ARTICLES

THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?
edited by Fernando Losada *and* Klaus Tuori

INTEGRATING MACROECONOMICS INTO THE EU SINGLE LEGAL ORDER: THE ROLE OF FINANCIAL STABILITY IN POST-CRISIS EUROPE

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TABLE OF CONTENTS: I. Introduction to the *Special Section*: EMU law and its relevance for the EU legal order. – II. Theoretical premise: studying the EU legal order in the context of European integration. – III. The origin of the autonomous EU legal order: the symbiosis between law and microeconomic integration. – III.1. The creation and development of a self-referential EU legal order. – III.2. Macroeconomic stability beyond the scope of EU law. – IV. Establishing a monetary union through an international treaty: matching law and macroeconomics in EU law within a "Europe of bits and pieces". – IV.1. The applicability of EU law to the ESCB. – IV.2. The applicability of EU law to microeconomic governance. – V. The irruption of debt relations and the need for financial stability: macroeconomics determining the content and structure of EU law. – V.1. Three debt junctures spurring the need for financial stability. – V.2. The return of teleological interpretation. – V.3. Financial stability as a new overriding objective addressing the mismatch between law and macroeconomics. – V.4. Financial stability consolidating an autonomous and unitary post-crisis EU legal order. – V.5. Integrated administration for a more centralised EMU governance. – VI. Conclusion: financial stability as cornerstone of the post-crisis EU legal order?

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ABSTRACT: This *Article* follows the trajectory of the EU legal order, from its inception to its current stage, by focusing on the transformations it has experienced resulting from its increasing interaction with macroeconomics. When the Court of Justice declared that a new legal order resulted from the provisions of the Treaty of Rome, its interpretation stemmed from a coherent understanding of the institutional form (indirect administration) and substantive content (microeconomic integration) of European integration. The addition of the macroeconomic layer of integration, with its own institutional form (integrated administration and open method of coordination) but still broadly subject to the same legal order, resulted into a less consistent whole. The crises the Union faced during the last decade tested the resistance of these structures and, although the Court has been consistently interpreting EU law according to the same procedures and techniques without radical deviations, the irruption of financial stability as macroeconomic imperative has rearranged the equilibrium in integration. Now we can argue that institutional form, substantive content and legal order of European integration are again realigned, but instead of resulting from the provisions of the Treaties and from placing the legal rationality of law at the core of the system, financial stability is the rationale coherently arranging them together. The consequences of this rearrangement for the EU legal order are the object of study of this *Special Section*.

KEYWORDS: EU legal order – macroeconomic integration – financial stability – integrated administration – EMU law – economic constitutionalism.

I. Introduction to the *Special Section*: EMU law and its relevance for the EU legal order

The financial and sovereign debt crises forced the European Union (EU) to adopt a series of measures to fight the extremely damaging consequences of unprecedented economic challenges. Aware of this development, lawyers engaged in the doctrinal analysis of the plethora of EU legal acts and international treaties adopted. Legal debates have primarily revolved around their validity according to primary EU law,[1] discussing to what extent they constitute a rupture with, a departure from, or a continuation with the pre-crisis Economic and Monetary Union (EMU) rules.[2] The Covid-19 pan-

[1] M Ruffert, 'The European Debt Crisis and European Union Law' (2011) CMLRev 1777; A de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance' (2012) CMLRev 1613; P Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) ELR 231; T Beukers, 'The New ECB and its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' (2013) CMLRev 1579; N Moloney, 'European Banking Union: Assessing its Risks and Resilience' (2014) CMLRev 1609; R Palmstorfer, 'The Reverse Majority Voting under the "Six Pack": A Bad Turn for the Union?' (2014) ELJ 186; K Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) ELR 154; A Steinbach, 'The Lender of Last Resort in the Eurozone' (2016) CMLRev 361.

[2] E Chiti and PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) CMLRev 683; AJ Menéndez, 'The Existential Crisis of the European Union' (2013) German Law Journal 453; Ka Tuori and Kl Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014); A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015); B de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Varia-

demic demanded yet a new reaction from European leaders, resulting in interventions and developments of EMU rules whose legality and relevance are currently discussed by the doctrine.[3] This *Special Section* goes beyond those discussions and aims to explore, whatever the constitutional status of the new measures is, what are their implications (if there are any) for the EU legal order. The focus of attention is thus the singleness of the EU legal order, and the main question we want to address is how new developments in the EMU may have affected its content, structure and principles.

To reply to these questions this *Special Section* gathers EU lawyers with expertise in different fields of integration, in order to detect and keep track of changes resulting from the revamped, post-crisis and post-pandemic macroeconomic integration. The aim is to determine to what extent recent EMU developments have affected the EU legal order by establishing new priorities, principles or mechanisms alien to pre-crises European integration. In other words, the objective is to test to what extent the self-referential and autonomous legal order of the EU has been altered during the crisis by exogenous elements complementing, adapting or transforming it to the needs of the expanded macroeconomic integration.

The close correlation between the development of a single legal order for the Union and the main goal of integration during the first decades of the process of European integration constitutes the theoretical starting point for this *Special Section*. A second crucial element is the contextual understanding of law. The key role played by law in European integration is widely acknowledged although it must be understood within a given context and therefore as potentially reactive to economic, political and institutional developments in each of the successive stages of the process of integration. Consequently, the theoretical assessments of the changes in the EU legal order need to consider to what extent they are supported by, or even derived from the developments outside the sphere of law. In this *Special Section*, these developments mainly relate to the series of crises of the last decade, although they also have longer origins in the post-war European integration.

Two special features characterise the law that substantively deals with European macroeconomic integration. First, the disconnection between material relevance and legal form is particularly relevant in EMU matters. Consequently, in formal terms EMU law relies on a *variety of legal sources*: From EU legal acts and Treaty amendments to international agreements, soft law measures and even private contracts between sovereigns and

tion or Constitutional Mutation?' (2015) EuConst 434; F Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (Oxford University Press 2016).

[3] AAM Mooij, 'The Legality of the ECB Responses to COVID-19' (2020) ELR 713; P Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' (2020) Legal Issues of Economic Integration 337; D Fromage, 'Towards Increasing Unity and Continuing Executive Predominance Within the E(M)U Post-COVID?' (2020) LIEI 385; B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) CMLRev 635.

their creditors. The upshot is that, against what was common practice in previous decades of integration mostly devoted to microeconomic issues, EU law is not necessarily the main legal vehicle for European macroeconomic integration. As a matter of fact, in this field EU law is just one among many driving forces. The second defining feature is *variable geographical scope* of the law substantively dealing with European macroeconomic integration. This may result from reasons inherent to EU law, be they EMU derogation clauses (and, with similar effect, *de facto* EMU derogations by avoiding participation in the Exchange Rate Mechanism (ERM), legal acts adopted by and for euro area members, or measures addressed to a single Member State. Furthermore, not all Member States are signatories of international treaties and agreements: Almost all have ratified the Treaty on Stability, Coordination and Governance in EMU and the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, whereas only euro area members ratified the Treaty on the European Stability Mechanism and its recent revision. A third overlapping geographical scope applies to the banking union, a new material competence conferred to the European Union as a result of the crisis, of which not only Eurozone countries but also Croatia and Bulgaria are members since 2020 – although with a different legal position to the euro area Member States.

Because of the combination of these two features – variety of legal sources and variable geographical scope – EMU law is an extremely complex legal corpus. While EU law has been considered a legal laboratory for developments and changes in well-established constitutional categories and legal concepts elaborated in the nation-state context, the new reality of macroeconomic integration and its specific political objectives constitutes another laboratory where to test, in turn, the resilience of the basic principles of EU law as the foundations of integration and of the EU legal order. In addition, EMU law has arguably extended the reach of law, and in particular of constitutional law, to substantive areas that have traditionally been left open at national level. Our interest is, consequently, to determine to what extent the emergence and development of EMU law has affected the EU legal order – both in terms of substantive contents and formal principles.

To do so this *Special Section* will examine recent developments in European legal integration on the basis of two tensions. First, the one between the singleness of the EU legal order and the specifics of one of its various subsystems, in this case the legal provisions dealing with economic and monetary integration. To address this tension, we will focus on the *EU law on the EMU*. And second, we will also explore the tension between law and macroeconomics in the context of European integration, focussing on the body of law that we label as *EMU law*. Hence, the level of analysis will entail legal theory to address the question of the singleness of the EU legal order and will be complemented with the study of the relation between law and economics from theoretical, substantive and institutional dimensions.

To accomplish that analysis the principle of autonomy of EU law is critical. Our point of departure acknowledges that the foundational principles of the EU legal order derive

from the Court of Justice of the European Union's (CJEU or the Court) decisive interpretation of the Treaties at a time when their core provisions dealt with microeconomic integration. The close connection between the political aims of integration and the interpretation of Treaty provisions explains why EU law not only successfully spread its scope to new areas in accordance with political developments, but also proved particularly susceptible to evolving in its principles, contents and procedures. The pace and speed of this evolution, accelerating in the last decades, can be traced in the recurrent update of textbooks in the field, and even in the revision and expansion of studies on the specific topic of the evolution of EU law.[4] In this regard, the principle of autonomy is crucial because, rather than keeping EU law detached from all external influence, it articulates its adaptation to new circumstances while formally respecting the internal coherence of the EU legal order. Accordingly, EU law's evolutionary character is part of its DNA.

By definition, all evolution implies changes and transformations in scope, depth, form or substance – or a sum of some or all of the previous. Hence, it is worth asking what changes and transformations EU law has experienced due to recent EMU developments. This is not an original quest and, in fact, the literature exploring this angle is rich: Some research has dealt with the impact of the financial crisis on various areas of EU law,[5] while others have studied how post-crisis EMU, and in particular banking union, represent a novelty in EU law.[6] Aware of this, the approach followed in this *Special Section* differs from previous doctrinal efforts in two significant aspects. First, when tracing the evolution of EU law specifically resulting from macroeconomic integration it promotes an overall understanding rather than explaining issues from a specific perspective. Our interest is to determine to what extent core principles of EU law apply to the post-crisis EMU or, on the contrary, to what extent new developments in the EMU determine the content of EU law. Hence, we aim at replicating in the legal domain a debate already existing in the institutional field, where some put the emphasis on the new institutional arrangements governing the array of competences conferred to the EU since Maastricht (the new-intergovernmentalism),[7] while some others stress the "colonization of ever greater swathes of public policy by institutions designed primarily to

[4] P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 1999); P Craig and G De Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford University Press 2009).

[5] J Schmidt, C Esplugues and R Arenas García (eds), *EU Law after the Financial Crisis* (Intersentia 2016).

[6] A Witte, 'The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?' (2014) Maastricht Journal of European and Comparative Law 89; A Pizzolla, 'The Role of the European Central Bank in the Single Supervisory Mechanism: A New Paradigm for EU Governance' (2018) ELR 2; G Lo Schiavo (ed.), *The European Banking Union and the Role of Law* (Edward Elgar 2019).

[7] CJ Bickerton, *European Integration: From Nation-States to Member States* (Oxford University Press 2012); U Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford University Press 2014); CJ Bickerton, D Hodson and U Pueter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press 2015).

create and govern a supranational market".[8] A parallel tension takes place in the legal domain regarding the interaction between EU law and new developments in the EMU. Again, a tension ultimately solved by the principle of autonomy of EU law. How has the policy-based macroeconomic integration been accommodated to the overall legal order primarily resulting from microeconomic integration? What has been the impact of the new macroeconomic objectives of integration, and in particular of financial stability, for the teleologically-interpreted EU legal order?

This introductory *Article* to the *Special Section* guides the reader in solving these questions by offering a narrative according to which to interpret the contributions by other authors on their areas of expertise. In section II, we elaborate three developments that had shaped the EU legal order: The first one is marked by the systemic need of the singleness of the legal order, despite the fragmentation foreseen in the treaties; the second results from inconsistencies at the intersection of law and macroeconomics; and the third corresponds to the administrative procedures and enforcement mechanisms of macroeconomic (or monetary) integration, different in spirit and form to the classic indirect administration characteristic of microeconomic (or market) integration.[9] This forms the theoretical perspective to analyse how the inclusion of initially microeconomic and later macroeconomic governance has affected the passage of EU law as a means of integration. In this regard, section III discusses law and microeconomic integration as a symbiotic relation, which is the origin of the autonomous EU legal order. Section IV turns to law and macroeconomic integration, when the EMU establishes the EU constitutional framework for macroeconomic regulations and governance. In institutional terms, a specific new mode of integration is established. Rather than dividing competences between national and EU levels (indirect administration), an instance of integrated administration was established in the form of the new central banking system with the European Central Bank (ECB) at its head. Section V continues from the previous sections to understand the changes caused by three overlapping debt junctures (sovereign, banking and pandemic) and their rescue measures. In particular, the section sees the appearance of the constitutional objective of financial stability as an EMU-induced rationale that penetrated the EU legal order to formally close the gap between EU law and crises measures, with implications for the EU institutional system and administrative law. At the same time, we point out that the objective of financial stability

[8] T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism beyond the State* (Oxford University Press 2016) 19.

[9] The distinction between market and monetary integration is based on the substantive content of integration (an example in S Frerichs and F Losada, 'The Role of Law in European Monetary Integration: A Critical Reconstruction and a Response to Klein' (2021) Global Perspectives), whereas the distinction between micro- and macroeconomic integration (first proposed in Ka Tuori and Kl Tuori, *The Eurozone Crisis* cit.) relies on the application of an economic lens over the object of integration to determine to what extent it corresponds to the aggregated or disaggregated level.

has very different features compared to the internal market objective, and not least for the purpose of teleological interpretation, which can have important repercussions for the accountability, the rule of law and democracy in the EU.

II. Theoretical premise: studying the EU legal order in the context of European integration

Law is a social construct dependent on, rather than detached from, its context. Accordingly, fully understanding developments in the EU legal order requires taking into account the context in which they take place. Indeed, during its formation and development EU law relied on several circumstantial elements resulting from given historical, political or economic junctures beyond the legal domain. When approached from this context-sensitive perspective, it is possible to distinguish at least three dimensions relevant for understanding the relation between EMU developments and the evolution, both in form and substance, of EU law and its legal order. Together, these three dimensions constitute the theoretical premise according to which the concrete objects of study in the remaining contributions to this *Special Section* can be analysed.

The first dimension refers to the use of legal dogmatic to interpret new developments in EU law through a legal order as consistent as possible. With the support of the doctrine,[10] the CJEU has played an active role in reconstructing those different legal developments according to a narrative that, while recognizing their different origins, construes them coherently as parts of a single legal order – within the explicit limits imposed by the wording of the Treaties. Moreover, the Court interprets the EU legal order not only as a consistent legal system, but also as autonomous from national and international law.[11] As a matter of fact, the autonomy of EU law was the actual basis of the reasoning of the Court in the foundational rulings establishing the EU legal order.[12] This exercise of systematization is possible because of the Court's monopoly over the final interpretation of every EU law provision.[13]

[10] A von Bogdandy and M Nettesheim, 'Ex Pluribus Unum: Fusion of the European Communities into the European Union' (1996) ELJ 267; A von Bogdandy, 'The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System' (1999) CMLRev 887.

[11] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1.

[12] See case C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1 and case C-6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

[13] "EU Law does not allow normative gaps to appear. Indeed, autonomy could hardly be achieved in a legal system that was not self-sufficient and complete. In order for the EU legal order to find its own independent space between national and international law, the fragmentation that would inevitably result from constitutional and legislative gaps cannot be allowed to persist. Although the solutions adopted to fill any gaps may be inspired by the constitutional traditions common to the Member States or by international treaties, those solutions must come from within the Union legal order itself. Thus, the very nature of EU law requires the Court of Justice to 'find' the law ('*Rechtsfindung*') by fashioning general prin-

The second dimension emphasizes the mismatch occurring at the intersection between law and macroeconomics.[14] Traditionally, in democratic systems these two dimensions tend not to overlap: Macroeconomic management is a task usually in hands of the executive power, because it seems to imply the adoption of discretional decisions that are subsequently object of political control by the parliament. When macroeconomic issues are instead subject to legal rules, as is the EMU, decision-maker's discretion is replaced by a pre-commitment, limiting the available choices to one concrete option. The role assigned to law in EMU is thus prone to dysfunctions, because legal rules are not flexible enough to adapt to the specific context to which the EU's macroeconomic management is supposed to react. Moreover, monitoring the observance of those rules is subject to a control of legality, thus involving courts rather parliaments. This control function puts courts under heavy stress because they have to reduce to a binary decision (legal/illegal) the review of acts that have extremely important consequences in economic terms and that usually result from subtle and changing political analysis. Importantly, when this role was assigned to courts it also gave them the opportunity (or necessity) to balance between legality and those consequences. The more potentially damaging the latter are, the more interest courts will have in finding an interpretation of the law in force able to validate the legality of the reviewed acts. Having the monopoly over EU law's interpretation, the CJEU is in a particularly privileged position to proceed to a trade-off between legality and the perceived continuation of European integration, on which its mere existence depends. But the price to pay for this trade-off is to assume that the Court is actually exerting a discretional, and thus a non-legal assessment, and therefore that within the specific framework combining law and macroeconomics in European integration the rule of law is seriously challenged.[15]

The third dimension corresponds to the institutional form of integration. In this regard, it is relevant to return to the distinction between micro- and macroeconomic integration. The former aims to achieve an internal market by dismantling all kinds of borders between Member States and by guaranteeing a level playing field. For that purpose, it relies on a model of integration according to which political and administrative decisions are adopted at European level and later implemented at national level. It is thus a model of integration based on an indirect administration, where the enforcement of rules relies on the rational authority of law. Macroeconomic integration, on the other hand, relies on the establishment of an integrated administration (the European

ciples of law where necessary" see K Lenaerts, 'The autonomy of European Union Law' in *Annali Aisdue* (Cacucci Editore 2020) 7.

[14] J García-Andrade Gómez, 'La Regulación de la Política Macroeconómica: Un Desafío para el Derecho Público' (2020) Revista de Derecho Público: Teoría y Método 125.

[15] C Joerges, '"Where the Law Runs Out": The Overburdening of Law and Constitutional Adjudication by the Financial Crisis and Europe's New Modes of Economic Governance' in S Garben, I Govaere and P Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart 2019) 167.

System of Central Banks (ESCB)) to deal with monetary matters, and on a peculiar entanglement of the Commission with national executives (the European semester) to achieve the coordination of economic policies. Enforcement, in this case, does not depend on legal rules but on other means such as active policies, financial incentives and constraints, and peer pressure (naming and shaming), all complemented in last resort with market pressure. Therefore, the forms and means of indirect and integrated administration as modes of integration are radically different.

In the remainder of this *Article*, we elaborate a historical review of European integration with the aim to explain in more detail a major transformation observable after intertwining these three dimensions, and which constitutes the theoretical premise of this *Special Section*. In a nutshell, when the Court established the existence of the EU legal order, legal form (features of EU law), substantive content (microeconomic integration) and institutional form (indirect administration) were the three of them well aligned and consistent with each other. As a matter of fact, "the Court inferred the legal form of Community law from its content".[16] Things are nevertheless different in macroeconomic integration, where the integration of new developments into the (single) EU legal order ultimately relies on the principle of autonomy of EU law, and hence on the sole interpretation of the CJEU – operating under the particular constraints mentioned above. In this case legal form (the specific features of EU law) is not well aligned with the substantive content of integration (macroeconomic issues) and its specific institutional form (integrated administration). The objective of this *Special Section* is first to identify those inconsistencies and then to determine how and whether the singleness of the EU legal order has allowed to integrate them into a coherent whole. This *Article* suggests that, in the end, financial stability actually played a facilitating role.

III. The origin of the autonomous EU legal order: the symbiosis between law and microeconomic integration

With the aim of promoting European integration, the Treaty of Rome (1957) set up a peculiar balance between politics, law and economics. The Treaty designed an overarching framework (the European Economic Community, EEC) enabling the development of economic relations between private actors across Europe. The concrete goal was to establish a common market (later internal market) where all economic actors could compete on a level playing field. Various treaty provisions and legal remedies aimed to guarantee and safeguard this objective. Macroeconomics, on the other hand, was neither a subject of active regulation nor of policies at the European level, as the responsibility in this area was divided between the international level in the form of the Bretton

[16] A Somek, 'Is Legality a Principle of EU Law?' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 67.

Woods system and the very different policy approaches at national level. Consequently, during the first decades of European integration macroeconomics was not part of the Community framework, but rather a source of exogenous instabilities that could jeopardize the achievements of integration.

III.1. The creation and development of a self-referential EU legal order

The EU legal order developed gradually into one of the most defining features of European integration. On one hand, nationals and economic actors from other Member States were entitled with rights to compete without discrimination in the whole Union. The economic assumption was that mobility of economic factors throughout the territory of all Member States would lead to more optimal allocations of production, investment and consumption decisions, which would enhance wealth creation and thus prosperity in Europe. In a crucial step, the Court made the political goal of achieving a common market into an efficient and enforceable legal objective, which led to the recognition and further development of the economic freedoms mentioned in the Treaty through the doctrine of direct effect.[17] On the other hand, the idea that a competitive market order would ensure the best allocation of resources entailed as well the notion that the public sector is tasked to guarantee the opportunity of different economic actors, whatever their economic might, to participate in the market. Public authorities needed to be equipped with means to take decisions on state aid and merger control to facilitate competitive market order. This work was mostly allocated to the Commission as the competition authority with its legal decisions based on increasingly refined economic assessments. For both, the realization of the economic freedoms and the enforcement of competition and state aid rules as the key means of integration, the development of a coherent and efficient legal process and the establishment of a clear set of legal remedies were essential. Accordingly, law had a key role to play in integration, placing a court internal to the treaties and sole interpreter of its provisions in a privileged position to determine the features of the EU legal order.

When solving actual substantive conflicts, mostly about economic freedoms or competition law, the CJEU could rely on its prominent position within the preliminary ruling procedure to declare and develop the foundational principles of the new legal order stemming from the Treaties – direct effect and primacy. Hence, by solving issues mainly related to the interpretation or validity of EU law, the Court was able to define the contours and develop the contents of the legal order resulting from the Treaties. In this regard, two elements are critical for our argument. First, the Court reserved for itself the last word about the interpretation of EU law, whereby no other jurisdiction has a say on the scope, limits or structure of EU law. This is the essence of the new legal or-

[17] The freedom of capital movements remained an exception and was liberalized only to the extent agreed politically by Member States.

der as an autonomous system.[18] Second, when interpreting the provisions of EU primary or secondary law, the politically set goals and objectives of the Treaties were turned into effective legal objectives to determine the scope of competences. This teleological interpretation was part of the rationale to establish the direct effect and primacy of EU law.[19] The combination of the autonomy of EU law with the importance of the teleological rationale in its interpretation established a self-referential legal order.

A corollary of the resulting mode of integration, assigning to law the role of transmission belt between the EU and national level, was the establishment of the principle of institutional and procedural autonomy as key feature of the EU legal order.[20] According to this principle, Member States will use their own institutions and procedures to implement and enforce the measures decided at European level by the political institutions. As signatories of an international agreement, they are still responsible for its fulfilment and observance. However, due to the specifics of EU law, the principle of institutional and procedural autonomy encompasses a number of sub-principles (principles of equivalence[21] and effectiveness[22]) that accentuate its EU law character. As a matter of fact, the effectiveness of EU law is so critical to the system that, according to the Court's interpretation, in certain cases EU law itself enables national courts,[23] and even national administrative authorities,[24] to set aside national law provisions if they cannot be interpreted in accordance with EU law. The self-referential EU legal order is thus also guaranteeing its own application by entitling courts with powers needed to effectively achieve the integration objectives through a teleological rationale.

III.2. Macroeconomic stability beyond the scope of EU law

When the original Treaties were signed by the Member States, they took for granted a certain set of contextual elements that affected the overall design of the integration process, in particular decisions on the economic freedoms. Monetary and currency stability was assumed to be guaranteed by the Bretton Woods system, making it possible for integration to focus on the concrete legal mechanisms required to reach the common market objective through microeconomic integration. The Treaties nonetheless included some general provisions about economic policies (art. 6 EEC) and the balance of payments (arts 108 and 109 EEC), and recommended addressing trade flows, curren-

[18] The systemic relevance of the principle of autonomy for EU law has been recently stressed in case C-284/16 *Achmea* ECLI:EU:C:2018:158 and in opinion 1/17 *Accord ECG UE-Canada* ECLI:EU:C:2019:341.

[19] In this regard, the very existence of the preliminary ruling procedure was critical for determining that a new legal order of international law has been established with the ratification of the European Treaties.

[20] Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188.

[21] Case C-326/96 *Levez v Jennings Ltd* ECLI:EU:C:1998:577 paras 27 ff., in particular paras 37 and 39-42.

[22] Case C-199/82 *Amministrazione delle finanze dello Stato v San Giorgio* ECLI:EU:C:1983:318 para. 14.

[23] Case C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* ECLI:EU:C:1978:49.

[24] Case C-103/88 *Fratelli Costanzo v Comune di Milano* ECLI:EU:C:1989:256.

cy exchange rates and inflation in a coordinated way, as a matter of common concern (art. 103 EEC). Unlike economic freedoms, which entitled private actors with rights, these provisions were considered of a declarative nature, and therefore competences remained national. Member States were aware of the constraints that legislation on macroeconomic issues put on policy discretion and of the potentially negative impact single economic decisions may have when implemented in the different national socio-economic contexts,[25] and hence decided not to establish a proper European macroeconomic policy despite the opportunity that art. 103(2) and (3) EEC seemed to present in that regard.[26] Importantly, European institutions were required in any case not to affect Member States' internal or external financial stability (art. 6(2) EEC).

From the mid-1960s onwards, the international currency stability started to show its shortcomings, which led to the collapse of the Bretton Woods system in the early 1970s. The resulting monetary instability endangered the eventual functioning of a common market and burdened the Common Agricultural Policy and its system for payments. Consequently, new European-scale currency coordination mechanisms were designed, but without resorting to the provisions of the Treaties. Indeed, the ultimate version, the European Monetary System (EMS), was agreed between the Commission and central banks of the Member States. The new monetary arrangement was politically integral part of the European integration process, but it was completely detached from EU law and free from rules that could be subject to revision by the Court.

From a legal perspective the EMS maintained Member States' and their central banks' discretion with regard to their currency policy, although the practical implications for macroeconomic governance were substantial. By aligning their currencies to the anchor currency, in practice the German mark, Member States were forced to replicate the German policy of price stability if they wanted to maintain their competitiveness. From the mid-1980s onwards, a number of political and economic developments (the signature of the Single European Act, the favourable economic context with a strong US dollar and the fall of communism and the subsequent German reunification) convinced political leaders of the benefits of establishing a single currency.[27] In the recurrent European discussion as to the sequence leading to that objective, the traditional insistence on the part of Germany on full economic convergence before establishing a common currency gave way to a more political and less rigid plan according to which economic convergence will result from the common currency. However, in substantive

[25] P VerLoren van Theemat, *The Changing Structure of International Economic Law: A Contribution of Legal History, of Comparative Law and of General Legal Theory to the Debate on a New International Economic Order* (Martinus Nijhoff Publishers 1981) 179-180.

[26] At least that is what Kaupa argues in C Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart 2016) 75.

[27] K Dyson and K Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999).

terms the compromise was forged around the successful German experience to disregard short-term political interests and to stress low inflation to maximize prosperity in the long run. Rather than a policy lever at disposal of politicians, monetary policy was considered a technical craft able to be mastered by experts, and central bank independence was a necessary institutional guarantee to pursue the low inflation objective. Along those lines, and again with the key input of central banks during the preparatory stage, it was possible to draft an agreement between Member States establishing an EMU, with a common currency (the euro) and an independent central bank (the ECB) whose primary objective was and still is to guarantee price stability. This political agreement took the legal form of an international treaty (the Treaty of Maastricht) that amended the original treaties and thus became EU primary law.

IV. Establishing a monetary union through an international treaty: matching law and macroeconomics in EU law within a "Europe of bits and pieces"

The Treaty of Maastricht manifested, from a legal perspective, the complexity of expanding the substantive areas of the Community, which were complemented with new competences of the Union. Its original, pillar-based structure detached intergovernmental policies in the areas of foreign and security policy and cooperation in police and judicial matters from the basic principles of EU law generally applicable for supranational integration. The special regimes for these policies ranged from including a specific set of legal acts with different legal effects than those of regulations, directives and decisions, to altering the role played by the Union institutions and the balance between them in the political decision-making process, or to reducing the role to be played by the Court (and therefore by law) in these areas. Constitutionally, the EU had a fragmentary structure,[28] and the legal regimes for the Union and the Communities differed to the point that the principles developed for the latter were not strictly applicable to the former.

Even though it was also discussed as an independent pillar,[29] the EMU was finally inserted in EU primary law as part of the supranational pillar, more specifically as part of the European Community. However, despite being as such primary EU law, it was all but a regular example of integration. First, because it combined competences conferred in exclusive to the supranational level (monetary policy) with national competences that required coordination (economic policies). And second, because instead of relying on EU institutions for adopting decisions to be implemented and enforced by Member States according to their own institutional and procedural rules (thus following the model of indirect administration), EMU provided for two different mechanisms of inte-

[28] D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) CMLRev 17.

[29] C Zilioli and M Selmayr, *The Law of the European Central Bank* (Hart 2001) 9 ff.

gration. For monetary policy, it detached National Central Banks (NCBs) from national administrations and integrated them in a joint administrative structure, the ESCB, with the ECB as its decision-making body. The internal relation between the ECB (Executive Board and Governing Council) and NCBs was controlled by a specific set of rules with effects exclusively *ad intra*. As to the coordination of national economic policies, it was articulated through the existing European institutions, although with altered roles in the decision-making process. Indirect administration, the hitherto modus operandi of European integration, was thus replaced by an integrated administration in the case of the ESCB and by what will become the open method of coordination for the coordination of national economic policies.

The specific feature of the EMU was that law and macroeconomics got closely linked to each other through the petrification of certain political agreements at EU treaty level, an instance of an economic constitution.[30] The signatories of the Maastricht Treaty resorted to law to limit the discretion inherent to macroeconomic policy-making. Hence, some key macroeconomic approaches and objectives were fixed at the Treaty level, including monetary policy's primary (and practically sole) objective of price stability, prudent fiscal policy as measured by low deficits, or national responsibility for public sector liabilities and banking sector solvency (financial stability). For the first time macroeconomic integration became a relevant part of EU law. As a consequence, the EU legal order and principles are applicable to the EMU (except when explicitly excluded by the Treaties themselves)[31] and in turn EMU provisions, as primary law, could affect the interpretation of EU law when using the contextual and teleological methods – as we will discuss in what follows.

IV.1. The applicability of EU law to the ESCB

Monetary policy and the broader EU macroeconomic governance became part of the EU legal order as seemingly regular EU law with its by then well-developed legal doctrine. However, the consequences of the mismatch between the material context from which the rules and principles of EU law were inferred (microeconomic integration) and the substantive content at hand (macroeconomics) started to become evident in many key areas of the legal system. First, the set of legal remedies designed in the Treaties to engage private actors in the judicial control of the economic freedoms was designed with microeconomic integration in mind. In the EMU, these remedies lose their role. It is difficult to imagine how a private actor could challenge a legal act dealing with aggregated elements of the economy, especially when the case-law of the Court requires a

[30] For a deeper discussion see K Tuori, *The European Central Bank and the European Macroeconomic Constitution: From a Central Bank of Stability to a Central Bank Crisis* (Cambridge University Press, forthcoming).

[31] It must be noted that, since both supranational and intergovernmental policies were part of the Treaties, they all are primary EU Law.

direct concern from non-institutional actors to present an action of annulment. The same can be said of the preliminary ruling procedure: It is hard to conceive how the solution to the main proceeding, a conflict between parties based on concrete rights, depends on the validity or interpretation of macroeconomic decisions.

An early example of the difficulty to reconcile the specific design of EMU, in particular the independence of the new ECB, with the applicability of the general regime of EU law was the *OLAF* case.[32] The ECB refused to accept that the Anti-Fraud Office set up by the Commission could monitor its activities and, as a matter of fact, created its own anti-fraud unit. The ECB insisted that its institutional independence justified that an administrative unit of the Commission should neither have direct access to its premises nor any kind of supervision power over its staff. The CJEU finally found that the status of independence of the ECB, worthy of recognition, did not justify the non-application of general EU law provisions to it. Hence, it can be inferred that the EU legal order, its principles and institutions are applicable to EMU law, which was further clarified in the Lisbon Treaty by listing the ECB among the EU institutions.

A corollary of the mismatch between the EU legal order, inferred from and developed according to microeconomic integration, and macroeconomic integration as designed in the EMU is that any potential conflict between ECB's internal legal instruments (arts 17 and 17(a) of the Rules of Procedure of the ECB)[33] and national legal acts – whatever their rank – is to be solved in accordance with the principle of primacy. This leads to the paradoxical situation of an ECB instruction, guideline or internal decision (administrative acts articulating the relationship between ECB bodies and NCBs) prevailing, as part of EU law, over national rules even of constitutional status. The rationale of primacy is strictly related to EU law's efficacy, but it seems that these *ad intra*, administrative acts of the ECB go well beyond that rationale. Anticipating the unintended consequences of applying the principle of primacy to those acts, the ECB has taken all precautions to assess in advance to what extent such a conflict may happen in order to avoid it.[34] However, it cannot be discarded that conflicts may take place.

A most recent and paradigmatic example of the tension between the EU legal order, conformed according to the needs of indirect administration, and the ESCB as instance of integrated administration is the ruling in *Rimšēvičs*,[35] by which the CJEU annulled a decision adopted by a national authority – the Anti-Corruption Office – suspending the governor of the Latvian NCB from office. Proceeding to a contextual and teleological in-

[32] Case C-11/00 *Commission vs ECB* ECLI:EU:C:2003:395.

[33] Decision 2004/257/EC of the European Central Bank of 19 February 2004 on adopting the Rules of Procedure of the European Central Bank as amended ECB/2004/2.

[34] "However, so far there have been no cases of conflict between an ECB guideline and a national law; the ECB's policy has always been to ensure that its guidelines are compatible with national law" in HK Scheller, *The European Central Bank: History, Role, and its Functions* (2nd edn, European Central Bank 2006) 63 fn 7.

[35] Joined cases C-202/18 and C-238/18 *Rimšēvičs v Latvia* ECLI:EU:C:2019:139.

terpretation of art. 14(2) of the Statute of the ESCB, the Court considered that the aim of the Treaties is to shield the ESCB from all political pressure. Accordingly, members of the Governing Council (that include all the euro area NCBs governors) can only be removed from office once proved guilty of serious misconduct. Otherwise, the suspension of functions may affect the functioning of the ECB, and also of the Single Supervision Mechanism (SSM). What is relevant for our argument is that due to the highly integrated system that the ESCB constitutes, "a new legal remedy has been established by which, by way of exception, a decision taken by a national authority may be referred to the Court".[36] The drafters of the Treaties thus amended the system of legal remedies to adapt the features of the action for annulment to the specifics of the ECB. Consequently, members of this independent, non-majoritarian institution have direct access to the CJEU. In this regard, there is a sharp contrast with the judicial protection of other national non-majoritarian institutions – courts – whose independence and non-removability of their members can only be reviewed through an action for failure to act promoted by the Commission.[37]

IV.2. The applicability of EU law to macroeconomic governance

The coordination of economic policies within the EMU also faced early difficulties to articulate macroeconomic integration through legal means. The first major conflict took place between the Commission and the Council concerning the excessive deficit procedure opened to Germany and France soon after the establishment of the euro. The Council had not followed the Commission's recommendation to move the excessive deficit procedure to the next stage for both France and Germany and thus opening the door to an eventual imposition of fines. When the Council was unwilling to adopt a decision as suggested by the Commission, it decided to declare the procedure in abeyance. In its judgment, the Court discussed the discrepancy between the formal procedure established in the Treaties and the margin for discretion required in macroeconomic policy. The CJEU declared that the inability of the Council to reach an agreement could not be considered a failure to act: Non-deciding is part of the political discretion at disposal of Member States.[38]

This judgment made explicit that macroeconomic decision-making implies wide discretion, although such discretion is at odds with the rule-based nature of the EMU as designed in the Treaty. The ruling also indicated the role to be played by law in macroeconomic integration, where judicial review by the Court could mainly focus on the control of formal legality (observance of procedural requirements and of the legal basis determining the competence) without discussing the material macroeconomic content,

[36] *Ibid*. para. 70.
[37] Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.
[38] Case C-27/04 *Commission v Council* ECLI:EU:C:2004:436.

which was left for the political domain. The general view of legal scholars about the role of the Court in the EMU was precisely that, due to its lack of substantive competence in macroeconomics, judicial review should and could only be limited to procedural matters.[39] However, this understanding became challenged during the crisis.

V. The irruption of debt relations and the need for financial stability: macroeconomics determining the content and structure of EU law

The previous section showed how the drafters of the treaties neglected or downplayed the potential conflicts arising from reconciling macroeconomic primary law, substantive economic policies and the broader EU legal order. Despite that, the legal regimes applicable to the Community and to the Union gradually merged into a single one, as they were formally consolidated in the Treaty of Lisbon.[40] This partially alleviated the impact of those inconsistencies, especially during the first decade of operation of the euro. Since then, however, a number of overlapping crises triggered the adoption of rescue measures and consequent institutional changes, making the potential conflicts resulting from those inconsistencies explicit, and the need to face their consequences unavoidable.

The events and measures adopted to deal with these different crises have been well documented.[41] For the purpose of our analysis, we group the events and rescue measures according to three different debt junctures. First, the sovereign debt crisis that started with the Greek rescues in 2010 and culminated in 2012 with the establishment of a permanent structure external to the EU to provide financial assistance (the ESM) and also in the ECB's new role as the main creditor to Member States through its quantitative easing programmes. Second, the banking debt crisis that, worsening the financial crisis that had started in 2008 by coupling sovereign debt difficulties and banking problems, culminated in 2014 by setting up the two main pillars of the Banking Un-

[39] MA Orriols i Sallés, *El Banco Central Europeo y el Sistema Europeo de Bancos Centrales. Régimen Jurídico de la Autoridad Monetaria de la Comunidad Europea* (Comares 2004) 444-445; P Leino, 'The European Central Bank and Legitimacy: Is the ECB a Modification of or an Exception to the Principle of Democracy?' (Harvard Jean Monnet Working Paper 1-2001) 15-16.

[40] A trend described by DM Curtin and IF Dekker, 'The European Union from Maastricht to Lisbon: Institutional and Legal Unity Out of the Shadows' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 155. In relation to the Common Foreign and Security Police see R Wessel, 'The Dynamics of the European Union Legal Order: An Increasingly Coherent Framework of Action and Interpretation' (2009) EuConst 117.

[41] For the financial and sovereign debt crisis in the European context see A Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (Allen Lane 2018); M Sandbu, *Europe's Orphan: The Future of the Euro and the Politics of Debt* (Princeton University Press 2017); and A Mody, *EuroTragedy: A Drama in Nine Acts* (Oxford University Press 2018). As to the Covid-19 pandemic crisis, see A Tooze, *Shutdown: How Covid Shook the World's Economy* (Allen Lane 2021) for a general political and macroeconomic perspective. For the concrete measures adopted in the European Union to deal with the pandemic crisis, see B de Witte, 'The European Union's Covid-19 Recovery Plan' cit.

ion, the Single Supervisory Mechanism (SSM) and Single Resolution Fund (SRF). And finally, the disruption of the economy induced by the Covid-19 pandemic that started in 2020, whose effects and implications are still ongoing but that has reshaped the structure of debt relations within the European Union. In each of these three junctures, debt worked as a transmitter and an accelerator of the risks at hand, therefore increasing the need for financial stability.

V.1. Three debt junctures spurring the need for financial stability

The initial stages of the great financial crisis were largely handled following the mechanisms and procedures anticipated in the Maastricht Treaty. Accordingly, the ECB took care of the banking sector's liquidity, whereas Member States coordinated their fiscal policies and maintained responsibility over the solvency of their financial institutions. This changed fundamentally when the Greek public finances faced imminent insolvency in early 2010, and similar worries arose for Portugal and Ireland. Facing the effects of this first debt juncture, the EU primary law model of national responsibility was finally replaced by euro area-based rescue measures that provided actual monetary transfers to Member States in trouble (or at least to their creditors). The initial bilateral loans from other Member States to Greece, the Commission's European Financial Stability Mechanism and loans through the European Financial Stability Facility either had no basis in EU primary law, were pushing the boundaries of art. 122(2) TFEU, or were seemingly contradicting some primary law provisions. The latter was in particular the case of the prohibition to assume other Member States' financial responsibilities established by virtue of art. 125 TFEU, which could be considered contrary to any form of mutualisation of debts at European level. One consequence was that the permanent institutional solution, the establishment of the ESM, took place on the basis of an international treaty – as also was the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund. This novelty pushed the scope of EMU law beyond the boundaries of EU law, resulting in a decoupling between the two. Similarly, the measures of the ECB, particularly the Outright Monetary Transactions (OMT) programme, were pushing the constitutional boundaries of the EU monetary policy, as the ECB effectively promised to ensure Member States market funding to the extent that they took part in the ESM adjustment programmes. A similar effect was reached later through the ECB's government bond purchases under the PSPP. At the same time, this part of EMU law became strongly related exclusively to euro area Member States, as proves the newly amended art. 136(3) TFEU, whose drafting now allows the adoption of a vehicle such as the ESM for them only. An additional institutional consequence of the new de facto mutualisation of debts in extreme circumstances, this time substantiated

in EU secondary law,[42] was the increased EU level control over national fiscal policy, particularly through the European Semester.

The second debt juncture resulted from the deeply-rooted problems in the euro area banking sector, and led to new rescue measures and institutional changes. The initial response to the financial and banking crisis, again, combined the central banking measures by the ECB together with non-euro area national central banks. The measures initially remained within the boundaries of EU law. The problems with insolvent banks and subsequent rescues and recapitalisations remained national responsibility, and followed national, and for the state aid also EU legislation. However, the ECB's new form of banking sector funding, the 3-year loans to banks through the Long-Term Refinancing Operations (LTROs) program, dramatically increased the link between the sovereigns in trouble and their banks, particularly in Spain and Italy. As a consequence, the ECB's monetary policy became more closely tied to the fiscal problems in Member States, and particularly to their funding conditions. Consequently, the use of the ESM financing for bank recapitalisations was made conditional on the centralisation of the banking supervision at the ECB. Hence, the main institutional changes were the introduction of the SSM and the SRF for banks. This followed the logic that if rescuing banks can jeopardise Member States' public finances, and if the latter are already part of EMU responsibilities (through the ESM and indirectly through the ECB), then the failures in banking supervision are paid for at the EMU level and the legitimation of national supervision is gone.

The last debt juncture is the still ongoing pandemic, a health crisis with massive economic and social repercussions. The measures adopted in reaction to the economic meltdown have increased the role of the EU in Member States' fiscal and structural policies. The main difference *vis-à-vis* the previous debt crises is that the EU macroeconomic involvement in Member States is now forward-looking and more allocative. The EU recovery package, labelled Next Generation EU, included the establishment of a Recovery and Re-

[42] We refer to the Six Pack (Regulation (EU) 1175/2011 of the European Parliament and the Council of 16 November 2011 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation (EU) 1177/2011 of the Council of 8 November 2011 on speeding up and clarifying the implementation of the excessive deficit procedure; Regulation (EU) 1173/2011 of the European Parliament and the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States; Regulation (EU) 1176/2011 of the European Parliament and the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances; and Regulation (EU) 1174/2011 of the European Parliament and the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area) and to the Two Pack (Regulation (EU) 473/2013 of the European Parliament and the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, and Regulation (EU) 472/2013 of the European Parliament and the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability).

silience Facility (RRF) containing the bulk of 750 billion euro of support to address the economic and social impact of the pandemic in Member States. From the EU legal order perspective, the new measures have aimed at taking an EU rather than EMU perspective. The main link with the EMU has been the ECB's commitment to ensure Member States funding conditions, again, through large scale bond purchases.[43] However, from a structural perspective, it is the role of the Commission, borrowing in markets for subsequent national expending, that has arguably constituted a dramatic re-allocation of competences and administrative power stemming from the pandemic crisis. The fact that the allocation of funds to Member States depends on the Commission's assessment of their spending plans puts the latter in the position of demanding political conditions not directly related to the actual recovery from the pandemic, such as the observance of the rule of law. Interestingly, the measures combine cyclical pandemic and even post-pandemic economic needs with structural and longer-term solutions.

V.2. The return of teleological interpretation

As a result of these debt-led crises decisive political action had to be adopted in three fronts of EMU's constitutional architecture. The first front was the expansion of the EU exclusive competence of monetary policy beyond the borders of national responsibilities with several unorthodox programs adopted by the ECB in support of the general economic situation, to the point of redefining the very role of central banking.[44] The second front was the blurring of Member States responsibility over their finances and debts with the establishment of new mechanisms to provide financial assistance to Member States and the issuance of bonds by the Commission. This arguably led to the third front, namely the expansion of European legal and institutional constraints over national budgetary policies and processes, made explicit on the different type of conditionality required in exchange of the assistance (austerity policies, observance of the rule of law, and with pandemic the types of forward-looking programmes). Consequently, the amount of legislation in force regarding the coordination of economic policies multiplied, also expanding to the international law field.[45] The obvious first consequence of this expansion in the number of rules is that national discretion over economic policy has been radically limited, and subjection to the rule of law is legally and politically more compelling than ever.[46] While macroeconomic management requires flexibility, the solutions to the crises increased the number, rigidity and enforceability of

[43] Under the now 1850 billion euro PEPP purchases. Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).

[44] A Tooze, 'The Death of the Central Bank Myth' (13 May 2020) Foreign Policy foreignpolicy.com; K Tuori, *The European Central Bank and the European Macroeconomic Constitution* cit.

[45] See the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

[46] Regulation (EU) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

constrains. A paradoxical example of this new approach was the attempt to reduce discretion in the imposition of sanctions within the economic governance framework: By subjecting them to the new "reverse qualified majority voting" a minority of Member States could adopt the decision.[47] The second consequence is that there is now more basis than ever to rely on courts to challenge economic policy decisions. Financial assistance and attached conditionality constitute a new set of debt-based economic relations between Member States.[48] Instead of reducing the role of law in macroeconomics to gain flexibility when dealing with unexpected situations and crisis, the introduction of these legal constraints in the context of the common currency triggered the formation of a new legal-administrative apparatus in charge of guaranteeing repayment of debts.

This put the CJEU on the spot when dealing with any single case related to EMU, due to their potentially massive and disturbing economic consequences. But it is precisely because of the relevance of the consequences for economic policy, and even for the constitutional framework of economic and monetary policy-making in the EMU in general, that legal claims in this regard multiplied. The CJEU proceeded in these judgments with its normal analytical apparatus, and therefore it did not decide in EMU cases using different criteria than in other areas of EU law. Instead, the solution that the Court found to deal with the difficulties presented by EMU cases was to determine the intensity of legal review, thus giving certain leeway on economic policy matters to the corresponding actors and focussing its analysis on a procedural control. However, EMU law cases present a structural difference vis-à-vis regular EU law cases, because integrated administration is disconnected from the legal remedies originally foreseen in the treaties. This results in convoluted cases both in constitutional and administrative terms: While individual claims in EMU-related issues were in principle to be discarded due to the misalignment between the aggregated objective of EU law actions and the individual right required by the Court to have locus standi, the new turn in EMU law opened the door to the reinterpretation of those claims as constitutional conflicts in the national context. Hence, when subsequently elevating preliminary questions, national courts were presenting a binary conflict where either the national constitution or EU law was breached.[49] This changed the awareness on the works of the CJEU, from being a silent actor whose decisions on preliminary rulings were noticed mainly *ex post*, to being on the spot under massive political pressure from the very moment the procedure started.

Under these circumstances, the Court had to deal with cases that were on the blurred and undefined area limiting law and macroeconomics. Due to the structure and relevance of the questions posed, the Court had to engage for the first time with the

[47] R Palmstorfer, 'The Reverse Majority Voting under the "Six Pack"' cit.

[48] F Losada, 'A Europe of Creditors and Debtors: Three Orders of Debt Relations in European Integration' (2020) JComMarSt 787.

[49] F Losada, 'On European Macroeconomic Integration and the Ensuing Clash of Courts: Apropos the German Constitutional Court Ruling on the ECB's Public Sector Purchase Program' (2020) Ordines 58.

substantive content of macroeconomics, but it could only rely on legal arguments when doing so. The clash between the rationales of law and macroeconomics had to be solved either by imposing a strict reading of EU primary law provisions, disregarding the potential economic implications, or by reinterpreting the said provisions in order to be as flexible as was deemed required by the economic policy institutions involved. It is in this specific situation that the concept of financial stability is used by the Court to legally justify the measures adopted. Importantly, the Lisbon Treaty established for the first time a clear distinction between competences and objectives. The idea of the Treaty drafters was to prevent that new conferral of power towards the European level could be inferred from political objectives.[50] However, the pressing needs imposed from the dramatic economic and political context elevated financial stability considerations to objective of the EU, in this case just rubber-stamping measures already adopted instead of promoting integration by legal means despite political concerns. Financial stability became a new objective of European integration.

V.3. Financial stability as a new overriding objective addressing the mismatch between law and macroeconomics

The recurring crises since 2008 completely changed the model designed in Maastricht for the EMU. The vast array of measures adopted to deal with the entangled sovereign, banking and pandemic debt crises aimed at restoring financial stability under a double rationale: Managing economic shocks and preventing future risks.[51] The managing of economic shocks included redistribution of financial resources, which was problematic not only due to the Treaty provisions prohibiting debt mutualisation, either directly or through the ECB, but also because redistribution requires the adoption of discretional decisions that are at odds with any rule-based system. Prevention of future risks consisted in the increased and reinforced monitoring of national economic policies (in particular via the European semester), thus limiting the discretion of national economic policy-making, but also in transferring banking supervision to the ECB. For the assisted countries those two sides of financial stability were balanced by requiring them to sign a Memorandum of Understanding (MoU) with the ESM. By virtue of that agreement, conditionality was imposed in exchange of financial assistance: Discretion on national policies was thus limited and the ESM was given the position to formulate the necessary policy measures to be adopted in exchange of the assistance. Financial stability was thus the political objective and ultimate rationale for a very broad range of measures.

Turning to the legal side, the initial textual interpretations of the Treaty provisions, particularly concerning art. 122(2) and 125 TFEU, could be classified as heroic attempts to

[50] J Larik, 'From Speciality to Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) ICLQ 935 and 958.

[51] G Lo Schiavo, *The Role of Financial Stability in EU Law and Policy* (Kluwer Law International 2017) 55 ff.

observe the letter of the Treaty. Unfortunately, they were neither convincing nor conducive to the coherence of the macroeconomic framework. This is where the concept of financial stability, formulated as objective of the Union, was of outmost importance in solving the emerging constitutional questions related to the rescue measures and to the new institutional structures. Furthermore, financial stability also gained a legal dimension by the concurrence of being deduced from the treaties, included in international agreements (ESM and the Treaty on Stability, Coordination and Governance (TSCG) in the EMU) and the European treaties (new art. 136(3) TFEU), and interpreted in a teleological way in the case law of the CJEU.[52]

However, and despite its wide use in legislative and the legal practice, the content of financial stability still remains ambiguous. There was hardly any attempt to define it in any exact or consistent manner. It is thus a relative concept always dependent on the context, indirectly defined as a lack of financial instability, and described in the economic literature in many different ways.[53] For this same reason, financial stability has been extremely practical as a legal tool to unify EMU law and the EU law on the EMU. However, the price to be paid in exchange of that alleged coherence is that, as a legally undetermined concept, financial stability enables the use of discretion depending on undefined contextual reasons: It relies on the striking of balances under certain particular circumstances leading in the long term to inconsistent legal decisions. Although extremely convenient in political terms, in the legal domain this leads to arbitrariness and, as such, attacks the very essence of what a legal system aspires to achieve.

V.4. Financial stability consolidating an autonomous and unitary post-crisis EU legal order

The effort to reconcile within the EMU framework the legal and the macroeconomic rationales in a coherent way became much more demanding with the rescue measures than when the Treaty of Maastricht entered into force. On one side, EU law has been extensively applied to the EMU with many new interesting consequences not only for the EMU but for EU law itself. On the other side, EMU law has gone beyond the limits of

[52] K Tuori and F Losada, 'The Emergence of the New Over-riding Objective of Financial Stability' in M González Pascual and A Torres Pérez (eds), *Social Rights in the EMU: New Challenges for a Social Europe* (Edward Elgar, forthcoming).

[53] Starting from the debt-deflation theory by I Fischer, 'The Debt-Deflation Theory of Great Depressions' (1933) Econometrica 337, the amount of analyses has exploded more recently. Earlier reflections cover many different aspects of financial intermediators (banks) and markets. Banking sector abilities are discussed, for example, by JH Boyd and EC Prescott, 'Financial Intermediary-Coalitions' (1986) Journal of Economics Theory 211 and by JE Stiglitz, 'Credit Markets and the Control of Capital' (1985) Journal of Money, Credit and Banking 133. The combined role of banks and markets is more thoroughly analysed in R Levine, 'Financial Development and Economic Growth: Views and Agenda' (1997) Journal of Economic Literature 288 and also in E Philip Davis, *Debt, Financial Fragility, and Systemic Risk* (Oxford University Press 1995).

EU law, escaping from the scope of the EU legal order and its remedies, but still having an impact in EU law. As a consequence, the EU legal order and many of its underlying principles could have witnessed changes that only now are starting to become clear.

As previously discussed, one of the key legal achievements of the earlier phase of integration was the reliance on and development of the autonomous rationality of law that found its embodiment in the CJEU landmark decisions that developed the key principles of EU legal order. As Allan Rosas writes in his contribution, the Court largely claimed to follow the earlier approach and the key principles also in cases related to crises.[54] The key cases contained application of EU law and interpretative methods in similar way to earlier case law. This internal perspective on the application of law could, however, be balanced with an external view that acknowledges the extreme circumstances under which the judgments were deliberated.

Indeed, most EMU related cases since the beginning of the crisis involved substance matters that potentially could have enormous and immediate economic and social consequences. They also involved large measures and institutional changes that had been agreed upon by the EU institutions and decision-making bodies, where the main substance matter was the extent of conferral of competences. The upshot was that legal technicalities (among which several decisions on the Banking Union, the legal standing of parties against ECB programmes or Eurogroup decisions, or on the reach and scope of fundamental rights, to name a few) could have a massive impact on the very existence of the EMU, or at least aggravate the situation and reactivate the market pressure. Hence, it could be argued that whereas the CJEU argumentation apparently relied on the autonomous rationality of law, in reality it had to be open to other considerations due to the massive economic repercussions. This could have had major impact on the EU legal order as many of its key principles, the principle of proportionality perhaps more than any other, were given content that stemmed from the needs of the specific situation rather than the needs of the internal logic and autonomous rationality of the EU legal order.

Furthermore, and interestingly, Rosas does not consider the *ESMA (short selling)* case as relevant for EMU, but just a case about regular EU law.[55] This case nonetheless merits inclusion in the group of cases stemming from the need to guarantee financial stability in the whole EU and with the same concerns related to macroeconomic integration as with most other cases such as *Gauwailer* and *Weiss* discussed by Rosas.[56] In any case, *ESMA (short selling)* shows that financial stability has become a primary objective beyond the EMU, defining both structure and content of EU law. Simoncini explores in this *Special Section* to what extent the establishment of the European Supervisory Authorities in the fi-

[54] A Rosas, 'EMU in the Case Law of the Union Courts: A General Overview and Some Observations' (2021) European Papers www.europeanpapers.eu 1397.

[55] Case C-270/12 *United Kingdom v Parliament and Council* ECLI:EU:C:2014:18; see A Rosas, 'EMU in the Case Law of the Union Courts' cit.

[56] A Rosas, 'EMU in the Case Law of the Union Courts' cit.

nancial markets (ESAs, among which ESMA) and the subsequent revision of the doctrine regarding the non-delegation of regulatory powers, have affected the EU legal order.[57] In this regard, it has been noted that there is an analogy in the application of competition law reasoning to complaints against ESAs decisions to investigate or not some company.[58] Indeed, the Court made an effort towards the consistency of all areas of EU law by deciding that, against the initial criteria of the Board of Appeal, the procedural position of complainants should be the same as the general EU law regime.[59]

Indeed, financial stability has started to gain traction in different areas of EU law, and not only in those specifically dealing with the management of the various crises. It is therefore important to assess the influence of financial stability in these areas to trace and understand its impact on the EU legal order in general. For instance, some have observed that in the financial services area financial stability considerations constitute a centripetal force leading to a competence creep towards the EU level.[60] Once competences are European, the likelihood of the ultimate rationale of new legal acts to stem from macroeconomic considerations, and from financial stability in particular, increases notably. For instance, the assessment of third country jurisdictions with similar regulation, relevant in terms of recognizing their applicability in the EU, can vary depending on their impact on EU's financial stability.[61] Furthermore, it has also been pointed out that the goals of financial regulation and private law currently overlap and that both protect the same objectives (financial stability and consumer protection). Hence, in addition to their own goals, "financial regulation addresses consumer protection top-down and private law addresses financial stability bottom-up".[62] However, there is an inherent imbalance in the intersection of financial stability with other objectives (in this case consumer protection), because none of those objectives can be "pushed to the point of undermining stability itself".[63] This is noticeable, for instance, in cases at the intersection between shareholder protection and financial stability, in which the CJEU ruled differently "based on the recognition of the existence of a systemic risk".[64] Similar developments take place also at the broader and more forward-looking areas. In this *Special Section*, Juutilainen explores to what extent financial stability concerns have determined the content of

[57] M Simoncini, 'The Delegation of Powers to EU Agencies After the Financial Crisis' (2021) European Papers www.europeanpapers.eu 1485.

[58] P Schammo, 'Actions and Inactions in the Investigation of Breaches of Union Law by the European Supervisory Authorities' (2018) CMLRev 1423 and 1447.

[59] Case T-660/14 *SV Capital v ABE* ECLI:EU:T:2015:608.

[60] F Pennesi, 'Equivalence in the Area of Financial Services: An Effective Instrument to Protect EU Financial Stability in Global Capital Markets?' (2021) CMLRev 39.

[61] *Ibid*. 52.

[62] G Comparato, 'Financial Stability in Private Law: Intersections, Conflicts, Choices' (2021) CMLRev 404.

[63] *Ibid*.

[64] *Ibid*. 412, comparing reasoning in cases C-441/93 *Pafitis and Others* ECLI:EU:C:1996:92 and C-41/15 *Dowling and Others* ECLI:EU:C:2016:836.

measures in designing and implementing the Capital Markets Union as another area where private law and internal market-related EU law could become subjected to the rationales of macroeconomic needs and threats.[65]

Finally, the pandemic responses are likely to result in analogous assessments in coming years. Although in this case the stability threat was fundamentally different, it turned also into a macroeconomic and financial stability issue. Consequently, the balancing between objectives followed the same pattern as in facing a financial stability threat, a model whereby the pandemic instability became an over-riding but not very clearly defined objective that this time eclipsed even the internal market objective in some areas and could be used to rationalise EU measures that would have been impossible before. One example is resorting to art. 175(3) TFEU as the legal basis for the RFF, an article that allows the use of specific funds outside existing EU cohesion policies and that thereby exploited economic cohesion funds for mainly short-term macroeconomic needs.

V.5. Integrated administration for a more centralised EMU governance

We described earlier how the institutional design of integration has evolved corresponding to the increase in the number of objectives, from ensuring the effective achievement of the internal market through the application of regular EU law, to operationalising after Maastricht the new macroeconomic governance model for the EMU. In the first instance, the model was based on indirect administration, while the latter introduced an integrated administration in the area of monetary policy and the open method of coordination for the other parts of the EMU macroeconomic governance. The reaction to the sovereign, bank and pandemic crises focused on guaranteeing the financial stability of the eurozone, and the promotion of this new objective resulted again in new administrative solutions.

Unsurprisingly, this model of developing the institutional and legal dimensions of European integration led to unexpected implications. For instance, differentiated integration in areas where indirect administration is applicable is less problematic, because those Member States participating in the policy at hand implement European decisions according to their own institutions and procedures. However, combining participation in the Banking Union, a two-level supervision including the ECB and national supervisors, with keeping the national currency (the case of Croatia and Bulgaria) requires the adoption of convoluted institutional and legal procedures. The model has to combine national monetary policy with supranational banking supervision, a task requiring the adoption of decisions directly addressed to private economic actors. In the resulting framework, the ultimate responsible of those decisions (the ECB) is also responsible for monetary policy in the Eurozone. This unforeseen situation forced to strike a delicate

[65] T Juutilainen, 'The EMU Rationale for Capital Markets Union' (2021) European Papers www.europeanpapers.eu 1505.

balance to guarantee the rights of those Member States, which cannot be involved in the actual decision-making bodies of the ECB. Consequently, the intricate solution adopted is artificial and perhaps unsatisfactory to solve eventual conflicts. It is mainly intended as a waiting room for the euro and, as such, was made into a pre-condition for it, an additional convergence criterion outside of the Maastricht Treaty.[66]

However, the Banking Union also results in new legal conundrums by combining the integrated administration model with a task that entitles economic operators with the right to appeal, first via administrative law and, in last instance, to the CJEU. Hence, the Banking Union combines the institutional form characteristic of macroeconomic integration with the procedural logic corresponding to microeconomic integration. The outcomes of this mismatch are unprecedented. Integrated administration links national and European financial supervisors together, but procedure-wise there are two different stages resulting in composite administrative procedures.[67] In the course of those procedures, for the first time European institutions (both the ECB and the CJEU) must apply (and interpret) national law. When doing so they have even disregarded national court's rulings if the effectiveness of EU law required so.[68] Hence, although composite administrative procedures have allegedly been established to safeguard national competences, the outcome is that the CJEU has expanded its control over national law. As a corollary the ECB can impose uniform supervisory tools and sanctions that the local competent authorities must execute even if they are against national legal traditions or result in procedures that are against the principles of the EU legal order.[69]

Another paradox resulting from the overlap of the integrated administration and the general provisions of the EU legal order is the use of delegated and implementing acts in the EMU. Since this is an area of exclusive competences (monetary policy) and of coordination of policies that are still national competence (economic governance), it is in principle unlikely that neither of these fields requires the adoption of delegated or implementing acts. Chamon dissects in his *Article* the number of occasions when these acts have nonetheless been used in macroeconomic integration, identifying the peculiarities of their use when compared to regular EU law. Interestingly enough, although in principle, it seems counterintuitive to picture the Council adopting Implementing Decisions, this has been the case each time the issue at stake was of vital economic rele-

[66] O Žáček, 'How to Get In? Euro Area Entry Criteria in Books and in Action' (2021) CMLRev 1141.

[67] FB Bastos, 'Derivative Illegality in European Composite Administrative Procedures' (2018) CMLRev 101; and FB Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-Making and Nonjusticiable National Law' (2020) EuConst 63.

[68] Case C-219/17 *Berlusconi and Fininvest* ECLI:EU:C:2018:1023. See FB Bastos, 'Judicial Review of Composite Administrative Procedures in the Single Supervisory Mechanism: *Berlusconi*' (2019) CMLRev 1355.

[69] P Weismann, 'Zur ebenenübergreifenden Verflechtung des Einheitlichen Aufsichtsmechanismus (SSM) aus Sicht des Unions- sowie des österreichischen Rechts' (2021) Zeitschrift für öffentliches Recht 799.

vance for the Member States.[70] This and other unconventional uses of delegated and implementing acts suggest that, as a result of the maladjustment between the EU legal order and the institutional form of integration in EMU affairs (integrated administration), in this area the law of EMU is diverging from standard EU law. Although the conclusions are only tentative, it seems clear that the consistency of the EU legal order is affected by this development.

A different but also vital feature of the EU legal order that is affected by the EMU is transparency. When acting as legislators, European institutions should observe the rules of transparency and citizens must be entitled to gain access and to review the documents on which those decisions are based as a basic principle of democratic governance. However, in instances of integrated administration the European institutions are usually not acting as legislator, but as executive or administrative power. Although this does not exclude opportunities for reviewing their actions and decisions, the confidentiality of their actions can be justified when balanced against other public objectives. This is the case of monetary policy, where confidentiality was made the rule rather than the exception, as Van Cleynenbreugel explains in this *Special Section*.[71] However, when banking financial supervision was transferred to the ECB, it raised doubts about to what extent the transparency of ECB actions depends on the matters it has to deal with (*ratione materiae*) or results from its own institutional provisions (*ratione personae*). In the former case new competences assigned to the ECB should in principle not be subject to the confidentiality regime. In the second case, the ECB would enjoy the restricted transparency regime whatever the activities it exerts, which could have implications for the expansion of ECB's activities. Naturally, banking supervision can justify in itself (thus *ratione materiae*) an extensive confidentiality regime.

Regarding the coordination of national economic policies, the developments have been similarly significant. The emergence of the European semester as the forum where to monitor and, if needed, adjust national fiscal decisions from an early stage of the budgetary process raises concerns from a democratic legitimacy perspective, because fiscal policy competences are national and, therefore, the Commission should not play more than a merely coordinative role.[72] Despite that, it has gradually increased its influence over national budgets, to the point that the ambitious policy programs established during the pandemic are articulated through the European Semester and the permanent overview of the Commission it entails. However, the provision on regional funds that constitutes the legal basis for the RFF is not related to the EMU secondary

[70] M Chamon, 'The *Sui Generis* Framework for Implementing the Law of EMU: A Constitutional Assessment' (2021) European Papers www.europeanpapers.eu 1463.

[71] P Van Cleynenbruegel, 'ECB Decision-making Within the Banking and Monetary Union: The Principle of Confidentiality on Its Way Out?' (2021) European Papers www.europeanpapers.eu 1437.

[72] P Leino-Sandberg and F Losada, 'How to Make the European Semester More Effective and Legitimate?' (July 2020) European Parliament, Economic Governance Support Unit www.europarl.europa.eu.

law acts instituting the European semester.[73] This can lead to assume that, once the broad competence is European, actions at EU level can be adopted by EU institutions without restrictions. However, this would disregard the principle of conferral, which imposes limits and conditions to the use of competences at the European level and insists that there can be no unconditional conferral of competences to the Union. Thus using the European semester (in principle a bottom-up process established by secondary law) for the purposes of a policy entitling the Commission to assign resources on a top-down fashion, should raise doubts concerning the principle of conferral. Furthermore, there are indications that the Commission leverage the disbursing of funds to guarantee compliance with other policy programs – not to mention the formal conditionality on the observance of the rule of law.

When seen together, all these developments depict a Union where centripetal forces have been set in motion. This is most obvious regarding the ECB's expanding (monetary) policy programmes and the role of the Commission to guide and monitor national executives within the framework of the European Semester. It is also applicable, but perhaps less evident, regarding the Court and its interpretation of national law within the Banking Union, which would result on a gradual harmonization of the national supervisory regimes. As Fromage indicates in her contribution,[74] this concentration of power at European level demands adapting or reconceiving the EU's accountability structures, most of which were not designed with these innovations in mind. It thus seems that major efforts are still required to adjust the EU institutional system to core democratic requirements.

VI. Conclusion: financial stability as cornerstone of the post-crisis EU legal order?

When seen with perspective, it is possible to identify several trends that have transformed both the form and content of European integration. When the Court declared that a new legal order resulted from the provisions of the Treaty of Rome, its interpretation stemmed from a coherent understanding of the institutional form (indirect administration) and substantive content (microeconomic integration) of European integration. The addition of the macroeconomic layer of integration, with its own institutional form (integrated administration and open method of coordination) but still broadly subject to the same legal order, resulted into a less consistent whole. The crises the Union faced during the last decade tested the resistance of these structures and, although the Court has been consistently interpreting EU law according to the same procedures and techniques without radical deviations, the irruption of financial stability as macroeconomic imperative has rearranged the equilibrium in integration. Now we can argue that insti-

[73] See the Six Pack and Two Pack cit.

[74] D Fromage, 'The Parliamentary Accountability of EMU Decisions: Between Informality and Fragmentation' (2021) European Papers www.europeanpapers.eu 1417.

tutional form, substantive content and legal order of European integration are again realigned, but instead of resulting from the provisions of the Treaties and from placing the legal rationality of law at the core of the system, financial stability is the rationale coherently arranging legal form, substantive content and institutional form.[75] Paradoxically enough, the autonomy of EU law and the central role to be played by the Court has been crucial in this change of paradigm. The consequences of this rearrangement for the EU legal order are the object of study of this *Special Section*.

[75] J de Miguel Bárcena, 'Estabilidad Financiera en Entornos Federales: la Nueva Constitución Económica del Riesgo' (2016) Revista de Derecho Constitucional Europeo 49.