

Constitutive Powers and Justification

The Duty to Give Reasons in EU Monetary Policy

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13.1 THE MANDATE OF THE ECB AND THE LIMITS OF LAW

The withdrawal of monetary policy from the realm of democratic politics is a pillar of the ‘constitution of money’ in the Economic and Monetary Union (EMU).¹ A choice that appeared relatively uncontentious in the early 1990s has become the core of the ECB’s legitimacy conundrum. While monetary policy was never a-political, it has until recently been perceived mostly as such, largely because of the neo-classical politico-economic premises of independence and inflation control that the Maastricht Treaty enshrined. The ECB’s decisions during the EU’s sovereign debt crisis were but part of an evolution of central banking that is in tension with that model.²

The ‘whatever it takes’ of 2012 was both the epitome of a crisis intervention and a first moment of a change that has had a much longer-term duration. The still-called *unconventional* monetary measures continued in place well beyond the heat of the crisis. The second and third moments signal what has been perceived as a radical change in the role of the ECB followed in 2020 and 2021. In 2020, when the Covid pandemic forced an unprecedented freeze of the economy, extraordinary fiscal and monetary stimulus, as much as vaccines, were essential ingredients to recover from economic collapse at the pace of resurgent pandemic waves. The ECB’s pandemic emergency programme (PEPP) was crucial to inject the liquidity desperately needed to prevent further economic meltdown.³ The support of economic policy – the ECB’s secondary mandate – came squarely to the forefront, much beyond the

¹ The ‘constitution of money’ is the title of Chessa, *La Costituzione della Moneta* (Jovene, 2016).

² See, among many, Tooze, ‘The Death of the Central Bank Myth’, *Foreign Policy*, May 13 2020.

³ For a first analysis, see M. Goldmann, ‘Borrowing Time: The ECB’s Pandemic Emergency Purchase Programme’, *VerfBlog*, 2020/3/27, <https://verfassungsblog.de/borrowing-time/>, DOI: 10.17176/20200328-002904-0.

narrow price stability that had been the purview of its monetary policy up to a decade before.⁴ At the time when this emergency action arrived, the ECB was engaged in a major overhaul of its mandate through a strategic review process, which came to an end in 2021. The acute awareness of the world's fragilities, as the climate crisis compounded with a health crisis, made this discussion turn not only on monetary policy objectives in a context of deflation but also on how far the ECB should become an actor for climate protection.⁵ This evolution is part of a larger phenomenon. Decarbonisation, digital transition, and inequality became part of the agendas of central banks, as, throughout the world, governments and central banks considered who has the necessary and most suitable instruments to tackle the political goals of the early twenty-first century.⁶ In the case of the EU, in particular, the ECB has at crucial points stepped in to occupy a space vacated by politics.

This evolution in little less than a decade remains politically contested. Even as central banks re-focused their attention on inflation, it revealed the centrality of central banks in our systems of government. Because it occurred within the unchanged Treaty strictures, the political conflict eventually reached the courts. The judgments of the Court of Justice of the European Union (CJEU) in the cases of *Gauweiler* (2015) and *Weiss* (2019) brought to the foreground fundamental constitutional questions on the vertical allocation of competences between the EU institutions and the Member States (and hence on the very design of the EMU), on the tension between democracy and independent executives but also on the possibilities of judicial and political accountability over an ever-expanding ECB on whose controversial decisions the survival of the euro rested. The disparity between the CJEU's and the German Constitutional Court's position regarding the degree of judicial

⁴ See the Introductory Statement to the Press Conference by Christine Lagarde and Luis de Guindos, following the monetary policy decisions of the Governing Board of 4 June 2020 ('*In line with its mandate, the Governing Council is determined to ensure the necessary degree of monetary accommodation and a smooth transmission of monetary policy across sectors and countries. Accordingly, we decided on a set of monetary policy measures to support the economy during its gradual reopening and to safeguard medium-term price stability.*'), in the aftermath of the *Weiss* ruling of the German Federal Constitutional Court (available at www.ecb.europa.eu/press/pressconf/2020/html/ecb.is200604~b479b8cfff.en.html).

⁵ ECB, 'Climate Change and Monetary Policy in the Euro Area' 271 *ECB Occasional Paper Series* (2021), accessible at www.ecb.europa.eu/pub/pdf/scpops/ecb.op271~36775d43c8.en.pdf, last accessed 4 February 2022. In addition, see, inter alia, Tooze, 'Climate crisis offers way out of monetary orthodoxy' (2021), accessible at <https://socialeurope.eu/climate-crisis-offers-way-out-of-monetary-orthodoxy>, last accessed 3 February 2022.

⁶ For a critical view, King and Katz, 'Central Banks Are Risking Their Independence', *Bloomberg*, August 23rd 2021 (available at www.bloomberg.com/opinion/articles/2021-08-23/central-banks-are-risking-their-independence-mervyn-king-dan-katz).

review, in particular in the case of *Weiss*, stirred the discussion on the limits of law-based accountability. At stake was, in particular, the scope of the principle of proportionality and the justification based on the ECB's duty to give reasons. While both proportionality and reason-giving have a long-standing pedigree in EU law – with regard to the judicial review, both of legislation and of discretionary administrative action – and are formally applicable to all actions of the EU institutions, both strictures treaded on uncertain ground when applied to monetary policy measures with salient economic policy implications.

These difficulties manifestly opened fundamental questions, pertaining not only to the role of courts and of their instruments of review in relation to monetary policy, but also, and more deeply, to the role of law in the government of money. Just like other EU bodies, the ECB interprets its mandate and makes policy choices when exercising discretion. From this perspective, it presumably should be subject to control through the public law principles that have become a cornerstone of the EU's administrative rule of law.⁷ But, unlike fields where judicial review is unquestioned and courts have progressively refined their techniques of control, the ECB operates in a sensitive policy field and displays a momentous power that diffusely and indirectly touches virtually every household and business (without mentioning the external aspects of its action). Due to the interaction between monetary and fiscal policy, its measures touch on the core of political decisions that in democracies are the premise of politically accountable governments and are largely outside the purview of courts (not least for reasons of standing).⁸ In these conditions, can law support political accountability, irrespective of concrete instances of judicial review? While this question is posed here in relation to monetary policy and to the ECB's evolving role, it has a broader relevance. How law operates in relation to executive bodies should not be limited to its judicial enforcement, not least because of the political stakes involved in the interpretation of the law when it comes to the delimitation of competences in the EU legal order.

This chapter addresses this question by analysing the functions of the duty to give reasons in relation to the powers of the ECB. It starts by characterising the ECB's powers as a specific instance of constitutive powers. Constitutive powers are not a prerogative of the ECB, but given its *potentia* as holder of the modes of money creation and the constitutional design of the EMU, they raise particular concerns regarding the legality of its actions (Section 13.2).

⁷ Making that argument in relation to the US Federal Reserve, see Conti-Brown, Listokin, and Parrillo, 'Towards and Administrative Law of Central Banking', 38 *Yale Journal on Regulation* 1 (2021), at p. 4.

⁸ Noting the same in relation to the Federal Reserve, *idem*.

The constitutive character of the ECB's powers explains the conundrum of the degree of judicial review over matters involving monetary policy. The judicial clash in *Weiss* on the role of courts in relation to the actions of the ECB shows that both full and limited review are, for different reasons, untenable or, at least, the CJEU and the FCC judgments confirm the limited role of courts in ascertaining the law in matters of monetary policy, irrespective of the degree of judicial review they chose to apply (Section 13.3). The existence of constitutive powers and, in particular, the specific circumstances that turned the constitutive powers of the ECB into a virtually intractable constitutional challenge postulate a shift in understanding the role of law in relation to the action of executive bodies. The legal and constitutional scope of the duty to give reasons in EU law will demonstrate that law can and must operate in the absence (or irrespective) of judicial review (Section 13.4). In particular, this perspective shows that the duty to give reasons, in its legal and constitutional vein, can support political accountability of the ECB's actions, substantively and not only procedurally. The chapter concludes by situating the limited relevance of the path proposed here to the democratisation of the government of money in the EU (Section 13.5).

13.2 THE ECB'S DISTINCT CONSTITUTIVE POWERS

13.2.1 *The Constitutional Question and What Lies Beneath*

The debate on the legality of quantitative easing (QE) was mostly motivated by the economic implications of this type of instruments. There lies the dividing line between considering the QE ECB programmes as still being part of its monetary policy mandate or, on the contrary, falling under the realm of economic policy, in relation to which the ECB has only a supporting role.⁹ The vertical allocation of powers defined in the Treaty turned a political-economic discussion over the characteristics of monetary policy programmes into a fundamental constitutional question with profound consequences. Far from being only a matter of legality, the delimitation of competences squarely put the finger on the structural flaws of the EMU (specifically on the lack of a fiscal union), as well as on the limits of the model of central bank independence, the degree of which is inversely proportional to the scope of central bank mandates.¹⁰

⁹ See Case C-62/14 *Gauweiler* EU:C:2015:400 and Case C-493/17, *Weiss*, EU:C:2018:1000.

¹⁰ See, inter alia, Leaman, *The Bundesbank Myth: Towards a Critique of Central Bank Independence* (Palgrave Macmillan, 2001).

The democratic implications of the interplay between monetary policy and fiscal (economic) policy – the first assigned to a supranational independent institution double-removed from democratic politics, the second, to Member States' governments – make the delimitation of the ECB's competence a particularly pressing constitutional question. The EMU constitutional framework combined with the politico-economic significance of quantitative easing as a mode of money creation makes this a fundamental political issue where the boundaries of democratic politics are at stake.

But lurking beneath the discussion on the limits of the ECB's mandate is also the broader question of the role of law in structuring and controlling the powers of executive bodies which are either independent or placed at arms-length from democratic politics. The interplay between law and administration in contemporary politics is perhaps less dramatic than the pressing questions facing the ECB, and the spectacular clash between two high courts over the boundaries of monetary policy and on how to review them. Yet, it is equally significant to understand, first, whether key public law assumptions hold in policy areas where administrative institutions shape today's societies and, second, to devise solutions for the flaws of current institutional designs and for suitable judicial and political accountability.

13.2.2 *A Functional Analysis of the ECB's Powers*

Setting for now aside the constitutional and political specificities of monetary policy and of the ECB's institutional setting, its powers have the following functional characteristics in common with other executive bodies: first, its mandate (whether narrowly or broadly interpreted) requires it to act in situations of uncertainty, reacting to the information that it collects and analyses, with a view to defining the best course of action on the basis of prognostic assessments that only the ECB/ECSB is both technically and legally competent to undertake; second, its decisions involve arbitrating between competing interests (that the conflicting objectives within its mandate mobilise), as well as assessing the effectiveness of the public action that, while taken by other institutions, can impact on the goals of its measures;¹¹ third, its mandate is delimited and concretised by resorting to open-textured norms whose meaning depends on the interpretation of evaluative and goal-oriented terms, and varies according both to the specific contexts in which the ECB needs to act and to the prevailing (even if contentious) perceptions of what the scope and

¹¹ In the case of monetary policy, these other institutions are national governments conducting fiscal policies and the agencies competent in related policy fields.

direction of its actions should be; and fourth, the long-term effects of its decisions will be fundamental for its credibility.

These characteristics give the ECB constitutive powers.¹² Constitutive powers entail a circular and reflexive process between law application and law creation: legal norms define the mandates of executive and administrative bodies, but the meaning of those norms is determined through the action of those bodies; at the same time, the public interests that those bodies are meant to protect only come to bear through that very same action. Constitutive powers do not exist without the legal norms which executive and administrative bodies interpret and which allow them to exercise discretion. Yet, two factors, in particular, blur the distinction between interpretation and discretion in these instances and, therefore, break down the boundaries between law creation and law application. First, the executive or administrative body produces or catalyses the knowledge that is needed to interpret the norm. The intricate relationship between, on the one hand, the concepts that the legal norm uses to delimit the administrative and, on the other, the complex facts that the norm regulates,¹³ makes the interpretation of the norm depend on the specification of technical terms and, hence, on the factual assessments that the administrative body was set up to make. It is the technical competence of the executive or administrative body that justifies the legal competence that it is given, within the constraints of a mandate that is both constitutionally and politically conditioned. Second, the attribution of meaning presupposes an understanding of the concrete aims of executive action and of how a particular factual situation may challenge those aims. Defining the meaning of the norm (e.g. price stability) is intertwined with shared normative understandings on what the role of that body should be in reaction to socio-economic and political realities and perceived needs of public action (e.g. what in each period price stability entails and how it can be articulated with other public policy objectives). Such definition of meaning has two intertwined effects. It generates and stabilises normative expectations (e.g. defining what is price stability sets the terms of what will be considered legally compliant measures). It gives existence to the public interests that delimit the legal mandate and that justify the existence of the administrative institution, and of its powers

¹² They were outlined in Mendes, 'Constitutive Powers of Executive Bodies: A Functional Analysis of the Single Resolution Board', 84 *The Modern Law Review* 6 (2021), 1330–1359, which also defines constitutive powers as characterised in this paragraph.

¹³ Sand, 'Hybrid Law – Law in a Global Society of Differentiation and Change', in Calliess, Fischer-Lescano, Wielsch and Zumbansen (eds.), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag* (Berlin: De Gruyter, 2009) 871–886, at 879–880, noting that 'law and politics become increasingly dependent on the semantics of the specialised areas they regulate' (at 886).

and instruments of action (e.g. price stability is also the public interest that the ECB needs to protect and achieve). Given their indeterminacy, these public interests only come into being retrospectively, through administrative action (e.g. price stability only becomes tangible through the action of the ECB). Ultimately, by acting, the administrative institution construes the legal norms that also ground what they may lawfully do.

Constitutive powers are not a prerogative of the ECB. These can arise in the conditions set out above, which apply to other administrative entities with rather different institutional characteristics and constitutional constraints.¹⁴ They acquire, however, a specific dimension in the case of the ECB, as will be seen in more detail below, and shed light on the difficulties of judicial review. They are also relevant for the discussion over the distinction between the *existence* and the *exercise* of a competence, which stemmed from the contrasting *Weiss* judgments of the CJEU and of Germany's Federal Constitutional Court (FCC) on proportionality. In fact, this controversy brought to light the constitutive nature of the ECB's powers. One of the many points of criticism directed against the FCC judgment in *Weiss* was that it applied wrongly the principle of proportionality, not only because of its self-referential way of approaching proportionality and of a misplaced degree of judicial review but also because, according to the Treaty, a proportionality assessment of competences only pertains to their exercise, not to their existence.¹⁵ That is indeed what stems from Article 5(4) TEU, but – as others have also pointed out – the mandate of the ECB is such that can be delimited only through its action, that is, through the exercise of competence.¹⁶ Its constitutive powers mean that it construes the legal norms that also ground what it may lawfully do. The distinction between the *existence* and the *exercise* of a competence then breaks down.

13.2.3 *The Blurred Boundaries of Legality*

It follows from the above that the ECB is deciding on the scope of its mandate and, hence, it *is deciding* on its own competences. The FCC was, therefore, accurate in its diagnosis.¹⁷ But it pointed at the wrong causes. The ECB's

¹⁴ As demonstrated in Mendes, *supra*, note 12.

¹⁵ See, among others, Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception', 21 *German Law Journal* 5 (2020), 979–994.

¹⁶ Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: *Gauweiler*', 53 *Common Market Law Review* 1 (2016), 139–196. See also Bóbcie in this volume.

¹⁷ Albeit not autonomously, contrary to what the FCC claimed: German Federal Constitution Court (FCC) BverfG, Judgment of the Second Senate of 5 May 2020–2 BvR 859/15, para 134 and 136.

actions are jurisgenerative not for lack of suitable judicial review of its actions (though there is certainly room to criticise the CJEU in this regard).¹⁸ They are jurisgenerative because of the functional nature of their powers in the conditions in which they must be exercised.¹⁹ For this reason, the existence of constitutive powers is not a pathology that must be corrected. But that does not mean that it is unproblematic.

Constitutive powers denote a fundamental tension within the very structure of constitutional democracies, which attribute to law a quality which it cannot have (or that it can only imperfectly achieve) in the circumstances in which central banks (and other administrative institutions) act: the ability to contain and constrain substantively the future-oriented powers of administrative entities acting in conditions of technical and political complexity and uncertainty. As the characterisation of constitutive powers indicates, this does not mean that law is meaningless. As mentioned, these public powers can only exist because the law provides for their existence: constitutive powers presuppose the very legal norms whose meaning executive bodies get to define. But, in a fundamental way, law does not have the capacity to contain and constrain their exercise as the rule of law strictures prescribe. For the same reason, but from a different perspective, also the role that economists attribute to rules in the debate between rules-based and discretionary monetary policy – in which the former is linked to the defence of a narrow mandate of independent central banks and the latter is held to be incompatible with this model role of central banking – is misleading. And, yet, the characterisation of the ECB's mandate along the model of a rules-based monetary policy continues to underpin the ECB's constitutional status of independence.

None of the above means, however, that legal substantive strictures are irrelevant to ascertain whether the ECB (or other bodies whose powers have the same functional characteristics) has acted within or outside its mandate. If constitutive powers only exist because legal norms can lawfully authorise their holders to act, legal norms must, to some extent at least, structure the way in which meaning will be given.²⁰ The concept of

¹⁸ See below.

¹⁹ Insofar as the conditions for the emergence of constitutive powers are linked to their functional nature, they raise similar problems to those elicited by de-politisation through knowledge-based institutions (M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', 21 *European Law Journal* 5 (2015), 572–598), and to the EU's purposive competences (G. Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence', 21 *European Law Journal* 1 (2015), 2–22). I am grateful to Mark Dawson for raising this point.

²⁰ In this sense, they are constituted powers (see, further, Mendes, note 12 above).

constitutive powers points, rather, to the concrete nature of the law that governs administrative and executive actions in the areas where they emerge. This law varies according to normative understandings of problem definition and on adequate responses generated in institutional settings where abiding by legal norms merges with the need to ensure the social acceptance of the interpretations and solutions that the administration adopts.²¹ Without those normative understandings, which the administrative bodies translate into legal forms, legal norms would be inoperative. So, as much as a specific conception of the relationship between monetary and fiscal policy has underpinned the current Treaty framework and the norms that delimit the mandate of the ECB, also a different understanding of that relationship has enabled the ECB to claim – and the CJEU to ascertain – that its quantitative easing programmes are within its mandate of price stability. That such understandings are contested is something that the *Weiss* saga (as much as the *Gauweiler* judgments before) has clearly revealed to the legal world. But, in the specific circumstances in which it acted, that contestation did not prevent the ECB from acting according to the normative understandings that formed in its institutional environment in relation to the meaning and scope of monetary policy. It is noteworthy that this process is deeper and more complex from the often too easy criticism of competence creep. As much as constitutive powers may lead to expansive interpretations of the scope of an entity's mandate – as was the case with the ECB – they can be constitutive in exactly the opposite sense.²² As I will explain next, the empowerment of the ECB does not necessarily follow from its constitutive powers.

13.2.4 A Distinct Instance of Constitutive Powers

Constitutive powers point to a relationship between law and administrative power that is different from accepted conceptions on the role of law in liberal democratic polities (a direction that requires further inquiry as to its legal and normative implications). Characterising the powers of the ECB as an instance of constitutive powers arguably helps approach in a more accurate way the question of the legality of its action. Yet, this proposed angle of analysis must not overshadow what is distinctive about the ECB's powers and their evolution.

²¹ This specific confluence is noted in Rosanvallon, *La légitimité démocratique. Impartialité, réflexivité, proximité* (Paris: Seuil, 2008), 19–20.

²² That is the case of the SRB, as argued in Mendes, note 12 above.

The ECB has the ability to control the means of money creation and to influence fundamentally the fiscal policy decisions of elected governments (as any central bank, given the interrelation between monetary and fiscal policy). This immense political power (in the sense of *potentia*) sets it apart from other administrative institutions. Compounded with constitutive powers, this trait manifestly makes it an excessively powerful institution and can only be constitutionally justified – if at all – if those powers can be subject to suitable forms of control. Its *potentia* allowed it to engage in an expansion of its mandate unimaginable when the ECB was set up in 1992.²³ In the political-economic context of the 2010s and in the very first years of the 2020s, the constitutive nature of its powers meant an unparalleled expansion of its monetary policy mandate, following an interpretation of its role, which at first it took on hesitantly, in the midst of the sovereign debt crisis (with the political support of national governments sitting in the Council), and is in the process of consolidating as a settled way of approaching its mandate. This is not the place to retell this story.²⁴ It is, however, important to underline, that the empowerment that the ECB has witnessed in the last decade is not a necessary consequence of the existence of constitutive powers.

That empowerment was only possible because of a complex combination of different economic and political circumstances that, while part of a broader change in central banking, raise specific constitutional and political difficulties in the EMU.²⁵ The very assessment of the legality or illegality of the ECB's quantitative easing programmes – whether they are still in the realm of monetary policy (whether legitimately or illegitimately) or, on the contrary, make illegal (and illegitimate) inroads into economic policy – is politically loaded (as the political curricula of some of the plaintiffs in *Gauweiler* and *Weiss* clearly show). Claiming, for instance, that – while the ECB's QE programmes were justified in the aftermath of the sovereign debt crisis and, hence, could be legally upheld as such – as soon as conditions of normality would be reached, the ECB needed to retreat to the narrow monetary policy mandate that it had pursued prior to the crisis, lest it being in breach of the Treaty, is entering a political battlefield. Here, legality is but one factor in a politico-economic (and also geo-strategic) discussion that touches on the very terms in which the EMU could be created in 1992.

²³ On the distinction between *potentia* and *potestas*, see Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 164–171.

²⁴ See, inter alia, Borger, *The Currency of Solidarity: Constitutional Transformation During the Euro Crisis* (Cambridge: Cambridge University Press, 2020).

²⁵ See, further, Tooze, *supra*, note 2.

That was the battlefield that the CJEU entered – almost inadvertently, it seems – with its *Weiss* judgment of 2019.²⁶ The legal dispute over the ECB’s mandate reflects the fundamental mismatch between the ‘new ECB’ and the political-economic premises that underlie the Treaty’s EMU rules.²⁷ Albeit not always explicitly, this is the background of the different conceptions of the ECB’s normative role within the EMU, and of the boundaries of monetary policy, part of the ongoing debate that heated up considerably after the FCC’s *Weiss* judgment in May 2020. The terms of the relationship between the two limbs of the ECB’s mandate – the extent to which they are in tension, what the meaning and extent of ‘support’ may be and, hence, the degree of permissible economic intervention – depends largely on which political economy theory one advocates and on how the very design of the ECB mandate meant endorsing a specific political-economic conception of monetary policy (monetarism) and the rejection of another (Keynesianism). That, in turn, impacts on the ECB’s independence and how it can be justified (or not) as democratically legitimate.²⁸ This background and the combination of constitutive powers and the political power (*potentia*) of the ECB account for much of the difficulties in finding a suitable degree of judicial review of the ECB’s monetary policy, beyond the principled arguments that can be drawn from its technical expertise and its institutionally safeguarded independence.

13.3 THE DEGREE OF JUDICIAL REVIEW OF MONETARY POLICY: A VIRTUALLY UNRESOLVABLE CONUNDRUM?

Monetary policy is an area where few would expect judicial review, or at least that judicial review could have an impactful role. It touches on core aspects of how a society is organised, not least because it conditions how constitutionally protected public goods and fundamental rights can be delivered. Yet, the impact of monetary policy measures is ‘generalised and indirect’, which,

²⁶ The judgment shows little if any awareness of the fundamental difference between *Gauweiler* – adjudicating measure announced in the height of a crisis as an emergency solution – and *Weiss* – whose object is a quantitative easing measure adopted in circumstances of normality.

²⁷ The term ‘new ECB’ is taken from Beukers, ‘The New ECB and its Relationship with the Member States of the Euro Area: Between Central Bank Independence and Central Bank Intervention’, 50 *Common Market Law Review* (2013), 1579–1620.

²⁸ See, among others, Chessa, *La Costituzione della Moneta* (Jovene, 2016) (showing how the ECB mandate meant casting away Keynesianism as a political-economic paradigm); de Boer and van’t Klooster, ‘The ECB, the Courts, and the Issue of Democratic Legitimacy after *Weiss*’, 57 *Common Market Law Review* 6 (2020), 1693–1710; M. Dani et al., ‘It’s the Political Economy...! A Moment of Truth for the Eurozone and the EU’, 19 *ICON* 1 (2021), 309–327.

in principle, precludes individual standing;²⁹ in addition, their institutional setting – entrusted to an independent central bank vertically detached from economic policies of Member States, and subject to very limited accountability by the EU and national parliaments – arguably makes direct litigation by institutional actors unlikely. In an article analysing the role of administrative law in relation to the US Federal Reserve, the authors noted the ‘rarity of Fed litigation’ and rightly pointed out that this is also a ‘testament to the Fed’s nearly unique power and autonomy’.³⁰

However, like any other area where public authority is exercised, with the limited exception of *actes de gouvernement*, the possibility of judicial review is a tenet of the rule of law. In the EU, its significance is deeper. The structural principle of attributed competences makes the possibility of judicial review for the respect of the boundaries of the institutions’ competences (*ultra vires*), in particular, a cornerstone of the whole EU construction. Of course, *how* that review is conducted matters to define the extent to which the Court will be having a say on how law can be deployed to delimit the powers that law conveys. In the case of monetary policy, behind the law stands not only the relative scope of action of Member States and of the EU institutions (the ECB and the Council coordinating economic policy) but also the tenability of the economists’ rules-bound-view on monetary policy that underpins the mandate of the independent ECB. Such a view presumes that the ECB’s monetary policy be kept strictly bound by economically defined yardsticks, poured into legal norms.³¹

13.3.1 *Neither Intrusion nor Deference: The Legal Implications of Full and of Limited Review in Weiss*

On the intensity of judicial review over the ECB’s actions, the two courts’ rulings on *Weiss* could possibly not be further apart (a disparity that the judgments in *Gauweiler* had already anticipated).³² Like other aspects of the judicial dispute,

²⁹ Conti-Brown, *supra*, note 7 at p. 5, with reference to the US Federal Reserve.

³⁰ *Idem*, *ibidem*.

³¹ According to the monetarist paradigm, the narrow legal mandate of the independent ECB confines it to price stability and makes this solution compatible with democratic legitimacy (which stems from the Treaty rules that delimit its authorisation to act); should there be the need for policing the boundaries of that mandate, another independent institution is there to make sure that rules are abided by, without interference from democratic politics.

³² Cf. *Gauweiler*, *supra*, note 9 and German Federal Constitution Court (FCC) BverfG, Judgment of the Second Senate of 21 June 2016 – 2 BvR 2728/13. On the degree of judicial review, see, among others, Goldmann, ‘Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review’, 15 *German Law Journal* 265 (2014).

these differences have been extensively noted in the literature.³³ I take them up here again only to the extent necessary to illustrate the conundrum of judicial review in these matters; that will also point out the weaknesses of the critique addressed to the FCC's position and of the praise that the CJEU's judgment got.

The FCC applied what most commentators considered to be a too-stringent gauge incompatible with the discretion that a central bank must have in monetary policy. It did so by drawing on the principle of proportionality and by requiring that its third limb (proportionality *stricto sensu*) be applied to ascertain whether the limits of the ECB's monetary policy mandate had been breached.³⁴ In this way, on the one hand, the FCC took the consequences from the premises of the monetarist paradigm that the EMU rules enshrined, as it insisted that the ECB's narrow mandate be upheld as a matter of law and of democratic legitimacy.³⁵ On the other, it departed from that paradigm, because it demanded that the 'economic and social policy effects' of the ECB's measures, including the impact that 'a programme for the purchase of government bonds has on, for example, public debt, personal savings, pension and retirement schemes, real estate prices and the keeping afloat of economically unviable companies' be weighed 'against the monetary policy objective that the programme aims to achieve and is capable of achieving'.³⁶ Having found that the ECB had not proceeded in this way, it required that it conduct a proportionality assessment and demonstrate that the economic effects of its measures were not disproportionate. This outcome resulted in a difficult compromise between exercising full judicial review, which the FCC held necessary, and, at the same time, giving sufficient leeway to the scope of monetary policy decisions.³⁷ (Dis)proportionate to what exactly is something

³³ See, among many others, de Boer and van't Klooster, *supra*, note 28 above, 1710–1721. The different degrees of judicial review applied by both courts stem from the different premises of their reasoning regarding the delimitation of the ECB's mandate and its institutional position (the CJEU emphasised its independence, the FCC its diminished democratic legitimacy).

³⁴ FCC, Weiss, para 165, 173, 176 and 179. On why this is doctrinally problematic, see Feichtner, 'The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe', 21 *German Law Journal* 5 (2020), 1097–1098; Marzal, 'Is the BVerfG PSPP Decision "Simply Not Comprehensible"', *VerfBlog* (2020), <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/>; M. Wendel 'Paradoxes of 'Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' 21 *German Law Journal* 5 (2020), 979–994.

³⁵ For a critique on how the defence of legality became a matter of democracy and can be an obstruction to democracy, see Feichtner, *idem*.

³⁶ FCC, Weiss, para 139. On how this departs from the monetarist paradigm, see de Boer and van't Klooster, *supra*, note 28, at p. 1717.

³⁷ FCC, Weiss, para 235. The ECB would act as a result of the German constitutional organs exercising their duty of monitoring the decisions of the Eurosystem, through their oversight of the Bundesbank participation therein (para 232 and 233).

that was not immediately clear (even if the judgment gave some hints in this regard).³⁸ The ECB needed in any event to ‘[identify], [weigh] and [balance] against one another’ the monetary policy objective of its programme and its economic policy effects.³⁹ In the plentiful commentary that ensued after May 2020, very few agreed with the FCC’s contention that full judicial review was due. Most pointed out that such a degree of review constrains the ECB to a specific way of acting and limits unduly the discretion that the Treaty gives it. The principle of proportionality, applied as the FCC requires, postulates a clear identification of the conflicting positions that must be weighed, something that is not possible in monetary policy.⁴⁰

Be that as it may, the ‘elephant in the room’, when the discretion of the ECB is invoked in relation to the limits to judicial review, is what the ECB’s discretion implies. Weighing different monetary policy alternatives in view of their economic policy effects is *not* a process that can be delimited by legal norms that identify the public interests to be protected or that specify thresholds of protection. It is a policy-making process where what price stability is and what it requires is defined at each point by the ECB itself (in coordination with political actors) and where various alternatives are open-ended. The lack of a concrete conflict prevents a balancing process that the full application of proportionality requires.⁴¹ This argument has deeper consequences. The presumption that the legal norms could operate in this field and limit public authority as they do in other areas of public law does not hold. Or, put differently, to assume that the Treaty norms can constrain the policy process that the ECB must undertake – that is, that monetary policy can be rules-based as the monetarist paradigm presumes – necessarily restricts the ECB’s scope of action in circumstances different from those that the Treaty framework envisaged. Indeed, proportionality is much more than a legal principle structuring the way to reach an outcome lawfully. How the FCC applied it presumes

³⁸ The interests voiced in the procedure by the litigants and the experts heard (see de Boer and van’t Klooster, n 27 above, 1720) sought to preserve the political-economic model that the Treaty enshrines. Preservation of the status quo means also maintaining the powers imbalances that it crystallises (see Feichtner, *supra*, note 34 above, at p. 1094).

³⁹ FCC, Weiss, para 165.

⁴⁰ Egidy, ‘Proportionality and Procedure of Monetary Policy’, 19 *International Journal of Constitutional Law* 1 (2021), 292–293, arguing (rightly) that the technique applied in fundamental rights’ protection to identify disproportionate limitations can hardly be applied to force the consideration of alternative measures concerning competing public interests that are difficult to pin down. Pointing also to a misapplication of fundamental rights jurisprudence to matters of monetary and economic policy, Feichtner, *supra*, note 34, 1097.

⁴¹ Feichtner, *idem*, *ibid.*, showing the difficulties in applying a proportionality test to determine the scope of the ECB’s competences; and Egidy, *supra* note 40, 293. Egidy sees nevertheless the scope for the application of proportionality to monetary policy (294–296).

that it is both possible and legally needed to hold on to the limits that the monetarist paradigm of monetary policy determines and that are specified in the Treaty.⁴²

From the opposite perspective to the one the FCC endorsed – that is, for those who defend that courts should not have a role in matters of monetary policy – the very existence of judicial review ‘qualifies as bold judicial law-making’ of the type that exceeds the boundaries of the judiciary function.⁴³ The fact that the CJEU is confronted with the need to adjudicate on such matters justifies *the* deferential approach to the ECB’s exercise of discretion that the Court endorsed. Commentators were almost unanimous in this regard.⁴⁴ The two arguments invoked are, in the case of the ECB, overlapping and circular: the legal and technical competence of the ECB and its independence, which the Court must respect. The comparative advantage of the ECB’s expertise is obviously uncontested. But this is a weak argument if not accompanied by a specification of what is special about monetary policy that prevents a more intense judicial review, for lack of expertise, which is possible in other areas where the Court also lacks expertise (where the correct interpretation of the law requires the Court to define, for example, if what financial stability requires in conditions of uncertainty falls within the mandate of the EU financial agencies or of its Single Resolution Board).⁴⁵ Independence and the way the Court had already delimited the boundaries of the ECB’s mandate (by reference to the objectives and to the tools of monetary policy, in *Pringle* and *Gauweiler*) come to the rescue. Judicial review is necessarily limited because it cannot impinge on the Treaty-protected independence of the ECB; furthermore, as the Court had also already established in *Gauweiler* and in *Pringle*, foreseeable indirect economic effects of monetary policy do not affect the classification of a measure as monetary. The Treaty norms and the Court’s case law, therefore, settle the issue of the degree of judicial review: deferential review limited to verifying whether manifest errors of assessment were committed (or, more specifically, *the* deference that the Court applied) is the only possible way of controlling the legality of the ECB’s action. That is consonant with the need to preserve the space of manoeuvre that the ECB

⁴² See, further, Dani et al. *supra* note 28.

⁴³ Mayer, ‘The Ultra Vires Ruling: Deconstructing the German Federal Constitutional Court’s PSPP Decision of 5 May 2020’, 16 *European Constitutional Law Review* (2020), 733–769, at p. 752, noting that ‘this ... is a step which the Federal Constitutional Court was never prepared to take in relation to the Bundesbank. There is no case of judicial review of Bundesbank action’.

⁴⁴ See, however, Dani et al. *supra*, note 28.

⁴⁵ On those specificities, in relation to the difficulties of applying the principle of proportionality, see Egidy, *supra*, note 40.

must have to adapt its instruments to varying circumstances.⁴⁶ In this reading, the Court suitably attuned the application of proportionality to how it can operate in an area of limited judicial review, in accordance with its standard of review in instances of discretion.⁴⁷ The Court was, therefore, right in holding that ‘nothing more can be required of the European System of Central Banks (ESCB) apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy’.⁴⁸

This position, however, fails to acknowledge that the way the CJEU reviewed the ECB’s programmes, in light of its discretion means *de facto* a blanket authorisation to the ECB that only gives legal anchoring to its *potentia*. The lack of clarity of what are the interests that must be put in proportion in a proportionality assessment does not only taint the third limb of proportionality that the FCC wrongly applied to an exercise of a competence and that the CJEU rightly omitted from its judgment.⁴⁹ It turns proportionality into a ‘free-standing ground of review’ that obfuscates what the Court is doing when applying this principle. ‘Free-standing ground of review’ – a term coined by Kosta – allows the Court to invoke the principle without actually conducting a proportionality assessment, because it does not balance conflicting interests.⁵⁰ That was the critique of the FCC to the CJEU’s *Weiss* judgment, when pointing out the difficulty in identifying which opposing interests the CJEU had considered and weighed.⁵¹ More than applying low-intensity review, the judgment meant an outright deferral to the economic expertise of the ECB.⁵² In fact, what the CJEU allowed for was what the FCC had already critiqued in its *Gauweiler* judgment in 2016: it enabled the ECB to ‘decide autonomously upon the scope of [its] competences’.⁵³ That much is confirmed by the assumption that when the ECB acts in controversial monetary policy it must only deploy with care and accuracy its *expertise*, which either is implicitly considered to be neutral to the political consequences of its measures, or, at least, necessarily incorporates their economic consequences (however classified).⁵⁴ Combined with the judicial interpretation of the delimitation of monetary policy, the result is that it is

⁴⁶ CJEU, *Weiss*, para 63.

⁴⁷ CJEU, *Weiss*, para 73, 78 and 81 [cite commentaries].

⁴⁸ CJEU, *Weiss*, para 91 (already in *Gauweiler*, para 75).

⁴⁹ But see, above, text accompanying note 16.

⁵⁰ Kosta, ‘The Principle of Proportionality in EU Law: An Interest-Based Taxonomy’, in Mendes (ed.), *EU Executive Discretion and the Limits of Law* (OUP, 2019) 198, 213–219, arguing that this was what happened in *Gauweiler* (idem, 215–218).

⁵¹ FCC, *Weiss*, 132.

⁵² As argued in Dani et al., *supra*, note 28, at p. 319.

⁵³ FCC, *Weiss*, para 134, citing its *Gauweiler* judgment of 21 June 2016, para 136.

⁵⁴ CJEU, *Weiss*, para 91.

virtually impossible to judicially prevent possible abuses of law by the ECB.⁵⁵ Ultimately, we are before an instance of judicial abdication.⁵⁶

13.3.2 *Beyond the Semblance of Judicial Review*

When applied to monetary policy, both full and limited reviews have difficulties that ultimately make them untenable. The judgment showed, thereby, the weaknesses of judicial accountability in this field. In very different ways, both degrees of review amounted only to a semblance of judicial review (as much as this critique appears counter-intuitive when applied to the FCC's judgment).⁵⁷ At the risk of oversimplifying the intricacies of both judgments, their result in terms of a court's ability to control the action of a central bank is comparable. They both acted as if their arguments and tools of review could constrain the actions of the ECB to patterns of legality that, at the end, are defined by the ECB itself, given its constitutive powers.

The CJEU sanctioned the 'whatever it takes' famously pronounced by Draghi in 2012. It had done so in *Gauweiler* and took the same position, in very different circumstances – and less comprehensibly – in *Weiss*, when the programme under scrutiny was not a response to an emergency. The FCC, in turn, ultimately took a decision that, as mentioned above, was, at best, an awkward compromise between stringent review and needed leeway of executive action.⁵⁸ The way out was merely procedural. The *Bundesbank* was prohibited from partaking in the PSPP, unless within three months, the ECB Governing Council would adopt 'a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme'.⁵⁹ This result contrasted starkly with the FCC's spectacular clash with the CJEU and with its harsh critique of the latter's judgment. Indeed, most commentators, writing and speaking in the immediate aftermath of the judgment, did not expect *any* substantial impact of the *Weiss* judgment on the ECB's monetary policy.⁶⁰ The reasons invoked were mostly of constitutional nature: the ECB is outside of the FCC's jurisdiction and the intricate way – if

⁵⁵ In this sense, FCC, *Weiss*, para 137. But see the criteria that the CJEU set for the legality of monetary policy instruments, in particular in relation to the prohibition of monetary financing (Article 123 TFEU).

⁵⁶ Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context', 21 *German Law Journal* 5 (2020), 2053.

⁵⁷ See, further, Dani et al., *supra*, note 28, 318–321.

⁵⁸ See note 36 above.

⁵⁹ FCC, *Weiss*, para 235.

⁶⁰ On this same note, Feichtner, *supra*, note 34, at p. 1091.

not flawed, as most argued – through which the FCC arrived at its conclusion could not, for legal and political reasons, have a bearing on the ECB.⁶¹

But there was another critique to the judgment's outcome: what the FCC required could easily be met. By collecting information that was even in the public domain, the ECB could satisfy the FCC's demand for proportionality. It only needed to channel that information institutionally to the German government and parliament and all would be settled. Why then risk a constitutional crisis at the worst possible moment?⁶² Both in institutional and in academic circles, the outcome of the judgment was seen as simply entailing the transmission of information. As soon as the judicial storm would pass, no far-reaching consequences to the actions of the ECB would be longer visible. That was, in fact, what happened.⁶³ What was, in substance, a major disagreement (with potentially immense constitutional consequences) on the way that a reviewing court should mobilise proportionality as an instrument of either full or limited review had no bearing in legal and policy terms. The result, in short, was a clear failure of substantive accountability through judicial control. This conclusion, in turn, also means that the association between full review with substantial accountability, on the one hand, and limited review with procedural accountability, on the other, hides more than it reveals.⁶⁴

⁶¹ The institutional reactions to the judgment buttressed this position (e.g. ECB, 'ECB takes note of German Federal Constitutional Court ruling and remains fully committed to its mandate', 5 May 2020, available at www.ecb.europa.eu/press/pr/date/2020/html/ecb.pr200505~00a09107a9.en.html; more exceptionally, CJEU, 'Press release following the judgment of the German Constitutional Court of 5 May 2020' 8 May 2020, available at <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf>).

⁶² The worst moment referred both to the PEPP, whose legality was controversial but all recognised to be essential to face the economic consequences of the pandemic, and to the bad signal that the FCC was giving to the EU's constitutional outliers, Hungary and Poland (see, among others, Sarmiento, 'An Infringement Action Against Germany After Its Constitutional Court's Ruling in Weiss? The Long Term and the Short Term', EULawLive, <https://eulawlive.com/op-ed-an-infringement-action-against-germany-after-its-constitutional-courts-ruling-in-weiss-the-long-term-and-the-short-term-by-daniel-sarmiento/>; Biernat, 'How Far Is It from Warsaw to Luxembourg and Karlsruhe: The Impact of the PSPP Judgment on Poland', 21 *German Law Journal* (2020), 1104–1115).

⁶³ See 'Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main on Wednesday and Thursday, 3–4 June 2020', under 'Monetary policy stance and policy considerations' (at www.ecb.europa.eu/press/accounts/2020/html/ecb.mg200625~fd97330d5f.en.html); 'Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an', *Frankfurter Allgemeine Zeitung*, 3 August 2020 (at www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ecz-erfuellt-16887907.html).

⁶⁴ For a proposal of how process-based judicial review should bridge the procedural-substantive divide and become 'justification-enhancing', see Gerstenberg, 'The Uncertain Structure of Process Review in the EU: Beyond the Debate on the CJEU's Weiss Ruling and the German Federal Constitutional Court's PSPP Ruling', *Just Cognes* 3 (2021), 279–301.

Few noted the significance of its judgment laid elsewhere: the FCC had disclosed the deeper constitutional difficulties that the ECB's action raised for the construction of the EMU.⁶⁵ In terms of accountability, the judgment's immediate outcome was significant, even if admittedly not consequential (at least in the short-term) for the conduct of monetary policy: the FCC had referred the question back to the political institutions.⁶⁶ So, even if both judgments had shown, in opposing ways, that neither full review nor limited review may be suitable means to control monetary policy, each pointed in a very different direction. While the CJEU empowered the ECB, the FCC stressed the importance of vertical checks by politically accountable institutions.

One question, however, remained unanswered. If the courts have, at the end, little to say in monetary policy matters – either because of the way they interpret the substantive mandates or because of the unsuitability of the tools that can deploy to contain legally the executive action of central banks – can law have a role in structuring and limiting the action of ECB? The answer is positive, but it is far from being straightforward. One must search for legal strictures that must be present irrespective of judicially generated or judicially enforced duties.

13.4 THE DUTY TO GIVE REASONS

13.4.1 *Reasons in Weiss*

The FCC censured both a 'lack of balancing and [a] lack of stating the reasons' by the ECB.⁶⁷ The German government and the German parliament had failed, as a result, to take suitable measures against the ECB's Governing Council. They had 'neither assessed nor substantiated' whether the PSPP was compliant with EU law.⁶⁸ If the problem was one of proportionality, it was compounded with insufficient documentation and communication of the balancing act that the ECB needs to undertake between the monetary and the economic policy consequences of its actions. In addition to stressing the importance of political accountability in matters of monetary policy, the FCC had also pointed to the relevance of the duty to give reasons. But beneath the fury of criticism it received, these strengths of the judgment were mostly ignored.

⁶⁵ Dani et al., *supra*, note 28.

⁶⁶ On the second point, Violante, *supra*, note 56, at p. 1053, pointing out the role of national constitutional courts.

⁶⁷ FCC, Weiss, para 176 and 177.

⁶⁸ FCC, Weiss, para 116.

It is hardly surprising that the relevance of the duty to give reasons went largely unnoticed. While in EU law it is a constitutional requirement applicable to all legal acts of the institutions, it is often dismissed as a routine practice without significant legal consequences or much noteworthy controversy. It is often invoked in judicial litigation, but hardly ever leads to pronouncements of breach capable of leading to the annulment of the legal act. That is largely due to the balanced approach to the duty of reason-giving that the EU Courts have developed and refined over the decades.⁶⁹ According to the formula that the Court also cited in *Weiss*, the statement of reasons

must show clearly and unequivocally the reasoning of the author of the measure in question, so as to enable *the persons concerned* to ascertain the reasons for the measure and to enable *the Court* to exercise its power of review, [but] it is not required to go into every relevant point of fact and law.⁷⁰

In this way, the Court ‘proceduralises rationality’ and attunes its demands to each litigious situation, considering the need of effective judicial protection in each case.⁷¹ Accordingly, the EU Courts consistently emphasise that the specific requirements of the duty to give reasons depend on the circumstances of each legal act, in particular, on the substance and wording of the measure, the nature of the reasons given, the interests that the persons directly and individually concerned may have in obtaining explanations, the context of the measure, and ‘the whole body of rules governing the matter in question’.⁷² This flexibility built into the duty allows the Courts to modulate their degree of review of compliance with this duty and to avoid the slippery step of turning the review of a procedural requirement into a review of the substantive legality of the act.⁷³ It also allows them to adapt a duty that applies indistinctly to all the legal acts of the institutions to their legal effects, for example, by distinguishing the scope of the duty to state reasons of an individual measure and of a measure intended to have general application.⁷⁴ All this mirrors the function

⁶⁹ On this, see further, Mendes, ‘The Foundations of the Duty to Give Reasons and a Normative Reconstruction’, in E. Fisher, J. King and A. Young (eds.), *The Foundations and Future of Public Law* (OUP, 2020), 299–321, 308–109. The analysis that follows has been developed first in this piece, from where the materials cited are taken.

⁷⁰ CJEU, *Weiss*, para 31, emphasis added.

⁷¹ The term is from Mashaw, *Reasoned Administration and Democratic Legitimacy. How Administrative Law Supports Democratic Government* (CUP, 2018), at p. 117.

⁷² CJEU, *Weiss*, para 33, which does not include the specification of all these parameters but follows this same line (for those, see, among many, Case C-15/10, *Etimine v Secretary of State for Work and Pensions*, EU:C:2011:504, para 114, or Case T-122/15, *Landeskreditbank v ECB*, EU:T:2017:337 para 124).

⁷³ P. Craig, *EU Administrative Law*, 3rd ed. (OUP, 2018), 318–320.

⁷⁴ As reflected in CJEU, *Weiss*, para 32.

that the duty to give reasons has in judicial proceedings. It operates as a norm of control, which, as the case law indicates, is instrumental for two purposes: to enable *the persons concerned* to ascertain the reasons for the measure and to enable *the Court* to exercise its power of review.⁷⁵

13.4.2 *Reasons and Integration: Constitutional Foundations*

In EU law, however, this duty has a deeper constitutional foundation, which gives it a different political significance and generates different legal implications from those that the case law normally expresses. The general duty to give reasons was meant also to enable ‘Member States and (...) all interested nationals [to ascertain] the circumstances in which the [institutions have] applied the Treaty’.⁷⁶ While related to the need to afford legal protection to persons concerned (eventually through judicial review), this function was distinct from this strictly protective dimension of the duty to give reasons. It was justified because of the limited (attributed) competences of the supranational institutions whose powers had the capacity to constrain the sovereignty of the Member States.

More deeply, in the case of the ECSC, the requirement that the Community ought to ‘publish the reasons for its actions’ was enshrined in a provision where the *functions* of the Community were outlined (Article 5 ECSC Treaty) and then specified as a legal duty of the High Authority (Article 15 ECSC Treaty). A systematic interpretation of Article 5 ECSC shows that there was an intrinsic link between the transparency that ought to derive from a statement of reasons and the action of the Community’s institutions, in particular of the High Authority at its core.⁷⁷ That the whole Community needed to be a ‘glass house’ was one of the foundational blocks of the integration process.⁷⁸ It was a means of ensuring the acceptance and cooperation of the natural and legal persons subject to the authority of the High Authority and, crucially of the Member States. Politically, without persuading through reasons, the Community would fail. Legally, if the acts of the High Authority needed to be the expression of the objectives of integration set in Article 3 ECSC (binding on the institutions), the statement of reasons was the means

⁷⁵ Note 70 above.

⁷⁶ Case 24/62, *Germany v Commission* :EU:C:1963:14, 69; Joined Cases 36, 37, 38–59 and 40/59, *Präsident et al. v High Authority*, EU:C:1960:36 439. What is stated in this paragraph is analysed in detail in Mendes, *supra*, note 68, pp. 309–313.

⁷⁷ Mendes, *supra*, note 69, pp. 311–312.

⁷⁸ Reuter, *La Communauté Européenne du Charbon et de l’Acier* (LGDJ, 1953) 76, cited in Mendes, *idem*, *ibidem*.

to enable a judgment on whether that legal bound was respected. Importantly, those passing that judgment were ‘the Member States and (...) all interested nationals’ who could thus ascertain ‘the circumstances in which the [institutions have] applied the Treaty’.⁷⁹

The political and legal significance of this public understanding (still visible in institutional litigation over the correct use of a legal basis) was overshadowed by how the Court developed the duty to give reasons as a norm of control (suitable for purposes of judicial review of legal acts involving discretion).⁸⁰ Nevertheless, the duty to give reasons was constitutionally, first and above all, ‘a guarantee against arbitrary action, by enabling *the public to understand and investigate the actions of the executive invested with important powers*’.⁸¹ Its purpose was, hence, to ensure substantive accountability, that is, to demonstrate how the choices made by the institutions ‘plausibly aimed for and achieved non-arbitrary results’.⁸² Importantly, it should ensure the ability of the public to pass that judgment. Of course, this referred to the knowledgeable public, who could have standing before the court (and, possibly, political weight within their Member States). But, nevertheless, the public understanding that the statement of reasons ought to facilitate would allow the High Authority to avert the ‘hostility of certain milieus[,] [those who] had expressed an accusation all the more formidable as obscure of “technocracy”, evoking the intervention of tenebrous powers, which in the modern political mythology have replaced the ancient gods’.⁸³ Not least, the political accountability that the duty served could – and should – be exerted by the parliamentary assembly, which at the time was, nevertheless, a rather weak institution.

This constitutional understanding of the duty to give reasons must be revived for today’s EU, given that the scope of duty to give reasons was broadened by the Lisbon Treaty, the same Treaty that introduced modifications intended to establish a ‘more institutionally solid, democratic and citizen-oriented foundation’ of the Union.⁸⁴ Such revival is particularly needed in the instances

⁷⁹ See note 75 above.

⁸⁰ Mendes, *supra*, note 69, pp. 313–314.

⁸¹ Joined Cases 36, 37, 38–59 and 40–59, *Präsident et al. v High Authority*, Opinion AG Lagrange, at 451 (emphasis added), cited and analysed in Mendes, *idem*, *ibidem*.

⁸² Dawson and Maricut-Akbik, in this book (text after fn 83).

⁸³ Reuter, *La Communauté Européenne du Charbon et de L’Acier* (LGDJ, 1953), p. 52 (cited in Mendes, ‘The Foundations of the Duty to Give Reasons and a Normative Reconstruction’, in Fisher, King and Young (eds.), *The Foundations and Future of Public Law* (OUP, 2020), at p. 314).

⁸⁴ Craig, *The Lisbon Treaty. Law, Politics and Treaty Reform* (OUP, 2010), pp. 71–77 and 247. The cited expression is from Calliess and Ruffert, *EUV/AEUV: das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (München: Beck, 5th ed, 2016), Article 296, pt 4.

in which its executive bodies can have constitutive powers, as is the case of the ECB. Justification, as a guarantee of substantive accountability, must then reflect the balancing of competing interests involved in decision-making and show how different groups and interests are advantaged and disadvantaged by a non-arbitrary decision.⁸⁵ That is a necessary component of generation of the public interests that the decision embodies, in relation to the legal framework in which it is embedded. It is, in other words, a necessary part of the exercise of constitutive powers and must be controllable as such. However, it is, arguably, not the task of the court reviewing the legality of judicially contested measures to enforce this constitutional dimension of the duty to give reasons. That must be primarily realised by the deciding body and by its political overseers.

13.4.3 *Reasons as a Norm of Conduct*

The constitutional foundation and function of the duty to give reasons means that, beyond the judicially suitable way in which the EU Courts review compliance with this duty, a statement of reasons must enable a public understanding of how public action of the EU institutions is contributing to achieve the objectives of EU integration, as interpreted at each point in accordance with the political priorities set by the competent bodies. From the same perspective, compliance with the duty to give reasons must enable a judgment of the compromise achieved between competing public interests, of the choices made by the decision-maker when defining a specific course of action, established in articulation with (and, hence, constituting) the legally defined purposes. Although this resonates strongly with a proportionality assessment (not surprisingly the duty to give reasons and proportionality often operate in tandem), it is not the same as proportionality. Showing the compromises achieved between competing public interests may be made through a proportionality assessment or not; per se, it does require that the balancing be conducted in the specific terms that the principle of proportionality mandates (in the EU legal order, or in the legal order of any of its Member States).

From this perspective, the statement of reasons is not primarily a means 'to enable *the persons concerned* to ascertain the reasons for the measure and to enable *the Court* to exercise its power of review', as it is in the hand of courts, where it must be applied with care to avoid turning a procedural requirement into a substantive review of the adequacy of the reasons given.⁸⁶ It does not

⁸⁵ Dawson and Maricut-Akbik, in this book (paragraph after fn 82).

⁸⁶ See note 71 above. That care is a constant note in the case law and reflected also in Weiss, para 30 to 33.

function as a norm of control, but as a norm of conduct: it is part of the process of normative concretisation inherent in decision-making and, as such, it provides the decision-maker with criteria of action, among others (economic models and parameters, efficacy, political convenience, non-binding international standards).⁸⁷ While being externally binding, it functions as a self-regulatory measure for the deciding body, an instrument to facilitate a substantiated judgment of the conditions, criteria and implications of the acts it adopts, in articulation with the purposes of legal action as defined in the enabling norms. It is also an essential part of its institutional duty of cooperation that the deciding institutions owe to those that, in a democratic polity, must hold them to account: they must make such process explicit to facilitate the action of their political overseers.⁸⁸ As such, the duty to give reasons, understood in this way, places a specific demand to decision-makers when at stake is the adoption of potentially or knowingly controversial measures, such as the quantitative easing programmes of the ECB. Compliance with the duty to give reasons must allow the political institutions to contest, where needed, measures of a controversial nature, that is, it is an essential condition of accountability and it must facilitate it. In the case of the monetary policy measures adopted by the ECB, controversial or not, the constitutional duty to give reasons requires the ECB to show, in its decision-making process, to the Member States and to the European Parliament (as well as to national parliaments, insofar as the economic policy of the Member States is implicated) how the public interests it needs to balance are being concretised, how it reconciles the conflicts among them, in view of the priorities they set in given economic circumstances, and the substantive implications of such balancing and priorities. Taking this position, however, requires a straightforward admission of the unavoidable political dimension of the technical competence of the ECB, which is still only hesitantly recognised – despite the evolution of the past decade – in particular by the EU institutions and by the Member States. It requires admitting that the ECB has constitutive powers that allow it to construe its own mandate and to give meaning to price stability, by mobilising its expertise.

As I argued elsewhere, with reference to the work of Jerry Mashaw, as a norm of conduct the duty to give reasons must reflect a decision-making process that makes legal acts ‘a plausible instance of rational collective action’, in

⁸⁷ On this distinction and definition, see Rodríguez de Santiago, *Metodología del Derecho Administrativo. Reglas de racionalidad para la adopción y el control de la decisión administrativa* (Marcial Pons, 2016), pp. 24–25.

⁸⁸ Article 13(2) TEU (‘The institutions shall practice mutual sincere cooperation’) read in coordination with Article 10(1) and (2) TEU arguably give textual support to a legal duty as proposed in the text.

relation to the substantive yardsticks that the applicable norms define.⁸⁹ It also establishes a suitable threshold to allow a meaningful political control. The independent ECB is not exempted from this dimension of the duty to give reasons that flow from the Treaty framework, as ascertained by the origins of the duty to give reasons and extrapolated to a Union purportedly based on democracy. The fact that this dimension of the duty to give reasons has not been concretised through judicial actions does not make it less relevant in EU law. It is a *legal duty*, which must be enforced as such by the EU institutions that may hold the ECB *politically* accountable. Being too bound by the Treaties, the European Council, the Council and the European Parliament – the EU's representative institutions (Article 10(2) TEU) – must develop mechanisms that ensure that the constitutional dimension of the duty to give reasons comes to bear in EU's institutional practice, for the sake of the public understanding that this duty was initially intended to convey, albeit, of course, in the very different institutional environment of the EU. It is, arguably, this legal *and* political path that must be developed to ensure that the ECB is subject to substantive accountability, that the 'normative goods' of non-arbitrariness can actually be achieved, and that its actions can actually be 'probed and contested' (in the sense of 'substantive openness' that Dawson and Maricut-Akbik suggest in the introduction to this book).⁹⁰ While the incentives need to induce such a change must not necessarily come from judicial review, clearly the CJEU has also an institutional responsibility in this regard.

At this point, it is pertinent to return to its monetary policy judgments. Referring to the contested nature of the ECB programmes it assessed (the OMT and the PSPP), the CJEU was right to assert both in *Gauweiler* and in *Weiss* that 'the fact that a reasoned analysis is disputed does not, in itself, suffice to establish a manifest error of assessment on the part of the ESCB'.⁹¹ This makes sense from the perspective of a court that adopts a standard of limited review to protect the discretion of the ECB. But it was wrong – straightforwardly wrong, given the political and legal implications of the expansion of the ECB's mandate – to assert, in the same paragraph, that 'nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with

⁸⁹ Mashaw, 'Public Reason and Administrative Legitimacy' in Bell, Elliot, Varuhas and Murray (eds.), *Public Law Adjudication in Common Law Systems. Process and Substance* (Hart, 2016), pp. 11–22, at 17. See too Mashaw, *supra*, note 71, pp. 158–159, arguing that political reasons ought to be given by administrators in connection to both statutorily defined criteria of judgment and other legal sources of public values (such as the Constitution).

⁹⁰ I borrow 'normative goods' from them.

⁹¹ *Gauweiler*, para 75 and *Weiss*, para 91.

all care and accuracy'.⁹² This passage both reveals and confirms that limited review was, in this case, a hands-off approach with unlimited deference to the ECB's economic expertise (a judicial version of sorts of 'whatever it takes'). As the analysis on the duty to give reasons indicates, in *legal* terms, there is much more to expect from the ECB, even if the role of courts in reviewing monetary policy measures is limited. In a legal system grounded on law – a law that purportedly must have democratic origins or endorsement – law must have a structuring role in the exercise of public authority, even when the nature of the policy field limits considerably the possibilities of control being exerted through courts. Even if courts cannot enforce certain dimensions of the law, they must not dismiss them.

13.5 NOT A FIX TO THE EMU CONSTITUTIONAL CHALLENGES

The reconstruction of the duty to give reasons proposed here draws both on its origins in EU law and on the constitutional framework in which it is now inserted. It shows that the duty to give reasons has an action-guiding role that must facilitate public understanding of how executive action is shaping the public interests that EU executive bodies are mandated to pursue. This is a function of the duty that has been hitherto neglected in EU law and that is particularly pertinent in instances in which the EU executive bodies exercise constitutive powers, as the ECB does. Understood as a norm of conduct, the duty to give reasons defines thresholds of justification different from those required by the Court when applying it as a norm of control in instances where discretion is exercised. The justification that EU law requires from its institutions is primarily a function of the political accountability that also the ECB must be subject to, its independence notwithstanding. This reconstruction shows that law has a life beyond justifiability, to paraphrase an expression of a former EU Ombudsman referring to good administration.⁹³ It provides yet another 'fix' to the conundrum that the ECB poses since it became a 'runaway institution' that can de facto define the limits of its own mandate.⁹⁴

⁹² *Idem*, *ibidem*.

⁹³ Characterised as having 'a life beyond legality' ('Legality and good administration: is there a difference?', Speech by the European Ombudsman, Nikiforos Diamandouros, at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, France, 15 October 2007, available at www.ombudsman.europa.eu/en/speech/en/370).

⁹⁴ I owe the expression 'runaway institution' to my colleague Anna-Lena Högenauer.

This chapter indicates a way to delimit the role of law in structuring the exercise of executive powers that goes beyond the role that the Courts can have in relation to monetary policy matters. Whether it is possible to devise a degree of judicial review, that runs neither the risk of doing too much, nor of doing too little, is a question that is most likely to occupy lawyers for a long time to come. No matter the outcome of this debate, its contribution to the democratic legitimacy conundrum of the ECB is likely to be very limited, if any.⁹⁵ Constraining the ECB back into the substantive limits that the Treaty enshrines means pinning it down to a political-economic programme that, while politically and technically contested today, remains *de jure* outside the realm of democratic contestation. Admitting that the ECB can continue acting as it has in the past decade without a Treaty change is to perpetuate zombie rules and the power imbalances that they enshrine, at the expense of leaving the determination of such rules to processes consonant with democratic constitutionalism.⁹⁶

From this perspective, also the path proposed in this chapter cannot be a fix to the constitutional challenges that the EMU poses. The reconstruction of the duty to give reasons presented here can only provide a limited contribution to improve its political accountability, for which law can and must contribute. With the meaning proposed here, accountability through the duty to give reasons carries a 'promise of control' because it enhances the possibilities of parliamentary scrutiny and political contestation over the changed role of the ECB and the new interpretations of the law that enable it. It does not carry a 'promise of democracy'.⁹⁷ Yet, it is clear that the ECB's accountability must not be understood as a voluntary exercise.⁹⁸ Independence does not shelter the ECB from a duty to give reasons that in EU law is more far-reaching than usually assumed. If judicial review must in principle be confined to the procedural vein of the duty to give reasons, the historical reconstruction of this duty's rationale shows that, outside of the court, the duty must be understood as a substantive *legal* stricture that ought to enable political control over the decisions of the ECB, its independence notwithstanding. Justification that permits contestation does not mean that the ECB must follow the views of its political controllers, even if it presumes that the ECB be responsive to the political implications of their decisions.⁹⁹ Admittedly, this is a difficult line

⁹⁵ On this conundrum and arguing that judicial review is not a suitable way of accountability from a perspective of democracy, see de Boer and van't Klooster, *supra*, note 28, pp. 1693–1710.

⁹⁶ Dani et al., *supra*, note 28.

⁹⁷ On these terms, see the Dawson and Maricut-Akbik in this book.

⁹⁸ As it is largely understood, see also Dawson and Maricut-Akbik in this book.

⁹⁹ See, in this sense, Dawson and Maricut-Akbik (text at fn 34).

to draw. Yet, the analysis above shows that, in what concerns the duty to give reasons, there is no legal necessity to the limited procedural accountability of the ECB.¹⁰⁰ On the contrary, that status quo currently results from the limited understanding of the scope of the duty to give reasons that judicial review conveys and, presumably, is shared in institutional practice. The constitutional dimension of the duty to give reasons highlighted here, if developed institutionally, may secure public-interest-based executive action understood in substantive terms, even if independence places clear limits to the ability of political accountability to induce substantive policy changes.

But, if the analysis in this chapter changes nothing to the premise that remains at the core of the EMU – monetary policy must be withdrawn from the realm of democratic politics – the characterisation of the ECB's powers as constitutive shows more than just how the law can operate in monetary policy beyond judicial review. It points to the democratic stakes of the decisions that are adopted in this policy field, to the inevitable political character of the ECB's monetary policy, and hence, to the constitutional difficulties of keeping it in the hands of an institution as strongly independent as the ECB.

¹⁰⁰ Specifically in what concerns the duty to give reasons, the finding that procedural accountability dominates in matters of monetary policy currently holds (Dawson and Maricut-Akbik in this book).

