PROPORTIONALITY IN THE *PSPP* AND *WEISS* JUDGMENTS: COMPARING TWO CONCEPTIONS OF THE UNITY OF PUBLIC LAW

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This article compares the conceptions of proportionality in the Weiss judgment of the Court of Justice of the European Union (ECJ) and the PSPP judgment of the German Constitutional Court (GCC). It will be pointed out that the two courts embrace a quite similar view when it comes to the structure of the test for proportionality, but a different one on the intensity of review. While the ECJ accepts a minimalist 'manifest error' standard of review, the GCC performs a more demanding scrutiny. As a result, the two judgments expose different conceptions of the "unity" of public law: all decisions by public authorities can become the subject of judicial scrutiny through a proportionality assessment, but the intensity of review can vary greatly. This, in turn, brings about serious consequences for the relations between reviewing and reviewed authorities. Finally, it will be claimed that the inner limitations of proportionality make strong views on the "correct" method for carrying out the test problematic.

Keywords: proportionality, *PSPP*, *Weiss*, deference doctrine, standard of review

I. INTRODUCTION

In this article, I compare the proportionality assessment performed by the German Constitutional Court (GCC) in the pivotal *PSPP* decision[1] to that used by the Court of Justice of the European Union (ECJ) in the earlier *Weiss* judgment regarding the Public Sector Purchase Program (PSPP) by the European Central Bank (ECB).[2] The GCC famously ruled that the *Weiss* decision was *ultra vires* and criticised its proportionality assessment. I will

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1 BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15 -, paras 1-23.

2 Case C-493/17 *Weiss and others v Bundesregierung* EU:C:2018:114.

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focus on this disagreement to argue that the concept of proportionality is flexible enough to accommodate different interpretations and that it is questionable whether it is possible to draw substantive conclusions based on methodological disagreements as to the proportionality assessment.

To do so, I will first briefly recapitulate the broader context of the *Weiss-PSPP* saga (section II) and then compare the proportionality assessments employed (section III). I will then move to the two substantive claims of the article. First, that depending on how the assessment is performed, the relations between the reviewing and the reviewed authorities change considerably, ranging from deference towards the rule-maker's choices to a much more intrusive review (section IV). In contrast to jurisdictions in which public law is "bifurcated" by the coexistence of different standards of review, in the context of the European Union (EU) and of Germany, the general application of proportionality engenders a certain unity of public law. In other words, unity derives from the extension of instruments of judicial control initially conceived for administrative law, like proportionality, to the constitutional level, so that no area of public law is left unconstrained. Beneath the surface of alleged unity, however, the flexibility of proportionality allows duality to appear again. Through proportionality, the reviewing authorities (usually the judiciary) have the discretionary power to leave a wider or a narrower margin of maneuver to those under review (the legislative or the executive). The comparison between *Weiss* and *PSPP* illustrates this point.

Second, proportionality itself does not recommend or prescribe a specific level of scrutiny. It is up to the reviewing authority to choose how to structure the test. Since this choice is discretionary, serious doubts arise as to any claim of "objective" methods to assess proportionality (section V). As a result, the view expressed by the GCC that alternative reconstructions of proportionality are methodologically mistaken is questionable.

II. Background and Reasoning

As the context of the two decisions is well known, I will limit this section to a few recapitulating remarks. On 22 January 2015, the ECB Governing Council announced the PSPP program as part of the broader Expanded Asset Purchase Program (EAPP), with the aim of increasing monetary supply and

inflation, to ultimately reach the target of a 2% inflation rate in the Eurozone. The PSPP was established by means of the ECB's Decision 2015/774 and allowed for purchase of public sector securities on the secondary market. Four different groups of complainants indirectly challenged the decision by alleging that German constitutional authorities (the Federal Parliament, the Federal Government, and the German Federal Bank) were not faithful to their responsibilities towards European integration by not taking steps against the implementation of the program in Germany. On 18 July 2017, the Second Senate of the GCC suspended the proceedings and referred to the ECJ *ex* article 267 of the Treaty on the Functioning of the European Union (TFEU). It asked five questions regarding the possible violation of articles 123(1) TFEU (preventing direct monetization of public debt), 119 and 127(1 and 2) TFEU (restricting ECB's competences to monetary policy only), 125 TFEU (preventing mutualization of Member States' public debts), 4(2) of the Treaty on European Union (TEU, preserving Member States' national identity), 5(1) TEU (principle of conferral), and 5(4) TEU (principle of proportionality). The ECJ issued its *Weiss* judgment on 11 December 2018 and no violation of the Treaties was identified. The ECJ also engaged in a long assessment of the proportionality of Decision 2015/774.[3]

The GCC received the preliminary ruling and issued its final decision on 5 May 2020. According to the Federal Court, *Weiss* had to be declared *ultra vires*. While the primary responsibility for the interpretation and application of EU law fell to the ECJ, in extreme circumstances the GCC considered itself justified to step in. Article 123 TFEU was not infringed, but according to the GCC, the proportionality assessment in *Weiss* failed to hold the PPSP program accountable: it was manifestly untenable from a methodological perspective. In particular, the assessment failed to give consideration to a series of competing economic interests affected by the program: the monetary measures within the PSPP had a wide economic impact and the ECB did not employ a sufficiently detailed proportionality assessment considering the effects on competing interests, nor did the ECJ require the ECB to do this.[4] As a result, the *Bundesbank* (German Federal Bank) would no longer be entitled to participate in the PSPP in three months, unless the ECB

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3 *Weiss* (n 2) paras 71-100.

4 BVerfG (n 1) para 133.

Governing Council adopted a new decision demonstrating the proportionate character of the measures.

III. Analysis: Two Roads to Proportionality

Having set the scene, I now focus on the comparison between the two conceptions of proportionality. These are interesting because they epitomize two different understandings of proportionality and of its role in public law. Proportionality is an argumentative structure aimed at assessing whether a certain decision is acceptable in pursuing some legally recommendable goals, while at the same time not causing unnecessary or excessive sacrifice of competing interests. It is structured in three[5] or four[6] steps: legitimacy, suitability, necessity, and proportionality *stricto sensu*. The rule of legitimacy prescribes that the goal pursued through a certain public measure shall be itself legally acceptable. According to the rule of suitability, given a measure realizing a certain interest while compromising a competing one, if the measure harms the latter interest while not realizing the former, it is not suitable. As for necessity, given two measures equally suitable to realize a certain principle, other things being equal, one must choose the one which entails the lesser sacrifice for the competing interest.[7] Finally, proportionality in a narrow sense calls for balance between the sacrificed and the realized interests: a large sacrifice would be disproportionate if paired with a modest enhancement.[8]

Did the ECJ and the GCC abide by this argumentative structure? Generally speaking, they did. Yet, they showed a rather different understanding of the correct way to perform this task.

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5 Samantha Besson, *The Morality of Conflict* (Hart Publishing 2005) 451-453. The three-stage test omits the legitimacy assessment.

6 Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 181-204.

7 Both the rule of suitability and that of necessity are instances of the general criterion of Paretian efficiency. See Robert Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 Ratio Juris 131, 135-136.

8 Ibid 135-136. On the various stages of proportionality and their definitions, see also Bernard Schlink, 'Proportionality', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 722-725.

1. Proportionality in Luxembourg: The Manifest Error Test

The ECJ devotes a significant amount of the *Weiss* judgment to the adjudication of whether Decision 774/2015 was proportionate overall.[9] As for its structure, the Court just recalls suitability and necessity,[10] although *de facto* some remarks on proportionality *stricto sensu* are added.[11] Starting with suitability, the Court recalls the documents and observations received by the ECB regarding the appropriateness of the measure to reach the desired inflation target and refers to the recitals of Decision 774/2015.[12] From these materials, the ECJ infers that the means are suitable for the purported aim. As for necessity, the Court claims that, given the context of persistent low inflation and the fruitless deployment of less intrusive measures, no other means would be equally effective.[13] Moreover, according to the ECJ, guarantees of less restrictive application of the PSPP were successfully arranged, namely the not selective nature of the purchase program, its temporary character, the presence of eligibility criteria for bonds' purchase, and the limits on total purchase volumes.[14] As a result, overall, the measure passed the necessity test. Finally, the ECJ considers the proportionality *stricto sensu* of the program.[15] It is pointed out that the ECB balanced various interests and adopted a series of safeguards to ensure that the risk of losses for central banks, which inevitably derives from the open market operations, was mitigated.[16] Apart from the safeguards already mentioned (which also make the PSPP less restrictive), the ECJ recalls the duty on each national central bank to only purchase securities of issuers within its own jurisdiction. Moreover, it points out that shared losses of national central banks are limited to those generated by securities issued by eligible international organizations (by design 10% only of the purchased securities). As a result,

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9 *Weiss* (n 2) paras 71-100. For a wider assessment of *Weiss*, see Annelieke A.M. Mooij, 'The Weiss judgment: The Court's further clarification of the ECB's legal framework' (2019) 26 Maastricht Journal of European and Comparative Law 449, 449-465.

10 *Weiss* (n 2) para 72.

11 Ibid paras 93-100.

12 Ibid paras 74-78.

13 Ibid paras 79-92.

14 Ibid paras 82-89.

15 Ibid paras 93-99.

16 Ibid paras 92 and 98.

the ECJ concludes that the PSPP program did not infringe the principle of proportionality.[17]

The ECJ repeats several times that the adopted scrutiny is the 'manifest error' rule. In other words, and in agreement with Advocate General Wathelet,[18] given the highly technical nature of the issue at stake and the broad discretion enjoyed by the European System of Central Banks (ESCB) and by the ECB in particular on monetary policy,[19] the Court only broadly evaluates the reasonableness of the decision, rather than strictly questioning its correctness. This can be seen when considering the phrases used to assess each stage: 'manifest error of assessment', 'manifestly beyond what is necessary', or 'disadvantages which are manifestly disproportionate' are recurring wordings.[20] These must be coupled with the Court's remarks on the 'duty to state reasons'[21] according to which, although the ECB is obliged to justify its decisions, if an act is of general application, 'a specific statement of reasons for each of the technical choices made by the institutions cannot be required'.[22] To sum up, the ECJ accepts the classic three-step assessment of proportionality, but the degree of scrutiny is cursory and deferent towards the ECB. This is not new, as the Court is known for changing the degree of scrutiny depending on the evaluated measure and for often applying proportionality in a looser manner when the discretionary power of an EU institution is involved.[23]

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17 Ibid paras 100.

18 Case C-493/17 *Weiss and others v Bundesregierung* EU:C:2018:114., Opinion of AG Wathelet, paras 96-101.

19 *Weiss* (n 2) para 73.

20 Ibid paras 78, 79, 81, 86, 91, 92, 93.

21 Ibid paras 30-33.

22 Ibid para 32.

23 See the seminal work by Gráinne De Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105, 115-126 and 146. See also Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16(2) European Law Journal 158, 171-172; Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 138; Robert Schütze, *European Constitutional Law* (Cambridge University Press 2015) 267-268.

2. Proportionality in Karlsruhe: a Comprehensive Assessment

Moving to the GCC, we find a stronger understanding of judicial review.[24] The test is structured according to the classic three-step scheme,[25] but the 'manifest error' degree of scrutiny is rejected. Instead, the court considers that proportionality must compensate for the broad discretion enjoyed by the ECB and the judges must engage in a deep substantive assessment.[26] The argument of the ECJ that deference must be grounded in the technical expertise of the ECB does not occur in the reasoning of the Federal Court: in the several paragraphs of the decisions devoted to proportionality, the GCC talks about the technical nature of the measures only once, and only to recall the position of the ECJ.[27] Overall, the 'self-imposed restraint' and the consequent standard of 'manifest error' makes the review 'not conductive'.[28]

As a result, according to the GCC, the loose proportionality assessment by the Court of Justice is unfit to preserve the principle of conferral. Most importantly, in the hands of the ECJ proportionality becomes 'not comprehensible' from a methodological perspective.[29] The GCC states that the ECJ takes for granted the mere assertion that the PSPP has monetary nature, without questioning the underlying factual assumptions or at least reviewing whether the respective reasoning is comprehensible.[30] Thus, the GGC argues that the ECJ fails to check whether it also is overall proportionate in the light of the competing economic interests at stake. Here, the reasoning of the GCC is slightly unclear: it identifies a decisive problem in the third stage of the test, yet it is difficult to ascertain whether it considers the third stage to be missing[31] or wrongly executed (by not considering some fundamental interests).[32] The most charitable

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24 BVerfG (n 1) paras 123-178. On the consistency of a stronger view of proportionality with the "German" understanding of judicial review, see Mattias Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' (2020) 21 German Law Journal 979, 989.

25 BVerfG (n 1) paras 125-126.

26 Ibid para 140-145.

27 Ibid para 131.

28 Ibid para 156.

29 Ibid para 11, 133, and 141.

30 Ibid para 137.

31 Ibid paras 138 and 141.

32 Ibid para 132.

interpretation here is perhaps that the GCC conceives it as so weak to be practically missing. In any case, the suggestion is that, in order to perform the assessment properly, one cannot just evaluate the risk of central banks' losses but must also look at other affected interests, ranging from the financing conditions of Member States to the risk of financial bubbles and losses for citizens.[33] Finally, according to the GCC, the behaviour of the ECJ is even more incomprehensible and methodologically flawed, given that in many other areas of EU law the ECJ usually takes into account the consequences of institutional decisions and therefore engages in stricter judicial review.[34]

These remarks recapitulating the tests of proportionality performed by the ECJ and the GCC allow us to now move to more theoretical considerations. The adopted standard of review, I argue, changes the relations between the reviewing and the reviewed authorities considerably and is the result of a discretionary choice, since there is no single 'method' of proportionality.

IV. Proportionality and the Unity of Public Law

What we see in the two decisions is divergence in the conceptions of proportionality. There is little novelty in this *per se*: proportionality is known for being open to different interpretations and applications. However, by performing the assessment in different ways, the two courts *de facto* also shape the relations between the reviewing authority (the judiciary) and the one under review (the central bank) in different ways. The ECJ leaves an area of loosely controllable discretion to the reviewed authority, something that the GCC is not ready to accept, and this happens through disagreement on proportionality.

I will illustrate this point by recalling a recent debate in common law jurisdictions regarding the necessity to 'bifurcate' public law by confining the proportionality review to infractions of constitutional rights (standard of correctness). Other cases, involving merely indirect interference with rights, shall instead better be subject to a narrower standard of review (through the *Wednesbury* reasonableness standard).[35] In fact, while the former requires a

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33 Ibid para 170-175.

34 Ibid paras 145-153.

35 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. According to the *Wednesbury* standard, there has been an abuse of discretion when

certain quest for reason-giving on behalf of decision-makers, the latter avoids seeking detailed factual and legal explanations and leaves appropriate room for political decision. Some argue in favour of this bifurcation,[36] while others take the view that proportionality should apply to varying degrees across the entire spectrum of public law.[37]

Comparing the conceptions of judicial review in *Weiss* and *PSPP*, one feels a certain distance from the common law environment: in the continental context, proportionality is extensively accepted, as the GCC itself underlined in the judgment.[38] Here, in other words, we seem to have reached a certain unity of public law,[39] specifically through the idea that, at least in principle, no decision by public authorities is a purely discretionary legal 'black hole', completely exempt from any review. So, reason-giving assessed through proportionality, initially developed in administrative law for justiciable decisions, is now also used at the level of highly discretionary administrative and even legislative decisions. In this sense, the 'administrativization' of constitutional law is quite advanced in Europe and, at least in principle, no legal black hole is admissible,[40] while proportionality goes across the entire spectrum.

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an act of discretion is 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (229).

36 Michael Taggart, 'Proportionality, Deference, Wednesbury' (2008) 3 New Zealand Law Review 423, 425 and 469-480.

37 David Dyzenhaus, 'Proportionality and Deference in a Culture of Justification', in Grant Huscroft, Bradley Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law* (Cambridge University Press 2014), 235-237 and 254-258.

38 BVerfG, (n 1) para 125. Proportionality is in fact an extremely widespread category, part of the 'post-war paradigm', in the words of Lorraine Weinrib, 'The Postwar Paradigm and American Exceptionalism', in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* 96 (Cambridge University Press 2006). Yet, it never fully penetrated common law jurisdictions, such as the USA. See Moshe Cohen-Eliya and Iddo Porat, 'American Balancing and German Proportionality: The Historical Origins', (2010) 8 International Journal of Constitutional Law 263, 264-286. In general, on the difficulties in transplanting proportionality in the English-speaking world, see Malcolm Thorburn, 'Proportionality', in David Dyzenhaus and Malcolm Thorburn (eds) Philosophical Foundations of Constitutional Law (Oxford University Press 2016), 309-313.

39 David Dyzenhaus, 'Baker: The Unity of Public Law?', in David Dyzenhaus (ed), *The Unity of Public Law* (Hart Publishing 2004), 1-2.

40 Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 The American Journal of Comparative Law 463, 487-490.

However, the comparison of *Weiss* and *PSPP* shows that in the continental context of Germany and the EU, the distinction between a standard of unreasonableness and one of correctness (which is also a debate about appropriate deference) translates into one about the proper 'intensity' of proportionality. Thus, in the continental context too '[t]he selection of a standard of review by an appellate or reviewing court signals the degree of deference or latitude that it is prepared to cede to the initial decision-making body',[41] but this happens *within* the proportionality assessment. Thus, no black holes are admitted, yet the possibility of grey areas remains given the different conceptions of proportionality. The flexibility of proportionality allows the interpreter to possibly "break" the unity of public law by applying different standards of review under a common label.

As a result, proportionality might well be, as argued elsewhere,[42] the main tool of the 'culture of justification', so that ideally every exercise of public powers must be substantively justified or justifiable to those affected by the decisions. However, by performing the assessment differently, the reviewing authorities can narrow the distance between the European unity of public law and the view of those arguing for the reasonableness-correctness divide. By leaving a certain discretion to the ECB, the ECJ is close to embracing the latter view, while the GCC rejects it: the difference between *Weiss* and *PSPP* can be understood as a conflict about the role of the judiciary via diverging applications of proportionality.

After noting the significant divergence in different assessments of proportionality, we can move to the question of whether the structure of the test itself privileges one conception over the other for methodological reasons. This, I will argue, is a rather problematic idea.

V. A Matter of Method?

The comparison underlines an inner tension in the GCC's decision. The *PSPP* judgment has a theoretical backbone which goes beyond a mere account of the proper division of competences between the national and

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41 Taggart (n 36) 451.

42 Cohen-Eliya and Porat (n 40) 474-482.

supranational level.[43] That is the conception of the Member States as the masters of the Treaties, involving a strict interpretation of the principle of conferral and a sceptical view of democracy at the EU level. This is not new, as it goes back to the *Maastricht* judgment in 1993.[44] Yet the *PSPP* decision entails something more, namely a strong conception of judicial review as the proper site to display public reason (at least in opposition to administrative bodies). This strong view, in turn, presupposes a certain optimism towards the possibilities of judicial reasoning when analysing public policies. It is slightly ironic that a conception of judicial review as the institutional embodiment of public reason through proportionality, which was suggested as a tool to find an equilibrium between the national and the supranational level,[45] is now used to ground an *ultra vires* decision.

Be that as it may, even if optimism is justified, the GCC's conception does not derive from proportionality itself: the assessment cannot guide the reviewing authority in choosing the appropriate standard of review, i.e. the appropriate degree of scrutiny through proportionality. On the contrary, it leaves open a series of puzzling questions. Should the decision-maker be left with some discretion in choosing the appropriate option among a series of reasonably unrestrictive ones or should they be strictly required to pick the least restrictive one? Should we leave the choice regarding what interests deserve to be balanced to the decision-maker or is it preferable that the judiciary has a say in that? Should we adopt a different standard of review when the institution under scrutiny is an independent agency such as a central bank?[46] Proportionality alone cannot answer these questions.

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43 Consider Vinx's comments on the conception of democracy exposed by the Federal Court in the *Lissabon* judgment. See Lars Vinx, 'The incoherence of strong popular sovereignty' (2013) 11 International Journal of Constitutional Law 101, 114-124. Vinx is tellingly recalled by Pavlos Eleftheriadis, 'Germany's Failing Court' (*Verfassungsblog*, 18 May 2020) <https://verfassungsblog.de/germanys-failing-court/> accessed 10 March 2021, and this might hint at a certain continuity in the Federal Court's view on democracy.

44 BVerfG, decision of 12 October 1993, 89, 155.

45 Mattias Kumm, 'The Moral Point of Constitutional Pluralism', in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 232-242.

46 On the ECB's independency in the context of the *PSPP* judgment see Diane Fromage, 'Weiss: The Bundesverfassungsgericht's over-expansive interpretation of the Bundestag's 'responsibility for integration' and the need to adapt judicial

In the context of the *Weiss-PSPP* saga, it has been noticed that the list of competing interests to be balanced in the third stage might well extend beyond those listed in paragraphs 170-175 of the *PSPP* judgment, for example to include environmental considerations under article 11 TFEU.[47] Therefore, the choice by the ECJ to limit its balancing to central banks' losses might well be arbitrary to a certain extent, but so is that of the Federal Court. More abstractly,

> [t]he assumption that the identification of interests can be divorced from political judgment either results from including all interests asserted by anyone to be relevant or brushes aside the prior question as to who is identifying the 'relevant' interests and according to what standard or criterion.[48]

Similarly, when it comes to necessity, determining that two monetary policies are equally effective, but that one is less restrictive, is not easy. Perhaps it would be more realistic to say that two measures are reasonably analogous in their effects, yet one is less damaging to competing interests.[49] Moreover, if it is true that, as the former president of the Israeli Supreme Court Aharon Barak says, '[t]he objective test [on necessity] is determined, largely, by the standard of common sense',[50] then it will be hard for judges to perform it in a nonarbitrary fashion when the evaluated polices are technically complex.

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review procedures to the E(S)CB's specificities', (2020) *EULaw Live Weekend Edition*, <https://issuu.com/eulawlive/docs/2020_018?e=40736167/78350760> 6-14 accessed 10 March 2021.

47 Antonio Marzal, 'Is the BVerfG PSPP decision 'simply not comprehensible'?', (*Verfassungsblog*, 9 May 2020) <https://verfassungsblog.de/is-the-bverfg-pspp-decision-simply-not-comprehensible/> accessed 10 March 2021. On environmental considerations in ECB's monetary policy, see Javier Solana, 'The Power of the Eurosystem to Promote Environmental Protection' (2019) 30 (4) European Business Law Review 547, 562-575.

48 Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Canadian Journal of Law and Jurisprudence 179, 191.

49 Cass Sunstein, *Legal Reasoning and Political Conflict*, (2nd edn Oxford University Press 2018) 72: 'When two cases appear obviously identical to us, it is because we have disregarded, as irrelevant, their inevitable differences'.

50 Aharon Barak, *Proportionality*, (Cambridge University Press 2012) 327.

The need to draw lines is inescapable, yet these lines are inevitably arbitrary to a certain extent,[51] even more so in intricate matters of monetary policy.[52] The assessment of proportionality involves more than merely applying a pre-structured reasoning which mechanically ensures an appropriate result.[53] Proportionality involves both moral reasoning and the multi-layered evaluation of large-scale policies, which comprises a variety of interests. The judge is required to make inevitably disputable political choices and there seems to be no one right way to assess proportionality,[54] not even for the apex court of the jurisdiction where it was born.[55] This conclusion allows us to ultimately advance the second claim of this essay: criticizing another decision based on methodological considerations seems possible but problematic, since a detailed, single method directly resulting from the concept proportionality itself is non-existent. Consequently, if there is some inevitable discretion in proportionality, then was it so clear that *Weiss* was 'manifestly' mistaken? If not, and given the enduring acceptance by the GCC of a 'manifest violation' standard of review set in *Honeywell*,[56] was the disagreement on proportionality the appropriate justification for an *ultra vires* decision?[57] The even deeper choice on the degree of deference to be shown by the judiciary, which determines the intensity of scrutiny through proportionality, is itself not obvious.

In sum, while it is easier to assess whether the structure of proportionality has been adhered to, adjudicating on the appropriate standard of review

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51 See Webber (n 48) 180: 'Indeed, the way in which the principle of proportionality generates particular conclusions is difficult to discern: concluding whether legislation "strikes the right balance" or is "proportionate" in relation to constitutional rights is, for the most part, asserted rather than demonstrated'.

52 See the comment by Karen Alter, 'Is it a Dance or is it Chicken?' (*Verfassungsblog*, 13 May 2020) <https://verfassungsblog.de/is-it-a-dance-or-is-it-chicken/> accessed 10 March 2021.

53 See Webber (n 48) 196.

54 Considering a continental jurisdiction quite close to Germany, think about the various standards used by the Italian Constitutional Court (balancing, reasonableness, proportionality). See Marta Cartabia, 'Of Bridges and Walls: The "Italian Style" of Constitutional Adjudication' (2016) 8 The Italian Journal of Public Law 37, 53-55.

55 On the German roots of proportionality and its transplant at the supranational level, see Cohen-Eliya and Porat (n 38) 271-276 and Barak (n 50) 175-188.

56 BVerfG, decision of 6 July 2010, 2 BvR 2661/06, paras 55-61.

57 BVerfG (n 1) paras 105-115.

hardly seems a matter of objectivity. Declaring a position such as the ECJ's in *Weiss* not only debatable but manifestly and methodologically mistaken seems, so to say, disproportionate.

VI. Conclusions

In this article, I have compared the different conceptions of proportionality displayed by the ECJ and by the GCC in the *Weiss-PSPP* saga. The flexibility of the assessment allows for a certain difference and the comparison shows a much more deferent approach in the interpretation of the ECJ, while the GCC is willing to use proportionality to scrutinize in detail the content of the decisions by an administrative agency like the ECB.

Based on this comparison, two claims were advanced. First, that through proportionality, the relations between reviewing and reviewed authorities can be shaped differently. Although proportionality is part of a common legal language of public law in Europe, which significantly constrains the removal of decisions from review (especially by the judiciary), still its flexibility allows for grey areas where the level of scrutiny is comparatively quite low. The unity of public law, in which every public decision is in principle subject to scrutiny, is accomplished in different degrees by means of the flexible structure of proportionality.

Second, this flexibility makes any possibility of talking about a single and objective method for performing the proportionality assessment quite questionable. At the very least, proportionality provides an ordered check list of the reasons and issues to consider when assessing a measure, so that it turns out to be an extremely helpful tool in modern public law. But it is no algorithm or theorem. The test has limits and often involves a certain amount of discretion too, which is rather hard to overcome. We should thus question our faith in its heuristic power. As a result, the paragraphs devoted by the GCC to the purported identification of an objective method to assess proportionality seem more puzzling than illuminating.