4

The Monetary Policy of the European Central Bank

4.1 INTRODUCTION

> 'When *I* use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean – neither more nor less.'[1]

In the story about monetary policy, the European Central Bank (ECB) is our Humpty Dumpty: when it uses the words 'monetary policy', they mean just what it chooses them to mean. This ability of the ECB comes from Article 119(2) TFEU, which states that the competence includes 'the *definition* and conduct of a single monetary policy' (emphasis added).[2] This undoubtedly makes the ECB extremely powerful. The Treaties have also endowed the ECB with a high level of independence:[3] one that has developed into an almost impervious screen shielding it from legal accountability demands.[4] The ability to define its own mandate, coupled with a high level of independence, created an ECB that wields enormous power, influencing the lives and livelihoods of EU citizens. The nature of the ECB's mandate has important consequences for its accountability, which was highlighted by the Court of Justice,[5] the Bundesverfassungsgericht,[6] as well as in

[1] L Carroll, *Through the Looking Glass* (Oxford World's Classics 2022) 68.
[2] See also Article 127(2) TFEU and Article 3.1 of the Statute of the European System of Central Banks and the European Central Bank (ESCB Statute).
[3] Article 130 TFEU.
[4] F Amtenbrink, 'The European Central Bank's Intricate Independence versus Accountability Conundrum in the Post-crisis Governance Framework' (2019) 26(1) *Maastricht Journal of European and Comparative Law* 165, 167.
[5] Case C-11/00 *Commission v ECB* EU:C:2003:395 [134], [137].
[6] Case 2 BvR 2728/13 *Gauweiler* Order of 14 January 2014 [187].

the literature.[7] In a nutshell, ECB's independence and accountability act as counterforces where independence most commonly prevails. How so?

Following a joint reading of Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. In addition, Article 127(1) TFEU tells us that without prejudice to this primary objective, the European System of Central Banks (ESCB, headed by the ECB) shall also 'support the general economic policies in the Union', with the aim of contributing to the achievement of the objectives enshrined in Article 3 TEU.[8] The 'without prejudice' phrasing in this provision is of enormous consequence for the common interest: it tells us that Treaty objectives that should guide all Union action hold but a secondary importance for the ECB's price stability mandate.[9] The ECB's high level of independence at the same time makes any contestation in that regard nearly impossible. Yet, there seems to be no unified stance among central bankers regarding the beneficial or detrimental nature of the relationship between the price stability mandate and the ECB's possible role in more general policies aimed at economic growth.[10] Such an environment creates significant leeway for the ECB to make its own assessments in a virtually unfettered manner.

Fears about the precarious status of ECB's accountability on paper materialised in practice. The overlap between monetary and economic policy effects became most vivid with the ECB's use of quantitative easing (the Public Sector Purchase Programme (PSPP)), which made the ECB the largest creditor of eurozone Member States.[11] This creditor role of the ECB makes it more difficult to achieve accountability via routes that theoretically may be open to Member States under the Treaties. It also places governments in a subordinate position to the ECB, with a decreased ability

[7] T Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context' (2020) 21 *German Law Journal* 1045, 1053–1056; M Dawson, A Maricut-Akbik and A Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' (2019) 25(1) *European Law Journal* 75, 77–80.

[8] These include balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress. The same provision also refers to economic, social, and territorial cohesion, and solidarity between Member States.

[9] S Egidy, 'Proportionality and Procedure of Monetary Policy-Making' (2021) 19(1) *International Journal of Constitutional Law* 285, 291.

[10] D Adamski, *Redefining European Economic Integration* (Cambridge University Press 2018) 109; E Monnet, 'The Democratic Challenge of Central Bank Credit Policies' (2023) *Accounting, Economics, and Law: A Convivium* 1, 2.

[11] K Tuori, 'The ECB's Quantitative Easing Programme as a Constitutional Game Changer' (2019) 26(1) *Maastricht Journal of European and Comparative Law* 94, 95.

to be responsive to their citizens. In some ways, this construct is similar to how the Troika-led creditors obstructed the chains of accountability of governments to their citizens in the area of financial assistance.

The ECB is also undoubtedly making value-based choices on how the PSPP is to be implemented, deciding on the desired consequences in the prices of assets, which arguably led to a significant income redistribution.[12] Another important consequence tied to the PSPP's rollout is that due to its sheer size and influence on the prices of assets, discontinuing the programme may result in significant uneven shocks across Member States, ultimately endangering financial stability.[13] As we will see below, the multifaceted consequences of ECB action caused a rift between the Court of Justice and the Bundesverfassungsgericht. The former took the view that so long as the ECB claims it is acting within its primary mandate (price stability), there is nothing problematic in its policies having other effects as well. In contrast to this, the latter argued that the ECB should do no more than act within its monetary policy mandate, which should be interpreted narrowly given its high level of independence under the Treaties.

The aim of this chapter is thus to highlight how these tensions influence the accountability of the ECB from the perspective of the individual and the achievement of the common interest as presented in Chapter 1. As a first step, I will present the legal framework of monetary policy within the system of the ESCB and explain in more detail the quantitative easing programmes of the ECB. Here, I will also provide a summary of the back-and-forth litigation on the scope of monetary policy between the Court of Justice and the Bundesverfassungsgericht in *Gauweiler* and *Weiss*. This background will allow for a further in-depth analysis of these decisions in the remainder of the chapter. To do so, I will then focus on the judicial review of monetary policy decisions by the Court of Justice (Section 4.3) and by national courts (Section 4.4). Both these sections will follow the same structure: I will focus, first, on access to courts and remedies, and second, on the ways in which the courts under analysis approached the principles of equality and solidarity for the purposes of achieving the common interest. The last section will focus on judicial interactions between the EU and national courts and the role they play in the legal accountability of the ECB.

[12] ibid 100.
[13] ibid 105.

4.2 MONETARY POLICY AND THE EUROPEAN SYSTEM OF CENTRAL BANKS

An exclusive competence of the EU, monetary policy and the EU's single currency may be one of the most visible symbols of EU integration after the establishment of the internal market. Its particular position within the EMU was a result of a decades-long debate between the so-called 'monetarists' and 'economists'. In a nutshell, the former argued that a common currency should precede the coordination of economic policies, whereas the latter focused on economic policy coordination as the necessary precondition for the introduction of the common currency.[14] While the monetarists prevailed, the creation of an asymmetrical EMU prevented the creation of a transfer union: every Member State continues to be competent for its economic and fiscal policy and remains solely responsible for its debt. This is ensured by the prohibition of monetary financing (Article 123(1) TFEU)[15] and the no-bailout clause (Article 125(1) TFEU).[16] In economic policy, fiscal surveillance at the EU level serves to ensure that Member States pursue a sound economic policy, thus minimising the likelihood of any possible shocks manifesting themselves across the eurozone.[17]

Within this legal scheme, the ECB is the governing institution of the European System of Central Banks, comprised also of central banks of eurozone Member States.[18] To achieve the objectives of monetary policy, national central banks and the ECB may operate in financial markets and conduct

[14] A Hinarejos, 'Economic and Monetary Union: Evolution and Conflict' in P Craig and G de Búrca (eds), *Evolution of EU Law* (Oxford University Press, 3rd ed 2021) 722 and the references cited.

[15] 'Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as "national central banks") in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.'

[16] 'The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.'

[17] Fiscal surveillance is outside the scope of this book. For a detailed analysis of this area, see P Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022).

[18] Articles 1 and 14.3 of the ESCB Statute.

credit operations with credit institutions and other market participants following the general principles established by the ECB.[19] They also conduct prudential supervision, and as will be detailed in Chapter 5, here the ECB also has a central role, whereas national supervisors act under its instructions and control.[20] The ECB is subject to judicial control at both the EU and national levels: under the general Treaty rules concerning the procedures before the Court of Justice and before national courts concerning disputes with creditors, debtors, or any other person.[21] The ESCB can be seen as a novel institutional system in which national central banks now wear two hats: they are national but are also EU authorities when acting under the ESCB.[22] In their latter function, the Governing Council of the ECB is entitled to decide that a central bank, while wearing its national hat, is acting in conflict with what is required of it while wearing its ESCB hat.[23]

The ECB's role changed significantly during and after the Euro crisis. It participated, alongside the Commission and the International Monetary Fund, in the Troika, negotiating financial assistance, the conditions under which it would be granted, and supervised national compliance.[24] Aside from its new role in banking supervision, it also added to its arsenal of powers the use of a non-conventional monetary policy mechanism: quantitative easing. This includes purchasing government bonds indirectly on the secondary market, thereby incentivising private purchases of bonds issued by troubled eurozone countries and providing the latter with a fresh supply of money.[25] While in the nation-state context the central bank usually buys government bonds directly,[26] the ECB had to work around the prohibition of monetary financing of Member States from Article 123 TFEU. The first quantitative easing programme to cause a legal ruffling of feathers[27] is the Outright

[19] Article 18 of the ESCB Statute.
[20] See Chapter 5, Section 5.2.
[21] Article 35.1 and 35.2 of the ESCB Statute.
[22] Case C-316/19 *Commission v Slovenia* EU:C:2020:1030 [83]; Case C-45/21 *Banka Slovenije* EU:C:2022:670 [52].
[23] Article 14.4 of the ESCB Statute.
[24] More generally on this role of the ECB, see T Beukers, 'The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' (2013) 50 *Common Market Law Review* 1579.
[25] Hinarejos (n 14) 731.
[26] D Andolfato and L Li, 'Quantitative Easing in Japan: Past and Present' (2014) 1 *Economic Synopses* 1.
[27] The earlier Securities Market Programme (SMP) was focused on secondary market bond-buying from 2010 to 2012 of bonds from Italy, Spain, Greece, Portugal, and Ireland. However, the SMP provided for a preferential creditor status for the ECB. It was also not linked to conditionality requirements.

Monetary Transactions (OMT) programme – without ever even being implemented. The programme was announced in the form of a press release,[28] outlining that purchases would be done only for Member States undergoing a financial assistance programme and so long as they complied with the conditionality attached. Apart from this constraint, there were no other quantitative limits to purchases, while the bonds to be purchased would be those with a maturity between one and three years.

The quantitative easing programme that actually did get to see the light of day was the PSPP.[29] The PSPP formed part of the ECB's extended asset purchase programme (APP) alongside the asset-backed securities purchase programme (ABSSP), the bond purchase programme (CBPP3) (both introduced in September 2014), and the corporate sector purchase programme (introduced in March 2016).[30] Unlike the OMT, the PSPP contained no restrictions in terms of compliance with the conditionality requirements. Instead, purchases were to be done across the entire eurozone according to the capital key contributions of eurozone Member States. The PSPP did initially contain a limitation on the volume of purchases to €60 billion, but these were continually extended and are today at a level of €2.5 trillion.[31] Another change in comparison to the OMT is that eligible bonds were now those with a maturity of between one and thirty years. The PSPP ran from 9 March 2015 to 19 December 2018 and from 1 November 2019 until 30 June 2022.

Finally, the ECB also instituted the Pandemic Emergency Purchase Programme (PEPP)[32] 'to counter the serious risks to the monetary policy

[28] Technical features of Outright Monetary Transactions, 6 September 2012, <www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html>.

[29] ECB Decision 2015/774 of 4 March 2015 on a secondary markets public sector asset purchase programme (OJ 2015 L121) 20, amended by Decision 2015/2101 of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (OJ 2015 L303) 106, Decision 2015/2464 of 16 December 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (OJ 2015 L344) 1, Decision 2016/702 of 18 April 2016 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (OJ 2016 L121) 24, and Decision (EU) 2017/100 of 11 January 2017 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (OJ 2017 L16) 51. For a more detailed presentation of the programme, see S Grund and F Grle, 'The European Central Bank's Public Sector Purchase Programme (PSPP), the Prohibition of Monetary Financing and Sovereign Debt Restructuring Scenarios' (2016) 41 *European Law Review* 781.

[30] For more information on the programmes of the APP, see <www.ecb.europa.eu/mopo/implement/app/html/index.en.html#pspp>.

[31] ibid.

[32] Decision 2020/440 of the ECB of 24 March 2020 on a temporary pandemic emergency purchase programme (OJ 2020 L91) 1.

transmission mechanism and the outlook for the euro area posed by the coronavirus (COVID-19) outbreak'.[33] Initiated in March 2020 with an envelope of €750 billion, it was ultimately expanded to €1,850 billion. Purchases were discontinued in March 2022. In terms of its characteristics, it resembles the PSPP in that it does not restrict its applicability to Member States receiving financial assistance but includes all eurozone members according to the capital key. This, with the caveat that purchases will be carried out with flexibility that might entail fluctuations over time. Eligibility of the bonds in terms of their maturity is set to from 70 days up to a maximum of 30 years and 364 days.

In addition to this general legal framework and the non-conventional mechanisms used by the ECB, it is useful in this section to introduce the main outlines of the litigation concerning quantitative easing that took place between the Court of Justice and the Bundesverfassungsgericht through the preliminary reference procedure. The two courts have been discussing the appropriate level of control of the ECB as an idiosyncratically independent institution extensively,[34] beginning with the announcement of the OMT. The judgment of the German court in *Weiss* concerning the PSPP is at present the last instance of this back-and-forth. Three main threads run through and shape these interactions: the legality of ECB action, *ultra vires* review, and the role of constitutional identity, culminating in the German rejection of the interpretation provided by the Court of Justice.

In *Gauweiler*, the Bundesverfassungsgericht raised doubts concerning the compatibility of the OMT mechanism with primary EU law. More specifically, for the OMT to be *ultra vires*, it needed to exceed the monetary policy mandate of the ECB and the prohibition of monetary financing, resulting in an encroachment of Member States' economic policy.[35] The Court of Justice's response confirmed the legality of the OMT programme: it first analysed the powers of the ECB and concluded that the indirect effects of monetary policy on economic policy do not make them equivalent, leading to the conclusion that the ECB was acting within its mandate.[36] The Court of

[33] ECB <www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html>.

[34] See also D Grimm, 'A Long Time Coming' (2020) 21 *German Law Journal* 944.

[35] Case 2 BvR 2728/13 *Gauweiler* Order of 14 January 2014 [36], [39], [63] and [80]. It is important to note here that the clear distinction between the two areas of competence is grounded in the Treaty text. However, issues related to the ECB's competence and accountability arose precisely because this formal division does not correspond to economic reality.

[36] Case C-62/14 *Gauweiler* EU:C:2015:400 [52], [56], relying also on its findings in Case C-370/12 *Pringle* EU:C:2012:756.

Justice further provided the conditions necessary for compliance with the Treaties,[37] albeit differently than what the Bundesverfassungsgericht proposed in its order for reference.[38] In respect of the relationship between the two courts, the Court of Justice omitted any analysis of the claims to constitutional identity and *ultra vires* review of the Bundesverfassungsgericht, stating only that the decisions under the preliminary reference procedure on the interpretation and validity of Union acts are binding on national courts.[39] The Bundesverfassungsgericht accepted the findings of the Court of Justice by setting out the relationship between the principle of primacy and the German Basic Law, addressing also the identity and *ultra vires* review it carries out in relation to EU acts. It concluded that any such review must be done cautiously, with restraint, and in a way that is open to European integration.[40]

This background shaped the second preliminary reference that was submitted by the Bundesverfassungsgericht concerning the PSPP.[41] This second reference revolved around three issues: the ECB's obligation to state reasons in devising the PSPP programme, the scope of the monetary policy mandate of the ECB, and the PSPP's compliance with the Treaty prohibition of monetary financing. The principle of proportionality was mentioned by the Bundesverfassungsgericht only in relation to the first two issues.

Regarding the duty to state reasons, the Court of Justice concurred with the Advocate General's broad assessment of which documents are relevant for making this finding,[42] such as the publication of press releases, statements of the President of the ECB, answers to the questions raised by the press, and by the ECB Governing Council's monetary policy meetings.[43] Therefore, the Court found that the ECB complied with its duty to state reasons. In determining next whether the PSPP falls within the sphere of monetary policy, the Court focused on the objectives and instruments of the measure in question.[44] It found that regardless of any possible indirect effects on

[37] For a more detailed analysis of each of these conditions, see T Tridimas and N Xanthoulis, 'A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict' (2016) 23(1) *Maastricht Journal of European and Comparative Law* 17, 23–30.
[38] ibid 30–31.
[39] Case C-62/14 *Gauweiler* (n 36) [16].
[40] Case 2 BvR 2728/13 *Gauweiler* Judgment of 21 June 2016 [121], [154], [156].
[41] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* Order of 18 July 2017.
[42] Opinion of Advocate General Wathelet in Case C-493/17 *Weiss* EU:C:2018:815 [133].
[43] Case C-493/17 *Weiss* EU:C:2018:1000 [37].
[44] ibid [53].

economic policy, the PSPP cannot be treated as an economic policy measure.[45] As to what constitutes an indirect effect, the Court rejected the Bundesverfassungsgericht's interpretation, relying instead on *Gauweiler* and *Pringle*: indirect effects are the foreseeable consequences of measures, which have therefore been knowingly accepted at that time.[46]

Finally, the Court analysed whether the PSPP is in line with the prohibition of monetary financing.[47] The preliminary reference specifically invited the Court to apply the safeguards necessary for preventing a circumvention of that prohibition from *Gauweiler*.[48] The Court recalled the *Gauweiler* principle that the intervention must not have an effect equivalent to the direct purchase of bonds and the programme must contain sufficient safeguards not to reduce the impetus for Member States to pursue a sound budgetary policy.[49] On the first point, the Court acknowledged that there is some foreseeability in the ESCB's intervention given the publication of some of the programme's features.[50] However, numerous safeguards reduce certainty among market operators and keep it in line with Article 123(1) TFEU.[51] The Court then turned its attention to whether the impetus for Member States to conduct a sound budgetary policy is reduced. It recognised that monetary policy will always have an impact on interest rates, with consequences for the refinancing conditions of public debt.[52] However, the programme 'may not create certainty regarding a future purchase of Member State bonds'.[53] In conclusion, the PSPP survived.

After receiving the response from the Court of Justice, the Bundesverfassungsgericht found that the proportionality test as applied by the Court of Justice deprives the said principle of its ability to protect Member State competence.[54] It declared the judgment of the Court of Justice[55] and the PSPP programme[56] *ultra vires*. Having rejected the findings

[45] ibid [61].
[46] ibid [63].
[47] ibid [102].
[48] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Order) (n 41) [79].
[49] Case C-493/17 *Weiss* (n 43) [104]–[107].
[50] ibid [111]–[112].
[51] ibid [113]–[126].
[52] ibid [130], in reference to Case C-62/14 *Gauweiler* (n 36) [110].
[53] ibid [132], in reference to Case C-62/14 *Gauweiler* (n 36) [113]–[114].
[54] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* Judgment of 5 May 2020 [123].
[55] ibid [116], [163].
[56] ibid [117], [178].

of the Court of Justice, the Bundesverfassungsgericht then took it upon itself to interpret the scope of the ECB's monetary policy mandate: the ECB failed to take into account the economic policy effects of the PSPP programme and, importantly, balance a number of competing interests against each other.[57]

In defining the relevant steps of the proportionality test, the Bundesverfassungsgericht stated that the fourth *stricto sensu* step has been omitted by the Court of Justice[58] as there was no review of the sufficiency of information provided by the ECB in balancing the relevant interests.[59] The ECB thus failed in its duty to state reasons concerning the proportionality of the PSPP.[60] In relation to the prohibition of monetary financing, the Bundesverfassungsgericht raised some doubts with regard to the scrutiny applied by the Court of Justice, again related to the duty to state reasons.[61] Ultimately, it decided that the programme is in line with the prohibition of monetary financing and does not breach the constitutional identity of Germany.[62]

In consequence, the Bundesverfassungsgericht gave the Bundesbank a three-month deadline during which it was obliged to work together with the ECB to ensure that the programme meets the principle of proportionality. Otherwise, the Bundesbank will no longer be allowed to participate in the PSPP programme.[63] Since then, the ECB has decided to comply with the request of the Bundesverfassungsgericht,[64] which the President of the Bundesbank deemed to be in compliance with the proportionality analysis to be carried out and published by the ECB.[65] The conclusion of this litigation culminated in an Order of the Bundesverfassungsgericht, confirming its judgment was complied with.[66]

[57] ibid [133], [138]–[145].
[58] Here the Bundesverfassungsgericht infamously stated that the decision of the Court of Justice is 'simply not comprehensible'. ibid [116].
[59] ibid [169], [176].
[60] ibid [177].
[61] ibid [190].
[62] ibid [228]–[229].
[63] ibid [235].
[64] See the letter by ECB President Christine Lagarde to MEP Sven Simon on 29 June 2020, available at <www.ecb.europa.eu/pub/pdf/other/ecb.mepletter200629_Simon~ece6ead766.en.pdf>; Speech by Yves Mersch, Member of the Executive Board of the ECB, 'In the spirit of European cooperation', 2 July 2020, available at <www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702~87ce377373.en.html>.
[65] Frankfurter Allgemeine Zeitung, 'Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an', 3 August 2020, available at <www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ezb-erfuellt-16887907.html?GEPC=s3>.
[66] Cases 2 BvR 1651/15 and 2 BvR 2006/15 Order of 29 April 2021.

4.3 JUDICIAL REVIEW AT THE EU LEVEL

4.3.1 *Access and Remedies*

There is no specific scheme of the judicial review of ECB action provided by the Treaties. The ECB is, according to Article 35.1 of the ESCB Statute, caught by the general scheme of review provided by Article 263 TFEU as well as other ways to trigger a procedure before the Court of Justice, such as the action for damages under Article 340 TFEU. The same headings of review apply. There was thus no attempt by Treaty drafters to create a specific form of review or exclude ECB action from judicial oversight altogether. In the ten cases where the Court of Justice dealt with the interpretation of monetary policy,[67] six were initiated through a preliminary reference and four via direct action. This tells us little about the patterns of litigation that are more pronounced in financial assistance (in favour of preliminary references) and in the Single Supervisory Mechanism (in favour of direct actions).

In that respect, there is hardly anything special about monetary policy when it comes to admissibility – save for the fact that the Court of Justice reviewed a Press Release of the ECB in announcing the OMT mechanism.[68] A press release merely set out the main features of the programme but did not constitute a binding measure adopted by the ECB. In that respect, some of the participants in the preliminary reference claimed the case is hypothetical and thus inadmissible.[69] Another line of attack was that the press release is a preparatory act that cannot be subject to questions of validity, as it does not produce legal effects.[70] The Court of Justice dismissed these arguments, claiming instead that since an action against a possible future act is possible under German law, the questions submitted through the preliminary reference procedure are necessary for the Bundesverfassungsgericht to resolve the case before it.[71]

As we will see below in respect of access and remedies at the national level,[72] the action before the Bundesverfassungsgericht was brought in the

[67] Cases concerning the European budgets, fiscal surveillance, or where monetary policy was mentioned in passing, were excluded.

[68] The admissibility of the preliminary reference was challenged in one way or another by the governments of Finland, France, Greece, Italy, the Netherlands, Portugal, and Spain, the European Parliament, the European Commission, and the ECB. Case C-62/14 *Gauweiler* (n 36) [18]–[31].

[69] ibid [20]–[21].

[70] ibid [23].

[71] ibid [27].

[72] Section 4.4.1.

context of an abstract review. This means that the national court is not in fact solving a dispute between the parties but conducting an abstract review – does that make the question of the national court hypothetical and thus inadmissible?[73] The Court of Justice dealt with preliminary references resulting from an abstract review at the national level, which although in their nature are hypothetical, nevertheless represent a genuine procedure at the national level. Here, then, the rules of national procedural law determine the relevance of the preliminary reference, and the Court of Justice will accept it as admissible.[74]

The Bundesverfassungsgericht did ask one question in *Weiss* that the Court of Justice found hypothetical and thus inadmissible. Taking into account the scenario of a default by a Member State, and the resulting possibility that other national central banks become jointly responsible for the resulting liabilities, the German court asked about the compatibility of such a risk-sharing scenario with the prohibition of monetary financing and the no-bailout clause. The Court of Justice found that there is no possibility envisaged in the PSPP for such risk-sharing to take place, and thus concluded its answer would be either advisory or purely hypothetical.[75] For its part, the Bundesverfassungsgericht understood this reply as meaning that the Treaties outright prohibit risk-sharing ever to be envisaged, and concluded, as we will see below, that this would also be precluded by Germany's constitutional identity.[76]

The question of remedies took an interesting turn, one from which it is possible to imagine further creativity by the Court of Justice. In *Rimšēvičs*,[77] the Court of Justice invalidated a national measure in the application of the ESCB Statute.[78] It should first be said that nobody, in fact, requested the Court to do so.[79] The Court anchored its decision in the independence of the ECB. The relevant provision of the ESCB Statute provides for a referral to the

[73] See, for example, Case C-399/11 *Melloni* EU:C:2013:107 [29]; Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* EU:C:2011:550 [30]; Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* EU:C:2010:363 [27].

[74] Case C-415/93 *Bosman* EU:C:1995:463 [65]; Case C-62/14 *Gauweiler* (n 36) [28]. After *Gauweiler*, the Court continued with this approach in, for example, Case C-621/18 *Whigtman* EU:C:2018:999 [31].

[75] Case C-493/17 *Weiss* (n 43) [162]–[167].

[76] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [224]–[228].

[77] Joined Cases C-202/18 and C-238/18 *Rimšēvičs* EU:C:2019:139.

[78] For a comment on the novelties of the case, see A Hinarejos, 'The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: *Rimšēvičs*' (2019) 56 *Common Market Law Review* 1649.

[79] Opinion of Advocate General Kokott in Joined Cases C-202/18 and C-238/18 *Rimšēvičs* EU:C:2018:1030 [40].

Court of Justice but nowhere explicitly allows annulling a national measure. Advocate General Kokott argued strongly against the Court of Justice directly annulling a national measure, explaining that this would amount to a transgression into the national sphere of competence. This, she argued, may only be granted by an express treaty provision.[80]

It is important to note that different language versions of Article 14.2 of the ESCB Statute open up space for some procedural ambiguity on its relationship to the annulment procedure from Article 263 TFEU and whether it may be extended to national measures. My analysis compared Article 14.2 ESCB Statute in English, French, Italian, Croatian, Slovenian, Bulgarian, Czech, Polish, and Slovakian. The variety of procedural solutions include: a referral (EN), an appeal (FR, PL, CZ), or simply an initiation or a proposal of a procedure (IT, HR, SL, BG, SK) before the Court of Justice. Yet, it is through the interpretation of the purpose of this provision that the Court found the legal justification for its action.[81] That is quite a powerful weapon that the Court of Justice now has in ensuring the independence of the ECB and national central banks.[82] Still, interpretative acrobatics need not be employed only for that purpose. It was discussed above that the relationship between the ECB's primary objective of maintaining price stability appears to take precedence over any and all other Treaty aims. The Court of Justice's mandate, under the framework of legal accountability presented in Chapter 1, should instead be used to promote aims beyond price stability,[83] even against the ECB when its decisions impact different interests across the eurozone.

4.3.2 *Solidarity and Equality*

Neither solidarity nor equality feature explicitly at any point in the analysis of the Court of Justice in the review of monetary policy activities of the ECB. Neither is it possible to discern the Court's approach to the common interest through the achievement of the objectives in Article 3 TEU and Articles 8 and 9 TFEU. This means that when the Court of Justice interprets the powers of the ECB and their possible limits, the aims associated with the common interest of the EMU do not seem to play a role. Taking this into account, the interpretation of the common interest in monetary policy will thus be

[80] ibid [60].
[81] Joined Cases C-202/18 and C-238/18 *Rimšēvičs* (n 77) [45]–[48].
[82] Opinion of Advocate General Kokott in Joined Cases C-202/18 and C-238/18 *Rimšēvičs* (n 79) [59].
[83] Such as those from Article 3 TEU.

approached through the lens of the balancing of interests through the proportionality test. In other words, looking at how the ECB balances different interests when making its decisions will be taken as the indirect route through which it is possible to establish how that institution makes value choices that hinge upon the achievement of the common interest. It is also the route through which it is possible to establish the relationship between the ECB's primary objective of price stability and the general objectives pertaining to the common interest in the EMU (found in Article 3 TEU and Articles 8 and 9 TFEU).

The proportionality analysis is particularly important as it was one of the main points of contention between the Court of Justice and the Bundesverfassungsgericht in the review of the PSPP. In what follows, I will thus focus on what is proportionality for and how to use it in respect of the ECB when it balances different interests that influence the achievement of the common interest. One of the central criticisms directed at the decision of the Bundesverfassungsgericht in *Weiss* revolves around whether proportionality is the correct answer when the question is how competences are divided between the EU and the Member States.[84] On this view, the Bundesverfassungsgericht was wrong to use the principle of proportionality in delineating competences between the EU and the national level, which should instead be applied to the way in which existing competences are exercised. This criticism is grounded in the wording of the Treaty: Article 5(1) TEU clearly separates the existence of competence (which is guided by the principle of conferral) from its exercise (to which the principle of proportionality applies).

It is easy to say that the principle of conferral can be straightforwardly applied to whether something is, for example, an action in the area of competition law under Article 3(1)(b) TFEU, further specified in Articles 101 and 102 TFEU. The European Commission, tasked with implementing competition law, does not have the mandate to define that it is the agreements between undertakings that are prohibited by competition law, nor can it include or exclude the abuse of a dominant position from the scope of competition law. How it applies these concepts in the *exercise* of its competence is then subject to the principle of proportionality. However, this separation is not as straightforward when it comes to the monetary policy mandate

[84] F C Mayer, 'To Boldly Go Where No Court Has Gone Before: The German Federal Constitutional Court's *ultra vires* decision of May 5, 2020' (2020) 21 *German Law Journal* 1116, 1119; Editorial Comments, 'Not Mastering the Treaties: The German Federal Constitutional Court's PSPP Judgment' (2020) 57 *Common Market Law Review* 965, 969.

of the ECB and its separation from economic policy. In turn, this has important consequences for the accountability of the ECB.

Let us then take a closer look at how the Court of Justice separates the analysis of existence from the exercise of monetary policy for the purposes of applying the principle of proportionality. In both *Gauweiler* and *Weiss*, 'delimitation of monetary policy' and 'proportionality' are separate headings, keeping in line with the division of Article 5(1) TEU.[85] Upon closer inspection, nevertheless, the proportionality analysis runs through both headings. In other words, due to how Article 119(2) TFEU sets out the monetary policy competence, the very *existence* of monetary policy is impossible to separate from and already forms part of its *exercise*: in order to find out whether the ECB acted *within* its mandate, we need to find out *how* it defined its mandate.[86]

In the proportionality section in *Gauweiler*, the Court of Justice defined it as requiring that acts of EU institutions be appropriate for attaining the objectives pursued and not go beyond what is necessary for achieving those objectives.[87] Back to the section on delimiting monetary policy, the Court of Justice analysed whether the OMT mechanism *contributes to* achieving the objective of singleness of monetary policy and maintaining price stability.[88] Furthermore, the Court went on to assess whether the *means* to achieve the objectives of the OMT are in line with the objectives of monetary policy,[89] methods that we would intuitively expect in the review of how a certain institution exercised its competence. The language of whether a measure contributes to an objective and is the means chosen to achieve it is used regularly in the proportionality analysis of the Court.[90] Precisely because a measure may have both monetary policy and economic policy effects[91] and these are difficult to separate,[92] the Court is inevitably engaging in an

[85] The literature does not seem to dispute this formalist division in the analysis. See, for example, M Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 *German Law Journal* 979, 985.

[86] See also N de Boer and J van 't Klooster, 'The ECB, the Courts and the Issue of Democratic Legitimacy after *Weiss*' (2020) 57(6) *Common Market Law Review* 1689. They argue that the crisis has changed the operation of the ECB in such a way that judicial review has shifted from assessing the limits of its mandate, to reviewing measures with significant choices even within its mandate that might still lack democratic legitimacy.

[87] Case C-62/14 *Gauweiler* (n 36) [67].

[88] ibid [48], [49].

[89] ibid [53].

[90] See, for example, Case C-817/19 *Ligue des droits humains* EU:C:2022:491 [121]–[124].

[91] Case C-62/14 *Gauweiler* (n 36) [51], [52].

[92] ibid [110]. See also Case C-493/17 *Weiss* (n 43) [60], [64].

assessment of whether the decision-maker (the ECB) by enacting its measures (the OMT, the PSPP) went *beyond what is necessary* to define and exercise its mandate (monetary policy).[93] The inability of separating existence from exercise is even more apparent in *Weiss*:

> It does not appear that the specification of the objective of maintaining price stability as the maintenance of inflation rates at levels below, but close to, 2% over the medium term, which the ESCB chose to adopt in 2003, is *vitiated by a manifest error of assessment and goes beyond* the framework established by the FEU Treaty.[94] (emphasis added)

A manifest error of assessment is a well-established standard for assessing the proportionality of exercise of competence of EU institutions.[95] Going beyond what is necessary is the explicitly stated third step of the proportionality test.[96] This approach is, in fact, not different from the way in which the Bundesverfassungsgericht phrased its standard of review in its order for reference: 'a manifest and structurally significant exceeding of competences'.[97] The argument here is not that the two tests are identical, but that both carry a logic of proportionality in assessing the ECB's compliance with its monetary policy mandate. From the perspective of ensuring ECB accountability in a set-up where it is empowered to define its own mandate, it thus seems inherently impossible to separate the existence and exercise stages of competence control. The ESCB, when defining the inflation target (which arguably should act as the outer limit of monetary policy), is in fact already also *exercising* it. Otherwise, would it at all be possible that the Court of Justice says such a determination is in compliance with the TFEU unless a manifest error of assessment is made?[98]

A positive consequence of applying the principle of proportionality to determine the limits of monetary policy is an increased standard of judicial review, an aim that has arguably been the root cause of both German preliminary references. Once applied to the PSPP programme, proportionality does have the potential of increasing the accountability of the ECB through a more stringent obligation of giving account, even in the stage of defining the

[93] On balancing as central to the structural approach of the Court of Justice in applying the principle of proportionality when reviewing EU measures, see T-I Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) *European Law Journal* 158, 177–180; P Craig, *EU Administrative Law* (Oxford University Press 2012) 656.

[94] Case C-493/17 *Weiss* (n 43) [56].

[95] Harbo (n 93) 177.

[96] Craig (n 93) 656–657.

[97] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Order) (n 41) [64].

[98] Case C-493/17 *Weiss* (n 43) [56].

inflation target. For whom is a target of 2 per cent good and what consequences will it have on aims such as income equality, full employment, or social progress? As shown in Chapter 2,[99] the ECB should carry the burden of showing the different interests that are possibly affected by its decision, the redistributive consequences of the approaches it was able to take, and why it chose a particular solution among those available.

In contrast to this high standard, the Court of Justice has been subject to ample critique due to its light touch proportionality review in both *Gauweiler*[100] and *Weiss*,[101] reducing its review to the duty to state reasons and accepting any and all reasons provided by the ESCB as sufficient. The proportionality analysis in *Gauweiler* did not properly engage in the assessment of less burdensome alternatives and was reduced to the Court of Justice analysing and ultimately accepting solely the information provided by the ESCB, thus concluding:

> [. . .] the ESCB weighed up the various interests in play so as to actually prevent disadvantages from arising, when the programme in question is implemented, which are manifestly disproportionate to the programme's objectives.[102]

In light of the standard of review proposed in Chapter 2, the approach of the Court of Justice, whereby it accepts whatever the ECB says without any challenge from other parties and other possible expert views, is light years away from what might be termed proper scrutiny of a decision with wide-ranging consequences for the entire euro area. In *Weiss*, the Court of Justice was equally one-sided in the choice of information that it found relevant for assessing the proportionality of the PSPP, again accepting the information provided by the ESCB as the only relevant one.[103] In essence, the Court of Justice did not allow for a thorough peer-review of the duty to state reasons on the part of the ESCB.[104] This criticism has been picked up directly by the Bundesverfassungsgericht,[105] demanding that less burdensome alternatives

[99] Section 2.3.3.

[100] Tridimas and Xanthoulis (n 37) 31; A Steinbach, 'All's Well That Ends Well? Crisis Policy after the German Constitutional Court's Ruling in *Gauweiler*' (2017) 24(1) *Maastricht Journal of European and Comparative Law* 140, 145.

[101] M Dawson and A Bobić, 'Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: *Weiss and Others*' (2019) 56(4) *Common Market Law Review* 1005, 1022–1028.

[102] Case C-62/14 *Gauweiler* (n 36) [91].

[103] Case C-493/17 *Weiss* (n 92) [81].

[104] Dawson and Bobić (n 101) 1023.

[105] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [184], [190].

be considered and a wide array of interests included in such considerations. The lesson learned from *Gauweiler* and *Weiss* may well be that the organisation of Article 5 TEU does not operate as well in the context of self-defined mandates, which would result in judicial review remaining confined to accepting any and all reasons provided by the institution in question.[106] Instead, the great power of the ECB to say what monetary policy is should be followed by great responsibility.

A possible consequence of this litigation is that other national courts follow the German example and begin imposing their own standards and demands for justification on the part of the ECB, leading to a proliferation of diverging national standards and resulting in the creation of an unrealistic burden for the ECB. However, I do not find it controversial that national courts demand more of the ECB when it comes to predicting, assessing, and selecting the specific redistributive effects of large-scale purchase programmes such as the PSPP. In some ways, it would create a race to the top: the ECB, by needing to comply with different levels of justification across Member States, will naturally provide information required by the highest standard for justification, thus automatically meeting the demands of lower standards. Does this harm the ECB's independence? I think not: the ECB has full independence in the implementation of its policies; it simply has a high burden of explaining them. In fact, the ECB, despite Article 130 TFEU explicitly prohibiting it from taking instructions from Member States, complied with the request of the Bundesverfassungsgericht[107] better to explain the proportionality of the PSPP. The ECB has, 'in line with the principle of sincere cooperation [...] decided to accommodate this request'.[108]

4.4 JUDICIAL REVIEW AT THE NATIONAL LEVEL

4.4.1 *Access and Remedies*

Standing before national courts is a matter of national law. If it results in a preliminary reference, it is of no importance whether the case concerns questions of interpretation or validity of Union law.[109] An exception to this rule is a possible abuse of the national procedure, in the event that the

[106] Arguably this seems to be the case in Case C-62/14 *Gauweiler* (n 36) [60] and Case C-493/17 *Weiss* (n 43) [56].
[107] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [235].
[108] See n 64.
[109] Case C-911/19 *Fédération bancaire française* EU:C:2021:599 [61]–[62].

applicant failed to submit an action for annulment at the EU level within the prescribed time period.[110] The litigation on quantitative easing offers a vivid demonstration of how powerful national procedural autonomy may be in allowing a wide range of individuals to challenge EU measures, something that would be virtually impossible to do at the EU level due to high standing requirements. Questions of EU integration have since the *Maastricht* judgment of the Bundesverfassungsgericht been opened to a constitutional complaint by individuals, whenever there is a danger that German constitutional identity might be jeopardised by excessive integration.[111]

When Mario Draghi announced the OMT programme, indeed German citizens did not shy away from challenging it before the Bundesverfassungsgericht: a whopping 11,693 of them challenged the Press Release.[112] While not all challenges were found admissible by the German court, the following was:

> From the submissions of the complainants in proceedings I., II., and III. it appears possible that the European Central Bank exceeded its competences in a sufficiently qualified manner by adopting the policy decision of 6 September 2012 regarding the OMT Programme and its possible implementation, thus giving rise to duties to react on the part of the Federal Government, which can be invoked in court by the complainants.[113]

In respect of the PSPP, it was challenged by 1,734 German citizens, and the Bundesverfassungsgericht was as generous:

> The challenge directed against the omission on the part of the Federal Government and the Bundestag is admissible in constitutional complaint proceedings. The complainants in proceedings I to III have standing to the extent that they assert, in a sufficiently substantiated manner, that with the PSPP the Eurosystem manifestly exceeded its competences in a structurally significant manner and violated Art. 123(1) TFEU; they also have standing as regards the assertion that possible changes to the risk-sharing regime could infringe the overall budgetary responsibility (haushaltspolitische Gesamtverantwortung) of the German Bundestag. Moreover, the

[110] Case C-188/92 *TWD Textilwerke Deggendorf GmbH* EU:C:1994:90 [18].
[111] P Huber, 'The Federal Constitutional Court and European Integration' (2015) 21(1) *European Public Law* 83, 97–98.
[112] K F Gärditz, 'Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court' (2014) 15(2) *German Law Journal* 183, 185 note 9.
[113] Case 2 BvR 2728/13 *Gauweiler* (Judgment) (n 40) [79].

> complainants in proceedings I and III continue to have a recognised legal interest in bringing proceedings (Rechtsschutzinteresse).[114]

Maintaining broad standards of admissibility may be seen as a destabilising element, bringing about uncertainty concerning the interpretation and validity of EU acts. In another way, it can also be seen as a source of imbalance given the differing standing requirements across Member States. But so what? If it is enough that the preliminary reference procedure is not used to circumvent the two-month deadline for an action for annulment under Article 263 TFEU, why should Member States not otherwise provide for a higher standard of effective judicial protection? So long as EU acts are subject to the preliminary reference procedure, the Court of Justice remains involved, all in the operation of the complete system of legal remedies set by the Treaties.[115]

Next, to remedies. The Bundesverfassungsgericht generally focuses on the constitutional organs and their obligations under the integration obligation from the Basic Law.[116] This includes actions as well as omissions of the constitutional organs.[117] In other words, because constitutional organs under the Basic Law have a responsibility towards European integration (*Integrationsverantwortung*), individuals must be able to exercise their influence through their right to vote. In the event that constitutional organs detract from electoral legitimation and exceed their integration mandate, individuals have legal claims against them. In *Gauweiler*, the Bundesverfassungsgericht accepted the interpretation of the Court of Justice – there were thus no remedies to be ordered.

In *Weiss*, however, a peculiar novelty took place in respect of remedies. First, the Bundesverfassungsgericht repeated its jurisprudence on the constitutional review in relation to acts of EU law.[118] The Bundesverfassungsgericht therefore declared the complaints admissible only insofar as they are directed against the omission of the constitutional organs to take action.[119] Given that the PSPP was in the eyes of the German court an act outside the competences

[114] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [86].
[115] Case 294/83 *Les Verts* EU:C:1986:166 [23].
[116] See, for example, Case 2 BvR 2/08 *Lisbon Treaty* Judgment of 30 June 2009 [240]. See also Case 2 BvR 2728/13 *Gauweiler* (Judgment) (n 40) [143]; Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [110].
[117] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [86].
[118] ibid [89].
[119] ibid [85].

of the ECB, this required a remedy under the Basic Law. Yet, the ECB is outside the authority of the Bundesverfassungsgericht, as it should also be independent from any instruction coming from another EU institution or Member State, under Article 130 TFEU. An indirect route was therefore necessary:

> As the PSPP constitutes an ultra vires act, given the ECB's failure to substantiate that the programme is proportionate, their responsibility with regard to European integration (Integrationsverantwortung) requires the Federal Government and the Bundestag to take steps seeking to ensure that the ECB conducts a proportionality assessment in relation to the PSPP. This duty does not conflict with the independence afforded both the ECB and the Bundesbank (Art. 130, Art. 282 TFEU, Art. 88(2) GG), as was already decided by the Second Senate. The Federal Government and the Bundestag must clearly communicate their legal view to the ECB or take other steps to ensure that conformity with the Treaties is restored.
>
> This applies accordingly with regard to the reinvestments under the PSPP that began on 1 January 2019 and the restart of the programme as of 1 November 2019 (cf. Decision of the ECB Governing Council of 12 September 2019). In this respect, the competent constitutional organs also have a duty to continue monitoring the decisions of the Eurosystem on the purchases of government bonds under the PSPP and use the means at their disposal to ensure that the ESCB stays within its mandate.[120]

The Bundesverfassungsgericht is treating ECB independence in the same cavalier manner we witnessed when the Court of Justice dealt with the ECB's duty to state reasons. We are simply to take them for their word: here, Article 130 TFEU would not be breached simply because the Bundesverfassungsgericht said so. Should the German constitutional organs fail in their obligation to put the ECB in its place when it comes to proportionality of the PSPP within three months, the Bundesbank would be prohibited from participating in the PSPP. The German court was thus willing to kill two EU law obligations with one stone: the independence of the ECB and the participation of the Bundesbank in the ESCB. As we now know, this did not materialise, given that the ECB exceptionally decided to comply with the request of the Bundesverfassungsgericht. Whether that action of the ECB was a breach of Article 130 TFEU is a question we will never know the answer to. This is all the more the case taking into account that the Governing Council of the ECB is supposed to ensure that national law

[120] ibid [232]–[233].

requirements imposed on the central banks do not go against their functions under the ESCB. A score of unanswered questions persist. Given, however, the already significant status of central bank independence under EU law, perhaps it is better they remain unanswered.

4.4.2 *Solidarity and Equality*

As was the case with the Court of Justice, the Bundesverfassungsgericht also omitted any reference to the principles of solidarity or equality. This means we are to discern the approach to the common interest indirectly: from its approach to what the ECB is required to do when balancing different interests and from its findings on risk-sharing. These two assessments took place in the context of *ultra vires* review, and a brief introduction into its operation is thus due. To declare a measure outside of EU competence, the existing jurisprudence of the German court sets a significant number of hurdles, formulated in the *Honeywell* decision.[121] The logic of these conditions is to maintain competence control a task shared and coordinated with the Court of Justice. In so doing, first, no other court in Germany except the Bundesverfassungsgericht can perform *ultra vires* review; second, a preliminary reference must be submitted to the Court of Justice prior to making a final decision; and third, the Court of Justice enjoys a tolerance of error in its judgment. Only after these requirements are met, the Bundesverfassungsgericht applies the substantive criteria for competence control by testing whether an EU act represents a 'manifest transgression' in an area that is 'highly significant' in the division of competences between the EU and its Member States.[122] In so doing, the Bundesverfassungsgericht explicitly acknowledges the 'precedence of application' of EU law.[123]

As already pointed to in the discussion on proportionality at the EU level,[124] controlling a possible transgression of the principle of conferral boils down to, in essence, a necessity analysis. In other words, the question is whether the constitutional organs *went beyond* what was allowed under the principle of conferral.[125] In so doing, they therefore exceed the democratic legitimation

[121] Case 2 BvR 2661/06 *Honeywell* Order of 6 July 2010.
[122] ibid [56], [60]–[61].
[123] Case 2 BvR 2728/13 *Gauweiler* (Judgment) (n 40) [146].
[124] Section 4.3.2.
[125] This is, according to the Bundesverfassungsgericht, what distinguishes *ultra vires* from identity review: the latter does not ask about the degree of a certain transgression, but rather whether an area that is excluded from European integration altogether was in fact regulated at the EU level. Case 2 BvR 2728/13 *Gauweiler* (Judgment) (n 40) [153].

granted to them by the citizens. If we compare the weight given to citizens' interests by the German court and the framework of political equality in achieving the common interest, the former focuses on the imperative that citizens are 'not subjected to a political power that they cannot escape and that they cannot in principle freely and equally choose in respect of persons and subject-matter'.[126] Still, this obligation appears limited to its procedural aspect: that democratic legitimation be given through elections. There is no monitoring of the content of what might be termed as the common interest, what is relevant is participation in democratic processes.[127]

In reviewing whether the ECB complied with its mandate and the aims it is supposed to achieve under the Treaties, the Bundesverfassungsgericht criticised the Court of Justice not only for accepting at face value the ECB's claims concerning the OMT's aims,[128] but also for assessing them individually, instead of conducting an 'overall evaluation'.[129] Yet, it assumed that the Court of Justice will hold the ECB to strict scrutiny in terms of the requirements of limits to monetary policy. It is central that Member States do not acquire the certainty that their bonds would be purchased, that they continue to comply with macroeconomic adjustment programmes and conditionality, and that the bond buying programme remains temporary.[130] In this way, the potential of a default and the ultimate risk-sharing between Member States would be negligible, but in any event, constitutional organs in Germany are required to approve individually any measure that involves a liability for the budget.[131] These conditions became central for the *ultra vires* finding the Bundesverfassungsgericht later made concerning the PSPP.

In conducting the *ultra vires* review in respect of the PSPP, the Bundesverfassungsgericht focused on two main issues: first, whether by adopting it, the ECB had overstepped its mandate by breaching the principle of proportionality and, consequently, whether it had infringed on the principle of conferral.[132] Here, the balancing of interests will become relevant, and we will see that the common interest for the Bundesverfassungsgericht regrettably remains one limited to Germany. The second relevant issue is the analysis of possible risk-sharing between the central banks of the eurozone, creating the

[126] ibid [166].
[127] ibid [126].
[128] ibid [183]–[184].
[129] ibid [190].
[130] ibid [196], [199], [202], [204].
[131] ibid [213]–[214], [219].
[132] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [117]–[178].

possibility of a transfer union and the liability of Member States for each other's debts.[133] Here, no red lines have been crossed by the ECB, but a warning remains in the form of constitutional identity: no risk-sharing is possible under the Treaties as they stand.

On the first point, for determining whether the ECB had overstepped its mandate in a qualified manner, the Bundesverfassungsgericht explicitly did not rely on the findings of the Court of Justice in *Weiss*. According to the German court, the judgment itself represents an *ultra vires* act and does not, as a consequence, bind it in its review.[134] The German court instead argued that the proportionality review as exercised by the Court of Justice neutralises the principle of proportionality's function to protect Member State competence.[135]

Specifically, the Bundesverfassungsgericht highlighted that the Court of Justice had limited its review to the statement that the ECB had not committed a manifest error of assessment due its economic expertise when designing the PSPP.[136] The main point of criticism concerns the failure of the Court of Justice to consider the economic policy effects of the PSPP.[137] The justification for this brings us closer to the common interest: if we analyse the economic policy effects of the PSPP, it would become possible to determine the competing interests that the ECB was supposed to balance against each other. Or to put it differently, had the ECB conducted merely monetary policy, such highly politicised questions would not even be put before the ECB. The failure to take economic policy effects into account and the relaxed approach to separating the economic and monetary policy by the Court of Justice led the Bundesverfassungsgericht to the conclusion that there was no meaningful competence review of the ECB's action at the EU level.[138] The imperative that this be done is in the eyes of the German court at the heart of proportionality review.[139] Instead, the approach of the Court of Justice allowed the ECB to choose any means it deemed adequate to reach its monetary policy goal, without having to balance the beneficial effects and collateral damage of the measure in question.[140] In the Bundesverfassungsgericht's view, this conflicts with the ECB's limited

[133] ibid [222].
[134] ibid [116].
[135] ibid [123].
[136] ibid [129]–[131].
[137] ibid [138]–[145].
[138] ibid [140]–[142].
[139] ibid [133].
[140] ibid [140].

democratic legitimation, which would require its mandate to be narrowly defined.[141]

Furthermore, the Bundesverfassungsgericht took issue with the lack of *stricto sensu* balancing in the analysis of the Court of Justice, thus warranting the application of its own proportionality test. Yet, it had not applied the *stricto sensu* stage itself either, instead stating that 'it would have been incumbent for the ECB' to do so.[142] Taking into account the emphasis of the German court on the ECB's limited mandate and insufficient democratic legitimation,[143] it appears counter-intuitive that the ECB should do so.[144] The Bundesverfassungsgericht devoted considerable attention to analysing the difference in the proportionality test developed by the Court of Justice and itself respectively, opting unsurprisingly to favour its own standard. The German court has in consequence been accused of parochialism,[145] and 'framing a European legal question largely in terms of German constitutional law'.[146] The German court engaged in an analysis of how the test is applied in other Member States,[147] then explained to the Court of Justice its own proportionality test,[148] and concluded it is deficient for the delimitation of competences between the EU and the national level.[149] A similar approach was subject to critique on the occasion of the Bundesverfassungsgericht's order in *Mr R*[150] when refusing to execute a European Arrest Warrant without submitting a preliminary reference to the Court of Justice.[151]

[141] ibid [144].
[142] ibid [176].
[143] ibid [136].
[144] Davies rightly points out that this would result in the ECB concluding that, despite its mandate to achieve price stability, it would sometimes need to abandon that aim as ultimately too costly in relation to its benefits. G Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price' 20 May 2020, European Law Blog. Available at <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price/>.
[145] T Marzal, 'Is the BVerfG PSPP Decision "Simply Not Comprehensible"?' 9 May 2020, Verfassungsblog. Available at <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/>.
[146] Wendel (n 85) 993.
[147] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [125].
[148] ibid [126].
[149] ibid [127], [133], [138].
[150] Case 2 BvR 2735/14 *Mr R*. Order of 15 December 2015.
[151] J Nowag, 'EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? Bundesverfassungsgericht: *Mr R* 2 BvR 2735/14, *Mr R v Order of the Oberlandesgericht Düsseldorf* Order of the Bundesverfassungsgericht (Second Senate) of 15 December 2015, DE:BVerfG:2015:rs20151215.2bvr273514' (2016) 53(5) *Common Market Law Review* 1441.

There is a further parochialism issue in the German decision, one far more detrimental to the common interest and the political equality of EU citizens. The Bundesverfassungsgericht saw it fit to perform its own proportionality review of the PSPP. For the Bundesverfassungsgericht, the decisions of the ECB lack the information it would need to fulfil this task, as they do not give evidence of whether the ECB has considered and balanced the effects of the PSPP.[152] According to the German court, the oral proceedings have shown, however, that there are several negative effects to the PSPP, which should have been taken into consideration by the ECB. For instance, it has been shown that there is a risk that Member States will be discouraged to implement consolidation measures,[153] and there is a risk of losses for private savings.[154] Furthermore, the fact that the volume of the programme increases overtime renders the balancing of these effects all the more necessary.[155] However, the Bundesverfassungsgericht focused only on the interests of German citizens. It entirely disregarded the possibility of contagion in the eurozone, or the eventuality that the consequences of one Member State defaulting may be felt across different Member States. It finally also completely neglected that the interests of, for example, savers or pensioners, need not be perfectly aligned *within* a single Member State. Endorsing the *Weiss* judgment approach would mean completely to deprive EU citizens of connection beyond their own Member State. In sum, the Bundesverfassungsgericht therefore concluded that the failure of the ECB to state reasons on the balancing of interests is in breach of the principle of proportionality. As a result, the PSPP decisions were not covered by the ECB's mandate and were *ultra vires*.[156]

Finally, the Bundesverfassungsgericht turned to whether the PSPP decisions infringe on the prohibition of monetary financing laid down in Article 123 TFEU. The Bundesverfassungsgericht accepted the safeguards established in *Gauweiler* to guarantee compliance with Article 123 TFEU.[157] Nevertheless, the German court criticised the way these safeguards were examined in *Weiss*, as the Court of Justice has neither scrutinised them closely nor explored whether there were circumstances capable of disproving their actual effectiveness. The Bundesverfassungsgericht, therefore, argued that this

[152] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [169], [176].
[153] ibid [170].
[154] ibid [169]–[175].
[155] ibid [169].
[156] ibid [177].
[157] ibid [183].

approach prevented meaningful judicial review.[158] These worries led to the final announcement of a red line for what the Basic Law would allow in terms of economic integration:[159] if the scheme of allocation of risks would redistribute sovereign debts among Member States.[160] After stating that such a redistribution would represent an assumption of liability illegal under the Basic Law,[161] the German court found that the ECB's decisions cannot violate Germany's constitutional identity. As it is prohibited by primary law, such a redistribution cannot, in fact, currently take place.[162] This once again cements the position of the Bundesverfassungsgericht as an exclusively Germany-oriented court without the ability to see and understand the interconnections inherent in the EMU.

4.5 ON JUDICIAL INTERACTIONS

> If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of *ultra vires* review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences.[163]

Voilà, the well-known conundrum of the European Union's constitutional set-up digested in one paragraph: who has the final say on the limits of EU competence? Because the principle of conferral is a shared concept of EU and national constitutional law,[164] its application is likewise shared between EU and national courts, inevitably creating conditions for the possibility of a constitutional conflict. In the EMU, it is in monetary policy that competence control materialised itself in judicial interactions most prominently,[165] thus

[158] ibid [184].
[159] The Bundesverfassungsgericht examined that issue in the context of its fifth preliminary question to the Court of Justice, which the latter found hypothetical and thus inadmissible. See Case C-493/17 *Weiss* (n 43) [166].
[160] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [222].
[161] ibid [227].
[162] ibid [228].
[163] ibid [111].
[164] Case 2 BVerfG 2/08 *Lisbon Treaty* (n 116) [234]; Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [158].
[165] In addition to this, the Bundesverfassungsgericht also reviewed the SSM, however, without submitting a preliminary reference to the Court of Justice. See Chapter 5, Section 5.4.

resulting in specific consequences for the legal accountability of the ECB. *Ultra vires* review was first introduced in the *Maastricht* judgment of the Bundesverfassungsgericht, widely considered the foremother of constitutional pluralism.[166] That court maintained the thesis that Member States are the 'Masters of the Treaties',[167] that are 'continuously breathing life into the Treaty'.[168] This meant that primacy of EU law only extends to acts within *vires*,[169] and it was the Bundesverfassungsgericht which retained the right to control the division between *intra* and *ultra vires*.

Weiss, where competence control resulted in the rejection of the Court of Justice's decision, is the second preliminary reference submitted by the Bundesverfassungsgericht. Constitutional courts across the EU are in general rarely submitting preliminary references, opting rather for indirect procedural routes to send their message across,[170] with the notable exception of the Belgian Constitutional Court.[171] One reason is that the very structure of the preliminary reference procedure leaves the constitutional court with only the most extreme option of disregarding the decision of the Court of Justice should it find it contrary to the national constitution. Understandably, the Court of Justice has consistently underlined the importance of judicial cooperation put into effect through the preliminary reference procedure.[172] Judicial interactions in the EU bring about important benefits and have through the history of European integration pushed the Court of Justice to increase its standards when reviewing EU action.[173] From a *de lege ferenda* perspective, visible from judicial interactions in monetary policy, national courts can provide the impetus for a substantive review of ECB action to be

[166] N MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) 1(3) *European Law Journal* 259.

[167] Cases 2 BvR 2134/92 and 2159/92 *Maastricht Treaty* Judgment of 12 October 1993 [II.a)].

[168] ibid [II.d).2.1].

[169] J Kokott, 'Report on Germany' in A-M Slaughter, A Stone Sweet and J H H Weiler (eds), *The European Court and National Courts, Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart 1998) 81.

[170] For an analysis, see A Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions between the European Court of Justice and Constitutional Courts of Member States' (2017) 18(6) *German Law Journal* 1395; G Martinico, 'Judging in the Multilevel Legal Order: Exploring the Techniques of "Hidden Dialogue"' (2010) 21 *King's College Law Journal* 257.

[171] Leading with forty-five preliminary references submitted. Court of Justice, 2021 Annual Report on Judicial Activity, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/qd-ap-22-001-en-n.pdf> 254.

[172] For example, Case 283/81 *Cilfit* EU:C:1982:335 [7].

[173] The area of fundamental rights review is the obvious suspect for describing how the Bundesverfassungsgericht pressured the Court of Justice into applying a higher standard for fundamental rights review. See also A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 177–187.

carried out by EU courts. Using judicial review and the preliminary reference procedure to relocate the individual in the EMU (a policy field otherwise dominated by states and EU institutions) could yet constitute a major contribution of judicial review.

Is the judicial review of monetary policy decisions an illustration of fruitful judicial interactions? Not quite. The German court, in my opinion, did not stick to its own rules on competence control, as it did not clarify the concept of 'a competence highly significant in the structure of the division of competences' While constitutional identity from Article 79(3) of the Basic Law is excluded from European integration altogether,[174] little to nothing is known about the concept of 'highly significant'. To demand of the Bundesverfassungsgericht more clearly to define this boundary would be a welcome development.

Furthermore, the Bundesverfassungsgericht gave no signal on how important the proportionality test was in its preliminary reference.[175] By omitting this fairly crucial information, it is difficult to talk about a genuinely open dialogue with the Court of Justice.[176] This runs counter to its statement in *Gauweiler* that there is an obligation to 'respect judicial development of the law by the Court of Justice even when the Court of Justice adopts a view against which weighty arguments could be made'.[177] The Bundesverfassungsgericht, in its Order for reference in *Weiss*,[178] placed a great deal of emphasis on the fact that the Court of Justice should remain consistent with the standards from *Gauweiler*.[179] And yet, the German court itself behaved inconsistently: the *stricto sensu* step of the proportionality test touted as central to the review of the PSPP was only introduced in the response to the decision of the Court of Justice, whereas no such expectation was hinted at in the order for preliminary reference itself, and even less so in the *Gauweiler* litigation. The point is not that this excuses the Court of Justice from carrying out a meaningful review of ECB's quantitative easing programmes. It is rather that judicial interactions, if they are to be fruitful, should be carried out in the spirit of mutual respect and sincere cooperation.

In the structure of constitutional pluralism, mutual respect and sincere cooperation play a central role in incrementally managing interpretative differences and ensuring the constructive nature of a possible constitutional

[174] Case 2 BVerfG 2/08 *Lisbon Treaty* (n 116) [240]–[241].
[175] Editorial Comments (n 84) 971.
[176] Wendel (n 85) 987.
[177] Case 2 BvR 2728/13 *Gauweiler* (Judgment) (n 35) [161].
[178] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Order) (n 97) [79].
[179] ibid [180], [193], [205].

conflict ensuing.[180] The preliminary reference procedure enables national courts to act as peer-reviewers ensuring the coherence of judicial review at the EU level. By holding the Court of Justice to its standards, national courts are able to create long-term legitimate expectations, and ultimately, contribute to the uniformity and coherence of EU law (an important consideration for all those who rely on ECB action). The way in which proportionality was introduced in *Weiss* can hardly be referred to as a role model for this approach. Language and expressions used by constitutional courts and the Court of Justice are of importance for how constitutional conflict and its resolution are managed, and there is a coherence in this sense among different constitutional courts in the EU.[181] The allegation of the Bundesverfassungsgericht that the judgment of the Court of Justice is 'simply not comprehensible'[182] is in that sense not the sort of language that should be employed between courts that have for so long interacted in a constructive manner, enhancing the EU's constitutional sphere. It departs from mutual respect and sincere cooperation and unnecessarily distracts from the issues that can constructively be addressed through constitutional conflict.

In addition, the Court of Justice on its part provided very little input as regards a possible rejection of its decision by the Bundesverfassungsgericht, restating its well-established case law on the binding nature of preliminary rulings,[183] despite the possibility left open in the reference to disregard a decision contrary to German constitutional identity. From the perspective of avoiding conflict, this tactic from *Gauweiler* has proven useful, as any interference by the Court of Justice in sensitive national constitutional matters may ultimately breach the obligation of the EU to respect national identities of Member States under Article 4(2) TEU. Nevertheless, taking into consideration that the Bundesverfassungsgericht has now twice raised serious concerns, emphasising the importance of German constitutional identity relating to the budgetary powers of the Bundestag, the Court of Justice will at a certain point need to define the room for manoeuvre available to the ECB

[180] M Goldmann, 'Constitutional Pluralism as Mutually Assured Discretion: The Court of Justice, the German Federal Constitutional Court, and the ECB' (2016) 23(1) *Maastricht Journal of European and Comparative Law* 119, 128; L D Spieker, 'Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi between the Court of Justice and National Constitutional Courts' (2020) 57(2) *Common Market Law Review* 361, 381; Bobić (n 173).

[181] Bobić (n 170) 1414–1423.

[182] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* (Judgment) (n 54) [116], [153].

[183] Case C-493/17 *Weiss* (n 43) [19].

when implementing large-scale programmes such as the PSPP at the expense of national budgetary powers.

Part of academic reactions to the German decision in *Weiss* characterise the German decision as breaching the rule of law.[184] This is, in my view, a mistake. Hitherto, there is nothing in the decision of the Bundesverfassungsgericht that questions the judicial independence of the Court of Justice, nor do we have reason to assume that the judges of the Bundesverfassungsgericht itself were biased or partial. In my view, shielding the Court of Justice from any sort of criticism by national courts would gravely disregard the structural properties of judicial cooperation in the EU, which moves forward through constructive conflict.[185] Further, it also neglects the constitutional set-up of the EU, which does not contain a federal supremacy clause, nor does it subsume national constitutional orders. It is, however, far-fetched to praise the Bundesverfassungsgericht for single-handedly increasing the accountability of the ECB, as its reasoning does not comply with its usual adherence to mutual respect towards and sincere cooperation with the Court of Justice.

[184] See, for example, Editorial Comments (n 84) 966.

[185] A Bobić, 'Constructive versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU' (2020) 22 *Cambridge Yearbook of European Legal Studies* 60.