The Principle of Proportionality and the European Central Bank*

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The article is divided into four parts. Parts I gives a general overview of the origin of the principle and its subsequent developments in light of the case-law of the European Court of Justice. It also reflects on the different meanings of proportionality as a flexible and multi-faceted principle. Part II investigates the principle of proportionality according to an ex ante perspective, i.e. as a principle capable of governing and orienting legislative and administrative action. Under this perspective, the article analyses the way proportionality impacts banking regulation, banking supervision and monetary policy.

Part III deals with the ex post perspective, i.e. the way proportionality is assessed and scrutinized by EU courts. Part IV concludes. Parts I and II were published in the previous issue.

Keywords: Proportionality, EU General Principles, ECB, Banking supervision, Monetary policy, Judicial review

1 PART III: PROPORTIONALITY IN JUDICIAL REVIEW: THE EX POST PERSPECTIVE

1.1 THE ROLE OF THE ECJ

In legal globalization Courts – as judges of the economy – play an essential role in the regulation of markets as noted by the philosopher Duncan

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This article was completed in November 2019, well before the German Constitutional Court's ruling of 5 May 2020. However, we are firmly convinced that the opinions expressed here have not lost their relevance. Rather, they might represent an even more useful contribution to a critical understanding of the German judgment and, more generally, of the role of the principle of proportionality as a general and multi-faceted principle of EU law. We believe that the EZB Urteil is open to criticism for several reasons. Notably, it embraces a wrongful and German-oriented understanding of proportionality, which fails to take into account the way the principle has been shaped in EU law and interpreted over the years by the Court of Justice. Moreover, the German judgment seems to indirectly confirm the advantages of a dual reading, ex ante *and* ex post, *of the principle of proportionality, as demonstrated in this article.*

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Kennedy.[1] EU law does not deviate from this scheme. In reality, the Court of Justice has played (and continues to play) a key role as the motor of European integration.

EU law has been formed mainly through the case law of the Court of Justice. The latter has acquired a dominant role in establishing common principles that drive the markets. The reference to general principles of law allows European Court of Justice (ECJ) to fill in the many gaps in the EU legal system, which are inevitably related to the fact that the EU still follows the principle of conferral. Not only. It has been assigned to the ECJ a monopolistic role in order to declare the existence of a principle from different sources as a general principle of EU law, since the ECJ's task is to ensure the uniform interpretation and application of the EU law (Article 267 TFEU).

Moreover, the ECJ is at the top of a composite architecture in which the European and national legal systems are integrated. The Court gathers many jurisdictional roles, such as administrative judge, appeal judge, international judge and constitutional judge. In the latter capacity, it exercises a judicial control over the conformity of EU legislative acts with the Treaties, it settles conflicts between States and the Union or between the European institutions and upholds fundamental principles.

The judicial review becomes the place of the balance in the concrete case between the requirements of protection of fundamental rights and the interests of the market as objectives of economic integration. As the A.G. Jacobs pointed out, 'the ECB is subject to the general principles of laws which form part of [EC] law and promotes the goals of the [EC] set out in Article 2 of the EC [as it was codified before the Lisbon Treaty] though the implementation of the tasks and duties laid upon it'.[2] According to the ECJ, the ECB's independence is 'strictly functional and is limited to the performance of [its] specific tasks'.[3] In other words, the Court affirmed that the ECB is subject to various kinds of controls over its activities. This recognition may imply the applicability of the EU Charter of Fundamental Rights to the actions taken by ECB in exercising its powers and with due regard for the principle of subsidiarity.[4]

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1 D. Kennedy, *Three Globalizations of Law and Legal Thought*, in *The New Law and Economic Development: A Critical Appraisal* (D. Trubek & A. Santos eds, Cambridge University Press 2006).

2 Opinion of Advocate General Jacobs, Case C-11/00, *Commission v. ECB* ECLI:EU:C:2003:395, states also that 'the independence thus established is not an end in itself; it serves a specific purpose. By shielding the decision-making process of the ECB from short-term political pressures the principle of independence aims to enable the ECB effectively to pursue the aim of price stability and, without prejudice to that aim, support the economic policies of the Community'.

3 *Ibid.*

4 The applicability of the Charter results from the fact that under Art. 51 of the Charter: 'The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers'. This is the reference used by the EU courts in Case T-107/17 *Ledra* and *Steinhoff* ECLI:EU:T:2019:353.

As a constitutional judge, the Court assesses the exercise of jurisdiction in the light of the principle of proportionality, acknowledged as a cornerstone of the EU legal system, which affects acts of normative value adopted by the European institutions and the implementation by the Member States. However, there are currently no cases of judicial review of banking legislative acts (see, however, the withdrawn application for judicial review brought by the UK against several CRD IV provisions[5]) and just isolated cases concerning ECB regulations (Article 130 TFEU), which would allow the Court to directly assess the proportionality of regulatory acts and ultimately exercise constitutionality control.[6]

In the role of administrative judge, the judiciary has to consider the principle of proportionality when reviewing individual decisions. The proportionality – understood as the acknowledgement of the control of the adequacy of the instrument for the purpose and proportion and balance of conflicting interests – arises in the assessment of the relationship between the legal purpose of the administrative action, which can be deduced from the legal framework, and the content and effects of the discretionary measure.

Compared to the past, the proportionality test appears to be more extensive according to a process of judicialization. EU judges are now more frequently involved in the control of ECB's administrative action, whereas in the past only few Court rulings concerned the ECB. Different is the scope of application: for example, in English Courts judges apply the proportionality test only in cases concerning human rights, whereas the proportionality test plays a central role within EU law. Nonetheless legal certainty should not be put at risk.

1.2 Proportionality and banking supervision: different tests

1.2[a] *The Jurisprudential Dimension*

As we have demonstrated in Part II, the principle of proportionality affects both banking regulation and banking supervision. In particular, it applies both to the ECB regulatory acts, both binding and non-binding, and to individual supervisory decisions.

To date, a relevant number of ECB supervisory decisions have been brought before the EU courts. Only a few, however, deal specifically with proportionality.

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5 Order of the ECJ in Case C-507/13 *United Kingdom* v. *Parliament and Council* ECLI:EU:C:2014:2481. *See* the conclusions of A.G. Niilo Jääskinen, para. 90 et seq. and the case law reported therein, to be found at ECLI:EU:C:2014:2394.

6 *See* however, e.g. action for annulment in case T-913/16, *Fininvest and Berlusconi v. ECB*, the eighth plea in law, alleging unlawfulness, on the basis of Art. 227 TFEU, of Art. 31(3) of the SSM Framework Regulation for breach of the rights of the defence guaranteed by Art. 41 of the Charter of Fundamental Rights and infringement of the corresponding general principles of law derived from the constitutional traditions common to the Member States.

This case law nevertheless allows us to draw some preliminary considerations on the way proportionality is applied by EU courts in the field of banking supervision.

Proportionality has been first invoked as a ground of review in the well-known *Landeskreditbank* case.[7] A German credit institution challenged the ECB decision qualifying it as a significant entity, subject to the direct supervision of the ECB. The bank argued that the ECB committed an error of law to the extent that it did not apply the 'particular circumstances' clause under Article 6.4 of the SSM regulation and Article 70 of the SSM Framework Regulation. Notably, the applicant argued that the decision to qualify an entity as significant under the SSM regulation should be based on the principle of subsidiarity and proportionality, thus requiring the supervisor to demonstrate on a that the direct supervision of the ECB was suitable and necessary, i.e. more appropriate than the national one.

The General Court, followed by the ECJ, rejected the complaint of the credit institution on the basis of a very broad reasoning focused on the particular structure of the SSM, as a 'centralized' administrative system in which national authorities' supervision over LSIs is not an exercise of an autonomous competence, but rather a decentralized implementation of an ECB exclusive competence. In relation to proportionality, the General Court held that, according to the settled case-law:

> the acts adopted by EU institutions must be appropriate for attaining the legitimate objectives pursued by the legislation at issue and must not exceed the limits of what is necessary in order to achieve those objectives; where there is a choice between several appropriate measures, recourse must be had to the least onerous; and the disadvantages caused must (paragraph 67).

It also reminded that 'the assessment of the proportionality of a measure must be reconciled with compliance with the discretion that may have been conferred on the EU institutions at the time it was adopted' (paragraph 68).

At a closer look, however, the Court did not enter into the previously announced three-limbs proportionality test, as it deemed it not necessary for the correct solution of the case. We believe it did rightly so. As the A.G. Hogan better clarified in his opinion, in fact, the proportionality argument advanced by the appellant amounted in substance to an indirect challenge to the validity of Article 6.4 SSM Regulation. By contrary, the principle of proportionality must be applied within the framework of the competences conferred on EU institutions and cannot alter the distribution of competences provided by the EU legislator.[8]

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[7] Case T-122/15, *Landeskreditbank Baden-Württemberg – Förderbank v. ECB,* ECLI:EU:T:2017:337.

[8] A.G. Hogan Opinion in C-450/17 P *Landeskreditbank Baden-Württemberg – Förderbank v. ECB,* ECLI:EU:C:2018:982, paras 57, 61 and 62. the principle of proportionality cannot alter the division of competences of the Member States and the Union which is governed by the principle of conferral pursuant to Arts 5(1) and (2) TEU.

Accordingly, in the appeal judgment, the Court held that the EU legislature, by creating the SSM, already took into due account the principle of proportionality (see Part II, par. 2.3). Therefore, the ECB is not required to determine on a case-by-case basis whether, in spite of the criteria set out in Article 6.4, a significant institution should come under the direct supervision of the national authorities on the ground that they are better placed to attain the objectives set out in the SSM regulation.[9]

Another recent judgment of the General Court provides interesting indications on the *ex post* control of proportionality *vis-à-vis* individual supervisory decisions and, more generally, on the intensity of judicial review on discretionary choices of the ECB. In *Crédit mutuel Arkéa v. ECB*,[10] the ECB ordered a French credit institution to hold additional capital as a result of the Supervisory Review and Evaluation Process (SREP) pursuant to Article 97 CRD IV. The issue at stake was the assessment of the existence of prudential risks such as not to ensure the sound management and the risk coverage by the credit institution, deriving from the likelihood of the credit institution leaving the *Crédit mutuel* group as a consequence of an on-going internal conflict. The applicant claimed that the contested SREP decision was vitiated by an error of law and errors of assessment, and that it was disproportionate.

The Court rejected the claim and observed that the ECB enjoys broad discretion when imposing additional capital requirements within a SREP exercise. As to proportionality, the Court reiterated the standard formula of the three-limbs test,[11] without however applying it. The Court rather scrutinized the reasoning of the ECB and concluded that the imposition of additional capital to cover the eventuality of the credit institution leaving the banking group did not amount to a manifest error of assessment, nor that it was manifestly disproportionate. This conclusion has not been drawn from an in-depth proportionality control, but rather from a thorough scrutiny of the reasoning of the contested decision.

This does not mean that the Court applied a deferent approach to the ECB's margin of discretion or that it refrained from scrutinising the ECB's complex economic assessments. On the contrary, the judicial review has been based on the stringent test developed in the anti-trust sector, starting from the well-known *Tetra Laval* ruling,[12] i.e. requiring to establish 'whether the evidence relied on is factually

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9 ECJ judgment in Case C-450/17 P, ECLI:EU:C:2019:372, para. 59. *See also* GC, T-122/15, *supra* n. 7, para. 75.

10 Case T-712/15, *Crédit mutuel Arkéa v. ECB* ECLI:EU:T:2017:900.

11 *Crédit mutuel Arkéa, ibid.*, paras 201 and 202.

12 *See* Case T-5/02, *Tetra Laval v. Commission* ECLI:EU:T:2002:264, followed by the ECJ, C-12/03 P, *Tetra Laval* ECLI:EU:C:2005:87. On this issue, H. Gillians, *Proportionality of EU Competition Fines: Proposal for a Principled Discussion*, 37 *World Competition* 435 (2014); J. Schwarze, *Les sanctions imposées pour les infractions au droit européen de la concurrence selon l'article 23 du règlement no 1/2003 CE à la lumière des principes généraux du droit*, 1 *Revue trimestrielle droit européen* (2007); S. B. Völker, *Rough Justice? An*

accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it'.[13] Yet, this judgment seems to confirm a tendency of the EU judge to conceal the proportionality control under the broader umbrella of the 'manifest error of assessment'.

The upcoming cases will most likely provide further clarifications about the *ex post* assessment of proportionality of banking supervisory measures. Proportionality is one of the main grounds of complaint in pending claims against the ECB decision regarding, in particular, the withdrawal of a banking licence[14] or the opposition to the acquisition of qualifying holdings.[15]

Case T-584/18, Ukrselhosprom PCF and Versobank v ECB, Case T-27/19, Pilatus Bank and Pilatus Holding v ECB,

Meanwhile one may argue that, from a broader perspective, the first case-law on banking supervision reveals the EU Courts' inclination to perform an in-depth judicial review of ECB supervisory measures. Although adhering to the usual 'limited review' formula, the General Court does not restrain itself to a merely formal or procedural scrutiny, but it undertakes a rather intense control on the substance of the contested decision.

The *Livret A* judgments (in particular, *La Banque Postale v. ECB*[16]) provide an interesting example of this approach. In these cases, the General Court annulled the ECB supervisory decisions rejecting the applications of six French banks requesting to benefit from the exemption under Article 429.14 CRR and to exclude from the calculation of their leverage ratio the exposures connected to some savings accounts. The Court found that, even if the ECB enjoyed a large margin of discretion in the application of the waiver, its decisions were affected both by an error of law in the interpretation of the waiver set out in the CRR and by a manifest error of assessment. In particular, the Court highlighted that the ECB interpreted Article 429 CRR in such a restrictive manner as to deprive it of any practical effect, namely render it inapplicable. Moreover, the Court recalled the

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Analysis of the European Commission's New Fining Guidelines, 44 Common Mkt. L. Rev. 1285 et seq. (2007); G. De Burca *The Principle of Proportionality and Its ALaw*, Y. B. Eur. L. 105 (1993); T. I. Harbo, *The Function of the Proportionality Principle in EU Law*, Eur. L. J. 158 (2010); A. Portuese, *Principle of Proportionality as Principle of Economic Efficiency*, Eur. L. J. 612 (2013).

13 *Arkéa*, *supra* n. 7. para. 179. Similarly, *ex multis*, ECJ, Case C-295/12 P, *Telefónica v. Commission*, para. 54; Case C-386/10 P, *Chalkor v. Commission*; Case C-326/05 P *Industrias Químicas del Vallés v. Commission*, para. 76; Case C-525/04 P, *Spain v. Lenzig*, para. 57;Case C-12/03 P, *Commission v. Tetra Laval BV*, *supra* n. 12, para. 39.

14 *See* Case T-698/16, *Trasta Komercbanka v. ECB* and Case T-321/17 *Niemelä and Others v. ECB* (both pending).

15 *See* Case T-913/16, *Fininvest and Berlusconi v. ECB* (pending).

16 General Court, s. II (extended), Case T-733/16, *La Banque postale v. ECB* ECLI:EU:T:2018:477; T-745/16, *BPCE v ECB* ECLI:EU:T:2018:476; T-757/16, *Société générale v. ECB* ECLI:EU:T:2018:473; T-751/16, *Confédération nationale du Crédit mutuel v. ECB* ECLI:EU:T:2018:475; T-758/16, *Crédit agricole SA v. ECB* ECLI:EU:T:2018:472; T-768/16, *BNP Paribas v. ECB* ECLI:EU:T:2018:471.

well-known *Technische Universität München* jurisprudence, according to which 'where a Community institution has a wide discretion, the review of observance of certain procedural guarantees is of fundamental importance'.[17] Accordingly, by scrutinizing the reasons stated by the ECB, the Court carried out an in-depth appraisal of the discretionary content of the contested measure, finding that the ECB failed to carry out an in-depth examination of the characteristics of the regulated saving accounts and that it did not accurately consider all the pertinent elements (such as the likelihood of some adverse events ever taking place).

Even if some applicants also raised the issue of proportionality, the Court stopped its analysis to the manifest error of assessment stage and did not address the proportionality complaint, considering it 'absorbed' by the previous statements.[18] It would seem in other words that the EU Court prefers to avoid applying the proportionality test, especially when this is not strictly necessary. The three-limbs proportionality test, in fact, might be understood as the most intrusive scrutiny on a public body's discretion, as it necessarily implies an *ex post* control over the authority's balancing exercise of conflicting interests.

1.2[b] *Proportionality and Judicial Control*

Although rules and principles from different sources have the same normative value, it is worth highlighting that in the field of individual supervisory decisions not many cases dealt with the proportionality principle. Notwithstanding, where the legislator established a legislative scheme that needs to be respected, the principle of proportionality cannot be deployed in a manner which would effectively undermine the *effet utile* of the legislative scheme.[19]

The analysis of the exercise of judicial control shows how the impact on fundamental rights is reduced in supervision, with the result that the process of contamination resulting from the case law of the European Court of Human Rights is less evident. The ECtHR has no difficulty in classifying the 'administrative' sanctions in the *Grande Stevens*[20] case or in *Menarini v. Italy*[21] case as criminal for the purposes of the European Convention on Human Rights. In this perspective, the Court holds that the main purpose of the administrative sanctions is deterrence and punishment, because they are proportional to the seriousness of the conduct, not to the damage caused to investors.

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17 Case C-269/90, *Technische Universität München* ECLI:EU:C:1991:438, para. 14.

18 *See* in particular, Case T-758/16, *Crédit Agricole v. ECB*, *supra* n. 16, para. 87.

19 A. G. Hogan Opinion in C-450/17 P, para. 61. On this point, *see* C. Zilioli, *Proportionality as the Organising Principle of European Banking Regulation*, in *Zentralbanken, Währungsunion und stabiles Finanzsystem* (T. Baums et al. eds, Berlin 2019.

20 *Grand Stevens v. Italy* (Application No. 18640/10).

21 *Menarini Diagnostics v. Italy* (Application No. 43509/08).

Proportionality means: suitability for the purpose pursued; necessity in the sense that it cannot be substituted with another measure, no less effective for the purpose and less incisive for the opposing interests; proportionate 'in the strict sense', in that it does not impose an excessive sacrifice on the antagonist interests when compared with the advantages gained by the other. In the third stage, therefore, the verification of the 'balancing' of the interests that come into conflict in the present case takes place. In the activity of judicial control of supervision, a different balancing of interests could be recorded, according to a balancing of benefits with sacrifices.

In contrast, the judicial check of proportionality usually seems to stop at the profiles of the suitability (appropriate to achieve the objectives) or necessary (the less restrictive). The principle of legality restricts the scope of the investigation, and it ensures that a distinction remains between the respective roles of courts and decision-makers. Judicial review does not lead to substitute the authority assessment.

The balance of interests (manifest disproportionality to the objectives pursued) may come under examination of the Court's decision only when the law does not define the objective in an accurate manner. So, generally the content of the test does not incorporate the third stage, called as 'proportionality in the narrow sense' or 'narrow proportionality'. Whereas in that stage it is considered the correct balance of interests that conflict in the decision taken by the authority, a sort of cost-benefit balance of the decision. This seems to confirm that the necessity and narrow proportionality questions constitute distinct criteria and this should be reflected in the judicial reasoning process. This shows that proportionality is a flexible principle, which can be adapted to the context in which it applies.

Finally, proportionality issues have an impact on the administrative proceedings. The duty to give reasons become essential. The reasoning is the prerequisite for proportionality: all the necessary elements must be provided in order to justify the institution's intervention. The justification must be fully transparent. The adoption of individual supervisory decisions appears appropriate or suitable when the measures are justified and reasonable. The circularity is clear. Strict compliance with these criteria is a prerequisite for judicial control.

1.3 Proportionality and monetary policy

1.3[a] *The Jurisprudential Dimension*

How does the proportionality principle operate in the monetary police case law? In the *Gauweiler* judgment,[22] the Court of Justice ruled on a preliminary reference concerning the validity of ECB decisions concerning Eurosystem *outright monetary*

[22] Case C-62/14 *Peter Gauweiler and Others v. Deutscher Bundestag* ECLI:EU:C:2015:400.

transactions (OMT) in the secondary sovereign debt markets. This is an 'unconventional' measure which allows the ECB to purchase securities from euro area governments subject to a financial assistance programme.

Since the measure in question was unconventional and justified by exceptional circumstances, the Court first assessed compliance with the principle of allocation from the point of view of the principle of proportionality. As emphasized in the Opinion of Advocate General Pedro Cruz Villalón:

> Whilst the Union must always observe the principle of proportionality when exercising its competences deriving from the principle of conferral (Article 5(4) TEU), observance of the principle of proportionality is particularly important in a case which concerns the exercise of competences that are being exercised on account of exceptional circumstances.[23]

Therefore, the analysis of the proportionality of the measure is closely linked to the principle of conferral of powers.

In such case, the ECJ first assessed whether the decision fell within the scope of the Union's monetary policy in order to establish the existence of an exclusive competence of the Union and then it assessed the administrative decisions in the light of the proportionality test.

Both the Advocate General and the Court, before making an analytical assessment of the proportionality test, dwelt on the limits of the Court's review in the area of monetary policy. In particular, the Advocate General, recognising that the ECB has a wide margin of discretion in the design and implementation of European monetary policy, specified that in monitoring the activities of the Central Bank the judges:

> must therefore avoid the risk of supplanting the Bank, by venturing into a highly technical terrain in which it is necessary to have an expertise and experience which, according to the Treaties, devolves solely upon the ECB. Therefore, the intensity of judicial review of the ECB's activity, its mandatory nature aside, must be characterised by a considerable degree of caution.[24]

Therefore, while it is said that the proportionality check on the ECB's discretionary power should be carried out with moderation (precisely because of the discretion enjoyed by the institution), it is argued that such a check becomes essential ('particularly important'[25]) where the competence is exercised on account of exceptional circumstances.

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[23] Opinion at ECLI:EU:C:2015:7, para. 161.

[24] *Ibid.*, para. 111. On the point at issue, P. Craig, *EMU, the European Central Bank and Judicial Review*, in *Legal Framework of the Single European Currency* 97–114 (P. Beaumont & N. Walker ed., Hart, Oxford-Portland 1999).

[25] A.G. Opinion, para. 161.

In this respect, the Court specified that as regards the proportionality review, since the European System of Central Banks (ESCB) is required to make technical choices and make complex forecasts and assessments when drawing up and implementing an open market operations programme, it should be granted, in that context, a wide discretionary power. As the Court points out, in the face of choices of a highly technical discretionary nature, the assessment of the court remains external to the administrative merit. Moreover, the Court requires that the proportionality test be carried out by monitoring compliance with 'certain procedural guarantees', including the following 'the obligation for the ESCB to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions'.[26]

The place where this 'considerable degree of caution' of judicial review is carried out appears to be mostly in the third stage of the proportionality test: the so-called proportionality *stricto sensu*. In this respect, the AG stressed that the ECB's recognition of a wide margin of discretion:

> means — particularly at the third stage of the review of proportionality — that the weighing-up exercise which the ECB is required to undertake in a situation such as that to which the OMT programme gives rise allows the ECB a broad margin of assessment, provided that no imbalance arises which is obviously disproportionate.[27]

Therefore, the finding of the non-proportionality of the measure must be self-evident.

The proportionality test in the present case has certain particularities in relation to the nature of the contested decision. Firstly, the link established by the AG between the proportionality test and the completeness of the measure is interesting: in fact, 'the proportionality *stricto sensu* of a programme such as OMT only once the programme has been activated and, in particular, in the light of the scale it may have'.[28] .It is particularly difficult – underlines the AG – to outline the complete and effective proportionality of an 'incomplete' measure.[29] Thus, the intensity of the proportionality check is affected by the uncertain nature of the activation of the programme. Moreover, the assessment of proportionality is further complicated by the fact that in order to ensure the effectiveness of the OMT programme, the ECB has not been able to disclose certain features of its activation. Indeed, the ECB has repeatedly stressed that making public the precise outlines of the limits that then make the measure effectively proportionate would undermine the overall strategic relevance of the operation.

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[26] Case C-62/14, *Peter Gauweiler*, para. 69.
[27] A.G. Opinion, para. 187.
[28] A.G. Opinion, para. 188.
[29] A.G. Opinion, para. 162.

In addition, the Court's review of *stricto sensu* proportionality was affected by another circumstance: the difficult assessment of the risks associated with the adoption of the OMT programme. This further restricted the scope of judicial review. This factor is reflected in particular in the AG's opinion. In detail, the AG, in assessing whether 'all the components of the measure at issue have been properly weighed up against one another',[30] related the following costs and benefits of the operation:

> on the one hand, the OMT programme permits the ECB to intervene in an exceptional situation in order to restore its monetary policy instruments and thus ensure that its mandate is effective; on the other hand, it is a measure which exposes the ECB to a financial risk, together with the moral hazard arising from the artificial alteration of the value of the bonds of the State concerned.[31]

In view of the applicants' allegations that the OMT programme would expose the ECB and the taxpayers of the Member States to an excessive risk that would neutralize the benefits associated with the programme, the AG gave greater weight to the fact that, while it is true that the planned operations present risk profiles, nevertheless 'the objections concerning the excessive risk assumed by the ECB would be founded if the Bank were to undertake a volume of purchases that would inevitably lead it to a situation in which it is facing insolvency'.[32] Therefore, in that respect the *stricto sensu* proportionality evaluation seems to be confused with another principle: the precautionary principle. The risk borne by the ECB by the contested measure has been assessed as a risk falling within the normal risk of central bank activity.[33]

The *Weiss* judgment concerns a reference for a preliminary ruling – again – from the German Federal Constitutional Court *(Bundesverfassungsgericht)* concerning the validity of Decision (EU) 2015/774 of the ECB of 4 March 2015 on a programme for the purchase of public sector assets on secondary markets (PSPP).[34] As in *Gauweiler*, the reference for a preliminary ruling concerned the validity of a programme for the purchase of government bonds on the so-called 'non-conventional' secondary markets, which, according to the applicants, are not covered by monetary policy and infringe the prohibition on monetary financing laid down in Article 123 TFEU. In particular, the procedure was intended to ascertain whether an act of the ECB is manifestly ultra vires and contrary to the German constitutional identity.

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30 A.G. Opinion, para. 185.
31 A.G. Opinion, para. 186.
32 A.G. Opinion, para. 195.
33 A.G. Opinion, para. 197.
34 Case C-493/17 *Weiss* ECLI:EU:C:2018:1000.

This ruling, as is amply demonstrated by the analysis of the conclusions presented by AG Melchior Wathelet, seems to confirm the Court's deferential attitude to the technical and discretionary questions of monetary policy, according to the marginal standard of review. After stressing that the PSPP falls within the ECB's monetary policy mandate in relation to the risks of deflation objectively identified at the time of the adoption of the programme, the AG pointed out that the broad technical discretionary power enjoyed by the ESCB when drawing up programmes of open market operations involving complex assessments means that ' … the Court must be wary of carrying out a review of expediency'.[35]

According to the AG in the case of highly technical discretionary powers, once it has been established that the objectives of the measure fall within the competence of the body which adopted them (in this case whether the programme can be subsumed within the framework of monetary policy), it is necessary, but also sufficient, that ' … the judicial body to find that guarantees which are theoretically sufficient exist to prevent that programme from pursuing, in reality, an overriding economic policy objective or from undermining the objective of price stability'.[36] As in the *Gauweiler* case, the AG first outlined the nature and purpose of the measure adopted and its compliance with the ECB's mandate.[37] Here the judge's assessment appears to be a control on the aims and objectives rather than on the means; and the monitoring of the latter is extrinsic precisely because of the high rate of complexity of the discretionary assessments made by the ESCB. The AG continues, arguing that:

> This seems to me to be consistent with the role of the court which, when it is recognised that the legislature has a broad discretion on account of highly complex economic, scientific and technical facts, must confine itself to examining whether the exercise of such powers has been vitiated by a manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion.

The judge in such a case could not overlap with the technical assessment made by the institution.[38]

This type of control ' … may seem limited, or even formal',[39] but nevertheless unavoidable; in fact, a possible more in-depth review would no longer be legal but economic and, as such, going beyond the jurisdictional power of the Court, would contravene the principle of separation of powers. It is precisely 'experience' that constitutes the element on which to establish the limits of the institutional mandate.

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35 Opinion of AG Wathelet, ECLI:EU:C:2018:815, para. 114.
36 *Ibid.*, para. 115.
37 *Ibid.*, paras 102–123.
38 *Ibid.*, para. 116.
39 *Ibid.*, para. 117.

It is also interesting that in the analysis of the suitability and *stricto sensu* proportionality of the measure, both the Court and the AG have retraced in detail and accurately all the steps of the procedure that led to the adoption of the contested programme. The AG reviewed the ECB's assessments in detail as to their logic and their relationship to the economic context of reference; it also checked that the institution had actually taken into account all the interests at stake and carried out a balance between them.

After reviewing paragraphs 126 to 150 of the technical-economic analysis carried out by the ECB,[40] the AG concluded that the characteristics of the measure show that ' ... the ESCB weighed up the various interests involved in such a way as to prevent disadvantages which are manifestly disproportionate to the objectives pursued from arising when the programme in question is implemented'.[41] Without denying the controversies concerning the effectiveness of the PSPP, the AG further clarified that, given the controversial nature surrounding monetary policy issues, the ESCB ' ... nothing more can be required [...] 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'.[42] Therefore, the analysis of the minutes of the meetings of the ECB's Governing Council was considered to constitute sufficient evidence of the diligence, impartiality and reasonableness of the contested programme.

As regards the 'risk dimension', the Court of Justice has taken up the reasoning of the *Gauweiler* judgment by pointing out in the section on the analysis of the *stricto sensu* proportionality of the programme that the ESCB has adopted measures and arrangements limiting the risk of central bank exposure associated with the adoption of the programme.

From the analysis of the two judgments examined, it would appear that, in view of the broad technical discretion that characterizes the sector, rather than the proportionality of the measure, the review seems to focus on two aspects: first, the *stricto sensu* suitability of the measure, i.e. its compliance with monetary policy objectives. In addition, it appears that in its assessment of the legality of the purchase programmes, the Court refers to the 'manifest error' in the proportionality assessment. In both of the above-mentioned judgments, the scope of the court's review is limited to a finding of a manifest error in the technical and discretionary assessment of the administrative authority. In that respect the Court in *Weiss* stated that:

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[40] This would be the standard proportionality test and the standard as regards suitability would be 'manifest error of assessment' and as regards necessity and proportionality *stricto sensu* a 'manifest disproportion to the objectives pursued'.

[41] *See supra* n. 35, para. 151.

[42] *Ibid.*, para. 152.

> the fact that that reasoned analysis is disputed does not, in itself, suffice to establish a manifest error of assessment on the part of the ESCB, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary technical means at its disposal to carry out that analysis with all care and accuracy.[43]

Secondly, the monitoring of compliance with certain procedural guarantees: these include an obligation for the ESCB to examine, accurately and impartially, all relevant elements of the factual situation and to give sufficient reasons for its decisions. Thus, the proportionality review seems to become a review of the impartiality and reasonableness of the measure.

In the *Accorinti* judgment, the canon of proportionality is used as a symptomatic element of a misuse of power.[44] The present case concerned the legality of certain measures adopted by the ECB in with the context of the restructuring of Greek public debt and, in particular, Decision 2012/153/EU of 5 March 2012 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic's debt exchange offer.

According to the applicants, the central bank misused its powers and infringed the principle of proportionality[45]: the conduct of the ECB had, in fact, as an unjustified reason the exclusive or at least decisive purpose of consolidating a preferential creditor status so as to escape the restructuring of Greek public debt, unlike private creditors. Thus, according to the applicants, the ECB has no discretionary power – or in any event abused it – to protect its balance sheet against losses incurred by private creditors. As the applicants claim, such conduct by the institution constitutes an infringement of the principles of proportionality, consistency and reasonableness.

In the present case, the Court, in rejecting the complaints put forward, superimposed the applicants' objections concerning the disproportionate nature of the measure and the misuse of powers incurred by the ECB, also on account of the 'succinct, vague and imprecise' nature[46] of the arguments put forward by the applicants in support of their claims. Irrespective of the lack of grounds put forward by the parties in support of the action,[47] the Court's restrictive approach to the technical discretionary review emerges from this judgment.

As emerges from the case law analysis, the proportionality evaluation differs according to the nature of the action: indeed, the proportionality review appears

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[43] *See* the judgment of the ECJ in *Weiss*, *supra* n. 34, para. 91.
[44] Case T-79/13, *Accorinti v. ECB* ECLI:EU:T:2015:756.
[45] *Ibid.*, para. 105.
[46] *Ibid.*, para. 110.
[47] *Ibid.*, para. 104.

weaker in cases of non-contractual liability against European institutions. As the General Court (GC) points out in *Accorinti*, the recognition of unlawful conduct alleged against an institution or other body requires, and is dependent on, the demonstration of a 'sufficiently serious breach of a rule of law intended to confer rights on individuals'. In order to make such an assessment of sufficient qualification, reference should be made to the ' ... manifestly and seriously disregarded the limits on its discretion'.[48] That means – continues the GC – that 'It is solely where that institution or body has only considerably reduced, or even no, discretion, that the mere infringement of EU law may suffice to establish the existence of a sufficiently serious breach'.[49]

In this case, however, the powers exercised by the ECB constitute the implementation of provisions of the Treaties and of the Statute which, in addition to enabling the institution to intervene in the capital markets and in the management of credit operations, 'confer a broad discretion on the ECB, the exercise of which entails complex evaluations of an economic and social nature and of rapidly-changing situations, which must be carried out in the context of the Eurosystem, or even of the European Union as a whole'.[50]

It follows that a possible infringement of those legal rules ' ... must be based on a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the ECB when exercising its powers in monetary policy matters'.[51] Indeed, the ECB, in exercising its discretion, is required both to assess the need to predict and assess complex and uncertain economic developments (such as developments in capital markets, money supply and the inflation rate) affecting the smooth functioning of the Eurosystem and in payment and credit systems, and to make political, economic and social choices requiring the balancing and balancing of the various objectives referred to in Article 127(1) TFEU, the main one being the maintenance of price stability.

This is even more true in the case of regulatory activities. In such cases, in fact, the wide scope of the interests to be protected could not be paralyzed by the 'fear' of actions for damages brought by individuals whose interests may conflict with the general one.

In rejecting the action, the Court in non-contractual liability cases therefore established a clear interrelation between the rate of discretion and the degree of reviewability of the contested decision: the greater the amount of interest taken

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48 *Ibid.*, para. 67.
49 *Ibid.*
50 *Ibid.*, para. 68.
51 *Ibid.*

into account by the ECB, the higher the threshold which must be exceeded by the applicants in order to establish the unlawfulness of the contested measure.[52]

The fact that the assessment of proportionality is more superficial in cases relating to contractual liability is also confirmed by the *Ledra* judgment where the Court does not dwell on a careful analysis of the proportionality test; it merely finds that there are serious risks to financial stability which justify a restriction of the right to property.

For what concerns the object of the judicial review another distinction could be made. In *Ledra*, unlike *Accorinti*, the Court of Justice used proportionality to assess whether the contested measure affected a fundamental right: the right to property.[53] The specific contextualization of the proportionality review in the area of balancing fundamental rights seems to affect the judicial review itself. In fact, unlike in the other cases referred to, in *Ledra* the Court justifies the proportionate nature of the contested decision on account of the exceptional nature of the economic and financial context.

In particular, the Court found the lawfulness of the conduct of the European institution on the basis that it ' ... corresponds to an objective of general interest pursued by the European Union, namely the objective of ensuring the stability of the banking system of the euro area as a whole'.[54]

In particular, the Court found that the imminent risk of financial losses to which depositors at the banks concerned would have been exposed in the event of bankruptcy justifies the adoption of measures restricting the right to property.[55] Read in the light of the objective of ensuring the stability of the banking system, those measures do not constitute a disproportionate intervention capable of undermining the very substance of the applicants' right to property.

In such a case, therefore, unlike the case law analysed above, the Court does not engage in an accurate and detailed analysis of the proportionality test by examining in depth the reasons put forward by the institutions in support of the contested measures, but merely finds that the imminence of risks to the stability of the banking system and the related principle of financial stability are circumstances in themselves suitable and sufficient to sacrifice an equally fundamental principle. In this respect, the Court, in the wake of the *Kotnik*[56] case law, points to the 'central role' played by financial services in the EU economy: banks and credit institutions are an essential source of financing for businesses. In this respect, the interconnected nature of banking services makes it essential to take measures to

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52 *See also* Case T-107/17, *Steinhoff*, *supra* n. 4, para. 53.
53 Case C-8/15 P – C-10/15 P, *Ledra Advertising v. Commission and ECB* ECLI:EU:C:2016:701.
54 *Ibid.*, para. 71.
55 The measures in question are effectively summarized in para. 73 of the judgment.
56 Case C-526/14 *Kotnik* ECLI:EU:C:2016:570, para. 50.

prevent the financial difficulties faced by a bank from spreading to other Member States. Such a situation could have negative repercussions on other sectors of the economy as well.

The weakness of the proportionality review which characterizes the judgment in question reveals another relevant distinction. Depending on the legal parameter used as the basis for the proportionality assessment, the Court's review changes: the assessment of proportionality under Article 52(1) of the Charter of Fundamental Rights appears to be less penetrating than the assessment under Article 5(4) TFEU.

In *Ledra*, in fact, the Court calibrates the proportionality review in this way: the contested decision is considered to be lawful on the assumption that the extent of the ECB's discretion and the high technical complexity of its assessments lead to an increase in the burden of proof on the applicants who wish to challenge the proportionality of the measure.[57]

1.3[b] *Monetary Policy and Judicial Control*

> Monetary policy in the Euro area also faced a special challenge. The ECB was a new central bank operating in a very heterogeneous monetary union, which created a particular imperative to establish inflation credibility. Establishing a commitment to controlling inflation was seen as critical to cement lower inflation expectations across the euro area – especially as moderate inflation was a relatively new phenomenon in several Member States.[58]

Consequently, it is difficult to identify a stable rule concerning the intensity of the judicial review of proportionality operated by the EU judges. Despite the incredible amount of case law where the possible infringement of the principle is evoked, cases in which EU judges declared legislative or administrative measures taken by EU authorities unlawful for breach of the principle of proportionality are very rare.

To safeguard the financial stability of the Euro area as a whole, the ECB has broad discretionary powers to define and implement monetary policy, employing conventional and non-conventional measures with an overtly discretionary and rather political function to perform.[59] The underlying argument is that the jurisdiction of an independent Central Bank ensures a coherent monetary policy not

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[57] In this respect, the comparison with the *Accorinti* case is interesting. In the latter case, unlike the *Ledra* judgment, the protection of a fundamental right was not at stake but the Court emphasizes the limit of discretion; in particular, it is not the implementation of the fundamental principle of the stability of the banking system i.e. taken into account to justify the contested decision.

[58] M. Draghi, *Twenty Years of the ECB's Monetary Policy*, speech ECB Forum on Central Banking, Sintra (18 June 2019).

[59] ECJ, Case C-370/12, *Pringle v. Government of Ireland*. *See* T. Tridimas, N. Xanthoulis, *A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict*, Maastricht J. Eur. & Comp. L. 32–33 (2016). On the *Pringle* decision, *see* P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, Maastricht J. Eur. & Comp. L. 3 (2013).

exposed to the pressure of short-term political interests.[60] At the same time, this approach allows that the Euro governance's mechanisms are managed according to rules, maintain a neutral character and remain within the realm of the rule of law.

While on other topics the ECJ has always been rather assertive, in this field it has shown a notable level of deference. The case signaled the new deference adopted by the ECJ in issues related to the economic and financial crises. In this sense, in monetary policy the Courts have to conduct a thorough analysis of the technical features of the measure in the light of the three components of the principle of proportionality: suitability, necessity and proportionality *stricto sensu*.

In this way, judicial review becomes the place where the objective pursued by the law is compared with the interests involved. The investigation into the 'necessity' of the measure concerns the relationship between the measure taken and the consequences for the opposing interests in order to verify whether the objective could be achieved by less restrictive means.

The judicial protection accorded by EU judges takes into account the interests at stake, which aims at allowing a comparative evaluation of advantages and disadvantages produced by the measure adopted by the authority. However, the difficulty is that adopting the proportionality test would alter the distinction between *appeal* and *review*, resulting in judicial appropriation of administrative functions.

The balancing of interests can be examined by the Court when the law does not define the objective in a precise manner – as it happens in monetary policy – and leaves it to the administration to determine the level at which the objective is to be achieved. In brief the measure adopted by the public authorities must not be such as placing an excessive burden on the people (on the legal sphere of the individual) concerned and to be intolerable.

Finally, the proportionality check cannot convert the jurisdiction limited to control of legality in full jurisdiction on the merits. Where the law grants the ECB a wide discretion because the decision implies a complex technical assessment of economic circumstances, the Court tends to exercise some self-restraints reducing its margin of action.

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[60] R. M. Lastra, *The Independence of the European System of Central Banks*, 33 Harv. Int'l L. J. 475, 477–78, 487–88 (1992).

2 PART IV: MAIN ISSUES AND CONCLUSIONS

2.1 The increasing relevance of the proportionality principle

Under EU law, the proportionality test is becoming progressively more and more important, as it is in the Member States.

The proportionality test is, statistically-speaking, the most invoked one. However, with scarce positive results. The records report just one case annulling an EU act on the sole ground of proportionality,[61] but unrelated to banking union law.[62] The case law on our subject matter confirms the general attitude of the courts.

Despite the poor outcomes of the proportionality test up this time, it seems inevitable that the principle will also be used in the future as the most appropriate test for scrutinising monetary policy and banking supervision issues. It is a flexible test, adaptable to different situations and kinds of abuse of power. It is appropriate both for a proper use of the power and for its control.

2.2 An example of the present 'judicialization'

The increasing role of the proportionality test in the fields here considered is an expression of the general process of 'judicialization', sometimes so 'heavy' and intrusive as to result in a 'juristocracy'.[63] The traditionally 'deferential' attitude towards the public authorities, especially the 'expert' authorities, has largely vanished.[64] It is not rare to find that the courts are approaching the limits to external control and tend to substitute the decisions taken by the competent administrative authorities, at least with regard to questions of law, thereby granting space to critics of their lack of legitimation and the judicial excess of power. In order to avoid the risk of a real juristocracy, a conscious self-restraint on the part of the courts[65] and, possibly, the reforms suggested below at paragraph 10 seem therefore quite necessary.

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61 Case C-293/12 and C-294/12, *Digital Rights Ireland Ltd*, ECLI:EU:C:2014:238 esp., para. 69.

62 The protection of individuals with regard to the processing of personal data, disciplined by Directive 2006/24/EC and framed by Arts 7, 8 and 11 of the Charter. A previous case (Joined cases C-92/09 and C-93/09, *Volker and Markus* ECLI:EU:C:2009:284), again referred to the same matter, decided by the ECJ with reference to a preliminary ruling under Art. 234 EC, made also a large use of the principle of proportionality, in connection with Arts 7 and 8 of the Charter, for ascertain the validity of the relevant law (Directive 95/46/EC, which was annulled).

63 R. Hirschl, *Towards Juristocracy* (Harvard 2004).

64 For a different view: B. De Witte, *Judicialization of the Euro Crisis ? A Critical Evaluation*, in *Institutions and the Crisis* 103 (F. Allen, E. Carletti & M. Gulati eds, Firenze: EUI 2018).

65 M. P. Chiti, *Judicial and Political Power. Where Is the Dividing Line?*, 21 Eur. Pub. L. 705 (2015).

2.3 Adominant test of review?

Will proportionality – which is now firmly established as a 'head of review' – become the sole or dominant test of judicial review on monetary policy and banking supervision?

The extensive use of the proportionality test in the fields considered herein does not imply that it is becoming the dominant or, even more so, the sole test of judicial review in the proceedings under Article 263 of the TFEU.[66] The applicants will not use only this ground of review for contesting the measures taken by ECB, as they prefer a wider spectrum of grounds of review which provides more opportunities.

2.4 Differentiation of the proportionality principle application

Does the proportionality test vary according to the kind of discipline and the character of the administrative procedure? In such case, does this amount to a physiological differentiation or an inconsistency?

The proportionality test is used in different ways according to the character of the issue under consideration. Its flexibility is the most appreciated feature. Under this perspective, differentiation does not mean inconsistency, firstly because proportionality is not a principle precisely defined by the law, so that there is no rigid legal parameter for contesting inconsistency; secondly, because, in any case, it is applied to different cases and not inconsistently to the same types of cases.

At the same time, one cannot ignore the fact that differentiation is a possible factor of uncertainty; as such, its places another general principle of EU law at risk, i.e. the principle of legal certainty. However, the requirement for certainty is not absolute, but rather indicates the goal of regulating and adjudicating, depending on the circumstances. Flexibility – as it is implied by proportionality – and certainty are not *per se* in contradiction.

2.5 Proportionality as a 'super principle'?

Among the many peculiarities of proportionality, it appears that the principle is becoming a 'super principle',[67] a 'more general' and influential principle of EU

[66] The argument is shared by P. Craig, P. Craig, *Proportionality, Rationality and Review*, N.Z. L. Rev. 265 270–271 (2010).

[67] Zilioli, *supra* n. 19.

law,[68] which can provide a sort of hierarchy between other principles, combining them in different situations. This is the case for financial stability.[69]

For 'more general principles', we intend that a group of principles, including proportionality, has special relevance in the EU courts' case law due to the genuine common acknowledgement in all the Member States' jurisdictions and their capacity to support the EU integration process.

The qualification of some general principles of EU law as 'more general' or similar is just descriptive, as the Treaties do not provide any grounds for distinction (as some national Constitutions do.)[70]

2.6 Is the proportionality test putting the ECB'S independence at risk?

The institutional independence of the ECB, recognized by the TFEU (Article 282(3)), is not at risk due to the proportionality test. Proportionality is related to the use of the ECB's powers, not to its institutional position. The proper issue is not 'independence', but the boundaries of the 'margin of discretion' provided by derived EU legislation (Regulation no. 1024/2013) and implicit in the ECB's institutional position. The recent case law of the EU courts is quite close to reaching those boundaries.

If the courts remain within their limits – which are broad, in any case – the ECB could be considered accountable and 'legitimated' by the positive results of the judicial review. On the contrary, if the courts move further over, the distinction between the functions of the executive and the judiciary could vanish with the possible substitution of the latter in the powers of the public administration. This would put the Rule of Law at significant risk and the foundation of the democratic system itself. The ECB, as an institution bound by the Rule of Law, has to operate within the limits set by the Treaties, but the judiciary must also respect its institutional limits.

2.7 Tensions between the roles of the ECJ

There are increasing problems for the ECJ as a court functioning both as a constitutional court (for the protection of fundamental rights) and as an administrative court of last instance (for applications for judicial review). See, as good examples, the *Kotnik* case,[71] and the *Ledra* decision.[72]

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[68] M. P. Chiti, *The Role of the ECJ in the Developing of General Principles of Law and Their Possible Codification*, Riv. It. Dir. Pubbl. Com. 661 (1995).

[69] The reference book on this principle is G. Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (fn. 37). *See also* Y. Mersch, *Financial Stability and the ECB*, in *ECB Legal Conference 2018*, 17 (Frankfurt a.M. 2018).

[70] For example, the Italian Constitution: Arts 1–7 and Arts 13–54.

[71] Case C-526/14 Kotnik, *supra* n. 56.

[72] Case C-8/15 P – C-10/15 P, Ledra Advertising, *supra* n. 53.

The review of the supervisory function in banking law is revealed as a typical administrative law review of administrative decisions on two separate tiers. In some cases, the applicants may raise not only 'administrative' grounds of review, but also 'constitutional' grounds, as in the *Ledra* cases. To the contrary, monetary policy decisions are contested on a clear constitutional basis, mostly through the preliminary ruling procedure or on direct applications by 'privileged' players.

Given the economic and strategic relevance of the two procedures, as a rule the cases are decided by the ECJ as a court of last instance. This circumstance implies a tension within the unitary role of the ECJ, revealing two judicial 'souls' (of constitutional and administrative law) which are not easily reconcilable.

The problem can only be solved by the EU legislators' remodelling of the entire judiciary, a reform which would be neither easy nor foreseeable in the near future.

2.8 Issues for specialized courts

Can the present trend avoid the risk of specialized courts?

The question of establishing EU specialized courts is not recent and is sometimes connected with proposals for territorial courts. Until 2017, there was the Civil Service Tribunal, a specialized court which has recently been abolished.

So far the proposals for specialized courts have been rejected, mostly due to the fact that they would not ensure consistent case law and a first-quality judiciary. Moreover, specialized courts tend to focus their review on technical problems, leaving aside relevant legal issues.

The clash between the need for an 'expert judge' matching the quality of a generalist judge of first instance can be overcome through the development of an administrative procedure open to the participation of the interested parties and granting administrative remedies of a genuine *quasi*-judicial nature, decided by bodies composed of a majority of non-lawyer members.

2.9 Proportionality in the EC HR case law

Developing the reference to ECtHR case law, it is worth noting that the Court of Human Rights has given strong consideration to the principle of proportionality, extending it to cases of varying nature. Its first jurisprudence was developed in the last decades of the twentieth century, well before the EC developments. But more recently, the Court has sped up its approach to the proportionality test, with

reference to the procedural rights of the affected parties. See, in particular, the *Menarini Diagnostics* and *Grande Stevens* cases.[73]

The principle set forth by the Strasbourg Court is that the right to a fair trial is one of the fundamental rights recognized by the Convention and guaranteed by the Court of Strasbourg. The right was thought of in the context of criminal trials, but since then an early jurisprudence has extended it to all judicial proceedings. Recently, the two leading cited cases have extended the scope of Article 6 to also cover administrative procedures, establishing an innovative right to a fair administrative procedure which shall be checked by the courts. The fines imposed by the national independent bodies, even if administrative in form, are 'sanctions' comparable to criminal sanctions. In order to respect Article 6 of the Convention, the organization and the procedure of these bodies must comply with the rules provided by that article, as interpreted by the Court. Secondly, their decisions imposing fines must be reviewed by a court with full jurisdiction.

According to the general statement of Article 6.1[74] TEU, the '*passarelle*' rule provided by Article 6.3[75] of the same Treaty and the Preamble of the Charter, the jurisprudence of the ECHR is more than just a source of inspiration for the EU courts[76]; it is a legal parameter for their judgments even though the procedure for EU accession to the ECHR is not yet concluded.

2.10 Some final proposals

Proposals for balancing discretionary powers and the proportionality test.

2.10[a] *Introducing the Maximum Standard of Guarantees in Administrative Procedure*

As a general rule, the intensity of judicial review varies according to the discipline of administrative procedure. The more the procedure is detailed and open to participation, the less intense is the judicial review, because the decisions which conclude the procedure have been adopted after the full consideration of all the relevant data and in respect of the due process requirements (procedural justice).

The intensity of the judicial review also depends on the existence of administrative guarantees. Sometimes the law provides administrative remedies,

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[73] For references to the cases *see* nn. 20 and 21. *See also* F. Cintioli, *Giusto processo, CEDU e sanzioni Antitrust*, Dir. proc. amm. 507 et seq. (2017). For an earlier case with a reference to proportionality *see Gillow v. United Kingdom* (Application No. 9063/80).

[74] 'The Union recognizes the rights, freedoms and principles set out in the CFREU'.

[75] 'Fundamental rights, as guaranteed by ECHR and as they result from the constitutional traditions common to Member States, shall constitute general principles of the Union's law'.

[76] A. Carbone, *Rapporti tra ordinamenti e rilevanza della CEDU nel diritto amministrativo*, Dir. proc. amm. 456 (2016).

adjudicated by bodies having a *quasi*-judicial character. In other cases, the administrative committees are established as 'technical' bodies whose opinion is part of the decision-making process, finalized to a better-grounded decision, but in any case open to public participation. In the first case, the interested parties have a remedy of a *quasi*-judicial character; in the second case, all the relevant data can be expressed and considered in the final decision. In such scenario, the judicial review is usually restricted to an external control of the legality. The present status of the ABoR depends on its ambivalence of a remedial and advising body. A reform of this body cannot be postponed; the debate is quite lively.[77]

In apparent contradiction to the remarks expressed above, we can see that even in the case of open procedures and administrative remedies, most of the more relevant litigation winds up in the courts. It is a demonstration that the interested parties may remain unsatisfied even in a sophisticated legal environment, asking the courts for a final say. In any case, the above-mentioned proposals could assure a more balanced role for the courts.

2.10[b] *Completing and Codifying Procedural Law*

EU procedural law is still today, after seventy years of European integration, composed of a miscellaneous series of acts with different forms and legal values. The ECJ case law has tried to assure a systematic model from the patchwork, but many issues remain without a precise written discipline, crafted only by the jurisprudence.[78]

It is a fundamental requirement of the Rule of Law that procedural law be established in positive law, better still in a codified manner.

Proportionality as a test of review remains, for the moment, largely shaped by the ECJ jurisprudence, with a degree of uncertainty about its use and consequences. It is time to appropriately define its precise scope and effect, including those powers which can be exercised by the courts.

The hoped-for development may happen only through a legislative reform, not just a systematic model provided by the courts.

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[77] As demonstrated by the recent essay of C. Brescia Morra, *Nature and Role of the Administrative Board of Review*, in *Building bridges: central banking law in an interconnected world, ECB Legal Conference 2019* (Frankfurt a.M., 2019 C. Brescia Morra, *Nature and role of the Administrative Board of Review, in Building bridges: central banking law in an interconnected world*. ECB Legal conference 2019, Frankfurt a.M, 2019).

[78] A. Arnull, *The EU and Its Court of Justice* 29 et seq. (Oxford 2006); 2014 K. Lenaerts, I. Maselis & K. Gutman, *EU Procedural Law*, 739 et seq. (Oxford, 2014).