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Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism

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Abstract

This article revisits the balancing act between independence and accountability at the European Central Bank (ECB). It contrasts procedural and substantive concepts of accountability, and challenges the mainstream idea that independence and accountability can be reconciled through narrow mandates, the indiscriminate increase of transparency, the creation of multiple channels of accountability, and the active use of judicial review. These assumptions form the pillars of a procedural type of accountability that promises to resolve the independence/accountability dilemma but fails to do so in practice. The article brings evidence to show how ECB accountability has become a complex administrative exercise that focuses on the procedural steps leading up to monetary and supervisory decisions while simultaneously limiting substantive accountability. The failure to acknowledge the trade-off between independence and accountability (said to be 'two sides of the same coin') has resulted in a tendency to privilege the former over the latter.

1 | PROCEDURAL AND SUBSTANTIVE ACCOUNTABILITY OF THE ECB

By now, there exists a veritable cottage industry in law and the social sciences of articles exploring the accountability of independent central banks in general and of the European Central Bank (ECB) in particular.¹ This literature is oriented around a central paradox. On the one hand, the independence of central banks is essential to their institutional design. For the ECB, this is anchored in the commitment under Article 282(3) TFEU that the ECB 'shall be independent in the exercise of its powers and in the management of its finances' and that 'Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that

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¹See for example in this journal P. Magnette, 'Towards "Accountable Independence"? Parliamentary Controls of the European Central Bank and the Rise of a New Democratic Model' (2000) 6 *European Law Journal* 326; D. Curtin, '"Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency' (2017) 23 *European Law Journal* 28.

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independence.' On the other hand, central banks exercise a level of regulatory authority that is simply incompatible with basic principles of democratic accountability under conditions of operational independence. As a result, their independence is ubiquitously accompanied by commitments to legal and political accountability. Central banks, including the ECB, are asked to perform two seemingly conflicting tasks—to be both independent and accountable. Central banks themselves have often responded to this dilemma by simply denying its existence. Independence and accountability are frequently said to be 'necessary counterparts' to one another or 'two sides of the same coin'.² By this account, accountability and particularly the transparency of central bank decisions can increase public confidence in their activities, thereby protecting them from undue political interference.

In this article, we unpack the idea of a 'virtuous circle' between independence and accountability of central banks. By discussing the case of the ECB, we argue that such a notion is premised on a procedural conception of accountability that can be contrasted to a substantive understanding of the term. We use the qualifiers 'procedural' and 'substantive' in a legal sense, referring to the distinction between evaluating a norm according to its content or evaluating it according to the process leading to its creation.³ Transported to ECB accountability, a procedural view would mean accounting for *how* the ECB has reached a decision, whereas a substantive perspective would refer to accounting for the decision *itself*. But what does it mean to account for decisions in a substantive sense? First, it means justifying an action within constitutionally acceptable terms; second, it entails a requirement to modify ill-conceived policies; and third, it assumes the possibility to make amends for errors of judgement rather than of process.⁴ Looking more closely at the elements of substantive accountability, constitutionally acceptable terms as normative benchmarks can be found in the Treaty framework concerning the ECB. First, Article 119 TFEU lists not only price stability and the 'support [of] the general economic policies in the Union, in accordance with the principle of an open market economy with free competition', but also provides underlying principles guiding all Member State and Union action: stable prices, sound public finances and monetary conditions, and a sustainable balance of payments. Constitutionally agreed terms also include the prohibition of monetary financing in Article 123 TFEU. The remaining two elements, modification of an ill-conceived policy and making amends for errors of judgement, would need to be assessed against these constitutionally acceptable terms.

As this article will demonstrate, such substantive forms of contesting and rendering accountable ECB action have increasingly been discarded in favour of a more procedural conception of the accountability of central banks (a view to which academia has lent significant support). This procedural notion of accountability carries four main pillars. The first is that strong accountability is linked to narrow mandates, able to specify clearly the goals of the ECB *ex ante* and thereby allow its activities to be evaluated *ex post*. The second links accountability to transparency: the more open and transparent the ECB is, the more accountable its governance. The third is a multi-level conception of central bank accountability: accountability is strengthened by creating multiple channels of accountability, whereby the failure of one route can be rectified by the presence of others. The final pillar couples accountability with judicial review: in the absence of political responsiveness, it posits judicial review as a mechanism to limit discretionary ECB activity and tie it to rule of law guarantees.

We posit these pillars of ECB accountability as procedural in that they do not conceptualise accountability as involving or requiring modifying or making amends for ECB policies *per se*. Rather, accountability is confined to the presence (or absence) of mechanisms and procedures controlling the ECB's decision-making *process*. These four pillars of procedural accountability represent commonly-held assumptions used to develop a baseline understanding of how an accountable ECB should act in a democratic European Union (EU). The assumptions are found both in official ECB discourse and in the academic literature on central bank accountability. The list discussed here may not be exhaustive but reflects, we argue, a current consensus on improving ECB accountability.

²For the former, see <https://www.ecb.europa.eu/ecb/orga/accountability/html/index.en.html> (accessed 29 June 2018); for the latter, see https://www.ecb.europa.eu/press/key/date/2017/html/sp170328_1.en.html (accessed 29 June 2018)

³K. Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 *Yearbook of European Law* 3; D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review* 1685.

⁴D. Oliver, *Government in the United Kingdom: The search for accountability, effectiveness and citizenship* (Milton Keynes, Open University Press 1991), 28.

Furthermore, it is not difficult to imagine the usefulness of the substance/procedure distinction for reconstructing the accountability of independent institutions. Whereas accounting for the substance of decisions would seemingly involve second-guessing the policy decisions of independent bodies, thereby threatening their operational independence, procedural accountability leaves substantive decision-making in independent hands *as long as* adequate procedural guarantees have been met. Procedural accountability seemingly provides a means of dissolving the tension between independence and accountability. It promises to control and limit the behaviour of actors like the ECB, by linking their activity to the political process, without simultaneously politicising their activities. There are therefore good reasons as to why the 'four pillars' discussed above are so attractive.

The purpose of this article is to articulate the limits of the procedural understanding of accountability. Sections 2 to 5 set out the most important academic contributions supporting the four pillars of procedural accountability, and offer an illustration of their limitations by providing examples from the ECBs practices in monetary policy and banking supervision. The main argument is that each of the four pillars tends to achieve far less than their proponents claim, often acting either as 'paper tigers' or undermining the very purposes for which they were advanced. As section 2 will show, the preference for narrow mandates may have a perverse effect: rather than narrow the discretion of the ECB, it forces it to engage in a convoluted form of policy-making that obscures the nature of its activities, thereby rendering political scrutiny more difficult. Simultaneously, narrow mandates limit the scope of issues that can be contested in relation to ECB decisions, ultimately rendering all questions procedural. Furthermore, as section 3 will develop, the relationship between transparency and accountability is not as straightforward as portrayed in the literature. Transparency can be detrimental under certain circumstances or simply lose its added value when operating *independently from* the possibility to sanction or question the merits of ECBs decisions. Finally, as sections 4 and 5 will show, neither multiplying accountability channels nor judicial review have, thus far, acted as serious and robust mechanisms for challenging ECB acts.

Procedural accountability at the ECB in this sense may be a false promise. At best, it tends to amount to an empty, administrative exercise that a well-resourced institution like the ECB can easily meet; at worst, it distracts from, or distorts, the key goal of accountability in independent institutions, which is to scrutinise and question their activities. Proceduralisms failure to acknowledge the trade-offs between independence and accountability thus results in a clear tendency to favour the former over the latter. While procedural accountability is a tempting solution to the impasse between independence and accountability, like all such solutions, it is just too good to be true.

2 | DOES ACCOUNTABILITY REQUIRE NARROW MANDATES?

The first pillar of procedural accountability of the ECB is grounded in the idea that *the narrower the legal mandate of the institution, the easier it is to hold it accountable*.⁵ In the EU setting, the emphasis on narrow mandates relates to the broader competence framework and the need for EU institutions to respect the principle of conferral (Article 5 TEU). The Banks narrow mandate has thus been posited both by the CJEU⁶ and by NGO actors⁷ as the 'flip-side' of its independence—*independence is granted to the Bank to achieve its tasks and is therefore tied to a strict definition of what those tasks entail*. Similarly, the Bundesverfassungsgericht has argued that the ECBs departure from the normal principle of democratic deliberation requires a strict and narrow reading of its tasks.⁸

⁵See, for example, O. Issing, 'The Eurosystem: Transparent and Accountable or 'Willem in Euroland' (1999) 37(3) *Journal of Common Market Studies* 503; J. de Haan and S. C. W. Eijffinger, 'The Democratic Accountability of the European Central Bank: A comment on Two Fairy-Tales *Journal of Common Market Studies* (2000) 38(3) 393; O. Issing, *Monetary Policy in the Euro Area* (CUP 2001); G. Ter Kuile, L. Wissink and W. Bovenschen, 'Tailor-made accountability within the Single Supervisory Mechanism' (2015) 52 *Common Market Law Review* 155.

⁶Case C-11/00 Commission of the European Communities v. the European Central Bank, Judgment of 10 July 2003

⁷B. Braun, *Two sides of the same coin? Independence and accountability at the ECB* (Transparency International EU, 2017) at 8

⁸BVerfG *Gauweiler*, Judgment of the Second Senate of 21 June 2016–2 BvR 2728/13 at para. 187. See also the preliminary reference decision of the BVerfG in Weiss et al concerning the PSPP programme of the ECB, where the German Court argues that the specific constitutional role that was accorded to the ECB, without a legitimisation comparable to that of nation states, requires its narrow reading.

In the political science literature, narrow mandates are put forward by principal-agent models attempting to explain the ECBs institutional design.⁹ The logic is straightforward: if the ECB is an agent 'contracted' by its political principals (the Member States) to carry out specific tasks, a narrower specification of those tasks will ensure that the agent has the powers required to fulfil its tasks but no more.¹⁰ Most importantly, narrow mandates provide a clear set of standards against which the conduct of the central bank can later be judged, and if need be, sanctioned. They provide substantive criteria which can empower accountability forums to demand and receive justifications regarding how independent institutions act.

Reform proposals devoted to improving the accountability of the Bank have therefore often argued for a further specification of the ECBs objectives.¹¹ In the area of supervision, for example, concerns have been raised over the broadness of the tasks provided to the ECB and the failure to determine a more detailed set of quantitative targets, equivalent to the 2% inflation goal found in monetary policy.¹² Others have questioned the distributive implications of supervisory decisions and the difficulties of separating monetary and supervisory functions (thereby questioning whether the relationship *between* the ECBs regulatory goals is sufficiently circumscribed).¹³ Narrowness would imply further specification of new ECB functions, allowing accountability forums like the Parliament and Council a greater opportunity to scrutinise these new tasks in detail.

The benefits of narrow mandates, however, stem from a tension implicit in any form of principal-agent delegation. The very factors which encourage delegation of power to independent institutions also make policing the exercise of their powers difficult.¹⁴ Normally, delegation is conducted for two reasons: firstly, to provide powers to technical experts who carry knowledge the principal lacks; and secondly, to improve the long-term credibility of a given policy, by insulating it from political manipulation.¹⁵ Precisely these factors make mandate-control of independent institutions difficult. If principals lack knowledge of a given policy field, they are also likely to lack the knowledge resources to verify whether an agent is 'correctly' implementing the mandate it has been provided with. The second reason—long-term credibility—amplifies this problem. Corrective action to enforce the terms of the original mandate can easily be cast, either by other political actors or by the institution itself, not as a legitimate effort to tie an institution to its mandate, but as a ploy to curb the institution's independence for political gain.

It is unlikely that narrowing an institution's mandate solves these problems. This is particularly so when an institution is tasked with solving regulatory problems that carry complex interdependencies (what public management scholars have termed 'wicked' problems).¹⁶ A feature of such regulatory problems is that action in one area often requires extensive intervention in other policy fields, with each intervention carrying high risks of unintended or even contradictory effects. Faced with such problems, the independent institution faces an unattractive choice: it must either decide to stretch its mandate explicitly (and face the associated reputational damage) or seek to do so by stealth, subsuming regulatory interventions in wider policy fields within the language and requirements of the original mission.

⁹R. Elgie, 'The politics of the European Central Bank: principal-agent theory and the democratic deficit' (2002) 9 *Journal of European Public Policy* 186, 190; G. Majone, 'Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance' (2001) 2 *European Union Politics* 1.

¹⁰For a general discussion on the principal-agent model, see B.R. Weingast, 'The Congressional-Bureaucratic System: A Principal Agent Perspective (with applications to the SEC)' (1984) 44 *Public Choice* 147.

¹¹On the use of benchmarks for this purpose, see P. Nicolaidis, 'Accountability of the ECBs Single Supervisory Mechanism: Evolving and Responsive' (2018) *CERiM Online Paper Series* Paper 10.

¹²K. Alexander, 'The European Central Bank and Banking Supervision: The Regulatory Limits of the Single Supervisory Mechanism' (2016) 13 *European Company & Financial Law Review* 467, at 469; J. Gren, 'The Politics of Delegation in European Banking Union: Building the ECBs supervisory oversight capacity' (2017) 13 *Journal of Contemporary European Research* 2.

¹³Alexander (n 12) at 486; M. Goldman, 'United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union' (2018) 14 *European Constitutional Law Review* 2, 283–310.

¹⁴R.B. Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 *New York University Law Review* 437.

¹⁵G. Majone, 'The rise of the regulatory state in Europe' (1994) 17 *West European Politics* 77.

¹⁶B.W. Head, 'Wicked Problems in Public Policy' (2008) 3 *Public Policy* 101.

This is why 'mandate stretching' by independent institutions is such a common charge and the first problem we identify in the presumption of narrow mandates improving accountability. The stretching need not be an institutional power grab but merely an effort to meet regulatory tasks originally conceptualised as clear but later revealed to require a complex balancing of mechanisms and interests (precisely the type of balancing that 'narrow mandates' are meant to avoid and place in the hands of more democratic bodies). In this sense, narrow mandates, rather than providing 'clarity' may simply encourage independent decision-makers to hide and re-frame their activities in increasingly convoluted ways.¹⁷

The expansion of ECB activities during the euro crisis has highlighted this phenomenon and with it, significantly challenged the paradigm of narrow mandates. In a short period of time, the ECB saw its powers increase exponentially¹⁸: firstly, through the introduction of unconventional balance sheet policies, such as the Outright Monetary Transactions programme (OMT, 2012) and the expanded Asset Purchase Programme (APP, 2014–2015) –which also included the controversial Public Sector Purchase Programme (PSPP). The OMT sparked a heated legal debate over the interpretation of the ECB mandate as regards monetary policy and the extent to which the bank violated the Treaty's 'no-bailout' clause.¹⁹ Secondly, the ECB became part of the so-called 'Troika', negotiating conditionality on Member States bailout programmes—a position that was roundly condemned as overstepping the mandate of a central bank with responsibilities over the monetary policy of the country demanding financial assistance.²⁰ Finally, the ECB became the chief banking supervisor in the euro area through the Single Supervisory Mechanism (SSM), requiring it (since 2014) to ensure 'the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State'.²¹

The monetary policy example illustrates starkly the difficulties of 'delineating' the ECB's mandate across these fields. The significant expansion in the ECB's tasks in the monetary field, coupled with the narrowness of its Treaty mandate, forced it precisely into the strategy of 'integration by stealth' mentioned above. A broader mandate, incorporating (as the United States Federal Reserve does) employment and general economic stabilisation functions might have allowed the ECB to justify its conduct with reference to those objectives. However, the price stability focus forced the Bank to justify a broad reading of its monetary policy remit, conceptualising for example differences in bond yields as a threat to the monetary policy transmission mechanism, and consequently to its ability to use interest rates to achieve price stability.²² This act of justification was made less demanding by the high complexity of the processes involved: when action was brought before the CJEU, the Court had little option but to use procedural arguments²³ to defer to the ECB on the question of whether the OMT programme was a necessary element of ensuring the 'singleness' of monetary policy, citing in this regard the need to respect the economic competencies of the ECB recognised by the Treaty.²⁴ In this sense, monetary policy provides some lessons for efforts

¹⁷See the ECB's own explainer: <https://www.ecb.europa.eu/ecb/orga/accountability/html/index.en.html> (accessed 29 June 2018).

¹⁸For an academic critique, see A. Högenauer and D. Howarth, 'Unconventional Monetary Policies and the European Central Banks Problematic Democratic Legitimacy' (2016) 71 *Zeitschrift für öffentliches Recht* 1, 2; for a more political one, see N. Megaw, 'Bundesbank Chief Weidmann Calls for End to ECB Stimulus' *Financial Times* (5 April 2017) <https://www.ft.com/content/22a90c6b-3fc9-3f63-bab7-6c5652a91fa4> (accessed 29 June 2018).

¹⁹See, for example, H. Sauer, 'Doubtful It Stood: Competence and Power in European Monetary and Constitutional Law in the Aftermath of the CJEU's OMT Judgment' (2015) 16 *German Law Journal* 971; D. Adamski, 'Economic constitution of the euro area after the Gauweiler preliminary ruling' (2015) 52 *Common Market Law Review* 1451; M. Goldoni, 'The Limits of Legal Accountability of the European Central Bank' (2017) 24 *George Mason Law Review* 595.

²⁰Braun (n 7), 6.

²¹Article 1, Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63–89.

²²ECB Press Release, 'Technical Features of Outright Monetary Transactions' (6 September 2012) available at: https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (accessed 29 June 2018).

²³See Section 5 below.

²⁴Case C-62/14, *Peter Gauweiler et al. v Deutscher Bundestag*, EU:C:2015:400.

to 'control' ECB action in others areas: narrower mandates may not limit ECB activity but simply force the Bank to justify and defend its decisions in unconventional terms. Assuming that areas like banking supervision are similarly volatile (i.e. that ensuring 'financial stability' might require a broad range of regulatory interventions that cannot be easily anticipated in advance) suggests the need for caution in assuming that a narrower mandate in this field would be an evident accountability advantage.

The second problem with assumptions underlying the accountability benefits of narrow mandates concerns their impact on the process of *giving* account. In this respect, narrow mandates not only fail to solve problems associated with delegation but may amplify them. As stated above, narrow mandates are meant to aid political accountability by providing clear standards against which the conduct of an institution may be judged. Narrow mandates, however, make political accountability difficult. Just as they are intended to limit an institution's range of possible conduct, they also limit the range and types of issues that the public may question or demand of an independent institution. As a result, the most politically salient questions—the issue of what goals the independent institution ought to be following and prioritising—are precisely the questions that cannot be addressed at all. In effect, narrow mandates shift the question of accountability away from the *substance and merits* of an institution's action towards the narrower issue of the technical and procedural means by which an institution acts.

An example from banking supervision is illustrative of this point. In 2015, the ECB held a public consultation on so-called 'options and discretions' (O&Ds) in the context of the SSM.²⁵ The proposed Regulation sought to harmonise the possibilities for financial institutions to seek opt-outs from (or alternative arrangements to meet) EU-level prudential requirements.²⁶ In the public consultation accompanying the draft regulation, those consulted questioned whether a detailed harmonisation of options and waivers lay within the ECB's competences, and if so, whether such a Regulation was proportionate given that it would result in the applicable national legislation, tailored to the national context, to be applied and interpreted by a Union institution. The ECB's response to these objections was less to substantively defend the need for such harmonisation than to argue that it lay within its supervisory mandate; indeed, that it was a *requirement* of that mandate:

*'Article 4(3) of the SSMR is a specific provision that defines the extent of the regulatory powers of the ECB in the field of prudential supervision. A literal interpretation of the main passage of Article 4(3) of the SSMR would also lead to the conclusion that the ECB is competent to adopt a regulatory act for the exercise of the O&Ds available in Union Law.'*²⁷

Precisely the substantive question the Bank was asked to justify—is it necessary to harmonise options and discretions to such an extent and why?—is seen as precluded by the nature of the ECB's mandate. Accountability is thus rendered not through a substantive answer to the questions posed but with reference to obligations perceived as arising from the Bank's mandate.

Narrow mandates promise clarity. In the context of the ECB, however, given the joined-up nature of economic policy and the political questions inherent in the effect of monetary and supervisory decisions, they often provide no such thing, limiting possibilities to substantively contest its decisions. Narrow mandates beget a procedural approach to the act of rendering accountability, encouraging independent institutions to justify their action with reference to *the mandate* rather than with reference to the substantive reasons motivating their conduct. The indiscriminate pursuit of transparency faces similar challenges, as the next section will discuss.

²⁵ECB Feedback Statement, 'Responses to the public consultation on a draft Regulation and draft Guide of the European Central Bank on the exercise of options and discretions available in Union law' (March 2016) available at https://www.bankingsupervision.europa.eu/legalframework/publiccons/pdf/reporting/feedback_statement_options_discretions.en.pdf?8f290fb3d019af7b9f801f38d60f5157 (accessed 29 June 2018).

²⁶Regulation 2016/445 of the ECB on the exercise of options and discretions available in Union law.

²⁷n 26, 8.

3 | ACCOUNTABILITY THROUGH TRANSPARENCY?

The second pillar of procedural accountability holds that *improving the transparency of the ECB will automatically make the institution more accountable*. Indeed, if there is one thing that most scholars and commentators can agree on, it is that the ECB should be more transparent.²⁸ The reasoning is straightforward: in order to assess whether central banks behave in line with monetary policy objectives, it is necessary to have sufficient information on the substance of decisions taken (policy transparency), the decision-making process and reasoning behind different positions (procedural transparency), the data put into those decisions (economic transparency), the implementation process (operational transparency), and more broadly, information on the specific goals of decisions (political transparency).²⁹

The last 20 years have seen a remarkable transformation in terms of the openness of central banks.³⁰ In the field of monetary policy, the regular transmission of information regarding the evidence-base for monetary decisions and the criteria guiding them is increasingly seen as a necessary pre-condition for market stability. Information on interest rate or other changes that take financial markets by surprise can produce severe volatility, with even unintended statements carrying potentially disastrous effects on the euro's value.³¹ Similarly, in the field of supervision, transparency can be conceptualised as a tool to keep financial institutions honest and abide by market discipline. Banks with risky practices and poor balance sheets are likely to see their share prices and perceived trustworthiness suffer if these are made open, providing an incentive for greater prudence.³² In both cases, financial and monetary stability requires stable expectations, which only complete and timely information can provide.

Finally, transparency can be defended due to more straightforward normative reasons. Unsurprisingly, NGO actors like Transparency International underline the transparency of the ECB as a key element in ensuring that citizens have trust in its activities, and thus in defending the institution against charges of corruption or institutional overreach.³³ Following the argument of Deidre Curtin, transparency lies in-between 'the grandiose concept of 'independence' and the more performative ECB "accountability"', which should in consequence be taken 'more seriously'.³⁴ Despite improvements in the ECBs accountability framework over time,³⁵ Curtin has criticised the Bank for its typically secretive behaviour and the ensuing defensive attitude when confronted with calls for transparency, particularly in relation to its role in the Troika.³⁶ While she argues that transparency is 'a necessary but insufficient

²⁸M. Goldmann, 'United in Diversity? The Relationship between Monetary Policy and Prudential Supervision in the Banking Union' (2018) 14(2) *European Constitutional Law Review* 283, 309; Issing 1999 (n 5); W. H. Buitier, 'Alice in Euroland' (1999) 37(2) *Journal of Common Market Studies* 181; de Haan and Eijffinger (n 5); Ter Kuile, Wissink and Bovenschen (n 5); K. Tuori and K. Tuori, *The Eurozone Crisis. A Constitutional Analysis* (CUP 2014); Braun (n 7), *Two sides of the same coin? Independence and accountability at the ECB*, p. 6; Curtin (n 1), M. Hallerberg, and N. Véron, 'The European Union remains a laggard on banking supervisory transparency' *Bruegel* (May 2016).

²⁹S.C.W. Eijffinger and P.M. Geraats, 'How Transparent Are Central Banks?' (2006) 22 *European Journal of Political Economy* 1, 3–5.

³⁰N.N. Dincer and B. Eichengreen, 'Central Bank Transparency and Independence: Updates and New Measures' (2014) 10 *International Journal of Central Banking* 189.

³¹See for example the market volatility induced by off-the-cuff remarks made by Executive Board Member Benoît Cœuré in 2015; C. Jones and S. Fleming, 'Benoît Cœuré speech highlights central bank links to financiers' *Financial Times* (21 May 2015) available at <https://www.ft.com/content/f48123e2-ff02-11e4-8dd4-00144feabd0> (accessed 29 June 2018).

³²Gandrud, Hallerberg, and Véron (n 28), 'The European Union remains a laggard on banking supervisory transparency'.

³³Braun (n 24).

³⁴Curtin (n 1) 28.

³⁵In an index measuring policy, procedural, economic, operational and political transparency on a scale from 1 to 15, the ECB has constantly improved its score, receiving 8.5 in 1998, 10.5 in 2002–2003, 11 in 2010, and 13.5 in 2015. See Dincer and Eichengreen (n 30) 203; S. Heidebrecht, 'Wie Transparent Ist Die Europäische Zentralbank? Eine International Vergleichende Betrachtung Vor Dem Hintergrund Der Weitreichenden Neuerungen Zum Januar 2015' (2015) 25 *Zeitschrift für Politikwissenschaft* 501, 514.

³⁶Curtin (n 1) 30.

condition of accountability,³⁷ even if transparency does not *ipso facto* guarantee accountability, it is an indispensable part of ensuring that an actor can be held accountable.

There may, however, be circumstances where transparency comes into conflict either with the ECB's goals or with its constitutional obligations. These conflicts can only be resolved by keeping information secret. Let us start with the constitutional argument. The ECB may be obliged to withhold certain information not simply to improve decision-making, but to avoid flouting Treaty rules. An example emerges from the current reference submitted by the Bundesverfassungsgericht to the Court of Justice concerning the ECB's Public Sector Purchase Programme.³⁸ Already in its OMT decision, the Court of Justice had addressed the issue of whether bond buying on the secondary markets could constitute a form of direct monetary financing as prohibited by Art. 123(1) TFEU. In its decision, the Court was satisfied that, as the ECB had insisted that a minimum period would be observed between the issue of a security on the primary market and its purchase on the secondary market, and would refrain from making any prior announcement concerning either decision, a degree of uncertainty surrounding the Bank's actions would remain.³⁹ Investors could not purchase a government bond in the sure knowledge that it would later be acquired by the ECB.

In its reference on the PSPP, the Bundesverfassungsgericht expressed a similar reservation. The PSPP is not confined to bail-out states but commits the ECB to purchasing bonds on secondary markets in line with the share of market capitalisation that Eurozone states hold in the ESM. As Matthias Goldmann has put it:

*'With the overall monthly volume of purchases and its distribution among the eurozone members being known, it does not require extraordinary mathematical talent from market participants to calculate the volume of debt which the ECB will absorb of each eurozone member per month. Also, the sheer volume of QE [Quantitative Easing] has led to a shortage of qualifying debt instruments. As a consequence, market participants could expect with certainty that the ECB would buy their qualifying bonds.'*⁴⁰

Article 123(1) TFEU seems to require, in order to meet its requirement of maintaining monetary discipline, that the ECB hides the intentions and scope of its bond-buying programmes in order to allow an 'undistorted' market price to settle. Consequently, the Bank has repeatedly clarified that particular safeguards do just this, namely that there be a 'black-out' period between the issuance of a bond and its purchase by the ECB on the secondary market, thus ensuring that market discipline is maintained.⁴¹ The PSPP reference illustrates the quandary faced by those arguing for a natural and mutually re-enforcing link between the transparency of ECB activities and the Bank's policy objectives. Regardless of whether or not 'black-out periods' are effective, it simply cannot be easily assumed that achieving ECB objectives requires a transparent and predictable relationship between the ECB, governments and market participants. Treaty rules may demand the precise opposite—namely that a degree of instability and uncertainty is maintained as a means of ensuring market discipline. In-transparency may be a necessary instrument to achieve this.

The ECB may also reject transparency for policy reasons. Wider research on the effects of transparency on political deliberation has indicated some of the negative effects that open political negotiations may have on the quality of deliberation.⁴² Policy-makers who know they are being watched may be less likely to engage in frank

³⁷*ibid.*, 43.

³⁸Cases 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15 Public Sector Purchase Programme (18 July 2017) available at <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2017/bvg17-070.html> (accessed 29 June 2018).

³⁹*Gauweiler* n 24, at [106].

⁴⁰M. Goldmann, 'Summer of Love: Karlsruhe Refers the QE Case to Luxembourg' (August 2017) available at <https://verfassungsblog.de/summer-of-love-karlsruhe-refers-the-qe-case-to-luxembourg/> (accessed 29 June 2018).

⁴¹Decision 2015/774 of the ECB on a Secondary Market Public Sector Assets Purchase Programme, OJ L 121, Art. 4(1).

⁴²E. Meade and D. Stasavage, 'Two Effects of Transparency on the Quality of Deliberation' (2005) 12 *Swiss Political Science Review* 123; O. O'Neill, 'Transparency and the Ethics of Communication' in C. Hood, D. Heald (eds.), (Oxford University Press, 2006), at 74.

discussion or to compromise on positions at a transnational level, to which they will later be held liable back home.⁴³ This is one reason why the Treaty explicitly restricts access to minutes of Governing Council meetings (a practice the Bank has partially relaxed through releasing non-attributable minutes). As put by one board member:

*'Direct, instant and constant communication does not necessarily translate into stronger accountability. In particular, it risks being over-simplified, unilateral or prone to confirmation bias, as it does not allow for a proper exchange of views.'*⁴⁴

The idea that transparency and accountability stand in a mutually re-enforcing relation carries limits where transparency affects the quality of policy exchange, or even encourages decision-makers to hide their true preferences. Ironically under such conditions, requirements of transparency may lead to in-transparency (i.e. disrupt the free flow of information between national banks and those that supervise them).

A more serious problem concerns the pursuit of transparency as an end in itself, independent from the substantive questioning of ECB decisions, as evidence from banking supervision demonstrates. In June 2017, the ECB declared for the first (and only) time so far that three of the banks it directly supervises are 'failing or likely to fail,' issuing a so-called FOLTF decision.⁴⁵ The banks were medium-sized credit institutions in Spain (Banco Popular Español) and Italy (Veneto Banca and Banco Popolare di Vicenza). In line with Article 18 of Regulation 806/2014 on the Single Resolution Mechanism (henceforth SRMR), a FOLTF decision entails that the bank is transferred to the Single Resolution Board (SRB), which decides if an EU-level resolution scheme is warranted in the 'public interest'⁴⁶ or, alternatively, if the bank should be wound up. In the three cases, Banco Popular Español was put in resolution through the SRM, while Veneto Banca and Banco Popolare were wound down according to Italian insolvency procedures.⁴⁷ The ECB's assessment of the 3 banks was crucial: in fact, it is not an understatement to say that FOLTF decisions constitute the reason why the SSM was established in the first place—namely to break the 'bank-sovereign negative feedback loops which were at the heart of the crisis'⁴⁸ (by allowing ailing banks to 'fail' without costly rescue attempts using taxpayer money).

Unsurprisingly, the ECB came under scrutiny in the months preceding and immediately following the FOLTF decisions. In this example, we focus on the relationship with the main political accountability forum in banking supervision—the European Parliament (EP). During June and July 2017, the ECB received 10 letters from Members of the European Parliament (MEPs) requesting information about the situation at Banco Popular. In relation to Veneto Banca and Banco Popolare, MEPs sent 3 letters requesting information during April–June 2017.⁴⁹ At a public hearing of the EP's Committee on Economic and Monetary Affairs (ECON) on 19 June, MEPs spent a lot of time asking Danièle Nouy, the Chair of the Supervisory Board, numerous transparency questions—focused on whether the ECB 'was aware' of Banco Popolare's problems and how it acted in response.⁵⁰ For this type of requests, ECB

⁴³D. Stasavage, 'Open-Door or Closed-Door? Transparency in Domestic and International Bargaining' (2004) 58 *International Organization* 667.

⁴⁴Y. Mersch, 'Aligning accountability with sovereignty in the European Union: the ECB's experience' (ECB Legal Conference 2017, Frankfurt am Main, 4–5 September, 2017) 17. To that effect, see also Issing 1999 (n 5), 508.

⁴⁵European Central Bank, 'ECB Annual Report on supervisory activities 2017' (March 2018), section 2.1, available at <https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/ssm.ar2017.en.html#toc26> (accessed 29 June 2018).

⁴⁶Art 18(5) SRMR stipulates that 'a resolution action shall be treated as in the public interest if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.'

⁴⁷n 45 supra.

⁴⁸See the Five Presidents' Report, available at https://ec.europa.eu/commission/sites/beta-political/files/5-presidents-report_en.pdf (accessed 29 June 2018), 11.

⁴⁹ECB Banking Supervision, 'Publications published in 2017' (n.d.), available at <https://www.bankingsupervision.europa.eu/press/publications/date/2017/html/index.en.html> (accessed 29 June 2017).

⁵⁰ECON Committee, 'Public Hearing with Danièle Nouy, Chair of the Supervisory Board of the ECB' (19 June 2017), available at <http://www.europarl.europa.eu/ep-live/en/committees/video?event=20170619-1500-COMMITTEE-ECON> (accessed 29 June 2018).

practice was to refuse disclosing information about specific banks due to professional secrecy requirements laid down in the Inter-Institutional Agreement between the European Parliament and the ECB, and the Capital Requirements Directive (CRD) IV.⁵¹ Instead of releasing confidential data, the ECB provided some general considerations regarding the process through which the SSM reaches decisions in circumstances when a bank faces systemic capital shortages. The ECB always justifies this lack of supervisory transparency in terms of concerns for financial stability and the desire to avoid bank runs:

*[Professional secrecy requirements] are aimed at instilling confidence in credit institutions that the banking supervisor will treat their sensitive information appropriately. This is essential for an open supervisory dialogue and thus an important basis for effective banking supervision.*⁵²

Nevertheless, following additional requests for information about the three banks submitted by citizens,⁵³ national parliaments and finance ministries, the ECB decided in August 2017 to publish on its website non-confidential versions of the FOLTF assessments for the three banks.⁵⁴ By any account, this should have been a victory for transparency advocates, even if the information came later and did not include individual supervisory decisions.⁵⁵

The irony was the lack of political follow-up to the publication of the non-confidential FOLTF assessments.⁵⁶ After the summer of 2017, MEPs did not mention any of the three cases in their letters to the ECB or in public hearings with the Chair of the Supervisory Board.⁵⁷ Political attention span is notoriously short; MEPs move quickly to other issues on the agenda once the initial media attention wanes. This begs the question: if having the information was so important, why did MEPs not act upon it? What is the benefit of transparency if the appropriateness of ECB decisions and procedures are not questioned against constitutionally agreed standards after the information becomes available? Looking at the EPs activity in the year after the three FOLTF decisions, we can see that their main recommendation to the ECB concerned improving the cooperation with the SRB,⁵⁸ and not the conduct of the ECB as a supervisor. Perhaps the lack of ex-post activity is unsurprising—given the ECB's operational independence, it is not clear what MEPs could concretely do in the case that FOLTF assessments revealed serious discrepancies between expert assessments and the resulting decisions of the Supervisory Board. From the perspective of political accountability, the achievement of transparency in this particular instance thus suggests a Pyrrhic victory.

None of the arguments above are meant to suggest that transparency is of no value in evaluating ECB accountability. As the general literature has observed, transparency and information remain vital if other elements

⁵¹See Letter from Danièle Nouy, Chair of the Supervisory Board, to Mr Urtasun and Mr Giegold, MEPs, with respect to a credit institution under ECB supervision, available at [supervisionhttps://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter170803_UrtasunGiegold.en.pdf?c77abd08475e626247cd4d24f1db7677](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter170803_UrtasunGiegold.en.pdf?c77abd08475e626247cd4d24f1db7677) (accessed 29 June 2018).

⁵²D. Nouy, 'Letter from Danièle Nouy, Chair of the Supervisory Board, to Mr Hayes, MEP, regarding professional secrecy requirements' (2017) available at https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.mepletter170614_hayes.en.pdf?d4fe5a6f7bb3e77e8697352785d4cced (accessed 29 June 2018).

⁵³In line with Decision ECB/2004/3 on public access to ECB documents.

⁵⁴n 45 supra.

⁵⁵In compliance with Art 27 SSMR and Art 53 et seq of CRD IV.

⁵⁶As regards legal follow-up, some early cases have appeared before the SRB. See: <https://srb.europa.eu/en/content/cases> (accessed 29 June 2018).

⁵⁷This is evident from the content of letters to MEPs published on the ECB website (n 45) as well as from the ensuing hearings of the SSM Chair in the ECON Committee on 9 November 2017 and 26 March 2018. See European Parliament At a Glance, 'Single Supervisory Mechanism (SSM) Accountability arrangements and legal base for hearings in the European Parliament State of play - May 2018' (2018), available at [http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/497742/IPOL_ATA\(2017\)497742_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2017/497742/IPOL_ATA(2017)497742_EN.pdf) (accessed 29 June 2018).

⁵⁸European Parliament, 'European Parliament Resolution of 1 March 2018 on Banking Union – Annual Report 2017 (2017/2072(INII))' P8_TA(2018)0058, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0058&language=EN> (accessed 26 November 2018).

of the accountability relation are to be exercised—in simple terms, if actors know nothing about what the ECB does, they will also be unable to effectively hold it to account for its activities. They are meant, however, to show that the reverse is also the case: transparency makes little sense as a centre of efforts to improve ECB accountability if it is to operate entirely independently of other elements of accountability, namely the capacity to contest ECB decisions (in both their procedural and substantive dimensions). Our primary accountability efforts must be directed there. In crude terms, what is important is not simply having information, *but what is done with it*.

4 | ACCOUNTABILITY THROUGH MULTIPLE CHANNELS?

A third pillar of procedural ECB accountability—particularly connected to the ECBs new mandate in banking supervision—is that *creating multiple accountability channels of a political, legal, or administrative nature will guarantee that the actor is held accountable by at least one of the forums*.⁵⁹ In the context of monetary policy, Issing argues that the ECBs President reporting to the European Parliament beyond the Treaty requirements strengthened the accountability structure by multiplying its layers.⁶⁰ In the area of banking supervision, Ter Kuile and associates explained that independence and accountability can be reconciled by establishing ‘a network of accountability moments’, meaning different layers of obligations that are ‘tailor-made’ for a specific field.⁶¹ Despite their apparent redundancy, the role of overlapping accountability channels is to ensure that ‘where one fails the other will still prevent disaster’.⁶² These ideas, promoted by Colin Scott in relation to the rise of the regulatory state, soon gained popularity in the EUs framework of multilevel and network governance, where diffused power centres made the implementation of a coherent accountability system impossible.⁶³ In this context, Harlow and Rawlings spoke of the positive impact of accountability networks, whose role was to ‘bring together agencies specialising in accountability with shared professional expertise and ethos’.⁶⁴ Elsewhere, Sabel and Zeitlin proposed a notion of dynamic accountability rooted in the expansion of peer review as a counterweight for technocratic authority.⁶⁵

The SSM framework offers a pointed example of many of these promises. Formally, there are political, administrative, and legal mechanisms through which supervisory decisions can be formally challenged—including the operation of a peer-review accountability forum through the Administrative Board of Review (ABoR). Although the institutions designed to hold the ECB accountable in the SSM do not operate as a network, they have network-like qualities to the extent that they sometimes refer to each others decisions and rely on each others work. The argument here is that the functioning of these multiple accountability mechanisms has so far not allowed substantive engagement with ECB decisions in the field. Conversely, the problem of proceduralism persists. Instead of establishing an accountability structure where one level compensates for the failure of another, the SSM framework put in place an elaborate box-ticking system that left the ECBs supervisory discretion intact. What is more, the existence of multiple accountability channels reinforced the notion that only procedural aspects of ECB decisions are open to question.

For example, one of the innovations of the SSM was that it introduced political accountability arrangements of the ECB towards the Council and national parliaments in addition to the European Parliament.⁶⁶ In each annual

⁵⁹Issing 1999 (n 5), Ter Kuile, Wissink and Bovenschen (n 5), Tuori and Tuori (n 28), 247.

⁶⁰Issing 1999 (n 5), 509.

⁶¹G. Ter Kuile, L. Wissink, and W. Bovenschen, ‘Tailor-made accountability within the Single Supervisory Mechanism’ (2015) 52 *Common Market Law Review* 155, 173.

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⁶³See for example Y. Papadopoulos, ‘Problems of Democratic Accountability in Network and Multilevel Governance’ (2007) 13 *European Law Journal* 469, 483–4.

⁶⁴C. Harlow and R. Rawlings, ‘Promoting Accountability in Multilevel Governance: A Network Approach’ (2007) 13 *European Law Journal* 542, 560.

⁶⁵C.F. Sabel and J. Zeitlin, ‘Learning from Difference: The New Architecture of Experimentalist Governance in the EU’ (2008) 14 *European Law Journal* 271, 313.

⁶⁶Art 21, SSMR.

report on banking supervision, the ECB includes a section on the number of meetings attended each year by the Chair of the Supervisory Board at the European Parliament, the Council, and national parliaments; if applicable, the number of letters exchanged with these institutions is also mentioned.⁶⁷ What is striking is the emphasis placed on the frequency of the meetings and the number of letters exchanged rather than on the topics discussed and the outcome of these meetings. Similarly, in the first evaluation of the SSM published by the European Commission in October 2017, accountability arrangements were praised as being 'overall effective' because 'in particular, the various processes and procedures in place for ensuring accountability towards political bodies [...] are used frequently in practice.'⁶⁸

However, one should not equate the existence of a plethora of accountability procedures—even when they are actively used—with substantively holding the ECB to account. The case of interactions with the Council is illustrative here. According to the Memorandum of Understanding between the two institutions, the ECB sends annual and quarterly reports to the Council and the Eurogroup; at the same time, the Chair of the Supervisory Board participates in at least 2 exchanges of views per year with the Eurogroup, and there is an obligation to answer written questions from Eurogroup members.⁶⁹ According to public statements released after Eurogroup meetings, the ECB's contribution consists of 'briefing' finance ministers on activities and issues related to banking supervision.⁷⁰ Moreover, the SSM website does not publish any letters addressed to the Eurogroup as it does with answers to questions from the European Parliament. Following a formal request for written questions exchanged between the ECB and the Eurogroup in the SSM framework, 'it appears that the Council does not hold any document' in this respect.⁷¹ This suggests that the Eurogroup spends little time on the SSM outside the obligatory biannual exchanges of views with the ECB. This is not surprising, given that the Eurogroup is usually busy with high-level political decisions on financial assistance programmes and more pressing legislative reforms.⁷² It is therefore not clear what the added value of this supplementary accountability channel is supposed to be.

Furthermore, national parliaments are also far from being a stringent accountability forum of the ECB in banking supervision. During 2014–2016, the Chair of the Supervisory Board participated in 6 meetings of national parliaments committees, and answered one question from the Latvian Parliament.⁷³ While interactions exist, they are still in their early stages and there is no research to assess their merit. Similar problems exist with respect to the ECB's main political interlocutor—the European Parliament. Preliminary research of ECB hearings at the ECON Committee shows that 'MEPs do not (explicitly) ask questions on the achievement of the SSM's objectives, but rather focus on the overall performance of the banking sector or the financial health of individual banks.'⁷⁴ In addition, MEPs ask numerous questions outside the ECB's competence in banking supervision or simply request the ECB's

⁶⁷See above, n 45.

⁶⁸European Commission, 'Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013' (2017), COM(2017) 591 final, 4–5.

⁶⁹Art 1–3, Memorandum of Understanding between the Council of the EU and the ECB on the cooperation on procedures related to the SSM.

⁷⁰The only information available is on the general topic of the meeting. See summary of Eurogroup meetings: <http://www.consilium.europa.eu/en/council-eu/eurogroup/> (accessed 29 June 2018).

⁷¹Personal communication, Answer Ref. 17/2142-ws/ns in response to an access to documents request sent by one of the authors on 12 October 2017.

⁷²A. Maricut and U. Puetter, 'Deciding on the European Semester: the European Council, the Council and the enduring asymmetry between economic and social policy issues' (2018) 25 *Journal of European Public Policy* 193, 202.

⁷³European Commission, 'Commission Staff Working Document accompanying the document' Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation (EU) No 1024/2013 [COM(2017) 591 final], SWD(2017) 336 final, 8.

⁷⁴F. Amtenbrink and M. Markakis, 'Towards a meaningful prudential supervision dialogue in the euro area? A study of the interaction between the European Parliament and the European Central Bank in the single supervisory mechanism' (2017) *ADEMU Working Paper Series*, 21.

opinion on ongoing legislative files.⁷⁵ This suggests that the accountability framework for supervisory decisions is still weak and frequent meetings with multiple political bodies will not fix the problem. The network of accountability relationships may be dense, but it remains shallow.

A further example of multiple accountability channels at work is provided by the ABoR. The ABoR was envisaged by Article 24 of the SSMR as an internal mechanism with competence to review 'the procedural and substantive conformity' of ECB decisions on banking supervision. Formally established by ECB Decision 2014/16, the ABoR has 5 members and 2 alternates who are not part of the ECB staff but individuals of 'high repute' in the field of banking or financial services.⁷⁶ The idea was to have a professional peer review body which has both the relevant knowledge and the experience necessary to assess ECB supervisory decisions. Submitting a request for review to the ABoR is 'without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties.'⁷⁷ In comparison to judicial review, the ABoR was heralded as 'a fast, cheap and expert first route' to challenge prudential decisions adopted by the ECB.⁷⁸ But unlike a court, the ABoR does not have adjudicative functions; instead, it provides non-binding opinions to the Supervisory Board, which can then decide to abrogate, replace, or maintain the original decision through the regular procedure.⁷⁹

The proceedings of the ABoR are not public, so the substance of the cases cannot be assessed. Nonetheless, there is information available from the ECB Annual Reports, the Commission's review of the SSM, and academic articles published by members of the ABoR. So far, there have been 24 requests for review submitted to the ABoR: four in 2014, eight in 2015, eight in 2016, and four in 2017.⁸⁰ Overall, the ABoR decided as follows: in nine cases it maintained the initial supervisory decision in its entirety; in six cases it maintained the decision but improved the reasoning (in five instances by adding to it and in one instance by deleting part of it); four cases were withdrawn after an agreement was reached in the meantime between the ECB and the concerned parties; three cases were inadmissible because they did not concern supervisory decisions but letters sent by ECB senior management and the Chair of the Supervisory Board. Finally, one case allowed the extension of a deadline for the applicant, and one opinion is still pending. When discussing the performance of the ABoR, the Commission noted that the ECB seemed 'willing to review its own decisions in light of dialogue with the parties concerned or of the suggestions given by the ABoR.'⁸¹ But taking into account, as set out above, that supervisory decisions remain identical in the majority of cases—except for their justification—the effectiveness of the ABoR is questionable.

Furthermore, the ABoR does not engage in the substantive review of ECB decisions. As a member of the board confirms:

*'the board's review is limited as to whether the due process requirements were complied with and, in particular, whether the statement of reasons was sufficient, whether the facts were correctly reproduced and whether there was any manifest error in the assessment, and whether the decision is manifestly disproportionate or vitiated by a misuse of powers.'*⁸²

⁷⁵A. Maricut-Akbik, 'Holding the Supervisor to Account: The European Parliament and the European Central Bank in Banking Supervision' (2018) *Policy Paper 19 November 2018*, Jacque Delors Institute Berlin/Bertelsmann Stiftung, 9–12.

⁷⁶Art 3, Dec ECB/2014/16.

⁷⁷Art 24(11), SSMR.

⁷⁸C. Brescia Morra, R. Smits and A. Magliari, 'The Administrative Board of Review of the European Central Bank: Experience After 2 Years' (2017) 18 *European Business Organization Law Review* 567, 588.

⁷⁹Art 16–17, Dec ECB/2014/16.

⁸⁰European Central Bank, 'ECB Annual Report on supervisory activities 2017', sec. 5.3. European Commission, 'Commission Staff Working Document' (n 73), 15.

⁸¹European Commission, 'Commission Staff Working Document' (n 73), 15.

⁸²Brescia Morra, Smits, and Magliari (n 78), 'The Administrative Board of Review of the European Central Bank', 577–578.

This means that the chief expert forum, the only one able to assess the substance of supervisory decisions, does not perform this type of review.

However, the rulings of the ABoR have important legal implications. In fact, EU Courts cite ABoR decisions as confirmation of the ECB's compliance with the duty to state reasons.⁸³ For instance, in May 2017, Förderbank appealed against the ECB's finding that it is a significant entity subject to the exclusive supervisory competence of the ECB.⁸⁴ Since ABoR had already reviewed the contested decision and found a sufficient statement of reasons, the General Court also looked to that decision to establish whether reasons have been sufficiently provided, and found that the two read in combination comply with the duty to state reasons.⁸⁵ The same was found in the most recent decision of the General Court, from December 2017, concerning the decision of the ECB to carry out prudential supervision of a group of credit institutions, rather than the applicant as a single entity.⁸⁶ In this case, the ECB provided no reasons for conducting supervision on a consolidated basis in its original decision, but the General Court nevertheless accepted those provided by the ABoR during the review process.⁸⁷ This means that the 'adding' of channels actually *subtracts* to the extent that the presence of one channel (here the ABoR) is given as a reason by the other channel (the General Court) to lower its intrusiveness, and ultimately its accountability standards.

To sum up, the SSM accountability framework created empty forms, as the existence of multiple accountability channels did not translate into substantive contestation of ECB actions in the field. Unquestionably, the ECB has frequent interactions with political and legal-administrative forums. However, the extent to which any of these forums is willing, able, or competent to hold the ECB accountable is doubtful. While the Eurogroup is busy with other items on the political agenda, the EP often does not use its interactions with the ECB productively, and the role of the ABoR is limited to a legality review. In the end, more accountability channels are not in themselves better in so far as they hinder substantive accountability. In the meantime, the independence/accountability dilemma remains unchanged.

5 | ACCOUNTABILITY THROUGH JUDICIAL REVIEW?

The fourth and final pillar of procedural accountability—highly controversial since the Euro crisis—is that *judicial review is an effective ex-post accountability mechanism to ensure the legality of central bank decisions*.⁸⁸ This rests on the development of a legal accountability system around the CJEU through which private parties can seek legal remedy, albeit with varying degrees of success, against member states and EU institutions.⁸⁹ The underlying logic is that central banks should be subject to the rule of law despite their independence, allowing individuals to question legally what may be difficult to question politically. Judicial review could thus act as a mechanism to limit ECBs discretion, tie it to its core mission, and ensure that fundamental rights are respected—and ultimately hold it to account against constitutionally agreed terms in a substantive sense. Even if the Bank is politically independent, legal scrutiny, including the ability of individuals and financial institutions to challenge decisions affecting their daily lives, should remain intact.

On the one hand, EU courts⁹⁰ have to ensure that the ECB meets its mandate and therefore respects the division of competences provided by the Treaty; on the other hand, they have to guarantee its transparency and openness to

⁸³See section 5 below.

⁸⁴Case T-122/15 *Landeskreditbank Baden-Württemberg—Förderbank v ECB* [2017] ECLI:EU:T:2017:337, [15]. The decision is currently being challenged before the Court of Justice: Case C-450/17 P Appeal brought on 26 July 2017 by the Landeskreditbank Baden-Württemberg—Förderbank against the judgment of the General Court.

⁸⁵*ibid*, [125]–[135].

⁸⁶Case T-712/15 *Crédit Mutuel Arkéa v ECB* [2017] ECLI:EU:T:2017:900.

⁸⁷*ibid*, [51].

⁸⁸Oliver (n 4); Goldmann (n 28); A. Steinbach, 'Effect-based analysis in the courts jurisprudence on the euro crisis' (2017) 42(2) *European Law Journal* 254.

⁸⁹C. Harlow, *Accountability in the European Union* (Oxford University Press 2002) 158.

⁹⁰The analysis will address the case law of both the General Court and the Court of Justice, depending on the specific procedural route.

citizens. This section examines the case law on ECB activities concerning three headings of review (the duty to state reasons, the use of discretion and proportionality) in order to show that EU Courts have generally remained within the confines of procedural review and the text of Article 263(2) TFEU, with little to no review of the substance of ECB decisions.⁹¹

The duty to provide reasons for a decision is generally considered an obligation conferred upon administrative bodies in order to make sure their decisions are grounded in the legal authority granted to them.⁹² The Court of Justice has addressed this duty as one of the cornerstones of judicial review of administrative action, in particular when the administrative body (e.g. the Commission) has specific expertise.⁹³ In relation to the ECB, the Court of Justice addressed the duty to state reasons in *Gauweiler*.⁹⁴ The Court of Justice carried out a limited form of review which largely re-stated the ECB's reasons, concluding that '[h]aving regard to the information placed before the Court in the present proceedings, it does not appear that that analysis of the economic situation of the euro area as at the date of the announcement of the programme in question is vitiated by a manifest error of assessment.'⁹⁵ The Court does not provide further information as to what would constitute a manifest error of assessment, nor does it engage with the substance of the decision, for example by providing other expert opinions on the topic, or other views taken by the parties to the proceedings, which might provide a clearer picture on the effects of the reasons employed by the ECB. In other cases, the Court of Justice was only asked to review the General Court's duty to state reasons, and therefore did not have the opportunity to review the same obligation of the ECB.⁹⁶

The General Court has also had the opportunity to assess the extent to which the ECB has provided reasons for its decisions. It found that:

*It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the necessary requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.*⁹⁷

Using this standard, the General Court has assessed the extent to which the ECB stated reasons for the exchange programme of Greek government bonds within the Securities Market Programme, which also included the applicant, a holder of Greek Government bonds. It sought access to the Annexes to the decision establishing the exchange programme, and the General Court assessed whether the ECB complied with its duty to state reasons when it rejected the request.⁹⁸ In the paragraphs of the judgment following the standard to be used, the General Court's review remains procedural—it only describes the ECB's provided description of reasons and thus moves us away from looking into their substance as regards its supervisory mandate. Expectedly, the General Court found the reasons provided by the ECB to be sufficient and rejected the applicant's claim.⁹⁹

⁹¹To this effect, see also, Tuori and Tuori (n 28) 245.

⁹²Art 296 TFEU. See generally M. Elliott, *Beatson, Matthews, and Elliott's Administrative Law Text and Materials*, 4th edition ed. (Oxford University Press, 2011) chap. 12.

⁹³See, for example, Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* [1991] ECLI:EU:C:1991:438, [13]–[14]; Case C-310/04 *Spain v Council* [2006] ECLI:EU:C:2006:521, [122].

⁹⁴Case C-62/14 *Gauweiler* (n 24).

⁹⁵*ibid*, [74].

⁹⁶See, for example, Joined Cases C-105-109/15P *Mallis and Others v European Commission and ECB* [2016] ECLI:EU:C:2016:702, [45].

⁹⁷Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB* [2015] ECLI:EU:T:2015:361, [32]–[33]. See also, Case C-17/99 *France v Commission* [2001] ECLI:EU:C:2001:178, [32] and Case C-445/00 *Austria v Council* [2003] ECLI:EU:C:2003:445, [49].

⁹⁸The ECB described the Annexes in a reply letter, but rejected access to them. Case T-376/13 *Versorgungswerk der Zahnärztekammer Schleswig-Holstein v ECB* (n 97), [8].

⁹⁹Other cases on duty to state reason, in which the Court makes reference to decisions by the ABoR, are described in section 4.

This approach regrettably does not ensure an obligation to state reasons in initial supervisory decisions, which can be supplemented by ABoRs contributions. This seems at odds with the approach of the General Court towards the Commission, where reasons had to be stated during the administrative procedure.¹⁰⁰ Entities subject to the competence of the ECB will find their rights protected only upon the review of the General Court, which tends to accept any and all reasons provided by the ECB. This can hardly incentivise the ECB to ensure sufficient reasons are provided when carrying out its activities and thus respect the obligation of meaningful public justification of its decisions.

A further head of review of ECB action concerns the manner in which the ECB has used the discretion accorded by its mandate. A long standing issue of administrative law more generally has been to find the right balance between the discretion necessary for a body to carry out its functions effectively and swiftly on the one hand, and the need to control its actions by courts in order for them to comply with legitimate expectations of individuals, on the other.¹⁰¹ The specific knowledge and the necessary discretion of the ECB in performing its tasks is thus at the centre of the difficulties of ensuring its accountability through judicial review. The special position of the ECB, concerning its specific knowledge and the requisite wide discretion was sanctioned by the General Court in its review of the ECB's decision on the restructuring of Greek debt:

*[...] any sufficiently serious breach of the legal rules at issue must be based on a manifest and serious failure to have regard for the limits of the broad discretion enjoyed by the ECB when exercising its powers in monetary policy matters.*¹⁰²

Accordingly, further analysis of the General Court referred to the specificities of monetary policy and how it fits into the text and aims of the Treaty provisions concerning the powers of the ECB and the manner of their use. Having repeated the arguments put forward by the ECB, the General Court found that there has been no manifest error in the assessment it conducted in issuing its decision. The Court of Justice reiterated the high standard for reviewing the use of discretion by the European System of Central Banks in the monetary field:

*In that regard [...] 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.*¹⁰³

The obligation to take decisions with all care and accuracy tells us little to nothing about how EU Courts can verify this. A comparable area is judicial review of EU acts on the basis of Commission impact assessments, described by the Commission itself as 'an essential tool for producing high quality and credible policy proposals'.¹⁰⁴ According to Alemanno, the obligation of composing impact assessments in the use of its broad discretion opened up the Commission to another layer of scrutiny.¹⁰⁵ In the already mentioned *Spain v Council* judgment, the Court of Justice found the lack of an impact assessment, despite its yet uncertain legal nature,¹⁰⁶ as the basis to annul an EU act.¹⁰⁷ Here,

¹⁰⁰Case T-410/03 *Hoechst GmbH v Commission* [2008] ECLI:EU:T:2008:211, [153].

¹⁰¹C. Hilson, 'Judicial review, policies and the fettering of discretion' (2002) *Public Law* 111.

¹⁰²Case T-79/13 *Accorinti v ECB* [2015] ECLI:EU:T:2015:756, [68]. See also, Opinion of Advocate General Cruz Villalón in Case C-62/14 *Gauweiler* [2015] ECLI:EU:C:2015:7, [111].

¹⁰³Case C-62/14 *Gauweiler* (n 24), [75], [80].

¹⁰⁴European Commission, 'Impact Assessment Guidelines', 15 January 2009, SEC(2009) 92, 19.

¹⁰⁵A. Alemanno, 'A Meeting of Minds on Impact Assessment When Ex Ante Evaluation Meets Ex Post Judicial Control' (2011) 17 *European Public Law* 485, 486.

¹⁰⁶*ibid*, 492–495.

¹⁰⁷Case C-310/04 *Spain v Council* (n 94), [121]–[134].

however, the Court of Justice engaged more intensely with the information provided, and looked whether the information provided formed a sound and consistent basis for the final act.¹⁰⁸ The EU Courts have not yet applied the same high level of scrutiny in reviewing ECB decisions. In other words, even a more robust form of procedural scrutiny, as requiring detailed evidence (such as IA) to justify discretionary decisions, does not appear in the case law concerning the ECB.

Proportionality analysis appears closest to a substance-based review of ECB action. When assessing the compatibility of national measures with the requirements of EU law, the Court of Justice goes to great lengths in assessing possible measures that would be less restrictive of intra-EU trade, often effectively replacing the final decision of the national court with its own.¹⁰⁹ However, the EU Courts do not exhibit the same intensity of review in relation to EU action. According to Lenaerts, proportionality review is process-based, relying mostly on the preparatory information provided by the body exercising its wide discretion.¹¹⁰ Yet, the way the EU Courts define proportionality seems to inherently include substantive review:

[The] principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not go beyond what is necessary in order to achieve those objectives.¹¹¹

However, as evidenced in *Gauweiler*, when an EU institution such as the ECB has wide discretion, the proportionality requirements become limited to examining 'carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions.'¹¹² Proportionality as a standard of review of ECB action is therefore merely a review of the duty to state reasons in disguise: it is achieved when the standard for a careful and accurate assessment, followed by a statement of reasons, is met. Yet, the analysis above has shown that (1) a careful assessment is controlled through the control of discretion (that is weaker when discretion is wider); and (2) the control of the duty to state reasons has been confined to accepting what the ECB put forward not in its initial decisions, but in the further review procedure, be it before the ABoR, or the General Court.¹¹³ Proportionality review, and judicial review more generally, has so far not proved itself to be a provider of substantive accountability, where the action of the ECB would be assessed against the legal framework and the mandate it establishes.

The case law analysis thus confirms that all heads of review of ECB action defer heavily to the expertise of the Bank, remain within the confines of light procedural checks, and accord greater weight to its independence than its accountability. Thus far, judicial review seems of limited use in holding the ECB to account in a substantive sense.

6 | CONCLUSION: TOWARDS SUBSTANTIVE ACCOUNTABILITY?

In March 2017, Benoît Cœuré, Member of the Executive Board of the ECB, gave a speech about the balance between independence and accountability 'in a changing world' of central banks. He reiterated his institution's mantra:

¹⁰⁸See also Joined Cases C-92 and 93/09 *Volker und Markus Schecke* [2010] ECLI:EU:C:2010:662, [81].

¹⁰⁹T. Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' (2011) 9 *International Journal of Constitutional Law* 737, 739.

¹¹⁰Lenaerts (n 3), 6.

¹¹¹Case C-62/14 *Gauweiler* (n 24), [67].

¹¹²*ibid.*, [68]–[69]. This is the general approach of the Court of Justice, most famously expressed in Case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002], [123].

¹¹³Case T-712/15 *Crédit Mutuel Arkéa v ECB* (n 86).

... yes, for the ECB independence and accountability are two sides of the same coin. The ECB was given a democratic mandate. Independence ensures that the ECB can act in line with its mandate. Accountability, on the other hand, ensures that the ECB does act in line with its mandate.¹¹⁴

This article showed that the current accountability framework of the ECB guarantees that the institution stays within its mandate only in a procedural way. In fact, existing challenges related to the interpretation of the mandate, which actually question ECB discretion, are either rare or unsuccessful. Moreover, there is a general tendency to reduce all accountability processes to procedural grounds. Even when the content of monetary or supervisory decisions is questioned, the ECB often answers by referring to *rules* which 'obliged' particular conduct (such as decisions to refuse document access, limit derogations from central standards and so on).

In this paper, we have explored why procedural assumptions are insufficient to make the ECB accountable. First, narrow mandates force the ECB to justify unconventional instruments through the existing competence framework ('mandate stretching') or simply reduce the scope of what can be questioned as regards monetary and supervisory decisions. Second, transparency sits in a qualified relationship to accountability: it is not an unconditional good but an ingredient that either requires other ingredients (e.g. sanction/follow-up) or may be detrimental under certain conditions. Third, the existence of multiple accountability mechanisms can be counterproductive. Instead of creating 'tailor-made' accountability where one forum compensates for the failure of another, in the end no channel addresses the substance of ECB decisions. Fourth, judicial review—in the procedural manner in which it is currently carried—again limits the engagement of its litigants with substantive issues. The EU Courts deferential approach towards the ECB calls into question the usefulness of legal channels in holding the institution accountable altogether. In this sense, it cannot be concluded that the definition of substantive accountability (provided in the introduction to this paper) has been met in regards to ECB activity.

Consequently, the balance between independence and accountability at the ECB has shifted without us noticing. The trade-off between independence and accountability has been obfuscated through a complex administrative structure of accountability that provides the impression that ECB decisions can be substantively challenged. Yet, when unpacking the grounds for establishing accountability, we soon realise that holding the ECB accountable rarely goes beyond proceduralism—or control of the process by which decisions are made. While pretending to reconcile independence and accountability at the ECB, the four promises of procedural accountability have effectively institutionalised the dominance of the former over the latter. We should be cautious in turning a blind eye to the democratic implications of this development.

Finally, we should consider the implications of this development for 'newer' ECB functions. At the very least, the findings of this paper suggest wariness in extending the model of accountability found in monetary policy—'narrow' quantitative mandates, limited transparency, and deferential judicial review—to newer ECB activities, with quite different legal foundations. As explored in this article, there is already some evidence of similarity in accountability practices between the monetary and supervisory arms of the ECB, as demonstrated by the interactions between the Supervisory Board and the EP following the model of the 'Monetary Dialogue',¹¹⁵ or case-law on the SSM showing a reluctance to engage in more intrusive forms of proportionality review (akin to the monetary field).

Alternatively, new ECB functions provide a testing ground to experiment with more substantive accountability mechanisms. Others have argued that the Banking Union provides an opportunity to ground ECB accountability in new tools of national parliamentary scrutiny.¹¹⁶ Alternatively, while the task of this paper was not to build a new accountability model for ECB action, the Banking Union could provide an opportunity to develop a more *substantive*

¹¹⁴B. Cœuré, 'Independence and accountability in a changing world' (2017) available at https://www.ecb.europa.eu/press/key/date/2017/html/sp170328_1.en.html (accessed 29 June 2018).

¹¹⁵See Amtenbrink and Markakis (n 74), Maricut-Akbik (n 75).

¹¹⁶D. Fromage and R. Ibrido, 'The 'Banking Dialogue' as a model to improve parliamentary involvement in the Monetary Dialogue?' (2018) 40 *Journal of European Integration* 295, 297.

notion of accountability in EU governance. As discussed in the introduction to this paper, such substantive accountability would focus on assessing ECB action not just against procedural norms but on the basis of the substantive constitutional aims EMU is designed to develop, as defined by the Treaties themselves.

These substantive norms—the equality of the Member States, the limitations on mutual debt and monetary financing, and others—provide a set of standards to be used by parliaments and courts to judge ECB action beyond the largely process-based scrutiny that now dominates the ECBs accountability relationships. These substantive standards, while in tension with one another, provide a baseline against which the questioning of the Banks mandate, the process of judicial review and the public demand for information and justification, could be assessed. Similarly, the use of these standards in rendering accountability could prompt a more open discussion about the substantive goals of EMU (for example on the role of solidarity in rendering economic actors accountable). The development of EMU has led to significant institutional experimentation; a similar level of growth and experimentation is needed in respect to the ECBs accountability framework. A more substantive notion of ECB accountability provides a useful starting point for this exercise.

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