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Constructive Constitutional Conflict as an Accountability Device in Monetary Policy

Ana Bobić

9.1 INTRODUCTION

The year is 1974. In Karlsruhe, the Second Senate of the Bundesverfassungsgericht just informed the Court of Justice that the way in which the latter is safeguarding fundamental rights is subpar to the standard of protection provided in the Grundgesetz.[1] *Solange*, the Court of Justice, does not step up its fundamental rights protection game; the Bundesverfassungsgericht will continue to do so despite the possibility of EU law requiring otherwise.[2] Theories and commentaries abounded, so much so that this instance of constitutional conflict is still used as the ideal type guiding our academic thought in the area of judicial interactions in the EU. For example, the doctrines of 'Reverse Solange'[3] and 'Horizontal Solange'[4] are an unavoidable reading for anyone attempting to make sense of judicial interactions in the EU.[5] Substantively, an important consequence of *Solange* is an increase in the level of fundamental

[1] Case 37 BVerfGE 271 *Internationale Handelsgesellschaft (Solange I)*, Judgment of 29 May 1974.

[2] In its response, in Case C-4/73, *Nold*, EU:C:1974:51, para 13, the Court of Justice used the common constitutional traditions of Member States as the source of inspiration and the level of protection of fundamental rights that will be accorded on the Union level. Finally, the Bundesverfassungsgericht accepted such a level of protection in the *Solange II* judgment. Case 73 BVerfGE 339 *Wünsche Handelsgesellschaft (Solange II)* Judgment of 22 October 1986, (1987) 3 CMLR 225.

[3] von Bogdandy and Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges', 15 *European Constitutional Law Review* 3 (2019) 391.

[4] Canor, 'My Brother's Keeper? Horizontal Solange: "An Ever Closer Distrust among the Peoples of Europe"', 50 *Common Market Law Review* 2 (2013) 383.

[5] For a summary, see Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis', 20 *German Law Journal* 8 (2019) 1182.

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rights protection in the EU, incrementally and dynamically developing through contestation between the EU and the national level.[6]

Fast forward to 2020, and the Court of Justice is being reprimanded by the Bundesverfassungsgericht yet again, this time for not properly controlling the European Central Bank (ECB) in respecting the limits of the law of the Economic and Monetary Union (EMU).[7] The ECB acting in excess of what the Treaties allow for is, according to the Bundesverfassungsgericht, not permitted by the Basic Law. This time around, the reaction to the German decision appears to me to suffer from a certain conflict fatigue: the attacks on the rule of law coming from Poland and Hungary are causing a strain in the ability of EU institutions[8] to ensure the respect of the values contained in Article 2 TEU, and the ultra vires finding of the Bundesverfassungsgericht is seen as unnecessarily adding fuel to the flames. This would explain the conceptually flawed, yet overwhelmingly present, conflation of the German and the Polish/Hungarian situations as both representing a rule of law issue that is an existential threat to the EU.[9] Constitutional conflict is thus considered a disruptive factor in the scholarship that regards the EU as a federal or quasi-federal system.[10]

Conversely, the EU's constitutional sphere is comprised of multiple constitutional sites of discourse and authority,[11] where the mutual recognition and respect between these sites is 'the only acceptable ethic of political responsibility for the new Europe'.[12] In consequence, constitutional conflict is not a bug but an important feature contributing to the system's functioning and incremental development.[13] So long as the conflict remains within the possible

[6] Schimmelfennig, 'Competition and Community: Constitutional Courts, Rhetorical Action, and the Institutionalisation of Human Rights in the European Union', 13 *Journal of European Public Policy* 8 (2006) 1247.

[7] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15, *Weiss II*, Judgment of 5 May 2020, para 116.

[8] Kelemen, 'The European Union's Authoritarian Equilibrium', 27 *Journal of European Public Policy* 3 (2020) 481.

[9] Editorial Comments, 'Not Mastering the Treaties: The German Federal Constitutional Court's PSPP Judgment', 57 *Common Market Law Review* (2020) 965; Mayer, 'To Boldly Go Where No Court Has Gone Before. The German Federal Constitutional Court's Ultra Vires Decision of May 5, 2020', 21 *German Law Journal* (2020) 1116, at 1124.

[10] Editorial Comments, op. cit. *supra* note 9; Kelemen and Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', 21 *Cambridge Yearbook of European Legal Studies* 1 (2019).

[11] Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* 3 (2002) 317, at 337.

[12] Ibid. Similarly, Maduro stresses the importance of the discursive element between different sites of constitutional authority, who then jointly and coherently strive to create the shared European legal space. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker (ed.), *Sovereignty in Transition* (Hart Publishing, 2003), pp. 513–514, 518.

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

interpretation of values contained in Article 2 TEU, the conflict is contained within the 'constitutional' but remains 'pluralist'.[14] Ultimately, a heterarchical setup is achieved through the system's in-built auto-correct function, which serves to incrementally accommodate points of conflict through mutual respect and sincere cooperation of all courts involved.[15]

Taking this context as the starting point, my aim is to answer what role does constitutional conflict, as a feature of the EU's constitutional framework, play when it comes to achieving accountability goods presented in the theoretical framework of this book? And in unpacking the goods further, are (and should) they better achieved through procedural or substantive means? I will more specifically refer to three accountability goods. First, the analysis of the jurisprudence of constitutional conflict in the monetary field will show the way in which courts can contribute to non-arbitrariness, by imposing on the decision-makers more stringent standards for justifying their policies. There is of course a procedural as well as a substantive dimension to such judicial demands. As I will show below, a common critique of the Court of Justice is that it remains on the procedural side of ensuring the non-arbitrariness in ECB decision-making. On the other hand, the Bundesverfassungsgericht is also criticised for holding too firm a grasp on the ECB in terms of its substantive demands to demonstrate the ways in which its action is constrained. There is thus a need to take a closer look at the potential of constitutional conflict to act as a discursive mechanism between the EU and national courts in devising a standard of judicial review that ensures the good of non-arbitrariness that goes beyond its procedural facet.

The second accountability good that can be achieved through judicial review characterised by constitutional conflict is effectiveness. How can courts ensure that the decisions of the ECB are in fact correct? Another common critique of judicial review in monetary policy is that the courts necessarily lack the expertise required to in fact substantively ensure that the ECB's decisions are sound. The analysis below will thus aim to show the ways in which effectiveness has featured in judicial review in the monetary field.

Finally, I will also show the ways in which judicial review and the resulting constitutional conflicts flesh out how the ECB can be accountable by delivering the good of publicness. What is particularly interesting in this regard is that publicness might mean different things to different courts, and the role of constitutional conflict is particularly important here to ensure that for

[14] Ibid., at p. 70.

[15] Bobić, 'Constitutional Pluralism Is Not Dead: An Analysis of Interactions between the European Court of Justice and Constitutional Courts of Member States', 18 *German Law Journal* 6 (2017) 1395, at p. 1423.

areas where the EU has competence, the good of publicness contributes to the common interest of the entire Union.

In answering these questions, I will focus on the judgment of the Bundesverfassungsgericht in *Weiss II* through an incremental lens, forming part of a broader conversation on accountability in the EMU between the two courts that began with the earlier *Gauweiler* litigation. After a brief presentation of the broader ECB-related jurisprudence of the two courts in Section 9.2, I will address, first, the question of the role of the principle of proportionality in assessing the legality of ECB action (Section 9.3); and, second, the competition between the Court of Justice and national constitutional courts in competence control (Section 9.4). The final Section (9.5) will offer some conclusions on how these judicial interactions fared in achieving the procedural and/or substantive facets of the three accountability goods, as well as the remaining dangers of the *Weiss II* decision for the European judicial space.

9.2 THE MONETARY POLICY LITIGATION

From the perspective of constitutional conflict, the two courts have been discussing the appropriate level of control of the ECB as an idiosyncratically independent institution for some time now,[16] beginning with the Outright Monetary Transactions (OMT) mechanism that was at the centre of the *Gauweiler* litigation. The decision of the German court in *Weiss II* is at present the last instance of this back and forth. Three main threads run through and shape these interactions: the legality of ECB action, ultra vires review, and the role of constitutional identity, culminating in the German rejection of the interpretation provided by the Court of Justice.

In *Gauweiler*, the Bundesverfassungsgericht raised doubts concerning the compatibility of the OMT mechanism with primary EU law. More specifically, for the OMT to be ultra vires, it needed to exceed the monetary policy mandate of the ECB and the prohibition of monetary financing, resulting in an encroachment of Member States' economic policy.[17] The Court of Justice's response confirmed the legality of the OMT programme: it first analysed the powers of the ECB and concluded that indirect effects of monetary policy on economic policy do not make them equivalent, leading to the

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

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

conclusion that the ECB was acting within the boundaries of its mandate.[18] The Court of Justice further provided an interpretation setting out some of the conditions necessary for compliance with the Treaties,[19] albeit differently than what the Bundesverfassungsgericht stated in its order for reference.[20] In relation to the judicial relationship between the two courts, the Court of Justice omitted any analysis of the claims to constitutional identity and ultra vires review of the Bundesverfassungsgericht, stating only that the decisions provided by way of the preliminary reference procedure concerning the interpretation and validity of Union acts are binding on the national court.[21] The Bundesverfassungsgericht accepted the findings of the Court of Justice, by setting out the relationship between the principle of primacy and the Basic Law, addressing also the identity and ultra vires review it carries out in relation to EU acts. It concluded that any such review must be done cautiously, with restraint, and in a way that is open to European integration.[22]

It is against this background that the Bundesverfassungsgericht submitted its second preliminary reference concerning the scope of ECB's mandate. This reference revolved around three issues: whether the ECB had complied with its obligation to state reasons in devising the Public Sector Purchase Programme (PSPP), whether said programme falls within the monetary policy mandate of the ECB, and whether it is contrary to the Treaty prohibition of monetary financing. The principle of proportionality was mentioned by the Bundesverfassungsgericht only in relation to the first two issues. After receiving the response from the Court of Justice, the Bundesverfassungsgericht found that the proportionality test as applied by the Court of Justice deprives the said principle of its ability to protect Member State competence.[23] It declared the judgment of the Court of Justice[24] and the PSPP[25] of the ECB ultra vires.

Having rejected the findings of the Court of Justice, the Bundesverfassungsgericht then took it upon itself to interpret the scope of the monetary policy mandate of the ECB. The ECB failed to take into account the economic policy effects of the PSPP and, importantly, balance a number

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

[19] For a more detailed analysis of each of these conditions, see Tridimas and Xanthoulis, 'A Legal Analysis of the Gauweiler Case. Between Monetary Policy and Constitutional Conflict', 23 *Maastricht Journal of European & Comparative Law* 1 (2016) 17, at 23–30.

[20] Ibid., at 30–31.

[21] Case C-62/14 *Gauweiler*, op. cit. *supra* note 18, para 16.

[22] Case 2 BvR 2728/13 *Gauweiler*, Judgment of 21 June 2016, paras 121, 154, 156.

[23] *Weiss II*, op. cit. *supra* note 7, para 123.

[24] Ibid., paras 116, 163.

[25] Ibid., paras 117, 178.

of competing interests against each other.[26] In defining the relevant steps of the proportionality test, the Bundesverfassungsgericht stated that the fourth *stricto sensu* step has been omitted by the Court of Justice,[27] and there was no review of the sufficiency of information provided by the ECB in balancing the relevant interests.[28] The ECB thus failed in its duty to state reasons concerning the proportionality of the PSPP.[29] In relation to the prohibition of monetary financing, the Bundesverfassungsgericht raised some doubts as to the scrutiny applied by the Court of Justice, again related to the duty to state reasons,[30] but ultimately decided that the programme is in line with the Treaty prohibition of monetary financing and does not breach the constitutional identity of Germany.[31]

In consequence, the Bundesverfassungsgericht provided the Bundesbank with a three-month deadline during which it is obliged to work together with the ECB in ensuring the programme meets the principle of proportionality as interpreted by the German court. Otherwise, the Bundesbank will no longer be allowed to participate in the PSPP.[32] Since then, the ECB has decided to comply with the request of the Bundesverfassungsgericht,[33] which the President of the Bundesbank deemed to be in compliance with the demands on the proportionality analysis to be carried out and published by the ECB.[34]

9.3 PROPORTIONALITY AND ECB ACCOUNTABILITY

One of the central criticisms directed to the decision in *Weiss II* revolves around whether proportionality is the correct answer when the question is how competences are divided between the EU and the national levels.[35]

[26] Ibid., paras 133, 138–145.

[27] Here the Bundesverfassungsgericht infamously stated that the decision of the Court of Justice is 'simply not comprehensible'. Ibid., paras 116.

[28] Ibid., paras 169, 176.

[29] Ibid., para 177.

[30] Ibid., para 190.

[31] Ibid., paras 228–229.

[32] Ibid., para 235.

[33] See the letter by ECB President Christine Lagarde to MEP Sven Simon on 29 June 2020, <www.ecb.europa.eu/pub/pdf/other/ecb.mepletter200629_Simon~ece6ead766.en.pdf>, (last visited 16 Aug. 2022); Speech by Yves Mersch, Member of the Executive Board of the ECB, 'In the spirit of European cooperation', 2 July 2020, <www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200702~87ce377373.en.html>, (last visited 16 Aug. 2022).

[34] Frankfurter Allgemeine Zeitung, 'Weidmann sieht Forderungen des Verfassungsgerichts als erfüllt an', 3 August 2020, <www.faz.net/aktuell/finanzen/jens-weidmann-verfassungsgerichtsurteil-zur-ezb-erfuellt-16887907.html?GEPC=s3>, (last visited 16 Aug. 2022).

[35] Mayer, op. cit. *supra* note 9, at 1119; Editorial Comments, op. cit. *supra* note 9, at 969.

It refers to Bundesverfassungsgericht's use of the principle of proportionality in delineating competences between the EU and the national levels, rather than applying it to the way in which these competences are exercised. This criticism is grounded in the wording of the Treaty, where Article 5(1) TEU clearly separates existence of competence to be guided by the principle of conferral and its exercise by the principle of proportionality. However, as I hope to show by analysing the interpretation of the two courts across *Gauweiler* and *Weiss*, this separation is not as straightforward when it comes to the mandate of the ECB, and the nature of separation between monetary and economic policy. In turn, this has important consequences for the accountability of the ECB as it allows the courts to better limit the arbitrariness of the ECB by connecting more closely the existence and exercise of competence in combination.[36] The conflict concerning the role of the principle of proportionality in holding the ECB to account thus seems to me to lose its pertinence. As I hope to show, it is less important to which stage, formally, it is being applied. What is relevant from the perspective of the good of non-arbitrariness in a substantive sense is that it places demands of justification on the ECB.

It is easy to say that the principle of conferral can be straightforwardly applied to whether something is, for example, an action in the area of competition law under Article 3(1)(b) TFEU, further specified in its content in Articles 101 and 102 TFEU. The European Commission, tasked with implementing competition law, does not have the mandate to define that it is agreements between undertakings that are prohibited by competition law, nor can it include or exclude the abuse of a dominant position from the scope of competition law. How it applies these concepts in the *exercise* of its competence is then subject to the principle of proportionality. However, when it comes to the ECB, Article 119(2) TFEU states that the competence itself includes 'the *definition* and conduct of a single monetary policy' (emphasis added).[37] In other words, the very *existence* of monetary policy is almost impossible to separate from and already forms part of its *exercise*: in order to find out whether the ECB acted *within* its mandate, we need to find out *how* it defined its mandate.[38] That this self-imposed and specific mandate has important consequences for

[36] See also the chapter of Joana Mendes in this volume on the existence/exercise distinction.

[37] See also Article 127(2) TFEU.

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

the accountability of the ECB has been highlighted by the Court of Justice,[39] the Bundesverfassungsgericht,[40] as well as in the literature.[41] In the specific context of the ECB, then, both should in my view be subject to the principle of proportionality as reviewed by courts.

Let us then take a closer look at how the Court of Justice separates the analysis of existence and exercise of monetary policy competence for the ECB. In both *Gauweiler* and *Weiss*, 'delimitation of monetary policy' and 'proportionality' are separate headings, keeping in line with the division of Article 5(1) TEU.[42] However, in substance, a proportionality analysis can be discerned under both headings. In the proportionality section in *Gauweiler*, the Court of Justice defines it as requiring that acts of EU institutions be appropriate for attaining the objectives pursued and not go beyond what is necessary in achieving those objectives.[43] Back to the section on delimiting the monetary policy, the Court of Justice analysed whether the OMT mechanism *contributes to* achieving the objective of singleness of monetary policy and maintaining price stability.[44] Furthermore, the Court went on to assess whether the *means* to achieve the objectives of the OMT are in line with the objectives of monetary policy[45] – finding itself on the thin line separating existence from exercise of monetary policy. Precisely because a measure may have both monetary policy and economic policy effects,[46] and these are difficult to separate,[47] the Court is inevitably engaging in an assessment of whether the decision-maker (the ECB) by enacting its measures (the OMT, the PSPP) exceeded the scope of their mandate (monetary policy).[48] The inability of separating the question of existence versus exercise

[39] Case C-11/00, *Commission v ECB*, EU:C:2003:395, paras 134, 137.

[40] Case 2 BvR 2728/13 *Gauweiler* (Order), op. cit. *supra* note 17, para 187.

[41] Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context', 21 *German Law Journal* (2020) 1045, at 1053–1056; Dawson, Maricut-Akbik, and Bobić, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism', 25 *European Law Journal* 1 (2019), 75, at 77–80.

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

[43] Case C-62/14 *Gauweiler*, op. cit. *supra* note 18, para 67.

[44] Ibid., paras 48, 49.

[45] Ibid., para 53.

[46] Ibid., paras 51, 52.

[47] Ibid., para 110. See also, Case C-493/17, *Weiss*, EU:C:2018:1000, paras 60, 64.

[48] On balancing as central to the structural approach of the Court of Justice in applying the principle of proportionality when reviewing EU measures, see Harbo, 'The Function of the Proportionality Principle in EU Law', 16 *European Law Journal* 2 (2020), 158, at 177–180; Craig, *EU Administrative Law* (Oxford University Press, 2012), at 656.

is more explicitly apparent in *Weiss*, when the Court of Justice analysed the delimitation of monetary policy:

> It does not appear that the specification of the objective of maintaining price stability as the maintenance of inflation rates at levels below, but close to, 2% over the medium term, which the ESCB chose to adopt in 2003, is *vitiated by a manifest error of assessment and goes beyond* the framework established by the FEU Treaty.[49] (emphasis added)

A manifest error of assessment is a well-established standard for assessing the proportionality of exercise of competence of EU institutions in EU law.[50] Going beyond what is necessary is the explicitly stated third step of the proportionality test.[51] This approach is in fact not different from the way in which the Bundesverfassungsgericht phrased its standard in its Order for reference: 'a manifest and structurally significant exceeding of competences'.[52] The argument here is not that the two tests correspond to each other in their precise content but that both carry a logic of proportionality in assessing the ECB's compliance with its monetary policy mandate. From the perspective of ensuring the accountability of the ECB in a setup where it is empowered to define its own mandate, it thus seems inherently impossible to separate the existence and the exercise stage of competence control. The European System of Central Banks (ESCB), when determining the inflation target – which arguably should act as the outer limit of the monetary policy competence – is in fact already also *exercising* it. Otherwise, would it at all be possible that the Court of Justice says such a determination is in compliance with the TFEU unless a manifest error of assessment is made?[53]

A somewhat positive consequence of applying the principle of proportionality to the existence of competence in monetary policy is an increased standard in competence monitoring that has arguably been at the source of the preliminary references in both *Gauweiler* and *Weiss*. Once applied to the PSPP, proportionality does have the potential of increasing the accountability of the ECB through a more stringent obligation of giving account, even in the stage of defining the inflation target. This arguably has direct influence on the ability of courts to ensure the accountability good of non-arbitrariness. In the area of self-defined mandates, then, a conflation of existence and

[49] Case C-493/17 *Weiss*, op. cit. *supra* note 47, para 56.
[50] Harbo, op. cit. *supra* note 48, at 177.
[51] Craig, op. cit. *supra* note 48, at 656–657.
[52] Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 *Weiss*, Order of 18 July 2017, para 64.
[53] Case C-493/17 *Weiss*, op. cit. *supra* note 47, para 56.

exercise of competence seems useful in delivering the non-arbitrariness good of accountability. The very existence of the need for the ECB to take action will thus be subject to scrutiny. By extension, the effectiveness and publicness of such decisions will also be controlled at an earlier stage and on a more in-depth level.

The Court of Justice has been subject to ample critique concerning its light touch proportionality review in both *Gauweiler*[54] and *Weiss*,[55] reducing its review to the duty to state reasons, and accepting any and all reasons provided by the ESCB as sufficient. The proportionality analysis in *Gauweiler* did not properly engage in the assessment of less burdensome alternatives, and was reduced to the Court of Justice analysing and ultimately accepting solely the information provided by the ESCB, thus concluding:

> the ESCB weighed up the various interests in play so as to actually prevent disadvantages from arising, when the programme in question is implemented, which are manifestly disproportionate to the programme's objectives.[56]

In *Weiss*, the Court of Justice was equally one-sided in the choice of information that it found relevant for assessing the proportionality of the PSPP, again accepting the information provided by the ESCB as the only relevant one.[57] In essence, the Court of Justice does not allow for a pluralist peer review of the duty to state reasons on the part of the ESCB.[58] This criticism has been picked up directly by the Bundesverfassungsgericht,[59] demanding that less burdensome alternatives be considered, and a wide array of interests included in such considerations. But who is in the best position to make such an assessment? Surely the ECB, both due to its Treaty role and the necessary expertise. Still, in order to ensure the effectiveness good of accountability, the ECB is not unique in being an institution that operates with a high level of expertise – so is the European Commission in many of the fields in which it operates. The same is the case for many EU's agencies. Yet, as regards the Commission, the Court of Justice developed standards of review to ensure that it effectively performs its Treaty-appointed functions.[60] The Court of Justice is also able to

[54] Tridimas and Xanthoulis, op. cit. *supra* note 19, at 31; Steinbach, 'All's Well that Ends Well? Crisis Policy after the German Constitutional Court's Ruling in Gauweiler', 24 *Maastricht Journal of European & Comparative Law* 1 (2017) 140, at 145.

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

[56] Case C-62/14 *Gauweiler*, op. cit. *supra* note 43, para 91.

[57] Case C-493/17 *Weiss*, op. cit. *supra* note 47, para 81.

[58] Dawson and Bobić, op. cit. *supra* note 55, at 1023.

[59] *Weiss II*, op. cit. *supra* note 7, paras 184, 190.

[60] Dawson and Bobić, op. cit. *supra* note 55.

order expert reports as well as question them in the hearings before it.[61] This is also a standard practice before German courts.[62]

The courts therefore do not need to become experts in the field in order to ensure that a proper peer review of decisions such as the ECB's is subject to a more detailed obligation of justification resulting in a substantive good of effectiveness.

In addition, which court, then, is in the best position to review such an assessment being made? Certainly, the Court of Justice is an institution presumed to safeguard EU-wide considerations, as opposed to a single national court.[63] Here the accountability good of publicness plays an important role. Importantly from the perspective of constitutional conflict, depending on which court we turn to, publicness might be understood as ensuring that decision-making is made in the EU or in the national interest. Indeed, the Bundesverfassungsgericht has been criticised for focusing on German fiscal and economic interests when it listed what information the ECB could have listed in its assessment in preparation for the PSPP. Yet, for matters of monetary policy, where the EU has exclusive competence, it is the common interest of the EU that should be ensured. This is another reason why the question of competences remains so prominent in this constitutional conflict.

Judicial review of monetary policy decisions is inherently not ideal: judges cannot be the ones to make complex economic assessments, as explicitly acknowledged by the Bundesverfassungsgericht.[64] Thus, another possible consequence of this litigation is that other national courts follow the German example and begin imposing their own standards and demands for justification on part of the ECB, leading to a proliferation of diverging national standards and resulting in the creation of an unrealistic burden for the ECB. This is in addition to a danger of demanding the publicness good to be delivered by the ECB in the national, rather than EU, common interest.

To remedy both these possibilities, a more substantial improvement in the accountability of the ECB may ultimately necessitate a treaty change that

[61] Article 70 of the Rules of Procedure of the Court of Justice.

[62] Grashof, 'The "You Know Better" Dilemma of Administrative Judges in Environmental Matters. A Note on the German Legal Context', 27 *European Energy and Environmental Law Review* (2018) 151.

[63] Hence, the parochialism accusation in Marzal, 'Is the BVerfG PSPP Decision "Simply Not Comprehensible"? A Critique of the Judgment's Reasoning on Proportionality' Verfassungsblog, 9 May 2020. https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/, (last visited 16 Aug. 2022).

[64] *Weiss II*, op. cit. *supra* note 7, para 173. Goldmann, 'Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review', 14 *German Law Journal* (2014) 265.

would either redefine its mandate or devise novel accountability arrangements.[65] However, as long as this does not take place, courts demanding more of the ECB in terms of assessing the redistributive effects of large-scale purchase programmes such as the PSPP does not appear to me controversial. In fact, the ECB, despite Article 130 TFEU explicitly prohibiting it from taking instructions from Member States, complied with the request of the Bundesverfassungsgericht[66] to better explain the proportionality of the PSPP. The ECB has, 'in line with the principle of sincere cooperation … decided to accommodate this request'.[67]

The lesson learned from *Gauwiler* and *Weiss* may well be that the structure of Article 5 TEU does not operate as well in the context of self-imposed mandates, where judicial review would need to be confined to accepting any and all reasons provided by the institution in question.[68] However, looking at how the Bundesverfassungsgericht introduced this change, can we really speak of a genuine pursuit of an increased level of accountability of the ECB by applying mutual respect and sincere cooperation? The next section aims to answer this question by looking at jurisdictional competition between the two courts.

9.4 SINCERE COOPERATION AND ACTUAL ACCOUNTABILITY OUTCOMES

> If any Member State could readily invoke the authority to decide, through its own courts, on the validity of EU acts, this could undermine the precedence of application accorded to EU law and jeopardise its uniform application. Yet if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences.[69]

Thus, we have before us the well-known conundrum of the European Union's constitutional setup digested in one paragraph: who has the final say on the limits of EU competence? This central and most likely eternal question of the EU's constitutional framework has important consequences

[65] For a proposal for reform carried out by a simplified revision procedure in Article 48(6) TEU, see de Boer and van't Klooster, op. cit. *supra* note 38.

[66] *Weiss II*, op. cit. *supra* note 7, para 235.

[67] www.ecb.europa.eu/pub/pdf/other/ecb.mepletter200629_Simon~ece6ead766.en.pdf, (last visited 16 Aug. 2022).

[68] Arguably this seems to be the case in Case C-62/14 *Gauweiler*, op. cit. *supra* note 43, para 60 and Case C-493/17 *Weiss*, op. cit. *supra* note 47, para 56.

[69] *Weiss II*, op. cit. *supra* note 7, para 111.

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for accountability goods. Namely, both non-arbitrariness and publicness as accountability goods depend on the manner in which competence control is exercised. This constitutional conflict thus firstly tells us that meaningful limits must exist to EU competence, and its institutions can use it only in a non-arbitrary manner. Secondly, the competence control conflict also has important repercussions as to what is the common interest to be ensured through the accountability good of publicness. Translated to the context of the ECB, then, the competence conflict can ensure that when it defines its activities, it indeed stays within its Treaty-accorded role in the monetary field. In this way, the manner of exercise of its mandate will already be subject to (at least a procedural) demand of non-arbitrariness. Constitutional conflict has even more striking consequences for the purposes of the publicness good. Once a competence of conferred upon the EU, the institution exercising it must do so in the common interest of the EU. In that sense, once the judicial review takes place before a national court, it cannot restrict itself to reviewing this accountability good solely from the perspective of the national common interest.

Ultra vires review was first introduced in the *Maastricht* judgment of the German court, widely considered the foremother of constitutional pluralism.[70] The Bundesverfassungsgericht maintained the thesis that Member States are the 'Masters of the Treaties',[71] which are 'continuously breathing life into the Treaty'.[72] This meant that primacy of EU law only extends to acts within vires,[73] and it was the Bundesverfassungsgericht who has retained the right to control the division between intra and ultra vires. Because the principle of conferral is a shared concept of EU and national constitutional law,[74] its application is likewise shared between EU and national courts, inevitably creating conditions for a possibility of constitutional conflict.

To place an EU measure outside the borders of EU competence, one must step through a significant number of hurdles set out in the *Honeywell* decision of the Bundesverfassungsgericht.[75] The logic of these numerous steps is to maintain competence control as a task shared and coordinated with the Court of Justice. In so doing, no other court in Germany but the

[70] MacCormick, 'The Maastricht-Urteil: Sovereignty Now', 1 *European Law Journal* 3 (1995), 259.
[71] Cases 2 BvR 2134/92 and 2159/92 *Maastricht Treaty*, Judgment of 12 October 1993, para II.a).
[72] Ibid., para II.d).2.1.
[73] Kokott, 'Report on Germany' in Slaughter, Stone Sweet, and Weiler (eds.), *The European Court and National Courts, Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, 1998), at 81.
[74] Case 2 BVerfG 2/08 *Lisbon Treaty*, Judgment of 30 June 2009, para 234; *Weiss II*, op. cit. *supra* note 7, para 158.
[75] Case 2 BverfG 2661/06 *Honeywell*, Order of 06 July 2010.

Bundesverfassungsgericht can conduct ultra vires review; a preliminary reference must be submitted to the Court of Justice prior to making any conclusions; and the Court of Justice has a tolerance of error in its judgment. Only after these conditions are met is the test of a 'manifest transgression' in the area 'highly significant' in the division of competences between the EU and its Member States applied.[76]

The way that these steps were applied in *Weiss II* leaves space for doubt. When is a competence highly significant in the structure of the division of competences? We know that this does not cover the substance of constitutional identity from Article 79(3) of the Basic Law, which is automatically excluded from European integration.[77] But that leaves us with little knowledge as to what highly significant is, leaving the Bundesverfassungsgericht in danger of a *laesio enormis* fallacy[78] concerning the boundaries of the German constitutional obligation to participate in the integration programme. To demand of the Bundesverfassungsgericht to more clearly define this boundary would be a welcome development.

It must also be acknowledged that the conceptual conundrum in competence control by the Court of Justice and its relationship to proportionality, as explained in the previous section, was neither explicitly raised nor contemplated by the Bundesverfassungsgericht.[79] Rather, the Bundesverfassungsgericht failed to emphasise the centrality of proportionality, and in particular its *stricto sensu* step, in its preliminary reference, therefore not engaging in a genuinely open dialogue with the Court of Justice.[80] This runs counter to its statement in *Gauweiler* that there is an obligation to 'respect judicial development of the law by the Court of Justice even when the Court of Justice adopts a view against which weighty arguments could be made'.[81] The Bundesverfassungsgericht placed great emphasis on the Court of Justice maintaining consistency with the standards concerning the ECB's mandate in *Gauweiler*[82] as well as in the Order for reference in *Weiss*.[83] And yet, the German court itself behaved entirely inconsistently: the *stricto sensu* step of the proportionality test touted as central to the review of the PSPP was only introduced in the response to the decision of the Court of Justice,

[76] Ibid., paras 56, 60–61.
[77] *Lisbon Treaty*, op. cit. *supra* note 74, paras 240–241.
[78] Schneider, 'Gauging "Ultra-Vires": The Good Parts', 21 *German Law Journal* (2020), 968, at 976.
[79] Editorial Comments, op. cit. *supra* note 9, at 971.
[80] Wendel, op. cit. *supra* note 42, at 987.
[81] *Gauweiler* (Judgment), op. cit. *supra* note 17, para 161.
[82] Ibid., paras 180, 193, 205.
[83] *Weiss* (Order), op. cit. *supra* note 52, para 79.

whereas no such expectation was hinted at in the order for preliminary reference itself, and even less so in the *Gauweiler* litigation.

Furthermore, the Bundesverfassungsgericht argued that the *stricto sensu* stage of balancing was not present in the analysis of the Court of Justice, thus warranting the application of its own proportionality test. Yet, it had not applied the *stricto sensu* stage itself either – and while it appears counter-intuitive that the ECB should do so,[84] in particular given the emphasis of the German court on the ECB's limited mandate and insufficient democratic legitimation[85] – it stated that 'it would have been incumbent for the ECB' to do so.[86] The Bundesverfassungsgericht devoted considerable attention to analysing the difference in the proportionality test developed by the Court of Justice and itself, respectively, opting unsurprisingly to apply its own standard. The German Court has in consequence been accused of parochialism,[87] and 'framing a European legal question largely in terms of German constitutional law'.[88] The Second Senate engaged in an analysis of how the test is applied in other Member States,[89] then explained to the Court of Justice its own (the latter's) proportionality test,[90] concluded it is deficient for the delimitation of competences between the EU and the national level,[91] and thence applied its own (presumably superior) proportionality test. A similar approach was subject to critique on the occasion of the Bundesverfassungsgericht's order in *Mr R*[92] when deciding to disapply the European Arrest Warrant, without submitting a preliminary reference to the Court of Justice.[93]

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

[84] Davies rightly points out that this would result in the ECB concluding that, despite its mandate to achieve price stability, it would sometimes need to abandon that aim as ultimately too costly in relation to its benefits. Davies, 'The German Constitutional Court Decides Price Stability May Not Be Worth Its Price', *European Law Blog*, 20 May 2020. <https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price/>, (last visited 16 Aug. 2022).

[85] *Weiss II*, op. cit. *supra* note 7, para 136.

[86] Ibid., para 176.

[87] Marzal, op. cit. *supra* note 63.

[88] Wendel, op. cit. *supra* note 42, at 993.

[89] *Weiss II*, op. cit. *supra* note 7, para 125.

[90] Ibid., para 126.

[91] Ibid., paras 127, 133, 138.

[92] Case 2 BvR 2735/14 *Mr R*. Order of 15 December 2015.

[93] Nowag, 'EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? Bundesverfassungsgericht: Mr R 2 BvR 2735/14, Mr R v. Order of the Oberlandesgericht Düsseldorf, Order of the Bundesverfassungsgericht (Second Senate) of 15 December 2015, DE:BVerfG:2015:rs20151215.2bvr273514', 53 *Common Market Law Review* 5 (2016), 1441.

ensuing.[94] The way in which proportionality was introduced in *Weiss II* can hardly be referred to as a role model for this approach. Language and expressions used by constitutional courts and the Court of Justice are of importance in the way constitutional conflict and its resolution is managed, and there is a coherence in this sense among different constitutional courts in the EU.[95] The allegation of the Bundesverfassungsgericht that the judgment of the Court of Justice is 'simply not comprehensible'[96] is in that sense not the sort of language that should be employed between courts that have for so long interacted in a constructive manner, enhancing the EU's constitutional sphere. It departs from the need for mutual respect and sincere cooperation, and unnecessarily distracts from the issues that can constructively be addressed through constitutional conflict.

The advantage of constitutional pluralism has in large part been precisely addressing issues such as the competence control carried out by the Court of Justice, dynamically and incrementally developing EU's constitutional sphere and preventing outright domination of one constitutional order over the other. This has direct benefits for the goods of non-arbitrariness as well as publicness. As regards the former, constitutional conflict has the advantage of courts questioning and incrementally raising the intensity of review, and by extension, ensuring that the institution in question acts within the limits of its competence. As regards the latter, constitutional conflict has the advantage of resolving, for individual cases, the question of competence division and therefore creating precise demands as regards the common interest of the EU or the Member State in question. In that sense, declaring an action of the ECB ultra vires is an outcome for the Court of Justice as well as EU institutions to reckon with. There are constructive elements in this finding that can incrementally be resolved through the auto-correct function of constitutional pluralism.

9.5 CONCLUSION

When can national courts contest the findings of the Court of Justice? In other words, is it possible for the Court of Justice to make a mistake? Justice Landau, in his dissent to the *Honeywell* decision, underlined the necessity of the Court of Justice being kept in check, be it by other EU institutions or Member

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

[95] Bobić, op. cit. *supra* note 15, at 1414–1423.

[96] *Weiss II*, op. cit. *supra* note 7, paras 116, 153.

States.[97] In the aftermath of the *Weiss II* decision, Justice Huber stated that there is space for improvement of the judicial review standards of the Court of Justice.[98] Legal scholarship has equally taken note of the light standard of review that the Court of Justice applies in relation to the ECB in specific.[99] Constitutional conflict in this area, it seems to me, performs an important function in delivering the accountability goods of non-arbitrariness (by specifying the limits and necessary justification for acting and the manner of such decision-making), effectiveness (by expanding the possible review of expertise decisions, expanding the pool of peer review through the use of experts in showing the correctness of decision-making), and publicness (by demanding the ECB to show how its measures are addressing an EU-wide common interest).

So while the German decision does not put into question the rule of law or basic values set out in Article 2 TEU, there are some, more permanent dangers lurking from the decision beyond its most immediate impact on the PSPP. One such danger that merits addressing is the interpretation put forward by the Bundesverfassungsgericht concerning Germany's constitutional identity in the context of risk-sharing. The Bundesverfassungsgericht's initial worry in *Gauwiler* concerned the possibility that quantitative easing may involve unforeseeable risks for national budgets beyond those directly approved by the *Bundestag*. It took into account the assurances of the Court of Justice that the OMT programme entails safeguards preventing such an outcome.[100] The same concern was raised in *Weiss*, where the Court of Justice dismissed the question about risk-sharing as hypothetical.[101] The Bundesverfassungsgericht took this to mean that the Treaties prohibit risk-sharing as such and added that this would also be contrary to Germany's constitutional identity protected by Articles 23(1) and 79(3) of the Basic Law.[102]

In that sense, identity review is a weapon of a strength incomparable to that of ultra vires review: while the latter allows for the situation to be remedied by an action of the Bundestag, the former is embedded in an unamendable characteristic of the Basic Law and without allowing any departures.[103] Translated to the language of the accountability good of publicness, a finding that an ECB measure goes against constitutional identity determines the scope of the common interest and by extension to the possible focus of any similar measure

[97] *Honeywell*, op. cit. *supra* note 75, Dissenting Opinion of Justice Landau, para 99.
[98] See interview with the Frankfurter Allgemeine Zeitung, <www.faz.net/aktuell/politik/inland/peter-huber-im-gespraech-das-ezb-urteil-war-zwingend-16766682.html> (last visited 16 Aug. 2022).
[99] See above, n 41, 54, 55.
[100] Case C-62/14 *Gauweiler*, op. cit. *supra* note 18, paras 123–126, accepted by the Bundesverfassungsgericht in *Gauweiler* (Judgment), op. cit. *supra* note 17, paras 218–219.
[101] Case C-493/17 *Weiss*, op. cit. *supra* note 47, paras 165–166.
[102] *Weiss II*, op. cit. *supra* note 7, paras 227–228.
[103] *Gauweiler* (Judgment), op. cit. *supra* note 17, para 29.

in the future. It may well be that constitutional identity (even if at the moment offering a constructive check to the principle of conferral) as performed by courts might act as a break in the political process that might legitimately aim, at a certain point, at a reform of the existing division of competences.

The PSPP was nevertheless found to be within what the constitutional identity allows for, but the findings concerning constitutional identity have landed on fertile ground. At present, the EU's 'Next Generation EU' pandemic programme that forms part of the EU's Own Resources Decision[104] is being challenged before the Bundesverfassungsgericht by the founder of the Alternative für Deutschland (AfD) precisely on the basis of constitutional identity.[105] On 26 March 2021, the Bundesverfassungsgericht issued an unreasoned decision[106] to the Federal President to hold off signing the bill until it decides whether to grant the applicants interim relief.[107] The interim relief was not grounded, but the decision is currently pending on the merits. The central argument of the applicant revolves around the possibility that Germany becomes liable for the entire amount of the pandemic fund, effectively introducing risk-sharing into EU law. Sincere cooperation, mutual respect, as well as consistency would demand a preliminary reference to be submitted to the Court of Justice. Here, the Court of Justice would also be put in a position to abide by its own standards concerning risk-sharing, or provide new insights that were possibly beyond the interpretations provided for the OMT and PSPP. However, in the midst of these uncertainties, it may transpire that the delicate balance between the two courts is already significantly upset by the above-analysed interpretations of proportionality and jurisdiction. In such a scenario, it is possible that the constitutional conflict reaches a destructive stage that cannot be remedied by a reasonable disagreement concerning the interpretation of EMU law. This might result in a need for a more general political reckoning of the German participation in the EMU and its future development, and the Covid-19 crisis seems to have provided a direct impetus for this to take place.

[104] Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom OJ L 424, 15.12.2020, pp. 1–10.

[105] More information on the initiative available here https://buendnis-buergerwille.de/verfassungsbeschwerde/, (last visited 16 Aug. 2022).

[106] 2 BvR 547/21 Decision of the Second Senate of 26 March 2021, <www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/03/rs20210326_2bvr054721.html>, (last visited 16 Aug. 2022).

[107] For a brief analysis of the procedural intricacies of the decision, see Repasi, 'Karlsruhe, Again: The Interim-Interim Relief of the German Constitutional Court Regarding Next Generation EU', *EU Law Live*, 29 March 2021, <https://eulawlive.com/analysis-karlsruhe-again-the-interim-interim-relief-of-the-german-constitutional-court-regarding-next-generation-eu-by-rene-repasi/>, (last visited 16 Aug. 2022).

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