowing those market operators to act, de facto, as intermediaries for the ESCB for the direct purchase of those bonds from the public authorities and bodies of the Member State concerned”.<sup>34</sup>

In *Gauweiler*, the ECJ found that since the ECB did not carry out any prior announcements concerning the volume and timescale of purchases, this acts as a safeguard in relation to a possible breach of Article 123 TFEU.<sup>35</sup> The *Bundesverfassungsgericht* thus reached a conclusion that it considers these safeguards binding upon the ECB, as well as the ECJ, when reviewing ECB action.<sup>36</sup> In the view of the *Bundesverfassungsgericht*, the ECB's position in the institutional structure of the EU requires a narrow interpretation of its mandate, given that its decisions are not made through the political process of deliberation.<sup>37</sup> It also agreed with the applicants in determining the influence that these findings have on the position of the Bundestag:

32. Ibid., para 31.

33. Ibid., para 44.

34. Case C-62/14, *Gauweiler*, para 104.

35. Ibid., para 106.

36. BVerfG *Weiss*, cited *supra* note 31, para 79.

37. Ibid., para 103.

“It follows from the democratic basis of budget autonomy . . . that the Bundestag may not consent to an inter-governmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the Bundestag’s control and influence. The Bundestag must individually approve every large-scale federal aid measure on the international or European Union level that is made in solidarity and results in expenditure”.<sup>38</sup>

The *Bundesverfassungsgericht* stated that if the Court of Justice found the PSPP outside the ECB’s mandate and in breach of the prohibition of monetary financing, such a transgression would be considered structurally significant,<sup>39</sup> thus meeting the *ultra vires* standard. Otherwise, should the German Court consider that the Court of Justice did not abide by its own conditions from *Gauweiler*, it will consider its preliminary ruling *ultra vires*.<sup>40</sup>

The *Bundesverfassungsgericht* submitted five questions. The first question to the ECJ was whether the prohibition on monetary financing was infringed, given the following factors: communication regarding the purchases creating *de facto* certainty in the market; the lack of transparency regarding the blackout period preventing judicial review; the holding of bonds until maturity; and the purchase of marketable debt instruments with a negative yield to maturity.

The second question concerned the infringement of Article 123 TFEU if changing market conditions (in particular a shortage of eligible bonds) precipitate a loosening of the purchase rules, and if the restrictions previously established by the ECJ for a bond purchase programme lose their effect.

The third question concerned the infringement of Articles 119 and 127(1) and (2) TFEU and Articles 17 to 24 of the Protocol on the European System of Central Banks and the ECB as it exceeds the mandate of the ECB, especially given that the volume of the PSPP materially influences the refinancing terms of the Member States; that the effect on refinancing of Member States, as well as on commercial banks, carries more than an “indirect” economic policy effect; that, given its economic impact, the PSPP infringes on the principle of proportionality; and that the absence of a statement of reasons makes it impossible to examine whether the PSPP is still necessary and proportionate.

Fourth, the *Bundesverfassungsgericht* asked whether the PSPP nevertheless infringes these provisions, given the volume of the programme,

38. *Ibid.*, para 56 referring to the German *Bundesverfassungsgericht* Case 2 BvR 1390/12 *European Stability Mechanism*, Judgment of 18 Mar. 2014.

39. BVerfG *Weiss*, cited *supra* note 31, para 66.

40. *Ibid.*, para 79.

its implementation for over two years and its economic effects – thus exceeding the monetary policy mandate of the ECB.

Lastly, the fifth question asked whether Articles 123 and 125 TFEU and Article 4(2) TEU are infringed, given the unlimited sharing of risks between the national central banks of the Eurosystem, if the recapitalizing of national central banks using budget funds might be necessary in the event of non-repayment of bonds.

### **3. Opinion of the Advocate General**

Advocate General Wathelet found the preliminary ruling in principle admissible.<sup>41</sup> The fifth question he found to be hypothetical, however, given the impossibility to ascertain the likelihood of non-repayment of bonds.<sup>42</sup> As for the remaining questions, the Advocate General referred to the *Gauweiler* conditions for compliance with Article 123(1) TFEU. First, the purchase of government bonds on secondary markets is not allowed under conditions which would be equivalent to that of a direct purchase of government bonds.<sup>43</sup> Second, the impetus of the Member States to follow a sound budgetary policy must not be impaired.<sup>44</sup>

Advocate General Wathelet found that the PSPP has sufficient safeguards preventing it from amounting to monetary financing.<sup>45</sup> In support of this, he first pointed to the obligation of the Governing Council to constantly monitor and adjust the PSPP.<sup>46</sup> Second, the volume of government bonds purchased under the PSPP is dependent on private bonds bought under the other three sub-programmes.<sup>47</sup> Third, unlike the OMT, the PSPP purchases are based on the ECB's capital subscription key, leading to greater unpredictability.<sup>48</sup> Fourth, the limit on holding certain government securities, and the daily risk monitoring of these limits, prevents certainty for operators in the primary market.<sup>49</sup> Fifth, a blackout period without a pre-determined duration allows the formation of a market price.<sup>50</sup> Lastly, the information provided by the ECB regarding the PSPP is necessary for its effectiveness, through the "signalling

41. Opinion of A.G. Wathelet, of 4 Oct. 2018, EU:C:2018:815, paras. 35–36.

42. *Ibid.*, para 45.

43. Opinion, para 50 in reference to Case C-62/14, *Gauweiler*, para 97.

44. Opinion, para 50.

45. *Ibid.*, para 54.

46. *Ibid.*, para 55.

47. *Ibid.*, para 56.

48. *Ibid.*, para 57.

49. *Ibid.*, para 58.

50. *Ibid.*, para 59.

channel,” but is general enough to prevent *de facto* certainty regarding the purchase of government bonds.<sup>51</sup>

On the question of whether there exists *de facto* certainty concerning which specific securities will be bought, Advocate General Wathelet found this insufficient to invalidate the PSPP. First, any potential certainty needs to take into account that not only government bonds are available for purchase under the PSPP.<sup>52</sup> Second, while this certainty relies on a shortage of securities, the ECB carried out a “thoughtful and measured assessment”.<sup>53</sup>

Similarly, the Opinion found that the features of the PSPP do not deter Member States from following a sound fiscal policy. First, the option to sell securities or end the programme is at the ESCB’s discretion.<sup>54</sup> Second, securities eligible for purchase under the PSPP require a certain credit quality rating.<sup>55</sup> Third, the PSPP only allows for limited risk sharing.<sup>56</sup> Lastly, the purchases according to the ECB’s capital key prevents virtually assisting Member States in financial difficulty (as it does not target such States).<sup>57</sup>

The Advocate General discussed the third and fourth questions, which deal with the connection between the PSPP and monetary policy, including its proportionality, together.<sup>58</sup> He referred to *Gauweiler* and *Pringle*, finding that both the objective of the PSPP (price stability) and the instruments used (purchasing public sector securities on the secondary market) pertain to monetary policy.<sup>59</sup> Furthermore, the Opinion referred to *Gauweiler* in arguing that a measure cannot be considered economic policy if it has merely indirect effects on the economy of Member States.<sup>60</sup> In the case of the PSPP, any improvement to the economic situation of Member States is an indirect effect of monetary policy, given the guarantees in place preventing the pursuit of a primary economic policy objective (i.e. the “limited” nature of the programme).<sup>61</sup>

Nonetheless, the PSPP needs to be proportionate. Recalling *Gauweiler*, in light of the broad discretion of the ESCB, judicial review should be focused on reviewing procedural guarantees, such as the obligation “to examine carefully and impartially all the relevant elements of the situation in question and to give

51. *Ibid.*, paras. 61–64.

52. *Ibid.*, para 79.

53. *Ibid.*, para 81.

54. *Ibid.*, para 85.

55. *Ibid.*, para 86.

56. *Ibid.*, paras. 87 and 89.

57. *Ibid.*, para 88.

58. *Ibid.*, para 93.

59. *Ibid.*, paras. 102–107.

60. *Ibid.*, para 98.

61. *Ibid.*, para 123.

an adequate statement of the reasons for its decisions”.<sup>62</sup> In relation to the ability of the PSPP to maintain price stability, the Advocate General accepted the ECB’s explanation.<sup>63</sup> Given the economic context during which the Decision had been adopted, where other measures had proven unsuccessful<sup>64</sup> and not taking action was problematic,<sup>65</sup> the PSPP was necessary.<sup>66</sup>

In assessing the adequacy of the statement of reasons, the Advocate General looked into a wide array of sources, such as the introductory statements of the President of the ECB and the minutes of the ECB Governing Council’s monetary policy meetings.<sup>67</sup> Taken together these constituted sufficient reasons to preclude a manifest error of assessment.<sup>68</sup> Finally, in assessing proportionality *stricto sensu*, the Advocate General found that “the various amendments to the PSPP, in particular in terms of duration and volume, are therefore the outcome of balancing the interests involved”.<sup>69</sup> There were therefore no factors affecting the validity of the PSPP.

#### 4. Judgment of the Court of Justice

The ECJ followed the Advocate General on questions of admissibility,<sup>70</sup> finding the fifth question inadmissible due to its hypothetical nature.<sup>71</sup> The Court, considering all the other four questions together, looked at three issues: whether the ECB complied with the obligation to state reasons; whether the PSPP falls within the sphere of the ESCB’s powers; and whether it is compatible with the prohibition of monetary financing of Member States.

First, regarding the duty to state reasons, the Court concurred with the Advocate General’s broad assessment of which documents are relevant for making this finding.<sup>72</sup> The Court additionally argued that publishing details of the blackout period would relate to the content of the measure, and not the reasons justifying it.<sup>73</sup> Therefore, the Court found that the ECB complied with its duty to state reasons.

62. *Ibid.*, para 125 in reference to Case C-62/14, *Gauweiler*, para 69.

63. *Ibid.*, para 130.

64. *Ibid.*, para 134.

65. *Ibid.*, para 135.

66. *Ibid.*, paras. 127–131.

67. *Ibid.*, para 133.

68. *Ibid.*, para 138.

69. *Ibid.*, para 148.

70. Judgment, paras. 17–26.

71. *Ibid.*, para 166.

72. *Ibid.*, para 37.

73. *Ibid.*, para 43.

Second, in determining whether the PSPP falls within the sphere of monetary policy,<sup>74</sup> the Court followed the Advocate General's reference to *Gauweiler* and *Pringle*, focusing on the objectives and instruments of the measure in question.<sup>75</sup> It found that regardless of any indirect effects on economic policy, the PSPP cannot be treated as an economic policy measure.<sup>76</sup> As to what constitutes an indirect effect, the Court rejected the *Bundesverfassungsgericht's* interpretation, relying instead on the notion of indirect effects elaborated in *Gauweiler* and *Pringle*: the foreseeable consequences of those measures, which have therefore been knowingly accepted at that time.<sup>77</sup>

Here, the Court differed from the Opinion that it is necessary to assess whether sufficient guarantees exist to prevent an economic aim from overshadowing a monetary one. Instead, the Court stated that in the pursuit of monetary policy, there will always be a foreseeable and accepted impact on the real economy, and that failing to consider these as indirect effects would prevent the ESCB from fulfilling its goals.<sup>78</sup> Regarding the instruments of the PSPP, the programme is based on the purchase of government securities on the secondary market, which falls within Article 18.1 of the Protocol on the ESCB and the ECB.<sup>79</sup> For these reasons, the Court found that the PSPP falls within the domain of monetary policy.<sup>80</sup>

In its proportionality analysis, the Court followed Advocate General Wathelet in measuring the proportionality of the PSPP against its economic effects.<sup>81</sup> As regards suitability, the Court looked at the economic context and practice of other central banks in order to determine that the ESCB did not commit a manifest error of assessment.<sup>82</sup> Furthermore, as regards necessity, the Court found that the PSPP does not go manifestly beyond what is necessary to achieve its objective. In support of this, the Court looked at the context, features, and scale of the PSPP.

First, the Court accepted the ECB's explanation that no other type of monetary policy measure would be able to achieve the same objective.<sup>83</sup> Second, the fact that the PSPP is not selective, its strict eligibility criteria, as

74. *Ibid.*, para 45.

75. *Ibid.*, para 53.

76. *Ibid.*, para 61.

77. *Ibid.*, para 63, referring to Case C-370/12, *Pringle* and Case C-62/14, *Gauweiler*, para 52.

78. *Ibid.*, paras. 64–67.

79. *Ibid.*, para 69.

80. *Ibid.*, para 70.

81. *Ibid.*, para 71. See also Case C-62/14, *Gauweiler*, para 66.

82. *Ibid.*, para 78.

83. *Ibid.*, para 81.

well as the temporary nature of the programme, render it necessary.<sup>84</sup> The Court accepted that the efficacy of the PSPP requires a sufficiently large volume of purchases.<sup>85</sup> The Court thus concluded that limiting the volume or duration of the programme would not be as efficient and rapid.<sup>86</sup> Third, the Court agreed with the Advocate General that the “ESCB weighed up the various interests involved so as effectively to prevent disadvantages which are manifestly disproportionate to the PSPP’s objective from arising on implementation of the programme”.<sup>87</sup> In particular, given that such open market operations entail the risk of losses,<sup>88</sup> the ESCB’s adoption of rules regarding risk-sharing aim to mitigate these risks.<sup>89</sup> Thus, the PSPP was proportionate.

Third, the Court analysed whether the PSPP is in line with the prohibition of monetary financing. The preliminary reference specifically invited the Court to apply its judgment in *Gauweiler* at this point.<sup>90</sup> The Court, agreeing with the Advocate General, recalled the *Gauweiler* principle that the intervention must not have an effect equivalent to the direct purchase of bonds, and the programme must contain sufficient safeguards not to reduce the impetus for Member States to pursue a sound budgetary policy.<sup>91</sup>

On the first point, the Court acknowledged some foreseeability as to the ESCB’s intervention, given the publication of some of the programme’s features.<sup>92</sup> However, numerous safeguards reduce certainty and maintain its consistency with Article 123(1) TFEU: the observance of an undisclosed blackout period; the ESCB only providing certainty regarding volumes of purchases for the APP as a whole; flexibility in the distribution of purchases; allowing for the purchase of diversified securities; the provision of purchase limits; and a lack of full transparency in the disclosure of purchases.<sup>93</sup>

The Court then turned its attention to whether the impetus for Member States to conduct a sound budgetary policy is reduced. The Court recognized that monetary policy will always have an impact on interest rates and bank refinancing, which impacts the refinancing conditions of public debt.<sup>94</sup> However, the programme “may not create certainty regarding a future

84. *Ibid.*, paras. 82–86.

85. *Ibid.*, para 90.

86. *Ibid.*, para 92.

87. *Ibid.*, para 93.

88. See Case C-62/14, *Gauweiler*, para 125.

89. Judgment, paras. 95–99.

90. BVerfG *Weiss*, cited *supra* note 31, para 66.

91. Judgment, paras. 104–107.

92. *Ibid.*, paras. 111–112.

93. *Ibid.*, paras. 113–126.

94. *Ibid.*, para 130 referring to Case C-62/14, *Gauweiler*; para 110.

purchase of Member State bonds”.<sup>95</sup> Here, the Court’s logic mirrors its findings on other questions: the temporary nature of the programme and the safeguards in place ensure the impetus to conduct a sound budgetary policy.

The final point the Court addressed was whether holding bonds until maturity and purchasing bonds at a negative yield to maturity are compatible with Article 123(1) TFEU. Regarding the holding of bonds until maturity, the impetus for Member States to conduct a sound monetary policy is not diminished, as the ESCB retains the option of selling the bond in question,<sup>96</sup> and in the event the ESCB holds onto the bond, there is no obligation to make further purchases from a Member State that ceases to follow a sound budgetary policy.<sup>97</sup> On the issue of bonds at a negative yield, the purchase of such bonds from the secondary market does not give rise to a direct purchase or the granting of a credit facility to a Member State.<sup>98</sup> The purchase of such securities diminishes the certainty of operators and does not have an equivalent effect to a direct purchase of bonds.<sup>99</sup> As a consequence, the PSPP is valid.<sup>100</sup>

## 5. Analysis

### 5.1. *Scope of the monetary policy mandate*

One central problem of the *Weiss* judgment concerns the delineation between monetary and general economic policy. The Treaties leave the division between the two ambiguous – while Article 3 TFEU lists monetary policy for Eurozone States as an exclusive Union competence, economic policy is confusingly cordoned off into a separate “coordinating” category, that is neither “shared” in the sense of Article 4 TFEU, nor is it an exclusively national competence. In spite of this, the German Court has no difficulty in concluding that “it would constitute a manifest and structurally significant exceeding of competences if the ECB acted outside its monetary mandate”.<sup>101</sup> Interpreting the mandate of the ECB in keeping with the German tradition, the *Bundesverfassungsgericht* thus attempts to delineate a clear line between

95. *Ibid.*, para 132 referring to Case C-62/14, *Gauweiler*, paras. 113–114.

96. *Ibid.*, para 150.

97. *Ibid.*, para 151.

98. *Ibid.*, para 155.

99. *Ibid.*, para 156.

100. *Ibid.*, para 168(1).

101. BVerfG *Weiss*, cited *supra* note 31, para 64.



monetary policy (as an exclusive EU matter) and fiscal policy (as a prerogative of the Member States subject “to a few exceptions”).<sup>102</sup>

Such an approach resonates deeply with the traditions of the German constitutional order. As Schütze points out, German federalism is based on a tradition of dual federalism in which the German Courts have attempted to separate and compartmentalize the different fields in which the federal and State levels may act.<sup>103</sup> The PSPP illustrates the profound limits of this approach when transferred to a supra-national economic and monetary Union. While monetary policy may seem like a simple exercise in setting and policing interest rates, the ability of interest-rate setting to achieve the goal of price stability is entirely mediated through the general economy. The story of the “post-crisis” developed world, i.e. from 2012 on (and Mario Draghi’s “do what it takes” speech), has been a story of the increasing redundancy of conventional monetary policy instruments. The traditional central bank tool – stimulating spending and lending by lowering interest rates – simply no longer works when there is no interest rate left to cut. As such, the measures required to raise inflation to the 2 percent target required instruments promoting more general economic stimulus.

The ECJ is in this sense surely right in insisting that “the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies”.<sup>104</sup> The provision of a secondary economic mandate for the ECB under Article 127(1) TFEU and the setting of shared guiding principles for both economic and monetary policy under Article 119(3) TFEU suggest that the Treaty drafters well understood the close inter-dependencies between these two fields. For the Economic and Monetary Union (EMU) to work effectively, it requires a cooperative, rather than exclusive, relationship between monetary and general economic policies.

The narrower legal question is whether *Weiss* utilizes the correct doctrinal tools to articulate the relationship between the two fields. Here, the judgment again relies on aspects of the *Gauweiler* decision. Stating that identifying whether PSPP is an aspect of monetary policy requires engaging with the objectives of the measure, *Weiss* follows *Gauweiler* in relying on the notion of “direct” and “indirect” effects.<sup>105</sup> While the PSPP is seen as having acknowledged effects on the refinancing conditions of the Member States, these are conceptualized by the Court as “indirect” and therefore not affecting the programme as a monetary measure.

102. *Ibid.*, para 65.

103. Schütze, “Classifying EU competences: German constitutional lessons?” in Garben and Govaere (Eds.) *The Division of Competences Between the EU and the Member States* (Hart, 2017).

104. Judgment, para 60.

105. *Ibid.*, para 61; Case C-62/14, *Gauweiler*, para 52.

The use of direct/indirect effects carries a certain logic. If tying the classification of a measure to its objective requires a rather subjective enquiry into the minds of the creator of a given programme, the notion of “effects” is more objective, requiring Courts to assess the real-world implications of a given measure. The difficulty is the classification of the effects of the PSPP as indirect. As discussed above, the point of secondary asset purchases is to stimulate the general economy. As explained by Mario Draghi when announcing the first major expansion of the programme in 2015:

“The sizeable increase in our balance sheet will further ease the monetary policy stance. In particular, financing conditions for firms and households in the euro area will continue to improve. Moreover, today’s decisions will support our forward guidance on the key ECB interest rates and reinforce the fact that there are significant and increasing differences in the monetary policy cycle between major advanced economies. Taken together, these factors should strengthen demand, increase capacity utilisation and support money and credit growth, and thereby contribute to a return of inflation rates towards 2%”.<sup>106</sup>

In this sense, the PSPP contributed to the easing of deflation and meeting the price stability target precisely through encouraging private spending and credit growth i.e. through stimulating the general economy. If this is so, however, why are the PSPP’s economic effects *indirect*? In fact, *the most direct effects of the programme are precisely its economic effects*, with a general raising of prices (and therefore a meeting of the inflation target) constituting an *indirect* consequence of a broader easing of economic conditions and the general money supply. This is the quandary that the use of the language of direct/indirect effect places the ECJ in: while the traditional “centre of gravity test” focuses on a measure’s intent and features,<sup>107</sup> there seems to be a clear divergence between the ordinary meaning of “direct” effects and their use in *Weiss*.

## 5.2. *The prohibition of monetary financing*

Both the OMT and the PSPP are instruments by virtue of which the ECB is able to buy government-issued bonds on the secondary market. Following *Gauweiler*, however, such purchases would not be allowed under conditions

106. Introductory Statement (22 Jan. 2015). Available at <[www.ecb.europa.eu/press/pressconf/2015/html/is150122.en.html](http://www.ecb.europa.eu/press/pressconf/2015/html/is150122.en.html)> (last visited 28 May 2019).

107. See e.g. Case C-338/01, *Commission v. Council*, EU:C:2004:253; Case C-130/10, *Parliament v. Council*, EU:C:2012:472.

of “equivalence” to primary purchases,<sup>108</sup> ultimately reducing the impetus for Member States to follow a sound budgetary policy.<sup>109</sup> To address this issue, the Court stated that when the ECB purchases government bonds on secondary markets, it must introduce “sufficient safeguards”.<sup>110</sup>

In *Gauweiler*, the ECJ set out the necessary safeguards against the circumvention of Article 123(1) TFEU: (1) a lack of certainty must exist concerning whether, when, which, and for how long the purchases will be made;<sup>111</sup> (2) the measure must not disincentivize Member States from following a sound budgetary policy;<sup>112</sup> (3) holding purchased bonds until maturity is allowed as long as the market operators cannot be certain that this option will be used;<sup>113</sup> and (4) the risk to which the ECB is exposed is mitigated by the condition of compliance with the European Stability Mechanism financing, attached to potential purchases.<sup>114</sup> One of the points in the preliminary reference was the insistence of the *Bundesverfassungsgericht* that the ECJ, when reviewing whether the PSPP complies with Article 123(1) TFEU, does so against these requirements.<sup>115</sup> The German Court thus regarded the conditions from *Gauweiler* as the relevant standard for Article 123(1) TFEU. Otherwise, the ECJ would itself be acting *ultra vires*.<sup>116</sup>

The Court of Justice agreed that Article 123(1) TFEU stands in the way of any measure that would have an effect equivalent to directly purchasing government bonds, and it does require safeguards to ensure Member States follow a sound budgetary policy.<sup>117</sup> Yet, it stated that the conditions it attached to the OMT cannot straightforwardly be applied to all ECB action in the monetary field, underlining that it is necessary to keep in mind the “particular features of the programme under consideration and the economic context” in which it was enacted and implemented.<sup>118</sup> This caveat seems to have been designed not only to decrease the chances that the *Bundesverfassungsgericht*

108. Case C-62/14, *Gauweiler*, para 97.

109. *Ibid.*, para 100.

110. *Ibid.*, para 102.

111. *Ibid.*, paras. 103, 104 and 112.

112. *Ibid.*, paras. 116–117.

113. *Ibid.*, para 118.

114. *Ibid.*, paras. 120 and 124. This condition is not straightforwardly applicable to the PSPP given that, unlike the OMT, it applies not only to Member States receiving financial assistance, but to all Members of the euro area. However, Art. 3(2) PSPP determines that bonds that would be ineligible due to the lack of required credit quality can be purchased if the relevant Member State is in receipt of financial assistance and in compliance with its conditions, thus partially reflecting the conditionality logic of the OMT. See also, Viterbo, “Legal and accountability issues arising from the ECB’s conditionality”, 1 EP (2016), 501, at 525–528.

115. BVerfG *Weiss*, cited *supra* note 31, para 79.

116. *Ibid.*

117. Judgment, paras. 106–107.

118. *Ibid.*, para 108.

declares the judgment *ultra vires*, but to allow the ECJ,<sup>119</sup> as well as the ECB itself, further flexibility in the future.

The *Bundesverfassungsgericht* wondered whether sufficient certainty existed on the market to circumvent the prohibition of monetary financing, given the available communication concerning the purchases<sup>120</sup> and the ability to hold bonds until maturity.<sup>121</sup> At the same time, the possibility for the Governing Council to impose blackout periods on purchases without prior announcement would, in the view of the *Bundesverfassungsgericht*, not influence price formation on the market, but prevent meaningful judicial review.<sup>122</sup> Conversely, the Court of Justice used precisely the blackout period to support the conclusion that private market operators would not be able to act as *de facto* intermediaries of Member States.<sup>123</sup> The ECJ further concluded that information such as the general volume of purchases<sup>124</sup> and their distribution according to the ECB capital contribution key,<sup>125</sup> only provide aggregate information<sup>126</sup> subject to revision and update by the ECB,<sup>127</sup> who is thus free to amend the purchases so as to meet the requirements of Article 123(1) TFEU. From the perspective of judicial review, the necessary consequence is more leeway for the ECB to determine the manner of securing compliance with Article 123(1) TFEU.

There is in this sense a difference between the two courts, relating to the difference between formal and substantive reasoning. The ECJ's reasoning on this point is decidedly formal. What matters in its view is that particular safeguards have been put in place by the ECB to limit the foreseeability of asset purchases.<sup>128</sup> What matters is that the risk of "equivalence" has been identified, and appropriate formal safeguards put in place (an approach also followed by A.G. Wathelet). The *Bundesverfassungsgericht*'s reasoning is much more substantive. What matters is not that there are safeguards *per se*,

119. de Búrca argues that EU law has more generally evolved through the use of vague and open terms that have deliberately been used to "mediate between very different understandings and conceptions of the issue under discussion." See de Búrca, "Reappraising subsidiarity's significance after Amsterdam", *Harvard Jean Monnet Working Paper* No. 7/99, 1999, 8. See also, Weatherill, *Law and Values in the European Union* (OUP, 2016), p. 69.

120. BVerfG *Weiss*, cited *supra* note 31, paras. 82 and 86.

121. *Ibid.*, para 98.

122. *Ibid.*, para 95.

123. Judgment, paras. 114–117.

124. *Ibid.*, para 118.

125. *Ibid.*, para 120.

126. *Ibid.*, para 126.

127. For example, *ibid.*, paras. 116, 118, 119 and 120.

128. Judgment, paras. 113–124.

but how effective they are and how they are likely to operate *de facto* on the market. The German Court itself attempts to calculate the likely German share of public securities purchased under the programme and surveys current market conditions (pointing out that many public securities currently carry a negative yield below the deposit facility rate, thus rendering them ineligible for the programme and further narrowing the range of securities available for the ECB to buy).<sup>129</sup> The *Bundesverfassungsgericht* is simply much more demanding: it is not willing to take safeguards at their word but is interested in their effects. These effects are likely to change significantly over time: at the time of writing, for example, the observations on negative yields, under different economic conditions, no longer hold (giving some credence to the ECJ's more cautious, rules-based approach).

Finally, the *Bundesverfassungsgericht* questioned whether changing market conditions may lead to loosening the conditions for compliance with Article 123(1) TFEU. The ECJ did not directly answer this question, but its statement concerning the need to take into account the economic context<sup>130</sup> implies that any future review will depend greatly on the economic situation, possibly warranting varying standards of review.

What all these findings share is that the greater the freedom accorded to the ECB in detailing the implementation of the PSPP, the lesser the ECJ seems willing to intrude by way of judicial review.<sup>131</sup> Given that it is precisely this concern that was specifically voiced in the preliminary reference, with consequences for judicial review of EU action more generally, it is not inconceivable for the *Bundesverfassungsgericht* to side with the ECJ on more technical issues, while disagreeing on matters of principle that will shape judicial review of EU action in the long term.<sup>132</sup>

### 5.3. Proportionality as the duty to state reasons

A further issue that is important for the future of EU judicial review is the judgment's proportionality analysis. A common criticism of the *Gauweiler*

129. BVerfG *Weiss*, cited *supra* note 31, para 85.

130. Judgment, para 108.

131. See, for the same argument, Dawson, Maricut-Akbik and Bobić, "Reconciling independence and accountability at the European Central Bank: The false promise of proceduralism", 25 *ELJ* (2019), 75.

132. The same took place in the *Gauweiler* litigation, where the ECJ avoided addressing claims of the *Bundesverfassungsgericht* concerning constitutional identity, but focused exclusively on the OMT programme. The *Bundesverfassungsgericht* in turn reiterated its claims concerning identity and *ultra vires* review of EU action in the abstract, and accepted the remaining analysis of the ECJ concerning the OMT programme itself.

judgment was its limited proportionality review.<sup>133</sup> *Gauweiler* provided the ECB with broad discretion to gauge the necessity and suitability of the OMT to meet the ECB's price stability objectives, subject to the requirement of a careful and impartial assessment of the relevant facts. This requirement was seen by the ECJ largely in terms of the duty to state reasons – as the OMT programme was subjected to observable limits and was directed at serious concerns regarding the “singleness” of monetary policy, the proportionality test was satisfied.<sup>134</sup>

In contrast to this approach, first, a more substantive notion of accountability would require justifying an action within constitutionally acceptable terms; second, it would entail a requirement to modify ill-conceived policies; and third, it assumes the possibility to make amends for errors of judgement rather than of process.<sup>135</sup> Placed in the context of the ECB, this would entail the Court of Justice being able to require the ECB to modify an ill-conceived policy and make amends for errors of judgement, assessed against constitutionally acceptable terms found in the Treaties, outlining the mandate and powers of the ECB.<sup>136</sup> Translated to the context of the *Gauweiler* judgment, that case demonstrates little *substantive* engagement with the proportionality of the OMT: the judgment did not, for example, use external evidence to verify ECB's empirical claims regarding the monetary transmission mechanism, nor did it require the ECB to justify the exclusion of alternative programmes (with, for example, a lesser impact on national policy competences).

Substantive review would also entail a more thorough appraisal of the information-gathering process that forms the basis for the decision in question. In its review of Commission action, with comparable levels of technical knowledge and discretion, the ECJ often engages more intensely with the information provided, examining whether it formed a sound and consistent basis for the final act.<sup>137</sup> In competition law, the Court frequently demands objective evidence demonstrating the exclusionary effect of an anticompetitive practice in order to determine a violation under Article 102

133. See e.g. Tridimas and Xanthoulis, “A legal analysis of the *Gauweiler* case: Between monetary policy and constitutional conflict”, 23 MJ (2016), 17, at 31; Steinbach, “All's well that ends well? Crisis policy after the German constitutional court's ruling in *Gauweiler*” 24 MJ (2017), 140, at 145.

134. Case C-62/14, *Gauweiler*, paras. 85–92.

135. Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press, 1991), p. 28.

136. See Dawson, Maricut-Akbik and Bobić, op. cit. *supra* note 131, pp. 76–77.

137. Joined Cases C-92 & 93/09, *Volker und Markus Schecke*, EU:C:2010:662, para 81.

TFEU.<sup>138</sup> Outside this field, the ECJ has found, for example, the lack of an impact assessment, despite its unclear legal nature,<sup>139</sup> to be a basis for annulment of a Council regulation.<sup>140</sup> Scott and Sturm add that judicial interpretation can focus on the quality of information gathering and the peer-review process used to justify EU action and policies. In turn, this jurisprudence can influence the future design of policymaking by emphasizing the importance of inclusive, deliberative, and participatory decisions.<sup>141</sup>

The PSPP carried several advantages in this regard – after it was activated it carried a number of supporting analyses explaining the rationale of the programme as it was amended. The stark differences between the *Bundesverfassungsgericht* and the ECJ over the implications of this for the standard of proportionality review, however, remained visible. The German Court maintained its restrictive view of the conditions under which the Bundesbank may participate in ECB activities, questioning the PSPP’s general economic impact and demanding that this should have been weighed by the ECB.<sup>142</sup>

Conversely, the central terminology and judicial techniques that defined the ECJ’s standard of review for the ECB in *Gauweiler* – the notions, for example, of “broad discretion,” of the need to make “complex technical assessments” and the focus on whether merely a “manifest error of assessment” has been made – were repeated in *Weiss*. The ECJ had even less trouble establishing proportionality, arguing that the ECB had adopted the programme “in the context of an economic crisis entailing a risk of deflation”<sup>143</sup> and that, in this context, there was sufficient credibility to the economic analysis produced by the ECB against any conclusion that the programme is “vitiating by a manifest error of assessment”.<sup>144</sup>

As in *Gauweiler*, the Court of Justice thus avoided that element of the necessity test that involves considering less burdensome alternatives,<sup>145</sup> pointing to the temporary and limited nature of each period of the programme.<sup>146</sup> The Court took information provided by the ECB concerning

138. Ibáñez Colomo, “Beyond the more economics based approach: A legal perspective on Article 102 TFEU case law”, 53 CML Rev. (2016), 3.

139. Alemanno, “A meeting of minds on impact assessment when ex ante evaluation meets ex post judicial control”, 17 EPL (2011), 485, at 486.

140. Case C-310/04, *Spain v. Council*, EU:C:2006:521, paras. 121–134.

141. Scott and Sturm, “Courts as catalysts: Re-thinking the judicial role in new governance”, 13 CJEL (2006), 565, at 573–574.

142. BVerfG *Weiss*, cited *supra* note 31, para 85.

143. Judgment, para 74.

144. *Ibid.*, para 78.

145. *Ibid.*, para 81.

146. *Ibid.*, paras. 85–86.

interest rates at face value, without engaging in a genuine analysis of alternative measures. This is even more visible in the Opinion of the Advocate General, who not only praised the information provided by the ECB as “useful,” “clear,” “coherent,” “comprehensive” and part of a “real debate” and an “open and reasoned discussion”,<sup>147</sup> but also accepted the “wait and see approach”<sup>148</sup> as the only alternative offered in the ECB’s assessment, resulting in the PSPP being a necessary measure.<sup>149</sup> The ECB’s justification of the volume and maturity of securities is thus made subject to an identical formula as in *Gauweiler*, namely that “nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.”<sup>150</sup>

In proportionality terms, therefore, there seems to be little meaningful difference between the two judgments in the standard of scrutiny demanded by the Court. “Complexity” is again used as a reason for a more limited proportionality analysis. One conclusion for judicial review of ECB action is thus that proportionality review – in the monetary field – is restricted to the review of the duty to state reasons, which only a manifest error of assessment is able to vitiate. Once this obligation is met, the ECB will face few, if any, further proportionality restrictions.

It remains to be seen whether reviewing only this duty can still prove a meaningful way of ensuring the ECB’s legal accountability. There remain meaningful contrasts with current judicial review of other areas, both of EU law more broadly and of ECB activity, e.g. via the recently established single supervisory mechanism (SSM). In terms of broader EU law, as recognized by Advocates General, EU Courts must be wary in using the “complexity” of a given policy field as a blanket reason to limit the availability of judicial review.<sup>151</sup> The majority of cases before the EU Courts, dealing with competition and internal market matters, touch upon complex issues in which economic forces and unpredictable causal relations are at play.

While the EU Courts have thus insisted that, in areas of complex assessment and forecasting, EU actors carry a “broad discretion,” this discretion remains subject to a duty of care.<sup>152</sup> While there remain variances in the case law

147. Opinion, paras. 133–134 and 136–137.

148. *Ibid.*, para 135.

149. *Ibid.*, para 137.

150. Judgment, para 91. In comparison, A.G. Wathelet did address necessity, but solely regarding the alternative measure of inaction, as one that would not be able to achieve the pursued aim. Opinion, paras. 134–135.

151. See e.g. Opinion of A.G. Jacobs in Case C-269/90, *Technische Universität München*, EU:C:1991:317.

152. Mendes, “Discretion, care and public interests in the EU administration: Probing the limits of law”, 53 CML Rev. (2016), 419; Hoffmann, “Delegation, discretion and the duty of



elaborating this principle, it involves a duty on the institution to analyse the relevant facts and information necessary to render a decision, and (in the words of the *Tetra Laval* judgment), “to ensure that evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it”.<sup>153</sup> This wider obligation to scrutinize the manner in which evidence has been gathered and to ensure a *basic pluralism* in the gathering of relevant evidence is displaced in *Weiss* by a narrower duty (“to carry out analysis with all care and accuracy”). This lighter duty does not seem, for example, to require the ECB to have considered other mechanisms to tackle deflation or to have relied on external evidence of the relation between asset purchases and prices.

A useful comparison may be with judicial review of other areas of ECB activity. In the case of the ECB’s supervisory arm, the SSM, the Court has been both far more willing to annul ECB decisions and more exacting in its demands.<sup>154</sup> The contrasting levels of success for litigants in the monetary and supervisory arms illustrate this trend well: all four cases concerning monetary policy were decided in favour of the ECB,<sup>155</sup> while in the supervisory arm, cases were decided against, or partially against, the ECB six out of twelve times<sup>156</sup> (given the nature of SSM decisions directly affecting large financial institutions, the rates of litigation differ significantly between the two arms).

care in the case-law of the Court of Justice of the European Union”, *University of Luxembourg Law Working Paper Series* 4, 2018.

153. Case C-12/03 P, *Tetra Laval*, EU:C:2005:87, para 39.

154. The literature in this field predominantly argues for a distinction between standards of review in the monetary and supervisory arms, respectively. This stems from the difference in the legal framework of the 2 areas, and the extent of discretion awarded to the ECB. See e.g. the dominant approach in the papers submitted to the ECB Legal Conference: *Shaping a new legal order for Europe: a tale of crises and opportunities*, 4–5 Sept. 2017, Frankfurt, available at

<[www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf](http://www.ecb.europa.eu/pub/pdf/other/ecblegalconferenceproceedings201712.en.pdf)> (last visited 28 May 2019).

155. Judgment; Case C-62/14, *Gauweiler*; Case T-79/13, *Accorinti and Others v. ECB*, EU:T:2015:756; Case T-749/15, *Nausicaa Anadyomène and Banque d’escompte v. ECB*, EU:T:2017:21.

156. 6 cases decided against or partially against the ECB: Case T-768/16, *BNP Paribas v. ECB*, EU:T:2018:471; Case T-745/16, *BPCE v. ECB*, EU:T:2018:476; Case T-751/16, *Confédération nationale du Crédit mutual v. ECB*, EU:T:2018:475; Case T-758/16, *Crédit Agricole v. ECB*, EU:T:2018:472; Case T-733/16, *Banque postale v. ECB*, EU:T:2018:477; Case T-757/16, *Société Générale v. ECB*, EU:T:2018:473. 6 cases decided in favour of the ECB: Case T-52/16, *Crédit mutual Arkéa v. ECB*, EU:T:2017:902; Case T-712/15, *Crédit mutual Arkéa v. ECB*, EU:T:2017:900; T-122/15, *Landeskreditbank Baden Württemberg v. ECB*, EU:T:2017:337; Case C-219/17, *Berlusconi and Fininvest*, EU:C:2018:1023; Case C-52/17, *VTB Bank (Austria)*, EU:C:2018:648; Joined Cases T-133-136/16, *Caisse régionale de crédit agricole mutual Alpes Provence v. ECB*, EU:T:2018:219.

Much of the explanation for these differences emerges from the different legal frameworks and the implications the EU Courts draw regarding the appropriate standard of review. While in monetary policy, the Bank carries a rather broad mandate (which it has itself specified via a 2% inflation target), in supervision, the EU legislature has established an extensive set of rules regulating the relationship between the ECB, financial institutions and national authorities.<sup>157</sup> This has allowed the EU Courts to adopt a more restrictive approach in some cases.

This can be observed, for example, in the six cases decided in 2018, brought by French banks objecting to the ECB's refusal to exclude certain saving products from the capital individual banks were required to transfer to a French public financial institution.<sup>158</sup> The General Court objected in particular to the ECB's failure to objectively evidence an identified risk (the default of the French State), holding that it did not act as a "good administrator" by failing to conduct a detailed examination of the specific characteristics of the savings products in question.<sup>159</sup>

In this sense, when proportionality is invoked as a ground for review in the monetary arm, it tends to be exhausted by a duty to state reasons,<sup>160</sup> whereas judicial review of the SSM indicates a willingness to go beyond this. The elaborated rules of the SSM, and the practice of the ECB and the national authorities it directs, have allowed successful annulment challenges, under proportionality standards that require the ECB to act as a coherent and competent administrator.<sup>161</sup> By contrast, the monetary field simply lacks such rules, and with it, the standards available to EU Courts with which to measure ECB action and subsequently contain ECB discretion. The ECB, given the different surrounding legal frameworks, is thus conceptualized not as an "administrator" but as an EU institution "acting independently" to realize Treaty goals.

The necessity stage, while present in some cases in both the SSM<sup>162</sup> and the monetary field,<sup>163</sup> remains highly limited, with the ECJ often refusing to

157. On the different standards of review in these two "arms", see Lehmann, "Varying standards of judicial scrutiny over Central Bank actions", ECB Legal Conference 2017, cited *supra* note 154.

158. Case T-733/16, *Banque postale*, Case T-745/16, *BPCE*, Case T-751/16, *Confédération nationale du Crédit mutual*, Case T-757/16, *Société Générale*, Case T-758/16, *Crédit Agricole*, Case T-768/16, *BNP Paribas*.

159. For an analysis of the cases, see the note of Rene Smits, available at: <ebi-euro pa.eu/wp-content/uploads/2019/01/Summaries-RS.pdf> (last visited 28 May 2019).

160. Judgment; Case C-62/14, *Gauweiler*.

161. Case T-768/16, *BNP Paribas*; Case T-745/16, *BPCE*; Case T-751/16, *Confédération nationale du Crédit mutual*; Case T-757/16, *Société Générale*.

162. Case T-52/16, *Crédit mutuel Arkéa*; Case T-712/15, *Crédit mutual Arkéa*.

163. Judgment; Case C-62/14, *Gauweiler*.

engage in an actual analysis of different measures beyond those put forward by the ECB. Finally, “substantive” proportionality review, as detailed in the beginning of this section, has not yet taken place as the ECJ has not engaged in an external peer review of the reasons forwarded by the ECB in its decision making.

The limited number of cases does put a strain on reaching more general conclusions on judicial review of ECB action, but they do display visible diverging trends in the two policy areas. The weight of existing case law suggests a slowly differing dual regime of review of ECB action: a highly deferential approach to the review of monetary policy on the one hand, and a level of review in the supervisory arm gradually following the broader pattern of EU administrative law, on the other.

#### 5.4. *Constitutional position of the ECB and consequences for judicial review*

##### 5.4.1. *Independence*

*Weiss*, much like in *Gauweiler*, goes to the heart of a central question for EU law – what is the role of the EU’s legal and political system in supervising independent institutions? The ECB’s independence has a different quality, both in comparison to other notionally independent bodies in the EU system (like agencies) and to national central banks. Its independence is anchored in the Treaties, in Articles 130 and 282(3) TFEU. This has been accompanied by a number of other independence guarantees (e.g. regarding the ECB’s finances and personnel).<sup>164</sup>

At the same time, independence (at least in the political economy literature that has been so influential in developing the model of an independent central bank) is conceived as independence from *political* rather than legal interference.<sup>165</sup> Independence is granted not to allow central banks to escape constitutional supervision *per se*, but rather to allow them to develop credible long-term policies without political manipulation. The ECJ once recognized this by arguing in its *OLAF* judgment that the ECB’s independence was largely *operational*, i.e. restricted to the degree of autonomy necessary for the

164. See on these, Zilioli and Riso, “New tasks and Central Bank independence: The Eurosystem experience” in Conti-Brown and Lastra (Eds.) *Research Handbook on Central Banking* (Edward Elgar, 2018).

165. See e.g. Majone, “Two logics of delegation: Agency and fiduciary relations in EU governance”, 2 *European Union Politics* (2001), 1; Elgie, “The politics of the European Central Bank: Principal-agent theory and the democratic deficit”, 9 *Journal of European Public Policy* (2002), 186.

ECB to fulfil its tasks.<sup>166</sup> As such, the ECB is caught by the general scheme of review of the Treaties, and Article 263 TFEU.

The disagreement between the *Bundesverfassungsgericht* and the ECJ can to a large extent be seen as a disagreement on how that independence should be interpreted. For the German Court, the nature of the ECB as a non-majoritarian body makes it an exception to the democratic principle and to the right of the German people to self-determination.<sup>167</sup> As a result, its mandate, and the extent to which its policies can restrict the prerogatives of other directly legitimated bodies, must be interpreted strictly.<sup>168</sup> For the ECJ, the rationale is the other way around: the unique anchoring of the ECB's independence within the Treaty, and the need to respect its operational functions as demanded by the principle of institutional balance, suggests broad discretion for the ECB to determine the range of instruments available to it to pursue its objectives.<sup>169</sup> The "special" nature of the ECB warrants a looser rather than tighter degree of judicial supervision.

This disagreement frames an inability of either Court to engage substantively with the surrounding constitutional rationale of the other body. For the *Bundesverfassungsgericht*, this is reflected in its failure to engage with the EU's diverse institutional system and the balance of authority between institutions that the Treaty provides.<sup>170</sup> While many areas of EU action are governed by detailed rules, the Treaty drafters explicitly provided the ECB with a general mandate to ensure price stability while leaving the ECB considerable leeway as to the means necessary to meet that objective. As argued in a note on the German Court's preliminary reference, the general nature of this mandate may warrant a more dynamic interpretation of the ECB's mandate, allowing the ECB to respond to new monetary challenges as they arise (in the context of an EMU that still lacks a strong fiscal pillar).<sup>171</sup> The complex weighing of interests and risks associated with conducting monetary policy places significant hurdles in the way of objective judicial scrutiny of the substantive reasons underlying ECB decisions. The German Court's certainty surrounding the PSPP's design and effects thus conflicts

166. Case C-11/00, *Commission v. European Central Bank (OLAF)*, EU:C:2003:395, para 127.

167. BVerfG *Weiss*, cited *supra* note 31, para 103. BVerfG *Gauweiler*, cited *supra* note 25, para 187 onwards.

168. *Ibid.* "The endorsement under constitutional law of the ECB's independence hinges on the requirement that its mandate be interpreted restrictively".

169. Judgment, paras. 49–52.

170. Goldmann, "Adjudicating economics? Central bank independence and the appropriate standard of judicial review", 15 GLJ (2014), 2.

171. Lang, "Ultra vires review of the ECB's policy of quantitative easing: An analysis of the German constitutional court's preliminary reference order in the PSPP case", 55 CML Rev. (2018), 923, at 939–941.

with the institutional modesty the Treaties demand regarding review of ECB action.<sup>172</sup> The danger here is of the judicial whims of one court (a national court reflecting that State's distinct preferences and experience) displacing the judgement of an institution explicitly designed to render economic judgements.

For the Court of Justice, this is reflected in the lack of consideration of the general accountability system in which the ECB sits (and its implications for national constitutional democracy).<sup>173</sup> This includes highly limited accountability either to national democratic institutions or to national representatives within EU bodies.<sup>174</sup> To provide an example, one aspect of the ECJ's limited standard of review is the standard formula on discretion imported from general EU administrative law that when specialized bodies make complex assessments of a technical nature, they should be allowed broad discretion, subject to the duty of the courts to check for a "manifest error of assessment".<sup>175</sup> This standard was used in *Gauweiler*<sup>176</sup> and *Weiss*.<sup>177</sup>

There is, however, a meaningful difference in the degree of political accountability to which actors like the Commission and the ECB are subject. For the Commission, its wide discretion is ultimately subject to political limits. A Commission that makes frequent errors, that exceeds powers provided for in legislation, or that mismanages policy responsibilities is ultimately subject to political censure (the revocation, for example, of delegated powers by the Union's legislative bodies, or the extensive scrutiny of the European Parliament).<sup>178</sup> The ECB carries no such threat: its main political accountability mechanism in this field, the Monetary Dialogue, has frequently been criticized as ineffective (and the ECB has often resisted efforts to engage in accountability exercises before national parliaments).<sup>179</sup> Any

172. In that sense, see the Dissenting Opinion of Justice L ubbe-Wolff in BVerfG *Gauweiler*, cited *supra* note 25, paras. 1 and 5–10.

173. And a departure from its more strict approach taken in Case C-11/00, *OLAF*.

174. The main political accountability channel in this regard, the Monetary Dialogue, is an accountability channel to the European Parliament. Accountability channels to the Eurogroup or National Parliaments are limited and underused. See Dawson, Maricut-Akbik and Bobi c, *op. cit. supra* note 131; Tesche, "Instrumentalizing EMU's democratic deficit: The ECB's unconventional accountability measures during the eurozone crisis", *Journal Eur. Int.* (2018), early view.

175. Case C-269/90, *Technische Universit at M unchen*, para 14.

176. Case C-62/14, *Gauweiler*, para 68.

177. Judgment, para 56.

178. See Brandsma and Blom-Hansen, "Controlling delegated powers in the post-Lisbon European Union", 23 *Journal of European Public Policy* (2016), 531.

179. Amtenbrink and Van Duin, "The European Central Bank before the European Parliament: Theory and practice after 10 years of monetary dialogue", 34 *EL Rev.* (2009), 561; Collignon and Diessner, "The ECB's monetary dialogue with the European Parliament: Efficiency and accountability during the euro crisis?", 54 *JCMS* (2016), 1296; Fromage and

“revocation of authority” could take place only via altering the Treaties themselves. While in this sense, a limited standard of review in broader administrative law takes place “in the shadow” of a wider system of political and administrative control (including to national representatives), the ECB experiences no such shadow.

#### 5.4.2. *Turn to procedural review*

The ECB’s independence and the complexity of its tasks suggest a weak standard of review; at the same time, its lack of political accountability and its gradual accumulation of significant decision-making power suggest exactly the opposite. As a consequence, when reviewing monetary decisions, judges are forced to either limit their review to procedural questions (thus respecting the former side of the equation) or engage in a more substantive form of review (respecting the latter side, but involving the Court in complex economic assessments).

The decision in *Weiss* indicates a clear preference for the former path: what the President of the Court has termed as “process-oriented review”.<sup>180</sup> This process-oriented approach couples a high degree of deference to the ECB on the use of its operational discretion with the notion that reviewing the procedural steps leading up to the adoption of a decision “is of fundamental importance.”<sup>181</sup> *Weiss* thus deals with the challenge of complexity by replacing substantive review with close attention to the procedure and justifications offered by the ECB in developing the PSPP. First, the ECJ notes that the ECB provides explanations not only for its initial decision to establish PSPP, but for subsequent expansion and amendment.<sup>182</sup> Second, it notes that each decision was underpinned by economic analysis, including comparative analysis (e.g. the use of asset purchase programmes to tackle deflationary risks by other central banks).<sup>183</sup> Third, the ECJ (following the Opinion of A.G. Wathelet<sup>184</sup>) takes wider institutional practice and the trend for the ECB to adopt new transparency exercises, such as press releases, press conferences, and abridged minutes of meetings of the Governing Council, into account.<sup>185</sup>

Ibrido, “The ‘Banking Dialogue’ as a model to improve parliamentary involvement in the monetary dialogue?”, 40 *Journal Eur. Int.* (2018), 295; Tesche, op. cit. *supra* note 174.

180. Lenaerts, “The European Court of Justice and process-oriented review”, 31 *YEL* (2012), 3; Harvey, “Towards process-oriented proportionality review in the European Union”, 23 *EPL* (2017), 93.

181. Judgment, para 30.

182. *Ibid.*, para 35.

183. *Ibid.*, para 77.

184. Opinion, paras. 133–138.

185. Judgment, para 37.

There is considerable merit to the procedural approach. It could be seen as a means of dealing with a broader tension between a substantive form of proportionality and a purely deferential form (which carries the danger of completely absolving the EU Courts of their responsibility to *objectively* assess the legality of EU acts). In the wider literature, procedural review has thus been seen as carrying two advantages, which also pertain in the *Weiss* decision. It allows the ECJ, as a judicial institution, to respect the principle of institutional balance in circumstances where complex measures are under review.<sup>186</sup> At the same time, procedural interrogation can be seen as an exercise in rationalizing the policy process, with judicial decisions nudging transnational actors towards increasing the levels of transparency, pluralism and justification provided via their decision-making.<sup>187</sup>

This use of procedural devices is, however, questionable, both in general and specifically when applied to the PSPP case. In more general terms, broader critiques of process review have focused on the difficulties of separating process and substance, with the result that process review can hide substantive disagreements that should either be openly weighed by courts or dealt with via the political process.<sup>188</sup> More specifically, there is evidence to suggest that some of the procedural mechanisms the ECJ has relied on in assessing whether acts meet the proportionality test (e.g. the increasing use of impact assessment in the legislative process) may not always have a robust basis, either in carrying particular biases (e.g. towards de-regulation) or in failing to consider seriously arguments of relevance to assessing the proportionality of a given legal act (e.g. its fundamental rights implications or the feasibility of less onerous alternatives).<sup>189</sup> Some scholars therefore highlight the dangers of the Court's procedural turn.

“In this regard, it would appear that the level of justificatory evidence the Court deems must be adduced by the law-maker in order to satisfy proportionality review is rather low. To date, the jurisprudence suggests that absent evidence being lacking entirely (e.g. *Spain v. Council*) all evidence adduced by the law-maker will be accepted at face-value, thus

186. Lenaerts, op. cit. *supra* note 180, at 15; Dyzenhaus, “Process and substance as aspects of the public law form”, 74 CLJ (2015), 284.

187. See Dawson, Maricut-Akbik and Bobić, op. cit. *supra* note 131; Scott and Sturm, op. cit. *supra* note 141; Popelier, “Preliminary comments on the role of courts as regulatory watchdogs”, 6 *Legisprudence* (2012), 257; Alemanno, op. cit. *supra* note 139, at 485.

188. See e.g. Tushnet, “Darkness on the edge of town: The contribution of John Hart Ely to constitutional theory”, 89 *Yale Law Journal* (1979); Michelman, “Family Quarrel” in Rosenfeld and Arato (Eds.) *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, 1998).

189. Dawson, “Better regulation and the future of EU regulatory law and politics”, 53 CML Rev. (2016), 1220; Harvey, op. cit. *supra* note 180, at 119.

leading to the suspicion that scrutiny of contested measures is effectively being operated in a box-ticking fashion”.<sup>190</sup>

In this sense, procedural review can only act as a meaningful substitute for more substantive forms of review if it involves assessing the *adequacy of procedures themselves*.

It is not difficult to apply this critique of procedural review to the *Weiss* judgment. While representatives of the Bundesbank were heard in the proceedings, the evidence relied upon by the ECJ in assessing the proportionality of the PSPP as well as other aspects (e.g. its link to Art. 123(1) TFEU) is provided exclusively by the ECB. The only independent source of information relied upon is the Court’s verification that indeed interest rates during the time of the PSPP’s programme activation were considerably below the Bank’s 2 percent target.<sup>191</sup>

At the same time, assessing the rigour and pluralism of the ECB’s decision-making practice is difficult – while, for example, the Opinion relies extensively on the minutes of the Governing Council, these minutes are redacted and anonymized, making it *de facto* difficult to assess the extent to which a meaningful and pluralistic discussion on particular questions has taken place. Although the ECB produces numerous economic assessments,<sup>192</sup> it has not yet established something akin to the Commission’s impact-assessment process, i.e. a pre-programme mechanism designed to assess the distributive impact, proportionality, or fundamental rights implications of its decisions. In simple terms, if an impact assessment *is itself* of variable adequacy in grounding the proportionality of decisions, the ECB’s decision-making may not reach the level of care, pluralism, and transparency even of this process.

In this context, and without being able to verify the adequacy of procedures or the veracity and robustness of information adduced by the ECB, procedural proportionality can easily become the very thing it is meant to avoid: a form of deference that does little to re-assure critics of the ECB that its policies have been rigorously judicially reviewed (while also doing little to encourage the ECB to engage in more rigorous decision-making).

190. Harvey, op. cit. *supra* note 180, at 118. See also, Weatherill, “The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court’s case law has become a ‘drafting guide’”, 12 GLJ (2011), 827.

191. Judgment, para 75.

192. See e.g. the Economic Bulletin series: <[www.ecb.europa.eu/pub/economic-bulletin/html/eb201804.en.html](http://www.ecb.europa.eu/pub/economic-bulletin/html/eb201804.en.html)> (last visited 28 May 2019).



### 5.4.3. Transparency

As discussed in section 5.3 above, in cases where the ECJ reviews the exercise of broad discretion by EU bodies, the duty to state reasons takes on a special significance. It is within the duty to state reasons that EU law connects with the broader accountability structure of EU governance.<sup>193</sup> This duty is a basic requirement of ensuring that the exercise of public authority carries a rational basis that is knowable both to the general public and to the specific addressees of EU acts. This general duty combines, in the specific case of the PSPP, with certain transparency obligations written into its founding acts (e.g. the publication of details regarding the value of securities held under the PSPP, the weight of securities between issuers, and eligibility criteria on assets eligible for purchase).<sup>194</sup> These elements are relied upon by the Court to motivate its finding that the ECB's duty to state reasons justifying the establishment of the PSPP was fulfilled.<sup>195</sup>

These transparency obligations fit within a more general narrative surrounding the relationship between the ECB's accountability and its independence: the two elements have often been said by the ECB to be "two sides of the same coin".<sup>196</sup> A more transparent ECB can better instil confidence in its activities, thus safeguarding its legitimacy and wider independence. Similarly, an independent ECB has less to fear from political interference, allowing it to make its decision-making process more open without fear of political sanction *ex post*.<sup>197</sup>

*Weiss* shows the limits of this vision. What if transparency, under particular circumstances, not only damages the ability of the ECB to fulfil its functions but impinges upon constitutional obligations the ECB is required to uphold under the terms of the Treaty? This is precisely the dilemma that the PSPP presents. If PSPP were truly transparent, i.e. if market participants could know and anticipate the exact securities the ECB were likely to buy under the programme, and in which quantities, a key "red line" set out in *Gauweiler* would be crossed. This red line is that, just as Article 123(1) TFEU prohibits

193. See Mashaw, "Reasoned administration: The European Union, the United States and the project of democratic governance", 76 *George Washington Law Review* (2007), 99.

194. Decision 2015/774, cited *supra* note 1, Art. 3.

195. Judgment, paras. 29–44.

196. Cœuré, "Independence and Accountability in a Changing World" (Introductory Remarks, Brussels (28 Mar. 17). Available at: <[www.ecb.europa.eu/press/key/date/2017/html/sp170328\\_1.en.html](http://www.ecb.europa.eu/press/key/date/2017/html/sp170328_1.en.html)> (last visited 28 May 2019).

197. See e.g. Curtin, "'Accountable independence' of the European Central Bank: Seeing the logics of transparency", 23 *ELJ* (2017), 28; Gandrud, Hallerberg and Véron, "The European Union remains a laggard on banking supervisory transparency" *Bruegel* (May 2016); Braun, *Two Sides of the Same Coin? Independence and Accountability at the ECB* (Transparency International EU, 2017).

the direct purchase of government bonds by the ECB, so it also prohibits purchases on the secondary market whose contours are so foreseeable as to make them *equivalent* to primary purchases.<sup>198</sup> Such equivalence, by providing market participants the security that particular bonds would be purchased by the ECB in any case, would likely distort the formation of a true market price, and in doing so, reduce the incentives for Member States to follow a sound budgetary policy.<sup>199</sup> This is the silver thread connecting *Weiss* to *Pringle* – once Article 123 TFEU had been interpreted in terms of the broader objective of budgetary responsibility, a trap had been set for any ECB programme likely to relieve the fiscal strain felt by government servicing debt via public securities.

It is therefore with some justification that the *Bundesverfassungsgericht* continually points to the tension between the transparency obligations undertaken in the context of Decision 2015/774 and Article 123(1) TFEU.<sup>200</sup> The programme may in fact be *too* transparent if one takes market realities into account. As the German Court points out, the strict eligibility criteria of the programme, and its tie to a national distribution key, means that, in practice, the number of securities available to the ECB for purchase on secondary markets for certain States may be decidedly limited.<sup>201</sup> *Weiss* thus puts the idea of a mutually re-enforcing link between transparency and independence to the test: the nature of its monetary policy forces the ECB, and the judiciary, to police an awkward trade-off between these two values.

This point also applies in terms of the tension between Article 123(1) TFEU and the adoption by PSPP of a “blackout period”. Precisely to allow *Gauweiler*’s red line on the outer limits of Article 123(1) TFEU to be met, the details of a “blackout period” between the issuance of a security by a public authority and its purchase on the secondary market remain non-transparent.<sup>202</sup> With some bravado, the *Bundesverfassungsgericht*, having already complained about the implications of transparency for Article 123(1) TFEU, *in addition* argued that the *lack* of information on the duration of the blackout period potentially violates the duty to state reasons, by restricting the ability of EU Courts to verify the period’s adequacy.<sup>203</sup>

While the *Bundersverfassungsgericht*’s question in this regard appears contradictory, this may simply reflect divergences between the two courts on

198. Case C-62/14, *Gauweiler*, para 97.

199. *Ibid.*, paras. 100–102.

200. BVerfG *Weiss*, cited *supra* note 31, paras. 85–90.

201. *Ibid.*, para 90. See also, Goldmann, “Summer of Love: Karlsruhe refers the QE case to Luxembourg”, *Verfassungsblog* (16 Aug. 2017), available at <[verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/](http://verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/)> (last visited 5 Mar. 2019).

202. Decision 2015/774, cited *supra* note 1, Art. 4(1).

203. BVerfG *Weiss*, cited *supra* note 31, para 94.

what the duty to state reasons entails. In *Weiss*, the ECJ quickly dismisses the challenge, arguing that publishing details of the period is not necessary to explain its necessity.<sup>204</sup> In simple terms, the ECJ does not relate the duty to state reasons to the *objective features* of the PSPP, but rather to the process of reason-giving used to *justify those features*. So long as adequate reasons have been given to justify the necessity of a blackout period, the duty to state reasons has been satisfied.

The difficulty in this regard is that the reasons given to justify the unknown duration of the blackout period in Decision 2015/774 are very limited. As with other parts of the judgment, both the Court and the Advocate General rely in this regard on justifications given by the ECB in the oral hearing as well as various “supplementary” documents provided by the ECB either before or after the Decisions establishing the various asset purchase programmes were made. This follows the ECJ’s practice in relation to cases brought against the ECB in the SSM, where subsequent explanations given by the Administrative Board of Review (an internal review body within the ECB) were accepted by the ECJ as evidence that the duty to state reasons had been met (in spite of the confidential nature of the hearings of that board).<sup>205</sup>

It is questionable whether even a rather informed affected individual could piece such disparate documents together in order to fully understand the reasons behind the establishment of the PSPP (giving weight to the notion that such reasons should be elaborated within the acts establishing such programmes themselves). In this sense, the ECJ’s expansion of the range of methods through which the duty to state reasons can be evidenced could be seen as an ambivalent step.

### 5.5. *Lessons for judicial interactions*

As briefly outlined above, the different heads of review developed and applied by the *Bundesverfassungsgericht* forced the Court of Justice to take notice of national constitutional concerns and adjust its case law accordingly. Still, challenging the jurisprudence of the ECJ may be problematic. As put by Advocate General Cruz Villalón: “it seems to me an all but impossible task to preserve this Union, as we know it today, if it is to be made subject to an absolute reservation, ill-defined and virtually at the discretion of each of the Member States, which takes the form of a category described as ‘constitutional identity’”.<sup>206</sup> While these fears have not yet materialized in

204. Judgment, para 43.

205. See Dawson, Maricut-Akbik and Bobić, op. cit. *supra* note 131, p. 28.

206. Opinion of A.G. Cruz Villalón in Case C-62/14, *Gauweiler*, EU:C:2015:7, para 59.

practice, the decision under analysis bears importance for possible clashes between national constitutional courts and the ECJ.

It has already been mentioned that this is the second preliminary reference submitted by the *Bundesverfassungsgericht*. Constitutional courts across the EU are in general rarely submitting preliminary references, opting rather for indirect procedural routes to send their message across,<sup>207</sup> with the notable exception of the Belgian Constitutional Court.<sup>208</sup> One reason is that the very structure of the preliminary reference procedure leaves the constitutional court with only the most extreme option of disregarding the ECJ's decision should it find it contrary to the national constitution. Understandably, the ECJ has consistently underlined the importance of judicial cooperation put into effect through the preliminary reference procedure,<sup>209</sup> which the ECJ would be wise not to disregard when trusted with a preliminary reference from a national constitutional court. Judicial interactions in the EU bring about important benefits and have through the history of European integration pushed the ECJ to increase its standards when reviewing EU action.<sup>210</sup> From a *de lege ferenda* perspective, visible from this reference, national courts can provide the impetus for substantive review of ECB action to be carried out by the EU Courts.

National courts can also ensure the coherence of such review, as this case demonstrates. By holding the Court of Justice to its standards, national courts are able to create long-term legitimate expectations, and ultimately, contribute to the uniformity and coherence of EU law (an important consideration for all those who rely on ECB action). What should be noted from the preliminary references concerning ECB action, both in the monetary and the supervisory arms, is that in all of them the Court of Justice provided an interpretation in favour of the ECB position.<sup>211</sup>

Furthermore, the preliminary reference procedure has the inevitable advantage of providing judicial protection to the individual, who is often underrepresented in cases concerning ECB competences, which are

207. For an analysis, see Bobić, "Constitutional pluralism is not dead: An analysis of interactions between the European Court of Justice and constitutional courts of Member States", 18 GLJ (2017), 1395; Martinico, "Judging in the multilevel legal order: Exploring the techniques of 'hidden dialogue'", 21 *King's College Law Journal* (2010), 257.

208. Leading with 34 preliminary references submitted. Court of Justice, 2017 Annual Report on Judicial Activity, available at <[curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/\\_ra\\_2017\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/_ra_2017_en.pdf)> (last visited 28 May 2019), 123.

209. E.g. Case C-283/81, *Cilfit*, EU:C:1982:335, para 7.

210. The area of fundamental rights review is the obvious suspect for describing how the *Bundesverfassungsgericht* pressured the ECJ into applying a higher standard for fundamental rights review.

211. The present judgment; Case C-62/14, *Gauweiler*; Case C-219/17, *Berlusconi and Fininvest*; Case C-52/17, *VTB Bank (Austria)*.

dominated by direct actions.<sup>212</sup> As famously stated back in 1986 in *Les Verts*, the preliminary reference procedure is part of a complete system of judicial remedies designed to permit the ECJ to review EU measures.<sup>213</sup> Its specific importance for the protection of rights of individuals was explicitly underlined by the ECJ on numerous occasions<sup>214</sup> and is of importance not just to the Court but to the wider legitimacy of the EU legal order. Using judicial review, and the preliminary reference procedure, to re-locate the individual in EMU (a policy field otherwise dominated by States and EU institutions) could yet constitute a major contribution of judicial review to the wider accountability of the EU.

Despite the benefits of the preliminary reference procedure, constitutional courts are not always in a position to submit a reference, and in the majority of cases, they reserve the final decision for themselves. It is in these situations that a conflict in interpretation between the EU and the national level may arise. The PSPP reference is a good example of a national court attempting to hold the ECJ to abide by its own standards, and equally to respect the limits of EU law. While it is impossible at this point to know whether the *Bundesverfassungsgericht* will accept the decision of the ECJ, it has, already in its reference, provided certain safeguards in case of disagreement. Before detailing the standard of review it will apply to the PSPP, it stated that “the obligation incumbent on the Federal Constitutional Court to pursue substantiated complaints of an *ultra vires* act on the part of the European bodies and institutions is to be coordinated with the task which the Treaties confer on the Court of Justice”.<sup>215</sup> The German Court then sets out the relationship between the principle of primacy and the Basic Law, addressing also the identity and *ultra vires* review it carries out in relation to EU acts. The conclusion is that any such review must be done cautiously, with restraint, and in a way that is open to European integration.<sup>216</sup>

Regardless of the many advantages of the preliminary reference procedure, it is regrettably possible to observe that the two courts are not so much meaningfully talking *to*, as much as *past* each other. This is visible from the back and forth exchange concerning the nature and extent of judicial review of ECB action in the monetary field. On the one hand, when assessing whether the objectives of the PSPP fall within monetary policy, the *Bundesverfassungsgericht* appears to find the information provided by the

212. Court of Justice, 2017 Annual Report on Judicial Activity, cited *supra* note 208, 106.

213. Case C-294/83, *Les Verts*, EU:C:1986:166, para 23.

214. See e.g. Opinion 2/13, *ECHR*, para 176; Case C-50/00 P, *UPA*, EU:C:2002:462, para 40; Case C-491/01, *BAT and Imperial Tobacco*, EU:C:2002:741, para 39.

215. BVerfG Weiss, cited *supra* note 31, para 56.

216. *Ibid.*, paras. 121, 154 and 156.

ECB insufficient to allow for judicial review.<sup>217</sup> On the other hand, when addressing the prohibition of monetary financing, the German Court finds the available information to hinder the need for uncertainty on the secondary market.<sup>218</sup> The Court of Justice, with the aim of opposing both propositions, falls into an analogous inconsistency: the information provided is enough for the Court to be able to review its objectives as regards monetary policy,<sup>219</sup> but not enough to provide certainty on the market and breach the prohibition on monetary financing.<sup>220</sup>

In addition, the Court of Justice on its part provided very little input as regards a possible rejection of its decision by the *Bundesverfassungsgericht*, restating its well-established case law on the binding nature of preliminary rulings,<sup>221</sup> despite the possibility left open in the reference for the German court to disregard a decision contrary to German constitutional identity. From the perspective of avoiding conflict, this tactic from *Gauweiler* has proved useful, as any interference by the ECJ in sensitive national constitutional matters may ultimately breach the obligation of the EU to respect national identities of Member States, as set out in Article 4(2) TEU. Nevertheless, taking into consideration that the *Bundesverfassungsgericht* has now twice raised serious concerns, emphasizing the importance of German constitutional identity relating to the budgetary powers of the *Bundestag*, the ECJ will at a certain point need to define the room for manoeuvre available to the ECB when implementing large-scale programmes such as the PSPP at the expense of national budgetary powers.

## 6. Conclusion

The euro crisis has dramatically influenced not only the economic strength of the EU and euro, but has left a permanent mark on its institutional structure. The *Weiss* litigation described and analysed in this note thus has significant consequences for the position of the ECB in carrying out its tasks accorded by the Treaties. It will determine the delicate balance between the discretion and independence necessary to perform its tasks successfully on the one hand, and the accountability mechanisms in place to keep the ECB in check, on the other. In that sense, the judgment also contributes to determining the standards of legal accountability in the economic and monetary field more generally, and

217. *Ibid.*, para 114.

218. *Ibid.*, para 80.

219. E.g. Judgment, paras. 88–89.

220. *Ibid.*, paras. 111 and 113–127.

221. *Ibid.*, para 19.

in particular in relation to the level of accountability required by constitutional law at the national level.

The common thread behind these different aspects of the case is that ultimately the ECJ will do, and appears to have done, whatever it takes to save the euro. It has allowed for a wide reading of the ECB's monetary policy mandate, without engaging in a more substantive review of the reasoning provided by the ECB. The Court has also accepted all safeguards provided by the ECB to satisfy the prohibition of monetary financing from Article 123(1) TFEU without questioning the information provided by the ECB, or contrasting it to other sources of expertise. It has further applied a narrow procedural version of proportionality review confined to assessing the ECB's duty to state reasons. All these findings from *Weiss* will have long-term effects on the constitutional position of the ECB, with the Court going a long way to strengthening the position of the ECB over time. In doing so, the ECJ also potentially endangers its collaborative relationship with the *Bundesverfassungsgericht*, as well as national courts more generally. One unanticipated consequence of this litigation may be an additional reluctance on the part of national courts to submit preliminary references. The answer to any question related to ECB activity (at least on monetary questions) seems to be known in advance.

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