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Theorising Judicial Review in the Economic and Monetary Union

2.1 INTRODUCTION

'Enemies of the People', cried the cover of the UK's *Daily Mail* on 4 November 2016.[1] This was in response to the decision of the High Court of England and Wales in *Miller* that the Government needs the approval of the Parliament to notify its withdrawal from the EU.[2] Boiled down to its less extreme form, the argument goes: judges are unelected and cannot review legislation enacted by the democratically elected representatives of citizens.[3]

[1] The *Daily Telegraph* in the same vein ran the title 'The Judges versus the People'. In a somewhat more sophisticated form, see also Justice Scalia of the US Supreme Court: 'A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.' *Obergefell v Hodges* 576 US 644 (2015), Dissenting Opinion of Justice Scalia, 5. Still, note Scalia himself twenty-four years prior: 'I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law.' *James B. Beam Distilling Co. v Georgia* 501 US 529 (1991), Concurring Opinion of Justice Scalia, 549.

[2] The irony of protesting against parliamentary approval as an affront to the will of the people is a different can of worms that will not be addressed here. Suffice it to say that the UK Government argued that it is within its royal prerogative pertaining to foreign affairs to submit the withdrawal notification, without the oversight of the Parliament. The latter is competent to decide by primary legislation on matters of constitutional significance, and the High Court found the withdrawal notification to meet that standard. See *Miller & Anor, R (On the Application of) v The Secretary of State for Exiting the European Union* (Rev 1) [2016] EWHC 2768 (Admin) (3 November 2016). The judgment of the High Court was upheld by the Supreme Court in *Miller & Anor, R (On the Application of) v Secretary of State for Exiting the European Union* (Rev 3) [2017] UKSC 5 (24 January 2017).

[3] For a seminal piece, see J Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346. In the US literature, this critique also developed into what is called the counter-majoritarian difficulty, according to which judicial review distorts majoritarian decision-making in democratically elected institutions. See A M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986); M Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-

In the camp opposite,[4] judicial review is seen as a corrective to the will of the majority, ensuring the protection of fundamental rights[5] and thus necessary in a democratic society that values equality, non-discrimination, and liberty.[6] The two opposing views of the role of courts concern the review of legislation, that is, acts of general application enacted by the representative body of a state.

I should also like to add a second layer to this story. Unlike that of legislation, judicial review of administrative action is widely accepted.[7] This is so given that the administration also lacks the democratic pedigree enjoyed by representative institutions and thus needs to be legally constrained.[8] But things get complicated also in this area, because the administration has a specific way of doing what it does: to implement and apply general (legislative) acts or to discharge of the roles delegated to it by the legislator,[9] it necessarily needs to make use of discretion.

There are at least three degrees of uses of discretion by an administrative body. First, it might be that the administrative body has specific technical knowledge necessary for the application of a certain act. For example, granting safety permits to building projects: here, technical knowledge will likely constrain, but not entirely limit, the ability to interpret safety in a variety of ways. Second, it is also possible that the body in question operates in an area where technical knowledge is a necessary precondition for dealing with situations of future uncertainty. For example, a body deciding whether one or another infrastructural project will have adverse environmental effects. The discretion in this case will manifest itself in predicting outcomes and deciding on the best course of action. Finally, the body in question may be granted the power to decide based on efficiency[10] or another similarly elusive criterion

Majoritarian Difficulty' (1995) 94(2) *Michigan Law Review* 245; J Waldron, *Law and Disagreement* (Oxford University Press 1999).

4 J H Ely, *Democracy and Distrust* (Harvard University Press 1981); R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996).

5 This view is also central to the theory of liberal constitutionalism, whereby courts act as a limitation to the power of the legislature and the executive. See F A Hayek, *Law, Legislation and Liberty, Vol. 1 Rules and Order* (University Chicago Press 1978); M Warren, 'Liberal Constitutionalism as Ideology: Marx and Habermas' (1989) 17 *Political Theory* 511.

6 J Shaw, 'Process and Constitutional Discourse in the European Union' (2000) 27 *Journal of Law & Society* 4, 16.

7 Waldron (n 3) 1354.

8 For an excellent account, see R Baldwin, *Rules and Government* (Clarendon Press 1995), in particular chapter 3.

9 To name but a few roles of the administration.

10 For a useful discussion on the problem of efficiency or effectiveness as a standard in administrative decision-making, see D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press 1986, reprinted 2011) 129–132.

(for example, when deciding whether an application for a public demonstration threatens public safety).

In even these three ideal-type examples, the administrative body will dispose of different degrees of discretion[11] that courts typically control against the standards set out in legislation and, as the case may be, against constitutional standards and principles (such as good administration, the protection of legitimate expectations, or proportionality, to name a few). In general, the role of courts in controlling the administration should not be such that the judge puts herself in the position of the administrative body and *ex novo* decides the issue.[12] This is often supported by the argument of maintaining the separation of powers and preventing courts from stepping into the role of the executive.[13] Rather, what courts should review is the decision-making process: ensuring that the body in question properly used its expertise, coherently reached its decision in line with procedural requirements, and generally did not go beyond what is necessary in respect of achieving the tasks granted to it.[14] On the opposite end stands the use of discretion and it is generally argued that the courts are not to control the latitude given to the administration, lest they take up the mandate of the administrative body.[15]

Transposed to the context of EU economic governance, these considerations acquire an additional layer of complexity. Traditionally, the Court of Justice is perceived as one of the dominant actors among EU institutions, pushing the integration agenda forward when political institutions fall short of such action.[16] In addition, through the preliminary reference procedure, judicial review gradually acquired prominent status in the Member States as well.[17] EU's economic governance breaks away from this paradigm, in particular due to a greater prominence of direct actions as opposed to the

[11] C Hilson, 'Judicial Review, Policies and the Fettering of Discretion' (2002) *Public Law* 111, 112–113; Galligan (n 10) 10–11.

[12] See in that respect the Opinion of Advocate General Emiliou in Case C-389/21 P *ECB v Crédit Lyonnais* EU:C:2022:844 [60]–[62].

[13] D Ritleng, 'Judicial Review of EU Administration Discretion: How Far Does the Separation of Powers Matter?' in J Mendes and I Venzke (eds), *Allocating Authority: Who Should Do What in European and International Law?* (Hart 2018) 185 and the literature cited in footnote 13.

[14] This is but a general list of principles of judicial review of administrative action. Certainly, each national system has its own specific rules, as does the EU legal order. The latter will be dealt with in the coming sections.

[15] For a discussion, see J Mendes, 'Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU' (2017) 80 *Modern Law Review* 443, 451–459.

[16] For an important account, see K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press 2003).

[17] A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 5–7.

preliminary reference procedure. While the powers of judicial review are clearly spelled out in the Treaties,[18] as are the bases for such review,[19] less obvious is which acts have 'binding legal effects'[20] to be susceptible to challenge at the EU level. Equally elusive is what standard EU courts use in reviewing decisions that involve a degree of discretion.[21]

Thus, we have before us a difficult constitutional structure: judicial review of legislation, and to some extent of administrative action, is in itself a disputed activity that continues to raise eyebrows of those demanding legitimation in the form of democratic elections. This is marred in addition by a multilevel operation of rules of economic governance and a central bank with an impervious screen of independence. My task in this chapter is to show why and how courts, despite all this, may contribute to legal accountability for decision-makers in EU's economic governance.[22]

Courts are and should be the institutions where individuals enforce the duty of policymakers to act in the common interest. The EMU is an area characterised by high redistributive effects coupled with a wide discretion on the part of decision-makers. Under these conditions, courts are, unlike political institutions, in a perfect position to ensure that such decisions meet the Treaty objectives of the common interest. To do so successfully, any review of decisions in the EMU entails two duties. First, the starting point for courts must be an assumption of a full review, which is an expression of their duty to

[18] Article 263(1) TFEU provides: 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.'

[19] Article 263(2)–(3) TFEU states: 'It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.'

[20] Joined Cases C-463/10 and C-475/10 *Deutsche Post and Germany v Commission* EU:C:2011:656 [36]; Case C-31/13 P *Hungary v Commission* EU:C:2014:70 [54]; Case C-16/16 P *Belgium v Commission* EU:C:2018:79 [30]. See further Section 2.2.3.

[21] For a useful overview, see M Krajewski, *Relative Authority of Judicial and Extra-Judicial Review: EU Courts, Boards of Appeal, Ombudsman* (Hart 2021) chapter 2.

[22] By way of a disclaimer, as also mentioned in the Introduction, my argument is not that courts are the sole locus of accountability in EU's economic governance, given that political and administrative institutions are operating in delivering other forms of accountability. Yet, the focus of my book is exclusively on courts and legal accountability.

safeguard the common interest as expressed in the Treaties and in the norm granting competence to the decision-maker in question. Second, decision-makers, for their part, have an extensive duty of giving reasons for their decisions and thus put to the court the arguments on the nature of their discretion and how they used it. The burden is in essence on the parties to demonstrate not only who should win the case, but also, preliminarily, what the appropriate standard of review should be. I propose that the parties carry the responsibility to present a rich evidentiary basis serving as ammunition for endorsing or rebutting the presumption of full judicial review. This judicial activity should be shared between national and EU courts, as is done in other areas of EU law. In this way, courts become the platform for discussing the extent of a power given to an institution and deciding whether it has contributed to the common interest.

Before detailing this proposal further in Section 2.3, I first turn to the most problematic examples of non-accountable decision-making that recently took place in the EMU (Section 2.2), causing problems for individuals accessing fora of legal accountability, most visibly in the reduction of the protection of fundamental rights.[23] The purpose of this section will be to offer a sneak-peek preview of what went wrong, how (the lack of) judicial review contributed to this problem, and why traditional arguments against judicial review do not work in this context. The chapter will close (Section 2.4) with conclusions as to how the proposed framework of judicial review will be used in the chapters to come.

2.2 PROBLEMS WITH JUDICIAL REVIEW IN THE EMU

In this section, my aim is to underline three specificities of the EU's economic governance law against which traditional anti-judicial review arguments do not bite, but instead exacerbate the problems associated with executive discretion. First, in response to the Euro crisis, many of the measures employed directly to aid debtor Member States did not have a source in EU law proper, but were formulated in novel legal constructions such as the powers of the Troika and the establishment of the European Stability Mechanism (ESM). Traditional channels of judicial review were consequently not available at the EU level and were of limited significance at the national level, given the economic urgency of accepting financial aid and the

[23] K H Ragnarsson, 'The Counter-Majoritarian Difficulty in a Neoliberal World: Socio-Economic Rights and Deference in Post-2008 Austerity Cases' (2019) 8 *Global Constitutionalism* 605, 611–615.

conditions attached. Second, in monetary policy, the ECB's independence (and by extension discretion) is constitutionally protected. This resulted in the ECB being de facto shielded from any meaningful judicial review, in particular given its expertise and mandate to define and conduct monetary policy. Finally, a third problem results from the legal nature of EU's economic governance, whereby the Commission and the ECB increasingly use soft law instruments and operate in composite institutional arrangements, making judicial review difficult.

These three areas will be explored as a broad-brush presentation of the issues transversally pervading the EMU's legal set-up: a high level of executive discretion, poor deliberative processes that produce strong redistributive effects, and a lack of acknowledgement of the structural inequalities that result from its rules. I will thus briefly turn to each of these problems in preparation of my argument on the proper role of judicial review in Section 2.3. This also serves as a primer for a more detailed exploration of judicial review and its weaknesses in Chapters 3–5, which will explore the areas of financial assistance, monetary policy, and the Single Supervisory Mechanism (SSM).

2.2.1 *Financial Assistance*

The area of financial assistance uncovered new ways of decision-making, specifically, by using public international law and deciding through Memoranda of Understanding concluded by the Troika and the Member State receiving financial assistance. Consequently, judicial review in this area became negligible given that the Court of Justice could only marginally control what has been decided (reviewing only the Treaty-compliance of the amendment to Article 136 TFEU for the purposes of creating the ESM in *Pringle*). In addition, some national constitutional courts had the opportunity to test the ESM against constitutional standards. Otherwise, outcomes for individuals stemming from financial assistance did not feature prominently before EU courts. Memoranda of Understanding only eventually crossed the admissibility threshold before the Court of Justice, which found that EU institutions are bound by the Charter in all their activities, within or without the Treaties.[24] Nevertheless, measures impacting the property rights of deposit

[24] Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising and Others v Commission* EU: C:2016:701 [67].

holders have to this day not resulted in the finding of a sufficiently serious breach to trigger the non-contractual liability of the Union.[25]

There is but one decision of the Court of Justice in financial assistance significantly impacting the constitutional framework of EU law. Alas, little changed in terms of legal accountability of the Troika. Instead, it reshaped the way the principle of judicial independence (protected by Article 19(1) TEU) operates: it became justiciable, by happenstance in the context of financial assistance. In *Juizes Portugueses*, the Court found that although the reduction of salaries of judges resulted from the conditionality attached to financial assistance to Portugal,[26] the situation did not concern 'an implementation of Union law' necessary for the applicability of the Charter.[27] However, Article 19(1) TEU refers to 'fields covered by Union law' and the independence of the judiciary is one such field. Ground-breaking in terms of elevating the status of judicial independence in EU law, the decision ultimately had little effect on the possibility to challenge the measures stemming from financial assistance (spoiler alert: the Court found the salary reduction as not interfering with judicial independence).[28] In conclusion, the area of financial assistance is a showcase of a deferential approach by the Court of Justice,[29] where changes that took place did so in small and rather unsatisfactory steps for those affected by the seismic changes that the conditionality-induced austerity brought about.

Against this brief illustration, the argument according to which judicial review is undemocratic and decisions taken by representative bodies should be judicial review-proof greatly misses the mark. The power of the Troika to impose conditionality requirements on debtor Member States greatly diminished the level of democratic deliberation in their representative institutions.[30] In fact, Salomon shows in great detail how the Greek government relied on its international obligations to the Troika to justify its lack of consideration for the

[25] Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Chrysostomides* EU:C:2020:1028. For a more detailed analysis of this case, see Chapter 3, Section 3.4.1.

[26] The Court refers to the national measures at issue as 'linked to requirements to eliminate an excessive budget deficit and to an EU financial assistance programme'. Case C-64/16 *Juizes Portugueses* EU:C:2018:117 [27].

[27] ibid [29].

[28] ibid [51].

[29] For the same conclusion following an analysis of the relevant jurisprudence of other European national courts, see Ragnarsson (n 23) 611.

[30] C Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt' in T Beukers, B de Witte and C Kilpatrick (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 279; A Poulou, 'Austerity and European Social Rights: How Can Courts Protect Europe's Lost Generation?' (2014) 15 *German Law Journal* 1145.

effects of austerity measures in the social sphere and human rights.[31] Requests for a referendum on the conditionality measures were rejected, whereas the spread of poverty did not come up in discussions between the Greek government and the Troika at all.[32] Yet, the urgency of the situation should in no way justify a disregard of deliberative processes, but instead speaks in favour of an increased judicial protection of human rights.[33]

In such a context, judicial deference to the political process aggravates what Ragnarsson calls a representation failure (given that states had no choice but to respond to the market, instead of to their political constituents).[34] In this scenario, national legislators and governments were not controlled by courts but by the Troika, who in turn was controlled by no one.[35] As already mentioned, the Court of Justice did eventually expand the applicability of the Charter to the Commission and the ECB for their activities in the Troika. Nevertheless, we have yet to witness a situation in which the Court finds that this obligation was not complied with and led to a breach of individual rights.

This has grave consequences for the political equality of citizens. It is undisputed that conditionality distorted the way political institutions at the national level usually balance various interests when making budgetary decisions. Rather than following the usual procedures of deliberation in a parliamentary setting, preceded possibly by factual examinations, risk and impact assessments by the executive, the debtor states were presented with a very concrete set of targets to be implemented and were left with little to no choice but to accept them, given the urgency of their dire economic situation.[36] On this view, market interests entered into and guided the choice of interests to be balanced. Thus, the Troika-led financial assistance caused political inequality of citizens at a more fundamental level: in their own Member

[31] M E Salomon, 'Of Austerity, Human Rights and International Institutions' (2015) 21(4) *European Law Journal* 521, 527–532.

[32] ibid 529–530.

[33] See also A Poulou, 'Human Rights Accountability in European Financial Assistance' in M Dawson (ed), *Substantive Accountability in Europe's New Economic Governance* (Cambridge University Press, forthcoming 2023).

[34] Ragnarsson (n 23) 620. He therefore promotes a view whereby a stronger role for courts in the austerity era could have acted as 'an enforcer of socio-economic rights as "destabilisation rights" that allow citizens to disrupt structures that are unresponsive to democratic challenge', at 623.

[35] This resembles also the general logic of the regulatory state, whereby regulation does not occur in the public interest, but is rather fomented by and benefits a certain industry. G J Stigler, 'The Theory of Economic Regulation' (1971) 6(2) *Bell Journal of Economics and Management Science* 114.

[36] See M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020) 55–57; Salomon (n 31).

State. The next (EU) level amplified this, as conditionality targeted the debtor Member States.[37] Judicial review is therefore crucial firstly to recuperate the position of the individual at the national level, in respect of her own government and parliament, by ensuring that the existing democratic procedures in place are in fact observed. This includes not only the parliamentary process but also all the relevant executive and administrative actors taking part in decision-making. As a result, it would be reasonable to expect that at the national level, the deliberative process allows for recognition of a variety of socioeconomic interests. EU courts then have a second important function, to assuage the discrepancies between debtor and creditor states, by levelling the playing field among all EU citizens, thereby enhancing their political equality. This, with a view of ensuring that deliberative processes exist, are visible to those they concern, and are subject to accountability processes.

2.2.2 *The European Central Bank*

Turning next to one of the central actors in the EMU, the European Central Bank holds under the Treaties a privileged position in several respects. First, under Article 127(1) TFEU, the European System of Central Banks is to conduct a single monetary policy with the aim of ensuring price stability in the euro area (further explained in Article 132 TFEU).[38] Second, under Article 130 TFEU, the ECB shall not take instructions from 'Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body', who are to respect its independence.[39] Under this legal construct, the ECB has wide discretion in the exercise of monetary policy and holds a constitutionally protected independent status. This position has arguably been further cemented[40] during the crisis, where the ECB employed

[37] This can be contrasted to the lenient approach of the Council to excessive deficits when it comes to creditor states, such as France and Germany, most clearly in Case C-27/04 *Commission v Council* EU:C:2004:436.

[38] Monetary policy is an exclusive competence of the EU under Article 3(1)(c) TFEU.

[39] See also Article 282(3) TFEU and Article 7 of the Statute of the European System of Central Banks and of the European Central Bank. Protocol No 4 to the Lisbon Treaty (OJ 2016 C 202) 230.

[40] F Amtenbrink, 'The European Central Bank's Intricate Independence versus Accountability Conundrum in the Post-crisis Governance Framework' (2019) 26(1) *Maastricht Journal of European and Comparative Law* 165, 167; M Dawson, A Maricut-Akbik and A Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' (2019) 25 *European Law Journal* 75, 79.

unconventional[41] monetary policy measures under its mandate to maintain price stability (a mandate the ECB itself is to interpret).[42] It will become painfully clear in Chapter 4 how shielded that makes it from mechanisms of accountability.

In making conclusions on why the traditional 'courts cannot control discretion' paradigm exacerbates accountability deficiencies of the ECB, it suffices to look at the standards against which EU and national courts have so far reviewed decisions made in such a context. The ECB's ability to carry out its monetary policy mandate independently was initially protected by the Court of Justice in relation to its operational independence.[43] The approach of the Court later turned into an almost blanket check for the ECB's goal independence, according to which the latter enjoys a broad discretion in determining how to achieve its monetary policy objectives.[44] This is all the more so given that the Court seems to accord the ECB with unquestionable expertise in this area,[45] thus qualifying further its deferential standard of review of its discretion.[46]

The division between political assessments and technical expertise made by the Court in determining the relevant standard of review of discretionary decisions did not develop specifically for the context in which the ECB operates. The approach of the Court is as follows: grounds for review, determining its scope, are those listed in the Treaties.[47] The scope remaining always the same, the nature of the power granted to the decision-maker holding discretion in turn determines the intensity of judicial review.[48] Specifically, when the power is of a technical nature involving complex

[41] The ECB and national central banks later on changed the term in the discourse to 'nonconventional' or 'nonstandard' and/or 'accommodative' monetary policies. See M Chang, D Howarth and L Pierret, 'Unconventional Monetary Policies and Moral Hazard: Constructing or Deconstructing the Legitimacy of the European Central Bank's New Instruments?' Manuscript on file with author, cited with the authors' permission.

[42] J Mendes, 'Constitutive Powers and Justification: The Duty to Give Reasons in EU Monetary Policy' in M Dawson (n 33); M Dawson and A Bobić, 'Quantitative Easing at the Court of Justice – Doing Whatever It Takes to Save the Euro: *Weiss and Others*' (2019) 56(4) *Common Market Law Review* 1005, 1027.

[43] Case C-11/00 *Commission v ECB* EU:C:2003:395 [127].

[44] Case C-62/14 *Gauweiler* EU:C:2015:400 [68]; Case C-493/17 *Weiss* EU:C:2018:1000 [49]–[52]. See also Amtenbrink (n 40) 168.

[45] For an example of blind trust in the ECB's expertise, see Opinion of Advocate General Wathelet in Case C-493/17 *Weiss* EU:C:2018:815 [126]–[139].

[46] For example, in Case C-62/14 *Gauweiler* (n 44) [68]. See also Amtenbrink (n 40) 169.

[47] See n 19 in this chapter.

[48] See Opinion of Advocate General Maduro in Case C-141/02 P *Commission v max-mobil* EU:C:2004:646 [77]–[78], who refers to intensity as 'depth'. See also, with a reference to intensity, Opinion of Advocate General Léger in Case C-40/03 P *Rica Foods* EU:C:2005:93 [48],

assessments (cognition), the discretion is wide and the Court examines whether a manifest error of assessment occurred.[49] This assessment of the Court refers to 'the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision'.[50] The Court confirmed the ECB had such discretion in *Gauweiler* and *Weiss*.[51]

As opposed to this, if the nature of the power granted entails discretion, that is, political (volition), the intensity of the review is even lower,[52] albeit still focused on finding a manifest error. For the ECB in specific, the Court of Justice confirmed in *Gauweiler* and *Weiss* that monetary policy decisions are usually of a controversial nature.[53] The General Court in *Accorinti* provided further detail on the political nature of ECB's discretion:

> [A]ny sufficiently serious breach of the legal rules at issue must be based on a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the ECB when exercising its powers in monetary policy matters. That is even more true because the exercise of that discretion implies the need for the ECB (...) also to make political, economic and social choices in which it is required to weigh up and decide between the different objectives referred to in Article 127(1) TFEU, the main objective of which is the maintenance of price stability.[54]

The reticence towards reviewing ECB action may then be due to the Court considering that ECB powers embody both these types of discretion. Instead of seeing this as a warning sign that a single institution might be holding too much unchecked power in its hands, the Court saw this as a reason to double down on providing the ECB with all the leeway the latter itself claimed it needed.[55] In simple terms, the political discretion granted to the ECB is grounded in its highly complex expertise. That expertise may be used widely by the ECB to help it decide on the use of its political discretion in making

Opinion of Advocate General Emiliou in Case C-389/21 P *ECB v Crédit Lyonnais* (n 12) [41]–[42].

49 Case C-14/10 *Nickel Institute* EU:C:2011:503 [60].

50 Case C-269/90 *Technische Universität München* EU:C:1991:438 [14].

51 See n 44 in this chapter.

52 Opinion of Advocate General Léger in Case C-40/03 P *Rica Foods* (n 48) [49].

53 Case C-62/14 *Gauweiler* (n 44) [75]; Case C-493/17 *Weiss* (n 44) [91].

54 Case T-79/13 *Accorinti and Others v ECB* EU:T:2015:756 [68].

55 This circularity as the defining feature of ECB's constitutive powers has been highlighted by Mendes as the feature that constitutes a 'breakdown between law creation and law application'. Mendes (n 42).

monetary policy decisions that are of a controversial nature: one can only know what a necessary monetary policy decision is if one has specific expert knowledge about this field.[56] The two discretions therefore reinforce each other to fortify the untouchable character of ECB action. It is difficult to argue against this background that ECB's independence and accountability carry equal weight. It is rather that legal accountability appears as the secondary, residual category: it is engaged so long as independence is not interfered with.

This construct may not be as problematic in a legal (constitutional) system where other forms of accountability would be in store for the ECB. Yet, given its Treaty-protected independence and the self-defined nature of its mandate, there appears to be no other political or administrative forum that is equipped with accountability tools with as direct consequences for ECB decisions as that in the arsenal of EU courts.[57] National courts, with the bombshell exception of the Bundesverfassungsgericht in respect of the PSPP Programme,[58] have not made a mark in the overall accountability of the ECB. This is all the more visible in the area of banking supervision, where EU courts explicitly deprived[59] national courts from reviewing national preparatory acts that serve as the basis for the ECB's supervisory decisions.[60] This significantly changed the interlocutors of legal accountability: in the SSM, no longer are national courts the ones engaging with the Court of Justice through the preliminary reference procedure. Instead, given the shift to direct actions, judicial interactions now remain in house, where the appellate power of the Court of Justice over the General Court places it at the centre of the legal accountability discourse.

[56] Summed up by the Court of Justice in *Gauweiler*: '(. . .) given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy'. Case C-62/14 *Gauweiler* (n 44) [75].

[57] See also L Dragomir, 'The ECB's Accountability: Adjusting Accountability Arrangements to the ECB's Evolving Roles' (2019) 26(1) *Maastricht Journal of European and Comparative Law* 35, 44–46; A Bobić and M Dawson, 'How Can Law Contribute to Accountability in EU Monetary Policy?' in D Adamski, F Amtenbrink and J de Haan (eds), *The Cambridge Handbook on European Monetary, Economic and Financial Market Integration* (Cambridge University Press 2023).

[58] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss* Judgment of 5 May 2020. For an extensive analysis of that decision, see A Bobić and M Dawson, 'Making Sense of the "Incomprehensible": The PSPP Judgment of the German Federal Constitutional Court' (2020) 57(6) *Common Market Law Review* 1953. For a further analysis of national judicial review in the area of monetary policy, see Chapter 4.

[59] Case C-219/17 *Berlusconi* EU:C:2018:1023 [44].

[60] See Chapter 5 for a detailed presentation of this case law.

The high level of independence granted to the ECB translates thus into a wide margin of discretion for it to implement its policies,[61] with a low level of interference by courts. That EU courts apply procedural review in conditions of high discretion[62] is common in other areas of EU law.[63] Still, the effects of monetary policy decisions carry redistributive impacts for the entire monetary union and cannot be ascribed merely to expertise, which is only the starting point for the ECB's decision-making process.[64] In other words, no matter the expertise behind its monetary policy decisions, this process inevitably involves also the weighing of different interests of actors across the eurozone. For example, a bond-buying programme will have asymmetric effects on different parts of financial markets that needs to be acknowledged as a crucial part of the ECB's decision-making process.[65] To sum up, the results of discretionary decisions of the ECB have effects beyond achieving price stability (the primary objective of ECB action).[66] Treating this discretion as being outside the courts' control thus leaves a large number of affected individuals without recourse to legal accountability. To ensure that the effects of the ECB's mandate are taken into account and balanced against each other with impunity, a more intense judicial review than that currently witnessed is imperative.

[61] Mendes describes the mandate of the ECB as granting it constitutive powers. She defines such powers as arising in the following scenario: 'legal norms define the mandates of executive and administrative bodies, but the meaning of those norms is determined through the action of those bodies'. Mendes (n 42) 7.

[62] As regards the duty to state reasons, the Court of Justice stated: '[. . .] it should be recalled that, in situations such as that at issue in the present case, in which an EU institution enjoys broad discretion, a review of compliance with certain procedural safeguards – including the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions – is of fundamental importance [. . .].' When it comes to the proportionality analysis, the Court further stated that: 'As regards judicial review of compliance with those conditions, since the ESCB is required, when it prepares and implements an open market operations programme of the kind provided for in Decision 2015/774, to make choices of a technical nature and to undertake complex forecasts and assessments, it must be allowed, in that context, a broad discretion [. . .].' Case C-493/17 *Weiss* (n 44) [30], [73].

[63] See, for example, in the field of State aid, Case C-148/19 P *BTB Holding Investments and Duferco Participations Holding v Commission* EU:C:2020:354 [56] and the case-law cited.

[64] For a critique of the Court's often artificial distinction between technical expertise and value judgments, see Mendes (n 15).

[65] This was an argument raised by the Bundesverfassungsgericht, albeit focusing merely on the effects within Germany. *Weiss* (n 58) [139].

[66] For an in-depth analysis of distributive effects of ECB action in the monetary field and constitutional consequences of demanding the ECB to take these into account, see D Argyroulis and N Vagdoutis, 'Tackling Economic Inequality: Reorienting ECB's Role?' Manuscript on file with author, cited with the authors' permission.

2.2.3 Soft Law Instruments

Finally, the rules in economic governance resulted in the Commission taking up a prominent position,[67] making use of its discretionary powers to enact a sea of secondary acts of general application, as well as additionally issuing an accompanying set of recommendations, guidelines, and the like on how it intends to interpret and apply them.[68] For example, in the context of the multilateral surveillance procedure under Article 121 TFEU, the Council formulates broad economic policy guidelines. These concern macroeconomic and structural policies in an attempt to coordinate Member States' economic policies for achieving common goals. The multilateral surveillance mechanism is then used to ensure that Member States comply with the guidelines, but these are not formally binding.[69] Another example is the Commission's communication outlining its views on the flexibility regime under the Stability and Growth Pact.[70] Again while not legally binding, the communication is of 'structural importance'[71] for the Commission's approach to the application of fiscal policy rules.

The Commission also participated in the Troika, outside the constitutional framework of EU law proper. While for different reasons than the ECB, the Commission is also in a position where it is difficult to subject it to judicial control. The essence of the issue with judicial review of Commission action in economic governance[72] is its predominantly soft law character.[73] Arguments against judicial review would in this context lead us to conclude

[67] P Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022) 119–121; M W Bauer and S Becker, 'The Unexpected Winner of the Crisis: The European Commission's Strengthened Role in Economic Governance' (2014) 36(3) *Journal of European Integration* 213.

[68] For a presentation of the complex legal framework applicable in the EMU, see Dermine (n 67) chapter 1.

[69] ibid 35.

[70] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the Economic and Social Committee, the Committee of Regions and the European Investment Bank, 'Making the Best Use of the Flexibility within the Existing Rules of the Stability and Growth Pact' COM (2015) 12 final.

[71] Dermine (n 67) 45.

[72] For an analysis of soft law instruments in EU fiscal surveillance, see P Dermine, 'The Instruments of Eurozone Fiscal Surveillance through the Lens of the Soft Law/Hard Law Dichotomy – Looking for a New Approach' (2021) 23(7) *Journal of Banking Regulation* 18.

[73] The literature on the emergence of soft law instruments in EU law is vast. For comprehensive accounts, see M Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge University Press 2011); M Eliantonio and O Stefan (eds), Special section 'Soft Law in the EU Legal Order: Reflections and Contemporary Trends' (2018) 37 *Yearbook of European Law*; M Eliantonio, E Korkea-aho and

that once a body has been given the power to enact soft law instruments by delegation from the legislator, courts should refrain from reviewing those powers.[74] Specifically, because soft law instruments do not have binding force, there is no need for judicial review. Soft law is, in addition, seen as part of the policymaking process that will ultimately result in enacting binding decisions. At this stage, policymakers should be able to change their position without being held responsible.

Yet, the multilevel nature of economic governance makes it more complicated to determine accountability channels at the EU and national level. The Commission cannot lift the entire economic governance weight on its own – it needs national authorities to implement and abide by requirements concerning prudent budgetary management, comply with instructions concerning fiscal surveillance, implement targets, and meet benchmarks (to name a few). These latter authorities arguably have a narrower public that can hold them to account, but it is equally difficult to achieve legal accountability given that the Commission's legal toolbox produces different obligations for national authorities, adding complexity to the relevant standard for review. This means that national authorities often act based on formally non-binding documents, but those may still create rights and obligations for individuals at the national level.[75] How are national courts to deal with disputes resulting therefrom? In addition, is there any space for EU courts to have a say in the matter? The case law of the Court of Justice, as the following paragraphs will show, provides limited guidance on the matter.

Let us begin with what the Treaties say. Under Article 288(5) TFEU, recommendations and opinions are listed as acts having no binding force. In line with this, they are under Article 263(1) TFEU excluded from acts that are reviewable through an action for annulment. Conversely, Article 267(1)(b) TFEU does not make any such differentiation and instead refers to 'acts of the institutions, bodies, offices or agencies of the Union'. Finally, Article 277 TFEU provides that, regardless of the deadline in Article 263 TFEU,

O Stefan (eds), *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence* (Hart 2021).

[74] Traditionally under the *Meroni* doctrine, executive powers delegated to agencies could not involve the use of discretion. Case 9/56 *Meroni* EU:C:1958:7 at 152. On the Court of Justice changing its 'no discretion through delegation' approach, see M Scholten and M van Rijsbergen, 'The *ESMA-Short Selling* Case: Erecting a New Delegation Doctrine in the EU upon the *Meroni-Romano* Remnants' (2014) 41(4) *Legal Issues of Economic Integration* 389.

[75] G Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment before the EU Courts: A Plea for a Liberal-Constitutional Approach' (2020) 16(3) *European Constitutional Law Review* 466, 488 and the literature cited.

'any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act'. On its face, then, Article 263 TFEU is the odd one out in terms of what is a reviewable act.

Against this background, let us take a look at what the Court of Justice said on the matter. It is well-known by now that soft law is sourced in a variety of acts beyond recommendations and opinions (e.g. guidelines, communications, notices, recommendations, information notes, letters, or press releases).[76] While without legally binding force, they 'nevertheless may have practical effects'.[77] The Court of Justice stated in *Grimaldi* that (in the concrete case) a recommendation cannot 'be regarded as having no legal effect'.[78] Rather, national courts are under an obligation to take soft law instruments 'into consideration'.[79] In *Belgium v Commission*, the Court explained that soft law instruments have the 'power to exhort and to persuade',[80] but without creating binding legal effects. The Court grounded this in the joint reading of Articles 263 and 288 TFEU.[81] The inconsistency among these findings is difficult to miss: we are either within or outside the letter of the Treaties, but the Court attempts to achieve both at the same time.[82] If recommendations and opinions are non-binding and non-reviewable acts, where does the duty of national courts to take them into consideration come from?[83] In the same vein, where does the authority for soft

[76] For a useful theorisation and typology, see F Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law' (2015) 21(1) *European Law Journal* 68, and in particular 77–86; most recently see also B Cappellina, A Ausfelder, A Eick, R Mespoulet, M Hartlapp, S Saurugger and F Terpan, 'Ever More Soft Law? A Dataset to Compare Binding and Non-binding EU Law across Policy Areas and over Time (2004–2019)' (2022) 23(4) *European Union Politics* 741.

[77] F Snyder, 'The Effectiveness of Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 *Modern Law Review* 19, 32.

[78] Case C-322/88 *Grimaldi* EU:C:1989:646 [18].

[79] 'The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.' ibid.

[80] Case C-16/16 P *Belgium v Commission* (n 20) [26].

[81] ibid [30].

[82] A Arnull, 'EU Recommendations and Judicial Review' (2018) 14 *European Constitutional Law Review* 609, 620.

[83] ibid 617, referring also to Opinion of Advocate General Bobek in Case C-16/16 P *Belgium v Commission* EU:C:2017:959 [168].

law instruments 'to exhort and to persuade' come from? Certainly not from the text of the Treaties.

In the context of direct actions, the Court of Justice defined a challengeable act as one which has 'binding legal effects'. How does one reach that conclusion? Back in the famous *ERTA* judgment, the Court introduced a 'substance over form' approach: 'an action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.[84] As a consequence, an EU act cannot be shielded from judicial review simply because its author misnamed it. It is relevant to look into the 'wording and context',[85] the 'substance'[86] of the act in question, and the intention of its author[87] as to the nature of its legal effects. Over time, the requirement of 'legal effects' has turned into 'binding legal effects'.[88] The Court in *Belgium v Commission* arguably departed, or at least distorted, its substance over form approach,[89] by focusing on recommendations not being expressly included in Article 263(1) TFEU. According to Arnull, this has consequences for the institutional balance in the EU, because the Commission will have an easier job in circumventing the otherwise required participation of the Council and/or Parliament by resorting to the use of recommendations and opinions.[90]

However, the story does not end here. EU soft law instruments will be treated differently before the Court of Justice if a question of its interpretation is raised in a preliminary reference procedure. This is the result of the Court's abovementioned findings in *Grimaldi* and has recently been expanded to situations where the national court is questioning the validity of a soft law

[84] Case 22/70 *Commission v Council* EU:C:1971:32 [42].

[85] Case C-57/95 *France v Commission* EU:C:1997:164 [18]; Case C-301/03 *Italy v Commission* EU:C:2005:727 [21]–[23].

[86] Case C-147/96 *Netherlands v Commission* EU:C:2000:335 [27] and case-law cited; Case C-366/88 *France v Commission* EU:C:1990:348 [23]; Case C-303/90 *France v Commission* EU:C:1991:424 [18]–[24]; Case C-325/91 *France v Commission* EU:C:1993:245 [20]–[23].

[87] Case C-362/08 P *Internationaler Hilfsfonds v Commission* EU:C:2010:40 [52]; Case C-521/06 P *Athinaïki Techniki v Commission* EU:C:2008:422 [42].

[88] Case 151/88 *Italy v Commission* EU:C:1989:201 [21]. The Court here refers to Case 60/81 *IBM v Commission* EU:C:1981:264 [9]: 'According to the consistent case-law of the Court any measure the *legal effects of which are binding on, and capable of affecting the interests of*, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void' (emphasis added). Advocate General Bobek has found this change as narrowing the admissibility threshold for direct actions. Opinion of Advocate General Bobek in Case C-16/16 P *Belgium v Commission* (n 83) [72]–[73].

[89] Gentile (n 75) 482–483; Arnull (n 82) 620.

[90] Arnull (n 82) 618.

act (in *Kotnik*,[91] *Balgarska Narodna Banka*,[92] and *Fédération Bancaire Française*).[93] There is more. It is within the national procedural autonomy to determine *who* can initiate a challenge of validity before national courts.[94] That is so because Article 267 TFEU does not impose any autonomous requirements of standing, unlike Article 263 TFEU. Thus, a trade association was able to initiate a challenge of validity against non-binding EBA guidelines regardless of any individual and direct concern so long as the national procedural rules respected the principles of effectiveness and equivalence.[95]

Hence, an asymmetry. In direct actions, soft law instruments are not a reviewable act, but in the preliminary reference procedure, anything goes. We may well contrast this to the above asymmetry in effects: Member States may refuse to comply with a soft law instrument (and it remains open for the Commission to attempt to enforce it by way of an infringement procedure).[96] Conversely, under *Grimaldi*, national courts must[97] take into consideration soft law instruments and it is therefore not entirely illogical that they are able to submit preliminary references concerning their interpretation or validity.[98] In a framework of legal accountability that focuses on the individuals rather than on Member States, the openness of the Court of Justice towards preliminary references concerning any and all soft law instruments is not

[91] Case C-526/14 *Kotnik* EU:C:2016:570 (concerning a Commission Communication).

[92] Case C-501/18 *Balgarska Narodna Banka* EU:C:2021:249 (concerning a recommendation of the European Banking Authority (EBA)).

[93] Case C-911/19 *Fédération bancaire française* EU:C:2021:599 (concerning EBA guidelines).

[94] ibid [62]–[65].

[95] National rules 'must not be less favourable than those concerning similar claims based on provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible'. See, for example, Case C-397/21 *HUMDA* EU:C:2022:790 [33].

[96] See Case C-575/18 P *Czech Republic v Commission* EU:C:2020:530 [80]. The Court here specified that, because of the Commission's discretion in using Article 258 TFEU, there is no corresponding right of the Member States to initiate a direct action on the matter.

[97] For an analysis of an intervening judgment where the Court seemingly forgot about *Grimaldi* and stated that national courts 'may' take into account soft law instruments, see E Korkea-aho, 'National Courts and European Soft Law: Is *Grimaldi* Still Good Law?' (2018) 37(1) *Yearbook of European Law* 470, 487–491. Nevertheless, given that the Court returned to *Grimaldi* in subsequent cases analysed above, it may be concluded that *Grimaldi* still is good law.

[98] For a critique concerning the inability of Member States to challenge soft law measures as opposed to individuals before national courts, see H Marjosola, M van Rijsbergen and M Scholten, 'How to Exhort and to Persuade with(out Legal) Force: Challenging Soft Law after *Fédération bancaire française*. Case C-911/19, *Fédération bancaire française (FBF) v Autorité de contrôle prudential et de resolution (ACPR)*, Judgment of the Court (Grand Chamber) of 15 July 2021, EU:C:2021:559' (2022) 59 *Common Market Law Review* 1523, 1535–1537.

problematic. Nevertheless, this construct may lead to asymmetries with negative effects in the SSM, which is dominated by direct actions.

There is a caveat, however: national procedural rules govern access to remedies. So long as they do not go below the standards provided for remedies concerning rights stemming from national law, the Court of Justice will find no issue with effective judicial protection. Along the same lines, access to review of EU soft law will vary across Member States, without the fall-back ability of Member States to safeguard their citizens' rights by challenging the act in question by way of a direct action. Necessarily then, national courts should share with EU courts the burden of ensuring the political equality of citizens.[99] In what comes next, I will propose the role that judicial review should play in economic governance to overcome the deficiencies described throughout this section.

2.3 JUDICIAL REVIEW AS A TOOL FOR ACHIEVING THE POLITICAL EQUALITY OF CITIZENS IN THE EMU

I should like to make clear my position in respect of the debate on the legitimacy of judicial review: I consider judicial review a normatively desirable and necessary activity in a democratic society. Its main role is to protect those fundamental rights of citizens put into jeopardy by decisions delivered through a majoritarian democratic process. In addition, in a context where the democratic process creates wide and extensively used discretion, robust judicial review is all the more important. In this section, I will present why this is the case by recalling some of the central works that have promoted this position more generally (specifically those by Dworkin and Ely). Qualifying this against the background of an ever-expanding executive discretion in economic governance presented in the previous section, I will then offer my view on the role and operation of judicial review. This will lead me finally to argue that judicial review is capable of substantially contributing to the political equality of citizens in the EU by delivering legal accountability of decision-makers in EU's economic governance.

2.3.1 *Theoretical Inspiration*

I will ground my normative position towards judicial review in the work of Dworkin and Ely, as there is, in my opinion, no need to reinvent the

[99] An issue I will address in Section 2.3.4.

extraordinary wheel they created. In his book *Taking Rights Seriously*,[100] Dworkin puts forward what he calls 'the rights thesis': 'men have moral rights against the state (. . .) therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality'.[101] According to this argument, 'judicial decisions enforce existing political rights'[102] that are 'creatures of both history and morality'.[103] They are (or should) never be a result of policy but instead always a result of principle.[104] As such, judicial decisions are of a political nature inasmuch as they need to respect individual or group rights. Dworkin argues that constitutional theory does not rest on simple majoritarian decision-making, but rather protects 'individual citizens and groups against certain decisions that a majority of citizens might want to make'.[105] While recognising the difficulty of defining which rights exactly are to be taken seriously, Dworkin argues that regardless, the logic behind their protection must rest on two important ideas: human dignity[106] and political equality.[107] On this view, courts serve as a counter-majoritarian force equipped with principles of ensuring human dignity and political equality of all citizens – and it is this idea that I subscribe to in devising my arguments for judicial review as an important accountability tool to ensure the political equality of citizens in the EU. If a majoritarian decision interferes to the extent that political equality is at risk, it is right that a judicial decision should protect an individual right pertaining to every member of a political community.[108]

[100] R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977; Bloomsbury Revelations reprint 2022).

[101] ibid 181.

[102] ibid 111.

[103] ibid 112. It should also be added that Dworkin's thesis relies heavily on the idea of justice as fairness developed by Rawls. See J Rawls, *A Theory of Justice* (Harvard University Press 1971).

[104] Dworkin (n 100) 107–111.

[105] ibid 165.

[106] 'The idea (. . .) supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.' ibid 239.

[107] 'This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some men have freedom of decision whatever the effect on the general good, then all men must have the same freedom.' ibid 240.

[108] Dworkin's work (published as separate papers that were put together in *Taking Rights Seriously*) has of course been subject to critique, in particular as regards his conviction that every case has one right answer that a judge equipped with principles of morality can reach. See for example, Michigan Law Review, 'Dworkin's "Rights Thesis"' (1976) 74(6) *Michigan Law Review* 1167.

What is Ely doing in Dworkin's company? That is a fair question, given that in his work he rejects the Dworkin's view that there are moral principles that ought to guide judicial activity.[109] Indeed when reading Ely's *Democracy and Distrust*, it is difficult to shake off the impression that the two have little to nothing in common, as they take entirely different routes to arrive at the point of advocating for judicial review. My intention here is not to reconcile their approaches. Instead, I am adding the work of Ely to this section because he too is an advocate of political equality as the underlying rationale[110] for justifying judicial review.[111] Before focusing on what interests me in Ely's work (the role of structural inequalities), I also want to distance myself from his strict separation between substance and process,[112] which seems to have inspired numerous proposals in the EU legal scholarship to the effect that the Court of Justice should conduct a process-oriented review.[113] When Ely argues that the protection of minorities is the necessary constraint on governmental action, his focus is on procedural requirements pertaining to the demand of equality. This, to ensure that judges do not substitute the government's legitimate policy choice with their own substantive view on a certain value.[114] However, it has been convincingly showed by others that if Ely himself can present any right as procedural, so can any judge.[115] That means that it is possible to disagree with Ely on his over-characterisation of what is procedural. This is precisely a drawback of the EU law literature that applies his process–

[109] 'There simply does not exist *a* method of moral philosophy. Ronald Dworkin also succumbs to this error.' Ely (n 4) 58.

[110] Although he would likely have disagreed with my characterisation that some ultimate moral principle guided his arguments. But there are traces of such a position. For example: 'There *are* ethical positions so hopelessly at odds with assumptions most of us hold that we would be justified in labelling them (if not with absolute precision) "irrational".' ibid 52.

[111] 'Naturally that cannot mean that groups that constitute minorities of the population can never be treated less favourably than the rest, but it does preclude a refusal to *represent* them, the denial to minorities of what Professor Dworkin has called "equal concern and respect in the design and administration of the political institutions that govern them".' ibid 82.

[112] ibid 88–101. Ely attempts here to show that the American Constitution, as well as the large part of the Bill of Rights, is in fact ridden with values that are procedural rather than substantive. For a critique of this point, see, for example, G E Lynch, 'Democracy and Distrust: A Theory of Judicial Review' (1980) 80 *Columbia Law Review* 857, 860; M Tushnet, 'Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' (1980) 89 *Yale Law Journal* 1037; P Brest, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063, 1065.

[113] For a broader critique of this phenomenon, see A Woodhouse, 'Process Review as Panacea: A Critique of Process Review Advocacy in the European Union' (2020) 45(3) *European Law Review* 373.

[114] Ely (n 4) 104.

[115] For a presentation of this critique, see Woodhouse (n 113) 376–379.

substance distinction in claiming that even proportionality review can be merely procedural.[116]

But it is also possible to agree with him that judicial review is necessary *precisely because* minority rights require protection, not because their protection is nothing more than ensuring due process.[117] What makes his argument pertinent is that he drives home the point of structural inequalities as unavoidably present in majoritarian decision-making, thus rendering counter-majoritarian judicial control indispensable. Differently from Dworkin, who focuses on the protection of rights, Ely recognises the inherently precarious position of those 'whose interests differ from the interests of most of the rest of us'.[118] While we could certainly engage in a logical exercise to reach the conclusion that each injustice to a member of a minority would fall under Dworkin's rights thesis, what interests me here is the recognition of the *structural* nature of such injustices in a majoritarian system. Ely stresses that these cannot be remedied through political accountability. Transposed to the context of the EU's economic governance and particularly the deficiencies described in the previous section, it is right to recognise that it is by (its current) design permeated with structural inequalities between citizens across the EU both in terms of their ability to influence decision-making and in respect of the (redistributive) outcomes such decisions bring about.[119] To sum up, I subscribe to Dworkin's value-based approach to judicial review that underscores the centrality of political equality of individuals, whereby the courts have an obligation to safeguard these moral principles against the

[116] For example, the acceptance by the Court of Justice of an impact assessment and its findings represented for Lenaerts a proof that proportionality review is entirely procedural. Yet, this is not what Ely's argument is about: ensuring that democratic representation is complied with is a thicker obligation, one that looks at structural relationships among citizens impacted by a rule or an individual decision. Without exploring those choices made, it is not possible for the courts to properly discharge their function. See K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31(1) *Yearbook of European Law* 3, 8.

[117] A critique to my approach may be that his argument on minority protection would not be possible without the process–substance distinction and that he would simply not support a substance-oriented view of judicial review because this would mean providing judges with the ability to make policy based on their personal values. But Ely is himself guilty of trying to have his cake and eat it: try as he might, he is unable to avoid the conclusion that the development or sustaining of inequalities in a purely majoritarian (procedural, if you will) system are issues deeply connected to values. For such a reading of his approach to democracy and political equality, see J S Schacter, 'Ely and the Idea of Democracy' (2004) 57 *Stanford Law Review* 737, 741–742. See also J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 266. I am grateful to Wayne V Walton for challenging me on this point.

[118] Ely (n 4) 78.

[119] These correspond broadly to Ely's two levels of representation. ibid 89.

government. In addition, a proper understanding of the role of judicial review is impossible to grasp without accepting the inherent structural inequalities of the constitutional system we are analysing – in this book, the EU's economic and monetary union.

2.3.2 *On Discretion*

In appreciating both these levels, I consider it necessary to address another point that will shape our conclusions on judicial review as a remedy against structural inequalities specific to the EMU: the role of executive discretion. In the previous section, I have described the main contours of the deficiencies that executive discretion brought about in financial assistance, and due to the role of the ECB and the Commission in other areas of economic governance. Of course, both Dworkin and Ely developed their arguments in the context of the US constitutional system, and I use them in an abstract manner. Yet, delegation of authority from the legislator to the executive and the resulting discretion is an unavoidable trend in national systems as well as the EU,[120] noticed even before it appeared in its version on steroids after the financial crisis. This is not a place to explore the (now) old literature of how the regulatory state (in the words of Majone) came about. But the discussions on discretion still yield some common misconceptions in EU law that it is useful to bring to light.

The first of those concerns defining discretion in the first place. Opinions vary: each of the following definitions, keep in mind, has a different relationship to understanding the limits of discretion. Let us begin again with Dworkin. Unlike Ely,[121] he devoted some attention to the role of discretion and its relationship to judicial review. Famously, he began his analysis with: 'Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction.'[122] In his view, discretion is only there because a norm has granted it, and by doing so, it necessarily determined its scope and limits. Depending on how far a particular action is from the centre of the doughnut, we may speak of weak or strong discretion, but

[120] D J Galligan, 'Arbitrariness and Formal Justice in Discretionary Decisions' in D J Galligan (ed), *Essays in Legal Theory: A Collaborative Work* (Melbourne University Press 1984) 145; G Majone, 'The Rise of the Regulatory State in Europe' (1994) 17(3) *West European Politics* 77.

[121] The closest connection to the discussion on the relationship between the administration and courts in *Democracy and Distrust* is one where Ely discusses the motivation of legislation that he considers applicable also to the administration. See Ely (n 4) 136–145.

[122] Dworkin (n 100) 48.

Dworkin acknowledges that even the strongest discretion (at the centre of the doughnut) does not amount to licence, as we are ultimately, in all our actions, bound by such principles as rationality, fairness, and effectiveness.[123]

Similarly to this was discretion defined by Lord Diplock of the UK's House of Lords: 'The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.'[124] For both Dworkin and Lord Diplock, control is inevitable, no matter the extent of discretion granted, as there is always at least a rationality requirement underlying any use of discretion. Constraints have been similarly set out by Galligan: 'the fundamental duties governing the exercise of discretion are threefold: a duty to decide according to rational considerations; a duty to advance the purposes and objects for which power has been granted; and a duty to comply with a variety of moral and political principles, such as fairness in various of its senses.'[125] Note that both these definitions share Dworkin's approach of higher principles guiding and limiting the exercise of discretion without distinguishing the reasons and extents of the discretion granted.

Consider, in opposition to these, the following two definitions coming from the EU law literature. First, Ritleng: '(. . .) discretion can be defined as the freedom of action which the holder of public authority enjoys in its decision-making or rule-making activity. It is the part of its activity that falls outside the ambit of judicial review'.[126] Second, Fritzsche: 'discretion can be defined as the power and competence of a decision-maker to decide, with highest authority, about the application of the law to a specific fact pattern or certain elements thereof. This power derives from the absence of a statutory predetermination and subsequent *de novo* decision by the controlling court'.[127] Here, discretion is seen in purely negative terms, as the nucleus of public authority not subject to judicial control.[128] It would result from this approach that once discretion is acknowledged, the body in question has free rein over the specific

[123] R Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 33–34.

[124] *Secretary of State for Education and Science v Tameside MBC* [1976] UKHL 6, 17. Mendes calls for a similar approach: 'discretion should be conceived as the authority attributed to decision-makers to choose between different alternatives when concretising legal norms with a view to achieving the ends that those norms identify'. Mendes (n 15) 462. See also Opinion of Advocate General Emiliou in Case C-389/21 P *ECB v Crédit Lyonnais* (n 12) [44].

[125] Galligan (n 120) 147.

[126] Ritleng (n 13) 184.

[127] A Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 *Common Market Law Review* 361, 364.

[128] For a critique of this approach, see Mendes (n 15) 461.

matter within its competence. It is particularly important also to note that Fritzsche's definition stems from the case law of EU courts.

The second misconception concerns the extent to which courts review discretionary decisions. This discussion is necessarily contingent on the first, of course. 'Positive' definitions of discretion focus on its content but maintain that control of its rational use is necessary. 'Negative' definitions of discretion instead require that courts display in respect of the administrative body a degree of deference. Here reasons for granting discretion become relevant and condition the extent of judicial control. Kavanagh accordingly distinguishes between minimal and substantive deference: the first is justified by arguments pertaining to the separation of powers, the second by the specific expertise of the body in question, its institutional features, and the procedures under which it operates.[129] In the EU context, the separation of powers, referred to as institutional balance, is often highlighted as the main reason for a light standard of review of discretion.[130]

Yet, it already became visible in Section 2.2 that the traditional arguments on the position of discretion and judicial review do not bite in the post-crisis context in several respects. The persistence in maintaining the same justifications as those imported from the context of the nation-state with different chains of accountability is inadequate. The pattern visible in decision-making post-crisis is a counter-intuitive one: while in the nation-state context deliberative processes create discretionary powers, for the post-crisis economic and monetary governance, the opposite is true. Specifically, decisions with high redistributive impacts, such as the ECB's bond-buying programmes and decisions on financial assistance to debtor Member States, lacked any deliberative process at their origins.[131]

My proposal on the proper treatment of discretion by courts takes inspiration from the criticism by Mendes, according to which the Court of Justice artificially separates discretion in making complex findings based on technical expertise (cognition), on the one hand, and discretion that involves a value judgment based on the balancing of interests (volition), on the other.[132]

[129] A Kavanagh, 'Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication' in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press 2008) 184.

[130] See Opinion of Advocate General Emiliou in Case C-389/21 P *ECB v Crédit Lyonnais* (n 12) [33].

[131] See above, in particular, Section 2.2.1.

[132] Mendes (n 15) 449. See also H P Nehl, 'Judicial Review of Complex Socio-Economic, Technical, and Scientific Assessments in the European Union' in J Mendes (ed), *EU Executive Discretion and the Limits of Law* (Oxford University Press 2019) 176.

Mendes is certainly right in claiming that the two activities of an administrative body necessarily overlap and it is not always possible to clearly distinguish them so as to then determine the relevant standard of judicial review – in particular after the financial crisis, which exacerbated the need for executive discretionary decision-making.[133] We should accordingly abandon distinctions that focus on predetermined categories of discretion, obscuring its effects. Courts should, as I will show in the following section, regard discretion as a unitary concept by focusing instead on their effects on the common interest and how these were balanced in the exercise of discretion by the decision-making body in question.

2.3.3 *What Type of Judicial Review?*

Informed by these important contributions from the theory of judicial review, I propose approaching the issue with a starting position of a rebuttable presumption of full review. An important consideration behind this approach is the high redistributive effects of decisions in the EMU.[134] Yet, opportunities for input from the individuals were few and far between, at best along national lines. No legitimacy routes were created for the individuals to connect along socioeconomic lines, where wealth redistribution takes shape. The Troika, as we will see in Chapter 3, only considered the financial effects of conditionality measures, instead of including a reflection on their socioeconomic effects. Likewise, we will see in Chapter 4, for example, that the ECB became the largest creditor of eurozone Member States through its quantitative easing programme, with significant effects in the prices of assets. Such a decision was not subject to any sort of *ex ante* scrutiny of the different socioeconomic interests that are inevitably affected. In this context, measures that carry political and socioeconomic outcomes for individuals must be pursued in the common interest and judicial review is there to ensure that is the case. But how exactly?

In every case that comes before a court and involves discretion, the presumption should be that it is to perform a high standard of review. This includes an intensive examination of all the factual, legal, as well as political considerations that went into reaching the decision under review. The legitimacy structure behind the granting of discretion to the decision-making body

[133] Mendes (n 15) 448.

[134] Most recently, see 'ECB Confronts a Cold Reality: Companies Are Cashing in on Inflation', *Reuters* (2 March 2023). Available at <www.reuters.com/markets/europe/ecb-confronts-cold-reality-companies-are-cashing-inflation-2023-03-02/>.

is also relevant: what limitations and conditions are attached to the granting of discretion and what are the accountability duties in other spheres (e.g., political, administrative) that the decision-maker was or will be subject to.[135] The burden then shifts to the parties to demonstrate not only who should win the case, but also, preliminarily, what should be the appropriate standard of review and all the necessary evidence to allow a court to reach conclusions on that point. In this way, the duty to state reasons becomes a central feature of legal accountability.

The parties thus carry the full burden of substantiating at least five elements determinative of the ultimate standard of review to be applied. First, that the power of the body in question involves (or does not) an area that is either complex, uncertain, highly politicised, carries redistributive effects, or any combination of these elements. The second element concerns the need that the decision-maker in question had (or did not have) a high duty of care in collecting all the relevant evidence for reaching a decision. Third, that an obligation was (or not) met to explain carefully and in a detailed manner what information was (or not) considered and why. Fourth, what values and/or societal interests have been at play in this intellectual process and how they were (or should have been) balanced. Fifth and finally, what would have been the alternative outcomes had a different path been opted for and why these would (or would not) have achieved the aim as mandated by the norm granting discretion.

It is, of course, a matter of fact that to a certain extent, these evidentiary activities are already present in the submissions of parties before EU and national courts. For example, the ECB argued in *Gauweiler* that the information that was taken into account in creating the Outright Monetary Transaction mechanism was sufficient and necessary in light of the ECB's assessment of the functioning of the monetary policy transmission mechanism.[136] However, my proposal goes further in that it places the burden on the parties also to justify the nature of the discretion and how it was used in all its facets (cognition and volition, and the extent to which either is present). To take the monetary policy field as an example again, I have already mentioned that the exercise of the price stability mandate of the ECB necessarily entails value choices that materialise in the redistribution field. In this scenario, I see nothing controversial in demanding the ECB to justify and

[135] This approach is echoed by the Bundesverfassungsgericht where it argued that the lack of political accountability of the ECB (i.e., its special status under the Treaties) should be the reason for a more stringent judicial review. *Weiss* (n 58) [143].

[136] Case C-62/14 *Gauweiler* (n 44) [73].

explain the choices it made, the reasons and data behind those choices, what alternatives were possible, and why they were not pursued. The opposing party then has the parallel task of demonstrating the inconsistencies or deficiencies in the ECB's submissions.

These elements go against the traditional wisdom whereby the more politicised the mandate of an institution, the less intense judicial scrutiny should be, lest the court does not replace the decision of that institution with its own. My approach is the reverse: the more politicised the mandate and the resulting decision under review, the higher the burden on the institution in question publicly to demonstrate the different interests and values it took into account in its decision-making process.[137] Here is where the institution's duty to state reasons plays a central role: should it become obvious that the institution in question needs to explain its conduct additionally, the likelier it is that it lacked in its obligation sufficiently to state reasons in the decision under review. This point is also crucial as a bridge between procedural and substantive judicial control, because it is the institution itself who ultimately needs to demonstrate the substantive qualities of its decision. The court merely rubberstamps the outcome that becomes clear in public judicial proceedings.

Presented with this rich evidentiary basis, the task of courts is then to assess and weigh it to reach the conclusion on the normative basis of the discretion in question, the context in which it was exercised, and the credibility and persuasiveness in showing that the proper duty of care was employed.[138] This is where the activity of the Court of Justice can surpass its modest procedural approach to reviewing decisions in the economic and monetary field.[139]

[137] This point broadly follows the logic introduced by Dawson and Maricut-Akbik concerning the accountability good of publicness. They explain publicness as follows: 'The final good is publicness or the idea that official action should be oriented towards the common good – and therefore justified by public or universal reasons. This involves demonstrating both that officials were not personally enriched and that their decisions are fairly balanced, taking into account different societal interests and perspectives. Once again, accountability can ensure the publicness of official action in this sense – when parliamentarians scrutinise government agencies, or courts conduct judicial review, a key demand is that actors show how their activities forwarded the national or collective interest. Accountability is thus a device to advance the normative good of public policy grounded in the public interest.' M Dawson and A Maricut-Akbik, 'Procedural vs Substantive Accountability in EMU Governance: Between Payoffs and Trade-offs' (2021) 28(11) *Journal of European Public Policy* 1707, 1714 (references omitted).

[138] This is no novel obligation. In the context of Article 41 of the Charter, guaranteeing the right to good administration, the Court stated: 'the right to good administration encompasses the obligation of the administration to give reasons for its decisions (see, to that effect, judgment of 8 May 2019, *PI*, C-230/18, EU:C:2019:383, paragraph 57 and the case-law cited)'. Joined Cases C-225/19 and C-226/19 *R.N.N.S. & K.A.* EU:C:2020:951 [34].

[139] Dawson, Maricut-Akbik and Bobić (n 40).

By demanding of the parties a full evidentiary analysis of the decision under review, courts will have before them a complete picture of the procedural as well as substantive considerations and outcomes and will be able to scrutinise both aspects of the decision. The legitimacy of this activity will be sourced in the normative obligation of the parties, and at the very least of the body in question, to justify itself in respect of the procedure followed and the aims it pursued. The public interests or values that were disregarded or sacrificed in this process will also be on full display for the public.[140]

This exercise for the decision-making body and the opposing party is in addition crucial for understanding the way in which that body safeguarded the common interest embedded in the norm granting it discretion in the first place.[141] This is central to the normative framework I use in this book and propose should guide decision-making in the EMU for the purposes of achieving political equality. It will be achieved when citizens are provided with a forum that protects their legitimate demands to seek recognition in shaping the common interest and its enforcement. Contestation is in this context the necessary condition of political equality, given that all citizens have entrusted the institutions to pursue and achieve goals in the common interest. Parties who challenge decisions before courts engage in contestation and do so in pursuit of the common interest. Their access to legal accountability is thus one mode of using the rights accorded to all EU citizens.

To achieve this aim, I have argued in Chapter 1 that the principles of solidarity and equality of Member States should be given a different interpretation to move away from a state-centred, conditionality-oriented focus. The common interest, in turn, is contingent upon Member States and the EU acting in respect of the principle of solidarity. We have learned from Ely that judicial review is a tool able effectively to remedy heterogeneous conditions in a political community. An analogous asymmetry pervades the EMU, both in the starting positions and in the outcomes of decisions on the different groups of society. The normative objectives embedded in the granting of discretionary powers with distributive effects, characteristic for the EMU, are translated into commitments of decision-makers towards all EU citizens in the achievement of the common interest. In Chapter 1, I have presented further arguments on

[140] This approach is also consistent with the role of courts as spaces for deliberation as argued by Habermas (n 117) 274–276.

[141] See also J 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: Essays in Honour of Paul Craig* (Oxford University Press 2020) 304.

what considerations normatively pertain to the pursuit of the common interest in the EMU even when the enabling norm is indeterminate.[142]

Finally, this arrangement of judicial review allows for a proportionality-based balancing exercise to take place. The balancing here will not lead the Court to engage in a *de novo* decision-making and substitution of the original decision with its own. Instead, it will be for the body whose decision is under review thoroughly to demonstrate how far it has gone to reconcile the competing interests its decision influenced. To return to the example of distributive effects, the question would be how the ECB has ensured, while working on achieving price stability, to prevent income inequality or similar redistributive outcomes. This echoes the approach taken by Scott and Sturm in touting courts as catalysts, whereby they are able to require that decision-makers 'justify their particular conception of a norm both in relation to the processes they use to produce that norm and in relation to more general normative commitments that must be articulated in context in order to assume meaning'.[143] In some ways, my proposal is that courts outsource the activity of balancing to the parties, and, in the exercise of their authority to say what the law is, endorse the outcome faithful to the enabling norm and the objectives underpinning it.

The court hearing the case is also able to invite independent experts to aid its assessment of the comprehensiveness and veracity of the facts submitted by the decision-maker and the opposing party. A good example of such a practice is the litigation that took place before the Bundesverfassungsgericht concerning the Own Resources Decision. There, a number of experts participated at the hearing and provided their views on the likelihood that the Next Generation EU measures carry a risk to the budgets of Member States.[144] These opinions at times provided contradicting prognoses, enabling the court to form an idea of what sort of fact-finding process should guide the decision-maker in assessing the risks and economic effects of a certain decision. This has an additional benefit of legitimising judicial review in scientific areas with high uncertainty, as the court hearing the case can decide it based on comprehensive information from the relevant expert community.

Comparing and assessing the credibility and persuasiveness of the different pieces of evidence presented to it is at the heart of the intellectual activity

[142] See Sections 2.3 and 2.4 in particular.

[143] J Scott and S Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13 *Columbia Journal of European Law* 565, 571.

[144] Cases 2 BvR 547/21 and 2 BvR 798/21 *Own Resources Decision* Judgment of 6 December 2022 [96], [179], [181], [201], [208], [221], [225]. For a further analysis of this decision, see section "Judicial Review at the National Level" in the Epilogue.

inherent to judicial activity that takes place across virtually all areas of human life.[145] In the same way that the Court of Justice is able to assess the proper use of discretion in highly scientific or uncertain areas,[146] so it is in the economic and monetary field.[147] This constellation allows the Court to dodge the most difficult bullet directed to its review of decisions in the EMU: that it does not have sufficient expertise in this area and should not interfere.[148] Instead, the Court's role is to have those with the necessary expertise justify themselves both in terms of the procedure followed and the substantive outcome reached in relation to the normative values that every decision-maker in the EMU should achieve. The party opposing the decision-maker represents, through its action before the Court, the interests of those affected by the decision under review. It is, of course, possible that the interests of that specific party are not representative of the common interest.[149] Procedurally, it should be said that in direct actions and appeals, EU courts examine the legal interest in bringing the case of their own motion.[150] This is contingent also upon the interpretation of the common interest, where the courts are not prevented, but are

[145] Nehl (n 132) 180. See also Opinion of Advocate General Ćapeta in Case C-268/21 *Norra Stockholm* EU:C:2022:755 [66]–[83].

[146] For example, the Court of Justice instructed national courts how to treat scientific evidence in the application of the Medicinal Products Directive and defined what might be considered 'beneficial effects on health' for the purposes of its application, in Case C-616/20 *M2Beauté Cosmetics GmbH* EU:C:2022:781 [38], [51]. We can all agree that the Court does not have the necessary expertise to make those conclusions, but it does have the intellectual tools available to assess different options and evidence presented to it. For a critique on the Court's overly intrusive review of scientific methodology, see G C Leonelli, 'The Fine Line between Procedural and Substantive Review in Cases Involving Complex Technical-Scientific Evaluations: *Bilbaìna*' (2018) 55(4) *Common Market Law Review* 1217.

[147] Case C-12/03 P *Tetra Laval* EU:C:2005:87 [39]: 'Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.'

[148] Most clearly expressed by M Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review' (2014) 15(2) *German Law Journal* 265.

[149] On this risk and the normative proposal to remedy it, see M Morvillo and M Weimer, 'Who Shapes the CJEU Regulatory Jurisprudence? On the Epistemic Power of Economic Actors and Ways to Counter It' (2022) 1(3) *European Law Open* 510.

[150] See Opinion of Advocate General Mengozzi in Case C-401/09 P *Evropaïki Dynamiki v ECB* EU:C:2011:31 [60] and in particular footnote 21.

rather obliged, to adjudicate in line with the constitutional principles underlying the common interest.

2.3.4 *On the Division of Judicial Labour*

In this last section, I want briefly to turn to the question of who should do what in the multilevel judicial structure of the EU. That question will be answered by determining the relevant interlocutors in the European judicial space and the way to ensure the quality of their work.

First, to interlocutors: why is it relevant that courts should 'talk to' and challenge each other? Without entering the well-travelled universe of the judicial dialogue literature, suffice it to say here that the EU's judicial set-up, with the preliminary reference procedure in the centre, depends on national and EU courts mutually contesting each other's decisions and thereby keeping each other in check.[151] Their interactions are of equal importance in the EMU. Thus, the starting position should be as elsewhere in EU law: EU courts deal with issues pertaining to EU law; national courts deal with issues pertaining to national law. When these two legal orders interact, so do the courts. This may take place through the preliminary reference procedure or through parallel decisions on the same subject matter. So far so good.

EMU law is, however, slightly different from other areas of EU law in that it is often made up of composite structures including the national and EU level. For example, monetary policy is exercised by the European System of Central Banks, which is composed of the ECB and national central banks of the euro area. Furthermore, the SSM equally operates in composition of the ECB and the relevant national authorities. There is more. In the operation of the SSM, the ECB operates on the basis of both EU and national law, therefore blurring the division of powers and applicable law. As will be described in Chapter 5 dealing with the SSM, EU courts have reserved for themselves the exclusive power to adjudicate matters in which the ECB has exclusive powers, even when it applies national law.[152] This exclusion removes one point of control in the legal accountability structure and is in my view deeply problematic. It also provides EU courts with the power to interpret national law, which goes beyond the powers granted to them under

[151] In my work, I have been a strong supporter of constructive constitutional conflict between the Court of Justice and national constitutional courts, arguing it is a vehicle of mutual checks and balances. See Bobić (n 17).

[152] Case C-219/17 *Berlusconi* (n 59).

Article 19(1) TEU and may lead to problematic outcomes should that interpretation be erroneous without any subsequent control.

From the perspective of access, knowledge, and democratic legitimacy, my view is that the traditional division of work in EU law should remain in place also in the EMU. This can at present be achieved by national courts accepting jurisdiction in contravention of the *Berlusconi* decision of the Court of Justice, and maintain, where necessary, the use of the preliminary reference procedure. This will also reduce the dominance of direct actions in the Banking Union more generally. Important improvements would arise in terms of access to justice as well, given the already mentioned high threshold for standing when it comes to non-privileged applicants, a problem less pronounced at the national level.

2.4 CONCLUSION

Judicial review is a contested concept in constitutional theory, for reasons concerning the democratic legitimacy of judges and the democratic consequences of their decisions. These concerns become more complex when courts get involved in reviewing the decisions of the administration and the executive who have been granted discretionary powers, where courts should arguably exercise deference not to replace the original decision with their own. Regardless of which side in this debate one takes, I have shown that arguments against judicial review are not compelling in respect of decision-making patterns in the EMU, an area where decisions inherently carry high redistributive outcomes. These latter are characterised by novel arenas of non-deliberative decision-making, a high degree of executive discretion, and a widespread use of soft law instruments.

Against this background, I have then presented my own vision of the role of judicial review in the EMU, grounded in the work of Dworkin and Ely. I used their work as normative support for judicial review, which is an efficient tool to safeguard political equality under conditions of structural inequalities. I have also relied on Mendes's work in arguing that we should employ a unitary understanding of discretion when approaching judicial control. With this in mind, I have proposed that the burden should be placed on the parties in the litigation to present a rich evidentiary basis that is to serve as ammunition aimed at endorsing or rebutting the presumption of full judicial review. This judicial activity should be shared between national and EU courts, as it is done in other areas of EU law. This is particularly important given the changes that took place in the division of tasks between national and EU courts in the SSM, where national courts lost the ability to review measures

where the ECB applies national law, and has the final say on supervisory decisions. With these lessons and proposals in mind, I now turn to explore in detail three areas of EMU governance: financial assistance mechanisms, monetary policy of the ECB, and the SSM. My aim will be to present EU and national judicial review of decisions in these areas and test them against the normative framework of accountability from Chapter 1, and how this should be done according to my proposal in this chapter.