

# Proportionality and procedure of monetary policy-making

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*In a highly controversial decision, the German Federal Constitutional Court (FCC) decided that the Public Sector Purchase Program (PSPP) of the European Central Bank (ECB) was ultra vires because it violated the principle of proportionality. The FCC took a procedural approach to proportionality, finding that the ECB had failed to substantiate its balancing assessment. Therefore, the Court considered itself unable to review whether PSPP was substantively proportionate, but announced that it might do so in a future case. The judgment raises the fundamental question of how courts should review monetary policy. The article begins by exploring the role of central banks between independence and accountability. Then, it analyzes, in three steps, what role the principle of proportionality should play in the realm of monetary policy. First, I argue that a traditional substantive balancing test as part of proportionality review is not applicable to monetary policy decisions and highlight the pitfalls of the FCC's approach. Second, I claim that the imposed procedural "duty to substantiate" is not suitable to promote the democratic accountability of the ECB. Third, I contend that, therefore, the PSPP ruling creates an impetus for strengthening the ECB's supranational accountability. I suggest that improving the monetary dialogue with the EU Parliament and establishing a comprehensive transparency regime for the ECB could further this goal. Ultimately, I propose that a narrow reading of the PSPP ruling could reconcile the current conflict between the FCC and the ECB and still provide a sufficient level of judicial accountability for the ECB's monetary policy-making.*

## 1. Introduction

In May 2020, the German Federal Constitutional Court (FCC) declared the acts of two supranational institutions to be *ultra vires*.<sup>1</sup> For the first time in its history, the FCC held that the Court of Justice of the European Union (CJEU) had acted in an "objectively arbitrary" manner and "manifestly exceed[ed] the judicial mandate" when reviewing

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<sup>1</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, *translation* at <https://bit.ly/3qMoBcj> [hereinafter PSPP].

the European Central Bank's (ECB) Public Sector Purchase Program (PSPP).<sup>2</sup> This move upsets the power equilibrium between the two courts. Most comments on this judgment to date have focused on the relationship between the courts. This judicial conflict is extremely important, but not the subject of this contribution. Instead, this article focuses on the FCC's second *ultra-vires* verdict, directed against the ECB. The FCC reviewed the legality of the monetary policy measure PSPP itself, after declining to implement the CJEU's preliminary ruling.<sup>3</sup> Never before has a national constitutional court exercised substantive review of the ECB's monetary policy. The pivotal element of the FCC's review is the principle of proportionality.<sup>4</sup> The FCC distinguishes between a procedural and a substantive element of proportionality. The FCC found that the ECB had failed to substantiate its balancing assessment of PSPP and that the FCC was unable to conduct a substantive balancing test without gaining more insight into the ECB's rationale for establishing PSPP.<sup>5</sup>

On the one hand, the immediate legal consequences of this procedural verdict are limited.<sup>6</sup> The FCC decided that the Bundesbank was no longer allowed to participate in PSPP unless the German Federal Government and the German Bundestag took active measures to ensure that the ECB substantiates its balancing assessment of PSPP in compliance with EU law within three months.<sup>7</sup> While the FCC's verdict only addressed the two German constitutional organs, it implied that the ECB had a procedural duty to substantiate its proportionality assessment under the Treaty on the Functioning of the European Union (TFEU).<sup>8</sup> The ECB's Governing Council, in turn, discussed the proportionality of PSPP in its June 2020 meeting. It also permitted the German Bundesbank to disclose several confidential documents on PSPP to the German Federal Government and allowed it to share the material with the German Bundestag.<sup>9</sup> In July 2020, the German Bundestag decided that it was satisfied with the ECB's efforts.<sup>10</sup> The majority of complainants in the PSPP case have since filed an

<sup>2</sup> *Id.* ¶¶ 118, 154.

<sup>3</sup> Case C-493/17, Weiss, ECLI:EU:C:2018:1000 (Dec. 11, 2018).

<sup>4</sup> PSPP, 2 BvR 859/15, ¶¶ 164–178.

<sup>5</sup> *Id.* ¶¶ 116, 176.

<sup>6</sup> Mattias Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, 21 GER. L.J. 979, 990 (2020) (emphasizing the “limited approach”). See also Teresa Violante, *Bring Back the Politics: The PSPP Ruling in Its Institutional Context*, 21 GER. L.J. 1045, 1052–3 (2020); Niels Petersen, *Karlsruhe's Lochner Moment? A Rational Choice Perspective on the German Federal Constitutional Court's Relationship to the CJEU After the PSPP Decision*, 21 GER. L.J. 995, 1003 (2020) (arguing that the procedural framing was “intended to minimize the scale of the escalation”).

<sup>7</sup> PSPP, 2 BvR 859/15, ¶¶ 232, 235.

<sup>8</sup> Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47 [hereinafter TFEU].

<sup>9</sup> See Letter from Christine Lagarde, Eur. Cntr. Bank President, to Sven Simon, Member of the European Parliament, L/CL/20/183 (June 29, 2020), at 2–3, <https://bit.ly/2MKAnFC>; Yves Mersch, Eur. Cntr. Bank Executive Board Member, *In the Spirit of European Cooperation*, Introductory remarks at the Salzburg Global Webinar (July 2, 2020), <https://bit.ly/2MM2rj9>; see also Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN [Parliamentary motion of the parliamentary groups of the parties CDU/CSU, SPD, FDP and BÜNDNIS 90/DIE GRÜNEN], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/20621 (July 1, 2020), <https://dip21.bundestag.de/dip21/btd/19/206/1920621.pdf> (Ger.).

<sup>10</sup> Deutscher Bundestag, 170th Sess., July 2, 2020, Plenarprotokoll 19/170, at 21283. See also BT 19/20621, July 1, 2020.

application for enforcement before the FCC in order to access the documents disclosed to the German Government and potentially prepare a second lawsuit.<sup>11</sup>

On the other hand, the judgment creates much more far-reaching implications.<sup>12</sup> The FCC suggests that it might substantively review the ECB's balancing assessment in a prospective case,<sup>13</sup> and hints at what such a review could look like.<sup>14</sup> In doing so, it sets a precedent for a future substantive proportionality review. Complainants in the *PSPP* case have already expressed a willingness to contest the measure a second time.<sup>15</sup> Other cases may follow. Constitutional complaints against the participation of the German Government and Bundestag in the ECB's Pandemic Emergency Purchase Program (PEPP)<sup>16</sup> are already pending.<sup>17</sup> Thus, the FCC's stance warrants a discussion of the role of proportionality and procedure within monetary policy-making.

Notably, the FCC also applies the principle of proportionality to the division of competences between the ECB and the EU Member States. It argues that the ECB exceeds its competence when it adopts a monetary policy measure that has economic policy effects, which "are at least comparable in weight to the monetary policy objective pursued."<sup>18</sup> Thus, it claims that the effects of *PSPP* for economic and fiscal policy matter "for both the delimitation of competences and the proportionality assessment."<sup>19</sup> However, the character of conventional monetary policy measures, such as asset purchases, does not change only because they foreseeably affect economic policy, and a proportionality review is not suitable to delineate the division of competences. Notwithstanding, the following analysis focuses on the role that a classic proportionality assessment should play in the realm of monetary policy.

The analysis of this article takes four steps. I begin by carving out the tension between the power and accountability of the ECB (Section 2). Then, I argue that a traditional substantive balancing test as part of proportionality review is not applicable to monetary policy decisions and highlight the pitfalls of the FCC's approach (Section 3). Further, I investigate the procedural duties that the *PSPP* ruling imposes (Section 4). Subsequently, I claim that the *PSPP* ruling creates an impetus for strengthening the ECB's supranational accountability, in particular vis-à-vis the EU Parliament (Section

<sup>11</sup> Antrag auf Erlass einer Anordnung gemäß § 35 BVerfGG [Application for an order pursuant to § 35 BVerfGG], 2 BvR 1651/15, Aug. 5, 2020 <https://bit.ly/36xv8A3>.

<sup>12</sup> See Mark Dawson & Adina Maricut-Akbik, *Procedural vs Substantive Accountability in EMU Governance: Between Payoffs and Trade-Offs*, J. EUR. PUB. POL'Y (forthcoming 2021), <https://doi.org/10.1080/13501763.2020.1797145> (also pointing out the dangers of this approach).

<sup>13</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 116 [hereinafter *PSPP*] (announcing that "it cannot yet be definitively determined whether the ECB decisions at issue satisfy the principle of proportionality"). See also *id.* ¶ 179.

<sup>14</sup> See *id.* ¶¶ 167–175 (addressing several concrete considerations).

<sup>15</sup> See Antrag auf Erlass einer Anordnung gemäß § 35 BVerfGG [Application for an order pursuant to § 35 BVerfGG], 2 BvR 1651/15, Aug. 5, 2020 <https://bit.ly/36xv8A3>.

<sup>16</sup> Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91/1 (Mar. 25, 2020).

<sup>17</sup> See AfD Bundestagsfraktion [AfD Fraction in the German Bundestag], Press Release (Aug. 28, 2020), <https://bit.ly/3pf156G>.

<sup>18</sup> *PSPP*, 2 BvR 859/15, ¶ 135.

<sup>19</sup> *Id.* ¶ 143.

5). On this basis, I present a workable standard of judicial review for monetary policy-making and suggest that a narrow reading of the *PSPP* ruling could reconcile the current conflict between the FCC and the ECB.

## 2. The ECB's struggle between independence and accountability

The *PSPP* ruling raises the fundamental question of how courts should review monetary policy. The central point of contention between the FCC and the CJEU is how to apply the principle of proportionality to the ECB's monetary policy measures. The FCC even declared the CJEU's ruling to be *ultra vires* because the CJEU failed to undertake a full balancing test.<sup>20</sup> In order to identify the proper level of judicial review, it is crucial to understand the role of central banks between independence and accountability.

Central banks obtained independence in order to address the time-inconsistency problem of monetary policy-making.<sup>21</sup> Shielding central banks from political influence is to prevent them from succumbing to the pressure of turning on the printing press to finance the political wishes *du jour*.<sup>22</sup> The FCC itself emphasized the importance of the ECB's independence in its *Maastricht* judgment.<sup>23</sup> Central banks are powerful institutions. In contrast to any other executive actor, they are able to finance their own activities without legislative funding.<sup>24</sup> The TFEU enshrines the ECB's independence and institutional position, so that any modification requires a unanimous decision of all EU Member States.<sup>25</sup> This solidifies the quasi-constitutional status of the ECB.<sup>26</sup> In contrast, a simple law could alter the competences and design of other central banks, for example the US Federal Reserve or the German Bundesbank prior

<sup>20</sup> Case C-62/14, *Gauweiler*, ECLI:EU:C:2015:400, ¶¶ 66–92 (June 16, 2015); Case C-493/17, *Weiss*, ECLI:EU:C:2018:1000, ¶¶ 71–100 (Dec. 11, 2018).

<sup>21</sup> See Robert J. Barro & David B. Gordon, *Rules, Discretion and Reputation in a Model of Monetary Policy*, 12 J. MONETARY ECON. 101 (1983); Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q. J. ECON. 1169 (1985). But see Christopher A. Hartwell, *On the Impossibility of Central Bank Independence: Four Decades of Time- (and Intellectual) Inconsistency*, 43 CAMBRIDGE J. ECON. 61 (2019) (emphasizing the limitations of this argument).

<sup>22</sup> See Rosa María Lastra, *The Institutional Path of Central Bank Independence*, in RESEARCH HANDBOOK ON CENTRAL BANKING 296, 300–302 (Peter Conti-Brown & Rosa María Lastra eds., 2018). See also C. A. E. Goodhart, *Central Bank Independence (1994)*, in THE CENTRAL BANK AND THE FINANCIAL SYSTEM 60, 66–67 (C. A. E. Goodhart ed., 1995) (providing a nuanced account on the basis of evidence from the United Kingdom).

<sup>23</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2134/92, 2 BvR 2159/92, Oct. 12, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 155, 204, 207–9, ¶¶ 147, 153–154.

<sup>24</sup> Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REG. 257, 273–286 (2015) (emphasizing the US Federal Reserve's budgetary independence).

<sup>25</sup> TFEU, *supra* note 8, arts. 130, 282(3). See Stefanie Egidy, *Judicial Review of Central Bank Actions: Can Europe Learn from the United States?*, in BUILDING BRIDGES IN AN INTERCONNECTED WORLD: ECB LEGAL CONFERENCE 2019, at 53, 54–55 (Eur. Cntr. Bank ed., 2019), <https://bit.ly/39AUzCz>; Goodhart, *supra* note 22, at 65 (explaining that independence is generally established through legislative acts).

<sup>26</sup> Fabian Amtenbrink, *Central Bank Challenges in the Global Economy*, in EUR. Y.B. INT'L ECON. L. 19, 26 (Christoph Herrmann & Jörg Philipp Terhechte eds., 2011).

to 1998.<sup>27</sup> Ever since the ECB's creation in 1998, its supporters as well as critics have tried to find the right balance between its independence and accountability.<sup>28</sup>

Accountability became more important during the European sovereign debt crisis when the ECB acted outside of its usual institutional setting as a member of the troika—the international consortium composed of the ECB, the European Commission, and the International Monetary Fund (IMF)—and resorted to unconventional instruments due to crisis exigencies. Mario Draghi's famous “Whatever it takes” speech signifies the ensuing legitimacy problem.<sup>29</sup> Recently, the ECB adopted a number of monetary policy measures to combat the ongoing coronavirus pandemic.<sup>30</sup> The ECB's crisis measures in particular sparked calls for more containment.<sup>31</sup> The ECB's current initiative to use its monetary policy tools in order to combat climate change and inequality under its secondary objective to “support the general economic policies in the Union” (Article 127(1) TFEU) has also caused push-back.<sup>32</sup>

Central banks act within a complex web of accountability mechanisms of varying strengths. The ECB is primarily accountable to the EU Parliament, to which it reports regularly.<sup>33</sup> Moreover, all of its actions are subject to judicial review under the jurisdiction of the CJEU (Article 263 TFEU). This excludes national constitutional courts from a review of the ECB's monetary policy measures. Even so, the FCC interprets Article 38 of the German Basic Law (Grundgesetz, GG) to contain an individual “right to democracy.” This right protects German citizens against German constitutional organs participating in supranational acts that are *ultra vires* or violate the constitutional identity of the Basic Law. Accordingly, the constitutional complaints before the FCC challenged the involvement of the German Bundestag and the Federal Government in the creation and execution of PSPP, not PSPP itself. Still, the success of the complaints depended on the legality of PSPP. The “right to democracy” therefore provides standing to implicitly challenge ECB acts despite their generality.<sup>34</sup>

<sup>27</sup> Federal Reserve Act, Pub. L. 63-43, 38 Stat. 251 (1913) (U.S.). Until December 25, 1992, GRUNDGESETZ [GG] [BASIC LAW], art. 88, translation at [www.gesetze-im-internet.de/englisch\\_gg/index.html](http://www.gesetze-im-internet.de/englisch_gg/index.html), only provided for the establishment of the Bundesbank; thereafter, it also guaranteed its independence.

<sup>28</sup> See, e.g., C. A. E. Goodhart, *A European Central Bank (1992)*, in *THE CENTRAL BANK AND THE FINANCIAL SYSTEM*, supra note 22, at 303, 313–318.

<sup>29</sup> Mario Draghi, Eur. Cntr. Bank President, Speech at the Global Investment Conference in London (July 26, 2012), [www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html](http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html). For a critical analysis, see Georg Vanberg & Mitu Gulati, *Financial Crises and Constitutional Compromise*, in *CONSTITUTIONS IN TIMES OF FINANCIAL CRISIS* 117, 137–139 (Tom Ginsburg, Georg Vanberg, & Mark Rosen eds., 2019).

<sup>30</sup> This includes in particular the EUR 1850 billion Pandemic Emergency Purchase Programme (PEPP). See Decision (EU) 2020/440, supra note 16.

<sup>31</sup> Charles Goodhart & Rosa Lastra, *Populism and Central Bank Independence*, 29 *OPEN ECON. REV.* 49 (2018).

<sup>32</sup> See, e.g., Isabel Schnabel, Eur. Cntr. Bank Executive Board Member, *Never Waste a Crisis: COVID-19, Climate Change and Monetary Policy*, Speech at a virtual roundtable on Sustainable Crisis Responses in Europe, organized by INSPIRE Res. Network (July 17, 2020), <https://bit.ly/3cCj17z>.

<sup>33</sup> See TFEU, supra note 8, art. 284(3).

<sup>34</sup> See Klaus-Ferdinand Gärditz, *Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court*, 14 *GERMAN L.J.* 183, 190–193 (2014) (criticizing this “actio popularis”). See also Wendel, supra note 6, at 992–993 (criticizing this “[d]emocracy [p]aradox”); Heiko Sauer, *Substantive EU Law Review Beyond the Veil of Democracy: The German Federal Constitutional Court Ultimately Acts as Supreme Court of the EU*, 16 *EU L. LIVE* 2, 2–4 (2020), <https://eulawlive.com/app/uploads/weekend-edition-16.pdf>.

### 3. Substantive proportionality review

The FCC reviewed whether PSPP complied with the principle of proportionality. Generally, the FCC's proportionality review takes three steps. First, the contested measure has to be suitable to promote a legitimate aim. Second, the measure has to be the least restrictive one among equally effective measures. Third, the measure has to be proportionate with regard to the aim pursued. In this third step, the FCC conducts a balancing test that weighs the contribution of a measure toward reaching a specific goal against the impact of that measure on other affected rights and interests.<sup>35</sup> The FCC's PSPP ruling focuses on this balancing test and dismisses the CJEU's preliminary ruling because it lacked a similar analysis and failed to consider and balance "the economic policy effects [. . .] to the detriment of Member States' competences" with the benefits of the PSPP.<sup>36</sup> This raises the question of whether and how balancing can be applied to monetary policy.

In the following section, I contend, first, that the ECB's primary mandate for price stability prohibits an open-ended balancing test (Section 3.1). Second, I argue that monetary policy-making is in principle not suited for balancing (Section 3.2). Third, I discuss how a balancing test would have to look like, if one were to agree with the FCC and apply a full balancing test in the realm of monetary policy (Section 3.3).

#### 3.1. Compatibility of balancing with the ECB's mandate

The FCC bases its proportionality review on Article 5(1) and (4) of the Treaty on European Union (TEU).<sup>37</sup> It uses the principle of proportionality mainly to distinguish between the competences for monetary and for economic policy, but also to check the exercise of powers. At the core of its analysis in relation to the ECB, the FCC demands that the ECB, when adopting a monetary policy measure like PSPP, balances the benefits of this measure for price stability with the measure's effects on economic and social policy in what seems to be a classic proportionality test. The concept of balancing presumes that the different considerations weighed against each other are generally equivalent and that either side could prevail. This implies that the ECB could not adopt a monetary policy measure if the measure's negative effects on economic policy outweigh its benefits for price stability. However, if one factor (e.g. price stability) had to prevail, any balancing test would be obsolete.

<sup>35</sup> Cf. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 596/56, June 11, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 377, 405–408, 410–412, ¶¶ 77–82, 88, 92; AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 342–343, 362–364 (2012); Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GER. L.J. 1387, 1387–1388 (2013); Andrej Lang, *Der Verhältnismäßigkeitsgrundsatz in der Rechtsprechung des Bundesverfassungsgerichts: Eine rechtsempirische Untersuchung mit rechtsvergleichenden Perspektiven*, 145 ARCHIV DES ÖFFENTLICHEN RECHTS 75, 117–119 (2020).

<sup>36</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 133 [hereinafter PSPP]. See also *id.* ¶¶ 123–153; Case C-493/17, Weiss, ECLI:EU:C:2018:1000, ¶¶ 71–92, 93–99 (Dec. 11, 2018); Case C-62/14, Gauweiler, ECLI:EU:C:2015:400, ¶¶ 66–90, 91 (June 16, 2015).

<sup>37</sup> Consolidated Version of the Treaty on European Union, 2012 O.J. (C 326) 13 [hereinafter TEU]; PSPP, 2 BvR 859/15, ¶¶ 123–124, 127–128, 133, 139.

Therefore, the *PSPP* ruling raises the question whether a balancing test is compatible with the ECB's primary mandate to pursue price stability under Article 127(1) TFEU. The ECB also has a secondary mandate to support the general economic policies in the European Union and to promote the objectives of Article 3 TEU (i.e. "full employment and social progress, and a high level of protection and improvement of the quality of the environment," as well as "social justice and protection").<sup>38</sup> There is no clear hierarchy within these secondary goals. While price stability has priority, the ECB has to pursue its secondary mandate as long as this is possible "[w]ithout prejudice to the objective of price stability."<sup>39</sup> This means that only when choosing between measures that are both suitable for promoting price stability could the ECB pick the measure that aligns more closely with the EU's economic policy, and it would have to do so. In that sense, the ECB has to adopt lexicographic preferences.<sup>40</sup> The ECB has no competence to freely balance price stability with competing economic policy goals. This is a question of institutional design. The US Federal Reserve, for instance, has a dual mandate to promote maximum employment and price stability, and it can determine the tradeoff.<sup>41</sup>

In order to adhere to its secondary mandate, the ECB cannot remain ignorant of the effects of its monetary policy beyond price stability. The ECB regularly assesses how monetary policy measures could affect economic policy.<sup>42</sup> These analyses influence the ECB's choice between different monetary policy measures without compromising its primary mandate. It is unlikely that the available policy options are equally effective in achieving price stability. At the same time, the ECB's mandate contains no obligation to pursue the most effective measure at all costs. This leaves the ECB with a margin of discretion to accommodate other considerations.<sup>43</sup> Imagine a measure that will likely fulfill the ECB's goal for an inflation rate of "close to, but below 2 percent," but will also likely impede the EU's economic policy gravely, competing against a measure that would only provide half the impetus toward price stability, but completely align with EU economic policy. Choosing the former measure would be most effective for price stability. Even so, the ECB may choose the latter option because this measure would still promote price stability and thus be "without prejudice" to it. However, this only applies when the ECB decides between measures that are at all effective in pursuing price stability. When choosing between a measure that promotes price stability and

<sup>38</sup> TFEU, *supra* note 8, art. 127(1).

<sup>39</sup> *Id.*; Ulrich Häde, *Art. 127 AEUV*, in *KOMMENTAR EUV/AEUV 6* (Christian Calliess & Matthias Ruffert ed., 5th ed. 2016); Cornelia Manger-Nestler, *Art. 127 AEUV*, in *FRANKFURTER KOMMENTAR EUV/GRC/AEUV 6–7* (Matthias Pechstein, Carsten Nowak & Ulrich Häde eds., 2017).

<sup>40</sup> See also Goodhart, *supra* note 28, at 315–316.

<sup>41</sup> Federal Reserve Act, of 1913 § 2A, 12 U.S.C. § 225a (2018) asks the Federal Reserve to "promote effectively the goals of maximum employment, stable prices, and moderate long term interest rates."

<sup>42</sup> See in particular ECONOMIC BULLETIN, [www.ecb.europa.eu/pub/economic-bulletin](http://www.ecb.europa.eu/pub/economic-bulletin) (last accessed Feb. 20, 2021). Quarterly *Economic Bulletins* inform Monetary Policy Meetings and "provide comprehensive analysis of economic and monetary developments including an integrated discussion of the staff macroeconomic projections on inflation, growth, public finances, and external trade" (*id.*).

<sup>43</sup> See also Goodhart, *supra* note 28, at 315 (inquiring whether "there [is] to be some trade-off in achieving these various, and at times possibly conflicting, objectives").

inaction that endangers price stability, the ECB has to choose the former, barring extreme circumstances.

Asking the ECB to freely balance price stability against other effects of a particular measure would undermine its primary mandate. It would mean that the ECB could choose not to promote price stability because it preferred certain economic goals, like reducing unemployment, or evaluated potential “economic policy effects” as weightier. However, the ECB may not abstain from pursuing price stability. Instead, it falls to the competent actors to combat unwanted side effects of monetary policy. What some have—with a more or less critical undertone—coined as “monetary dominance”<sup>44</sup> is ultimately an expression of a division in competences.<sup>45</sup>

### 3.2. Testing the proportionality of monetary policy-making

Beyond this legal limit, a balancing test is not suitable to review the limits of monetary policy-making in general. The FCC almost exclusively applies a proportionality review to fundamental rights limitations.<sup>46</sup> The underlying conflict between the affected right and the purpose of the contested state measure guides the balancing assessment.<sup>47</sup> Policy-making, though, follows an open-ended process of considering various courses of action and their impact on a wide set of interests. Therefore, policy-making does not lend itself to balancing as a mechanism intended to weigh and compare more clearly defined conflicting positions. The FCC actually made this argument for legislative fiscal policy-making.<sup>48</sup> The FCC reviewed a federal budget law of 1981 that exceeded the Basic Law’s debt ceiling. The German legislature had invoked an exception to the debt ceiling that allowed additional borrowing “to avert a disturbance of the macro-economic equilibrium.”<sup>49</sup> The FCC checked whether such a disturbance existed and whether the legislature could have taken alternative countermeasures. The FCC explicitly declined to conduct a balancing test. It emphasized the legislature’s competence to resolve the fiscal crisis in an open-ended policy-making process that incorporates myriad interests and (social) policy arguments. The FCC argued that while both limiting debt and safeguarding economic stability were important public interests, their relationship was not comparable to that of a legislative measure and a

<sup>44</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 171.

<sup>45</sup> See Martin F. Hellwig, *Financial Stability, Monetary Policy, Banking Supervision, and Central Banking* (Preprint of the Max Planck Inst. for Res. on Collective Goods, Bonn 2014/9, July 2014), at 26–27, [https://homepage.coll.mpg.de/pdf\\_dat/2014\\_09online.pdf](https://homepage.coll.mpg.de/pdf_dat/2014_09online.pdf). See also Mario Draghi, Eur. Cntr. Bank President, Statement at Eur. Cntr. Bank Press Conference, Frankfurt am Main (Jan. 22, 2015), [www.ecb.europa.eu/press/pressconf/2015/html/is150122.en.html](http://www.ecb.europa.eu/press/pressconf/2015/html/is150122.en.html).

<sup>46</sup> There are few exceptions concerning the relationship of state actors, in particular with regard to the subjective right of municipalities to self-government, see Horst Dreier, *Art. 20, Rechtsstaat*, in *GRUNDGESETZ KOMMENTAR* ¶ 188 (Horst Dreier ed., 3d ed. 2015); ANDREAS HEUSCH, *DER GRUNDSATZ DER VERHÄLTNISSÄSSIGKEIT IM STAATSORGANISATIONSRECHT* 184–207 (2003).

<sup>47</sup> NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA* 165–177 (2017).

<sup>48</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvF 1/82, Apr. 18, 1989, 79 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVERGE] 311, 341–343, ¶¶ 88–89.

<sup>49</sup> *Id.* ¶ 88 (translated by author).

corresponding fundamental right that protects against disproportionate limitations.<sup>50</sup> Thus, the FCC held that a balancing test was not applicable.

Monetary policy-making resembles fiscal policy-making in certain ways. The ECB is of course different from the legislature in that it is an executive actor with a primary mandate to pursue price stability. Nevertheless, it has some leeway to implement its secondary mandate, which includes numerous public interests, such as EU economic policies, employment, social progress, environmental protection, and social justice. The *PSPP* ruling actually emphasizes the ECB's duty to consider the various costs and benefits of its monetary policy for the EU's economic and social policy as well as the economy as such. This open-ended process bears a resemblance to that of fiscal policy-making. Along the lines of the FCC's argument, a balancing test is thus also not suitable to review the limits of monetary policy-making.

Even without a full balancing test, proportionality review provides ample room to hold the ECB accountable for its monetary policy. Proportionality review should focus on the necessity test as interpreted by the CJEU. The CJEU checks whether the "objective could have been achieved by any other type of monetary policy measure entailing more limited action."<sup>51</sup> This standard obligates the ECB to carefully evaluate its options and select the more limited measures. The ECB also has to account for necessity concerns when designing potential measures, in particular with regard to their period of application, volume, and conditions. The necessity standard can commit the ECB to gradually intensify its monetary policy measures through step-by-step experimentation and to monitor their effectiveness and effects. The FCC, however, usually applies a narrow necessity doctrine, in which it only compares measures that are "equally suitable."<sup>52</sup> Since two monetary policy measures will hardly ever be "equally" suitable, necessity review has little traction. This could explain why the *PSPP* ruling placed little emphasis on the necessity test.<sup>53</sup> The FCC is free to conduct the same analysis under a balancing framework and check whether the ECB could have taken alternative measures to pursue price stability, which would have better realized the ECB's secondary goals. In rare instances, it could also eliminate measures that triggered extreme consequences. But as shown, the nature of monetary policy-making and the primary mandate to price stability both disallow a full balancing review.

### 3.3. Relevant factors in a balancing analysis

The *PSPP* ruling suggests that the FCC will apply a balancing test in future cases concerning monetary policy measures of the ECB. In this section, I examine what balancing could look like—assuming one were to subscribe to the FCC's application of

<sup>50</sup> *Id.* ¶ 88.

<sup>51</sup> Case C-493/17, Weiss, ECLI:EU:C:2018:1000, ¶ 81 (Dec. 11, 2018).

<sup>52</sup> PETERSEN, *supra* note 47, at 176 (pointing out that due to a narrow second step, the German balancing sometimes resembles the Canadian least restrictive means test, which is applied much more broadly: *id.* at 132).

<sup>53</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 166–167 [hereinafter *PSPP*].

balancing despite the arguments to the contrary. I analyze how a court—be it the FCC or the CJEU—would have to identify the different interests that can enter a balancing test. This is challenging in cases concerning monetary policy. In fundamental rights cases, the FCC balances the intended benefits of a contested state measure against the affected fundamental right.<sup>54</sup> But the review of monetary policy measures lacks a parallel concrete conflict. A monetary policy measure like PSPP has numerous effects that could be balanced with its price stability goal. So far, no standards exist for selecting and for weighing the relevant factors for a balancing test.<sup>55</sup> In the *PSPP* ruling, the FCC envisions an open-ended balancing process that includes “economic and social policy effects” and the “economic and social impact on virtually all citizens.”<sup>56</sup> The FCC lists several potentially relevant interests,<sup>57</sup> but could reassess their relevance in future cases. Moreover, the judgment leaves open “how such concerns are to be weighed exactly in the context of a monetary policy decision.”<sup>58</sup> However, it would be problematic if the FCC assumed a competence to weigh the different interests itself substituting the ECB’s assessment due to the supranational nature of such a competence and potential cross-border effects. The FCC’s fundamental rights adjudication contains guidelines as to which effects to incorporate into balancing. These standards should instruct its future balancing analysis of monetary policy measures. This would exclude three kinds of effects in particular: effects that are too remote, one-sided, or lack a sufficient causal connection to the contested measure.

First, the FCC should dismiss from its balancing assessment consequences of a monetary policy measure that are too remote. This would mirror its fundamental rights adjudication.<sup>59</sup> The *PSPP* ruling seems to suggest otherwise. The FCC voices concern that the low interest rates due to PSPP help create so-called zombie companies.<sup>60</sup> It is already disputed that low interest rates foster the survival of firms that are close to bankruptcy.<sup>61</sup> But even if they do, the responsibility to remedy this unwanted consequence of monetary policy falls to the competent actors, who could react through macroprudential regulation or fiscal policy. In an earlier case, the FCC made a similar point with regard to the German Bundesbank.<sup>62</sup> Furthermore, the *PSPP* ruling

<sup>54</sup> See Andreas Voßkuhle, *Grundwissen Öffentliches Recht: Der Grundsatz der Verhältnismäßigkeit*, 47 JURISTISCHE SCHULUNG 429, 429–430 (2007).

<sup>55</sup> See Peter Bofinger, Martin Hellwig, Michael Hüther, Monika Schnitzer, Moritz Schularick, & Guntram Wolff, *Unabhängigkeit der Notenbank*, FRANKFURTER ALLGEMEINE ZEITUNG, May 29, 2020, at 18.

<sup>56</sup> *PSPP*, 2 BvR 859/15, ¶¶ 139, 173. See also *id.* ¶¶ 160–176.

<sup>57</sup> *Id.* ¶ 176.

<sup>58</sup> See *id.* ¶ 173.

<sup>59</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvL 4/00, July 11, 2006, 116 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202, 222, ¶¶ 82–84; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 261/10, Nov. 1, 2010, ¶ 12; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 1371/13, Mar. 15, 2018, ¶ 29.

<sup>60</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 174 [hereinafter *PSPP*].

<sup>61</sup> See, e.g., Isabel Schnabel, *Narratives about the ECB’s monetary policy – reality or fiction?*, Speech at the Juristische Studiengesellschaft Karlsruhe (Feb. 11, 2020), <https://bit.ly/3daqiN4>.

<sup>62</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvF 1/82, Apr. 18, 1989, 79 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 311, 329–330, ¶ 56.

criticizes that PSPP incentivizes EU Member States to forego structural reforms to achieve “a sound budgetary policy.”<sup>63</sup> But the Member States are themselves solely responsible for creating sound budgets, even if outside factors make it more difficult, as long as the measure adheres to the prohibition of monetary financing in Article 123(1) TFEU.<sup>64</sup> Fiscal policy-making remains an autonomous national decision. The ECB lacks the competence to set incentives purposefully for national fiscal policy. Therefore, the FCC cannot invoke this factor against price stability in a balancing test.

Second, a balancing test must not include a one-sided set of interests. While the ECB cannot possibly consider all effects of monetary policy measures, it would be problematic were it to consider only a regionally biased selection because its mandate encompasses the entire eurozone.<sup>65</sup> A judicial review of its balancing needs to reflect this dimension as well. Nonetheless, the FCC focuses on negative effects of low interest rates and rising real-estate prices on “shareholders, tenants, real estate owners, savers or insurance policy holders,”<sup>66</sup> but fails to mention the potential benefits of low interest rates, in particular for unemployment, for example in Italy or Spain. This would not constitute a permissible balancing test.

Third, a balancing assessment can only incorporate causal effects of monetary policy decisions. This raises the crucial question of who is in charge of assessing this causal relationship and, in case of multiple causalities, weighing their importance. In the *PSPP* ruling, the FCC undertakes its own assessment, which deviates from the economic analysis of the ECB and lists economically controversial effects as potential factors of a balancing test. Most noteworthy, the FCC argues that the “sharp increases” in real-estate prices “possibly already come close to creating a ‘market bubble’.”<sup>67</sup> To the contrary, the ECB contended that its economic experts could not detect a housing market bubble.<sup>68</sup> The existence of such a bubble is subject to intense debate.<sup>69</sup> In a future substantive balancing test, the FCC should resort to only checking the ECB’s decision-making process instead of conducting its own causality assessment. It does so in other cases. The FCC recognizes the importance of judicial self-restraint in instances where the judiciary and the executive come to competing, but similarly justifiable

<sup>63</sup> *PSPP*, 2 BvR 859/15, ¶171.

<sup>64</sup> See Account of the monetary policy meeting of the Eur. Cntr. Bank Governing Council, Frankfurt am Main, Jan. 21–22, 2015, at 14, [https://www.ecb.europa.eu/press/accounts/2015/html/mg150219\\_en.pdf](https://www.ecb.europa.eu/press/accounts/2015/html/mg150219_en.pdf) [hereinafter Account of the Monetary Policy Meeting, Jan. 21–22, 2015] (emphasizing the responsibility of “euro area governments and the European Commission” and stating that “the effectiveness of sovereign bond purchases would also depend on the appropriate action on the part of other policy-makers in the euro area”).

<sup>65</sup> Manger-Nestler, *supra* note 39, at 7 (pointing out that the ESCB cannot be biased toward national interests).

<sup>66</sup> *PSPP*, 2 BvR 859/15, ¶173.

<sup>67</sup> *Id.* ¶173.

<sup>68</sup> See, e.g., Draghi, *supra* note 45.

<sup>69</sup> For an overview, see SACHVERSTÄNDIGENRAT ZUR BEGUTACHTUNG DER GESAMTWIRTSCHAFTLICHEN ENTWICKLUNG [GER. COUNCIL ECON. EXPERTS], VOR WICHTIGEN WIRTSCHAFTSPOLITISCHEN WEICHENSTELLUNGEN: JAHRESGUTACHTEN 18/19, at 336–348 (2018), <https://bit.ly/3rFV0Ss> [hereinafter JAHRESGUTACHTEN 18/19].

results.<sup>70</sup> The FCC also defers to the legislature's causality analysis of complex matters, checking whether the legislature has carefully considered the relevant evidence.<sup>71</sup> The FCC should apply this reasoning to the ECB as well. It could follow the CJEU holding that “nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.”<sup>72</sup> Otherwise, the FCC would take on a challenge that it is unlikely to meet. In order to substitute the ECB's economic analyses with its own assessment, the FCC would need to compile the relevant expertise and integrate economically and regionally heterogeneous assessments. The *PSPP* ruling illustrates potential pitfalls. When identifying a “market bubble” on the basis of the oral hearing, the FCC failed to specify the geographic scope of the potential real-estate bubble, whose expertise it relied on, and which data informed this expertise even though the existence of a bubble is controversial among economists.<sup>73</sup> The secrecy of judicial deliberations makes it impossible to reconstruct the FCC's analysis of this question. Ultimately, the ECB is independent precisely to safeguard the integrity of its expertise, which should prevent judicial second-guessing.<sup>74</sup>

#### 4. Procedural obligations

The *PSPP* ruling focuses on the procedural component of proportionality analysis. The FCC argues that it cannot determine from the available information whether and how the ECB conducted the required balancing. Without that knowledge, the FCC considers itself incapable to review the substance of the ECB's balancing. Therefore, the FCC calls on the German Bundestag and Government to take active steps to ensure that the ECB substantiates the proportionality of *PSPP*. The *PSPP* ruling contains almost no details about this “duty to substantiate.” Therefore, in the following section, I begin by assessing what function the procedural obligation to substantiate balancing might have and how we might usefully understand this obligation in the context of the ECB (Section 4.1). Second, I argue that the outcome of the *PSPP* ruling, i.e. the ECB producing a balancing narrative, is not suitable to fulfill the FCC's declared aim to promote the ECB's democratic accountability. The procedural duty would fit better under the concept of supranational loyalty (Section 4.2). Third, I show that the nature

<sup>70</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2502/08, Feb. 18, 2010, ¶ 14; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 1187/80, July 8, 1982, 61 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 82, 110, ¶ 88–89.

<sup>71</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvF 1/15, 2 BvF 2/15, Sept. 19, 2018, 150 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 89–91, ¶¶ 174–175, 178.

<sup>72</sup> Case C-493/17, Weiss, ECLI:EU:C:2018:1000, ¶ 91 (Dec. 11, 2018) citing Case C-62/14, Gauweiler, ECLI:EU:C:2015:400, ¶ 75 (June 16, 2015).

<sup>73</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 173 [hereinafter *PSPP*]; see, e.g., JAHRESGUTACHTEN 18/19, *supra* note 69.

<sup>74</sup> TFEU, *supra* note 8, arts. 119, 127(1), 130; TEU, *supra* note 37, art. 3. See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2134/92, 2 BvR 2159/92, Oct. 12, 1993, 89 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155, 204–205, ¶ 147.

of this “duty to substantiate” is unprecedented and results from the supranational idiosyncrasies of the case at hand (Section 4.3).

#### 4.1. Defining the duty to substantiate

The *PSPP* ruling establishes a duty of the ECB to substantiate its balancing analysis, but neither specifies the nature of this procedural duty nor explains vis-à-vis whom the ECB needs to fulfill it.<sup>75</sup> In the following section, I situate this obligation within the range of similar duties to provide information in order to determine the function of this obligation and to assess its impact on the ECB. This contextualization helps assess why the FCC deemed the available material on PSPP to be insufficient and whether the ECB’s recent efforts to produce information will satisfy the FCC.

A duty to provide information can fall within two categories. First, transparency obligations prompt the respective actor to disclose information about certain events and provide direct insight. The actor needs to show, not tell. This includes duties to grant access to information, to disclose information to a specific addressee, and to document data that would otherwise not be readily available, for example by recording sessions. Second, communication duties require an actor to narrate or explain certain decisions, thus giving an indirect account of events. The actor has to tell, not show. This category includes reason-giving requirements, which oblige actors to explain and argue for their decisions. Communication duties within a judicial context encompass the burden of substantiation, the burden of persuasion, and the burden of justification. Both sets of duties can concern the substance of decisions or the decision-making process.

The *PSPP* ruling asks the ECB to substantiate how it assessed PSPP’s proportionality, but not to disclose its decision-making records. This constitutes a duty to communicate. It mirrors procedural obligations in judicial proceedings, where a party needs to elaborate on certain events or decisions in order to meet the burden of substantiation. The duty to substantiate is notably different from the duty to provide a statement of reasons (Article 296 TFEU) in that the latter aims at explaining the motives for a decision, but not at elaborating on the decision-making process.<sup>76</sup>

It surprises that the ECB’s information about the establishment of PSPP available at the time of the *PSPP* ruling (and referenced by the CJEU) was not sufficient for the FCC. The FCC criticized a complete lack of balancing considerations, despite looking for evidence in “the ECB’s press releases” and “other public statements by ECB officials.”<sup>77</sup> However, the ECB’s public documents contain monetary and economic analyses of then-recent developments and anticipated effects of PSPP.<sup>78</sup> Moreover, they outline

<sup>75</sup> *PSPP*, 2 BvR 859/15, ¶¶ 168–169, 176–177.

<sup>76</sup> See Joana Mendes, *The Foundations of the Duty to Give Reasons and a Normative Reconstruction*, in *THE FOUNDATIONS AND FUTURE OF PUBLIC LAW* 299, 311–312 (Elizabeth Fisher, Jeff King, & Alison Young eds., 2020) (focusing on the constructive nature of the statement).

<sup>77</sup> *PSPP*, 2 BvR 859/15, ¶ 176.

<sup>78</sup> See especially ECB, *December 2014 Eurosystem Staff Macroeconomic Projections for the Euro Area*, MONTHLY BULLETIN 85 (Dec. 2014), [www.ecb.europa.eu/pub/pdf/mobu/mb201412en.pdf](http://www.ecb.europa.eu/pub/pdf/mobu/mb201412en.pdf) (informing the monetary policy meeting of Jan. 21–22, 2015).

different policy options, but also compare the potential effects of PSPP to those of “a ‘wait and see’ approach.”<sup>79</sup> The account of the ECB’s Monetary Policy Meeting of January 2015 further evaluates the effectiveness of PSPP.<sup>80</sup> This account also reveals discussions and dissent within the Governing Council, which indicates a balancing process. In particular, Council members argued for using sovereign bond purchases only “in contingency situations,” “as the cost-benefit assessment of the proposed measures was not positive in their view.”<sup>81</sup> The ECB also addressed specific aspects that the *PSPP* ruling found to have been lacking. The Governing Council for instance mentioned the potential problem of discouraging governments from pursuing structural and fiscal reforms as well as negative effects on financial stability, but argued that other actors were responsible for solving these issues, in particular through macro-prudential policy.<sup>82</sup> Lastly, in hearings before the Committee on Economic and Monetary Affairs of the EU Parliament, the President of the ECB acknowledged the impact of low interest rates on savers and emphasized that monetary policy was a “very delicate balancing act.”<sup>83</sup>

Before the backdrop of this public information, the FCC’s request for further substantiation seems superfluous. What the FCC was missing could only be that the ECB saliently lays out an explicit and comprehensive proportionality assessment of PSPP. Indeed, the public material on PSPP contains no explicit balancing analysis of the ECB, which, however, makes sense given the limited applicability of a balancing framework to monetary policy-making, as outlined above, and the corresponding case law of the CJEU. In reaction to the judgment, the Governing Council explained its “proportionality assessment” and how it investigated whether alternative measures were “offering a better balance between intended and unintended effects.”<sup>84</sup> Moreover, the Governing Council shared internal documents containing considerations on PSPP with the German Government and Bundestag under a condition of confidentiality.<sup>85</sup> It is important to note that there exists no duty of the ECB to disclose these materials with national actors, which is why the ECB only does so in the “spirit of cooperation.”<sup>86</sup> The FCC should accept these documents as a good-faith account of the ECB’s monetary policy-making at the time. The efforts should be sufficient to satisfy the procedural

<sup>79</sup> Account of the monetary policy meeting, Jan. 21–22, 2015, *supra* note 64, at 6–7.

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Id.* at 12–13.

<sup>82</sup> *Id.* at 14–15.

<sup>83</sup> Mario Draghi, President of the Eur. Cntr. Bank, Monetary Dialogue, Committee on Economic and Monetary Affairs of the European Parliament (Mar. 23, 2015), esp. at 2–4, 11–12, [www.ecb.europa.eu/pub/pdf/annex/ecb.sp150323\\_1\\_transcript.en.pdf](http://www.ecb.europa.eu/pub/pdf/annex/ecb.sp150323_1_transcript.en.pdf).

<sup>84</sup> See Account of the monetary policy meeting of the Eur. Cntr. Bank Governing Council, Frankfurt am Main, June 3–4, 2020.

<sup>85</sup> See Antrag der Fraktionen CDU/CSU, SPD, FDP und BÜNDNIS 90/DIE GRÜNEN [Parliamentary motion of the parliamentary groups of the parties CDU/CSU, SPD, FDP and BÜNDNIS 90/DIE GRÜNEN], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 19/20621 (July 1, 2020), <https://dip21.bundestag.de/dip21/btd/19/206/1920621.pdf> (Ger.).

<sup>86</sup> See Mersch, *supra* note 9.

standard of the FCC, even though the ECB does not apply the principle of proportionality to the division of competences (as suggested by the FCC).

#### 4.2. Democratic demand or duty of loyalty

The *PSPP* ruling frames the ECB's duty to substantiate its balancing assessment as promoting democracy—albeit on a national, not a supranational level.<sup>87</sup> On the one hand, the FCC intends to enable judicial review.<sup>88</sup> On the other hand, the FCC enforces the “right to democracy” that it derives from Article 38 GG. Accordingly, the FCC asked the German Government and Bundestag to gather the necessary information from the ECB. The ECB submitted an account of its balancing assessment and additionally disclosed the minutes of the pertinent Monetary Policy Meetings on the establishment of *PSPP* under confidentiality rules. This raises doubts as to whether the FCC's verdict is suitable to promote the democratic accountability of the ECB. Two arguments speak against this. First, the FCC only asked the ECB for an after-the-fact report of its balancing, not a disclosure of the underlying decision-making process. Second, the confidentiality of the submitted material hinders a thorough democratic discourse. I suggest that the principle of loyal cooperation (Article 4(3) TEU) would be a more suitable frame to capture the essence of the *PSPP* ruling than democratic accountability.

The democratic accountability of the ECB is an ongoing concern.<sup>89</sup> The ECB is subject to judicial scrutiny of the CJEU and accountable to the EU Parliament.<sup>90</sup> In a democracy, it is important for public actors to explain their decision-making rationale. Therefore, a duty to substantiate a balancing assessment contains democratic elements. At the same time, holding decision-makers accountable and exercising substantive criticism requires knowledge of how—and with what weight—different considerations actually entered the decision-making process. This requires procedural transparency. Yet, procedural transparency is a little-used accountability mechanism for the ECB.<sup>91</sup> Currently, the ECB decides itself whether to grant access to most of its documents,<sup>92</sup> and the CJEU only reviews these decisions under a lenient standard of review.<sup>93</sup> The ECB has resorted to a variety of communication measures, through which it explains and justifies its policies instead of disclosing its decision-making

<sup>87</sup> See also Isabel Feichtner, *The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratization of Europe*, 21 GERMAN L.J. 1090, 1100–1101 (2020).

<sup>88</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 179.

<sup>89</sup> See also Fabian Amtenbrink, *The European Central Bank's Intricate Independence Versus Accountability Conundrum in the Post-Crisis Governance Framework*, 26 MAASTRICHT J. EUR. & COMP. L. 165 (2019).

<sup>90</sup> See Section 2.

<sup>91</sup> Pieter Van Cleynenbreugel, *Confidentiality Behind Transparent Doors: The European Central Bank and the EU Law Principle of Openness*, 25 MAASTRICHT J. EUR. & COMP. L. 52, 53, 54–56, 59–61 (2018).

<sup>92</sup> Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank, 2016 O.J. (C 202) 230, art. 10.4.

<sup>93</sup> See, e.g., Case T-590/10, *Thesing and Bloomberg Finance v. ECB*, EU:T:2012:635 (Nov. 29, 2012); Case T-376/13, *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v. ECB*, EU:T:2015:361 (June 4, 2015).

processes.<sup>94</sup> But there are alternative systems. The US Federal Reserve, for example, is subject to a statutory transparency regime, which the judiciary enforces with little leeway for the Federal Reserve to rely on general confidentiality exceptions.<sup>95</sup> The ensuing level of insight into US monetary policy allows for a more nuanced political debate, especially for controversial measures.

In response to the *PSPP* ruling, the ECB granted access to excerpts from minutes of Governing Council deliberations under confidentiality protections. This does not spur democratic discourse and public accountability. The confidentiality requirements prevent political actors from actively utilizing or exploiting the information both as representatives and vis-à-vis the media and public.<sup>96</sup> Parliamentarians may neither disclose confidential information nor refer to its content to justify policy initiatives. Moreover, the confidentiality regime excludes staff, experts, and other third parties from evaluation and critique. Therefore, members of the opposition within the German Bundestag have exerted pressure to declassify the documents and make them available outside of the Secret Records Office (*Geheimschutzstelle*) of the German Bundestag.<sup>97</sup> These efforts were successful for four of the seven documents.<sup>98</sup> Still, parliamentarians criticized that “many passages in a central document were blacked out” even in its classified version.<sup>99</sup> These parameters limit the democratic value of the FCC’s verdict.

Conceptually, the ECB’s duty to substantiate its balancing analysis could rather be seen as an expression of the duty of loyalty, which promotes cooperation between supranational and national institutions. The ECB is competent to engage in such a cooperation on the basis of its institutional autonomy. However, the principle of loyalty cannot operate at the expense of the ECB’s primary goal of price stability.<sup>100</sup> It might have been beneficial had the ECB taken up the opportunity to appear before the FCC to answer the judges’ proportionality inquiry in the oral hearing of the *PSPP* case.

<sup>94</sup> Deirdre Curtin, “Accountable Independence” of the European Central Bank: Seeing the Logics of Transparency, 23 *EUR. L.J.* 28, 31–34 (2017) (conceptualizing “ECB Transparency as Communication”).

<sup>95</sup> Egidy, *supra* note 25, at 61–65. See Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250 (1966).

<sup>96</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvE 2/11, Nov. 7, 2017, 147 *ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS* [BVerfGE] 50, 128–129, 132, ¶¶ 201, 203, 209–210.

<sup>97</sup> Deutscher Bundestag, 170th Session, July 2, 2020, Plenarprotokoll 19/170, at 21281(B) (Statement by Franziska Brantner).

<sup>98</sup> Deutscher Bundestag, 170th Session, July 2, 2020, Plenarprotokoll 19/170, at 21281(B). According to Antrag auf Erlass einer Anordnung gemäß § 35 BVerfGG [Application for an order pursuant to § 35 BVerfGG], 2 BvR 1651/15, Aug. 5, 2020, at 4, 14–15 <https://bit.ly/36xv8A3> confidentiality was lifted for the following four documents: Second Interim Report on Complementing the June–October Policy Package, Jan. 7, 2015; Expanded Euro Area Purchase Programme: Monetary Policy Considerations, Nov. 21, 2014; Antworten zum Fragenkatalog gemäß §§ 27, 27a BVerfGG [Answers to the questionnaire in accordance with §§ 27, 27a], Nov. 15, 2016; EZB-Stellungnahme beim EuGH [ECB Statement before the CJEU], Nov. 30, 2017, while the following three documents remained confidential: Excerpt from the ECB Policy Briefing Note of June 2020; TRAIL Account of the monetary policy meeting of the Governing Council of the European Central Bank held in Frankfurt am Main, Dec. 4, 2014; Excerpts of 506th meeting of the ECB Governing Council, June 24, 2020.

<sup>99</sup> Deutscher Bundestag, 170th Session, July 2, 2020, Plenarprotokoll 19/170, at 21281(B) (translated by author).

<sup>100</sup> Manger-Nestler, *supra* note 39, at 6; Häde, *supra* note 39, at 7.

However, loyalty works both ways and it appears that the FCC itself failed to communicate the importance of an additional exchange, in particular as its preliminary reference to the CJEU barely even mentioned balancing, which only became relevant in the final judgment.<sup>101</sup>

### 4.3. Unprecedented outcome

The *PSPP* ruling declares PSPP to be *ultra vires*, but only provisionally. The FCC rules that the ECB acted *ultra vires* because it had failed to substantiate its balancing assessment. Notably, the FCC does not claim that no balancing took place, only that it cannot tell from the available information. It gives the ECB the opportunity to put forward an explicit balancing assessment within three months of the judgment. Then—the Court implies—PSPP would fulfill at least the procedural dimension of the proportionality principle. This doctrinal solution is unique compared to other cases of proportionality review before the FCC and lower German courts. The courts recognize a procedural burden of substantiation in their proportionality analysis of both legislative and executive acts, mainly to counteract a wider substantive margin of discretion.<sup>102</sup> But so far, the courts have asked neither executive agencies nor the legislature to provide a substantiation subsequent to their ruling.

German executive actors have to comply with the principle of proportionality.<sup>103</sup> They must undertake a balancing assessment when exercising discretion and justify their decisions accordingly. An affected individual can challenge an administrative measure in a judicial proceeding against the executive. The administrative court will strike down the measure if there is evidence that the agency failed to recognize its discretion and assumed it could only take one decision. If the agency provided an insufficient justification for the contested measure, German administrative law permits the executive to supplement its arguments throughout the judicial proceedings.<sup>104</sup> This is different in the *PSPP* case. The FCC claims that it found no hint of the necessary balancing of the ECB.<sup>105</sup> However, it found no evidence of its absence either. Otherwise, it would be pointless to argue for a duty to give a post-hoc substantiation of a balancing assessment. What distinguishes the ECB from national executive actors, procedurally

<sup>101</sup> Neither the oral argument nor the PSPP reference suggested that the ruling would turn on the application of a balancing test. The ECB submitted answers to forty-three questions of the FCC prior to its oral hearing in July 2019; see Mersch, *supra* note 9. See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶¶ 75–79 [hereinafter *PSPP*] (providing a summary of the answers, without any reference to proportionality); Wendel, *supra* note 6, at 987–988 (pointing out that proportionality as a limit on the ECB's competences only appeared in the FCC's final decision).

<sup>102</sup> See also *PSPP*, 2 BvR 859/15, ¶ 141 (“It is true that the ECB is afforded a margin of appreciation as regards the assessment and appraisal of the consequences of its actions and the weighing of such consequences in relation to the objectives pursued by the asset purchase programme”).

<sup>103</sup> See BARAK, *supra* note 35, at 178–181 (on the origins of proportionality in administrative law).

<sup>104</sup> VERWALTUNGSGERICHTSORDNUNG [VwGO] [FEDERAL CODE OF ADMINISTRATIVE COURT PROCEDURE], § 114(2), translation at [www.gesetze-im-internet.de/englisch\\_vwgo/index.html](http://www.gesetze-im-internet.de/englisch_vwgo/index.html). See Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], 1 C 17.97, May 5, 1998, 106 ENTSCHIEDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 351, 363–6, ¶¶ 35–37, 39–40.

<sup>105</sup> *PSPP*, 2 BvR 859/15, ¶ 176.

speaking, is that it was not a party to the *PSPP* lawsuit. Thus, it was not prompted to respond to any proportionality inquiries that arose during the judicial proceedings.

When reviewing the proportionality of legislative acts, the FCC evaluates their purpose and effects autonomously.<sup>106</sup> The FCC requires the legislature to elaborate certain choices only when the Court applies a limited substantive review. For instance, the FCC establishes a legislative duty to substantiate for certain budget laws or laws determining the allocation of social benefits—areas with a wide legislative margin of discretion.<sup>107</sup> Yet, if the legislature fails to put forward sufficient arguments in support of its acts, the FCC will invalidate the law instead of rendering a provisional verdict as it did in its *PSPP* ruling. This unique legal consequence toward the ECB reflects the fact that a national constitutional court assumes jurisdiction over a supranational institution through a doctrinal backdoor. As a result, the ECB is not party to the judicial proceedings against it and enjoys no procedural protections.

## 5. Alternative accountability mechanisms

At the core of its *PSPP* ruling, the FCC worries about a lack of democratic accountability of the ECB from a national point of view. It declares the CJEU's preliminary ruling to be *ultra vires* because the CJEU did not apply a full balancing test to the ECB's monetary policy measures. Even though judicial review is an important tenet of central-bank accountability, a national constitutional court's threat of revoking monetary policy measures endangers the integrity of supranational central banking. Moreover, a national lawsuit tilts the debate about supranational monetary policy toward specific (national) interests.<sup>108</sup> These implications raise the importance of the ECB's accountability, which mainly lies with the EU Parliament and the CJEU.

In the following section, I suggest how one could strengthen the ECB's accountability on a supranational level. First, the ECB should consider expanding its transparency regime for internal documents, thus taking on the impetus of the *PSPP* ruling (Section 5.1). Second, there is room for improving existing inter-institutional accountability mechanisms, in particular the monetary dialogue between ECB and EU Parliament (Section 5.2). Third, contrary to some concerns, even a narrow reading of the *PSPP* ruling leaves a sufficient standard of judicial review for monetary policy measures (Section 5.3).

<sup>106</sup> See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 111/74, 1 BvR 283/78, Mar. 20, 1979, 51 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 26–27, ¶ 85.

<sup>107</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvF 1/15, 2 BvF 2/15, Sept. 19, 2018, 150 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 90–1, ¶ 178 (summarizing the case law). The same applies to the state constitutional courts: see, e.g., Verfassungsgerichtshof des Landes Berlin [VerfGH Berlin] [Constitutional Court of the State of Berlin], 125/02, Oct. 31, 2003, ¶ 56.

<sup>108</sup> See Michael Waibel, *The EU's Most Influential Economic Policy-Maker: Mario Draghi at the European Central Bank*, 31 EUR. J. INT'L L. 345, 351–352 (2020) (giving a critical account of the one-sided debate about the effects of ECB policies on savers).

### 5.1. Transparency of monetary policy-making

In order to make central banking more accessible to criticism, the ECB should consider introducing a comprehensive transparency regime.<sup>109</sup> Overall, the ECB receives average transparency ratings.<sup>110</sup> The ECB's efforts to communicate its policies and publish its economic and monetary analyses earn it high scores for economic and political transparency. Still, its current practice lags behind in terms of procedural transparency. The ECB grants limited access to its documents. In particular, it provides only summarized accounts of its Monetary Policy Meetings, which are conducted behind closed doors and only the President of the Council and a member of the Commission may participate.<sup>111</sup> Full transcripts—alongside all other documents—shall be generally made available after thirty years.<sup>112</sup> Broader procedural transparency would allow for more multifaceted insights into monetary policy debates and enable actors from all Member States to engage in the corresponding public discourse. An extension of mandatory disclosure rules would not require a Treaty revision, but merely a decision of the Governing Council.<sup>113</sup>

Increasing transparency could also have disadvantages. The behavior of financial-market actors depends on their projections about future events. Empirical studies show that information can influence the predictions and behavior of financial-market participants.<sup>114</sup> Central banks are well aware of these effects and adapt their communication policy accordingly.<sup>115</sup> The US Federal Reserve, in particular the former Fed Chair Alan Greenspan, even made strategic use of “Fedspeak,” a rhetorical technique

<sup>109</sup> Grégory Claeys & Marta Domínguez-Jiménez, *How Can the European Parliament Better Oversee the European Central Bank?* (Monetary Dialogue Papers, Sept. 2020), at 83–84, <https://bit.ly/2Yzz713> (expressing the same demand).

<sup>110</sup> For an analysis, see Sylvester C.W. Eijffinger & Petra M. Geraats, *How Transparent Are Central Banks?*, 22 EUR. J. POL. ECON. 1 (2006).

<sup>111</sup> TFEU, *supra* note 8, art. 284(1).

<sup>112</sup> Decision (EC) 2004/257 of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank, ECB/2004/2, 2004 O.J. (L 80) 33, art. 23.3.

<sup>113</sup> Protocol No. 4 on the Statute of the European System of Central Banks and of the European Central Bank, 2016 O.J. (C 202) 230, art. 10.4; Decision (EC) 2004/257, *supra* note 112, art. 23.

<sup>114</sup> Alexander Jung, *Have Minutes Helped to Predict Fed Funds Rate Changes?*, 49 J. MACROECON. 18 (2016); Daniel Jubinski & Marc Tomljanovich, *Do FOMC Minutes Matter to Markets? An Intraday Analysis of FOMC Minutes Releases on Individual Equity Volatility and Returns*, 22 REV. FIN. ECON. 86 (2013); Donald L. Kohn & Brian P. Sack, *Central Bank Talk: Does It Matter and Why?*, in MACROECONOMICS, MONETARY POLICY, AND FINANCIAL STABILITY: A Festschrift in Honour of Charles Freedman 175 (Bank of Canada ed., 2004); Elynn Boukus & Joshua V. Rosenberg, *The Information Content of FOMC Minutes* (Federal Reserve Bank of New York Working Paper, 2006), <https://nyfed.org/3oJHew6> (arguing that “themes extracted from the minutes are indeed correlated with current and future macroeconomic and financial market indicators”); Carlo Rosa, *The Financial Market Effect of FOMC Minutes*, 19 FED. RESERVE BANK N.Y. ECON. POL'Y REV. 67 (2013) (showing the effect of the release of Federal Open Market Committee (FOMC) minutes on US asset prices).

<sup>115</sup> See Michael Ehrmann & Marcel Fratzscher, *Communication by Central Bank Committee Members: Different Strategies, Same Effectiveness*, 39 J. MONEY, CREDIT & BANKING 509 (2007) (“assess[ing] the communication strategies of the Federal Reserve, the Bank of England, and the European Central Bank and their effectiveness”). See also Michael Ehrmann & Marcel Fratzscher, *The Timing of Central Bank Communication*, 23 EUR. J. POL. ECON. 124 (2007) (focusing on systematic patterns of the timing of communication).

of explaining monetary policy with empty and opaque phrases.<sup>116</sup> A time-lag for disclosures might mitigate these effects, as it would make it harder for financial market participants to draw inferences that could endanger the effectiveness of monetary policy measures.

But there are other arguments against increased transparency. One concern is that the quality of deliberations will decline and dissent will decrease if the decision-makers anticipate the future publication of their debates. Empirical studies have tested this hypothesis on a data-set consisting of the deliberations of the Federal Reserve's decision-making body, the Federal Open Market Committee (FOMC).<sup>117</sup> In 1993, a natural experiment took place in that the Federal Reserve unexpectedly decided to publish past and future transcripts of its monetary policy-making meetings (with a time lag of five years). Thus, the FOMC conducted discussions prior to 1993 under the assumption of permanent confidentiality, while thereafter its members knew that their debates would become part of the public record five years later.<sup>118</sup> The studies, in particular linguistic analyses, found that, while members of the FOMC showed less dissenting behavior,<sup>119</sup> they debated in a more disciplined and potentially more thorough manner.<sup>120</sup>

Similar concerns could be raised against publishing the minutes of ECB Governing Council meetings. It is important to note, however, that Governing Council members cannot expect these meetings to remain confidential long-term because full transcripts are accessible after thirty years. Furthermore, the FCC's *PSPP* ruling makes it clear to Governing Council members that the ECB might disclose parts of its records again to national governments, parliaments, or courts, demanding insight into the decision-making process. This development could prompt Governing Council members to focus on balancing, or motivate them to pay lip service to proportionality. In any case, reducing the time-lag for disclosure from thirty to, say, five years is unlikely to have negative effects. This weakens the argument against transparency. Even though a five-year time-lag seems long, it might not be slower than other routes to transparency,

<sup>116</sup> See Robert B. Ahdieh, *From FedSpeak to Forward Guidance: Regulatory Dimensions of Central Bank Communications*, 50 GA. L. REV. 213, 218–222, 227–231 (2015) (analyzing the Federal Reserve's communication as a monetary policy tool); Eyup Kahvecia & Aysun Odabaş, *Central Banks' Communication Strategy and Content Analysis of Monetary Policy Statements: The Case of Fed, ECB and CBRT*, 235 PROCEDIA: SOCIAL AND BEHAVIORAL SCIENCES 618 (2016) (studying, for example, the ECB's communication strategy and finding "no significant tone difference in certainty, optimism and the realism over time" despite its increase in transparency).

<sup>117</sup> See David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBS. 157 (2015) (analyzing the practices of the FOMC).

<sup>118</sup> See Ellen E. Meade & David Stasavage, *Publicity of Debate and the Incentive to Dissent: Evidence from the US Federal Reserve*, 118 ECON. J. 695, 697 (2008) (using an original data set of FOMC deliberations).

<sup>119</sup> *Id.*

<sup>120</sup> Stephen Hansen, Michael McMahon, & Andrea Prat, *Transparency and Deliberation Within the FOMC: A Computational Linguistics Approach*, 133 Q. J. ECON. 801 (2018) (presenting evidence of less dissenting behavior among inexperienced FOMC members, whose contributions however seem to be more influential and finding "that meetings become less interactive, more scripted, and more quantitatively oriented").

given that the complainants in the *PSPP* case waited almost five years and gained only limited insight through the judicial process to date.<sup>121</sup>

So far, the ECB has refused to make its decision-making process public because it fears national political pressure to conflict with central-bank independence.<sup>122</sup> Nevertheless, transparency and independence are not incompatible. The experience of other central banks shows that procedural transparency can be an essential element of central banking. The ECB also already publishes summarized accounts that contain information on internal debate and dissent, although it anonymizes individual positions.<sup>123</sup> Sometimes, a member of the Governing Council even speaks out publicly against certain decisions.<sup>124</sup> These statements do not impair the ECB's independence. On the contrary, public dissent highlights that the Governing Council brings together heterogeneous views and considers a broad spectrum of economic and legal arguments as well as geographic and substantive perspectives. Increased transparency could strengthen the ECB's independence and legitimacy, as well as its democratic accountability.

## 5.2. Monetary dialogue and institutional cooperation

The *PSPP* ruling should also serve as an impetus to strengthen the accountability of the ECB through improved dialog and cooperation with other EU actors. This could compensate for a substantive margin of discretion in judicial review and fulfill the FCC's request for an explicit explanation of the ECB's monetary policy assessment and its balancing process.

The EU Parliament is the primary locus of the ECB's accountability. The ECB President regularly appears before the Committee on Economic and Monetary Affairs of the EU Parliament to engage in a so-called monetary dialogue.<sup>125</sup> Members of the EU Parliament can also submit written questions to the ECB.<sup>126</sup> The corresponding material is publicly available. However, the members of the EU Parliament currently under-utilize these accountability mechanisms. In particular, none of the questions presented to the ECB up until the announcement of the *PSPP* ruling addressed proportionality or balancing, although these topics were of political concern to at least some,

<sup>121</sup> See Antrag auf Erlass einer Anordnung gemäß § 35 BVerfGG [Application for an order pursuant to § 35 BVerfGG], 2 BvR 1651/15, Aug. 5, 2020 <https://bit.ly/36xv8A3>.

<sup>122</sup> See, e.g., Otmar Issing, Eur. Cntr. Bank Executive Board Member, *The Monetary Policy of the ECB: Stability, Transparency, Accountability*, Speech at the Royal Institute of International Affairs, London (Oct. 25, 1999), [www.ecb.europa.eu/press/key/date/1999/html/sp991025\\_1.en.html](http://www.ecb.europa.eu/press/key/date/1999/html/sp991025_1.en.html); Sirka Hämäläinen, Eur. Cntr. Bank Executive Board Member, *The ECB's Monetary Policy: Accountability, Transparency and Communication*, Speech at the Old Age, New Economy and Central Banking Conference, organized by CEPR/ESI and Suomen Pankki, Helsinki (Sept. 14, 2001), [www.ecb.europa.eu/press/key/date/2001/html/sp010914.en.html](http://www.ecb.europa.eu/press/key/date/2001/html/sp010914.en.html).

<sup>123</sup> See, e.g., Account of the Monetary Policy Meeting, Jan. 21–22, 2015, *supra* note 64, at 12–14 (regarding *PSPP*).

<sup>124</sup> See De Nederlandsche Bank, Press Release, *Klaas Knot Comments on ECB Policy Measures* (Sept. 13, 2019).

<sup>125</sup> TFEU, *supra* note 8, art. 284(3).

<sup>126</sup> Rules of Procedure of the European Parliament, 9th term, rule 140 (Feb. 2020), <https://bit.ly/3rc0y6U>.

judging by the more than 1700 complainants in the *PSPP* case before the FCC that included members of the EU Parliament.<sup>127</sup> The monetary dialogue with the Committee on Economic and Monetary Affairs did touch upon proportionality considerations, with the President of the ECB elaborating on certain economic implications of *PSPP*.<sup>128</sup> But the transcripts indicate that the ECB President at times seems to evade questions and the limited time allocated to each parliamentarian allows almost no follow-up.<sup>129</sup> Therefore, parliamentarians would be well advised to put forward a more concerted effort to realize the full potential of these sessions, for instance by preparing coherent lines of inquiry, following up on unanswered questions, or advocating for the ECB President to respond to unanswered questions in writing.<sup>130</sup> But dialog cuts both ways. Political actors in the EU could strengthen accountability by clearly communicating and prioritizing their goals to the ECB in order to better guide the ECB's interpretation of its secondary mandate.<sup>131</sup>

Parliamentary accountability also has a national dimension. Members of the ECB Governing Council appear before national parliaments to comment on monetary policy even though they have no duty to do so.<sup>132</sup> This is an expression of supranational loyalty as enshrined in Article 4(3) TEU. These encounters offer an opportunity for parliamentarians to broach issues of national concern, like certain consequences of specific monetary policy measures. The ensuing exchanges can provide insight into the decision-making process within the Governing Council. For instance, the President of the Dutch central bank and Governing Council Member Klaas Knot criticized certain ECB measures as “disproportionate” before the Dutch Parliament.<sup>133</sup> The German Bundestag established a new, national “monetary dialogue” in September 2020 in order to “accompany” the ECB's monetary policy.<sup>134</sup> It remains to be seen how the Bundestag uses this instrument to promote the ECB's democratic accountability while staying within its competences.

Ultimately, institutional cooperation of the EU Parliament and national parliaments with the ECB has to rely on a mutual understanding of and commitment to central-bank independence. Parliamentarians can only aim to hold the ECB accountable, not

<sup>127</sup> So far only one question addressed the principle of proportionality and balancing, but only in response to the FCC's *PSPP* ruling, see Sven Simon, *Question for Written Answer Z-036/2020 to the European Central Bank* (May 29, 2020), <https://bit.ly/3ti08FT>.

<sup>128</sup> See Draghi, *supra* note 83, at 2–4, 11–12.

<sup>129</sup> See, e.g., *id.* esp. at 7–8.

<sup>130</sup> See Rosa M. Lastra, *Accountability Mechanisms of the Bank of England and of the European Central Bank* (Monetary Dialogue Papers, Sept. 2020), at 31–33, [www.europarl.europa.eu/cmsdata/211623/1\\_LASTRA-final.pdf](http://www.europarl.europa.eu/cmsdata/211623/1_LASTRA-final.pdf); CLAEYS & DOMÍNGUEZ-JIMÉNEZ, *supra* note 109, at 82–83 (discussing further ways of improvement).

<sup>131</sup> See Claeys & Domínguez-Jiménez, *supra* note 109, at 84–85 (also making this suggestion).

<sup>132</sup> Nicolò Fraccaroli, Alessandro Giovannini, & Jean-François Jamet, *The Evolution of the ECB's Accountability Practices During the Crisis*, 5 *ECONOMIC BULLETIN* 47, 59 n.77 (2018), <https://bit.ly/3atF9zd> (counting six visits of the ECB President before national parliaments since 2012: twice in Germany, in Spain, France, Finland, Italy, and the Netherlands).

<sup>133</sup> De Nederlandsche Bank, Press Release, *supra* note 124.

<sup>134</sup> German Bundestag, Press Release, *Deutscher Bundestag vereinbart ausschussübergreifenden “Geldpolitischen Dialog”* (Sept. 11, 2020), <https://bit.ly/3jb5ar7>.

try to influence its decision-making. The institutional framework allows for an effective dialog if both sides take their responsibility seriously to engage in meaningful debate. Therefore, an enhanced dialog with the EU Parliament or even national parliaments (on a voluntary basis) could be sufficient to assuage the FCC's concerns, in particular because such interaction provides accountability vis-à-vis democratically elected parliaments.<sup>135</sup>

### 5.3. Judicial standard of review

When choosing a standard of review for monetary policy measures, courts have to strike the right balance between independence and accountability. While the *Maastricht* judgment of the FCC emphasized the essential role of the ECB's independence,<sup>136</sup> its *PSPP* ruling uses the principle of proportionality to enforce accountability. The *PSPP* ruling outlines a two-step process. So far, the FCC emphasized the procedural duties of the ECB as the first step, but has not undertaken a substantive balancing test yet. This provides an opportunity to lay out the appropriate standard of review for ECB monetary policy measures prior to a potential second judgment—assuming that a national court can review them at all.

Judicial review can stand in tension with independence.<sup>137</sup> Under the TFEU, all ECB measures are subject to judicial review, although the scrutiny applied varies.<sup>138</sup> The FCC emphasizes that a larger degree of independence should increase judicial scrutiny.<sup>139</sup> Yet, this is not self-evident. The purpose of independence is to prevent political influence and limit challenges to the expertise of central banks. Of course, judges are not themselves politicians—their judicial independence limits (but does not exclude) the danger that judicial review is used to apply political pressure to a central bank. However, judges have little to no expertise in monetary policy-making and might succumb to fallacies influenced by political arguments. Therefore, central-bank independence warrants that the courts grant the ECB a margin of appreciation.<sup>140</sup> This does not leave monetary policy unchecked. Within proportionality analysis, the CJEU reviews whether the ECB pursued the legitimate aim of price stability or abused its authority for other purposes, using price stability only as a pretext. More intense scrutiny

<sup>135</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2728/13, Jan. 14, 2014, 134 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 366, 425, ¶ 125 (Gertrude Lübke-Wolf, J., dissenting), translation at <https://bit.ly/2MbK1kA> (emphasizing the limited effectiveness of “more or less inconsequential communicative behaviour”).

<sup>136</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2134/92, 2 BvR 2159/92, Oct. 12, 1993, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 155, 204, 207–209, ¶¶ 147, 153–4.

<sup>137</sup> See Matthias Lehmann, *Varying Standards of Judicial Scrutiny Over Central Bank Actions*, in ECB LEGAL CONFERENCE: SHAPING A NEW LEGAL ORDER FOR EUROPE: A TALE OF CRISES AND OPPORTUNITIES 112, 116–117 (Eur. Cntr. Bank ed., 2017), <https://bit.ly/3pNgbSc>.

<sup>138</sup> Case C-62/14, Gauweiler, ECLI:EU:C:2015:400, ¶ 83 (June 16, 2015). See also Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 2728/13, June 21, 2016, 142 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 123, 223, ¶ 194.

<sup>139</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 143.

<sup>140</sup> See also *id.* ¶ 141.

might be in order in crisis situations and with regard to unconventional measures. Moreover, a thorough judicial application of the necessity test demands that the ECB intensify its measures, gradually combined with a periodic review. Thus, the ECB would have to meet a higher burden of justification for particularly extensive or intensive measures, for instance in crisis situations. Moreover, the necessity test (or, in the FCC's framework, a narrow balancing test) requires the ECB to choose measures that effectively pursue price stability in line with its secondary goals over instruments that may be more effective, but also interfere with secondary goals, such as EU economic policy. Additional legal limits, especially the prohibition of monetary financing (Article 123 TFEU), warrant a strict review.<sup>141</sup>

## 6. Conclusion

The *PSPP* ruling prompted the ECB to substantiate its proportionality assessment. At the same time, the FCC has announced that it might still conduct a substantive balancing assessment of its own. Then it would check whether the ECB has carefully selected, researched, and considered all relevant effects of the contested programs, and—most importantly—reached a justifiable result. At this juncture in a future proceeding, the FCC should carefully consider that a full balancing test cannot be applied to monetary policy measures because it conflicts with the ECB's primary mandate to price stability and is not suitable for this kind of policy-making. Courts should grant the ECB a wide margin of discretion in light of the central bank's independence, in particular as the judges lack sufficient economic expertise and the necessary tools to obtain it. Therefore, they cannot legitimately substitute their own judgments for that of the ECB. A particular problem would lie in the confidentiality of judicial deliberations. How could the European community ensure that the FCC itself has carefully considered the relevant effects of a monetary policy measure? Assuming this task would overburden the FCC and endanger its public support. Overall, the *PSPP* ruling provides an impulse to rethink the ECB's accountability. Strengthening the ECB's cooperation with the EU Parliament, but also national parliaments, through an effective monetary dialogue and establishing a comprehensive transparency regime for the ECB's decision-making processes might go a long way to restore faith in the institution.<sup>142</sup>

<sup>141</sup> See Lehmann, *supra* note 137, at 118–119, 123–128 (providing an in-depth assessment).

<sup>142</sup> On the importance of credibility in central banks, see Goodhart, *supra* note 22, at 66–7.