'It's the (Asymmetric) Economy, Stupid!'
Some Remarks on the *Weiss* Case of the *Bundesverfassungsgericht*

Andrea Guazzarotti*

Abstract

Drawing on the *Weiss* case of the BVerG, the article aims to criticize the irenic vision behind the construction of a 'denationalized' monetary policy entrusted to the ECB. In the absence of a European political union, and in the opposition of many to the creation of such a union, it was better to imagine an ECB devoted to pursuing the best possible monetary policy from a technical point of view (the vision from nowhere). The economic crisis which began in 2008 showed that, under the curtain of secrecy and the aura of technicality, the ECB is constantly called upon to mediate conflicting national economic interests. This mediation leaves winners and losers on the battlefield. It is, therefore, questionable that the search for transparency and the stronger judicial scrutiny sponsored by the BVerG towards the ECB policy choices could solve the original flaws of the EMU's architecture. It is even more so, if the solution advanced by the BVerG to the structural problems of the EMU is to put European debtor States under the control of the ESM, whose democratic credentials and transparency are highly disputable. The 'Idealtyp', patronized by the BverG, of central banking exclusively devoted to contrast inflationary pressures, could appear to be more in line with the original intent of the European Treaties and with Art 88 of the German Constitution. However, in a time in which global deflationary tendencies are the most dangerous enemy of the biggest national central banks, such a model of central banking can only exacerbate the growing economic asymmetries among Member States in the EMU.

I. Introduction

Drawing on the *Weiss* case of the BVerG, the article aims to criticize the irenic vision behind the construction of a 'denationalized' monetary policy entrusted to the ECB. Indeed, the promoters of that vision intelligently denied the dichotomy between an ECB, called upon to pursue the interests of the Member States and an ECB, called upon to pursue purely European interests. The 'denationalization' of monetary policy that such theories had in mind (and perhaps still have) did not coincide at all with the ECB's vision as the incarnation of the Central Bank of a future 'European federal state'. This is maybe due to the consciousness that, for the ECB capability to pursue purely European interests, it would be necessary to have political institutions capable of effectively synthesizing

* Associate Professor of Constitutional Law, University of Ferrara.

these European interests. In the absence of such political institutions, and in the opposition of many to the future affirmation of a European federal state, it is better to imagine an ECB devoted to pursuing the best possible monetary policy from a technical point of view (the vision from nowhere). This reading was backed, before the entry into force of the Treaty of Lisbon, by the fact that the ECB was not on the list of Community institutions (Art 7.1 TEC).

The economic crisis that began in 2008 laid bare the illusory nature of the ECB's vision, given the strong asymmetry of the monetary choices made by both Trichet and the first Draghi and the influence exerted on these choices by German interests. Subsequent efforts by the ECB itself to prevent the break-up of the Eurozone witnesses the ECB's laborious efforts to mediate national interests under the veil of the secrecy of its decision-making process.

The duty of transparency, which seems to be imposed today by the BVerG on the motivation of the ECB's choices, could neutralize the benefits of this secrecy, rising the political degree of the mediations among divergent national interests that the ECB is called to carry out almost every day; a political degree that may not be sustainable by an institution like the ECB.

In addition, the whole structure of the decision in the *Weiss* case seems to be aimed at isolating the position of the individual national Central banker, called upon to choose between 'two masters' and to give priority to his national constitutional duties. This is to undermine the legal architecture of the ECB, perceived as a single institution, not merely the sum of a plurality of national Central Banks.

The trial by fire of the European economic crisis has shown as unrealistic the hypothesis of a Central Bank completely independent of the economic choices of political power, even within the 'non-state', that is the EMU. The return to purity of a totally independent monetary policy, sponsored by the BVerG in the *Weiss* case refers, in fact, to a central banking model that did not even exist in Germany before the euro. As mercilessly reconstructed by the economic historian, Marcello de Cecco, that model had a resounding denial with the German government's choice in favor of the reunification of Germany.

The shortcomings in the functioning of the Eurozone machinery also lie in the fact that the economic choices of the European political institutions are practically non-existent and that, as a result, this vacuum has ended up being filled by the ECB's monetary policy. But even if the Eurozone were to evolve towards a political and fiscal Union, capable of supranational economic choices, the model of a Central Bank purely devoted to combating inflation, in perfect isolation from the demands of politics, would not be viable, certainly not at a time when the biggest central banks in the world are called upon to fight against global deflation (Tooze).

II. Transparency, as a Minor Form of Accountability of the ECB. But For All?

At the time of Draghi's famous announcement of the OMT programme in 2012, in spite of the fierce opposition from the President of the Bundesbank, the German Chancellor Merkel stated, immediately after that announcement, that she had no doubt about the nature of this programme and that it was fully within the ECB's mandate.[1] The factual basis of such an endorsement by the German Chancellor in favor of the ECB remained unclear.

It is almost certain, however, that there has been informal and confidential coordination between economic policy choices (those of the German government, in the first place, but also of the other governments of Eurozone) and monetary policy choices of the ECB (or at least of its President).

Something similar had already happened with the Security Market Programme by Trichet, Draghi's predecessor at the presidency of the ECB. Shortly before the creation of the first European bailout fund, he denied that the ECB would purchase government bonds on secondary markets. Once the bailout fund had been created, Trichet abruptly reversed his decision, in order to facilitate the task for creditor countries.[2] The same happened with Draghi's OMT programme; once the ESM had been set up, as a proxy for market discipline upon 'relaxed governments' of the South, the ECB announced something that seemed unconceivable just shortly before, namely the selective purchase of public securities on secondary markets for potentially *unlimited* quantities.[3]

Put in this perspective, the aim of the BVerG in the *Weiss* judgment – Case no 2 BvR 859/15 – seems to be that of unveiling such informal and opaque coordination among the heads of the political institutions (national, rather than of the EU) and those of the ECB.

If we look at the (provisional) outcome of the whole affair, it seems that, after the *Weiss* case, it will be no longer possible for the ECB to persuade only the head of the German government on the legitimacy of ECB's unconventional monetary policy. The whole Government and, most of all, the national Parliament of the Eurozone hegemon country need being involved in the ECB's decision-making process, at least in the form of a detailed illustration of the reasons supporting such monetary policy decisions.

As for the monetary policy, the BVerG gained from the ECB something similar to what is prescribed only in the area of banking supervision; not only does the ECB have to report to the European Parliament, but it must do so also

[1] 'I acknowledge that what the ECB has done is motivated by monetary policy issues. I have no reason to doubt that, so stated Chancellor Merkel': A. Mody, *Eurotragedy. A drama in nine acts* (New York: Oxford University Press, 2018), 314.

[2] K. Tuori, 'Has Euro Area Monetary Policy Become Redistribution by Monetary Means? 'Unconventional' Monetary Policy as a Hidden Transfer Mechanism' 22 *European Law Journal*, 857 (2016).

[3] ibid 860-861.

to national parliaments.[4] It is not clear, however, if this democratic takeover was made for the benefit of every national parliament of the Eurozone or only of the most powerful one.

It is fair to say that, after the *Weiss* case, it will be more difficult, if not impossible, for an ECB President to refuse any cooperation, in terms of transparency, with a national parliament, as it was the case with Trichet and the Irish parliament.[5]

In such a sensitive field as monetary policy, however, economic constraints count more than legal constraints. After the democratic win of the BVerG over the ECB, even the Italian Parliament could potentially make a claim for the same degree of accountability of the ECB. But will it really be able to do so? What will be the reaction of financial markets in case of a hard confrontation between the Italian Parliament and the ECB? Would the former be strong enough to hazard a hike in treasury bonds' interest rate? As for monetary policy effects in the Eurozone, the right to national constitutional identity, as enshrined in Art 4(2) TEU, seems deeply asymmetric.

III. Unveiling the Façade of ECB as a Unique Institution

The litigation on the *Weiss* case is an opportunity to reflect on the role of the Bundesbank in the German political-institutional system. The rebellion by the German members of the ECB's Governing Council to Trichet's Security Market Programme, along with the outspoken opposition of the President of the Buba (Bundesbank) to both the OMT and the Draghi's PSPP (Public Sector Purchase Programme), marked a clear split between the visions of the German monetary authorities and the German government. The latter, faced with the worsening of the financial crisis in southern Europe, preferred to support the ECB Presidency, overtly declaring the OMT programme compliant with the ECB's institutional mandate.[6] If the national monetary authority is the 'master' of the 'technical' monetary policy, which has to be exercised fully independently, such a denial of the President of the Buba by the German Chancellor would have appeared as an infringement to the constitutional prerogatives of the Buba itself.

[4] D. Curtin, 'Accountable Independence' of the European Central Bank: Seeing the Logic of Transparency' 23 *European Law Journal*, 37 (2017); in the area of banking supervision, reporting is due not only to the (European) Parliament, as with monetary policy (Art 20 SSM Regulation) but also to national parliaments (SSM Regulation, Recita 56, Art 21)

[5] ibid 42: 'ex-President Trichet refused to appear before the Irish Banking Inquiry [parliamentary committee] to answer questions about what happened and the precise role of the ECB. He claimed professional privilege three years after he left the bank'; 'According to the findings of the Irish parliamentary inquiry, the ECB actually 'contributed to the inappropriate placing of significant banking debts on the Irish citizen'. Moreover, the ECB had 'direct involvement in terms of significant decisions taken by the Irish Government in the period under investigation'.

[6] A. Mody, n 1 above, 314.

In the light of German historical precedents, however, such an assessment of institutional relations between the Buba and the German government seems inaccurate. On the eve of German reunification, the President of Buba, Poehl, frankly took a position against the project of the German government. From this perspective, however,

> 'he duly withdrew, so as not to run the position of being put in the minority, in the Buba Council, by members representing the Länder and who are chosen by the German Parliament, even if formally appointed by the President of the Republic. And indeed, the way in which Germany's monetary reunification was achieved is the perfect antithesis of the principles set out for twenty years by German monetary authorities. In 1990, however, the two German governments threw their hearts over the hurdle, and Governor Poehl had to choose between accepting the political will from his own government or resigning. When put to the test, the autonomy of the German central bank proved to be a paper tiger'.[7]

At the historical juncture of German reunification, it sufficed

> 'a Chancellor representing a party that does not need to rely upon the autonomy of the Central Bank to obtain the confidence of international markets, to show the whole world the precariousness of the actual foundations of the autonomy of the Buba itself'.[8]

Today, this scenario is complicated by the institutional development of national central banks in the Eurozone, so that the Buba itself, although still independent, is no longer able to stand alone against the choices of its own national government.

At least formally, today the Buba is nothing more than one of the ECB's executive organs, which, far from being a mere 'constellation of coordinated [national] bodies', constitutes a single institution.[9]

According to a 'strict interpretivist' interpretation of the Treaties and, above all, of the ECB Statute (Arts 9.2 and 14), the relationship between National Central Banks (NCBs) and the ECB is of 'functional subordination', at least in the field of monetary policy.[10]

Pursuant to this functional subordination, the NCBs, under Arts 130 and

[7] M. de Cecco, 'L'unificazione monetaria europea in prospettiva storica', in Id ed, *Monete in concorrenza* (Bologna: il Mulino, 1992), 16-17.

[8] ibid 16.

[9] T. Padoa Schioppa, 'Presentazione', in C. Zilioli and M. Selmayr eds, *La Banca centrale europea* (Milano: Giuffrè, 2007), IX.

[10] S. Antoniazzi, *La Banca centrale europea tra politica monetaria e vigilanza bancaria* (Torino: Giappichelli, 2013), 9 and 33 ('subordinazione funzionale'); C. Zilioli and M. Selmayr, n 9 above, 128-130.

131 TFEU and Art 7 of the ECB Statute, are fully independent from their own national governments and therefore they do not represent national interests within the European System of Central Banks (ESCB).[11]

This functional subordination and independence of NCBs are backed by two exceptional powers. The first is the infringement procedure before the ECJ that the ECB can issue against a NCB (the only case in EU law in which the infringement procedure, directly by the ECB and not by the Commission, is directed against a national institution and not against the Member State: Art 35.6 ECB Statute and Art 271, letter *d* TFEU). The second is the special action for annulment that both the ECB and a National Central Banker can bring before the ECJ against national acts aimed at lifting the National Central Banker from office (Art 14.2 ECB Statute).[12]

The BVerG stepped into this complex framework. If we look at the independence guaranteed to the ECB and the Buba by Art 130 TFEU and Art 88 of the German Constitution, it is not clear what the BVerG means when it calls upon the constitutional duty for the German Government and Parliament to ensure that the ECB remains within the limits of the mandate set out in the Treaties.[13] However, from a political perspective, the BVerG strategy is not difficult to understand.

Ordering the Buba and the German Government and Parliament to rebel against the ECB, if, within three months, the ECB had not adopted acts to demonstrate the legitimacy of its previous Quantitative Easing programme (the PSPP),[14] the BVerG is probably trying to insulate a national element within the ECB, and thus to undermine its unity, which is the essence of the ECB 'supranational' nature.

Subject to such specific constitutional obligations, which the BVerG declared as prevailing over EU law, the Buba played the role of a 'diligent party' and was enabled by the ECB's Governing Council to pass on to the German Government and Parliament the preparatory acts of the decisions on the PSPP, so that those acts became 'relatively' unsealed.[15]

In spite of this (provisional) appeasing epilogue, it cannot be hidden that the 'federal' architecture of the ECB had been put under siege for the first time. Although formally anchored to the supremacy of the National Constitution over

[11] C. Zilioli and M. Selmayr, n 9 above, 38-39.

[12] ibid 149-153. See the annulment of the suspension of the Latvian central banker issued by the ECJ in joined cases C-202/18 e C-238/18 *Rimsevics and ECB* v *Latvia*, Judgment of 26 February 2019, available at www.eur-lex.europa.eu.

[13] M. Wendel, 'Paradoxes of Ultra-Vires Review: A Critical Review of the PSPP Decision and Its Initial Reception' 21 *German Law Journal*, 983 (2020).

[14] *Weiss*, § 232.

[15] The ECB's documents cannot be viewed except by the Members of the German Parliament and Government; such limitation has given rise to the reaction of the applicants in the *Weiss* case, who are now planning to launch another action before the BVerG in order to obtain the full declassification of these acts. See https://tinyurl.com/ybyukb96 (last visited 27 December 2020).

the (legislative order of execution of the) European Treaties, and even if inspired by the duty to protect the interests of savers, together with the dogma of market discipline, the BVerG's claim to scrutinize the ECB's actions highlights the fragility of the ECB's legitimacy as a 'neutral' and democratically irresponsible institution called upon to carry out politically sensitive mediations.

IV. The Political Costs of ECB's Transparency in an Inexistent Political Union

The BVerG, almost paradoxically, declared itself as a paladin of the independence both of the ECB and the Buba.[16] One can speculate on the real intention of the BVerfG and criticize its consistency,[17] but this assumption represents an institutional construction not devoid of a certain degree of elegance.

For the BVerG, the independence of the ECB is a double-edged sword. On the one side, it implies a narrow interpretation of the mandate entrusted to the ECB (monetary policy alone, not economic or fiscal), so as not to affect political bodies charged with economic policy at national level and preserve democracy (*Weiss*, § 143). On the other side, interpreting the ECB's independence as preventing any 'systemic' effect on national economy (such as lowering spreads and reducing the cost of public debt for some Member States) it enables the ECB itself (and NCBs in the ESCB) to resist pressures from national governments (*Weiss*, § 161), so that limiting the ECB's room for maneuver goes in favor of the ECB itself and its ability to make 'free' choices.

The way in which the BVerG designs the role of the ECB in its relationship with the political institutions of the Eurozone and with Member States is well-defined and shows geometrical symmetry. However, it completely ignores the criticism of the ECB for preferring to sacrifice, at the end of Trichet's mandate, the needs of southern European countries to those of Germany (allegedly exposed to the risk of inflation).[18] Such an ECB, only devoted to control inflation in the euro's core countries, but not to prevent the risk of falling deflation in the periphery of the Eurozone, has nothing 'symmetric' about it, even if only looking at the primary objective of 'price stability' (which should also mean preventing deflation). In the light of the facts, the BVerG's elegant theory of the ECB's independence (aimed at protecting both democracy within Member States and freedom of the ECB) reveals itself as artificial and biased.

The idea expressed at the very beginning of the ECB's history, that the ECB belonged neither to Member States nor to the (former) European Community,

[16] *Weiss*, § 142-3, § 161.

[17] S. Poli and R. Cisotta, 'The German Federal Constitutional Court's Exercise of Ultra Vires Review and the Possibility to Open an Infringement Action for the Commission' 21 *German Law Journal*, 1084-1085 (2020).

[18] A. Mody, n 1 above, 291-296.

but that it was 'a truly supranational central bank'[19] relied implicitly upon the reductionist view that money is only a medium of exchange and not an institution of power.[20]

This way of thinking helped to bypass the huge obstacle of a single monetary policy for different national economies, namely a monetary policy that would inevitably favour someone at the expense of others, in the absence of a compensation chamber where national interests are balanced, that is, without any institutional instrument to sublimate nationalist conflicts to political ones through the mediation of transnational political parties.[21]

The focus on the primary objective of price stability, as the *lex specialis* capable of insulating monetary policy from the whole panoply of EU objectives (such as employment, growth, environmental protection, etc: Art 3 TEU, referred to by Art 127.1 TFEU), was apt to divert the attention from that huge obstacle. The comparison is meaningful between Art 3 TEU, referring to 'social market economy', and Art 119 TFEU, together with Art 2 of the ECB Statute, in which the adjective 'social' disappears and only remains, as for monetary policy, the obligation for the ESCB to act in accordance with an open and free-competition market economy.[22]

That idyllic vision of a completely 'denationalized' and depoliticized monetary policy was formally anchored to the fact that the ECB, in addition to having a legal personality distinct from the European Community itself, was not formally part of the European institutions (Art 7.1 TEC).[23]

Even after the ECB has entered the list of EU institutions (Art 13 TFEU), [24] its institutional identity remains unclear. It could be a piece of a federal identity *in progress* within which the Governors of National central banks are called upon to pursue the collective 'supranational' good, untethered from their national ties. More realistically, however, ECB could perform the role of a 'neutral' compensation chamber for divergent national economic interests called upon to surrogate the powers of an overtly political institution, with the advantage of being able to operate behind the shield of the 'technicality' of its decisions and the secrecy of its working method.

Today, this advantage is partially undermined by the intervention of the EU's most powerful National Constitutional Court, which has burdened the

[19] C. Zilioli and M. Selmayr, n 9 above, 40.

[20] G. Ingham, *La natura della moneta* (Roma: Fazi Editore, 2016).

[21] S. Mantovani, 'La moneta europea tra economia e politica' 58 *Stato e mercato*, 80 (2000).

[22] R. Bin, L'indipendenza delle banche centrali come principio costituzionale, Relazione all'ICON·S Italian Chapter Inaugural Conference. "Unità e frammentazione dentro e oltre lo Stato", Roma, 23-24 novembre 2018, available at https://tinyurl.com/y7lymwd4 (2018) (last visited 27 December 2020).

[23] C. Zilioli and M. Selmayr, n 9 above, 43.

[24] Even after the Lisbon Treaty, the ECB keeps its own legal personality, distinct from the EU's one (Art 282 TFEU); the same is to say for its distinct extra-contractual liability (Art 340.3 TFEU) and its distinct balance sheet (ibid 45).

ECB with the obligation of a 'qualified' transparency, at least to the benefit of the German Government and Parliament.

V. Mediating National Conflicts at Frankfurt

During the economic crisis, begun in 2008 and before the litigation in the *Weiss* case, European scholars had highlighted that a single monetary policy was unable to be fit for all Eurozone economies.[25]

The objective of price stability, in its apparent uniqueness, implies the hard work of mediation. The recent history of the European economic crisis has dramatically made it clear that inflationary pressures in some states and dangerous deflationary tendencies in others may have occurred at the same time. This inevitably suggests the power of the ECB to balance opposing interests and to negotiate among national claims.[26]

The views of certain US scholars, as far as this key problem is concerned, are even more drastic than the European ones, in their assumption that the claim to apply a 'One-Size-Fits-All' Monetary Policy in nineteen different countries is a real 'European tragedy'.[27] The author in question considers the unconventional monetary policy operations implemented by the Draghi's ECB as a (too late) attempt to balance the heavy losses imposed on the southern European states (plus Ireland) by the previous ECB policy aimed at raising interest rates.[28]

This monetary policy was openly inspired by the intention to second the point of view of Germany, which feared an inflationary flare-up, due to the rise of energy prices in those years. That restrictive monetary policy stance continued during the first period of Draghi's mandate, when the ECB denied the need for a drastic and quick reduction of interest rates.[29]

Now, let us

> 'imagine a hearing in the Spanish or the Italian constitutional court on the question of whether or not their governments were remiss in not demanding to see the reasoning that justified the ECB's decision in 2008 or 2011 to raise interest rates just as the European economy was sliding into first one and then a second recession. Were German concerns about inflation at those critical moments weighed against the damage that would

[25] F.W. Scharpf, 'Monetary Union, Fiscal Crisis and the Preemption of Democracy' 11/11 *Discussion Paper* (2011), available at https://tinyurl.com/ybfulzt8 (last visited 27 December 2020); C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Oxford-Portland: Bloomsbury Publishing, 2016), 292.

[26] C. Kaupa, n 25 above, 292.

[27] A. Mody, n 1 above, 320; see also B. Eichengreen, Hall of Mirrors. The Great Depression, the Great Recession, and the Uses – and Misuses – of History (New York: OUP, 2015), 8, 370-371.

[28] A. Mody, n 1 above, 313.

[29] ibid 304-307. For a different reading of the German preference for a restrictive monetary policy in 2011, see S. Cesaratto, *Sei lezioni di economia* (Reggio Emilia: Imprimatur, 2016), 263.

> be done to the employment opportunities of millions of their fellow citizens in the Eurozone? Would Karlsruhe have heard a case brought on those grounds by an unfortunate German citizen who lost his or her job as a result of those disastrously misjudged monetary policy moves?'.[30]

If we adopt the substantive perspective of Tooze and Mody, according to which the ECB mediation between national interests leaves winners and losers on the battlefield, we become skeptical about the assumption that unconventional monetary policies deserve a stricter scrutiny than conventional ones.[31] But we also became skeptical about the idea that the problem to address is the ECB's accountability and that its solution lies in tightening the scrutiny (even the judicial one) of it.[32] Surely, this is not the solution to Eurozone dysfunctions.

If, by this perspective, we analyze the choices which the ECB made in handling the economic crisis begun in 2008, it becomes possible to question the whole approach of the BVerG in the *Weiss* case. Entirely abstracting from the asymmetrical effects on the Member States caused by a single monetary policy, the BVerG puts its spotlight exclusively on the fact that compliance with the narrow limits of the ECB's mandate implies a 'full judicial review' (*Weiss*, § 143), and that such a judicial review can be carried out, as a form of subrogation, by a national constitutional court.

Contrary to this approach, it is fair to say that a court with jurisdiction for the supranational level should be better equipped to interpret the monetary policy of the supranational central bank than a national constitutional court, due to the tricky balancing among national interests, which might require amending the previous 'conventional' monetary operations with following 'unconventional' ones. Still, it is quite possible that a supranational court understands better than a national constitutional court the complicated task of a supranational Central Bank responsible for deciding a single monetary policy for such differentiated economic areas, which perhaps explains the U.S. judicial deference to the Fed.[33]

Perhaps the choice of the CJEU not to enquire in too much detail about the reasons for the supranational Central Bank's line of conduct in such a fragmented context is also tantamount to avoiding the exposure the clash of national interests and thus to amplify fragmentation and nationalistic cleavages among European citizens.

[30] A. Tooze, 'The Death of the Central Bank Myth' *Foreign Policy*, 17 (2020).

[31] K. Tuori, n 2 above, passim.

[32] M. Dawson, A. Bobić and A. Maricut-Akbik, 'Reconciling Independence and Accountability at the European Central Bank: The False Promise of Proceduralism' 25 *European Law Journal*, 91 (2019).

[33] S. Egidy, Judicial Review of Central bank Actions: Can Europe Learn from the United States?, in Building Bridges: Central Banking law in an Interconnected World. ECB Legal Conference 2019, 53-76, available at https://tinyurl.com/ycv8gn55 (last visited 27 December 2020).

One might even suspect that the national governments of such an 'incomplete' monetary union, in the absence of adequate political space wherein these kind of conflicts can be balanced, would intentionally prefer leaving the 'dirty work' to the ECB. In other words, they prefer that the clash of national economic interests be managed behind the curtain of 'technical discretion', rather than exposing its eruption in public. Such conflicts of interest, indeed, prevent a real supranational economic policy in the Eurozone and force monetary policy to step in by means of unconventional operations.[34]

It is also plausible, however, to imagine that the choice of the German Constitutional Court consciously serves to show such a monetary policy model as unsustainable, aiming to overcome the heterogeneity of national economies through a comeback to homogeneity, as it was originally intended by its own country (a 'Northern' Euro as opposed to a 'Southern' Euro). For this Constitutional Court, the option of breaking up monetary union is not a constitutional taboo, as it can inevitably be in the constitutional systems of debtor states.

The condition posed by the German Government at the time of Maastricht to its citizens for allowing the transfer of monetary sovereignty, namely that the ECB would never operate indirectly redistributive policies and that it would pursue the sole objective of combating inflation[35], was in fact 'constitutionalized' in Art 88 GG.[36]

This makes it perfectly plausible that the Constitutional Court of such a national legal system should, without too many qualms, balance the constitutional interests at stake; the protection of German savers, cloaked under the veil of democracy, against Germany's continued membership of the euro, thus ignoring that the Treaties' drafters purposely did not provide for the option of a selective exit from the Eurozone alone (in order to support the credibility of the new supranational currency, conceived as 'irrevocable').[37]

However, what annoys the audience not in tune with the BVerG, especially that in South-European countries, is that the legal-constitutional argument instrumentally reverses the burden of the choice in question: the breakdown of monetary union. In the BVerG approach, in fact, the only option left to 'debtors' Member States is to submit themselves first to the financial market discipline; then to the European Stability Mechanism (ESM). The only option is of losing their own democratic sovereignty; it is an option that, after the well-known Greek events (but, in Italy, even after the 'commissioners' by the Monti government), no pro-European party seems able openly to defend before the national constituency,

[34] A. Tooze, n 31 above, 20.

[35] ibid 10.

[36] C. Zilioli and M. Selmayr, n 10 above, 51-52; A. Guazzarotti, 'La sovranità tra Costituzioni nazionali e Trattati europei' *DPCE online*, 350-353 (2020).

[37] See the former Protocol n 24 on the transition to the third stage of the EMU: C. Zilioli and M. Selmayr, n 9 above, 39.

without suffering a hemorrhage of votes. Assuming that, *if debtor countries want to lower spreads and make their public debt sustainable, they have to submit to the ESM*,[38] it is tantamount to imposing on them the clear choice of whether to remain in the euro as vassals or exit. Against this background, the fundamental right to democracy recognized to the benefit of every German citizen by the German Constitution would be dispensable for the citizens of debtor countries.

Exiting Euro by the South European countries would be very painful, especially for Italy, as it should repay the previous euro-denominated debt with a new national currency greatly devalued against the euro.[39]

The opposite would happen if Germany and its satellites (the Netherlands, Austria, Finland, and Belgium) were to leave euro. 'There really will be no losers', as the depreciation of the euro following this kind of exit will enable the remaining States to 'continue to pay their debts in the new cheaper euro, which will also give them a much-needed boost in competitiveness and a chance to jump-start growth'.[40]

According to this American interpretation of the euro-dilemma, the choice for Germany to leave the euro would not be negative for Germans, even if that would cause a reflation of the Deutschmark which would make German exports less competitive.[41] If we can agree with Mody that '(t)hat is actually a desirable outcome for the world', giving the unbearable amount of German current account surplus, it is more difficult to think that 'Germanexit' represents a desirable outcome 'for Germany, too'.[42] According to Mody, '(p)erhaps the greatest gain will be political. Germany plays the role of a hegemon in Europe but is unwilling to bear the cost of being a hegemon'. Indeed, the BVerG belongs to those who do not want to pay the cost of a German hegemony in Europe. The political problem is that the German legal struggle to escape such cost, while at the same time profiting from the benefit of the single currency, seems more oriented to letting the Southern countries pay the bill for a possible exit, than to put this burden on German shoulders.

VI. A Different Type of Central Bank for a Different Kind of Union?

According to the dominant narrative supported by the 'Europeanist' doctrine, the current Eurozone framework highlights a 'gap' in the lack of a supranational Central Bank fit for accomplishing the key function of 'lender of last resort', as is the case for the most influential central banks in the world. Reasonable as it

[38] *Weiss*, § 170-1.
[39] A. Mody, n 1 above, 447.
[40] ibid 447.
[41] ibid 448.
[42] ibid.

may appear, this opinion is biased.

This mainstream narrative, by putting the spotlight on the shortcomings of the European Monetary Union, ends up neutralising, or at least minimising, the nationalistic conflict. What this vulgate covers is the hidden face of the question, well highlighted by US literature. The latter, as cited, is highly critical of the ECB *à la* Trichet, accused of raising rates at a time when Southern Europe (and Ireland) desperately needed an expansionary monetary policy. But this happened in accordance with the interests of the hegemonic country in the Eurozone, Germany, where there were signs of inflation rising above the fateful threshold (unwritten in any EU legal act, including the ECB Statute) of 2%. This was mainly due to the rise in energy prices, a volatile component of inflation measure that is usually sterilized in the US.[43]

The problem, in other words, does not lie so much or above all in the absence of legal tools in the European Treaties (and in the ECB Statute) empowering the central bank to carry on effective monetary policies, thus forcing the central bank to use 'unconventional' tools. The problem is also, and above all, the ECB's inability to manoeuvre (conventional or unconventional) tools so as not to penalise some Member States and not to benefit others.

The first (dominant) narrative seems aimed at absolving those who, especially in Italy, portrayed European monetary integration as a piece of an inevitable march towards the political-fiscal union, highlighting what remains to be done and explaining that the ECB's choices are limited by primary law. The second narrative points to prove mercilessly that symmetrical monetary policy for different national economies is impossible; as a result, the ECB gives priority to the needs of national hegemonic economies and ends up increasing divergences among stronger and weaker economies.[44]

Against this background, the debate over both the ECB's unconventional measures and the caselaw of the BVerG could turn out to be little more than a smokescreen, when compared to the bitter reality. If we accept the second narrative, it is easier to share the view of those who argue that the function of central banks and especially that of the ECB, is to regulate the speed with which capital is centralised in the 'core' states.[45] Italy, moreover, is an example of how little a central bank alone can do to help narrow the gaps among national regions with deeply different economic structures.

Many years ago, Michel Foucault wrote that the never-ending 'diplomatic' logic underlying the balance of power among the various Italian national entities prevented Italy in the seventeenth century from developing tools and institutions of the Polizeistaat, on which the welfare state institutions had been later grafted,

[43] ibid 315-318.

[44] '(T)he ECB's monetary policy stance could serve only some of the member states and would necessarily neglect the others': A. Mody, n 1 above, 320.

[45] E. Brancaccio, O. Costantini and S. Lucarelli, 'Crisi e centralizzazione del capitale finanziario' *Moneta e credito*, 53-79 (2015).

in France and elsewhere in Europe.[46] Unfortunately, this condition of 'permanent diplomacy' and lack of the democratic version of the Polizeistaat, ie the welfare state, characterizes the E(M)U today and is likely to go on featuring it in the future, despite the novelties induced to face the pandemic crisis.

Perhaps implementing the 'Next Generation EU'[47] will invalidate this pessimistic prediction. However, if we will ever witness the birth of a 'federal' development of the E(M)U as a consequence of the 'Next Generation EU' programme, this will not happen without a patronising monetary policy, as was the case for the recent history of German reunification. Without overcoming the legal architecture of the ECB, the one the BVerG vigorously upheld in the *Weiss* case[48], no solution could be found to the serious and growing divergence among national economies forced into a single monetary policy.

[46] M. Foucault, Sicurezza, territorio, popolazione. Corso al Collège de France (1977-1978) (Milano: Feltrinelli, 2007), 228-229.

[47] Available at https://tinyurl.com/y6kxhenw (last visited 27 December 2020).

[48] O. Chessa, 'Il paradosso di Karlsruhe. Primato del diritto costituzionale nazionale e separazione tra politica monetaria e politica economica, Liber Amicorum per Pasquale Costanzo' *Consulta OnLine*, 5-6 (2020).