



ARTICLES

SPECIAL SECTION – POLICY COORDINATION IN THE EU: TAKING STOCK OF THE OPEN METHOD OF COORDINATION

EUROPEAN ECONOMIC GOVERNANCE IN A POST-CRISIS ERA – A CONCEPTUAL APPRAISAL

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ABSTRACT: EU economic governance, as organized in the Treaties and implemented during the first years of the Economic and Monetary Union (EMU), strongly echoed the philosophy of “new governance” theories, and closely resembled the general patterns of the Open Method of Coordination (OMC). This Article seeks to determine whether this still holds true after the Eurozone crisis, and the subsequent fundamental revamping of the EMU’s economic pillar. It is argued that the Eurocrisis set in motion a dual process of expansion and intensification of EU intervention in economic policy, and brought about a new economic governance model. This new model relies on a certain understanding of policy coordination – supranationally driven, increasingly substantive and designed to harmonize – which sharply contrasts with that at the heart of new governance and the OMC. On that basis, the Article further argues that in the post-crisis era, EU economic governance radically departs from the OMC pattern and its main constitutive features (horizontality, experimentation, diversity accommodation), so much so that it has lost most of its relevance as a conceptual framework to characterize EU economic policy. Finally, the *Article* highlights the fundamentally paradoxical nature of the post-crisis EU economic governance framework, and the disparities that exist, on the one hand between the reality of post-crisis economic coordination and the relevant institutional discourse, and on the other hand, between the extensive powers the EU now enjoys under that governance framework, and the weak constitutional settlement that supports it.

KEYWORDS: EU economic policy – eurocrisis – transformation – governance – open method of coordination – harmonizing coordination.

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I. INTRODUCTION – EU ECONOMIC POLICY FROM A GOVERNANCE PERSPECTIVE

The Eurozone crisis has triggered a dramatic upheaval in the legal and political architecture of the Economic and Monetary Union (EMU). The crisis brought into the open the many structural flaws of the EMU construct as it had been designed in Maastricht. The constitutional asymmetry of the EMU was especially at stake, along with the weakness of its economic pillar. The crisis showed that the currency union was not sustainable if economic and fiscal policies remained primarily national, and if the inevitable interdependencies entailed in the sharing of the Euro were not more forcefully dealt with at the supranational level. Consequently, the correction of this systemic imbalance was placed high on the political agenda, and many reforms were passed to make up for the mistakes made in the original design of the EMU such as the Six-Pack, Two-Pack, Fiscal Compact, EuroPlus Pact and so on.

Much has been written on this unprecedented reconfiguration of the EMU architecture. EU law scholars have mostly favoured the institutional and constitutional perspective to describe and analyse the ongoing transformations. This *Article* does not follow this trend. Instead, it considers the dramatic upheaval in the economic pillar of the EMU through a more underexploited approach, that of governance modes. Through this governance perspective, this *Article* seeks to show how the Eurozone crisis, and the body of new rules and arrangements it gave rise to, changed the nature and the ambition of EU action in economic policy. It also endeavours to determine whether those changes mark a significant departure from the system that prevailed in the pre-crisis era. As Section II will show, the economic policy the EU followed until the crisis could be fairly described as a process of policy coordination, deeply inspired by the ‘new governance’ theories, which displayed the key characteristics of their main embodiment in the EU institutional framework, the Open Method of Coordination (OMC). The fundamental question this *Article* seeks to answer is whether it is still legitimate, after the Eurocrisis, to approach EU economic governance in those terms. Does the OMC, and its emphasis on multi-level power-sharing, soft coordination through deliberation, and experimentation, still constitute an adequate framework to understand EU economic policy?

The issue is controversial, and the few commentators that have sought to address it have yet to reach common ground.¹ This *Article* adds to that debate by offering a new perspective on economic governance in a post-crisis era. The approach is both conceptual and comparative. The *Article* identifies the core features of the post-crisis economic governance model and contrasts it with the model of the pre-crisis era. It does so in order to examine whether new governance and the OMC remain adequate theoretical tools to conceptualize economic governance today and in order to highlight some of the paradoxes and shortcomings of the current system.

¹ See for example J. ZEITLIN, *EU Experimentalist Governance in Times of Crisis*, in *West European Politics*, 2016, p. 1073 *et seq.*; M. DAWSON, *The Legal and Political Accountability Structure of Post-Crisis EU Economic Governance*, in *Journal of Common Market Studies*, 2015, p. 976 *et seq.*

The *Article* is structured as follows. Section II offers a comprehensive account of economic governance in the pre-crisis era. It elaborates on the institutional system set up by the Maastricht Treaty for economic policy, and highlights the proximity between EU economic governance, as it was actually conducted during the first two decades of the EMU, and the OMC and “new governance” conceptual frameworks. Section III focuses on the post-crisis situation. It describes the main substantive and institutional transformations brought about by the crisis, and identifies the main characteristics of the new governance model that resulted. On that basis, it highlights the metamorphosis economic governance has undergone since 2010, and the associated paradoxes that this structural shift has involved.

II. CHARACTERIZING ECONOMIC COORDINATION IN THE PRE-CRISIS ERA

II.1. THE TREATY FRAMEWORK ON ECONOMIC POLICY

Much has been written on the structural asymmetry of the EMU.² The negotiation of the Maastricht Treaty revealed two conflicting macroeconomic logics: the economist logic, according to which the supranationalization of money required, especially in a sub-optimal currency area such as the one under construction,³ an integrated macroeconomic policy and ultimately, political union, and the monetarist logic, following which the adoption of a common currency, combined with market mechanisms, would trigger the convergence of European economies, thus making an integrated economic policy superfluous.⁴ The outcome was, as it often is, a political compromise. Monetary policy would be fully transferred to the supranational level, whereas macroeconomic management would mainly remain in the hands of the European nation-States, with the *caveat* that their economic policies shall be regarded as “a matter of common concern” (Art. 121, para. 1, TFEU). At the heart of the Maastricht construct, there is thus a core unresolved political tension between a strong claim for containment, which seeks to prevent the EU from interfering in highly sensitive political choices of an intrinsically redistributive nature, and the recognition of a *de facto* necessity to act somehow collectively in the sphere of economic policy, due to the high degree of interdependence brought about by the shared currency.

² For an extensive account, see R. LASTRA, J.-V. LOUIS, *European Economic and Monetary Union: History, Trends and Prospects*, in *Yearbook of European Law*, 2013, p. 60 *et seq.*; A. HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, Oxford: Oxford University Press, 2015, p. 3 *et seq.*

³ It was from very early on admitted that the EMU did not meet all the criteria of an “optimum currency area”. This model, developed by Robert Mundell, emphasizes the importance of factor (capital and labour) mobility, wage flexibility, automatic fiscal transfers and macroeconomic convergence.

⁴ See K. DYSON, F. FEATHERSTONE, *The Road to Maastricht. Negotiating Economic and Monetary Union*, Oxford: Oxford University Press, 1999, p. 291.

It is this founding tension that explains the conceptual ambiguity around economic policy as an EU competence. Indeed, economic policy stands out as a particularly fragmented and indeterminate field of competence, which does not fit squarely within the categorization of EU competences set up by the Lisbon Treaty.⁵

What do the constitutional texts tell us?⁶ The general principle is stated in Art. 2, para. 3, and Art. 5, para. 1, TFEU: Member States shall coordinate their economic policies (together with their employment and social policies) within the arrangements determined by the Treaties and further provided for by the Union institutions. National economic policies ought to be implemented in coordination, to contribute to the general objectives of the Union, and in accordance with “the principle of an open market economy with free competition, favouring an efficient allocation of resources” (Art. 120 TFEU). The coordination of national economic policies is mainly carried out under a process established by Art. 121, paras 2-6, TFEU, colloquially known as the Multilateral Surveillance Procedure (MSP).⁷ The MSP is a soft law process that works through monitoring national policies in light of common supranational standards, the Broad Economic Policy Guidelines (BEPG). Inconsistencies may lead to the European Commission (Commission) issuing warnings and, ultimately, to policy recommendations (eventually made public) by the Council of Ministers (Council).⁸ More specific to national budgetary policies, the prohibitions of monetary financing (Art. 123 TFEU) and privileged access to financial institutions (Art. 124 TFEU) and the no-bailout clause (Art. 125 TFEU) aim at guaranteeing the Member States’ commitment to sound public finances (Art. 119, para. 3, TFEU). Finally, Art. 126 TFEU establishes the so-called Excessive Deficit Procedure (EDP).⁹ The EDP is an EU law process which aims to preserve the soundness and stability of the Member States’ public finances.¹⁰ In summary, under the EDP, the Commission monitors “the development of the budgetary situation and of the stock of government debt in the Member States” (Art. 126, para. 2, TFEU). Acting upon proposals from the Commission, the Council decides to open of a procedure against a Member State with an excessive deficit (Art. 126, para. 6,

⁵ Especially so when contrasted to monetary policy.

⁶ For a general overview, see R. SMITS, *Some Reflections on Economic Policy*, in *Legal Issues of Economic Integration*, 2007, p. 5 *et seq.*

⁷ The MSP has been further organized, and integrated into the Stability and Growth Pact (of which it constitutes the preventive arm), by Regulation (EC) 1466/97 of the Council of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

⁸ For a more detailed analysis, see J.-V. LOUIS, *L’Europe et sa monnaie*, Bruxelles: Editions de l’ULB, 2009, p. 85 *et seq.*

⁹ Together with Protocol No. 12 on the excessive deficit procedure. Regulation (EC) 1467/97 of the Council of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure has further specified the timing and modalities of the EDP, which since then constitutes the corrective arm of the Stability and Growth Pact.

¹⁰ For further information, see J.-V. LOUIS, *L’Europe et sa monnaie*, cit., p. 97 *et seq.*; R. LASTRA, J.-V. LOUIS, *European Economic and Monetary Union*, cit., p. 107 *et seq.*

TFEU), and after doing so, issues recommendations on how to correct the situation (Art. 126, paras 7-8, TFEU). The Commission is not entitled to bring infringement procedures against a Member State that failed to take measures to bring its deficit under control (Art. 126, para. 10, TFEU) but persistent non-compliance may ultimately lead to the imposition of financial sanctions by the Council (Art. 126, para. 11, TFEU).¹¹

Against this background, it is clear that economic policy is difficult to characterize within the competence constellation of the Lisbon Treaty. It did not go unnoticed that the competence basis for economic policy had been included in separate provisions, namely Art. 2, para. 3, and Art. 5 TFEU, between those devoted to shared competences and complementary competences, thus suggesting that this policy field falls outside the three-tier competence structure of the Lisbon Treaty for exclusive, shared and complementary competences. In addition, the Court of Justice has so far failed to provide any conclusive guidance as to the exact nature of the EU competence for economic policy.¹² This has led to confusion in the literature, and commentators are still divided as to whether economic policy ought to be treated as a shared,¹³ complementary¹⁴ or *sui generis*¹⁵ competence.

¹¹ It was posited that Arts 123 to 126 TFEU would suffice to prevent moral hazard and negative externalities across the EMU, and that budgetary and macroeconomic discipline would thus be guaranteed. There is no need to explain how this assumption was fundamentally questioned by the Eurocrisis.

¹² In both *Pringle* and *Gauweiler*, the Court managed to evade the question. See Court of Justice, judgement of 27 November 2012, case C-370/12, *Pringle v. Government of Ireland et al.*, paras 108-114; judgement of 16 June 2015, case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*, paras 46-65.

¹³ Some argue that following the clear language of Art. 4, para. 1, TFEU, this is the default category for competences not otherwise classified by the Treaties. For that argument, see C. TIMMERMANS, *ECJ Doctrines on Competences*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, Oxford: Oxford University Press, 2014, p. 163; K. LENAERTS, P. VAN NUFFEL, *European Union Law*, London: Sweet & Maxwell, 2011, p. 128; J.-C. PIRIS, *The Lisbon Treaty – A Legal and Political Analysis*, Cambridge: Cambridge University Press, 2010, p. 77. *Contra*, see Opinion of AG Kokott delivered on 26 October 2012, case C-370/12, *Pringle v. Government of Ireland et al.*, para. 93.

¹⁴ For another group of commentators, the “soft” nature of the intervention powers of the Union in the field of economic policy, as well as their alleged lack of pre-emptive effect, suggest economic policy should be regarded as a complementary competence. As an example, see M. DOUGAN, *The Convention’s Draft Constitutional Treaty: Bringing Europe Closer to its Lawyers?*, in *European Law Review*, 2003, p. 771.

¹⁵ For this last group, the fact that economic policy was inserted in separate Treaty provisions would indicate the Drafters’ clear intent to refuse its qualification either as a shared or a complementary competence. Economic policy, together with employment and social policy, should thus be considered as a distinct, *sui generis* category of competence, falling outside the conceptual trilogy consecrated by the Lisbon Treaty. See R. BIEBER, *The Allocation of Economic Policy*, in L. AZOULAI (ed.), *The Question of Competence in the European Union*, cit., p. 89 *et seq.*; P. CRAIG, *The Lisbon Treaty – Law, Politics and Treaty Reform*, Oxford: Oxford University Press, 2010, p. 178 *et seq.*; J. DUTHEIL DE LA ROCHÈRE, *Fédéralisation de l’Europe – Le problème de la clarification des compétences entre l’Union et les Etats*, in O. BEAUD, A. LECHEVALIER, I. PERNICE, S. STRUDEL (eds), *L’Europe en voie de Constitution*, Bruxelles: Bruylant, 2004, p. 329; J.-P. JACQUÉ, *Droit institutionnel de l’Union européenne*, Paris: Dalloz, 2015, p. 180; R. SCHÜTZE, *European Constitutional Law*, Cambridge: Cambridge University Press, 2016, p. 241 *et seq.*; F. MARTUCCI, *L’ordre économique et monétaire de l’Union européenne*, Bruxelles: Bruylant, 2015, p. 263.

Such conceptual uncertainty makes determining the legal regime economic policy should be subject to particularly challenging. From the combined wording of Art. 2, para. 3, and Art. 5 TFEU, one may only infer that the Union can provide arrangements and take measures to allow the Member States to coordinate their economic policies, on top of those already put in place by the Treaties. It should be emphasized that following Art. 2, para. 3, TFEU, it is not the Union that coordinates Member States' economic policies, but the Member States that carry out such coordination. The role of the Union thus appears as that of a facilitator, rather than of a policy-maker *per se*. However, the peculiar position of economic policy in the competence constellation suggests that the Union competence in that field must be normatively stronger than its complementary competences under Art. 6 TFEU, and that it would therefore allow some degree of harmonization.¹⁶ After all, Art. 2, para. 3, TFEU does not, as Art. 2, para. 5, TFEU does, specify that legal acts adopted by the Union in the field of economic policy shall not entail harmonization. The question of whether some kind of pre-emptive effect could be attributed to measures adopted by the Union under its competence for economic policy remains unanswered.

Under the Treaty framework, economic policy very much looks like an unidentified object. Although the EU's powers under the specific chapter devoted to economic policy (and most notably under Arts 121 and 126 TFEU) are more neatly framed, the room for general action under Art. 5 TFEU remains largely undefined. These powers must entail more than mere complementary prerogatives, but not as much as what the Union enjoys under the competences it shares with Member States. One may therefore be tempted to claim that the very specificity of this field of competence, which the Masters of the Treaties left undefined and unconstrained, was its constant state of flux, its flexibility, and its adaptability to the context and the needs of the time.

II.2. PRE-CRISIS ECONOMIC GOVERNANCE AND THE OMC

Despite the fundamental ambiguity of the nature of economic policy as an EU competence, it remains possible, on the basis of both the relevant Treaty provisions and the subsequent practice of the EU institutions and the Member States, to identify the main features of EMU economic governance as it was *de facto* carried out in the pre-crisis era.¹⁷ This section claims it was mainly designed as a kind of soft governance, very much along the lines of the theories of new governance.¹⁸ Starting from the letter of the EU Treaties,

¹⁶ See R. SCHÜTZE, *European Constitutional Law*, cit., p. 242. *Contra*, see Tridimas which speaks of an "EU presence", rather than competence, in the field of economic policy, which would only allow for convergence, rather than harmonisation (T. TRIDIMAS, *Competence after Lisbon: The Elusive Search for Bright Lines*, in D. ASHIAGBOR, N. COUNTOURIS, I. LIANOS (eds), *The European Union After the Treaty of Lisbon*, Cambridge: Cambridge University Press, 2012, p. 56).

¹⁷ This generally refers to a time period spanning from the entry into force of the Maastricht Treaty in 1993 to the outbreak of the Eurozone crisis in 2009-2010.

¹⁸ On soft law and soft governance in the EU, see F. TERPAN, *Soft Law in the European Union – The Changing Nature of EU Law*, in *European Law Journal*, 2015, p. 86 *et seq.*

and the emphasis on coordination as the driving principle of this governance framework, the analysis shows that the kind of economic coordination carried out until the eve of the Eurocrisis was very much aligned with the main precepts of new governance and experimentalism, and strongly reflected their main embodiment in the EU institutional framework, i.e. the OMC.

The EU Treaties identify coordination as the guiding principle for EU economic governance. As already pointed out, it is not for the Union to coordinate its Member States' economic policies, but for the Member States to carry out such coordination *inter se*, following the methodology provided for in the Treaties. The role of the EU as an arranger consists of providing and managing the procedural frameworks necessary for economic coordination to take place, rather than in dictating the terms and orientations of the policies to coordinate.¹⁹ There seems to be no room for EU action of a more substantive, harmonizing nature.

In the pre-crisis era, EU action in the field of economic policy has been in line with that model. Under the general rule consecrated by ex-Art. 98 of the Treaty establishing the European Community (TEC), Member States were to regard their economic policies as a matter of common concern, and were therefore mandated to enact policies consistent with the general objectives of the EU and the economic guidelines defined collectively. Economic coordination was itself primarily carried out under the MSP set up by ex-Art. 99 TEC, as complemented by Regulation 1466/97.²⁰ The MSP consisted of an early warning system, a soft and non-binding process combining reporting, discussion, advice and peer-review to achieve compliance on the one hand with the BEPG,²¹ and on the other, with the medium-term budgetary objective (MTBO) set by each country.²² Under this framework, economic coordination was very much nationally driven. Be it the details on important economic reforms taken by the Member States (ex-Art. 99, para. 3, TEC) or the stability and convergence programmes mandated by Regulation 1466/97, the information economic coordination relied on emanated from the Member States themselves, and its availability was dependent on their good will and eagerness to cooperate.²³ Economic coordination itself, i.e. adoption of the general benchmarks steering the process (the BEPG), review and assessment of national economic policies, and the issuance of

¹⁹ In that regard, see Art. 121, para. 6, and Art. 126, para. 14, TFEU. Since Lisbon, specific arrangements may also be foreseen for Eurozone countries, following Art. 136 TFEU.

²⁰ Regulation 1466/97 established the preventive arm of the Stability and Growth Pact.

²¹ Adopted following the procedure detailed in ex-Art. 99 TEC.

²² Following Art. 3, para. 2, let. a), and Art. 7, para. 2, let. a) of Regulation 1466/97, each Member State is ascribed a medium-term budgetary objective (and an adjustment path towards it) that will secure compliance with the debt and deficit criteria of the Maastricht Treaty.

²³ Amtenbrink and De Haan have shown the limited means the EU and the other Member States did enjoy *vis-à-vis* a State reluctant to faithfully fulfil its reporting obligations. F. AMTENBRINK, J. DE HAAN, *Economic Governance in the European Union: Fiscal Policy Discipline Versus Flexibility*, in *Common Market Law Review*, 2003, p. 1081 *et seq.*

warnings and policy recommendations, was primarily conducted by those EU institutions mostly dominated by the national logic: the European Council, the EuroGroup and, first and foremost, the Council of Ministers.²⁴ The European Parliament remained very much sidelined in the entire process, thus confirming the horizontal, state-centred nature of economic coordination in its early stages.²⁵

These elements tend to highlight the strong intergovernmental character of EU economic governance in the pre-crisis era.²⁶ In this policy arrangement, the functions of the Commission, the institution that embodies the supranational interest of the EU as a whole, were mainly procedural, of a facilitative nature.²⁷ The Commission acted as the link between the individual Member States and the various decision-making bodies at the supranational level, starting with the Council. Its primary responsibility was to secure full adherence to the coordination process as it was framed in the Treaties and in the Stability and Growth Pact (SGP).²⁸ If the Commission enjoyed significant prerogatives of suggestion and recommendation, it could never act autonomously. The ultimate authority always lay somewhere else, most often with the Council.

Moreover, the policy coordination carried out could be best characterized as very open, soft and loose, in the sense that its ultimate aim was limited to the attainment of common economic objectives (starting with sound public finances and efficient allocation of resources) through a preserved diversity of national policy structures and solutions. Economic coordination in the pre-crisis era did not equate to the joint implementation of a certain type of economic policy. The emphasis was thus certainly not on substantive convergence (and even less so on harmonization) and the reduction of structural economic differences among Member States. Quite the contrary, it solely supported the collective pursuit of shared policy goals (constituting a common economic project) through a perpetuated plurality of approaches, structures and tools. Hence, one might best describe economic coordination in its early phase as “project-coordination”.

In short, the governance model behind EU economic policy in the pre-crisis era was nationally driven, it confined the Commission (and the EU) to a mere procedural, facilitative role, and it relied on a soft understanding of policy coordination, solely focused on

²⁴ See U. PUETTER, *The Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance*, Manchester: Manchester University Press, 2006.

²⁵ C. LORD, *The European Parliament in the Economic Governance of the European Union*, in *Journal of Common Market Studies*, 2003, p. 249 *et seq.*

²⁶ For similar findings, see F. AMTENBRINK, J. DE HAAN, *Economic Governance in the European Union*, cit., p. 1080; I. MAHER, *Economic Governance: Hybridity, Accountability and Control*, in *Columbia Journal of European Law*, 2007, p. 693 *et seq.*

²⁷ I. MAHER, *Economic Governance*, cit., p. 694. More generally, on the procedural nature of the EU competences in the field of economic policy, see F. MARTUCCI, *L'ordre économique et monétaire de l'Union européenne*, cit., p. 264 *et seq.*

²⁸ This responsibility was clearly emphasized by the Court of Justice in 2004. See Court of Justice, judgement of 13 July 2004, case C-27/04, *Commission v. Council*, paras 78-81.

the implementation of shared goals via a diversity of national approaches. This model strongly echoes both the philosophy and the main precepts of “new governance” theories.²⁹

New governance is here understood as a departure from the traditional methods and forms of regulation³⁰ and, in the specific context of the EU, from the Community method and the “integration through law” narrative.³¹ It is characterized by the rejection of normative hierarchy, and it encourages multi-level power-sharing, leaves final policy-making to the lower-level policy actors, and seeks to foster iterative deliberation and experimentation³² by relying on flexible and revisable guidelines and benchmarks rather than binding standards or norms.³³ The central manifestation of new governance in the EU is undoubtedly the OMC, which took shape in the field of social and employment policy,³⁴ and was later codified by the Lisbon European Council in 2000.³⁵ The emergence and expansion of the OMC in EU institutional practice can be explained by subsidiarity (and the limited competences of the EU), flexibility and legitimacy.³⁶ In brief, the OMC could be best described as a procedural strategy “which leaves a considerable amount of policy autonomy to the Member States, and which normally blends the setting of guidelines or objectives at EU level with the elaboration of Member States action plans or strat-

²⁹ Within the theory of new governance, which has produced a vast array of literature, it is possible to distinguish various trends and schools, with their own conceptualization and characterization of the phenomenon: democratic experimentalism, proceduralisation and reflexive law. This *Article* will not enter these theoretical debates, but will rely on a basic and consensual understanding of new governance. For an extensive and comparative account of these trends, see M. DAWSON, *New Governance and the Transformation of EU Law*, Cambridge: Cambridge University Press, 2011, p. 105 *et seq.*

³⁰ M. DAWSON, *New Governance in the EU after the Euro Crisis: Retired or Reborn?*, in *EUI AEL Paper Series*, no. 1, 2015, p. 2.

³¹ J. SCOTT, L. TRUBEK, *Mind the Gap: Law and New Approaches to Governance in the European Union*, in *European Law Journal*, 2002, p. 1.

³² C. SABEL, J. ZEITLIN, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, in *European Law Journal*, 2008, p. 271 *et seq.*

³³ S. SMISMANS, *From Harmonization to Co-ordination? EU law in the Lisbon Governance Architecture*, in *Journal European Public Policy*, 2011, p. 505.

³⁴ S. DEAKIN, O. DE SCHUTTER, *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?*, Bruxelles: Bruylant, 2005.

³⁵ European Council, Presidency Conclusions of 23-24 March 2000, paras 37-40. The Conclusions identify the four key elements of the Method: the definition of common goals and guidelines at EU level; the setting of benchmarks and indicators to compare State policies and performances; the translation of EU guidelines into national policies and programmes; periodic monitoring, evaluation and peer-review.

³⁶ D. HODSON, I. MAHER, *The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination*, in *Journal of Common Market Studies*, 2001, p. 727 *et seq.*

egy reports in an iterative process intending to bring about greater coordination and mutual learning in these policy fields".³⁷ It is generally considered to display the following key features:³⁸ revisability,³⁹ diversity,⁴⁰ proceduralization⁴¹ and national ownership.⁴²

It is self-evident that the pre-crisis economic governance model of the EMU described above meets both the overall philosophy of new governance and the general pattern of the OMC.⁴³ This model emerged in response to a dual concern: on the one hand, securing a minimal level of interstate concertation in the conduct of Member States' economic policies, in view of the many interdependencies that the sharing of a common currency entails, and on the other hand, the preservation of national sovereignty (and diversity) with regard to economic and redistributive policies. The structure of the pre-crisis economic governance model revolved around a common process (the MSP, as complemented by the SGP) bringing together all relevant policy actors to coordinate their action in the economic field through discussion and monitoring (*proceduralization*). Together at the EU level, they set the overarching guidelines and objectives (BEPG and MTBO) that would guide their future budgetary and economic policies for the year to come (*revisability*). Those guidelines were then translated into national action plans (stability and convergence programmes), which the States devised in absolute autonomy (*diversity* and *differentiation*). The process was strongly dominated, both at the deliberative and implementation stages, by the Member States (either taken individually, or gathered in the Council), with the Commission confined to a supportive role (*national ownership*).⁴⁴ The

³⁷ G. DE BÚRCA, *The Constitutional Challenge of New Governance in the European Union*, in *European Law Review*, 2003, p. 824.

³⁸ This characterization builds upon that established by Dawson, and Scott and Trubek. See M. DAWSON, *New Governance in the EU after the Euro Crisis*, cit., p. 4 *et seq.*; J. SCOTT, L. TRUBEK, *Mind the Gap*, cit., p. 5 *et seq.*

³⁹ I.e. the flexibility and adaptability of the policy guidelines, benchmarks and objectives, which are constantly reviewed, adjusted and renewed following an iterative process, with no clear demarcation between rule-making and rule-implementation.

⁴⁰ I.e. the tailoring of policy-making, the rejection of a *one-size-fits-all* approach and the emphasis on differentiation.

⁴¹ I.e. the OMC is less about substantive output than about tying all policy actors into a collective decision-making process, structured around deliberation, participation and power sharing, with the aim of fostering mutual learning and experimentation.

⁴² I.e. the idea that Member States, the lower-level units, are both the key players of the OMC process itself, and the ultimate decision-makers on the realization and implementation of the OMC guidelines.

⁴³ For a similar view, see F. AMTENBRINK, J. DE HAAN, *Economic Governance in the European Union*, cit., p. 1079; D. HODSON, I. MAHER, *The Open Method as a New Mode of Governance*, cit.; D. HODSON, *Macroeconomic Co-ordination in the Euro Area: The Scope and Limits of the Open Method*, in *Journal of European Public Policy*, 2004, p. 231; E. SZYSZCZAK, *Experimental Governance: The Open Method of Coordination*, in *European Law Journal*, 2006, p. 494; F. TERPAN, *Soft Law in the European Union*, cit., p. 81 *et seq.*

⁴⁴ One can easily argue that both diversity and national ownership have been further strengthened as the 2005 reform of the SGP increased the possibilities for country-specificity and differentiation.

process may well have allowed for peer pressure but it retained an overly soft, open and non-constraining nature.

The co-existence, next to this economic coordination framework, of prescriptive budgetary rules on deficit and debt, and a surveillance mechanism, the EDP, which may ultimately lead to the imposition of sanctions, seems to sit uneasily with the characterization of economic governance in the pre-crisis era as new governance. This *Article* claims that such hybridity does not contradict this broad depiction of pre-crisis EU economic governance as an OMC-like process.⁴⁵ The existence of substantive treaty rules on national budgets certainly contributed to constraining the flexibility and discretion Member States enjoy in economic coordination, but did not fundamentally question the open, soft and coordinate nature of the policy process.⁴⁶ Moreover, the EDP, which can be reasonably characterized as a hard law mechanism in view of its hierarchical, binding and punitive nature, has proven a non-credible threat, which in the pre-crisis period failed to discipline Member States running excessive deficits.⁴⁷ The reasons for this low credibility pertained to the procedure's lack of teeth in its first stages and, more importantly, to its non-automaticity and deep politicization, due to the dominance of the Council on each crucial step of the EDP.⁴⁸ Despite its many flaws, the EDP, and the substantive budgetary rules to which it secured compliance, did interplay with the softer framework for economic coordination, and continued casting "a shadow" of hard law.⁴⁹ But this shadow was not threatening enough to call into question the intrinsic flexibility, openness and coordination of the overall governance process.

⁴⁵ D. TRUBEK, P. COTTRELL, M. NANCE, *Soft Law, Hard Law and European Integration: Towards a Theory of Hybridity*, in G. DE BÚRCA, J. SCOTT (eds), *Law and New Governance in the EU and the US*, Oxford: Hart, 2006, p. 65 *et seq.*

⁴⁶ On the notion of constrained discretion, see J. PISANI-FERRY, *Only One Bed for Two Dreams: A Critical Retrospective on the Debate over the Economic Governance of the Euro Area*, in *Journal of Common Market Studies*, 2006, p. 839.

⁴⁷ The famous case of France and Germany in 2004-2005 is quite telling in that regard. See *European Commission v. Council of the European Union*, *cit.* See also D. HODSON, I. MAHER, *Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact*, in *Journal of European Public Policy*, 2004, p. 798 *et seq.*

⁴⁸ For Maher, the absence of political ownership of the EDP called its very existence into question (I. MAHER, *Economic Governance: Hybridity, Accountability and Control*, *cit.*, p. 807).

⁴⁹ On this interplay, see W. SCHELKE, *EU Fiscal Governance: Hard Law in the Shadow of Soft Law?*, in *Columbia Journal of European Law*, 2007, p. 706 *et seq.*; K. ARMSTRONG, *The Character of EU Law and Governance: From "Community Method" to New Modes of Governance*, in *Current Legal Problems*, 2011, p. 199 *et seq.*; A. HÉRITIER, M. RHODES (eds), *New Modes of Governance in Europe – Governing in the Shadow of Hierarchy*, Basingstoke: Palgrave Macmillan, 2011.

III. ECONOMIC GOVERNANCE IN THE POST-CRISIS ERA – ENTERING A NEW WORLD?

III.1. WHITHER THE OMC? THE NEW FACE OF ECONOMIC COORDINATION

The Eurocrisis has changed the face of EU action in the field of economic policy. Whether under the existing provisions of the Treaties, in the framework of new mechanisms and processes set up under EU law, or under *ad hoc* arrangements hastily put together outside the EU legal framework, the Union's activism in the field since 2010 has truly been unprecedented. In this new governance context, which has been widely discussed in the literature,⁵⁰ two main trends can be identified.

On the one hand, the scope of EU economic governance has dramatically expanded to an unprecedented magnitude. In the pre-crisis era, EU economic policy was very much focused on budgetary policies. After the storm, this emphasis of course remains, and has been accentuated through substantial strengthening of the budgetary surveillance mechanisms. This is seen in the consolidation of the SGP by the Six-Pack reform,⁵¹ the harmonization of national budgetary frameworks carried out under Directive 2011/85,⁵² the es-

⁵⁰ Among others, see K. TUORI, K. TUORI, *The Eurozone Crisis – A Constitutional Analysis*, Cambridge: Cambridge University Press, 2014, p. 105 *et seq.*; A. HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, cit., p. 29 *et seq.*; D. ADAMSKI, *Economic Policy Coordination as a Game Involving Economic Stability and National Sovereignty*, in *European Law Journal*, 2016, p. 180 *et seq.*; F. ALLEMAND, F. MARTUCCI, *La nouvelle gouvernance économique européenne*, in *Cahiers de Droit Européen*, 2012, p. 17 *et seq.*; K. ARMSTRONG, *The New Governance of EU Fiscal Discipline*, in *European Law Review*, 2013, p. 601 *et seq.*; M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit.; N. DE SADELEER, *The New Architecture of the European Economic Governance: A Leviathan or a Flat-Footed Colossus?*, in *Maastricht Journal of European and Comparative Law*, 2012, p. 354 *et seq.*; M. IOANNIDIS, *Europe's New Transformation: How the EU Economic Constitution Changed During the Eurozone Crisis*, in *Common Market Law Review*, 2016, p. 1237 *et seq.*; R. SMITS, *The Crisis Response in Europe's Economic and Monetary Union: Overview of Legal Developments*, in *Fordham International Law Journal*, 2015, p. 1137 *et seq.*; P. CRAIG, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, in M. ADAMS, F. FABBRINI, P. LAROCHE (eds), *The Constitutionalization of European Budgetary Constraints*, Oxford: Hart, 2016, p. 72 *et seq.*

⁵¹ See especially, Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the Euro area; Regulation (EU) 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; and Regulation (EU) 1177/2011 of the Council of 8 November 2011 amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

⁵² Directive 2011/85/EU of the Council of 8 November 2011 on requirements for budgetary frameworks of the Member States.

establishment of a Eurozone-specific budgetary monitoring procedure by Two-Pack Regulation 473/2013⁵³ and the internalization of a shared fiscal discipline regime mandated by the Fiscal Compact.⁵⁴ The focus has however been broadened to macroeconomic policies *sensu lato*, via the Macroeconomic Imbalance Procedure (MIP), which in many regards, reflects the logic of the SGP in the macroeconomic field.⁵⁵ This dual evolution, combined with the impetus given by the Europe 2020 strategy and the EuroPlus Pact, and the merger of various coordination cycles under the European Semester framework,⁵⁶ has been taken advantage of by the EU to make inroads (actual or potential) in any national policy sector with a budgetary or macroeconomic aspect or impact (in short, potentially every single area of national public action), thus triggering a general blurring of the classic dividing lines between the Union's and its Member States' respective spheres

⁵³ Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the euro area Member States.

⁵⁴ The Fiscal Compact constitutes the core of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). Its key provision, Art. 3, para. 2, requires that its signatories internalize the balanced-budget rule and an automatic budgetary correction mechanism into their domestic legal order through rules of a (quasi-) constitutional rank. Compliance with that obligation is to be supervised by the Commission together with the Court of Justice (Art. 8).

⁵⁵ In summary, the MIP, as organized by its founding Regulation (EU) 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, aims at identifying, preventing and addressing the emergence of macroeconomic imbalances which have the potential to adversely affect the economic stability of a Member State and of the Union. The notion of macroeconomic imbalance is largely conceived, and can relate to a multiplicity of sources: current account imbalance, problematic real exchange rates, excessive levels of private debt, worrying trends on the real estate market, unsustainable levels of unemployment and so on. Following a template quite similar to that of the SGP in the field of public finances, the MIP is structured around two arms: a preventive arm and a corrective arm, which can be triggered by the Council on the basis of the macroeconomic assessment carried out by the Commission. The MIP, just like the SGP, heavily rests on a dense net of monitoring, surveillance and reporting processes, the intensity of which depends on the nature of the macroeconomic imbalance at stake, and the status of Member States under the MIP. Regulation (EU) 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, adds an extra "hard" layer to the MIP, by setting up a Eurozone-specific regime of sanctions that can be applied to reluctant Member States under an excessive imbalance procedure.

⁵⁶ The European Semester has been established by Six-Pack Regulation 1175/2011. It brings all existing coordination mechanisms (the SGP, the MIP, budgetary monitoring under Regulation 473/2013, Europe 2020 and the EuroPlus Pact) under one common procedural "umbrella framework", and can therefore be best described as a meta-coordination process. It seeks to strengthen and extend the coordination capacities of the EU, and foster maximal synergy and transversality. The Semester is run following a synchronized timeline, which provides for both *ex ante* orientation and *ex post* correction and assessment. It opens in January with the publication of the Annual Growth Survey and the Council recommendations on the economic policy of the euro area. But, the apex of the process is certainly in May, when the Commission releases its country-specific recommendations, which are subsequently endorsed by the Council. For more, see the official detailed timeline provided by the Commission on ec.europa.eu.

of competences.⁵⁷ More specifically from a conceptual point of view, since 2010 an expansion of the EU understanding of the very notion of economic policy is observed, leading to a *de facto* extension of its material scope.⁵⁸ Significant pieces of social, employment and other redistributive policies are absorbed into EU economic governance, without specific regard being paid to their distinctive features. This willful emphasis on the sole budgetary and macroeconomic aspects of policy areas, and their subsequent incorporation into the realm of EU economic governance, has brought about a phenomenon of “economization” of redistributive (and not strictly economic) policy areas.⁵⁹

On the other hand, the crisis has also triggered a substantial intensification of the means and methods of EU action in the economic field. As shown *supra*, before the crisis broke out, economic policy was from a governance perspective mainly characterized by its softness, and by policy processes resorting to new governance techniques, with the already notable but non-paradoxical exception of the EDP. The post-crisis situation looks much different. The clearest example of such intensification is certainly to be found in countries under financial assistance such as Greece, Portugal, Ireland or Romania, which following their bail-out, saw large parts of their economic and social policies radically constrained⁶⁰ by the prescriptive conditionality programs the EU had them enter into in the name of fiscal consolidation and macroeconomic stability.⁶¹ Other structural transformations of the general architecture of EU economic governance also support the escalation of EU economic action, across the board this time. The EDP has been further hardened, and seriously depoliticized (and automatized) via the introduction of reverse qualified majority voting (RQMV), thus enhancing the overall credibility of the threat.⁶² The

⁵⁷ See M. DAWSON, F. DE WITTE, *Constitutional Balance in the EU after the Euro-crisis*, in *Modern Law Review*, 2013, p. 824 *et seq.*

⁵⁸ See N. MARTINEZ-YANEZ, *Rethinking the Role of Employment and Social Policy Coordination Competences in a Deeper Economic Union*, in *European Labour Law Journal*, 2016, p. 533 *et seq.*

⁵⁹ One may also speak of economic mainstreaming or, in view of Art. 9 TFEU's objective, of “reverse” mainstreaming. In that regard, see F. COSTAMAGNA, *The Impact of Stronger Economic Policy Co-ordination on the European Social Dimension: Issues of Legitimacy*, in M. ADAMS, F. FABBRINI, P. LAROCHE (eds), *The Constitutionalization of European Budgetary Constraints*, cit., p. 359 *et seq.*

⁶⁰ Since the entry into force of the Two-Pack, those countries are subject to the so-called “enhanced surveillance” procedure set up by Regulation (EU) 472/2013 of the European Parliament and of 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. See M. IOANNIDIS, *EU Financial Assistance Conditionality after “Two Pack”*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, p. 61 *et seq.*

⁶¹ See the narrative of “bonded government” developed by Damian Chalmers in D. CHALMERS, *Crisis Reconfiguration of the European Constitutional State*, in D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (eds), *The End of Eurocrats’ Dream – Adjusting to European Diversity*, Cambridge: Cambridge University Press, 2016, p. 269 *et seq.*

⁶² See R. PALMSTORFER, *The Reverse Majority Voting under the Six-Pack: A Bad Turn for the Union?*, in *European Law Journal*, 2014, p. 186 *et seq.* Following a similar rationale as the RQMV, Art. 7 TSCG instructs

punitive logic of the EDP has been further extended to the preventive arm of the SGP, making sanctions possible at a much earlier stage. Under the combined effect of Regulation 473/2013, Directive 2011/85 and the Fiscal Compact, substantial inroads have been made in both the procedural and substantive budgetary autonomy of the Member States. The spirit and architecture of the SGP, with a dual preventive/corrective structure, a fully-fledged sanction regime, and clear supranational steering, have been duplicated in the field of macroeconomic policy via the MIP. Even under the European Semester, the new umbrella framework for economic policy coordination within the EMU and a process that remains formally of a soft and open nature, EU action has proven significantly more incisive. This has to do with the central role the Commission has been endowed with, and the dominance it exercises in the whole process, especially *vis-à-vis* the Council of Ministers, which is bound by the “comply or explain” rule.⁶³ This also relates to the level of detail and prescription of the policy guidance addressed to Member States, which overall has increased, despite clear variations depending on the state’s economic and budgetary health. Moreover, in the Semester context, the interplay between soft economic policy coordination strictly speaking and the more constraining arrangements of the SGP and MIP is strengthened, and the shadow of hard law cast by the latter is more immediate than in the pre-crisis era. This suggests that the Semester’s output, starting with the country-specific recommendations it produces yearly, may be more binding and enforceable than it *prima facie* seems.⁶⁴ The use of financial incentives under the European Semester only further confirms this phenomenon of intensification. The 2014-2020 Structural Funding Regulation indeed favours the alignment of funding priorities with policy priorities expressed by the EU in the framework of the Semester. A certain form of conditionality is thus established between the granting of structural funds by the EU, and Member States’ compliance with the recommendations addressed to them under the Semester process.⁶⁵

What is one to make of this dual evolution undergone by EU economic policy in the aftermath of the Eurocrisis, especially if analysed against the economic governance model that prevailed in the pre-crisis era? It is claimed that this model, as derived from

Eurozone Member States to support the proposals made by the Commission with regard to a State under an EDP.

⁶³ According to this rule, which applies to most instruments adopted under the Semester process (starting with the country-specific recommendations), the Council may only amend the Commission’s proposals if it justifies the changes brought. The rule has the practical effect of deterring the Council from suggesting amendments. See Art. 2-ab, para. 2, of Regulation 1466/97, as amended by Six-Pack Regulation 1175/2011.

⁶⁴ For more, see C. WUTSCHER, *Coordination by Coercion? On the Legal Status of European Semester Instruments*, on file with author; E. KORKEA-AHO, *Adjudicating New Governance – Deliberative Democracy in the European Union*, Abingdon: Routledge, 2015, p. 86 *et seq.*

⁶⁵ On this question, see also A. STEINBACH, *Structural Reforms in EU Member States: Exploring Sanction-based and Reward-based Mechanisms*, in *European Journal of Legal Studies*, 2016, p. 173 *et seq.*

the EU Treaties⁶⁶ and its functioning during the first decade post-Maastricht, has been radically reconfigured, as the EMU moved from one coordination pattern to another. As has been shown, economic policy was granted a status of its own under the Treaties, neither shared nor complementary, but somewhere in between. Coordination was coined as the guiding principle for this area of EU competence. This economic coordination was to remain primarily in the hands of the Member States, with the Union acting as a facilitator and arranger. Strongly echoing the philosophy of new governance theories, and the founding rationale of their main manifestation in the EU framework, the OMC, coordination was designed as procedural and open-ended, and primarily focused on the implementation of shared goals via a preserved diversity of national approaches. The Eurocrisis caused the EU and its Member States to largely transcend this pattern, leading to its evolution towards a new form of coordination, and a new type of EU intervention in the field of economic policy. It displays the following features.

First, the role and prerogatives of the actors of economic coordination have changed. A reversal of the relationship (and power dynamics) between the EU and its Member States has taken place. If the Member States blatantly dominated the political process that produced the main crisis-induced reforms discussed above,⁶⁷ now their implementation and day-to-day operation is firmly in the hands of the Commission.⁶⁸ As a result, Member States are more subjects than drivers in the post-Eurocrisis economic coordination galaxy. The introduction of RQMV at critical junctures of the SGP and MIP, which in most cases will leave Member States with no other choice than to rubberstamp the decisions reached by the Commission, paradigmatically embodies this trend. One could also refer to the dominant part played by the Commission under the European Semester framework. If certain aspects of the process, such as the budgetary monitoring carried out under Regulation 473/2013, are fully administered by the Commission, others still require the formal intervention of the Council. But even there, under the effect of the

⁶⁶ Notwithstanding the addition of a third paragraph to Art. 136 TFEU to allow the establishment of a stability mechanism by the Eurozone Member States, the EU Treaties have been left untouched during the Eurocrisis.

⁶⁷ It is against that background that claims about the emergence of a new intergovernmentalism have been made. See for example, C. BICKERTON, D. HODSON, U. PUETTER, *The New Intergovernmentalism: European Integration in the Post-Maastricht Era*, in *Journal of Common Market Studies*, 2015, p. 703 *et seq.* The strong part played by the European Council, the Eurogroup and the Council of Ministers, the strong reliance on pure international law to get new initiatives through, do support such claims, but only at the reform level. The actual implementation of those reforms is, as this *Article* argues, dominated by supranational logic.

⁶⁸ For an interesting analysis of the Commission's role under the new architecture of EU economic governance, and the centrality of expertise and scientific truth, see L. DE LUCIA, *The Rationale of Economics and Law in the Aftermath of the Crisis: A Lesson from Michel Foucault*, in *European Constitutional Law Review*, 2016, p. 455 *et seq.*

“comply or explain” rule, the Commission retains the upper hand. In short, the Commission no longer is a mere facilitator that secures full adherence with an economic coordination process managed by the States and the intergovernmental fora in Brussels. It now runs it, and heavily weighs on its outcomes. The “re-credibilization” of the corrective and sanction-based mechanisms of that process, together with the strengthening of the link between these harder arrangements and the softer coordination cycle, further support the claim of an increasingly supranational hold on the entire economic governance of the EMU.⁶⁹ Of course, this in no way means that national actors have become insignificant. They retain an important role within the EU arrangements for economic coordination. However constrained its discretion may be in that regard, the Council keeps the final say in the framework of the EDP, the MIP or on the outputs of the European Semester (the Annual Growth Survey, country-specific recommendations and so on). Moreover, although the pressure faced by national authorities in that context may well have increased, the success of EU economic governance still depends on Member States’ compliance, and their willingness to translate its main outputs into national measures and reforms. Yet, despite the important prerogatives it retains under the post-crisis economic governance framework, the national level no longer has the prominence it used to enjoy, in line with the Treaties, during the first decade of EMU. More than ever today, the drive and the impulse in the field of economic coordination is supranational. It is interesting to note that this strengthening of the supranational institutions of the EU at the expense of the Member States and their intergovernmental fora only concerns, at least to a certain extent, the Commission. From a comparative perspective, the institutional position of the European Parliament, or that of the EU social partners, has not been similarly enhanced.⁷⁰ The evolution of EU economic governance into an increasingly centralized and vertical system should not distract us from a parallel phenomenon, directly correlated to the emergence of the Commission as a powerful actor endowed with wide supervisory functions and several prerogatives of a (quasi-)decisional nature in the field of economic policy. This institutional context, and the complex and flexible regulatory frameworks the Commission is to rely its decisions on, have opened wide discretionary spaces that it has had no other choices than to exploit. In the post-crisis era, the Commission is repeatedly placed in situations where it has to exercise judgement and make use of its interpretative

⁶⁹ For a similar view, see K. ARMSTRONG, *Differentiated Economic Governance and the Reshaping of Dominium Law*, in M. ADAMS, F. FABBRINI, P. LAROCHE (eds), *The Constitutionalization of European Budgetary Constraints*, cit., p. 72 *et seq.*

⁷⁰ See C. FASONE, *European Economic Governance and Parliamentary Representation: What Place for the European Parliament*, in *European Law Journal*, 2014, p. 174; M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 988 *et seq.*

authority. This has in turn contributed to its politicization,⁷¹ a phenomenon acknowledged by the Commission itself.⁷² Because the Commission has emerged as the central actor of post-crisis economic governance, it has thus gone through a parallel politicizing trajectory. As a consequence, the Commission has become heavily exposed to external pressures, as other EU institutions and, most notably, Member States may seek to regain clout by weighing on the decision-making process within the Commission itself.⁷³ The clearest example of this is probably that of the Commission's decision in July 2016 not to request the imposition of fines on Spain and Portugal for not taking sufficient action to reduce their excessive deficit, which seems to have been heavily influenced by pressures exercised by Wolfgang Schäuble on several EU commissioners. Similar national pressures may explain the lenient approach of the Commission towards France in the framework of the EDP it is still subject to.

The second feature of this new coordination pattern directly connects to the progressive supranationalization of economic coordination within the EU, and the evolution of the Commission's role from a facilitator to a stimulator and policy-initiator. This institutional evolution deeply impacted the nature and content of supranational action, which is not only procedural anymore (an arrangements provider), but has gained an increasingly substantive and material nature.⁷⁴ Far from merely framing and monitoring an economic coordination process in the hands of the Member States, the EU supranational institutions, with the Commission at the fore, have taken advantage of the stronger institutional position they occupy under the post-Eurocrisis governance framework, to directly influence the terms and orientations of the many (national) policies to coordinate, seeking to advance, through increasingly prescriptive means, a certain reform agenda and set of policy preferences, based on a specific socio-economic model (an ideational

⁷¹ On this phenomenon, see also P. LEINO, T. SAARENHEIMO, *Discretion, Economic Governance and the (New) Political Commission*, in J. MENDES (ed.), *EU Executive Discretion and the Limits of Law*, Oxford: Oxford University Press, 2018 (forthcoming).

⁷² Commission President Juncker made it clear in a speech delivered in December 2015 before the European Parliament: "Economic governance is not about legal rules or numerical percentages: it is about people and it is about political decisions that affect them".

⁷³ More broadly on the permeability of the European Commission to external political tendencies in the field of economic governance, see A. DE STREEL, *The Confusion of Tasks in the Decision-making Process of the European Economic Governance*, in F. FABBRINI, E. HIRSCH BALLIN, H. SOMSEN (eds), *What Form of Government for the European Union and the Eurozone?*, Oxford: Hart, 2015, p. 88 *et seq.*

⁷⁴ See R. BIEBER, *The Allocation of Economic Policy*, *cit.*, p. 92, who rightly speaks of the EU economic policy competence as "a 'dormant' substantive competence", that has thus been abundantly activated in the context of the Eurocrisis. In a similar vein, Chalmers argues that in the aftermath of the Eurocrisis, economic and fiscal governance is subject to a regime of co-government (D. CHALMERS, *The European Redistributive State and a European Law of Struggle*, in *European Law Journal*, 2012, p. 679 *et seq.*).

repertoire)⁷⁵ they hope will permeate the entire process.⁷⁶ The degree of uniformity displayed on specific policy issues (such as pension reforms, social security or fiscal policy) by the European Semester's country-specific recommendations or the Memoranda of Understanding entered into by bailed-out countries for example, suggests this is the intended effect. Providing a comprehensive analysis of this embedded agenda, and underlying model, goes beyond the scope of this *Article*. One can however identify the following founding features: strong emphasis on fiscal stability through budgetary consolidation and the restoration of growth, macroeconomic sustainability and competitiveness through structural reforms; almost exclusive recourse to "supply-side" structural reforms (privatization, deregulation and reduction of barriers to entry in protected sectors, flexibilization of labour laws and social dialogue mechanisms, activation of social security schemes, income tax reforms, administrative simplification, and so on); economization of social policies.⁷⁷

Directly flowing from this dual trend – the supranationalization and substantivization of EU economic coordination – comes the third feature of the post-crisis coordination pattern, probably the most crucial and the most groundbreaking. It is argued that the economic coordination model has evolved from one of "project-coordination", mainly derived from the "new governance" and experimentalist narrative, and thus based on OMC techniques, to one of "harmonizing coordination", which has ultimately not much more to do with the original model, although it is still largely decked out in its formal and institutional finery.⁷⁸ The claim here is that the post-crisis economic governance of the EMU took advantage of the Treaties' indeterminacy to dramatically expand and thicken the very concept of coordination.⁷⁹ If the new economic coordination model still borrows and builds on the conventional language and methods of the OMC, it has however stopped

⁷⁵ The expression is used by Smismans in S. SMISMANS, *From Harmonization to Co-ordination?*, cit., p. 506.

⁷⁶ See the characterization of post-crisis economic governance as a regime of knowledge-truth governed by the Foucauldian principles of discipline and pastorship, in L. DE LUCIA, *The Rationale of Economics and Law in the Aftermath of the Crisis*, cit., p. 466 *et seq.* For a similar account, in the light of authoritarian liberalism, see A. SOMEK, *Delegation and Authority: Authoritarian Liberalism Today*, in *European Law Journal*, 2015, p. 340 *et seq.*

⁷⁷ For more on this issue, see P. HALL, *Varieties of Capitalism and the Euro Crisis*, in *West European Politics*, 2014, p. 1223 *et seq.*; J.-P. FITOUSSI, F. SARACENO, *European Economic Governance: The Berlin-Washington Consensus*, in *Cambridge Journal of Economics*, 2013, p. 479 *et seq.*

⁷⁸ In 2001 already, Hodson and Maher argued that the OMC could just be a transitional mechanism on the basis of which coordination could evolve into a "form of positive integration with agreement on a specific policy approach at", and policy transfers to the supranational level (D. HODSON, I. MAHER, *The Open Method as a New Mode of Governance*, cit., p. 740 *et seq.*). This Article argues that, even if it occurred by stealth and without any adaptation of the EU constitutional framework, this is exactly the kind of transformation that the Eurocrisis precipitated.

⁷⁹ See N. MARTINEZ-YANEZ, *Rethinking the Role of Employment and Social Policy Coordination Competences in a Deeper Economic Union*, cit., p. 540 *et seq.*

living up to its spirit and founding rationale. The process no longer aims at the collective pursuit of a shared economic project and the attainment of common policy objectives through a diversity of structures, tools and approaches. It is to contribute to the joint implementation of a certain type of economic policy, and hence pursues far-reaching substantive convergence by seeking to erase, or at least reduce the structural economic and social differences between the Member States.⁸⁰ This diverted utilization of OMC techniques, and the coordination narrative in general, amounts to a hidden attempt at harmonization. Under the guise of classic policy coordination, the EU is indeed striving to *order* national policies in the economic and social field along the lines of the uniform model described above.

This attempted harmonization is not the “reflexive” harmonization often associated with the OMC and “new governance” techniques, which mainly implies the diffusion of a common discourse and set of beliefs to collectively approach shared problems. It is a much harder kind of harmonization, which goes beyond mere convergence: harmonization as “a conscious process that has the aim of leading to the insertion of a concept into the national legal orders, which triggers a process of adaptation to form a European concept [the socio-economic agenda advocated for by the EU] as uniform as required to serve the objectives of the European Union [the stability and viability of the EMU]”.⁸¹ Such harmonization leaves little room for experimentation and mutual-learning as it attempts to reduce, rather than accommodate, structural differences between Member States. This form of legal, political and economic integration, as we have seen it unfolding since the Eurocrisis broke out, however contrasts with the traditional form of harmonization the EU classically relies on.⁸² At least four differences can be identified. First, the harmonization purpose is most often covert and not explicitly assumed by the EU as is traditionally the case.⁸³ As a consequence, harmonization is carried out “by stealth”, through a vast and complex array of instruments and mechanisms that considered in isolation may not be deemed of a harmonizing nature, but when placed end to end, tend to exert

⁸⁰ On this point, see M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 984 *et seq.*, who argues that “post-crisis economic governance seems to adopt the form of coordination but not its substance”. See also, M. DAWSON, *New Governance in the EU After the Euro Crisis*, cit., p. 14 *et seq.*

⁸¹ E. LOHSE, *The Meaning of Harmonisation in the Context of European Union Law – A Process in Need of Definition*, in M. ANDENAS, C. BAASCH ANDERSEN (eds), *Theory and Practice of Harmonisation*, Cheltenham: Edward Elgar, 2011, p. 313.

⁸² That is harmonization as approximation, as it is traditionally relied on in the field of internal market law. In this regard, see I. MALETIC, *Theory and Practice of Harmonisation in the European Internal Market*, in M. ANDENAS, C. BAASCH ANDERSEN (eds), *Theory and Practice of Harmonisation*, cit., p. 314 *et seq.*

⁸³ It is contended that as a general rule, this harmonizing ambition is openly acknowledged when pursued in the traditional areas of integration. If the question of the actual policy goal striven for through a harmonization initiative (market integration, public health, social policy, ...) can of course be highly debatable, as the *Tobacco Advertising* saga has amply shown, that of the underlying harmonizing endeavour rarely is.

undeniable pressure towards harmonization. Second, the harmonization at stake here is a non-universal, variable-geometry one, in the sense that the pressure exerted on Member States is not uniform, but greatly varies according to their fiscal and macroeconomic health.⁸⁴ Under the classic harmonization model, the push towards harmonization is homogeneously and symmetrically applied to all Member States, as they face (at least from a legal perspective) comparable substantive and procedural duties. As a general rule, this is not the case under the “harmonizing coordination” model that prevails post-crisis in the field of economic governance. Asymmetry has to a large extent become the overarching rule, in the sense that the pressure towards harmonization, and the number and intensity of legal, political and financial obligations flowing from it, highly vary from one country to the other, depending on the State of its public finances and its macroeconomic track record, and the procedures it is subjected to. Third, the enforcement tools available to the harmonizer widely differ from those traditionally attached to classic harmonization, namely the initiation of judicial proceedings with the Court of Justice of the European Union as ultimate authority. Enforcement under the post-crisis economic “harmonizing coordination” model does not rely on judicial procedures and institutions,⁸⁵ or any other kind of external review mechanism, and is directly assumed by the harmonizer itself, i.e. the Commission, acting sometimes on its own, sometimes with other political bodies, and being able to mobilize a vast array of financial sanctions. In that regard, the enlarged and strengthened sanction regimes under the SGP and MIP have been discussed. Member States under the enhanced surveillance procedure face the constant threat of seeing their financial assistance cut if they fail to satisfactorily comply with their reform commitments. Financial incentives are also used under the Semester process. Finally, if the scope for EU action under the classic harmonization model is already quite broad, that under the economic “harmonizing coordination” model is even wider, in view of the all-encompassing understanding of economic policy that prevails in the post-crisis era. One may even provocatively claim that its scope is potentially unlimited, as it is difficult to think of any public policy sector that could not be deemed harmonizable under the overarching

⁸⁴ M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 981 *et seq.* See also, D. CHALMERS, *The European Redistributive State and a European Law of Struggle*, cit., p. 687 *et seq.*

⁸⁵ In the framework of the EDP for example, see Art. 126, para. 10, TFEU and *European Commission v. Council of the European Union*, cit. See also the Court of Justice's refusal to intervene with regard to conditionalities imposed on bailed-out States: Court of Justice, order of 14 December 2011, case C-434/11, *Corpul National al Politistilor*; order of 10 May 2012, case C-134/12, *MAI et al*; order of 15 November 2012, case C-369/12, *Corpul National al Politistilor*; order of 14 December 2011, case C-462/11, *Cozman*; order of 7 March 2013, case C-128/12, *Sindicato dos Bancarios do Norte et al.*; order of 26 June 2014, case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins*; order of 21 October 2014, case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*. As a more general rule, the lack of judicial involvement may also be explained by the new economic governance framework's continued reliance on OMC formal language (see *infra*).

objectives of budgetary discipline and macroeconomic stability. Under the new economic governance framework, the EU comes closer to the status of a total political actor, potentially active in each and every area of national policy.⁸⁶

III.2. THE PARADOXES OF ECONOMIC GOVERNANCE IN THE POST-CRISIS ERA

The Eurocrisis led the EU and its Member States to largely transcend the original model of economic governance, and precipitated its evolution towards a new type of EU intervention in the field of economic and budgetary policy. In the post-crisis era, economic coordination is supranationally driven, combines both procedural and substantive aspects and displays evident harmonizing features. More fundamentally, EU economic governance has ceased to live up to the spirit of new governance, experimentalism and the OMC altogether, as its ultimate aim no longer seems to be the collective pursuance of shared objectives through an accommodated diversity of policy approaches, but the diffusion of a certain reform agenda and its underlying socio-economic project, through the reduction of national divergences.

The post-crisis economic governance model, and the genre of economic policy coordination it is grounded on, if analysed in the light of the political and legal context of their emergence, reveal two founding paradoxes. They are briefly introduced in the following sections, with the hope that they will prompt further research and ultimately be addressed by the legal and political authorities in the EU.

The first paradox lies in the fact that if post-crisis economic governance has abandoned the foundational philosophy and rationale of the OMC, it still borrows, and builds on, the traditional language, methods and instruments of the OMC, though in a much diverted way. On the surface, and following the narrative presented by the EU, it is as if the fundamental overhaul described above had not occurred. This view is further supported by the constancy of the Treaty framework for economic policy. The TFEU provisions on economic coordination have indeed been left untouched, thus suggesting that the pre-crisis system, and its OMC-likeness, have continued and not been significantly departed from. As things currently stand, the constitutional charter of the EU fails to account for what economic coordination is really all about.⁸⁷

⁸⁶ M. DAWSON, *Opening Pandora's Box? The Crisis and the EU Institutions*, in M. DAWSON, H. ENDERLEIN, C. JOERGES (eds), *Beyond The Crisis – The Governance of Europe's Economic, Political and Legal Transformation*, Oxford: Oxford University Press, 2015, p. 85. See further P. GENSCHER, M. JACHTENFUCHS (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford: Oxford University Press, 2013.

⁸⁷ The question of whether the evolution of economic coordination in the aftermath of the Eurocrisis complies with the Treaty provisions (and its competence allocation system) on economic policy lies beyond the scope of this *Article*. For an interesting analysis, see C. KAUPA, *The Pluralist Character of the European Economic Constitution*, Oxford: Hart, 2016, p. 277 *et seq.*

The second paradox relates to the constitutional settlement on which the post-crisis economic governance of the EMU rests. The claim here is that the Eurocrisis has produced a fundamental, and worrying, misalignment between economic governance and its constitutional credentials. As amply shown in the literature, new governance and OMC processes such as pre-crisis economic coordination, rely on a flexible constitutional compromise characterized by a rather loose understanding of the rule of law, which is to be considered as the natural prolongation of the reversible, experimental and open-ended nature of these governance processes.⁸⁸ Briefly, this compromise displays the following traits. OMC normative outputs feature a low level of generality, publicity, clarity, foreseeability and congruence. Because of its intrinsic reversibility and differentiation, the OMC is not conducive to much legal certainty and equality. When it comes to the availability of external review, judicial or quasi-judicial actors only have a very peripheral role to play under the OMC, for the very reason that the notion of justiciability seems particularly ill-suited to the process in view of the softness and non-binding character of its main outputs.⁸⁹ Similarly, parliamentary actors are kept at the margin of the process, which is mainly considered to be an executive one.⁹⁰ Following a similar logic, and in view again of the programmatic, flexible and soft nature of the OMC, fundamental rights do not act as credible guidelines likely to frame, and potentially constrain, these governance processes. It is both striking and paradoxical that these traits, and the constitutional settlement that sustains them, are still very much present in the post-crisis economic governance framework. Indeed, whereas economic coordination decidedly moved away from the pre-crisis pattern of coordination to become increasingly supranational, substantive, harmonizing and, in the end, 'harder', the constitutional settlement on which that pre-crisis model relied has been perpetuated without any parallel redefinition nor upgrade of its "rule of law" credentials, thus bringing about significant constitutional discrepancies. Despite the thicker legal environment in which Member States evolve in the post-crisis era, with more numerous and far-reaching legal obligations, subject to substantially stricter enforcement mechanisms, the economic and budgetary rules they are to abide by still present problems of clarity, consistency and foreseeability.⁹¹ This is certainly not

⁸⁸ See for example M. DAWSON, *Soft Law and the Rule of Law in the European Union: Revision or Redundancy?*, in B. DE WITTE, A. VAUCHEZ (eds), *Lawyer Europe: European law as a Trans-National Social Field*, Oxford: Hart, 2013, p. 221 *et seq.*; G. DE BÚRCA, *The Constitutional Challenge of New Governance in the European Union*, *cit.*

⁸⁹ See J. SCOTT, S. STURM, *Courts as Catalysts: Re-thinking the Judicial in New Governance*, in *Columbia Journal of European Law*, 2007, p. 565 *et seq.*

⁹⁰ See C. LORD, *The European Parliament in the Economic Governance of the European Union*, *cit.*; F. DUINA, T. RAUNIO, *The Open Method of Coordination and National Parliaments: Further Marginalization or New Opportunities?*, in *Journal of European Public Policy*, 2007, p. 489 *et seq.*

⁹¹ This is particularly the case in the field of fiscal surveillance, where rules still lack precision and consistency. The multiplicity of the sources used (primary law, secondary law, international law, the Commission's administrative guidance) does not serve clarity. Some key notions of the legal regimes at stake

conducive to much legal certainty and, combined with an almost absolute lack of external review, raises legitimate concerns as to the equality and objectivity of the various processes of the new economic governance framework. When it comes to legal accountability, practice indeed reveals that the EU judicature has broadly continued to stay away from economic governance, whereas the very features of the pre-crisis governance model that justified such a stance were progressively abandoned.⁹² This raises important issues of access to justice, and means that the significant powers the EU has gained in the field of economic policy are not matched with an appropriate level of judicial control. In the same vein, there is a vast array of literature showing how the transformation of EU economic governance, and the substantial strengthening of the EU prerogatives in the field, especially those of the Commission, have not been accompanied by a parallel consolidation of the democratic credentials of EU economic decision-making.⁹³ In the words of Dawson, this dual evolution has contributed to opening “accountability gaps”, both in the legal and political realm.⁹⁴ Finally, while economic governance has become more intrusive and constraining for Member States’ policies, and potentially more disruptive for citizens’ benefits and entitlements, the institutional position of fundamental rights in that policy area has not been redefined, and rights considerations have so far failed to conclusively guide and frame the action of EU actors in the field of economic policy.⁹⁵

(such as that MTBO or structural deficit) are vaguely defined, thus harming foreseeability. The MIP could also be mentioned, as its central concept, the macroeconomic imbalance, is only broadly defined in the texts, and very much left to the appreciation of the Commission.

⁹² On the closure displayed by the Court, see the developments *supra*. See also L. FROMONT, *L’application problématique de la Charte des droits fondamentaux aux mesures d’austérité: vers une immunité juridictionnelle*, in *Journal européen des droits de l’homme*, 2016, p. 469 *et seq.* It should however be noted that the Court has recently started showing greater awareness of the role it may have to play under the post-crisis economic governance framework. In that regard, see Court of Justice, judgement of 20 September 2016, case C-8/15 to C-10/15, *Ledra Advertising et al. v. European Commission and ECB*. For an extended analysis, see P. DERMINE, *The End of Impunity? Legal Duties of “Borrowed” EU Institutions under the ESM Framework*, in *European Constitutional Law Review*, 2017, p. 369 *et seq.*

⁹³ See for example M. MADURO, M. KUMM, B. DE WITTE, *The Democratic Governance of the Euro*, in *RSCAS Policy Paper*, no. 18, 2012; K. TUORI, K. TUORI, *The Eurozone Crisis – A Constitutional Analysis*, cit., p. 205 *et seq.*; C. GLINSKI, C. JOERGES (eds), *The European Crisis and the Transformation of Transnational Governance – Authoritarian Managerialism Versus Democratic Governance*, Oxford: Hart, 2014; D. CURTIN, *Challenging Executive Dominance in European Democracy*, in *Common Market Law Review*, 2014, p. 1 *et seq.*; J. HABERMAS, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, in *European Law Journal*, 2015, p. 546 *et seq.*; F. SCHARPF, *After the Crash: A Perspective on Multilevel European Democracy*, in *European Law Journal*, 2015, p. 384 *et seq.*; L. DANIELE, P. SIMONE, R. CISOTTA (eds), *Democracy in the EMU in the Aftermath of the Crisis*, Cham: Springer, 2017.

⁹⁴ M. DAWSON, *The Legal and Political Accountability Structure of Post-crisis EU Economic Governance*, cit., p. 986 *et seq.* See also S. GARBEN, *The Constitutional (Im)balance between “the Market” and “the Social” in the European Union*, in *European Constitutional Law Review*, 2017, p. 47 *et seq.*

⁹⁵ For an in-depth analysis of that very issue, see O. DE SCHUTTER, P. DERMINE, *The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union*, in *European Journal of Human Rights*, 2017, p. 108 *et seq.* See also, M. DAWSON, *The Governance of EU Fundamental Rights*, Cambridge: CUP, 2017, p. 185 *et seq.*

IV. CONCLUSION

This *Article* began with a return to the roots of EU economic policy. Section II explained how economic governance quickly evolved, in spite of the cryptic nature of the relevant Treaty provisions, into a soft, procedural and State-centred kind of policy coordination, very much in line with the overall philosophy of the “new governance” theories, and the characteristics of their main embodiment in the EU institutional framework, the OMC. Section III showed how the Eurocrisis opened a new chapter for EU economic governance. The dual trend of expansion and intensification of EU economic action it initiated indeed contributed to bringing about a new model of governance, based on a more intense understanding of policy coordination, in sharp contrast with that which prevailed in the pre-crisis era: an economic coordination increasingly driven and propelled by the EU itself and the Commission; an economic coordination where EU action is no longer solely procedural, but has become strongly substantive and material; an economic coordination which ultimately strives for convergence and harmonization of policy approaches and policy tools. Against this background, this *Article’s* central claim has been that the OMC, and its emphasis on horizontality, differentiation and experimentation, are no longer relevant to approach EU economic governance. In the post-crisis era, EU economic governance has obviously ceased to live up to its founding rationale.

This *Article* has striven to describe a politico-legal phenomenon, i.e. the transition from one governance model to another, and the abandonment of the OMC as a policy framework for EU economic coordination. But it has not sought to take sides as to the soundness and justification of such evolution in view of the wider trajectory of the EMU project. It has however considered it crucial to draw attention to two constitutive, yet highly disturbing, paradoxes of EU economic governance in the post-crisis era. The metamorphosis of economic governance within the Union has been precipitated by covert, underground and interstitial institutional dynamics that the EU and its Member States have so far failed to explicitly embrace. The relevant provisions of the EU constitutional charter have not been amended, and the Union’s narrative on economic coordination suggests it is just business as usual. As a result, one can only grasp the full meaning and extent of the transformations at play through a complex holistic analysis of the new legal framework for EU economic policy and the practice of relevant actors within it. Here lies the first paradox of post-crisis economic governance in the EU. Even if economic coordination no longer plays by the rules of the OMC, the EU still very much relies on the conventional language of the OMC, as if that framework were still relevant today. There is thus a strong mismatch between the discourse and the facts, the form and the substance of EU post-crisis economic governance, obviously harming transparency, intelligibility and in the end, accountability. This mismatch leads to a second paradoxical development: the pre-crisis constitutional foundations of EU economic policy have broadly stayed in place, although the governance model they supported underwent an unprecedented up-

heaval. This perpetuation, and lack of parallel redefinition of the constitutional settlement of EU economic governance, is even more problematic, as it suggests that the post-crisis model is at odds with some of the most fundamental values of the EU.

From a normative and practical perspective, both paradoxes must be resolved soon. For obvious reasons of political readability and legal consistency, the transition to a new form of economic coordination, away from soft law and the OMC, must be unequivocally accounted for. In agreement with the constitutional charter of the EU, the “rule of law” and democratic credentials of EU post-crisis economic governance are to be aligned with the powers and prerogatives the EU currently enjoys in that framework. As the dust of the Eurocrisis starts to settle, it is high time to start addressing the foundational shortcomings of a governance model that emerged in a context of emergency. Its long-term sustainability, efficiency and legitimacy are in the balance.