**The German Federal Constitutional Court’s PSPP Judgment: Proportionality Review Par Excellence**

In the German Federal Constitutional Court’s [PSPP judgment](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html)the FCC found essentially that the Court of Justice’ s proportionality scrutiny of the ECB’s decision on the PSPP program was *ultra vires.* Obviously a number of blog posts, articles and commentaries have centred on the political implications of the judgment, its impact for the Monetary Union, the social and economic implications as well as its constitutional dimension (the ever-lasting discussion of pluralism, primacy and so forth). In general EU law scholars have criticised the FCC’s judgement on various points ([Davies,](https://europeanlawblog.eu/2020/05/21/the-german-federal-supreme-court-decides-price-stability-may-not-be-worth-its-price/) [Sadl](https://verfassungsblog.de/when-is-a-court-a-court/) and [Marzal](https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/)) inter alia the FCC’s reading of Article 19 TEU, its conflation of conferral and proportionality (and the different principles in Article 5 TEU) and its (blunt and uncompelling) attack on the Court of Justice’s methodological competencies.

Whilst conceding that these are all very important questions, the following analysis departs from the FCC’s stringent proportionality review to elaborate an argument on what intensity of review should be adopted when reviewing the ECB’s economic policies. Building on previous scholarly analyses ([Öberg](https://www.cambridge.org/core/journals/european-constitutional-law-review/article/rise-of-the-procedural-paradigm-judicial-review-of-eu-legislation-in-vertical-competence-disputes/6FB00BAAC56BAF690E6948BADEEE5C08)) and relevant Court case law( *[Spain v Council](http://curia.europa.eu/juris/document/document.jsf?text=&docid=63681&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1588726)* and *[Vodafone](http://curia.europa.eu/juris/document/document.jsf?text=&docid=79665&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1588592)*,) it suggests that the proper standard of proportionality analysis should primarily be guided by the nature of the actions by EU agencies and their relative discretion in taking such actions. This argument suggests that general legislative acts where EU agencies or institutions exercise some discretion should be subject to more deferential review whilst administrative decisions (being characterised by a more limited discretion on part of the institution or agency) should be subject to more intense judicial scrutiny. The implications of this argument are then discussed with respect to the PSPP judgment .

I *Different degrees of judicial review of proportionality*

It is appropriate when discussing the FCC’s proportionality review to consider the Court of Justice’s case law on proportionality review of EU actions. In this case law, there appears to be a somewhat crude distinction between proportionality review of general EU legislative acts (where the EU institution holds substantial discretion) and instances of review of individual decisions or legislative acts which are targeted at specific individuals where the EU institution have no or very limited discretion ([Craig](https://global.oup.com/academic/product/eu-administrative-law-9780198831648?cc=se&lang=en&), ch 19).

In this regard, it is important to underline that the Court of Justice’s standard of review and intensity of proportionality review has not generally been dependent upon whether review is undertaken in a specific area such as fundamental rights, monetary policies, internal market, or competition law. The key rationale for stringent proportionality review in the Court’s case law is related to the fact that these cases have been concerned with ‘individual decisions’ or decisions of a similar nature ([Öberg](https://www.cambridge.org/core/journals/european-constitutional-law-review/article/rise-of-the-procedural-paradigm-judicial-review-of-eu-legislation-in-vertical-competence-disputes/6FB00BAAC56BAF690E6948BADEEE5C08); 271-273,[Young).](https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1468-2230.2009.00757.x)

The CFI’s judgments in *[Tetra Laval](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62002TJ0005)* and *[Pfizer](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999TJ0013)* are cases in point of strong intense judicial review prompted by the fact that the contested legislative action in those decisions were, in principle, related to decisions addressed to individuals. Such decisions are generally subject to a highly intense review by the EU courts. Although the regulation in *Pfizer* was formally of a general nature, its effect had the nature of a ‘*decision*’ by withdrawing Pfizer’s authorisation to market virginiamycin and since Pfizer was the only company having such an authorisation. The act was thus of ‘direct’ and ‘individual’ concern to Pfizer’. *Tetra Laval*, on the other hand, was concerned with a Commission decision prohibiting a prospective merger. The fact that this decision immediately affected the rights of Tetra Laval required a full judicial review of the Commission’s decision entailing a renewed and comprehensive assessment of the legal analysis and the factual basis for the decision.

This suggests that when the EU legislator/Commission acts more as an executive than as a general legislature, less deference is justified because the effects of annulment are less draconian (not frustrating an entire legislative scheme) and because strict review of individual decisions does not encroach upon the EU legislator’s discretion in making complex policy choices. The latter rationale underscoring the questionable democratic legitimacy of the ECB seems to have provided a strong inspiration for the FCC’s intense judicial scrutiny of the ECB’s activities (*PSPP* judgment, paras 142-143). Added to this, another significant reason for intense judicial review, as witnessed by *[Kadi II](https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62010CJ0584), Tetra Laval and Pfizer,* is that individuals must be protected against discretionary interferences with their fundamental freedoms. In those instances, it is also the fact that individuals and firms were directly targeted and adversely affected by the decisions which justified more intense scrutiny.

In contrast, when it comes to judicial review of the EU legislator’s policy choices and more general legislative acts, other considerations may be relevant. It might be argued that scrutiny in the context of broad EU common policies should be very deferential because the facts are complex since the EU legislator undertakes policy choices and because the EU legislature has to reconcile divergent interests when making such policies. In these cases, the Court is also normally tasked with reviewing a broad piece of framework legislation, which may have been subject to cumbersome negotiations between the different EU institutions, and which are envisaged to generally approximate Member States’ legislation in a certain field. It is clear that the Court may be less willing to intervene to challenge the exercise of the EU legislator’s discretion (*[Omega Air and others](http://curia.europa.eu/juris/liste.jsf?num=C-27/00&language=en)*, paras. 63-64; *[British American Tobacco](http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=sv&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-491%252F01&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=1505701)*, para 123; *[Phillip Morris Brands](http://curia.europa.eu/juris/document/document.jsf?text=&docid=177724&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1505795)*, paras 165-166)

The division in the case law between review of general legislative acts and acts being primarily addressed to certain individuals thus suggest that there must be a justification for applying the intense test derived from the Court’s case law in *Tetra Laval, Pfizer* and *Kadi II* to the field of the ECB’s monetary policies. The review in the style of *Tetra Laval, Pfizer* and *Kadi II* is strict substantive review that is used when the Court examines individual administrative decisions. Such review entails a *de novo* assessment of the legal and factual assessment made by the administrative agency. Such a review may be too intensive for controlling the ECB’s decisions since the ECB adopts decisions as part of a broader policy framework and exercises some discretion for this purpose. If the Court of Justice would apply the strict proportionality test test suggested by the FCC, there would be a risk that the Court encroaching upon the ECB’s discretion and independence (Art 127, Art 130 TFEU and Art 7 of the [Statute of the ECB and ECSB](https://www.ecb.europa.eu/ecb/legal/pdf/oj_c_2016_202_full_en_pro4.pdf)). The latter rationale was strongly relied on by the Court in *Weiss* as reason for more deferential review (*[Weiss](http://curia.europa.eu/juris/document/document.jsf?text=&docid=208741&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1506418)* paras 73, 91 and 92).

The contested ECB decisions are, however, also apparently to some extent individualised in the sense that they are targeted to specific addresses, ie the national central banks in the Euro-zone which are obliged to purchase government bonds (or other euro-denominated marketable debt securities) issued by their governments or other specifically recognised bodies (Art 1 and 3 (1) of the [PSPP decision](https://www.ecb.europa.eu/ecb/legal/pdf/celex_32020d0188_en_txt.pdf)). The latter provides a reason for more intense proportionality scrutiny. My preliminary assessment is that the ECB decisions should be seen as an admixture of a general legislative act and an individual decision (see PSPP judgments, paras 1-18 for the background of the programme). This is in line with ECB’s mandate which allows it to exercise some discretion for making economic and policy choices. This discretion is, however, not unlimited but circumscribed by EU primary law (Art 127-129 of the TFEU; Statute of the ECB and ECSB). All this would suggest that a more modest medium intensity (between’ manifestly inappropriate’ review in the style of *Phillip Morris Brands* and full review along the lines of *Pfizer*) and ‘process-based’ review (See [Lenaerts](https://academic.oup.com/yel/article/31/1/3/1666182) and [Öberg](https://www.cambridge.org/core/journals/european-constitutional-law-review/article/rise-of-the-procedural-paradigm-judicial-review-of-eu-legislation-in-vertical-competence-disputes/6FB00BAAC56BAF690E6948BADEEE5C08) for the use of this concept) along the lines of *Spain v Council* would be appropriate for review of the ECB’s activities. This standard, requiring the objectives of the decision to be substantiated by ‘relevant information’ is an appropriate ‘middle-way’ solution between full substantive review of facts and complete surrender to the discretion of the ECB.

II *The proportionality assessment in the PSPP judgment*

The type of proportionality test the FCC suggests in the *PSPP* judgment (paras 124-180) seems to be reminiscent of the EU Courts’ strict factual review in *Tetra Laval, Kadi II and Pfizer*. The FCC adopts a very rigorous stance on proportionality review suggesting that the Court of Justice’s review of proportionality in *Weiss* was not sufficient and that they wish to substitute the assessment of the Court of Justice and the ECB. As the FCC observed in its judgment, the Court of Justice has in the past reviewed proportionality more stringently in cases of fundamental freedoms and particularly in relation to review of individual decisions (*PSPP*, paras 144-154). The FCC is right in some of their observations. It appears that the Court of Justice in *Weiss* employed a deferential review standard whilst still considering the appropriateness and necessity of the ECB’s decisions in some detail. In pure quantitative terms, the proportionality assessment still covers around 30 paragraphs which cannot be seen overall as evidence of strikingly scant reasoning (*Weiss*, paras 71-100).

In qualitative terms, it appears in *Weiss* that the Court of Justice is very reluctant to assess economic policies as it sees itself unfit both in terms of expertise and legitimacy for this task (*Weiss,* para 73, 74-77). The Court of Justice relies for this purpose very much on information provided by the ECB in assessing the proportionality of the decisions. It does not, as it seems, rely on any external evidence to independently assess the ECB’s factual basis for their decisions. The Court does not seem to discuss or analyse in detail contradicting information or views on the matter apparently perceiving this area to be politically very contentious relying on the ECB’s discretion to make these assessments correctly. In the words of the Court ‘nothing more can thus 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 accuracy and care’ (*Weiss*, para 91).

The Court’s approach to the delicate question of review is understandable. The role of the Court of Justice, or any court for this purpose, are not to be co-legislators. Its task is, however, to ensure that the primary decision-maker, in this case the ECB, bases its decisions on relevant facts and gives sufficient reasons for those decisions (See [Dawson and Bobic](https://kluwerlawonline-com.db.ub.oru.se/journalarticle/Common%20Market%20Law%20Review/56.4/21576), 1023-1027 for a similar observation). In the *Weiss* judgment, the Court of Justice was capable of ascertaining that the ECB’s practices were in line with conventional practices of other central banks and could in formal terms be defended on the basis of the existing legal framework (recitals to decisions, guidelines, documents by the institutions and protocols and various other information before the court, *Weiss*, paras 74-78, 83, 85, 88-90, 92, 95, 96, 99 ). However, I argue that the Court of Justice should have searched for more explanations and required the ECB to substantiate the factual basis for their decisions. In particular, it seems that the Court did not genuinely considered the existence of different options for bond programmes which would have had less potentially serious economic implications for bondholders. This appears from paragraph 92 of the *Weiss* judgment where the Court holds that it is not ‘*apparent* that a government-bonds purchase programme of either more limited volume or shorter duration would have been able to bring about –– as effectively and rapidly as the PSPP –– changes in inflation comparable to those sought by the ESCB, for the purpose of achieving the primary Treaty objectives of monetary policy’. Given the seemingly high risks involved in the programme which could entail significant losses for the ECB and the central banks of Member States, it would obviously have been possible to explore the existence of more risk-minimising options (See *PSPP* judgment, paras 166-216 for the detailed analysis of the necessity of the PSPP). Furthermore, the suitability of the programme to achieve the objectives of easing monetary and financial conditions were addressed very scantily in only four paragraphs (*Weiss,* paras 74-77). Again, the issue seems to be on which information and evidence the ECB relied on when it reached the conclusion that this was a ‘suitable’ measure. It appears that it is intrinsically difficult to assess the ECB’s exercise of discretion unless the ‘basic facts’ upon which the policy was devised is present (See *Spain v Council*, paras 110-133).

III *Conclusions*

In sum, it is a delicate task to make a definitive assessment on the merits of the FCC’s proportionality test. I am, however, of the opinion that the Court of Justice in *Weiss* could have probed more stringently both in terms of the evidence, facts and projections by the ECB to ensure that this body really had all ‘relevant information’ when it adopted their decisions. The FCC was thus in principle right to criticise the Court of Justice’s approach to proportionality review. This does not entail that I believe that the FCC should have gone to such lengths to condemn the Court of Justice’s proportionality assessment as *ultra vires*. But the discussion here suggests indeed that proportionality review of ECB’s exercise of its discretion must be more stringent. Such a more intense and ‘process-based’ review would instil more accountability and credibility into the Court of Justice’s proportionality review of economic policies and ultimately enhance the legitimacy of the ECB’s contentious and significant activities in the area of monetary policy.