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Unpacking Legal Accountability: The Case of the European Central Bank

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Abstract

Although the term "legal accountability" increasingly appears in scholarly discourse surrounding the European Central Bank (ECB), it is under-theorised. This article explores three different dimensions of legal accountability, which are often confused. Accountability *to* law refers to accountability to legal rules and standards. Accountability *through* law refers to achieving routes of administrative and political accountability through legal institutions. Accountability *of* law implies the accountability of legal institutions themselves to the wider public (and other courts) for their decisions. We argue that these dimensions are deeply connected in the sense that either improvements or failures along one dimension are easily carried to the others. We demonstrate the argument by applying our concept of legal accountability to ECB activity, comparing judicial review in the context of monetary policy with the Single Supervisory Mechanism. These cases suggest a possible vicious rather than virtuous circle of legal accountability, i.e., a tendency for either unclear legal standards or lack of accountability of courts themselves to undermine accountability for ECB activity as a whole.

Keywords

accountability; banking supervision; European Central Bank; judicial review; monetary policy

1. Introduction

There is by now widespread literature on the accountability of the European Central Bank (ECB; Losada, 2016). More recently, however, a legal dimension has been added to this literature, where accountability emerged

as an anchor concept in legal debates concerning the Bank and its mandate (Bobić, 2024; Dawson, 2023; Goldoni, 2016; Markakis, 2020). In doing so, they connect the involvement of courts and legal rules with a wider institutional context, in which courts seem to complement other institutions in their accountability and policy-making practices.

At the same time, while accountability is heavily theorized and debated (Bovens, 2007; Bovens et al., 2010), "legal accountability" is not (except Oliver, 1991). What is implied by it? What do we do when we add "legal" to the conceptual apparatus of accountability? The starting point of this article is that these questions are not obvious and that there is in fact tension and confusion running through legal accountability as a term (one which translates into difficulties in practically holding the ECB to legal account).

In this article, we will therefore explore three different usages of legal accountability, which are often confused in scholarly discourse (Section 2). Accountability *to* law refers to developing accountability to legal rules and standards. Accountability *through* law refers to achieving other routes of (administrative and political accountability) through legal rules or institutions. Finally, accountability *of* law implies the need for legal institutions themselves to be accountable for the decisions they make to the wider public (and other courts).

As we will argue in this article, improving legal accountability more broadly may require developing complementary relations between these different varieties. The disagreement surrounding controversial litigation involving the ECB, concerning its Public Sector Purchase Programme (PSPP) programme, is a case in point. It revolved around the question of whether the attempt to tie the ECB to prior legal standards (accountability *to* law) improved or eroded either the political accountability of the ECB (accountability *through* law) or the credibility and quality of judicial dialogue (accountability *of* law). There is therefore a close relationship between the different elements of legal accountability. Deficiencies in one of its dimensions can easily, under certain conditions, be "passed on" to other dimensions too, just as improvements in one dimension can also help accountability in its other meanings.

In a final step, we will apply these categories to ECB activity, drawing a contrast between the judicial review of ECB action in monetary policy (Section 3) and in the Single Supervisory Mechanism (SSM; Section 4). The ECB has significantly different tasks in these two areas: in monetary policy, it steers the exclusive competence of the EU based on an exceptionally high level of discretion granted by the EU treaties. In the SSM, its work is shared with national supervisory authorities, to ensure prudential management of the banking sector. In addition, as will become evident in the analysis, the CJEU uses virtually the same standard of review in the two areas, which means that we will be able to see how divergences within accountability *through* and *of* law of the two different areas affect accountability *to* law—one may expect that the three categories of legal accountability will interact differently in the two fields. As we will argue, judicial review of monetary policy shows deficiencies along all three categories, with limited evidence that legal standards meaningfully structure ECB activity; that judicial intervention caused any improvement of political accountability; or that judicial dialogue contributed to the accountability of legal institutions themselves. A lack of accountability along one channel (e.g., accountability *to* law) also weakens the other two forms of accountability. On the contrary, in the SSM we can observe a flexible approach to judicial review, where the ECB acts as the principal supervisor but depends on national competent authorities to be able to supervise meaningfully. Specifically, here accountability *to* law takes centre stage, however, to the potential detriment

of accountability *of* law (given the dominance of EU courts in judicial review to the exclusion of national courts). As we argue in the conclusion (Section 5), the contrast between the two fields offers meaningful lessons on how the "legal accountability" of the ECB's activity can be realised.

2. What Is Legal Accountability and What Is it Trying to Achieve?

As already discussed, there are by now several definitions and conceptual frameworks of accountability, both within and outside the EU context. One cannot say the same for legal accountability. This might be because many lawyers consider legal accountability of limited conceptual use. Lawyers work with other concepts—such as legitimacy or the rule of law—to orient the debate about the role of legal institutions (Arnull & Wincott, 2013; see also Bressman, 2003). Legitimacy and the rule of law are both concepts with a wide range of meanings contingent upon different constitutional traditions (Buchanan, 2002; Møller & Skaaning, 2012), transforming them at the EU level into concepts with contested meaning (Magen, 2016). At the same time, it is not clear that legitimacy, the rule of law, and accountability are aiming at the same things. Legitimacy, for example, seems a thick normative concept. Accountability, however, is much narrower, referring to a process of "holding decision-makers to account," which seems but one element of legitimacy in a broader normative sense. Accountability and the rule of law also seem to have different goals—as we will discuss, legal accountability may not per se involve courts and is not exhausted by the concern for arbitrariness that animates the rule of law debate. Legal accountability is, simply speaking, something else.

Part of the problem is that legal accountability often means different things to different strands of scholarship. One understanding of legal accountability—the one most closely associated with the rule of law—is accountability *to* law. Therefore, when key pieces of legislation, such as the recent Digital Services Act, talk of holding states and digital providers to account, they are referring to a particular type of legal accountability understood as the need for actors to explain why and how they followed the applicable rules (Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022, 2022, recitals 34, 39, 60). This type of accountability is also relatively easy to fit within more general accountability frameworks. Bovens, for example, defines accountability in terms of a relationship between an actor and a forum, the latter of which can demand justifications and seek correction for misconduct (Bovens, 2007).

Accordingly, applying the Bovens framework to accountability *to* law, an actor who may or may not have breached established legal standards is held to account by a court or other rule-applying body (the forum). The judicial process then explores the "fit" of the actor's conduct to the relevant legal regime. Many notions of legal accountability thus follow this idea: Legal accountability is about tying the actions of public officials and other powerful actors to legal standards (typically through courts) and subject to a specific standard of review. This latter point is particularly present within legal discourse, where accountability *to* law also includes a significant debate about *how* courts should exercise this function. For example, when are courts entitled to review the full extent of the officials' conduct and when should they confine their review to the search for a manifest error, based on the wide discretion granted to the official (Goldmann, 2014; Türk, 2010)? It is questionable, however, whether this is the only meaningful understanding of legal accountability. It suggests a fixed (substantive) legal standard, with which an actor must comply, or under which (where granted a wider margin of discretion) the actor must legally justify their action. Not all forms of legal accountability, however, fit this description. In addition, although the standard of review is important, an

important facet of legal accountability concerns how courts monitor other accountability processes and who monitors them in turn. In other words, there is more to accountability than simply observing a linear relationship between a court and a reviewed actor.

Another type of legal accountability is accountability *through* law. The idea here is not to tie actors to a given rule but instead to use the law to establish an administrative or political process, or to force actors to take principles or interests into account that they would not consider otherwise. The key difference in this second category is that the goal of legal accountability is not to "follow the rules." Instead, the goal is to use the law to better and further political or other forms of accountability. In simple terms, accountability duties in this category may be defined by law (indeed their legal character is vital) but are not exhausted by law or even necessarily take place before courts. To give some examples, individuals might use courts to ensure that officials conduct environmental impact assessments or provide journalists with official documents. They might alternatively rely on legal rules to encourage institutions or companies to answer questions before parliament or submit to an independent audit. Here, legal accountability is not being used to test the fit of an action to a fixed normative standard; but rather to access or improve other processes of account-giving. These processes may involve rules but these rules either structure or accompany other, non-legal, benchmarks for success—e.g., was an official programme value for money, did it meet the needs of stakeholder X, or was it just from a distributive point of view?

A final variety of legal accountability is what we can term accountability *of* law. This relates to the two above categories in one important sense: If courts are important either to securing adherence to legal rules or to guaranteeing other forms of accountability, they also have to be accountable themselves. Courts must therefore answer for how they reached their decisions to the public, to political branches of government (to varying degrees, but certainly without endangering their independence), and to other courts. This final variety of legal accountability is tied to, but separable from, the other two categories: it might involve either accountability *to* law (i.e., did this court plausibly interpret the relevant rules?) or accountability *through* law (i.e., constitutional provisions might establish certain forms of accountability for courts, such as judicial councils, transparency, or other obligations). When we talk of "legal accountability," it is important, therefore, to understand what type of legal accountability we are dealing with.

Finally, it is worth reflecting on the relationship between the different varieties of legal accountability. They are of course linked in a manner that allows them to complement and reinforce each other. This also, however, means that deficiencies in one can easily lead to deficiencies in the others. To give some examples, accountability *to* law is important partly because it allows the duties of political actors to be defined and clarified. This process is also important for accountability *through* law. This follows from a well-defined strand in accountability literature (not without its critics), which holds that meaningful political accountability requires precise and well-defined mandates that political principals can use to hold agents to account (Elgie, 2002; Majone, 2001). We might also imagine spillovers the other way around. In technical and complex fields, legal assessments over whether actors complied with rules may require expert help. For example, accountability *to* law may require an input of processes determined by accountability *through* law (e.g., where law structures accountability assessments but does not define their content). Equally, one might expect courts to perform judicial review more accurately and diligently if they are subject to external review by other courts (i.e., accountability *to* law benefits from accountability *of* law). Finally, the earlier discussion on standards of judicial review also relates to the inter-twining of the categories. A loose standard

of review may or may not be appropriate depending on whether it is operating in combination with robust forms of political or administrative accountability, just as a strict standard may be better justified if the court developing that standard is appropriately overseen by other judicial bodies (that, e.g., can limit over-reach).

In these examples, the categories are working together—accountability *through* law allows accountability *to* law (and vice versa), with accountability *of* law keeping legal actors themselves honest. As we will see when moving to the ECB example, this virtuous circle cannot be taken for granted. It can as easily become vicious, with the inability to operationalize one form of legal accountability inhibiting the others. A lack of accountability *to* law can deprive accountability forums of the necessary leverage and clarity to hold officials answerable (thus frustrating accountability *through* law), just as a lack of accountability *of* law can create greater scope for error and inconsistency or overreach in legal decision-making (undermining accountability *to* law). There is thus an inter-twining of the different forms of legal accountability that allows them both to rise and to fall together.

3. Legal Accountability in Monetary Policy

These three categories are, in our view, of use for understanding the legal accountability of the ECB. This is so in the sense that the EU's economic and monetary policy chapter establishes all three forms of legal accountability. In terms of accountability *to* law, the ECB is established under a mandate and is, therefore, obliged to account for why its actions fit that mandate. This obligation explains a whole host of ECB communication activities, be they direct—i.e., the preambles that introduce Bank decisions announcing new programmes—or indirect—such as academic articles of Bank officials explaining why particular activities would fall within the Bank's mandate (Ioannidis & Zilioli, 2022). As we will go on to discuss, in practice, such accountability is highly difficult to realise. In legal terms, however, the ECB is subject to the "normal" scheme of EU judicial review, with the possibility of challenging its acts with reference to either general principles of EU law or those relating directly to treaty obligations for the ECB.

The EU treaties also, however, establish accountability *through* law for the ECB. In simple terms, the law demands that the ECB enter into other processes of account-giving. Some of these are financial: provisions of EU law place auditing obligations on the ECB, establishing accountability to both the European Anti-Fraud Office (OLAF; European Central Bank, 2004) and the European Court of Auditors (European Central Bank, 2019). Others are political: Art. 284(3) TFEU establishes a general obligation to give account to the European Parliament; an obligation that has been concretised in the form of the monetary and supervisory dialogues between MEPs, the ECB president, and the president of the SSM's supervisory board. In these examples, law is used to establish processes of administrative, financial, and political accountability, but without guaranteeing any particular outcome of these processes. Importantly, the law not only establishes but also limits political and financial accountability. The EU treaties demand that the Bank do "not take instructions" from others, whereas the CJEU's case law (for example, *Commission v ECB*, 2003) recognises that OLAF's anti-corruption activities should respect the Bank's operational independence thus rendering many more demanding forms of accountability *through* law impossible.

Finally, accountability *of* law is important for understanding the legal accountability of the ECB. One of the consequences of the ECB's independence is that it has few interlocutors with real powers to sanction its activities. The CJEU is therefore arguably the only institution (bar an existential collective decision of the

member states) able to veto its operational decisions. Reflecting our notion of an intertwining of different forms of accountability, this thus places a heightened obligation on the CJEU itself to be accountable for how it scrutinises ECB activity—i.e., for how it applies legal standards to the ECB, explains its decisions, and ensures other forms of account-giving. The dialogue that takes place with national courts under the preliminary reference procedure provides one form of accountability in this regard.

While different forms of legal accountability complement and reinforce each other, they also might conflict, or foreclose each other. This latter scenario seems to be the experience of legal accountability in the field of monetary policy and may explain at least some of the scholarly debate regarding the interaction between courts and the ECB in recent years. Let us therefore assess how the different forms of legal accountability in monetary policy relate. The central debate here concerns the mandate of the ECB. As is well known, the Bank's mandate distinguishes between a primary mandate centered on price stability and a secondary one of supporting the Union's general economic policies. Significant confusion and disagreement permeate the debate concerning the boundaries of both mandates. A significant part of this confusion relates to the rapid evolution of the ECB's tasks from the establishment of its mandate to today (where it is called upon to solve a range of challenges from tackling inflationary challenges through unconventional instruments to "greening" its financial assets).

In respect of the price stability mandate, the most significant controversy has concerned the various quantitative easing programmes of the Bank. In *Gauweiler*, the CJEU was called upon to assess the compatibility of the Outright Monetary Transactions (OMT) programme with both the price stability mandate and other substantive rules contained in the TFEU, most notably the prohibition on monetary financing of Art. 123(1) TFEU. While the judgment triggered a significant academic debate, it also elaborated a number of substantive legal standards that fit accountability *to* law well. The CJEU provided particular limits on how quantitative easing (QE) programmes may be designed, which bind the ECB and may be relied upon by other actors. Without being exhaustive, these included the notion that bond-buying should not lessen the impetus of member states to follow a sound budgetary policy (*Peter Gauweiler and Others v Deutscher Bundestag*, 2015, para. 115), and that bond purchases on the secondary market should not "have an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States" (*Peter Gauweiler and Others v Deutscher Bundestag*, 2015, para. 107).

The concrete limits set by the Court may lose pertinence as the ECB moves away from bond buying towards investment in green policies (on the legal aspects of the ECB's turn to greening its policies see van t' Klooster & de Boer, 2023) and novel questions concerning its accountability arise. For example, what obligations in stating reasons and assessing the proportionality of its decisions await the ECB when it makes monetary policy based on green policies? What remains from the post-crisis litigation is a deferential standard of review that grants the ECB a wide margin of discretion. As such, this standard of review weakens accountability *to* law. The analysis of other facets of legal accountability is therefore useful for getting the full picture of the ECB's legal accountability.

What is important about these standards is not simply their legal effects but their ability to further other forms of accountability. To begin with accountability *through* law, by defining and elaborating treaty provisions, the CJEU in theory provided political actors with tools to better hold the Bank to its mandate. One can observe this by contrasting monetary and supervisory policy, as indicated by studies examining the attitudes of MEPs

to scrutinizing the ECB—the level of scrutiny by MEPs is often linked to perceptions regarding the necessary degree of ECB independence across the two fields (which is often perceived as higher in the monetary than supervisory fields; Akbik, 2022, p. 28). By delineating the Bank's mandate (i.e., ensuring accountability *to* law), the CJEU also potentially furthered accountability *through* law.

Another effect of the *Gauweiler* standards is that, by elaborating legal criteria on the ECB's mandate, the CJEU also established a set of standards against which *its own conduct* could be judged. As all EU lawyers know, the CJEU's power depends on its position in a larger system of judicial cooperation, where its interpretations of EU law can orient the activity of national courts. By establishing legal standards for the Bank (accountability *to* law), the CJEU also therefore allows for accountability *of* law, by providing a basis through which its own review of the ECB can be judged in the future, structuring the dialogue between the CJEU and other courts (on this, see Bobić, 2023). This speaks to a further point raised in legal literature—dialogue over "repeat" cases in a multi-level system presents an opportunity for courts mutually to discuss, clarify, and refine legal norms, improving their institutional legitimacy in the process.

So far, so good. Our analysis so far suggests an ability for the different categories of legal accountability to complement each other. The difficulty of course is that the entwinement of these categories also allows them to work against each other, as we can see if we move further down the QE saga. Having adopted a series of criteria in *Gauweiler*, the problem for the CJEU was that the Bank was not finished. Through its PSPP and later Pandemic Emergency Purchase (PEPP) programmes, the ECB adopted forms of QE that significantly relaxed many of the limits observed in the original OMT. This is most pronounced in PEPP, where the tying of bond distribution to the ECB's capital key and conditionality principles was outright abandoned (Bobić & Dawson, 2020). This of course placed the CJEU in a bind: would it insist upon rigorously upholding the *Gauweiler* standards or rather defer to the ECB's assessment of what was "necessary" to fulfil the price stability mandate and the "equivalent effect" standard used to interpret Art. 123(1) TFEU?

The key to the disagreement between the CJEU and the German Federal Constitutional Court (FCC) with reference to these questions, in our view, may be read as a disagreement regarding the proper relationship between the different categories of legal accountability. Looking at the CJEU's judgment, one may conclude that the three categories of legal accountability were all met in *Weiss*. From the perspective of accountability *to* law, the CJEU demanded that the ECB be treated as an institution with significant discretion to make complex decisions (*Weiss*, 2018, para. 73). This assessment was influenced by its own reading of the Bank's mandate, which gives the Bank considerable discretion to assess what is necessary to meet the requirements of price stability. Therefore, because the CJEU found that the ECB did not commit a manifest error of assessment, we may conclude that for that court, accountability *to* law was complied with. This influenced the way the CJEU approached what we refer to as accountability *through* and *of* law. The simple fact of what Mendes (2023) has termed the Bank's "constitutive powers" meant that the CJEU did not consider it necessary to insist on other forms of legal accountability. For example, if the Bank is exercising, through QE, its exclusive competence, and if it is operationally independent when doing so, this cannot be subject to challenge from national courts—as the Court reminded through its highly unusual press release following the FCC's *ultra vires* ruling (CJEU, 2020).

Reading the FCC judgment from the perspective of our three forms of legal accountability shows that accountability *to*, *through*, and *of* law required something else entirely for that court (Bundesverfassungsgericht, 2020). The first category required the ECB to follow the criteria set down in

Gauweiler. In its reference to PSPP, the FCC was therefore unrelentingly detailed in examining the *Gauweiler* criteria, using them to assess later ECB activity (Bundesverfassungsgericht, 2017, para. 79). Like the CJEU, this first disagreement influences how the FCC sees the other two categories. In its view, there is a strong link between accountability *to* law and accountability *through* law. For the FCC, the ECB was an exception to the democratic principle and an institution acting in a blurred area, with a significant capacity to limit fiscal policy competences, otherwise reserved for national parliaments (Bundesverfassungsgericht, 2020, para. 144). Accountability *through* law therefore required not significant discretion but a strict reading of the Bank's mandate, and consequently a more thorough proportionality assessment than the one conducted by the CJEU in *Weiss*.

Here, the FCC also draws a connection between accountability *to* law and accountability *of* law: meeting the latter requires a degree of consistency in the CJEU's approach. It was this lack of consistency, i.e., the inability fully to apply the *Gauweiler* criteria and operationalise the proportionality principle, which rendered the CJEU's approach "incomprehensible" (Bundesverfassungsgericht, 2020, para. 116). The ultimate finding of *ultra vires* therefore stems from the FCC's view that the proper complementarity between the different categories of legal accountability—and particularly between the delineation of competences and the necessary intensity of proportionality review—had not been observed. Rather, in its view, the categories are working against each other. Because the CJEU does not take the *Gauweiler* criteria seriously (accountability *to* law), the functions and democratic principles of the Bundestag are usurped (accountability *through* law), which implies that the CJEU has acted beyond its constitutional boundaries (accountability *of* law). The FCC's critique of the PSPP is therefore one precisely of whether the ECB's monetary policy is legally accountable.

Monetary policy is of course a curious beast. We might simply write the PSPP episode off as the culmination of a long-standing judicial standoff, with the ECB as the collateral victim (e.g., Grimm, 2020). Additionally, we might question the general utility of judicial review in a complex technical field such as monetary policy—i.e., perhaps avoiding substantive economic judgment to the highest degree possible is the judicial approach most consistent with the ECB's mandate. Just as many domestic courts refuse to review monetary decisions, there may be reasons for modesty in terms of what courts can realistically contribute to accountability in the monetary field.

Regardless of the deadlock between the two courts, it is unclear, however, whether legal accountability in monetary policy is working along any of the three categories. While scholars disagree on the merits of the FCC's critique, the one point where there is wide(r) agreement is that one root of the conflict is the low standard of proportionality review demanded by the CJEU in its *Weiss* judgment (Dawson & Bobić, 2019; Nicolaides & Kool, 2021; Petersen & Chatziathanasiou, 2021). The ability of the Bank to massively ramp up the ambition of its QE programmes, all the while justifying them by the monetary transmission mechanism, suggests that accountability *to* law does not seem an exacting limit to its activities. As once remarked regarding the role of the Court's Art. 114 TFEU jurisprudence, the Court's QE criteria have been received more as a "drafting guide" that can be interspersed in ECB decisions by its legal service than a set of serious constraints (Weatherill, 2011). Accountability *to* law seems limited.

The same, however, applies vis-a-vis the other two categories. The FCC's intervention may have indirectly "nudged" the Bank to provide more information on how it balances fiscal and monetary considerations. It is unclear, however, whether judicial intervention has significantly influenced the ECB's other accountability

practices. The accountability framework of the Bank—a well-known combination of hearings, press conferences, and limited document access—is a largely self-imposed set of obligations, with limited indications that judicial intervention has opened up new channels of political or administrative accountability.

Some elements of judicial intervention may even have further limited accountability *through* and *to* law. An example is "black-out" periods. According to *Weiss*, an important element in the CJEU accepting the conformity of the PSPP programme with the prohibition of monetary financing was the use by the Bank of such periods (*Weiss*, 2018, para. 116). These "black-outs" made it more difficult for investors to be sure that bonds issued by governments would be purchased by the ECB by creating a mandatory black-out period, during which the Bank would not purchase bonds sold on secondary markets. By creating investor uncertainty, the equivalence between primary and secondary purchases (held by the CJEU to be a violation of Art. 123(1) TFEU in *Gauweiler*) could be avoided.

Such periods also, however, establish problems in terms of accountability *through* and *to* law: In terms of accountability *through* law, black-out periods are by definition intransparent—precisely in order to create investor uncertainty they also establish uncertainty for political actors in terms of their ability to follow and understand patterns of ECB purchases. In terms of accountability *to* law, they create problems for judicial review for the same reasons. The FCC thus complained repeatedly in its PSPP decision that the very ability of black-out periods to establish sufficient investor uncertainty was something courts themselves should be able to review (Bundesverfassungsgericht, 2020, pp. 187–191). As the FCC put it: "*ex post* disclosure of the relevant information is a prerequisite for conducting an effective judicial review of whether the purchases circumvent the prohibition of monetary financing" (Bundesverfassungsgericht, 2020, p. 189). The ill-tempered back and forth between the CJEU and FCC thus suggests that a lack of confidence in accountability *to* law can establish problems in terms of accountability *through* and *of* law as well.

In this sense, the virtuous circle has become a vicious circle: opportunities for political contestation of the ECB's activities are limited as a result of its discretion, endorsed by the CJEU. At the same time, national courts are increasingly losing confidence in the ability of the EU's legal system to place meaningful boundaries on what the ECB can or cannot do (with the "greening" of the Bank's mandate opening up new frontiers in this debate). This returns us to an earlier point: If legal accountability fails in one of its pillars, it is more likely to fail in the others. Turning next to the Bank's supervisory mandate can allow us to better test and refine this argument.

4. Legal Accountability in Supervisory Policy

The ECB's position in the supervisory arm is a result of a rather different legal setup than that accorded to it for the conduct of monetary policy. The ECB here cannot exercise its supervisory powers without cooperation with national supervisory authorities, and this has direct consequences for the three types of legal accountability. More interesting still is how the EU courts interpreted the SSM legal framework, with the effect that legal accountability on paper and in practice do not entirely overlap. To explore these intricacies, a brief description of the SSM system is in order.

Banking supervision is the first pillar of the Banking Union, created by the SSM Regulation (Regulation (EU) 2013/1024 of the Council of 15 October 2013, 2013). The SSM Regulation was based on the competence

for harmonising prudential supervision in Art. 127(6) TFEU. The basic organisation of the SSM is that the ECB supervises significant entities, whereas national competent authorities supervise less significant entities. The final decision on the significant character of an entity lies with the ECB. Crucially, the ECB has the power to take on the supervision of an entity having hitherto been classified as less significant and vice versa. Of relevance is also that Joint Supervisory Teams, comprised of members of the ECB and the relevant national supervisory authority, exercise the daily monitoring of significant entities.

In carrying out their respective tasks under the SSM Regulation, the relationship between the ECB and competent national authorities should be based on cooperation in good faith and continuous exchange of relevant information. Under the SSM Regulation, these institutions share and divide supervisory and other tasks; however, they also share the applicable law: national supervisory authorities apply EU and national law, as does the ECB. For example, under Art. 4(3) of the SSM Regulation, the ECB applies all relevant Union law. However, given that all relevant Union law is also comprised of national law implementing directives and exercising the options offered therein, the ECB applies that national law. In addition, when necessary for the exercise of its supervisory tasks, the ECB will issue instructions to competent national authorities to make use of relevant powers under national law.

The ECB's need to apply and take into account national law is particularly manifest in areas where it has exclusive competence to exercise supervisory tasks regardless of whether the bank in question is significant or less significant. The first such situation is issuing and withdrawing operating authorisations to credit institutions: here the ECB depends entirely on the national law regulating the procedure and requirements for granting and withdrawing authorisations. The competent national authority drafts the decision proposing to the ECB to grant the authorisation.

On paper, then, accountability *to* law is of a twofold character: legal rules and standards are sourced in both EU and national law and intuitively the review of this behaviour would pertain to EU and national courts, respectively. These courts, in enforcing accountability *through* law, would be called on to ensure that the superior position of the ECB vis-à-vis national supervisors is respected, i.e., national courts would ensure the accountability of national supervisors to the ECB, horizontally. Such constellations of political accountability between the ECB and national supervisors have not yet appeared before courts, but this is not inconceivable. Concerning accountability *through* law of the ECB itself, for example, it is accountable to the Parliament and Council, whereas national parliaments are entitled to issue reasoned opinions concerning the annual report of the ECB and can demand responses in writing. Here the diagnosis is similar to monetary policy: It has not yet become clear that the judicial review of the ECB's supervisory activity spilled over into its political accountability arrangements. Finally, accountability *to* law appears simple in this exercise: Both levels of the judiciary are to maintain coherent standards of judicial review in this area against the standards of the SSM Regulation. No contestation from the national level comparable to the one we have seen in the monetary field took place.

Despite what might have been expected, the enmeshment of EU and national law in banking supervision brought about innovations in judicial review. In the standard division of tasks between EU and national courts, EU courts are competent to interpret (and possibly invalidate) EU law, while national courts do the same with respect to national law. Yet, what happens when the ECB makes a decision that is based on the preparatory act of the national competent authority? To complicate matters further, what if that national preparatory act

is in parallel subject to judicial review on the national level, or further still, survived judicial review on the national level and is considered to be final? A simple, albeit counterintuitive, conclusion given by the CJEU answered all these questions simultaneously: the National Preparatory Act is in fact an EU act. EU courts are exclusively competent to interpret and possibly invalidate such acts, while national courts are prevented from doing so (*Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, 2018).

In *Berlusconi*, the central issue was the status of national preparatory acts based on which the ECB refused to approve the purchase of a controlling share, based on its powers under the SSM Regulation. The decision to oppose or not oppose an acquisition of a qualifying holding is not possible without the use of national law following Art. 4(3) of the SSM Regulation. More specifically, the requirements attached to such acquisitions are regulated by national law and any such acquisition should be notified to the national competent authority. The national competent authority then forwards the notification to the ECB and prepares a proposal for a decision to oppose the acquisition or not.

Based on the recommendation of the national supervisor, the ECB decided to oppose the acquisition of a controlling share in a bank by Silvio Berlusconi. He was, prior to this attempt, found guilty of tax fraud and did not meet the reputation requirement required under Italian law for such purchases. In turn, this cast serious doubts about the sound and prudent management of the bank in the future.

Berlusconi challenged the national and ECB's decisions everywhere he could and the final procedure is central to our analysis of accountability *to* and *of* law, in particular regarding the nature and relationship between decisions and procedures before the Bank of Italy and the ECB. The case reached the CJEU by way of a preliminary reference. First, the Italian Council of State asked whether Art. 263 TFEU, which regulates direct actions against EU acts before EU courts, may be used to challenge procedures, preparatory acts, and non-binding proposals of national competent authorities in the area of prudential supervision.

The advocate general found that to determine the jurisdiction to review national preparatory acts one needs to look to the location of the final decision-making power. Given that in the context of the acquisition of qualifying holdings the final decision lies with the ECB, the advocate general concluded that the jurisdiction for review of such decisions accordingly "must lie with the General Court and the Court of Justice" (CJEU, 2018, para. 105). According to the advocate general, this includes the power to review the decision of the ECB as well as the national preparatory act, the proper place for this review is the annulment action against the ECB decision before the General Court.

The CJEU broadly followed the advocate general. Yet, the reasoning for establishing the exclusive jurisdiction of EU courts was grounded in the exclusive power of the ECB to decide on the acquisition of qualifying holdings, thereby the exclusive power of EU courts to review its actions ensures effective judicial protection of the persons concerned (*Silvio Berlusconi and Finanziaria d'investimento Fininvest SpA (Fininvest) v Banca d'Italia and Istituto per la Vigilanza Sulle Assicurazioni (IVASS)*, 2018, para. 44). As a consequence, Art. 263 TFEU prevents national courts from conducting judicial review of such acts. This renders the cooperation mechanism between the EU and national authorities effective, preventing the risk of divergent assessments by EU and national courts. The necessary consequence of this finding is then also the inability to use any national remedy that would hinder this.

The consequence is that accountability *to* law is now a decision for EU courts, regardless of the fact that the SSM Regulation includes national law in the relevant legal framework. While EU courts conduct reviews based on national law in the SSM, it remains unclear whether they treat that law as a question of law or fact, as is the case with national law in other areas of EU law, such as trademarks (for a discussion, see CJEU, 2024, pp. 38–51). The latter solution is problematic insofar as it pertains to the parties to the case, rather than the courts conducting judicial review, to *know the law*. This finding seems to be corroborated by a recent judgment of the CJEU, which stated how it reviews the General Court's interpretation of national law in the SSM: it will sanction either distortions of the wording of national law or manifestly wrong interpretations, based on the documents in the case file (*Anglo Austrian AAB v ECB*, 2024, para. 86). Furthermore, through the exclusion of national courts, EU courts lose an important interlocutor that ensures accountability *of* law. Lastly, this organisation of accountability *through* law in the SSM places a strong focus on the ECB holding national supervisors to account, but without significant findings as to the parallel accountability obligations for the ECB.

The clear division of jurisdiction between EU and national courts in this area, coupled with the explicit prohibition for national courts to review national preparatory acts where the final word pertains to an EU institution, constitutes an innovation in the case law of the CJEU (Brito Bastos, 2019). It is also an example of the spillover from accountability *to* law (which now takes place exclusively at the EU level) to accountability *of* law. By taking over this task, EU courts are reducing the burden on the national judiciary, but are also making it more difficult to access such review, due to the notoriously high bar for non-privileged applicants to access direct actions before EU courts. That places EU courts in a position where their decisions are unquestionable, be it through the preliminary reference procedure or by reviewing the decisions of national supervisors. In other words, an OMT/PSPP-like litigation is hardly imaginable in the context of the SSM, with serious consequences for accountability *of* law. Unlike in monetary policy, where the ECB's independence is the main driver of accountability structures, here the ECB's privileged position stems from its exclusive powers in the SSM (Dermine & Eliantonio, 2019). Yet, the exclusion of national courts from participating in the broader review of supervisory decisions and preparatory acts removes one point of (indirect) control of EU courts. In other words, here a change in accountability *of* law may produce issues in the coherence and correctness of how EU courts ensure accountability *to* law.

That also results in an unclear situation for national supervisory authorities: mistakes that they commit in this process as a matter of national law seem to be under the scrutiny of EU courts, resulting in no accountability *to* national law, despite it being a relevant source of law in banking supervision. The CJEU placed great emphasis on the specific cooperation mechanism that underlies the SSM as a manifestation of sincere cooperation from Art. 4(3) TEU. This, however, comes at the expense of the jurisdiction of national courts reviewing acts of national institutions applying (also) national law. This is not without relevance also for accountability *through* law: lack of judicial review puts stress on political or other types of accountability procedures in store for national supervisors. However, national supervisors may not take their account-giving obligations as seriously if they know that there is no genuine legal scrutiny or a legal process. Thus, accountability *through* law may also be diminished, in a context where no meaningful legal process in the context of accountability *to* law ultimately takes place.

Still, it may be said that the obligation of the ECB to apply national law under the SSM Regulation and the general obligation of cooperation and assistance with national competent authorities, allow EU courts to

review the duty of care applied by the ECB in exercising its discretion. One might also intuitively say that because the ECB's tasks in supervisory policy are more technical than monetary policy, and its mandate is sourced in secondary rather than primary law, the CJEU might exercise more stringent review. However, the CJEU recently decided that in the SSM, judicial review should be limited to a review of a manifest error, based on the Bank's broad discretion (*ECB v Crédit Lyonnais*, 2023, paras. 55, 57, 72).

From the perspective of legal accountability as presented in this article, we can therefore see the three facets of legal accountability interacting differently than in monetary policy. Despite the ECB's more technical role in the SSM, accountability *to* law suffers from two defects: First, by reviewing the ECB's interpretation and application of national law only at the EU level and with a limited reach (focusing only on distortions of the text), there is a risk that accountability *to* law will remain of limited character. Second, by maintaining a deferential approach and reinforcing the ECB's wide discretion also in this area, EU courts themselves do not compensate for the lack of review at the national level. These deficiencies spill over further into the accountability *of* law. Barring national courts from the review of national preparatory acts means that they have been excluded from participating in the enforcement of accountability *of* law, as they no longer stand as institutions questioning the standards of the CJEU, who instead remain alone at the top.

5. Conclusions

We have thus seen how the three varieties of legal accountability operate and interrelate in the ECB's exercise of monetary policy and the SSM. A lesson that results from both areas we analysed is that the line between the virtuous and the vicious circle connecting the three types of legal accountability is extremely thin. In other words, the equilibrium between them is difficult to achieve but easy to upset, thanks to the legal framework within which the ECB operates in both fields. In particular, ECB's independence in the monetary field and its exclusive powers in the SSM have reduced the role of its accountability *to* law, witnessed in the deference shown to it by the CJEU (most recently, *ECB v Crédit Lyonnais*, 2023).

The differences we observe between the two fields are most clearly visible in accountability *through* law, which in our view influences the role of the other two forms of legal accountability. In monetary policy, the CJEU and the FCC significantly differ in their understanding of what legal accountability *through* law demands: for the FCC, deficiencies in this variety of legal accountability should have resulted in a more stringent standard of review under accountability *to* law. For the CJEU, the ECB's monetary policy mandate decreased the need for accountability *to* and *through* law. Accountability *of* law seems to be the dominant method of legal accountability in monetary policy, based on the interactions between the CJEU and the FCC. In the SSM, by contrast, accountability *through* law produced the opposite effect: accountability *of* law was almost entirely deprived of its useful effect, given the exclusion of national courts from reviewing a significant amount of SSM decisions. CJEU is thus seemingly left without any meaningful interlocutor, an interaction that usually improves the standard of review and accountability *to* law more generally. A comparison between monetary policy and the SSM therefore demonstrates the usefulness of the three forms of legal accountability as an analytical tool.

In sum, is layering legal accountability in three varieties, as we did in this contribution, a useful conceptual exercise for better understanding the role that legal accountability plays and should play? One of the great criticisms directed to courts in the European Monetary Union (EMU) context is that they should generally not

review central bank decisions due to their apparent lack of expertise in the field and because central banking inherently demands high levels of discretion (Goldmann, 2014). In this view, legal accountability is of little to no use in this field and focus should be placed on political and other forms of accountability. We consider that the nuanced view of legal accountability as presented here allows us to move away from that criticism: the three varieties of legal accountability place different demands on the ECB, constrain the courts themselves, and ensure that other types of accountability deliver satisfactory results. A nuanced understanding of legal accountability also helps us identify accountability problems more precisely, by seeing how a change in one variety improves or hinders another. By distinguishing different elements of legal accountability, we finally hope to offer a conceptual framework of use to understand the role of law in the accountability practices of other institutions and policy areas.

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Conflict of Interests

The authors declare no conflict of interests.

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