Law and monetary policy: from limited judicial review to parliamentary scrutiny in the EMU

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Abstract

In monetary policy public power seems to go unchecked by law, even if law is a central component of monetary structures. Recent calls by US scholars to revisit the exceptionality of monetary policy in relation to public law could find some answers in recent monetary policy judgments in the European Monetary Union (EMU). Specifically, the legal principles deployed in the conflicting judgments of the *Bundesverfassungsgericht* and the Court of Justice of the European Union in *Weiss*, proportionality and reasons, combined with care, can be important tools to secure external scrutiny of central-bank measures. They provide parameters of reasoning that the ECB must deploy in its decision-making. Importantly, they can unveil the conditions, criteria and implications of monetary policy decisions and, potentially, influence and change the processes and content of monetary policy. But they have not been deployed by courts to this effect. I argue that they can support a heightened parliamentary scrutiny, and overcome limitations of the current monetary dialogue. Because of the EMU design, this is not a solution to democratize monetary policy, but one avenue to expand the voices that influence monetary policy decisions.

During the decade-long process of EU integration, integration-through-law has placed the Court of Justice of the European Union (CJEU) at the center of the complex economic, political and social dynamics that have involved states, corporations and citizens in the shaping of EU law. At the same time, the deepening of integration and of the tensions between the legal orders of the Member States and of the Union, led the CJEU to extend the veil of the law to areas where judicial adjudication fits uneasily. Monetary policy is one of such areas, as a contentious policy field where central banks' decisions diffusely and indirectly touch virtually every household and business and interact with the political decisions of politically accountable governments.

At the height of the Eurozone sovereign debt crisis, and later in a period of relative normalcy, the CJEU adjudicated two high-profile cases – *Gauweiler* and *Weiss* – in a largely similar manner.[1] It seemingly struck the delicate balance between, on the one hand, preserving the discretion of the European Central Bank (ECB) in exercising an EU exclusive competence and, on the other, setting boundaries assuring that the ECB acts lawfully when pursuing its mandate within the limits set by the Treaty norms. Legal interpretation, assisted by the deployment of legal principles – proportionality and reason-giving – purportedly, have allowed the court to provide

[1] Case C-62/14, *Gauweiler*, Judgment of the Court (Grand Chamber) of 16 June 2015, ECLI:EU:C:2015:400 (henceforth, *Gauweiler*), and C-493/17, *Weiss*, Judgment of the Court (Grand Chamber) of 11 December 2018, ECLI:EU:C:2018:1000 (henceforth, *Weiss*).

judicial review suitable for the degree of complexity of monetary policy decisions, enabling it to control possible manifest errors of assessment, and, hence, filter out blatant instances of illegality of central bank decisions.[2] When the ECB also became active in banking supervision, the extension of the Court's customary administrative-law-like methodology to the deeply political realm of money supply regulation seemed to preserve the rule-of-law canon of the EU: like any other institution, the ECB is subject to judicial review.[3] The matter was, nevertheless, hotly debated, when in May 2020, the German Federal Constitutional Court (FCC) set aside the CJEU judgment on *ultra vires* grounds, given the EU court's highly deferential examination of proportionality.[4]

This jurisprudential development is potentially relevant in comparative terms. In the US, there have been recent calls to critically assess whether the idiosyncratic features of central banking justify deviations from 'normal' administrative-law recipes, and, specifically, how to attune judicial review to the new world of central banking.[5] From this perspective, the solutions of EU law could be appealing. Against this background, this chapter takes the discussion of judicial review triggered by the *Gauweiler* and *Weiss* judgments as a starting point to assess the role that the legal principles deployed in judicial review can have in monetary policy.[6] It argues that those judgments have shown that the conventional methodology that the CJEU has applied to review complex technical assessments reveals the weaknesses, rather than the ability, of courts to control or structure the discretion exercised by central banks. Yet, the judgments do point the way to the role that the legal techniques developed by the CJEU – and, hence, the law that structures discretionary decision-making – may nevertheless have in a different institutional setting. The monetary dialogue between the ECB and the European Parliament has emerged as an institutional practice that aims to render the ECB accountable to the Parliament but which has important limitations as an accountability forum.

The chapter starts by outlining the main layers of legality that placed the CJEU at the core of constitutional turmoil in the EU and contrasts judicial review of monetary-policy decisions in EU law and in US law (Section 1). Despite the many pages that have already been dedicated to the

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[2] K. Lenaerts, "Proportionality as a Matrix Principle Promoting the Effectiveness of EU Law and the Legitimacy of EU action – Keynote Speech" in ECB Legal Conference 2021, *Continuity and Change – How the Challenges of Today Prepare the Ground for Tomorrow* (2022), 27-42, 30-33 (https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings202204~c2e5739756.en.pdf).

[3] Referring to "the methodological approach followed by the Court", idem, 33.

[4] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915 ((henceforth, 'FCC, *Weiss*').

[5] P. Conti-Brown, Y. Listokin, N. R. Parrillo, 'Towards and Administrative Law of Central Banking' (2021) *Yale Journal on Regulation* 38(1), 1; S. Ostrowski, "Judging the Fed", (2021) *Yale Law Journal* 131(2), 726.

[6] This chapter advances the argument I first made in J. Mendes "Constitutive powers and justification: the duty to give reasons in EU monetary policy", forthcoming in M Dawson et al. (eds.) *Towards Substantive Accountability in EU Economic Governance* (CUP, forthcoming), where I ask whether law can support political accountability, irrespective of concrete instances of judicial review.

Gauweiler and *Weiss* judgments of both the CJEU and the German FCC, it is important to return to them to contrast the positions of three different judiciaries on the possibilities of judicial review of monetary policy. None of these positions has convincingly justified *judicial* control over central bank measures. Yet, zooming in on the legal principles that were deployed in the conflicting judgments of the FCC and the CJEU in *Weiss* – proportionality, care, and reasons – the chapter argues that they are, indeed, important tools to secure external scrutiny of central-bank measures (Section 2). They provide parameters of reasoning that the ECB must deploy in its decision-making and can unveil the value judgments that central bankers necessarily make when assessing the conditions, criteria and implications of monetary policy decisions and the processes through which they define the content of monetary policy. They can be used to assess how compromises between competing interests have been struck and, hence, to question and contest the choices made, and, possibly, through ex post scrutiny, change the course of monetary policy. Yet, even if law supports these processes, this is not a task for the courts, whose control necessarily leads to a binary outcome of legality/illegality. It is, on the contrary, a type of scrutiny that parliaments can and must deploy when enhancing the mechanisms through which they hold accountable one of the most powerful institutions in modern government and whose independence must not exempt it from public scrutiny. The chapter argues that the deployment of such legal principles can help to overcome some of the weaknesses of the "monetary dialogue" that emerged as the main institutional practice of the European Parliament in seeking to hold the ECB accountable (Section 3). It concludes that this proposal cannot tackle the deep democratic challenges of the EMU, but can nevertheless help to improve the much-needed parliamentary scrutiny of the actions of the ECB (Section 4).

1. Judicial review of monetary policy decisions: a comparative note

1.1. The European Central Bank before two European Courts: two cases, three episodes of a saga

The *Gauweiler* and the *Weiss* judgments were both triggered by the constitutional complaints of a group of German academics, lawyers and politicians who mobilized the FCC, and indirectly the CJEU, to act against two unconventional, monetary-policy measures adopted by the European Central Bank (ECB): the ECB's Outright Monetary Transactions (OMT) program of 2012 and the Public Sector Purchase Programme (PSPP) of 2015. In their contention, the ECB was, through those programs, supporting the economies and financing the budgets of the Member States in need, in breach of its mandate and of the Treaty prohibition of monetary financing, and, as a result, of the sovereign rights of the German parliament as well as, by implication, their own right to vote.

The formal link was straightforwardly formulated thus: "if the Bundestag … loses competences, the right to vote guaranteed [by the Constitution] loses substance".[7] Concretely, the constitutional complaints were directed at preserving the political-economy model that the Treaty has enshrined, against the circumstances that, since the early 2010s, pushed the ECB to expand its actions beyond the strict price stability mandate that had guided the bank's operation before the global financial crisis. The bank had become the stronghold of secure financial stability in the Eurozone through measures that had obvious economic effects that no longer allowed ECB to present itself as a technocratic institution insulated from political choices.

In her dissenting opinion to the FCC order in the *Gauweiler* case, judge Gertrude Lübbe-Wolff warned that the German court was putting itself in an impossible position in a double sense: not only had it held the action admissible in novel terms that lacked "determinative standards" set in previous case law.[8] But it also was wholly unclear what action would be required if the CJEU were to find the OMT decision *ultra vires*. In her view, lack of action by national sovereign institutions with regard to measures taken at the EU level could not be subject to a constitutional complaint in the case of *Gauweiler*, where the applicants protested the inaction of the German Parliament and Government that, they argued, amounted to a violation of German sovereign rights. If it had succeeded, there was no explicit constitutional mandate that specified in substantive terms "the content and reach of the alleged duty to act".[9] No rule determined what the German Parliament and Government would be *legally* bound to do with a view to remedying the claimed omission. Lübbe-Wolff was adamant: "one ought to refuse being sent on grand desert tours that will not lead to any spring".[10] The claims in *Gauweiler* did not succeed – both the CJEU and the FCC upheld the legality of OMT[11] – but the final outcome of *Weiss* confirmed Lübbe-Wolff's warnings more than seven years later.

Having overcome the admissibility hurdles, both at national and EU level, *Gauweiler* set the terms of judicial review that the CJEU later repeated in *Weiss*, despite the very different

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[7] Peter Huber (2019), "The ECB under the scrutiny of the *Bundesverfassungsgericht*", in ECB Legal Conference 2019, "Building bridges: central banking law in an interconnected world" (April, 2019), pp. 28-46 at p. 36 (https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf).

[8] The Court held their plea admissible based on a possible breach of the right to vote protected by Article 38(1) of the German Basic Law before an *ultra vires* act of the ECB.

[9] Dissenting Opinion of Justice Lübbe-Wolff on the Order of the Second Senate of 14 January 2013, ECLI:DE:BVerfG:2014:rs20140114.2bvr272813, para 16 to 20.

[10] Idem, para 23. She added: "the problem of indeterminateness and indeterminability of what is positively due … will remain virulent as a problem of indeterminateness and, accordingly, unenforceability of what the Court decides" (para 24). For an exhaustive analysis of the other constitutional dimensions of this reference, see, among many, M. Wendel, "Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference" (2014) *European Constitutional Law Review* 10(2), 263.

[11] Among the many analyses of the case, its outcome is documented here: A. Pliakos and G. Anagnostaras, "Saving Face? The German Federal Constitutional Court Decides Gauweiler" (2017) *German Law Journal* 18(1), 213.

circumstances of the programs subject to review.[12] The main legal devices that have enabled the Court on both occasions to uphold the legality of the ECB measures were the following. First, the Court delimited the mandate of the ECB, specifically the boundaries between monetary and economic policy, by reference to the goals of the measures adopted and the need to preserve the transmission of monetary policy through the means chosen by the ECB.[13] Second, starting from the premise of the ECB's wide discretion, the CJEU applied a proportionality test and concluded that the ECB had committed no "manifest error of assessment" in determining the necessity and appropriateness of the measure.[14] Third, it identified the characteristics of the program that, in its view, prevented it from circumventing the prohibition of monetary financing.[15] In *Gauweiler*, the FCC accepted the CJEU ruling, and the constitutional claims were dismissed. A few years later it admitted the same constitutional complaints in relation to the PSPP program. In its preliminary reference to the CJEU, the FCC expressed strong doubts on the proportionality of the programme. Yet, this time, the FCC rejected the ruling of the CJEU, in a judgment that disrupted the world of European law for the months that followed its pronouncement in May 2020.[16] Its main objection was to the way the CJEU assessed the proportionality of the PSPP's intended monetary effects and the unintended economic side effects.[17] Although the FCC raised concerns about the CJEU's assessment that PSPP did not circumvent the prohibition of monetary financing, it accepted its position on this point.[18]

The position of the FCC could hardly have been stronger and demonstrated, a contrario, how proportionality *cannot* be a norm of judicial control of the ECB's discretion.[19] For the first time, it held that a legal act of an EU institution was not binding on Germany.[20] In its view, the CJEU had acted *ultra vires* by having "[accepted] positions asserted by the ECB without closer scrutiny" and "[allowing] the ECB to expand – gradually and in a manner that is not necessarily noticeable from the outset – its competences on its own authority".[21] Because of how the CJEU had applied proportionality, its judgment was "simply not comprehensible" and thus "objectively

[12] On these differences, see M. Dani et al., 'It's the political economy...! A moment of truth for the eurozone and the EU', (2021) *International Journal of Constitutional Law* 19(1), 309.
[13] *Gauweiler,* para 46-52; *Weiss*, para 53-70.
[14] *Gauweiler*, para 66-92, in particular para 74 and 75; *Weiss*, para 56 and 71-97, in particular 73 and 91.
[15] *Gauweiler*, para 93-127; *Weiss*, para 102 and following.
[16] See, among many, the special collection "European Constitutional Pluralism and the PSPP Judgment" in the German Law Journal 2020 24(4) and the symposium on "The PSPP Judgment of the Bundesverfassungsgericht" *International Journal of Constitutional Law* 2021 19(1).
[17] FCC, *Weiss*, para 153 and 176-178.
[18] FCC, *Weiss*, para 184 and 197.
[19] This argument has been developed in more detail in Dani et al. (n 12) and Mendes (n 6).
[20] Para 119.
[21] FCC, *Weiss*, para 142 (in relation to the objectives of the measure) and para 156 (in relation to the CJEU's application of the principle of proportionality).

arbitrary". The turmoil that ensued, the judgment's strong terms, and the manifold discussions around primacy seemed to signal a major turning point in EU law. And yet, within the deadline set by the Court, the president of the Bundestag and the German finance minister simply declared that the information that the Bundesbank had sent were sufficient to meet the proportionality assessment as the FCC had required.[22] In May 2021, "the FCC announced that there will be no further constitutional check of the documents".[23] The German Parliament and Government had acted as prompted by the FCC, but, aside from the regular use of the language of proportionality in the ECB measures and public speeches, little, if anything, was gained in terms of accountability of its actions. The "grand desert tours" manifestly did "not lead to any spring". Beneath the major clash between the two high courts that seemed to imperil the longstanding process of mutual constitutional adjustment, they had both revealed – in deeply distinct ways – their incapacity to weigh in on monetary policy measures adopted by an independent central bank.[24]

1.2. Non-justiciability of the Fed's monetary policy decisions

From a comparative perspective, the very possibility of judicial review of the monetary policy decisions of central banks appears an exception. In other jurisdictions, the outcome of the very few judicial challenges against central banks' monetary policy decisions seem to place them outside the realm of justiciability. This argument is advanced here solely by relying on US law.

Raichle v Federal Reserve Bank of New York , a federal appellate case from 1929, 16 years after the establishment of the Federal Reserve System, is the relevant precedent. It held that questions raised by measures pertaining to the setting of interest rates are, most likely, of a political nature.[25] In this judgment, despite the fact that the US Court of Appeals did not apply the political questions doctrine, it found "persuasive" the argument of the defendant that "upon the facts alleged the questions raised are political, and not justiciable".[26] In an oft-cited passage of that judgment, the Court held that:

> It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often

[22] D. Utrilla, "Three months after Weiss: Was nun?", EU Law Live, 5th August 2020 (https://eulawlive.com/three-months-after-weiss-was-nun/).
[23] German Federal Constitutional Court judgment of 18 May 2021 2 BvR 1651/15 ECLI:DE:BVerfG:2021:rs20210429.2bvr165115.
[24] For detail, see Dani et al. (n 12).
[25] *Raichle v. Federal Reserve Bank of New York*, 34 F.2d 910 (2d Cir. 1929), July 15, 1929.
[26] See, further, Ostrowski (n 5), 752 (holding that Raichle "somewhat blurs the line between non-justiciability and extreme deference", yet concluding that "at bottom, it matters little whether this precedent is best read as a merits decision subject to enormous deference or a holding on justiciability – the takeaway is the same").

> change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made.[27]

The case pertained to the banks' actions to raise interest rates, for which the plaintiff claimed compensation for damages. The Court noted "the broad purposes of the Act and the wide powers of supervision and control given to the Federal Reserve Board over the whole Reserve System".[28] It also outlined the tools that the Federal Reserve Banks had at their disposal. The explicit mention in the enabling statute of purchases and sales in the open market meant that this was, in itself, a lawful tool. The question, then, was whether it had been rendered unlawful because of the purpose for which it had been mobilized: to reduce the volume of collateral or brokers' loans, the effect that had caused damage to the plaintiff, to increase interest rates.[29] In other words, the court assessed whether this tool and purpose had been appropriate. The Court saw no basis to consider it unlawful:

> We can see no basis for the contention that it is a tort for a Federal Reserve Bank to sell its securities in the open market, to *fix discount rates which are unreasonably high*, or to refuse to discount eligible paper, *even though its policy may be mistaken and its judgment bad*. The remedy sought would make the courts, rather than the Federal Reserve Board, the supervisors of the Federal Reserve System, and would involve a cure worse than the malady. …. If [the bank] proceeds in good faith through open market operations and control of discount rates to bring about a reduction of brokers' loans, it commits no legal wrong.[30]

The cited passages indicate that, in matters of monetary policy, accountability for monetary policy decisions is not a task for courts. One analysis, however, notes a detail that could unlock a possible judicial basis for review: bad faith on the part of the bank, however difficult to ascertain by courts, can generate a "legal wrong".[31] Still, *Raichle* stands today as an hallmark of central bank exceptionalism when it comes to judicially-determined fetters on discretion, which make these powerful institutions mostly "invisible" in "court-centered [paradigms] of administrative law".[32] David Zaring summarizes the Fed's subjection to judicial review, in particular its Open Markets Committee (FOMC) as follows: "a combination of *Chevron* deference, unwilling potential plaintiffs,

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[27] *Raichle,* at 915, cited at S. Egidy, "Judicial review of central bank actions: can Europe learn from the United States?" in ECB Legal Conference 2019, "Building bridges: central banking law in an interconnected world" (2019), p. 53-76, 57 (https://www.ecb.europa.eu/pub/pdf/other/ecb.ecblegalconferenceproceedings201912~9325c45957.en.pdf); D. Zaring, "Law and Custom on the Federal Open Market Committee" (2015) *Law and Contemporary Problems*, 78(3), 157, at 175; and Ostrowski (n 5), 735.

[28] *Raichle,* at 913.

[29] *Raichle,* at 915. The plaintiff had argued that "the bank during the year 1928 illegally engaged in a course of conduct, which it is still continuing, that had for its object an arbitrary reduction of brokers' loans and a general reduction of security prices"; furthermore, the Federal Reserve Bank had "'arbitrarily and unreasonably raised' the rediscount rate which it charges to its member banks, 'for the purpose and with the effect of raising interest rates generally" with the result that "interest rates [had] become unreasonable, and plaintiff [had been damaged by being obliged to pay such rates for borrowed money, and by having the value of his securities depreciated through the sale of securities by persons unwilling or unable to pay these rates" (*Raichle*, at 911).

[30] *Raichle,* at 915, emphasis added.

[31] Egidy (n 27) 58, identifying here an „outer limit" to the wide deference of *Raichle.*

[32] Conti-Brown (n 5) 5.

and, most importantly, the lack of a standard for reviewability identified by Judge Hand in *Raichle*, has made the agency extremely difficult to judicially supervise."[33] Supervision of the FOMC remains with the Federal Reserve Board, and the economic impacts that its monetary policy decisions may have on individuals remain an indirect and general effect of macroeconomic decisions.[34] On this account, these decisions should remain largely exempt from judicial review.

1.3. A different continent, a different time

Reasons similar to those the US Court of Appeals invoked in *Raichle* in 1929 arguably apply to gauging the effects of a program for the purchase of government bonds on the financing conditions and needs of Member States (at stake in *Weiss*). The deployment of instruments of monetary policy raises political questions that challenge justiciability. Yet, in the EMU, the law delimits the authority of the bank in terms that allow litigants to contest the political economic tenets of monetary policy decisions (as *Gauweiler* and *Weiss* illustrate).[35] Practice has shown since 2010 that even a narrow mandate of price stability can be redefined through administrative and judicial interpretation, showing the illusion of rule-bound monetary policy. But even as the ECB returned to the core business of interest rate regulation in 2022, in the aftermath of the covid-induced economic slowdown and the rise of energy prices, the strong political stakes of monetary policy decisions are evident.[36] There are, therefore, important prudential reasons for limiting judicial review, beyond the vague justification that "questions of monetary policy are usually of a controversial nature".[37]

From this perspective the standard on which the CJEU settled, while not perfect, could stand for "meaningful oversight of the agency without unduly intervening in its zone of expertise", as called for across the Atlantic.[38] And yet, the judgment of the CJEU in *Weiss* gives little support to the conclusion that the Court is capable of exercising "meaningful oversight" over the actions of the ECB and, still less, that it has found its proper role as the overseer of legality in an area that, admittedly, presents a fundamental challenge. The Court simply confirmed the ECB's own position that it has "*full* discretion to use its instruments, as necessary, to carry out its tasks and

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[33] Zaring (n 27) 175. See, further, p. 176. On the changes of the Federal Reserve System, see, succinctly, Ostrowski (n 5), 735-736.
[34] Which explains the lack of standing: Conti-Brown et al. (n 5), 5, footnote 13.
[35] See, further, Section 3 below.
[36] Discussing the nature of inflation and showing its political stakes, see I. Weber, et al "Inflation in Times of Overlapping Emergencies: Systemically Significant Prices from an Input-output Perspective" (2022) Economics Department Working Paper Series 340. See also A. Tooze, "Now is a time of tough choices — including on the 2% inflation target", *Financial Times*, June 29 2023.
[37] *Weiss*, para 90: *Gauweiler*, para 75
[38] Ostrowski (n 5), 761.

fulfil its mandate".[39] It sanctioned both the Treaty norms – the ECB defines monetary policy – and the institutional practice that has enabled the ECB to define the boundaries of its own mandate, through the policy measures it has adopted since its inception and, much more visibly, in the past decade.[40]

2. The untapped potential of the *Weiss* saga[41]

The volumes of articles and commentaries written on *Weiss* focused on primacy, judicial dialogue, and on different understandings of proportionality. However, they largely ignored the substantial issues behind the case: the meaning of central bank independence when the bank holds massive amounts of government and corporate bonds, and the viability of an EMU whose political economic tenets are virtually set in stone in Treaty norms.[42] Most analyses have also largely downplayed the transformative potential of the judicial clash. Beyond the criticism of both judgments, beyond the heated debate on the terms and possibilities of judicial "dialogue" between high courts, and beyond the contention over different interpretations of legal rules, the case of *Weiss* revealed the need to acknowledge and address the limits of proceeding through legal tweaking. In addition, it highlighted the dysfunctionality and deep democratic flaws of the EMU.[43] Yet, three years on, these issues linger on, dormant in the apparent calm brought by the retreat of the ECB into inflation curbing and price stability. The tension between legal stasis (which *Weiss* ultimately reinforced) and central bank dynamism (arguably unstoppable), noted by Martin Höpner, has not subsided.[44]

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[39] https://www.ecb.europa.eu/ecb/orga/accountability/html/index.en.html (accessed June 27th, 2023, emphasis added).

[40] Mendes (n 6). The different proposals on the interpretation of the ECB's mandate that have been advanced since 2021, following the ECB's strategic review fail to address a fundamental point: in the current state of EU law, the ECB gets to choose which of the many goals of the secondary mandate it gets to pursue and this is a fundamental political choice (see, in particular, M. Ioannidis and C. Zilioli, "Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies" (2022) *Common Market Law Review*, 59 (2), 363 and N. de Boer, J. van 't Klooster, 'The ECB, the Courts, and the Issue of Democratic Legitimacy after Weiss' (2020) *Common Market Law Review* 57(6), 1717). The fact that its choice for climate change can be explained through a policy of appointments (J. Deyris, "Too green to be true? Forging a climate consensus at the European Central Bank, (2023) *New Political Economy*) and the argument that, unlike in other policy areas, climate change is guided by strict benchmarks set by political institutions (see Ioannidis and Zilioli, idem) does not alleviate the democratic concerns raised by leaving such a choice in the hands of an extremely independent institution.

[41] This section draws on arguments briefly advanced in J. Mendes, "General principles of law in monetary policy: in the hands of courts?" in D. Fromage (ed.), *Jacques Ziller: a European scholar* (European University Institute, 2022), 2-14, DOI: 10.2870/098663.

[42] Treaty revision has become politically untenable and, yet, central bank policies changed throughout the world. Among many, A. Tooze, 'The Death of the Central Bank Myth', Foreign Policy, May 13 2020.

[43] Dani et al (n 12), arguing that Weiss represented a missed opportunity for constitutional transformation.

[44] Martin Höpner, "Proportionality in the PSPP Saga: Why Constitutional Pluralism Is Here to Stay and Why the Federal Constitutional Court Did Not Violate the Rules of Loyal Conduct" (2022) *European Papers* 6(3), 1527, at 1535-1536.

Against this background, and failing Treaty reform, the quest continues for a "meaningful oversight" of the ECB that does not "unduly [intervene] in its zone of expertise" (however the limits of "unduly" interference may be defined). Here too, both in the FCC and in the CJEU judgments in *Weiss* give important pointers, although neither judgment was able to advance them fruitfully.

2.1. Proportionality as a procedural requirement in the FCC judgment

There is little doubt that the judgment of the FCC aimed at preserving the Maastricht settlement of a narrow Treaty mandate, as the ECB interpreted it in the first decade of its existence, and pursued by a depoliticized central bank. Its insistence on proportionality, however, belied that very settlement. By requiring that proportionality includes a "balancing of the competing interests" implicated by the consequences of measure chosen by the ECB,[45] the FCC in fact assumed that what the ECB must do – and does – goes beyond a neutral and purely expertise-based monetary policy that can be distinguished from economic policy decisions that are the competence of the democratic institutions of the Member States, and coordinated at the EU level with the "support" of the ECB.[46] The FCC requested that "the program's monetary policy objective and its economic policy effects be identified, weighed and balanced against one another"; and that the ECB provide "a prognosis as to the PSPP's economic policy effects [and] an assessment of whether any such effects were proportionate to the intended advantages in the area of monetary policy".[47] It further identified that the "relevant economic policy effects of the PSPP" may include: "the risk of creating real estate and stock market bubbles as well as the economic and social impact on virtually all citizens, who are at least indirectly affected inter alia as shareholders, tenants, real estate owners, savers or insurance policy holders".[48] The Court seemed particularly concerned with the PSPP's "considerable risk of losses for private savings", specifically pension schemes; the rise of real estate prices with "sharp increases – especially regarding residential property in major cities – [...], which possibly already come close to creating a "market bubble"; with access to cheap credit that PSPP enabled, thereby "[allowing] economically unviable companies to stay on the market"; with "the risk that the ESCB becomes dependent on Member State politics as it can no longer simply terminate and undo the programme without jeopardizing the stability of the monetary union". [49]

The division of tasks in the relationship between the ECB and the reviewing court – the CJEU, which in this instance the FCC replaced – is clear according to the FCC. It is not up to the

[45] FCC, *Weiss*, para 138.
[46] Article 127 TFEU. See, on this argument, de Boer and van 't Klooster (n 40).
[47] FCC, *Weiss*, para 165 and 168.
[48] Idem, para 173.
[49] Idem, para 173-175.

court "to decide … how such concerns are to be weighed exactly in the context of a monetary policy decision; rather, the point is that such effects, …, must not be completely ignored"; "it would have been incumbent upon the ECB to weigh these effects and balance them, based on proportionality considerations, against the expected positive contributions to achieving the monetary policy objective the ECB itself has set".[50] That is not only because of the ECB's relative technical competence, but also because that operation enables the Court to control "whether it was still proportionate to tolerate the economic and social policy effects of the PSPP, problematic as they may be in respect of the order of competences, or, possibly, at what point they have become disproportionate".[51] In the case of *Weiss*, the "lack of balancing and lack of stating the reasons informing such balancing" meant that the ECB had breached proportionality as a requirement that guides the delimitation of competences in EU law.[52]

There is little point in rehearsing here the many critiques that this aspect of the judgment has raised.[53] What I wish to highlight is not whether the Court could have required such a balancing from the ECB (because it lacked the competence to adjudicate on the legality of an act of an EU institution, because it applied too strict test of judicial review, or because it relied on a parochial approach to proportionality), but the procedural duty that the FCC derived from proportionality.[54] The FCC presumed that the principle of proportionality is a tool that can be deployed both as a norm of conduct by the ECB and as a norm of control by the courts when controlling the exercise of monetary powers.

2.2. Care and reasons as procedural requirements in the CJEU judgment

The two courts converge with regards to the ability judicial review to weigh in on matters of monetary policy. Their judgments are premised on the idea that general principles of law can be mobilized by the courts as a means of controlling their discretion, even if they resort to such principles in radically different ways. In addition to proportionality, the CJEU indicated in both *Gauweiler* and *Weiss* two other procedural duties: careful and impartial examination and the duty to give reasons. These feature often in case law that examines, in various fields of law, the bounds of legality in an exercise of discretion, in combination or isolated from a control of proportionality.

[50] Idem, para 173 and 176.
[51] Idem, para 176.
[52] Idem, Weiss, para 177.
[53] See, among many, M. Wendel, "Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception" (2020) *German Law Journal* 21(5), 979
[54] See also I. Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe' (2020) *German Law Journal* 21(5) 1110.

In *Weiss*, in particular, the Court seemed to treat the review of monetary policy as just another instance of review of discretion.[55]

Yet, contrary to what it stated in both judgments, the CJEU did not deploy these legal principles to control the ECB's discretion, and it ended up couching in legal language the decision-making of the ECB – through its reasoning based on proportionality and care – without asserting control.[56] The problem here is not only the high degree of deferral given to the ECB decision, and, in particular, to its expertise, expressed by the Court when referring, in both judgments, to the principle of care ("given that questions of monetary policy are usually of a controversial nature and *in view of the ESCB's broad discretion*, *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*").[57] The problem is that the Court took at face value the information the ECB provided and the arguments it put forward.[58] When looking for manifest errors of assessment – for which it conflated care and proportionality[59] – the Court examined the measure, its characteristics, against the justification given by the ECB for the means chosen and the ends *as interpreted by the ECB*.[60] It did so, mostly, if not exclusively, based on the measure itself, without external references that could serve as normative yardsticks of assessment. This way of proceeding may be explained by the court's rules of procedure in preliminary reference actions, that condition the Court's inquisitorial powers, and justified by limited judicial review of monetary policy decisions. Yet, it remains true that these general principles of law have not operated as judicial safeguards that balance out the discretion of the authority subject to control. If they are to function as tools of *control* of discretion, care and proportionality require an examination of the decision-

[55] *Weiss*, para 30 ("in situations such as that at issue in the present case, in which an EU institution enjoys broad discretion, a review of compliance with certain procedural safeguards — including the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions — is of fundamental importance").
[56] On this point, I am using the analysis that appeared in Mendes (n 41).
[57] *Gauweiler*, para 75; *Weiss*, para 90, emphasis added.
[58] *Weiss*, para 74 ("it follows from recital 3 of Decision 2015/774, from the documents published by the ECB (…) and from the observations submitted to the Court"), 75 ("it can be seen from the documents before the Court"), 76 (restating recital 4 of Decision 2015/774), para 77 (relying on statements of the ECB). The reasoning includes general references to "observations" and "documents" that refer, presumably, to all that can be submitted to the Court according to Article 23 of the Statute, as well as those that the Court may request according to Article 24 of the Statute. See also *Weiss*, para 80 (where the Court situates its examination of whether PSPP went "manifestly beyond what is necessary" to maintain price stability in the context of PSPP, as described by the ECB); para 82 and 83 to 92. The effects of successively renewed short periods, which the Court mentions, are not identified in the judgment (para 85 and 86); there is only a circular mention to the necessity of the PSPP based on the temporary nature of the programme: "the PSPP has, from the start, been intended to apply only during the *period necessary for attaining the objective sought* and is therefore temporary in nature" (para 84). Similarly, the effects of the limitations placed on the volume of bonds that may be acquired was also not identified (para 87 to 89); also here one is confronted with a circular reference: "that amount (…) was regularly revised in order to *restrict it to what was necessary in order to achieve the stated objective*" (para 88).
[59] V. Kosta "Proportionality and discretion in EU law: in search of clarity, in ECB Legal Conference 2021, *Continuity and change – how the challenges of today prepare the ground for tomorrow* (2022) pp. 98-102
[60] *Weiss*, para 78 and 91.

maker's process that must go beyond an analysis of the facts and arguments brought forward by the author of the measure challenged. They presuppose probing external evidence and assessing alternatives, or, at least, the processes followed to assess alternatives. Care, as a tool of control, presumes that there is some yardstick, external to the measure itself, that allows the court to assess the relevance of the factors considered. Proportionality requires, at least, that the adequacy and necessity of the measure be probed in view of possible alternatives. The Court of Justice did neither in its *Weiss* judgment. In the words of the much-criticized judgment of the FCC, the CJEU "[accepted] positions asserted by the ECB without closer scrutiny", in a way that cannot prevent a situation in which the ECB gets "to expand … its competences on its own authority".[61]

With regard to the duty to give reasons, the Court treated the PSPP decision as it does any act of the EU institutions. According to the formula that the Court also cited in *Weiss*, the statement of reasons

> must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable *the persons concerned* to ascertain the reasons for the measure and to enable *the Court* to exercise its power of review, [but] it is not required to go into every relevant point of fact and law.[62]

This way of 'proceduralising rationality' allows for a much-needed flexibility in adjusting judicial review of procedural duty to the circumstances of each case and avoiding turning it into review of the substantive legality of the act.[63] It also allows the Court to adapt a duty that applies indistinctly to all the legal acts of the institutions to their legal effects, e.g., by distinguishing the scope of the duty to state reasons of an individual measure and of a measure intended to have general application.[64] The EU Courts consistently emphasize that the specific requirements of the duty to give reasons depend on the circumstances of each legal act, in particular, on the substance and wording of the measure, the nature of the reasons given, the interests that the persons directly and individually concerned may have in obtaining explanations, the context of the measure, and 'the whole body of rules governing the matter in question'.[65]

When deployed in judicial proceedings, the duty to give reasons operates as a norm of control, which, as the cited passage indicates, is instrumental for two purposes: to enable *the persons*

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[61] FCC, *Weiss*, para 142 (in relation to the objectives of the PSPP) and para 156 (in relation to the application of proportionality). Similarly, Egidy (n 27).
[62] *Weiss*, para 31, emphasis added.
[63] P. Craig, *EU Administrative Law*, 3rd ed. (OUP, 2018), 318-320. The term 'proceduralising rationality' is from J. L. Mashaw, *Reasoned Administration and Democratic Legitimacy. How Administrative Law Supports Democratic Government* (CUP, 2018), 117. The analysis on reasons that follows has been much expanded in Mendes (n 6).
[64] As reflected in *Weiss*, para 32.
[65] *Weiss*, para 33, which does not include the specification of all these parameters but follows this same line (for those, see, among many, Case C-15/10, *Etimine v Secretary of State for Work and Pensions*, ECLI:EU:C:2011:504, para 114, or Case T-122/15, *Landeskreditbank v ECB*, ECLI:EU:T:2017:337 para 124).

concerned to ascertain the reasons for the measure and to enable *the Court* to exercise its power of review. This is also how the Court applied its case law on the duty to give reasons in *Weiss*: it outlined all the elements that had been brought before the Court, whether included in the decision under review or generally published by the ECB, considering that these "supplement the reasoning given in the decisions by setting out, in detail, the economic analyses underpinning the decisions, the various options considered by the Governing Council and the reasons justifying the choices made, in the light, in particular, of the observed and anticipated effects of the PSPP".[66] Only in one point it dismissed laconically the concerns of the FCC with regard to reasons. The CJEU considered that the absence of publication of details relating to the black-out period was outside the scope of the duty to give reasons, because "the purpose of such publication would be to show the precise content of the measures adopted by the ESCB rather than the reasons justifying those measures".[67]

This treatment of reasons in *Weiss* follows the longstanding case law of the Court. The problem does not lie here, but rather in the narrow function of the duty to give reasons when used as a tool of judicial review. As filtered through the case law of the court the duty to give reasons has lost its original wide scope in EU law.[68] This occurred because of the Court's need to strike a difficult balance between compliance with the duty to give reasons while being unable to review their substance, which is off-limits to the courts. The duty to give reason has been enshrined in the Community Treaties since the 1950s, applicable first only to some of the acts of the High Authority of the European Coal and Steel Community and of the Commission and of the Council of the European Economic Community. This duty was, first and above all, "a guarantee against arbitrary action, [aimed at] enabling *the public to understand and investigate the actions of the executive invested with important powers"*.[69] In the case of monetary policy, there are two reasons to favor reviving the original meaning that the duty to give reasons had in EU law. First, the economic, social and political consequences of ECB decisions have far-reaching effects (which, in a model of monetary dominance, constrain significantly the fiscal policies of Member States). Second, the judicial review has had a very limited effect on reigning in monetary policy following the *Weiss* saga. Just like the other general legal principles that the CJEU mobilized in *Weiss*, the duty to give reasons served less to control than to support the strong powers that the ECB has acquired in the EU institutional

[66] *Weiss*, para 36 (the analysis on the duty to give reasons is in para 30 to 43).
[67] *Weiss*, para 43.
[68] J. Mendes, 'The Foundations of the Duty to Give Reasons and a Normative Reconstruction', E. Fisher, J. King and A. Young (eds.) *The Foundations and Future of Public Law* (OUP, 2020), 299-321
[69] Joined Cases 36, 37, 38-59 and 40-59, *Präsident et al. v High Authority*, Opinion AG Lagrange, at 451(emphasis added), cited and analysed Mendes, idem, 313-314. On the scope of the duty, see Article 15 of the Treaty establishing the European Coal and Steel Community (Article 30 imposed the same duty on the judgments of the Court) and Article 190 of the Treaty establishing the European Economic Community.

system. But the realization of the potential that the duty of reasons – in the meaning it originally had in EU law – is not a task for the courts, but for the European Parliament and for national parliaments. The rest of the chapter develops this argument, by drawing on the economic dialogue that the ECB maintains with the European Parliament. Before proceeding, however, the next section clarifies the potential that these three *legal* principles have for "meaningful oversight" of the ECB.

2.3. Untapped potential

The FCC resorted to the principle of proportionality as part of the balancing operation that the ECB must conduct to be sure that it fully considers the various socio-economic effects of the measures it pursues in carrying out its mandate. As Isabel Feichtner has argued, an obligation to evaluate the distributive effects of monetary policy measures – documented in one single procedure (in the guise of impact assessment reports) – would facilitate external scrutiny and could define the content of monetary policy.

The point, to be clear, is not to have "an *ex post* rationalization in a report" but a process of decision-making that considers alternatives in view of their effects, alternatives which may replace the originally planned course of action. Parliaments, as Feichtner indicates, should be the accountability fora for compliance with a principle of proportionality as a tool for gauging the distributive effects of monetary policy.[70] Given the lack of clarity about what interests must be balanced, if the court were to assess that balancing by deploying proportionality as a legal principle, it would manifestly go beyond what courts can do.[71] Determining "whether it was still proportionate to tolerate the economic and social policy effects of the PSPP…, or, possibly, at what point they have become disproportionate"[72] – or at what point economic implications become the primary objective of a measure and are not merely secondary to a monetary policy measure – is not something that can be ascertained on the basis of the law. The FCC presumed wrongly, that the principle of proportionality could serve as a norm of control *by the courts* when controlling the exercise of monetary powers to this effect. In contrast, the same tool can be used by parliaments to force, through *ex post* controls, a process of self-reflection that the ECB must conduct and document in ways that make the stakes accessible, ascertainable and contestable by the European Parliament.

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[70] Feichtner (n 54) 1100.
[71] On how this lack of determination affects the application of the principle of proportionality in monetary policy, see S. Egidy, 'Proportionality and procedure of monetary policy-making' (2021) *International Journal of Constitutional Law*, 19(1) 292-3, and Toni Marzal, "Making sense of the use of proportionality in the Bunderverfassunsgericht's PSPP decision, (2020) *Revue des Affaires Européennes*, 2, 441.
[72] FCC, *Weiss,* para 176.

For this purpose, the principle of careful and impartial assessment offers a solid basis for an external scrutiny of how the ECB went about assessing relevant factors when carrying out the various studies that the preparation of monetary policy measures requires. Much like proportionality – applied in the demanding reading of the FCC – careful and impartial examination is a tool that can pierce through the complexity of decision-making and tease out the conditions, the criteria and the implications of monetary policy decisions. The fact that it has developed in EU law through case law, as an aspect of good administration does not mean that it cannot also be used by the Parliament for the same purpose. In fact, these tools cannot be deployed in monetary policy by the institution that developed them – the Court – without that scrutiny bringing it too close to a substitution of judgment. The lack of external legal yardsticks provided by legal norms challenges the judicial application of these principles. In addition, assessment by the Court can only lead to one of two outcomes: the legality or the illegality of a contested measure. It risks, therefore, distortions of policy decisions that can be detrimental to the ECB's mandate.[73] And yet, as the outcome of *Weiss* has demonstrated, a fully deferential approach to the expertise of the ECB is not a viable alternative. It amounts only to a semblance of control, which may "crowd out other forms of accountability"; by endorsing the legality of policy measures even if on thin grounds, it risks substituting for political debate.[74]

Proportionality and care, practiced by the ECB, must be accompanied by a duty to give reasons. In the original meaning this duty had in EU law, reasons ought not be provided to satisfy "persons concerned" or to support the task of reviewing courts, but, instead, to facilitate public understanding, even if only of a knowledgeable public, composed of Member States and of parliamentary representatives. The revival of this way of understanding the duty to give reasons is particularly needed when the actions of the ECB affect the economic policy decisions that are constitutionally the premise of the Member States, whether or not there has been a breach of the vertical division of competences. Such a statement of reasons is likely to reveal how different groups and interests are advantaged and disadvantaged by the ECB's policy measures. But it may not necessarily be the task for the court reviewing the legality of judicially contested measures to enforce this constitutional dimension of the duty to give reasons. Even if it is a *legal* duty, its purpose is not to support judicial review of legality, or protect the rights of the persons concerned. Rather, this constitutional dimension is meant to support a public understanding of how the public actions of the EU institutions are contributing to the achievement of the objectives of EU integration. Concretely, it can enable a judgment of the compromise achieved between competing

[73] I take this point from Mendes (n 41).
[74] Egidy (n 27) 69.

public interests, of the choices made by the decisionmaker when defining a specific course of action, established through legally defined purposes. As such, the duty to give reasons functions as a self-regulatory measure for the deciding body, an instrument to facilitate a substantiated judgment of the conditions, criteria and implications of the acts it adopts. This process may not only facilitate a change in the content of monetary policy, given the opening of the decision-making procedure that it may enable, but it may also support the scrutiny of the political overseers and, in particular, of the European Parliament. This function of the duty to give reasons is arguably a component of the duty of cooperation that the deciding institutions owe to those that, in a democratic polity, must hold them to account.[75]

Like any other institution, the ECB is bound to abide by the law that brought it into existence, which is subject to different legal interpretations guided by varying policy choices. The principles of proportionality, care and reasons can unveil the intertwinement between legal interpretations and policy choices that ground the ECB's action. Outside the Court, they can serve as a channel to expand the range of actors who participate in the accountability fora of the ECB – not the Court or the persons concerned, seen as the litigants that have stakes in the case they brought to court, but the representatives of the citizens in the parliament. By mobilizing the tools that the courts have developed for their function of control, parliamentarians are not restricted to the role of an impartial umpire who, in that role, must not cross the boundaries of what would be an "undue" interference with the powers that the Treaty legally warrants.

Two objections can be raised against applying this set of legal principles to the ECB: its independence and the possibility of fostering an undesirable amount of judicial litigation. Independence, however, cannot be understood as isolating the ECB from "meaningful scrutiny", nor can it be understood in the absolute terms which have enabled the ECB to decide the terms of its own mandate.[76] As much as the boundaries of ECB mandate have evolved, so too must the understanding of independence evolve under the Treaty. Its independence, much like its discretion, cannot be "full" to the point of obliterating substantive accountability to democratic institutions.[77] In addition, the ECB's high degree of independence is a reason *for*, not against, a closer scrutiny of its policy measures.

Even if done *ex post*, such scrutiny can, in time, influence the course of monetary policy that the ECB choses and the considerations that it brings into its decision-making. Importantly, this change that, following Isabel Feichtner, I indicate as a possible effect of applying a demanding

[75] Article 13(2) TEU ('The institutions shall practice mutual sincere cooperation') read in coordination with Article 10(1) and (2) TEU arguably give textual support to a legal duty as proposed in the text.
[76] See further, Mendes (n 6).
[77] See further, Dawson et al. (n 6). On the claim of "full discretion", see n 39.

view of proportionality, combined with care and reasons as just explained, need not happen in the form of instructions to the ECB. Legally, it cannot. By force of Article 130 TFEU, the ECB cannot receive instructions from any Union or national institution, and these must not seek to influence either the ECB or national central banks. But changes can come from within the institution, triggered by successive processes of *ex post* scrutiny, in which a larger scope of interlocutors of the ECB – not only the markets but also political overseers – assess the terms of the ECB's policy measures with formal *and* material powers of accountability. Surely, the combined application of general legal principles in support of heightened parliamentary scrutiny does not suffice to induce such a result. What I propose here – focused only on the role of general principles of law – must be one element among other mechanisms of accountability. Namely, the European Parliament has called for "a more meaningful advisory role in the appointment process" in the procedure to appoint members of the ECB's Executive Council, on which it is consulted.[78]

Finally, and turning to the second possible objection, the heightened parliamentary accountability stemming from mobilizing legal principles may indeed create incentives for judicial litigation. The EU courts could be faced with more legal challenges that may strike at the core of the ECB discretion, as *Gauweiler* and *Weiss*. Yet, two points counter this objection. First, the full deference to the discretion of the ECB that the Court upheld in the two instances and the ensuing light-touch deployment of proportionality and reasons, are arguably important deterrents to litigants seeking in a judgment of illegality of monetary policy decisions. Second, if such cases arise, a light-touch type of scrutiny – although not the full empowerment that *Weiss* enabled – can be further justified *if* a stronger "meaningful scrutiny" is being exercised by other account holders. That is not the case currently, as will be seen in the next section. In those conditions, judicial review could be part of a triangular relationship of accountability that involves the parliament and the courts.

3. Parliamentary scrutiny of ECB

The accountability of the ECB towards the European Parliament draws essentially on the Monetary Dialogue. The "dialogue" refers to the exchange of information that occurs in quarterly meetings between the Parliament's ECON Committee and the ECB President, based on MEPs questions on the ECB's conduct of monetary policy.[79] This institutional practice resulted from the

[78] European Parliament Resolution of 10 February 2021 on the European Central Bank Annual report 2020 (2020/2123(INI)), point 35. On the importance of appointments for ideational changes, see Deyris (n. 40).

[79] For details, see R Lastra, "Accountability Mechanisms of the Bank of England and of the European Central Bank" Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, 2020, p. 24; K. Whelan, "Accountability at the Fed and the ECB", Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life

initiative of the Parliament and the willingness of the ECB to draw on the ECB's duty to "address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament".[80] As such, this norm provides for a very limited channel of accountability (although it has, since 2016, generated an exchange between the two institutions in the form of ECB statements).[81] The motivations of the Parliament are well documented in a report of 1998. Starting from the premises that "monetary policy is not … neutral" and that "the independence of a central bank bestows upon it a weighty responsibility for economic and social development", the Parliament noted the ECB's "unprecedented degree of independence", the significance of the power to define price stability and, thereby, influence economic growth, investment, and employment.[82] Such power, the Parliament noted, requires a corresponding "high degree of transparency of monetary-policy decisions" and a "high level" of democratic accountability, unmatched by the "embryonic form" envisaged in the Treaty.[83] The Parliament also added that demanding democratic accountability can support a "high degree of credibility and trustworthiness of the future ECB".[84]

Since the outset, the ECB seems to have been convinced of the advantages of establishing regular contacts with the Parliament, but the forum has proven a rather limited means to effectively scrutinize the ECB.[85] In 2009, an analysis of the first decade of monetary dialogue noted that the discussions lacked focus and were superficial; in this light, the willingness of the ECB to subject itself to parliamentary scrutiny was more window-dressing than effective commitment to

Policies, Luxembourg, 2020, 17; G Claeys and M. Domínguez-Jiménez, "How Can the European Parliament Better Oversee the European Central Bank?" Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, Luxembourg, 2020, 20.

[80] Article 284(3) TFEU (replicated in Article 15.3 of the Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (OJ C 202/230). The same report needs to be addressed to the Council and the Commission, and also to the European Council. On the legal framework of the ECB' parliamentary accountability, see F Amtenbrink, K van Duin "The European Central Bank before the European Parliament: theory and practice after 10 years of monetary dialogue (2009) *European Law Review* 34(4), 561, at 565-70, pointing out the proactive roles of the EP and of the ECB in establishing the monetary dialogue and the significance of this practice against the background of very thin legal provisions.

[81] European Parliament Resolution of 25 February 2016 on the European Central Bank Annual Report for 2014 (2015/2115(INI)), para 35; Feedback on the input provided by the European Parliament as part of its resolution on the ECB Annual Report 2014 (https://www.ecb.europa.eu/pub/pdf/other/20160407_feedback_on_the_input_provided_by_the_european_parliament_en.pdf). Codifying this practice, see European Parliament Decision of 1 June 2023 on the arrangements in the form of an exchange of letters between the European Parliament and the European Central Bank on structuring the practices for interaction in the area of central banking (2023/2026(ACI)), under ECB's Annual Report.

[82] European Parliament, "Report on democratic accountability in the 3rd phase of EMU 23 March 1998", Committee on Economic and Monetary Affairs and Industrial Policy, Rapporteur: Mrs Christa Randzio-Plath, points 1 and 2. (I am using the French version, which reads at points differently from the English translation "L'indépendance d'une banque centrale lui confère une lourde responsabilité au niveau du développement économique et social.")

[83] The corresponded is clear in the text of the resolution that followed the report: European Parliament, "Resolution on democratic accountability in the third phase of EMU" (OJ C 138 , 04/05/1998) p. 177, point 4.

[84] Report on democratic accountability, point 5.

[85] Amtenbrink and van Duin (n 80), 570.

democratic accountability.[86] Recent studies have confirmed the limits of monetary dialogue and its weaknesses as a form of substantive accountability.[87] Lack of focus and of interaction remain a problem, with commentators suggesting the need for "a more inquisitive style of questioning" and for opportunities of follow-up questions.[88] Diessner, in particular, pointed out the "acute awareness" of MEPs "of the limited input into the EBC's decision-making" which he attributes to the ECB's extreme independence.[89] Yet, as much as this extreme independence has been an institutional practice in the two decades of the ECB's existence, it stems from an understanding of the degree of independence that is not a necessity under the wording of Article 130 TFEU. Although EPs cannot give instructions to the Bank, independence cannot be a limit to a close scrutiny of the ECB's past actions. The Treaty is sparse in defining the ECB's accountability, but nothing in its wording indicates that a high degree of independence must not be followed by a demanding degree of accountability, as requested by the Parliament since the outset and in line with the various public statements of members of the ECB in this regard.[90] The EP can pass an *ex post* substantiated judgment on the merits of the ECB's monetary policy decisions, on the conditions of their adoption, on the criteria that led to the specific configurations of a decision or a program and on its implications. Passing a substantiated judgment *ex post* factum does not amount to "seek or take instructions" that Article 130 TFEU precludes.

The much-needed improvements to make the EP an effective accountability forum for monetary policy require, in addition to suggestions to change the format and composition of the meetings, that the MEPs requests for information and justification on how the ECB delivers its mandate be focused, relevant and significant.[91] The deployment of the principles of proportionality and of careful and impartial examination by MEPs in the quarterly meetings can support this

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[86] Idem, 581-2 ("For the ECB president the current arrangements provide him with the perfect venue to parade his openness in the conduct of monetary policy and the ECB's readiness to subject itself to external review of its performance").

[87] On substantive accountability see Dawson et al (2023) (n 6).; see also M. Dawson et al. "Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism" (2019) *European Law Journal*, 25(1), 75. In detail, on the limits, see S. Diessner "The promises and pitfalls of the ECB's 'legitimacy-as-accountability' towards the European parliament post-crisis" (2022) *The Journal of Legislative Studies*, 28 (3), 402 405-410. Noting that "dialogue" can be just a "a 'lecture' or statement by the ECB President to MEPs", see Lastra (n 79), 28; observing that it "is not well suited to the necessary detailed exploration of the various complex monetary policy issues that have emerged in recent years", see Whelan (n 79), 17.

[88] Whelan (n 79), 17. Stressing the same lack of focus already noted in 2009, see Claeys and Domínguez-Jiménez, (n 79), 12. No changes to the current practice appear in the recent accountability "arrangements" established between the ECB and the EP (see EP Decision, n 81, under "Hearings before the ECON committee"), despite the intentions of the Parliament manifested in the preamble of the Parliament's decision (see recital H).

[89] Diessner (n 87), 407.

[90] E.g. Y. Mersch, 'Central bank independence revisited', European Central Bank (2017), https://www.ecb.europa.eu/press/key/date/2017/html/sp170330.en.html

[91] A. Akbik, *The European Parliament as an Accountability Forum: Overseeing the Economic and Monetary Union* (Cambridge University Press, 2022), 190-6, in particular 191-193 (although this study does not cover the monetary policy dialogue, many of its insights are relevant in this context).

process, both at the preparation stage and by informing follow up questions. They provide a reasoning structure that can guide both decision-making and the processes of control of those decisions. They enable MEPs to pierce through the political and technical complexity involved in monetary policy decisions. As much as they allow courts to tap into the logic of executive decision-making, assess the reasonableness of decisions taken in the exercise of discretion and how the examination conducted by the decision-makers supported the technical and value judgments that their decisions incorporate, they can also support the Parliament in the same process. If used to strengthen the monetary dialogue, they will be part of a process that is intended to trigger political debate, to probe alternatives and to facilitate a substantiated judgment, without the constraints of a binary decision of legality/illegality. The lack of sanction – which several commentators pointed out as a weakness of the monetary dialogue – is not a necessary obstacle to substantive accountability, if the process of information exchange and justification can deliver a public justification that can espouse an informed contestation, balance out the information asymmetry and, thereby, create an actual "dialogue" which, in turn, can influence the course of future actions of the ECB.

4. Integration through law by the Parliament, not democracy

Integration through law has been the "most powerful narrative of EU law".[92] Although it dominated throughout much of the decades that preceded the European sovereign debt crisis, the developments of EU integration that have unfolded since have arguably shown the limits of this way of conceiving the role of law in the EU. Other perspectives are emerging and my proposal to rely on law to counterbalance the power that the ECB retains in the EMU governance structure perpetuates may seem, at the very least, anachronistic. As long as the EMU retains its original design, the power imbalances that it crystalizes will be maintained.[93] The 'legal fix' through general principles to induce contestation within the process of monetary policy decision-making, and a democratic debate and justification of these decisions mediated through parliamentary accountability, will operate against the background of Treaty norms that were *meant* to insulate the ECB not only from national governmental politics but also from the other EU institutions.[94]

[92] C. Joerges, "Why European legal scholarship should become aware of Karl Polanyi: The Great Transformation and the integration project" (2022) *European Law Open*, 1(4), 1067.
[93] Feichtner (n 54) 1094.
[94] S. Mudge and A. Vauchez, "Dependence on Independence. Central bank lawyers and the (un)making of the European economy", (2022) *Economy and Society*, 51(4) 584.

The constraints on democracy that stem from the over-constitutionalization of the Treaties are particularly strong in the case of the EMU.[95] These are institutional, as fundamental political trade-offs involved in setting interest-rates and inflation targets are entrusted to a central bank that has acquired an unparalleled degree of independence.[96] But, importantly, they are also substantive. The Treaty perpetuates a monetarist paradigm of political economy: price stability is *the* goal of monetary policy, which must be attained without prejudice to supporting economic policy goals (Articles 119(2) and 127(1) TFEU); money is a neutral medium of economic exchange, inflation a quantitative phenomenon regulated through interest rates and, in any event, without interferences in the functioning of "an open market economy with free competition, favouring an efficient allocation of resources" (Articles 119(2), 127(1) and 123 TFEU); the participating states must ensure sound public finances (Articles 119(3), 123 and 126 TFEU). This framework defines at a constitutional level the boundaries within which any redistributive choices ensuing from monetary policy decisions are taken. The Treaty, therefore, favours specific policy outcomes in the trade-offs that must be struck between competing policy interests implicated in monetary policy decisions.[97] As such, it closes off the possibilities of open and inclusive monetary policy making that I propose could follow from a heighten parliamentary accountability.

My proposal in this chapter is intended to force a democratic deliberation and justification that was avoided by design when the EMU was set up. It faces, at least, two hurdles. First, the current EMU is built on a purposeful depoliticization of money, that served not only the deepening of European integration but also the preferences of governments to avoid responsibility for the distributional choices entailed in monetary policy decisions.[98] Second, if governments have abdicated political responsibility for controversial – and, potentially, politically costly – decisions, parliamentarians may also wish to hide behind the ECB independence to shy away from the type of substantive accountability that I am advocating.[99] Since the sovereign debt crisis, however, the subjugation of the economic policies of elected national governments to the monetary stance of the ECB lost the benefit of the technocratic justification for the ECB's independence and the appearance of neutrality that the ECB had secured. That subjugation persists no matter whether the ECB decides to pursue expansive or restrictive monetary policies, and how it may perceive its

[95] On the argument of over-constitutionalisation, see D. Grimm, "The Democratic Costs of Constitutionalisation. The European Case" (2015) *European Law Journal,* 21(4) 460.
[96] On those trade-offs, see Tooze (n 36) and P. Heimberger and L. Steininger 'ECB interest rate hikes will damage climate protection policies', *EUROPP – European Politics and Policy or the London School of Economics*, August 15, 2022.
[97] A. Peychev, "The primacy of the European Central Bank: Distributional conflicts between theory and practice in the pursuit of price stability, (2023) *European View* 22(1) 48, at 52.
[98] S. Eich, *The Currency of Politics* (Princeton, 2023) 195-201, J. Leaman, *The Bundesbank Myth*. Towards a critique of Central Bank Independence (Palgrave, 2001), 225-241.
[99] I am grateful to Susan Rose-Ackerman for this point.

role at a given point in time. Maintaining the current EMU design means maintaining a managerial modus of economic government, alienated from democratic processes, that restricts these processes also fundamentally at the national level.[100] Neither Treaty norms nor a return to the "normal" business of central bankers of curbing inflation that we are witnessing in 2023 can hide the eminently political character of the regulation of money. Parliamentarians may be aware that the political costs of lack of accountability may be higher than pursuing the non-consequential forms of dialogue that has existed hitherto.

As long as the EMU operates within the current Treaty framework, the proposal I make cannot amount to any form of democratization. Yet, I would like to suggest that, in the current stage of the EMU, giving more importance to the law in monetary policy as a support of parliamentary accountability can be a means to open possibilities of limited reform within the current Treaty framework. It can be a step in the direction of increased parliamentary scrutiny, which, short of Treaty reform, remains an important step to take. It can unveil the political stakes of the criteria of monetary policy decisions and as well as of its implications and, possibly, in conjunction with other triggers, force the consideration of alternatives. Presently, the evolution of central banking and the transformations that the interpretation of the Treaty – *a contrario sensu* if needed be – fall within the sole purview of the central bank, within a system that includes the national central banks. Formal account holders – be them courts or parliaments – must find ways to be effective voices in that process.

[100] Dani et al. (n 12).