# The EMU and Its Multi-Level Constitutional Structure: The Need for More Imaginative 'Dialogue' Among and Across EU and National Institutions

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*'Finance' has become the most salient part of the European project. For better or worse, it has been the EU's major field of experimentation for institutional innovations, and also the protagonist of its major tensions. Such tensions pervade the Monetary Union, the Banking Union, and the framework for fiscal stability and budgetary coordination, and, in important occasions or respects, have ignited inter-court conflicts, exposed some accountability gaps, and made more difficult than desirable cooperation towards a common policy and mutual understanding, albeit in the diversity, at the inter-governmental level. It need not be like this. All those shortcomings can be overcome without major statutory reform, with a more imaginative use of the tools already in place, and (crucially) a change in the practice of dialogue between institutions and bodies, both from a vertical perspective (notably, courts, but also parliaments and governments) and a horizontal one (between political, administrative and judicial levels of accountability).*

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## 1 INTRODUCTION

These days, financial affairs have become the example that represents the state of the European project. The Great Financial Crisis (2007–2008) and the European sovereign debt crisis (2010–2013) spurred remarkable institutional innovations that concentrated decision-making powers at the European Union (EU) level, through secondary legislation, Treaty changes, shifts in practice, or all of the above, at what still today seems a vertiginous speed for EU standards. The early stages of the crisis were characterized by half-hearted initiatives, such as the European Financial

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Stability Facility (EFSF) in the fiscal front,[1] the programs to support specific market segments, like public and private securities or covered bond markets (Securities Markets Programme; SMP and covered bond purchase Programme – CBPP) in the monetary front[2] and the creation of the European Supervisory Authorities (EBA, ESMA, EIPOA[3]) from what used to be the Level-3 'Committees' or 'Lamfalussy architecture'[4] accompanied by the European Systemic Risk Board (ESRB[5]), in the supervisory front.

As the crisis worsened, it became increasingly evident that EU solutions needed a greater effort to enhance their credibility. This led to a build-up of financial resources through the adoption of the European Stability Mechanism (ESM) to aid in the fiscal-financial stability front, [6] which had to be accompanied by the ECB's pledge to 'do whatever it takes' to save the Euro, in 2012. Money and pledges alone, however, were only temporary solutions, and a renewed institutional architecture would be needed to shore up the finances of EU sovereigns and banks alike. For the former, in parallel to the talks leading to the ESM, a whole new framework was adopted to enhance fiscal coordination, through the Six-Pack (on fiscal policy and macroeconomic imbalances[7]), the Two-Pack (on fiscal and budgetary coordination and surveillance[8]),

1 https://www.esm.europa.eu/efsf-overview. (accessed 25 Jan. 2021)

2 Note that the European Central Bank (ECB) decides on measures to address severe tensions in financial markets. 10 May 2010. *See*, https://www.ecb.europa.eu/press/pr/date/2010/html/pr100510.en.html. (accessed 25 Jan. 2021)

3 Respectively: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC.

4 https://ec.europa.eu/info/business-economy-euro/banking-and-finance/regulatory-process-financial-services/regulatory-process-financial-services_en.(accessed 25 Jan. 2021)

5 *See* Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 Nov. 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.

6 Treaty Establishing the ESM, signed on 2 Feb. 2012, https://www.esm.europa.eu/legal-documents/esm-treaty.

7 Regulation 1175/2011 amending Regulation 1466/97: On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation 1177/2011 amending Regulation 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure; Regulation 1173/2011 On the effective enforcement of budgetary surveillance in the euro area; Directive 2011/85/EU On requirements for budgetary frameworks of the Member States; Regulation 1176/2011 On the prevention and correction of macroeconomic imbalances; Regulation 1174/2011 On enforcement action to correct excessive macroeconomic imbalances in the euro area.

8 Regulation 473/2013: On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area; Regulation 472/2013: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

and the Fiscal Compact Treaty,[9] which we will refer to as the 'Fiscal Consolidation Legal Framework'. For the latter, EU authorities promoted a reinforced framework for prudential regulation (the Single Rulebook[10]), bank supervision (the Single Supervisory Mechanism, or SSM[11]), and bank resolution (the Single Resolution Mechanism, or SRM[12]) which together with the European Deposit Insurance Scheme (EDIS)[13] form the Banking Union (BU), which has been echoed by its sibling, the Capital Markets Union (CMU[14]).

Although the EU has been repeatedly criticized for acting too slow on the crisis (and, admittedly, it was slower than the United States, which reacted and exited the crisis, more quickly) the coordination problem within the EU should not be underestimated. In retrospect, it looks impressive that the EU twenty-seven-member club and the Eurozone's nineteen-member one could achieve as much as they did, in such a short time.

In fact, the EU seems to have learned from this experience of the recent past, and in response to the Coronavirus diseases 2019 (COVID-19) crisis, EU institutions, and the Member States have reacted in a matter of months to approve what is arguably the most ambitious financial development in the history of the Union: a comprehensive package of a EUR 1,824,3 billion effort, combining the multiannual financial framework (MFF) and an extraordinary recovery effort, Next Generation EU (NGEU), where the latter (EUR 750 billion) will be dedicated primarily to a Recovery and Resilience Facility (RRF – EUR 672,5 billion), a large part of which (EUR 312,5 billion) will be *grants*.[15] Thus, although a pat-in-the-back seems uncalled for in these tragic times, no one can say that the EU 'cannot get things done'.

So why the sad faces? The reasons seem to have less to do with the rules themselves than with the *context* of their adoption, and the ensuing *perception* of

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9 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 2 Mar. 2012.

10 *See*, https://eba.europa.eu/regulation-and-policy/single-rulebook.

11 *See* Council Regulation (EU) No 1024/2013 of 15 Oct. 2013.

12 *See* Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014.

13 Proposal for a Regulation amending Regulation (EU) 806/2014 in order to establish a European Deposit Insurance Scheme. Strasbourg, 24 Nov. 2015 COM(2015) 586 final 2015/0270 (COD). For the whole Banking Union ensemble, as it was originally envisaged, *see* Commission Communication, *A Roadmap Towards a Banking Union* (Brussels 12 Sept. 2012) COM(2012) 510 final; European Commission Completing Europe's Economic and Monetary Union. Report by: Jean-Claude Juncker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz (Five Presidents Report), 2015.

14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Action Plan on Building A Capital Markets Union* (Brussels 30 Sept. 2015) COM(2015) 468 final. *See also* the new action plan, i.e., *A Capital Markets Union for People and Businesses-new Action Plan* (Brussels 24 Sept. 2020) COM(2020) 590 final.

15 *See* Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions. Brussels, 21 July 2020 (OR. en) EUCO 10/20, https://www.consilium.europa.eu/en/press/press-releases/2020/07/21/european-council-conclusions-17-21-july-2020. *See also* Paul Dermine in this special issue.

them in some contexts. In the same way that the rules evidence institutional creativity, their context is a testimony of undeniable political tensions between the 'fiscally virtuous' North and the 'fiscal profligate' South. How much 'political' tensions are visible in policy, or institutional constraints, is debatable, but some signs can definitely be interpreted in that sense. Fiscal rules are obsessively focused on negative terms, like 'surveillance', 'excessive', 'imbalances', 'prevention', 'correction' or 'enforcement'.[16] The ESM is not based on, nor subject to, EU Law.[17] EDIS, a piece that was considered (and, at the time of the political conception of the SSM, originally agreed as) essential in the Banking Union to sever the link between banks and sovereigns, remains still to be adopted, due to its burden-sharing implications.

This contrast between the sophistication of the framework and the weakness of the political consensus about what it is, and what it is supposed to achieve, results in tensions, and leaks at the seams. On the financial side, a 2019 ruling by the German Federal Constitutional Court (Bundesverfassungsgericht, hereafter: BVerfG) held that the SSM, and the distribution of competences between ECB and national competent authorities was constitutionally valid, *provided* that it was interpreted restrictively (but in this way in square contrast with an obiter dictum of the GCEU in its *Landeskreditbank* judgment)[18] and that the diminished level of legitimacy was balanced by enhanced democratic accountability.[19] On the fiscal side, the existing (but not always fully enforced nor incorporated into Member States' legal systems) fiscal rules (Stability and Growth Pact) were substantially reinforced using both EU Law and an international treaty (the Fiscal Compact). But this reinforcement came with strings attached, as the fiscal consolidation rules were also employed to bestow credibility on bail-out programs, a link which proved poisonous for a number of reasons, as austerity policies undertaken in the framework of the bail-out programs were then understood to be a consequence of the fiscal consolidation legal framework as a whole. This at least partly explains the struggle of some Constitutional Courts when analysing spending cuts,[20] as well as the worrying misinterpretation of what activating the temporary suspension or 'escape clause'[21]

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16 A positive term, like 'strengthening' is used once, and only to strengthen 'budgetary surveillance', so it should not count.

17 ESM Treaty signed on 2 Feb. 2012. T/ESM 2012-LT/en 1. The fact that the ESM is not subject to EU Law was stated in Judgment of 27 Nov. 2012, case C-370/12 *Pringle*, EU:C:2012:756, and reiterated in Judgment of 20 Sept. 2016, cases C-8/15 P to C-10/15 P Ledra Advertising *v.* Commission and ECB, EU:C:2016:701. However, it may not encroach upon EU Law (Art. 3–2 TFEU).

18 Judgment of 16 May 2017, case T-122/15, Landeskreditbank Baden-Württemberg – Förderbank *v.* European Central Bank (ECB), EU:T:2017:337.

19 BverfG 2 BvR 1685/14, 2 BvR 2631/14 30 July 2019.

20 V. Ruiz Almendral, *The European Fiscal Consolidation Legal Framework: Its Impact on National Fiscal Constitutions and Parliamentary Democracy*, in *Constitutional Change Through Euro-Crisis Law* 28–67 (T. Beukers, B. De Witte & C. Kilpatrick eds, Cambridge University Press 2017); D. Tega, *Welfare Rights and Economic Crisis Before the Italian Constitutional Court*, 4(1) Eur. J. Soc. L. 63–74 (2014).

21 The clause is defined Arts 5(1), 6(3), 9(1) and 10(3) of Regulation (EC) 1466/97 and Arts 3(5) and 5(2) of Regulation (EC) 1467/97, facilitates the coordination of budgetary policies in times of severe

actually means. On the monetary side, the BVerfG ruled, on 5 May 2020,[22] that the Public Sector Purchase program (PSPP)[23] created by the ECB, this time as a monetary authority, and the Court of Justice ruling validating it,[24] were *ultra vires* acts beyond their respective mandates.[25]

In our view, this undesirable state of affairs is, to a large extent, a problem of framing, and dialogue. The political tensions often result in a reading of the legal sources which excessively focuses on the system's perceived threats to sovereignty, accountability or solidarity, and which is also mired with 'absolutes' and 'red lines'.

In section 2, we identify the problem areas (Monetary Union, Banking Union, fiscal and budgetary coordination) where a different framing of the issues has resulted in increasingly entrenched positions, which traditional communication channels have been unable to palliate.

Lastly, in section 3, we identify examples where communication channels are underutilized and could help bring a more productive interplay and dialogue between institutions, both vertically (between EU and national levels) and horizontally (between EU institutions, agencies and bodies). We offer an initial view of how such new channels of communication could improve the problems identified in earlier sections focused on Monetary Union, Banking Union and fiscal coordination.

## 2 A CHARACTERIZATION OF THE EXISTING PROBLEMS AND THEIR MAIN FEATURES

In this Section, we outline the different problems that currently exist/have arisen over the past decade, grouping them in two areas. One is the area of Monetary and Banking Union, where the occasional rupture of dialogue between high courts, represented by the discussion over 'proportionality' (2.1.) hides a deeper, multi-level, multi-faceted problem of 'accountability' (2.3.) Another is the area of fiscal and budgetary stability, where a remarkable machinery of fiscal coordination has been framed in terms of 'austerity' (2.3.).

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economic downturn. *See* Communication from the Commission to the Counsel on the activation of the general escape clause of the Stability and Growth Pact (COM(2020) 123 final.

22 BverfG decision of 5 May 2020, – 2 BvR 859/15.

23 Decision of the Governing Council of the European Central Bank of 22 Jan. 2015 on an expanded asset purchase programme (ECB/2015/10) and Decision of the European Central Bank of 4 Mar. 2015 (Decision (EU) 2015/774) on a secondary markets public sector asset purchase programme, as amended by Decision of the European Central Bank of 5 Nov. 2015 (Decision [EU] 2015/2101).

24 Judgment of 11 Dec. 2018, *Weiss and Others*, C-493/17, EU:C:2018:1000.

25 2 BvR 859/15 at 133, 135–138, 141, 143, among others.

### 2.1 Monetary Union and 'Proportionality'

The clearest example of the tensions at the heart of the European Monetary Union (EMU) is evidenced by the recent case law of the BVerfG. After the Weiss judgment of 5 May 2020, few would consider the judiciary as the 'least dangerous' power 'to the political rights of the Constitution'.[26] Frictions between the CJEU at the top of the EU legal order and Constitutional Courts at the top of national legal orders are a growing concern.[27] This case is an example that, despite the preliminary reference procedure, the dialogue between courts can become strained and the highest domestic courts may decide to act more boldly as those having the last word on their constitutional counter-limits and values.[28] The *Weiss* ruling's forerunners are the *Landtová*[29] and *Ajos*[30] rulings where the Czech Constitutional Court and the Danish Supreme Court found that the CJEU had acted *ultra vires* in finding a breach of EU law by national statutory provisions and international treaties. However, due to the visibility of the BVerfG, the involvement not only of the CJEU, but also of the ECB, and the centrality of the policy involved (the PSPP was the ECB's quantitative easing (QE) program to restore the monetary policy transmission mechanism to full functionality and avert the risk of deflation), this has been the most salient example of a fracture of inter-court dialogue.

The consequences of the current ruling may transcend the case. In this case, the German Constitutional Court's *ultra vires* control operated as a de facto ultimate (last resort) legality control of (1) a decision adopted by an EU institution whose independence (and thus full insulation from national or supranational instructions) is protected by Article 130 TFEU, (2) in respect to the ECB monetary policy mandate, which is an exclusive competence of the EU under the TFEU and (3) based on a factual assessment, which was confined to the text of the original ECB decisions.

Of all these elements, the latter was the most striking and suggestive. In synthesis, the Court reached the conclusion that both the ECB and the CJEU had acted *ultra vires*, because they neglected the side-effects of quantitative

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26 Federalist No. 78 1788.

27 *National Courts and EU Law. New Issues, Theories and Methods* 3 (Bruno de Witte et al., eds, Edward Elgar, Cheltenham, Nothampton, MA 2016); Darinka Piqani, *The Simmenthal Revolution Revisited: What Role for Constitutional Courts?* ivi, 26–48. Compare, in the Italian Constitutional Court's judgment of 17 Dec. 2017 No 267; judgment of 21 Feb. 2019, no. 20 and ordonnance of preliminary reference 10 May 2019, no. 117.

28 Compare e.g., Italian Constitutional Court, judgment of 15 Apr. 2008 No 103; Italian Constitutional Court, judgment of 18 July 2013 No 207; French Conseil Constitutionnel, 2013–314, judgment of 4 Apr. 2013; BVerfG, judgment of 14 Jan. 2014.

29 The ruling declared *ultra vires* was the Judgment of 22 June 2011, case C-399/09 *Marie Landtová*, EU: C:2011:415.

30 Case no. 15/2014 *Dansk Industri (DI) acting for Ajos A/S v. The estate left by A*. The ruling declared invalid was the judgment of 19 Apr. 2016, case C-441/14 *Ajos*, EU:C:2016:278.

easing in government finances and bank balance sheets.[31] This is a finding that *factually speaking*, is not correct. If one analyses the publicly available statements, studies by the ECB, or the speeches and remarks by ECB Presidents, board members and high-ranking officials (including in the context of the Monetary Dialogue at the European Parliament[32]), it is almost impossible to say, like the Court said in its ruling, that:

> *'[i]t is not ascertainable that any such balancing was conducted, neither when the programme was first launched nor at any point during its implementation; it is therefore not possible to review whether it was still proportionate to tolerate the economic and social policy effects of the PSPP, problematic as they may be in respect of the order of competences, or, possibly, at what point they have become disproportionate. Neither the ECB's press releases nor other public statements by ECB officials hint at any such balancing having taken place'* (authors' translation).[33]

Some might argue that this statement was made in an *obiter* fashion, because the BVerfG's main analysis, some paragraphs above, was based solely on the letter of the ECB decisions.[34] Yet, consciously disregarding the background of such decisions (including ECB research, speeches and other official documents), and their posterior developments does not make it much better. As per the Court's assessment of the CJEU's proportionality review, the level of detail in the CJEU's ruling is greater than in the BVerfG's judgment, and is far superior to the precedents in other jurisdictions.[35]

Yet, the flaws of the BVerfG's ruling are secondary.[36] The broader point is that, if a prestigious court, in a very visible setting, decides to adopt a controversial position and does so on a wobbly factual basis, something must have gone terribly wrong in inter-court dialogue. It need not have been this way. The *Weiss*' immediate forerunner in monetary policy was *Gauweiler*. There we can distinguish

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31 BVerfG judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15, 2 BvR 980/16 (hereafter: BVerfG *Weiss*).

32 For some examples of such statements and assessments, *see* Marco Lamandini & David Ramos Muñoz, *Monetary Policy Judicial Review by 'Hysteron Proteron'? In Praise of a Judicial Methodology Grounded on Facts and on a Sober and Neutral Appraisal of (ex ante) Macro-economic Assessments*, EU Law Live (20 May 2020) (hereafter: Lamandini; Ramos Muñoz *hysteron proteron*); Filippo Annunziata, Marco Lamandini & David Ramos Muñoz, *Weiss and EU Union Banking Law. A Test for the Fundamental Principles of the Treaty,* European Banking Institute Working Paper Series 2020 – no. 67 (hereafter: Annunziata; Lamandini; Ramos Muñoz *Weiss*).

33 BverfG decision of 5 May 2020, – 2 BvR 859/15 *Weiss,* at 176.

34 For example, *'it is not ascertainable from Decision (EU) 2015/774 of the ECB Governing Council of 4 Mar. 2015 on the PSPP nor from subsequent Decisions (EU) 2015/2101, (EU) 2015/2464, (EU) 2016/702, (EU) 2017/100 and the Decision of 12 Sept. 2019 that these decisions contained, or were based on, the required balancing of the monetary policy objective against the economic policy effects resulting from the means used to achieve it (see (1) below). As a result, the foregoing deci- sions violate the principle of proportionality'*. BverfG decision of 5 May 2020, - 2 BvR 859/15 *Weiss* at 167. *See also* paras 168–169.

35 Compare, e.g., the deferential stance towards the monetary authority in Raichle v. Federal Reserve Bank of New York, 34 F.2d 910 (2d Cir. 1929).

36 We have done that elsewhere. *See* Lamandini & Ramos Muñoz, *Hysteron Proteron supra* n. 32; Annunziata, Lamandini & Ramos Muñoz, *Weiss, supra* n. 32.

*Gauweiler I*,[37] where the BVerfG made its first-ever preliminary reference in an admittedly original fashion (as it practically reached the conclusion that the ECB's Outright Monetary Transaction program was *ultra vires* and thus illegal and asked the CJEU to confirm this). Yet, this was followed by the CJEU's *Gauweiler* ruling, where the Court tactfully avoided the thorniest issues,[38] and used a proportionality analysis to show that the ECB's discretion was not absolute. The BVerfG's final ruling, taking into account the CJEU's response (*Gauweiler II*[39]), accepted the CJEU's conclusions, albeit grudgingly. Its interpretation of the monetary mandate still differed from the CJEU's, sowing the seeds for the subsequent clash, but eventually the court was persuaded that the ECB had not 'manifestly' exceeded its competences[40] and that the CJEU's proportionality analysis offered a modicum of judicial review.[41] Thus, considering how the dispute had begun, this was a triumph of dialogue. *Weiss* would, in this respect, be *Gauweiler's* mirror image (or 'evil twin' if one is less politically correct), with a preliminary reference by the BVerfG arguably more deferential than its counterpart in *Gauweiler*, and a final ruling that was definitely less so.

### 2.2 Banking Union and 'Accountability'

The *Weiss* ruling was worrisome for its final *dictum*, tone and approach, but with the benefit of hindsight, it is not that surprising in its substance, once we consider it as a decision in the wake of the *SSM/SRM* ruling of July 2019.[42] Even though *Gauweiler* was *Weiss'* predecessor and provided its background in the field of monetary policy, if we broaden the scope to 'financial constitutional frictions', the *SSM//SRM* ruling was *Weiss'* closest forerunner in time, and also provides relevant insights.

The plaintiffs in the case challenged before the BVerfG the main components of the Banking Union, namely the SSM, and the respective powers of the ECB and national authorities within that System; the SRM, and the respective powers of the SRB and national authorities within it; and the Single Resolution Fund (SRF). The *contents* of the BVerfG's decision already shows the potential for a constitutional crisis. The BVerfG concluded that, in light of the 'constitutional' basis for the SSM

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37 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 14 Jan. 2014, 2 BvR 2728/13 (Ger.), (BVerfG *Gauweiler I*). An English translation of the decision is, http://www.bverfg.de/e/rs20140114_2bvr272813en.html. For a discussion of the case, *see* Marco Lamandini, David Ramos & Javier Solana, *The ECB as a Catalyst for Change in EU Law (Part 1): The ECB's Mandates,* 23(1) Colum. J. Eur. L. 1–54 (2016).

38 Judgment of 16 June 2015, case C-62/14 *Peter Gauweiler v. Deutsche Bundestag*, EU:C:2015:400.

39 Judgment of 21 June 2016, 2 BvR 2728/13 (BVerfG *Gauweiler II*).

40 *Ibid.,* at 183–190.

41 *Ibid.,* at 66–92.

42 BVerfG ruling of 30 July 2019, 2 BvR 1685/14 – 2 BvR 2631/14 (*SSM/SRM*).

(Article 127 (6) TFEU), and SRM (Article 114 TFEU) neither mechanism was *ultra vires* nor unconstitutional *provided that* they were interpreted restrictively.[43] The BVerfG also held that both mechanisms complied with this requirement, because, in its view, they established a division of competences where *only some tasks* were attributed to the ECB, and to the SRB,[44] while *substantial tasks* were left to NCAs, and NRAs.[45] For the SSM in particular, the BVerfG expressly held that NCAs tasks were exercised under *national* law, and not through re-delegation from the EU authorities.[46]

The BVerfG *SSM/SRM* ruling was preceded by the *Landeskreditbank* rulings mentioned in the introduction,[47] where the General Court and the Court of Justice, had reached, albeit in an obiter dictum (but made with quite a strong statement), the opposite conclusion, i.e., that the SSM created a *single* mechanism, where all the competences were *exclusively* vested on the ECB, and NCAs exercised them by re-delegation from the ECB,[48] or 'assisted' the ECB in the performance of those tasks.[49] Yet, there is a clear difference between *SSM/SRM* and *Weiss*. Where *Weiss* was extreme, *SSM/SRM* was restrained, where *Weiss* was based on a (creative) interpretation of constitutional principles, *SSM/SRM* was deeply attached to the text of the Treaty, and where *Weiss* was openly confrontational, *SSM/SRM* ignored the contradiction, holding that the CJEU had not said what it actually had said. All of these differences, however, do not veil the same unfortunate difficulty in inter-court dialogue.

Finally, although the constitutionality analysis of Banking Union mechanisms in *SSM/SRM* is a *conditio sine qua non* for any ulterior considerations, it does not represent the whole, nor, in our view, the most important part of the ruling. Once

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43 BVerfG *SSM/SRM,* at 167–169, 233, 242, 245–246, 258, 265.

44 BVerfG *SSM/SRM,* at 173–176 (SSM), 254–256 (SRM).

45 BVerfG *SSM/SRM,* at 177–184 (SSM), 261 (SRM).

46 BVerfG *SSM/SRM,* at 185 (for the SSM).

47 General Court, Judgment of 16 May 2017, Landeskreditbank Baden-Württemberg *v.* European Central Bank, T-122/15, EU:T:2017:337 (Landeskreditbank General Court); CJEU, Judgment of 8 May 2019, Landeskreditbank Baden-Württemberg *v.* European Central Bank, C-450/17 P, EU: C:2019:372 (Landeskreditbank CJEU).

48 *'The Court notes, firstly, that it is apparent from the examination of the interaction between Art. 4(1) and Art. 6 of the Basic Regulation, as discussed in paras 20 to 28 above, that the logic of the relationship between them consists in allowing the exclusive competences delegated to the ECB to be implemented within a decentralized framework, rather than having a distribution of competences between the ECB and the national authorities in the performance of the tasks referred to in Art. 4(1) of that regulation. Similarly, under Art. 6(4), second subparagraph, of that same regulation the ECB has exclusive competence for determining the "particular circumstances" in which direct supervision of an entity which should fall solely under its supervision might instead be under the supervision of a national authority'. Landeskreditbank* GC, at 54.

49 *'it follows from the wording of Art. 4(1) of Regulation No 1024/2013 that the ECB is exclusively competent to carry out the tasks stated in that provision in relation to all those institutions […] The national competent authorities thus assist the ECB in carrying out the tasks conferred on it by Regulation No 1024/2013, by a decentralized implementation of some of those tasks in relation to less significant credit institutions, within the meaning of the first subparagraph of Art. 6(4) of that regulation'. Landeskreditbank CJEU* at 38, 41.

we conclude that the SSM/SRM are legal, the focus pivots towards how the two mechanisms work, and how their competences are exercised, and controlled. In this sense, the *SSM/SRM* ruling devoted ample space to the mechanism's 'lack of democratic legitimacy',[50] and the BVerfG concluded that the independence of the ECB's Supervisory Board and the SRB resulted in diminished democratic legitimacy and was thus a cause for concern.[51] And although the Court finally concluded that the mechanisms' independence was constitutional, this did not come 'gratis', but only because such diminished legitimacy was 'balanced' or 'compensated' by accountability mechanisms.[52] The ECB would thus be subject to administrative review by the Administrative Board of Review (ABoR), and the SRB subject to quasi-judicial review by the Appeal Panel (AP) for the SRM,[53] and both to the judicial review by the General Court and the CJEU,[54] the European Parliament and Council both as legislators, and as fora were explanations are regularly due,[55] and national parliaments, to which reporting obligations are also due.[56] National parliaments and national courts do have an accountability role for NCAs and NRAs,[57] and the BVerfG indicated that the federal government could also influence EU bodies 'indirectly' through its presence in the Council, and the national parliament could participate in this process if it was duly informed.[58] Arguably, these concerns in the *SSM/SRM* ruling tried to warn EU institutions beyond the Banking Union itself. In its *Weiss* ruling, the BVerfG argued that neither the ECB nor the CJEU had properly weighed the PSPP's side-effects not only on sovereign finances, but also on banks' balance sheets.[59] In *Weiss*, however, the BVerfG did not make the connection more

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50 BVerfG *SSM/SRM,* at 203–230, 267–292.

51 BVerfG *SSM/SRM,* at 209–210. In para. 210 the BVerfG held that: *'the ECB's independence is in clear conflict with the principle of the sovereignty of the people (Art. 20(2) first sentence GG) given that an essential policy area is beyond the reach of the directly and democratically legitimated representatives of the people and its authority to issue orders, and given that the Bundestag's possibilities of influencing the performance of tasks and the exercise of powers in these areas are significantly curtailed*. This cannot be justified by the institutional framework under Art. 88 second sentence GG given that – as repeatedly held by the Federal Constitutional Court– this provision requires a restrictive interpretation of the ECB's monetary policy mandate and may not simply be applied to other areas'. With regard to the SRM, the BVerfG held, in para. 279 that: *'While domestic law initially provided for comprehensive democratic legitimation and oversight of measures relating to bank resolution (see (a) below), the SRM Regulation results in a diminished level of democratic legitimation'*.

52 BVerfG SSM/SRM, at 209, 212, 216, 217, 291, 292.

53 BVerfG SSM/SRM, at 213 (SSM) and 275 (SRM).

54 BVerfG SSM/SRM, at 214 (SSM) and 276 (SRM). In addition, national courts have a role in controlling ECB actions such as on-site inspections and entries on business premises. *See* BVerfG SSM/SRM, at 215 (SSM).

55 BVerfG SSM/SRM, at 216–217 (SSM).

56 BVerfG SSM/SRM, at 218 (SSM), 288 (SRM).

57 BVerfG SSM/SRM, at 224, 229 (SSM) and 281–283, 289 (SRM).

58 BVerfG SSM/SRM, at 272–273 (SRM).

59 According to the BVerfG, the PSPP *'affects balance sheets in the commercial banking sector by transferring large quantities of government bonds, including high-risk ones, to the balance sheets of the Eurosystem, which significantly improves the economic situation of the relevant banks and increases their credit rating. At the same time, it creates an*

explicit, by, e.g., discussing how accountability tools could be used to request the ECB, in its supervisory capacity, to explain what measures were put in place to ensure that increased liquidity did not result in bubbles or an excess of Non-Performing Assets (NPAs). Yet, if we focus on *SSM/SRM*, rather than focusing on *Weiss*, it is just to highlight that Banking Union accountability transcends supervision and resolution, and cements trust in the ECB's ability to make 'proportionate' monetary decisions.

Thus, the BVerfG's analysis in *SSM/SRM* points in the right direction, by suggesting that independence is justified when accompanied by accountability. Yet, its analysis is necessarily theoretical, based on the available tools *ex ante*, rather than on an *ex post* assessment of how those tools are exercised in practice. Some of us have conducted such practical analysis, and concluded that, although there is a reasonably robust framework for accountability, there is room for practical improvements.[60] There are clear positive signs. First, relevant questions are asked sessions of the EP committee (ECON), and MEPs are engaged (political accountability). Second, specialist institutions do not hesitate to point to the lack of transparency, like the European Court of Auditors (ECA) did, or to publicly call for explanations on sub-optimal practices, like the European Ombudsman. Third, EU courts have shown that, despite the complexity of the issues, the norm is not a blanket deferential attitude, but a thorough and robust review, and the same can be said of quasi-judicial bodies, which may also contribute specialization and expediency.[61]

On the negative side, the activity of the ECB and the SRB is characterized by a high level of expertise, but even more by access to very specific, deep, granular information, by careful, methodical planning (often of cyclical nature) and by very strong coordination on a vertical level (between SRB and NRAs) and on a horizontal level (e.g., between ECB, SRB, and between SRB and Commission). These features that characterize the SSM/SRM activity are not matched on the accountability level. By way of summary: (1) the EP responsible committee lacks access to the kind of privileged information that would enable a more meaningful exercise of political accountability, and lacks a clear 'accountability agenda', where each issue is explored in depth, and given continuity. Thus, MEPs' meaningful questions have no

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*incentive for banks to increase lending despite the low level of interest rates'* BVerfG *Weiss,* at 172 (authors' translation).

60 Marco Lamandini & David Ramos Muñoz, *SSM and SRB Accountability at European Level: What Room for Improvements?,* European Parliament Report Economic Governance Support Unit (EGOV) Directorate-General for Internal Policies PE 645.711 – Apr. 2020 (hereafter: Lamandini & Ramos Muñoz *SSM-SRB accountability*); and also *Banking Union's Accountability System in Practice. A Health Check-Up to Europe's Financial Heart*, Working Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701117 (hereafter: Lamandini & Ramos Muñoz *Banking Union Accountability*).

61 Lamandini & Ramos Muñoz, *SSM-SRB Accountability, supra* n. 60, at 34, 20, 23–25; Lamandini & Ramos Muñoz, *Banking Union Accountability, supra* n. 60, at 16, 21–22, 27.

follow-up from one hearing to another. Thus, hearings often resemble a catalogue or wish list of relevant features, which change from one session to another; (2) the ECA only explores 'operational' issues, and the Ombudsman controls are too episodical; (3) judicial review is thorough, but takes too long to be fully effective, while quasi-judicial review bodies have a limited remit (SRB-AP) or their opinions are not public and may even be ignored by the relevant body (ECB-ABoR). Perhaps more importantly, (4) there is not a single (visible) example, in any level of accountability (political, administrative, legal) of the kind of close (vertical or horizontal) coordination that characterizes the supervisory and resolution activity, sometimes for no apparent reason.[62]

In summary, unlike the EMU, which had deep 'constitutional' roots, the Banking Union is more the product of (creative) legal brinkmanship than of a firm Treaty basis. Thus, unlike *Weiss*' intemperate substance and tone, the BVerfG's more restrained and detailed appraisal in its *SSM/SRM* ruling demands pause and reflection. That is not bad news. Given its shakier foundations, the court's assessment is presented in a sort of 'quid pro quo': the constitutionality of the mechanisms will be respected, provided that a sufficient level of accountability is guaranteed. Rather than focusing on the contradiction between the BVerfG's ruling and its counterpart from EU courts (*Landeskreditbank*) or being offended by the seemingly transactional tone, we should be grateful that the trade-off is being made explicit. This means that, as long as an *ex post* assessment of accountability tools shows that they are sufficient to hold supervisory and resolution authorities in check, there is no apparent reason to revisit the *ex ante* constitutional legality of either the SSM or the SRM (with more dramatic consequences). Alas, such a preliminary assessment shows a lot of potential, but also important risks. The point here is that addressing such risks is essential to ensure that the Banking Union, and the integration of EU financial markets it should foster, proceed apace, and constitute the keystone that helps underpin the Single Monetary Policy.

### 2.3 Fiscal coordination and 'austerity'

If *Weiss* is a case that must be read in light of *SSM/SRM* and *Gauweiler, Gauweiler* must be read in light of *Pringle*,[63] where the CJEU examined the legality of the ESM. The CJEU ruled (correctly, in our view) that the ESM did not encroach on the ECB's exclusive competence on monetary policy,[64] nor breached the limits of the

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62 Lamandini & Ramos Muñoz, *SSM-SRB Accountability, supra* n. 60; Lamandini & Ramos Muñoz, *Banking Union Accountability, supra* n. 60.

63 CJEU Judgment of 27 Nov. 2012, Thomas Pringle *v.* Government of Ireland, C-370/12, EU:C:2012:756.

64 *Pringle*, at 46 and ff.

'no bail-out clause' for states.[65] Yet, both findings were used by the BVerfG in its preliminary reference in *Gauweiler* to suggest that the ECB's monetary policy had to be interpreted quite narrowly (only then could the ESM not encroach on it), and that its prohibition of monetary financing had to be read in an extremely strict way (only then could the 'no bail-out' clause for states be read flexibly).

*Pringle*, however, is only the tip of the iceberg of the problems associated to the legal framework on fiscal stability and coordination: the ESM is a stability mechanism established by a Treaty outside EU Law, but reliant on EU institutions (European Commission and ECB) for its functioning[66]; and the ESM is only the backstop mechanism of a whole framework presided by the Fiscal Compact, a non-EU Treaty that relies on both the EU legal framework for implementation (the Six-Pack and Two-Pack Directive and Regulations), EU institutions for application (the EU Commission) and adjudication (the CJEU) and Member States for specific implementation. Furthermore, the implementation of 'rescue programs' are based on Memoranda of Understanding (MoU) which, despite their ambiguous nature, impose conditions upon recipient Member States that have been deemed to 'limit' parliamentary sovereignty and encroach upon fundamental rights. None of these instruments (ESM, Fiscal Compact, MoUs) are apparently subject to the EU's constitutional framework.

Once the side-effects of such a construction inevitably emerged, they were judicialized, and the CJEU was given the role of constitutional firefighter and held that non-Treaty acts, if adopted by an EU institution, can give rise to Treaty-based responsibility, in *Ledra*[67]; and that even MoUs can have legal effects and be therefore subject to judicial review, in *Florescu*.[68] This has not stopped national courts from offering legal rebukes against adjustment programs, like the Portuguese Constitutional Court did between 2010 and 2014.[69]

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65 *Pringle*, at 129 and ff.

66 Article 13 (1) ESM Treaty states that: *'An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks: (a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Art. 18(2); (b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF; (c) to assess the actual or potential financing needs of the ESM Member concerned'. See* B. De Witte, *Using International Law in the Euro Crisis: Causes and Consequences*, ARENA Working Paper, 4/June 2013, in particular at 22 et seq., on the implications of the system, ARENA Working Papers; 2013/04, http://hdl.handle.net/1814/29345.

67 Judgment of the Court (Grand Chamber) 20 Sept. 2016, Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising* EU:C:2016:701.

68 Judgment of the Court (Grand Chamber) of 13 June 2017, case C-258/14 *Florescu*, EU:C:2017:448.

69 *See* e.g., Acórdão no. 353/2012 of 5 July 2012 (declaring unconstitutional the Budget Act 2012 provisions suspending monthly allowances for public workers); or Acórdão no. 187/2013, of 5 Apr. (declaring various suspension of allowances unconstitutional). Other Courts presented a more balanced view, such as the Italian or the Spanish Constitutional Court (Spanish Constitutional Court) (*see* inter alia, its Opinion 49/2015, 5 Mar. 2015).

All these judicial clashes fell in the background of broader political tensions between lenders and borrowers (in Europe), and between parties pro-and-against budget 'cuts' (at a national level).

The collateral damage was to (wrongly) paint the whole framework under the broad brush of 'austerity', a word that has been tainted with suspicion for a long time, and to conclude that the Fiscal consolidation legal framework is, in fact, a limitation of parliamentary powers, as well as a potential threat to the development of the welfare state, as it would entail the need to undertake budgetary cuts to meet the limits.

This view, which, by sheer repetition, has gained traction and become quite popular in some political and even legal circles, is simply wrong.

Austerity is far from being the objective of the fiscal and budgetary coordination rules, which are by and large neutral with regard to the revenue and expenditure structure of Member States. Furthermore, existing expenditure data (Eurostat) does not support the view that only or mainly austerity policies were enacted. Leaving aside the not irrelevant issue of determining what exactly is meant by austerity, social expenditures as a whole (i.e., social protection spending) did increase between 2001 and 2018,[70]. despite the fact that in particular between 2009 and 2010, public revenues plummeted,[71] in particular in some of the countries that were worst hit by the Great Recession (such as, but not only, Italy and Spain). Furthermore, it is often ignored that some budgetary cuts in specific programmes may often be the result of the growing (budgetary) relevance of funding pensions, something that happens for obvious demographic reasons. In fact, in countries such as Spain and Italy, what actually did play a greater role in reducing social expenditure is the increasing allocation of public funds to financing old age pensions, following pension funding systems devised in a time where longevity did not come close to the current data.[72] Because even the discussion of adjusting pension payments comes at a high political cost, the blunt reality is that the most significant item in expenditure on social protection is old age pensions, which amounted to 10.4 % of GDP in 2018. By contrast, expenditure on 'family and children' accounted for 1.7 % of GDP.[73] This is just an example, but it is relevant because public

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70 https://ec.europa.eu/eurostat/statistics-explained/index.php/Government_expenditure_on_social_protection#Evolution_of_.27expenditure_on_social_protection.27.

71 Total revenue from taxes and social contributions, EU-27 and EA-19%, of GDP, 1995–2019. *See*, ht tps://ec.europa.eu/eurostat/statistics-explained/index.php/Tax_revenue_statistics.

72 *See* a full diagnosis at: Giuseppe Carone, Per Eckefeldt, Luigi Giamboni, Veli Laine and Stéphanie Pamies Sumne. 'Pension Reforms in the EU since the Early 2000s: Achievements and Challenges Ahead'. Discussion paper 42, 2016, which points out the existence of a 'political context characterized by ageing voters may hinder reforms, including those touching upon entitlement systems' (at 45).

73 *See* Eurostat (*Ibid*). Table 1: Total general government expenditure on social protection, 2018 (% of GDP) – *Source*: Eurostat.

data also consistently shows that children (aged less than eighteen) have a much higher level of poverty or social exclusion than both working-aged adults and older people.[74]

In fact, the legal fiscal consolidation regime, encapsulated into the European Semester may well be the best shot at preserving and improving the European Welfare State. The main purpose of budgetary constraints is in fact democracy, as they are rooted in time, inconsistency issues and the need to preserve intergenerational equity. Leaving aside the fact that Member States vary vastly in their levels of public spending and revenue, even differing in the actual tax by GDP pressure in harmonized taxes.[75]

As for parliamentary powers, the current budgetary coordination legal framework has at least the potential to reinvigorate, if not outright restore, the actual powers that Parliaments have in the budgetary process. The old (even romantic) view that still regards the budgetary process as one controlled by a parliament (i.e., no taxation without representation) is quite far from the reality of modern parliamentarism.[76] Budgets are lengthy complicated documents mainly controlled by the Executive branch. It is Governments who are the masters of budgets. Parliaments, however, do play a crucial role in making Governments accountable, which is what the actual approval process of the Budget is actually about. From this perspective, the Fiscal consolidation rules have substantially increased parliamentary powers, as there are new powerful instruments which, if adequately used, enable Parliaments to better control the Budgets, not only during the approval phase but, crucially, during the execution phase.

Among many other elements, the need to now specifically discuss the debt and deficit thresholds, as well as the Spending ceiling, the limitation to 'off-budgeting' techniques, by including all public sector entities into the deficit/debt limits, or the establishment of independent fiscal institutions to control and review public spending. These last organisms, which are added to existing Courts of Auditors, were a requirement of the legal framework[77] and, though

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74 'Children were the age group with the highest at risk of poverty or social exclusion rates in twelve out of the twenty-seven EU Member States (including 2018 data for Ireland and Italy)'. *See* Eurostat., https://ec.europa.eu/eurostat/statistics-explained/index.php/Children_at_risk_of_poverty_or_social_exclusion#Key_findings.

75 *See* the contrast of Social Spending at: Eurostat, Government expenditure on social protection, 2018data, https://ec.europa.eu/eurostat/statistics-explained/index.php/Government_expenditure_on_social_protection. *See* the differences in data on average tax burden and implicit tax rates at: Taxation Trends report, 2020, https://op.europa.eu/en/publication-detail/-/publication/c0b00da7-c4b1-11ea-b3a4-01aa75ed71a1/language-en.

76 *See* Almendral, *supra* n. 20; C. Fasone, *Taking Budgetary Powers Away from National Parliaments?: On Parliamentary Prerogatives in the Eurozone Crisis*, https://cadmus.eui.eu/handle/1814/36658.

77 *See* Council Directive 2011/85 on requirements for national budgetary frameworks, the Fiscal Compact and Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area (part of the 'Two Pack').

a novelty in most Member States, have improved and broadened the toolkit for Parliaments to control the Budget.[78]

Finally, it is often forgotten that the Parliaments still hold the 'power of the purse', i.e., the principle of legality (no taxation without representation) still requires that National Parliaments decide on the establishment and substantial modification of taxes, which cannot then be left for Government regulation. Tax revenues (including social contributions) amount to about 90% of total government revenue,[79] and there are no legal constraints for Parliaments to actually employ their powers on the revenue side.

### 2.4 Preliminary conclusions: a 'backwards' and 'forward' reading of constitutional conflict

In the previous sections, we have provided a 'backward' reading of constitutional conflicts, starting with the latest *Weiss* ruling as the most salient example of inter-court dialogue gone awry, and of a ruling by *hysteron proteron* (i.e., taking the proposition to be proven as a premise). Yet, this static picture is not fully satisfactory. If we broaden the scope to include banking supervision and fiscal stability and coordination, and re-arrange the stages chronologically, a different *story* emerges.

In that story, the first step involved fiscal stability and coordination, where a new framework was spawned with notable legal creativity, but in the midst of political confrontation and with a worrying absence of political, administrative or judicial checks-and-balances. The catalyst, or immediate problem in *Pringle* was an alleged circumvention of the Treaties. Yet, despite its importance for subsequent case law, *Pringle* is most relevant for what it did not and could not, decide; i.e., it is as an example of courts' limited ability to offer a comprehensive picture or roadmap for the way forward. The CJEU could provide binary (yes/no) answers to questions over the ESM and the ECB's respective mandates, or the meaning of 'no bail-out'. It could not venture an opinion over whether creating a whole set of institutions *for* the EU but *outside* its rules was a good, or even a sustainable, idea.

In a second stage, Member States soon realized that a fiscal framework and backstop was not enough; i.e., there was a need to sever the link between banks and sovereigns, which is why a EDIS was proposed, which could operate separately from the ESM. Since trust was in short supply, however, this had to be accompanied by

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78 *See* Scope Index of Fiscal Institutions (SIFI). *See also* a measure of the existing interactions between IFIs and National Parliaments at: Laszlo Jankovics & Monika Sherwood, *Independent Fiscal Institutions in the EU Member States: The Early Years*, European Economy Discussion Papers No. 67, European Commission, Brussels, 20 et seq. (2017).

79 Again, *see* Eurostat (*Ibid*). In 2019 tax revenue accounted for 89.2 % of total government revenue. Or 41.1 & of GDP in the EU.

a major reshuffling of the competences on bank supervision and crisis-management, i.e., the Banking Union. This time the catalyst, or immediate problem in the allegedly compatible, but implicitly contradictory rulings of *Landeskreditbank* (by the CJEU) and *SSM/SRM* (by the BVerfG) was not whether the Treaties were being circumvented (as in *Pringle*) but whether their competences (Articles 127 (6) and 114 TFEU) were being stretched beyond recognition. Yet, the deeper problem was the risk that a limited democratic legitimacy for such a transfer, or reorganization, of powers, was not balanced by enhanced mechanisms of accountability.

In a third stage, the ECB, which had already acted as 'firefighter of last resort' in the 2012 crisis that resulted in the establishment of the Banking Union, continued to provide liquidity to the markets to mitigate turbulence and avert deflation. In this stage, the catalyst was this time the openly contradictory rulings by the CJEU and the BVerfG. On this immediate conflict, we are not equidistant. Regardless of its merits from an economic perspective, we believe the PSPP was well within the ECB's Treaty mandate, that the CJEU was right, and the BVerfG was wrong and detached of the facts … And yet, reading the case in the broader chronological context outlined above we concede that, on the deeper problem of checks-and-balances, and inter-institutional relations, some action (and reflection) is needed. What kind of action is something that we explore in the next Section.

## 3 TENTATIVE SOLUTIONS: THE NEED FOR MORE IMAGINATIVE DIALOGUE(S)

The previous Section has shown that inter-court dialogue in the Monetary Union and Banking Union can occasionally, but in very relevant instances, deteriorate, and that is partly due to the lack of a more imaginative practice, something that we discuss first (3.1.). Yet, although courts have (reluctantly) become the most visible decision-making forum, the problem far transcends courts, and encompasses all the institutions and bodies entrusted with the system's accountability, something that we explore next (3.2.) Finally, the links between *parliaments*, in particular, transcend the practice of 'accountability', and constitute the main element of a necessary (re)vindication of democracy at the European (and the national) level (3.3.).

### 3.1 Inter-court dialogue and multi-level legality

The problem of inter-court dialogue has at least two variations. First, the exceptional cases ('hard cases' in Dworkin parlance[80]) like *Weiss*, where constitutional courts are asked to act as a final check to prevent the alleged usurpation of competences by EU

[80] Ronald Dworkin, *Hard Cases,* 88(6) Harv. L. Rev. 1057–1109 (Apr. 1975).

institutions acting *ultra vires*, the alleged hollowing out of (national) constitutional identity by (EU) decision-making, the alleged overriding of core fundamental rights that may have a different content under national constitutions and the Charter.

American federal history reminds one of how far this kind of judicial conflict can go. Although the Supremacy of federal law over states' law is expressly enshrined in the Constitution[81] (rather than judicially construed, as in EU Law), some understood that supremacy worked *provided that* the federal power acted within its constitutional limits. Congress' decision to substantially increase tariffs in 1828 was used by detractors in the South to argue that such limits had been trespassed upon,[82] and that the Federal government had used the competence over tariffs for a different political aim, an accusation not far away from the BVerfG's *Weiss* ruling. The ensuing 'nullification crisis'[83] was solved through political compromise, but the tension did not go away and led to the Civil War and several highly controversial Supreme Court's rulings.[84]

A second variation concerns the opposite situation (typical in the Banking Union) where a European institution is called to apply national laws implementing EU Directives, like the ECB is called to do under Article 4(3) of SSM.[85] In this context, it may happen that the ECB adopts a decision based on a national law that is allegedly unconstitutional, and thus the addressee of the ECB decision decides to challenge it in front of the General Court, as part of its pleas of invalidity.[86] This poses the (still open) question of whether European courts, as part of their legality review under, and interpretation of national laws[87] may also consider constitutionality questions and how,[88] i.e., involving the competent national constitutional court (if the state has a concentrated constitutionality review) or directly reviewing the constitutionality of the applicable national law provisions (if such review is not

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81 Article VI, s. 2 of the US Constitution. It was defended as an existential necessity by Alexander Hamilton and James Madison in Federalist No. 33 and 44.

82 John Calhoun's *South Carolina Exposition and Protest* Dec. 1828 argued that '*if it be conceded (…) that the sovereign powers delegated are divided between the General and State Governments, and that the latter bold their portion by the same tenure as the former, it would seem impossible to deny to the States the right of deciding on the infractions of their powers, and the proper remedy to be applied for their correction*'.

83 This included the South Carolina's Nullification Ordinance of 1832.

84 Dred Scott *v.* Sandford, 60 US (19 How.) 393 (1857); Ableman v. Booth, 62 US (21 How.) 506 (1859).

85 Regulation (UE) No. 1024/2013 of 15 Oct. 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions. *See* Florin Coman-Kund & Fabian Amtenbrink, *On the Scope and Limits of the Application of National Law by the European Central Bank Within the Single Supervisory Mechanism*, 33 Banking & Fin. L. Rev. 133–172 (2018); Andreas Witte, *The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?*, 21 *MJ* 89–109 (2014).

86 Indeed, it has already happened. *See* the pending case T-913/16, Fininvest and Berlusconi *v.* ECB.

87 Miro Prek & Silvère Lefèvre, *The EU Courts as 'National' courts: National Law in the EU Judicial Process*, 54 Common Mkt. L. Rev.369–402 (2017).

88 Vittorio Di Bucci, *Quelques questions concernant le controle jurisdictionnel sur le mécanisme de surveillance unique*, in *Liber Amicorum Antonio Tizzano* 316–331 (Roberto Adam et al., eds, Giappichelli, Torino 2018).

centralized). This second dimension shows the need for a stronger coordination and dialogue between European courts and national courts that is no longer unidirectional, but bi-directional.

In light of these types of problems, one solution is to do nothing, which risks leading to a succession of constitutional crises, and leaving EU Courts to blunder their way into national laws. An opposite solution would be to establish a new appeal jurisdiction within the Court of Justice, a 'Mixed Grand Chamber' with judges from the Court and from the Highest Courts of Member States, with review limited to 'serious breach' cases,[89] which, despite being appealing, would require deep and controversial institutional reform, and would not solve the problem's second variation.

A third solution would be to alter the practice of inter-court dialogue in more imaginative ways, which would, at most, require adjusting the CJEU's Rules of Procedure. If we consider the first variation ('serious constitutional breach'), we must take into account two things. One, the 'plain vanilla' use of the preliminary reference procedure is fine for the vast majority of cases, which means that the threshold for activating the 'plan B' or 'enhanced dialogue' solution should be extremely high, and concern very exceptional, alleged problems of (1) collusion between EU institutions and bodies and the CJEU to favour a creeping expansion of Treaty powers beyond Treaty limits; (2) a CJEU's refusal to annul decisions lacking democratic control (unlikely); (3) a sloppy management by the CJEU of the fundamental rights of common traditions or a misalignment between fundamental rights under national law and the Charter and common constitutional traditions (again, unlikely); and (4) manifest errors by the CJEU in determining the competences conferred by the Treaties to the EU institutions and their exercise in conformity to the general principles. Second, even for those rare cases where there could be such national constitutional control, determining that this is not necessarily the end of the game, because the ruling that the national order has been trespassed upon should still leave the last say to the CJEU, in a subsequent infringement action.[90]

In light of this, a solution seems possible. For variation one, the rules of procedure could give special standing to the referring Constitutional Court, for example, in two new ways: (1) by allowing the court that has made the preliminary reference to be heard in camera by the CJEU at the end of the written and oral procedure; or (2) by requesting the CJEU to communicate in advance to the

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89 Joseph. H.H. Weiler & Daniel Sarmiento, *The EU Judiciary After Weiss – Proposing a New Mixed Chamber of the Court of Justice,* EU Law Live (1 June 2020).

90 *See* e.g., Judgments of 9 Dec. 2003, case C-129/00, *Commission v. Italy*, EU:C:2003:656; 12 Nov. 2009, case C-154/08 *Commission v. Spain*, EU:C:2009:695; or 4 Oct. 2018, case C-416/17 *Commission v. France*, EU:C:2018:811.

referring Constitutional Court its draft decision, asking for comments within a reasonable deadline, comments which the CJEU could consider for amendments to the draft before adoption or could simply disregard.[91] If this seems far-fetched, consider simply the *Taricco* saga, where the Italian Constitutional Court made a preliminary reference, the CJEU answered, the Italian Constitutional Court made a second reference, arguing that the CJEU's first response could lead to a situation unconstitutional under national law, and asking the CJEU to reconsider, and a second response, where the CJEU changed course.[92] This was enhanced dialogue in practice, and it worked very well. Yet, this kind of interaction lacks any formal recognition in the Rules of Procedure, and relying on courts' ingenuity to 'invent' new means of dialogue risks triggering a crisis. For a contrast where more ingenuity could have helped avert the crisis, we just need to see *Weiss supra*.

Unlike the first variation, where the very last say is with the CJEU, in the second variation (EU courts' adjudication on national law's constitutionality), the last say should be with the national Constitutional Courts. The American dual judicial system may also offer some insights. The US Supreme Court is at the apex of the federal system, like the CJEU is at the apex of the European one, but it lacks authority to interpret state law and only exceptionally does so (and is criticized for it).[93] Thus, for variation two, EU courts should have the possibility of making a 'reverse' reference, where they ask a question to the national court. This would not require reforming the Rules of Procedure, although introducing a specific provision would enhance certainty. In the procedure before the national Constitutional Courts, the standing of the European courts as referring courts could be expressly acknowledged and accompanied by procedural privileges, such as the possibility of (1) making its voice heard in camera by the Constitutional Court at the end of the written and oral procedure; or (2) having the draft decision in advance, in a similar fashion as under the European procedure for serious breach. This would consist in asking for comments within a reasonable deadline. The Constitutional Court could consider such comments for amendments to the draft before adoption or could simply disregard them.

The kind of 'enhanced dialogue' procedures that are suggested here would offer several advantages. First, and foremost, it would offer a formal channel of communication to avoid constitutional crises. This would deter national courts from toying with unilateral solutions, like the BVerfG's in *Weiss*. Second, the CJEU would

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91 In the same way that the Rules of Procedure now include the 'expedited preliminary ruling procedure' (Arts 105–106) or the 'urgent preliminary ruling procedure' the RoP could include a special procedure involving serious constitutional breaches.

92 Judgment of 8 Sept. 2015, case C-105/14 *Ivo Taricco*, EU:C:2015:555; Italian Constitutional Court, Order of 23 Nov. 2016 no. 24/2017; Judgment of 5 Dec. 2017, Case C-42/17, M.A.S. and M.B. EU:C:2017:936 (*Taricco II*); Italian Constitutional Court, Judgment of 10 Apr. 2018 no. 115/2018.

93 Bush *v.* Gore, 531 US 98 (2000).

acknowledge that constitutional disputes are different and are hard, and that even the highest court in the (European) land does not have all the answers, and that 'with a little help from my friends' (the national courts) the CJEU can avoid singing out of tune. Third, a certain procedural 'symmetry' between variation one and variation two of the problem would send a strong message to national courts that their constitutional order is duly acknowledged and respected. Fourth, all these positive signs could be given without a cumbersome legislative procedure, or the interference of other institutions; the Court could make the amendments of its own motion. Fifth, and final, the presence of such a procedure should not necessarily be read as an invitation to use it in a 'frivolous' manner, which can be solved through the regular preliminary reference. At the same time, this would encourage constitutional courts to settle the problems openly, rather than letting them fester.

### 3.2 From legality to accountability: reflections on a 'Single Accountability Mechanism' (SAM)

A more open and imaginative inter-court dialogue is a necessary condition to ensure that the monetary, supervisory and resolution architecture is matched by the judicial review architecture. Yet, it is not a sufficient condition, at least not if we consider the full dimension of each problem. The previous section has shown that each conflict (monetary, supervisory/resolution and fiscal) ended up in court. However, the conflicts settled before the courts normally evidenced deeper tensions that should have been addressed in other fora and were not, due to the shortcomings of those fora. Thus, to find the root of the problem, it is important to transition from judicial review to 'accountability', which comprises court-administered legal accountability, but also includes the political and specialist/administrative levels.

From that broader standpoint, in the same way that we think of a 'Single Monetary Policy', a 'Single Supervisory Mechanism' or 'Single Resolution Mechanism' we should reflect on a 'Single Accountability Mechanism' (SAM). This requires transcending accountability 'tools' and thinking in terms of the accountability 'system', i.e., the way the different tools work *together*. All this requires is thinking on the features underpinning the smooth and successful functioning of the relevant policies (monetary, supervisory, resolution) and apply the lessons to the accountability stage. This reasoning by analogy exposes the shortcomings of the accountability system in a crude light, but also suggests ways in which it can be improved.[94]

The ECB and the SRB are characterized by their expertise, and even more crucially, their access to sensitive information, their careful planning, and the

[94] Lamandini & Ramos Muñoz, *Banking Union Accountability, supra* n. 60.

continuity of most of their activities (to ensure the delivery of results) and by a strong coordination both vertically (ECB-NCAs, SRB-NRAs) and horizontally (ECB-SRB, SRB-Commission, and ECB board and supervisory board). None of these features are matched (not even close) at an accountability level.

Accountability fora have access to expertise, but they lack access to information, due to its confidential nature. In this sense, one practical measure would consist in making better use of the Chair and Vice-Chair of the ECON Committee to coordinate information flows, for example allowing access to information by a limited number of MEPs (including, but not necessarily limited to, the Chair and Vice-Chair). This may be politically controversial (it would require differentiated access and a stronger role for the Chair and Vice-Chair) but it is not against the rules, it would respect confidentiality rules, and would benefit the whole committee (and EP) since, with better access to information, the Chair and Vice-Chair (plus other MEPs if it is so agreed) could broaden the scope of the debate and steer it in the right direction.

In addition, the EP dialogue with the institutions and bodies that perform 'specialist' or administrative accountability tasks leaves much to be desired. The ECA, for example, is coordinated by the budget committee, and seems to have no formal communication with ECON, which is the forum for the monetary dialogue and banking dialogue.[95] Thus, on top of the limits of ECA's mandate (which focuses only on 'operational' issues), there is neither a formal channel for ECON to relay its concerns to the ECA (which could include those concerns within the purview of its fact-finding missions), nor is there one for the ECA to discuss with ECON the operational concerns, which could flag concerns in other areas. Even more striking if one thinks about it is the absence of a practice consisting of the EP's formally requesting opinions from the EBA. This despite giving such opinions is part of the EBA mandate and the latter is the EU agency formally entrusted with the monitoring and review ECB and NCAs' supervisory practice and effectiveness through analyses (including peer-review ones), and has access to the kind of sensitive, deep, granular information that the EP would need to make its inquiries more focused.[96]

The under-utilization of communication and cooperation channels that could enhance access to information by political bodies and could give voice to the concerns raised by specialist bodies is compounded by a lack of strategic approach towards accountability.[97] ECA and EBA, for instance, are characterized by careful planning, but they are not accompanied by a similar approach at the political level. MEPs' questions in hearings are often relevant and meaningful, but there is no (or insufficient) continuity from one hearing to another. The discussion moves on

95 *Ibid*.
96 *Ibid*.
97 *Ibid*.

(sometimes driven by public perceptions) without having obtained from the relevant institution or agency any commitment or roadmap to effect changes, or at least a clear reason why it intends not to do so.[98] This is less due to the ECB/SRB than to the lack of a clear agenda on the EP's side. Such shortage of planning and continuity results in a lack of 'deliverability', i.e., something to show for, and grants the ECB/SRB an enormous influence in setting the agenda.

And yet … practice offers examples where the coordinated action by EP and other institutions or bodies result in meaningful, identifiable change.[99] It is a pity that no lessons are drawn, so far, from these isolated examples to adopt this coordinated approach at a higher level, with a clear 'accountability cycle' or agenda.

Finally, the above exemplifies that on top of an absence of planning and continuity, there is also insufficient horizontal coordination in the accountability tasks, to which we must add the insufficient (or at least insufficiently visible) vertical coordination. National concerns reach the EP, as can be seen from the content of some letters to the ECB and the SRB, and from some questions during hearings, but the channels through which this happens are informal, or unclear. And yet again, agencies like the EBA, or institutions like the ECA sit atop a network of national agencies (NCAs) and institutions (national courts of auditors), respectively, with which they must coordinate to ensure that information flows and is properly used. National parliaments and the EP would only need to make room for a formal dialogue with such networks to tap into that well of information and to adapt their agenda to make the best use of such information, e.g., asking for it sufficiently in advance, and working in parallel at the EU and national levels. This, in turn, would nudge parliaments to coordinate their agenda more closely, e.g., through the relevant committees. There is experience with the recalibration of the role of parliaments on seemingly technical issues. Some authors posit that the involvement of national parliaments in coordination with the EP can enhance transparency and foster widespread acceptance of trade agreements, for example.[100]

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98 *Ibid*.

99 Consider, e.g., the ECA's request to the EP to put pressure on the ECB to facilitate access to information (ECA Communication to the European Parliament concerning the European Parliament's request to be kept informed regarding the problem of access to information in relation to the European Central Bank, as laid down in para. 29 of the 2016 discharge procedure (2017/2188) (DEC)), and the resulting Memorandum of Understanding (MoU) between the ECA and the ECB regarding audits on the ECB's supervisory tasks (ECA-ECB MoU) s. I, nos. 3–6; or the coordinated pressure (perhaps not formally, but in practice) by the EP and Ombudsman on speaking engagements and interactions with third parties by ECB board members and high-ranking officials, which resulted in changes in policy (*see* Guiding principles for external communication by members of the Executive Board of the European Central Bank, 6 Oct. 2015).

100 Cristina Fasone & Maria Romaniello, *Chapter 10. A Temporary Recalibration of Executive – Legislative Relations on EU Trade Agreements?,* in *Executive-legislative (Im)balance in the European Union* (Diane Fromage & Anna Herranz-Surallés eds, Oxford: Hart Publishing 2021).

EP and national parliaments do not need to reinvent the wheel. The coordination between the EU-level authorities (ECB and SRB) and national authorities (NCBs, NCAs, and NRAs) is important because it enhances the effectiveness of monetary, supervisory, and resolution policy. Thus, it is only logical that the interplay between parliaments and administrative authorities at the EU and the national level will enhance their legitimacy. It will also enhance the quality of democracy across the board. In fact, given the prominent role that banking and finance now play as a linchpin of the European project, it is odd that it has not been made the subject of interparliamentary cooperation.[101] Ensuring a constant flow of information and exchange would be instrumental to ensure that (1) national concerns over the Banking Union are aggregated at a European level in an open and structured manner (rather than depending on informal and personal connections); (2) these can be used for accountability purposes at the EU level (through the EP); and (3) the responses by the ECB/SRB can then inform the national debate between national parliaments and authorities, to avoid parallel (and misinformed) discourses. It would also allow connection of the banking and finance and the fiscal level, where the meaning of EU rules for parliaments is often misunderstood.

### 3.3 From accountability to democracy, and a (re)vindication of the role of parliaments

The third dimension of the constitutional problem concerns situations arising from agreements beyond the Treaties due to the coexistence of a Monetary Union and a deficient economic and fiscal Union.

Budgets are by and large a product of Governments, not a product of Parliaments. A Government outlines and directs economic policy mainly through the budget. The European Semester has not altered this fundamental logic, but it has increased the actual powers that Parliaments have, as well as providing them with new instruments which, if rightly used, could turn around the until now the somewhat dormant role of Parliaments vis a vis the budget. One limited but recent example of the, yet untapped, the potential of fiscal coordination instrument is the introduction of the 'European Green Deal' in the European Semester.[102] Of course, the COVID-19 crisis has, at least for

[101] Also pointing in this direction, *see* Diane Fromage & Renato Ibrido, *Accountability and democratic oversight in the European Banking Union,* in *The European Banking Union and the Role of Law* 66–86 (Gianni Lo Schiavo ed., Edward: Elgar Publishing 2019).

[102] *See* European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. The European Green Deal* (11 Dec. 2019), COM(2019) 640 final. 'As part of the Green Deal, the

now, relegated the urgency of addressing of climate change and energy transition – which shares the invisibility time-inconsistency element with debt and deficit in public accounts –, so this new tool still needs to sink in.[103] Finally, and among others, it is worth mentioning other existing elements, such as the 'permanent dialog' between national parliaments and EU institutions envisaged in Article 10a) of the Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, or the monitoring of the involvement of the national parliament in the preparation of the medium-term budgetary plans ('Index on the quality of medium-term budgetary framework'). The index shows an improvement of the actual implication of Parliaments in the budgetary process, with most Member States' parliaments now voting on the medium-term plans.[104] There is however room for improvement in terms of the actual involvement of National Parliaments. The analysis of the actual power of Parliaments must also be consistent with what the budget is and how it is developed. What is understood as a 'new restriction' is not new, but an already existing issue that was, until the different enactments of Stability pact rules entered into force, drowned in technicality: the deficit, public debt, and the very sustainability of financing it all. When restrictions to parliamentary debate, as a consequence of the fiscal framework, are denounced, it seems that the previous situation is largely ignored, as is most of what actually makes public finances, which is often also left out. There is an expenditure side, but there is also a revenue side (mainly taxation and social security contributions) which plays a fundamental role in eventually diminishing the debt and deficit, and in which Parliaments' powers remain unchanged. This must also be a part of the debate.

## 4 CONCLUSIONS

Finance has come to be the ground to test the temperature of the European project. The EMU, the Banking Union, and the increasing fiscal backstop and budgetary coordination are remarkable achievements that kept the Union moving forward against formidable odds. Granted, they show flaws in design and content. Yet,

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Commission will refocus the European Semester process of macroeconomic coordination to integrate the United Nations' sustainable development goals, to put sustainability and the well-being of citizens at the centre of economic policy, and the sustainable development goals at the heart of the EU's policymaking and action'. *See* a compilation of the proposed changed of course at: *Greening the European Semester*, https://ec.europa.eu/environment/integration/green_semester/index_en.htm (accessed 20 Oct. 2020).

103 https://www.consilium.europa.eu/en/press/press-releases/2020/07/20/european-semester-2020-country-specific-recommendations-adopted/.

104 [*See* detailed database. Insert table in final doc], https://ec.europa.eu/info/publications/medium-term-budgetary-frameworks-database_en.

according to us, a large part of the problems that have surfaced in the past decade do not require drastic Treaty changes. They are problems of dialogue, where parties failed to make use of the instruments already available. Courts could make a more imaginative use of the procedural instruments; political and administrative bodies could coordinate better to exercise accountability, and parliaments could actually use the new tools and the independent oversight to claim back control over the budget and be a relevant entity in the multi-level dialogue. A focus on such practical details is not as exciting as talking about a looming constitutional crisis. Yet, it is more realistic, and infinitely more useful.