THE *KARLSRUHE* COURT'S RULING: HOW TO LAY BARE THE FRAGILITIES OF EUROPEAN INTEGRATION

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Abstract

This article draws attention to the hyper-responsibilization of the European Central Bank, linking it to the absence of a political counterweight at central level. It argues that the orthodoxy of the treaties, adopted by the German Federal Court, lays bare this fundamental fragility of European integration.

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1. Introduction

The recent and serious conflict between the Court of Justice of the EU (ECJ) and the German Federal Constitutional Court (FCC) has rekindled the long-simmering debate on the problem of who should have the last word in the European Union (EU) legal area. The specific context on which the conflict took place has brought to light the presence of a significant fracture line which affects not only the relationships of coexistence between legal systems, but also the very functionality of the common institutions. The problem, as is widely known, concerns the possibility that the European Central Bank (or rather the System of European Central Banks, also known as ESCB) will continue to implement, even in the foreseeable future, its programs for the purchase of eurozone government bonds in the secondary market. The recent judgement by the German Federal Constitutional Court appears to call into question the conformity of the European Central Bank's (ECB) actions within the mandate defined in the Treaties, casting a sinister shadow upon the validity of the most recently launched pandemic emergency program. It is worth noticing that, on the basis of these programs, the ECB has managed to hold, through *Bankitalia*, a 17% share of Italian public debt. This share is inevitably destined to increase up to 30%, as a result of the new programs launched during the pandemic crisis.

It is not to difficult to imagine the drastic effects which could result from the adoption of such a large divestment program[2].

It can be argued that the ruling from Karlsruhe signals a real breaking point in the process of EU integration, not only because of the unprecedented act of rebellion by the German Court against the Court of Luxembourg, but above all because of the disruptive nature, for the purposes of the stability of the eurozone, of the issues at the heart of the conflict between the two jurisdictions. It is believed, therefore, that the ruling could be an opportunity for a decisive turning point in the process of European integration, and offer the opportunity to reflect on the number of available alternatives.

This article aims to examine four different problematic issues. The first concerns the question of hierarchy in the interpretation of EU law, strongly shaken by the conflict opened up by the FCC. It will be shown that the resolution of the problem of the conflict between jurisdictions transcends the mere legal horizon and more broadly concerns the reasons for coexistence between the different legal systems, the ideology that pervades the EU construction and the role played by the ECB, especially with regard to the stabilizing function of the eurozone. The argument put forward here is that the conflict between Courts has deeper roots and exemplifies larger problems and current imbalances within the entire eurozone. I will dedicate the next two sections of this essay to analyze this very point. My main thesis is that the EU project is currently characterized by a condition of radical disorientation in which monetary policies have become progressively politicized, while economic policies have undertaken an opposite path of depoliticization. This peculiar situation marks a departure from the institutional models traditionally known, according to which economic policies are fully part of the circuits of political and democratic representation, whereas monetary policies are, more or less rigorously, free from political influence[3]. The second part of this article will focus on the

[2] "*Unicredit: l'Italia ha il 66% del proprio debito e 4.400 miliardi per allontanare patrimoniali*", Milanofinanza, May 25, 2020, available on: https://www.milanofinanza.it/news/unicredit-l-italia-ha-il-66-del-proprio-debito-e-4-400-miliardi-per-allontanare-patrimoniali-202005250825439522.

[3] Forms of connection with varying intensity to political power are possible, as shown for example by the case of the British Central Bank which is linked to

process of depoliticization of economic policies. The analysis examines the barycentric role exercised by the single market by relaying on the paradigm of the "disembedded market economy", described by POLANYI in his 1940s essay. This works seems to provide a credible framework to understand the model of integration that has been so far followed and which is driven by the demolishing force of the market. The underlying idea is that the adoption of this paradigm has gradually shifted the state decision-making processes on economic policy towards a grey area characterized by an attenuation of political power, due to the deepening links of interdependence within the European arena and the single market.

Shading light on the effects of so-called destructive austerity will prepare the ground for the third part of the essay, where the attention will be focused on the action taken in recent years by the ECB. The idea sustained here is that the threat to the integrity and irreversibility of the single currency, fed by the growing nervousness of the markets, has led to a politicization of monetary policy, forcing the monetary authority to assume a substitute function for political power. This situation will be compared with the legal horizon outlined by the Treaties. On the legal level, attention will be given to the reinterpretation of the no bail-out clauses and the evolution of the concept of solidarity, marked by the emergence of conditional solidarity. I will try to demonstrate that the "catastrophic scenario" of the dissolution of the single currency has certainly legitimized a different interpretation of the fiscal and monetary rescue prohibitions enshrined in Art. 123 and 125 of the TFEU (the Treaty on the Functioning of the European Union), allowing forms of assistance consistent with the rationale of these prohibitions. It has not, however, let to extend the mandate of the ECB to the point of recognizing the eurozone's rescue power outside the cases of correction of the (episodic) irrationality of financial markets or the fight against deflation. It is precisely these considerations that

politics by a policy relationship (particularly in the determination of objectives). For a broader discussion of this topic, see O. Chessa *La costituzione della moneta. Concorrenza indipendenza della banca centrale pareggio di bilancio* (2016); G.B Pittaluga, G. Cama, *Banche centrali e democrazia. Istituzioni, moneta e competizione politica* (2004).

underpin the expression of strong doubts about the boundaries of the actions recently taken by the ECB.

These reflections will be developed in the fourth and last part of the essay, which examines the scenarios opened by the *Karlsruhe* Court ruling. With this ruling, the FCC seems to attempt to limit the ECB's actions, definitively blocking the way to creeping processes of mutualization/monetization of state debts. This could conceivably force the actors who play a major role in the European scenario to react accordingly. They could be pushed to rebuild the necessary instruments on political ground to achieve orderly coexistence of the different legal systems and economies, aware of constraints of monetary policy. The idea that will be supported is that, despite the constraints on the activity of the ECB, the FCC's ruling can provide the opportunity for the realization of more transparent choices in order to identify straightforward paths to deepen the EU economic and political integration.

SECTION I. RISE AND DECLINE OF CONSTITUTIONAL PLURALISM

2. Constitutional pluralism as an explanatory paradigm of integration between different legal orders

One controversial issue concerns, as mentioned previously, the problem of the uniform interpretation of EU law, jeopardized by the FCC's decision. Indeed, the German Constitutional Court claimed to review the legality of the measures adopted by different EU institutions, breaking the monopoly recognized by the Treaties to the Court of Luxembourg (Art. 19 TEU and 267 TFEU). The fact that a national court can declare itself competent to directly review the validity of EU acts and, what is more, disregarding a contrary ruling of the ECJ, seems not entirely surprising. The presence of a conflict between Courts in the European legal area constitutes the most evident form of the crisis of integration between legal systems. The publicist doctrine has long formulated new reconstructive paradigms in order to offer an explanatory key to the otherwise irresoluble relationship between European and national legal systems. At certain stages of the European integration process, the paradigm of constitutional

pluralism has established itself as the most refined attempt to get out of the shadows of the rigid opposition between two antithetical viewpoints of the legal phenomenon: the monist approach proposed by the ECJ, based on the primacy and originality of EU law, and the dualist perspective accepted by several national constitutional courts. As is well known, the national judges are little inclined to recognize a character of true autonomy of the EU law with respect to national systems. According to their view, EU law would still find its source of legitimacy in the national legal orders[4]. Both approaches, in their absoluteness and symmetric viewpoints, seemed at a certain point far too tied to a classic, hierarchical vision of the legal system to be able to explain the complex European legal space. The European legal order is characterized by relationships of mutual interaction, rather than of hierarchy, between systems at different levels[5]. The doctrine of constitutional pluralism, therefore, represents the most advanced attempt to systematize and mitigate a conflict that has always been latent in the integration process. This clash was already perceived in the field of fundamental rights during the 1970s and 1980s, but became clear only in the aftermath of the *Maastricht-Urteil* in 1993[6].

According to the doctrine of constitutional pluralism, the European legal space is characterized by the presence of

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[4] For an effective summary of this explanatory model, see M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, 3(4) Eur. Law J. 213 (2015).

[5] Among the most authoritative voices which supports the theory of constitutional pluralism is N. MacCormick, *The Maastricht-Urteil: Sovereignty Now*, 2 Eur. Law J. 259 (1995); M. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, in N. Walker (ed.), *Sovereignty in Transition* (2003) at 501; M. Kumm, *Who is the Final Arbiter of Constitutionality in Europe? Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice,* 36 Common Mark. Law Rev. 351 (1999); F. Mayer, *The European Constitution and the Courts Adjudicating European Constitutional Law in a Multilevel System*, 9 Jean Monnet Working Paper 1 (2003); I. Pernice, *Multilevel Constitutionalism and the Crisis of Democracy in Europe*, 11(3) Eur. Const. Law Rev. 541-562 (2015); A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 Common Mark. Law Rev. 1417 (2011); J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14(4) Eur. Law J. 389-422 (2008).

[6] J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, cit.

heterarchical relations[7] (and not hierarchical ones). In such a complex framework, the problem of who is the final arbiter and "who has the last word" remains, by default, unsolved. It follows that each of the European and national courts retains, within the boundaries of their own system, the final word[8], provided that every single authority approaches the other with caution, respect and discretion. In this view, the objective is to strengthen the EU legal area and avoid its disintegration. Nevertheless, this discussion has slowly turned into a real conflict involving politically divisive issues, such as the limits of monetary policy and the interpretation of no bail-out clauses, where a leading role has been increasingly exercised by the FCC[9]. In summarizing the jurisprudence of this constitutional court, it should be kept in mind that the *Bundesverfassungsgericht* has developed two different answers aimed at protecting the integrity of the German constitutional order from potential damage caused by EU institutions: the *ultra vires* review and the identity control (*Identitatskontrolle*)[10], in which the counter-limit elaborated by the *Solange* judgement of 1974 has reemerged[11]. Both instruments are not explicitly rooted in any source[12]; needless to say, they result from the ongoing process of jurisprudential refinement that has made it possible to identify their legal basis within the German Constitution. Among the two, the first solution is well-grounded

[7] D. Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, 111 Public Law and Legal Theory Working Paper Series (2008).

[8] N. MacCormick, *The Maastricht-Urteil: Sovereignty Now,* cit.

[9] M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit.

[10] On the history of this conflict and the control instruments forged by the FCC, see M. Payandeh, *Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, 48(1) Common Mark. Law Rev. 9 (2011).

[11] Solange I, Judgment of 29 May *1974 - BVerfGE 37, 271*; on this assimilation process, see A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48(5) Common Mark. Law Rev. 1417 (2011). The judicial review was elaborated by Solange in order to ensure respect for fundamental rights. But the FCC undertook to withdraw from this kind of review as long as the EU and its Court would have been able to respect fundamental rights; see Judgment of 22 *October 1986*, 73 *BVerfGE 339*; see also M. Payandeh, *Constitutional Review of EU Law after Honeywell,* cit.

[12] J. Bast, *Don't Act beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, 15(2) Ger. Law J. 167 (2014).

in the jurisprudential elaboration of the 1970s[13], but it was only claimed and theorized in the *Maastricht-Urteil* of 1993[14]. In this judgment, it was associated with the democratic principle and the dualist approach to the examination of relations between legal orders[15]. In the construction of the theoretical foundation of the *ultra vires review,* one finds the crucial idea that the European legal order cannot, by itself, create the conditions to undermine, in conflict with the Treaties, the competences of the Member States (also known as *Kompetenz-Kompetenz*), even if the amendments of the Treaties were to take place via interpretation. This is the reason why in the *Maastricht-Urteil* the FCC committed to reserving for itself for the future the possibility of scrutinizing legal acts adopted by European institutions. Its objective is to verify whether the EU legal acts remain within the limits of the powers conferred to the EU or not. In the latter case, the performed *ultra vires* act would be considered legally non-binding within the framework of German sovereignty. The next period saw the FCC engaged in a challenging process aimed at defining the substantive and procedural conditions for the use of the *ultra vires review*. In this direction, the 2009 *Lissabon-Urteil*[16] and the 2010 *Honeywell* judgment[17] are milestones. More precisely, with

[13] M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, 10 Eur. Const. Law Rev. 263 (2014); M. Payandeh, *Constitutional Review of EU Law after Honeywell,* cit.

[14] Judgement of October 12 1993, BVerfGE 89, 155; Brunner v European Union Treaty CMLR [1994] 57. According to the Federal Court, democracy could only be fully realized at national level, but not yet at European level, given the absence of the necessary sociological and cultural pre-requisites. The democratic legitimacy of the EU would therefore be achieved indirectly through national parliaments, given the still marginal role played by the European Parliament. This explains the need for the competences conferred to the EU to be well defined (see S.J. Boom, *The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?,* 43(2) Am. J. Comp. *L.*, 185 (1995) so as not to deprive the States - and thus the EU - of the necessary democratic legitimacy and sufficiently clear in order to prevent the EU claiming additional competences that are beyond its power, which could encroach on the powers of the Member States. At a certain point in the judgment, the democratic principle intersects with the dualist approach to the construction of relations between systems.

[15] The relationship between democracy and *ultra vires review*, see J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement,* cit.

[16] Judgement of 30 June 2009, 2 BVerfGE, 2/08.

[17] Judgement of 6 July 2010, BVerfGE 2661/06.

the latter ruling the FCC offered the ECJ the opportunity to express its point of view, while reserving the power to disagree given the outcome of the substantive tests of the application of the *ultra vires*. In other words, the ECJ's ruling would be binding, but on the condition that it does not lead to a manifest breach of the principle of competence and that this would not result in a structurally significant change in the distribution of competences and to the detriment of the Member States. The procedural condition upheld in the *Honeywell* judgment was for the first time observed in the judgment on the "Outright Monetary Transactions" (OMT) programme[18]. The final act of this process took place in the judgment of 5 May 2020, with which the FCC disobeyed the ECJ for the first time and disregarded the ECJ's judgment, declaring *ultra vires* the European act.

While the development of the *ultra vires review* was somewhat completed with these judgments, the FCC laid the foundations for a second, innovative, option: the *identitätskontrolle*, forged with the 2009 *Lissabon-Urteil*[19] and subsequently refined by the OMT ruling of 2016, which also clarified its scope and function. The identity review makes it possible to verify whether the principles declared inviolable by Art. 79 sec. 3 of the German Constitution[20] are affected by the transfer of sovereign powers by the German legislature or by acts undertaken by institutions of the EU. Such a form of control would prevent not only the attribution to the EU of sovereign powers outside the areas liable to transfer mechanisms, but also the adoption of acts by the EU institutions able to produce an

[18] Judgement of 14 January 2014, BVerfGE 2728/13.

[19] Judgement of 30 June 2009, 2 BVerfGE, 2/08. This ruling also reiterated the need for the exercise of public authority at EU level to go no further than the integration program authorized in Germany by an act of Parliament, which was considered almost a kind of bridge between national and European law, of which the Federal Court was the controller. The metaphor of the bridge often appears in European doctrine, see M. Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference*, cit. and is to be attributed to an essay by one of the German judges published just before the *Maastricht-Urteil* (P Kirchhof, *Deutsches Verfassungsrecht und Europaiisches Gemeinschaftsrecht*, in P. Kirchhof, C.D. Ehlermann (eds.), *Europarecht Beiheft* (1991).

[20] This concerns the protection of human dignity, the principles of democracy, the rule of law, the welfare state and the federal state.

equivalent effect[21]. Over time, this jurisprudence has induced an emulation effect in other national jurisdictions. As a consequence, the aforementioned instruments of control[22] soon has spread to other national constitutional courts[23]. All of this has exacerbated the already existing perplexities, especially those regarding *ultra vires* control. Indeed, this type of review pushes the national courts to interfere with the ECJ's exclusive jurisdiction concerning the assessment of conformity of legal acts of European authorities with primary European law[24]. According to the ECJ, national courts do not have the power to declare acts of EU institutions invalid. It follows that the claim of the national courts to conduct an *ultra vires review* of EU acts has been viewed as being at odds with the centralized model of judicial review exercised by the ECJ, which does not tolerate the emergence of competing authorities, apart from exceptional cases. These include radically null or non-existent European acts where the judicial review takes place at widespread level, lacking a contrary presumption of validity of legal acts[25]. Of course, there have been diametrically opposed understandings of the legal phenomenon here under discussion. Those who look critically at the actions taken by the FCC underline a certain degree of circularity in the arguments used to escape the obligations provided by the Treaties (Art. 19 TEU and 267 TFEU). They argue that the FCC does not distinguish between two different issues represented on the one hand by the substantive limits posed to the competence of the EU and on the

[21] Judgement of 21 June 2016, BVerfGE 2728/13, para. 138.

[22] Some of these are related to Art. 4(2) TEU and to the clause on national identity provided therein, which makes it possible to support a pluralistic vision of the relations between European law and national law; in this regard see A. von Bogdandy, S. Schill, *Overcoming Absolute Primacy*, cit.

[23] G. Anagnostaras, *Activation of the Ultra Vires Review: the Slovak Pensions Judgment of the Czech Constitutional Court*, 14(7) Ger. Law J. 959 (2013).

[24] See EU Court of Justice 22 October 1987, Foto-Frost v. Hauptzollamt Lubeck, CJEU Case 314/85). As it was pointed out in the judgment of 13 May 1981 (International Chemical corporation, 66/80, ECR 1191), the powers conferred by Art. 177 to the Court are essentially intended to ensure the uniform application of Community law by national courts. This need for uniformity is particularly pressing where the validity of a Community act is at issue. The existence of divergences on the validity of Community acts between the courts of Member States could undermine the very unity of the Community legal order and the fundamental need for legal certainty.

[25] J. Bast, *Don't Act beyond Your Powers*, cit. at 171.

other hand by the problem of jurisdiction over the validity of acts of the EU institutions. These different perspectives – they contend – should instead be considered separately, because the argument anchored on the principle of conferral are not sufficient to establish who should have the last say in the matter[26].

From a national perspective, the FFC's standpoint does not seem to be neither vague nor weak; it is aligned with the dualist approach to the relations between legal systems. This induces the constitutional judge to interpret the foundation act of the EU not as a new constitution but as an international treaty, of which the Member States remain 'their own masters'. According to this view, the primacy of EU law, although recognized, proceeds from the authorization provided by the law of ratification. This framework appears to have a significant influence on the FCC's argument on *ultra vires* review. According to this logic, the superordinate level cannot create, not even with the support of the body responsible for resolving conflicts of competence, the conditions to undermine the competences of the Member States. This is exactly the reason why the seditious act of the ECJ, which alters the competences regulated by the Treaties, is in turn *ultra vires*[27]. Nevertheless, the other type of control related to constitutional identity has also been subject to similar criticism. Also in this case the national courts of the Member States have claimed the power to suspend the effects of an act of an EU institution, considered detrimental to the constitutional identity of the Member States. What is even more serious, the national courts contested both the centralized system of jurisdiction and the principle of the primacy of EU law[28].

The debate about the *ultra vires review* shows, however, how unproductive the legal argument could be in the resolution of problems that do not belong solely and exclusively to the dimension of law but interfere with the development of the federal process, as it will soon be shown. For the moment, moving

[26] M. Payandeh, *see above* n. 9, 24.

[27] The stance adopted by the Federal Court is described in G. Luebbe Wolff, *Who Has the Last Word. National and Transnational Courts – Conflict and Cooperation*, 30(1) Yearb. Eur. Law 89 (2011).

[28] L.D. Spieker, *Framing and Managing Constitutional Identity Conflicts: How to Stabilize the Modus Vivendi Between the Court of Justice and National Constitutional Courts*, 57(2) Common Mark. Law Rev. 361 (2020).

the analysis to the case triggered by the *Karlsruhe* pronouncement of 5 May 2020, the main fact to be noted is that the explosion of the conflict between courts took place on a strong ground with a legitimate, recognized value for both systems: the EU and the national systems. Behind this conflict are hiding two different types of risk[29]: the disintegration of the eurozone, dependent (under the given institutional conditions) on the recognition or not of a sufficient margin of manoeuvre for the ECB, and the potential weakening of the competences of the Member States in politically important areas, such as those relating to fiscal drag. This corroborates the idea that the conflict between Courts was precisely triggered by these very debates that could be classified as 'existential'. It cannot rule out the possibility that this could also have initiated a phenomenon of politicization of the courts or, at least, of failing of their institutional impartiality, thereby influencing their respective perspective on the intensity of judicial review to be applied to the decision-making process of the ECB itself[30].

3. Overcoming conflict: on the risk of offering a legal-formal response to substantive political problem

As the dialogue between the Courts converged into open conflict, the criticism against the doctrines of constitutional pluralism became more intense. Different scholars have observed the unsustainability of a model that could threaten to compromise not only the rule of law but also the very integrity of the EU[31]. If public authority - it has been argued- is to be conceived as occurring in a multiplicity of autonomous settings, then constitutional pluralism fails to deliver precisely where an answer is most needed, that is, when the constitutional conflict cannot be

[29] Because of the systemic repercussions for the stability of the eurozone, what is at stake seems is different from the contentious situation concerning fundamental rights issues; a different position is expressed in D. Sarmiento, J.H.H. Weiler, *The EU Judiciary after Weiss, Verfassungblog, on matters constitutional* (2020) https://verfassungsblog.de/the-eu-judiciary-after-weiss/

[30] This constitutes the real bone of contention between the two Courts, see § 13.

[31] D. Kelemen, *On the Unsustainability of Constitutional Pluralism*, 23(1) Maastricht J. Eur. & Comp. L. 136 (2016); M. Loughhlin, *Constitutional Pluralism: An Oxymoron?*, 3(1) Glob. Con. 9-30 (2014).

prevented or resolved[32]. There is, therefore, a need for the EU to move towards some form of monism, through a newly found constitutional maturity. If the EU intends to survive as a coherent legal system, the principle of primacy of EU law and supremacy of its Court should be applied[33].

In some respects, calls to overcome the conflict through a new judicial monism have been proposed again also in the aftermath of the *Weiss* judgment of 5 May 2020. In order to offer greater guarantees to the Member States, some scholars have launched the idea of a different chamber within the ECJ with a different composition and powers to settle conflicts[34]. These proposals are not entirely new, especially if seen from a comparative and historical perspective. As is well-known, similar ideas emerged in the 1800's in the United States during the attempt to overcome the challenge to the supremacy of the Supreme Court posed by some states[35]. Nevertheless, it is reasonable to believe that the anti-pluralism of those who propose a solution by concentrating the ultimate authority in the hands of the ECJ only, as an alternative to the prospect of disintegration and exit strategy, represents a legal-formal response to a problem with broader political implications. *This is particularly true* when *considering* the European context, which is characterized by significant contradictions affecting the very nature of the EU as well as the solidarity links that bind the different Member States. To put it another way, the proposal of achieving a new form of monism through the recognition of the supremacy of the ECJ

[32] See A. Somek, *Monism*: *A Tale of the Undead?* in M. Avbelj, J. Komárek (eds.), *Constitutional Pluralism in the European Union and beyond* (2012); also M.P. Maduro, Three Claims of Constitutional Pluralism, in M. Avbelj, J. Komárek (Eds.), *Constitutional Pluralism in the European Union and beyond* (2012); L. Pierdominici, *The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?* 9(2) Persp. Fed. 127 (2017).

[33] Especially since such supremacy would not affect the sovereignty of the Member States; they would, in fact, keep the possibility of withdrawal should the organization develop in such a way to clash with their essential constitutional values. See R.D. Keleman, *On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozon*e, cit.

[34] See the proposal concerning the "Mixed Grand Chamber presided by the President of the Court of Justice", formulated from D. Sarmiento, J.H.H. Weiler, *The EU Judiciary after Weiss, Verfassungblog, on matters constitutional*, cit.

[35] See S.J. Boom, *The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?*, cit.

appears to lose sight of the broader picture. What is at stake goes far beyond the problem of the European judicial network to concern the entire architecture of the eurozone, its ideology and its current political fragility[36].

The real crux of the matter seems to be not so much the problem of how EU and national jurisdictions can cooperate[37], but rather how the different national constitutional systems can coexist harmoniously[38]. In short, the conflict between the Courts is just the tip of the iceberg, the apparent problem that is not necessarily the real one. The main issue, in effect, pertains to the institutional equilibrium of the eurozone: the rarefaction of political power, but also the problem, closely related to the former, deriving from the condition of hyper-responsibility of the ECB. It is exactly around this search for equilibrium amidst competing interests that a thorough analysis should be centered. The objective is to better comprehend the institutional context in which the conflict has arisen and think of ways and means to overcome the very crisis.

SECTION II. DEPOLITICIZATION OF ECONOMIC POLICIES

4. An explanatory model: the utopia of the disembedded market economy

In recent years, the economic and financial crisis and the subsequent phenomena of great social alarm has led many scholars to look back on past events, in order to ascertain possible solutions to the damages of today's society. This partly explains the resurgent interest, also in European public law studies, in the situations that occurred between the end of the nineteenth century and the two wars, strongly influenced by the massive social upheavals generated by the development of a single international

[36] I share the criticism formulated by M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit. at 221.

[37] S.J. Boom, *The European Union after the Maastricht Decision: Will Germany Be the "Virginia of Europe?,* cit.

[38] With or without the existence of a formal hierarchical relationship, this is a problem whose resolution goes beyond the legal horizon, as the American experience shows. See M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit. at 221.

market. This was characterized by the simultaneous presence of an international monetary system based on fixed exchange rates (the 'gold standard') and a competitive labor market[39]. This explains the frequent reference to KARL POLANYI's study, "The Great Transformation"[40], published in the forties of the last century. According to POLANYI, the attempt put forward by the elites of the time, under the impetus of the ideology of economic liberalism, to achieve a "disembedded, fully and self-regulating market economy" on a global level constitutes an unrealizable utopia. This reasoning is based on the awareness of the destructive power inherent in the autonomization of the economic sphere from the political and social ones (the disembedded market economy). The dissolution of the market from political and democratic bonds would be, in fact, unavoidably destined to lead to a disarticulated society— a consequence of the subjugation of the latter to the needs of the economy and the commodification of work. According to KARL POLANYI, in the long run these phenomena could trigger a counter-reaction and produced a perverse spiral during its intermediate stages, namely the rebellion of the social classes most affected by the crisis against the established order and the introduction of national protection mechanisms. All of this could determine the emergence of authoritarian regimes, favoring the race towards the formation of colonial empires fighting amongst themselves[41].

Starting in the 1970s, the objective of overcoming national sovereignty to create an effective international legal order has again been proposed as the dominant ideology. This has been justified as a necessary consequence of the liberal program of

[39] M. Goldmann, *The Great Recurrence: Karl Polanyi and the Crises of the European union*, 23(3-4) Eur. Law J. 272-289 (2017) and here for the references to previous studies, among which are those by M. Everson, C. Joerges, *Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts Law Constitutionalism*, 18(5) Eur. Law J. 644 (2012); C. Joerges, J. Falke, *Karl Polanyi: Globalisation and the Potential of Law in Transnational Markets* (2011); C. Holmes, *Whatever it takes: Polanyian perspectives on the eurozone crisis and the gold standard*, 43(4) Econ. Soc. 582 (2014). A critical and perhpas more elbarte perspective is offered by A. Sandulli, *Il ruolo del diritto in Europa. L'integrazione europea dalla prospettiva del diritto amministrativo* (2018).

[40] K. Polanyi, *The Great Transformation. The political and the Economic Origins of our Time* (2001) at 144.

[41] K. Polanyi, ibidem.

defending individual freedoms by the threats of public power, traditionally associated with the exercise of sovereignty at the national level[42]. In this way, the paradigm of the disembedded market economy was back in vogue within the new political programs. In addition, it has emerged that idea according to which the national arenas, within which redistributive conflicts are resolved, should be subject to tighter and deeper external constraints. This reveals a process of neutralization or rarefaction of political power[43], a corollary of the forced coexistence between national states and the globalized market, which is well summarized by the RODRIK trilemma[44]. According to this paradigm, it is not conceivable to have democracy, international economic integration and national sovereignty simultaneously, and it is only possible to choose two of them. If the choice falls on maintaining sovereignty of nation states, because of the strong levels of international economic integration the idea of developing an effective space for mass politics will necessarily be put aside. On the contrary, if the main aim becomes preserving vital space to allow mass politics without at the same time abandoning the objective of economic integration, it will become imperative to overcome the nation states and try to rebuild democratic arenas at a supranational level. If this last attempt is considered illusory, it would be then necessary to mitigate (but not to cancel) international economic integration, in order to preserve an acceptable level of democracy at a national level.

The use of these explanatory paradigms has been considered particularly relevant in European public law studies,

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[42] F.A. von Hayek, *The Economic Conditions of Interstate Federalism*, in *Individualism and Economic Order* (1948) at 255. For a discussion of the program of overcoming national sovereignty, see Q. Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism* (2018). For a reconstruction of the events starting from the end of Bretton Woods, see A.J. Menendez, *The Existential Crisis of the European Union*, 14(5) Ger. Law J. 453 (2013).

[43] This is widely discussed phenomenon in research on European affairs, albeit from apparently different angles and divergent explanations. For a constitutionalist approach, see D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21(4) Eur. Law J. 460 (2015).

[44] D. Rodrik, *The Globalization Paradox. Why Global Markets, States, and Democracy Can't Coexist* (2011).

since the weakening of politics[45] and the social and political unsustainability of the disembedded market economy[46] have appeared as the most tangible signs of the crisis affecting the EU for more than ten years now.

4.1. Integration through law

There are basically two paths through which disembeddedness[47], understood as the absence of social and political control over the process of production and distribution, has gradually taken place in Europe. The two paths are: integration through law and the realization of the European Monetary Union. I will mention both briefly, the first here and the second in the second section, to then move on to a more detailed examination of some specific issues.

The first road can be traced back to the process of constitutionalization of the Union's law and to the commitment embraced by the EU to protect the four fundamental economic freedoms. In this regard, GRIMM's reconstruction appears convincing. According to this author, modern constitutionalism is based on a delicate balance between democracy (reformism also in a redistributive sense) and the protection of fundamental rights (liberal conservatism); its function is to legitimize political power and, at the same time, to limit it without the objective of replacing it. Constitutions provide, therefore, a general framework of political viability, but cannot determine or have a constraints on the content of all political decisions[48]. In brief, the fragile equilibrium between political freedom and personal freedom or, in other words, between positive and negative freedoms lay at the root of every liberal-democratic system[49]. According to GRIMM, European constitutionalism, accelerated by the activism of the

[45] J. Snell, *The Trilemma of European Economic and Monetary Integration, and its Consequences*, 22(2) Eur. Law J. 157 (2016).
[46] M. Goldmann, *The Great Recurrence: Karl Polanyi and the Crises of the European union*, 23(3-4) Eur. Law J. 272 (2017).
[47] Here I am using a term which is not employed by Polanyi and has been coined by some scholars to refer to the autonomy of the market from society and politics, see V.M. Vančura, *Polanyi's Great Transformation and the Concept of the Embedded Economy*, 2 *IES Occasional Paper* (2011), http://ies.fsv.cuni.cz.
[48] D. Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, cit. at 464.
[49] See B.Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (2004) at 34, 35.

ECJ, is different. Driven by the need to ensure the functionality of the European order, the Court has elaborated since the 1960's the principles of the useful effect and supremacy of EU law over national systems, including national constitutional law[50]. At the same time, by interpreting the Treaties in a different way from what occurs in a conventional act, it has understood the same very competences of the EU in a wider sense. The result has been the multiplication of cases in which the four economic freedoms enshrined in the Treaties have come into conflict with national choices— often the result of difficult political compromises, as they are aimed at protecting values other than mere economic freedoms having significant social implications[51].

This explains why the main driving force behind the European project has been negative integration, based on the destructive force of the market.

The Union has been entrusted with competences which by default leave little room for manoeuvre of national legislators. This is particularly true when national political choices present situations of conflict with the four economic freedoms recognized by the Treaties[52]. Therefore, the problems of the positive integration have emerged, given the difficulty to reaching political agreements especially in a EU characterized both by deep heterogeneity (also from the economic and social point of view[53]) and divergent interests amongst the individual Member States[54]. A paralyzing heterogeneity has, for example, emerged in a striking way in the field of labor protection. In this specific field, the fundamental social rights have often been sacrificed for the principle of market competition. The EU Commission's legislative initiative has gradually become more and more rarefied. Integration has thus mainly developed through administrative

[50] Judgment of the *Court* of *Justice*, *Costa* v *ENEL*, *Case 6/64* (*15 July 1964)*. On the role of the ECJ in constitutionalization, see also A. Sandulli, *Il ruolo del diritto in Europa*, cit. at 161 et seq.

[51] See M. Dani, *Re-Imagining the Cosmopolitan Constitution: A Comment on Alexander Somek's The Cosmopolitan Constitution*, 19(6) Ger. Law J. 1152 (2018).

[52] F.W. Scharpf, *Governing in Europe: Effective and Democratic?* (1999).

[53] Federalism between heterogeneous states are investigated by F.A. von Hayek, *The Economic Conditions of Interstate Federalism*, cit. at 255.

[54] F.W. Scharpf, *Governing in Europe,* cit.

and judicial channels, which are depoliticized in nature[55]. According to GRIMM, European constitutionalism has not limited itself to determining the procedures and delineating the applicable areas but has also tried to dictate the content of the rules of game, losing sight of the distinction between fundamental and ordinary rules. This would have undermined the room for manoeuvre of national politics, preventing it from making choices of strategic importance for society[56].

4.2 The realization of the monetary union

The second path of realization of the disembedded market economy has been produced by the asymmetry, designed by the Maastricht Treaty, between the centralization of monetary policy (Art. 105 of the Treaty of Rome, as modified at Maastricht) and the decentralization of economic and budgetary policies (Article 103 of the Treaty) — a consequence of the failure to provide a political union and federal government able to implement stabilizing policies through fiscal measures[57]. The functions of welfare have thus remained confined to the national level, where have been exposed to the conditioning forces of the market[58]. The danger of a

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[55] M. Dani, *The Rise of the Supranational Executive and the Post-Political Drift of European Public Law, 24(2)* Indiana J. Glob. Leg. Stud. 399 (2017).

[56] D. Grimm, *The Democratic Costs of Constitutionalisation*, cit. at 470 et seq.

[57] In particular, on the importance of a centralised budget able to remedy asymmetric shocks, see P. Kenen, *The Theory of Optimum Currency Areas: An Eclectic View. In Monetary Problems of the International Economy*, R. Mundell, A. Swoboda (eds.), (1969) and P. Krugman, *Revenge of the Optimum Currency Area*, 27(1) NBER Macroecon. Annu 439 (2013); F. Salmoni, *Stabilità finanziaria, Unione bancaria europea e costituzione* (2019).

[58] W. Streeck, *European Social Policy: Progressive Regression*, 18(11) *MPIfG Discussion Paper*, https://www.mpifg.de/pu/mpifg_dp/2018/dp18-11.pdf; Id., *Il modello sociale europeo: dalla redistribuzione alla solidarietà competitiva*, 1 St. merc. 3 (2000). According to this author, the heterogeneity of Member States makes it impossible to build a European social model through the identification of minimum standards. He mentions the exposure of national systems to international economic competition as an incentive for "structural reform", the subordination of "social policy, national and European, to the defense of a common hard currency through fiscal consolidation" and the transition from the "federal social democracy to competitive adjustment" of national social protection and social life to global markets"; W. Streeck, *Buying Time* The *Delayed Crisis of Democratic Capitalism* (*2014).* On the role of the market as a means of limiting and regulating the prerogatives of States, see G. Guarino, *Verso l'Europa ovvero la fine della politica* (1997) at 124; F.A. von Hayek,

misalignment between the policies pursued by the various Member States has been lurking behind this asymmetry. This risk has been made even more tangible by the difficulty of achieving an equally effective monetary policy for all countries. There has been, from the very beginning, a clear perception of these dangers, to the extent that the so-called the DELORS report of 1989[59], in summarizing the basic principles of the future monetary union, has clearly indicated the divergence between the economic and budgetary policies pursued by the individual countries as the source of dangerous imbalances within the monetary area. The same report has argued that it was unfeasible to solve these problems, as suggested by the doctrines on optimal currency areas[60], through the stabilizing function carried out at the central level, given the small budget at the supranational level.

While the risks related to the deepening of the interdependence links created by the monetary union were evident, what remained more uncertain was ascertaining which tools were necessary to prevent the creation of imbalances within the eurozone. The DELORS report itself has questioned the possibility that market forces could contribute to regulating national policies, penalizing state institutions with less rigorous budgets and policies through an increase in rates of debt financing. On the feasibility of such a solution the report has showed, however, a certain degree of prudence, if not real skepticism, deriving from the danger that markets misjudge the states' reliability level. Markets often find it difficult to understand solvency risks in time. Yet, once the risk has become apparent, they could operate under the pressure of panic, denying a state accessing the market in a too rapid and dangerous way[61]. Therefore, the solution outlined by the committee opted for the coordination of national policies and the introduction of

The Economic Conditions of Interstate Federalism, cit. and O. Chessa, *La costituzione della moneta*, cit. at 456, 471.

[59] Cfr. Report on economic and monetary union in the European Community, presented by the Committee for the study of economic and monetary union on 17 April 1989, available at: http://aei.pitt.edu/1007/1/monetary_delors.pdf, at 19-20; J. Delors, *Un anno cardine: Discorso del presidente Jacques Delors dinanzi al Parlamento europeo*, 29(2) *Riv. st. pol. int. 245 (*1992).

[60] See P. Kenen, *The Theory of Optimum Currency Areas*, cit.

[61] See the above mentioned Report on economic and monetary union in the European Community.

constraints on budgetary policies, starting from the identification of a desirable level of deficit. The choices made in Maastricht, in order to ensure the proper functioning of the eurozone in the future, clearly took into account the proposals contained in the DELORS report; the decentralization of economic and budgetary policies was accompanied by forms of coordination within the Council (Art. 103, of the Treaty, as revised at Maastricht) and instruments to control excessive deficits (Art. 104 TEC). These were then strengthened with the 1997 introduction of the Stability and Growth Pact, without entirely renouncing to market discipline, which was considered necessary to require Member States to comply with sound fiscal and economic policies[62]. There was strong confidence that this set of measures - together with a strong liberalization of the labor markets to guarantee price adjustments no longer achievable through the devaluation of the currency - would have made the eurozone able to react to possible asymmetric shocks in the future[63].

This basic, single currency's guiding philosophy has clearly been determined by Germany's dominant influence during the Maastricht negotiations. It is not surprising that the EU economic constitution has been shaped from the outset around the ordo-liberal principles of responsibility and stability[64]. The principle of responsibility requires that each market participant is held accountable for their own actions and decisions, without sharing negative results with others—a response which is considered unfavorably as it could encourage irresponsible conduct (*moral*

[62] The adoption of the Pact shows a certain mistrust of the market as a factor regulating national policies. On market discipline, see the study widely quoted by G. Bishop, D. Damrau, M. Miller, *1992 and beyond: Market Discipline Can Work in the EC Monetary Union* (1989); T.T. Minassian, J. Craig, *Control of Subnational Government Borrowing*, in *Fiscal Federalism in Theory and Practice*, Teresa Ter-Minassian (ed.) (1997) at 156 et seq.; T.D. Lane, *Market Discipline*, 40(1) *Staff Papers* (International Monetary Fund) 53 (1993). On the presence of a dual approach within the Maastricht Treaty, see K. Pantazatou, M. Rodopoulos, *A "Typus" as an Appropriate Legal Tool for the Interpretation of the "No Bail-out" Clause: The 'Private Investor Principle'*, 2 Eur. Pol. 7 (2015).

[63] P. Krugman, *Revenge of the Optimum Currency Area,* cit.

[64] This is also widely emphasized in legal doctrine. See in particular Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications*, 28 EUI LAW (2012) at 8.

hazard)[65]. To translate this principle into the EU economic constitution has required the establishment of specific legal arrangements. The introduction of peremptory no bail-out clauses and statutes prohibiting external bail-outs, both of a fiscal (see Art. 104 B TEC, now Art. 125 TFEU) and monetary nature (see Art. 104 TEC, now Art. 123 TFEU) should be understood as reflecting this very context, properly designed in order to avoid transferring risks from one Member State to the other. Establishing an independent central bank (Art. 108 TEC, now Art. 130 TFEU)[66]ב based on the model of the Deutsche Bundesbank[67], with the identification of a clear mandate focusing primarily on price stability (Art. 105 TEC, now Art. 127 TFEU) ב was also meant to strengthen such clauses by building a powerful firewall against the danger that a Member State could exert political pressure on the central bank[68]. The underlying idea is that only the risk of a

[65] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas* (2016) at 99–117.

[66] Already in early studies of the 1980s (in particular J. DELORS, Report on economic and monetary union in the European Community, presented on 17 April 1989, in http://aei.pitt.edu/1007/1/monetary_delors.pdf) the independence from politics and the objective of price stability were identified as salient features of the future ECB and in line with the requests of the Bundesbank which was, in fact, present (with its President Pohl) in the Committee. See M. Duckenfield, *Bundesbank-government relations in Germany in the 1990s: From GEMU to EMU*, 22(3) West Eur. Polit. 87 (1999); the fact that the establishment of an independent central bank represents the most important contribution of German ordo-liberalism to the establishment of the Treaties is widely recognized, see for instance in J. Hien, c. Joerges, *Dead Man Walking: Current European Interest in the Ordoliberal Tradition*, 3 UEI Working Papers LAW, (2018) at 14 and further on some related footnotes and references quoting the writings by E.J. Mestmäcker, *Europäische Prüfsteine der Herrschaft und des Rechts, ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft*, 57 ORDO 3 (2007).

[67] The independence of the German Central Bank, described as independent and committed to the priority of guaranteeing price stability, from the federal government was enshrined in the Basic Law in the Revision Act of 21 December 1992, which introduced into Art. 88 of the Federal Law the provision that the tasks of the Central Bank could be transferred to the ECB. On this subject, see M. Everson, C. Joerges, *Between Constitutional Command and Technocratic Rule: Post Crisis Governance and the Treaty on Stability, Coordination and Governance* ("The Fiscal Compact", in C. Harlow, P. Leino, G. della Cananea (eds.) *Research Handbook on EU Administrative Law* (2017) at 175.

[68] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas*, cit. at 98, 99, 118.

direct default on the public debt, due to the prohibition of external rescue, would provide a real incentive for Member States to implement virtuous fiscal policies[69]. Eliminating this risk would represent a sort of stimulus for taking greater risks (moral hazard[70]). This also explains the reasons why the eurozone's economic constitution is reluctant towards forms of stabilization entrusted with fiscal transfer mechanisms, since such a scheme could easily turn into a permanent transfer mechanism and act as a sort of insurance mechanism which could postpone the structural adjustments necessary for individual members [71].

Behind this articulated but ideologically homogeneous framework of rules, another ordo-liberal principle was hiding: the stability of the currency. This has become self-evident with the independence of the ECB, its policies' primary objective of price stability (art. 105 EC Treaty) and the hostility to economic interventions. Forms of interference on the economy were considered harmful to the ethical order of the market, apart from rules designed to ensure the proper functioning of the market[72]. Ordo-liberal schools, in line with the other schools of neo-liberal thought, oppose monetary or fiscal stimuli, considered as capable of producing inflationary hotbeds but without offering real

[69] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit. at 111; A.L. Bovenberg, J.J.M. Kremers, P.R. Masson, *Economic and Monetary Union in Europe and Constraints on National Budgetary Policies*, 38(2) Staff Papers (International Monetary Fund) Special Issue on Europe 373 (1991). In regard to the credibility of the no bail-out clauses in controlling the degree of indebtedness of decentralized government levels, see T.T. Minassian, J. Craig, *Control of Subnational Government Borrowing, in* Teresa Ter-Minassian (ed.) *Fiscal Federalism in Theory and Practice* (1997) at 156 et seq.

[70] This phrase can be traced back to German ordo-liberals, who in turn drew it from the field of insurance law, on which see M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas*, cit. at 74.

[71] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas*, cit. at 119; H.W. Sinn, *Austerity, Growth and Inflation: Remarks on the Eurozone's Unresolved Competitiveness Problem*, 37(1) World Econ. 1 (2014); similarly P. Krugman, *Revenge of the Optimum Currency Area*, cit. at 439-448.

[72] Ordo-liberalism differs from the doctrines of laissez faire precisely because of the strong role that it attributes to the State in ensuring the conditions for the proper functioning of the market, through prior determination of the rules of the game (the so-called economic constitution). See in this respect R. Hillebrand, *Germany And Its Eurozone Crisis Policy: The Impact of the Country's Ordoliberal Heritage*, 33(1) Ger. Polit. Soc. 6 (2015); W. Sauter, *The Economic Constitution of the European Union*, 4(1) Columbia J. Eur. Law 27 (1998).

advantages in terms of economic growth, which is said to be achieved in the long term only through structural adjustments aimed at improving the productivity of economic factors. The advent of the economic crisis revealed, however, the fragility of this perspective. On the one hand, the decentralization of economic policies had also instigated their misalignment, widening the gap in the level of competitiveness between different countries and paving the way for asymmetric shocks[73]. On the other hand, the creation of the single currency had fomented the onset of internal imbalances through the alignment of interest rates, which had become too high in Germany bringing stagnation and low inflation, and too low in southern Europe causing excessive inflation growth. When the imbalances resulting from this set of factors emerged, the circulation of credit in Europe reached a standstill, leading to higher spreads[74].

Different proposals were outlined in order to realign the levels of competitiveness between North and South Europe. Two of them were based on the idea of the political and social unsustainability of adjustments through internal deflation which, despite the fact that it was considered as necessary to reduce production costs in Southern countries, would lead to a deepening of the recession due to austerity measures, worsening the debt situation of the countries involved[75]. While sharing this premise, the two solutions differed in the final proposal put forward, reflecting divergent views on how to address the moral hazard problem. Those who neglected its importance proposed a

[73] The reference is to the wage repression policies launched by Germany, see F.W. Scharpf, *L'Europa. La democrazia sospesa. L'Unione monetaria, la crisi economia e la politica bloccata (*2016) at 25; P. De Grauwe, *The Governance of a Fragile Eurozone*, 346 *CEPS Working Document* (2011). On the misalignment of the levels of competitiveness of the different economies in the aftermath of the introduction of the single currency, see most recently C.J. Day, *Continental Drift: Is the Euro's Fixed Exchange Rate Regime Undermining Cohesion Policy?* Eur. Rev. 1 (2020). The misalignment of policies constitutes a consubstantial risk to the asymmetry between the market and social policies, which remains confined within national borders. These different dimensions are investigated in A. Sandulli, *Il ruolo del diritto in Europa,* cit. at 68; A. Rusek, *Eurozone's Future: The political Economy of Structural Convergence,* 4(1) Eur. J. Econ. Law Pol. 1 (2017).

[74] There is a minimum of consensus on this analysis, see P. Krugman, *Revenge of the Optimum Currency Area*, cit.; H.W. Sinn, *Austerity, Growth and Inflation*, cit.

[75] P. De Grauwe, *The Governance of a Fragile Eurozone*, cit.

strengthening of the Union through the creation of a central budget, while those who emphasized its centrality suggested exiting the single currency, either permanently through the dismantling of the eurozone, or temporarily through the introduction of the mechanism known as revolving door[76].

These two different strategies have, however, been assessed as politically and legally impracticable, albeit from opposite perspectives. The moral hazard has been seen by Northern countries as an obstacle to the provision of common guarantee instruments. Fiscal transfer, debt mutualization mechanisms, and the unification of the banking system have not fully developed. With regard to the banking union, this is partly related to the danger – according to its detractors – that the guarantee on bank deposits, by providing an indirect guarantee of public debt of the Member States, could result in an incentive to indebtedness. The plan to create a European unemployment insurance scheme has been subject to a similar hesitation, as this kind of funds could provide an incentive for the countries of Southern Europe to postpone the measures to liberalize the labor market. The model of a fiscal union, itself seen as a central pillar of EU project, aimed at overcoming the imbalances generated by the monetary union has increasingly appeared to lack feasibility. Such a solution would not, of course, violate any provision of the Treaty and let alone Art. 125 TFEU[77], given the implementation of EU transfer mechanisms. Nevertheless, even this path has received a certain degree of skepticism, given the difficulty of preventing automatic forms of tax transfer from favoring moral hazard.

The discussions around the creation of an adequate central budget have also historically been shaped by the inflexible position expressed by the German Federal Court since the *Maastricht-Urteil* in 1993. The German constitutional judge has repeatedly expressed the idea that the agreement on a stability community is one of the essential conditions for Germany's adherence to the monetary integration project[78]. The very

[76] H.W. Sinn, *Austerity, Growth and Inflation, ibidem.*

[77] A. De Gregorio Merino*, Legal Developments in the Economic and Monetary Union during the Debt crisis: The Mechanisms of Financial Assistance*, 49(5) Common Mark. Law Rev. 1613 (2012).

[78] Judgment Oct. 12, 1993, BVerfGE 89, para. 90. See also V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, 9(1) Eur. Const. Law

provision of a fiscal union would limit the democratic principle which is a core concept of national constitutional identity, thus contrasting with the eternity clause established in Art. 79 of the German Constitution. In other words, according to the German judge the transfer of further functions and resources to EU bodies would excessively debase the national democratic arena. What is more is that this violation of the democratic principle would not be compensated at a higher level either, considering that the eurozone itself would continue to be characterized by democratic deficit. The third and last solution, the exit from the single currency, has been considered unfeasible by all the European elites, given the associated economic and political risks[79]. Therefore, the only option left in the field was the provision of macro-economic adjustment mechanisms aimed at achieving internal devaluation[80] and implemented through instruments of the liberalization of labor markets and austerity in budgetary policies[81].

5. The crisis of legitimacy

What has been described so far explains why the European reforms undertaken during the years of the crisis were driven by the objective of making the mechanisms for implementing the "disembedded market economy" more effective. The need of a form of intervention was widely felt, especially in those areas where important dysfunctionalities had emerged, for instance in national political arenas. These were seen as resisting forces, to be subdued in order to impose on them the structural reforms necessary for the survival of the eurozone[82]. A first package of

Rev. 7 (2013) and J.V. Louis, *Guest Editorial: the No-bailout Clause and Rescue Packages*, 47(4) Common Mark. Law Rev. 971 (2010). This principle is frequently reiterated in the judicial decision which have followed since the judgement of 7 September 2011, BVerfGE 987/10, para. 137 and the judgement of 12 September 2012 2 BVerfGE, 1390/12, para. 115.

[79] While economic risks are unpredictable, political risks often reflect the fear of damaging the integration project permanently.

[80] R. McCrea, *Forward or Back: The future of European Integration and the Impossibility of the Status quo*, 23(1-2) Eur. Law J., 84 (2017).

[81] P. De Grauwe, *The Governance of a Fragile Eurozone*, cit.

[82] The agenda of European technocratic institutions are analyzed in see F.W. Scharpf, *L'Europa. La democrazia sospesa* at 20 et seq.

reforms, launched with the six-pack which came into force in 2011, contained provisions relating to both fiscal policies and macroeconomic imbalances. In respect to the former, the Stability and Growth Pact was revised in a restrictive manner by strengthening monitoring and sanctioning powers. With regard to macroeconomic imbalances, a specific surveillance system was introduced, providing the possibility for the European institutions to intervene with recommendations and impose sanctions. A second reform intervention was carried out with an international treaty known as Fiscal Compact, which came into force in 2013. Its aim was to strengthen the limits set out in the Stability and Growth Pact by committing the contracting countries to introduce a balanced budget in constitutional rules. A third package of rules was introduced with the so-called two-pack which came into force in 2013, and consisted of two regulations. The first strengthens monitoring and surveillance mechanisms on Member States that are, or risk being, facing difficulties with regard to their financial stability. The degree of monitoring and surveillance is closely related to the financial situation faced by the Member States. This measure is designed not only for Member States under or about ti leave financial assistance programs but also for Member States with high financial instability or receiving financial assistance even on a precautionary basis[83]. The second measure concerns scrutiny and evaluation of the eurozone budget, with the Commission having the power to revise it[84]. This strengthening of control instruments[85] has, however, gone hand in hand with some increase in market discipline; its efficiency has been improved via the strengthening of supranational surveillance mechanisms[86].

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[83] J. Snell, *The Trilemma of European Economic and Monetary Integration,* cit.

[84] F. Salmoni, *Stabilità finanziaria, Unione bancaria europea e costituzione*, cit. at 128 et seq.

[85] Instruments, it is worth noting, strongly limiting the prerogatives of Member States in terms of economic and budgetary policies, see K. Tuori, K. Tuori, *The Eurozone Crisis. A Constitutional Analysis (*2014) at 105. *Contra* D. Adamski, *Economic Policy Coordination as Game Involving Economic Stability and National Sovereignty*, 22(2) Eur. Law J. 180 (2016) at 188.

[86] This is demonstrated by the financial markets reactions to the economic policies adopted in recent years by populist governments (see, for instance, the Italian government in office until 5 September 2019), which were not supported by supranational governance. The markets have, in fact, made the most of this lack of support to exercise a function of pressure and control over national

With regard to the reading of the institutional set-up resulting from the reforms described above, there are differing opinions. The idea, supported by some, that the integration process could be developed through the strengthening of executive federalism[87] hides an element of truth. National governments came up with important proposal to face the crisis, starting from the identification of new rescue mechanisms[88]. The final outcome of this renewed interventionism at national-level led to common institutions, for instance the European Commission, playing a central role in examining national budgets and policies. Nevertheless, the paradox is only an apparent one. To regain importance have been mainly technocratic institutions, which advocate a clear neo-liberal agenda as the only viable way to allow the maintenance of the monetary union[89]. The result has been an increased technicalization and an even more marked weakening of politics[90]. These observations confirm the validity of RODRIK's trilemma about the impossibility of achieving and maintaining national sovereignty, supranational economic integration and democracy all together[91]. What has been sacrificed in this model of technocratic integration dictated by market forces is the legitimation of public power [92].

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governments, helping the Commission and the Council to make effective the European guidelines on the containment of national deficits.

[87] C.J. Bickerton, D. Hodson, U. Puetter, *The New Intergovernmentalism: European Integration in the Post-Maastricht era*, 53(4) J. Common Mark. Stud. 703 (2015). See also L. De Lucia, *The Rationale of Economics and Law in the Aftermath of the Crisis: A Lesson from Michel Foucault*, 12 Eur. Const. Law Rev. 445 (2016) at 454. According to this author, the dynamics triggered by the most recent institutional reforms could represent a model of "pastorship" and "discipline", two notions occurring in Foucault's thought.

[88] J. Snell, *The Trilemma of European Economic and Monetary Integration,* cit.

[89] F.W. Scharpf, *L'Europa. La democrazia sospesa*, cit. at 45.

[90] J. Snell, *The Trilemma of European Economic and Monetary Integration,* cit. at 168-170; J. Habermas, *Nella spirale tecnocratica. Un'arringa per la solidarietà europea* (2014) at 18. On the presence of unresolved issues (due to the implementation of policies made with no political input) and the complexity of the institutional framework, see A. Sandulli, *Il ruolo del diritto in Europa*, cit. at 116, 117.

[91] M. Hartmann, F. de Witte, *Ending the Honeymoon: Constructing Europe Beyond the Market*, 14(5) Ger. Law J. 449 (2013).

[92] F. W. Scharpf, *De-Constitutionalisation and Majority Rule: A Democratic Vision for Europe*, 23(5) Eur. Law J. 315 (2017).

It is not surprising, therefore, that this mode of integration has encountered several challenges on its way. The growth of radical political movements well exemplifies this challenging situation. There is no doubt in fact that this political phenomenon testifies to the exasperation felt by parts of the electorate towards an institutional model in which political alternatives are structurally inhibited. The profound, subsequent frustration and disappointment resulted in increasing calls for an exit option[93]. It is also clear that the reasons for dissatisfaction can diverge among the different EU Member States. For instance, for many European citizens the maintenance of the *status quo* could constitute the realization of a legitimate political idea in which the distributive justice is seen as a threat to the abstractness of law, the principle of equality, and negative freedoms[94]. In so doing, they adhere to a perspective that resolves the tensions between liberalism (protection of fundamental rights) and democracy (distributive justice) by attributing a predominant role to the first and posing strong limits to the second. Nevertheless, the main criticism made against the advocates of the *status quo* is that this potential (legitimate) balance is not the result of democratic political decisions but the inevitable consequence of an *ex ante* choice made once and for all by the Treaties.

SECTION III. POLITICIZATION OF MONETARY POLICY

6. The wishful thinking of the Treaties: the systemic crisis as a scenario excluded from the legal horizon

The European Commission is not the only technocratic institution to have gained power and influence during the unfolding crisis. If we look at the events of the last decade carefully, it becomes clear that the fragile balance of the single

[93] The dynamics of this phenomenon are investigated in A.O. Hirschman, *Exit, Voice, and Loyalty. Responses to Decline in Firms, Organizations, and States* (1970).

[94] F.A. von Hayek, *The Constitution of Liberty* (1960). The idea that a steady decline of the rule of law and liberalism would satisfy the demand of social justice is widespread. See Q. Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism,* at 272.

currency has been largely ensured by the work of the ECB[95]. The monetary Authority has often been called upon to intervene in a territory not clearly defined by the Treaties. This extended interventionist approach by the ECB has strong correlations with the crisis of the sovereign debt. Although necessary to recover competitiveness level of the Southern Member States, austerity has produced adverse social and financial effects, pushing the most vulnerable economies into recession, deflation and increasing deficits and debt[96]. Whereas debtor countries were suffering from the increase in budget deficits because of the repressive policies they had to implement, the increasingly nervous financial markets were showing little confidence in the ability of these countries to serve their debt. These often irrational reactions have nonetheless been capable of leading States towards a crisis of liquidity and solvency[97].

This situation found the Eurozone completely unprepared[98]. As a former Italian Finance Minister has often pointed out[99], the European Treaties were not familiar with the word "crisis", having been prepared at a time when there seemed

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[95] P.D. Tortola, *The Politicization of the European Central Bank: What Is It, and How to Study It?* 58(3) J. Common Mark. Stud. 501 (2020).

[96] P. De Grauwe, *The Governance of a Fragile Eurozone*, cit. at 9 observes that "The countries that lost competitiveness from 1999 to 2008 (Greece, Portugal, Spain, Ireland) have to start improving it. Given the impossibility of using a devaluation of the currency, an internal devaluation must be engineered, i.e. wages and prices must be brought down relative to those of the competitors. This can only be achieved by deflationary macroeconomic policies (mainly budgetary policies). Inevitably, this will first lead to a recession and thus (through the operation of the automatic stabilizers) to increases in budget deficits". On the resulting role played by the ECB, see A. Hinarejos, *Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union: European Court of Justice, Judgment of 16 June 2015, Case C-62/14*, 11(3) Eur. Const. Law Rev. 563 (2015).

[97] A situation that laid bare the condition of greater vulnerability of countries adhering to the monetary union, due to the absence of a lender able to reassure the markets; see P. De Grauwe, *see above* n. 71, 7, 9; C. Gerner-Beurle, E. Kucuk, E. Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, 15(2) Ger. Law J. 288 (2014).

[98] V. Borger, *The ESM and the European Court's Predicament in Pringle*, 14(1) Ger. Law J. 113 (2013) at 114.

[99] This is a reference to Minister Tremonti; his interview can be accessed at: https://www.ilgiornale.it/news/intervista-tremonti-1847400.html

to be no end to the possibility of economic growth. According to another thesis, the crisis was seen as an opportunity to achieve the necessary political and fiscal union. If the architecture designed by Maastricht is examined more closely, it can be seen that the exclusion of a systemic crisis scenario from the horizon outlined by the Treaties is rooted in an exclusively preventive strategy focused on what has been defined as negative solidarity[100], aimed at segregating systemic risk within the borders of nation states. The real aim of the sound fiscal policies imposed by the Treaties on the Member States is the need to ensure that national imbalances are to be ascribed to a national level exclusively, without compromising the economic conditions in the other members of the EU community—defined indeed, as a "stability community". It is for this reason that Art. 123 and 125 TFEU have outlined so-called no bail-out clauses; these, however, have received little interest from scholars[101]. In their peremptoriness, the regulatory provisions on the prohibition of monetary and fiscal rescue seem to follow the aforementioned perspective outlined in the post-*Maastricht* Treaties, in which the bonds of trans-national solidarity are confined within very narrow limits.

The principle of solidarity is contemplated in Art. 2 TEU, but not in the section (the one enclosed in the first sentence) indicating the founding values, thus reflecting the already exposed tension between strong and weak States and the well-known fear of not encouraging moral hazard enough[102]. Even the principle of social justice, recognized in Art. 3 TEU third paragraph, is represented as solidarity between States and not between citizens, so to be subject to the limits provided by Art.123 and 125 TFEU regarding the prohibition of aid or funding to States. The only form of positive solidarity appeared in the provisions contained in Art. 122 TFEU, which legitimized the EU to grant assistance to States facing difficulties due to events beyond their control, and in Art. 143 TFEU, which authorizes the

[100] On the distinction between negative and positive solidarity, see V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit. at 20, 21.

[101] P.J. Castillo Ortiz, *The Political De-determination of Legal Rules and the Contested Meaning of the 'No Bailout' Clause*, 26(2) Soc. Leg. Stud. 249 (2017).

[102] A.V. Bogdandy, *I principi fondamentali dell'Unione europea. Un contributo allo sviluppo del costituzionalismo europeo* (2011) at 134 et seq.

Council to grant assistance to States outside the euro area if they experience balance of payments problems. Solidarity emerges therefore with a negative dimension: the obligation to not accumulate debt.

7. The debate following the onset of the crisis: in search of an ambitious compromise between market disciplines and the irreversibility of-currency

Financial markets behaved for a long time as if those bans did not exist and kept ignoring, until the outbreak of the Greek crisis, the diverging financial solidity between the states in determining the interest rate on loans[103]. The initial market sentiment was not entirely groundless. For the reasons explained above, the Treaties did not contemplate a potential systemic or existential crisis. Moreover, they were not equipped with an adequate solution to face worse scenarios, had these occurred despite precautions. Yet, precisely this evident gap in the Treaties should have justified a more pragmatic approach to the interpretation of the no bail-out clauses. It was, in fact, almost 'as if the Eurozone had dictated a perfect regulation to prevent fires, but then forgot to set up a fire brigade in the event that a fire had really broken out, threatening the common structures'[104]. The Treaties were dealing too summarily with the crisis affecting Member States; by responding with the default or voluntary external rescue mechanism under Art. 122 TFEU they were dismissing the worst-case scenario of a systemic crisis able to seriously damage the entire eurozone. It can be argued that the rules prohibiting rescue mechanisms were certainly more tangled and multifaceted than what theorized by legal doctrine[105]. Their real nature started emerging only with the advent of the crisis, that is to say, in front of a serious scenario until then taken into consideration only by economic doctrine— which, in fact, was

[103] J.V. Louis, *Guest Editorial,* cit.
[104] P. De Grauwe, *Fighting the Wrong Enemy*, https://voxeu.org/article/europe-s-private-versus-public-debt-problem-fighting-wrong-enemy; Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications,* cit. at 22; P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20(1) Maastricht J. Eur. & Comp. L. 10 (2013).
[105] P.J. Castillo Ortiz, *The Political De-determination*, cit. at 260.

skeptic about the efficacy of the prohibitions[106]. The budgetary code of the Union was being reconsidered in political debate, with the aim of relativizing its scope and adapt it to the increasing emergency situation[107].

A new way of understanding the no bail-out clauses emerged from a set of acts of the EU institutions, including the decisions taken by the EU Council, the European Council and the Member States. The conditional solidarity, that is, financial assistance conditional on compliance with strict macroeconomic recovery and adjustment programs, was presented as a solution in line with the scheme outlined by the Treaties and the rationale of the rescue bans. More precisely, this solution appeared in the first form of financial assistance built in 2010, with the establishment of the European financial stabilization mechanism (EFSM) and the European Financial Stability Facility (EFSF). These mechanisms were codified in subsequent years (2011/2012) not only through the creation of a permanent type of assistance mechanism, namely the European Stability Mechanism (ESM), intended to replace the previous funds and vehicles[108], but also through the amendment

106 Since the Maastricht Treaty, economic doctrine has explained how, in a monetary and economic union, the need for bail out mechanisms derives from the deep interdependence links between States; these links could generate a situation in which public debt securities of countries at risk of default could be held by private citizens, companies and banks of Member States with sound financial system. See A.L. Bovenberg, J.J.M. Kremers, P.R. Masson, *Economic and Monetary Union in Europe and Constraints on National Budgetary Policies*, 38(2) *Staff Papers* (International Monetary Fund), Special Issue on Europe 374 (1991). See also P.J. Castillo Ortiz, *The Political De-determination*, cit. at 260.

107 Dynamics which could be opened up by an emergency situation, also with reference to the identification of the rule of recognition, are explored in H.L.A. Hart, *The Concept of Law* (1961) at 92, 104; in the specific interpretation of the no bail-out clause , see K. Dyson, *Sworn to Grim Necessity? Imperfections of European Economic Governance, Normative Political Theory, and Supreme Emergency*, 35(3) J. Eur. Integr 207 (2013) e P.J. Castillo Ortiz, *The Political De-determination*, cit.

108 In addition to Council Regulation (EU) No 407/2010 of 11 May 2010 on the EFSM, adopted under Art. 122 TFEU, one should also refer to EU Council Decision No 9614/10 of 9 May 2010, considered as a decision subject to international law which decides on the establishment of a Special Purpose Vehicle, the *European Financial Stability Facility* (EFSF). These measures followed the *Greek Loan Facility*, decided on 2 May 2010, consisting of a package of bilateral loans granted to Greece and administered by the Commission. At the meeting that took place on 28-29 October 2010, the European Council decided to replace both mechanisms with a permanent instrument. The ESM Treaty, all

of the Art. 136 TFEU[109] which authorizing the Member States to establish a permanent mechanism to safeguard the stability of the euro area[110].

This different interpretation of the no bail-out clauses found also support in the debate that arose within legal doctrine. It was noted that the scenario outlined in the Treaties was more articulated than initially thought due to a sort of misinterpretation of Art. 123 and 125 TFEU. This became self-evident in the possibility authorized by the Treaty on the functioning of the EU to offer assistance to Member States facing difficulties for which they could not be directly responsible (Art. 122 TFEU), demonstrating the non-absoluteness of the prohibitions of rescue[111]. The debate could certainly have offered a wider range of solutions beyond Art. 122 TFEU, given that this provision refers to well-defined interventions of financial assistance: those made one-off (and not permanently) by the EU (and not by the states) to benefit individual countries (without systemic implications related to the stability of the euro area) in difficulties for reasons not directly attributable to them[112]. After all, the fragility of this legal

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euro area Member States were signatories, was ratified on 2 February 2011 and entered into force on 27 September 2012.

[109] Promoted by the European Council on 17 December 2010, Euco 30/10 and approved via a simplified procedure. The decision on the amendment of Art. 136 TFEU was adopted on 25 March 2011, 2011/199/EU. The text contained in Art. 136 entered into force after the approval of the Member States whose currency is the euro, in accordance with their respective constitutional procedures. For a survey of the different measures and mechanisms, see A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union,* cit.

[110] B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism, European Policy Analysis*, EPA (2011).

[111] J.V. Louis, *Guest Editorial,* cit. According to this author, the provision of Art. 122 TFEU was the result of a compromise between countries with a strong currency and economy on the one hand, and countries with weaker currencies and economies on the other hand; similar considerations are found in V. Borger, *The ESM and the European Court's Predicament in Pringle,* cit. at 120.

[112] The fact that a state cannot always be held responsible if facing challenging circumstances (principle of state liability) seems to play a major role when interpreting Art. 122 TFEU and Art. 125 TFEU. If the forms of assistance under Art. 122 TFEU can be granted even in the event of a crisis due to fiscal indiscipline, the discipline on excessive deficits contemplated in the Stability Pact would not be actualised (see V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit. at 27). B. de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, cit. at 5

basis[113], unable to deal with a systemic crisis partly triggered by the economic turmoil of a country not completely blameless in this regard (Greece)[114], pushed the various European actors to promote the amendment of Art. 136 TFEU, with a view to consolidating a less rigorous interpretation of Art. 125 TFEU[115].

What should be underlined here is that this scenario allowed a latent tension to emerge in the legal debate between two conflicting pillars of the Economic and Monetary Union: 1) the no bail-out clauses, able to ensure through market discipline the pursuit of sound fiscal policies by Member States, and 2) the pursuit of stability of the eurozone which, by imposing the deployment of fiscal (and perhaps even monetary) interventions, seemed to push in the opposite direction and encourage moral hazard[116]. Therefore, there slowly started to emerge an idea, both among economic theorists and political circles that a form of solidarity depending on the adoption of macro-economic

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stresses the importance for the assistance to be granted of the non-attributability of the state of difficulty on the basis of Art. 122 TFEU. Whether assistance under Art. 122 TFEU could also be provided in cases of countries facing difficulties resulting from their own initiatives remains a controversial topic, as mentioned by Kaarlo Tuori, *The European Financial Crisis*, cit. at 26.

[113] On the applicability of the aforementioned article to the sovereign debt crisis, there was no unanimous consensus among economic theorists, since some authors believed that Art. 122 TFEU was perfectly applicable also to cases of financial difficulties caused by a public debt crisis; its compatibility with the following Art. 125 TFEU would have been entrusted to the provision of appropriate conditionality. This latter is the view expressed in the aforementioned publication by J.V. Louis, *Guest Editorial,* cit. and in A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union,* cit. at 1634, who, however, stresses the necessarily temporary nature of the aid mechanism set out in Art. 122 TFEU and V. Borger, *The ESM and the European Court's Predicament in Pringle*, cit. at 128, which identifies Art. 122 TFEU as a sufficient legal basis also for the construction of a permanent rescue mechanism.

[114] Regulation 407/2010 of 11 May 2010, establishing the European financial stabilization mechanism, does not mention the fault of the Member State. The fund, established under Art. 122 TFEU, was not, in fact, used for Greece; see Kaarlo Tuori, *The European Financial Crisis*, cit. at 26.

[115] B. de Witte, *The European Treaty Amendment*, cit.

[116] Kaarlo Tuori, *The European Financial Crisis*, cit. at 22, 24; P. Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology,* cit. at 10; M. Wilkinson, *The Euro Is Irreversible! … Or is it?: On OMT, Austerity and the Threat of "Grexit"*, 16(4) Ger. Law J. 1052 (2015).

adjustment measures could ensure an optimal balance between these two opposing forces[117]. The main argument in favor of the intervention was that the aid, if conditional, would not have discouraged Member States' pursuit of sound fiscal and economic policies. Moreover, this compromise would ensure the compliance with the rationale behind the rescue bans, to be identified in the encouragement to achieve fiscal rigor. Market discipline would be replaced by a different kind of stimulus, that is, aid conditionality, in order to satisfy the needs elucidated in the Treaties[118]. Of course, there were also more restrictive interpretations of the prohibitions, which relied on a literal understanding of the Treaties. But the teleological approach described above emerged overwhelmingly in jurisprudence.

After the German Federal Court between 2011 and 2012 freed up new emergency instruments devised in the European legal area from the accusation of creating an unlawful transfer union[119], the ECJ also intervened on the subject. With the well-known 2012 Pringle case, the Luxembourg Court of Justice used the teleological criterion based on the identification of the rationale pursued by Art. 125 TFEU to establish the compatibility with the Treaties of forms of assistance granted, under certain conditions, by the Member States. In the Court's view, the ESM Treaty fell within the Member States' area of competence and did

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117 On the role of conditionality, see C. Pinelli, *Conditionality and Economic Constitutionalism in the Eurozone,* 11(1) Ital. J. Publ. Law, 22 (2019).

118 A. De Gregorio Merino, *Legal Developments in the Economic and Monetary Union,* cit. at 1626.

119 In opposition to the dogma of stability community. This dogma has been the *conditio sine qua non* for Germany's commitment to participation to the monetary union since Maastricht-Urteil. In the judgment of 7 September 2011, BVerfGE 987/10, para. 133 et seq., concerning financial aid to Greece and the validity of the rescue mechanism (the EFSF), the Court ruled out the possibility that the obligations put forward by the Federal Republic of Germany could subvert the principles underpinning the idea of mutuality to achieve economic stability, since no forms of automatic liability and no transfer mechanisms were provided, and not to such an extent as to undermine the budgetary autonomy of the Parliament and, by default, the democratic principle. The most explicit considerations on the interpretation of the Treaties appear in the 2012 ESM ruling, in which the Federal Court states that the new Art. 136 TFEU does not exempt from budgetary discipline and allows voluntary assistance subject to certain conditions and aimed at saving the eurozone; see Judgment of 12 September 2012 -2 BVerfGE 1390/12, para. 129 et seq.

not interfere with those conferred to the EU in respect to monetary policies and the coordination of economic policies. It was argued that the objective pursued by the signatory states was to grant economic aid and save the eurozone as a whole[120]. This did not, however, exempt the signatory states from complying with primary EU law, for instance in respect to the prohibition of fiscal rescue measures set out in Art. 125 TFEU.

According to the Court's interpretation, the paradigm of market discipline, and with it the dogma of stability community, would not been obscured by the introduction of emergency instruments specifically designed to deal with a solvency crisis if experienced by a Member State, which could jeopardize the stability of the euro area as a whole[121]. The preventive logic of market discipline and the stability community dogma will be respected insofar Member States aim to pursue sound fiscal policies. This explains the need for forms of fiscal assistance characterized by strict conditionality clauses to ensure the stability of the entire eurozone[122]. Nevertheless, in order to comply with the no bail-out clause it is equally important that other Members do not become liable for the debts of a Member State receiving aid. According to European jurisprudence, the legal basis of the ESM Treaty should not be Art. 122 TFEU but Art. 125, based on that evolutionary interpretation seen above. It thus considers Art. 136(3) TFEU, introduced for the implementation emergency reforms, as confirming a power which is, in effect, already recognized in the Treaties[123].

8. Unconventional monetary policies: an overview

Some identify a line of continuity between the political and legal debate that has arisen around the interpretation of the fiscal

[120] According to the Court (EU Court of Justice, 27 November 2012, in Case C-370/12, paras. 56, 96 et seq.), the ESM Treaty's objective is safeguarding the stability of the euro area as a whole, which is clearly distinguished from the objective of maintaining price stability—arguably the main objective of the Union's monetary policy.

[121] EU Court of Justice 27 November 2012, para. 59.

[122] EU Court of Justice 27 November 2012, Case C-370/12, paras. 121, 133 ff. V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit. at 24 stresses the need for these two different assistance requirements.

[123] V. Borger, *The ESM and the European Court's Predicament in Pringle,* cit. at 132.

no bail-out clause and the (unconventional[124]) monetary policy decisions taken by the ECB during the last decade. It was argued that the ECB's decisions would have accepted the idea of solidarity conditional on the adoption of reforms or adjustment program[125]. Behind this line of reasoning - albeit in non-explicit forms – lies the conviction that the integrity of the eurozone is an essential component of the ECB's mandate, deductible starting from the objective of price stability. It follows, in accordance with this view, that the monetary authority would be fully legitimated to act as an active player in eurozone rescue operations, reconciling the two opposite poles of values, present in the Treaty: the irreversibility of the currency and the no bail-out clauses. Nevertheless, that the ECB may indeed play an explicit role in the euro bail-out, provided the strict conditions set out under Article 125 TFEU are observed, is an idea that is not readily accepted in the legal debate. Moreover, as will be explained later, such an idea appears unconvincing unless surrounded by further cautions, given its tendency to lead to a questionable overlapping of tasks and functions regarding the prerogatives of EU Member States. In fact, the problem focuses on the redistributive effects associated with such monetary interventions, which are not legitimized by prior decisions taken within the European or national democratic circuit. As regards the problematic relationship between the stabilization of the eurozone and the boundaries of the ECB's mandate, I will argue that an emergency intervention can also be carried out by the Central Bank but only if certain conditions are met. Without these, the intervention, although commendable, would be unlawful since it would not only damage the prerogatives of the Member States but also the very nature of the Union based on the dogma of stability community. This problem will be examined in the following sections.

What is important for the moment to highlight is the administrative behavior of the monetary authority, characterized by the ECB's growing activism. As is well known, the preservation of the integrity of the eurozone has taken shape through the purchase of government bonds on the secondary market and the

[124] O. Chessa, *La costituzione della moneta*, cit. at 345 et seq.
[125] V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area*, cit.

consequent attenuation of spreads. The first intervention program dates back to May 2010, with the establishment of the *Securities Markets Programme* (SMP)[126]. The intervention was aimed not only at the purchase of public debt securities, but also at their sterilization, in order not to increase the mass of money in circulation and the subsequent risk of inflationary shocks. The program was justified by the need to provide liquidity in the markets in order to restore the proper functioning of monetary policy transmission mechanisms; the ultimate objective was, however, to ensure the stability of the currency, threatened by speculation that was beginning to attack the public debt of Greece, Ireland and Portugal. On that occasion, the commitments made by the States at European headquarters to intensify the process of fiscal consolidation were considered sufficient by the ECB to intervene in the secondary market with the purchase of government bonds[127]. With the spread of the financial crisis during 2011, the program was extended to Spain and Italy with specific conditions imposed on them in two different letters dated August 2011[128]. The importance linked to the implementation of the necessary reforms by the aided states was such that the purchase of the securities was reduced when it emerged that the Italian Government was unwilling to carry out the adjustments and structural reforms indicated in the aforementioned letter[129]. It

[126] Decision 14 May 2010 (ECB/2010/5).

[127] Point 4 of the preamble to Decision ECB/2010/5 reads as follows: "The Governing Council will decide on the scope of the interventions. The Governing Council has noted the statement of the euro area member state governments that they 'will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures' and the precise additional commitments taken by some euro area member state governments to accelerate fiscal consolidation and ensure the sustainability of their public finances". R. Smits, *The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments*, 38 Fordham Int. Law J. 1167 (2015) underlines the presence of an implicit conditionality *ab origine*.

[128] For the text of the ECB's letter of August 5 2011, see https://st.ilsole24ore.com/art/notizie/2011-09-29/testo-lettera-governo-italiano-091227.shtml?uuid=Aad8ZT8D; similar letter was sent to the Spanish government headed by Zapatero at the time: https://english.elpais.com/elpais/2013/12/04/inenglish/1386168519_020729.html.

[129] V. Borger, *How the Debt Crisis Exposes the Development of Solidarity in the Euro Area,* cit. at 20, 21.

should be added that the introduction and implementation of the program was affected by the presence of a serious conflict within the ECB's directorate. According to some of its member, there was a lack of a clear and direct link between the aids and the conditionality[130]. In addition, the ECB's own promise to sterilize purchases was broken at some point[131].

As early as December 2011, the ECB launched a further program (the *Long-Term Refinancing Operations*, LTRO). This financial instrument, formally aimed to provide liquidity to banks, was in fact a way to provide liquidity to sovereign states through the financing of the banking channel. The resurgence of the crisis, especially following the joint statements made by MERKEL and SARKOZY in Deauville on 18 October 2010[132] has, however, led to the need for further stabilization interventions by the monetary authority. In this context took place the famous speech on "*whatever it takes*" given by Draghi on 26 July 2012: the ECB President announced that, within its mandate, the ECB would do everything necessary to save the euro. Although legally questionable, the intervention carried out by the ECB had succeeded in preserving the common currency, also avoiding the risk of a dangerous judicial dispute, thanks to a statement released to the media[133].

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[130] See K. Dyson, *Sworn to Grim Necessity?* cit. at 217.

[131] C. Jones, *European Central Bank Unleashes Quantitative Easing*, *Financial Times* (2015), available online at https://www.ft.com/content/aedf6a66-a231-11e4-bbb8-00144feab7de.

[132] The statement concerns the need for private participation in the restructuring of public debt (the so-called *private sector involvement*) as a condition for the intervention of the rescue instruments developed in Europe. On the existence of a causal link between those statements and the reaction of the markets, see M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit. at 108, 343. The qualified journalistic sources of the time do not give a different representation of the events, see C. Bastasin, *The Franco-German Ballet on Greece at the Origin of this Midsummer Crisis*, August 4, 2011, which can be accessed online at: Il Sole 24 Ore, https://st.ilsole24ore.com/art/commenti-e-idee/2011-08-03/balletto-francotedesco-grecia-origine-214854.shtml?uuid=AazjPZtD. As Bastasin explains, although the agreement had commenced from 2013 it was considered immediately operational by the German banks which had disposed of the Greek securities, giving rise to market speculation, which involved the securities of all the states of the so-called suburbs communities.

[133] M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit.; S. Kennedy, J. Black, *Draghi's 'Whatever It Takes' Still Works As Euro Revives*,

In order to overcome the legal objections raised against the previous program, in September 2012 the ECB announced the launch of the OMT, declaring its willingness to purchase a potentially unlimited number of euro area government debt securities, without acting as a preferred creditor (so-called *pari passu*), providing certain conditions were met. Among these was the condition that the Member State in question should adhere to a financial assistance program under the *European Stability Mechanism* (ESM). The link with these conditions therefore became more evident due to the adherence to the ESM's financial assistance program. The OMT program was, in fact, never used[134], but, in 2014 the ECB once again came to the eurozone's aid by setting up the *Expanded Asset Purchase Programme* (EAPP). The aim of this was to enable the purchase of financial assets and to provide credit to the economy and the transmission of monetary policy, with the stated objective of reducing inflation rates to levels close to 2%, consistent with the ECB's main objective of maintaining price stability within the euro area (the program is better known as *Quantitative Easing*, QE)[135]. Within this program, with a series of other more detailed decisions, the ECB was setting up the so-called *Public Sector Purchase Programme* (PSPP), aimed also at allowing the purchase - under certain conditions depending, *inter alia*, on the fiscal conduct and creditworthiness of the states - of the euro area Member States' public debt securities, in order to contribute to the achievement of the desired inflation target[136].

Bloomberg online (2014), available online at: http://www.bloomberg.com/news/2014-01-10/draghi-s-whatever-it-takes-still-works-as-eurorevives.html.

134 M.K. Brunnermeier, H. James, J. Landau, *The Euro and the Battle of Ideas,* cit. at 99–117.

135 This is a highly articulated program designed to facilitate the transmission of monetary policy, and it consists of several programs: The *Corporate Sector Purchase Programme* (CSPP); the *Public Sector Purchase Programme* (PSPP); the *Asset-Backed Securities Purchase Programme* (ABSPP); and the *Third Covered Bond Purchase Programme* (CBPP3).

136 As also clarified by the ECJ, the specific reasons for the activation of this program can be found in the statements made by the President of the ECB at subsequent press conferences. According to these statements, it was the exceptionally low inflation rates, compared to the objective of maintaining price stability through a return to annual inflation rates closer to 2%, that justified the introduction of the PSPP, and the regular adjustments made to this program.

Finally, in order to respond to the coronavirus-related crisis (COVID-19), the Governing Council of the ECB decided in March 2020 to launch a new *Pandemic Emergency Purchase Programme* (PEPP)[137]. In June 2020, the program was further strengthened with additional resources and extended until mid-2021. Compared to previous programs, the ECB decided to accept securities from countries without creditworthiness. It also deliberated not to take into account the so-called *capital key*, i.e. the principle that the ECB was bound to allocate purchases in proportion to the states' capital shares of the Central Bank. As clearly seen from the analysis of the various programs, the motivation for the intervention appears, in many cases, to be closely related not to the stabilization of the eurozone in the strictest sense of the word, but to the need to restore the correct functioning of the transmission mechanisms of monetary policy, obstructed by the widening of the so-called spreads. Having clarified the programs implemented by the ECB in recent years, it is now appropriate to shift the focus to the problematic issue of the relationship between the extension of the ECB's mandate and the rescue of the eurozone.

9. The dark side of a controversial power: unconventional monetary policies between price stability and currency rescue

Almost all of the monetary policy decisions mentioned above have become the target of a barrage from German populist movements. The guarantees of direct access to judgement, together with a broad interpretation of active legitimation, have, over time made the FCC a type of privileged forum for German Eurosceptic movements[138]. For its part, the FCC has understood its role as custodian of the Constitution in a very conservative way. In fact, the FCC has acted as guardian of the European integration

Before the adoption of Decisions 2015/774, 2015/2464, 2016/702 and 2017/100, the annual inflation rate was -0.2%, 0.1%, 0.3% and 0.6% respectively. It was only at the press conference on 7 September 2017 that the President of the ECB announced that the annual inflation rate had reached 1.5%, thus approaching the target. Court of Justice of EU, 11 December 2018, Case C-493/17 *Weiss* and others, para. 39.

[137] Decision (EU) 2020/440 of the ECB of 24 March 2020.

[138] M. Wendel, *Exceeding Judicial Competence in the Name of Democracy*, cit. at 283.

program[139], although seeking a dialogue with the Court of Justice, in accordance with a *modus procedendi* of theoretical openness to EU law already advocated in the 2010 *Honeywell* judgement[140]. With this ruling, the Federal Supreme Court clarified the conditions of access to *ultra vires* review, committing itself to offering the Court of Justice the opportunity to express its views on the issue at stake in the proceedings. Nevertheless, this was an unfriendly opening, given that it was part of a type of procedure in which the German General Court reserved for itself the power to review the content of the judgement of the ECJ, thus breaking the monopoly held by the Court of Luxembourg in the review of European acts. These profiles, closely related to the paradigm of constitutional pluralism, have already been sufficiently discussed. It is important here to note that European jurisprudence on the ECB unconventional policies has been formed precisely as a result of the preliminary rulings of the German judge during the constitutional proceedings relating to the OMT and PSPP monetary policy programs.

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[139] The metaphor of the bridge, of which the Court would be the guardian, often appears in European doctrine, see M. Wendel, *Exceeding Judicial Competence in the Name of Democracy*, cit.

[140] Judgement of 6 July 2010, BVerfGE 2661, 06. The ruling refers to a very specific case in which the ECJ had intervened for a preliminary ruling to interpret EU law, but with a judgement largely contested in its contents (judgement C-144/04 Mangold). A. Wiesbrock, *The Implications of Mangold for domestic legal systems: The Honeywell case*, 18(1-2) Maastricht J. Eur. & Comp. Law 208 (2011). In this ruling, the FCC clarifies the conditions of access to the ultra vires union. From a substantive point of view, the court calls for a recurrence of a qualified infringement, characterized not only by a manifest breach of the principle of competence but also by a structurally significant change in the distribution of competences, to the detriment of the Member States. From a procedural point of view, the court also affirms the need for the ECJ to be given the opportunity to rule on the validity of the scrutinized European legal acts and on the interpretation of EU law, before it itself takes the final decision in the case. The homage to the principle of openness to European law also does not imply an attitude of condescension towards the judgement of the Court of Luxembourg; on the contrary, the *Bundesverfassungsgericht* expressly declares that it reserves itself the power to disregard the European judgement if, on the result of the application of the substantive tests examined beforehand, it should in turn be affected by the ultra vires stigma (M. KUMM, *Rebel without good cause: Karlsruhe's misguided attempt to draw the CJEU into game of chicken and what the CJEU might do about it,* 15(2) Ger. Law J. 203 (2014). M. Wendel, *Exceeding Judicial Competence in the Name of Democracy*, cit. at 274.

In the first 2015 *Gauweiler* judgement[141] on the validity of the OMT program, the functional aspect of the ECB's mandate is at the heart of the European Court's reasoning. It is precisely the cross-cutting nature of the ECB's competences - resulting from its link with the objective of maintaining price stability, in accordance with Art.127(1) and 282(2) TFEU - that allows the European Court to rule out the illegality of non-conventional monetary policy measures, even in the face of interventions affecting the areas covered by economic policies. What matters, according to the European courts, is that the objective pursued by the ECB is price stability[142]. On closer inspection, the legal reasoning followed by the European judges appears more articulated. In the ECJ's view, the primary objective of price stability is linked to the adoption of measures aimed at ensuring the uniqueness of monetary policy and its functionality, against the distorting effects caused by the irrational increase of interest rates. The widening of spreads on government bond yields would undermine monetary policy, frustrating it in the peripheries most affected by speculation[143]. Certainly, in the perspective accepted by the European judge, it is necessary that such monetary interventions do not result in the violation of the no bail-out clause. As well as in the previous *Pringle* ruling, concerning fiscal assistance interventions (suspected of violating Art. 125 TFEU), as in the *Gauweiler* ruling concerning monetary assistance interventions (suspected of violating Art. 123 TFEU), the use of teleological criterion, based on the identification of the rationale pursued by the Treaty provision, allows the ECJ to limit the rigor of Art. 123 TFEU. Monetary assistance interventions would therefore be prohibited not in absolute terms, but only where they are likely to frustrate the rationale of the prohibition and deter states from pursuing sound budgetary policies[144].

In the ECJ's view, the OMT program is compatible with Art. 123(1) TFEU. The reasons given in support of this conclusion are, firstly, the subordination of monetary intervention to the condition of prior accession of the Member State concerned by the

[141] Court of Justice of the EU, 16 May 2015, Case C-62/14 *Gauweiler*.
[142] Court of Justice of the EU, 16 May 2015, Case C-62/14 *Gauweiler*, para. 46.
[143] O. Chessa, *La costituzione della moneta*, cit. at 357 et seq.
[144] Court of Justice of the EU 16 May 2015, Case C-62/14 *Gauweiler*, paras. 99/102.

purchase of the securities to the ESM program (which in itself imposes clear conditionality). But also the containment of the purchases to an extent which preserves the monetary policy transmission mechanism, in order to ensure the cessation of purchases as soon as the objectives are achieved. In other words, the aim cannot be to ensure a complete harmonization of securities yields, i.e. without paying attention to the different degree of reliability of the budgetary measures adopted by the different countries. According to the Court, other precautions associated with the program[145] would be suitable to prevent the diversion from the states' tension towards the implementation of sound fiscal policies and thus safeguard the *ultima ratio* of Article 123 TFEU[146]. The core of these arguments is taken up in the subsequent *Weiss* 2018 judgement on the PSPP program, which differs in part from the previous judgement due to the partial diversity of the factual context. Price stability continues to be one of the ECJ's main concerns. But the reasoning is developed in a factual framework of clear deflation of the economies of the EU Member States. As noted before, this economic situation had called for the adoption of unconventional monetary policies, including the purchase of public debt securities aimed at facilitating the raising of the level of inflation to a lower level, but still close to 2%[147]. Responding to the new objections raised by the FCC[148], Luxembourg judges reiterate that, in the absence of an explicit definition, monetary policy is defined primarily on the basis of a teleological criterion, thereby attention must be paid to the objective of price stability. Such an objective would be defined by the Treaty only in qualitative terms, through reference to the abstract concept of price stability, but not in quantitative terms. It follows that the Treaty doesn't preclude monetary policies of the kind undertaken by the ECB within quantitative easing (QE).

[145] Such as the limitation of purchases to certain security categories, as well as the reservation of the power to sell securities, depending on the fiscal discipline ensured by the State concerned.

[146] Court of Justice of the EU 16 May 2015, case C-62/14 *Gauweiler*, paras. 103/107.

[147] Court of Justice of the EU, 1 December 2018, Case C-493/17 *Weiss* and others, paras. 39, 41.

[148] Order 18 July 2017, BverfGE 859/15.

Faced with the new objections raised by the FCC, the European Court ruled out the possibility that the results of the effects on the real economy, although recognized before and therefore foreseen and accepted by the ECB, could imply defining the actions taken into the PSPP program as an equivalent economic policy measure. In the ECB's view, to exert an influence on inflation rates the ECB is necessarily inclined to adopt measures which have certain effects on the real economy. To introduce such a ban, albeit limited to cases where the effects are foreseeable and consciously accepted, would be tantamount to prohibiting the ECB from using the means available to it under the Treaties to achieve its monetary policy objectives[149]. The European Court also comes to very similar conclusions with the other questions. With regard to the infringement of the prohibition on State funding provided for in Art. 123 TFEU, the ECJ again points out that the precautions adopted (the absence of guarantees regarding the continuation of the purchase of the government securities, the dependence of the program on the need to achieve the monetary policy objective of achieving inflation close to 2%, the selectivity of these acquisitions, the distribution of the acquired program according to the key for the subscription of the ECB capital, the capital key, and the credit quality of the State), are such as to ensure that the States are not diverted from the incitement to pursue sound fiscal policies[150].

The examination of European case law provides, at this point, a sufficiently clear overview of the problem of the legal basis for the ECB's intervention. The joint reading of the *Pringle*, *Gauweiler* and *Weiss* judgements makes it possible to distinguish clearly, at least in theory, between the exclusive competences of the Union in monetary policy and those of the Member States in economic policy. A line of demarcation can be traced by using a functional and teleological criterion. According to this, only the objective of price stability can justify a monetary policy intervention (including non-conventional ones) by the ECB. Conversely, the economic policy objectives, pursued through fiscal leverage, including fiscal assistance to countries in debt

[149] Court of Justice of the EU, 11 December 2018, Case C-493/17, *Weiss* and others, paras. 61 to 67.

[150] Court of Justice of the EU, 11 December 2018, Case C-493/17 *Weiss* and others, paras. 132-142.

crisis, would be the responsibility of the Member States. In turn, price stability constitutes an objective that can be pursued, according to the above-mentioned jurisprudence, both through the non-selective acquisition of large quantities of public debt securities[151] and the elimination of obstacles to the correct transmission of monetary policy[152]. Certainly, the teleological criterion leads to the drawing of transversal competences, by their nature productive of interferences and overlaps. Although motivated by different, and in some ways even opposite needs, monetary and fiscal policies produce similar effects. It follows that it seems quite normal for monetary policies to produce consequences also in the economic field, given that economic policies produce effects also on the price level. Therefore, it is not surprising that the danger of overlap is also present in some aspects of the eurozone's own rescue measures.

Whereas the objective of price stability is a prerogative of the European Central Bank and should be implemented through the elimination of obstructions to the functionality of monetary policy, financial assistance to countries in difficulty, motivated by the danger of compromising the stability of the eurozone as a whole, falls within the prerogatives of individual Member States, within the ESM mechanism. Nevertheless, there is a significant stabilization profile of the euro area that continues to fall under the umbrella of monetary policies. Achieving the objective of the uniqueness of monetary policy, which is functional to the primary objective of price stability, can stabilize the euro area through the elimination of obstacles to the transmission of monetary impulses (i.e. the compression of spreads). This does not alter the nature of the power exercised. The power remains monetary in nature, precisely on the basis of a functional criterion which looks at the objective pursued (the uniqueness and functionality of monetary policy)[153]. One could say that there is one side of the stability of the euro area that is relevant to monetary policies and a second

[151] With the aim of bringing the price level back to a certain desirable value (as in the case of the PSPP), as in the case of the EQF (PSPP), see Court of Justice of the EU, 11 December 2018, Case C-493/17, Weiss and others, paras. 82 and 90.
[152] In order to ensure the uniqueness of this policy, as in the case of the OMT. See Court of Justice of EU, 16 May 2015, Case C-62/14 *Gauweiler*, para. 46 et seq.
[153] T. Tridimas, N. Xanthoulis, *A Legal Analysis of the Gauweiler Case*, 23(1) Maastricht J. Eur. &Comp. L. 7 (2016) at 33.

that is relevant to the Member States. These reflections are important as they allow the exclusion of the presence of overlaps between the OMT program and the interventions of the ESM mechanism[154]. The accession of a Member State to the rescue mechanism is a necessary but not a sufficient condition to justify intervention by the ECB, which can only intervene because of the need to remove obstacles to the correct transmission of monetary policy[155]. Not every obstruction in the transmission instruments of monetary policy appears capable of justifying intervention by the ECB, which makes the line of demarcation between these two sides of eurozone stabilization more evident.

The presupposition, on which the ECJ bases its interpretation of Art. 123 and 125 TFEU, is that there are forms of market pressure completely removed from the power of control of individual countries, since they are not related to the soundness of the budgetary policies. The market discipline, not always guided by rationality, can result in sudden and unwarranted worries. For example, a fear of a break-up of the eurozone could lead to a baseless rise in interest rates, fueling distrust towards the sustainability of the debt of a certain member country. According to the multiple equilibrium theory, unjustified changes in market sentiment may shift a Member State's position towards rates that are less sustainable for public finances. The greater severity of national debt would justify a higher level of rates *ex post*, although the macroeconomic and budgetary position remains unchanged. In short, with unchanged policies, the state position would shift towards a bad equilibrium. As in a self-fulfilling prophecy, all this can lead the state towards a solvency crisis without ECB intervening to bring the rate curve back to sustainable levels in line with the fundamentals[156].

The intervention of the ECB is therefore justified by the need to preserve the functionality of monetary policies from alterations generated by the irrationality of the market (and not by the fiscal choices of the various states), as the ECJ states clearly in

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154 Court of Justice of EU, 16 May 2015, Case C-62/14 *Gauweiler*, para. 65.

155 T. Tridimas, N. Xanthoulis, *A Legal Analysis of the Gauweiler Case,* cit. at 26.

156 P. De Grauwe, Y. Ji, A. Steinbach, *The EU debt crisis: Testing and revisiting Conventional Legal Doctrine,* 51 Int. Rev. Law Econ. 29 (2017).

specific passages of the 2015 *Gauweiler* judgement[157]. In these circumstances, the financial stabilization intervention of the ECB - functional to ensure the uniqueness of monetary policy - is aimed at eliminating that share of the spread that can be linked to the irrationality of the market. As long as the objective is limited to this, the ECB's activity would appear to fall within the scope of its mandate. In other words, it acts without encroaching on the Member States' competences about rescuing a Member State in difficulty. This would instead occur if the removal of obstacles to the transmission of monetary policy also includes that part of the spread that is linked to the bad budgetary policies pursued by individual states. In the latter case, if the eurozone as a whole is endangered, it will be necessary to call for the intervention of the Fund for the Rescue of States. It will, therefore, be this fund that will provide necessary aid, imposing the conditions needed to subrogate the market regulation required by Art. 123 and 125 TFEU, temporarily deactivated for reasons of preservation of the eurozone. In such a framework, the ECB will then be in a position to intervene not to save the eurozone through monetary aid, but only to remedy the irrational reactions of the markets which, driven by the fear of a break-up of the eurozone, would otherwise lead to a tightening of the states' financing conditions[158].

In conclusion, a well-founded argument is that the risk of the collapse of the eurozone is a matter for monetary policy when it is fueled by irrational market sentiment. This is the reason why the ECB should act, even under existing treaties, as a last resort lender, to calm the markets from unfounded fears— for instance, those related to the break-up of the eurozone or the exit of some eurozone Member States. In such cases, the ECB intervenes to

[157] Paragraphs 72, 76 and 77 where, with reference to the MTO program, it is noted "that the above-mentioned program is based on an analysis of the economic situation in the euro area according to which, at the date of the announcement of the program, the interest rates on the public debt securities of the various euro area countries were characterized by high volatility and extreme yield spreads. According to the ECB, these yield spreads were not exclusively due to macroeconomic differences between these countries but were partly due to the need for excessive risk premium for securities issued by some Member States to cover the risk of the collapse of the euro area."

[158] C. Gerner-Beuerle, E. Kucuk, E. Schuster, *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, cit. at 291 et seq.

prevent a liquidity problem from turning into a solvency problem for the Member States. On the contrary, where the risk of collapse arises from real solvency problems in Member States' finances, leading to a requirement of fiscal aid from other countries, there will be an economic policy problem that is the exclusive responsibility of the Member States. This would require the activation of funds managed by the ESM, also through an explicit political decision by national parliaments if the fund's capital was insufficient. Yet, the risk of eurozone collapse is a matter for monetary policy also where it is propitiated by a persistent condition of deflation, so as to justify unconventional policies of the ECB, aimed at providing a monetary stimulus to the economy. In theory, not even an intervention of this kind seems capable of undermining the incitement to pursue a sound budgetary policy. The temporary nature of the measure – resulting from its functionalization to achieve the objective of lower inflation, close to 2% – should indeed makes it possible to avoid the states reaching some certainty regarding the support function performed by the ECB. Such a conviction would, moreover, be prevented by the adoption of other precautions, made explicit in European jurisprudence, such as the quantitative limitations to the purchase of securities, deriving from their containment within the limits of the shareholding held by the state in the ECB's capital, and the need to purchase only securities with precise guarantees of creditworthiness[159].

Of course, it is a prerequisite that all unconventional monetary policy interventions are part of a scenario in which price stability is to be achieved or preserved. According to the Treaty, the only thing that the ECB cannot do is to adopt monetary policies that threaten to give rise to inflationary spirals, reducing the value of the currency. The currency that the ECB can, within the limits just shown, help to sustain is, therefore, still a non-inflationary currency, which is why the need for monetary policy measures is to ensure the preservation of the primary objective of price stability.

[159] Court of Justice of the EU, Delors. 11 2018, Case C-493/17, *Weiss* and others, para. 132 et seq.

10. The politicization of monetary choices as a protean phenomenon with global diffusion

As previously stated, the action of the monetary authority has found widespread hostility in the populist movements of Northern countries, motivated by the negative externalities (for those countries) attributable to a long season of negative rates, guaranteed under the QE program. In reality, critical voices against the action of the monetary authority have also been raised outside the political arena by scholars and jurists of different backgrounds, in whose arguments there is frequent reference to the accusation of politicization of monetary policies[160]. These criticisms are all based on the acknowledgement of the central role played by the ECB in avoiding the alleged eurozone breakup. It is worth remembering that this role was not sought by the ECB. Perhaps it has even been carried out with a certain reluctance and, nevertheless, accepted for reasons of necessity, due to the absence of a real political counter power which, assuming full responsibility for the management of a common budget, is able to engage a dialogue with the monetary authority, with a view to greater coordination. It could be argued that it was precisely the lack of a real unitary economic policy, capable of ensuring through an adequate common budget the investments necessary to ensure the balanced development of the whole Union that generated an overexposure of the ECB[161].

Firstly, we should try to clarify what is meant by the politicization of monetary policies, and verify how this politicization relates to the Treaties. This expression can certainly be used to denote a context in which the redistributive effects of monetary policy choices become more accentuated or in which the scope of the administrative discretion is broadened. Redistributive effects are normally observable in ordinary and conventional monetary policy choices[162]. It could not be otherwise, since monetary policies aim to change the basic conditions of the economy, so that inevitably they are bound to produce some redistributive effect within society: for example, the increase or

[160] This is a recurring theme in the post-crisis debate, as recalled by P.D. Tortola, *The Politicization of the European Central Bank,* cit.; A. Hinarejos, *Gauweiler and the Outright Monetary Transactions Programme*, cit.

[161] P.D. Tortola, *The Politicization of the European Central Bank,* cit. at 504.

[162] P.D. Tortola, *The Politicization of the European Central Bank,* cit. at 505.

reduction of rates can affect the economic reality, in terms of slowing down or accelerating production, with all the consequences that can be imagined in terms of variation in the process of job creation[163]. Nevertheless, in the unconventional monetary policies, the redistributive effects appear more evident and marked, due to the fact that the subjects or the beneficiary states of the heterodox operations are more directly (almost physically) identifiable[164]. With reference to the breadth of discretion granted to the administration, this appears very low when, as in the case of the ECB, the mandate of the institution is polarized about the objective of price stability. In this case, the monetary authority is freed from the reminders to seek a balance (trade-off) between inflation and the level of unemployment, through a weighting between interests well known to public law scholars. Nevertheless, the breadth of discretion of monetary policy decisions seems significantly higher in economic contexts exposed to the risk of deflation, for reasons also linked to the nature of the decision-making process. When the interest in price stability is not threatened and a monetary policy aiming at relaunching the economy is required, the graduation or the hierarchy of the different public interests seems to reflect different priorities. It follows that the other interests (economic growth, employment and citizens' welfare) can acquire larger attention, handing over a wider range of operational instruments to the monetary authority. In the case of the ECB, the extension of tasks and responsibilities seems almost institutionalized, given that the support of the Union's general policies is expressly mentioned in Art. 119(2) TFEU[165].

A closer look shows that the politicization of monetary policies is a widespread phenomenon at a global level, and it has taken place in conjunction with the advent of a period of economic growth characterized by very low levels of inflation. Certainly, in Europe this phenomenon has presented itself in more controversial and debated forms. The reasons are different: for instance, 1) the structural deficit from which the eurozone continues to suffer on an institutional level (it suffices here to

[163] J. Fernandez Albertos, *The Politics of Central Bank Independence,* 18 Annu. Rev. Polit. Sci. 217 (2015) at 224.
[164] J. Fernandez Albertos, *The Politics of Central Bank Independence,* cit. at 230.
[165] Cfr. CGUE, 2018 Weiss, para. 60.

mention the lack of political countervailing power and adequate central budget), which compromises its balanced growth, and also 2) the greater difficulty of recognizing more profound political powers in supranational agencies, in which the link with political representation appears more rarefied when compared to the same international standards[166]. Nevertheless, this type of politicization does not seem to escape, for reasons which have already partly emerged, the boundaries drawn by the Treaties for the viability of monetary policies. The fact that redistributive effects are produced does not place monetary intervention outside the mandate of the authority if, as the ECJ has pointed out, the objective targeted by the ECB is genuinely linked to price stability. Monetary activity will suffer from a more pronounced politicization but cannot be considered as unlawful or *ultra vires*. In the same way, the ECB can also contribute to the development of further values of the Union through monetary policy, provided that the value of price stability is not betrayed.

11. The politicization of monetary policies as a possible effect of the deformation/avoidance of the ECB's mandate

In a broader sense, politicization implies a manipulation of the decision-making criteria. In this case, a political purpose replaces a technical task, distorting or circumventing the objectives set by the institutional mandate[167]. A phenomenon of this kind can take place especially when the ECB addresses the urge to solve the complex dilemma between the duty to operate in a depoliticized manner and bound to its mandate, and the pursuit of objectives which, although not strictly within its sphere of competence, are nevertheless of great political importance, such as safeguarding stability values and the existence of the EU[168]. As already observed, with a certain amount of caution the issue of the eurozone bail-out can legitimately fall within the ECB's task. In certain circumstances, the ECB is empowered to act as an

[166] See J. Fernandez Albertos, *The Politics of Central Bank Independence,* cit. at 230. On the presence of different models, see O. Chessa, *La costituzione della moneta*, cit. at 270 et seq.
[167] P.D. Tortola, *The Politicization of the European Central Bank,* cit. at 505.
[168] P.D. Tortola, *ibidem.*

emergency authority, either by eliminating the irrational sentiments of the financial market, which prevent the correct transmission of monetary policy impulses, or by favoring a reflation of the economy to bring it towards more desirable levels of inflation. In these cases, the ECB is, of course, the bulwark of the eurozone, but within a framework of devices designed however to achieve monetary policy objectives. Nevertheless, in an emergency situation, characterized by a persistent stalemate of the other institutional forces, the deformation of the institutional mandate can also constitute the expedient through which the ECB promotes itself as a rescue authority, without any limitations. In such a case, there may occur a clear and radical detachment between the formally declared objective of the ECB and the real intention, realizing a *de facto* bail-out of a Member State or of the euro area as a whole, outside any credible link with monetary policy objectives. This is an extremely topical issue when one considers that, as a result of the huge purchase program forged by the ECB in the aftermath of the 2020 pandemic crisis, the monetary authority will be able to hold significant shares of the debt of the countries with the most distressed public finances. Therefore, the problem that arises regards the intensity of judicial review necessary to effectively verify the existence of such a disconnection. This very problem, which is the real subject of dispute between the various national and European courts, will be discussed below. Here I shall dwell longer on the role of the ECB by briefly examining the reasons which - in the view of those in favor of an orthodox interpretation of the Treaties - would advise against elevating the ECB to the ultimate rescue authority of the eurozone. As has been highlighted, the main question does not involve the possibility of central banks buying government bonds, since such purchases have now become part of the central banks' toolbox at international level. The real risk is instead that the banks buy a too large amount of government bonds, and for the wrong reasons. These purchases could result in excessive monetization, motivated by objectives of sustainability of public finances rather than by objectives of financial stabilization (market irrationality) or price stability (fight against deflation)[169].

[169] O. Blanchard, J. Pisani-Ferry, *Monetisation: Do not panic,* VOX, CEPR, (2020).

Repeated interventions by the ECB in the purchase of public debt securities present a tangible risk that the ECB will remain trapped in its role as a last resort lender. It would also expose it to increasing political pressure which will make it more difficult for the authority to withdraw from the need to renew the purchase of securities. In other words, the reiteration of unconventional interventions and, above all, the size of the public debt shares held by the ECB would have the effect of trapping the monetary authority in a condition of dependence on the fiscal policies of the Member States, neutralizing the possibility of a non-traumatic exit plan[170]. After all, it is precisely the difficulty of imagining an exit plan from unconventional policies capable of not compromising the hold of the eurozone that contributes to making the risk of a politicization of the future choices of the monetary authority perceptible. The reasons relating to price stability could be tempered by other reasons relating to the endurance of the eurozone as a whole. If the conditions of deflation were to cease and there was a need to raise interest rates, the ECB could, in fact, be forced in virtue of political realism to stand still[171], in order not to compromise the solvency of the Member States[172]. Further objections can be found also in national constitutional systems. In dealing with these topics, it is necessary to come back to the no bail-out clauses. Art. 125 TFEU excludes the existence of co-responsibility on the part of the states or the Union for the obligations entered into by any of them. Nevertheless, it does not prohibit financial aids from being granted voluntarily if they do not lessen the pressure on the states to pursue sound fiscal policies[173]. But not prohibiting, under certain conditions, the bail-out of the eurozone does not mean that the preservation of the eurozone's integrity is an obligation. In short, even if justified by the rescue of the eurozone, financial aid from states under Art. 136 TFEU, or from common Union instruments under Art. 353 TFEU, will have to be the subject of a specific political decision, excluding any form of automatism. This

170 A. Belke, *Driven by the Markets? ECB Sovereign Bond Purchases and the Securities Markets Programme*, Ruhr Economic Paper 194 (2010).

171 This would favor overheating of the economy and excessive growth in inflation.

172 Kaarlo Tuori, *The European Financial Crisis*, cit. at 38.

173 Court of Justice, November 27, 2012, in Case C-370/12, para. 67.

seems entirely reasonable. Although it is granted in the form of loans and not transfers, fiscal aid presents the concrete risk of default by the recipient state, entailing a danger for present and future budgets of the Member States contributing to the granting of the loans in question. This calls out for an explicit political position to be taken by states and voters, through their national Parliaments, as fiscal drainage from one country to another could, in fact, occur.

Notwithstanding that the Member States have agreed to the possibility of granting assistance to countries in difficulty through the ESM Treaty, they have not made unlimited commitments. Their responsibility is limited to a clear financial threshold (€ 700 billion)[174], and a new act of consent is required to adjust the ESM capital to the new rescue measures[175]. Therefore, if it is true that within the eurozone bail-outs require specific authorization from the various national Parliaments, which could also opt for a different strategy (for instance the refusal of risk sharing, with possible exit from the eurozone), then it is clear that the need for such authorization cannot be circumvented through monetary policy and unconventional manoeuvres.

The default of the Member State, *de facto* financed by the ECB, constitutes an event that could alternatively lead to the monetization of public debt if the losses created by the non-repayment of securities by the Member State were compensated with the same amount of money put in circulation by the ECB, or with capital increases by the individual Member States if it was intended to prevent monetization while keeping the supply of money circulation unchanged. In both cases, there would be a transfer of resources between the different states: a direct transfer in the case of a capital increase through the use of tax leverage,

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[174] With reference to the ESM Treaty, this decision was made by the signatory states, but limited to the paid-up capital in the amount defined in Art. 8 of the Treaty. The capital may be adjusted where necessary to cope with new crises, but this requires an explicit amendment to the Treaty, with the necessary involvement of national parliaments. Moreover, the law ratifying the ESM Treaty was deemed unconstitutional by the German Federal Supreme Court precisely because "none of the disputed statutes creates or consolidates an automatic effect whereby the German Bundestag would waive its right to decide on the budget", thus judgement of 7 September 2011, 2 BvR 987/10, para. 136.

[175] See R.D. Keleman, *On the Unsustainability of Constitutional Pluralism*, cit.

and indirect in the case of monetization due to the risk of an increase in inflationary phenomena[176]. Moreover, this would happen without the involvement of national democratic circuits, based on the decision of an authority without necessary legitimacy. It seems evident then that, if the ECB were to opt for an explicit monetization of public debt through the perpetual renewal of owned government bonds, as proposed in the current economic debate, it would take an explicitly redistributive decision which, if not justified by an objective of price stability, would seem to fall within the economic policy competence of the Member States[177]. Other objections can be found in respect to European law; in fact, a decision that did not offer sufficient reassurance regarding the non-inflationary nature of monetization would directly conflict with the ECB's mandate[178]. At the very least, the compatibility of such an option with the no bail-out clauses would also be controversial. The reason is that the irredeemable government bonds could be interpreted as an incentive to moral hazard and the consequent accumulation of new debt. Although the possibility of a revocation or a different determination by the ECB, depending on the fiscally irreproachable behavior of the assisted Member States, has been proposed as a suitable measure to avert expectations[179], the plausibility and credibility of a solution of this kind, which in fact configures a type of permanent *sub iudice* monetization, remains controversial.

[176] The transfer would be indirect in the case of monetization, since in such a case the debt crisis of a Member State would be converted into an increase in inflation in the entire economic area covered by the monetary union.

[177] On the fact that the democratic principle requires an explicit decision to mutualize risk between the different States, see O. Blanchard, J. Pisani-Ferry, *Monetisation: Do not panic,* cit.

[178] For the compatibility of monetization and irredeemable government bonds held by the ECB, see P. De Grauwe, S. Diessner, *What Price to Pay for Monetary Financing of Budget Deficits in the Euro Area*, Vox Cepr, 18 June 2020.

[179] Similarly in P. De Grauwe, S. Diessner, *What Price to Pay for Monetary Financing of Budget Deficits in the Euro Area,* cit.

SECTION IV. CONFLICT AS A DRIVER OF INTEGRATION

12. The Karlsruhe Court's ruling: how to lay bare the fragilities of European integration

The foregoing argument brings the discussion back to some of the initial points I have made, in particular the conflict that has arisen between the ECJ and the FCC with respect to the validity of the PSPP program. In this regard, it is possible to take an approach with different levels of analysis, in order to better understand the reasoning followed by the German Court. One analysis focuses on the problem of the ECB's circumvention of its institutional mandate. It is interesting to note that the FCC openly refers to the abuse of law[180]. In doing so, it clearly intends to allude to a case of misuse of power. More precisely, the FCC wants to refer to a power that has been exercised in order to achieve objectives that are, in fact, outside the ECB's mandate.

This calls into play the problem of the intensity of judicial review and its suitability (or otherwise) to intercept cases of misuse of power by the ECB. A second level of analysis concerns broader aspects relating to the relations woven by the European supranational system with the individual national systems and, consequently, to the problems of the legal nature of the European Judicial Network. In this perspective, the issue regards uniformity in the interpretation of EU law. In brief, the question is who should have the last word within the EU legal area, especially in the resolution of conflicts of competence between the Union and the Member States.

There are close correlations between the two different levels of analysis outlined. According to the view put forward by the FCC, it would be precisely the weakness of the judicial review exercised by the ECJ that would be conducive to an exercise of the ECB power outside its mandate, such as to generate a *de facto* transfer of additional powers from the Member States for the benefit of the Union. Examination of these problematic issues will make it possible to appreciate the disruptive nature of the ruling. Insofar it seems to draw strict limits to the role of the ECB, the FCC seems, in fact, to lay bare the fragile balances of European integration, pointing out with extreme clarity the limits that the

[180] Expressly mentioned in the judgement of 5 May 2020, Bvr 859/15, para. 137.

politicization of monetary policies cannot overcome, except at the cost of an illegitimate deformation of the ECB' institutional mandate. I shall now focus on the analysis of these different limits.

13. The intensity of review as a reflection of a different view of the ECB's stabilization function

A main problem to examine involves the different types of scrutiny exercised by the two courts about the ECB's discretionary power. It is, in fact, precisely in respect to the standard of judicial review, i.e. the amount of deference given by the courts in reviewing the ECB's decisions, that the conflict between judges has opened up. Behind this diversity of positions are clearly hidden deeper considerations that impinge on the multidimensional and complex nature of the European project and the Treaties, elements partly already illustrated (*see above* § 2, 3). The different German and European pronunciations of the PSPP saga follows, in effect, an identical pattern. At first glance, the judges seem have focused their efforts on identifying "misuse of power". Secondly, their analysis shifts to a different level to verify whether the exercise of power is contrary to the European legal system professed values, such as those protected by Art. 123 and 125 TFEU.

With regard to the first part of judicial scrutiny conducted by the judges, despite the question referred by the FCC formally concerns the lack of competence of the ECB[181], in substantive terms the grounds on which the judicial review is made seems the misuse of power. With reference to this basis of the judicial review, the rulings apply a strategy based in two successive stages. In order to better appreciate its content, however, one should look synthetically at the morphology of misuse of power and start from the schemes elaborated by the philosophy of law, in order to assume a perspective not contaminated by national or European traditions. Following this approach, the misuse of power always presupposes the existence of a constitutive rule. In

[181] The relationship between lack of competence and misuse of power is explored in P. Gasparri, *Eccesso di potere (dir. amm.*), Enc. *dir*., *(1965) at 123*; P. Craig, G. de Burqa, *Eu Law, Text, Cases and Materials* (2015) at 576

according to HART's classification scheme[182], the constitutive rule determines the realization of a certain effect, which modifies the legal reality, through the exercise of the power. Nevertheless, the typical legal effect is always linked to further effects or states of fact. It is precisely the link that binds power to these further states of affairs that is decisive in qualifying the misuse of power (the "*détournement de pouvoir*"). This particular defect of the administrative act manifests itself every time power is exercised in order to produce further consequences, which are in contrast with a certain principle of the legal system and are extraneous to the exercise of power. This is a definition of misuse which, despite the peculiarities of the individual legal orders, can be said to be common to the entire European legal culture. Taking all of this into consideration, it is now possible to appreciate, in the argumentative strategy followed by the two different rulings, the two-stage control mentioned earlier. In the first phase, the scrutiny aims to verify the existence of a direct link between the exercise of power and the further consequences, ascertaining whether the decision-maker intends to obtain the production of further consequences. In a subsequent phase, it aims to examine the existence of an indirect link between the exercise of power and the further states of fact, through the principle of proportionality, which is moreover provided for by the Treaty on European Union as a bulwark of the principle of conferral[183].

With regard to the first test, according to the argumentative strategy developed by the German court in its request for a preliminary ruling, the volition and the production of these additional consequences would constitute an infringement of the principle of conferral, because they are effects which can normally

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[182] See H.L.A. *Hart, The Concept of Law*, cit. This issue enables a clear distinction to be made between misuse of power and abuse of rights, behind which there is not a constitutive rule but a regulatory rule, that is to say, a rule governing conduct. See more in M. Atienza, J. Ruiz Manero, *Illeciti atipici. L'abuso del diritto, la frode alla legge, lo sviamento di potere* (2004) at 75.

[183] The application of the principles in order to verify the correct exercise of public power does not diminish the usefulness of the misuse of power: the techniques are not alternatives to each other, but rather complementary (see M. Atienza, J. Ruiz Manero, *Illeciti atipici. L'abuso del diritto, la frode alla legge, lo sviamento di potere*, cit. at 97). The connection between claims based on misuse of power and those based on proportionality, in the EU legal order, are analyzed in P. Craig, G. De Burca, *EU Law. Text, Cases and Materials*, cit. at 576.

be achieved by the exercise of different powers entrusted to the Member States. To put it another way, the PSPP monetary policy program was intended to produce certain effects – such as improving the refinancing conditions of commercial banks and Member States – which, according to the German court, can be attributed to economic policy interventions. According to the FCC, since these effects are recognized *ex ante* and are also sought by the ECB, they would not merely be indirect. This would proof, in the FCC'S view, the exercise by the ECB of powers not attributable to the monetary policy area. This opinion, expressed in the FCC's request for a preliminary ruling in 2017, did not seem, however, particularly convincing. The ECJ had no difficulty in overcoming that objection, reiterating the instrumental nature of these effects with respect to the (monetary policy) objective of lowering rates and increasing inflation up to the 2% limit. In simple terms, without interventions of that kind, it would not have been possible for the ECB to exercise its prerogatives to achieve the (legitimate) monetary policy objective of reflate the economy. The reasoning of the Luxembourg judges is convincing, to the point that it is not effectively replicated in the subsequent ruling of the FCC[184]. In the judgement of 5 May 2020, the FCC focuses rather on the objective of finding, through the control on proportionality, an indirect link between power and further states of affairs.

Regarding the proportionality review, this is a form of scrutiny imposed by the very law of the Treaties to make it possible to verify whether the institutions' action is limited to what is necessary in order to achieve the objectives set out in the Treaties, as required by Article 5(3) TEU. Nevertheless, in the current case such review is also used to reveal the presence of any misuse of power[185]. It is precisely the approach to proportionality that marks a clear distance between the two courts, not only cultural[186], but also political-institutional, which goes beyond the specific case of the PSPP program to embrace the nature of the

[184] One gets this very impression when reading the decision of *5* May *2020*, *2 BvR 859/15*.

[185] P. Craig, G. De Burca, *EU Law. Text, Cases and Materials*, cit. at 576.

[186] This data is underlined by D.U. Galetta, *Karlsruhe über Alles? The Reasoning on the Principle of Proportionality in the Judgement of 5 May 2020 of the German BVerfG and its Consequences*, 14 *federalismi.it* (2020).

integration project[187]. The Luxembourg Court's review of the institutions' acts is based on its constant concern to ensure wide discretionary powers of the Union institutions, especially when measures are taken in areas involving complex economic or technical assessments[188]. This explains why, in the European Court's view, only the manifestly inappropriate nature of the measure can affect the validity of the act in question[189]. It can therefore be said that the proportionality test carried out by European case law does not fully exploit the potential of this type of control. This conclusion is further confirmed by the fact that the ECJ normally limits the application of proportionality only to the tests of adequacy (with respect to the purpose) and necessity (aimed at directing the administration towards the identification of the least afflictive or restrictive measure), with the exclusion of the proportionality test in the strict sense, aimed at verifying the correctness of the balance between the different and opposing interests[190].

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[187] See G. Della Cananea, *L'amministrazione europea*, in S. Cassese (eds.) *Trattato di Diritto Amministrativo*, (2003) at 1916, 1917, also for the relevant references to legal doctrine, where the author links the not particular intensity of judicial control to the favor shown by the ECJ towards integration, and to the detriment of the autonomy of national powers.

[188] For example, in the field of the competition law, see M. van der Woude, *Judicial Control in Complex Economic Matters*, 10(7) J. E. C. L. & Pract. 415 (2019); A. Kalintiri, *What's in a Name? The Marginal Standard of Review of "Complex Economic Evaluations" in EU Competition Enforcement*, 53(5) Common Mark. Law Rev. 1283 (2016).

[189] Most recently, Court of Justice EU, 19 September 2019, in case C-251/18, para. 47; Court of Justice EU, 18 October 2018, in case C-100/17, para. 63; Court of Justice of the EU, 6 September 2017, in Case C-643/15, para. 207; Court of Justice EU, 4 May 2016, Case C-358/14, EU:C:2016:323, para. 79; EU Court of Justice, 10 September 2002 in case C-491/01, para. 123. A broader discussion of this benchmark in doctrine is found in D.U. Galetta, *Principio di proporzionalità* (voce), diritto on line, 2012, Treccani; D. De Pretis, *I principi nel diritto amministrativo dell'Unione europea. Pensare il diritto pubblico liber amicorum per Giandomenico Falcon*, in M. Malo, B. Marchetti, D. De Pretis (eds.), *Quaderni della Facoltà di giurisprudenza (*2015) at 143; also T. Harbo, *The Function of the Proportionality Principle in EU Law*, 16(2) Eur. Law J. 158 (2010); M. Poto, *The Principle of Proportionality, Comparative Perspective*, 8(9) Ger. Law J. 835 (2019).

[190] D. De Pretis, *I principi nel diritto amministrativo dell'Unione europea*, cit. at 142; D.U. Galetta, *Karlsruhe über Alles?* cit.; P. Craig, G. De Burca, *EU Law. Text, Cases and Materials*, cit. at 577.

The *Weiss* judgement of the ECJ is coherently inscribed within this framework, presenting no significant update in respect to the previous case law of the ECJ. Here too, as in previous rulings, the court is based on the particular complexity of the assessments and technical forecasts made by the monetary authority in order to recognize a wide discretion of the ECB. Hence the particular deference shown by the Court of Justice towards the ECB, whose actions were considered well censurable, but only in the presence of *manifest* errors of appreciation or assessment. The proportionality test itself in the strict sense of the term has been barely considered. It can be understood that the application of the proportionality test has also taken place in this case, as in the previous cases (starting from the *Gauweiler* ruling), with a very light criterion of judgement[191].The FCC's criticism of the ECJ's ruling is therefore methodological. In the FCC's view, such a type of review in itself seems totally inadequate to detect any "abuse of rights", since it wouldn't make it possible to demonstrate the monetary authority's pursuit of "other" objectives, linked to a framework of interests and values that falls within the competence of the Member States[192]. Nevertheless, the FCC's argument does not always appear persuasive, at least on this latter profile. This seems particularly evident in the identification of the counter-interests allegedly omitted by the ECB. In fact, the German judge seems to give priority to negative externalities – such as, for example, the negative effects of the policy of low interest rates on the protection of savings, the creation of financial bubbles and the growth in real estate prices – that are by far concentrated in specific countries. In doing so, it fails nevertheless consider the possibility not that such externalities may find their own counterbalance in benefits, much greater, for the entire monetary area[193]. However, the question remains unresolved at present, since the FCC requires the ECB to define the prominence of the interests that would justify the drive towards the implementation of the monetary program, also considering the

[191] See M.A. Wilkinson, *Constitutional Pluralism: Chronicle of a Death Foretold?*, cit.at 218 which speaks of a "feather" review, although with reference to the previous OMT decision.

[192] Decision May *5, 2020, 2 BvR 859/15*, paras. 132, 133.

[193] See M. Poiares Maduro, *Some Preliminary Remarks on the PSPP Decision on the German Constitutional Court, (*2020), https://verfassungsblog.de/.

PSPP's effectiveness in combating the deflationary phenomenon that has been gripping the eurozone for years. On the other hand, where the censorship of the FCC appears to be more persuasive is when it points out, in its argument concerning the counter-interests to be weighed up on the basis of the proportionality test in the strict sense, the risk that the ECB may become dependent on the policies of the Member States. In this regard, the FCC's judgement is supported by considerations concerning the scale and duration of the program, which would make the interruption of purchases a serious threat to the stability of the Union. Such a dependence could easily lead the ECB to sacrifice the value of price stability on the altar of the euro area, thereby compromising its institutional mandate[194]. This warning issued by the German Court is further reiterated in the paragraphs of the ruling concerning the infringement of Art. 123 TFEU, which constitutes - alongside the two-stage verification described so far - the other ground of the judicial review of the ECB's activity. The recurrence of such a defect was excluded at this stage of the proceedings, but only because of the absence of an unambiguous circumstantial framework.

In short, in the perspective of the German Constitutional Judge, there are very strict limits that the ECB cannot overcome. Among them, there is not only the need for a genuine and long-lasting link between the monetary policy program and the objective of price stability, but also a precise demonstration of the benefits of the programs undertaken with respect to the negative externalities, also attributable to those programs. This is why there is the need for a very strict review of the technical assessments and forecasts made by the ECB, in order to prevent the monetary authority from becoming the ultimate authority legitimated to rescue the eurozone, using the free margin of action allowed by the more permissive jurisprudence of the Court of Justice. According to the German court's point of view, it would be precisely the weakness of the Court of Justice's review that would produce the effect (*or perhaps the objective*) of providing the ECB with a wider margin of action in the stabilization functions of the euro area. In turn, this greater room of maneuver by the ECB would favor a *de facto* transfer of additional competences from the

[194] Decision of *5 May 2020, 2 BvR 859/15*, paras. 175, 176.

Member States to the Union, contrary to the principle of conferral set out in Article 5 TEU[195]. Based on *ultra vires review*, FCC concluded that *Weiss* judgement was, indeed, adopted in manifest violation of the mandate conferred on ECB and contributes to a structurally significant change in the distribution of competences, to the detriment of the Member States. Consequently, the German constitutional bodies should take steps to ensure that the ECB conducts a proportionality assessment of the PSPP. If then the German Constitutional Court were to find itself dissatisfied with the arguments put forward by the ECB, the Bundesbank would be forced to disengage from its existing programs with obvious consequences for the credibility and effectiveness of the ECB's monetary policies.

Overall, there is no doubt that behind this harsh stance of the German judge is hidden the attempt to restrict as much as possible the ECB's room for manoeuvre. The objective is to prevent forms of creeping monetization of sovereign debts, by imposing an orthodox interpretation of the Treaties. The problem is that the ECB is actually moving towards the result feared by the FCC, forced by the presence of a situation of necessity. The seriousness of the arguments used by the German Court, in reaffirming the orthodoxy of the Treaties, can indeed be fully appreciated by looking at the most recent developments, which led the ECB to forge yet another monetary program, on the occasion of the pandemic. In relation to this new intervention, the risks of creeping monetization of public debt and entrapment of monetary authority, already feared by the Federal Court, would seem, in fact, to be even more concrete. This conclusion is based on the fact that the ECB failed to adopt some of the minimum precautions required by the Court of Justice to ensure compliance

[195] It is interesting to note that, as evidence of the unsustainability of the light control carried out by the Court of Justice, the FCC reminds not only the ECJ case law, concerning other contexts, but also that of the European Court of Human Rights on the principle of fair trial under Art. 6 of the ECHR, where the Court calls for a full review of complex technical assessments, see M. Allena, F. Goisis, *Full Jurisdiction Under Art. 6 ECHR: Hans Kelsen v. The Principle of Separation of Powers*, 26(2) Eur. Public Law 287 (2020) at 296. Regarding the possibility of realizing the accountability through the judicial review, see M. Dawson, A. Maricut-Akbik, A. Bobić, *Reconciling Independence and accountability at the European Central Bank: The false promise of Proceduralism*, 25 Eur. Law J. 75 (2019).

with Article 123 TFEU, as the compliance with the capital key and the need to purchase securities with creditworthiness. It is not surprising, therefore, that yet another appeal to the FCC is already being announced.

14. Some final remarks

In the light of what has been widely examined here, it seems that the danger for the disintegration of the EU legal order does not come from the conflict between the Courts themselves, but from the very field on which the conflict has arisen. This, in fact, is marked by a deep fracture which affects the formation of the entire eurozone and its underlying philosophy. At the center of the judicial conflict lies the stabilization function carried out by the ECB, accused of acting in a territory where the risk of monetization of debts or, in any case, of ECB dependence on the fiscal policies of the Member States is looming on the horizon. As already emphasized, this is a function which, although carried out with a degree of reluctance on the part of the Monetary Authority, has often been the only bulwark of stability in the eurozone. In order to clarify this increased interventionism of the ECB, it has been mentioned the politicization of monetary policies in previous pages. To explain its origins, it has been referred to the asymmetric development of the Union and to questions that concern deeply the structure of the eurozone as well as the ideology that pervades it.

It is, therefore, in this complex institutional context that the German Court's ruling must be understood. When reading some of the censures made by the German constitutional judge one is under the impression that that the judges' target is rather radical and invests the legitimacy of the entire unconventional monetary policies. But besides some passages marked by a more pronounced one-sidedness and partiality of views, the legal arguments used by German judges seem anything but peregrine, especially where they aim to stigmatize the danger of a creeping monetization of public debts. It is easy to see what the verdict of the *Bundesverfassungsgericht* might entail, especially in the current economic climate, in terms of the integrity of economic and

monetary union, should the final outcome see the *Bundesbank* abandon the continuation of its current monetary programs[196].

Should this scenario develop, also as a result of new legal actions undertaken against the new unconventional monetary policy programs, the risk of a Union break-up would be too real not to impose a resolution of the current institutional deadlock. This could be done by means of the creation of an institutional and political power able to counterbalance monetary policies in order to ensure a more balanced development of the Union. A solution to the Eurozone imbalances could be to deepen the Union's redistributive functions by strengthening Europe's fiscal capacity and deepening its budget, well beyond the 1% of GDP limit on which it currently stands. This measure is considered to be largely insufficient to ensure the centralized stabilization function deemed necessary to remedy the negative externalities arising from the incompleteness of monetary union[197]. But no less important would also be the establishment of a European Minister of Finance, subject to parliamentary control, capable of interacting with the Monetary Authority to improve the coordination of monetary and fiscal policies. This new institution should also provide the ECB with the necessary political legitimacy for the implementation of non-conventional monetary programs, called upon to support the general policies of the Union[198].

[196] This is the hope expressed by M. Dani, J. Mendes, A. J. Menendez, M. Wilkinson, H. Schepel, E. Chiti, *At the End of the Law* (2020) https://verfassungsblog.de/at-the-end-of-the-law/.

[197] See a. Arahuetes garcía, g. Gómez Bengoechea, *Fiscal Union, Monetary Policy Normalization and Populism in the Eurozone*, 28(2) Eur. Rev. 238 (2020) and L. Lionello, *Establishing a Budgetary Capacity in the Eurozone. Recent Proposals and Legal Challenges*, 24(6) Maastricht J. Eur. & Comp. L. 822 (2017).

[198] With regard to the need for strengthening the political legitimation of the European institutions, see A. Sandulli, *Il ruolo del diritto in Europa*, cit. at 118.