"It's the political economy . . .!" A moment of truth for the eurozone and the EU

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The article discusses the Weiss dispute from a political economy perspective. It first sets this litigation in its wider context, namely the protracted transformation of the Economic and Monetary Union (EMU) over the last decade, a decade which has revealed the structural flaws in its design. It then briefly sketches the changing role of central banking, from a fixation on fighting inflation to a more recent focus on combating deflation. This helps to explain the problematic character of the Weiss rulings and the commentaries they have provoked, illustrating a general failure to consider the limits of law, the result of clinging to different parts of the EMU wreckage, on the assumption that the current constitutional framework remains viable. Finally, the article emphasizes the transformative potential of the Weiss saga. The judicial conflict lays bare the unsustainability of the present arrangements, and reveals the necessity of a choice between genuinely federal integration and coordinated dismantling of EMU.

1. Introduction: The elephant in the room

The German Federal Constitutional Court's (FCC) ruling on the Court of Justice of the European Union's (CJEU) *Weiss* decision (the "*PSPP* ruling")[1] has produced an

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1 *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, *translation at* https://bit.ly/3qMoBcj [hereinafter *PSPP*]; Case C-493/17, Weiss, ECLI:EU:C:2018:1000 (Dec. 11, 2018).

avalanche of commentaries and will likely be the source of a mountain of case notes and articles. Scholars and pundits have focused on the institutional aspects of the judgment, with two key themes emerging: authority and proportionality. The ruling is said to be an act of "rebellion" or of "resistance" (depending on the eye of the beholder) against the authority of the CJEU. Or the ruling is said to be about the principle of proportionality, revealing partisans of two different blends of proportionality: Luxembourgeois (the CJEU) and Karlsruheois (the FCC).

There is a fundamental reason to be deeply frustrated with this reaction: by focusing on authority and proportionality without any contextualization, the elephant in the room is hidden, namely the fate of the EU's economic and monetary constitution.

Few if any commentators note that the *PSPP* ruling challenges an unconventional monetary policy tool, the Public Sector Purchase Programme (PSPP), with which the European Central Bank (ECB) has acquired bonds of a value of over 20% of the euro area's GDP.[2] This omission, however, makes it impossible to apprehend the constitutional implications of the *PSPP* ruling. The limits of law as a means of integration are thus overlooked. Or, to put it more bluntly, "It's the political economy, stupid"![3]

The lack of proper contextualization is, moreover, likely to lead to distorted prognoses. The *PSPP* ruling is the latest stage in the longer socioeconomic evolution of European integration, and of its crisis management since 2007. Key principles of the "Maastricht" Economic and Monetary Union (EMU), such as the independence of the central bank and the radical separation of the liabilities of national treasuries, have been altered in practice and in law. Instead of engaging with this transformation, legal analyses, much as the rulings themselves, maintain the illusion that the Maastricht paradigm still holds, even if different courts and authors interpret it differently. Analysis comes hand in hand with "off the cuff" policy proposals to resolve the judicial conflict, disregarding the complex legitimacy questions at play as well as the reality of German and European politics. Finally, hyperbole around the institutional tit-for-tat results in actually downplaying the transformative potential of the judicial saga. The conflict is turned into a courtroom drama, sustained by the simplistic expectation that the eurozone might escape from its present impasse by way of smart legal reasoning. Muddling through is likely to become a spent strategy in the near future.

In this article, we refer to "the *Weiss* saga" to designate both the *Weiss* ruling of the CJEU and the *PSPP* ruling.[4] We argue that the *Weiss* saga should be read through the lenses of political economy. While we are highly critical of both courts, the conflict shows the fundamental dysfunctionality of EMU as currently configured. Muddling through is inflicting increasing damage on national democratic and social constitutions. If we want to avoid this, it is essential to create the time and space for

[2] In October 2020, the reported value of assets purchased under the PSPP was EUR 2295 billion. *See* Eur. Cntr. Bank, Press Release, *Consolidated Financial Statement of the Eurosystem as at 2 October 2020* (Oct. 7, 2020), https://bit.ly/39yXawO.

[3] Marco Dani et al., *At the End of the Law: A Moment of Truth for the Eurozone and the EU*, Verfassungsblog (May 15, 2020), https://verfassungsblog.de/at-the-end-of-the-law/.

[4] *See* Case C-493/17, Weiss, ECLI:EU:C:2018:1000; *PSPP*, 2 BvR 859/15.

democratic decision making and, prerably, to engage in a comprehensive and radical amendment of the treaty framework.

We proceed by first setting the *Weiss* saga in its wider context, namely the protracted transformation of EMU over the last decade, a decade which has revealed the structural flaws in its design (Section 2). We then briefly sketch the changing role of central banking, from a fixation on fighting inflation to a focus on combating deflation (Section 3). This helps to explain the problematic character of the rulings of the FCC and the CJEU and the commentaries they have provoked, illustrating a general failure to consider the *limits of law*. This is the result of clinging to different parts of the EMU wreckage, on the assumption that the current constitutional framework remains viable (Section 4). Finally, we emphasize the transformative potential of the *Weiss* saga. The judicial conflict lays bare the unsustainability of the present arrangements; it reveals the need for either genuinely federal integration or coordinated dismantling of EMU. Yet it so far remains a missed opportunity, as highlighted by a comparison with Roosevelt's New Deal (Section 5). The final section considers the recent fiscal measures taken under the pillars of "Nex Generation EU" (NGEU). It concludes by arguing that, although not without some innovative features, this initiative sets a course that remains economically insufficient and democratically deficient (Section 6).

2. Context: An asymmetric and precarious Economic and Monetary Union

The protracted financial, economic, and fiscal crises Europe has experienced since 2007, now amplified by the COVID-19 pandemic, are an essential part of any sound analysis of the *PSPP* ruling. These challenges have found the European Union as a whole, and the eurozone in particular, entangled in a set of highly problematic structures, decision-making procedures, and substantive norms. Three elements relevant to our analysis deserve to be briefly sketched: (i) the functional constitution and structural flaws of EMU (Section 2.1); (ii) EMU's problematic transformation through the management of the financial, economic, and fiscal crises (Section 2.2); and (iii) the further challenges for EMU created by the pandemic emergency, just weeks before the FCC rendered its final judgment on *PSPP* (Section 2.3).

2.1. Structural flaws: A monetary union ill-equipped to face crises

The original design of EMU was based on the assumption that the stability of the euro as a currency could be ensured without the support of common supranational institutions dealing with economic and fiscal policy, or what amounts to the same, that the euro could be the first modern money without a state.

What is perhaps less well known is the fact that this asymmetric construction, combining a federalized and depoliticized monetary policy with a plurality of national fiscal policies, was the upshot of a particular constellation of interests and ideas. After the fall of the Berlin Wall, there was a strong political will to realize a monetary union, but no common political vision of how to govern it. There were federalists

who favored the transfer of tax powers to the EU, ordoliberals who aspired to a process of gradual economic convergence leading to monetary union, and neoliberals who placed their faith in the logic of the market. These differences were overcome by an implicit agreement on the convenience and feasibility of a "modest" monetary policy, exclusively aimed at ensuring "price stability" and entrusted to a central bank insulated from democratic politics.[5] This agreement was reinforced by a widely shared culture of "total optimism,"[6] a utopian belief in permanent economic and financial growth, sustained by the expansion of business activities, market liberalization, and free circulation of capital. In this context, the single currency could be conceptualized as a politically neutral device and could function as a means of placing external constraints on domestic mass politics.[7]

In reality, however, EMU was a highly dysfunctional construction that would be prone to crises. Enduring structural differences between national socioeconomic structures were bound to be ill-served by a single monetary policy likely to fit none. The almost unavoidable outcome was rigid constraints on the fiscal autonomy of Member States. As a monetary union without a political union, EMU lacked institutional structures and tools capable of reducing economic divergencies, not least through the redistribution of resources.[8] The asymmetric nature of EMU and the pulverization of public power were at the root of the multidimensional European crisis—financial, fiscal, economic, institutional, and political[9]—which began in 2007 and whose deeply transformative effects on the EU continue to reverberate into the present.[10]

2.2. Shoring up a dysfunctional EMU

The European response to the crisis has gradually transformed EMU by establishing a framework of financial assistance, conditionality, limitation of national fiscal sovereignty, and "unconventional" monetary policy.

This development has been remarkable in many regards. An attempt to shore up EMU, it has been presented as necessary in order to attenuate the devastating impact of the crisis and keep the euro from unravelling. "Financial assistance" granted to

[5] *See* Amy Verdun, *The Institutional Design of EMU: A Democratic Deficit?*, 18 J. Pub. Pol'y 107 (1998). On the broader similarities between ordoliberalism and neoliberalism, see Michael A. Wilkinson, *Authoritarian Liberalism: On the Common Critique of Ordoliberalism and Neoliberalism*, 45 Critical Soc. 1023 (2019).

[6] *See* Giandomenico Majone, Rethinking the Union of Europe Post-Crisis: Has Integration Gone too Far? 58–87 (2014).

[7] *See* Kenneth Dyson & Kevin Featherstone, *Italy and EMU as a* vincolo esterno*: Empowering the Technocrats, Transforming the State*, 1 S. Eur. Soc'y & Pol. 272 (1996). Most revealing is Guido Carli, Cinquant'anni di vita italiana (1996).

[8] This constitutes a remarkable design flaw. The 1977 McDougall report expressly called for a sizeable "supranational" budget to stabilize the European economic area. *See* 1 Donald McDougal et al., Report of the Study Group on the Role of Public Finance in European Integration (Apr. 1977), http://aei.pitt.edu/36433/1/Report.study.group.A13.pdf.

[9] Edoardo Chiti, Agustín Menéndez, & Pedro Teixeira, *The European Rescue of the European Union*, *in* The European Rescue of the European Union? The Existential Crisis of the European Political Project 391, 392–401 (Edoardo Chiti, Agustín Menéndez, & Pedro Teixeira eds., 2012).

[10] For an overview, see recently The Crisis Behind the EuroCrisis: On the Multi-Systemic Failure of the EU (Eva Nanopoulos & Fotis Vergis eds., 2019).

states experiencing fiscal difficulties led to the creation of a European Monetary Fund of sorts, eventually consolidated into the European Stability Mechanism (ESM). These changes shattered the tight separation between national exchequers and curtailed national fiscal sovereignty, as loans were subject to strict conditionality (soon identified with "austerity" policies). The elaboration by the ECB of new instruments of monetary policy was a parallel and complementary development: the launch of Outright Monetary Transactions (OMT), although tied to the ESM and conditionality, represented a "de facto" move away from an exclusive focus on price stability and avoidance of inflation, at the very same time that the ECB became active in the policing of loan conditionality through its own participation in the "troika."[11]

This new framework, however, was highly problematic, not only from an economic, but also from a legal, democratic, and social perspective. Austerity programs directly contributed to the eurozone's dismal performance and reinforced a structural divide between creditor and debtor countries.[12] The limitation of national fiscal sovereignty was not accompanied by the establishment of some form of supranational economic government, let alone by the provision of a genuine EU fiscal competence. The new economic governance, instead, was called to operate through what were said to be rules-based mechanisms aimed at disciplining national policies. Recourse to instruments of "unconventional" monetary policy widened the ECB's mandate, on the basis of a loose and disputable interpretation of the relevant Treaty provisions. In the subsequent litigation in *Gauweiler*, both the CJEU and eventually the FCC held that the OMT program did not breach the prohibition on monetary financing of national budgets,[13] provided that some "safeguards" were respected, preventing the ECB's operations on secondary bond markets from becoming the functional equivalent of direct purchases.[14] But a clear tension remained between the evolving mandate of the ECB and a rigid constitutional framework.

2.3. When crises deepen: The COVID pandemic response

The pandemic emergency has created further challenges for EMU. The shock to supply and demand has called for massive public intervention aimed at strengthening public health care systems and counterbalancing the effects of lockdowns and persistent restrictions on economic activity. EU institutions have "suspended" the application of competition and fiscal rules that preempt public intervention in the economy. In

[11] A fact the Advocate General expressed concern about in C-62/14, Gauweiler and Others, ECLI:EU:C:2015:7 (Cruz Villalón, AG).

[12] Joseph E. Stieglitz, The Euro and its Threat to the Future of Europe 63ff., 177ff. (2016); Mark Blyth, Austerity: The History of a Dangerous Idea (2013); A. Mody, Euro Tragedy: A Drama in Nine Acts (2018); Fernando Losada, *A Europe of Creditors and Debtors: Three Orders of Debt Relations in European Integration*, 58 J. Common Mkt. Stud. 787 (2020).

[13] Consolidated version of the Treaty on the Functioning of the European Union, art. 123, 2012 O.J. (C 326) 47 [hereinafter TFEU].

[14] *See* Case C-62/14, Gauweiler and Others, ECLI:EU:C:2015:400; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Order of the Second Senate, 2 BvR 2728/13, Jan. 14, 2014, *translation at* https://bit.ly/2MbK1kA [hereinafter *OMT Referral*].

particular, the rules governing state aids have been virtually put on hold so that even "temporary" *en masse* nationalizations are possible.[15] Fiscal rules setting ceilings on deficits and debts have been set aside for an indefinite period of time.[16]

However, it is one thing to allow states to intervene, and quite another to create the conditions under which they can do so with similar effect and resolve. Unleashing the financial power of states without taking note of the unevenness of fiscal capacity runs the risk of accelerating divergence within the EU, and especially within the eurozone. This is so for two related reasons. The impact of the pandemic is and may remain highly asymmetric. In economic and social terms, worst hit are the countries with large tourism, transport, and retail service sectors, and in which remote work is less feasible. In addition, previous levels of debt lead to very different conditions of access to credit, which in eurozone orthodoxy should be obtained in financial markets and under "market conditions."[17]

Moreover, if the pandemic were to last longer than analysts expect (a far from improbable scenario), all states, and not only those in the eurozone periphery, may end up with serious difficulties in financing their public debt. In the middle of a deep recession, Member States may struggle to find buyers for new debt to the value of 10% of their GDP, in addition to the amount required to roll over debt reaching maturity.

Barely a few weeks before the FCC rendered its *PSPP* ruling, the ECB stepped in. After initial hesitation, it not only expanded its second round of quantitative easing by more than EUR 300 billion, it also announced the so-called Pandemic Emergency Purchase Programme (PEPP), an extraordinary plan initially worth EUR 750 billion (increased by EUR 600 billion a month after the FCC *PSPP* ruling, and by a further EUR 500 billion in December 2020).[18] In contrast to quantitative easing (QE) measures, of which PSPP is an example, PEPP sets no ceiling on the purchase of public debt per issuer, and acquisitions do not have to be made in strict proportion to the percentage in which states participate in the capital of the ECB (the so-called "capital key"). This allows for greater flexibility. It is calculated that since the launch of PEPP, the ECB has acquired close to 70% of the public debt issued by Member States.[19] And yet, compared to programs adopted by other central banks, it remains restricted in the sense that direct monetary financing is (at least theoretically) still out of bounds. This reflects the legal limitations of the EMU framework, with the ECB already acting at the very limits of its powers, and probably beyond them—PEPP likely violates Article 123 of the Treaty on the Functioning of the European Union (TFEU), as inferred from the *PSPP* ruling.[20]

[15] Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, C(2020) 1863 final (Mar. 19, 2020), https://bit.ly/3czKS9k.

[16] Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis (23 March 2020), https://bit.ly/3pRpeBy.

[17] Case C-62/14, Gauweiler, ECLI:EU:C:2015:400, ¶¶ 100, 103, 108.

[18] Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), 2020 O.J. (L 91) 1, 1–4. This was expanded on June 4, 2020 and December 10, 2020.

[19] Marco Buti & Marcello Messori, *Implementing the Recovery and Resilience Plans: The Case of Italy* (Luiss School of Eur. Pol. Econ. Policy Brief 39/2020, Nov. 2020), https://bit.ly/3pC3kCb.

[20] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶¶ 201, 204, 211.

3. Central banking: The changing role of the ECB

These latest developments invite a reflection on the changing role of central banking, a key aspect underlying the *Weiss* saga. In the context of the original design of EMU, the radical independence of the ECB was the institutional embodiment of the project of a politically neutral common currency, which had as a necessary corollary a clear-cut distinction between the spheres of economic and monetary policy. More than a decade into the manifold European crisis, however, the independence and neutrality of the ECB have proved illusory. The functional need to avoid the disorganized unraveling of the eurozone has led to a gradual and problematic mutation of the role of the ECB.

The powers of the ECB are clearly set out in the Treaties. The ECB is designed to be a fully independent central bank, sheltered from any form of political interference,[21] with full and exclusive competence over the monetary policy of the eurozone.[22] As stressed by the FCC, the legitimacy of such an arrangement is supposed to rest on the technocratic character of the ECB, which justifies an exception to the general rule of the democratic legitimation of public power. In this allegedly narrow domain, epistocracy trumps democracy. The ECB is expected to exercise its mandate in a clearly defined and restricted sphere on the grounds of cumulated technical knowledge in the conduct of monetary policy. As a result, drawing a clear line between monetary and economic issues is of the utmost importance, so as to guarantee that economic issues remain firmly in the hands of democratically legitimated bodies.[23] The outcome, as is well known, is an idiosyncratic form of economic and monetary union, partly inspired by postwar German arrangements, at the very same time that the key institutional actor, the ECB, in contrast to its German counterpart, is disconnected from the political, economic, and cultural contexts in which economic policy is conducted.

The viability of this layout assumed a limited central bank.[24] In the specific context in which EMU was designed,[25] "monetarists" carried the day in affirming that the only meaningful task left to central banks was to fight inflation, as the Bundesbank had done since 1974 and the US Federal Reserve since 1979. Despite the rather mixed record of this vision when it was implemented in the first half of the 1980s (not least in Lawson's Britain),[26] it was boosted by the collapse of the Soviet bloc and by German

[21] TFEU, *supra* note 13, art. 130.

[22] *Id.* arts. 127–128.

[23] *See, e.g.*, Kathleen MacNamara, *The Forgotten Problem of Embeddedness: History Lessons for the Euro*, *in* The Future of the Euro 21 (Matthias Matthijs & Mark Blyth eds., 2015).

[24] This is reflected not only in the ECB's mandate as enshrined in the Treaties (first and foremost, to ensure price stability, and only then to support general economic policy), but also in the monetary rule which the ECB itself has articulated, setting as its target the growth of consumer prices at around 2%. *See* Governing Council Eur. Cntr. Bank, Press Release, *A Stability-Oriented Monetary Policy Strategy for the ESCB* (Oct. 13, 1998), www.ecb.europa.eu/press/pr/date/1998/html/pr981013_1.en.html; Governing Council Eur. Cntr. Bank, Press Release, *The ECB's Monetary Policy Strategy* (May 8, 2003), www.ecb.europa.eu/press/pr/date/2003/html/pr030508_2.en.html.

[25] Briefly sketched in Section 2.1.

[26] David Smith, The Rise and Fall of Monetarism (1991).

reunification, precisely at the moment EMU's design was determined.[27] The negative consequences that a deflationary monetary policy could have for full employment and the distribution of income and wealth were fully set aside, resulting in implicit but fundamental redistributive choices.

While the peculiar construction of EMU appeared to thrive for a decade,[28] the "modest" ECB became a much more ambitious institution when the financial and fiscal seas turned rough. With financial markets in free fall, the ECB, like other major central banks, became the lender of last resort of private financial institutions through massive refinancing operations, turning it into a "market-maker." When the pile of cross-border debt that had been accumulated in the first decade of EMU threatened to collapse, the ECB played a major, if not exclusive, role as the lender of last resort for sovereign states, later expanded through the European version of quantitative easing, which ultimately led to PSPP. These were not, however, to be merely exceptional interventions. They have become regular powers of the ECB after their decade-long exercise. The fact that a capitalist economy moves from one imbalance to the next renders unavoidable a key stabilizing role for monetary policy, which turns the whole distinction between economic and monetary policy into an exercise in scholastic obfuscation.[29] But without such a distinction, the coherence of the Maastricht design breaks down.

This mutation of the role of the central bank is far from exclusive to Europe.[30] All major central banks have assumed more expansive powers through the recent crises. What renders the European case politically and constitutionally explosive is the power of the myth of central bank independence,[31] reflected in the TFEU and domestic constitutions. This myth persists, with the Maastricht rules entrenched beyond the reach of the ordinary political process and politically buttressed by ordoliberals and rent-seekers of the ordoliberal institutional design.[32]

[27] Ellie Cohen, *The Euro, Economic Federalism, and National Sovereignty*, *in* The Idea of Europe: From Antiquity to the European Union, 260 (Anthony Pagden ed., 2002). *Cf.* Harold James, Making the European Monetary Union 211–216 (2012).

[28] Massive cross-border financial flows compensated for the structural imbalances between the eurozone core and the eurozone periphery, permitting a precarious and contingent macroeconomic stability, as well as a catching-up process in terms of disposable income. In such circumstances, the ECB had a relatively easy task in keeping consumer prices around 2% in aggregate terms, not only formally complying with its mandate, but apparently demonstrating the virtues of its design. We now know, however, that underneath this comforting exterior, the picture was more mixed. Not only was price stability seriously compromised by skyrocketing asset prices, but even consumer price differentials within the eurozone were slowly but steadily creating a massive structural divergence between core and periphery, accelerated by wage repression in Germany. *See, e.g.*, Bob Jessop, *Variegated Capitalism,* das Modell Deutschland*, and the Eurozone Crisis*, 22 J. Contemp. Eur. Stud. 248 (2014).

[29] Pierluigi Ciocca, L'instabilità dell'economia: Prospettive di analisi storica (1987); Pierluigi Ciocca, la banca che ci manca: le banche centrali, l'europa, l'instabilità del capitalismo (2015).

[30] Adam Tooze, *The Death of the Central Bank Myth*, Foreign Pol'y (May 13, 2020), https://bit.ly/2YyltVn.

[31] *Cf.* Jeremy Leaman, The Bundesbank Myth: Towards a Critique of Central Bank Independence 222–229 (2001). On the ideological origins of the myth, see also Jeremy Leaman, *Central Banking and the Crisis of Social Democracy: A Comparative Analysis of British and German Views*, 4 Ger. Pol. 22 (1995).

[32] *See* Arnaud Lechevalier, *Why and How Has German Ordoliberalism Become a French Issue? Some Aspects about Ordoliberal Thoughts We Can Learn from the French Reception*, *in* Ordoliberalism, Law and The Rule of Economics 27 (Joseph Hien & Christian Joerges eds., 2017).

When the CJEU confronted the new realities of central banking in *Gauweiler*, it chose to treat the OMT program as exceptional. It devised a test premised on assumptions about the "normal" role and function of the central bank in "normal" economic conditions: ensure the singleness of the monetary policy and the preservation of the monetary policy transmission mechanism. In markets characterized by "excessive" risk premia, not justified by macroeconomic differences, promising to buy sovereign debt on secondary markets was held to be necessary and proportionate to the extent that it would return markets to a rational equilibrium, where risk would be priced "correctly."[33] The markets could then exercise their disciplinary power on Member States, unconstrained by a program that had been carefully crafted to avoid imperiling that power, and the Bank could go back to its day job of transmitting undistorted "impulses" rather than bloating up its balance sheet.[34] This, of course, was not to be.

Yet in *Weiss*, the CJEU turned crisis law into the new normal, repeating the reasoning fashioned for the exception as if it were perfectly suitable for the norm. At stake was no longer the need to repair disrupted transmission mechanisms, that prevented the ECB from ensuring price stability, but the need to enhance the monetary policy's transmission potential to the real economy with a view to averting deflation. The same loose strictures that had enabled the Court to preserve the validity of an emergency measure, announced at the height of the eurozone crisis and intended to secure a return to the "normal," applied now, in the new normal, when the ECB consolidated an unprecedented level of economic intervention in its successive attempts to return inflation to its desirable level. Crisis or no crisis, we were told that "nothing more" must be required from the ECB than the careful and accurate deployment of its expertise.[35]

This comes with a serious consequence. Commitment to the cause of European integration has blinded the CJEU to the democratic void that has emerged in European economic and monetary governance. It might not be the institutional role of the CJEU to correct fundamental democratic design flaws, but the step it took from crisis law to a new normal, by a questionable use of legal tools of review, further entrenched that void. The FCC, in response, although insisting on the principle of democratic legitimacy, can only offer the pretense that a return to the Maastricht criteria would remedy the democratic defects.[36] The FCC's hybrid neoliberal and ordoliberal worldview, conveyed by the litigants and the claims they brought to the German Court, alerted it to the perils of an unlimited expansion of the ECB's powers. But it remained blind to the preconditions of a stable and symmetrical monetary union: a democratically responsive and redistributive supranational government.

The ECB's "independence" from political influence and its single mandate of "price stability" reflect the obsessions of a previous era. Even—or especially—after 2007, Member States were willing to sacrifice investment if that required breaching fiscal

[33] Case C-62/14, Gauweiler, ECLI:EU:C:2015:400, ¶¶ 72–73, 76–78.

[34] *Id.*, ¶¶ 82, 85–90.

[35] *Id.* ¶ 75; C-493/17, Weiss, ECLI:EU:C:2018:1000, ¶ 91.

[36] On the use of the principle of democracy in this judgment, see Isabel Feichtner, *The German Constitutional Court's PSPP Judgment: Impediment and Impetus for the Democratisation of Europe*, 21 Ger. L.J. 1090 (2020).

rules, and what is left of organized labor utterly failed to exert any upward pressure on wages.[37] The mantra of "sound public finances" has now transformed into Member States' inability, or unwillingness, to conduct any meaningful economic policy at all. Rather than fighting to keep inflation down at 2%, the ECB is struggling to combat deflation. This inversion, however, has occurred without any concurrent political, legal, or constitutional change. Indeed, the most relevant adaptation to the new reality is likely to come from the relative obscurity of the ECB's monetary policy strategy review announced for the summer of 2021. Presented as an exercise "in full respect of the ECB's price stability mandate as enshrined in the Treaty,"[38] the review is bound to show just how far the Bank is compelled—and prepared—to push the limits of the concept. President Lagarde has already made clear that "unconventional" policies are here to stay, and that the consequent, intensified interaction between monetary and fiscal policies raises questions including "how to set policy in a world of possibly permanently higher levels of public debt, and the appropriate design of Europe's fiscal framework."[39] Tellingly, no acknowledgment is made of the political and democratic implications of such redesign.

4. The *Weiss* and *PSPP* judgments: Eluding and maintaining an outdated Treaty framework

By now it may be clear to the reader that the transformation of the ECB into the powerful institution that it is today is more complex than a simple power grab.[40] While the *Weiss* saga demonstrated the continuing legal significance of its mandate, there is little doubt that the Bank has gradually reinterpreted its boundaries. The ECB has determined its own competence, as the FCC puts it, and thereby imperiled the European order of competences. Yet, contrary to the FCC's ruling, this is not the consequence merely of a lack of judicial oversight. Judicial scrutiny alone cannot remedy it. The clash between the two courts thus has the merit of highlighting the limits of law, and, in particular, of the principle of proportionality, with both courts employing it as a means to disguise their policy preferences.

The CJEU's delimitation of the scope of monetary policy by reference to the objectives pursued and the effectiveness of monetary action conceals the fact that monetary and economic policy are intertwined in a way that defies the neat lines drawn in the Treaty. It allows the ECB to stretch the monetary justification for its programs beyond the limits envisaged at Maastricht, and virtually collapses the distinction that the CJEU

[37] *See* Andreas Bieler et al., *EU Aggregate Demand as a Way out of Crisis? Engaging the Post-Keynesian Critique*, 57 J. Common Mkt Stud. 805 (2019).

[38] Eur. Cntr. Bank, Press Release, *ECB Launches Review of Its Monetary Policy* (23 January 2020), https://bit.ly/3oLwgX6.

[39] Christine Lagarde, *The Monetary Policy Strategy Review: Some Preliminary Considerations*, Speech at the *ECB and its Watchers XXI* conference, Frankfurt am. Main, Sept. 30, 2020, https://bit.ly/3r93NvT.

[40] *See* Hjalte Lokdam, *"We Serve the People of Europe": Reimagining the ECB's Political Master in the Wake of Its Emergency Politics*, 58 J. Common Mkt Stud. 978 (2020).

only apparently upheld.[41] As the main pillar of EMU's institutional structure crumbles, the Luxembourg Court continues to insist on a distinction that reality elides.

The FCC used proportionality as a tool to determine a suitable balance between monetary policy objectives and economic policy effects (a matter that, purportedly, a court can ascertain, even if the German Court applied proportionality in a way that is formally contrary to Article 5(4) of the Treaty on the European Union (TEU)).[42] The principle of proportionality enabled the FCC to engage in *ultra-vires* review on the assumption that it can ensure that the ECB's discretion is contained within proper limits. Compliance can and should then be subject to strict judicial scrutiny. Yet the actual consequences of its judgment confirm that this is largely an illusion, at least as long as the ECB remains, at crucial points, the only institution capable of securing macroeconomic stability and is regarded as such by the European Council (particularly in a context characterized by political blockages that eliminate any alternative or complementary course of action).[43]

The dispute about proportionality shows its malleability. Having settled the issue of the existence of competence by reference to the objectives of monetary policy, the CJEU could deploy proportionality in a relatively innocuous way. It could largely disregard the economic policy effects of QE measures because, given the premise of the Court's reasoning, these were not part of the ends against which the means should be tested, not even as secondary purposes.[44] Its standard of review was not only limited to manifest errors or disproportionality; it was premised on an outright deferral to the economic expertise of the ECB, which was presumed to be unblemished by policy considerations in the exercise of its mandate.[45] The reference to the duty of care within the CJEU's proportionality assessment is telling in this regard. This is less a duty of compliance which the CJEU will review to counterbalance wide discretion,[46] than a duty the ECB is presumed to comply with when adopting controversial monetary policy measures. The CJEU's use of proportionality as a free-standing ground of judicial review, that is, without clarifying the opposing interests to balance, essentially mimics the ECB's own proportionality assessment (as the FCC pointed out).[47]

41 Even while stressing that it was never meant to be absolute: *see* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 859/15, May 5, 2020, ¶ 60 [hereinafter *PSPP*].

42 *See* Consolidated Version of the Treaty on European Union, art. 5(4), 2006 O.J. (C 321) E/5 [hereinafter TEU]. The FCC uses the principle to establish the *existence*, rather than the *exercise* of competence: *see PSPP*, 2 BvR 859/15, ¶ 127 ("[T]he specific manner in which the CJEU applies the principle of proportionality in the case at hand renders that principle meaningless *for the purposes of distinguishing*, in relation to the PSPP, between monetary policy and economic policy" (emphasis added)), and *id.* ¶¶ 139, 165.

43 Deborah Mabbett & Waltraud Schelkle, *Independent or Lonely? Central Banking in Crisis*, 26 Rev. Int'l Pol. Econ. 436, 453–5 (2019).

44 Except to the extent that the FCC considered the risk of losses: *PSPP*, 2 BvR 859/15, ¶¶ 94–99.

45 Case C-493/17, Weiss, ECLI:EU:C:2018:1000, ¶ 91 ("nothing more can be required" of the European System of Central Banks apart from a careful and accurate deployment of its "economic expertise and the necessary technical means at its disposal").

46 *See in particular* Case C-269/90, Technische Universität München v. Hauptzollamt München-Mitte, ECLI:EU:C:1991:438, ¶ 14, *cited in PSPP*, 2 BvR 859/15, ¶ 30; Case C-62/14, Gauweiler, ECLI:EU:C:2015:400, ¶ 69.

47 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme, ECB/2015/10, 2015 O.J. (L 121) 20, recitals 4 and 5. *See also PSPP*, 2 BvR 859/15, ¶ 132; Vassiliki Kosta, *The Principle of Proportionality in EU Law: An Interest-Based Taxonomy*, *in* EU Executive Discretion and the Limits of Law 198, 213–19 (Joana Mendes ed., 2019).

The suitability and necessity of the program are assessed in the program's own terms, by reference to its stated objectives, not by balancing the aim pursued against unidentified (non-existent?) interests in need of legal protection. Far from constituting a legal constraint on the adoption of measures, "the purported monetary policy objective is possibly only invoked to disguise what essentially constitutes an economic and fiscal policy agenda."[48] An impolite but accurate translation in plain English is that the CJEU was merely pretending to engage in proportionality review, when the positive outcome was predetermined from the outset, independently of the circumstances.[49]

In its critique of the CJEU, the FCC paradoxically clarified the futility of proportionality as a means of tying the ECB's actions to its mandate. The FCC presumed that a proper application of proportionality could police the limits of monetary policy and its socio-economic distributional effects. According to the FCC, the court's role is to require the ECB to demonstrate it has weighed and justified the foreseeable and knowingly accepted economic consequences of its program against its monetary policy objectives.[50] While one should indeed require the ECB to justify its actions plainly and openly, competence, in the FCC's line of reasoning, becomes a matter of determining when the economic effect of an instrument outweighs its monetary purpose. In other words, competence is a matter of degree.[51] At what point is the limited mandate breached? At what point are economic implications no longer secondary, but primary objectives? Even presuming that such an exercise could be objectively assessed, the answer does not lie in the law.

The FCC lays bare the fuzziness of the boundary between monetary and economic matters. Although attempting to squeeze the ECB back into its narrow Treaty mandate of price stability, in reality it demonstrates the difficulties of a distinction that rests on a legal fiction: the fiction that the conduct of monetary policy can be detached from economic policy and insulated from political interference. As we have already argued, the triumph of this idea is the product of a specific politico-economic context and a historically contingent institutional setting.[52]

Between the empowerment of the ECB through a full-blown deferral to its technical expertise, on the one hand, and the formally strict (and inward-looking) approach to proportionality, on the other, *both* courts avoid the fundamental issue: the ECB's mandate has changed because, having been designed to fight inflation (and inflation only), it is now fighting deflation. And, in crucial moments, it was the only institution capable of intervening to avoid the uncontrolled unravelling of the Eurozone, first during the fiscal crisis in September 2012, then after the COVID-19 pandemic

[48] *PSPP*, 2 BvR 859/15, ¶ 137.

[49] *Cf.* Leone Niglia, *Eclipse of the Constitution* {Europe Nouveau Siècle}, 22 Eur. L.J. 132 (2016). *See also* Kosta, *supra* note 47, at 218–219.

[50] *PSPP*, 2 BvR 859/15, ¶¶ 173, 176, 179.

[51] In a similar sense, but pointing to the problems this poses in view of TEU, *supra* note 42, art. 5(1) and (4), and the preemptive effect of exclusive competence, see Matthias Wendel, *Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception*, 21 Ger. L.J. 979, 986 (2020).

[52] Leaman, *supra* note 31; Simon Mee, Central Bank Independence and the Legacy of the German Past 1–28 (2019).

in March 2020. The European "catch-22," quite obviously, is that the ECB's original mandate does not support such intervention, and were it to be amended to do so, it would be impossible to reconcile with a depoliticized central bank.

What we are left with is a fundamental problem of democratic accountability. The ECB is now free to do "whatever it takes" no longer only in exceptional situations (duly emphasized by AG Cruz Villalón in his *Gauweiler* opinion[53] but absent in the *Weiss* ruling of the CJEU), but as long as it can demonstrate to judicial satisfaction that it has conducted a sound proportionality analysis. In the meanwhile, independence is unmoored from the democratic foundation of a limited Treaty mandate,[54] and the ability of governments and parliaments of Member States to pursue economic policy is significantly restricted.

Ultimately, the dispute in the *Weiss* saga seems to turn on the matter of the detail of the justification given by the ECB. Yet, what is at stake is far from a matter of detail. If courts cannot police the boundaries of the mandate of an independent central bank—and it is our contention that the *Weiss* saga shows that they cannot—there is more at stake than a problem of the rule of law. The question of how to fashion programs of monetary and economic intervention in a democratic and effective way—ever more pressing—is obfuscated by the judicial dispute. The FCC clearly unveiled (willingly or not) the legal and democratic defects of the current construction. Yet the political "all-or-nothing" discourse in support of integration hinders the consideration of alternatives to the existing structures.[55] Independence of the ECB is revealed not so much as a positive choice, but as a formula of convenience deployed to *avoid* having to make fundamental democratic choices.

5. A missed opportunity for constitutional transformation

Awareness of the high stakes involved in the case could have inspired an entirely different approach by *both* courts. If there ever was a case in which it made sense to apply something akin to the political question doctrine, it was in the *Weiss* and *PSPP* rulings.[56] Had the CJEU and the FCC done so, they would have put a halt to the judicialization of quantitative easing, not to mention to the endless discussions about authority and proportionality.

Nevertheless, in the decision to adjudicate the merits of the cases there seemed to be a silver lining. Even the harshest critics of its timing, logic, and tone could acknowledge the potential of the *PSPP* ruling of the FCC to force the European Union to face some fundamental and even existential issues. From an optimistic perspective, *PSPP*

[53] Case C-62/14, Gauweiler, ECLI:EU:C:2015:7 (Cruz Villalón, AG).

[54] On the limits of this justification, see Leaman, *supra* note 31, at 253–257.

[55] Joseph H.H. Weiler, Integration Through Fear, 23 Eur. J. Int'l L. 1, 1–5 (2012); Michael A. Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union*, 14 Ger. L.J. 527 (2013); Nicole Scicluna, European Union Constitutionalism in Crisis 130 (2015).

[56] Along the arguments advanced in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Order of the Second Senate, 2 BvR 2728/13, Jan. 14, 2014 (Lübbe-Wolff, J., sep. op.), *translation at* https://bit.ly/2MbK1kA [hereinafter *OMT Referral*].

could be the ruling to focus minds on the need for Treaty reform (and domestic constitutional reform): either to create a robust fiscal center and a paradigm change in European central banking, or to pursue a coordinated dismantling of the monetary union through the formation of a looser structure. Until now, this opportunity has been missed; the avoidance of democratic choices continues unabated. The result is more of the same fudge seen in previous crises, the same dysfunctional recipe of creative monetary policy, financial assistance and conditionality, and seemingly endless litigation.

To appreciate the opportunity offered by the *PSPP* ruling, a comparison with more remote developments in constitutional history, when judicial resistance did trigger a momentous constitutional transformation, is instructive. In particular, the shift from *laissez-faire* to activist constitutionalism during the New Deal offers an interesting parallel.[57]

Judicial resistance to the most meaningful legislative acts adopted in the "first New Deal"[58] was, if we follow Bruce Ackerman's famous account, not an aberration by recalcitrant conservative judges, but a principled challenge to a rising movement of transformative reform, which led to signaling that the New Deal entailed a profound modification in the constitutional system.[59] By striking down measures that replaced market capitalism with a corporatist structure under presidential leadership, the US Supreme Court made, whatever the intention of the individual justices, a positive contribution to the quality of the ongoing constitutional debate.[60] Particularly after the

[57] The analogy between current European developments and the New Deal period is more general but cannot be fully explored. Consider, for instance, the "gold clause" cases or, for that matter, Roosevelt's fundamental monetary decision of April 1933 to go off the gold standard. The immediate purpose of going off gold was to lighten the burden of the Great Depression on farmers, especially by generating inflation, raising commodity prices, and effectively lowering mortgage payments. Whatever the wisdom of the policy, it was clearly going to be fatally defeated if the "gold clauses," ubiquitous in loan and bond contracts, both public and private, were upheld. For this reason, Congress passed H.J. Res. 192, 73d Cong. 1st Sess. (June 5, 1933), declaring all gold clauses contrary to public policy and void. As a result, up to four "gold clause" cases ended up before the Supreme Court. The stakes could not have been greater, nor could they have a more familiar ring. Financial markets, both in the United States and around the world, awaited the decisions with trepidation. Waves of bankruptcies and bank collapses were expected to follow negative rulings. At the same time, unease was widespread in certain circles about the rather obvious distributive effects of the measures among creditors and debtors. As a result, the pressure on the Supreme Court was enormous. The options available to the justices resonate today: at the extremes, they could either take President Roosevelt's word for it and accept that warlike emergency powers were called for by the force of circumstance (as argued by Arthur Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation*, 44 Yale L.J. 53, 59–60 (1934)), or uphold the contract and property rights central to the common law constitutionalism of the *Lochner* era and condemn the federal government's efforts at economic engineering. In its 1935 rulings, the Supreme Court did neither. On the validity of gold clauses in private contracts, it boldly upheld the power of Congress to conduct "monetary policy" over the sanctity of contract and property rights limited to a proportionality test of sorts. *Cf.* Norman v. Baltimore, 294 U.S. 240, 310 (1935) and the detailed account offered in Sebastian Edwards, American Default: The Untold Story of FDR, the Supreme Court and the Battle over Gold (2018).

[58] The National Industrial Recovery Act, Pub. L. 73–76, and the Agricultural Adjustment Act, Pub. L. 73-10.

[59] 2 Bruce Ackerman, We the people: Transformations 291 (1998).

[60] *Id.* at 303–305, 312.

two unanimous judgments in *Schechter*[61] and *Radford*,[62] Roosevelt was forced into a drastic choice between a return to a Hoover-style of government or a political struggle for constitutional change. Roosevelt discarded the possibility of formal constitutional amendment as too politically risky.[63] Constitutional change was instead pursued informally by means of a more refined and yet no less radical package of legislative reforms (the so-called "second New Deal") and the notorious court-packing plan.[64]

The outcome of this story is well known: faced with a hugely popular presidential administration after the 1936 elections and the more tangible prospect of hostile judicial reform, the US Supreme Court operated a judicial switch,[65] which killed off the debate on the political economy of the US Constitution and enabled its unconventional adaptation to active government intervention.[66]

The *PSPP* ruling could indeed have been the starting point for a similar trajectory. Of course, the main actors in this European saga were quite different from the American antecedent: the focal point of constitutional resistance was not a federal but a national court, and the main policy actor on the ground was a technocratic body rather than a president with broad popular support. These are no small differences, and the outcome of the story will reflect them to a great extent.

But the analogies between the two sagas are instructive. First, both take place against the backdrop of outdated constitutional frameworks whose rigorous enforcement prevents the adoption of policy measures successfully experimented with elsewhere. Second, both cases involve courts that are not afraid to defy the mounting policy consensus. Third, in both cases, policymakers are confronted with the same dilemma between reverting to the previous course of action and progressing towards a more advanced policy agenda.

With this in mind, the *Weiss* saga can be reviewed on the basis of the political dynamics triggered by *Schechter* and *Radford.* The *Weiss* saga took place in an ideological context that, like the *laissez-faire* constitutionalism of the mid-1930s, had already revealed its shortcomings. That was clear at least since *Gauweiler*. In that case, the FCC criticized proportionality review by the CJEU and subjected the Bundesbank's participation in the ECB program to strict conditions. Subsequent to *Gauweiler*, the ECB's QE programs, however, challenged the conditions set out by the CJEU and the FCC, in a rather clear attempt to move to a functional paradigm entailing a broader mandate and a focus on fighting deflation and economic stagnation.[67] The *PSPP* ruling, in

[61] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[62] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

[63] 2 Ackerman, *supra* note 59, at 326–328.

[64] *Id.* at 301–2, 317–319.

[65] *Id.* at 332, 342–343. The turning point is commonly identified in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). The "switch" may have had rather more nuanced drivers than merely elections and court-packing. *See* Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998).

[66] Ackerman, *supra* note 59, at 384. This constitutional change was then memorialized in United States v. Carolene Products Company, 304 U.S. 144 (1938) and United States v. Darby Lumber Co., 312 U.S. 100 (1941).

[67] Tooze, *supra* note 30.

opposing this development, signaled that such a transition requires Treaty revision, at the very least.[68]

After the *PSPP* ruling, European political and technocratic elites, like the Roosevelt administration after *Schechter* and *Radford*, were forced into a decision between competing strategies. There were essentially three options. First, EU policy-makers could bow to the FCC and retreat to a more orthodox interpretation of the Treaties. They could abandon the QE programs, and replace them with the usual mix of financial assistance and conditionality administered to countries in financial pain during the euro crisis. By attempting to push EU institutions in this direction, the *PSPP* ruling revealed a high degree of political awareness on the side of German constitutional judges, because it strengthened the minority position of the Bundesbank within the Governing Council of the ECB and favored the preferred outcome of many Northern and Eastern European governments since the beginning of the COVID-19 crisis. At the same time, that response to the ruling would have dramatically increased the chances of an implosion of the Eurozone, as any measures of fresh austerity imposed upon peripheral States in the midst of the pandemic would literally be explosive.

The second option was treaty amendment in the direction of either the reform of EMU or its coordinated dissolution. As in 1936 America, in 2020 Europe, this, on paper, was the most appropriate response. Yet in the world of pragmatic politics the appetite for it was small.[69] Moreover, none of the EU policymakers could vaunt a degree of political support comparable to that enabling Roosevelt's unconventional constitutional change. But without such a transformative response, the basic structural problems would remain.

The third option was for the EU institutions to respond to the *PSPP* ruling in managerial terms with a view to preserving rather than transforming the precarious system constructed by the existing treaty framework. This option of muddling through was always the most likely to prevail.

6. Can the democratic and social constitution survive another decade of muddling through?

The most cool-headed policy reaction to *Weiss* was that of the ECB, which decided to disregard the ruling on the correct assumption that state courts cannot bind federal authorities and that its program was valid for EU purposes.[70] Policy decisions followed consistently from this premise: as mentioned above,[71] not only were QE programs

[68] Opposition is expressed in the strongest form by the FCC, but the CJEU, with its interpretation of TFEU, *supra* note 13, art. 123, also seems on the same page.

[69] In retrospect, some Americans may regret Roosevelt's reluctance to pursue constitutional amendment despite his huge popularity. *See* Bruce Ackerman, Revolutionary Constitutions: Charismatic Leadership and the Rule of Law 395 (2019).

[70] Eur. Cntr. Bank, Press Release, *ECB Takes Note of German Federal Constitutional Court Ruling and Remains Fully Committed to Its Mandate* (May 5, 2020), https://bit.ly/36v8sjP.

[71] *See supra* Section 2.3.

retained, but they were later expanded to cope with a crisis that in the meantime had worsened. This course of action made economic sense, but it again exposed the gap between the law in the books and the law in action. To be sure, this reaction recalled Roosevelt's decision to push forward with the "second New Deal" in the aftermath of *Schechter* and *Radford*. But while with that plan Roosevelt was openly challenging the Supreme Court and its economic and political constituency, the ECB did not seem similarly motivated. Nothing in its actions and declarations after the *PSPP* ruling seems to suggest a constitutional moment. The ECB was, again, buying time.[72]

Exceptionalism and the preservation of the status quo were also the prevailing features of NGEU, the wide-ranging package of EU fiscal measures announced by the European Council as a response to the COVID-19 pandemic.[73] To be sure, compared with the ECB reaction, the linkage between this initiative and the *PSPP* ruling is far from direct and explicit.[74] From a political economy perspective, however, NGEU is part of the picture. It is a move to reduce excessive emphasis on monetary policy and to shift part of the burden to the EU budget. Yet, this plan only gestures towards the necessary constitutional transformation and, although containing elements of institutional innovation, it remains a fudge to muddle through under the existing Treaty framework.

The innovative part of NGEU is not insignificant: the program includes a Recovery and Resilience Facility (Recovery Fund) that commits the European Union to unprecedented levels of joint indebtedness.[75] It is not the Hamiltonian moment craved by many professed federalists, but it is a move in that direction: more substantial than current structural and cohesion funds, the Recovery Fund introduces a meaningful instrument of transnational solidarity, entailing the transfer of sizeable resources in the forms of grants and loans to the countries worst affected by the COVID-19 pandemic. At the moment of writing, it must be added, many crucial aspects of the program are still being settled.[76]

Even at this stage, however, two elements signal that NGEU is unlikely to amount to a constitutional transformation. For one, the Recovery Fund is an exceptional program conceived in strict relation to the COVID-19 pandemic. Of course, it will keep European institutions busy for the next three to five years, and there are already many claiming that *ce n'est qu'un debut*. Our assessment is more cautious: the instrument may turn out to be the embryo of a more permanent and sizeable fiscal capacity of the European Union. Yet, for the time being, it rests on a precarious political consensus

[72] *Cf.* Wolfgang Streeck, Buying Time: The Delayed Crisis of Democratic Capitalism (Patrick Camiller and David Fernbach, trans., Verso, 2015).

[73] European Council Conclusions, EUCO 10/20 (July 17–21, 2020), https://bit.ly/39zDCsj [hereinafter European Council Conclusions].

[74] *Id.* The establishment of a Recovery Fund had already been planned before the *PSPP* ruling at the Eurogroup meeting of April 9, 2020, see European Council, Press Release, *Report on the Comprehensive Economic Policy Response to the COVID-19 Pandemic* (Apr. 9, 2020), https://bit.ly/3ozuOad.

[75] *See* European Council Conclusions, *supra* note 73, sec. A14.

[76] *See* European Council, Press Release, *Recovery and Resilience Facility: Council Presidency and Parliament Reach Provisional Agreement* (Dec. 18, 2020), https://bit.ly/3alSKbP.

which would disappear were the NGEU to be presented as the harbinger of a more consolidated fiscal European Union. It is not a mere detail that the package includes a marked reduction of the permanent EU budget, which will decline in real terms once the extraordinary expenditure made on recovery is over.

Second, and most importantly, although the Recovery Fund provides non-repayable money to finance *recovery and resilience plans* in worst-hit countries,[77] this money comes with considerable conditions: beneficiary countries will not simply be asked to comply with the terms of the approved plans, but they are also expected to implement the country-specific recommendations defined by the European Commission and the Council within the European Semester.[78] In other words, the Recovery Fund is not simply a financial transfer to fund national projects with an EU *imprimatur*; it is the carrot for a cocktail of structural reforms which may end up proving very similar to those implemented in southern Europe over the last decade. Thus, the institutional architecture emerging for the recovery from the COVID-19 crisis points decisively to an increased managerial effort on the part of the European Union to harness national policymaking. It cannot be discarded that at some point the currently suspended Stability and Growth Pact will be reactivated, with the consequence that many of the Member States will be subject to an excessive deficit procedure.[79] The constraints on national budgets may well be strict and for many countries the Recovery Fund may become the main or even the only available source of funding for public investments. Considering the record of the previous experiments with austerity, the political economy of the operation is dubious to say the least.[80]

But even if the European Union were to pursue a more benign and far-sighted economic policy, its overall democratic cost would be enormous, as national budgetary policies would be almost entirely preempted by the combination of the Recovery Fund and the Stability and Growth Pact constraints. A democratic black hole would emerge. In other words, exceptionalism and the preservation of the status quo remain the prevailing features of the response.

This outcome is perhaps all that can realistically be expected in the current circumstances of European politics. Had there been a set of political parties seriously committed to the completion of EMU, the *PSPP* ruling might have been the trigger for a revolutionary reform. But no meaningful political force with such a political agenda is in sight and, tellingly, neither has the judgment of the FCC openly challenging the authority of EU law contributed to its awakening. As a result, we are headed towards another uncertain decade of "muddling through" and technocratic problem-solving.

Past experience has taught us that muddling through under the existing treaties works only at the expense of the democratic and social constitution. Past and present experience also shows the necessity of using macroeconomic instruments that are

[77] European Council Conclusions, *supra* note 73, sec. A18.

[78] *Id.* sec. A19.

[79] TFEU, *supra* note 13, art. 126.

[80] *See* Special Rapporteur on Extreme Poverty and Human Rights, Statement (Jan. 27–Feb. 7, 2020) (by Philip Alston), https://bit.ly/3j67a3K.

part of the social democratic tradition, and which EU rules constrain or foreclose.[81] If those are now required, there are only two ways to harness them: either by aligning EMU to democratic and social ends or by unravelling it in a coordinated fashion to restore democratic and social constitutionalism at the national level. At the moment, both options seem devoid of sufficient political support, which leaves us with the unpleasant impression that, at the end of the day, the real loser from this affair will be the democratic and social constitution itself.

[81] Interview by Marie Charrel and Eric Albert with Christine Lagarde, President of the ECB, Le Monde (Oct. 19, 2020), https://bit.ly/36tih1A.