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Controlling the Powers of the ECB: delegation, discretion, reasoning and care
What Gauweiler, Weiss and others can teach us

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Abstract

In the context of the developing European Economic and Monetary Union (EMU), questions of political and judicial means of control of the bodies central to shaping this policy are of great relevance. This paper looks at how responsibility towards political and judicial means of control can be ensured in reality and what the case law of the CJEU can teach about the accountability standards of a structurally independent executive body such as the ECB. In the inverse, it also looks at the more general lessons the CJEU's Gauweiler case has for today's understanding of the EMU as central part of EU public law.

Keywords: Accountability of ECB; Judicial review; Gauweiler judgment; Weiss case ; discretionary powers; proportionality

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A Introduction

The question whether and how to control central banks has been asked since the establishment of the first central banks. The introduction of the notion of independence of a central bank, either enshrined by legislative act, or, as in the EU, in constitutional terms in a series of Treaty provisions, has heightened the relevance of this question. What does structural independence of an executive body such as the ECB mean when it comes to responsibility towards political and judicial means of control? What are the criteria, if any, to hold the ECB to account?

These questions arise also in the context of the developing European Economic and Monetary Union (EMU). The disputes about the institutional and structural possibilities have long reached the CJEU as ultimate arbiter of such problematic issues in cases such as *Pringle*[1] and *Gauweiler.*[2] Whilst *Pringle* tested the possibilities of institutional architecture and the relation between inter-governmental action amongst (a great majority but not all of the) Member States, *Gauweiler* aimed straight at the powers of the ECB in the context of the uneven twins of economic and monetary Union. *Gauweiler* was the first ever preliminary reference procedure initiated by the German Constitutional Court (GCC), the Bundesverfassungsgericht.[3] In it the GCC challenged the legality of the decision of the Governing Board of the European Central Bank (ECB) of September 2012 on so called 'Outright Monetary Transactions' (OMT).[4] The GCC complied with the CJEU's ruling in *Gauweiler,* but not without making known its disapproval of the outcome of the case.[5]

Following the 2016 judgement of the GCC in *Gauweiler,* in 2017 a series of plaintiffs brought another case before the GCC regarding the legality (this time) of an actually

[1] Case C-370/12 *Pringle* EU:C:2012:756.

[2] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400.

[3] Request for a preliminary ruling from the Bundesverfassungsgericht (Germany) lodged on 10 February 2014 – Peter Gauweiler and Others, GCC, 2 BvR 1390/12 of 17.12.2013, http://www.GCC.de/entscheidungen/rs20131217_2bvr139012.html.

[4] *Gauweiler* was significant for legal integration in the EU since, although this case is the first which the German GCC has ever referred to the CJEU in a preliminary reference procedure (Article 267 TFEU), the reference by the GCC was formulated in very terse words. Essentially, the reference asked for clarification about the legality of the ECB's OMT decision. This was not formulated in terms of a dialogue between Courts, each respecting the other's distinctive powers but instead the GCC explained to the CJEU why it considered the ECB's decision to be *ultra vires* of its mandate. Inherent was a thinly veiled threat to not accept the exclusive competence of the CJEU to review the legality of EU law and, instead, to unilaterally hold an act of an EU institution to be invalid within a Member State of the EU. Therein, The GCC reinforced its sceptical position of the primacy of EU law over the law of Member States by recalling in its decision for preliminary reference its case-law concerning the limits it perceived to be set for the Federal Republic of Germany's integration in the European Union. In its decision, it refers to and further interprets the scope of its own case-law making reference inter alia to its judgments concerning the Treaty of Maastricht (GCCE, 89, 155 of 12 October 1993) the Treaty of Lisbon (GCCE, 123, 267 of 30 June 2009) and in *Honeywell* (2 BvR 2661/06 of 6 July 2010) as precedent for its questions to the CJEU.

[5] GCC 2 BvR 2728/13, 2 BvE 13/13, 2 BvR 2731/13, 2 BvR 2730/13, 2 BvR 2729/13, of 21 June 2016.

implemented programme of the ECB, the so called 'Public Sector Purchase Programme' (PSPP) which is the main component of the ECB's framework programme called the 'Expanded Asset Purchase Programme' (EAPP). The extent of these programmes is not entirely clear since exact numbers are hard to come by. According to figures cited by the GCC, the EAPP has, since its instigation, had a volume between 60 and 80 billion Euros a month and an overall volume of 1,8 trillion Euros by May 2017. Of these 1,8 trillion, 1,5 trillion Euros was due to purchases under the PSPP. The GCC has presented to the CJEU questions as to the compatibility of these programmes with the prohibition of monetary financing of States under Article 123 TFEU, the principle of limited attribution of competencies in Article 5(1) TEU and Articles 119, 127*et seq* TFEU. The new case is known as *Weiss and Others.* [6]

Against that background, this paper looks at what the case law so far can tell us about the accountability standards of the ECB. This paper will thus be based on an analysis of the *Gauweiler* case with a keen eye on the possible outcome of the new case *Weiss and Others.* [7] It will look predominantly at ex post accountability through judicial review, which although obviously not being the only form of accountability, in the case of a body as constitutionally independent as the ECB, appears to be one of the more important forms of accountability. Therefore, this contribution to the debate on the developing EMU focusses on the question what general lessons the *Gauweiler* case has taught for the development of the understanding of an economic and monetary Union – and with it possibly EU public law more generally.

B Background – the EMU and the OMT disputes

One of the European Union's most ambitious policy projects to date is the "economic and monetary union whose currency is the euro" (EMU, Article 3(4) TEU). The EMU's two policies – the economic union and the monetary union - are an unequal set of twins. On one hand, the monetary union's central elements are developed in great detail in the Treaties. They provide not only for provisions containing the introduction of the Euro as a single currency; but also institutionally, for the creation of the European System of Central Banks (ESCB) with the European Central Bank (ECB) on the EU level as a highly independent body equipped with the power to adopt specific forms of act. Additionally, the Treaty is specific about policy goals and principles of monetary policy.

[6] The new case is registered as C-493/17 *Weiss and Others*. So far, the Court has made an order in the case rejecting the application of the expedited procedure under Article 105 of the Procedural Rules of the CJEU – Order of the President in C-493/17 *Weiss and Others* ECLI:EU:2017:792.

[7] C-493/17 *Weiss and Others* (pending at time of writing of this WP).

The economic union, on the other hand, is much less developed on the Union level. The original approach in the Treaty of Maastricht of 1992 was to leave economic – and fiscal - policies largely within the competence of the Member States with the establishment of only loose mechanisms of intergovernmental cooperation. Market pressures, so the original thinking behind the loose structure, would in the long run ensure that national policy choices by the elected parliaments and governments on the Member State levels and align them with each other to form a coherent whole.[8]

In view of this situation, a key challenge for a unified monetary policy in the EU has been the resulting potential mismatches of policy approaches in these two highly interrelated policy fields.[9] Irrespective of the very different treatment of the monetary and economic policies in the EMU, the two are highly inter-related. Monetary policy, largely set by the ECB and implemented by the ESCB, takes place alongside of and in coordination with fiscal policy measures, which typically include taxation or debt-financing of public budgets and the allocation of available funds in national budgets and social security systems. The broader economic policy orientation of Member States also includes issues of regulation, for example, through labour law, competition law or energy law. Monetary policy is created by reacting to and commenting on economic policy decisions of Member States. Therefore, the ECB, as a highly specialised European institution, may risk overstepping into matters of economic policy. Drawing the boundaries is not easy. In exercising its task of designing the correct monetary policy for the Eurozone, the ECB cannot ignore the structure and the state of the economy. In fact, it might have more information about the reality of the economic situation than many Member State governments.

The contested OMT decision of the ECB which gave rise to the *Gauweiler* case was taken in a time of particular market unrest. Doubts about the future of the EMU were rampant. The cost of borrowing money on the markets rose sharply for some Member

[8] One possible explanation for the distinction between the monetary and the economic policy in the Treaties is that it had originally been based on the assumption that the key to stable growth in the economy was 'sound' monetary policy conducted by technical experts in independent central banks (see e.g. Peter A. Hall, The Mythology of European Monetary Union, 18 *Swiss Political Science Review* (2012), 508-513 at 508). Active fiscal policy, was deemed counterproductive and it would have appeared inopportune to give the monetary union capacities for coordinating its member states' fiscal policies (see e.g. Tal Sadeh, Amy Verdun, Explaining Europe's Monetary Union: A Survey of the Literature, 11 *International Studies Review* (2009), 277-301 at 285 with further references). The fact that this distinction allowed for the creation of a monetary union without the necessity of the transfer of a wide range of fiscal and general economic policy powers to the EU might help explain the striking differences in structure between the monetary and the economic union within the EMU.

[9] The objectives and administrative tasks of the economic and monetary union (Article 3(4) TEU) are outlined in Article 119 TFEU according to which the activities of the Member States and the Union under monetary policy include "the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition" and creating and administering "a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy (…)."

States of the EU, in some instances, arguably, rather independently of the underlying creditworthiness of the public treasuries trying to sell its government bonds. At that time, the president of the ECB, Mario Draghi, made a widely cited speech stating that within its mandate, "the ECB is ready to do whatever it takes to preserve the euro." To this he added: "And believe me, it will be enough."[10] One month later, at a press conference after a meeting of the ECB's Governing Council of 6 September 2012, the president of the ECB announced to the public the decision to conduct the OMT-programme and gave some details. Essentially the ECB announced that it would develop a programme the legal details were yet to be decided by legal instruments. In its statement, the ECB declared that it was ready to purchase on secondary markets government bonds issued by States of the euro area, subject to certain conditions which included that, first, states concerned had to be subject to financial assistance by either the European Financial Stability Facility ("EFSF")[11] or the European Stability Mechanism ("ESM"),[12] two structures put into place by Member States in the context of the European economic policy to stabilise States in financial difficulties. Second, no quantitative limits for the amount of purchases of these government bonds were announced. Third, the ECB would act in the same way as any private creditors and therefore not benefit from a special status as public actor. Finally, the ECB announced that any liquidity so created would be fully 'sterilised', indicating that the ECB wished to avoid the creation of additional money in circulation.

This announcement sufficed to reduce the in view of the ECB extreme spreads and the high volatility of the interest rates charged for government bonds of various States using the Euro which had not been based on macroeconomic differences between the States but were based on speculation as to the breaking up of the Eurozone. Initially, the announcement was not followed up by binding ECB legal instruments or decisions to put the OMT programme in place and was consequently never implemented. The mere announcement had however the power to calm the markets. Since 2012 there have been no more extreme spreads of the kind which led the ECB to make its announcement.

The ECB did however, formally unrelated to the actual OMT programme, begin in March 2015 a landmark €60 billion per month so called 'quantitative easing' programme in which it buys government bonds on the secondary markets. This programme, now known as the EAPP and the PSPP gave rise to the pending case *Weiss and Others*.

[10] Speech by Mario Draghi, President of the ECB at the Global Investment Conference in London, 26 July 2012, http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html.

[11] The European Financial Stability Facility, is a special purpose vehicle, outside the EU Law framework, established as a private company under Luxembourg law with the EU member states as shareholders.

[12] The European Stability Mechanism (ESM) is the permanent crisis resolution mechanism for the countries of the euro area. The intergovernmental treaty under public international law establishing the ESM was adopted on 2 February 2012.

In *Gauweiler* and in *Weiss and Others* the GCC asked essentially similar questions: whether the ECB overstepped its powers which have been conferred on it in the Treaties relating primarily to monetary policy. Did the ECB act *ultra vires* in venturing into economic policy – a matter reserved in the EU's federal structure to the Member States?[13]

The GCC's references to the CJEU for preliminary ruling raised the questions, first, whether the OMT programme, rather than being a monetary policy measure under Article 18 ESCB Statute and Article 119 TFEU, was in fact related to economic policy - which would make it fall outside the scope of the ECB's mandate. Secondly, the German court was doubtful whether the measure complied with the prohibition of monetary financing of the Member States laid down in the provisions of the EU economic union in Article 123 TFEU.

This is a familiar pattern to public law: Constitutional questions arise from matters with an administrative background. However, the underlying concern in the German debate voiced also by some of the plaintiffs in the original dispute before the GCC was that if the ECB were to move ahead with its bond-buying programme, this might risk exposing the ECB to such degree of obligations that ECB risked itself to go bankrupt. In this case, the Member States, being the ultimate shareholders of the ECB, would be held liable for the losses which in turn would affect the budgetary powers of the national parliaments.

Already here, there is good reason to doubt the soundness of the legal analysis of the question: Whether the ECB as a central bank with the exclusive power to issue currency (Article 128 TFEU) and conduct monetary policy measures can technically go bankrupt, is an open question. Technically speaking, one might assume that the worst case scenario would that an overload of the ECB with bad debt might be is that the ECB might not create any profits to be dispensed amongst its shareholders, the national central banks. A country like Germany would thus not receive any payments towards its national budget. Therefore the perceived risk for the budgetary autonomy of the German federal parliament, the Bundestag under Article 79(3) of the German Consitution, the Grundgesetz, and the right to meaningfully influence policy making by exercising the right to vote under Article 39 of the Grundgesetz, appears to be highly theoretical, if non-existent.

[13] Additionally, the GCC asks the question, whether the OMT decision, by allowing for the purchase of particular Euro member government bonds on the so called secondary market violates the prohibition of monetary financing of state debt laid down in Article 123(1) TFEU.

C Constitutional review of announcements and general programmes

Irrespective of the first considerations on whether the concerns are well founded, the facts underlying the case in *Gauweiler* are important, especially when compared to the now pending case *Weiss and Others*. *Gauweiler* was based on the fact that the plaintiffs brought action before the GCC regarding an announcement made by the ECB of a detailed plan to undertake future market interventions by means of entering into purchase agreements on the open markets of government bonds.[14] Legally speaking, an obvious question is whether such announcement, or the underlying decision to make such de facto announcement, can or should be subject to any judicial review. Does the fact that a measure was announced as an emergency measure by the ECB but later not implemented have change anything in this respect?

a) Review of Regulation by Information by the ECB

The possible judicial review of an announcement of a future policy as was done in *Gaweiler* is surely a very rare situation which was brought upon the CJEU by the GCC's extremely wide interpretation of standing to bring action against an alleged violation of a fundamental rights and principles. However, within the EMU, it would appear quite normal that many of the measures adopted by the ECB and the ESCB are in fact not 'final acts' in the sense of the extensive case law on reviewable acts under Article 263 TFEU, but instead measures which are less specifically defined such as communications intended to influence the markets, purchase programmes which have certain effects whether intended or not and many other forms of informal action. The situation which the GCC's preliminary reference in *Gauweiler* has given rise to is therefore possibly indicative of a series of questions with respect to difficulties holding action by a body like the highly independent ECB which is active in various way shaping monetary policy and which has a high degree of discretion doing so. The notion of what might be called 'factual conduct' and its review is thus gaining importance in this respect.

Generally, administrative action that is explicitly or implicitly designed to have factual, as opposed to legal, consequences or effects can be referred to as 'factual conduct' or 'factual act' in order to distinguish them from formal, legally effective measures.[15] Neither in the EU context nor in the context of national legal systems does factual conduct occur in a legal vacuum. Rules and principles of EU administrative law frame establishing both criteria for the legality cases of factual conduct and the consequences

[14] This announcement was made in a dramatic moment with great market unrest. The ECB used its status and credibility to declare an emergency measure to be imminent.

[15] Expressions found in the language of some of the legal systems of the Member State include *acte juridique* and *fait materiel* (French) and *Realakt* and *schlichtes/informales Verwaltungshandeln* (German).

of the illegality. Normally the legality of any factual act undertaken by an EU institution would be open to review within the procedure for a preliminary ruling by the ECJ under Article 267 TFEU.[16] That was the case in the GCC reference to the CJEU in *Gauweiler*. Unusual, but inherent in the system of legal review of the Court system in Europe which is separated by national and European levels, is that a national Court such as the German Constitutional Court, can by broadly interpreting its admissibility criteria achieve broad review by the CJEU of diverse categories of action of EU institutions and bodies. The CJEU principles has the obligation of answering questions submitted to it by a national court. It is recognised in EU law that a purely factual measure or other factual conduct, lacking in itself formal legal status or character, may amount to the implementation, at least implicitly or tacitly, of a decision.

In *Gauweiler*, however, the assessment of the nature of the act was not obvious. The ECB held a press conference announcing a decision by its Governing Board. That decision was a principled decision that the ECB was ready to take, at an unknown moment in the future, possibly binding legal acts which were to then determine to greater detail the specific circumstances of possible future action. Irrespective of the future nature of the measure, it was undisputed that the announcement was already fairly detailed as to the conditions the Governing Board of the ECB had set as criteria for future action. Yet, legally speaking, the only 'act' subject to possible review was the announcement in the press that the Governing Board had decided in principle on how to address matters in the future.

Information policy being reviewed under conditions of factual conduct is not limited to monetary policy. Monetary policy is merely one example of public communication having become a key tool of regulation. 'Regulation by information' as it is generally known is a central element of public activities used in many policy areas. Within the EU, the European Commission applies this approach to further the goals of the Treaties. Publication within fields of Union competences can be either in the form of information of interested parties about decision-making criteria and practices or in the form of establishing performance benchmarks and reporting about Member States' or other actors' performance. In the context of monetary policy, the ECB, as European agency, has the explicit legal obligation to communicate widely and transparently. Communication is one of the respected tools of this field by which the ECB can influence markets in order to conduct its policies.

16 The latter, unlike Art. 230 EC (Art. 263 TFEU), allows for the review of any forms of acts by the institutions. Unlike Art. 230 EC (Art. 263 TFEU), does not require that acts intended to produce legal effects vis-à-vis third parties.

All of this cannot, however, deter from the fact that the ECB announcement was not a binding legal decision but can merely be qualified as what was referred to as mere factual conduct. In reviewing this, the CJEU confirmed in *Gauweiler* the criteria of legality it had in earlier case law established for such factual conduct.

These criteria include that, first, the institution or authority will need to be competent to act within the policy area. Factual conduct can only be tolerated within the scope of empowerment undertaken under the general legal provisions of the Treaties under the principle of conferral. The competence must extend not only to the question of whether to act in a certain policy area but also *how* to act. An announcement as to future activity, or even a threat with future activity is only legal if the power to conduct such activity exits. In the case of the OMT the issue was thus in *Gauweiler* whether announcing that such measures would be undertaken would be legal.

Second, legality of such conduct relates to the *limits* upon the action to be taken. Specifically, the institution or body undertaking the factual conduct must respect and meet the standards of the general principles of law which generally govern the legality of Union acts, such as the principles of proportionality and the protection of fundamental rights and others.[17] In other words, the test of legality of factual conduct should not differ from that applicable to formal measures taken by the administration.

In *Gauweiler* the CJEU explicitly confirmed this approach as set of criteria for review of the announcement of the OMT programme by the ECB. It first reviews its legal basis and whether the ECB had acted *ultra vires* the powers conferred on it in its enabling law – the Treaties and the Statutes of the ESCB – before reviewing compliance with general principles of EU law such as, most importantly, the principle of proportionality.

The CJEU's confirmation in *Gauweiler* of the importance of regulating information and the confirmation of the criteria for review are an important clarification. Only due to the questions raised in the context of the preliminary reference from the GCC, does the CJEU acknowledge this approach. No direct actions for annulment under Article 263 TFEU would have been admissible so that the Court might not have had opportunity to so clearly express its views on the criteria for legality and review.[18]

b) Review of a general programme

[17]

[18] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400, paras 32-126.

The CJEU's Advocate General in the case, Cruz Villalón, had pointed out another specificity of the review question addressed to the CJEU: The question for him is how to conduct judicial review 'where the impugned act is a measure outlining a general programme of action, intended to bind the actual authority which is the author of the decision.' The question is, therefore, should there be any difference between review of such general but internal programme as opposed to review of 'an act that contains a measure which creates rights and obligations with regard to third parties.'

The problem raised here is also indicative of difficulties holding a body such as the ECB to account by means of judicial review. As described above, the action in the field of monetary policy might be of factual nature. Moreover, measures of the ECB and of the ESCB are effective in monetary policy terms not necessarily because they are specific individual measures, but because their width and breadth can have an impact on worldwide currency markets and economies of the scale of the Euro zone. In *Weiss and Others,* for example, the question is posed about the legality of two ECB purchasing programmes worth no less than 1 800 billion Euros by May 2017 and counting.

Review of a programme should take place, according to the AG,[19] since general action programmes of public authorities may be capable of having a very direct impact on the future legal situation of individuals. This, so the AG "justifies taking a non-formalistic approach" when considering whether it should reviewed. Otherwise, the AG argued

> "there would be a risk that an institution could undermine the system of acts and the corresponding judicial safeguards by disguising acts that are intended to produce external effects as general programmes."[20]

The CJEU implicitly followed this line. In *Gauweiler* it submitted the announcement of the OMT programme to the same criteria for judicial review as any other factual act it comes to review. In fact, it can rely on a long tradition of case law doing so reaching back over forty years. In *ERTA* the CJEU reviewed a Council position paper coordinating Member States in the negotiations for the conclusion of an international agreement which was subject to judicial review, because it was capable of "derogating … from the procedure laid down by the Treaty."[21] There appears to be no reason, why the CJEU should do otherwise in *Weiss and Others* as well as in future case law arising on the review of acts of the ECB.

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[19] Opinion of AG Cruz Villalón of 14 January 2015 in Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)*, ECLI:EU:C:2015:400, paras 75. 76.

[20] Opinion of AG Cruz Villalón of 14 January 2015 in Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)*, ECLI:EU:C:2015:400, paras 75. 76.

[21] Case 22/70 *ERTA*, EU:C:1971:32, para 54.

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The fact that the GCC grants standing to plaintiffs not only regarding spending programmes which are actually put into place - such as in the context of the 'Public Sector Purchase Programme' (PSPP) which is the main component of the ECB's framework programme called the 'Expanded Asset Purchase Programme' (EAPP) subject to the dispute in *Weiss and Others* – but also grants standing to allow individuals to seek review of announced plans for possible future action such as the OMT programme in *Gauweiler,* allows the CJEU to leave the exact nature of a programme open. Instead, in the preliminary reference procedure the CJEU can concentrate on matters of substance and critiera of review of whatever nature the action under review has.

In fact the CJEU in *Gauweiler* regarded the ECB announcement, because of the details given in the press declaration about the future programme, to be sufficiently precise in order to be able to review its legality. It of course did so in view of the fact that *Gauweiler* was the first and long awaited preliminary reference by the GCC. But this approach of the CJEU is, it should be mentioned, entirely consistent with the CJEU's approach in its review under Article 318(11) TFEU of future international agreements. That article specifically speaks of "agreements envisaged", a term interpreted by the CJEU interprets broadly requesting only the subject matter of the agreement to be known.[22] Even before negotiations have started and a specific text being presented, the specific procedure is admissible, according to the Court as long as it has sufficient information about the content and the basic structural elements of the plan for the envisaged agreement.[23] Therefore, it would appear to be quite possible and reasonable to expect this line of approach to be applied by the CJEU also in the future to questions of review of measures of the ECB and ESCB.

Another point, however, is quite clear from the GCC's question and the CJEU's response in *Gauweiler*. Judicial review of action of highly independent agencies such as the ECB, with its immense powers both legally and factually by its prerogative with regard to monetary policy, may have to take place as far as possible prior to its execution *ex ante*. The case *Weiss and Others* is an example of this. When the decision of the CJEU in that case will be handed to the GCC possibly in the early summer of 2018, the programme might have been wound down significantly by the ECB and a total of well over 2 trillion Euros might have been spent. Economists and political pundits will widely disagree about whether the programme was necessary, cost-effective or whether suitable alternatives might have existed to achieve the same result. But *Weiss and Others* will only

[22] See e.g. Opinion 1/78 *international agreement on natural rubber* [1979] ECR 2871, paras 32-34.
[23] See e.g. Opinion 1/94 *Accession by the Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, paras 11-12.

be *ex post* review and any effects – positive or negative – will have made their lasting long-term imprint on reality.

D The CJEU's full review of compliance with the legal basis and its limitations

The judicial review of the ECB's announcement of the OMT programme that the CJEU offered in *Gauweiler* followed a well-developed and well-rehearsed two-tier approach of judicial review by the CJEU: First, to look at whether a programme has a legal basis and whether it violates any legal norms to which its powers are subject (see below a). Second, to review whether the measure complies with general principles of EU law. These principles include compliance with procedural requirements such as the obligation of justification as well as what is known as the 'duty of care' i.e. the full and impartial assessment of all relevant facts prior to decision-making (below b). This latter principle can also be merged in review with compliance with the principle of proportionality to which any act of an EU body is subject. The review under the principle of proportionality is the moment where the real question of the degree of review of the discretionary powers of a highly independent agency will be asked. One of the steps of proportionality is the review whether less onerous alternatives have been properly considered and discarded for good reason (below c).

a) The legal basis of an ECB measure and its interpretation

Review of any act of an EU body, be it legislative or administrative in nature is subject in principle to full review as to compliance with the legal basis. Under this legality requirement any measure needs a legal basis and must remain within the boundaries of the powers conferred by it. This is a question of review of what the Court refers to as 'objective criteria' in that, in principle, it undertakes full review of the compliance of the ECB with these criteria. However, such full review needs to take into account the nature of the empowerment in EU law which is defined by the wording and the institutional context.

i) The legal basis and the questions of delegation in matters of expertise

The degree to which the EU's legal system has regulated a matter by higher ranking law may vary. In fact the very nature of delegation (in a constitutional norm or a legislative act or otherwise) to an expert body such as the ECB indicates that a certain degree of freedom to assess situations and to act according to these assessments has been

delegated. Therefore, delegation is inherently linked to granting a margin of appreciation or of a certain degree of discretion.

First, the question of what has been delegated touches upon the degree of openness and empowerment, which an act conferring powers on a body such as the ECB contains. If it is understood that the recipient of delegation has been granted the power to interpret the extent of a legal mandate then this interpretative power may amount to discretion. Generally the CJEU has not seen the interpretation of the terms of delegation and thus their concretization to contain an instance of exercise of powers which are either discretionary in nature. But occasionally, especially in the field of State aid, it has accepted that or deserve similar treatment to matters of discretion. The determination of what exactly the statutory prerequisites are (and what they mean) will often, nevertheless, require the interpretation of unclear statutory terms. Even where no discretion has been conferred on an administration, the content and meaning of a delegating provision may need to be determined by interpretation—often in light of facts, the existence of which must be established by the decision-maker. An example of this exists in state aid cases, concerning the definition of an aid under Article 107 TFEU. The European courts have held that the concept of aid is objective, the test being whether a state measure confers an advantage on one or more particular undertakings.[52] Here, the Commission assesses situations in applying the law without enjoying a discretion, 'save for particular circumstances owing to the complex nature of the State intervention in question'.[53]

The ECB has been created as a specific body by Treaty provisions. It has been granted wide powers but is also regulated to a high degree by what can be referred to as 'traité-loi'. Therefore, in tune with the degree of detail of the legal framework of the matter, judicial review of such activity can be equally detailed. In that sense, the CJEU measures actions of the ECB against compliance with the legal framework and the objectives of monetary policy.

Both the OMT programme subject to review in *Gauweiler* as well as the PSPP and the EAPP programmes subject to review in *Weiss and Others* fall under the powers granted to the ECB under Article 18 of the ESCB Statutes. Article 18 of the ESCB Statutes

[52] Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, para 25; Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, para 95; Case T-98/00 *Linde v Commission* [2002] ECR II-3961, para 40.

[53] Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paras 52–53; Case T-358/94 *Air France v Commission* [1996] ECR II-2109, para 71; Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paras 10–11. These particular circumstances have been found by the case law, eg in areas in which the Commission, in order to determine whether investment by the public authorities in the capital of an undertaking, constitutes State aid within the meaning of Art 107 TFEU, considers the so-called 'private investor test'. See Case C-56/93 *Belgium v Commission* [1996] ECR I-723, para 10; Joined Cases T-126/96 and T-127/96 *Breda Fucine Meridionali and others v Commission* [1998] ECR II-3437, para 5; T-296/97 *Alitalia v Commission* [2000] ECR II-3871, para 105; T-301/01, *Alitalia v Commission* [2008] ECR II-1753, para 185; T-196/04, *Ryanair v Commission* [2008] ECR II-3643, para 41.

authorises the ECB to conduct so called "open market and credit operations" which are activities which include entering into contracts for buying and selling as well as lending or borrowing "claims and marketable instruments" as well as conducting "credit operations with credit institutions and other market participants, with lending being based on adequate collateral." But also, importantly, Article 18 of the ESCB Statutes requires active measures of transparency. Thereunder, the ECB is obliged to conduct an information policy "for the announcement of conditions under which they stand ready to enter into such transactions."

With this mandate, fundamentally political powers with wide policy discretion have been conferred on the ECB as a very independent administrative body of the Union. The ECB is designed as an expert body. It is set up to concentrate a maximum amount of expertise in matters of monetary policy. This is not unusual, since central banks all over the world are involved with exactly these tasks. Monetary policy is an area that requires great technical expertise to manage and entails large and substantive risks for the economic wellbeing of all citizens and for the financial positions of the Member States. For that reason, it is an eminently political area of law.[24]

For this, the ECB is a body under EU law with features in part specific to it and in part known in other areas of EU administrative law. The independence of the ECB is reflected in its internal organisation which is not unlike other EU agencies. Within the ECB, the ECB's Governing Council has the central tasks of formulating the monetary policy of the Union by adopting the guidelines and takes the decisions including under Article 12(1) Statutes ESCB, decisions relating to "intermediate monetary objectives, key interest rates and the supply of reserves in the ESCB."[25] However, unlike agencies, the ECB is owned by the national central banks (NCBs) of the EU Member States which have joined the Eurozone. The ECB conducts monetary policy for the EU in conjunction with the NCBs in the ESCB.[26] Therein, the ECB has powers to issue instruments, which although called guidelines, are binding orders to NCBs.

[24] However there are some important differences between the ECB and the organization of other Union agencies. The relevant Treaty provisions regulate to great detail the internal structure and the independence of the ECB. The ESCB under Article 130 TFEU and the ECB according to its statutes a strictly independent. Under Article 130 TFEU "neither the ECB, nor a national central bank, nor any member of their decision making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State."

[25] Under Article 283 TFEU the ECB's Governing Council comprises the members of the executive board of the ECB and the Governors of the NCBs of the Eurozone states. The NCBs are thereby not represented as institutions but by individuals acting in their capacity as members of an ECB organ. Each member of the Governing Council has one vote exercised in confidential proceedings. But voting rights are not allocated on a one-Member-State-one-vote basis. The number of governors with voting rights is limited to 15.

[26] As of 2015 the following 18 Member States who had adopted the Euro as their currency: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Luxembourg, Ireland, Italy, Latvia, Lithuania, Netherlands, Portugal, Slovenia, Spain.

In its objective review of the exercise of whether ECB measures have a legal basis the CJEU has to accept that the expertise of the institution developing a measure must be recognised and that its scientific evaluation of a situation should be respected.

In *Gauweiler,* the Advocate General spelt out *ex post facto* that the fact that the Eurozone did not break apart and that the conditions for conducting a single monetary policy was restored is sufficient in the context of this review.[27] The CJEU adopted the same approach as the AG in *Gauweiler* despite the contestations of one of the plaintiffs in the original dispute that that was not the case. Also, the GCC had formulated strong doubts as to whether this was the case in reality.

A similar view may be taken by the CJEU in *Weiss and Others* in that the fact that the programmes of the ECB, as expensive as they might have been, did lead to or at least were not incompatible with maintaining price stability and the unity of the Euro shows that they were supportive of a more general economic policy goal of achieving economic recovery and growth. And who could blame the Court for taking such *ex post* view? It would be difficult to find any reliable expertise explaining how and in which parts and with which mechanisms the massive influx of money has stabilised the monetary systems without leading to massive inflation as was feared by some observers measuring the approach by historic standards. The success of the ECB's measure would indicate that the ECB's approach using tools of monetary policy and thereby, inter alia servicing economic policy objectives, as is explicitly its mandate under Article 127 TFEU was right. These constellations from *Gauweiler* and *Weiss and Others* however will not always exist in the future.

It would appear therefore that, in principle, a much clearer relation between criteria of full review, scientific expertise and discretion in its evaluation would need to be established in order to ensure a more convincing level or review.

ii) The centre of gravity of a measure – what about secondary effects?

One approach is looking at the intention of the author of a measure: The delimitation of monetary policy – conferred on the ESCB – and economic policy – which remains largely with the Member States and the Union legislator – was viewed by the CJEU in *Gauweiler* as a question of primary versus secondary effects of a measure. In reality, the distinction mirrors older case law of the CJEU on the so called 'centre of gravity' rule which was applied in situations where a measure could have several competing legal basis each proposing a different decision making procedure. The Court informs that the

[27] Opinion of AG Cruz Villalón of 14 January 2015 in Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)*, ECLI:EU:C:2015:400, para 84.

fact that a measure in the field of the Union's monetary policy might incidentally also have secondary effects 'on the stability of the euro area', which is a matter of economic policy, does not call that assessment into question.'[28]

Applying this centre of gravity rule is of course not easy in the context of the EMU. Although the ECB's mandate is quite precisely defined in the TFEU, which in its Article 127 states that its "the primary objective" "is to maintain *price stability*" (emphasis added), Article 127 TFEU explicitly also states that without prejudice to this objective, monetary policy shall support the "general economic policies in the Union... ." This is a restatement of Article 119(2) TFEU which identifies the broad policy objectives to be pursued within the EMU as having the "primary objective to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union …". Article 282(4) TFEU establishes in this respect that the ECB "shall adopt such measures as are necessary to carry out its tasks."

However, the contrast between monetary and economic policy within the EMU is striking and is therefore the source of conflict between Member States and the ECB as to the division of competencies. Despite the very detailed delegation of powers in monetary matters to the ESCB and the ECB, only very little primary law exists regarding economic policy which remains within national competence subject to coordination.[29]

Both the disputes in *Gauweiler* and in *Weiss and Others,* in essence, question the key norm to the dispute which is the essential limitation of ECB monetary policies regarding the economic policy decisions. In it, the competences of the ECB are strictly circumscribed by the prohibition of monetary financing of Member State debt by means of direct purchases as opposed to open market operations of the ECB involving Member State bonds (Article 123(1) TFEU). The question raised in both cases is whether the intended or unintended side-effects of a measure adopted by the ECB as a monetary policy instrument could lead to the fact that they are *ultra vires* regarding economic policy prerogatives of the Member States.

[28] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400, para 51, with reference to C-370/12 *Pringle* EU:C:2012:756, para 56.

[29] At the time of the entry into force of the Treaty of Lisbon, only few provisions of secondary law had been in place in the field of the economic policy part of the EMU. In fact, the Treaty of Lisbon reflected quite precisely the situation the Treaty of Maastricht had left behind with an imbalance between detailed rules on the monetary Union and very few precise provisions on the economic Union. Much of the field of economic policy cooperation was developed *ad hoc* in response to the onset of the 2008-2013 economic crises. The central legal norm has been Article 126 TFEU on the prohibition of excessive government deficits. However, these basic provisions have been expanded with structures, some of which seemed to be testing notions of constitutionality via the creative use of existing forms of act. Great creativity was employed to set up structures capable of achieving the objectives amid a divided Union with countries having adopted the Euro and countries not having done so.

In *Gauweiler* the Court held that the ECB had the right to design a programme to ensure that its monetary policy would be capable of contributing to price stability in a single currency area. It accepts the technical evaluations of the ECB that at the moment of the publication of its announcement, interest rates charged for government bonds by different member states had been distorted by speculation about their exit from the Eurozone, and therefore threatening the policy objective of a 'single' currency. The CJEU also allows the ECB to develop or to adopt concepts of economic theory and apply them in the context of its executive policies. In *Gauweiler* this was the theory the existence and functioning of a so called 'transmission mechanism' of monetary policy. [30] The Court thereby followed its case law approach which it has developed e.g. with respect to the Commission's adoption of economic theory approaches in the application of competition law.

iii) Conditionality

The matter of conditionality of ECB action was subject to review in *Gauweiler* in the context of the compliance with the legal basis. It could also have been an issue of proportionality. [31] The ECB had announced its OMT bond buying activities on the condition that the 'target' countries, i.e. those whose bonds would be accepted, needed to comply with the conditions of EFSM and ESM macroeconomic adjustment programmes in order to be eligible. The background to this *conditionality* requirement was the following: In reaction to the realities of the lack of common economic policy and in the wake of the economic crises since 2008, the EU had to find ways to deal with various emergency situations. Thus between late 2010 and 2012, a comprehensive reinforcement of economic governance in the EU and the euro area was set in place establishing institutional structures such as the European Stability Mechanism (ESM),[32] the European Financial Stabilisation Mechanism (EFSM)[33] and the European Financial Stability Facility (EFSF) [34] as agreements under public international law outside the Treaty framework.[35] Using public international law was not uncontested but had become necessary by the lack of unanimity in Council. In *Pringle* the CJEU declared this

[30] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400, paras 46-49: "Since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB's ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining the primary objective laid down in Article 127(1) TFEU."

[31] See on conditionality especially Viorica Vita, Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality, 2017 *Cambridge Yearbook of European Legal Studies*, 1-28.

[32] The European Stability Mechanism (ESM) is the permanent crisis resolution mechanism for the countries of the euro area. The intergovernmental treaty establishing the ESM was adopted on 2 February 2012.

[33] The European Financial Stabilisation Mechanism, legally based in Art. 122 (2) TFEU, is a programme whose purpose is to provide loans to EU Member States in financial difficulty.

[34] The European Financial Stability Facility, is a special purpose vehicle, outside the EU Law framework, established as a private company under Luxembourg law with the Member States as shareholders.

[35] See e.g. Viorica Vita, Rivisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality. 2017 *Cambridge Yearbook on European Legal Studies*, 1-28.

approach legal,[36] but the negative consequence is that the inter-governmental approach excludes making use of democratic accountability existing within rule-making procedures under Union law.[37]

Although the importation of rules and standards formulated under public international law is a normal undertaking in EU administrative law (in some policy fields such as medical safety or air safety, this is explicitly encouraged by legislative acts), the ECB used the criteria of conditionality in effect to discriminate between EU Member States by buying bonds only from some but not all Eurozone Members.

This the CJEU found proved the independence of the ECB and its compliance with primarily monetary objectives. It was, according the Court, in compliance with the ECB's obligations under Article 127(1) TFEU to do nothing that would dis-encourage Member States to maintain sound finances.[38] In that sense, it is a question of such discretionary decision to include conditionality was to be seen as a justification of discrimination? Most likely the Court simply did not want to interfere with basic economic policy choices by the institutions. A more detailed review of conditionality, the terms under which it is created and the use of this concept should have been necessary in my view.

But there is another problem in the conditionality issue. As the AG had pointed out, the ECB had participated in the formulation of conditions of conditionality. Therefore it had participated in that way in the formulation of the criteria of economic policy of the Member States which are in assistance programmes of the EFSM and the ESM. The ECB would thus, when creating the condition for government bond purchase programmes, in effect, reinforce the incentives to comply with these conditions.[39] In that sense, the Court should have acknowledged the problematic matter of the ECB having participated in the conditionality criteria. When using these very criteria in the design of

[36] Case C-370/12 *Pringle* EU:C:2012:756; with much literature having discussed the legality of the structure. See e.g. See for instance, Mathias Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 C.M.L. Rev. 1777,1785; Richard Palmstorfer, 'To bail out or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law' (2012) 37 *E.L. Rev.,* 771-784; Jean-Victor Louis, 'The no-bailout clause and rescue packages' (2010) 47 *C.M.L.Rev.* 971, 977; Jörn Pipkorn, 'Legal arrangements in the Treaty of Maastricht for the effectiveness of the economic and monetary union' (1994) 31 *C.M.L.Rev.* 275; Harald Hofmeister 'To Bail Out Or Not to Bail Out?—Legal Aspects of the Greek Crisis', (2010-2011) 13 *Cambridge Yearbook of European Legal Studies,* 113 – 134.

[37] The chosen approach thus considerably strengthened the executive branch of powers of the Member States. One example is the creation and empowerment in matters of fiscal and economic policies of the 'Eurogroup', a gathering of national ministers of finance. Another effect of this approach is that the ECB was involved, due to its unmatched expertise in monetary policy matters, in the drafting of the conditions of the assistance granted to Member States by the EFSM and the ESM.

[38] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400, paras 58-60.

[39] Opinion of AG Cruz Villalón of 14 January 2015 in Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)*, ECLI:EU:C:2015:400, para 156.

its monetary policy tools, it thereby might be seen to be more than merely incidentally affecting economic policy approaches but instead actively being pursuing economic policy goals.

At the end of the day, the main problem is one of a lack of procedural rules and transparency in the creation of executive rule-making. Only properly formulated and transparently executed executive rule-making can avoid the ambiguity of the authorship and of expertise used in rule-making. In *Gauweiler* the Court avoided the problem by not mentioning it. But the problem is essentially here, and it was argued in the case.

b) Does the ECB comply with the limitations of its mandate?

As indicated, the scope of the ECB's powers in monetary policy matters is particularly narrowly defined in EU constitutional provisions of the Treaties. The competences of the ECB are for example circumscribed by the prohibition of monetary financing of Member State debt by means of direct purchases (as opposed to open market operations of the ECB involving Member State bonds - Article 123(1) TFEU). This prohibition relates to the original concept of creating the European economic and monetary union by means of a centralised monetary policy in combination with a loose cooperation of economic policies. The original pre-crises construct was hoping for the disciplining effect of the financial markets to incite Member States to take sound financial decisions This was supposed to imply a 'competitive' and 'decentralized' model of the macro-economic European Constitution.[40] Such a 'market-based system' is premised on the fact that states' in principle should have direct access to financial markets in order to finance their debts. Fiscal indiscipline and unsound public finances would be punished, the market-based model argues, directly through the markets which would stop the lending to the non-compliant state. In this vein, 125 TFEU[41] establishes a 'no bail-out clause' in combination with a strict prohibition on 'monetising' debt through the ECB in Article 123 TFEU.[42]

[40] Miguel Poiares Maduro, We the Court, (Hart Publishing 1998), p. 103 *et seq.*

[41] Article 125 (1) TFEU reads as: "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".

[42] Article 125 (1) TFEU reads as: "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".

Review of compliance and compatibility of the ECB's actions with these limits and with Article 123 TFEU is, given its nature as limitation of powers and compliance with the condition of the legal basis, in principle subject to full judicial review by the CJEU.

Whilst on this basis, the CJEU in *Gauweiler* found that the ECB may on the financial markets buy and sell outright marketable instruments which include government bonds, in *Weiss and Others*, the CJEU will need to look closer. In *Gauweiler* the CJEU was in the comfortable position to review an non-executed programme which had been announced only in a press-briefing informing about decisional procedures within the ECB. In *Weiss and Others*, on the other hand, the CJEU is asked to review a fully-fledged programme which has been put into action. The GCC explicitly asks whether the conditions defined in theoretical terms in *Gauweiler* are actually complied with in the situation at stake in *Weiss and Others* in which review is sought of ongoing programmes, the EAPP and the PSPP which by May 2017 had grown to the size of € 1,8 trillion.

The conditions of each of the EAPP was, according to the facts established by the GCC published in ECB press releases.[43] The PSPP was introduced by a published decision of 4 March 2015,[44] and has been amended by several subsequent decisions both as to the scope of the programme and the conditions applied to the purchase of public bonds.[45] Both programmes have published detailed conditions about their volume and the conditions of purchase.

Although part of the ESCB mandate is transparent communication, the irony of this is that, although the ECB is required to inform transparently about its activities and the announcement of the OMT programme fell short within this point.

In *Gauweiler* the CJEU had to accept that the ECB could only fulfil the requirements it establishes, if it leaves market participants uncertain about when and how much debt it would buy on the secondary market and how long it would hold the government bonds once purchased, i.e. whether it would resell these bonds or whether it would hold them to maturity.

In *Weiss and Others,* the GCC now questions the issue from two sides: It critics that the ECB engages *de facto* in monetary financing of public budgets by publically announcing

[43] ECB press release of 22 January 2015 on the EAPP.

[44] Beschluss (EU) 2015/774 der Europäischen Zentralbank vom 4. März 2015 über ein Programm zum Ankauf von Wertpapieren des öffentlichen Sektors an den Sekundärmärkten (EZB/2015/10).

[45] E.g.: Beschluss (EU) 2016/1041 der Europäischen Zentralbank vom 22. Juni 2016 über die Notenbankfähigkeit der von der Hellenischen Republik begebenen oder in vollem Umfang garantierten marktfähigen Schuldtitel und zur Aufhebung des Beschlusses (EU) 2015/300 (ECZ/2016/18).

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April 2018

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Abstract

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Keywords: Accountability of ECB; Judicial review; Gauweiler judgment; Weiss case ; discretionary powers; proportionality

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the conditions of its purchase programme, thereby allowing for states and market participants to precisely fine-tune their offers to the ECB. On the other hand, the GCC criticises that there is not sufficient reasoning as to the conditions and conditionalities of the programme thus making judicial review *de facto* impossible – a criticism leading to the argument that the programmes should be declared illegal by the CJEU.

Additionally, the GCC restates in its preliminary reference decision to the CJEU that in its view, a limited interpretation of the powers of the ESCB is necessary for reasons of democratic legitimacy of the ESCB, a structure which has been equipped with great independence in Article 130 TFEU and the third and fourth sentence of Article 282(3) TFEU.[46] The GCC argues that given the possible effect of monetary stability on individual economic rights as well as the effect of the stability of public finances on the budgetary powers of democratically elected national parliaments, a restrictive interpretation of the monetary powers of the ESCB and the ECB should be adopted. This argument, however, appears quite contradictory. If the ECB is obliged to ensure monetary stability and support economic policies including the stability of public finances, a broad interpretation of the means available to the ESCB and the ECB could be just as well arguable.

Therefore, although the CJEU will conduct full review of the definition of the powers of the ESCB and the ECB and the exercise of these powers, it is far from clear that in the setting of broadly defined powers which require expert input for the definition of the meaning of the terms of conferral and the very wide discretion granted in the choice of instruments will result in a high level of detailed judicial review of the ECB.

Changes to this situation, if politically desired, would most likely require Treaty amendments. The forms of accountability in that case would most likely be heightened political control and influence rather than judicial review. The argument in favour of a highly technocratic, expert-driven and fiercely independent ECB was, in the 1990ies the need for an independent control of politically motivated short-termism in economic thinking. A trade-off is obviously necessary between various policy objectives.

Another approach would be not to address the issue of powers exercised by the ESCB and ECB by means of constitutional amendment through Treaty change but by means of administrative law in the form of the establishment of transparent and reviewable procedural rules for executive decision-making applicable also to matters of an agency as powerful as the ECB. This procedural solution is one which is often pursued by the

[46] BVerfGE 142, 123 (Urteil vom 21. Juni 2016, *OMT*) at paras 187 et seq.

CJEU as cure for ills in the exercise of discretionary decision-making and will thus be discussed in the following part on the review of discretionary decision making.

E Review of the discretionary powers of the ECB

It would appear that the matters of full review discussed above leave some room for assessment to an EU agency as the ECB. Even in full review, the CJEU has deferred to assessments of factual situations and expert input into the definition of the criteria in Treaty provisions identifying the empowerment of the ECB.

In its case law, and explicitly in *Gauweiler,* the CJEU has so far accepted that large quantities of statistical information and economic expertise are needed for monetary policy making. The broad legal definition of the ECB's tasks, combined with a constitutionally guaranteed independence of the ECB, results in very broad discretion of the ECB to decide upon the use of such data for monetary policy decisions. The ECB has, as AG Cruz Villanón observed in *Gauweiler*, at its disposal technical expertise and access to crucial information which allows it to devise monetary policies that actually influence economic realities. [47] This type of highly technical, very complex and information intensive activity is, consequently, very difficult to monitor through 'traditional' legal means of a framework of powers and judicial review.

However, according to the case law of the CJEU, the fewer the possibilities of judicial review as to the substance of the decision of the administration, the more important are procedural considerations as to, for example, compliance with the procedural notion of the duty of care (full and independent assessment of all relevant facts prior to decision-making),[48] compliance with the requirement of reasoning of a measure. This, in the case law of the CJEU, is generally wrapped up in an in-depth review of proportionality.

The CJEU in *Gauweiler* confirmed and reinforced this existing trend in the EU. Broad discretion conferred on an institution or body will not deter from detailed review under proportionality criteria. The key to this development is, like in many systems, a proceduralisation of review criteria.

a) Statement of reasons

[47] See: Opinion of AG Cruz Villalón in C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* of 14 January 2015.

[48] See very helpfully dissecting the distinction between the procedural duty of care in the context of the principle of good administration and substantive criteria for care e.g. in the field of tort law or, more specifically in the ECB mandate, the ECB's duty of care for the unity and integrity of the internal market: Pierre Schammo, The ECB's duty of care for the unity and integrity of the internal market, 42 *European Law Review* (2017), 3-26 at pp. 18-19.

The acceptance of the technical expertise and forecasts based on complex assessments by the court in that context must be generally supported by an adequate statement of the reasons for its decision allowing the Court to conduct review under all relevant criteria including the principle of proportionality.

In this context, in *Gauweiler* the fact that the OMT programme was merely announced at a press conference but was non-existent at the time of the CJEU's decision, led to the fact that – as all factual conduct – it came without a statement of reasons. The Court played over this problem by stating that

> "the press release, together with draft legal acts considered during the meeting of the Governing Council [of the ECB] at which the press release was approved, make known the essential elements of a programme such as that announced in the press release and are as such as to enable the Court to exercise its judicial review."[49]

With respect to the programmes subject to review in *Weiss and Others* the relevant decisions state very clearly the conditions of the programmes such as their temporary scope, their material scope and certain conditions of purchase. This will allow for a more detailed review of proportionality. However, the exact terms of contract in the open market actions of the ESCB members (Article 18 of the ESCB Statutes) do not appear to be known but will be relevant.

In general, however, the criticism can cut both ways, as mentioned. Too much transparency can lead to the fact that a measure designed as monetary intervention will have strong effects on economic policy making. On the other hand, too little transparency as to the reasons and conditions of a measure will cause difficulties in judicial review.

b) Appropriateness

On the basis of deference to the factual assessment of the ECB and its explanations given in and around the press conference leading to the announcement of the OMT programme, the CJEU there finds that under the first leg of the proportionality test, the ECB could reasonably have taken the view that the OMT programme was appropriate to achieve the objectives outlined in the Treaty of conducting a single currency, maintaining price stability in the entire Eurozone and without prejudice to the former also supporting the general economic policies of the Union, especially economic

[49] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400, para 71.

recovery, growth and sound public finances.[50] However, in *Gauweiler* this was undertaken in the context of an emergency measure which presumably would reduce the requirements of documentation and increase the margin of appreciation of facts granted to the institution. In *Weiss and Others* the programmes are more fully documented.

c) Manifestly going beyond what is necessary

The second leg of the proportionality review looks at whether the measure under review, the OMT programme, does not go manifestly beyond what is necessary to achieve the objectives it purposes. This level of review is particularly difficult in the event that it is not even clear at the time of judicial review if and under which exact conditions that measure would be ever implemented. The in-depth discussion of the CJEU of this question shows just how far it is willing to go to humour the GCC in order to fully answer the question posed even in the absence of legally binding detailed information about the possible future act. After all, the object of review is not a legal act but an announcement at a press conference of the fact that the Governing Board of the ECB has decided that in future it may engage in certain activities.

In *Gauweiler* the CJEU required that the conditions discussed in the second aspect of proportionality here require that the bond purchases by the ECB cease as soon as the ECB's objectives have been achieved.[51] However, the determination of this very moment is in the ECB's discretion. This criteria is therefore not a very powerful criteria for limitation and judicial review. The Court also points out that at the time of judgement - two years after the announcement of the programme - it has not been implemented. The announcement as such having been effective to calm the markets therefore seems to have been effective and necessary to achieve the objectives of conducting monetary policy for the single currency, the Euro, in an *ex post facto* analyis. The Court here can use the advantage of hindsight, although the legality of a programme announcement as the that regarding OMT would need to be reviewed as of the moment of its announcement. In *Weiss and Others,* concerning a case of a set of *de facto* implemented programmes, review would have to take place as to the legality of the programme not only at the moment of its initiation, but continuously thereafter.[52]

However, in *Gauweiler,* the CJEU found a different approach: It did not apply the usual formula for the second leg of the proportionality test in balancing decisions or limitations of rights. The more standard approach has been displayed, for example, in *Afton Chemical* where the Court cited a long line of precedent for its formula that "when

[50] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400, paras 72-80.
[51] Case C-62/14 *Gauweiler and Others v Deutscher Bundestag (OMT)* of 16 June 2015, ECLI:EU:C:2015:400, para 82.
[52] See to this effect *Schrems I* CITE FULLY.

there is a choice between several appropriate measures recourse must be had to the least onerous."[53] The notion of 'least onerous' therefore requires a clear definition of the rights in question and of balancing.

In *Gauweiler* the CJEU avoided this formulation. One can only speculate why. One possibility is that this allows to avoid discussing the claim brought forward by the GCC in its decision on preliminary reference that at the end of the day the budgetary rights of the Member States are in question. After all, the reason this might not be the case is a rather problematic one to make in legal terms. The ECB has the power to create money, and thus is most unlikely ever to go bankrupt. Possibly for this reason, the CJEU in *Gauweiler* retreated to the more general formulation used occasionally in pure 'limitation of competence' or with other words 'conferral' questions and cited instead *Association Kokopelli,* a case with a particularly limited reading of the criteria for review of proportionality, as precedent of the formulation of the criteria of proportionality in this case.[54] Interestingly, the CJEU decided thereby actively to reduce its level of review as compared to the AG who in para 177 of his opinion referred to a more onerous second-leg proportionality test by looking for whether "the means used may none the less be excessive if compared with the other options that would have been available to the ECB."[55] In its decision on presenting a preliminary question in *Weiss and Others,* the GCC comes forcefully back to this issue citing both the economic rights of individuals as well as the budgetary powers of the Member State parliaments.[56]

As a result, the Court finds that since the conditions for the OMT programme include strict limitations to objectives pursued and is limited to certain types pf bonds issued by Member States selected on the basis of pre-defined criteria the measure is not manifestly beyond what is necessary to achieve the ECB's monetary policy objectives. *Gauweiler* limited the proportionality review. This might become the most problematic element of the case, and I would predict, would constitute its weakest point. It is a failed opportunity to conduct proportionality review to a degree which would even be convincing to the openly critical GCC. The preliminary reference in *Weiss and Others* takes up exactly this point forcefully.

d) Overall reasonableness

[53] CITE FULLY *Afton Chemical*

[54] See C-59/11 *Association Kokopelli* EU:C:2012:447, para 38. *Kokopelli* concerned a dispute between two seed dealing companies and the question whether seeds varieties not officially registered could be marketed. *Kokopelli* must be considered particularly narrow since the case actually affected rights of individuals which needed to be balanced.

[55] Citing C-331/88 *Fédesa and Others* EU:C:1990:391 para 13 and C-180/00 *Netherlands v Commission* EU:C:2005:451, para 103.

[56] Decision of the German Constitutional Court, Bundesverfassungsgericht of 24 May 2017, 2 BvR 859/15, 1651/15, 2006/15 and 980/16, para 56.

The third leg of the proportionality test, finally, consists of analysing whether the various interests in the case have been overall reasonably weighed up against each other. On the basis of the above discussions both the CJEU and the AG have no difficulties finding that this level of review is complied with. The general question to be asked, which underlies the German concerns in the originating case is what level of cost the monetary union might be worth to them. That would appear to be a question which is quite unsuitable for litigation and for a court to decide. Accordingly, the discussion is short on this matter in *Gauweiler*.

The same will most likely be the case in *Weiss and Others*. Despite the pharanoic dimensions of the EAPP and the PSPP which by May 2017 had reached € 1,8 trillion roughly the equivalent of Italy's annual GDP (or over 10% of the EU28 annual GDP), the *ex post* review shows so far, that price stability has been maintained and the economy in the EU is growing and public finances in the Member States seem to have stabilized. Thus it is difficult to find that in judicial review a comparison between means and ends is a manifest imbalance would be found – despite valid intellectual debates about the effects and the merits of the programmes.

F What do we learn from disputes such as Gauweiler *and soon* Weiss and Others*?*

The legal framework of EU economic policy of the EU is in the process of continuous transformation. The economic and financial crisis of the years after 2008 have been catalytic for accelerating integration. But some of these measures have gone deeper than simply strengthening the previous policy framework and have changed the details of the EMU roadmap both from an institutional and constitutional perspective. Monetary policy excised in the ESCB's specific structure of de-centralised Union administration is a case study of a highly integrated agency regime which no other EU policy area has reached. At the same time, EU monetary policy has become an exemplary field to study the independence of agencies, the powerful role which specific expertise is given in defining a highly relevant and specifically framed objective: that of guaranteeing price stability. This precisely defined policy goal shall be exercised where possible in the context of maintaining price stability to contribute to the 'general economic policies in the Union'. It is thus a technical objective which should be exercised also in the context of politically defined goals. Therefore, the administration of the Union's monetary policy is highly political administration.

However despite the many specific features, this area also presents itself as an area of study with a wealth of examples for many of the general characteristics and the problems of the fast evolving Union administrative law.[57] One of the reasons for this is that normally, monetary and economic policies are quite well hidden away in the bowls of the state. Lawyers rarely venture into this field of high technical expertise and highly independent agencies. If at all, public law instruments of control of central banks are often centred on anticipatory modes of control through nomination of key personnel such as the central bank's president. *Ex post* tools of review and accountability often are in the form of auditing reports and parliament hearings in which central bankers need to justify their decisions.

In the EU, this generally well hidden area has been brought to the broad light of day by the Treaty of Maastricht and Lisbon's distribution of powers concerning EMU along the various multiple levels of governance. Monetary policy was fully centralised in the ECB, economic policy largely remained in the hands of the Member States. This distinction proved to be an impossible approach and so since 2008 in a series of international agreements and EU legislation, economic policy has been brought into the realm of the executive branches of Member States coordinating on an intergovernmental level and the EU Commission. In view of this, the ECB is supposed to exercise its objective of maintaining price stability whilst nonetheless supporting the economic policy objectives formulated in within the EMU. In doing so, however, it has to navigate the particular, and one might add as the 2008 crises has shown, quite possibly over-optimistic or even naïve, hope that the 'invisible hand' of market pressures will lead to a fully-fledged coordination of growth oriented economic policies of the Euro Member States. Instead, the ECB finds itself in a situation where it has to define monetary policy in view of markets, which can over- or under-price certain risks. Speculation is a strong force in creating prices. In that situation, the ECB had announced its OMT programme and put into place the EAPP and PSPP programmes. The objectives were to counteract against speculation detrimental to the existence of a single monetary policy, strengthen monetary stability and overall budgetary stability in the Member States.

In view of this, at the end of the day, the disputes before the GCC arose from the fear that the German Parliament having the ultimate budgetary rights in Germany, would be exposed to undefined financial liabilities resulting from ECB action on bond markets trying to stem speculation and maintain the unity of the Eurozone. The fear was that by buying bonds, the ECB would actually risk bankruptcy itself and thus in need of being bailed out by its shareholders – the national central banks.

[57] Herwig C.H. Hofmann, Gerard C. Rowe, Alexander H. Türk, *Administrative Law and Policy of the European Union,* Oxford University Press (Oxford 2011), 18.

Also, the fear was that the ECB would indirectly engage in monetary financing of state budgets in that it would buy government bonds by circumventing the prohibition of monetary financing of budgets in Article 123(2) TFEU.

The disputes however also show that it is difficult to maintain a clear distinction between monetary and economic policy. The EMU's structure of strict distinction is a shimera. It limits both the monetary as well as the economic policy options of the EU and the Member States. Instead of classic neo-functionalist spill-over effects, the ECB is left in a situation fighting against speculation-based attempts at roll-backs of integration and very different interpretations of good public budgetary policy.

With respect to the possibilities of judicial review of the actions of central banks, *Gauweiler* marks a big step towards developing accountability in legal terms whilst respecting technical expertise and the discretion which has been conferred on the ECB in order to back that up. The key instrument in EU law to navigate the treacherous waters of ensuring legality and accountability of acts on one hand and protecting discretionary power has consisted in fine-tuning the review under proportionality. The CJEU takes the right steps to submit ECB action to the proportionality test. But much needs to be done to better develop the criteria of proportionality whose exact application remains in a state of flux. Just by comparing the precedents the CJEU and the AG rely on in definition of their proportionality criteria makes clear, how much work needs to be done in this context. *Weiss and Others* will be the test-case revisiting these matters.

The approaches of the CJEU to review of extensive executive discretion in the field of monetary and economic policies in *Gauweiler* and *Weiss and Others* will become a central element of discussion in future structures. On December 6th 2017 the Commission proposed a policy plan on the deepening of the EMU.[58] Therein it proposes *inter alia* the creation of a European Monetary Fund (EMF). The EMF would build on the European Stability Mechanism (ESM), which is an international organisation based in Luxembourg and integrate this into the EU law framework as an EMF. The EMF would thus become a kind of EU agency with a legal basis in a legislative act. The Commission expects that to "strengthened its institutional anchoring" "will help to create new synergies within the EU framework, notably in

[58] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank Further Steps Towards Completing Europe's EMU: A Roadmap of 6 December 2017, COM(2017) 821 final; European Commission, Reflection Paper on the Deepening of the Economic and Monetary Union of 31.5.2017, COM(2017) 291 final.

terms of transparency, legal review and efficiency of the EU's financial resources."[59] It can also contribute to improving the cooperation with the European Commission as well as the latter's oversight functions as well as accountability to the European Parliament."[60] The ESM would thus be an agency with far reaching freedoms and discretionary powers within the EMU, albeit as an agency based on legislative empowerment and not a constitutional mandate as the ECB. The criteria of review established in *Gauweiler* and *Weiss and Others* will become a new EU agency standard. It is noteworthy, that these developments are not limited to the field of the EMU. Also the new Frontex regulation goes beyond classic agency discretion powers and requires robust forms of judicial review to maintain its legitimacy.

Another interesting point which was developed in this case, in response to the pressure exercised by the GCC, is the possibility of review of what generally might be regarded as a 'factual act' as opposed to a legally binding act. The announcement of a programme which was yet to be defined in legally binding acts was submitted to review to answer the question of the GCC. The definition of the degree of sub-elements of the programme was unclear. Therefore, the Court essentially reconfirmed a structure of review for all such not-fully defined types of act, be they factual acts, be they programmes of unclear legal status to be later specified: The single approach to their review is to control the existence of a legal basis, the compliance of the measure with all specifications of the legal basis and, finally, a test as to the compliance of the measure with general principles of EU law, which in all practical terms often means essentially the compliance with the proportionality test.

[59] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank Further Steps Towards Completing Europe's EMU: A Roadmap of 6 December 2017, COM(2017) 821 final, 4.

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