Law and Discretion in Monetary Policy and in the Banking Union: Complexity Between High Politics and Administration

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Abstract: The controversy over the degree of judicial review of monetary policy decisions triggered by the contrasting *Weiss* judgments of the German Constitutional Court and of the Court of Justice of the European Union invites an inquiry into the role of law in areas characterised by a high degree of political and technical complexity. This article singles out the structural conditions that qualify complexity in specific instances of decision-making: prognostic assessments, goal-oriented decisions, marked by uncertainty, legal indeterminacy and discretion. These traits characterise both monetary policy decisions and some regulatory decisions taken within the banking union, such as the setting of minimum requirements for own funds and eligible liabilities (MREL) and the calculation of the leverage ratios of credit institutions (Livret A judgments). Irrespective of the very distinct formal-institutional legal frameworks of these two policy fields, in those conditions legality may be determined by the discretionary choices of the decision-maker. For this reason, they impact the court's deployment of legal principles, namely proportionality and careful and impartial examination. This cross-sector comparison sheds light on the relative specificity of monetary policy, and leads to rejecting the transposition of a distinction between 'high politics' and 'ordinary administration' to EU law, as a means of both explaining and guiding different degrees of judicial review in conditions of complexity. The different constitutional relevance of monetary policy decisions and of 'ordinary' banking supervision requires not a distinction that can rationalise judicial review, but a full consideration of the role that the law must have in supporting non-judicial accountability.

Keywords: judicial review of administrative discretion – complex technical and economic assessments – monetary policy – proportionality – banking union – principle of careful and impartial examination

1. Law and discretion beneath the formal-institutional layer

In 2020, the *Weiss* judgment of the German Federal Constitutional Court became the epicenter of a constitutional crisis that shook the European legal world. While the stance of the German Court was unprecedented, those who predicted that diplomacy and pragmatism would soon mitigate the medium-term shock waves were soon proven right.[1] For the observers of the

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[1] By the deadline set by the German Constitutional Court the German institutions involved (the Bundesbank and the German federal parliament and government) had declared that the ECB had satisfied the requirements of the

progressive empowerment of the European Central Bank (ECB), however, a nagging question lingered on: is this as far as law can go? A bystander to the process of that empowerment, filtered and endorsed by the Court of Justice of the European Union (CJEU)? A tool in the hands of a court (the German Court) that failed in the hubristic belief that a rigorous application of the law can limit that empowerment?

The exceptionality of judicial review of monetary policy decisions, on the one hand, and the acceptance by the political institutions of the ECB's redefinition of its mandate, on the other, may indicate as much. And yet, the outright deferral by the Court of Justice to the ECB's discretion in a judgment that, unlike *Gauweiler*, was not justified by exceptional circumstances, merits closer attention. It has important institutional and constitutional implications: respectively, the empowerment of the ECB in the legal system of the EU and its profound impacts on the allocation of competences between the Member States and the EU institutions.

I take the examination of judicial review of monetary policy decisions as a starting point to inquire into the public law framing of the relationships between discretion and law in specific instances of decision-making: those that rely on complex technical assessments in future-oriented action carried out in conditions of uncertainty, made under norms that are either open-textured or open to interpretation, and involving the arbitration of competing interests. I focus on how that relationship plays out in two distinct but related fields where those same structural conditions are present: monetary policy decisions and selected aspects of bank resolution and supervision. While my analysis here is limited to certain aspects of the regulation of money, I acknowledge that the conditions which I highlight are present in other fields of regulation and are, to a great extent, a feature of the 'regulatory state'. The purpose of my analysis, however, is not to engage in a general theory of regulation, but to show that monetary policy is not as exceptional as one tends to treat it. Stressing the structural features that it shares with banking regulation will allow me to probe into the difficulties of judicial review in this field, to identify both what is unique to monetary policy and what are commonalities that it shares with other policy fields. I will, thereby, challenge the implied assumption that monetary policy belongs somewhat to the realm of high politics, outside of the boundaries of ordinary administration that are, by contrast, controllable by legal standards. I conclude that the distinction between 'high politics' and 'ordinary administration' must be discarded as a means to rationalise the judicial review of monetary policy decisions and immunise them from judicial control. It is constitutionally misplaced in EU law and it is not justified by distinct conditions of decision-

judgment (see, e.g., "ECB stimulus plan meets court requirements: German finance minister", Reuters June 29, 2020), without that changing anything to the PSPP programme.

making. Importantly, it risks displacing the discussions on the democratic accountability of central bank decisions and the role that law can have both in conditioning such accountability and, possibly, facilitating it. Irrespective of judicial review, law remains an integral part of monetary decision-making. It can – and must – be deployed also by non-judicial institutions.

The contrast between the EU constitutional framework of monetary policy, on the one hand, and bank resolution and supervision, on the other will allow me to isolate, as far as possible, the relationship between law and discretion from their respective formal-institutional characteristics. *Institutionally*, monetary policy and bank resolution and supervision could not be further apart: monetary policy is entrusted to a 'system' headed by an EU institution with Treaty guaranteed independence; resolution and supervision are entrusted to 'mechanisms' and subject to a much denser normative layer of secondary norms that not only define the boundaries of competences of an agency (the Single Resolution Board) and of the ECB acting-as-agency, but also formally intertwine their decision-making procedures with that of national administrations and EU institutions. *Formally*, monetary policy decisions have, as their addressees, banks, financial markets and their operators, at a general, systemic level; resolution and supervision decisions are individual decisions, formally limited to the banks concerned and to the affected third parties. They are also framed by legal norms that, to a great extent, set objectives rather than defining concrete parameters of public action. Yet, *structurally*, the conditions of their decision-making powers are similar (technical complexity, future-oriented action, uncertainty, all combined with a degree of legal indeterminacy and involving value judgments on the interests at stake). These structural conditions can give rise to constitutive powers, which enable decision-making bodies to construe the legal norms that also ground what they may lawfully do, be it broader mandates (monetary policy), or the legal conditions of administrative powers (the "if" part of legal norms). They condition the use of principles of law that *in both fields* are used to structure and, possibly, control the exercise of public power.

The article starts by recalling, briefly, the legal controversy over the unconventional monetary policy measures of the ECB. Section 2 analyses and probes the critique over the application of proportionality in the *Weiss* judgments by examining the nature of the powers of the ECB and the specificity of monetary policy. This analysis requires returning, even if only shortly, to a much-discussed controversy (Section 2.1). Yet, contrary to the apparent closure of the *Weiss* saga, the matter of judicial review over monetary policy decisions is far from settled. First, what makes judicial review of monetary policy decisions particularly difficult are the ECB's constitutive powers *and* specific traits of monetary policy in the EMU setting, not some generally undefined distinct nature of monetary policy that is often implicit when explaining the courts'

limited role (Section 2.2). Secondly, while these traits justify indeed limited judicial review, the procedural review that the CJEU conducted cannot secure the legality of the ECB's decisions or, at least, assuage the concerns that, in the current conditions, the ECB can define its mandate on its own terms (Section 2.3). For proportionality to function as a norm of control of discretion, it requires an examination of the underlying interests, eventually hindered by the contested measure or protected by the deployment of proportionality. In the structural conditions of constitutive powers, such an assessment can bring the court too close to a substitution of judgment, or at least, make it a co-definer of the policy programmes or decisions that the legal norms may allow. Why this result is accepted in some areas – such as banking supervision – and not in others – monetary policy – merits closer scrutiny. In Section 3, the examination of one aspect of banking resolution – the determination of minimum requirements for own funds and eligible liabilities (MREL) – will show, first, that also the decision-makers who act under detailed legal norms may get to define the lawful terms of administrative action, just like central bankers in monetary policy (Sections 3.1 and 3.2). That analysis will show, secondly, that the application of the principle of careful and impartial examination as a norm of control to instances where constitutive powers may emerge makes the Court participate in the exercise of discretion by interpreting and determining the law (Sections 3.3 and 3.4). While the Court has been routinely navigating that grey area when conducting judicial review of discretion in banking union cases, this is something for which it lacks the normative basis in the area of monetary policy, where external yardsticks of control cannot be deducted from legal norms through methods of legal interpretation.

The identification of the structural conditions of constitutive powers moves the relationship between law and discretion beyond the framing of "complexity" as a shorthand for limited judicial review. Section 4, thus, explains the extent to which, in those conditions, the meaning of the enabling law may be defined by executive bodies, both in politically salient monetary policy decisions and in routine banking supervision decisions (Section 4.1). This common trait relativises the specificity of monetary policy measures. *Prima facie*, the formal and institutional setting of monetary policy, as well as its political salience, do bring it close to the areas of high politics that could justify non-justiciability, or a highly deferential degree of review as an imperfect surrogate of non-justiciability in EU law. Yet, both constitutional reasons and the structural similarities between monetary policy and other fields of regulation speak against introducing a misplaced analogy between "high politics" and "administration" in EU law (Section 4.2). Section 5 concludes. It points out that in conditions of constitutive powers, law enables but may constrain to a significantly lower degree. For this reason, judicial review in such

instances must be seen in close interaction with parliamentary accountability. Here, law can be a means to strengthen parliamentary scrutiny. In this light, *Weiss* is not as good as it gets.

2. The conundrum of judicial review over monetary policy decisions

2.1. The Bank and the Courts

Ever since it was called in to hold the Eurozone together during the sovereign debt crisis, the ECB has been at the center of political and legal turmoil. The story has been told many times, as frequently as sophisticated analyses were made of the *Gauweiler* and *Weiss* judgments – the hallmarks of judicial review of monetary policy in the EU.[2] It will be only briefly outlined here, to situate the specificity of monetary policy and my critique of the CJEU's case law, while shedding some light on the structural reasons behind "complexity".

Before and after the peak of the sovereign debt crisis, in a changed political economy of the Eurozone, large scale asset purchases programmes led the ECB to hold hundreds of billions of euros of sovereign and corporate debt (until 2022).[3] These "unconventional monetary policy" measures represented a rupture with the monetarist model of central banking enshrined in the Treaty, in particular with a narrow conception of price stability (as reflected in the interpretation of Article 127 TFEU that prevailed until the first decade of the century), and with the prohibition of monetary financing (enshrined in Article 123 TFEU). Opponents feared the crumbling of that political-economic system and of the Bank's independence, now imperiled by the widening of its mandate (to financial stability, no longer only price stability), and, above all, the political-economic consequences of securing cheap financing for corporations and governments. Proponents defended the programs as needed in a context of deflation, for which conventional monetary policy was unsuited. At stake was, crucially, the vertical allocation of competences between, on the one hand, an independent institution, in charge of price stability, and, on the other, the Member States' governments and parliaments and their ability to define, through democratic processes, their respective economic policies. How far the former can enter the realm of the latter is clearly not only a matter of economics or of legal interpretation. On the

[2] Case C-62/14 *Gauweiler* EU:C:2015:400 and Case C-493/17, *Weiss*, EU:C:2018:1000. See, among many, M. Goldmann, "Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review" 15 GLJ (2014), 265-280; V. Borger, "Outright Monetary Transactions and the stability mandate of the ECB: *Gauweiler"* 53 CMLRev (2016) 139-196 M. Dawson, and A. Bobić. "Court of Justice Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the euro:Weiss and Others" 56 CMLRev (2019) 1005–1040; M. Wendel 'Paradoxes of 'Ultra-Vires Review: A critical Review of the PSPP Decision and Its Initial Reception' 21 *German Law Journal* (2020) 979 – 994; I. Feichtner "The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe" 21 GLJ (2020), 1090-1103; S. Egidy, "Proportionality and Procedure of Monetary Policy-Making" 19 ICON (2021), 285–308.

[3] For an overview, see https://www.ecb.europa.eu/mopo/implement/app/html/index.en.html.

legality of the ECB's actions depended the democratic credentials of the EMU institutional set-up.

Faced with a reality that defied the political-economic premises of the 1992 EMU, and while operating in a legal system premised on the principle of attribution of competences, the ECB tested to the limit how far law can stretch to accommodate a radical change of the circumstances of executive action. In turn, the German Constitutional Court, triggered by the guardians of monetary policy orthodoxy, asked the CJEU to adjudicate on the legality of monetary policy decisions in view of their economic implications. The legal disputes were the mirror of the controversy that had surrounded unconventional monetary policy measures since the inception, and that, until then, had remained within the relatively closed circles of monetary policy experts.

In *Gauweiler*, the CJEU adjudicated for the first time the legality of the ECB's unorthodoxy, but in highly exceptional circumstances: at stake was the announcement of the Outright Monetary Programme that, upon a simple press release made at the peak of the sovereign debt crisis, had saved the euro from the edge of the cliff. The CJEU walked on a tightrope between, on the one hand, exercising a judicial check of legality and, on the other, keeping unscathed the emergency measure. In the test it devised, monetary policy competence is delimited by reference to the objectives pursued and to the effectiveness of monetary policy and, thus, easily encompasses measures with far-reaching economic implications.[4] Foreseeable 'indirect economic effects' of monetary policy (however they may be identified) cannot transform the monetary nature of a measure.[5] The principle of proportionality further enabled the Court to ascertain whether the exercise of the monetary policy competence was necessary and appropriate – hence lawful – in view of the objectives pursued. Following its first step of review, the Court had already characterised those objectives as primarily monetary and not as primarily economic (hence, within the limits of Article 127 TFEU).[6] So it was only in view of the monetary policy objectives that necessity and appropriateness where tested. All this depended, crucially, on the expertise of the ECB: the Court relied both on the arguments the ECB used to frame what it was doing to preserve the monetary policy transmission mechanism and on its expertise that supported the necessity and appropriateness of the programmes it adopted, without probing it in view of alternative economic assessments.[7]

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[4] Case C-493/17, *Weiss*, para 53 to 57; Case C-62/14 *Gauweiler*, para 46 to 50 and 51-52, combined with 58-59, respectively (see, further, para 64 on the importance of the objectives to delimit monetary from economic policy).
[5] Case C-493/17, *Weiss*, para 61 to 67.
[6] Case C-493/17, *Weiss*, para 71 to 72; Case C-62/14 *Gauweiler*, para 66-67.
[7] Case C-493/17, *Weiss*, para 65, 74 to 78; Case C-62/14 *Gauweiler*, para 50, and 72-73, 76-78.

The CJEU followed the same reasoning in *Weiss*. Here, however, it applied it to what had become the ECB's standard action in a decade-long context of deflation: the acquisition of massive amounts of debt that empowered the ECB in an unprecedented way.[8] Unlike *Gauweiler*, *Weiss* referred to a programme that was *not* a crisis measure. This was a fundamental difference, but it had no reflection in the standard of review that the CJEU applied. Nevertheless, the CJEU approach – by contrast to the presumed full review that the German constitutional court followed in its *Weiss* judgment[9] – became accepted as *the* way of ensuring the subjection of the ECB's monetary policy decisions to the law. The general and abstract manner in which the Treaties defined the primary objective of the Union's monetary policy, the controversial character of monetary measures, and the technical complexity of the assessments required, based on forecasts, recommended not only limited judicial review but also a deferential approach to the manifest error of assessment test.[10] These are indeed solid reasons to limit judicial review.

Importantly, the position of the Court is that, like any other institution, the ECB is bound to abide by the law and, like any other institution exercising discretion, its decisions can be probed judicially by asserting compliance with "procedural guarantees"; in instances of discretion, these acquire "fundamental importance" while enabling the Court to stray away from the substantive merits of the contested decisions.[11] In matters of monetary policy, the Court can follow the same methodology that it applies elsewhere when reviewing discretion.[12] Only that, in this specific instance of discretion, the same legal principles that generally may enable the Court to ensure different degrees of limited review did not operate as a balance to the wide discretion of the ECB. Neither the principle of proportionality, nor the principle of careful and impartial examination (mentioned in passing by the Court in its analysis of proportionality), placed constraints to the discretion of the decision-maker such that they can counter-balance its wide discretion. While, following *Weiss*, these principles are presumed to function as norms of control in the hands of the Court to probe the exercise of discretion of the ECB, and fetter its wide discretion, they did not function as such. The structural reasons that hide behind the

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[8] These are not exceptional circumstances: see, among many, K. Bernoth, M. Fratzscher, P. König (2014), "Weak inflation and threat of deflation in the euro area: Limits of conventional monetary policy", 4 DIW Economic Bulletin (Deutsches Institut für Wirtschaftsforschung (DIW), 5, 15-28 (available at https://www.econstor.eu/bitstream/10419/98671/1/788066439.pdf). See also, A. Tooze, 'The Death of the Central Bank Myth', *Foreign Policy*, May 13 2020.

[9] On why this is only a presumption, see M. Dani et al., 'It's the political economy...! A moment of truth for the eurozone and the EU' 19 ICON (2021) 309 -327.

[10] Case C-493/17, *Weiss*, para 55, 73, 91; Case C-62/14 *Gauweiler*, para 91.

[11] Case C-62/14 *Gauweiler*, para 68-69 (awkwardly stated when reviewing compliance with the principle of proportionality); Case C-493/17, *Weiss*, para 30 (when reviewing compliance with the duty to give reasons).

[12] 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, at 33.

"complexity" of decision-making in this area, combined with the political salience of monetary measures, place the CJEU in an extremely difficult, but not unsurmountable, position when asked to adjudicate on the legality of monetary policy. These arguments will be developed now, first, by characterising the powers of the ECB and highlighting what is distinctive to monetary policy, and then, by explaining why the general principles mobilised in *Weiss* did not operate in their presumed function of control.[13] How the Court can face these hurdles while avoiding the straightforward empowerment of the ECB that resulted from *Weiss* will be indicated later.[14]

2.2. The ECB's powers between law and discretion

The structural conditions under which the ECB acts qualify the powers that the Treaty gives it.[15] First, its decisions are taken in situations of uncertainty, even if of varying degree, and are based on prognostic assessments, which, institutionally, only the ECB is technically and legally competent to undertake.[16] Second, its mandate is delimited by open-textured norms, whose meaning depends on the specification of evaluative and goal-oriented terms (price stability). By the very nature of these terms, their interpretation presupposes varying understandings on what the role of the ECB should be in different political-economic contexts. These entail ideological conceptions on the scope and direction of its actions that prevail in the institutional environment of the ECB at each point in time.[17] Verifying whether the ECB has competence to act depends, further, on the specification of technical terms (e.g. transmission mechanism of monetary policy, and price stability itself), which hinge on the technical assessments made by the ECB of the contexts in which it acts and what decisions those contexts require. Third, the attribution of

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[13] The distinction between norms of control and norms of conduct is made in J. M. Rodriguez de Santiago, *Metodología del Derecho Administrativo. Reglas de racionalidad para la adopción y el control de la decisión administrativa* (Marcial Pons, 2016), p. 24-25 and applied to EU law in 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.

[14] See Section 5 *infra.*

[15] See 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) section 2.2, on which this analysis draws.

[16] On the varying degrees of uncertainty M. Grzegorczyk and F. Papadia (2022) 'Measuring macroeconomic uncertainty during the euro's lifetime', Working Paper 10/2022, Bruegel, noting the intense uncertainty of 2022. See also, on the more recent challenges that uncertainty poses to the central banks, Financial Times, 'Central Banks Seek Interest Rate Sweet Spot in Inflation Fight', 18 May 2022).

[17] See A. Chadwick, "Rethinking the EU's 'Monetary Constitution': Legal Theories of Money, the Euro, and Transnational Law", European Law Open 3 (2022), 468–509, Section 1. The disputes over the legality of unconventional monetary policies have been, also, a contention between monetarists, holding that inflation is a monetary phenomenon, and neo-Keynesians, viewing inflation as matter of social conflict. Accounting for a recent exchange among economists on this dispute, see James K. Galbraith, "Convergence on Conflict? Blanchard, Krugman, Summers and Inflation", Monetary Policy Institute Blog, January, 9th, 2023 https://medium.com/@monetarypolicyinstitute/convergence-on-conflict-inflation-in-the-21st-century-7bccb7b6479#_ftnref. On how ideational changes have occurred recently, Jérôme Deyris, "Too green to be true? Forging a climate consensus at the European Central Bank", New Political Economy (2023).

meaning entails the arbitration between competing interests concerned by the mandate of the ECB.[18] The very determination of which considerations matter to secure the transmission mechanism of monetary policy[19] – e.g. whether addressing climate risks is part of securing price stability – are fundamental choices that depend on the knowledge generated and catalysed by the ECB. In addition, defining its course of action also requires the ECB to assess the effectiveness of the public action of other institutions – national governments conducting fiscal policies and the administrative agencies competent in related policy fields – insofar as that can impact on the goals of its measures. Fourth, because of the purposive nature of its competence, the long-term effects of its decisions will be fundamental for its credibility. All this, combined, lies behind the references in judicial review to "the technical complexity of the assessments required, based on forecasts"[20] and to the controversial character of monetary measures.[21]

These conditions mean that, to fulfil the function it was entrusted to carry out under the Treaty, the ECB defines the meaning of the legal norms that delimit its mandate, through *its own action*. What price stability entails can only be defined through the action of the ECB, because the interpretation of the norm that delimits its scope of action depends on the specification of technical terms and, hence, on the factual assessments that the ECB was set up to make. At the same time, price stability – the goal and public interest that define the scope of its mandate and which it is bound to achieve and protect – only comes to bear through that very same action. We are not "just" before decisions that require the ECB "to make choices of a technical nature and to undertake forecasts and complex assessments [and thus to enjoy] a broad discretion",[22] or that entail "a wide power of assessment in choosing" the best course of action or, to signify the same, "a broad discretion … as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which [it adopts]".[23] More than discretionary, its powers are constitutive of the legal regime that frames its existence and

[18] They may be those of the sectors of production that set "systemically significant prices" for price stability: 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.
[19] The transmission of monetary policy is essential to define the scope of monetary policy: Case C-62/14 *Gauweiler*, para 50.
[20] Case C-62/14 *Gauweiler*, para 75; Case C-493/17, *Weiss*, 73.
[21] Case C-62/14 *Gauweiler*, para 75; Case C-493/17, *Weiss*, 91.
[22] Case C-62/14 *Gauweiler*, para 68; Case C-493/17, *Weiss*, para 73.
[23] Case T-733/16, *La Banque Postale v ECB*, EU:T:2018:477, para 69 and Case T-510/17, *Antonio Del Valle Ruíz v Commission and Single Resolution Board*, EU:T:2022:312, para 107, respectively on banking supervision and on banking resolution..

function, and constitutive of the public interests that it is meant to protect and that justify its existence and function.[24]

The constitutive character of the powers of the ECB *does not* come from the political intricacy and salience of its decisions, or from its technical complexity, *but* from the conditions indicated above. Those conditions qualify what could otherwise be described as "jurisdictional discretion", i.e. discretion regarding the establishment of the conditions of legal action that resort to indeterminate legal concepts.[25] The choice between alternative courses of action (the essence of discretion) can be made already when determining the meaning of the legally defined conditions of administrative action (or the meaning of the goals of action, in the case of the ECB). Hence, discretion and interpretation blur. The norms that grant and delimit public powers become an instrument of mediating, forging and channeling the processes through which executive and administrative powers define the scope of their action.[26] Because this happens when defining *the very terms and conditions of action*, the structural conditions of constitutive powers identified above strengthen the difficulties in distinguishing between factual and legal assessments.[27] Importantly, the conditions that give rise to constitutive powers are present in other policy fields. Even if less salient, less impactful in their market effects, and framed by a much tighter legislative framework, those conditions may generate, structurally, the same type of powers, exercised by executive bodies different from the ECB.[28]

There are, nevertheless, specific traits of monetary policy that make judicial review in this area particularly difficult: what is fundamentally at stake in monetary policy is the control of the means of money creation. This gives the ECB's constitutive powers a distinct constitutional salience: its political power – in the sense of *potentia*, the "ability to dispose of things" – allows it to penetrate society in ways that are largely not mediated by legal norms but, predominantly, through the generation and distribution of money via the banking system.[29] This means, first, that, while legal norms define its scope and means of action, they are not pivotal in defining the forms, content and direction of public action.[30] Secondly, and relatedly, unlike other areas of public action, in the current institutional set up of the EMU, the executive body's capacity to act is not co-defined by a legislature that either sets the conditions of action (through detailed legal

[24] On constitutive powers and why they are distinct from discretion, see J. Mendes, 'Constitutive Powers of Executive Bodies: A Functional Analysis of the Single Resolution Board' (2021) 84 *The Modern Law Review,* 6, 1330-1359, at 1335-1342.
[25] P. Craig, *EU Administrative Law* 3rd ed. (OUP, 2018) 447-452.
[26] See, further, Mendes, op. cit. *supra.* n 24
[27] H.P. Nehl, 'Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union' in J. Mendes (ed) *EU Executive Discretion and the Limits of Law* (OUP, 2019), 157-197, at 176-177.
[28] See, further, Section 3.
[29] On *potentia*, see, among others, M. Loughlin, *Foundations of Public Law* (OUP, 2010), 164-168.
[30] 'Law recedes' in the face of *potentia* – Loughlin, *idem*, citing Foucault (167).

regimes) or influences its course of action through channels of political accountability. In formal terms, the ECB acts alone: the norms in the Treaty are specified by the ECB without the mediation of secondary legal norms decided by another institution. Thirdly, its *potentia* places the ECB in a position to influence, decisively, the fiscal policy of elected governments. A change in the understanding of the goals of its actions, and of the legal norms that delimit them, expands or restricts the scope of national governments to define their economic policies.

The constitutive nature of the powers of the ECB, combined with these distinct traits, impacts on the ability of the Court (arguably, any court) to review the legality of monetary policy decisions. In particular, the principles of law that the Court mobilises to control the discretion of the EU institutions and of the EU's administration cannot operate here as norms of control in the same terms as they do in other instances of judicial review of discretionary powers.

2.3. Proportionality and care did not constrain

The constitutive character of the ECB's powers, in particular, explains the controversy around the application of the principle of proportionality in *Weiss*, both regarding the distinction between the existence and the exercise of competence and the degree of judicial review that proportionality may support. The German Federal Constitutional Court (FCC) was strongly criticised on both accounts. Probing that critique in the light of the analysis above cuts through the fog of the polarised and heated defense of the position of one court over the other. It explains why the standard of review of discretion that the CJEU applied does not enable a meaningful control of discretion, while the alternative cannot be the one that the FCC defended.

The FCC was said to have got wrong the scope of application of this principle in EU law: it applied proportionality to ascertain the *existence* of a competence, while, according to Article 5(4) TEU, a proportionality assessment of competences only pertains to their *exercise*, after ascertaining that the author has competence to act.[31] That is indeed what the Treaty says, but this argument overlooks that, because of the structural conditions of action pointed out above, the mandate of the ECB can be delimited only through its action, i.e., *through the exercise* of the competence.[32] The ECB construes the legal norms that also ground what it may lawfully do. For this reason, the distinction between the *existence* and the *exercise* of a competence breaks down.[33] As said above, what is price stability, can only be determined through the very action of the ECB: the ECB alone is legally and technically competent to define what, in each political and

[31] See, among others, Wendel, *op. cit.,* supra n 2. On the controversy, see A. Bobic in M Dawson et al. (eds.) *Towards Substantive Accountability in EU Economic Governance* (CUP, forthcoming). See also Lenaerts, op. cit., *supra* n 12, at 28-30 and 38-39.
[32] Borger, op. cit., *supra* n 2.
[33] Also argued in Mendes, op. cit., *supra* n 15.

economic context, it must do to keep or restore price stability. That depends less on how the ECB has generally defined price stability,[34] than on how, at each point in time, the ECB itself understands its role in reaction to macroeconomic prognostic assessments and decides, based on the information that it solely collects and analyses, which risks it can plausibly incur to achieve the desired outcomes.[35] Uncertainty, even if it comes in differing scales of magnitude, compounds the challenge, but also expands the leeway that the ECB has to define the terms of its action and the legal framework that governs it.

These conditions also have implications for judicial review of specific instances of an exercise of discretion. The need to give the ECB a free hand to define the objectives of its action – i.e. to determine what still counts as securing price stability despite the "knowingly acceptable and definitely foreseeable" economic effects of a measure[36] – informed the position of the Court.[37] But, when it deployed proportionality, the CJEU de facto assessed the suitability and necessity of the means chosen by the ECB – its programmes and their characteristics – against goals that are *defined by the institution* and that are re-instated through its decisions. That can be due to the lack of sufficient normative basis to perform a control of legality, to the procedural rules governing the preliminary ruling procedure,[38] as well as to the structural conditions of constitutive powers. There are no pre-defined yardsticks external to the action of the ECB that can serve as a reference to the assessments that the Court makes, at least no pre-defined yardsticks that can be derived from legal interpretation to ascertain at what point the economic implications of a measure affect its nature as a primarily monetary measure. The conditions to perform a *control* of proportionality are, therefore, undoubtedly challenging. But the difficulties are not unsurmountable. That much is shown by how both the CJEU and the FCC went about assessing the compliance of PSPP with Article 123 TFEU.[39]

In its case law on the application of proportionality to instances of broad discretion by the decision-maker, the CJEU only checks, under a proportionality test, whether there is a "manifest error": in proportionality terms, whether the measure was "manifestly inappropriate"

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[34] The ECB determines not only what price stability requires at each time, but also what price stability is – see the Strategic Review (cite). This point further strengthens the argument made above.

[35] Both are dependent on a prevailing political-economic understanding on inflation and central banks (note 17 *supra*).

[36] Case C-493/17, *Weiss*, para 67 (the citation is from para 62, where the Court refers to the view of the German Constitutional Court).

[37] See Opinion AG Cruz Villalón, *Gauweiler*, para 111 ("the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution") and Opinion AG Wathelet, *Weiss*, "the Court must be wary of carrying out a review of expediency", both reflected in the respective judgments.

[38] I owe this point to a discussion with Michal Krajewski.

[39] I am grateful to Marco Dani for pointing this out.

or whether it went "manifestly beyond what is necessary".[40] At the same time, commentators have noted that the Court also conflates a proportionality assessment with control for manifest errors, which, in turn, leads it into an appraisal of how the reviewed body went about the technical assessments that grounded the challenged act.[41] Both in *Gauweiler* and *Weiss*, it did so by relying only on the technical expertise provided by the ECB, without probing – as it often does in instances of legislative and of administrative discretion – the relevance of the factors considered and whether all relevant factors were taken into account.[42] Proportionality was, in essence, confusingly conflated with an assessment of care and manifest error.[43] In both judgments, the Court's reference to the principle of care – "nothing more can be required" from the ECB apart from a careful and accurate deployment of its "economic expertise and the necessary technical means at its disposal"[44] – did not require from the Court an analysis of that care and accuracy. In this case, this was not a duty that the CJEU reviews to counterbalance wide discretion, but a duty the ECB is presumed to comply with when adopting controversial monetary policy measures.[45] This is not judicial review limited to asserting manifest errors of assessment – of technical assessments or of proportionality assessments – eventually committed by the author of the decisions in its decision-making process. This is judicial review premised on an outright deferral to the expertise of the decision-maker, where the reference to the tools of limited review is just that: a reference.[46] It signals a type of review that the Court did not conduct, because it relied on the documents and arguments presented by the decision-maker and on the programme's own terms, as defined by the ECB.[47]

As it often does, and must do, the Court calibrated the tools it uses when it reviews discretionary decisions – including general principles – to the concrete case at hand. To recall:

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[40] Case C-493/17, *Weiss*, para 78 (no "manifest error of assessment" as a conclusion of the application of the suitability test – the Court does not use here "manifestly inappropriate") and para 79 (setting out the standard for the assessment of necessity).

[41] Nehl, op. cit., *supra* n 27, 189 ('closely connects'); M. Chiti, M. Macchia and A. Magliari, "The Principle of Proportionality and the European Central Bank, 26 European Public Law (2020), 843-866, 848 (in general) and 855 (in *Gauweiler* and *Weiss*). V. Kosta, "Proportionality and Discretion in EU Law: In Search for Clarity" in ECB Legal Conference 2021, "Continuity and change – how the challenges of today prepare the ground for tomorrow", April 2022, 98-102 (noting, in particular, that the Courts' conflation of manifest error and care can also be done under the heading of proportionality - at 104).

[42] Case C-493/17, *Weiss*, para 74 to 77, 80.

[43] Kosta, op. cit., *supra* n 41, 104-105. Chiti, Macchia and Magliari op. cit., *supra* n 41, stating that "rather than the proportionality of the measure" the Court reviewed the "*stricto sensu* suitability of the measure" and focused on manifest error – at 855).

[44] Case C-62/14 *Gauweiler*, para 75 ; Case C-493/17, *Weiss*, para 91.

[45] Dani et al., *op. cit.,* supra n 9, 319.

[46] Case C-493/17, *Weiss*, para 30. Stressing the importance of that reference, see Lenaerts, op. cit., *supra* n 12, 38-39.

[47] In a similar sense, see 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*, 53-76, at 69 ("the CJEU has so far refrained from checking any details of the ECB's decision-making process. It has rather relied on the ECB's own description of how it made the necessary assessments").

one where the ECB gets to define the meaning of the terms that delimit the lawful scope of its action, where its decisions depend on prognostic assessments that it is solely legally and technically competent to undertake, while, at the same time, arbitrating competing interests and setting the terms for the credibility of the institution in view of the long-term effects of these decisions. Using proportionality as tool of control entails *always* a judgment on the decision-maker's assessment of the adequacy (the relation between means and ends) and of the necessity of the measure in view of alternative, equally effective, means to achieve legitimate aims, even if only to identify "manifest" inadequacy, excesses (in the case of necessity) or errors (if conflated into the proportionality assessment). It entails, hence, a degree of intrusiveness on the substantive merits of the decision. Above all, a judgment on necessity entails assessing the relationship between the interest involved in the judicial conflict that proportionality is meant to protect and the legitimate aim that the decision-maker must achieve.[48] Similarly, the principle of care requires the Court "to carry out an *at least* cursory value judgment of the relevance of the facts and the evidence forming the subject matter of the case".[49] It presumes that there is some yardstick – external to the measure itself – that allows the court to assess the *relevance* of the factors considered, i.e. whether the decision-maker "set out clearly and unequivocally the basic facts *which had to be taken into account* as the basis of the contested measures".[50] In any event, using proportionality and care as tools of control – whether mingled or as separate headings – means, at the very least, making an examination of decision-making that goes beyond the facts and arguments brought forward by the author of the measure challenged.

In the structural conditions of constitutive powers, probing alternatives to assess the proportionality of the measure, as much as probing into the facts to assess their relevance in decision-making, can bring the Court too close to a substitution of judgment.[51] That is even more so when – as in monetary policy – the law provides few, if any, yardsticks to ascertain what can be relevant factors and when the definition of the goals of each measure requires delicate political balances of high constitutional salience. In this case, given proportionality's own indeterminacy, an attempt to ascertain the balancing of interests according to criteria that can be derived from the norm brings the Court – any court in similar circumstances – too close to overreaching its powers of judicial review if it strikes down an ECB decision on the grounds of

[48] V. Kosta, 'The Principle of Proportionality in EU Law: An Interest-Based Taxonomy' in J. Mendes (ed.), *EU Executive Discretion and the Limits of Law* (Oxford University Press, 2019), 198-219, insisting that proportionality is, ultimately, always about conflicts of interests. See also Kosta, op. cit., *supra* n 41, 105, noting that balacing is present at the necessity stage of the proportionality assessment.
[49] Nehl, op. cit., *supra* n 27, 196, emphasis in the original.
[50] The citation is from the case law cited by Lenaerts to illustrate what he calls "procedural proportionality" (op. cit., *supra* n 12, 38).
[51] On the continuity between applying care and substituting judgment, see Section 3.3. below.

wrong interpretation or lack of proportionality.[52] In such circumstances, the Court will use the flexibility that its tools of review give it not only within the boundaries defined by the concrete case at hand, as it always does,[53] but also – presumably – only as far as the institutional environment and context of the decision advises. The demonstration of this argument requires an examination of how the Court has applied its manifest error of assessment standard in instances of discretion where similar structural conditions of decision-making are present. This is the analysis that follows, which, by virtue of the decisions and judgments examined, will focus on the principle of careful and impartial examination. It will show that, to operate as a norm of control, by probing into the relevance of the factors considered, the principle of care makes the court a co-definer of the substance of the measures, even if to a varying degree.

3. Preventing bank failures and the role of courts

3.1. "Too-big-to fail no more": MREL and their determination

The supervisory and regulatory powers of executive bodies in the area of banking union have brought to EU law and to its courts an important segment of complex technical assessments that shape the interface between public intervention and private banking activities. As mentioned in the introduction, institutionally, monetary policy and banking union have very distinct traits. In particular, the density and detail of the legislative norms on banking resolution and supervision provide both a basis for decision-making and indications to controlling bodies on the relevant factors that must be considered in decision-making. These are areas of "clearly defined" powers, where discretion is "precisely delineated" by legal norms that provide objective criteria and, thereby, ground judicial review.[54] This well-known formulation of EU law can also serve as a placeholder for ordinary administration, usually associated with subordination to normative or political determination, and normally deprived of the degree of discretion that enables executive bodies to set a political direction of public action, or the criteria and forms through which public interests should be concretised.[55] Yet, the structural conditions that give rise to constitutive powers can also occur in areas of ordinary administration. This continuity between what would

[52] See, further, Dani et al., op. cit., *supra* n 9, 318-320. See also, Chiti, Macchia and Magliari op. cit., *supra* n 41, 860, noting that "adopting the proportionality test [risks] judicial appreciation of administrative functions", because of the need to consider the interests at stake.
[53] See, Nehl, op. cit., *supra* n 27.
[54] Case C-9/56 *Meroni v High Authority* EU:C:1958:7, 152; Case C-270/12 *United Kingdom v Parliament and Council* EU:C:2014:18 (*Short-selling*).
[55] See, among many, P. Serrand, "Administrer et gouverner. Histoire d'une distinction" 4 *Jus Politicum* (2010) available at http://juspoliticum.com/article/Administrer-et-gouverner-Histoire-d-une-distinction-219.html, and V Cerulli Irelli, "Politica e amministrazione tra atti 'politici' e atti 'di alta amministrazione'" 1 *Diritto Pubblico* (2009), 101-134, in particular 109-114, 121-123.

be policy-making areas presumably reserved to higher instances of administration, on the one hand, and instances of ordinary administration, on the other, will be illustrated here by reference to the determination of minimum requirements for own funds and eligible liabilities (MREL), which are the competence of resolution authorities.

MREL are long-term debt instruments intended to ensure that the bank's investors bear the losses if the bank fails and that the bank's viability can be maintained or restored. They are a core element of the preventive arm of the baking resolution regime and instrumental to its overall bail-in philosophy.[56] MREL secure capital that, once written down (to absorb losses) or converted into equity, should function as a self-insurance, thus enabling to a significant extent "the restoration of the bank's balance sheet".[57] Put simply, they "ensure that bail-in is easier to execute",[58] by making those who invest in the bank capital incur possible losses. Ultimately, they are meant to avoid excessively risky practices supported by moral hazard. In formal legal terms**,** MREL are individual decisions, which can be challenged before the SRB Board of Appeal and before the courts.[59] MRELs are determined on a case-by-case basis, in accordance with the characteristics of each bank (their size, business model, funding model and risk profile are one of the criteria that the SRB needs to comply with) and with a view to facilitate the resolution strategy defined in the plan.[60] They are, however, carried out in tandem with the planning of resolution and are an important element of the resolution plan.[61]

The legal requirements for the determination of MREL are highly detailed.[62] Quite apart from monetary policy, competence delimitation does not operate on the basis of objectives and

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[56] M. Lamandini and D. Ramos Muñoz, "Minimum Requirements for Own Capital and Eligible Liabilities", in M. P. Chiti, V. Santoro (eds.), *The Palgrave Handbook of European Banking Union Law* (Palgrave, 2019), 321-348, at 323, to whom I owe the heading of this sub-section (321).

[57] T. Tröger, "Why MREL Won't Help Much: Minimum Requirements for Bail-in Capital as an Insufficient Remedy for Defunct Private Sector Involvement under the European Bank Resolution Framework" 21, Journal of Banking Law (2020) 64-81, at 68

[58] Lamandini and Ramos Muñoz, *op. cit.,* supra n 56, 328.

[59] On the difficulties in determining whether the General Court or national courts have jurisdiction, see S. Grünewald, "Judicial Control of Resolution Planning Measures in C Zilioli and K.-P. Wojcik (eds.), *Judicial Review in the European Banking Union* (Edward Elgar, 2021), 395-415.

[60] Article 12d(1)(d) and (a) SRM Regulation. See, also, SRB, Minimum Requirement for Own Funds and Eligible Liabilities (MREL) - SRB Policy under the Banking Package, May 2021, p. 5 (their purpose is "to ensure that a bank maintains at all times sufficient eligible instruments to facilitate the implementation of the preferred resolution strategy").

[61] Article 12(4) SRM Regulation. AP Decision n. 2/2021, para 97 ("the iMREL decision and the resolution plan go hand in hand"). Grünewald, *op. cit.,* supra n 59, 398 ("the preferred resolution strategy identified in the resolution plan will impact how resolvability is assessed and MREL determined. (…) *it can form part of the bank's reasons for complaint, but it cannot be the subject of complaint on its own*" emphasis added).

[62] Regulation 2019/877 of the European Parliament and of the Council of 20 May 2019, amending Regulation No 806/2014 as regards the loss-absorbing and recapitalisation capacity of credit institutions and investment firms (OJ 2019 L 150/226), modified the previous Article 12. The current norms, among other aspects, define the procedure (Article 12), the modes of MREL calculation (Article 12a), the instruments that are excluded from MREL, those that must be classified as eligible liabilities and the respective conditions for exclusion and inclusion (Articles 12b and 12c), the general and specific criteria for the determination of MREL (Articles 12d and 12e), the terms of MREL

means of action. The specification of the conditions of action is often a detailed legal concretisation of the objectives that the instruments of regulation such as MREL are meant to achieve. Still, the determination of MREL is future- and goal-oriented, i.e. the objectives for which they were envisaged as an instrument of regulation are fundamental in their application. As part of the resolution plans, MREL must ensure the possibility to apply the resolution tools "in a way that meets the resolution objectives",[63] as defined in Article 14 of the SRM Regulation. That much is reflected in two of the criteria for their determination: they must ensure that losses can be absorbed and they must ensure the recapitalisation of the bank such that it will be able to "continue to comply with the conditions for the authorisation" and to carry out the activities authorised.[64] The final criterion that the SRB must consider is

> "*the extent to which the failure of the entity would have an adverse effect on financial stability*, including through contagion to other institutions or entities, due to the interconnectedness of the entity with those other institutions or entities or with the rest of the financial system."[65]

The micro and the macro dimension of the delimitation of MREL are, therefore, deeply intertwined. The setting of MREL is about the bank, contends with its business and resolution strategy, and depends on its various characteristics as legally determined. But it is also about preserving financial stability, preventing moral hazard of the bankers – inducing therefore market discipline – and avoiding resort to taxpayers' money, one of the main goals of the whole regime of banking resolution. The macro dimension of MREL is attained through, and mediated by, the combination of the individual decisions. All this must be achieved in an environment where the stakes are high: banks are likely to litigate, including on fundamental rights grounds, and an eventual need for bail-in, as much as bail-out, should this at the end be unavoidable, can be subject to public outcry.[66] Considering what may be at stake, the "exorbitant emphasis on proportionality and technical fine-tunning" reflected in the regulation is perhaps not surprising.[67]

3.2. The "if" of administrative action: complex technical assessments between law and discretion

The level of technical detail in the legal specification of the SRB powers to set MREL does not exclude the structural conditions of constitutive powers. Often, the determination of whether the

application to resolution and to non-resolution entities, i.e. those as such identified by the Board on the basis of its assessments (Articles 12f and 12g, as well as Articles 3(24a) and 8), the sanctions for breaches of those norms (Article 12j).

[63] Article 12d(1)(a) SRM Regulation.

[64] Article 12d(1)(b) and (c) SRM Regulation. See, further, Tröger, *op. cit.,* supra n 57, 66-7 (pointing to the need to predict adjustments in MREL calibration and to the risks of mispricing due to adjustments of MREL prescriptions, and arguing that administrative discretion in this matter impairs market discipline).

[65] Article 12d(1)(e) SRM Regulation, emphasis added.

[66] Lamandini and Ramos Muñoz, *op. cit.,* supra n 56, 341.

[67] Tröger, *op. cit.,* supra n 57, 66.

norm's factual predicate is verified – whether the legal conditions of action are fulfilled – depends on carrying out prognostic technical assessments in conditions of uncertainty (e.g. "the extent to which the failure of the entity would have an adverse effect on financial stability").[68] That determination may require also setting out the meaning of evaluative and goal-oriented terms (e.g. "adverse effect", "financial stability"). The goal of MREL measures – ensuring the preservation of the health of credit institutions in the medium and long-run and their ability to absorb losses in case of failure – may be explicit in the legal conditions of action.[69] Even if this is not the case, their systematic insertion in the legal regime is likely to make the telos of the administrative powers a fundamental aspect of the interpretation of those conditions.[70] Judgments on "the extent to which the failure of the entity would have an adverse effect on financial stability" will entail a choice on the relative position of the private interests of the supervised bank and the public interest of stability. All these factors – technical assessments that are future-oriented, characterised by uncertainty, enmeshed with the goals of administrative action and with value judgments on the interests deserving precedence – determine the interpretation of the legal conditions of action. Similarly to what happens in monetary policy, defining the meaning of the enabling legal norm entails a choice on the options that legal norms *may* have granted to the administration (a choice that both delimits and conditions those options). Unlike in monetary policy, the interpretation of the enabling legal norm in the case of MREL relies on the information gathered and assessed through a close collaboration between more than one competent public authority.[71] It is a choice that is legally bound: whether or not the conditions are verified in any given instance is a matter of law. But one that may be conditioned by the decision-makers' understanding of their role under the applicable legal regime – e.g. whether achieving its goals require a stricter or looser stance regarding risks – by the criteria that, accordingly, they consider relevant to guide their complex technical assessments, and by the specific circumstances of each case.

As the SRB Appeal Panel noted, in a case pertaining to the SRB's interpretation of the legal conditions to grant a waiver in the determination of MREL, this assessment "is not an

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[68] See text accompanying n 65.

[69] Cf. Article 12d(e) SRM Regulation (in text accompanying n 65) and Article 12h(1)(c) SRM Regulation (that "there is no current or foreseen *material practical or legal impediment* to the prompt transfer of own funds or repayment of liabilities by the parent undertaking to the subsidiary" is a condition to grant a waiver in the determination of MRE, emphasis added).

[70] Case C-152/18, *Crédit Mutuel Arkea v ECB*, ECLI:EU:C:2019:810, paragraph 53. See also, stressing the importance of teleological interpretation in matters of prudential supervision and resolution by reference to this judgment, Decision of the SRB Appeal Panel in Case 2/2021 of 27 January 2022 (henceforth Decision '2/2021'), para 74.

[71] Because of the links with the loss absorbing capacity of the bank, the determination of MRELs requires a close collaboration between the banking supervisor and the resolution authority (Tröger, *op. cit.,* supra n 57, 72).

exercise of discretion *in the proper sense*".[72] Here, the spheres of legality and of discretion blur, because the determination of the meaning of the law mingles, on the one hand, technical knowledge, and, hence, cognition (e.g. whether there are "current or foreseen practical or legal impediments" to the transfer of funds), and, on the other, value judgments, and, hence, volition (e.g. whether prudential reasons may justify a stricter position on this matter). This is where what counts as a *relevant* factor of decision-making is defined, i.e. what can be qualified as relevant in view of the law that the decision-maker must apply, of the goals that the law envisages, and how they can be best concretised in the circumstances which the decision-maker faces. These are the factors and criteria that, legally, must be taken into account and base the measures adopted.[73]

In the case where the Appeal Panel made that observation, the dispute on MREL determination boiled down to a disagreement between the appellant and the SRB on whether the legal conditions to exercise discretion were met (not on the exercise of discretion itself). Specifically, the dispute hinged on whether one of the criteria that the SRB used in order to assess the verification of the disputed legal condition was an unwarranted and unlawful addition by the SRB, or, on the contrary, that criterion could still derive from the law because it was in line with the objectives of the legal regime. Although this dispute is very distant from the controversy surrounding monetary policy decisions, they have in common the fact that the finding of what is legal – what can still be derived from the law – depends on the policy objectives of a decision or of a determination that influences it. In the case at hand, as part of ensuring that "there is no current or foreseen material practical or legal impediment to the prompt transfer of own funds or repayment of liabilities by the resolution entity to the subsidiary" – one of the conditions to apply the legally envisaged waiver on MREL determination – the SRB demanded that the appellant provide a guarantee.[74] The appellant claimed that this was an additional condition, which not only amounted to the SRB exercising de facto regulatory powers, outside of its mandate, but also breached the law because it deprived the possibility of a granting a waiver of any practical legal effect. The SRB (and the Appeal Panel), on the contrary, considered that this was a relevant criterion to consider when making sure that "sufficient arrangements" are in place as a condition for deciding whether the waiver should be granted.[75]

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[72] Decision 2/2021, cited supra n 70, para 79, emphasis added (I focus here only on this part of the case, which concerned also a 'classic' instance of discretion). Other conflicts on the determination of MREL that have reached the Appeal Panel pertain to jurisdictional discretion: see, in addition, Decisions of the SRB Appeal Panel in Case 8/2018 of 16 October 2018, in Case 3/2022 of 8 June 2022, and in Case 1/2022 of 29 June 2022 (all available at https://www.srb.europa.eu/en/cases/search).

[73] See further text accompanying footnotes 97 to 99, *infra*.

[74] Article 12h(1)(c) SRM Regulation and Decision 2/2021, cited supra n 70, para 15.

[75] Decision 2/2021, cited supra n 70, para 94.

Insofar as they derive from the legal norm, the definition of concretising criteria by the decision-maker is, in litigation language, a matter of law.[76] But these are, at the same time, criteria that the competent authority creates to structure the exercise of its discretionary power under the legal norm.[77] It is part of the norms of conduct that the administration constructs to guide its choices in view of the public interests that it needs to protect (i.e. of the 'telos' of the norm), which, in its view, will allow it to exercise its discretion correctly (e.g. to assess the level of risk that granting the waiver can pose).[78]

This norm of conduct is a matter of law (it must fit in, concretise and reflect the text of the legal norm), but it is essentially dependent on the goals of the norm and on the context in which it is applied. It co-determines the factual assessment. The finding of a lack of error of law in its regard – because the criterion of action could still be derived from the law – is hence likely to determine the lack of an error of assessment – because the non-verification of that criterion evidences a level of risk that the decision-maker is not willing to endorse.[79] The establishment of the norm of conduct is, in other words, a segment of the exercise of discretion, which reflects the positioning of the SRB – as a matter of policy – on the fulfilment of the legal conditions of action. Thus, in the case of Article 12h of the Single Resolution Mechanism Regulation (SRMR), the SRB "evolved from a more lenient to a stricter approach".[80] It is, at the same time, a matter of interpretation, insofar as indications on the criteria that can structure the discretionary choice can be derived from the spirit of the norm or from the overall purpose and system of the legal regime. The law, therefore, provides the criteria that can structure the discretionary choice.

Because of these combined traits, the concretisation of the legal conditions of action "does not morph into a *de facto* exercise of regulatory powers" that could amount to general rule-setting, as the appellant in this case had invoked.[81] Importantly, this interplay between interpretation and discretion, has deep structural consequences: it shows a continuity that the distinction between matter of law and matter of fact tends to conceal.[82] This is where the line between a strict, yet limited, control of administrative discretion can morph into substitution of judgment. This is a problem that the Appeal Panel does not face, even if, like most appellate

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[76] Idem ("the Board did not err in law in the application of Article 12h").
[77] That segment of discretion that the interpretation of the norm allows for, that the Appeal Panel called not a more constrained "margin of appreciation" or "a margin of technical appreciation", rather than "discretion in the proper sense": Decision 2/2021, *supra* n 70, para 79 and 95.
[78] See, further, Santiago, *supra* n 13.
[79] Decision 2/2021, cited supra n 70, para 94 and 95. On the importance of the contextual and teleological interpretation, see para 70 to 74.
[80] Decision 2/2021, *supra* n 70, para 102.
[81] Decision 2/2021, *supra* n 70, para 99.
[82] See Nehl, op. cit., *supra* n 27, 176 ("there is no clear divide between issues of fact and of law … factual and legal appraisals tend to merge").

bodies, it decides to follow very closely the judicial reasoning of review in matters of complex technical assessments.[83] Courts, however, are clearly in a different position.

3.3. Delimiting relevant factors: fact and law…

When it comes to financial regulation, as in other policy areas, the General Court has shown that the complexity of the technical assessments involved in regulation is no obstacle to the stringency of judicial review. The judicial practice established first with regard to prudential decisions taken in the field of supervision has been extended, not surprisingly, also to resolution matters.[84] Discretionary decisions are closely scrutinised and their motives probed, while the Court attempts a difficult balance between defining the aspects that may be judicially determined and preserving the choices that must be left to administrative decision-makers – a balance that, ultimately, is progressively determined by litigation. In the process of ensuring that the law is observed, the Court may become a co-definer not only of the legal regimes but also of the policy programmes and choices that the legal norms enshrine. This is something that the legal categories with which the Court works do not acknowledge.

The General Court has not yet been confronted with any dispute on the determination of MREL. The SRB's eight-year practice on setting a revising MREL - set in articulation with the public and private actors that are part of its institutional environment - appears, thus far, to be consensual (or, at least, not litigious enough to justify involving the Court). However, the same difficulties in delimiting the boundaries of interpretation and the boundaries of discretion have underlain the so-called Livret A judgments of 2018.[85] They pertain to one aspect of supervisory powers under the capital requirements regulation – the calculation of leverage ratios and possible derogations from the legal conditions of that calculation – which, substantively, does not stray far from the determination of MREL.[86]

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[83] See, in particular, M. Lamandini and D. Ramos Muñoz, "Law and Practice of Financial Appeal Bodies (ESAs' Board of Appeal, SRB Appeal Panel): A View from the Inside." 57 *CMLRev* (2020) 119–160, and M. Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart, 2021).

[84] See M Ioannidis, "The Judicial Review of Discretion in the Banking Union: from 'Soft' to 'Hard(er)' Look? In C Zilioli and K.-P. Wojcik (eds.) *Judicial Review in the European Banking Union* (Edward Elgar, 2021), 130-145, noting that the Livret A cases are widely regarded as a turning point (138). On resolution, see Case T-510/17, *Antonio Del Valle Ruíz v Commission and Single Resolution Board*, EU:T:2022:312, para 110. Per se, the presence of complexity of technical assessments is not a criterion of the suitable degree of judicial review (see n 110 below).

[85] The Livret A cases are the following: Case T-733/16 *Banque Postale v ECB*, EU:T:2018:477; Case T-758/16, *Crédit Agricole v ECB* EU:T:2018:472; Case T-745/16 *BPCE v ECB*, EU:T:2018:476; Case T-757/16 *Société Générale v ECB*, EU:T:2018:473; Case T-751/16 *Confédération Nationale du Crédit Mutuel v ECB* EU:T:2018:475; Case T-768/16 *BNP Paribas v ECB* EU:T:2018:471.

[86] The line of argumentation of the appellant in Decision 2/2021 *supra* n 70 (see para 52 and the reasoning at para 75) confirm the parallelism that can exist between banking supervision cases on capital requirements and banking resolution determinations of MREL

The capital requirements regulation sets out the terms in which credit institutions must calculate their leverage ratios to secure sufficient own funds and meet, if needed, requests for the repayment of their debts. Leverage ratios discourage credit institutions from funding their investments excessively by debt rather than by own funds, and are, therefore, meant to avoid the risks of failing banks. The regulation introduced the possibility to exclude from the calculation of leverage ratios exposures that have a particularly low risk profile (i.e., exposures to a public sector entity which, because of a state guarantee, may be treated as equivalent to exposures to the relevant central government, regional or local government) and, cumulatively, that do not result from an investment choice of the credit institution, but rather arise from legally compulsory transfers to fund general interest investments Like the case of waivers envisaged for the determination of MRELs, this is a prudential decision directed at securing the financial soundness of credit institutions.[87] Similarly, whether to grant or not that exclusion is a discretionary choice of the competent supervisory authority which arises once the legal conditions are fulfilled.[88]

In the Livret A judgments, the Court delimited in important ways how that discretion must be lawfully exercised. That happened in three main steps. First, the Court characterised the decision-maker's discretion – in the case, the ECB – and examined its interpretation of the legal norm granting that discretion. It specified that the discretion of the competent authority must be exercised in view of reconciling the competing objectives that underlie the legal norm.[89] In the judgments of 2018, the Court replaced the ECB's interpretation of the relevant legal provision: in its view, that interpretation precluded the very exercise of discretion and deprived the legal provision that granted discretion from its practical effect. At the same time, it teased out from the capital requirements regulation the intentions of the legislature in introducing the leverage ratio and derogations to its calculation.[90] This specification of the objectives of the legal norm, allowed the Court – in a second step – to assess whether the criteria chosen by the ECB to exercise its discretion could be lawfully derived from the norm that sets the legal conditions for

[87] See the conditions established in Article 429(14) of Regulation 575/2013, in the version in force at the time of the facts of the *Livret A* judgments, currently Article 429a(1)(j) of Regulation 575/2013 (as amended by Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019).

[88] Case T-733/16, *La Banque Postale v ECB* (*supra* n 85), para 40 and 41 (on which the Appeal Panel relied for its Decision 2/2021, since the structure if the two norms at stake is similar). One of those conditions entails also a discretionary choice: the exposures must be treated in accordance with Article 116(4) (429(14)(c)), according to which "In exceptional circumstances, exposures to public-sector entities *may be treated as* exposures to the central government, regional government or local authority in whose jurisdiction they are established *where in the opinion of the competent authorities* of this jurisdiction there is no difference in risk between such exposures because of the existence of an *appropriate guarantee* by the central government, regional government or local authority" (emphasis added).

[89] Case T-733/16, *La Banque Postale v ECB* (*supra* n n 85), para 56 to 58, and 95 (the same formulation can be found in the other Livret A cases – e.g. Case T-758/16, *Crédit Agricole v ECB* (*supra* n 85 *supra*), para 50 to 52, and 66).

[90] Case T-758/16, *Crédit Agricole v ECB*, para 40 to 46 (also Case T-733/16, *La Banque Postale v ECB,* para 46 to 51).

action.[91] Thirdly – and finally – the Court examined the relevance of two of the criteria used by the ECB: the possibility of sovereign default and the period between the adjustments of the credit institution concerned and the public sector entity to which it makes compulsory transfers. In this assessment, the Court defined further legal obligations. It concluded that the criteria set by the ECB can be considered pertinent if accompanied by an individual assessment of whether and how they played out in the individual circumstances of the case at hand.[92] Failing such an individual assessment, i.e., *as the ECB applied them*, they could not be relevant considerations to guide the exercise of discretion. The Court also established an additional duty of the competent authority in relation to the second criterion (the adjustment period): only if accompanied by a "thorough examination of the characteristics of the regulated savings", can that criterion be considered a *relevant* factor of decision-making.[93] This "thorough examination" is nothing else than a specification of the duty of careful an impartial examination in this particular matter of banking supervision.[94]

In the language of litigation, all these are matters of law, because they stem from the interpretation of the norm, specifically, from its objectives. In these cases, the ECB's partial consideration of the legal objectives had made it incur in an error of law: it applied the legal norm in a way that deprived the possibility of derogation from its practical effect.[95] The judicial specification of the objectives of the legal norm and the delimitation of what are, accordingly, relevant factors of decision-making meant narrowing down the scope of discretion: from the moment in which the Court ascertained the legality of the relevant criteria of decision-making, these criteria – while still part of a norm of conduct – are no longer part of the discretion of the decision-maker when deciding on how to go about its decisions.[96] They become part of the Court's grounds to assess whether manifest errors of assessment have been made.

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[91] Case T-758/16, *Crédit Agricole v ECB*, para 53 to 58 and 64 (also Case T-733/16 *La Banque Postale v ECB*, 80 to 86 and 93).
[92] Case T-758/16, *Crédit Agricole v ECB*, para 61 to 66 and 80 (also Case T-733/16 *La Banque Postale v ECB*, para 89 to 95 and 111).
[93] Case T-758/16, *Crédit Agricole v ECB*, para 80 and 81 (also Case T-733/16 *La Banque Postale v ECB*, para 111 and 112), emphasis added.
[94] Case T-758/16, *Crédit Agricole v ECB*, para 82 ("that obligation to examine the particular characteristics of regulated savings also arose in application of the case-law [on the duty of the competent authority to examine carefully and impartially all relevant aspects of the individual case]") and para 84 (also Case T-733/16 *La Banque Postale v ECB*, para 113 and 115).
[95] Case T-758/16, *Crédit Agricole v ECB*, para 60 to 66. On the same points, see Case T-504/19, *Crédit Lyonnais v ECB* EU:T:2021:185, para 43 and 66, respectively.
[96] Case T-504/19, *Crédit Lyonnais v ECB,* para 95, confirming that defining a methodology of decision-making is within the remit of the ECB under a legal provision which envisages a discretionary power (a point not touched by the appeal C-389/21 P, *ECB v Crédit Lyonnais* EU:C:2023:368, para 79).

But this drawing out the boundaries between the law and the scope of discretion clearly means treading uncertain ground.[97] Determining the relevance of decision-making criteria is a matter of interpretation that brings the Court too close to an off-limits area: the substitution of a discretionary judgment. First, delimiting the relevant from the irrelevant factors in the exercise of discretion, through legal interpretation, implies ascertaining also the goals of public action that must be concretised in each case. It amounts to an assessment of the norm of conduct that decision-makers construct as part of their exercise of discretion: the structuring elements that the decision-makers can derive from the applicable legal strictures to guide their exercise of discretion. A judicial determination of relevance not only can change how the decision-maker exercises discretion in *individual cases*; it may also preclude a stricter or looser position on prudential matters. It makes the Court participate in the exercise of discretion *through* the determination of the law. Secondly, the distance between the establishment of a norm of conduct and its application in each instance – the grounds of each decision and their substantive merits ('le bien-fondé') – is very short.[98] They are both elements of the exercise of discretion. Yet, in litigation terms, one is a matter of law (the general definition of the criteria of decision-making is a matter of law), hence, potentially subject to full review; the other is a matter of fact (the assessment of each individual case) and, hence, subject to review under the manifest error of assessment test. In this test, discretion is balanced out by the "even more fundamental significance" of verifying compliance with "the duty of the competent institution to examine carefully and impartially *all the relevant aspects* of the individual case".[99]

3.4. … and the ambiguity of the duty of care

From the proximity between the definition of the norm of conduct and the factual assessments made in individual cases (and, hence, from the interplay between law/interpretation and fact/discretion) arises the ambiguity of the duty of careful and impartial examination. As a tool of judicial review (a norm of control), it presumes that what qualifies as relevant can be ascertained by the Court without exceeding the boundaries of an exacting but, still, limited review, and, hence, respect the "broad power of assessment" that, according to the law, the decision-maker must retain.[100] What qualifies as relevant is externally given by the law. If not

[97] This fact is admitted also by those who insist on a categorial distinction: see Opinion AG Emiliou in Case C-389/21 P, *European Central Bank v Crédit Lyonnais*, EU:C:2022:844, para 63.
[98] As evidenced in *Crédit Lyonnais v ECB*, para 46 and 69 (where the Court distinguishes the correct application of its previous judgment from the merits of the decision), 102 and 104 (referring to the argumentation of Crédit Lyonnais and of the ECB that evidence the systematic links between the correct application of the law and the correctness of the discretionary assessment).
[99] Case T-504/19, *Crédit Lyonnais v ECB*, para 98 and 99, emphasis added.
[100] Case T-504/19, *Crédit Lyonnais v ECB*, para 98.

directly, it is at least indirectly deductible from the norm through methods of legal interpretation, and, hence, detached from the specifics of each case and from the decision (i.e., from the application of the law).

Yet, the degree to which the norm of conduct constructed by the decision-maker can be deduced from the law – and hence be subject to the scrutiny of the court without incurring in substitution of judgment – may be minimal. It is logical that the factors that are part of the norm of conduct are the same as those that ground the decision-maker's factual assessment in concrete cases. If this is the case, then the delimitation of what stems from the law and is a matter of legality, on the one hand, and what stems from the law and is a matter of discretion, on the other, is particularly difficult (if possible at all). The relevant factors provide both the basis *and* the justification of the decision, both the general criteria (the definition of the norm of conduct) *and* the aspects of the individual case that are considered relevant (the application of that norm of conduct to the individual case). Insofar as these coincide, the scrutiny of the decision-maker's conduct through the application of the duty of careful and impartial examination necessarily entails a substantive assessment of the merits, irrespective of the depth of the standard of review applied by the court.[101]

In conditions of indeterminacy, such as those that may give rise to constitutive powers, a scrutiny of care risks slipping into a substitution of judgment. If "the relevant elements are inherently uncertain, speculative or subjective", [102] and if that circumstance does not prevent the Court from exercising intense scrutiny – as the Livret A judgments show – then, arguably, the reviewing court may come rather close to a substitution of judgment when deploying the principle of careful and impartial assessment as a tool of review. That explains what happened in *Crédit Lyonnais*, in the first instance judgment.[103] Here, care and impartiality of all relevant aspects of an individual case turned into an examination of the methodology designed by the ECB to guide its discretion in applying the derogation and of its application in the case at hand. At first instance, the Court's verification of whether, in compliance with the principle of care, the ECB had assessed all the relevant factors led it to do the following. It highlighted the characteristics of the regulated savings that, in its assessment, the ECB ignored or downplayed and that the applicant "demonstrated to the required legal standard" (i.e., its status as a 'safe investment' in the event of a banking crisis); next, it assessed differently the legal qualification of those savings

[101] Nehl op. cit. *supra*, n 27, 192 ("although clothed in procedural language, the observance of the principle of care has a strong connotation of substantive review and legality of the exercise of discretion, because it necessarily implies that the judges make a value judgment on the *relevance* of the (primary) facts needed for the purposes of the discretionary appraisal", emphasis in the original).

[102] Advocate General Opinion in Crédit Lyonnais (supra n 97), para 66.

[103] Case T-504/19, *Crédit Lyonnais v ECB,* para 41 to 45, 48 to 50, 57 to 68 show the tensions mentioned in the text (this part of the judgment was not impacted by the appeal: C-389/21 P, *ECB v Crédit Lyonnais*, para 79).

(i.e. their ability to create excessive leverage); and, finally, drawing on these first points, it made a different assessment of the causality between the liquidity of the regulated savings and the conclusion drawn by the ECB that it could ground the risk of fire sale of assets.[104] This part of the judgment was quashed on appeal, as entailing a substitution of judgment.[105] Tellingly, when delivering its own judgment on the matter the CJEU did not deploy the principle of care. Instead, it turned to the standard of proof required when the decision-maker must carry out "prudential analysis of a provisional nature".[106] This technique allowed the Court to just make an assessment of the plausibility of the factors considered relevant by the ECB to support its decision and conclude – easily – that they were not vitiated by a manifest error.[107] At stake was the ability of the ECB to pursue a more stringent prudential policy in the application of the exception envisaged in the capital requirements regulation, a policy that considered not only past but also future risks.[108] In a case where the importance of the objective pursued by the legislation "is of the greatest general significance",[109] defining the "level of protection of the interests involved" is both a competence of the decision-maker and – as this case illustrates - an element of the lawfulness of the decisions taken.

4. Behind and beyond traditional public law doctrinal categories

4.1. Behind "complex technical assessments" and "manifest errors"

The above analysis confirms that "complexity" is an unsatisfactory label to explain and justify the degree of review that the Court chooses to apply in each instance of discretionary action,[110] not least because its generality blends powers with distinct legal dimensions and with a varying degree of political salience. As much as the "manifest error of assessment" standard of review, complexity is, at best, a shorthand to signal a type of judicial control that, depending on the pleas put forward in any given judicial proceeding, will typically involve the application of principles of law, among which the principle of careful and impartial assessment, proportionality and the duty

[104] See Case T-504/19, *Crédit Lyonnais v ECB*, para 107 to 110, 110 to 113 and 113 to 116, respectively.
[105] C-389/21 P, *ECB v Crédit Lyonnais*, para 65 to 75.
[106] *Idem*, para 92 and 93.
[107] *Idem*, para 94 to 115 and 121 to 124.
[108] In his opinion, AG Emiliou, despite his principled denial that technical discretion may entail policy discretion, indirectly acknowledged that underlying the judgment was the need for a "cautious approach and increased relevance on the part of the ECB", assessed in light of "the overarching aim of the EU legislation in question" (supra n 97, para 120).
[109] Opinion AG Emiliou (*supra* n 97), para 85.
[110] The same has been pointed out by A. Kalintiri "What's in a Name? The Marginal Standard of Review of 'Complex Economic Assessments' in EU Competition Enforcement" 53 CMLRev (2016) 5 1283–1316, at 1299 and by Nehl, *op. cit.,* supra n 27. This observation holds irrespective of the source of complexity, i.e., whether it stems from "factual complexity" or from divergent but equally reasonable factual assessments or legal qualification of facts (see, for this distinction, Opinion of AG Emiliou in *Crédit Lyonnais*, n 97 *supra*, para 48 to 50).

to give reasons. In a formulation which has become a classic of EU law, compliance with procedural guarantees (a term that typically does not encompass proportionality) assumes even more fundamental "importance" or "significance" when "an EU institution enjoys broad discretion" or "a wide power of assessment".[111] It signals the type of judicial tools that, most likely, will be used flexibly by judges, who can "switch between or combine the available standards and concepts that, in their view, are most appropriate to solve the legal dispute" within the limits of each case.[112]

"Complexity" in the case of monetary policy decisions and in the instances of banking resolution and supervision analysed here, refers, however, to something more specific, something that also discretion (even jurisdictional discretion) does not suitably capture.[113] It refers to the technical assessments that the decision-makers must make when deciding whether the legal conditions to act are verified or not, or (as in the case of the Livret A judgments) to derive from the legal norms the criteria that can structure the exercise of discretion. Those instances have in common a set of structural conditions of administrative action: the "complex technical assessments" they require are (1) made in situations of uncertainty, (2) depend on the information that is collected and analysed by the decision-maker because of its technical and legal competence, (3) are prognostic and (4) needed to give meaning to the evaluative or goal-oriented terms used in the legal norms that ground and delimit the powers of the decision-maker. At the same time, (5) they either determine or are co-determined by the specific understandings of the goals that the decision-makers must achieve in the medium and long-run to suitably fulfil their function and maintain the credibility that fundamentally depends on the long-term effects of their decisions. These structural conditions are present both when the ECB adopts monetary measures and when the SRB or the ECB take decisions under banking union provisions.[114] While the technical assessments made under these conditions are often regarded as not involving political choices, they are imbued with value judgments and, importantly, co-delimit the scope of permissible applications of the law.[115] In such circumstances, there is no a priori standard of what can count as "manifest" error.[116] This applies, to different degrees, not only to the macro-level and politically salient monetary policy decisions but also to the routine

[111] Case C-493/17, *Weiss*, para 30; Case T-758/16, *Crédit Agricole*, para 30 and 31, all going back to C-269/90, *Technische Universität München*, EU:C:1991:438, paragraph 14.
[112] Nehl, op. cit. *supra*, n 27 196.
[113] Mendes, op. cit. *supra*, 24, 1341-1342.
[114] See, Sub-sections 2.2 and 3.2, *supra.*
[115] See the useful definition of complex assessment in Opinion of AG Emiliou in *Crédit Lyonnais*, n 97 *supra*, para 50.
[116] The proposal of AG Emiliou in *Crédit Lyonnais* is, hence, inoperative (n 97 *supra*, para 58).

banking supervision decisions analysed here. None of this is reflected in the categories of judicial review that the Court uses as a reference to signal different standards of review.[117]

That these are not cases of "discretion in the proper sense" – or that there is something specific to administrative decision-making in such conditions – is perhaps more discernible (by contrast) in instances of "clearly delimited executive powers". These are illustrated by the powers of the SRB and the ECB under the banking union regulations.[118] But the same structural conditions are present when the ECB adopts monetary policy measures under its strictly delimited, yet, open-ended mandate in the Treaty. Also here, in the same circumstances, the ECB must define whether the conditions of legal action which presuppose its legal competence to act are or not present when it acts under Article 127 TFEU. In this instance, those conditions are much more loosely defined and clearly do not follow the syllogistic ("if, then") logic of most legal norms delimiting discretionary powers. Nevertheless, structurally the legal norms that delineate the ECB's competence to act operate under the conditions indicated above. In accordance with the *Gauweiler* and *Weiss* judgments, the complex technical assessments conducted by the ECB must ground measures that, in scope, remain primarily monetary policy measures, insofar as they are, first and foremost, directed at preserving price stability and the transmission mechanism of monetary policy, irrespective of economic effects that can be regarded as "indirect".[119]

In both instances of decision-making, the technical complexity of the assessments that must be carried out to ascertain whether the legal competence to act is fulfilled or not – or whether the specific legal conditions of action are verified or not – is combined with legal interpretation, because at stake are always legal norms that resort to more or less open-ended terms in delimiting the norms' factual predicate that can only be understood by deploying technical knowledge ("price stability", "current or foreseeable practical or legal impediment", "adverse effect on financial stability"). These are, at the same time, powers attributed to achieve policy goals, which are delimited and concretised by legal norms to varying degrees. Because of the knowledge required to attribute meaning to these norms and because of the purposive character of the competences delineated by law, the systematic and teleological methods of interpretation acquire particular relevance.[120] Discretion, no matter whether more 'technical' or

[117] These were reiterated in the Opinion of AG Emiliou in *Crédit Lyonnais*, n 97 *supra*.
[118] See Decision 2/2021, *supra* n 70, para 79 and text accompanying footnotes 72 to 80 *supra* (Sub-section 3.2).
[119] Gauweiler, para 52, and Case C-493/17, *Weiss*, para 61.
[120] Decision 2/2021, para 70 to 74, on both methods, and Opinion AG Emiliou in *Crédit Lyonnais*, n 97 *supra*, para 67, mentioning only the importance of 'the *wording* and the *objective* of the relevant provisions' in delimiting discretion (emphasis in the original).

more 'political' leaning in character,[121] must be exercised in view of reconciling competing objectives of the legal regime in which the enabling legal norms are inserted.[122] How each instance of discretion is inserted in that legal regime, how each instrument of the legal regime (together with their more specific goals) works – or must work – at a more granular level, in view of those overarching objectives, is important to determine the lawfulness of the criteria that guide decision-making. These are also the 'relevant' factors that need to ground the choices and the decision eventually taken.[123]

As stressed above, in deciding monetary policy measures and in the instances of banking union analysed here, those choices occur at the moment of determining the limits of the legal competence to act. In the structural characteristics of action pointed out above, the court's possible questioning of the law – of the decision-makers' interpretation of its goals and of the overall system in which it is inserted – may amount to questioning the policy strategy of an administrative authority. The risk of crossing those boundaries is more evident when the legal norms are less specific, if at all, regarding the conditions of legal action – the case of monetary policy. It is much more difficult to discern – but equally present – where the legal norms fine-tune those conditions to the detail, but, nevertheless, cannot avoid the use of goal-oriented, open-ended terms, as in many instances of discretion in the banking union.

4.2. Beyond "ordinary' and "high" administration: the relative specificity of monetary policy decisions

Despite the commonalities indicated above, the denser web of legal norms makes undoubtedly a difference in the ability of the courts or review bodies to use their tools of review to ascertain the meaning of the enabling legal norms in the banking union cases. On a first approach, this difference of degree of legal density could be the reason to consider the instances of decision-making subject to more detailed legal norms as belonging to the ordinary realm of administration and monetary policy decisions as part of a higher administration, relatively free from legal-normative constraints. *Prima facie*, the introduction of this distinction in EU law could be the upshot of the distinctive features of monetary policy and of the different formal-institutional frameworks of monetary policy, on the one hand, and of banking union, on the other, recalled in the beginning of this article.[124] That could, moreover, be consistent with the macro-implications

[121] M. Prek and S. Lefèvre, '"Administrative Discretion", "Power of Appraisal" and "Margin of Appraisal" in Judicial Review Proceedings Before the General Court' 56 CMLRev (2019) 339-380. These categories, however, can only be taken as a very imperfect 'rule of thumb' (using this expression, but upholding the distinction, see Opinion of AG Emiliou in *Crédit Lyonnais*, n 97 *supra*, para 52).

[122] As confirmed by the General Court in the Livret A cases (see n 89 *supra.*

[123] The Livret A judgments are an illustration thereof (see Section 3.3. above, in text accompanying n 89 to 94, *supra*).

[124] See Section 1 and Sub-section 2.2., *supra.*

of monetary policy decisions, which contrast with the more limited legal and political scope of banking supervision decisions (as systemically relevant as these may be). In what follows, I will explain, first, the appeal of introducing this classification and, then, the reasons why it should be discarded.

Distinguishing between instances of ordinary and higher administration in EU law could provide a systematic justification for the different positioning of the Court when reviewing discretion in monetary policy and in banking union matters, as analysed in this piece. It would turn, essentially, on the degree of specification of the enabling legal norms. Thus, the assumption is that, where there is a dense legal delimitation of executive powers, the Court can control the legality of criteria of decision (the norms of conduct defined by the decision-maker) based on its interpretation of the relevant legal norms and, to that effect, replace the decision-makers' interpretation that guides its exercise of discretion. The *Livret A* judgments could confirm this, as the MREL decision of the SRB Appeal Panel.[125] In this case, when the Appeal Panel needed to ascertain the legality of the SRB assessment of whether the conditions to grant a waiver were fulfilled, it examined whether the SRB's interpretation and delineation of relevant factors of decision was in line with the objectives of the legal regime, as specified in the SRB regulation. In these instances, the ability of executive bodies to give meaning to – and hence construct – the legal norms that ground their power to act can be restrained, through ex post control of legality, because of the criteria that, more or less explicitly, can be derived from the applicable norms. The substantive indications contained in the highly detailed provisions that compose the respective legal regimes may give the reviewing bodies a solid basis to assess whether all the relevant aspects that must be considered were carefully and impartially examined. This assessment, however, always means taking a position on the substantive merits of the case (on what counts as *relevant*).[126] To different degrees – depending on how far the applicable legal norms provide criteria of decision-making that are external to the measure under scrutiny – the assessment of relevance makes the reviewing court or appeal body participate in the exercise of discretion through setting out the interpretation of the legal conditions of action or the compatibility of the decision-maker's assessment of relevance with the law.[127] Insofar as the teleological and systematic elements of interpretation are particularly important in these cases, the court may, at least in part, substitute judgment, i.e. substitute the decision-maker's understanding of the goals of administrative action. The question then, is less one of delimiting the law from the facts, but of a reasonable assessment by the court on how far it can go down

[125] See Sub-sections 3.2. and 3.3., *supra*.
[126] Nehl, op. cit. *supra*, n 27, 192 and Sub-section 3.3, *supra*.
[127] See Sub-sections 3.2 and 3.3., *supra*.

that road – more a matter of prudential review that will extend or narrow down the scope of what falls under legality and what is left to the administration.[128] At any rate, the level of normative specification provides a basis to a reviewing entity to enter this space of decision-making.

The absence of a similar regulatory density in the field of monetary policy has, logically, institutional consequences: the extent to which the court can get involved in the process of defining what are the relevant factors of decision-making, with the consequences just indicated, lacks those normative reference points – external to the measure itself – that allow them to scrutinise the complex technical assessments involved *both* in interpretation of the enabling norms and in the exercise of discretion. The absence of that normative support narrows down the space for judicial review.[129] This does not mean that the courts cannot technically do it: they have the tools at their disposal to probe executive decision-making taken in the conditions that generate constitutive powers.[130] The principles of care and proportionality, in particular, are potentially sharp tools to probe the type of judgment that the ECB needs to make when acting under its monetary policy mandate. Only that – if used as norms of control – they necessarily involve a degree of substantive interference in the decision-makers assessment for which the courts lack sufficient normative grounds and – importantly – may lack the support of the relevant actors that populate its institutional environment.[131] Mobilising proportionality as a norm of control entails, at least, a scrutiny of the adequacy between means and ends, as well as of the necessity of the measure, in view of how other means may achieve the legitimate aim pursued, which – even if limited to the detection of "manifest errors" – requires taking a position on the underlying interests involved in the judicial conflict.[132] Mobilising care as a norm of control means assessing whether all relevant aspects that the decision-maker needs to consider were carefully and impartially examined, which implies taking a position on the substantive character of *relevance* (what counts as relevant factors). Under the conditions that give rise to constitutive powers, this makes the reviewing court a virtual or effective surrogate of the primary decision-maker, because it participates in the exercise of discretion through the determination of the law.[133] The lack of normative specification of the applicable legal norms, while not

[128] The judgment issued by the CJEU in *Crédit Lyonnais* is an illustration (C-389/21 P, *ECB v Crédit Lyonnais*, para 89 to 115, 118 to 123).
[129] See Sub-sections 2.2 and 2.3., *supra*.
[130] On those condition, see Sub-sections 3.2 and 3.3., *supra*.
[131] The aspects that support the social legitimacy of the judgment should not be underestimated, as arguably the backlash against the *Weiss* judgment of the FCC shows.
[132] See Sub-section 2.3., *supra*.
[133] See Sub-section 3.3., *supra*.

unsurmountable (inter alia, by mobilising proportionality and care), considerably restrains the institutional capacity of courts to review legality.

It may be, then, tempting to explain the difficulties of judicial review by resorting to an undefined (and difficult to apply) category of "high administration" that contrasts with ordinary administration.[134] That would support the exceptional degree of deference that the Court of Justice displayed in *Weiss* as good law. The conclusion could be that, like the distinction political and technical discretion, such categorisation could maybe serve as a highly imperfect 'rule of thumb' to guide the court in its practice and to guide doctrinal analyses of its case law.[135] But the creation of doctrinal categories can hardly be justified by the need to provide an imperfect guidance that can, at most, offer a strawman categorisation of what is at stake in the exercise of public powers. Three reasons, in particular, speak against transposing that distinction to EU law, as explained next.

First, the consequence of introducing a category of "high administration" in EU law would very likely amount to perpetuating the *de facto* non-justiciability of monetary policy decisions, with important systemic effects, based on a misconceived analogy with state-settings. *Weiss* amounted to the mobilisation of principles of law as "judicial workarounds".[136] Should it remain good law, it supports a fiction of judicial control that risks depleting those legal principles as norms of control, and, ultimately, turn them into empty signifiers with pernicious effects to the principle of the rule of law. In the words of the much-criticised judgment of the FCC, by "[accepting] positions asserted by the ECB without closer scrutiny", the CJEU "allows the ECB to expand … its competences on its own authority".[137]

The semblance of judicial review has, furthermore, systemic effects. It maintains a fiction of control that buttresses the empowerment of the ECB and eludes how EU law operates - and how it can operate - in relation to executive powers. It reinforces an undesirable status quo.[138] It provides a justification to a specificity of the EU legal system – a constitutional central bank – which is an abnormal case in a comparative perspective and that can hardly be justified on democratic grounds.[139] The fact that in the EMU there are no other institutions concretising parameters of the monetary policy action for the ECB and defining normative reference points

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[134] On the difficulties in delimiting them, see Serrand "Administrer et gouverner" and Cerulli Irelli, "Politica e amministrazione" (op. cit. *supra* n. 55). Singling out *Weiss* is justified by the fact that it was judicial review for 'normal' circumstances, outside of the emergency situations that has led to the OMT announcement that was challenged in *Gauweiler*.

[135] See n. 121 *supra.*

[136] S. Ostrowski, "Judging the Fed" 131 Yale Law Journal (2021), 726-781, at 765

[137] 2 BvR 859/15, Judgment of 5 May 2020, para 142 (in relation to the objectives only) and para 156 (in relation to the application of proportionality).

[138] On this argument, see, further, Dani et al., op. cit. *supra* n 9.

[139] Idem.

by which its actions can be legally and politically assessed – hence, the lack of sufficient normative grounds that could support a control of legality, by courts or other review bodies – is not a matter of necessity stemming from specific traits of the nature of monetary policy. It is a matter of institutional design and of choice of the drafters of the Maastricht Treaty, informed by conceptions of central banking that are contested today. As legal theories of money have shown recently, there is nothing in the nature of the functions of central banks that requires the technocratic institutional design of money that currently prevails, at least nothing that justifies the exclusion of other institutions in the delimitation of central banks' powers to regulate money.[140] The doctrinal distinction, therefore, precludes avenues of reform that should bring other institutions to the delimitation of the parameters of action of the ECB.

Second, the analogy is misplaced. In constitutional law, the grounds for non-justiciability have always been political, not technocratic. *Actes de gouvernment* or acts of high administration have been those considered to pertain to the political function of the government as one of the highest bodies of the state. Even if one must avoid idealising the foundations of public authority exercised by national executives, the authority of those highest bodies of the state is grounded in legitimacy assets that the ECB clearly does not have.[141] Extending this doctrine to the ECB monetary powers would, at the very least, require the impossible: squaring the circle of applying a concept that was conceived to delimit state powers that, because of their political essence, must be excluded from judicial review, to the presumed rule-bound and technical powers of an independent institution designed as such to be immune from political orientations, and still subject to the jurisdiction of the CJEU.

Third, such a distinction would further obfuscate the continuity that exists between areas of high legal-normative density (banking union) and of low legal-normative density (monetary policy) that this article has shown. Structurally, beneath the distinct institutional frameworks, there are important similarities between the ECB's monetary policy powers and the powers that it deploys when acting in its supervisory role, similar also to the powers that other administrative agencies deploy in other fields of regulation, when the conditions for the emergence of constitutive powers are present. There is, therefore, a continuity that a possible delimitation of an area of non-justiciability – or the introduction of a distinction between areas of "ordinary" and "high administration" – would break. *How* to delimit one from the other, if at all possible, would be a doctrinal exercise fraught with difficulties, as is the categorical distinction between political and technical discretion. Moreover, it would be in contradiction (or hard to square) with the

[140] Chadwick, op. cit. *supra* n 17.
[141] On legitimacy assets, see J Mendes and I. Venzke, "Introducing the Idea of Relative Authority" in J Mendes and I. Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart, 2018), 1-26.

degree to which law – and, as a result, courts – is shaping the regulation of money in banking supervision and regulation, in areas characterised by the same structural conditions of decision-making. Despite of the distinct features monetary policy, the close affinities between the two fields of public action must not be ignored.[142] Finally, even within the current institutional design of the EMU, such a distinction precludes the role that law can nevertheless have in structuring the power of the ECB, as I suggest next, in the guise of conclusion.

5. Is *Weiss* as good as it gets? Avenues for rethinking the role of law in the government of money

The similarity of the structural conditions in which the law operates in the fields examined in this paper (technical complexity, future-oriented action, uncertainty, all combined with a degree of legal indeterminacy in the delimitation of the competence to act and involving value judgments on the interests implicated in decision-making) offers a new perspective on the role that law has and can have in relation to the powers deployed in each case, as well as on the role of the reviewing courts. These are instances in which constitutive powers may emerge, enabling their holder to define the meaning of enabling norms, i.e., those that ground their powers and the boundaries of their lawful exercise. These conditions may exist both in areas where legal-normative densification is weaker (monetary policy) and in areas subject to very detailed legal regimes (banking resolution and supervision). They establish, therefore, a continuity between what could *prima facie* be considered an area of high administration and areas of ordinary administration. They also support the rejection to transpose to EU law the distinction high and ordinary administration, which, in addition, would be constitutionally misplaced and pernicious to accountability.

The characterisation of the monetary policy powers of the ECB as constitutive explains the difficult position of the controlling court when judicial review happens in the absence of pre-defined yardsticks that can serve as a reference to a binary judgment of legality/illegality. The type of judgments that the Court must make when applying proportionality as a *norm of control* could bring it too close to substituting judgment, because of the structural conditions of constitutive powers present when the ECB takes monetary policy decisions. While deference is justified to preserve the delicate political balances underlying monetary policy decisions, proportionality as a norm of control would require a significant degree of intrusiveness in the substance of the measure to eventually ascertain the conditions, the criteria and the implications

[142] This is stressed by American scholars who point to the need to reconsidering the role of law and of judicial review in both areas (e.g. Ostrowski, supra n 136)

of the challenged measures. It requires probing into the evidence and arguments of the ECB to assess its measure in relation to the objectives pursued, without accepting at face value the characterisation that the ECB makes of his own decision. In the case of *Weiss*, rather than controlling, the Court merely gave the ECB a structure of justification for its actions, through proportionality, which will not restrict the expansion of the ECB's powers, or otherwise steer or influence its decisions. The Court buttressed the ECB's view of "*full* discretion" and further entrenched a situation in which the ECB – and, formally, *only* the ECB – defines the boundaries of its mandate.[143] This will be as wide and as narrow as the ECB considers needed, at each point in time, to preserve the monetary transmission mechanism. In conditions of constitutive powers, those assessments and choices, which justified the creation of the ECB and for which this institution is solely competent, will define the meaning of key open-ended terms that delimit the scope of the enabling norms, either literally (price stability) or as a result of an expansive interpretation (financial stability).

Constitutive powers can also emerge when administrative bodies subject to more detailed legal strictures get nevertheless to define the legal conditions of administrative action (the "if" part of legal norms). Also here, only through administrative action is it possible to give meaning to the enabling legal norm. Matters of law (the lawful scope of the powers through the verification of the legal conditions of action) depend on the goals that the decision-maker sets to achieve, based on their interpretation of the law and of their role under it, on the criteria that they consider relevant to, in accordance with that understanding, take a suitable decision to the specific facts of the case. Finding what is lawful depends on the policy objectives that at a macro or a micro level the decision-maker decides to pursue. The Court then navigates a grey area, where disentangling what may be judicially determined from what is off-limits is particularly challenging, where teleological and systematic interpretation make judicial review, in a sense, also prudential.[144] Here, resort to the principle of careful and impartial examination, mobilised as a tool of intense scrutiny, allows the Court to probe facts and criteria of decision-making to assess their relevance in relation to the objectives that administrative bodies must achieve. By applying in a consistent line of cases, the Court can progressively specify the objective of the legal norm and indicate, accordingly, what are relevant factors that must be taken into account. But this progressive determination of the law makes the Court participate in the exercise of discretion, as the 2018 Livret A judgments show, potentially bringing it too close to a substitution of

[143] The citation is taken from the self-characterisation of the ECB at https://www.ecb.europa.eu/ecb/orga/accountability/html/index.en.html (emphasis added)
[144] See n. 120 *supra*.

judgment. In the structural conditions of constitutive powers, the Court can become a co-definer of the policy programmes or decisions that the legal norms may allow.

In areas where the degree of normative specification of legislative norms supports an intense scrutiny, the Court moves in an institutional environment distinct from monetary policy. Yet, it is still within the grey area generated by the conditions of constitutive powers, which make it impossible to determine beforehand which factors will be left to the administration and which to the court. That determination will depend much less on doctrinal categorisations of types of discretion or of degrees of review – which can only serve as imperfect 'rules of thumb'[145] – than on the individual circumstances of each case. The judgment is, then, less about the delimitation of law and fact than about a *judgment* of how far the Court may go in steering the policy direction that the challenged decision represents, in view of the institutional environment and of the context of the decision whose legality it must ascertain or reject. These considerations, arguably, become more prominent in the grey areas that this article sought to delimit. The Court will use with flexibility the tools of review at its disposal limited, not only by the facts of the case, arguments and evidence produced before the court in support of the pleas of illegality, but also (presumably) by the impact that their review may have on the application, balance and effectiveness of the legal regime it is interpreting and applying.

In the instances of decision-making analysed here, the domain of the law withers. It triggers a process of decision-making where complexity primes. This process is either not legal in essence (the case of monetary policy, in the current EMU institutional framework) or is legal insofar as a legislature, in interaction with the executive bodies created to develop and sustain a legal regime, has been capable of translating complexity into legal norms (the cases of banking union examined in this piece). These norms, then, frame and contain and, thereby, give normative support to the subsequent intervention of reviewing bodies.

In these conditions, law enables, but the degree to which it can constrain varies significantly, as does the degree to which a reviewing court can ascertain their meaning. Courts become less controllers of legality than actors that mediate the processes through which public interests are pursued in areas of deep complexity.[146] Dense legal regimes, depending on the degree to which substantive criteria are pre-established or indicated by the legislature, may facilitate the application by the Court of Justice of the tools of review which it has developed over decades, in different policy fields, and support the translation of complexity into the judicial

[145] See n. 121 *supra*.

[146] Because the applicable legal norms, in conditions of constitutive powers, are ways of mediating the processes through which different actors define how public interests are composed and pursued and legal positions defined accordingly (Mendes, op. cit. *supra* n 24, 1342).

grid of fact/law, discretion/interpretation, manifest error/manifestly inappropriate. Strict judicial control, by application of a demanding manifest error of assessment test, will nevertheless make the court participate in the exercise of discretion. The structural conditions of constitutive powers propose, thus, a different understanding of the dynamic of allocation of authority behind the distinction law/discretion. They curb the ability of legal concepts such as interpretation and discretion to make sense of the relative position of executive decision-makers and of reviewing courts; they impact on the ability of the court to mobilise legal principles to control exercises of discretion – legal principles that straddle the line between procedural and substantive review to the point of possibly merging them. That is the case, as examined here, of the principles of proportionality and of careful and impartial examination.

Given the weak role of the law in delimiting the bounds of monetary policy, is *Weiss* as good as it gets? If it stands for what the courts can do with proportionality, without wishing to upset the balances struck by central bankers, yes. But, as I argued above, that does not amount to a control of discretion, or to a control of the boundaries of a mandate defined through the exercise of discretion. The usual method of judicial review of discretion does not function here, unlike the position that underlies the judgment of the Court of Justice in *Weiss*.[147]

Yet, when its intervention is requested, the Court must ensure some form of judicial control, in a way that avoids the full empowerment of the institution under scrutiny. To that effect, the Court must do more than just provide the ECB with a structure of justification of its decisions. Since *Weiss*, the ECB must make use of its "full discretion" without even being externally limited by the "knowingly accepted and definitely foreseeable" effects on the real economy of its measures, as that would "represent an insurmountable obstacle to its accomplishing the task assigned to it by primary law".[148] Also without any procedural demands on the "care and accuracy" that it puts in the use of "its economic expertise" ("nothing more can be required…" the Court stated).[149] And, yet, the evaluation of the distributive effects of monetary policy measures is part of what the ECB does. Its decisions knowingly impact labour income and wealth inequality.[150] If the ECB follows proportionality as a norm of conduct – as abundantly mentioned in its decisions and communications in the last years – it must follow a process of decision-making that considers alternative courses of action in view of their effects and that may lead it to assess differently the adequacy and necessity of the measures under

[147] See Lenaerts, op. cit. *supra* n 12.
[148] *Weiss*, para 62 and 67. See, on this point, A. Peychev, "The primacy of the European Central Bank: Distributional conflicts between theory and practice in the pursuit of price stability, 22 *European View* (2023) 48, at 54.
[149] *Weiss*, para 91. The duty to give reasons, as deployed by the Court, does not place any meaningful constrains on the ECB (see Mendes, op. cit., *supra* 15).
[150] J. van 't Klooster and C. Fontan, "The Myth of Market Neutrality: A Comparative Study of the European Central Bank's and the Swiss National Bank's Corporate Security Purchases", *New Political Economy* (2019) 1-15.

consideration. This is something that the Court can require: an obligation to document in one single procedure (in the guise of impact assessment reports) the assessment of the distributional effects and of the considerations taken as relevant to secure the transmission mechanism of monetary policy.[151] It is an obligation that the Court can control, as part of the duty to give reasons, and that can support a limited review. It does not require deploying proportionality *à la* German Federal Constitutional Court, but assessing the plausibility of the final determination, under a manifest error test, against standards of economic rationality that are heedful of disagreements in economic theory that are relevant for the decision reviewed.[152] Only thus can a manifest-error-type of control be meaningful. The purpose of this obligation is not to produce "an *ex post* rationalization in a report" but to document a process of decision-making that considers alternatives in view of their effects. It is an obligation that may ultimately lead to replacing the originally planned course of action with those alternatives, as part as an autonomous assessment of the ECB.[153]

The purpose of this type of judicial review is to facilitate external scrutiny by parliaments, who should be the accountability fora for compliance with the principles of proportionality and of care as tools for gauging the distributive effects of monetary policy and for providing a structure of justification.[154] The Court would, thus, contribute to strengthen the substantive accountability of the ECB, which must be carried out by parliaments and, possibly, by other controlling bodies.

The interaction that I propose between judicial review and parliamentary accountability is reminiscent of the German Federal Constitutional Court approach to squaring the circle of the democratic legitimacy of independent authorities.[155] This approach, however, has important limitations. Law – the necessarily incomplete law that gives rise to constitutive powers – is at best an imperfect means of securing democratic legitimacy. In particular, within the current EMU framework, law does not channel, but precludes democratic decision-making.[156] In the analysis proposed here, procedural law can, nevertheless, be a means to support the strengthening of parliamentary accountability, which is much needed in the current institutional practice.[157]

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[151] This comes close to what, at the end, the FCC required in its *Weiss* judgment, and meets the analysis of Isabel Feichtner on the role that proportionality can have as a "step towards the democratization of money" (Feichtner, op. cit. *supra* n. 2, 1100).
[152] I owe this point to Marco Dani.
[153] Feichtner *idem*, *ibidem*.
[154] Feichtner, *idem*, *ibidem*.
[155] BVerfG, Judgment of the Second Senate of 30 July 2019 - 2 BvR 1685/14, para 129.
[156] Dani et al, op. cit. *supra* n 9. More generally, see D. Grimm, "The Democratic Costs of Constitutionalisation. The European Case" (21) *European Law Journal,* (2015) 460.
[157] A. Akbik, *The European Parliament as an Accountability Forum: Overseeing the Economic and Monetary Union* (Cambridge University Press, 2022). Arguably, the use by parliaments of judicial tools of control of complex decision-making

It follows from the above that when executive bodies act in the structural conditions of constitutive powers, judicial review is significant only in interaction with other means of accountability.[158] The need for complementarity is particularly evident in the case of monetary policy, given the scale of impacts of decisions taken by central banks.[159] But it is not exclusive to monetary policy. Where courts can only assess plausibility, parliaments can inquiry into the options that were not taken, based eventually on the procedural strictures that courts can impose on the ECB. Where, under an examination of the principle of care and impartial assessment, courts make substantive assessments of relevance that can only lead to a conclusion of legality/illegality, parliaments can tease out the political implications of the constitutive powers that administrative bodies exercise.[160] In the hands of parliaments, the principles of proportionality and care can be a trigger for political debate and contestation of technical decisions that have important distributive effects. In the banking union, this can ultimately lead to a change of the enabling norms. In monetary policy, clearly not.

decisions (such a proportionality and care) could be usefully used by parliaments to improve important flaws in their processes of accountability.

[158] I am paraphrasing the German Federal Constitutional Court in its baking union judgment (supra n 155, para 129).

[159] See, e.g., A. Tooze, "Now is a time of tough choices — including on the 2% inflation target", *Financial Times*, June 29 2023.

[160] While this may seem obvious, this is what *Weiss* precluded.