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The False Commodity in the European Game of Legal Chairs: Between the Ideal of Regulatory Competition and the Practice of Capitalism Triumphant

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Abstract: Community law was established as a meta-legal order to provide a systematic solution to conflicts betweeen national legal orders. Integration, and in particular integration *of law*, was required to tackle the functional and normative problems that ensued from the disorganised co-existence of State legal orders in Europe. Integration of law was made compatible with the preservation of autonomy to define the national socio-economic model and structure because early European legislation organised the *co-operation* of national legal orders. The power to regulate and mould the economy was reinforced, at the same time that the sharpest corners of national power were clipped (by reference to the formal principle of non-discrimination). From the late seventies, the point and purpose of European integration was redefined. *L'Europe par le marché* resulted in integration *through* law, making of law the key means through which national regulatory and monetary policies

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were made to compete with each other. The result was the progressive definition of the content of law by the exercise of economic freedoms, a most peculiar process leading to turning law into a false commodity. Since the late 2000s, the role of law in the process of European integration has been increased to the detriment of governance arrangements, but this has only exacerbated the commodification of law and its submission to the imperative of ensuring the store value of money.

KEYWORDS: constitutional law – economic law – regulatory competition – economic freedoms – monetary union – public powers.

I. From the legal regulation of cross-border relations to systematic policy and regulatory competition

Economic and cultural relationships tend not infrequently to cut across the normative boundaries that define the territories to which legal orders apply. The perennial mismatch between the geography of legal orders and that of social relations requires both maintaining and transcending normative borders. On the one hand, the subjective interests of those engaging in cross-border relationships require preventing the disruption that may result from the conflictive concurrence of norms from two or more legal orders. To achieve this, it is necessary either to relativize normative boundaries (through appeals so different in form as to those to comity or to the subjective rights of the parties), or to get rid of them. On the other hand, the effectiveness of legal norms requires preventing the artificial arrangement of relationships in space so as to escape any form of legal discipline, or to pick and choose which legal order governs that relationship. This last concern renders necessary to maintain normative borders, which may or may not include physical borders (transit points where the right – of persons, goods and capitals – to enter into the territory is verified).

There are three main techniques to reconcile the maintenance and the transcendence of borders:

a) The oldest expedient is to establish *conflict rules*, i.e. secondary or meta-rules that determine which norm governs a specific cross-border relationship.[1] Conflict rules were first inserted into *municipal* legal orders as norms that took into account that the underlying relations cut across jurisdictional borders (giving at least some consideration to interests that were not located within the jurisdiction called to decide), but which were still unilateral, i.e. decided on its own by each legal order. Functional and norma-

[1] In continental Europe there is a tendency to equate the discipline of "conflicts of law" with that of "private international law". That implies a far too narrow understanding of the breadth and scope of conflicts of law, which extends not only to conflicts between norms belonging to different legal orders, but also to those part of the same national legal order (typical in federal or quasi-federal States); and not only to conflicts of contract or tort law, but also to administrative, labour or tax law. In this *Article*, I refer to "conflicts of law" and "conflicts" in this wider sense, closer to that prelavent in the United Kingdom and in the United States, and which Christian Joerges has masterly applied to the analysis of European law.

tive reasons favoured moving to *bilateral*, and then, *multilateral* conflict norms, so that the very process of producing the norms would ensure the appropriate weighing in of the interests external to each country. The rise of the nation-state as a political form in the wake of the French Revolution turned conflicts of law into a largely international discipline, as States tended to homogeneise the norms applicable within their territory (thus drastically reducing internal conflicts).[2] That was not the case in the United Kingdom and the United States, which kept an internal legal pluralistic structure.[3]

b) A second technique is that of enacting specific *substantive norms* applicable to cross-border relations. As is the case with conflict rules, substantive norms can be established unilaterally, bilaterally or multilaterally. In all cases, the purpose is to ensure that cross-border relations are legally disciplined in a homogeneous way, i.e. independently of which is the *side of the border* where eventual conflicts or disputes arise;

c) Finally, the relationship between norms can be organised by means of delegating to non-state actors the determination of the applicable norms.[4] The range of choice left to private parties can range from the choice of the specific norm governing one relationship to the capacity to select the legal regime of their socio-economic relationships as a whole (so that they can choose where and according to which law to incorporate a business, where to fill in their tax forms, which social security system to contribute to and so on).

"Policy competition", "regulatory arbitrage" and "regulatory competition"[5] are specific instances of this third set of techniques. In particular, "policy competition" and "regulatory competition" are said to be processes in which the determination of the applicable norms to cross-border relationships results from a multitude of private choices that resemble, both formally and functionally, the way in which "markets" operate. The difference being that private parties choose not competing goods or services, but competing legal norms, so that the myriad of private choices do not determine the price at which the market clears, but coalesce into defining the substantive content of the applicable legal regime.[6]

[2] The rise of the nation-state also affected the very content of the norms of private international law. Nationality emerged as a powerful rival to domicile/residence as the law governing conflicts. See the classic P.S. MANCINI, *Della nazionalità come fondamento del diritto delle genti*, Torino: Giappichelli, 2000.

[3] W. CORNISH, M. LOBBAN, K. SMITH, *Private International Law*, in W. CORNISH, J.S. ANDERSON, R. COCKS, M. LOBBAN, P. POLDEN, K. SMITH, *The Oxford History of the Laws of England: Volume XI: 1820–1914 English Legal System*, Oxford: Oxford University Press, 2010, p. 279.

[4] N. BOBBIO, *Teoria Generale del Diritto*, Torino: Giappichelli, 1993, p. 173 *et seq*.

[5] See among others: J-M. SUN, J. PELKMANS, *Regulatory Competition in the Single Market*, in *Journal of Common Market Studies*, 1995, p. 67 *et seq*.; S. DEAKIN, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, in *European Law Journal*, 2006, p. 440 *et seq*.; A. SAYDÉ, *One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law*, in *Cambridge Yearbook of European Legal Studies*, 2010-11, p. 365 *et seq*.

[6] The characterization of the overlap of legal systems as a market-like competition was first articulated in the pioneering work on what came to be known as fiscal federalism. Cf. C.M. THIEBOUT, *A Pure Theory of Local Expenditures*, in *Journal of Political Economy*, 1956, p. 416 *et seq*.

It is important to notice that the three techniques unleash more or less intense pressures to reconsider the substantive content of *purely internal* norms. While in the short run it is conceivable that the norm applicable to internal and cross-border relations be different, in the mid and in the long runs it is likely that the discrepancy will result in pressure to extend to purely internal solutions the cross-border solution. The combined effect of the principle of equality before the law and, if the cross-border norm is perceived to be more beneficial to its addressees, the political mobilisation of the internal addressees of the norms, might bring about that change.[7] This entails that changes in the discipline of cross-border relationships may play a strategic role in the process of changing the substantive content of the law in general.

II. European Community law as the discipline of cross-border legal relations

Social, economic, cultural and political relations cutting across national borders increased exponentially in 19th century Europe. Instability and potential conflict were kept in check by a mixture of privately organised and politically-mediated means. Thus, privately owned and largely privately governed central banks played a key role in upholding the gold standard, which constituted the basic infrastructure of cross-border economic activity. In their turn, national legislators tended to increase the scope within which private autonomy could configure socio-economic relations.[8] At the very same time, though, systems of international conflict norms were enshrined in national legal orders; they were to be slowly but steadily replaced by treaty-based conflict norms.

This fragile and unstable system was tested and found failing during the First World War.[9] As a result, the interwar period was characterised by systemic instability, which after 1929 would result in the decrease of cross-border interaction, indeed in a rapid renationalisation of social, economic, political and cultural life. In such a context, the lack of political agreement on the government of cross-border relations fostered the emergence of private forms of organisation, such as cartels.[10]

[7] In such a context, "policy competition" and "regulatory competition" transform themselves into systematic phenomena, pitting legal orders against legal orders as a whole.

[8] See the magisterial reconstruction of K. Polanyi, *The Great Transformation*, Boston: Beacon Press, 1944. More recently, A. Milward, S. Berrick Saul, *The Economic Development of Continental Europe 1780-1870*, London: Routledge, 1973; Id., *The Development of the Economies of Continental Europe 1850-1914*. London: Routledge, 1977.

[9] C.S. Maier, *Recasting Burgeois Europe*, Princeton: Princeton University Press, 1975; A. Tooze, *The Deluge*, London: Allan Lane, 2014.

[10] K.R. Mirow, H. Maurer, *Webs of Power: International Cartels and the World Economy*, Boston: Houghton Mifflin, 1994.

It was against this context that Community law could be interpreted and developed as a politically-mediated means of organising cross-border relations with an explicit view to overcoming the instability of “spontaneous” order.[11]

Through a mixture of conflict norms and substantive norms, Community law was expected to create the framework within which the laws of national legal orders could *cooperate*. In particular, Community law would reinforce the capacity of legal systems to govern their environments, by means of supplementing their capacities regarding cross-border environments. In other words, Community law would contribute to enhance the effectiveness of public power in Europe, in particular creating the conditions under which the Democratic and Social State could become an institutional reality and not only a regulatory ideal (section 1). The stability of such a model was, however, dependent on a strong background consensus on the point and purpose of public action. The monetary and economic crises of the 1970s shattered such consensus, and revealed the limits of Community law not only as a means of political integration, but also as the tool with which to govern cross-border socio-economic relations (section 2).

II.1. Community law as the European law of conflict: coordinating public power through law

Community law was established as a meta-legal order intended to provide a systematic solution to the organisation of cross-border relationships in Europe. Integration, and in particular legal integration, was needed to tackle the functional and normative problems that ensued from the disorganised co-existence of State legal orders in Europe, as the Europeans had learned the hard way, through the miserable experiences of the interwar period and of two world wars. The odd mix of cartel arrangements and disorganised concurrence of policies and regulatory systems was indeed associated in the minds of post-war Europeans with their recent dismal experiences.[12] A politically-mediated and intentional *discipline* governing cross-border relations was called for, so as to create the conditions under which legal systems could enter into *mutually supporting cooperative* relationships. Community law was expected to be a decisive contribution in that regard.

The Treaties contained three decisive choices.

Firstly, the fundamental norms enshrined in the Treaty establishing the European Economic Community introduced *formal* limits to the way in which each Member States exercised its public powers. The sharpest corners of national public power were thus clipped, while preserving the capacity of each Member State to shape its social and economic policies in line with the historical tradition and actual needs of each State. This bal-

[11] P. Reuter, *La Communauté européenne du charbon et de l'acier*, Paris: LGDJ, 1953.

[12] D. Gerber, *Law and Competition in Twentieth-Century Europe*, Oxford: Oxford University Press, 2001; W. Wells, *Antitrust and the Formation of the Postwar World*, New York: Columbia University Press, 2002.

ancing act revolved around the principle of non-discrimination and around the granting to all Community nationals of a set of subjective but embedded rights. For one, non discrimination required Member States of the Communities to *provide* Community nationals the treatment that used to be reserved to nationals.[13] This limited the range of policy choices available to States, albeit without committing States to any specific form of disciplining or regulation of private activity. In other words, non-discrimination imposed the widening of the scope of application of certain rights and duties, but not the acknowledgment of any specific set of subjective rights and duties vis-à-vis the Member States.[14] For two, the creation of a common market was mainly concerned with the elimination of customs duties and measures having an equivalent effect to customs duties, and with the (steered) movement of workers across national borders. In other words, it was about goods and persons moving in a regulated fashion.[15] As a consequence, Community law did not only not tweak the national power to shape and define public socio-economic policies, but actually widened the set of actual policy choices among which Member States could choose, as a result of the creation of institutional structures and decision-making processes that allowed European States to support each other's powers.

Secondly, integration was envisaged as a process of *approximation*, not *unification*, of laws. The point and purpose of Community law was not to reduce to unity the law applicable in the territory of the Communities, but rather to organise the co-existence of the multiplicity of national legal orders. Harmony, not identity, was the objective.[16] Consequently, integration was not about ascertaining one-size-fits-all legal solutions to common challenges, but about figuring out legal solutions that allowed reconciling the

[13] Cf. Art. 7 of the EEC Treaty: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

[14] Art. 7, para. 2, ruled out a too daring construction of Art. 7, by referring back to secondary legislation the establishment of rules "designed to prohibit such discrimination".

[15] Both freedom of establishment and free movement of capital were conditioned to political agreement being reached regarding the terms and conditions under which it would be acknowledged.

[16] It would go beyond the scope of this *Article* to consider the terminological shift that took place at some point in the seventies, when reference to approximation was substituted by harmonisation; and to consider how the latter came to be identified in everything but in name with unification. It is important to stress, however, that comparative lawyers tended to draw a clear distinction between unification and harmonisation. See, for example, W.J. Kamba, *Comparative Law: A Theoretical Framework*, in *International and Comparative Law Quarterly*, 1974, p. 501: "Although the idea of a world-wide law exerted a great deal of influence on the development of comparative legal studies and research and on the various movements for the unification which flourished in Europe in the post World War I years, research and experience have demonstrated that it is a 'pious hope' which is neither attainable nor desirable under existing world political and social conditions. It is now readily conceded that unification at the international level is only feasible and desirable in more limited spheres of law such as: commercial law, maritime law, conflicts of laws, and in new areas such as space law, broadcasting law and atomic law. Harmonisation has better prospects because while eliminating or minimising major extant legal obstacles, it allows for a certain amount of variation in matters of detail. It is thus not surprising that since the beginning of this century it has been steadily coming to the fore".

objective of common action with the persistence of different social, political, cultural and economic choices. Substantive supranational law was thus also an example of "embedded" liberalism,[17] not only in politico-economic terms, but also in legal ones. The "federal" nature of Community law was perhaps foremostly reflected in the text of one of the key provisions of the original Treaty establishing the European Economic Community, Art. 100. It read as follows: "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market".

This fundamental choice was not only in line with the principle of enumerated competences (attribution of competences), but also with the very range of legal instruments which could embody supranational legal norms. The sources of Community law included not only abstract and general norms (*regulations*, "binding" in their "entirety and directly applicable in all Member States", ex Art. 189 of the EEC Treaty), but also lighter *directives*, defined as binding exclusively in their objectives, and thus leaving States a wide margin of manoeuvre to define the concrete norms through which to meet the set goals. The Treaties did not only not rule out resort to international treaties and agreements, but in certain regards they fostered their use (including in the critical area of the reciprocal recognition and enforcement of judgments and of double taxation, among others, ex Art. 220 of the EEC Treaty).

Thirdly, the motor of substantive legal integration was to be the *political* decision-making process. Regulations and directives were the result of negotiations leading to unanimous consent in the Council of Ministers.[18] The fundamental decisions determining the shape of European integration (think of the Stresa agreement leading to the establishment of the Common Agricultural Policy)[19] and the key decisions concretising the integration programme (from freedom of movement of workers[20] to the harmonisation of customs duties and of indirect taxation)[21] were the outcome of *politically mediated decisions*. It could still be objected that the Court of Justice played a fundamental role in defining the nature of Community law (in particular, in sustaining the "constitutional in-

[17] K. POLANYI, *The Great Transformation*, cit.; J. RUGGIE, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, in *International Organization*, 1982, p. 79 *et seq*.

[18] The original EEC Treaty foresaw the progressive move to qualified majority voting. But, as is well known, the French govermment adamantly opposed. The "empty chair" crisis ensued. It was only overcome on the basis of the so-called "Luxembourg agreement", which entailed retaining, for all practical purposes, unanimous decision-making.

[19] N.P. LUDLOW, *The Making of the CAP: Towards a Historical Analysis of the EU's First Major Policy*, in *Contemporary European History*, 2005, p. 347 *et seq*.

[20] K.A. DAHLBERG, *The EEC Commission and the Politics of the Free Movement of Labour*, in *Journal of Common Market Studies*, 1968, p. 310 *et seq*.

[21] A.J. MENÉNDEZ, Neumark *Vindicated*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The Eurocrats' Dream*, Cambridge: Cambridge University Press, 2016, p. 78 *et seq*.

terpretation" of Community law actively proposed by the legal services of the European Commission since at the very least the early sixties, if not before).[22] That the Court was far from a secondary player, it is undisputed. But the decisions which are generally regarded as *transformative* were less so in the short run. *Van Gend en Loos*[23] and *Costa*,[24] while laying the ground for future decisive developments, had a rather limited impact, structurally and substantially, in the short run. The decisions were to become decisive because they planted seeds that would sprout later. But for the time being, the *motor* of integration remained the "institutional triangle",[25] with the Commission and the Council of Ministers playing a key role as co-legislators.

From this perspective, Community law could be characterised (and has indeed been characterised by Christian Joerges)[26] as a paradigmatic example of a *federal* (or quasi-federal) conflict of laws system. That is, as a system of norms that produced substantive and conflict norms that prevented conflict between public powers, and that provided coherent normative solutions when such conflicts arose.

It should be added that Community law was rendered possible by a basic substantive convergence of national constitutional orders (around the regulatory ideal of the Democratic and Social State). This was so because, even in the "little Europe" made up of the six founding Member States, unanimous agreement on the path to be followed required a commonality of views on socio-economic visions and on the role that public institutions should play in bringing such visions about. Otherwise, as Fritz Scharpf would suggest in the early eighties, the supranational institutional and decision-making machinery was likely to lead Europe into blockage, into what he referred acutely as a "joint-decision trap".[27] At the very same time that Community law *complemented*, both functionally and normatively, national Democratic and Social States. As a result, Community law operated as a *framework within which not only States exercised public powers jointly*, but within which they could mutually support the effectiveness of their powers as independent States.

[22] E. STEIN, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the* Costa *Case*, in *Michigan Law Journal*, 1965, p. 491 *et seq.*; E. STEIN, *Lawyers, Judges, and the Making of a Transnational Constitution*, in *American Journal of International Law*, 1981, p. 1 *et seq.*; W. MATTLI, A.M. SLAUGHTER, *Revisiting the European Court of Justice*, in *International Organization*, 1998, p. 177 *et seq*.

[23] Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*.

[24] Court of Justice, judgment of 15 July 1964, case 6/64, *Costa*.

[25] E. NOËL, *Les rouages de l'Europe*, Paris: Nathan; Brussels: Labor, 1979.

[26] C. JOERGES, *The Idea of a Three-Dimensional Conflicts Law as Constitutional Form*, RECON Online Working Paper, no. 05, 2010, www.reconproject.eu.

[27] F. SCHARPF, *The Joint-Decision Trap: Lessons from German Federalism and European Integration*, in *Public Administration*, 1988, p. 239 *et seq*.

II.2. The limits of Community law as European law of conflicts: Europe entrapped

Radical change in the background circumstances against which European integration unfolded was brought about by the monetary, economic and fiscal crises of the seventies.[28] In August 1971, the United States abandoned the pledge to convert its currency into gold at a fixed price. This aggravated a looming monetary crisis, plunging Western economies into financial turbulence. In September 1973, the effects of the monetary crisis were amplified by a sharp economic downturn, triggered by a massive increase in the price of oil.[29]

European integration had proceeded far enough as to render necessary a coordinated response to the crises, but not far enough so as to render such response probable, even feasible. As a result, the asymmetric impact of the crises was compounded by the asymmetric effects of the different national policy responses to the crises. In the aftermath of such double divergence, the background consensus on socio-economic visions and on the role of public institutions started to crack. By early 1974, a clear divide was visible among States that assigned preference to the fight against inflation, even at the price of strengthening the forces of deflation (such as Germany or the Netherlands) and States that still regarded full employment as a paramount objective, still to be ensured even if risking an inflationary spiral (such as Italy and the United Kingdom).[30] Moreover, by the time that a certain convergence on the primacy of the fight against inflation emerged (from 1976, and most clearly, from the end of 1978), the European background consensus on the Democratic and Social State was broken, as rendered visible by the election of Margaret Thatcher in 1979 (its effects amplified by the election of Ronald Reagan as US President in 1980).

With the constitutional consensus shattered, the European Communities seemed incapable not only of making a useful contribution to containing and overcoming the crises, but even of maintaining the degree of integration which had been reached so far. It proved simply impossible both to produce new legal norms to govern a rapidly

[28] Although European integration had been effectively launched by the European wide monetary arrangements of the European Payments Union (EPU) in 1950, such arrangements were phased out in 1958. The founding Member States of the Communities, together with other European States, accepted the full convertibility of their currencies under the Bretton Woods monetary arrangements. Such a decision would cast a long shadow over European integration. The role of the dollar as anchor to the system required, both and at the same time, that the United States expanded the offer of dollars in line with the growth of the world economy, and restrained the demand of dollars to ensure the credibility of the promise to convert dollars into gold. By the mid sixties, the soundness of the diagnoses which claimed that the Bretton Woods system was doomed were in the process of being vindicated. On EPU, see B. Eichengreen, *Reconstructing Europe's Trade and Payments: The European Payments Union*, Manchester: Manchester University Press, 1993; R. Salais, *Le viol de l'Europe*, Paris: Presses Universitaires de France, 2013.

[29] P. Armstrong, A. Glyn, J. Harrison, *Capitalism Since 1945*, Oxford: Blackwell, 1991; R. Brenner, *The Economics of Turbulence*, London: Verso, 2006.

[30] P. Armstrong, A. Glyn, J. Harrison, *Capitalism Since 1945*, cit., p. 233 *et seq.*

changing socio-economic reality, and to amend the already existing norms to adapt them to new circumstances. In other words, Community law was stuck between an impossible *status quo* and the sheer improbability of forging new political agreements.[31] In particular, the very features of European decision-making process that had made major contributions to the legitimacy and efficiency of the Communities (very especially, the symmetric inter-governmentalism reinforced by the Luxembourg compromise) started to be openly criticised. This reflected a combination of views: old-time centralising views that always regarded the Gaullist pluralistic turn with suspicion (reflected in the Commission's criticism of the central role of the Council of Ministers) and growingly neo-liberal views that established an association between "dirigiste" policies and European integration. It was from this latter line of criticism that the very term of "Eurosclerosis" emerged.[32] And it would be from that line of criticism that a radical new understanding of the internal market and of the project of creating a European currency would originate, unleashing a radical transformation of the European Communities.

III. From Community to Union: fostering normative competition through European Union law

The crisis which European integration underwent in the seventies fostered new ways of conceiving the government of cross-border relations. Among the upcoming narratives, the ones revolving around the call for a single currency and a single market would underpin the actual transformation of the Communities in the late seventies and early eighties into a European Union (section 1). The government of European integration was deeply affected. New paths of integration were opened by means of organising processes of framed policy competition (regarding monetary and fiscal policy) and regulatory competition (regarding the whole set of socio-economic norms). This resulted in new roles and new tasks for Community law (section 2).

III.1. The narratives of the single market and of the single currency

By the mid-seventies, a new narrative of European integration got hold of European debates: *l'Europe par le marché*, or integration through the creation of a single market and a single currency.[33] This new narrative was based on a two-fold diagnosis of the European malaise.

a) Firstly, Europe was *blocked*, incapable of articulating responses to the several challenges that it had confronted since the late sixties. The monetary crisis confronted

[31] M. Gilbert, *European Integration: A Concise History*, Lanham: Rowman and Littlefield, 2011.

[32] The term was normatively and politically loaded, informed as it was by what we would now characterise as neoliberal views.

[33] G. Grin, *The Battle of the Single European Market*, London: Kegan Paul, 2003; N. Jabko, *L'Europe par le marché,* Paris: Sciences Po, 2009.

Europe with the need of re-establishing an autonomous monetary infrastructure that could support the internal market. Different visions regarding the role of monetary policy, the relationship between fiscal and monetary policy, and last but not least, the actual instruments through which a common monetary and fiscal policy could be established, rendered consensus simply impossible. By the same token, the 1973 economic crisis impacted European States in a deeply asymmetric manner. Under such conditions, the Communities were incapable of articulating a common response, something that amplified divergences as States opted for following different, and far from compatible, national policies. The most obvious signal of the seriousness of the challenges ahead was the fact that intra-Community trade, which had been constantly growing since the late fifties, stalled and then declined.

b) Secondly, the cause of the incapacity of the Communities to react was to be found in the *overpoliticisation* of the European decision-making processes. The requirement of unanimous decision-making in the Council led to paralysis. The full potential of economic integration required decoupling its unfolding from supranational political decision-making.

To overcome the blockage of the European Communities, it was claimed that it was necessary to establish both a single currency and a single market.[34] A major cause of the appeal of this new narrative is to be found in the peculiar way in which it combined reference to continuity and to radical transformation. On the one hand, the advocates of the creation of a single currency and of a single market claimed that to transcend the trap into which the European Communities were stuck, what was needed was *merely* the full realisation of the original programme of integration. In other words, Eurosclerosis could be cured by finding the courage to realise the original ambitions of the founders. On the other hand, what was presented as the "completion" of the original programme of integration required a radical break with the original design of the Communities. So far, European integration had been premised on the necessary synchronisation of economic and political integration. In other words, economic integration and political integration were expected to go hand in glove, both for prudential and for normative reasons. However, that synchronisation was the root cause of over politicisation. What was needed was to decouple economic from political integration, turning economic integration into the *motor* of integration. Or what is the same, subordinating political to economic integration. This implied accepting the risk that economic integration could proceed *in the absence* of a parallel process of political integration; or to put it differently, of economic integration advancing even in the presence of clear political re-

[34] Commission, *Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28-29 June 1985)*, COM(85) 310 final; Commission, *One Market, One Money: An Evaluation of the Potential Benefits and Costs of Forming an Economic and Monetary Union*, in *European Economy*, 1990, p. 1 *et seq.*

sistance. In brief, the language of the single market and single currency was conservative, but the means to achieve them could not be but revolutionary.

III.2. From Community law to Union law through policy and regulatory competition

The goals of establishing a single currency and a single market led to a radical transformation of the European Communities and of Community law. The single market *entailed* a radical shift in the role of supranational law in the process of integration, from the form of politically mediated set of norms complementing national Democratic and Social States to steering device of policy and regulatory competition between national legal orders (a). In its turn, the single currency foreclosed the political space within which it would have been possible to articulate alternative policies at either the national or the supranational level (b).

a) From common to single market.

The establishment of the single market resulted in a major transformation of the government of the European Union. Instead of a politically mediated definition of the internal market, the contours of the single market were to be defined through a *framed regulatory competition* propelled by the holders of economic freedoms as constructed by the Court of Justice in one decisive ruling after the other.

Three were the key legal steps in the fashioning of this transformation.

Firstly came the redefinition of free movement of goods as a legal category in the late seventies and early eighties. As pointed, in the original, "Treaty" understanding of free movement of goods, the point and purpose of that freedom was to eliminate tariff barriers and measures having an equivalent effect. National norms discriminating goods produced in other Member States, and only norms discriminating goods produced in other Member States, were to be found in breach of Community law. From the ruling in *Cassis de Dijon*, the standard of review was a much wider one.[35] Any national norm, even if not discriminatory, was to be declared invalid if it placed obstacles to the free movement of goods. This entailed that any national norm, independently of its consistence and purpose, could be declared to be in breach of supranational law if it restricted in one way or the other the unimpeded movement of goods. As a result, free movement of goods would stop being the modest operationalisation of the principle of non-discrimination, and would become an ambitious *substantive standard*, the actual content of which would be determined by the Court itself.

Secondly, the distinction between on the one hand free movement of goods and on the other hand the other economic freedoms, enshrined in the structure and literal

[35] Court of Justice, judgment of 20 February 1980, case 120/78 *Rewe v Bundesmonopolverwaltung für Branntwein*.

tenor of the Treaties, was muddled in the rulings in *Luisi and Carbone*[36] and in *Cowan*.[37] Luxembourg judges extended Community rights to the *recipients* of services. This turned *anybody* engaging in cross-border activities into a potential holder of European rights (if only because it is extremely hard in capitalist societies to move around without becoming the passive recipient of services).[38] This widened (and reconfigured) the European personal status (prefiguring the mould that European citizenship would have). Decisively, the two decisions, and very especially *Luisi and Carbone*, pointed to the indivisibility of the different economic freedoms. Even if capital movements had not been liberalised, and States retained the power to set limits to them, the right to move in order to receive services entitled Europeans not only to physical exit, but also to carry with them their capital when leaving their country. The decision was underpinned by the implicit assumption that economic freedoms were indivisible.

Thirdly, in the nineties and early 2000s the CJEU drew the conclusions that stemmed from the new understanding of free movement of goods and from the assumption that economic freedoms were indivisible, namely it generalised the *new* conception of economic freedom established in *Cassis de Dijon* to all other economic freedoms (i.e. freedom of establishment, freedom to provide services, free movement of capital and, last but not least, free movement of workers).[39] The Single European Act, and even more so, the Maastricht Treaty, seem to have been regarded by the Court as a clear political signal backing such a move, which required trumping the literal and systematic interpretation of European primary law with a teleological interpretation of the Treaties not dissimilar to that underpinning the "foundational" rulings of the Court in *Van Gend* and *Costa* (the implications of which were now radically transformed, given the new substantive autonomy of Community law).

This double jurisprudential shift opened the path to the radical transformation of the relationship between law and politics in European integration.

Firstly, *Cassis de Dijon* created the conditions under which the *political motoring* of legal integration could be replaced by the *private initiative* of the holders of Community rights as economic freedoms. In particular, the Commission drew from the *Cassis de Dijon* ruling the conclusion that integration could proceed not only through political decision-making and mediation, but also through what it labelled as "mutual" recogni-

[36] Court of Justice, judgment of 31 January 1984, joined cases 286/82 and 26/83, *Luisi and Carbone*.

[37] Court of Justice, judgment of 2 February 1989, case C-186/87, *Cowan*.

[38] A.J. Menéndez, E.D.H. Olsen, *Misunderstanding European Citizenship*, Basingtoke: Palgrave, 2019 (forthcoming).

[39] Court of Justice: judgment of 25 July 1991, case C-76/90, *Säger*; judgment of 30 November 1995, case C-55/94 *Gebhard*; judgment of 15 December 1995, case C-415/93 *Bosman* and after the entry into force of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, judgment of 14 December 1995, case C-163/94, *Sanz de Lera*.

tion.[40] Despite the normative labelling, what was understood by mutual recognition was the combination of the immediate acceptance of all regulatory choices made by Member States by all other Member States, and the transformation of private litigants (not infrequently, multinational companies) in the agents that would decide, through litigation, which regulatory choice would prevail in the Community as a whole. Moreover, once private parties had been recognised as holders of the "new" economic freedoms, they may not need to go to court, but merely *threaten to do* so, in order to render effective their rights. In other words, instead of politically mediated *positive common norms*, integration could now proceed by the case by case removal of national laws in breach of the *new* economic freedoms.

To illustrate the point. The static implication of *Cassis de Dijon* was that German authorities were required to recognise French regulatory standards. But once German authorities had to accept the selling of foreign cassis with a lower alcoholic content than that required by its own legislation, pressure was likely to come from national beverage producers to allow the manufacturing of German cassis which also had a lower alcoholic content. As a result, Germany would be most likely forced to change its own legislation to prevent German producers relocating to France so as to be able to produce a cassis that remained price-competitive with the French cassis. Thus, the dynamic implication of mutual recognition was to unleash a process of change of national regulatory standards led by the holders of economic freedoms.

While *Cassis de Dijon* was circumscribed to free movement of goods, the Commission soon argued in favour of extending mutual recognition to the provision of services (and indirectly, to the free movement of capital). Revealing is the way in which the crucial White Paper on the single market does so, while at the same time making for the first time use of the concept of "regulatory competition". It is worth quoting at length:

> "Goods and people moving within the Community should not find obstacles inside the different Member States as opposed to meeting them at the border. This does not mean that there should be the same rules everywhere, but that goods as well as citizens and companies should be able to move freely within the Community. Subject to certain important constraints […], the general principle should be approved that, if a product is lawfully manufactured and marked in one Member State, there is no reason why it should not be sold freely throughout the Community. Indeed, the objectives of national legislation, such as the protection of human health and life and of the environment, are more often than not identical. It follows that the rules and controls developed to achieve those objectives, although they may take different forms, essentially come down to the same thing, and so should normally be accorded recognition in all Member States, not forgetting the possibilities of cooperation between national authorities. *What is true for goods, is also true for services and for people.* If a Community citizens or a company

[40] Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ("Cassis de Dijon").

meets the requirements for its activity in one member State, there should be no valid reason why those citizens or companies should not exercise their economic activities also in other parts of the Community."[41]

In brief, the re-characterisation of economic freedoms as self-standing rights implied that the move from the common market to the single market set in motion a process in which Community law served as an "irritant" of national policies and regulations. This was found necessary to ensure that integration followed its proper dynamics and course.[42]

Secondly, the jurisprudential shift created new functional reasons why the move towards qualified majority voting could be regarded as an urgent priority. Indeed, the Single European Act (re)introduced qualified majority voting in the Council.[43] Despite the rather tortuous literal tenor of the amended drafting of the Single European Act, successive rounds of Treaty amendment resulted not only in the widening of the policies regarding which decisions could be taken by qualified majority voting, but also the granting in such cases of "co-decision" powers to the European Parliament (expected to vote in most cases by simple majority).

However, it should be emphasised that it was not intended in the Single European Act, or for that matter at any later stage, that qualified majority voting would become the standard decision-making rule in supranational decision-making. There was, and there remains, a set of policies regarding which unanimity in the Council is still required. This entails that alongside qualified majority voting came (implicit) rules dividing law-making labour between different decision-making processes. In very broad terms, the "new" process (qualified majority) were to be applicable when taking decisions concerning the realisation of the "single market" programme (market-making policies). On the other hand, unanimity in the Council was and is still required when "positive" measures rectifying the pattern of distribution of economic burdens and benefits resulting from the operation of markets (market-correcting policies). This division of labour resulted in the artificial splitting of issues alongside the division of labour between decision-making procedures. As a result, the move to qualified majority voting facilitated the adoption of measures reinforcing the new understanding of economic freedoms favoured by the

[41] Commission, *Completing the Internal Market*, cit., paras 57-58 (emphasis added).

[42] Whether such dynamics would end being a race to the bottom or a race to the top is highly relevant in substantive terms, but what is clear is that "mutual recognition" was not a recipe for normative stability. It was, in the best of cases, a pathway that led to the creative destruction of national legal systems.

[43] The move to qualified majority voting, as has been highlighted among others by Weiler, results in a key, if not the key, piece of the belt transmitting indirect national democratic legitimacy into supranational law being removed. The "loss" in indirect democratic legitimacy was said to be more than compensated by the emergence of the European Parliament as co-decider. Still, the move to qualified majority deeply transformed the relationship between European law and Member States, which could not be imposed supranational laws that they had rejected. J. WEILER, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, p. 68 *et seq*. and p. 232.

Court of Justice, while *de facto* hampering legislation aiming at reregulating economic activity at the supranational level. Successive enlargements would only amplify this bias.[44] Moreover, the artificial splitting of issues ended up being projected to the way in which socio-economic questions were regarded, emphasising for example the two-pronged understanding of the relationship between the "economic" and the "social" sides of the socio-economic structure, a dichotomy that would percolate also to the national level (preparing the ground for the distinction between fiscal and monetary policy that would be in built into the Economic and Monetary Union, EMU).

b) From common to single currency: framed policy competition.

If the single market was introduced through a *framed regulatory competition* propelled by the holders of economic freedoms as constructed by the Court of Justice from *Cassis de Dijon* onwards, the road towards the single currency was paved by a peculiar form of *policy competition* in which *financial markets* were (further) empowered to determine the policy alternatives available to national governments when implementing monetary and fiscal policy.

The single currency was created in two steps. Firstly, the European Monetary System (EMS) was agreed in late 1978, and introduced in early 1979. Secondly, EMU was agreed in 1992 and implemented in 1998. While most attention is usually given to the second step, the fact of the matter is that, with the benefit of hindsight, the decisions that shaped the course that the European Union would follow were already taken in 1978.

As already pointed, the Bretton Woods monetary system entered the last stages of its final crisis in August 1971. It was then that the US President put an end to the role of the US as anchor of the system by discontinuing the convertibility of dollars into gold at a fixed rate. As a result, the European internal market was left without a monetary infrastructure. Both the trade of goods and common agricultural policy were affected, as both depended on a modicum of monetary stability.[45] The consequence of the demise of Bretton Woods vindicated those Cassandras that had been urging supranational and national institutions to establish an autonomous European monetary infrastructure.[46] Monetary and financial turbulence ensued. In their midst, several attempts were made to coordinate the national monetary policies of the Member States of the Communities. Until 1978, all such efforts failed. In the process, the growing influence exerted by key actors in financial markets shifted the balance of power among States and among social

[44] The higher the number of Member States, and the more diverse the socio-economic structures of the Member States, the more difficult it has become to take unanimous decisions.

[45] An argument that was to be repeated once and again. See P. Werner, *Report to the Council and the Commission on the realisation by stages of Economic and Monetary Union in the Community – "Werner Report"*, 8 October 1970, ec.europa.eu, p. 7; see also J.C. Ingram, *The Case for European Monetary Integration*, Princeton: Princeton University Press, April 1973.

[46] R. Triffin, *Europe and the Money Muddle*, Oxford: Oxford University Press, 1957. A *post mortem* in R. Triffin, *"Europe and the Money Muddle" Revisited*, in *PSL Quarterly Review*, 1978, p. 49 *et seq*.

classes in each State. In particular, policies favouring price stability, even at the cost of sacrificing full employment and (some of) the social achievements of the Democratic and Social State, were favoured by the markets. By the same token, States that persevered in making use of their powers to prop employment and to shelter workers from the worst outcomes of the crises experienced serious difficulties to stabilise the value of their currencies.[47] Slowly but steadily, a consensus of sorts emerged among European governments assigning primacy to the fight against inflation in pursuit of price stability.[48] In the autumn of 1978, political events would favour that such consensus would render possible the establishment of the EMS.

In formal terms, the EMS was a rather modest agreement, with a similar objective to that of other failed attempts at establishing a European monetary infrastructure: the fixation of thresholds (parity pegs) within which European currencies would fluctuate, thus preventing too wide oscillations. Formally speaking, the EMS seemed to engage all States, both those with strong and weak currencies, to ensure that all currencies moved around their rate targets. Thus, a currency made up of all national currencies, the ECU (European Currency Unit), was introduced, with a view to rendering visible the extent to which each currency diverged from its central parity, and thus, how big the effort to be made by each State should be.

In substantive terms, however, joining the EMS, and above all, staying within the EMS, required accepting that price stability was a necessary condition for *any* sound economic policy. Objectives other than price stability could be pursued, but only *once* price stability had been achieved. This implied reversing the wide post-war consensus around the primacy of fiscal over monetary policy.

This was so due to two structural implications of the EMS.

Firstly, and despite formal proclamations to the contrary, the efforts to keep the relative parities of currencies were not only unevenly distributed (with countries with weak currencies bearing the brunt of the effort),[49] but also that the EMS "froze" the perception

[47] A. GLYN, *Unleashing Capitalism*, Oxford: Oxford University Press, 2006.

[48] E. MOURLON-DRUOL, *A Europe Made of Money: The Emergence of the European Monetary System*, Ithaca: Cornell University Press, 2012.

[49] The agreement leading to the ESM was premised on the assumption that EMS States would pool their currency reserves to a considerable extent. However, there were from start good reasons to doubt the Bundesbank feel obliged by any political agreement to that effect. In 1992, as the crisis of the EMS unfolded, it would become clear that the German central bank did not feel compelled to make use of its reserves to contribute to keeping the parity of other currencies if doing so endangered the German national interest. It would later come to be known that the Bundesbank had only accepted ESM under the condition of indeed not being obliged to intervene. The so-called Emminger letter (where this condition was specified) remained secret, because as Federal Chancellor Helmut Schmidt put it to the Council of the Bundesbank in autumn of 1978: "Let us imagine that this appeared in a French or Italian newspaper tomorrow. The editorials would criticise their own governments for believing such a shallow promise from the Germans. A [German] government promises to intervene to uphold certain rules of the game but then writes in an internal paper that it intends to act differently at times of emergency". D. MARSH, *The*

of currencies as weak and strong. As a result, the EMS *entrenched* the difference in structural power in favour of countries with strong currencies.[50] Moreover, the net result was a major reinforcement of the power of the Bundesbank. As the Deutsche Mark became the anchor currency of the EMS, the Bundesbank became the key actor in the shaping of monetary policy in the whole of Europe.[51] Thus, not only national fiscal policy was subordinated to monetary policy, but all national monetary policies were subordinated to the only central bank whose independence was legally – though not constitutionally – enshrined, and which had recently proven to what extent it had the means to define the overall shape of policy (monetary *and* fiscal) even against a reluctant government.

Secondly, States were *de facto* required to renounce the powers which allowed them to establish the terms according to which they became indebted, outstandingly the power to require the central bank to act as lender of last resort of the State, and the

Euro. The Battle for the New Global Currency, New Haven: Yale University Press, 2009, p. 91. Schmidt went on to reassure the Bundesbank of the tradition of not keeping commitments on the monetary side: "In spring 1973, we contravened ruling international constitutional law, the [International Monetary Fund] IMF agreement, in several ways. We adhered neither to the overall rules of the game, the procedural rules, nor to the material legal regulations. We freed the Bundesbank from the obligation to intervene against the dollar, solely with the motive of gaining manoeuvring room within our county for a stable policy, one that was geared to stability. In accord with the Bundesbank leadership and with the finance minister, the then German government, the then Chancellor approved this. We did not notify previously, when the Federal Republic became a member of the IMF that we would apply *clausula rebus sic stantibus*. We did not even write it down. We did it when it was the only way out".

[50] When the EMS was agreed, there were still plans to ensure a coherent development of monetary and fiscal policy, including a supranational fiscal capacity, intended as the means to undertake a supranational stabilisation policy. However as some actors pointed (and perhaps suspected) that was never to be realised. This makes especially prescient the very critical assessment made by then Governor of the Bank of Italy, Paolo Baffi, before the Senate Commission on October 26, 1978: "I also believe Italian participation in the EMS will prove valuable, provided it is possible to realise the three conditions announced in Parliament by Mr Pandolfi and repeated here: [1] that the System shall be immediately operational in the three aspects originally foreseen with regard to the exchange rate agreements, the credit facilities, and the measures in support of the less prosperous economies; [2] that each of these aspects shall be acceptable (so that, for example, an unsatisfactory exchange agreement cannot be offset by more extensive credit facilities); and [3] finally, that the system shall be sufficiently flexible to allow Italy to come back into line with the stronger countries, without upheavals, as regards economic conditions and especially inflation. The basic reason why each of these conditions must be realised separately, with no scope for offsets, lies in the enormous difference in the situation of a county which maintains an unrealistic exchange rate or undermines its development potential with a series of exchange-rate crises, and which receives aid from its partners, or some of them, to 'compensate' for this loss of competitiveness and potential, and that of a country which, partly because of a suitable exchange-rate policy, stays afloat and advances under its own steam" (P. BAFFI, *The European Monetary System and Italian Participation*, in P. CIOCCA (ed.), *Money and the Economy*, Basingstoke: Palgrave, 1987, p. 275).

[51] D. MARSH, *Bundesbank: The Bank that Rules Europe*, London: Mandarin, 1993; J. LEAMAN, *The Bundesbank Myth*, Basingstoke: Palgrave, 2001, p. 220 *et seq.*

power to impose forced loans to the State on banks.[52] While (contrary to what would be the case in EMU) there was no formal clause forbidding such practices, financial markets were very likely to exert downward pressure on the currency of any State applying such policies. Very especially given that the countries with "strong currencies" (Germany and the Netherlands) had made a policy out of not making use of that possibilities. Public debt was thus symbolically and legally downgraded. This resulted in a new understanding and a new approach to the issue of public debt.

By the end of 1978, EMS had been agreed, just in time for the first direct elections to the European Parliament. The EMS provided (relative) stability, only at the price of becoming the vehicle of a peculiar form of monetary hegemony. Disinflation, which was a priority for different policy reasons, became now an objective to be pursued through the means dictated by the Bundesbank.[53] Keeping the parity of the currency required mimicking not only German monetary policy (something that implied renouncing the use of the central bank as lender of last resort, or imposing compulsory loans on private banks) but also converging with German social policy (which implied abandoning a policy focused on internal demand, and finding the way of turning external demand the exclusive engine of economic growth). The former was indeed implemented quite quickly, among other things because its implications were not properly understood by political actors (and keep on not being understood, failing to establish a relationship between the growth of public debt and the renunciation of the role of the central bank as lender of last resort). The latter were much harder to implement, and resulted in half-way measures. Wages were deindexed in some States, but the transformation of the socio-economic model proved, as could not be otherwise, an impossible mission to achieve.[54]

As a result, the EMS became a powerful constraint on all national monetary and fiscal policies. All national monetary policies were largely constrained by German monetary policy, which in its turn was anchored, thanks to the reinforced "independence" of the Bundesbank into a conception of "sound money" that ruled out the use of monetary policy for any purpose but the keeping of the value of money as a stock of value, i.e. the value of money. In such a way, the "neutral" conception of money characteristic of the old days of the gold standard made a comeback. And with it the fetters (even if now not golden) not only on stabilisation policy, but on economic and social policy as a whole. EMS was premised on the "divorce" of monetary and fiscal policy.[55] A different set of

[52] For the paradigmatic Italian case, this entailed a neat separation between central bank and Treasury (the so-called "divorce"). A critical analysis in A. Graziani, *Lo sviluppo dell'economia italiana,* Torino: Bollati Boringhieri, 1998, p. 141 *et seq*.

[53] J. Leaman, *The Bundesbank Myth*, cit., p. 181 *et seq.*

[54] As it is to this day, see F. Scharpf, *Forced Structural Convergence in the Eurozone – Or a Differentiated European Monetary Community*, MPIfG Discussion Paper 16/15, www.mpi-fg-koeln.mpg.de.

[55] Something regarded at the time as a necessary means to either curb high inflation (ERM) or to ensure a sustained low level of inflation (EMU).

institutions, procedures and substantive norms should apply to the making and implementation of on the one hand monetary policy and on the other hand economic and fiscal policy.[56] Monetary policy was to be steered by national central banks enjoying a reinforced autonomy from political institutions (in the Exchange Rate Mechanism, ERM), or by a fully independent central bank (in the EMU). Fiscal policy was to remain in the hands of national political authorities, but subject to major constrains. States renounced using the levers through which they controlled the terms according to which they issued debt. In particular, central banks were expected to stop acting as lenders of last resort of States, while States were expected not to (and later in EMU formally forbidden to) impose on financial institutions coerced loans.[57]

As a result, monetary coordination reduced the scope of fiscal and socio-economic policy choices that national governments could actually make. Moving from a common to a (quasi) single currency created a powerful *constraint* that reinforced the bias in favour of a maximalistic interpretation of economic freedoms, resulting, as we already saw, from the division of labour between supranational decision-making processes.

As we saw in the previous section, the EMS led to a framed form of policy competition on what concerned both fiscal and monetary policy. Still, policy competition had several limits. Not only the collective of governments might decide to intervene to realign exchange rates at any moment, but States retained in full their formal powers over fiscal and monetary policy, which they could turn into something rather material by leaving the EMS. These two limits to policy competition were closely related. The tacit decision not to realign currencies from 1987 resulted in the building of tensions that would eventually result in not only Italy and the United Kingdom leaving the EMS in September 1992, but in the virtual abandonment of the arrangement.[58]

With the benefit of hindsight, EMU codified and entrenched the fundamental choices implicit in the design of the EMS, and at the same time rendered such choices much harder to revert.

This had ambivalent consequences when it came to policy competition.

[56] In the case of EMU this was explicitly codified into the Treaties. In the case of ERM, it was the result of how the system of "managed currencies" was operated, very especially since the second half of the eighties, in which the combination of *de facto* German monetary hegemony and lack of adjustment to exchange rates created the conditions under which all States were forced to follow German monetary policy and renounce to stabilise the economy through monetary policy. The failure to do that (which was a reasonable failure given the political, social and economic implications of "succeeding") accounts for the *de facto* collapse of ERM in 1992.

[57] Under EMU, Eurozone States were also prohibited from extending loans to each other and/or to assume financial responsibilities of other Member States. The "no-bailout pact" was the reverse image of the explicit reference to the mutual provision of financial assistance in case of acute balance of payments imbalances in the original Treaties.

[58] D. Marsh, *Bundesbank*, cit.

On the one hand, federal unified rule replaced doctored[59] policy competition as the governing mechanism of monetary policy. The System of European Central Banks, with the European Central Bank (ECB) at its apex, was empowered to define and implement the monetary policy of the Eurozone, i.e. of the States that would join Economic and Monetary Union. The defining features of the ECB and the mandate that it was given in the Treaties revealed, however, the clear continuities between EMS and EMU. The preservation of the store value of capital was no longer to be the product of the pressure exerted by financial markets over central banks to follow the policy of the Bundesbank, but was to be guaranteed by the establishment of a Eurozone independent central bank, formally (and only formally)[60] moulded in the semblance of the Bundesbank, which was mandated first and foremost to maintain price stability.

On the other hand, policy competition was reinforced on what regarded fiscal policy. Formally speaking, States retained full control over their fiscal policy.[61] Moreover, the functional coherence of the single monetary policy and the plurality of fiscal policies was to be fostered through *informal political coordination arrangements*, what would come to be known as *fiscal governance*. "Guidelines", "benchmarks" and "targets" ("soft law", not law proper) were to be worked out through "deliberation", "peer review" and the development of "best practices". However, it was also the case that all capital movements within the European Union had been liberalised *in the name of preparing for Monetary Union*, but that an integral part of the design of EMU was the extension of such freedom to *third countries*.[62] This created the conditions under which financial markets could exert considerable pressure over the Member States of the European Union, and particularly, of the Eurozone, when it came to the design of their fiscal policies. Markets would exert that pressure not through the pricing of the national currencies (by definition transcended by EMU) but through the assignment of value to the sovereign debt of the different States (in concrete, by "demanding" differentiated interests rates for lending to each Member State). The role of markets was amplified by the codification of rules that forced States to depend for their financing on capital markets. The monetisation of public debt through central banks was forbidden.[63] As were the mutualisation of debts[64] and forced loans.[65] Moreover, it was also decided that no mechanism of financial assistance among States would be created. This implied re-

[59] Doctored because there were massive structural forces at play which forced all national central banks to follow the cue of the Bundesbank.

[60] C. JOERGES, *The Overburdening of Law by Ordoliberalism and the Integration Project*, in J. HEIN, C. JOERGES (eds), *Ordoliberalism, Law and The Rule of Economics*, Oxford: Hart, 2018, p. 179 *et seq.*

[61] *A contrario*, Art. 98 of the EC Treaty.

[62] Art. 56.

[63] Art. 101.

[64] Art. 103.

[65] Art. 102.

nouncing to adapt the facility that already existed (and which had been made use of several times) for tackling balance of payments crises.

Moreover, as was the case with the EMS, policy competition was framed. The Treaties contained the key elements of such a frame. In particular, *fiscal rules* were written into the Treaties that established the "limits" to national discretion in the implementation of fiscal policy (60 per cent GDP public debt, 3 per cent public deficit).[66] Such rules were formally supported by sanctions (even if the very content of the sanctions implied that they would only be effective *were they not to be applied*). The Stability and Growth Pact of 1997 fleshed out, both procedurally and substantially, the just referred fiscal rules.

It is important to reiterate here that the move to EMU seems to have been perceived by the Court of Justice as a very strong signal, which it interpreted as licensing the further *strengthening* of its case law on economic freedoms. This was not an illogical conclusion. The socio-economic model underpinning and powering both framed policy competition and framed regulatory competition was roughly the same.

IV. After the crises: the unhidden hand of supranational power

During the first two decades of the single market and the first decade of EMU levels of employment and consumption were maintained or increased. Framed policy competition and framed regulatory competition seemed to bring about widespread welfare gains, even if unevenly distributed. (section 1). The economic, financial and fiscal crises burst the unsustainable bubbles generated by the phenomenal growth of private debt that had mediated the contradictions of the European socio-economic model. This has resulted in a long series of decisions and structural reforms through which European institutions have tried to govern the overlapping and mutually reinforcing crises. The result has been a massive transformation, which has consolidated regulatory and policy competition, by means of changing of the means through which it is organised and managed. Governance mechanisms have been (partially) replaced by legal norms (section 2).

IV.1. The gathering of the crises: private debt as macro-economic stabiliser

Policy competition and regulatory competition unleashed a process of fragmentation and pulverisation of public power in the European Union, which was even more marked in the Eurozone.

It took quite some time for such effects to be fully visible. *L'Europe par le marché* came hand in hand (and was in itself part) of a process of economic globalisation that

[66] Art. 104 of the EC Treaty plus the protocol on excessive deficits.

altered the international division of labour.[67] Cheap imported goods seemed to increase the purchasing power of Europeans. Thus, regulatory competition appeared to be associated with increased welfare. At the very same time, policy competition facilitated the expansion of financial activities, resulting in a rapid (but uneven) growth of private debt.[68] Such new opportunities to get indebted compensated in some countries the combined effects of the shrinking income share of wages and the steady increase of wage and wealth inequality. By the same token, the structural divergences between Eurozone States were cloaked by massive flows of capital that created the illusion of the Eurozone periphery catching up with the Eurozone core.[69] This compensated both the deflationary impact of growing inequality and the erosion of the taxing capacity of Eurozone States (in itself resulting from the new understanding of free movement of capital).[70] It can be concluded, thus, that the long-term social, economic and political costs of fragmenting public power were *postponed*. Time, in the terms argued by Wolfgang Streeck, was bought.[71]

IV.2. Old governance in new rules: the European socio-economic model as a zero-sum game

The bill will be dear, but will be collected in full only *in the future*. Only *the future* suddenly arrived in 2007. Starting then, financial, economic and then fiscal crises hit the European Union and its Member States and revealed the full implications of resort to private debt as *the* macroeconomic stabiliser.[72]

The challenge was met by accelerating and radicalising the principles at the core of the single market and the single currency.[73] Despite the considerable extent to which improvisation and on-the-hoof decision-making were characteristic of the post-2007 period, the government of the crises was consistently oriented towards the preservation of the capacity of money to serve as a store of value, and the maintenance of the mechanisms through which further capital accumulation could take place.[74] Keeping

[67] F. Snyder, *Globalisation and Europeanisation as Friends and Rivals: European Union Law in Global Economic Networks*, in EUI LAW Working Papers, no. 8, 1999, cadmus.eui.eu.

[68] C. Crouch, *The Strange Non-Death of Neo-Liberalism*, London: Polity, 2012; W. Streeck, *Buying Time*, London: Verso, 2014.

[69] A. Bagnai, *Il Tramonto dell'euro*, Reggio Emilia: Imprimatur, 2012.

[70] See S. Keen, *Can We Avoid Another Financial Crisis?*, London: Polity, 2017.

[71] W. Streeck, *Buying Time*, cit.

[72] Details in A.J. Menéndez, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 453 *et seq*.

[73] A.J. Menéndez, *A European Union in Constitutional Mutation?*, in *European Law Journal*, 2014, p. 127 *et seq*.

[74] More extensively, A.J. Menéndez, *The Crisis of Law and the European Crises: From the Social and Democratic* Rechtsstaat *to the Consolidating State of (Pseudo-)technocratic Governance*, in *Journal of Law and Society*, 2017, p. 56 *et seq*.

States competing with each other to achieve such goals remained essential. Still, achieving such goals in a shifting environment required recalibrating again the role of law in the process of European integration. Competition is now enforced not only through governance mechanisms, but has been in-built into European Union law.

Supranational institutions have acquired new powers through which they exert massive influence over the design of national fiscal and social policies, so that the only way that States can compensate the fluctuations of the economic cycle or the vagaries of the external change of the currency is by means of taking measures aimed at increasing the competitiveness of the external sector of the economy.

a) For one, new fiscal rules (including the deficit and debt trajectory objectives) have been enshrined into the Stability and Growth Pact. They revolve around the new concept of "medium-term budgetary objective", defined by reference to the "cyclically adjusted" deficit or "structural deficit".[75] At the same time, the fiscal rules already set in the Maastricht Treaty have been made more demanding. Not only the fiscal targets to be met by States are tougher, but Member States are now obliged to patriate into their constitutions (or constitutional laws) one of the European fiscal rules, the deficit ceiling (wrongly referred as "golden rule" or "debt brake" in media parlance).[76]

b) For two, an emerging constitutional convention forbids Eurozone States from defaulting on their debts. The different stages in the Greek fiscal crisis, especially in the spring of 2015, constitute evidence in that regard.[77] Member States have been encouraged to make constitutional commitments to the absolute priority of the payment of principal and interest of debt over any other State expenditure (the pressure has been successful in the case of Spain, see the amended text of Art. 135, para. 3, of the Spanish Constitution).

c) For three, a set of "macroeconomic indicators" has been established with a view to limiting the discretion of Member States in the overall design of their social and economic policies.[78]

[75] Art. 3 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012; Art. 2a of Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, as amended by Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

[76] See Art. 3, para. 2, of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union; see also Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

[77] See for example, D. Scally, *Schäuble Says Greece Default, Euro Exit Looks Inevitable*, in *Irish Times*, 28 June 2015, www.irishtimes.com.

[78] Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; the scoreboard can be found at ec.europa.eu.

Moreover, the efficacy of the new fiscal rules is expected to have been increased by the increasing monitoring and disciplinary powers that European institutions have been assigned.

a) For one, the Commission has seen its powers to monitor and discipline national fiscal and macroeconomic policy strengthened, given the increased authority of its proposals, deemed to be approved if a qualified minority of the Council concurs.[79]

b) For two, compliance with the obligation to patriate the deficit ceiling has been assigned to the Court of Justice; a review of "European constitutionality" of the actual national reforms (including constitutional reforms) adopted to comply with the obligation could be conducted, and the reform declared in breach of European law.[80]

By the same token, supranational institutions have been recognised, and have also arrogated to themselves, powers through which they can provide funding to Eurozone States alternative to those available in financial markets. The granting of such funding is, however, conditional upon States designing their fiscal and social policies in line with the requests of supranational institutions which, so far, have required States to preserve the store value of money, very especially financial capital. As a result, supranational institutions (most significantly the ECB and the Commissioner for Economic and Financial Affairs) and some national institutions (outstandingly, the presidents and chancellors of the exchequer of the main creditor States, and foremostly Germany) have acquired the power to activate or deactivate the power of financial markets to influence the shape of national fiscal and social policy. Moreover, the ECB has assumed the role of lender of last resort of Eurozone States, a power that it has pledged to exert by reference to the terms of the financial assistance provided by the Eurozone, and consequently, by reference to their underlying *conditionality*.

The return of rules has not entailed, however, a change in the set of objectives that define EMU. Rules are now preferred to governance mechanisms not because there is a new willingness to preserve the discretionality of political organs, but rather because "governance" mechanisms were found to be of limited value in effectively limiting such discretionality. The purpose remains to subordinate all possible objectives of fiscal policy to the maintenance of the store value of money (i.e. of capital). The net result of this further transformation of the organisation of public power in Europe is the further fragmentation, pulverisation and discipline of public power. But, contrary to what was largely the case in the road to the single market and the single currency, supranational institutions have acquired relevant new powers. Such powers, however, do not facilitate collective action at the supranational level, as the further disciplining of national public power. The latter development has come hand in hand with the further devaluation of

[79] Art. 7 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

[80] Art. 8, para. 1, of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

democratic law as a means of integration. The new competencies attributed to the European Union have all resulted in gains by institutions whose legitimacy is indirectly democratic or are by design non-representative (the ECB) while the competencies and authority of both the European Parliament and of national parliaments (with the rather more formal than substantive exception of some national parliaments, as just indicated) have largely stalled. The clear "institutional" winner is the ECB, an institution that is by design insulated from democratic politics. The same reasoning applies to the Court of Justice, the European Monetary Stability Fund, the already created national fiscal authorities, the envisaged European Fiscal Authority and the planned national competitiveness authorities. The "Euro Summit" and the "Eurogroup" have become relevant institutions when it comes to the exercise of a good deal of the (old and new) economic powers in the hands of the European Union. But as was pointed in the previous section, the way in which the said institutions actually operate has itself been transformed during the crises. What some political scientists call the "new" intergovernmentalism[81] is based not on the equality between Member States, but actually on the (formalised) inequality among States. On the other hand, only with a considerable degree of optimism can it be said that representative institutions have merely not gained power. It is indeed telling that while the European Parliament and national parliaments have been assigned mere "debating" powers, an institution external to the EU, the IMF, has been acknowledged, both *de jure* and even more so *de facto*, key powers in the process of granting financial assistance to Eurozone States, and monitoring compliance with the economic programmes to which the said assistance is conditioned.

As a consequence, the law has been brought back, but only because it is a law very different from that characteristic of post-war Democratic and Social States. This is reflected in the fact that the new and the revamped fiscal rules are not supported by a wide democratic legitimacy; rather they were decided by reference to allegedly *objective* (and thus pre-political) standards (monetary stability, financial stability), to be *applied* by non-representative institutions (the Commissioner for Economic and Financial Affairs, the ECB) and through non-democratic decision-making procedures (paradigmatically, minoritarian decision-making in the Council).

V. Conclusions

The disastrous experience of the disorganised concurrence of legal orders that marked the interwar period paved the way for the constitution of the European Communities. Community law was fashioned as a mixture of politically-mediated conflict norms and

[81] C. J. Bickerton, D. Hodson, U. Puetter, *The New Intergovernmentalism: European Integration in the Post-Maastricht Era*, in *Journal of Common Market Studies*, 2014, p. 703 *et seq.*; C. J. Bickerton, D. Hodson, U. Puetter, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, Oxford: Oxford University Press, 2015.

substantive norms that provided a balanced organisation of the relationships between national legal orders. Community law clipped the sharpest corners of public power, while not only preserving, but reinforcing the *actual* political leeway that Member States had in the choice of their social and economic policies.[82]

The functionality of European integration in general and of Community law in particular was crucially dependent on the background consensus on the purpose of public power and on the goals of integration, basically corresponding to the regulatory ideal of the Democratic and Social State that was also open and cooperative. Such consensus was however shattered in the early seventies. The asymmetric impact of the monetary (1971) and economic crises (1973 and 1979) was amplified by the lack of coordination of the national policy responses. Economic and political divergence led to the blockage of a political system revolving around unanimous decision-making in the Council of Ministers.

European paralysis favoured the emergence of a radically new narrative and conception of European integration. The objective of creating a single currency and a single market was presented as the completion of the original political and economic project of the Communities, but as a matter of fact implied a radical transformation of its objectives. Economic borders were no longer to be rendered permeable, but to be abolished. The economic rights stemming from Community law were no longer to be constructed as operationalisations of the principle of non-discrimination, but as manifestations of the right to private property and of entrepreneurial freedom.

The establishment of the single market and the single currency was to be brought about through law, but the role of law in society was to change. In particular, law was to become key in the organisation of processes of regulatory competition (the single market) and policy competition (the single currency), in which the choices made by private actors (entrepreneurs and consumers, investors in financial markets) would end up determining the substantive content of the norms organising cross-border relations. In both cases, the processes of "competition" were "framed", "programmed" in their unfolding by a legislative process *biased* in favour of private property and entrepreneurial freedom (single market) and by institutional and substantive norms making of the preservation of the store value of money a fundamental objective of both monetary and fiscal policy. The result was a double *commodification of law*. In static terms, European law empowered market actors to impose their economic power over the political

[82] This does not entail that European Union law did not limit the range of possible socio-economic policies that could be implemented. Not only any set of fundamental laws has that effect, but in concrete, it could be argued that Community law, even in its original format, was more constraining than post-war national constitutional orders. The question cannot be tackled here. But it is definitely worth pursuing. C. KAUPA, *The Pluralist Character of the European Economic Constitution*, Oxford: Hart, 2016 sets the agenda, even if it seems to me overoptimistic regarding the ecumenical character of the fundamental norms organising power in the founding Treaties of the Communities.

will of national representative institutions through their strategic use of economic freedoms. In dynamic terms, the very content of regulatory norms came to be left in the hands of economic actors. The process resembled *market competition*, in that States bade for economic activity through different offers of regulatory norms. But this was not an ideal market where all actors had equal power, but a game of legal chairs in which only the most powerful and most mobile economic actors had a real say. Law was literally turned into *another* commodity.

It was in such a way that regulatory competition and policy competition came to play a fundamental role in European integration, that indeed they have become fundamental sources of the substantive norms applicable to cross-border relations. Such competition has not only been planned, but actually orchestrated. Regulatory and policy competition were not brought about by the decentralised force of private actors, but designed by political fiat. By the same token, the outcome of the "competition" has been largely predetermined to result in the maximisation of the right to private property and entrepreneurial freedom in the case of the single market, of the protection of financial capital in the case of the single currency. Heads, private property wins. Tails, entrepreneurial freedom prevails.

This reveals the extent to which the *market in laws* has been everything but a market. In his seminal *Great Transformation*, Polanyi argued quite forcefully that one of the fundamental flaws of self-regulated capitalism was to mistake the character of land, labour and money, to conclude that these were commodities. But they were not: they were and they could not but be *fictitious commodities*.[83] A fundamental flaw of the prevailing understanding of European integration and of European law is to believe that law can become a commodity, in the sense that its content can and should be ascertained through a *market-like* process.

Europeans once learned from disaster (one is tempted to say from *disasters*) that it is extremely risky to renounce to define and shape the relationship of the State legal order with other normative orders, and very especially, with other State legal orders. Trusting in the emergence of a spontaneous meta-order governing cross-border legal relations might result not only in major social and economic losses, but may undermine the very basis of political and social stability. In particular, we cannot expect to enjoy the necessary modicum of social and economic stability if we leave the relationships between legal orders to be determined through functional equivalents of market relationships, that is, through some form of normative *competition*. Conceptualising the relationship between legal orders in terms of a market for laws entails not only endangering the capacity of social integration of the law, but overstretching the very institution of the market.

[83] K. Polanyi, *The Great Transformation*, cit., p. 71 *et seq.*; C. Joerges, J. Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, Oxford: Hart Publishing, 2011.

The ultimate proof of the failure of false marketisation is to be found in the way in which European institutions have tried (and failed) to govern the crises. On the one hand, the massive changes introduced since 2007 are underpinned by the assumption that financial markets cannot be trusted to adequately police the discretion enjoyed by States in the implementation of their fiscal policies. Thus the granting of new and formidable competences to supranational institutions, which can now not only monitor and sanction national fiscal policies, but also provide sources of funding alternative to financial markets. On the other hand, the powers that supranational institutions have been granted are not so much positive powers, as disciplinary powers. To make things even worse, such programmes are "programmed" by reference to the standards that would result from the unimpeded functioning of markets. We run the risk of multiplying the damage caused by regarding the law as a false commodity by the damage bound to be generated by a peculiar form of *dirigisme* on the hoof.