Similar, Therefore Different: Judicial Review of Another Unconventional Monetary Policy in Weiss (C-493/17)

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In Weiss, the Court of Justice of the European Union (CJEU) was asked again by the German Federal Constitutional Court (FCC) to examine the legality of an unconventional monetary policy measure of the European Central Bank (ECB). The Court upheld the Public Sector Purchases Program (PSPP) using largely the same legal tests for government bond purchases as set out in its previous ruling. This case note argues that Weiss nevertheless signals a further unwillingness of the Court to strictly review the actions of the ECB, as the Court refrained from examining the actual effects and implementation of this unconventional measure. Even though the Court clarifies some legal issues surrounding the review of actions of the ECB, it shies away from offering a broader perspective on its own role in Economic and Monetary Union (EMU).

1 INTRODUCTION

Three years after the CJEU upheld in Gauweiler the Outright Monetary Transactions (OMT) program of the ECB in response to the first reference for a preliminary ruling by the German FCC, the CJEU was asked again by the FCC to rule on the legality of another unconventional monetary policy of the ECB, namely the large-scale purchase of government bonds under the PSPP. Again, the CJEU upheld the measure. However, the similarity between the case at hand, Weiss, and Gauweiler is deceiving, as the aggrieved measures and the circumstances of the judgments are significantly different.

Whereas OMT concerned the promise of the ECB to intervene when fears of a Eurozone breakup and excessive sovereign interest rates would hamper the monetary policy transmission mechanism, PSPP is the ECB’s response to low inflation. The former posed unique questions about the role of a central bank in a monetary union between states. The latter follows, belatedly, in the footsteps of several other high-profile central banks. Most notably, the United States Federal Reserve System

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started with the large-scale purchase of government bonds in 2009.\footnote{Federal Open Market Committee Statement of 18 Mar. 2009, https://www.federalreserve.gov/newsevents/pressreleases/monetary20090318a.htm (accessed 14 Mar. 2019).} The central banks of the UK and Japan also used the large-scale purchase of government bonds to drive up inflation. Hence, as a matter of monetary policy, the ECB finds itself in good company, even if the efficacy of the purchases remains disputed.\footnote{See e.g. Daniel Gros, Euro Area Quantitative Easing: Large Volumes, Small Impact?, Suerf Pol’y Note 8–9 (2018).}

As the second judgment in response to a request for a preliminary reference from the FCC, it has the obvious benefit of not being the first. Whereas the first reference was described as a game of chicken,\footnote{Mattias Kumm, Rebel Without a Good Cause: Karlsruhe’s Misguided Attempt to Draw the CJEU into a Game of ‘Chicken’ and What the CJEU Might Do About It, 15 G. L. J. (2014). Also see the contribution by Mayer in the same issue.} this second reference has the characteristics of a Hollywood sequel: same actors, same story-line, but none of the suspense and drama.\footnote{Unless, of course, the Bundesverfassungsgericht decides to declare PSPP ultra-vires.} After the FCC accepted the legality of the OMT, it appears that the parameters have been set for future interactions.\footnote{But see Andrej Lang, Ultra Vires Review of the ECB’s Policy of Quantitative Easing: An Analysis of the German Constitutional Court’s Preliminary Reference Order in the PSPP Case, 55 Comm. &kt. L. Rev. 949 (2018).}

In two ways, the CJEU thus appears to have had an easier task in Weiss than in Gauweiler, as the aggrieved measure is more readily classified as monetary policy and there is less pressure to out-manoeuvre the FCC. Recognizing that its earlier decision apparently held sway, the CJEU in Weiss relied heavily on its reasoning in Gauweiler. Too much, it will be argued in this case-note. Rather than use the opportunity of a less contentious case to deepen its analysis of the constitutional framework of the EMU and offer a more convincing account of its own role therein, the CJEU restricted itself to a minimalistic application of the criteria developed in Gauweiler. In doing so, the Court cast aside legitimate concerns of the FCC.

This case note focusses primarily on the legal framework governing the ECB; the relationship between the CJEU and the FCC is discussed in passing. The following sections will first provide the factual and legal background of the case (section 2), followed by a summary of the judgment (section 3). The comments on the judgment (section 4) will focus on the definition of monetary policy (section 4.1), the proportionality review (section 4.2) and the prohibition of monetary financing (section 4.3).

## 2 BACKGROUND

PSPP is an unconventional monetary policy measure adopted by the ECB towards the end of euro-crisis. It involves the large-scale purchase of bonds issued by public entities in the Eurozone, mostly central governments, by the Eurosystem with the aim of increasing inflation. The purchases started in March 2015, after its
announcement in January 2015, and ended after being extended several times, in December 2018. The Eurosystem now holds some 1.9tn euro of government bonds.

PSPP follows earlier crisis measures involving the large-scale purchases of government bonds by the Eurosystem. The first program of the ECB in this regard was the Securities Market Program (SMP). It was adopted simultaneously with the first bailout package of Greece in May 2010 and concerned the purchase of bonds of Member States (MS) under financial duress, with the stated aim of restoring the monetary policy transmission mechanism.

The OMT program replaced the SMP in 2012 with a promise to buy government bonds of MS in a financial assistance program to reduce the exit-premium placed on their bonds that hampered the monetary policy transaction mechanism. OMT is conditional upon the participation of a Member State in a financial assistance program, which includes observance of ‘strict conditionality’. Although no bonds have actually been purchased under the OMT program, the legality of the program was disputed by the FCC in its first ever reference to the CJEU in January 2014. The CJEU rejected in Gauweiler the claims that a measure such as OMT did not qualify as a monetary policy measure, based on its objective and instruments, was not a proportional measure and violated the monetary financing prohibition.

Even though the OMT program has been credited as a turning point in the euro-crisis, breaking the spell of centrifugal forces, it did not lead to a return of normal monetary policy conditions. Eurozone economic growth returned in 2014, but inflation remained low, with even some deflation in late 2014/early 2015. In this context, the ECB decided in September 2014 on a third series of covered bond purchases (CBPP3) and an asset backed securities program (ABPP). In January 2015, the ECB then announced the PSPP, which together with the aforementioned programs would constitute the extended Asset Purchases Program (APP). Within the APP, the PSPP was subsidiary to the other programs, but the large majority of purchases nevertheless occurred under the PSPP.

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9 Decision of the ECB establishing a securities markets programme, ECB/2010/5.
11 Jean Pisani-Ferry, The Eurozone’s Zero Paradox – and How to Solve It, in How to Fix Europe’s Monetary Union: Views of Leading Economists 76–77 (Richard Baldwin & Francesco Giavazzi eds 2016). Also see Peter Bofinger’s contribution in the same volume.
12 Since June 2016, the APP also included the Corporate Sector Purchase Program. Decision 2016/948 of the ECB on the implementation of the corporate sector purchase programme, ECB/2016/16.
The PSPP is executed mainly through the National Central Banks (NCBs) of the Eurosystem. Their share of the purchases was set at 92%, allocated amongst them on the basis of the ECB capital key. The rest was purchased by the ECB (8%). The large majority of purchases consisted of government bonds, but 12% would consist of eligible debt securities of international organizations and multilateral development banks. These latter bonds have been bought by NCB’s. In the press conference following the decision on the PSPP, ECB President Draghi announced that the purchases by the ECB and the purchases by NCB’s of debt securities of international organizations were subject to a risk sharing regime (12% + 8%) and that the remaining 80% of the PSPP was not subject to risk sharing.\(^\text{13}\)

Four other modalities of the PSPP must be mentioned here. First, only securities with a certain credit quality assessment and outstanding maturity between one and thirty years were eligible for purchase under the PSPP.\(^\text{14}\) Securities below the appropriate level are eligible if they are guaranteed by the central government of a Member State in a financial assistance program.\(^\text{15}\) Second, purchases were only permitted after a blackout period to allow for the formation of a market price.\(^\text{16}\) Third, issue and issuer limits would prevent the Eurosystem from holding more than 33% of a single issue and 33% of the total debt of a single issuer.\(^\text{17}\) Lastly, the ECB stated that it would accept treatment \textit{pari passu} with private investors.\(^\text{18}\)

Constitutional complaints were submitted to the FCC for an ultra vires review of the PSPP. On 18 July 2017, the FCC suspended the proceedings and submitted five questions to the CJEU for a preliminary ruling.\(^\text{19}\) The first and second question concern the conformity of the PSPP with Article 123 TFEU (the prohibition on monetary financing). Of particular interest for the FCC are in this respect the de facto certainty that the Eurosystem is going to buy a part of MS bonds, that the purchased bonds are held until maturity and that insufficient information is provided on the

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\(^{14}\) Originally, the outstanding maturity was a minimum of two years, according to Art. 3.3 Decision 2015/77. See Decision 2017/100 of the ECB amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, ECB/2017/1.

\(^{15}\) Art. 3(2)(c) Decision 2015/774.

\(^{16}\) Art. 4 Decision 2015/774.

\(^{17}\) Art. 5 Decision 2015/774. The Article was amended several times, see most importantly, Decision 2015/2101 of the ECB amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme, ECB/2015/33.

\(^{18}\) Recital 8 Decision 2015/774. See on this issue (in Dutch) N. C. Voortman & C. Hopman, \textit{De zaak Accorinti: aansprakelijkheid van de ECB en implicaties voor het huidige onconventionele monetaire beleid}, Maandblad Voor Vermogensrecht (2016). They note that the requirement of \textit{pari passu} treatment as a contractual obligation binds the issuer of the bond, not the holder (at 132). The statement that the ECB accepts \textit{pari passu} treatment might nevertheless create legitimate expectations amongst other bondholders that the ECB will not again participate in a debt swap with the aim of avoiding a restructuring (at 134).

blackout period for judicial review. Also, the FCC asked whether the restrictions from the CJEU case-law can lose their effect when the ECB is required to loosen the rules to continue its implementation of PSPP. The third and fourth question concerned the conformity of the PSPP with the mandate of the ECB and the principle of proportionality. In both cases, the size and duration of the program are considered particularly troublesome. The last question challenged the possibility of unlimited loss sharing.

3 THE DECISION OF THE COURT

As in the Gauweiler case, the Court finds itself confronted with the question of the admissibility of the reference, since the referring court might not accept the answer. The Court refers to its previous judgment and repeats that its judgment is binding upon the national court.

The Court examines questions 1 to 4 together, starting with the alleged violation of the obligation to state reasons. The Court finds that the decision did explain the measures’ objective, necessity and functioning. Moreover, the minutes of the Governing Council and publications by the ECB that underscore the economic analysis of the PSPP are relevant in this regard. As the purpose of the blackout period would be undermined by the publication of more detail about their operation, the obligation to state reasons cannot demand the publication of its details.20

Regarding the nature of PSPP as monetary policy, the Court first discusses the objective of PSPP.

According to recital 4 of Decision 2015/774, the objective is to ease monetary conditions and thereby bring about a return of inflation levels below but close to 2% inflation. Therefore, the PSPP ‘can be attached to the primary objective of the Union’s monetary policy’.21 The Court dismisses the argument of the FCC that the economic effects of PSPP affect its objective. As the secondary goal of the European System of Central Banks (ESCB) is to support the general economic policies in the Union, the Court observes that ‘the authors of the Treaties did not intend to make an absolute separation between economic and monetary policies’.22 As noted in Gauweiler, the mere fact that a monetary policy measure has indirect effects does not mean it is equivalent to an economic policy measure. To this, the Court now adds that foreseeable and knowingly accepted effects of a measure do not disqualify them from being indirect.23 As the instruments through which PSPP is executed, buying in the financial markets, conforms with the tool-box provided to the ECB under Article 18.1 of the

20 Weiss, supra n. 1, paras 30–44.
21 Ibid., paras 53–57.
22 Ibid., para. 60.
23 Ibid., paras 61–67.
ESCB/ECB, the Court concludes that PSPP falls within the sphere of monetary policy.\textsuperscript{24}

As part of the proportionality review, the suitability of PSPP for the achievement of the ECB’s objective is established by reference to the deflation in December 2014 that required further monetary easing beyond what other tools had been able to provide and the fact that other central banks have adopted similar practices, accompanied by various studies on the efficacy of large-scale purchases.\textsuperscript{25} The question whether PSPP manifestly goes beyond what is necessary then engages with several aspects of PSPP, such as its temporary and indiscriminate nature, the issue and issuer limits and the fact that the program was prolonged several times following insufficient changes in inflation rates. The substantial size of PSPP is a requirement of its efficacy, as might be the holding of bonds until maturity. Other monetary policy measures, entailing more limited action, could not have achieved the ESCB’s goals. The Court also finds that it is not apparent that a shorter or smaller program would have been able to achieve the changes in inflation levels.\textsuperscript{26}

Although the Court later dismisses the fifth question of the FCC on loss sharing as hypothetical, its substance is discussed in relation to the proportionality of PSPP. The instruction that each NCB only purchases bonds of issuers in its own jurisdiction serves to shield other NCB’s from losses in case an issuer fails to make a repayment. After duly considering the interests involved, the Court notes, the ECB ‘found it not appropriate to establish a general rule on loss sharing’.\textsuperscript{27}

The conformity of PSPP with the prohibition of monetary financing also follows the two-step test constructed in \textit{Gauweiler}, concerning the purchases of government bonds on the secondary markets. The first step is to consider whether the purchases on the secondary market have an equivalent effect to direct purchases. This would be the case if other purchasers of those bonds knew for certain they could sell them to the ECB or NCB’s and thus could act as intermediaries for the ESCB. After noting some features of the PSPP that increase the foreseeability of purchases by the ECB, the Court lists several aspects of the PSPP that increase the uncertainty of purchases, such as the blackout period, the fact that PSPP purchases are subsidiary in the APP, the discretion of the Governing Council in executing the program, the range of different eligible bonds and the issue and issuer limits. The foreseeability of large-scale purchases of bonds under PSPP therefore does not translate into a certainty for private operators that they can act as intermediaries for the ESCB.\textsuperscript{28}

\textsuperscript{24} \textit{Ibid.}, paras 68–70.
\textsuperscript{25} \textit{Ibid.}, paras 74–78.
\textsuperscript{26} \textit{Ibid.}, para 79–92.
\textsuperscript{27} \textit{Ibid.}, para 93–100.
\textsuperscript{28} \textit{Ibid.}, para 111–28.
similar list is used by the Court to show that the PSPP does not lessen the impetus of MS to conduct a sound budgetary policy. 29

Special consideration is given to the questions whether purchases of bonds with a negative yield and whether holding the purchased bonds until maturity violates Article 123 TFEU. In both cases, the Court answers in the negative. 30

The Court concludes that the validity of PSPP is not affected by any of the considerations put forward by the FCC.

4 COMMENTS

Before discussing the three main elements of the decision, this section first discusses briefly the process of judicialization of EMU, as the role of the Court in reviewing the actions of the ECB has proven a key point of contention in previous cases and commentaries.

At the start of EMU, the role of the judiciary appears to have been a rather forgotten topic. The Maastricht Treaty placed great trust in law to organize monetary integration, both horizontally, between the institutions, and vertically, between the Union and the MS, but few intimations can be found in the Treaties about what was expected from the judiciary in EMU. The excessive deficit procedure partially excluded the use of the infringement procedure and the ECB was given the clear authority to defend its institutional position before the Court, but this hardly offered a comprehensive account of the scope and depth of judicial involvement in the management of the euro. 31

This omission is, in retrospect, somewhat surprising, given the otherwise extraordinary role of the CJEU in the constitutional construction of the European project. Perhaps the best explanation of the limited interest for the place of the Court in EMU was that the Court was expected to do very little, 32 which indeed it did in the first decade of the euro. The euro did not demand an activist or integrationist Court, as the first two high-profile cases on EMU in 2003 and 2004 showed. 33 In both cases, the Court applied a rather straightforward reading of the Treaties, signalling its unwillingness to be involved in routine EMU disputes. The lack of court involvement in this period was furthermore enabled by an overall lack of

29 Ibid., paras 133–44.
30 Ibid., paras 148–57.
31 Arts 126(10) TFEU (ex 104C EC Treaty) and 263 TFEU (ex 173 EC Treaty).
development of the legal framework of the euro. In 2009, after a decade of monetary integration, the legal framework of the euro still closely resembled the framework as created by the Maastricht Treaty.

In the crisis, as the legal framework of the euro was overhauled through a combination of intergovernmental actions, Union legislation and ECB interventions, the Court was called upon to square the legal circle of euro-crisis law. In Pringle and Gauweiler, under great political and economic pressure, the Court aligned two of the most contentious parts of the crisis-response with the original rules of the euro through an innovative reading of the relevant Treaty provisions. The lines drawn by the Court in these cases now form the background against which negotiations about further euro-reform take place.

Since 2015, after Gauweiler and the approval of the third Greek bailout package, the crisis-atmosphere surrounding the euro has abated. In this post-crisis era, the Court is working through the implications of the reconfiguration of the euro in a steady stream of cases. The Court now appears to take on a more central role in the euro. However, the contradictions and tensions of the earlier phases of monetary integration remain visible: the euro continues to be heavily rules-based without a clear account of the role of the Court therein and the haphazard development of euro-crisis law impedes a clear formulation of the new legal foundations of the euro. Moreover, there remains the fear that this is not a post-crisis but an inter-crisis era.

What this brief account of the process of judicialization of EMU shows is that the question of the appropriate role of the Court in EMU is deeply intertwined with the question of the role of (constitutional) law in EMU. As the role of law took on different manifestations in different times of monetary integration, so did the role of the Court. What is still missing, therefore, despite the various commentaries on the Gauweiler saga, is a comprehensive argument on the appropriate role of the CJEU for

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34 A prominent innovation in this period was the inclusion of the ECB amongst the institutions of the Union in 2009 with the entry into force of the Lisbon Treaty. As was already noted at the time, however, this transformation hardly affected the substantive rules and institutional relations of the ECB, see Bernd Krauskopf & Christine Steven, The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the First Ten Years of Its Existence, 46 Com. Mkt. L. Rev. 1143–75 (2009).


the euro that considers not only the specific functioning of the institutions of the euro (an economic vision of EMU), but also the relation of the Court to the evolution of the legal framework of the euro.38

The ambition of this case note is therefore modest; it does not try to construct a comprehensive theory on the role of the judiciary in EMU. Rather, the aim is to highlight the legal relevance of various aspects of the case in light of earlier judgments on EMU and the overall legal framework of the euro. In other words, it seeks to bring to the fore those elements of the case that any theory on the role of the judiciary in EMU must consider.

4.1 Monetary policy

One of the most noteworthy aspects of the reference of the FCC concerns the issue whether economic effects are ‘indirect’ to the goals of a measure, or whether the effects of a measure can have a bearing on its qualification as a monetary policy measure. This question builds upon the decisions of the CJEU in Pringle and Gauweiler, where the Court mainly looked at the objective of a measure, together with the chosen instruments, to determine the nature of that measure. In Pringle, the CJEU noted that an economic policy measure cannot be regarded as monetary policy, ‘for the sole reason that it may have indirect effects on the stability of the euro’.39 In the reference leading to Gauweiler, the FCC did not question the nature of what would (not) constitute an indirect effect, in response to which the CJEU repeated its line of reasoning from Pringle.40 In the reference in Weiss, the FCC instead places the effects of the measure at the heart of its arguments about the nature of the PSPP.

The FCC discusses the indirect effects in light of the need for effective judicial control of the actions of the ECB in light of the principle of conferral: as the judicial review of the actions of the ECB centres around the objectives and the nature of the measure, the stated objective cannot be accepted as irrefutable proof of the nature of the measure. The FCC thus seeks to employ the economic effects as an indicator for the nature of a measure. Unfortunately, the reasoning of the FCC is not straightforward. It first argues that ‘such effects [on economic policy] can only be considered “indirect” when they are connected to the challenged measure only through additional intermediate measures and when they do not constitute consequences that are

39 Pringle, supra n. 35, para. 56.
40 Gauweiler, supra n. 1, paras 52 & 59.
foreseeable with certainty. The FCC then reformulates its position by stating that the effects of a measure cannot be considered indirect ‘if the economic policy effects of a measure are intended or deliberately accepted, and these effects are at least comparable in weight to the monetary policy objective pursued.’ In essence, the FCC wants to know when the knowingly accepted economic effects overshadow the stated objective of a measure. Rather than using a balancing test to examine the proportionality of the measure, the FCC suggests a balancing test to determine the nature of the measure, thus examining together different elements of the judicial review under Articles 119 and 127 TFEU.

The CJEU rejects the view of the FCC on indirect effects. First, the CJEU misinterprets the reference of the FCC as suggesting that effects that are knowingly accepted cannot be qualified as indirect. This can indeed be easily rejected. If the ECB could not adopt measures that it knows has economic effects, it would indeed be impossible for the ECB to conduct a proper monetary policy. Second, the Court repeats its view that monetary policy necessarily has economic effects on interest rates, bank refinancing conditions and the refinancing conditions of Member States with a deficit. Therefore, the ECB may seek such effects in order to achieve its goal of maintaining price stability. It appears that for the Court the economic effects that form part of the transmission mechanism between Eurosystem measures and price levels cannot be considered indirect effects.

What is thus not in dispute between the FCC and the CJEU is the fact that the economic effects were deliberately sought by the ECB and that these effects are connected to price levels. Rather, what is contested is whether the size or weight of the economic effects can be used to show that the stated objective did not accurately reflect the nature of the measure.

The difficulty with the position of the FCC is that is unclear at what point the economic effects are of such a magnitude that they overshadow the monetary policy objective. The FCC compares in its reference the economic effects with the monetary policy objectives without any indication of the scales against which both are measured, and thus how they can be compared. Moreover, the FCC does not submit any evidence on the actual effects of PSPP, but assumes the effects based on the volume and modality of the monthly purchases. Hence, the danger is that in the pursuit of effective judicial review an arbitrary limit is set to the competence of the ECB to conduct monetary policy.

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41. FCC, 2 BvR 859/15, supra n. 19, para. 119.
42. Ibid.
43. See ibid., para. 121, where the FCC applies its framework, first, by asking whether the effects were deliberately accepted, and second, by weighing the economic impact of the measure.
44. FCC, 2 BvR 859/15, supra n. 19, para. 121. The FCC does refer to the economic evidence regarding the de facto certainty of the MS that a part of their bonds will be purchased, provided earlier in the reference. This does not include a discussion of the size of the actual effect of this de facto certainty.
Despite these difficulties with the position of the FCC, the response of the CJEU is also disappointing. The CJEU dismisses the approach of the FCC to indirect effects, but does not provide an alternative view on indirect effects, nor does it sketch out any other mechanism of refuting the stated objective. The CJEU thus relies for its review of the nature of PSPP primarily on its stated objective. As such, the CJEU fails to take seriously the possibility that the ECB actually pursues other objectives under the guise of pursuing price stability, or that the economic effects are disproportional to the monetary policy objective. A more fruitful approach would have been to reject the approach of the FCC on narrower grounds, but leave intact the possibility of a balancing exercise that compares the economic effects of a measure to the stated monetary policy objectives. This could invite references that suggest a workable standard of comparison, corroborated by appropriate evidence. Moreover, the misunderstanding of the reference of the FCC can be construed as ill-mannered and impeding proper judicial dialogue. The roles appear to be reversed from the Gauweiler case, where the FCC was accused of taking a less than amicable approach by threatening to disregard a ‘wrong’ answer from the CJEU.45

This is not to say that the CJEU is wrong in its conclusion about PSPP as a measure of monetary policy. Especially given the experience of other central banks with quantitative easing, the persistence of low inflation, the failure of other instruments to achieve the goal of price stability, the maintenance of purchase limits, and the limited size of the purchases in comparison to, for example, the Euro area GDP, there are few indications that the ECB in this particular case acted outside its mandate.

### 4.2 Proportionality

The parameters for the proportionality review are largely based on Gauweiler, meaning that the emphasis lies on the suitability and necessity test, with a small role for a proportionality test _strictu sensu_. In any case, the proportionality review does not examine the relation between the size or weight of the economic effects of the measure in relation to the monetary objectives. This section first examines the difference between OMT and PSPP, before turning towards two specific aspects of the review, namely the obligation to state reasons and the lack of loss sharing.

As noted above, PSPP was dubbed an unconventional monetary policy measure. The indication of ‘unconventional’ is not, however, a legal term (yet). Neither in Gauweiler or Weiss does the Court use the term. In Gauweiler, the unconventional nature of the measure was nevertheless a prominent feature as the objectives of

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45 Alexander Thiele, _Friendly or Unfriendly Act? The ‘Historic’ Referral of the Constitutional Court to the ECJ Regarding the ECB’s OMT Program_, 15 G.L. J. (2014).
OMT were safeguarding the singleness of monetary policy and the monetary policy transmission mechanism. OMT concerned the conditions under which (ordinary) monetary policy would be effective. For the proportionality analysis, this meant that OMT could be analysed in relative isolation from the other tools of monetary policy. PSPP is, in this regard, a little less unconventional, as its goal is to boost inflation levels. This raises the question of the legal relation of PSPP with other monetary policy tools.

From a policy perspective, PSPP has been defended as necessary due to the zero-lower bound of interest rates and the ineffectiveness of other monetary policy measures. As the main interest rates set by the ECB become (too) negative, banks will resort to cash for storing liquidity surpluses, thus limiting the possibilities of using interest rates to influence monetary conditions. Other policy tools exist and have been used by the ECB, such as forward guidance, (Targeted) Long Term Refinancing Operations and asset purchases of other types of bonds. The effectiveness of these measures is also limited for various reasons, hence the turn to PSPP. This, then, is the monetary policy narrative on the adoption of PSPP, as for example told by ECB President Draghi at the adoption of PSPP. The insufficiency of other tools warranted the adoption of PSPP.

The CJEU adopted this analysis in its proportionality review. First, in the suitability test, it notes the persistent low levels of inflation, ‘in spite of the [adopted] monetary policy measures’. In the second leg of the proportionality review, the Court is even more explicit when it notes that ‘it does not appear that the ESCB’s objective could have been achieved by any other type of monetary policy measure entailing more limited action’. Large-scale bond purchases are therefore an ultimum remedium in the face of deflation.

By comparing the PSPP to other monetary policy measures and accepting it on the grounds that less extensive measures would not have been able to achieve the same results, the CJEU suggests that there is a scale of monetary policy measures ranging from limited to extensive measures. Moreover, the ECB is obliged, under the proportionality principle, to choose the most limited measure that can achieve the pursued objectives.

For the PSPP, with the 2.1tn euro worth of bond purchases, it is not difficult to argue that this should indeed be qualified as a measure entailing extensive action. In

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47 Draghi, supra n. 13: ‘Thus, today the adoption of further balance sheet measures has become warranted to achieve our price stability objective, given that the key ECB interest rates have reached their lower bound.’ It should be noted that Draghi did not mention the ‘spectre of deflation’, but rather spoke of the indicators of inflation at their ‘historic low’.
48 Weiss, supra n. 1, para. 81.
other cases, however, it would be more difficult to distinguish between measures on this scale. As the (in)famous ‘whatever it takes’-speech by Draghi and the OMT program show, modern monetary policy is as much about expectation management as it is about forceful action. 49 Perhaps, in future cases, the CJEU will retroactively consider the PSPP an unconventional measure in order to justify why more conventional measures are not subject to a comparative review under the proportionality principle.

4.2.1 Statement of Reasons

In his analysis of the case, Advocate General Wathelet made extensive use of the minutes of Governing Council meetings to substantiate his arguments. Most prominently, the minutes of the Governing Council serve to show that the ECB has fulfilled its obligation to state reasons. 50 According to the Advocate General, the reasons for PSPP were disclosed in a clear and unequivocal fashion either in the recitals of the decision, the introductory statement to the press conference of Draghi or in the minutes of the Governing Council meeting of 22 January 2015.

The CJEU takes a more circumspect view on the minutes of the Governing Council. The reasons given in the decisions were ‘supplemented’ by various publications of the ECB, including the minutes of the Governing Council. 51 These additional materials ‘clarified’ successive decisions on the PSPP. The minutes furthermore contain ‘explanations’ on the fluctuating size of monthly bond purchases and ‘show’ that side-effects of the program were taken into account.

The meeting of 22 January 2015 was coincidentally the first meeting of which the minutes were published. The ECB had announced in July 2014 that it would start publishing the minutes of Governing Council meetings and in December 2014 provided details on how it would do so. 52 The minutes, published four weeks after the meeting, start with an overview of financial, economic and monetary developments, followed by policy options presented by a member of the Executive Board.

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51 Weiss, supra n. 1, para. 36. The introductory statements of the President of the ECB at the press conferences following Governing Council meetings are used in a similar way by the Court. Relevant considerations in this regard are that the Governing Council discusses the introductory statement and that the statements are available immediately.

The ensuing debate in the Governing Council is covered by the minutes in unattributed form, with statements like ‘the members generally shared the assessment that’ or ‘some members argued’.

The minutes provide insight into the ongoing debates on monetary policy within the Governing Council. As such, they add a modicum of transparency to an otherwise opaque institution.\(^{53}\) The legal standard for the statement of reasons, however, is that it is clear and unequivocal.\(^{54}\) To what extent the opinion of some members of the Governing Council can unequivocally be attributed to the ECB is unclear. Moreover, the obligation to state reasons has a purpose beyond the judicial review of the Court, namely to inform the persons concerned with the measure.\(^{55}\) It is unclear how the reasons for a specific decision can be located within the minutes, except with the help of the ECB in the context of a judicial procedure. Another problematic aspect in this regard is that the minutes are only published four weeks after the meeting of the Governing Council. For persons challenging acts of the ECB on the basis of Article 263 TFEU, this reduces their ability to effectively challenge legal acts that concern them directly.

Hence, the approach of the CJEU to the minutes of the Governing Council should be preferred over the approach of AG Wathelet, as it emphasizes the need to have the reasons for a measure outlined in the measure itself. The minutes can serve a supportive role in the procedures before the Court but cannot fulfill the obligation to state reasons.

4.2.2 Loss Sharing

In addition to the suitability and necessity tests, the Court in Gauweiler applied a strictu sensu proportionality test, namely whether the measure in its implementation does not have disadvantages that are manifestly disproportionate to the objective of the measure. In Gauweiler, the test was introduced and completed in a short paragraph; in Weiss it leads the Court to discuss the potential losses that might ensue from PSPP.\(^{56}\) The FCC had raised in its reference a question about the conformity of unlimited risk sharing with Articles 123 and 125 TFEU.\(^{57}\) By dismissing that question as hypothetical and engaging with the issue of loss sharing through the lens of proportionality, the Court apparently tried to sidestep a thorny constitutional debate and endorse the


\(^{54}\) Gauweiler, supra n. 1, paras 69–70.

\(^{55}\) Ibid., para. 125.

\(^{56}\) Weiss, supra n. 1, paras 93–100. In Gauweiler, the Court had argued that Art. 33 of the ESCB/ECB Statute regulated the manner in which the losses of the ECB are allocated, without imposing a limit on the risks that the ECB may take. Ibid., para. 125.

\(^{57}\) FCC, 2 BvR 859/15, supra n. 19, paras 132–34.
approach of the ECB in this instance as a pragmatic solution. The result of this approach is rather unsatisfactory, as the motivation for the lack of loss sharing touches upon the constitutional foundations of EMU, that is, the distribution of powers between the Union and the Member States, as regulated by the EU Treaties. By approving the approach of the ECB, even in narrow terms, the CJEU appears to approve the constitutional reading of the mandate of the ECB. This would already be problematic in and of itself: statements on the constitutional setup of the monetary union ought to be expressed clearly and be properly justified. In this case, it is especially problematic, as the position of the ECB, and by implication the CJEU, appears to contradict a foundational pillar of the Gauweiler case.

As can be gleaned from the minutes of the Governing Council, as well as from public statements of members of the Governing Council, the topic of risk sharing was a key issue in discussions on the PSPP. In the Governing Council meeting of 22 January 2015, ECB Executive Board Member Praet suggested that a continuum of options was available, from full loss-sharing to no loss sharing for the bonds held by the NCB’s. The chosen option was defended by the argument that ‘a regime of partial loss sharing would be more commensurate with the current architecture of Economic and Monetary Union and the Treaties under which the ECB operates.’ ECB Executive Board member Benoît Cœuré argued later: ‘we have taken into account the specificities of the euro area, meaning that we operate in an environment of decentralised national fiscal authorities, and the ECB has no mandate to engage in large-scale pooling of fiscal risks’. To examine the legal issue at play, it is necessary here to first examine the legal background of loss sharing in the ESCB and the manner in which the ECB has applied the legal framework. It should first be noted that the ECB has wide discretion to decide upon the manner in which monetary policy is executed, either through the ECB itself or through the NCB’s. The loss sharing provisions are, however, slightly

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60 In the European Parliament, Draghi argued that this: ‘takes into account the unique institutional structure of the euro area, in which a single currency and a single monetary policy co-exist alongside 19 national fiscal policies.’ European Parliament, Committee on Economic and Monetary Policy, Monetary Dialogue with Mario Draghi, president of the ECB, 2 (15 June 2015). Also see Jean-Victor Louis, The EMU After the Gauweiler Judgement and the Juncker Report, 23 Maastricht J. Eur. & Comp. L. 55, 66 (2016).


62 Art. 14(3) ESCB/ECB Statute.
different for monetary policy measures executed at the central or decentral level. Losses from monetary policy executed at the central level are offset, first, against the profits made in that year, then by general reserve fund of the ECB and lastly, upon decision of the Governing Council, against the monetary income of the NCB’s of the relevant financial year. 63 On the decentral level, the NCB’s can be indemnified in exceptional circumstances for specific losses incurred in the execution of monetary policy upon decision by the Governing Council.64

ECB President Draghi acknowledged in response to questions from the press on 22 January 2015, that the ECB has in the past indeed indemnified losses from NCBs.65 However, he also stated that: ‘[t]here is a combined ruling coming from the statutes of the ECB and from a Governing Council decision that a default mode is a full risksharing mode.’ This view is corroborated by statements in the annual reports of NCBs. The German Bundesbank, for example, noted in its annual report of 2011 that losses are ‘customarily borne jointly, dependent on a decision of the ECB Governing Council’.66

At issue here is the discretion of the ECB in attributing the losses and profits of monetary policy, in particular the reasons under which the ECB may decide upon the allocation of losses. 67 An appropriate consideration for the ECB in this regard is the effectiveness of the policy itself. For OMT, full risk sharing was considered a requirement for its effectiveness. For PSPP, however, risk sharing was not considered necessary for its effectiveness.

Under dispute then is whether the ‘singleness’ of monetary policy must be taken into consideration in the decision upon the allocation of losses. Especially economists have been vocal in their opposition to the lack of loss sharing on the basis that it would undermine the singleness of monetary policy. For example, Buiter argued that: ‘Profit and loss sharing is essential for a viable monetary union. The Eurosystem’s steady drift away from profit and loss sharing adds to the list of existential risks faced by the euro area during the coming years.’68 The fear is that a lack of loss sharing would isolate an NCB within the Eurosystem in case of severe losses that can result from sovereign default. Hence, the exclusion of risk sharing is not disconnected from the integrity of the Eurozone and the singleness of monetary policy.

63 Art. 33(2) ESCB/ECB Statute.
64 Art. 32(4) ESCB/ECB Statute.
66 German Bundesbank, Annual Report 2011, at 49.
67 In effect, this discretion concerns two decisions, firstly, the level at which a policy is executed, and secondly, if a policy is executed at the decentral level, whether an NCB is indemnified for losses resulting from that policy.
Draghi had denied this concern at the press conference on 22 January, arguing that the loss sharing regime: 'has nothing to do with the singleness of the monetary policy, because the decisions are being taken by the Governing Council with a euro area focus …' 69 This is a rather procedural interpretation of what a ‘single’ monetary policy is. In Gauweiler, the CJEU endorsed the more substantive perspective of the ECB on the singleness of monetary policy, arguing that ‘dispelling unjustified fears about the break-up of the euro area’ was likely to facilitate the singleness of monetary policy. 70 Maintaining a single monetary policy is in this view more than just a central decision maker setting the policy for the Eurozone; it also implies a responsibility for maintaining the integrity of the Eurozone. By accepting the statements of the ECB on loss sharing without scrutinizing the underlying motivations and constitutional concerns, the CJEU thus appears to validate an inconsistent approach of the ECB towards its responsibility for the maintenance of a single monetary policy.

4.3 THE PROHIBITION OF MONETARY FINANCING

In Gauweiler, the Court took into account several aspects in its review whether a measure lessened ‘the impetus of the Member States concerned to follow a sound budgetary policy’ and thus violated Article 123 TFEU. The relationship between these several aspects was ambiguous, thus leaving doubt about the exact standard. Weiss offers some help in this regard, but also raises new questions.

The first question in Gauweiler was whether the measure shields the MS against market pressure. 71 What was important for the Court was that the measure in question would not affect the necessity of MS with a deficit to rely on the market for their financing; changes in their policies would thus continue to be under scrutiny from the financial markets. MS could not have the certainty that their bonds would be purchased in the future and the measure could not lead to a harmonization of interest rates amongst MS regardless of their economic situation. 72 Secondly, it was apparently relevant to the Court in Gauweiler that the measure was accompanied by several guarantees that limited the impact of the measure on the impetus to conduct sound budgetary policies. A precise standard was not provided for these guarantees. 73

69 Draghi, supra n. 13.
70 Gauweiler, supra n. 1, paras 76–77.
71 Ibid., para. 114.
72 Ibid., para. 113.
73 Ibid., paras 115–20.
In Weiss, it is clear that what matters for the Court is the lack of certainty for MS that their bonds will be purchased in the future and the resulting need of the MS to rely on the markets for the financing of their deficits. This provides consistency as to what is expected from the ECB with regard to government bond purchases, but lowers the intensity of the judicial review. First, the Court no longer refers to the requirement that the implementation does not lead to an unwarranted harmonization of interest rates. An explanation for this omission is that such an examination would lead the Court to examine conflicting and complex economic research on the actual effects of PSPP on the financing conditions of the MS, and that the Court sought to avoid such engagement. In light of this strategy to avoid becoming entangled in difficult economic arguments, it is surprising that the Court in Weiss at the outset of the review of compliance with Article 123 TFEU stressed that the need for safeguards depends also 'on the economic context in which that programme is adopted and implemented.

Second, the lack of certainty for MS is proven primarily through a combination of the objective of the measure and formal aspects of the program that show, for example, that the Member State has to rely ‘chiefly’ on the markets for its deficit financing. These aspects are examined with regard to their effect on the MS deficit financing in abstracto. Whereas the reference of the FCC aimed to show the de facto certainty that their bonds will be purchased, the Court limits its review to the existence of de jure limits to the program, imposed by the ECB itself. For the review of OMT an examination of the effects of the guarantees in practice was impossible because the program had not been implemented. For PSPP, the refusal to examine the de facto effects of the program or the actual use of the discretion of the ECB in the implementation of the program signals again the retreat from a strict review of the actions of the ECB.

74 The concept of uncertainty is also the pivotal in the assessment of whether purchases on the secondary market have an equivalent effect as direct purchases; see Weiss, supra n. 1, paras 115, 116, 117, 126 and 128.

75 That the CJEU in Gauweiler considered the interest rates relevant, was probably a response to the framing of the question by the FCC in that case. See Paul Craig & Menelaos Markakis, Gauweiler and the Legality of Outright Monetary Transactions, No. 5/2016 Oxford Legal Studies Research Paper, 10 (2016). Also see Vestert Borger, Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler, 53 Com. Mkt. Rev. 139, 190 (2016).

76 Weiss, supra n. 1, para. 108. The ‘economic context’ is only mentioned by the Court when explaining that the purchase of bonds with a negative yield does not violate Art. 123 TFEU, but actually helps reduce the likelihood that private operators can identify with certainty which bonds will be purchased by the Eurosystem by broadening the range of eligible bonds.

77 Weiss, supra n. 1, para. 141.

78 FCC, 2 BvR 859/15, supra n. 19, paras 81–92.

79 Weiss, supra n. 1, para. 139.
4.3.1 Purchase Limits

The purchase limits set by the ECB for the PSPP are relevant for the CJEU in the proportionality review and for the prohibition of monetary financing. In both cases, it is unclear how important the purchase limits are for the Court. They are part of a list of factors that the Court considers relevant. As such, it cannot be stated that the purchase limits are a necessary part of the program, or that the chosen percentages cannot be increased.

By not discussing the purchase limits in detail, the Court also avoids settling an ongoing debate about the participation of the Eurosystem in debt restructuring. With the purchase of government debt, the Eurosystem runs the risk of becoming entangled in sovereign debt restructuring. Debt restructuring is a way for a MS to reduce its debt burden and it can be necessary for the debt sustainability of a MS. As debt restructuring can be a chaotic process, the Member States decided early on in the euro-crisis to introduce Collective Action Clauses in new bonds. Such clauses provide for a restructuring of (a series of) government debt through a vote of the bondholders and are supposed to provide for a more orderly way of dealing with excess government debt in moments of crisis. Whereas losses for the Eurosystem resulting from a restructuring based on a CAC are not in themselves problematic, the issue is whether the Eurosystem may actively participate in such a restructuring, in light of the prohibition of monetary financing. If the Eurosystem would agree to a restructuring of a sovereign bond it held, that could be seen as tantamount to providing financial aid to a Member State. On the other hand, if the Eurosystem were to block a restructuring of debt that has the support of other market participants, the Eurosystem could be accused of frustrating the functioning of government debt markets.

By installing purchase limits, the ECB sought to avoid getting into a situation where it could have a veto on orderly debt restructurings. This suggests that the ECB would refuse to actively support the restructuring of government debt. It is doubtful, however, whether this strategy actually allows restructurings to proceed without the participation of the ECB; the opposition of the ECB to restructuring can significantly increase the percentage needed amongst the other bondholders in favour of restructuring.

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80 Ibid., paras 89, 124, 125 and 143.
81 Statement of the Eurogroup of 28 Nov. 2010. Also see Art. 12(3) Treaty Establishing the European Stability Mechanism.
83 See the discussion in Matthias Goldmann, Debt Restructuring in the Light of Pringle and Gauweiler – Flexibility and Conditionality, in ESCB Legal Conference 2016 (2016).
84 Recital 5 Decision 2015/774.
85 Goldmann, supra n. 83, at 84; Borger, supra n. 75, at 186.
86 Martinelli, supra n. 82, at 16.
Hence, the silence of the Court in this regard leaves room for the ECB to modify its stance towards the purchase limits. As the ECB’s toolbox remains depleted, it will come under pressure to do so in case of new economic problems for the Eurozone.

4.3.2 Holding Until Maturity

In its final decision on the legality of OMT, the FCC declared that the holding of purchased government bonds until maturity would have to remain an exception and based on a monetary policy objective. Regularly holding bonds until maturity would suggest that the ECB would accept default risks. In the reference in Weiss, the FCC deepened its position by arguing that holding bonds until maturity would neutralize their effect on the markets. The CJEU refuted the FCC: the ESCB is not obliged to consider the holding of the bonds until maturity as an exception. On the basis of the objectives and characteristics of an open market operation, the ECB should decide whether selling is appropriate under that program.

The statement by the CJEU is consistent with the rest of the decision, but nevertheless leaves much to be desired. Notwithstanding the generally reluctant approach of the CJEU to formulating limits to the discretion of the ECB to conduct its policies, the legal analysis of PSPP by the CJEU itself leads to several such limits that may be relevant to the topic of the holding of bonds until maturity. The Court does test whether holding bonds until maturity might lessen the impetus for MS to conduct sound budgetary policy, but does not examine explicitly other requirements for the conduct of monetary policy. Two are particularly relevant here. First, in its discussion on the proportionality of PSPP, the CJEU noted the risk of losses involved in the purchase of government bonds and enumerated several safeguards imposed by the ECB to limit that risk. The ending of purchases in January 2019 does not mean that the risks of the PSPP have disappeared, as the bonds are still on the balance-sheet of the ESCB. As part of its general obligation to prevent damages that are manifestly disproportionate to the PSPP’s objective, the ESCB can therefore be considered to be under the obligation to continue to minimize the risk of losses.

88 FCC, 2 BvR 2728/13, judgment of 21 June 2016, DE:BVerfG:2016:rs20160621.2bvr272813, para. 195. Moreover, the FCC found that ‘market participants may not have certainty that the purchased bonds will be held until maturity’ (para. 202).
89 FCC, 2 BvR 859/15, supra n. 19, para. 98.
90 Also see Weiss, supra n. 1, para. 90.
91 Ibid., para 151–52.
92 Ibid., paras 93–94.
93 Bonds purchased under the PSPP program have, on average, a longer remaining maturity than those that were bought under the SMP program. See ECB, supra n. 8.
stemming from the holding onto government bonds. Obviously, selling the bonds would be the most effective method to dispose of the risks. This does not mean that the ECB is obliged – as a rule – to sell the bonds, but rather that the ECB has to award due priority to the selling of the government bonds, as part of, and not contrary to, its monetary policy mandate.

Secondly, and more generally, the proportionality of PSPP was considered in light of other monetary policy measures entailing more limited action. In effect, the ECB maintains the PSPP as an ongoing program until it sells the bonds that were purchased through it, or until the bonds mature. The question is therefore whether the ECB is obliged to speed up the end of the program under the principle that limited action is preferred over more extensive action. As the CJEU clearly indicated, more limited action by the ECB is preferred over more extensive action. It would follow the approach of the CJEU to then also demand that the ECB prioritize ending or reducing an ongoing extensive program in favour of other monetary policy tools. Again, this obligation is integral to the general obligation of the ECB to conduct monetary policy with the goal of maintaining price stability.

Beyond these two arguments that follow directly from the Courts own assessment of the legality of PSPP, another argument, based on the General Court’s decision in Accorinti, can be made to oblige the ECB to not regard the holding of bonds until maturity as default policy option. At issue in Accorinti was the legality of the participation of the ECB in a debt swap with the Greek government that protected the ECB from the restructuring of Greek debt. The General Court held that the position of the ECB could not be compared to ordinary creditors and that the swap protected the financial integrity of the Eurosystem. The latter aspect brings to light another goal of the prohibition of monetary financing, other than to encourage MS to follow a sound budgetary policy, namely to protect the ECB and strengthen its independence. As the purchase and holding of government bonds by the Eurosystem can negatively affect its relationship with national governments, the Eurosystem has a strong interest to minimize its holding of such debt.

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94 T-79/13 Accorinti v. ECB [2015] EU:T:2015:756, paras 93–94. See also para. 86 where the ECB had apparently argued that the debt swap was necessary to protect the independence of the Eurosystem (Art. 130 TFEU). Moreover, the second question of the FCC also hints at a broader understanding of Art. 123 TFEU by focusing on the institutional dynamics that might accompany the purchase of government bonds.

95 This dual aim is reinforced by the location of the prohibition in the Treaties. Whereas the Court mainly refers to Art. 123 TFEU, which is placed in Ch. 1 ‘Economic Policy’ of Title VIII, the text of the prohibition is reproduced in Art. 21 of the ESCB/ECB Statute.
5 CONCLUSION

This case note has shown that the Court in several ways has sought to limit the scope and intensity of its review of ECB actions. Most of the changes in the review, as compared to the previous case, are subtle and result from using the same approach for PSPP as for the review of OMT, which ignores that the former has actually been implemented and thus offered different opportunities for review. The most prominent aspect of the decision is the rejection by the CJEU of the approach of the FCC for examining the nature of a measure as economic or monetary. This rejection leaves the Court vulnerable to the charge that its review is primarily based on the objective of a measure, as provided by the ECB itself. Regarding the prohibition of monetary financing, the Court shied away from examining whether the measure resulted in an undue harmonization of interest rates on MS bonds. Instead, the Court limited its review to a discussion of the modalities of the measure.

As noted at the outset of the commentary, the evaluation of the strategy of the Court in Weiss will depend to a large extent on one’s position regarding the appropriate role of the courts in reviewing ECB action. It was also noted there that a comprehensive argument concerning the role of the Court and the role of law for EMU is still absent. The aim of this case note has therefore been to highlight the legal manoeuvres of the Court and point out peculiarities in the legal reasoning of the Court that both opponents and proponents of stricter review of the actions of the ECB by the Court should engage with.

One of the most noteworthy aspects of Weiss is perhaps the absence of any acknowledgement of the historical time in which it is handed down. In this aspect as well, Weiss builds on its predecessor. Again, the repetition tells us something new. Despite the existential crisis raging through the Union in 2015, the Court refrained in Gauweiler from using the crisis circumstances to justify an expansive interpretation of Treaty provisions. The Court thus navigated the crisis by ignoring it, at least in its interpretation of the Treaties. The actions of the ECB were warranted by the centrifugal forces acting upon the Eurozone, but the crisis did not affect how the Court looked at the Treaties. The Court even referred – unconvincingly – to the travaux préparatoires of the Maastricht Treaty to show that the crisis-fighting measures were foreshadowed by the Maastricht Treaty. The position of the Court in Gauweiler is best understood not by reference to its reasoning, but to the tremendous pressure resting on the Court. Invalidating OMT could have meant the end of the euro. Since 2015, the crisis has abated and outside the context of a crisis, courts have more opportunities to (re-)assert their control. Courts that take a step back at the moment of crisis, can reclaim their position post-crisis. Before Weiss, the possibility persisted that the Court would retroactively recognize the crisis and use the end of the crisis to impose a stricter review on the actions of the ECB. After Weiss, this possibility no longer exists.