Conclusion

C.1 INTRODUCTION

Whenever I explained to other people what my book will be about, I always visualised a Greek pensioner who voted for Syriza in the January 2015 elections, hopeful that it will make good on its anti-austerity promises (outlined in the Thessaloniki Programme). The Syriza government was formed, promises were broken, and Memoranda of Understanding were signed. Tsipras resigned as Prime Minister on 20 August 2015. Devastating consequences materialised and fundamentally transformed the Greek social fabric. What was that Greek pensioner able to do? In other words, was there a space for the individual to hold decision-makers in EU economic governance to account before courts, where political actions fail? Across theory and practice, my aim was to reconceptualise legal accountability in a way that replaces the individual at the heart of all activities in the Economic and Monetary Union.

For this purpose, I proposed a framework of legal accountability for EU's economic governance that reasserts the centrality of the individual in its institutional framework. The equal ability of all EU citizens to hold decision-makers in the EMU accountable, I argued, can be achieved through a balanced application of the principles of equality and solidarity. From this perspective, accountability is the glue that binds the public institution to the common interest. To achieve it, these institutions have a duty to maintain a balance between the principles of equality and solidarity. Seen in this way, all institutions are under an obligation to consider the interests involved in a way that best serves the common interest.

Because of deficiencies in political and other forms of accountability in the EMU, the focus of this book was on courts. I proposed a new framework of judicial review designed to enforce a high duty of care by decision-makers

towards the common interest, and an extensive duty to state reasons on how this was done. Decisions in the EMU carry high redistributive effects, which should be an important concern in judicial scrutiny. The burden then shifts to the parties to demonstrate not only who should win the case, but also, preliminarily, what the appropriate standard of review and all the necessary evidence should be. The parties in the litigation thus carry the responsibility to present a rich evidentiary basis that serves as ammunition aimed at endorsing or rebutting the presumption of full judicial review. In this way, courts become the public platform for discussing the extent of power given to an institution and deciding on the way it has contributed to the common interest.

The exploration of legal accountability in this book spanned across three case studies, each of which brought to light different challenges for the individual in holding decision-makers to account. In the European Stability Mechanism and other instruments of financial assistance, issues for accountability were caused by the nature of the legal acts in question, and the lack of connection between the decision-makers and those affected. Here, the major socioeconomic effects in debtor states were the result of decisions without democratic input either on the creditor side (led by the Troika) or on the debtor side (due to the urgency of accepting the conditions of financial assistance). Courts barely intervened, and changes, for example by expanding the scope of the Charter of Fundamental Rights by the Court of Justice, were slow and with little practical effect.

In monetary policy, the puzzle was finding out the proper intensity of review that courts should apply when controlling the action of an independent central bank. Thus, the main challenge was to reconcile the high level of independence of the European Central Bank in making its decisions with the need to subject it to any sort of accountability. Given that political accountability is difficult to achieve against a highly independent institution, the thrust of the matter here was the extent of judicial review and the degree of deference that courts should exhibit. The Court of Justice and the German Bundesverfassungsgericht engaged in a tumultuous exchange on the proper duty to state reasons and balancing the different interests in monetary policy decisions.

Finally, the central question in the Single Supervisory Mechanism was who does what and based on which law? Banking supervision is the task of the ECB, but it conducts it by sharing its tasks with national supervisors. In so doing, it also often applies national law. Which courts review which decisions here, and based on which law? This area is thus characterised by a shift in the traditional division of competences between EU and national courts, because

now the Court of Justice is the one to review also the national preparatory acts against the standards of national law.

The aim of the conclusion is to offer some final thoughts on the role that the common interest played in judicial review and with what intensity the courts reviewed the duties of decision-makers to achieve it across the three case studies.

C.2 FINANCIAL ASSISTANCE MECHANISMS

'They work in the port,' said he after a pause. 'Do you know what we call them? Structural reforms.'(. . .)

'Every day, there are more people. Yesterday, I had another meeting with them in the office. I have meetings all the time. First with the World Bank, then with them, then again with the World Bank. Take a look at these people, standing there. They think it depends on me. They think I can do something. I do not know what to say to them. There are new rules now. Things work differently, companies are run differently. Parts of the port will need to be privatized. Someone has to do it. It just happens to be me, but if it wasn't me, it would have to be someone else, whoever, does not matter who, someone has to do it.'[1]

The powerlessness of national political actors in the process of negotiating the desperately needed financial assistance deprived them of responsiveness to their citizens. Structural reforms were imposed and, as we have seen in Chapters 2 and 3, hardly any questions were asked about the social impacts of such reforms. The legal nature of financial assistance exacerbated this dire situation: EU courts would not review non-EU law. Intuitively we might have expected that judicial review in this area would dominantly take place at the national level, given that financial assistance mechanisms were mainly created outside EU law and carried out at the national level. Alas, we have seen in Chapter 3 that the urgency of the situation and the superior position of creditors placed the national political institutions between a rock and a hard place, making democratic input virtually inexistent. Courts were also in an extremely delicate position, juggling between constitutional protections in the socioeconomic sphere and external demands for reforms that focused only on financial stabilisation and debt restructuring.

The crux of national judicial review of measures implementing individual reforms, similarly to the review of the ESM Treaty ratification process, was on

[1] L Ypi, *Free: Coming of Age at the End of History* (Penguin Books 2022) 242, 244.

https://doi.org/10.1017/9781009207942.009 Published online by Cambridge University Press

justifying such reforms by compelling public interest, which in some cases (such as Greece) included a reference to the common interest of the Eurozone. Save for the case of Portugal, where the Constitutional Tribunal attempted to safeguard social protection standards (albeit with limited success), it is difficult to conclude that national courts had any significance in contesting measures of post-crisis governance. The common interest, instead of being conceptually aligned with the aims of Article 3 TEU by providing a space for socioeconomic considerations to come to the fore, was reduced to mere survival, epitomised through the restructuring of public debt. The intensity of review was low, where the duty to state reasons and possible alternatives were not explored in depth. That was, of course, the result of strict conditionality of financial assistance terms: national decision-makers had limited leeway in implementing what was required of them and less still were they able to show that they carried out a thorough examination of socioeconomic effects that would arise as a result.

The Irish Supreme Court was the lone institution to submit a preliminary reference to the Court of Justice to determine the compliance of the ESM Treaty with EU law. A perhaps more optimistic remark should be made about the national review of the ESM Treaty. The courts mostly referred to each other's jurisprudence in supporting their findings. In that sense, Austrian, Polish, and Estonian decisions cite earlier German findings, and the German final decision on the ESM[2] in turn cites the Estonian and French decisions. While the courts did not cite each other on questions of solidarity or the common interest, this does leave us with the impression of their awareness of a shared project, which may in the future pave the way for a more coordinated approach towards judicial review of economic governance.

As mentioned, the contribution of EU courts grew over time. The initial resistance to admit cases concerning Memoranda of Understanding eventually changed. The Court of Justice also extended the applicability of the Charter to those instruments. As regards Memoranda under the ESM assistance, the Court of Justice expanded the applicability of EU law, and consequently the Charter, to EU institutions when acting within the ESM framework.[3] These are important developments that pave way for the common interest to take up

[2] Case 2 BvR 1390/12 *ESM Treaty II* Judgment of the Second Senate of 12 September 2012, citing the Estonian decision in [211], [220], and the French decision in [244].

[3] Case C-258/14 *Florescu* EU:C:2017:448.

a more prominent role. It is also possible to say that the Court of Justice is bringing closer together the myriad sources of law regulating financial assistance and drawing them nearer to traditional EU judicial review. We can thus conclude that the Court of Justice has changed its approach to expand judicial protection. However, only to a limited extent.

The ability of individuals to seek direct recourse against Memoranda of Understanding under the ESM is restricted solely to action for damages, which remains problematic.[4] It does not result in more general accountability of the European Central Bank and the Commission for their conduct within the ESM. It also requires the individual to construct indirect routes to hold these institutions to account and this will only be successful if she is able to prove that a sufficiently serious breach has occurred, as explicitly reasserted by the Court of Justice in *Chrysostomides*. None of the applicants in the cases analysed were able to meet this threshold. In addition, the Court of Justice made no mention of the principle of solidarity and we can consequently see little to no concrete use of it in the area of financial assistance. But given that incremental change did take place, why not expect the same for the common interest? It is thus possible to argue for a more prominent role of the principle of solidarity in the interpretation of the common interest in the area of financial assistance.

One can, however, hardly be optimistic about the standard of justification that was required from EU institutions in this area of review. The duty to state reasons and the information required from decision-makers was incommensurate with the severe redistributive effects their decisions brought about. It is interesting to see the General Court attempting to improve this limited reach of judicial review. This is visible in its more substantive approach to judicial review and broadening of access to individuals. Yet, the Court of Justice disagreed with the General Court and little progress appears to be on the horizon.

A final note is due on the reform of the ESM Treaty that is currently awaiting Italy's ratification. Its main novelty is the possibility of demanding from the country in trouble to implement a preliminary restructuring of debt as a precondition of receiving aid.[5] The current Italian government is opposed

[4] See also F Pennesi, 'The Accountability of the European Stability Mechanism and the European Monetary Fund: Who Should Answer for Conditionality Measures?' (2018) 3(2) *European Papers* 511, 528–529.

[5] For an overview, see M Messori, 'The Flexibility Game Is Not Worth the New ESM' Luiss SEP Working Paper 15/2019, 4.

to the introduction of such a possibility because, as economists explain (although this view is not unanimous among experts), the Italian debt is held mainly by its residents (unlike the Greek debt, which was mainly held by foreign banks and wealthy individuals).[6] Restructuring such debt would have devastating consequences for domestic consumption and would lead to a major recession.[7] The dispute among experts is anchored in opposing economic philosophies of the EU's North and South,[8] and this tells us something about the common interest: insistence on formal equality of Member States results in uniform macroeconomic solutions across Member States based on a single economic philosophy.

The common interest demands of decision-makers to look beyond these constraints and take due care of the heterogeneous conditions across different socioeconomic groups within and across the Member States. The financial assistance mechanisms that were analysed in Chapter 3 were arguably a victim of urgency, where quick and (financially) efficient solutions needed to be put in place. We are now in a better position to approach the design of future emergency solutions that would account for differences among Member States, improve the democratic participation of both national decision-makers and EU citizens, and protect the social and equality aims in Article 3 TEU and Articles 8 and 9 TFEU. This, with the aim of avoiding the painful socioeconomic effects we witnessed in debtor Member States.

C.3 MONETARY POLICY OF THE EUROPEAN CENTRAL BANK

Was the individual able to ensure that the common interest is served in the monetary policy field? The short answer is: not quite. Here, the main hurdle to overcome was the ECB's high level of independence in achieving its price stability mandate. Overall, as presented in Chapter 4, we have witnessed the Court of Justice and the Bundesverfassungsgericht disagreeing over the appropriate intensity of review of ECB's decisions and the extent to which it should justify how it balanced the different interests affected. What does this mean for the common interest?

From the perspective of the Court of Justice, the ECB is shielded by its independence and expertise. The Court of Justice accepted as admissible

[6] G Galli, 'The Reform of the ESM and Why It Is So Controversial in Italy' (2020) 15(3) *Capital Markets Law Journal* 262, 270.
[7] ibid 271.
[8] ibid 267.

questions on the interpretation and validity of even a Press Release of the ECB, thus arguably providing broad access to justice with EU-wide effects. However, in terms of the common interest, we are left with the impression that objectives from Article 3 TEU (and Articles 8 and 9 TFEU) did not influence how the ECB achieves its primary mandate of price stability. This can best be illustrated if we compare what took place before the Court of Justice with my proposal for the type of judicial review[9] that should ideally be carried out against decisions with high redistributive effects.

Ideally the Court of Justice should begin with a presumption of a full review and hold the ECB to a high standard of a duty to state reasons. The ECB should, in response, provide the Court with the full material that led to its decision, including a detailed explanation of the possible directions it could have taken, how each of these options would materialise in the redistributive field, what socioeconomic interests would be affected, and how it ultimately balanced those interests in reaching its decision. If possible, the Court of Justice should also include in its review other experts that might contradict or support the claims of the ECB in that respect. Regrettably, that is not what happened. The Court of Justice, instead, both in *Gauweiler* and *Weiss*, accepted the ECB's argument that the decisions it made were the only possible course of action it had before it. This may well be the case, but there was insufficient evidentiary material presented to the Court for it to be absolutely certain that the ECB acted with a proper duty of care.

What about the parallel review that took place before the Bundesverfassungsgericht? First, to the common interest. The biggest weakness of that court's approach was its sole focus on Germany. German pensioners, German savers, and German prices of assets were the considerations of relevance in its review of ECB's quantitative easing programmes. Let us now imagine courts in all Member States doing the same. Would this increase the accountability of the ECB in respect of the common interest? Most certainly not. The ECB's decisions need to cater to the entire Eurozone, ensuring that their effects account for the possibility of contagion, cross-border shocks, and socioeconomic groups across the Eurozone. These decisions should also cater to considerations of the common interest, such as balanced economic growth and price stability, social justice and protection, and the combat against social exclusion. If we follow the logic of the German court, the ECB should arguably issue a different decision for each

[9] See Chapter 2, Section 2.3.3.

Eurozone member to ensure that only national interests are protected. I consider this highly problematic.

What of the intensity of judicial review? In this respect, the Bundesverfassungsgericht's approach does hold lessons that are more generally valuable for reviewing ECB's decisions. Specifically, to achieve objectives in the common interest, the ECB should be subject to a high duty of justifying its decisions. Of course, it is not necessary that this exercise follows the rigid steps of the proportionality test of the German court. Nevertheless, preparing a highly specific evidentiary basis for the decisions that it makes, an analysis of the redistributive effects, and more generally macroeconomic effects that can be expected is something that should not be seen as a burden on the ECB's operational independence. Another lesson from the German review is the inclusion of a broader pool of experts in the field, which would make judicial review a public forum for assessing how the ECB used its expertise and are there any deficiencies or inconsistencies in how it reached its conclusions on the best course of action. In the context where the ECB makes its decisions in a highly independent, and thus publicly unavailable process, unveiling them before the courts is in my opinion a benefit for the individual. Her ability to enforce the common interest through this process counterbalances the lack of ECB's accountability in the political sphere.

Finally, can we make any conclusions on the benefits of the preliminary reference procedure as it played out in *Gauweiler* and *Weiss*? The preliminary reference has important benefits in the context of a highly independent ECB. National courts should be seen as agents promoting contestation with effects for the entire Eurozone. Although this book was critical of the deferential approach of the Court of Justice to the ECB, it should be said that problems with ECB's accountability would likely have remained obscured had it not been for the two preliminary references that forced the Court of Justice to engage in the review of quantitative easing in the first place. In that sense, national courts also enhance the common interest, by acting on behalf of EU citizens in triggering the preliminary reference procedure, the result of which is binding on all EU Member States.

In addition, submitting a preliminary reference may assuage some of the drawbacks related to access to review at the national level. Namely, access to constitutional review on the national level is most commonly guaranteed only to privileged applicants. Lower courts, where access is broader, may contribute to the creation of EU-wide legal solutions by potentially accessing the Court of Justice through the preliminary reference procedure. This procedure has the additional benefit of holding the Court of Justice itself to account by

incentivising it to create and maintain consistent standards of review and use its privileged position to grant an EU-wide authority to the application of those standards.

C.4 THE SINGLE SUPERVISORY MECHANISM

The last case study in this book analysed legal accountability in the Single Supervisory Mechanism, which again demonstrated its own specific challenges. As a tool aimed at preventing future banking crises from developing, the ECB and national competent authorities supervise credit institutions to ensure that they comply with the requirements of prudential management in a composite setting. This means that both the ECB and national authorities apply EU and national law, which, as Chapter 5 has shown, created novel challenges for the judicial review done by EU and national courts. In a nutshell, the question is which court reviews what and based on which law (EU or national)? A second challenge in the SSM concerns the dominance of direct actions. Both of these have specific outcomes when it comes to the duty of decision-makers to act in the common interest and the intensity of judicial review that the courts perform in ensuring that duty.

In respect of the division of tasks between national and EU courts in reviewing decisions made in a composite procedure, the Court of Justice reserved for the EU level the review of decisions of the ECB, but also of national decisions that lead to a final decision of the ECB when the latter has discretion. This means that the traditional organisation of judicial review is somewhat distorted because EU courts gained the power also to review national decisions based on national law. Here the question of the common interest then becomes central: the national preparatory act is most commonly the result of national law, which was in turn enacted by the legislator in pursuit of national interests. The same may be said of a situation in which the ECB acts on the basis of national law, and it remains unclear whether the ECB then has the obligation to promote the national interest underlying that law, or is it supposed to adjust its decisions also in the pursuit of the common interest.

Two considerations are relevant here. First, by reserving the review on the EU level whenever the ECB is making the final decision by using discretion, it may be said that the involvement of EU courts ensures that the common interest is taken into account. As was done in the context of state aid in bailing-in banks in *Kotnik*, considerations such as a fair sharing of burden among shareholders and creditors of a troubled bank were given a prominent

position.[10] However, as we have seen that systemic risk can be prevented by preserving the diversity of the banking systems across Member States, EU courts should always ensure that the heterogeneity of banking systems, including national interests in preserving them, is safeguarded and that an extensive examination of expert opinions in these situations is of essence.

The second consideration to keep in mind is how EU courts interpret national law that the ECB applies. With the aim of remaining within their sphere of competence under Article 19(1) TEU, EU courts should pay great attention to relevant national case law and involve as much as possible national authorities in procedures before them. This aligns with my proposal for a thorough and extensive examination of the duty to state reasons by the institution whose decision is under review. In the SSM context, this approach would impose on the ECB and the opposing party a high burden of showing how relevant national law should be interpreted, what normative considerations can be found in that national law, and whether the common interest should have any influence in this process.

Access to justice for individuals who are in one way or another affected by supervisory decisions should not suffer, however, due to this novel division of tasks. Under the current case law of the Court of Justice, these concerns are not entirely dispelled. For example, it is unclear how effective judicial protection can be ensured for those individuals who do not meet the standing threshold of Article 263(4) TFEU, and yet are affected by the national preparatory act where the ECB enacts the final decision. Such national acts may have ancillary effects not only on the credit institution supervised, but also, for example, on individuals whose fundamental rights might be affected during the search of premises or other investigation powers of national authorities. The Court of Justice did demonstrate a degree of flexibility in *Trasta Komercbanka* when standing is affected by national rules on legal representation. However, it does not appear that the position of shareholders (especially minority ones) will improve.[11]

To assuage these deficiencies, national rules of standing traditionally act as a counterforce to rigid standing requirements in EU law. We have seen how

[10] See, in the context of the troubles of Credit Suisse, 'SRB, EBA and ECB Banking Supervision Statement on the Announcement on 19 March 2023 by Swiss Authorities' Press Release of 20 March 2023. Available at <www.srb.europa.eu/en/content/srb-eba-and-ecb-banking-supervision-statement-announcement-19-march-2023-swiss-authorities#:~:text=The%20Single%20Resolution%20Board%2C%20the,order%20to%20ensure%20financial%20stability>.

[11] This issue is, after *Trasta Komercbanka*, now again pending before the Court of Justice in Case C-777/22 P *ECB v Corneli* and Case C-789/22 P *Commission v Corneli*.

the implementation of the SSM in Germany triggered a constitutional complaint under the same conditions as in other areas of EU law. Yet, we have also seen in *Berlusconi* that national remedies cannot interfere with the exclusive jurisdiction of EU courts to also review national preparatory acts. Procedurally, thus, national courts are cornered and have few other options but to assume jurisdiction nevertheless, if effective judicial protection would otherwise be jeopardised. In a way, that would follow the logic of the Court of Justice in *Trasta Komercbanka* when it admitted legal representation contrary to national law. Of course, this strategy for national courts would also mean departing from the Court's findings in *Berlusconi*. Still, my view is that they should in those situations submit a preliminary reference. The double benefit here would be that the Court of Justice would remain involved, and yet, the ownership of the main proceedings and the final outcome would remain in the hands of the national court.

This disobedience is necessary to combat the downsides of direct actions dominating the SSM. It was already emphasised in Chapter 5 that in such a constellation the Court of Justice loses national courts as important interlocutors. Their continued interaction is crucial for the management of national and common interests that come into play when the ECB and national authorities apply both EU and national law. In other words, composite procedures require composite judicial review. The General Court cannot substitute that role as it is inherently subordinate to the Court of Justice. Lastly, by holding the Court of Justice to its standards, national courts are able to create long-term legitimate expectations, and ultimately, contribute to the uniformity and coherence of EU law.

C.5 THE COMMON INTEREST BEFORE COURTS AND BEYOND

That was what courts could or should have done. But they cannot do everything. I would like to close this book by underlining that courts, as important as they are in ensuring after-the-fact accountability to individuals, are not the platform where democratic deliberation and participation should take place. In an ideal world, highly redistributive decisions in the EMU should be taken after ample democratic input by those affected. Regrettably, that is not how the EMU is designed, but instead displays grave deficiencies that result in political inequality of EU citizens. This book thus started from the premise that in the absence of a radical overhaul of how EMU decisions are made, courts can improve the position of the individual in holding EMU decision-makers to account. It should also be said that another benefit of judicial involvement in this area is that it can create change in the behaviour

of decision-makers themselves. In other words, when enacting decisions in the EMU, the relevant institutions will rectify their previous behaviour due to their knowledge of the standards of review that await them before courts. While writing this book, the Next Generation EU package saw the light of day. The Epilogue that follows will analyse it from the perspective of legal accountability as conceived of in this book and offer some final thoughts on what awaits individuals in its rollout.