Articles

The Law of the Economic and Monetary Union: Complementing, Adapting or Transforming the EU Legal Order?

edited by Fernando Losada *and* Klaus Tuori

ECB Decision-making Within the Banking and Monetary Union: The Principle of Confidentiality on Its Way Out?

Pieter Van Cleynenbreugel*

Table of Contents: I. Introduction. – II. The ECB's transparency exceptionalism within the EU constitutional framework. – II.1. Confidentiality as a necessary governance tool for ECB monetary policy. – II.2. Extending the same confidentiality approach to ECB prudential supervision. – II.3. The compatibility of ECB monetary policy-making confidentiality with EU constitutional law. – III. The exceptional nature of ECB exceptionalism. – III.1. Professional secrecy and confidentiality in banking supervision. – III.2. Transparency and access to documents in the context of the Single Resolution Mechanism. – III.3. Towards increased transparency in Eurogroup activities? – IV. The principle of ECB confidential decision-making on its way out? – IV.1 Prudential supervision activities as "administrative tasks"? – IV.2. *Weiss:* the *Bundesverfassungsgericht's* implicit critique on the ECB's confidential monetary policymaking. – IV.3. Confidentiality: an eroding governance *modus*? – V. Conclusion.

Abstract: Art. 15 TFEU requires EU institutions to work as transparently as possible. Within the framework of that provision, the European Central Bank (ECB) has been able to benefit from a more lenient transparency regime, in which confidential decision-making takes centre stage in relation to monetary policy and prudential supervision. Somewhat contradictorily, other key actors within the banking and monetary Union (national banking supervisory authorities, the Single Resolution Board and the Eurogroup) do not share the ECB's preference for confidential decision-making. This *Article* compares those different transparency approaches and questions whether the lack of coherence between them can still be maintained within the current EU constitutional law framework. In that regard, it submits that maintaining confidentiality at least in the field of prudential supervision is difficult to square with the spirit of art. 15 TFEU. In addition, the German Federal Constitutional Court judgment in *Weiss* has a profound impact on the maintenance of confidential decision-making in the context of monetary policymaking as well. It follows from those observations that the era of confidential decision-making, although not over yet, is at least likely to erode gradually towards more transparency at the ECB.

* Professor of European Union law, University of Liège, pieter.vancleynenbreugel@uliege.be.

ISSN 2499-8249
doi: 10.15166/2499-8249/533

(CC BY-NC-ND 4.0)

KEYWORDS: openness and transparency – access to documents – European Central Bank – Single Resolution Board – Eurogroup – confidential decision-making.

I. Introduction

In a European Union (EU) based on the rule of law and on democracy,[1] it goes without saying that its institutions need to be accountable for the decisions they make.[2] One of the ways to increase such accountability lies in requiring them to have more open and transparent decision-making processes in place. It is no surprise, therefore, that the increase in powers and responsibilities of EU institutions has been accompanied by the emergence of a legal principle of transparency governing those institutions' operations. Within the EU, this principle of transparency has been linked most closely to the emergence of a fundamental right to request and obtain access to non-published documents held by different EU institutions.

The European Central Bank (ECB), for its part, has managed to continue operating a governance framework in which confidentiality rather than transparency remains the starting point. This *Article* analyses the key features of the ECB's current confidentiality-focused governance framework (section II). It subsequently compares that framework with the more transparency-oriented features present among other bodies or institutions within the EU banking union (section III). That analysis allows confirming the exceptional nature of ECB confidentiality compared to other banking union actors. Against that background, the *Article* assesses to what extent the ECB's exceptional transparency approach can be maintained within the current EU constitutional framework. At first sight, the letter of art. 15 TEU would not be against those exceptional features to be kept in both monetary policymaking and prudential supervision contexts. However, it will be submitted that maintaining confidentiality in ECB prudential supervision is difficult to square with the spirit of that very provision. The *Article* therefore calls upon the Court of Justice to clarify its scope urgently. In the same way, the German Federal Constitutional Court judgment in the *Weiss* case has a profound impact on the maintenance of confidential decision-making in the context of monetary policymaking as well. It follows from those observations that the era of confidential decision-making, although not over yet, is at least likely to erode gradually towards more transparency at the ECB (section IV).

[1] See art. 1 TEU. On the EU's understanding of the rule of law and its origins in economic integration, see P Van Cleynenbreugel, 'Member States in the EU Economic Constitution: Rule of Law Challenges and Opportunities' (2019) LIEI 329, 330 ff.

[2] See for a review of accountability issues and their application in the context of the European Central Bank, D Curtin, '"Accountable Independence" of the European Central Bank: Seeing the Logics of Transparency' (2017) ELJ 28. See more generally within the framework of the Economic and Monetary Union, M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020) 52-54 on transparency problems as accountability issues.

II. The ECB's transparency exceptionalism within the EU constitutional framework

Transparency is a key principle of EU constitutional law.[3] Since the entry into force of the Lisbon Treaty, art. 15 TFEU obliges all EU institutions to work as openly as possible and to have transparent procedures in place in order to promote good governance and ensure the participation of civil society. According to the third paragraph of that same provision, each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents. The latter right is also guaranteed by art. 42 of the Charter of Fundamental Rights of the European Union (the Charter).

In principle, the ECB, mentioned explicitly since the Lisbon Treaty among the EU institutions,[4] is also subject to those obligations. art. 15(3) TFEU nevertheless states that the abovementioned obligations apply only to the ECB when exercising its "administrative tasks".[5] Any information relating to other tasks executed by that institution would not have to be part of its access to documents regime. Absent any further clarification of what constitutes an administrative task document at this stage, it seems that the ECB feels confident to restrict significantly the access to documents that concern both its monetary policymaking and prudential supervision activities. As a result, any potential access to those documents could still be governed by a presumption or principle of confidential decision-making. It is against that background that confidential decision-making still reigns at the ECB in both monetary policy (II.1) and banking supervision (II.2).[6] In 2019, the Court of Justice confirmed that the ECB's confidentiality approach in monetary policy is compatible with EU constitutional law (II.3).

II.1. Confidentiality as a necessary governance tool for ECB monetary policy

The ECB's key responsibility is to determine monetary policy in the Eurozone. Situated at the heart of the European System of Central Banks (ESCB), its core task remains

[3] See again art. 1 TEU, which states that within the EU, decisions are taken as openly as possible and as closely as possible to the citizen.

[4] See art. 13(1) TEU.

[5] Art. 15(3) TFEU, fourth indent extends the same exception to the Court of Justice and the European Investment Bank. The Court has made it clear that it will only grant access to documents that are not linked to its judicial function: see Decision 2020/C 45/02 of the Court of Justice of the European Union of 26 November 2019 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions; see also case T-433/17 *Dehousse v Court of Justice of the European Union* ECLI:EU:T:2019:632 para. 34, where the General Court stated that transparency is to be the rule and confidentiality the exception.

[6] See also P Van Cleynenbreugel, 'Confidentiality behind Transparent Doors: the European Central Bank and the EU Law Principle of Openness' (2018) Maastricht Journal of European and Comparative Law 52.

maintaining price stability in the Eurozone, *inter alia* by having the exclusive right to authorise the issuing of Euro banknotes.[7] The ESCB more generally structures the Eurozone's monetary policy, coordinates foreign-exchange operations and ensures the smooth operation of payment systems in the Eurozone.[8]

Within the context of that mandate, confidential decision-making remains the starting point. Art. 132(2) TFEU states that "[t]he European Central Bank *may decide* to publish its decisions, recommendations and opinions".[9] That provision already hints at the ECB's discretion in making its decisions public. That could be interpreted as reflecting a preference for confidential decision-making, as was and still is common in monetary policy activities. Art. 10(4) of the ECB Statute confirms even more explicitly that "[t]he proceedings of the [Governing Council] meetings shall be confidential. The Governing Council may decide to make the outcome of its deliberations public". Again, this provision clearly indicates that the actual minutes of the deliberations will not be deemed publicly available, only the outcome of decisions *may* be made public; publicity thus constitutes the exception rather than the rule.

That preference for confidentiality makes sense when one links it to the very nature of monetary policy. This type of policy and the initiatives taken to maintain price stability are by their very nature activist interventions in the market.[10] Given the impact such decisions may have and the speculative actions they may result in if it becomes fully clear how and how far the ECB is willing and able to go in its short-term decision-making, confidentiality serves as a tool to 'manage expectations' among stakeholders. As such, confidentiality serves as an instrument directly to avoid that the actual conduct of effective and efficient monetary policy is rendered impossible.

The confidentiality posture has been confirmed in the ECB Rules of Procedure and in the ECB's 2004 access to documents decision. According to art. 23.1 of the Rules of Procedure, proceedings of decision-making bodies shall be confidential unless the Governing Council authorises the President to make the outcome of their deliberations public. The same Rules state that not only the proceedings are confidential; any document drawn up or held by the ECB shall be classified and handled in accordance with the organisational rules regarding professional secrecy and management and confidentiality of information. Only after 30 years will the documents become publicly available.[11] The

[7] Art. 127(1) TFEU.

[8] Art. 127(3) TFEU.

[9] Emphasis added. See for an example Decision 150/2001/EC of the European Central Bank of 10 November 2000 on the publication of certain legal acts and instruments of the ECB.

[10] See for background on the nature of ECB monetary policy, K Tuori, 'The ECB's Quantitative Easing Programme as a Constitutional Game Changer' (2019) Maastricht Journal of European and Comparative Law 94.

[11] Decision 257/2004/EC of the European Central Bank of 19 February 2004 adopting the Rules of Procedure of the European Central Bank, art. 23(3). See also Decision 2/2004/ECB of the European Central Bank of 17 June 2004 adopting the Rules of Procedure of the General Council of the European Central Bank, art. 10(3).

2004 access to documents decision allows individuals to request access to ECB documents. However, art. 4(1)(a), first indent also maintains that access to documents can be refused when such access would go against the public interest in maintaining the confidentiality of the proceedings of the Governing Council.[12] In the exercise of its mandate conferred by the TFEU, the ECB clearly favours confidential decision-making.

II.2. Extending the same confidentiality approach to ECB prudential supervision

Since November 2014, the ECB has also come to play a most important role in the prudential supervision of significant credit institutions established in a eurozone Member State.[13] Being part of the on-going EU banking union, ECB prudential supervision takes place in the context of the single supervisory mechanism (SSM) set up by Council Regulation 1024/2013.[14] Effectively replacing the role of formerly national prudential supervision authorities, the ECB is responsible within the SSM for the assembly of data and the adoption of decisions relating to individual credit institutions, starting with authorising their activities to adopting sanctioning decisions.[15] As such, the ECB complements its macro-economic monetary policy powers and scarce macro-prudential – stability-focused powers with micro-prudential oversight over specific credit institutions.[16]

As part of its supervisory activities, the ECB applies the sector-specific Directives and Regulations governing the prudential supervision of credit institutions. Those different instruments contain specific provisions on safeguarding professional secrecy, which have to be respected by the ECB. The professional secrecy obligations relating to financial market supervision are so extensive that one could be inclined to believe that financial supervisory decisions are also subject principally to the principle of confidential decision-making.[17] The ECB certainly operates on the basis of that premise, as art. 23(1) of its Rules of Procedure

[12] Decision 258/2004/EC of the European Central Bank of 4 March 2004 on public access to European Central Bank documents.

[13] On the emergence of the Banking Union and the ECB's role in that regard, see among others N Moloney, 'European Banking Union: Assessing its Risks and Resilience' (2014) CMLRev 1609 and BS Nielsen, 'Main Features of the European Banking Union' (2015) European Business Law Review 805.

[14] On the Single Supervisory Mechanism in particular, see among others B Wolfers and T Voland, 'Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank' (2014) CMLRev 1463.

[15] Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, art. 4.

[16] On macro-prudential supervision powers, which are entrusted to the European Systemic Risk Board, the secretariat of which is assured by the ECB, see Regulation 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, and C Papathanassiou and G Zagouras, 'A European Framework for Macro-Prudential Oversight' in E Wymeersch, KJ Hopt and G Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (Oxford University Press 2012) 159.

[17] That has also been a position defended by Advocate General Bot, in case C-15/16 *Baumeister* ECLI:EU:C:2017:958, opinion of AG Bot, para. 41.

extends confidential decision-making to the ECB Supervisory Board. The ECB thus seems to operate on the assumption that all documents relating to financial supervisory tasks are confidential and may not be communicated. The abovementioned art. 4(1)(a), first indent of the 2004 access to documents decision also states that access to documents can be refused when such access would go against the public interest in maintaining the confidentiality of the proceedings of the Supervisory Board or other bodies established pursuant to Regulation (EU) No 1024/2013. Exceptions to such confidentiality exist, yet are phrased as exceptions to the professional secrecy obligations also in place. When no such exception exists, the general idea would be that banking supervision documents at ECB level remain confidential and are not to be made accessible for individuals.

However, Regulation 1024/2013 does not seem to accept confidential decision-making unequivocally within the EU banking union's overall prudential supervision framework. According to recital 59 of that Regulation, "[t]he regulation referred to in art. 15(3) TFEU should determine detailed rules enabling access to documents held by the ECB resulting from the carrying out of supervisory tasks, in accordance with the TFEU". That recital requires the determination of detailed rules enabling access to documents resulting from the carrying out of supervisory tasks. For documents falling outside the scope of its professional secrecy obligations, the ECB would thus have to ensure that individuals can request access to them in accordance with a Regulation adopted to that extent by the Council and the European Parliament. At present, the only Regulation in place on the basis of that provision is Regulation 1049/2001, which covers only Commission, European Parliament and Council documents.[18] ECB documents, not even those held in the context of its prudential supervision mandate, do not benefit from a similar access to documents regime.

The policy choice to exclude prudential documents from a more generous transparency legal regime may come as a surprise. Prudential supervision is fundamentally different from monetary policymaking. Where in the latter case the risks of speculation and on the spot decision-making warrant a significant amount of confidentiality, the former essentially concerns criteria and frameworks on the basis of which the solvability of credit institutions will be assessed. In order to guarantee an equal and correct application of those rules in all individual cases, transparency by means of access to documents could be considered a hallmark of good administration. The ECB, for its part, decided to keep such decision-making processes confidential nonetheless, in apparent contradiction with the spirit of Regulation 1024/2013, yet in line with its predominantly confidential monetary policymaking features.

[18] Regulation (EC) 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

II.3. The compatibility of ECB monetary policymaking confidentiality with EU constitutional law

The limited scope accorded to the principle of transparency in ECB governance has given rise to criticism.[19] It is not surprising that the question as to whether confidentiality can remain at the heart of ECB policymaking has ended up before the EU Courts. In the *Espírito Santo* case, the Court had an opportunity to address that issue in the context of monetary policy. Banco Espírito Santo (BES), a Portuguese credit institution, came under financial pressure and saw its liquidity position deteriorating. The Portuguese national bank granted an emergency liquidity credit, which was later confirmed and limited up to a certain ceiling by the ECB Governing Council. After one month, the ECB decided to suspend BES' access to emergency liquidity and order all credit granted already to be repaid. In the minutes accompanying the decision mentioning the suspension, the amount of the credit offered and the maximum amount that could be granted were mentioned.[20] As a result of the Decision, BES had to initiate insolvency proceedings and entered into resolution. The holding company behind the insolvent bank requested access to those minutes, which was granted partially by the ECB.[21] However, said amounts were not made public. According to the ECB, disclosure of the document would undermine the protection of the public interest as regards the confidentiality of the proceedings of the ECB's decision-making bodies.[22] In the subsequent action for annulment against the ECB's refusal decision, the General Court held that the exception grounded in the confidentiality of proceedings could not be invoked as such without any further explanation.[23] Refusing access to a document simply because it concerned a confidential Governing Council decision was not sufficient according to the General Court. The ECB would have to explain how and why the confidentiality of procedures was at risk in the specific case at hand.[24]

However, the Court of Justice on appeal confirmed that the access to documents decision cannot be interpreted in such an extensive way.[25] The Court implicitly seems to agree that art. 15(3) TFEU shields the ECB from having to grant as wide an access to documents that do not relate to its purely administrative tasks. Monetary policy, the Court additionally

[19] See on that point, P Leino-Sandberg, 'Public Access to ECB Documents: Are Accountability, Independence and Effectiveness an Impossible Trinity?' in European Central Bank (ed) *Building Bridges: Central Banking Law in an Interconnected World*, Proceedings of the ECB legal Conference 2019, 24 June 2020 www.ecb.europa.eu 206.

[20] Case T-251/15 *Espírito Santo Financial (Portugal) v ECB* ECLI:EU:T:2018:234 para. 5.

[21] *Ibid*. paras 12 and 15.

[22] *Ibid*. para. 52.

[23] *Ibid*. paras 81 and 125.

[24] See also case T-730/16 *Espírito Santo Financial Group SA v ECB* ECLI:EU:T:2019:161, which resulted in a similar conclusion.

[25] Case C-442/18 P *ECB v Espírito Santo Financial (Portugal)* ECLI:EU:C:2019:1117 para. 42. The Court reached the same conclusion in case C-396/19 P *ECB v Estate of Espírito Santo Financial Group* ECLI:EU:C:2020:845.

appears to presume, is not part of those tasks. As a result, if the Governing Council decided not to make certain information public, art. 4(1)(a) first indent implies that no access to that information can be given.[26] No further detailed or specific motivation would be required from the ECB when it refuses access to documents on confidentiality grounds.[27]

In practice, it follows from the Court of Justice's ruling that the principle of confidential decision-making still weighs more heavily than the right of access to ECB documents in the context of ECB monetary policymaking. The ECB retains the discretion to exclude a large amount of information and documents from the overall principle of transparency. In doing so, it can elevate confidential decision-making to a principle that supersedes transparency in the context of its decision-making procedures. According to the Court, the EU law principle of transparency clearly has its limits within this particular context. Although the ECB has other accountability mechanisms in place, including its accountability to other EU institutions,[28] its independence guaranteeing its expert-based functioning,[29] and its extensive communication of its decisions,[30] the fact remains that the room for transparency as an accountability tool is more limited in this context than in the framework of the functioning of other EU institutions.[31]

The Court arrived at this conclusion in the framework of monetary policymaking. An important open question nevertheless remains as to whether the same reasoning would apply in the context of prudential supervision of credit institutions. In the absence of a clear answer given to that question by the Court of Justice, however, it remains to be seen whether the ECB's choice to extend its confidential governance features into that domain as well would be considered compatible with EU primary law.

III. The exceptional nature of ECB exceptionalism

The previous section highlighted that confidentiality remains at the heart of ECB decision-making and that EU constitutional law, by virtue of art. 15(3) TFEU, at least implicitly

[26] *ECB v Espírito Santo Financial (Portugal)*, cit. para. 44.

[27] *Ibid*. para. 56.

[28] See for background, F Amtenbrink, 'The European Central Bank's Intricate Independence versus Accountability Conundrum in the Post-Crisis Governance Framework' (2019) Maastricht Journal of European and Comparative Law 165.

[29] See D Fromage, 'Guaranteeing the ECB Democratic Accountability in the Post-Banking Union Era: An Ever More Difficult Task?' (2019) Maastricht Journal of European and Comparative Law 48.

[30] See P Van Cleynenbreugel, 'Confidentiality behind Transparent Doors: the European Central Bank and the EU Law Principle of Openness' cit. 59 ff. On the difficulties of communicating within the context of banking supervision, see M Bozina Beros, 'The ECB's Accountability within the SSM Framework: Mind the (Transparency) Gap?' (2019) Maastricht Journal of European and Comparative Law 122. For a proposal to allow experts audit confidential decisions, see P Nicolaïdes, 'Accountability of the ECB's Supervisory Activities: Evolving and Responsive' (2019) Maastricht Journal of European and Comparative Law 136.

[31] See on that point, P Leino-Sandberg, 'Public Access to ECB Documents: Are Accountability, Independence and Effectiveness an Impossible Trinity?' cit. 215.

tolerates its precedence over the principle of transparency. As such, the ECB's decision-making framework appears to reflect an anomaly in the EU legal order's overall attention to transparency. Indeed, transparency takes centre stage in other sub-fields of EU banking supervision and monetary policy.[32] Despite confirming explicitly the legality of confidential ECB decision-making under EU law in the context of monetary policymaking, the Court of Justice has taken transparency rather than confidentiality as a starting point in relation to the powers and mandates of national supervisory authorities also entrusted with banking supervision (III.1). In the same way, the newly created Single Resolution Board (SRB) within the Single Resolution Mechanism (SRM) for winding up insolvent credit institutions has taken transparency and the legal regime of Regulation 1049/2001 as its key starting point. Unsurprisingly, the Appellate Panel attached to that Board has also promoted a widest possible access to documents (III.2). Even more remarkably, the Eurogroup, an informal meeting of Eurozone finance ministers that does not qualify as an institution under EU law,[33] has made transparency the starting point of its decision-making operations, taking precedence over confidential decision-making (III.3). As a result, the ECB's reliance on confidential decision-making to limit access to its documents truly represents an exceptional EU governance modus within the EU banking and monetary unions.

III.1. Professional secrecy and confidentiality in banking supervision

The prudential supervision mechanism of credit institutions set up within the Eurozone entrusts the ECB with the prudential supervision over significant credit institutions established in a Eurozone Member State.[34] In addition to the ECB, however, national competent supervisory authorities, coordinating their activities within the European Banking Authority,[35] also play a key role in supervising banks on a daily basis.[36] When enforcing EU banking supervision law, those national authorities are acting within the scope of EU law[37] and

[32] We specifically focus on domains of banking and monetary law covered by EU law. The European Stability Mechanism, established by international Treaty and operating in accordance with public international law, is not covered by our analysis. See Treaty establishing the ESM [2012]. The ESM does not have a transparency/access to documents regime in place, although calls have been made to pay attention to this, see M Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* cit. 147.

[33] This was confirmed in the context of an action for annulment on the basis of art. 263 TFEU in joined cases C-105/15 P to C-109/15 P *Mallis and Malli v Commission and ECB* ECLI:EU:C:2016:702 paras 47-49. Advocate General Pitruzzella confirmed that position in his opinion in a case on EU liability for damages caused by Eurogroup actions, see joined cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P *Council v K. Chrysostomides & Co. and Others* ECLI:EU:C:2020:390, opinion of AG Pitruzzella, paras 62-107.

[34] See art. 4 Regulation 1024/2013 cit. See also for background G Bassani, *The Legal Framework applicable to the Single Supervisory Mechanism: Tapestry or Patchwork?* (Kluwer Law International 2019).

[35] See Regulation (EU) 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision 716/2009/EC and repealing Commission Decision 2009/78/EC.

[36] See, by way of example, art. 6 of Regulation 1024/2013 cit.

[37] At least according to case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para. 28.

therefore, in principle, subject to EU fundamental rights. However, art. 15 TFEU and art. 42 of the Charter only apply to EU institutions, offices, bodies and agencies and cannot therefore directly extend to the operations of national supervisory authorities under EU law.[38]

It can nevertheless be questioned to what extent the EU law principle of transparency, which underlies aforementioned Treaty and Charter provisions, also plays out in the operations of those supervisory authorities. To the extent that this is the case, transparent and open governance should be the rule and confidential decision-making the exception. Absent any EU primarily law provision similar to art. 15(3) TFEU that could be interpreted as justifying the inversing of that order,[39] the confidentiality of proceedings cannot in principle trump the principle of transparency.

Within the framework of banking supervision, no provisions are consecrated explicitly to the right of access to documents held by national supervisory authorities in the execution of their supervisory mandate. The only provisions somewhat related to this issue concern the professional secrecy obligations. According to those provisions, which appear in slightly different forms throughout different EU legislative instruments,[40] officials of supervisory authorities cannot in principle disclose documents exchanged or obtained from another national supervisory authority. In order to keep ensuring the effective exchange of such data and to enhance mutual trust between national authorities to exchange that information, its confidentiality is to be guaranteed. EU secondary legislation acknowledges some exceptions to that non-disclosure principle, such as in cases where this information is necessary to be used in criminal procedures.[41] Exchanged information protected by professional secrecy obligations thus remains confidential. At first sight, it would seem tempting to infer from the foregoing that, as a result, all EU-mandated banking supervision operations engaged in by national supervisory authorities operate, just like the ECB, under the principle of confidentiality, which supersedes the principle of transparency. That was also the position defended by Advocate General Bot in a 2017 Opinion to the *Baumeister* case.[42] However, the Court of Justice did not agree with that position. It rather stated that the information protected by professional secrecy was to be limited to "information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning

[38] As confirmed in case C-594/16 *Buccioni* ECLI:EU:C:2018:717 para. 20.

[39] As done by the Court in *ECB v Espírito Santo Financial (Portugal)* cit. para. 56.

[40] For an overview, see case C-594/16 *Buccioni* ECLI:EU:C:2018:425, opinion of AG Bobek, para. 43; see also R Smits and N Badenhoop, 'Towards a Single Standard of Professional Secrecy for Supervisory Authorities: A Reform Proposal' (2019) ELR 295.

[41] By way of example, see Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, art. 76(1).

[42] *Baumeister*, opinion of AG Bot, cit. para. 41.

of the system for monitoring the activities of investment firms that the EU legislature established".[43] Such information can only be disclosed on the basis of explicit legal provisions allowing for such disclosure.[44] By contrast, information not meeting those criteria is not confidential and can benefit in principle from access to documents, even when it is obtained in the framework of financial market supervision.[45] The Court confirmed this approach in its *UBS Europe*[46] and *Buccioni*[47] judgments.

As Advocate General (AG) Bobek summarised in his Opinion to *Buccioni*, three levels of transparency principles exist. In general, the principle that all documents held by a public authority are in principle accessible upon request. That principle is not absolute, as certain documents can be excluded from access, unless they meet specific conditions for disclosure of confidential information. Confidential information protected by professional secrecy obligations constitutes an exception to the overall transparency principle and EU law provides a limited series of circumstances in which such confidential information can be disclosed nonetheless.[48] At the outset, however, the category of confidential information may not be construed excessively broadly in this context.

The approach taken by the Court in this particular context is different from the one taken in relation to ECB monetary policy in *Espírito Santo*. As submitted in the previous section, the ECB has been given the opportunity to allow a principle of confidential decision-making to take the place of transparency. It follows from the judgments discussed here that this is not the case in relation to national banking supervisory authorities. Although EU secondary legislation offers relatively broad professional secrecy and confidentiality frameworks, those continue to operate against the background of the EU law principle of transparency and the idea of the widest possible access to documents. The Court decided not to follow AG Bot's suggestion to apply the ECB confidentiality logic to this field. From a coherence point of view, that is most regrettable. As both the ECB and national supervisory authorities engage in banking supervision activities, different disclosure regimes may apply to those supervision-related documents that do not fall within the professional secrecy obligations. It may as a result be easier to obtain such documents from national authorities than from the ECB, which results in a rather incoherent prudential supervision transparency framework.[49] In our opinion, that inconsistent framework does not deserve to remain in place, if only because it creates different

[43] *Baumeister* cit. para. 35.

[44] *Ibid*. para. 43.

[45] *Ibid*. para. 44.

[46] Case C-358/16 *UBS Europe and Others* ECLI:EU:C:2018:715.

[47] *Buccioni* cit. para. 30.

[48] *Buccioni*, opinion of AG Bobek, cit. para. 32.

[49] Although, given the ECB's particular role in relying on prudential supervision insights to develop effective monetary policies, it could also be argued that internal coherence *vis-à-vis* the accessibility of documents would be more important than coherence between national authorities and the ECB in access to prudential supervision documents. The Court has not had the opportunity to address that point in the case law referred to here.

accountability standards for actors involved in similar processes. At present, however, the Court of Justice implicitly confirms that those differences exist, resulting in ECB decision-making remaining an exception to the transparency principle.

III.2. Transparency and access to documents in the context of the single resolution mechanism (SRM)

As part of the EU's banking union, a single resolution mechanism has been set up in addition to the single supervisory mechanism in which the ECB and national banking authorities cooperate. The purpose of the single resolution mechanism is to ensure the orderly and coordinated winding down of insolvent credit institutions.[50] To avoid such procedures being done at the expense of taxpayers, banks have to contribute to a single resolution fund.[51] Regulation 806/2014 sets up this mechanism and entrusts a new EU agency, the SRB, with the adoption of resolution decisions.[52] Given the financially and often politically sensitive nature of resolution procedures, professional secrecy and confidentiality obligations have been put in place.[53] Within the context of SRB operations, attention has nevertheless also been paid to transparency and access to documents. Contrary to the framework maintained by the ECB, the SRB transparency framework closely aligns with Regulation 1049/2001 and its precedence of transparency over confidential decision-making.

According to art. 90 of Regulation 806/2014, Regulation 1049/2001 shall apply to documents held by the Board. In addition, persons who are the subject of the SRB's decisions shall be entitled to have access to the SRB's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or internal preparatory documents of the Board. The SRB had to adopt specific rules on how that Regulation would be implemented in the context of its operations.

In February 2017, the SRB adopted its access to documents decision.[54] Acknowledging that art. 15 TFEU and Regulation 1049/2001 seek to guarantee access to documents to the fullest extent possible, the SRB Decision undertakes to define the conditions and

[50] Recital 10 of Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010.

[51] Art. 67 of the Regulation 806/2014 cit.

[52] Art. 42 of the Regulation 806/2014 cit. On the SRB's extensive powers, see IG Asimakopoulos, 'The Single Resolution Board as a New form of Economic Governance' in H Hofmann, K Pantazatou and G Zaccaroni (eds), *The Metamorphosis of the European Economic Constitution* (Edward Elgar 2019) 279.

[53] Art. of the 88 Regulation 806/2014 cit.

[54] Decision (SRB/ES/2017/1) of the executive session of the Board of 9 February 2017 on public access to the Single Resolution Board documents (hereinafter SRB access to documents Decision).

limits of public access to its documents.[55] Similar to the 2004 ECB Decision and contrary to Regulation 1049/2001, art. 1 of the SRB Decision does not mention that it intends to grant the widest access possible to those documents. However, despite the absence of a reference to such widest access, the exceptions to access have been phrased in a narrower way than in the ECB Decision. Just like Regulation 1049/2001 and the ECB Access Decision, the Decision distinguishes mandatory exceptions to disclosure ("shall refuse") and exceptions to disclosure when no overriding public interest would nonetheless justify disclosure. The second category of exceptions is a perfect copy of Regulation 1049/2001. As to the mandatory exceptions, access to SRB documents shall be refused in case disclosure would undermine *i)* the public interest as regards the financial, monetary or economic policy of the Union or a Member State, the stability of the financial system of the Union or a Member State, the Union's or a Member State's policy relating to the resolution of credit institutions or other financial institutions, international relations, public security and the purpose of inspections, *ii)* the privacy and integrity of an individual with regard to his personal data and *iii)* the confidentiality of information protected as such under EU law.[56] The exceptions list is comparable to the one in Regulation 1049/2001, with the additional nuance that the SRB explicitly excludes confidential information protected by EU law from the scope of disclosure. In doing so, the Decision mainly confirms what had already been stated in Regulation 806/2014.[57] Documents relating to preliminary consultations or deliberations shall be refused even after decisions have been taken unless an overriding reason in the public interest requires disclosure. For exchanges with national resolution authorities, national banking supervision authorities and the ECB, this rule applies unequivocally. For exchanges with other bodies, the SRB will have to show that disclosure would undermine its decision-making processes.

Applicants for documents who have been refused full access need to submit a confirmatory application. Against the confirmatory decision, an internal appeal before the SRB Appeal Panel needs to be lodged, prior to submitting the case for review to the EU Courts or the European Ombudsman.[58] In the context of the winding down of *Banco Popular*,[59] the Appeal Panel has had the opportunity, throughout a series of cases, to confirm the need for the SRB to adhere to the key principles set out by Regulation 1049/2001. In those cases, the Appeal Panel confirmed that the SRB is to operate on the basis that, in principle, every document should be accessible unless certain overriding interests mandate against disclosure. That does not mean that certain categories of documents cannot be presumed confidential.[60] In that case, just like in the framework of Regulation

[55] Recitals 1 and 2 of the SRB access to documents Decision cit.

[56] Art. 4(1) of the SRB access to documents Decision cit.

[57] Art. 90(4) of the Regulation 806/2014 cit.

[58] Art. 90(3) of the Regulation 806/2014 cit.

[59] For an overview, see the decisions of the SRB regarding *Banco Popular* at srb.europa.eu.

[60] See, by way of example, Single Resolution Board Appeal Panel, final decision of 19 June 2018, case 54/17 para. 20.

1049/2001, it falls upon the applicant to demonstrate an overriding interest justifying why a document falling within that category is to be made public.

An important question that remains unaddressed so far is the extent to which the SRB can rely on exceptions to disclosure that were not directly covered by Regulation 1049/2001. Art. 90(2) of Regulation 806/2014 determines that the Board is to adopt a decision explaining how Regulation 1049/2001 will be applicable to it. That provision does not allow the SRB to envisage additional exceptions justifying non-disclosure of documents. At present, an appeal is pending before the General Court against an Appeal Panel decision invoking precisely that argument. It remains to be seen how the Court will rule in this respect.[61]

The uncertainty about the scope of non-disclosure exceptions notwithstanding, it cannot be denied that access to SRB documents cannot simply be refused in order to protect the confidentiality of banking resolution proceedings. As required by Regulation 1049/2001 and the case law interpreting it, the SRB has to offer a detailed description of the circumstances in which access to a document is refused. By obliging the SRB to take that position, transparency instead of confidentiality is being considered as the principle governing SRB operations. As such, the SRB operations are different from those of the ECB, which continues to allow confidentiality of its decision-making to be used as a justification in access to documents requests.

III.3. Towards increased transparency in Eurogroup activities?

To further highlight the ECB's transparency exceptionalism within the overall framework of EU banking supervision and monetary policy, it is useful also to compare its transparency approach with the one taken by the Eurogroup. A body not explicitly conferred powers as a matter of EU law,[62] the Eurogroup nevertheless plays an important role in the institutional setup of the Eurozone. It should not surprise, therefore, that concerns have been voiced regarding the transparency of that body as well. In that context, it is interesting to note that the Eurogroup itself has taken steps to become more transparent. Those steps resemble the approach the ECB has taken towards transparency throughout its policies.

At first sight, the Eurogroup appears to have a rather shady status as a matter of EU constitutional law. Prior to the Lisbon Treaty, the Eurogroup was not recognised as such. An informal meeting of eurozone finance Ministers often preceding regular Council meetings, the Eurogroup became a forum in which eurozone Member States discussed their economic and budgetary policies and through which they sought, informally, to streamline those policies.

[61] See, to that extent, pending case T-62/18 *Aeris Invest v CRU*, pending case – action brought on 6 February 2018, first plea in law.

[62] *Mallis and Malli v Commission and ECB* cit. paras 47-49.

Existing without a clear legal basis since 1998,[63] the Lisbon Treaty acknowledged its existence by inserting art. 137 TFEU, which states that arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group. According to art. 1 of Protocol N. 14 attached to the TFEU, the Ministers of the Member States whose currency is the euro shall meet informally.

A hybrid body not being part of the Council or the European Council as such, its meetings are prepared and administered by a Eurogroup Working Group (EWG), the secretariat of which is assured by the European Commission. As a preparatory committee, the discussions within that Working Group are kept confidential, meaning that agendas and documents supporting preparatory work are not made public at the outset.[64]

Given its hybrid status within the EU constitutional framework and its reliance on EU administrative services to support its operations, questions have arisen regarding the applicability of the EU law principle of transparency to Eurogroup operations. As a body not explicitly mentioned in Regulation 1049/2001, documents maintained by the Eurogroup would in principle not be amenable to access under that Regulation, above all absent a specific Decision or Regulation targeting the Eurogroup. At the same time, however, the fact that the Commission and Council General Secretariat maintain certain documents relating to the Eurogroup and EWG, would seem to make it possible for individuals to request access to them under Regulation 1049/2001. Indeed, per art. 2(3) of that Regulation, all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the EU can be the subject of an access request. The fact, however, that Eurogroup documents were not included in the Council's public register made it difficult to assess on what basis the EWG and Eurogroup decided to adopt or agree on certain policies. The complex institutional setup of the Eurogroup thus makes it very difficult to evaluate its decisions and to effectively hold it to account.

In a 2013 Report by Transparency International, the lack of transparency and accountability of the Eurogroup was put forward explicitly.[65] In reaction to calls for increasing transparency, the Eurogroup's then-President Jeroen Dijsselbloem decided to take action.[66] In March 2016, the Eurogroup agreed upon the principle that documents submitted to the Eurogroup will, as a rule, be published after the meetings, unless well-founded objections warrant against such publication.[67] At the same time, it was stated that the Eurogroup is not an EU institution and would not therefore fall within the scope

[63] See, to that extent, the site of the Eurogroup at the website of the Council of the European Union, www.consilium.europa.eu.

[64] This is based upon recital 11 of Regulation 1049/2001 cit.

[65] An update in B Braun and M Hübner, *Vanishing Act: The Eurogroup's Accountability* (Transparency International EU 2019) transparency.eu.

[66] Remarks by Eurogroup President following the meeting of 11 February 2016 www.consilium.europa.eu.

[67] Remarks by Eurogroup President following the meeting of 7 March 2016 www.consilium.europa.eu.

of Regulation 1049/2001.[68] Documents held by or prepared by Eurozone Member States can only be accessed in accordance with their national transparency regimes. To the extent that documents are held by the Commission or Council secretariat, those bodies can be called upon, in accordance with the procedure set out in Regulation 1049/2001, to consider applications for access to documents.[69]

Against the background of the pressure exerted by the European Ombudsman, the Eurogroup in 2018 decided to revise its transparency policy. In September 2018, Eurogroup President Centeno put on the agenda the review of the communications' strategy in order to improve it further for the future.[70] That review resulted in important modifications being made to the governance of the Eurogroup as of September 2019. From that point onwards, as part of those modifications, an online repository of publicly available Eurogroup documents, featuring a search engine and filtering options, was created. In addition, the Eurogroup's webpage now mentions explicitly that the right to access to documents can be exercised by addressing requests for access to documents related to the activity of the Eurogroup and its preparatory instances to the EU institution holding them, notably the Council or the Commission.[71] As a result of those steps, the Eurogroup will no longer be able to simply refer to confidentiality as a reason not to make documents public. Without the presence of another public interest justifying non-disclosure, transparency and the disclosure of document underlies Eurogroup working methods.

IV. The principle of ECB confidential decision-making on its way out?

The main observation that can be derived from the overview in the previous two sections is that the ECB maintains a *status aparte* from a transparency point of view compared to other actors within the EU banking union. Although in practice all actors have the opportunity to protect confidential documents, the ECB is the only one, relying implicitly on art. 15(3) TFEU, to put confidentiality instead of transparency at the centre of its governance framework.

The fact nevertheless remains that the confidentiality-centred governance framework of the ECB in both monetary policy and banking supervision sits uneasily with the overall ambition of the EU to place transparency through access to documents more directly at the forefront of its decision-making processes. Recent developments may therefore even hint at a gradual erosion of confidential decision-making at ECB level and caution against the ECB remaining all too firmly attached to all of its current confidential governance policies.

[68] Reply from the Eurogroup President to the European Ombudsman of 16 May 2016 on recent initiatives to improve Eurogroup transparency www.ombudsman.europa.eu.

[69] *Ibid*.

[70] Remarks by Eurogroup President following the meeting of 7 September 2018 www.consilium.europa.eu.

[71] See Eurogroup transparency policy review and way forward of 20 September 2019 www.consilium.europa.eu 3.

Two such developments will be distinguished in this section. First, although ECB confidentiality also extends to the framework of prudential supervision within the SSM, the ongoing transparency evolutions in related banking union actors (national prudential supervisors applying EU law and the SRB) in our opinion constitute, if not a legal obligation, at least a very clear invitation to the ECB to modify its confidentiality approach in relation to its SSM supervisory tasks. The ECB could even be obliged to do so, to the extent that the Court of Justice would classify its prudential supervision activities as ECB "administrative tasks" under art. 15(3) TFEU. We submit that this interpretation would not be completely unlikely (IV.1). Second, although, in contrast with prudential supervision, there are better policy reasons to keep a confidential decision-making framework in place in monetary policymaking, it has become evident that changes may also need to be contemplated in that context. The German Federal Constitutional Court's (BVerfG) judgment rendered on 5 May 2020 in the *Weiss* case constitutes an important illustration in that regard.[72] That judgment can be understood as criticising the ECB's confidential decision-making process. It is therefore submitted that the best way to avoid the BVerfG from disregarding judgments of the Court of Justice and starting to rule itself on the compatibility of ECB measures with EU law would be to envisage the introduction of institutional transparency sandboxes in a selected number of cases involving monetary policymaking (IV.2). Both developments show that, albeit to different extents and in different ways, the principle of confidential decision-making is expected to face increasing scrutiny in the coming years (IV.3).

IV.1. Prudential supervision activities as "administrative tasks"?

Art. 15(3) TFEU obliges the ECB only to set up an access to documents regime covering documents relating to its administrative tasks. The Court's validation of ECB confidential monetary policymaking in the *Espírito Santo* case implicitly and indirectly confirms that monetary policymaking is not an administrative task and can therefore be shielded from wider access to documents requirements.[73] It nevertheless remains unclear to what extent that same reasoning also applies to the ECB's prudential supervision activities. At first sight, the two domains are fundamentally different. Whereas monetary policymaking involves engaging in short-term corrective interventions in the functioning of the market and monetary system, prudential activities in essence constitute an administrative supervision mandate similar to many other market supervision frameworks and procedures. Given those differences, it may very well be possible to maintain different access to documents approaches in both fields.

[72] German Constitutional Court judgment 2 BvR 859/15. On the judgment, see D Kyriazis, 'The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango' (6 May 2020) European Law Blog europeanlawblog.eu and A Viterbo, 'The PSPP Judgment of the German Federal Constitutional Court: Throwing Sand in the Wheels of the European Central Bank' European Papers (European Forum Insight of 26 June 2020) www.europeanpapers.eu 671.

[73] *ECB v Espírito Santo Financial (Portugal)* cit. para. 42.

In addition, the developments that have been taking place among other EU banking union actors (national prudential supervision authorities and the SRB) cast additional doubt on the ECB's continued reliance on confidential decision-making in this field. It follows from the overview of transparency steps taken by other actors within the banking union in the previous section that transparency rather than confidentiality constitutes the governance starting point for those actors. On top of those evolutions, it is important to recall that recital 59 of Regulation 1024/2013 seems to prefer a more transparency-oriented policy in that regard at the level of all authorities involved in prudential supervision, including the ECB. The ECB's involvement in the SSM would mean that it would also have to take that call for more transparency seriously. The fact that national prudential supervision authorities are subject to wider access to documents obligations and the interest the EU may have in ensuring a coherent application and interpretation of its prudential supervision regulatory framework could also argue in favour of more transparency at least in the ECB's prudential supervision access to documents framework.

The ECB for its part seems convinced that it is not in the same way affected by this drive towards more transparency in prudential supervision. Art. 4(1)(a) of its 2004 access to documents decision continues to refer to the confidentiality of Supervisory board procedures in that regard. As a result, documents related to prudential supervision activities can also, as a matter of principle, remain protected by confidentiality. From an EU constitutional law's perspective, the ECB's extension of confidentiality to prudential supervision tasks implicitly relies on the presumption that ECB prudential supervision activities, just like those relating to monetary policymaking, do not relate to its administrative tasks. As a reminder, it is only for those tasks that art. 15(3) TFEU requires the presence of a full-fledged access to documents legal framework.

Although the Treaty does not define administrative tasks, the European Ombudsman in 1997 indicated that such concept relates only to documents involving an institution's internal administration (its organisational features, its tenders, its human resources decisions etc.).[74] That narrow interpretation has been relied on by the ECB to set up a more lenient access to documents regime in relation to monetary policymaking and prudential supervision activities. In that narrow understanding, prudential supervision tasks are not administrative tasks, which implies that the ECB could retain full discretion to limit access to any document that is not related to the exercise of those tasks.

It goes without saying that neither a recital to Regulation 1024/2013 nor the fact that national authorities applying the same or similar rules of EU secondary legislation act in a more transparent way, can supersede a provision of EU primary law such as art. 15(3) TFEU that limits transparency to documents relating to administrative tasks. The issue nevertheless remains that the notion of "administrative tasks" has not been defined yet authoritatively by the Court of Justice. Absent such a final interpretation, the ECB

[74] Draft recommendation of 20 January 1997 of the European Ombudsman on the own initiative inquiry into public access to documents, 616/PUBAC/F/IJH www.ombudsman.europa.eu.

currently relies on a non-binding interpretation of that notion by the European Ombudsman. That interpretation was put forward in 1997, at a time when it was rather unimaginable that the ECB would also act as a banking supervisor in its own right, which essentially amounts to the administrative supervision of major credit institutions. Compared with monetary policymaking, which deals with *ad hoc* interventions on the market and of which the Court has confirmed their non-administrative task nature,[75] prudential supervision in essence constitutes an act of administrative supervision that is recurrent and remains on-going, results in the adoption of administrative decisions and potentially sanctions. In addition, the activity of prudential supervision consists in the application and interpretation of EU legislation that is already in place instead of taking (pro-)active measures to intervene in the functioning of markets on an ad hoc basis. Traditionally speaking, such tasks could be classified as administrative in nature, which could result in them also being considered as such for the purposes of art. 15(3) TFEU.

Given their more administrative nature and focus compared to monetary policymaking, we submit that it cannot be excluded that the Court of Justice, should it have the occasion to do so, would interpret art. 15(3) in a more transparency-oriented fashion in the context of prudential supervision activities. That is especially true given the Court's confirmation that national prudential supervision authorities implementing and applying the same EU secondary legislation instruments as the ECB need to have such access to documents regimes in place. It is difficult to justify why the same types of documents could be accessed at national level whereas the mere fact that a credit institution is overseen by the ECB shields those documents from being made accessible. To the extent that disclosing such documents does not impinge upon the effectiveness of ECB monetary policymaking or on professional secrecy obligations, their disclosure should be considered. Given the interest the EU has in ensuring a consistent interpretation of its secondary legislation at both EU and national levels and the fundamental differences that exist between prudential supervision and monetary policymaking, this interpretation is not to be excluded at the outset.

To the extent that such an interpretation appears likely against the background of more general transparency evolutions within the banking union, prudential supervision-related "administrative tasks" at ECB level should, per art. 15(3) TFEU, be accompanied by a wider access to documents legal regime. It remains to be seen when and whether the ECB, rather than wait for such an interpretation by the Court of Justice, would be willing pro-actively to take steps in that direction and remove the confidentiality focus from its prudential supervision activities. Although that would do away with the current coherence in the ECB's overall confidentiality governance framework extending both to monetary policymaking and prudential supervision, it would align ECB prudential supervision practices more directly with transparency and access to documents obligations that are already imposed on national prudential supervisors.

[75] *ECB v Espírito Santo Financial (Portugal)* cit.

IV.2. *Weiss*: the *Bundesverfassungsgericht*'s implicit critique on the ECB's confidential monetary policymaking

Within the framework of monetary policymaking, the BVerfG's *Weiss* judgment may also herald modest steps towards an increasingly transparent governance framework. The judgment above all held that the Court of Justice acted *ultra vires* in applying a too-deferent proportionality test to the assessment of an ECB programme,[76] allowing for the purchase of government bonds (the public sector asset purchase programme or PSPP).[77] Although the BVerfG above all criticised the Court of Justice for having failed to engage in a full proportionality review of the ECB's PSPP decision, it also criticised the way in which the ECB had justified the need for this programme under its monetary policy competences. According to the BVerfG, it was unclear to what extent the ECB had balanced the economic and social policy effects of its programme against the need for price stability interventions.[78]

The judgment particularly emphasised that this lack of detailed reasoning constitutes an *ultra vires* act on behalf of the ECB.[79] The lack of a sufficient amount of information available[80] makes it impossible for the Court of Justice of the European Union and the German legislator to fully determine whether the ECB could maintain such a programme. The BVerfG therefore called upon the ECB Governing Council to adopt "a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme".[81] In doing so, the ECB has to ensure that it is sufficiently transparent and open about those reasons, in order to allow the Court of Justice and national Parliaments fully to assess and review the decisions taken in that context.

In general terms, the BVerfG's critique on the PSPP programme is essentially a critique on the way in which ECB decision-making is held to account.[82] The German Court does not however impose or mandate an immediate change in the ECB's transparency-confidentiality balance. It only wants to ensure that the reasons underlying and motivating certain programmes and decisions can be understood and reviewed better at Member State level. We nevertheless submit that the BVerfG judgment can be understood to consider as problematic the opaque and confidential nature of decision-making at the

[76] Case C-493/17 *Weiss and Others* ECLI:EU:C:2018:1000.

[77] See for that programme, Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10). In the meantime, that Decision had been replaced by Decision (EU) 2020/188 of the European Central Bank of 3 February 2020 on a secondary markets public sector asset purchase programme (ECB/2020/9).

[78] German Constitutional Court judgment 2 BvR 859/15 cit. paras 176-177.

[79] *Ibid*. para. 178.

[80] *Ibid*. para. 216.

[81] *Ibid*. para. 235.

[82] M Lamandini and D Ramos Muñoz, 'Monetary policy judicial review by 'hysteron proteron'? In praise of a judicial methodology grounded on facts and on a sober and neutral appraisal of (*ex ante*) macro-economic assessments' (20 May 2020) EU Law Live eulawlive.com.

ECB level.[83] The BVerfG gave a clear sign that the current extent of confidential decision-making may make it difficult to sufficiently review the ECB's actions.

Against that background, the BVerfG judgment could be understood as presenting an opportunity to reconsider the ECB's confidential decision-making framework. The question therefore remains what modifications would be required to improve that framework. It is clear from the aforementioned observations that the BVerfG at a general level took issue with the lack of documentation and information justifying certain features of the PSPP programme. Such criticism would require the ECB to manage expectations better and to disclose the particular information it relies on to make decisions beyond its current open communications strategies.

From a legal point of view, the simplest solution would be to remove the layer of confidentiality surrounding ECB decision-making. In practice, that would imply a change to art. 10.4 of the ECB Statute, which amounts to a modification of the Protocol attached to the Treaties containing that Statute. It goes without saying that, in the current state of affairs, any Treaty change would seem a remote possibility unlikely to succeed. Changes to art. 23.1 of the ECB Rules of Procedure, highlighting that the ECB will operate in a more transparent way would seem to offer a solution. However, the ECB's pledge to be more transparent would not take away the fact that art. 10(4) of the ECB Statute still confirms that confidentiality remains at the heart of the ECB Governing Council. In practice, therefore, any changes made to the Rules of Procedure would risk to remain cosmetic without modifying anything in practice.

It is therefore submitted that, rather than changing the regulatory framework in the first place, it may be more constructive to think about alternative ways that would result in increased openness and transparency, without necessarily having to be accompanied by Treaty changes. One such approach could consist in the Governing Council creating so-called "transparency sandboxes". A transparency sandbox would consist in a framework in accordance with which a selected group of individuals and institutions would be given wider access to documents otherwise considered as confidential. The notion of "transparency sandboxes" is inspired by so-called regulatory sandboxes, safe spaces in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question.[84] Within the context of regulation, regulators sometimes accept businesses to experiment with certain technologies within a closely confined space. By way of analogy, it would not be impossible for the ECB to experiment, in relation to certain kinds of documents, with an openness framework that goes beyond what is usually possible under

[83] See also E Cerrato, F Agostini and N Jaberg, 'Why the PSPP judgment of the German Federal Constitutional Court Gives the ECB Another Incentive to Integrate Climate Change Considerations into Monetary Policy' (27 May 2020) European Law Blog europeanlawblog.eu.

[84] See for the definition of a regulatory sandbox the UK's Financial Conduct Authority's brochure on regulatory sandboxes: Financial Conduct Authority, 'Regulatory Sandbox' (November 2015) www.fca.org.uk 1.

generally applicable confidentiality and access to documents rules. The sandbox would allow, on a case-by-case basis, to make documents more widely available to stakeholders involved in or affected by certain decisions. Stakeholders involved in the decision-making process would receive access to the sandbox documents. However, such access could be accompanied by safeguards and obligations of secrecy not to transfer those documents beyond those allowed entry into the sandbox. To the extent that those decisions may have a (presumed) impact on a larger group of stakeholders, a wider disclosure of those documents could be envisaged. It could even be contemplated in that respect to grant a large number of individuals access to certain sandboxes. That would imply that the ECB or another body closely associated with it, would have to determine whether or not to include a certain decision within a sandbox. In practice, this type of action is exactly what the ECB engaged in in the wake of the BVerfG's *Weiss* judgment. The ECB made certain supporting documents available to the German Central Bank (the *Bundesbank*), which in turn involved the German Federal Ministry of Finance and the Bundestag of the German Federal Parliament in the consultation of those documents.[85] On the basis of that consultation, the German authorities involved could decide whether or not the ECB had respected the proportionality principle with regard to the PSPP programme.

The organisation of such institutional sandboxes is likely to raise at least four specific questions. First, it has to be decided what documents can be subject to a sandbox. In the PSPP case, the BVerfG indicated clearly that all documents relating to the adoption of that decision and enabling a full proportionality review were to be shared. However, when there is no such external demand for a given document, it may be difficult to anticipate which documents could be made subject to a sandbox. A sandbox framework is essentially *ex post* and responsive, a reaction to an external demand for more transparency. As such, it may be difficult to set up in an *ex ante* and general fashion which documents can be included in a sandbox and under which conditions. It could be envisaged that an independent expert board reviewing ECB classifications and deciding on the scope of sandbox operations could be set up. When that happens, it is not excluded that decisions taken following this internal review procedure will be subject to judicial review before the EU Courts on the basis of art. 263 TFEU. Second, the question remains as to the access to those documents included in the sandbox. Putting those documents there implies that their accessibility is going to increase. However, absent general criteria regarding the persons having access to them, it will fall upon the ECB to determine, on a case-by-case basis the extent of persons benefiting from access to those documents. That implies that the category of viewers of documents has to be determined carefully and in each case. This is obviously a laborious task that requires careful consideration. Third, the decision to include a certain decision in a sandbox and to extend it to certain categories of persons and not others is likely to give rise to disputes and calls for an increased review over those

[85] See for coverage of those developments A Rinke, 'ECB stimulus plans meets court requirements: German Finance Minister' (29 June 2020) Reuters www.reuters.com.

decisions. It may be necessary also to set up an administrative review mechanism allowing individuals to request a sandbox treatment or to contest decisions responding negatively to their request. In any case, the mere possibility of introducing institutionalised transparency sandboxes would need to be accompanied by new administrative structures within the ECB as well. Fourth, it is likely that the sandbox approach would result in incoherent transparency approaches. Some documents would be made subject to sandbox treatment, while others, relating to similar decisions, would not. In the same way, the scope of stakeholders granted access to the sandbox would differ from case to case and someone would have to determine clearly who is a stakeholder and who is not. A clear definition of who can be a stakeholder and the professional secrecy obligations accompanying stakeholdership would therefore have to be established in the framework setting up the institutional sandbox regime.

Despite those open questions, we submit that the sandbox approach outlined here could service as a means for the ECB to translate the BVerfG's critique in a sustainable and more transparency-oriented framework. It allows directly to counter the BVerfG's objections without fundamentally overhauling the confidentiality-oriented governance framework underlying ECB monetary policy. Although formally and at the outset maintaining the ECB's confidential decision-making approach, the potentially intensified *ex post* review over decisions that had to be taken on short notice would increase avenues to question the ECB's currently unquestionable expertise in monetary policymaking and, more generally, the confidentiality rationale that accompanies it. The future setup and potential functioning of those institutional sandboxes would therefore have to include safeguards to avoid the effectiveness of monetary policymaking being undermined. The addition of supplementary administrative layers and increased professional secrecy standards could be envisaged in that regard. At present, it remains to be seen whether, in response to the BVerfG, the institutional sandbox mechanism could be set up on a more permanent basis and what safeguards will have to be put in place to keep confidential decision-making play a central role in monetary policymaking. What is clear, however, is that the strict confidentiality-oriented policy focus will continue to be under scrutiny in the realm of monetary policymaking and may require a new balance between transparency and confidentiality.

IV.3. Confidentiality: an eroding governance *modus*?

The developments outlined in this section demonstrate that the ECB's confidentiality-centred decision-making may be eroding, in the first place in the realm of prudential supervision but also and to a lesser extent in the realm of monetary policymaking.

In the realm of prudential supervision, the ECB operates on the assumption that decision-making is in principle confidential and that transparency through access to documents can be limited on grounds of such confidentiality. That interpretation is nevertheless dependent on prudential supervision tasks not being classified as administrative

tasks under art. 15(3) TFEU. This *Article* submitted that, absent judicial clarification, the administrative nature of prudential supervision procedures could lead the Court to require a wider access to documents regime for those activities. If that were to be accepted, merely referring to the confidentiality of ECB Supervisory Board meetings would no longer constitute a valid reason to refuse access to documents in that context. It may be useful for the ECB to take into account that option.

Although the pro-active, ad hoc interventionist nature of monetary policymaking serves as a justification to keep this domain largely confidential, the BVerfG *Weiss* judgment at the very least requires the setup of increased transparency sandboxes to be put in place. To comply with that judgment and avoid future problems, we advocated the setup of an institutionalised sandbox mechanism in this context. Although that mechanism does not as such do away with the principle of confidentiality in monetary policymaking, it brings some important nuances to it that require additional safeguards.

Although, at present confidentiality still stands as a valid legal principle, those potential or emerging cracks in the governance framework warrant attention at ECB level and demonstrate, at the very least, that unfettered reliance on confidential decision-making is becoming increasingly difficult as the EU banking and monetary union mature.

V. Conclusion

Despite the overall recognition of an EU law principle of transparency and access to documents, the ECB has managed to retain a decision-making framework focused on confidentiality. This *Article* highlighted how the ECB's remaining focus on confidentiality is increasingly becoming the exception within the EU banking and monetary unions. Other actors involved in the same policy sphere operate on the basis of transparency rather than confidentiality. When applying EU law, national banking supervision authorities, despite being subject to important professional secrecy obligations, operate on the basis of transparency and the potential access to each relevant document. In the same way, the newly created SRB has implemented a transparency-focused governance framework, which has been refined in the context of its Appeal Panel's activities. Even the Eurogroup, a body not part of the EU institutions, as the ECB originally was as well, adopted governance principles that essentially reflect a transparency-oriented decision-making approach. As a result, the ECB remains somewhat alone with its confidentiality-centred decision-making framework. Although inconsistent and giving rise to different access to documents standards, the specific ECB status has been deemed legal under EU law, at least in the framework of monetary policymaking.

At the same time, however, the *Article* highlighted two developments that show that the ECB's unfettered reliance on confidential decision-making faces increasing scrutiny. On the one hand, the extension of ECB confidentiality to its prudential supervision activities may be a step too far. Although the ECB itself maintains a coherent confidentiality focus, we argued that the nature of monetary policymaking and prudential supervision tasks are

completely different and may justify a different transparency approach. In addition, the fact that national prudential supervisors applying the same instruments of EU prudential supervision legislation operate under more transparent circumstances also calls for modifications being made at ECB level in that regard. It was submitted that a more extensive interpretation of the "administrative tasks" notion in art. 15 TFEU would no longer seem unimaginable in this regard, indirectly resulting in wider access to ECB prudential supervision documents. On the other hand, the German BVerfG's judgment in *Weiss* highlighted that the ECB may have to think about ways to shed more light on some aspects of its monetary policy. Seeking to reflect upon a constructive way forward, the *Article* called for the institutionalisation of transparency sandboxes, but also cautioned against the risks they carry along. Given the need for clarity and modifications in both fields of ECB activity, it can no longer be denied that ECB confidential decision-making is at the very least coming to terms with increasing demands for transparency across the EU legal order.