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The Existential Crisis of the European Union

By Agustín José Menéndez[*]

"I reject the intellectual glamour of pessimism that has become pervasive in Europe and that does not lead to any good."
Jose Manuel Durao Barroso, 9 December 2012[1]

"The purpose of studying politics is not to acquire a set of ready made answers to political questions, but to avoid being deceived by politicians."
Joan Robinson, slightly edited[2]

"[P]lus des droits pour chacun . . . c'est moins de pouvoir pour tous."[3]
Marcel Gauchet, La Democratie d'une crise à l'autre

A. Introduction

In this paper, I put forward four theses and one coda. The theses can be summarized as follows:

Thesis one (section B): Five crises, not one. The European Union is not undergoing one crisis, but is instead suffering several simultaneous, interrelated, and intertwined crises—crises, which are global, not exclusively European. Put differently, the subprime crisis

[*]Lecturer, Universidad de Léon and ARENA, Oslo.

[1]Jose Manuel Durao Barroso, President of the European Commission, (Dec. 9, 2012), *available at* http://internacional.elpais.com/internacional/2012/12/07/actualidad/1354883340_577802.html. Barroso seems to have become a glamorous intellectual watcher, as he has referred to this trend repeatedly. Either the President or his ghost writers used it at least in three previous occasions: Jose Manuel Durao Barroso, President of the European Commission, Speech Before the European Parliament (Feb. 2010), *available at* http://europa.eu/rapid/press-release_SPEECH-10-21_en.htm9); Jose Manuel Durao Barroso, President of the European Commission, Speech Before the European Parliament (Oct. 2010), *available at* http://europa.eu/rapid/press-release_SPEECH-10-559_en.htm); Jose Manuel Durao Barroso, President of the European Commission, Speech Before the European Parliament (March 2011), *available at* (http://europa.eu/rapid/press-release_SPEECH-11-198_en.htm).

[2] *See* Joan Robinson, 2 COLLECTED ECON. PAPERS 1, 17 (1980). "The purpose of studying economics is not to acquire a set of ready made answers to economic questions, but to avoid being deceived by economists." *Id*.

[3] MARCEL GAUCHET, LA DÉMOCRATIE D'UNE CRISE À L'AUTRE 42 (2007).

turned the economic, financial, fiscal, macroeconomic, and political structure weaknesses of the Western socio-economic order into at least five major crises.

Thesis two (section C): The European Union bears responsibility for the crises. The European Union is not only experiencing these crises, but is significantly responsible for the crises in the first place. The transformation of the institutional structure of the Union and the substantive policy choices made in the last three decades have fostered the very structural weaknesses that were turned into crises by the subprime crisis. In particular, it seems to me that the self-standing and disembedded understanding of economic freedoms, as expressions of the right to individualistic private autonomy and the creation of an asymmetric economic and monetary union, played a major role in destabilizing the Union.

Thesis three (section D): The measures taken at the supranational level to address and overcome the crises have been inconsistent, based as they have been on a shifting diagnosis of the cause of the crises and have led to contradictory policy options. A whole set of supranational policy decisions and structural reforms have been put forward in the last five years with the aim of governing the crises. There are good reasons to doubt that they have really contributed to overcoming the crises.

Thesis four (section E): The European government of the crises has unleashed a process of European constitutional mutation. What have been presented as exceptional and temporal measures have indeed resulted in a major constitutional mutation that has aggravated the already looming tension between this European Union and the European constitutional and political project, as enshrined in the Social and Democratic *Rechtsstaat* at the core of post-war national constitutions, and largely underpinning the original European Communities.

Coda (section F): As things stand, neither a reformist strategy (a change in course of policy within the present Treaty and the emerging *para-Treaty* framework) nor a constitutional rupture strategy (via a constituting assembly with a democratic mandate) seem like viable strategies to undertake a democratic rescue of the European Union. If any path holds promise, it is that of national constitutional resistance, based on challenging the policies and decisions of the recent years—especially the last five years—on the basis of the deep constitution of the European Union,[4] and the common constitutional law of the Social and Democratic *Rechtsstaat*. This might allow a reopening of political space and a return to a democratic understanding of constitutional law. The future, however, looks bleak.

[4] By the deep constitution of the European Union I mean the collective of national constitutions (usually referred to in the Community law jargon as "the constitutional law common to the Member States," or the "common constitutional traditions"). This collective is reflective of the underlying social and economic fundamental norms that underpin the regulatory ideal of the *Social and Democratic Rechtsstaat*.

B. Five Crises, Not One Crisis

My first thesis is that we find ourselves in the midst of five closely interrelated crises, not just one. In my argument, I propose to distinguish the following three elements: (1) Five different structural weaknesses of Western socio-economic systems as they stood circa 2007 (economic, financial, fiscal, macroeconomic, and political); (2) the catalytic event of the crises (the US subprime mortgage crisis that started in 2006/2007 that was close to shutting down the global financial system in 2008); and (3) the ensuing five crises, which are the result of the catalytic event turning structural weaknesses into crises. Or to put it differently, five different crises were unleashed by one single catalytic event, which should not be confounded with the crises themselves, no matter how interesting, relevant and revealing the study of the subprime crisis may be.

I. Five Structural Weaknesses

Crises do not fall from the sky. They are all the consequence of precedent, institutional designs, procedural arrangements, implemented policies, wrong decisions, and non-decisions.[5] A good start at unpacking the crisis is to distinguish five different structural weaknesses of the Western socio-economic order—including, quite obviously, the socio-economic order of the European Union—circa 2007: Economic, financial, fiscal, macroeconomic, and political.

First, there was a major underlying *economic structural weakness*, resulting from the fact that while the socio-economic model was based on the assumption that high and sustained increases in the capacity to produce goods and services were possible—resulting in a constant increase in overall wealth—growth patterns had fallen behind expected rates since the 1970s and had indeed been constantly decreasing in the last thirty years.[6] The postwar Western social contract assumed the possibility of reconciling the interests of workers, capital holders, and citizens—roles, which overlapped in many cases—through sustained high rates of growth of at least 3-4% per annum (see Tables 1 and 2). Such high rates of growth made possible the simultaneous achievement of sustained income and wealth increases, high levels of investment, and revenue to fund and expand the key pillars of the welfare state (education, health and pension payments) (See Tables 3, 4 and 5). Since the early 1970s, however, no Western country has achieved such high and sustained economic growth (see Tables 1 and 2 for European countries). To the contrary, growth has

[5] On non-decisions, see generally SUSAN STRANGE, CASINO CAPITALISM 29–59 (1986). *See also*, SUSAN STRANGE, STATES AND MARKETS (2d ed. 1988).

[6] *See* BARRY EICHENGREEN, THE EUROPEAN ECONOMY SINCE 1945 (2008).

tended to constantly diminish.[7] Tolerance of inflation and private Keynesianism were two different but equally unsustainable strategies to avoid and/or overcome this structural weakness.[8] The former strategy was revealed to be a short-lived means of avoiding the problems at the cost of aggravating them, while the latter resulted in a massive redistribution of income and wealth in favour of the richest, the devastating effects of which could only be temporarily compensated for by a massive and unsustainable growth of private debt.

TABLE 1: GDP Growth in Historical Perspective[9]

	1913-1950	1950-1973	1973-2000
Western Europe	1.1	4.5	2.1
Peripheral Europe	1.2	6.0	3.4
Eastern Europe	1,7	4.7	-0.2

TABLE 2: GDP growth in historical perspective, selected EU countries, decade averages[10]

	1960s	1970s	1980s	1990s
Belgium	4.41	2.21	1.34	1.51
Denmark	3.02	0.70	1.51	2.46
France	4.72	2.16	1.24	1.00
Germany	4.23	2-49	0.79	1.71
Italy	5.59	3.27	1.37	1.08
Netherlands	3.95	1.40	0.66	1.20
Spain	7.04	2.59	2.06	1.80
United Kingdom	2.29	1.35	2.31	1.44

7 The only exceptions to this rule have been countries that engaged into the wildest form of financial and fiscal excesses. We know now—and we should have known all along—that doping growth through an inflow of foreign capital is highly likely to lead to financial bubbles and later misery.

8 *See* COLIN CROUCH, THE STRANGE NON-DEATH OF NEO-LIBERALISM (2011); Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 1, 5–29 (2011).

9 EICHENGREEN, *supra* note 6, at 16.

10 Bernard Heitger, *The Scope of Government and Its Impact on Economic Growth in OECD Countries* (Kiehl Inst. for World Econ., Working Paper No. 1034, 2001), *available at* http://www.ifw-members.ifw-kiel.de/publications/the-scope-of-government-and-its-impact-on-economic-growth-in-oecd-countries/kap1034.pdf.

TABLE 3: PUBLIC EXPENDITURE ON EDUCATION (PERCENTAGE OF GDP)[11]

	1937	1960	1980	1993/94
Belgium	n.d.	4.6	6.1	5.6
France	1.3	2.4	5.0	5.8
Germany	n.d.	2.9	4.7	4.8
Italy	1.6	3.6	4.4	5.2
Netherlands	n.d.	4.9	7.6	5.5
United Kingdom	1.1	4.0	4.3	5.6

TABLE 4: PUBLIC EXPENDITURE ON HEALTH (PERCENTAGE OF GDP)[12]

	About 1930	1960	1980	1994
Belgium	0.1	2.1	5.1	7.2
France	0.3	2.5	6.1	7.6
Germany	0.7	3.2	6.5	7.0
Italy	n.d.	3.0	6.0	5.9
Netherlands	n.d.	1.3	6.5	6.9
United Kingdom	0.6	3.3	5.2	5.8

TABLE 5: PUBLIC EXPENDITURE ON PENSIONS (PERCENTAGE OF GDP)[13]

	1937	1960	1980	1993
Belgium	3.7	4.3	11.2	10.9
France	n.d.	6.0	10.5	12.3
Germany	n.d.	9.7	12.8	12.4
Italy	n.d.	5.5	11.7	14.5
Netherlands	n.d.	4.0	12.6	13.4
United Kingdom	1.0	4.0	5.9	7.3

Second, there was a major underlying *financial structural weakness*, resulting from an unsustainable growth of financial assets and a radical transformation of the actual purpose and role of financial institutions. These financial institutions largely abandoned their role as intermediaries between private savers and non-financial enterprises, becoming key operators of increasingly self-referential financial markets. The financial turbulence

[11] VITO TANZI & LUDGER SCHUKNECHT, PUBLIC EXPENDITURE IN THE 20TH CENTURY 34 (2000).

[12] *Id.* at 38.

[13] *Id.* at 41.

unleashed by the end of Bretton Woods created an overnight demand for financial products that *covered* against exchange losses, which subsequently fanned the flame of the transnational financial markets that had been slowly gaining ground in the 1960s, and quite significantly, the Eurodollar market.[14] The growth of the financial industry, even if partially propelled by the wish to *hedge* against risks, actually multiplied the existing risks, only that for a long period, it was widely believed that such risks were first and foremost opportunities, something that seemed self-evident from the constantly high level of profits of financial investments.[15] This created the wrong impression that financial investment was a much better investment opportunity than non-financial activities. Financialization and the transformation of the role of financial institutions were further sped up by technical and conceptual innovations in financial theory that were said to have resulted in the elimination of financial risk through adequate economic modeling and pricing.[16] Risk was no longer to be managed through risk assessment but was simply assumed to be eliminated when appropriate economic modeling was resorted to.[17] The short-term profitability of the new financial products was facilitated by a permissive approach to regulation and taxation of financial activities by the reopening of old markets, such as those of China and the whole of Eastern Europe, including Russia, which had been largely closed to capitalists by the triumph of communist regimes, and by the shift of the control over the monetary base and the power to create money from governments to central banks, and then from central banks to private banks.[18] With financial increases at constant double-digit levels and non-financial profits not recuperating in a sustained manner, profits were increasingly reinvested in the financial sector, thus further feeding the growth of the financial sector.[19] In such a context, it was only a matter of time before it was assumed that the financial sector had found the means of emancipating itself from its role as an auxiliary of the non-financial sector and had become an alternative growth driver itself. It

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[14] *See generally* FRED L. BLOCK, THE ORIGINS OF INTERNATIONAL ECONOMIC DISORDER (1977); ROBERT LESSON, IDEOLOGY AND INTERNATIONAL COOPERATION: THE DECLINE AND FALL OF BRETTON WOODS (2003); ROBERT BRENNER, THE ECONOMICS OF GLOBAL TURBULENCE (2006).

[15] *See generally* STRANGE, *supra* note 5; *See also* SUSAN STRANGE, MAD MONEY (1998).

[16] This point was presciently made by Strange. *See generally* Strange, *supra* note 5. More recently, see generally JOHN CASSIDY, HOW MARKETS FAIL (2010); NICHOLAS DUNBAR, THE DEVIL'S DERIVATIVES (2011); ANAT ADMATI & MARTIN HELLWIGG, THE BANKERS' NEW CLOTHES (2013).

[17] If one is allowed to use the fashionable Euro-jargon, risk assessment ceased being regarded as a matter of discretion based on knowledge and experience, and began to be regarded as a matter of the mechanic application of the rules written into the economic models. *See generally* DUNBAR, *supra* note 16; MARY MELLOR, THE FUTURE OF MONEY (2010); SCOTT PATTERSON, THE QUANTS: HOW A SMALL BAND OF MATH WIZARDS TOOK OVER WALL STREET AND NEARLY DESTROYED IT (2010); MICHAEL LEWIS, THE BIG SHORT (2010); MICHAEL LEWIS, BOOMERANG (2011); EMANUEL DERBAN, MODELS BEHAVING BADLY (2011); GILLIAN TETT, FOOL'S GOLD (2009).

[18] *See generally* MELLOR, *supra* note 17.

[19] *See generally* MICHAEL HUDSON, THE BUBBLE AND BEYOND (2012).

came to be believed that the declining rates of economic growth (resulting from the first structural weakness) could be compensated for by the growth of the financial sector.[20] When this assumption was adopted, the belief spread that new economic models had wiped out risk, and the fictitious capital started to grow exponentially.[21] The inflation of financial assets was, however, a pattern tolerated, when not welcomed, by the central banks of Western countries, including the European Central Bank from its inception. Asset inflation was regarded as innocuous—contrary to what was the case with inflation in non-financial assets—if not beneficial.[22]

Third, there was a variable *structural fiscal weakness* that consisted of a declining capacity of states to implement their tax and regulatory legal frameworks in a fair and sufficient manner. Starting in the early 1970s, all Western states had experienced the decline of knowledge about the income and the wealth flows subject to their regulatory and tax jurisdiction.[23] This decline in the cognitive basis of tax and regulation activities is a direct consequence of the specific kind of financialization that we have experienced in previous decades, a mode of financialization that is closely associated with transnational financial markets growing in a legal and economic space where they place themselves beyond the reach of national regulatory and tax authorities—always, quite obviously, with the support of some of the sovereign states, or a variable coalition of them.[24] Providers of financial services, including banks, operated as key intermediaries between the national and the transnational, and in so doing, eventually eased the way for capital holders to make use of transnational investment opportunities to avoid paying taxes were they were due.[25] The

20 The financial crisis of 2006 and 2007 has revealed the extent to which these premises were simply false. But because financialization had become pervasive and enduring in time, it had basically turned the financial sector into a deadweight loss for the economy as a whole. That was true throughout the period, but was covered up by the appearance of buoyancy in financial activities and investments.

21 For an analysis based on a historically sophisticated and nuanced understanding of the role of finance in the economy, see generally MASSIMO AMATO & LUCA FANTACCI, THE END OF FINANCE (2012), partially followed by MASSIMO AMATO & LUCA FANTACCI, COME SALVARE IL MERCATO DAL CAPITALISMO: IDEE PER UN'ALTRA FINANZA (2012).

22 Despite the fact that not only its long-term effects, but also its short-term effects, were deleterious. It suffices to consider the implications that asset inflation has had in the geographical configuration of cities—in particular, the radicalization of the processes of spatial segregation.

23 *See generally* BLOCK, *supra* note 14; ERIC HELLEINER, STATES AND THE REEMERGENCE OF GLOBAL FINANCE (1994).

24 The "recovery" of international financial markets that rendered organizationally possible the financialization of the economy and the financial crisis created the conditions for undermining the cognitive basis of tax states. A development seen with calculated ambivalence by the Commission since the 1960s, as the Euromarkets were at the same time unregulated, and thus a challenge to the European Communities as a polity in the making, and powerful forces of integration of financial markets in Europe, breakers of the national barriers to the creation of "deep and liquid" financial markets operating across borders.

25 Tax havens were never external challenges or threats to the European, American, and Japanese financial system, but the creatures of the European, American, and Japanese financial systems. *See generally* RONEN PALAN ET AL., TAX HAVENS: HOW GLOBALISATION REALLY WORKS (2010); ALAIN DENEAULT, OFFSHORE PARADIS FISCAUX ET SOUVERANITÉ undermining of the cognitive basis of tax states led to the erosion of the state capacities to implement, in a fair and effective manner, their tax and regulatory norms. Three compensatory strategies were developed. First, the erosion of the tax base and of the tax knowledge was expected to be contained by means of reducing the tax burden to mobile sources of income, in the hope of keeping mobile taxpayers in the tax rolls, even if at reduced rates of contribution. The re-dualization of the income tax, pioneered by the Scandinavian countries in the 1980s, was but the first instance of this pattern.[26] Fiscal amnesties were different means of seeking a rather similar result.[27] Second, some states have engaged in the cooptation of financial enterprises, offering as incentive the incorporation in their jurisdiction of a financial regulatory framework in line with the interests of financial capital holders (the so-called light touch financial regulation)—a form of "financial regulation lite."[28] By means of attracting the headquarters of companies providing financial services, some states aim at compensating for the general loss of tax capacities and revenue with the revenue resulting from the abnormal concentration of financial companies in their jurisdiction. Alternatively, states have attracted both non-financial and financial companies by creating a regulatory framework and providing a set of bilateral tax treaties that facilitate the minimization of overall tax burdens. While the United Kingdom is a paradigmatic example of the first strategy, the Benelux countries and Ireland are good examples of the second strategy.[29] Third, other states relied on

CRIMINELLE (2010); NICHOLAS SHAXSON, TREASURE ISLANDS (2011); RICHARD BROOKS, THE GREAT TAX ROBBERY (2013); Richard Murphy, Over Here and Under Taxed (2013)

[26] *See e.g.*, Peter Birch Sørensen, *From the Global Income Tax to the Dual Income Tax: Recent Reforms in the Nordic Countries* (Econ. Policy Research Unit, Working Paper No. 1993 - 7), *available at* http://www.econ.ku.dk/epru/files/wp/wp-93-07.pdf. On the recent German debate, *see generally* GERMAN COUNCIL OF ECONOMIC EXPERTS, DUAL INCOME TAX (2008).

[27] *See generally* TAX AMNESTIES (Jacques Malherbe ed., 2011).

[28] On light touch financial regulation, see Greta R. Krippner *Capitalizing on Crisis: The Political Origins of the Rise of Finance*, Cambridge: Massachussets, Harvard University Press, 2011. The 2009 review of the British Financial Services Authority (the so-called Turner Review, available at http://www.fsa.gov.uk/pubs/other/turner_review.pdf) is a scathing criticism of that approach to financial regulation. The geographical implications of light touch regulation, fundamental from a tax perspective, are considered by Dariusz Wójcik, 'The Dark Side of NY-LON: Financial Centres and the Global Financial Crisis', 50 (2013) Urban *Studies*, forthcoming (advanced online publication, doi 10.1177/0042098012474513). The very light taxation of the so-called "non domiciled" persons (the "non-doms") is a complementary element in the British strategy of maximisation of tax revenue through the attraction of financial activities into London. The tax treatment of non-doms is heavily criticized in the Christian Aid report *Death and Taxes: The True Toll of Tax Dodging*, available at http://www.christianaid.org.uk/images/deathandtaxes.pdf

[29] *See generally* MICHIEL VAN DIJK, FRANCIS WEYZIG & RICHARD MURPHY, THE NETHERLANDS: A TAX HAVEN AMSTERDAM (2007). *See also*, the reports on the different EU Member States in the Financial Secrecy Index, *Financial Secrecy* Index, TAX JUSTICE NETWORK (2009), http://www.financialsecrecyindex.com/. On the relationship between tax evasion and financial deregulation, *see generally* JEAN DE MAILLARD, L'ARNAQUE: LA FINANCE AU-DESSUS DES LOIS ET DES RÈGLES (2011). In the run up to the third phase of monetary union, the European Commission wrote different reports and put forward several initiatives on harmful tax competition, see *Communication From the Commission to the* Council *Towards Tax Co-Ordination in the European Union: A Package to Handle Harmful Tax Competition*,

speculative activities and financial bubbles to compensate for the loss of revenue, or even to fund the electoral decision to reduce the tax sacrifice demanded from stable revenue sources. This was the case in Spain and Ireland during the last decade.[30] In all cases, the tax gap (the difference between what should have been collected under the application of the tax law and what actually was collected) has tended to grow as a result of this growing cognitive gap of the tax state. The extent, depth, and evolution of this structural weakness, however, are variable and depend on the specific resilience of the adaptive strategies followed by each state.[31]

Fourth, there was a growing macroeconomic structural weakness: A progressive loss of the pulls and levers through which states could steer the economic ship and insure citizens against the uncertainties of the future—to the extent, quite obviously, that this is possible. This resulted from two major developments. First, states lost some of the key means to conduct macroeconomic policy as a direct consequence of the collapse of the post-war monetary order. Both political decisions and non-decisions led to the failure of the Bretton Woods system, through which the Western community, led by the United States as monetary hegemony, ensured monetary and financial stability.[32] The very failure of Bretton Woods undermined the very preconditions that rendered operative and effective some of the fundamental macroeconomic pulls and levers.[33] Second, public macroeconomic powers tended to be split and fragmented. While in the early 1970s only Germany and Switzerland favored the model of an autonomous central bank setting monetary policy without political interference, by the early 1980s the debates on the creation of an autonomous central bank were being won by those favorable to such an

COM (1997) 495 final (Oct. 1, 1997), *available at*: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1997:0495:FIN:EN:PDF)). The reports, which were far from radical, were shelved. On the literature, see generally William W. Bratton & Joseph A. McCahery, *Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation* 28 COMMON MKT. L. REV. 677 (2001); BEN J. KIEKEBELD, HARMFUL TAX COMPETITION IN THE EUROPEAN UNION: CODE OF CONDUCT, COUNTERMEASURES AND EU LAW (2004). On tax competition in the EU, see generally CARLO PINTO, TAX COMPETITION IN THE EUROPEAN UNION (2003).

30 On Ireland, see generally CONOR MCCABE, THE SINS OF THE FATHER: TRACING THE DECISIONS THAT SHAPED THE IRISH ECONOMY (2011). On Spain, see José Manuel Naredo and Antonio Montiel Álvarez, *El modelo inmobiliario español*, (2011)

31 The third strategy is clearly the less resilient, given not only its immediate sensitivity to an economic downturn, but also the fact that it is associated with the fostering of a particularly unsustainable economic model. The resilience of the first strategy clearly depends on the residual tax "ethics" of taxpayers. Of the two "exploitative" strategies, the one based on fostering a national tax evasion industry is probably the more robust, as it less prone to cyclical downturns and it does not entail massive contingent liabilities from the financial sector when and if it goes into trouble.

32 On the relevance of non-decisions, see generally STRANGE, *supra* note 5. On the structural economic background of the demise of Bretton Woods, see generally BRENNER, *supra* note 14.

33 *See generally* FRITZ SCHARPF, CRISES AND CHOICE IN EUROPEAN SOCIAL-DEMOCRACY (1991).

arrangement, vindicated by the apparent track record of the Bundesbank, which was regarded as having played a key role in turning Germany into a model of price contention and economic growth.[34] Third, the efficiency of macroeconomic pulls and levers was highly undermined by the general trend to lift not only trade barriers, but also most obstacles to any kind of economic activity, including financial activities across borders. Trade liberalization, without some form of political countervailing institutionalization could do nothing but undermine the actual capacity of States to make use of macroeconomic levers, no matter the persistence of such formal powers.[35]

Finally, the legitimacy and stability of democratic political systems was severely challenged, resulting in major *political structural weaknesses*. The various processes that have already been described resulted in a schizophrenic political transformation. The two oil crises of the 1970s undermined the post-war Keynesian consensus, radically transforming the shape and structure of public discourse in democratic states, and also undermining the underlying consensus about the very point of transnational and supranational institutional structures.[36] As a result, a second rescue of the weakening nation-states through transnational arrangements and supranational institutions became problematic, if not impossible. The neoliberal agenda did not only threaten the social and democratic *Rechtsstaat* at home, but it also undermined the capacity of the supranational level of government to become a key instrument in the creation of the structural conditions under which the Social and Democratic *Rechtsstaat* could flourish. As a consequence, the shift from national to supranational democratic politics has not only stalled, but has been reversed, at least in public narratives (a phenomenon usually referred to within Europe as

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34 *See generally* JEREMY LEAMAN, THE BUNDESBANK MYTH (2001).

35 This was indeed a central argument in favor of moving from European Monetary System (EMS) to European Monetary Union (EMU):

> "Unless new items are added to the agenda, the Community will be seeking to achieve the impossible task of reconciling (1) free trade, (2) full capital mobility, (3) fixed (or at any rate managed) exchange rates and (4) national autonomy in the conduct of monetary policy. These four elements form what I call an 'inconsistent quartet': economic theory and historical experience have repeatedly shown that these four elements cannot coexist, and that at least one has to give way."

Tomaso Padoa Schioppa, *The European Monetary System: A Long Term View*, *in* THE EUROPEAN MONETARY SYSTEM 369, 373 (Francesco Giavazzi, Stefano Miccosi & Marcus Miller eds., 1988). On the role of political decisions in the unleashing of finance, see generally KRIPPNER, *supra* note 28. On the European lead on liberalizing capital movements, see Rawi Abdelal, *Writing the Rules of Global Finance: France, Europe, and Capital Liberalization*, 13 REV. OF INT'L POL. ECON. 1, 1 (2006); RAWI ABDELAL, CAPITAL RULES (2009).

36 On neoliberalism as a pragmatic political movement, see generally DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2007); DAVID HARVEY, THE ENIGMA OF CAPITAL AND THE CRISIS OF CAPITALISM (2010); GERARD DUMENIL & DOMINIQUE LEVY, CAPITAL RESURGENT (2004); LEO PANITCH & SAM GINDIN, THE MAKING OF GLOBAL CAPITALISM (2012).

the end of the permissive consensus on European integration). In actual practice, however, the disempowerment of nation-states has been accelerated by the transformation of transnational and supranational institutions from frameworks of public cooperation to structural fosterers of regulatory and tax competition. As a consequence, the structural capacity of states to organize collective action has declined without being replaced by any other institution. Power has consequently shifted from the public to the private realm, to the institutions of power based on the capital medium. The serious, and growing, mismatch of the political aspirations inscribed in the fundamental laws of the nation-states, and of the European Union, to act in a way responsive to democratic will formation has resulted in a structural democratic crisis.

II. The Catalytic Event

All of these structural weaknesses accumulated over a long period of time: Roughly speaking from the last years of the Bretton Wood system through to the present. The subprime crisis hit the United States economy in the last quarter of 2006 and hit the world economy, at the latest, by August 2007.[37] The original reaction of institutional actors, both politicians and central bankers, was to minimize the breadth and scope of the crisis.[38] That would have been reasonable if a similar crisis had erupted four or five decades earlier; perhaps even one decade earlier. A crisis in the US subprime market should have been a manageable crisis. After all, the subprime market was a small part of the US mortgage market, which in and of itself was a relatively small part of the set of global financial markets. The crisis, however, was very hard to contain because the unsustainable growth

[37] For a general narrative of the catalytic event, see generally JOHAN A. LYBECJ, A GLOBAL HISTORY OF THE FINANCIAL CRASH OF 2007-2010 (2011).

[38] *See e.g.*, Jean Claude Trichet, Address at the Ceremony to Mark the 10th Anniversary of the European Central Bank and the European System of Central Banks (June 2, 2008), *available at* http://www.ecb.int/press/key/date/2008/html/sp080602.en.html. ("The euro has been a remarkable success."). Trichet was explicit in rejecting self-complacency, but in the list of the challenges facing the Union one finds none of the main challenges which it has been confronted since. *See also* Jean Claude Trichet, President of the European Central Bank, The euro@10: Achievements and Responsibilities, Remarks at the Ceremony of the European Parliament to Mark the 10th Anniversary of the Euro (13 January 2009), *available at* http://www.ecb.int/press/key/date/2009/html/sp090113.en.html ("In recent months we have seen another benefit of the euro: the financial crisis is demonstrating that in turbulent financial waters it is better to be on a large, solid and steady ship rather than on a small vessel.").

> Would Europe have been able to act as swiftly, decisively and coherently if we did not have the single currency uniting us? Would we have been able to protect many separate national currencies from the fallout of the financial crisis? I believe that we can be proud of the reaction of European authorities, parliaments, governments and central banks. Together we have shown that Europe is capable of taking [sic] decisions, even in the most difficult circumstances.

Id.

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of the US subprime market was indeed a symptom of the deep and grave structural weaknesses to which I have just referred. The consequences of the subprime crisis were not proportional to the intrinsic dangerousness of the subprime crisis itself, but to the structural fragility of the socio-economic order. By hitting the weak financial spot of the central national economy of the world system, the subprime crisis transformed the abovementioned five looming weaknesses into five mutually interacting crises.

III. What Do We Gain by Thinking of the Crisis in the Plural?

By thinking of the crises within the analytical framework put forward in this section, it seems to me that we derive four main advantages. First, we avoid collapsing the triggering process (the catalytic event) into the underlying crises themselves. More than five years into the crises, it is simply implausible to continue to claim that, "Were it not for the subprime excesses, were it not for the decision to allow Lehmann to fall," there would have been no crises in the first place, a claim which was occasionally made in the early months of the crises.[39] The subprime crisis was the final drop into a glass that was already full. Had it not been full, the authorities would have actually been able to contain the subprime crisis quite easily.

Second, moving from the singular crisis into the plural crises, we avoid pushing all symptoms and all consequences of the crises into one single and amorphous box called *the crisis*. Collapsing all crises into one crisis is the best strategy to prolong the confusion and avoid the allocation of responsibilities. But it prevents any serious discussion about what went wrong (which entails setting the crises in their historical context and elucidating the process which nurtured the weaknesses and contributed to the gathering of the crises) and what can be done to make things right (which entails mobilizing the knowledge of the past to shape the future). This quite naturally leads me to emphasize that the main point I am trying to make is not that the crises are five and only five—these five—but that we have to disaggregate the crisis. Perhaps other distinctions should be drawn; perhaps not all crises here described belong to the same level of analysis. But what seems to be of fundamental importance is to avoid the singular and go for the plural—to move from crisis talk to crises talk in a structured way.

Third, the five crises here distinguished allow us to gain perspective, both in geographical and in temporal terms. On the one hand, it allows us to understand why the crisis is not American or European, but rather global in scope, even if the sequence of the crisis, and

[39] On the "No Lehmann, no crisis" frame of mind in late 2008 and early 2009, *see generally* Neill Ferguson, *The Lessons: A Lehman Deal Would Not Have Saved Us*, FINANCIAL TIMES, Sept. 14, 2009, *available at* http://www.ft.com/intl/cms/s/0/f96f2134-a15b-11de-a88d-00144feabdc0.html#axzz2Rz0InhG6. While Ferguson plays down the relevance of the non rescue of Lehmann, he does so *against the current*, describing in detail mainstream opinion on the matter. Let me only add that while it seems to me that Ferguson has a point, the reasons why he finds the failed rescue of Lehmann a non-decisive moment are very different from mine.

the virulence of its different symptoms, varies across time and space. On the other hand, it helps us avoid the tendency to focus exclusively on the most recent crisis episode in a fully de-contextualized manner. In particular, it helps avoid the temptation not only of reducing the crisis to the subprime crisis—as already hinted—but also of reducing it to its financial dimension. There is no doubt that there is a serious financial crisis going on, and that such a crisis is especially intense in Europe, with European banks in a more fragile state given their world record levels of leveraging.[40] But there is also no doubt that the financial excesses that taxpayers are now being forced to pay for are more the consequence than the cause of the underlying economic and political weaknesses. The radical transformation of the financial sector and the overall financialization of the economy would not have happened had it not been for the declining rate of profit in the non-financial sector. The attractiveness of financial profits accelerated the decline of investment in non-financial activities, resulting in the aggravation of the economic weakness. The pluralistic analytical framework forces us to consider the way in which the different dimensions of the crises are interrelated.

Finally, the analytical framework put forward in this section is not neutral—none is—but is widely ecumenical. While it is hard to reconcile with neoliberal socio-economic theory, if such things exists, it provides a framework compatible with ordo-liberal, liberist, liberal, social-democrat, or Marxist accounts of the crises. That Western economies have been experiencing a long economic crisis is something that both liberists and Marxists would agree upon.[41] They would disagree, however, on the ultimate causes of the phenomenon: Marxists may be inclined to refer to the secular decline of growth rates, while liberists would emphasize the stifling consequences of regulatory intervention, including the creation of booms and busts by central bankers. Both my analytical framework and indeed the rest of the paper are compatible with both interpretations.

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[40] *See generally* INTERNATIONAL MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: THE QUEST FOR LASTING STABILITY (Apr. 2012), *available at* http://www.imf.org/external/pubs/ft/gfsr/2012/01/pdf/text.pdf European banks have deleveraged considerably since 2007, but even after that they have barely reached the leverage levels of US banks in 2007. It goes without saying that such relative levels are not unrelated to the different role banks play in financial intermediation in the U.S. and in Europe. See TABLE 7 for the assets to GPD ratios, which are a good indicator of the problem.

[41] For a Hayekian view, see generally DAVID BECKWORTH, BOOM AND BUST BANKING (2012). For a (heterodox) Marxist view, see generally JOHN BELLAMY FOSTER & FRED MAGDOFF, THE GREAT FINANCIAL CRISIS (2009); JOHN BELLAMY FOSTER & ROBERT MCCHESNEY, THE ENDLESS CRISIS (2012).

C. From Five Crises to the Existential Crisis of the European Union: Why the European Union Bears Major Responsibility for the Crises

My second thesis is that the European Union *is* the crises, or to put it in less blunt terms, that the European Union has played a significant role in the adoption of the decisions and policies which have ended up causing the crises. This largely accounts for what is perhaps the one-million-euro-question of the present crisis of the European Union: How come what started as a crisis in a small sector of the US mortgage market (the subprime market) has actually hit the European Union more badly than the United States?[42] Part of the answer lies in the way in which the crises have been governed in the United States and in Europe, and to that I return in the next section. But another part lies in the fact that, when the subprime crisis hit, the European Union was in a more structurally fragile position than the United States. This was so because the Union had seen its resilience as a polity widely diminished by the transformation of its constitutional setup from the eighties onwards, and by the belated, but substantive triumph of neoliberalism in policy terms at the European level. The present existential crises were, if the reader allows me the expression, a set of disasters waiting to happen.

Does this mean that I assign the European Union a primary or even exclusive responsibility for the crises? Certainly not. That would contradict the analytical framework I have put forward in the first section, as such a framework leads quite naturally to the conclusion that the crises are, if not global, at least as widespread as the dominant socio-economic model of financialized capitalism.[43] My claim is much more circumspect. In general terms, in sectionI I, I affirm that there must be a relationship between the degree of responsibility of a political community for the gathering of the crises and the extent of its powers and competences. I find that either the politico logical or legal literature were wrong, and that, consequently, the European Union was a largely powerless and irrelevant polity, or else it must be conceded that the European Union must have had a share of responsibility for the coming of the crises. In concrete terms, in section II, I claim that the present understanding of the normative implications and substantive meaning of economic freedoms, section

[42] The IMF estimated the losses resulting from the collapse of the subprime market in the U.S. at 500 billion dollars, which is a relatively small amount by reference to the size of the global financial market INTERNATIONAL MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: THE QUEST FOR LASTING STABILITY (Apr. 2012), *available at* http://www.imf.org/external/pubs/ft/gfsr/2012/01/pdf/text.pdf. Admati and Hellwig point out that the dot.com bubble collapse caused losses six times that size (for a value of 3 trillion dollars). *See* ANAT DMATI & MARTIN HELLWIG, THE BANKERS' NEW CLOTHES: WHAT'S WRONG WITH BANKING AND WHAT TO DO ABOUT IT 60–78 (2013).

[43] The 2007 financial crisis ignited a series of crises that were far from limited to the European Union. Clearly the rest of the western world was also deeply affected. Areas of the world economy which seem to have been less affected, and even to have recovered from the 2008-2009 relapse by now, were, however, affected in the past by other financial crises closely related to the present one, and may indeed be affected in the future by new replicas of the underlying crises. Indeed, what was really shocking about the 2007-2008 crisis was not the pattern or sequence of the crisis (to a large extent a replay of previous financial crisis, with recent precedents in Russia, Asia, or South America) but that it affected the wealthiest core of the world economy.

II(1), and the decision to create an asymmetric monetary and economic union, section II(2), played a fundamental role in the fragilization of the European Union, in making of it a polity less capable of braving the rude sea of the crises.

I. The General Case for the Responsibility of the Union

The responsibility to be assigned to the different states and polities on the gathering of the crises cannot be anything but proportional to the clout and influence of each state and polity in the shaping of global and transnational, formal and informal, institutional structures and arrangements.

The Member States of the European Union explicitly agreed or tacitly coalesced to transferring to the Union fundamental competences regarding the molding of the national and supranational—if these are different—socio-economic orders. Most of these competences are *negative* in character, based on *prohibiting certain courses of action to public institutions (and occasionally private actors*), with supranational institutions being empowered to enforce such prohibitions. The four economic freedoms and the principle of fair competition are paradigmatic examples of these powers.[44] However, the fact that the Union derives largely negative competences from such principles does not mean that enforcing such prohibitions does not result in a very specific molding of the socio-economic order—indeed, that it thus proves the substantially biased character of the constitutional law of the Union, to which I return *infra*.[45] Other competences are positive, from agricultural policy to regional policy. The fact that some of these competences (the harmonization of tax systems, for example) have not been exercised extensively, due to the structural difficulties to forge a common European will within the present institutional

[44] The quartet of economic freedoms enshrined in the Treaties of the European Communities are the free movement of goods, the free movement of workers (now redefined as free movement of persons), the freedom of establishment and the free movement of capital. In line with the original design of Bretton Woods, free movement of goods was given a specific and more reinforced status (trade in goods was the key element in the opening up of national economies to other European economic actors), agricultural products were given a rather different status (under the Common Agricultural Policy, under which free movement followed considerable state intervention in the business and conditions of farming), and free movement of capitals was essentially limited to free movement of payment and for all other purposes conditioned in its actual realization to the taking of further integrative decisions. It was only in the 1980s that the Court of Justice worked out a rather similar legal framework for all economic freedoms. Free movement of capital was given full status as an economic freedom by a 1988 Directive. Council Directive 88/361, art. 1, 1988 O.J. (L 178) 5–8 (EC). As part of the package deal agreed to in Maastricht in 1992 towards the achievement of monetary union, free movement of capital was extended to and from third countries (in the implicit understanding that this will enhance the disciplinary potential of international financial markets over national fiscal policies). Undistorted competition completed the original economic constitution underpinning the Treaties with a view to curb the concentration of private power, which could distort the allocative and cognitive rules of markets. For a classical normative understanding, see Lionel Robbins, *Economic Aspects of Federation*, *in* THE EUROPEAN RESCUE OF THE EUROPEAN UNION 429, 429-445 (Edoardo Chiti, Agustín José Menendez & Pedro Teixeira eds., 2011).

[45] *See generally* STRANGE, *supra* note 5.

set up and decision-making procedures of the Union, does not mean that the Union did not have any power or competence in the matter, but only that the constitutional setup of the Union made unlikely its exercise, as, quite obviously, non-decisions can be as influential as actual decisions.

So it seems to me that it is quite plausible to claim that, by 2007, the European Union held some of the key powers and competencies through which the socio-economics of Europe were reshaped and remolded in the last decades. But if the Union had key competences on socio-economic matters, the Union must be proportionally responsible for the present fragility of the socio-economic order and its lack of resilience in the face of the subprime crisis resulting in the unleashing of the five structural crises referred to in section B.

Allocating the exclusive responsibility for the crises on other polities (for example, to the United States or the Member States of the Union) and consequently depicting the Union as an innocent bystander is indeed only plausible if one shows that the European Union has been either a polity without actual cloutor that the Union has opposed the substantive policies and institutional transformations that underpin the five structural weaknesses referred to in section B.[46]

The claim that the European Union has had no clout in the shaping of the socio-economic order may arise from the implicit assumption that negative competences through the affirmation of negative constitutional principles do not render a polity influential at all; or, alternatively, from the assumption that if the consequences of the existent institutional setup and substantive constitutional framework are unintended, they cannot be blamed on any political community.

Regarding the first assumption, it is important to reiterate that the competences of the Union may well be more negative than positive, so that the core of Union powers are competences entitling the Union to prohibit or preclude public regulation, taxation, and, in general, action by national and local public authorities. Thus, the present understanding of the right to free movement of capital may not amount to much as an enabler of legislative, regulatory, and executive action of the Union, but that does not mean that the right of free movement of capital is less of a phenomenal instrument to shape, some would say bias, the socio-economic order. Negative integration is no less integration than positive integration, even if the distributive consequences of each kind of integration may well be very different, as it is the structural capacity of each type of integration to be molded through democratic decision-making.

[46] On account of its lack of actual influence—as is generally thought to be the case of the Arab League, the Nordic Council, or the Council of Europe—or on account of the Union being a *longa manus* of some other polity or powerful actor—a smokescreen behind which the Member States hid themselves—or the Trojan Horse of some or another hegemonic design, and many other silly conspiracy theories.

Regarding the second assumption, the fact that the structural consequences of certain negative powers, and of the general constellation of Union powers, may have unintended consequences (i.e. the fact that nobody wished the Union to be incapable of acting in a decisive and helpful manner at times of crisis) does not undermine my argument, either. It may well be that nobody wished such a thing to be so, but that does not change the fact that this is a necessary consequence of the institutional setup of the European Union and of the substantive content of European Union law.

Furthermore, denying the power and influence of a European Union that has acquired manifold socio-economic competences would go against not only the extensive politological literature depicting the transformation of the European Union into an autonomous political community, system, or regime, but also against the extensive legal literature describing the evolving structural and substantive constitutional principles of Community law. Community law, which has increasingly stood in tension, if not contradiction with some national constitutional principles. Indeed, the present institutional discourse that tries to deny that this is a European crisis is hard to reconcile with the past institutional discourse that celebrated the many achievements of integration.[47]

One could argue in the alternative that the European Union has opposed or confronted the policies and institutional developments at the root of the crises. While a fashion of this line of reasoning seemed to emerge in the days following the collapse of Lehman Brothers (associated to the narrative according to which this was purely an American crisis), blaming the crisis on the specific socio-economic order of capitalism does not absolve the Union of responsibility.[48] As I have already suggested, and will show in more depth in subsection II,

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[47] *See, e,g.*, DANIEL COHN BENDIT & GUY VERHOFSTADT, FOR EUROPE (2012).

[48] European institutions were largely very optimistic in the early days of the crisis, emphasizing the "protection" that the EMU extended to the Union:

> EMU has improved the euro area's resilience against adverse external developments. In its first decade the euro area has been exposed to a series of external shocks associated with the global business cycle, the most significant being the bursting of the dotcom bubble and subsequent downturn in the US in the early 2000s. Nevertheless, the ensuing slowdown in the euro area at the beginning of the decade was considerably more muted than in comparable episodes prior to the adoption of the single currency. Today once again, the euro area appears protected from the worst of the present global financial turbulence. The anchoring of inflation expectations has contributed to this improved resilience, as have the reforms carried out under the Lisbon Strategy for Growth and Jobs and the renewed budgetary discipline since the SGP reform.

EUROPEAN COMMISSION, ECONOMIC AND FINANCIAL AFFAIRS, EMU at Ten: Successes and Challenges After Ten Years of Economic and Monetary Union 5 (2008), *available at* http://ec.europa.eu/economy_finance/publications/publication12682_en.pdf. In early 2009, the President of the

the European Union has played a key, if far from exclusive, role in shaping contemporary financialized capitalism.[49]

II. Concrete Factors Contributing to the Acute Fragility of the Union in the Face of the Crises: The Role of Economic Freedoms and Asymmetric Monetary Union

If the Union was not an ineffectual union, it must bear a responsibility for the crises. But if the Union is perhaps not the only, or not the main, party responsible, how could the crises end up affecting the European Union more badly than other polities? Answering that question requires focusing on the specific features of the European socio-economic order circa 2008 that rendered it peculiarly fragile when confronted with crises.

The mainstream line of reasoning (reflected in the official discourse that "more Europe, and not less Europe" is needed to overcome the crises) claims that the existential crisis of the European Union is the direct consequence of the incomplete character of the European Union, and more specifically, of the governance of the Eurozone.[50] The present existential crisis would be just another infant disease of the Union, a necessary, if disagreeable, episode in the unfolding of the process of creating an ever closer union"[51]

ECB was still depicting the actions of the ECB as a matter of avoiding "contagion," referring to the USA in a polite fashion as "advanced economies" (which probably comprised the United Kingdom). *See* Jean Claude Trichet, *Roundtable at the International Colloquium: Nouveau Monde*, NOUVEAU CAPITALISME, Feb. 9, 2009, *available at* http://www.ecb.int/press/key/date/2009/html/sp090109.en.html. The "American" character of the crisis also underlined Sarkozy's call to 'refound capitalism.'" *See* Nicolas Sarkozy, *Statement to the Press*, LE MONDE, Sept. 25, 2008, *available at* http://www.lemonde.fr/politique/article/2008/09/25/le-discours-de-nicolas-sarkozy-atoulon_1099795_823448.html.

49 We could certainly move from the role of the European Union in shaping the structural weaknesses of the socio-economic order into the forces shaping the choice of policies within the European Union, but that would imply shifting the analysis from one level to the other, a movement that can be applied to all institutional actors (the Member States of the European Union, the United States or Japan, or for that matter, the IMF or Goldman Sachs) and would not result in any special discharge of responsibility in the case of the European Union.

50 The analysis of the causes of the crisis, even when considering the structural failures or shortcomings of the constitutional framework of the European Union, especially of the EMU, is always made part of an overall argument that refers the shortcomings to the incompleteness of the process of integration. This is an immutable constant in all official documents. For further reading on this topic, see one of the first analyses of the crisis, PRESIDENCY CONCLUSIONS, BRUSSELS EUROPEAN COUNCIL (2008); *A Blueprint for a Deep and Genuine Economic and Monetary Union*, COM (2012) 777 final/2 (Nov. 30, 2012). One is left wondering how to characterize the existing EMU if we need a deep and genuine one. Perhaps superficial and fake?

51 This seems to be, for example, the underlying analysis in ULRICH BECK, A GERMAN EUROPE (2013). *See generally* JÜRGEN HABERMAS, THE CRISIS OF THE EUROPEAN UNION (2012). Habermas seems to have abandoned that understanding and favors a more nuanced approach, in which *more Europe* could be catastrophic if it is not *the right kind of Europe*. *But see* Jürgen Habermas, Address in Leuven (Apr. 25, 2013), *available at* http://www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/en/democracy-solidarity-and-the-european-crisis, where not only a more benevolent assessment of the actions and policies of Council and Commission comes to the fore (technocratic bridging) and where the topos of incompleteness comes back.

Such a line of thought, however, besides its mechanist character, fails to consider that this crisis has hit the European Union more badly than previous crises, such as the two oil crises of the 1970s.[52] How come this European Union, which was said to have become "irreversible" thanks to economic and monetary Union and, consequently, "more complete," reveals itself to be more fragile than the "less complete" Communities of the 1970s. There are very good reasons to distrust the optimistic reduction of the existential crisis of the Union to a crisis of growth, and the overcoming of the crisis to the addition of allegedly missing blocks to the European constitutional structure, without seriously questioning the effects of the blocks that were previously added or those that are in line to be added.

Indeed, the analysis of the concrete responsibility of the Union in the gathering of the crises, and of the concrete factors that have made the Union especially vulnerable in the face of the crises, seems to me to require the consideration of the key planks of the European socio-economic order. In the following sections, I focus on two of these key planks, perhaps the most fundamental ones: In section B(II)(1), I examine the present understanding of economic freedoms as the fundamental standards of the review of the European constitutionality of all European norms, and in section B(II)(2), I examine the asymmetric design of economic and monetary union as decided in 1992 (with the signature of the Treaty of Maastricht) and implemented in 1999 (with the "irreversible" fixing of parities and the start of operations of the European Central Bank). I consider both how both planks came to be shaped, and how they nurtured the structural weaknesses described in section A. The historical context of both planks seems to suggest that the fragility of this European Union is not intrinsic to the process of European integration as such, but to the concrete constitutional configuration of the present Union—a configuration that has been confirmed, not questioned, by the way the crises have been addressed at the European level, as we will see in section C.

1. Economic Freedoms

The famous four economic freedoms (free movement of goods, free movement of workers—later of persons— freedom of establishment, and free movement of capital) were, by 2008, understood to operationalize the supranational right to individual, if not individualistic, autonomy. This supranational right to individual had been elevated by the

[52] If the solution to the crises is completing and deepening integration, the implicit premise is that had the European Union been more complete and deeply integrated, it would have been more resilient to the crises. But why should there be a direct relationship between integration and resilience? The original Treaties contained numerous safeguards, exit clauses, and emergency provisions. Many of which were eliminated in the name of further and deeper integration. This was clearly the case with the provisions regarding balance of payments crisis (see especially Article 108 in the original text of the Treaty Establishing the European Economic Community) Treaty Establishing the European Economic Community, Mar. 25, 1957, 198 U.N.T.S. 3, art. 108 [hereinafter EEC Treaty]. In the absence of economic convergence and political union, resilience is not increased, rather decreased, by eliminating flexibility.

European Court of Justice to be the yardstick of European constitutionality, defining the substantive validity of all national norms in an autonomous way from national constitutional law. This implied a major break with the original understanding of economic freedoms as operationalizations of non-discrimination, which not only entailed the respect of the socio-economic choices of the Member States, but also the primacy of the decisions of representative institutions when it came to the shaping of the emerging supranational socio-economic order.[53] This new understanding was instrumental in the nurturing of the several structural weaknesses referred to in section B.

The founding Treaties of the Communities made economic freedoms a key means to achieving European integration. The redrawing of the political borders of the old continent (something implicit in the aim of achieving "an ever closer Union,"[54] which effectively boils down to a call for the development of an institutional means of solving conflicts and coordinating actions across borders) was thus to be achieved through the redrawing of economic borders.

There were, however, different understandings of how exactly that should be achieved. During the negotiation process, two different visions collided. On the one hand, ordo-liberals and liberists, who had in Ludwig Erhard a key representative, were of the view that economic freedoms should be the key instrument of integration, together with strong European anti-trust rules—what we could label as the *self-standing understanding of economic freedoms* and a forerunner of the present understanding of economic freedoms.[55] Individual economic actors, empowered by the economic freedoms, should be the drivers of integration. The actual exercise of their rights to economic freedom through the four economic freedoms would unleash an undirected process of harmonization of the national regulatory and tax frameworks. According to that understanding, European integration should be a matter of disempowering states and empowering economic actors

[53] On the general background, see ALEXANDER SOMEK, INDIVIDUALISM (2008); ALEXANDER SOMEK, ENGINEERING EQUALITY (2011).

[54] As is very well known, the phrase "ever closer union," mentioned in the Preamble to the Treaty establishing the European Economic Community ("determined to lay the foundations of an ever closer union among the peoples of Europe"), has become established as a catchphrase with which reference is usually made to the need of always progressing in the direction of *more Europe*. Treaty Establishing the European Economic Community, Mar. 25, 1957, 198 U.N.T.S. 3, preamble [hereinafter EEC Treaty]. It is quite obvious, however, that, from a constitutional perspective, quantity has to take the back seat of quality.

[55] See the anthology of ordo-liberalism thought in GERMANY'S SOCIAL MARKET ECONOMY: ORIGINS AND EVOLUTION (Alan Peacock & Hans Willgerodt eds., 1989). *See also* A.J. NICHOLLS, FREEDOM WITH RESPONSIBILITY (1994); MICHEL FOUCAULT, NAISSANCE DE LA BIOPOLITIQUE (2004),especially the lectures of January 31st, February 7th, 14th and 21th, and of March 7th, all in 1979, and reproduced in pages 77 to 220; Mark Blyth, *Austerity*, Oxford: Oxford University Press, 2013, especially chapter 5. For the lack of attention in actual policy to the competition plank of ordoliberalism, see Irene Oswalt-Eucken, *Freedom and Economic Power: Neglected Aspects of Walter Eucken's Work*, 21 J. ECON. STUDIES, 38, 38-45 (1994).

through the assignment of hierarchical and normative priority to economic freedoms. In such a way, European integration would contribute to the acceleration of economic integration worldwide.[56] On the other hand, Christian-democrats and Social-democrats favored a common market that would lead first and foremost to the opening of national markets to economic actors from other Member States without endangering the capacity of each of the Member States to decide on the appropriate mix of regulatory and tax policies. Economic freedoms should entail economic actors to the right not to be discriminated against, but to be treated in the same way as national economic actors. This was something that, quite obviously, did not predetermine how economic actors should be treated or what kind of regulatory and taxing policies should be pursued as part of the public steering of the socio-economic order. Economic freedoms should be a formal¸ not substantive standard. Further integrationist moves, from the implementation of common national markets to the creation of a single market should be politically mediated, articulated by a harmonized common law, so that the regulatory and tax capacities lost at the national level will be regained at the supranational level.[57] In such a way, European integration would contribute to a managed process of economic integration at the global scale.

The tension between these two visions was reconciled by the usual constitutional technique of ambivalent drafting. In this case, the drafting of the Treaties, with the choice of an international Treaty full of constitutional provisions being in itself a paradigm example of ambivalent drafting. At the end of the day, however, the literal tenor of the Treaties was tilted in favor of the embedded understanding of economic freedoms; the systematic reading of the Treaties supported the construction of economic freedoms as concretizations of the principle of non-discrimination on the basis of nationality for two main reasons. First, there was a separated treatment of, on the one hand, free movement of goods, and on the other hand, the other three economic freedoms. That by itself was reflective of the "managed capitalism" paradigm of a very Keynesian flavor, according to which free movement of goods could only be liberalized, and the advantages resulting from trade reaped, if the structural conditions were created for a national regulation of the other factors of production, especially capital.[58] Especially revealing was the fact that the

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[56] *See generally* LUDWIG ERHARD, GERMANY'S COMEBACK IN THE WORLD MARKET (1954).

[57] Probably the best theoretical account of this conception is to be found in ALAN MILWARD, THE EUROPEAN RESCUE OF THE NATION-STATE (1992) and *Politics and Economics in the European Union* (2005).

[58] *See* HYMAN MINSKY, KEYNES (2008); Scott Newton, *J. M. Keynes and the Postwar International Economic Order* 4 HISTORY COMPASS 308, 308–313 (2006); BENN STEIL, THE BATTLE OF BRETTON WOODS (2013), which is however a trifle exceedingly focused on the pro-Soviet sympathies of White. A general descriptive introduction can be found in Allan H. Meltzer, *Keynes on Monetary Reform and International Economic Order*, *in* MONETARY ECONOMICS IN THE 1980S (F. Capie & G. Wood eds., 1989). The *locus classicus* on the characterization of the postwar order as embedded liberalism can be found in John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic System*, 36 INT'L ORG. 379, 379-415 (1982).

norms concerning agricultural policy were placed between the chapter devoted to free movement of goods and the chapter devoted to the other economic freedoms.[59] Even if the Treaties left open the concrete shape of agricultural policy, the general provisions written there assumed that the common agricultural market would be created and thoroughly steered by public institutions.[60] Something that corresponded to not only the actual policy choices of Social-democratic and Christian-democratic governments that were very much influenced by both the New Deal paradigm and by the very pressing needs of a devastated Europe, but also to the conception of managed capitalism itself. Second, free movement of capital was depicted as an aspirational goal,[61] reduced in its operational dimension to the freedom of payments necessary to render effective the other economic freedoms, and very especially, free movement of goods.[62]

Moreover, the fundamental decisions taken since the early days of the process of integration strengthened the prevalence of the embedded conception. Perhaps the defining decision was the one on the apparently technical issue of the indirect taxation of exports within the common market.

The moment that coal and steel started to cross the borders, borders that have been rendered more porous by the Treaties, the question was raised of what should be done regarding the practice of reinstituting at the border the indirect taxes that were bearing on the export price of the exported goods. The German government, inspired by the ordoliberal vision, claimed that no compensation should be made. The French government, advocating the alternative understanding of economic freedoms, claimed that full compensation should be made.[63] The coal and steel community opted for the latter vision.[64]

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[59] *See* EEC Treaty.

[60] *See* EEC Treaty arts. 38.4, 39 (noting that free movement in agricultural products will be rendered possible by a common agricultural policy achieving a comprehensive set of objectives, shaping agricultural production according to certain socio-economic values).

[61] *See* EEC Treaty art. 67, para. 1.

[62] *See id.* at 67.2, para. 2.

[63] *See* ERNEST J. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950-1957 60-63 (1958).

[64] *See* High Auth. of the Eur. Coal and Steel Cmty. [HAECSC], *Rapport sur les problems poses par les taxes sur le chiffre d'affaires dans le marché commun établi par la commission d'experts institituée para la Haute Autorité [Report on the Problems Raised by the Different Turnover Tax Systems Applied Within the Common Market: Report Prepared by the Committee of Experts Set up under Order No. 1-53 of the High Authority]*, HAECSC Doc. 1057-53 (Mar. 5, 1953), usually referred to as the Tinbergen Report. *See also* Commission Decision No. 30/1953, art. 5, 1953 J.O. (C 109) ("[I]t shall be a prohibited practice within the meaning of Article 60 (1) of the Treaty to include in the price charged to the purchaser the amount of any taxes or charges in respect of which the seller is entitled to exemption or drawback.").

All parties assumed, however, that this first decision was a mere temporary expedient, as the practice of compensation at the border was easily amenable to the hidden subsidization of exports. The prevalent mechanics of indirect taxation rendered it almost impossible to calculate, in an exact manner, how much indirect taxes had been imposed on the exported good or service, opening the way to a too generous calculation on the side of the authorities of the state of export. To avoid such distortions was the main objective of the First and Second Value Added Tax (VAT) Directives, and later, the "definitive" Sixth VAT Directive.[65] By adopting them, Member States renounced their autonomy to define the base of indirect taxes, but in exchange were given full autonomy on the setting of VAT rates. That was in itself a way of coordinating state powers with a view to reconcile integration and national political autonomy. More significantly to our present discussion, the power to raise VAT was retained by the state where the good or service was consumed.[66] Such an arrangement was reflective of the drive to open up national markets, while preserving the structural capacity of Member States to retain their regulatory and tax powers—the capacity to decide the different ways in which competing socio-economic claims should be reconciled.

Finally, the four-stage drive to a common market consisted in the removal of obstacles at the border to economic goods, actors and services from other Member States, and not on a general reconfiguration of national regulatory and taxing norms. The "single market without internal frontiers"[67] was understood not only as the vision of an ultimate and distant goal in need of being politically concretized,[68] but it was also assumed that (a) the

[65] *See* Directive 67/227/EEC, of the European Economic Community and of the Council of 11 April 1967 on the Harmonization of Legislation of Member States Concerning Turnover Taxes, 1967 O.J. (L 71) 1301; Directive 77/388/EEC, of the European Economic Community and of the Sixth Council of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes—Common System of Value Added Tax: Uniform Basis of Assessment, 1977 O.J. (L 145) 1.

[66] To be precise, the option for place of consumption (destination) as the connecting tax factor was supposed to be a "temporary" arrangement, so that in due course VAT would be collected at "source" (see the first two directives of 1967, *supra*, fn 60). The "temporary" arrangement has lasted for decades, and there is no good reason to think that it will be concluded soon. Indeed, the European Commission has now become favourable to taxation at destination for reasons of political expediency. See Communication on the future of VAT, COM (2011) 851 final, of 6 December 2011, available at .http://ec.europa.eu/taxation_customs/resources/documents/taxation/vat/key_documents/communications/com_2011_851_en.pdf

[67] The fashionable expression made popular by the Delors Commission with the 1985 White Paper on the completion of the internal market. *See Commission White Paper on Completing the Market*, COM (1985) 310 final (June 14, 1985) [hereinafter White Paper on Completing the Market].

[68] Indeed, the Treaty establishing the European Economic Community was only specific on the four stages leading to the common market, or perhaps to be more precise, to the opening of national markets to economic agents of all Member States. . Treaty Establishing the European Economic Community, Mar. 25, 1957, 198 U.N.T.S. 3,[hereinafter EEC Treaty]. On what a fully internal market would require, and how it was to be achieved, the timing and the means of achieving it should be decided politically, and that (b) the said objective required a process of positive integration of national socio-economic institutions and legal norms, which would result in the recreation of many of the state capacities at the supranational level.[69]

The prevalence of the embedded conception of economic freedoms would soon be challenged, and ultimately, overcame. Two events were perhaps decisive. First, the Luxembourg compromise resulted in the postponement *sine die* of the move towards qualified majority voting within the Council. This rendered the process of politically mediated integration—of legal harmonization—prone to be constantly blocked, and consequently, tilted towards the status quo. It was not only that new regulations and directive were difficult to pass—although from the standpoint of the present European Union with a membership of 27 Member States, finding an agreement among six Member States seems an easy task to discharge—but that already existing secondary law was difficult to amend.[70] This fostered the impression that confining integration to politically decided harmonization was exceedingly slow, resulting in the *sclerosis* of the European Communities. Second, the two oil crises of the 1970s challenged the post-war framework of managed capitalism, of which the embedded conception of economic freedoms was one fundamental part. The apparent failure of Keynesian policies, which seemed to be bound to lead to the odd combination of stagnation and inflation, contrasted with the apparent success of the more liberal approach followed by Germany, thanks to the structural role played by the Bundesbank.[71] The *neoliberal paradigm* became part of the mainstream, emerging from the radical wilderness to which it was confined in the 1950's and 1960's.

The re-discovery of the integrationist potential of economic freedoms was only a matter of time once the fight against inflation, and not full employment and growth, became the

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founding Treaties were silent, if one leaves aside general open-ended principles and vague aspirations. *See* Treaty Establishing the European Economic Community, Mar. 25 1957, 298 U.N.T.S. 3.

69 Under such circumstances, it was only natural that, for example, personal taxes remained the exclusive competence of Member States, even if it was clear from the very first day that they should be Europeanized at some point if the aspiration of creating a single market was to be realized. In line with the general expectations concerning the political road to the internal market, it was assumed that there would be an actual transfer of effective taxing powers to the supranational level, preserving the capacity of public institutions—both European and national—of making use of personal income tax to raise most public revenue, redistribute income within the political community, and macro- and micro-manage the economy. In the meantime, economic integration should be pursued in such a way as to preserve the capacity of each nation-state to regulate, stabilize and correct each national economy. *See* KURT LIPSTEIN, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY (1974), for the legal articulation of this understanding of the common market project.

70 *See generally* Fritz W. Scharpf, *The Joint Decision Trap: Lessons from German Federalism and European Integration*, 66 PUB. ADMIN. 239 (1988), for a key part of the joint decision trap.

71 *See* LEAMAN, *supra* note 34; *see also* FRITZ W. SCHARPF, CRISIS AND CHOICE IN EUROPEAN SOCIAL DEMOCRACY (Ruth Crowley & Fred Thompson, trans., 1991).

ultimate goals of economic policy. Slowly but rather firmly, a consensus emerged among European elites concerning the need of inverting the relationship between economic and political integration. In the absence of a thick political agreement on the way, it was hoped that if the complex relationships between economic, insurance, and political communities would be governed by means of accelerating economic integration, the European Communities could solve their mounting problems. In particular, Directorate General III of the Commission, seconded by the European Court of Justice and later by the Council of Ministers, proposed to re-launch European integration by placing market integration at the very center of the project.[72] This meant focusing all energies on the completion of the "internal market without internal frontiers," which was to be regarded as immediately realizable through the mutual recognition of national regulatory standards.[73] Accelerating economic integration to overcome political disagreement could not but lead to dis-embedding economic integration.

Contrary to the embedded understanding of economic freedoms, the project of the single market, as launched by the Directorate General III of the Commission under Gaston Thorn, and fully fleshed out in the famous White Paper under Delors,[74] presented economic freedoms as the concretization of an individual right to private autonomy which, as hypothesized, had always been enshrined in the Treaties, a right autonomous from and transcending national constitutional law. As a result, European integration would not only require rendering porous national economic borders, extending to European economic actors the treatment provided to nationals, but actually reshaping the national socio-economic order in a way compatible with the said European right to private autonomy. The politically driven creation of a single market was substituted by the vision of the single market to be created through the mutual recognition of regulatory structures.[75]

This seemed to offer equal promise to actors upholding rather contrasting conceptions of what the European Union should become. It was welcomed by the growing number of political actors who blamed the economic crisis on the political meddling of the relationships between economic and insurance communities, which effected the Union, and who had been implementing an agenda which basically consisted of narrowing the community of social insurance and increasing the freedoms enjoyed by actors in markets (a double process of privatization of communities of economic risk and of insurance). For

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[72] *See generally* GILLES GRIN, THE BATTLE OF THE SINGLE EUROPEAN MARKET: ACHIEVEMENTS AND ECONOMIC THOUGHT 1985-2000 (2003).

[73] *See White Paper on Completing the Market, supra* note 67; *see also Communication from the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon')*, 1980 O.J. (C 256) 2, 3.

[74] *Id.*

[75] *See, e.g.,* JACQUES PELKMANS, EUROPEAN INTEGRATION: METHODS AND ECONOMIC ANALYSIS 25 (3d ed. 2006).

such actors, the European Union held promise as the level of government at which the right constitutional norms could be set up to establish supranational markets. At the same time, and for different reasons, pushing for further economic integration without additional Europeanization of the insurance and political communities was regarded as a promising alternative route to achieve the ultimate reconstitution of a coherent relationship between economic, insurance, and political communities at the supranational level. In particular, some of the actors upholding a federalizing view of the Union came to believe that speeding up economic integration will necessarily result in strong demand for further social and political integration. For those actors, the Single European Act was indeed the kind of measure that was bound to generate the sequence of spill-overs,[76] which would lead the Communities to the original destination (political Union in a social-democratic fashion) only through a different route.[77] In brief, neoliberals saw a major opportunity in the single market to ensure intellectual victory. Christian-Democrats and Social-Democrats warmed to the idea, betting that negative integration would revive the European project, and by itself create a supranational political constituency favorable to reregulation and redistribution at the European level, perhaps in a replay of the original dynamics unleashed by the Treaties of Rome.

The reconstruction of community law in the semblance of this new understanding of economic freedoms was a long process in which the European Court of Justice (ECJ) played a leading role under the instigation of the Commission. This occurred, as time passed, with the support of both the European Council and the Council of Ministers, even though the manifold political implications of the new understanding were largely kept outside public discussion, being presented as largely apolitical.

The first and perhaps fundamental move was contained in *Cassis de Dijon.*[78] The case concerned free movement of goods—in particular, the importation of a French liqueur into Germany. The ECJ would rule that a German law protecting consumers, albeit treating in a perfectly equal manner both German and imported goods, was to be regarded as breaching community law. A German supermarket (Rewe) had had trouble selling French *cassis* on account of the fact that the German authorities insisted on applying a national law that required that any *cassis* had a minimum alcoholic graduation that the French product did not have. It was clear that the rationale of the German law was to avoid the

[76] This forms the core of the spillover mechanism, described by HAAS, *supra* note 63. The argument of the spill-over is the background of the key Neumark report of 1962. *See generally* RAPPORT DU COMITÉ FISCAL ET FINANCIER = REPORT OF THE FISCAL AND FINANCIAL COMMITTEE, ARCHIVE OF EUROPEAN INTEGRATION (1962), *available at* http://aei.pitt.edu/33686/.

[77] *See generally* JACQUES DELORS, MÉMOIRES (2004); RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE (2007).

[78] Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649 [hereinafter *Cassis de Dujon* case].

consumers being fooled by the arbitrary labeling of goods by exporters and/or retailers. To avoid confusion, German law reserved the use of the label *cassis* to goods meeting the expectations of the average German consumer (the teutonic person in the Clapham omnibus, if one is allowed to use a rather old fashioned expression).

Formally speaking the ECJ limited itself in its ruling to offer a general and abstract interpretation of the provision on free movement of goods enshrined in the Treaties:

> [The concept of] measures having an effect equivalent to quantitative restrictions on imports contained in Article 30 of the EEC treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a member state also falls within the prohibition laid down in that provision where the importation of alcoholic beverages lawfully produced and marketed in another member state is concerned.[79]

However, the rationale of the *ratio decidendi* of the case goes further: a ban on *any* product that was legally sold in *any* other Member State of the communities would, *prima facie*, constitute a disproportionate infringement on the constitutional principle of free movement of goods. Consequently, any national norm putting obstacles to the sale of goods legally available in another Member State would be considered as a breach of a key European constitutional norm, and thus void unless there were countervailing reasons which could justify this infringement. While the ruling is phrased in general and abstract terms, it is hard to imagine how the German court could avoid the conclusion that the German law prohibiting the sale was to be set aside, as this complete selling prohibition was incompatible with Community law.

There is every reason to concur with mainstream scholarship in stressing the constitutional importance and relevance of the decision. But there are good reasons to contest the normative assessment of the ruling. The apparently innocent affirmation of the interposition of obstacles as an autonomous reason for declaring a national norm in breach of Community law implies a massive constitutional transformation.

First, it gives massive concrete bite to the structural principles of direct effect and primacy. In the first place, *Cassis de Dijon* turns free movement of goods from a standard, which could be used to declare national norms regulating the porosity of the border invalid to a full-fledged standard of European constitutional review, covering all national legal norms.[80]

[79] *See id.* ¶ 15.

[80] *See id.* ¶ 13, 14.

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In other words, *Cassis de Dijon* transforms the power of review of the validity of national laws by reference to the constitutional principles of community law from a mouse—restricted to the national norms through which the economic border is established and reproduced—to an elephant—extending to the whole national legal order. Secondly, *Cassis de Dijon* emancipates the review of European constitutionality from the substantive content of national constitutional law. As long as free movement of goods was understood as a concretization of the principle of non-discrimination, what community law required from national legislation was to merely extend the same treatment to European economic actors as that enjoyed by national economic actors. Free movement of goods as an embedded economic freedom was a formal constitutional yardstick, not a substantive one. The moment in which the breadth and scope of what constitutes a breach is shifted from a discriminatory norm to an obstacle, economic freedoms become autonomous substantive standards of constitutional review. This points to the progressive emancipation of Union law from the deep constitution of the European Union, the constitutional law common to the Member States.[81]

Second, it shifts control of the process of integration from the political and—directly or indirectly—representative institutions of the Union to the ECJ and the national courts that feed the ECJ with preliminary references. In turn, the private economic actors are empowered by the case law of the ECJ to set aside all national norms in breach of EU law, even in national systems where constitutional courts enjoy a monopoly of constitutional review.

Third, it gives concrete content to the structural empowerment of private actors, especially those with the resources to be repeat litigants before European Courts, to mold the concrete socio-economic implications of Community law.

[81] Paradoxically, the European Court of Justice, not long after, explicitly rendered the foundational role of the said common constitutional law. The transformation of economic freedoms was given constitutional salience by the fact that the legal services of the Council, Commission, and European Parliament (regarding the law-making process) and the European Court of Justice and national European courts (regarding the adjudication stage) have come to accept that economic freedoms are the fundamental yardstick of European constitutionality; in other words, these freedoms are the substantive values according to which the validity of all European norms (derivative supranational norms and all national norms, including constitutional norms) are to be assessed. It is true that fundamental rights are also said to be a key part of the substantive constitutional law of the European Union, and that should be expected to make them part of the European canon of constitutionality. However, the peculiar synthetic constitutional path followed by the Union accounts for the fact that this is not the case. Fundamental rights were not originally included in the Treaties, an omission that has justified the case law of the Court that limits their salience to the review of the European constitutionality of supranational norms and decisions. That implies that they are part of the constitutional yardstick only in these cases. In such a way the ECJ seems to avoid claiming to be the ultimate guardian of constitutional values, as national courts can keep playing that role regarding fundamental rights. Such an outright claim would be hard to sustain given the lesser democratic legitimacy of European constitutional law vis-à-vis national law. But even if less obvious, the claim to guardianship of the economic freedoms—and of the economic freedoms *and not* of fundamental rights in the same way—is actually even more problematic when juxtaposed to the claim of total primacy of Union law.

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Fourth, the replacement of political harmonization by the mutual recognition of regulatory standards operates a drastic revolution in the very understanding of the relationship among Member States and national legal orders from one based on political cooperation and mutual self-reinforcement to one based on political competition and consequently mutual self-disempowerment.

Fifth, the definition and status of free movement of capital was radically transformed in two steps. The first was the enactment of Directive 88/361, which aimed at overcoming the very secondary status assigned to free movement of capital.[82] Partly an addition to the single market drive consecrated in the Single European Act, partly a preparatory step in the long-winded negotiation that would end up launching an economic and monetary union in Maastricht, the Directive aimed at the complete liberalization of capital movements within the Union. Very significant was the fact that while it was made clear during the negotiation process that an unqualified liberalization would risk undermining the cognitive capacities of the tax state, especially on what concerned capital income and cumulated capital wealth, no agreement was reached on parallel measures that would allow the avoidance of the erosion of the actual taxing capacities of the Member States. The Directive, as such, was approved and entered into force nonetheless, its approval rendered easier by the fact that states were negotiating under the shadow of qualified majority voting. Any measures required to fight eventual tax evasion would have required unanimous approval at the Council, something highly unlikely in view of the interests at stake. The second major step was the double decision to formalize in the Treaties the new status of free movement of capital as a full-fledged economic freedom, and to extend its breadth to encompass movements of capital from and to third countries.[83] These new *erga omnes* understanding of free movement of capital (an exceptional understanding, as the other three economic freedoms only extend to the territory of the Member States of the European Union, or the European Economic Area) was a fundamental part of the design of the asymmetric economic and monetary union, as I will indicate later.

Sixth, the extension of the new understanding of free movement of goods to all other economic freedoms, a step which also implied blurring the distinction between economic freedoms suggested by the very structure of the Rome Treaty. The timing of this extension (the process started in 1991) with the judgment in *Säger*[84] seems to suggest that the

[82] *See* Council Directive 88/361/EEC, 1988 O.J. (L 178) 5.

[83] *See* EEC Treaty, art. 56, ¶ 1 (establishing the European Economic Community) as amended by the Treaty of Maastricht, "[w]ithin the framework of the provisions set out in [that] Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited." Treaty of Maastricht, Feb, 7, 1992, 1992 O.J. (C 191). *See also* EEC Treaty art. 56., ¶ 2 ("[A]ll restrictions on payments between Member States and between Member States and third countries shall be prohibited.").

[84] *See* Case C-76/90, Säger v. Dennemeyer, & Co. Ltd, 2008 E.C.R. I-4221; Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165; Case C-415/93, Union Royale Belge des

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decisions taken by the Council, both with the 88/361 Directive and even more with the signature of the Maastricht Treaty, were taken by the ECJ as political signals of endorsement of the new understanding of economic freedoms.

The structural implications of the disembedded understanding of economic freedoms seemed to have been suddenly noticed by the academic literature after the rulings in *Viking* and *Laval*, but the transformation had by then been ongoing for decades.[85] *Viking* and *Laval* may have rendered dramatically evident that the ECJ had come to believe that the force of fundamental constitutional principles was to be limited by the constitutional primacy of economic freedoms, but the ruling of the ECJ in these cases was in many senses a mere scribbling in the margins of the lines of case law which had brought under review of European constitutionality national direct taxes and national non-contributory pensions, to refer to only two paradigmatic examples.

This disembedding of economic freedoms contributed to accelerating the neoliberal turn in the whole of the European Union. The new understanding of economic freedoms empowered private actors, especially repeated players before the ECJ, to challenge all elements of national tax and regulatory systems, and, in the process, to deepen the breadth and reach of the rights to which they were now entitled. The ECJ transformed, as indicated, economic freedoms into yardsticks of the constitutionality of all national norms. But the ECJ being a court and not a legislature, the disruptive effect of judicial decisions could not be matched by the capacity of the ECJ to reconstitute in a coherent fashion the said tax and regulatory tax regimes. Moreover, the transformation of economic freedoms took place in the absence of any constitutional decision extending the competences of the Union. The transformation of economic freedoms was purely constitutional, limited to the horizontal effect of such rights as standards of European constitutional review.

Finally, and perhaps decisively, this transformation came hand in hand with the establishment of a division of labor between the community decision-making processes. While the empowering of the European Parliament and the creation of the co-decision procedure, which would blossom in the Maastricht Treaty, were welcomed as essential steps towards closing the democratic deficit of the Union, as a matter of fact, they had more ambivalent consequences. This is so because they resulted in forcing the splitting of issues that were really the same policy problem, depending on which procedure—the standard one that required unanimity in the Council, or co-decision that was based on

Société de Football Association ASBL v. Bosman, 1995 E.C.R. I-4921. See Case C-163/94, Criminal Proceedings Against Sanz de Lera and Others, 1995 E.C.R. I-4821 (providing an example after the entry into force of Directive 88/361, *supra* note 82).

[85] *See* Case C-438/05*,* Intl. Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779; Case C-341/05, Laval un Partneri Ltd. v. Byggnadsarbetareförbundet, 2007 E.C.R. I-11767; *see also* Case C-346/06, Rüffert v. Niedersachsen, 2008 E.C.R. I-1989; Case C-319/06, Comm'n of the Eur. Comty. v. Luxembourg, 2008 E.C.R. I-4323.

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majorities in the Council and the Parliament—the decision had to be taken. Because the chances of getting measures passed were different under each of these processes, the legislative division of labor favored a structural substantive bias at the core of Union law. In practice, measures which aimed at deepening the breadth and scope of economic freedoms were favored, while measures aimed at modifying the distributive outcomes of market integration remained very easy to block. Under such circumstances, the joint decision trap was much reduced for measures tending in the direction of furthering a disembedded understanding of economic freedoms, while it remained the same—and actually worsened as the membership of the Union grew—for measures aimed at rectifying the case law of the ECJ.

This new understanding of economic freedoms equally reinforced the underlying pattern of both privatization of public enterprises and of marketization of the structures of the public administration and of public services, while the liberalization of economic activities—which failed to heighten the growth potential of European economies—had a major impact on the patterns of income distribution and contributed to the growth of inequalities *within* Member States.[86]

Moreover, the new understanding of free movement of capital as a full-fledged economic freedom gave a boost to the process of financialization, opening up heavily regulated financial systems to international financial actors, and consequently, created new opportunities of financial development in less mature financial systems. It led to a dramatic increase of the structural opportunities to engage in a fully legal manner into tax dodging, not only by means of using the conduit of jurisdictions which operated *de facto* as a tax haven (Luxembourg or United Kingdom), but also through corporate tax planning via transfer prices, with the Benelux and Ireland playing a key role as states of incorporation for that purpose. The cognitive capacities of the tax state were given a new blow.

The capacity of European states to undertake investment or industrial policies was also severely undermined. Not only were public investments and public enterprises progressively subject to market rules, but the actual capacity to encourage investment in a specific sector or company was rendered extremely difficult. Ironically, at the very same time that competition law was being transformed by reference to the new standard of consumer welfare maximization, so was a backdoor to the increasing toleration of private monopolies.

Finally, the new understanding of economic freedoms led to a juridification and judicialization of citizenship. While embedded economic freedoms were enjoyed by Europeans in the states in which they were not citizens, the disembedded economic freedoms turned the doctrine of reverse discrimination into a mere expedient by means of

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[86] *See generally* DANY NICOL, THE CONSTITUTIONAL PROTECTION OF CAPITALISM (2010).

which the ECJ reduces its workload or avoids entering, for the time being, too controversial of legal waters. Even if this development is coherent with the transformation of economic freedoms into operationalizations not only, and not mainly, of non-discrimination, but of the right to individual private autonomy, the fact of the matter is that this new understanding creates another means of influencing public policy in addition to representative democratic politics. The holders of economic freedoms who have the economic resources to become repeat players before the ECJ or the Commission can influence policy in proportion not to the number of their co-citizens they manage to persuade, but by the depth of their pockets. The structural bias of the supranational legislative process, made worse by the Lisbon Treaty, increases the chances that they enjoy the full benefits of their repeated litigation undisturbed by rectificatory regulations or directives.[87]

2. Asymmetric Monetary Union: The Facilitating of Financialization and Undermining of Macroeconomic Government, Leading to a Political Crisis.

The asymmetric economic and monetary Union implied the definitive abandonment of the idea of the Union as a means of coordinating public policies in favor of an understanding of the Union as an instrument of enhancing competition between public policies in a narrow set of areas. This radical transformation of the European Union—and of the underlying political project—not only had consequences within the Union, but had deep global effects. The new understanding of the economic freedoms resulted in the Union leading the global juridification of the principle and practice of free movement of capital. The asymmetric economic and monetary union accelerated the global turn towards allegedly autonomous and seemingly technocratic central banks. Taken together, the new conception of economic freedoms and the asymmetric monetary union, created the conditions under which European banks, which play a much more central financing role of non-financial activity than in the US, became more exposed to the process of financialization and were consequently extremely fragile when the 2007-2008 crises manifested. Similarly, these two developments go a long way to explain the structural incapacity of European institutions to act in a decisive and meaningful way when the crises developed, and the choice of contradictory and damaging policies when the crises continued.

For two decades, the project of European integration was facilitated by the monetary stability provided by the Bretton Woods monetary system, a system that was largely successful in reconciling the liberalization of free trade in goods with the creation of the structural conditions under which states could enjoy autonomy when defining their fiscal

[87] On the structural deficit, see generally JOHN ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, THE CONSTITUTION'S GIFT: A CONSTITUTIONAL THEORY FOR A DEMOCRATIC EUROPEAN UNION 222ff (2011).

and macroeconomic policies.[88] However, the hegemonic role assumed by the United States in the postwar monetary order created the conditions under which it was only a matter of time that the international duties of the United States, as monetary hegemon, democratically decided national fiscal priorities would collide.[89] In the spring of 1971, Nixon had to choose between, on the one hand, preserving Bretton Woods through deflating the US economy, and on the other hand, neglecting its hegemonic duties and gaining the room to maneuver necessary to foster growth, and in the process, obtain a second presidential term. Nixon opted for the latter and *de facto*, if not *de jure*, put an end to international monetary stability.[90]

The early institutional projects and initiatives towards the establishment of a European common currency and a common European monetary policy resulted from the realization that the Bretton Woods system was inherently unstable, and that its dismissal would destabilize the achievements of European integration, especially the common agricultural

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88 *See generally* Michael D. Bordo, *The Bretton Woods International Monetary System: An Historical Overview*, *in* A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM 3, 3–108 (Michael D. Bordo & Barry Eichengreen eds., 1993); DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY (2011).

89 Simultaneously, the reserve role of the US dollar was bound to be questioned by the very success of the dollar. The more dollars that were kept in non-US hands, the less credible the US gold convertibility pledge would become. That lack of credibility out of success was already nurturing currency instability in the mid-1960s. There was a clear consciousness of the limits of Bretton Woods at the European Commission. *See Memorandum of the Commission on the Action Programme for the Community for the Second Stage*, at 11, ¶ 128, COM (1962) 300 final (Oct. 24, 1962).

> But monetary policy is of vital importance to the Common Market from another point of view. From the end of the transition period on, if not even sooner economic union will involve fixed rates of exchange between Member States with very narrow limits on the variations allowed. Any major modification would so much upset the trade of countries no longer protected by any customs barrier, and, because of the guaranteed Community intervention price for grain and other basic agricultural products, would cause such sudden changes in prices of farm products and therefore in farm incomes also, that the Common Market itself could be imperiled.

Id. See also Council Decision 64/300/EEC, On Cooperation Between the Central Banks of the Member States of the European Economic Community, 1964 O.J. (77) 1206; Council Decision 64/301/EEC, On Cooperation Between the Member States in the Field of International Monetary Relations, 1964 O.J. (77) 1207; Declaration 64/306/EEC, of the Representatives of the Governments of the Member States of the European Economic Community, Meeting within the Council of 8 May 1964 on the Prior Consultations Between Member States in the Event of Changes in the Exchange-Rate Parities of Their Currencies, 1964 O.J. (78) 1226. *But see* Ivo Maes, *Economic Thought at the European Commission and the Creation of EMU (1957-1991)* (Dipartimento de Economia, La Sapienza, Working Paper No. 2, 2009) *available at* http://phdschool-economics.dse.uniroma1.it/Economia/Publications/papers/maes2.pdf.

90 *See generally* BARRY EICHENGREEN, EXORBITANT PRIVILEGE: THE RISE AND FALL OF THE DOLLAR AND THE FUTURE OF THE INTERNATIONAL MONETARY SYSTEM (2011).

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policy (based as it was on a system of public subsidies the value of which would become highly volatile) and the common market (as monetary turbulence would render investment in productive capacities oriented to exportation to other Member States an almost impossible task). When Bretton Woods collapsed, not much had been achieved, but there was a clear consciousness of what was at stake for the Communities. A rapid succession of ineffectual plans was made to realize economic and monetary union. All failed until the 1990s. Monetary turbulence was kept within bound by more or less informal, "grey" central bank cooperation,[91] and in part, thanks to the painful recreation of bits and pieces of the Bretton Woods system within the European Communities (a recreation which was, however, not deprived of its own problems. While the snake in the tunnel and the snake outside the tunnel arrangements were non-lasting, the European Monetary System ended up providing a decade of monetary stability to the Communities, although a stability which came at a price and was far from idyllic).[92] The EMS was inherently unstable. Not only on account of the hegemonic role of Germany—which, thanks to the transformation of the Deutsche Mark in the key European international reserve currency, assumed a role within the ESM akin to that of the United States within Bretton Woods—but also due to the very new understanding of economic freedoms, and especially the free the movement of capital, fostered and consecrated by the European Commission and the ECJ in the terms considered in the previous paragraph.[93] Indeed, the capacity of the EMS to stabilize exchange rates came to a sudden end in 1992, just at the time that the new understanding of free movement of capital fully unleashed the destabilizing effects of this freedom. The reluctance to realign currencies in response to the different patterns of economic performance built up tensions that exploded under the force of financial speculation (but which had been culminating before).[94]

The combined effect of the persistent lack of an international replacement of Bretton Woods—and the ensuing potential and reality of monetary instability—the structural instability of the European Monetary System, and the fall of the Berlin Wall—and the resulting political challenges stemming from German reunification—account for the

[91] *See generally* FABRIZIO SACCOMANNI, MANAGING INTERNATIONAL FINANCIAL INSTABILITY: NATIONAL TAMERS VERSUS GLOBAL TIGERS (2008).

[92] *See generally* ANDRÉ SZÁSZ, THE ROAD TO EUROPEAN MONETARY UNION (1999); STEFAN COLLIGNON, MONETARY STABILITY IN EUROPE (2002); DAVID MARSH, THE EURO: THE BATTLE FOR THE NEW GLOBAL CURRENCY (2009, 2nd edition 2011).

[93] German unification unleashed these two destabilizing forces some months after the signature of the Maastricht Treaty and during its convoluted ratification process. When the massive public expenditure resulting from the specific way in which reunification was managed overheated the German economy, the Bundesbank raised its interest rates and forced the rest of the States Members of the ESM to adopt deflationary policies unsuited to their economies. The liberalization of capital movements implemented in 1992 as part of both the single market completion project and as a preparatory step for monetary union facilitated speculative flows that revealed the structural limits of the ESM.

[94] *See* MARSH, *supra* note 92.

peculiar agreement to both decide on economic and monetary union at Maastricht in 1992, and to implement the said union in 1999.[95] All three of these factors, especially the third, created the basis for a political agreement on the need to transcend the European Monetary System and create a common European currency supported by a common monetary policy. There was a wide political agreement on the need of combining German reunification with decisions that would render European integration *irreversible*—a short name for making disintegration prohibitively costly, so as to dissuade any Member State, especially Germany, from deciding to exit the Union. However, the depth of the political agreement did not extend to the specific configuration of economic and monetary union, and particularly, not to the institutional setup, procedural arrangements and substantive rules governing monetary and fiscal policy in such a way as to ensure a functional equivalen*t* to a well-ordered economic and monetary union.

The result of this peculiar set of circumstances was a very idiosyncratic mix of muddling through and constitutional experimentation in the form of an asymmetric monetary and economic union. Monetary policy was federalized and de-politicized. Not only the federal ECB, but also its federal components—the national central banks making up the European System of Central Banks—were to be configured as autonomous institutions, freed from political pressures and political cycles, in the template of the until-then-odd-bank-out, the Bundesbank.[96] Monetary policy was trusted to technicians, who were given the mandate to maintain monetary stability first and foremost, paying attention to the realization of the other goals of the European Union, such as fostering economic growth and ensuring full employment, only when that was compatible with monetary stability. In their turn, fiscal policies remained national and, formally speaking, at least the outcome of political decision-making processes. National autonomy was framed, however, by caps on yearly deficits and overall public debt—although, in practice, attention will focus exclusively on yearly deficits—as well as by substantive principles forcing Member States to adopt strict fiscal policies. Key in that regard was the prohibition of central banking financing of national debts, the prohibition of the imposition of forced loans on financial institutions, and the intentional elimination of the provision of financial assistance between Member States, including a ban on the mutualization of debts. This framework was still said to be neutral given that states remained free to decide by what concrete means they will comply with the requirements of *rigeur* in fiscal policy, and reach their deficit targets.[97] Moreover, the sanctions foreseen in and further detailed by the Stability and Growth Pact of 1997 remained essentially symbolic. This was so because not only was the decision to sanction

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[95] *Id.*

[96] *See* Robert Sparve, *Central Bank Independence Under European Union and other International Standards*, *in* EUROPEAN CENTRAL BANKS: LEGAL ASPECTS OF THE EUROPEAN SYSTEM OF CENTRAL BANKS, 271 (Liber Amicorum & Paolo Zamoni Garavelli eds., 2005).

[97] *See generally* LORENZO BINI SMAGHI, IL PARADOSSO DELL'EURO: LUCI E OMBRE DIECI ANNI DOPO (2010) (providing an outstanding rationalization of *rigeur* in fiscal policy).

ultimately a political decision (as the Franco-German episode of the early 2000s will reveal), but also there were some Member States too large to be sanctioned, as sanctioning them would throw the whole Eurozone into recession.[98]

The coherence of this unique and unprecedented mix was trusted to *governance arrangements* and to the disciplinary force of financial markets. The former, the governance arrangements, were characterized by the substitution of the certainty of the form of law by the flexibility of the form of *soft law* (the broad economic policy guidelines produced by the Council every year, the macroeconomic benchmarks, and arguably the debt thresholds once monetary union was launched), and the replacement of the institutional coercion of law by a form of group pressure (peer pressure) rather akin to that characteristic of positive morality. The latter, leading actors in financial markets, had been already empowered them to play a key disciplinary role by the transformation of free movement of capital into a full-fledged economic freedom by Directive 1988/361 (the role of hedge funds in the European Monetary System crisis of 1992 was indeed largely courtesy of the said Directive).[99] The structural power of key financial actors was further strengthened by the transformation of free movement of capital into an *erga omnes* freedom. Contrary to the internal market logic, capital movements were made free not only within the Union, but also outside the Union.[100] That increased the ease with which financial markets could vote for the fiscal policies of the different Member States.[101] Whether that would turn financial markets into good judges of fiscal policy was a totally different question, rather taken for granted than substantiated during the Maastricht negotiations.

This asymmetric economic and monetary union heightened the financial and macroeconomic weaknesses of the European Union. First, the key role assigned to financial markets in disciplining the autonomous fiscal policies of the states participating in monetary union gave a major impulse to the process of financialization. The revamping of

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98 Indeed, what the French-German episode of the 2000s revealed was not the lack of willingness of the big countries to play by the rules, but rather the very nature of the said rules.

99 *See* Council Directive 88/361/EEC, 1988 O.J. (L 178) 5. Cf. Sideek Mohamed, *European Community Law on the Free Movement of Capital and EMU*, Dordrecht: Martinus Nijhoff, 1999, pp. 240ff

100 Kristina Ståhl, 'Free movement of capital between Member States and third countries', 13 (2004) *EC Tax Review*, pp. 47-56, at p. 52 and Steffen Hindelang, *Free Movement of Capital and Foreign Direct Investment*, Oxford: Oxford University Press, 2009, p. 22. On the gritty-nitty of the negotiations, see Kenneth Dyson and Keith Featherstone, *The Road to Maastricht. Negotiating Economic and Monetary Union*, Oxford: Oxford University Press, 1999; Colette Mazzucelli, *France and Germany at Maastricht. Politics and Negotiations to create the European Union*, New York, Garland Publishing, 1997, chapter IV.

101 Germany had also been the odd state out, having liberalized outgoing capital movements since the foundation of the Federal Republic. Incoming capital movements were, however, subject to regulation, and indeed flows of hot money were periodically discouraged in order to avoid their having an inflationary impact.

free movement of capital as a fundamental economic freedom gave a new impulse to the process of financiarization within the European Union, at the same time turning the Union into the leading force in the process of juridifying the new orthodoxy on the blessings of financial liberalization. While the driving economic forces in the process of financialization had been US financial institutions, the driving legal force was the European Union. Second, the projection of the *Bundesbank* model to the European scale implied the renunciation of one key pull and lever in the discharge of state responsibilities: monetary policy. Moreover, fiscal *rigeur* necessarily implied abandoning the key pulls that made public debt an extremely safe asset. By simultaneously renouncing to finance its deficit through the central bank, or through its monetization, and to impose forced loans, in a context marked by the prohibition of the mutualization of debts or the provision of financial assistance to countries in fiscal difficulties, the states participating in the monetary union made themselves more prone to bankruptcy and payment defaults. Indeed, it was this mix of original decisions at Maastricht, and not the Deauville agreement of 2010 between France and Germany that created the conditions under which a Member State of the European Union could default.

For ten years, EMU was regarded as working very efficiently and very smoothly. Massive outflows of capital from the core Eurozone states (Germany, Austria, Netherlands, Finland, and to a much lesser extent, France) to peripheral Member States (Spain, Portugal, Greece, Ireland, and, to a lesser extent, Italy) seemed to be leading to income and wealth convergence within the Eurozone. In reality, however, EMU masked growing divergence, papering income and wealth differences with the flows of credit. From a political standpoint, it is important to notice that the formal national political autonomy was highly conditioned by the different structural position of the different States, which created powerful incentives to follow peculiar strategies of adaptation: exporting competitiveness in the Euro-core, real estate and consumption bubbles in the South, and specialization on tax avoidance in the Benelux.

The asymmetric economic and monetary union provided answers to two rather urgent challenges to the process of European integration, namely, how to avoid the strong disintegrative forces of international monetary turbulences—of which the September 1992 monetary crisis was an *ex post facto* example, revealing the structural limits of the ESM—and how to avoid German reunification unleashing another kind of disintegrative force. But while providing short-term solutions to these two problems, we should also consider what effects asymmetric and monetary union had on the five underlying weaknesses referred to in Section B(I). At the end of the day, it seems to me that asymmetric and monetary union made the European Union much more fragile on each of the five dimensions.

First, EMU explicitly led to the intentional weakening of the macroeconomic steering capacities of Eurozone states, and necessarily to the overall weakening of macroeconomic steering capacities within the Eurozone, as the powers that were renounced by Member States were not recreated at the supranational level. In the first instance, the specific kind of monetary union decided implied renouncing monetary policy as a politically controlled macroeconomic lever. Indeed, the philosophy underlying the German socio-economic constitution—although not so much the actual practice beyond the myth—now transferred to the European level, affirming that it was preferable to depoliticize monetary policy. Secondly, fiscal policy was subject to a set of general and allegedly politically neutral principles, essentially budgetary stability (defined in general terms in the Treaties, and then further concretized in the Stability and Growth Pact) and budgetary *rigeur*. While the former were constructed in widely flexible terms, too flexible according to the mainstream view, the latter implied from the moment in which they were in force the undermining of the structural solvency of public debt, and consequently, of the role of public debt as the safest asset, the investment asset of last resort. It was the Maastricht framework, and not decisions in 2010, that turned Eurozone states into potential defaulters. When states renounce the monetization of debt and the imposition of forced loans on financial institutions and citizens, they turn public debt into just an ordinary investment, in terms of the guarantees that support its solvency. But if public debt is an ordinary investment, then it follows that *like any ordinary investment*, it may be fruitful or it may turn out to leave the investor with a net loss. Finally, the combination of free movement of capital *erga omnes* with the design of a Eurozone financial market without a supranational insurer of last resort, rendered uncertain the capacity of Member States to act as insurers of last resort of their national financial institutions, in the sense of financial institutions established in their jurisdiction. A banking union based on mutual recognition and not on the creation of common institutional structures led not only to a transfer union by stealth (from Northern European financial institutions to Southern citizens, and to a lesser extent, states), but occasionally led to elephant-astic financial sectors, with liabilities that were multiples of the gross national product of the host state of the financial institution. This was the case of Iceland in the European Economic Area (EEA) and, closer to home, of Ireland.

TABLE 6: SIZE OF THE BANKS RELATIVE TO GDP (MULTIPLE) (2009)[102]

Austria	3.8
Germany	3.1
Finland	2.3
Netherlands	3.9
France	3.8
Italy	2.4
Spain	3.3
Portugal	3.1
Ireland	8.1
Greece	2.1
United Kingdom	6.0
Slovenia	1.5
Cyprus	8.2
Luxembourg	21.2

[102] *eLibrary Data*, INT'L MONETARY FUND, *available at* http://elibrary-data.imf.org/ (last visited May 13, 2013).

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TABLE 7.1: Evolution of GDP per head (Nominal prices), % of EU-27 in 1999, % of Germany (1997-2004)[103]

	1997	1998	1999	2000	2001	2002	2003	2004
D E	23200 130.3 100	23800 133.7 100	24500 137.6 100	25100 141 100	25700 144.4 100	26000 146.1 100	26200 147.2 100	26800 150.6 100
N L	21900 123 94.4	22900 128.6 96.2	24400 137.1 99.6	26300 147.7 104.8	27900 156.7 108.6	28800 161.8 110.8	29400 165.2 112.2	30200 169.7 112.7
F I	21100 118.5 90.9	22500 126.4 94.5	23700 133.5 96.7	25500 143.3 101.6	26800 150.5 104.3	27600 155.1 106.1	27900 156.7 106.4	29100 163.5 108.5
A T	22900 128.6 98.7	23800 133.7 100	24800 139.3 101.2	25900 145 103.1	26400 148.3 102.7	27100 152.2 104.2	27500 154.4 105	28500 160.1 106.3
F R	21000 117.8 90.5	21900 123 92	22700 127.5 92.6	23700 133.1 94.4	24500 137.6 95.3	25000 140.4 96.1	25600 143.8 97.7	26500 148.8 98.8
I T	18500 103.9 79.7	19100 107.3 80.2	19800 111.2 80.8	20900 117.4 83.2	21900 123 85.2	22700 125.8 87.3	23200 130.3 88.5	23900 134.2 89.2
E S	12800 71.9 53.8	13500 75.8 56.7	14500 81.5 59.2	15700 88.2 62.5	16700 93.8 65	17700 99.4 68.1	18600 104.4 71	19700 110.6 73.5
P T	10100 56.7 43.5	10800 60.7 45.4	11600 65.16 47.3	12400 69.7 49.4	13000 73 50.6	13500 75.8 51.9	13700 77 52.2	14200 80 53
E L	11000 61.8 47.4	11300 63.4 47.8	12100 67.8 49.4	12600 70.8 50.2	13400 75.3 52.1	14300 80.3 55	15600 87.6 59.5	16700 93.8 62.3
I E	19600 110.1 84.5	21200 119.1 89.1	24100 135.4 98.4	27600 155 110	30300 170.2 117.9	33200 186.5 127.7	35000 196.6 133.6	36700 206.17 136.9

[103] *Annual Nat'l Accounts*, EUROSTAT (May 13, 2013), http://epp.eurostat.ec.europa.eu/portal/page/portal/national_accounts/data/main_tables.

TABLE 7.2: Evolution of GDP per head (Nominal prices), % of EU-27 in 1999, % of Germany (2005-2011)[104]

	2005	2006	2007	2008	2009	2010	2011
D E	27200 152.8 100	28200 158.4 100	29600 166.3 100	30200 169.7 100	29300 164.6 100	30600 171.9 100	31700 178 100
N L	31500 177 115.8	33100 185.9 117.4	34900 196.1 117.90	36300 203.9 120.2	34600 194.3 118.1	35600 200 116.3	36100 202.80 113.8
F I	30000 168.5 110.3	31500 177 111.7	34000 191 114.8	34900 196.1 115.5	32500 182.6 110.9	33600 188.8 109.8	35100 197.19 110.7
A T	29600 166.2 108.8	31100 174.7 110.2	32800 184.2 110.8	34000 191 112.5	32800 184.2 111.9	33900 190.4 110.8	35700 200.56 112.61
F R	27300 153.3 100.3	28400 159.5 100.7	29600 166.2 100	30100 169.1 99.6	29300 164.6 100	29800 167.4 97.3	30600 171.9 96.5
I T	24400 137.1 89.7	25200 141.5 89.3	26000 146.1 87.8	26200 147.2 86.7	125200 141.8 86	25600 143.8 83.6	26000 146 82
E S	20900 117.4 76.8	22300 125.3 79.1	23500 132 79.3	23900 134.3 79.1	22900 128.6 78.1	23100 129.8 75.4	23000 129.2 72.5
P T	14600 82 53.6	15100 84.3 53.5	16000 90 54	16200 91 53.6	15900 89.3 54.2	16200 91 52.9	16000 89.9 50.5
E L	17500 98.3 62	19000 106.7 67.4	20300 114.4 68.5	21100 118.5 69.9	20800 116.8 70.1	20400 114.6 66.6	18500 103.9 58,35
I E	39000 219.1 143.4	41600 233.7 147.5	43400 243.8 146.6	40500 227.5 134.1	35700 200.5 121.8	34400 193.2 112.4	35400 198.8 111.67

104 *Annual Nat'l Accounts*, EUROSTAT (May 13, 2013), http://epp.eurostat.ec.europa.eu/portal/page/portal/national_accounts/data/main_tables.

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Second, EMU accelerated the process of financialization in the Member States of the Eurozone, and in general, of the European Union. First, free movement of capital was turned, as indicated, into *erga omnes* freedom as part of the Maastricht deal. Second, the launch of the monetary union in 1999 not only eliminated the currency risk in financial operations within the Union, but also created the wrong impression that when the financial chips came down, the Eurozone as a whole would band together and act as insurer of last resort. The latter assumption explains why the cost of issuing debt to Member States of the Eurozone became essentially the same. The massive spreads of the ESM era were followed by almost identical borrowing costs. Given that the underlying solidity of the national tax systems remained different, the homogenization could only be explained by the wide assumption by financial and political actors that it was a matter of time before some form of pooled risk was established.

The acceleration of the financialization of the economy further fragilized the long-term growth perspectives of the whole Eurozone, and, especially, those of the peripheral countries. On the one hand, capital holders in core Eurozone countries (especially in Germany and Finland) increased their income share thanks to structural reforms that depressed wages and increased the competitiveness of the external sector. Increased competitiveness was translated into higher profits thanks to the gain of growing market shares—critically in the Eurozone itself, or by becoming more competitive than producers in peripheral Eurozone countries. The growing piles of capital in the form of profits were then recycled through financial capital investments, a good deal of which ended up fuelling the unsustainable growth of private debt in peripheral Eurozone states. Heavy reliance on foreign trade, in the German case, exports represent close to 50%, and imports a bit less,[105] has made core Eurozone countries heavily exposed to the evolution of international trade, as the first months of the 2008/2009 recession rendered abundantly clear. On the other hand, peripheral states were flooded with cheap capital from core Eurozone states. While that was found a salutary development for almost a decade, as capital will naturally move towards better investment opportunities, a good deal of the incoming capital ended up in investments that offered short-term profitability but which were clearly unsustainable. The real estate booms in Spain and Ireland, and the growth of private consumption despite stagnating economic capacity in Portugal and Greece were rendered possible by a dramatic growth of private debt, which was essentially external debt.[106] Private Keynesianism

[105] According to the World Bank, the value of German exports was 50% of the GDP in 2010 (according to the IMF, the value was 48% in 2007, 42% in 2008, and 47% in 2009). *See Exports of Goods and* Services *(% of GDP)*, THE WORLD BANK, http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS (last visited May 13, 2013). Imports were at 45% in 2010 (42% in 2007, 37% in 2008, 41% in 2009). *Id.*

[106] Alberto Bagnai, *Il Tramonto dell'euro*, Reggio Emilia: Imprimatur, 2012 makes the point abundantly clear, and places it in the historical context of centre/periphery relations in financial terms (see especially pp. 134-64) Bagnai, who is a developmental economist (as Albert O. Hirschmann and Ha-Joo Chang, by the way) applies Frenkel and Rapetti's theoretical framework on financial crisis in developing countries to the core-periphery relationship within EMU. See Roberto Frenkel and Martin Rapetti, 'A developing country view of the current

generated the mirage of income and wealth recovery in the South, but only at the price of increasing the structural weaknesses of the national economic models.[107]

TABLE 8: PRIVATE DEBT RELATIVE TO GDP[108]

	1996	1998	2002	2006	2010	2011	INCREASE ('96=100) IN 2010	INCREASE ('98=100) IN 2010	INCREASE ('98=100) IN 2011
AT	104.8	111.6	126.8	144.4	164.4	160.7	156,87	147.31	143.99
DE	117.8	124.2	135.9	124.2	127.2	127.8	107,97	102.88	102.89
FI	105.7	99.9	126.7	147.3	182.8	178.8	172.94	182.98	178.97
NL	151	165	195	212.6	225.3	224.6	149.20	136.54	136.12
FR	104.2	103.9	124.1	136.8	158.6	160.4	152.20	152.64	154.37
IT	70.8	70.8	89.5	110	129.1	128.6	182.34	182.34	181.63
ES	77.6	87.6	139.5	200.4	227.3	218.1	292.91	259.47	248.97
PT	88	148.7	187.9	209.2	249.5	253.6	283.52	167.78	170.54
IE	48 ('95)	156.8 ('01)	153.8	217.1	315.3	309.5	1656.87	201.10 ('01=100)	197.38 ('01=100)
EL	38.2	43.2	68.3	98.2	128.1	130	335.34	296.52	300.92
UK	122.8	132.1	167.5	206.3	209.2	206.4	170.35	158.36	156.24

global crisis: what should not be forgotten and what should be done, 33 (2009) *Cambridge Journal of Economics*, pp. 685-702. Indeed, it is interesting to note that the Maastricht Treaty made explicit reference to the obligation of European institutions of monitoring the evolution of the current account imbalances (See Article 3.A.3 of the Treaty of Maastricht: "These activities of the Member States and the Community shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and *a sustainable balance of payments*" (my italics). However, such an obligation was honoured in the breach, in view of the enormous current account deficits accumulated by the PIIGS (all of them, and not only the "chronic" deficitarians such as Greece or Spain, but also Italy: See TABLE 10)

[107] See Bagnai, *supra,* fn 104. See also Vladimiro Giacché, *Titanic Europa*, Reggio Emilia: Aliberti, 2011 and Marco Passarella and Emiliano Brancaccio, L'austerità e di destra e sta distruggendo l'Europa, Milano: Saggiatore, 2012.

[108] *National Accounts: GDP*, EUROSTAT (Apr. 25, 2013, 2:06 PM), *available at* http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/National_accounts_%E2%80%93_GDP. And for Ireland, see generally DEBT PART 2: PERSONAL DEBT CONSEQUENCES, SPOTLIGHT 1 (2010), *available at* http://www.oireachtas.ie/parliament/media/housesoftheoireachtas/libraryresearch/spotlights/Personal_Debt_and_Consequences.pdf.

TABLE 9: CURRENT ACCOUNT BALANCE (3 YEAR AVERAGE)[109]

	2001	2003	2005	2007	2009	2010
Austria	-1.1	1.2	2.0	2.8	3.7	3.7
Germany	-1.0	1.3	3.9	6.3	6.5	6.1
Finland	7.2	7.2	4.8	3.9	2.9	2.0
Netherlands	2.8	3.6	6.9	7.8	5.4	5.7
France	1.8	1.1	0.2	-0.7	-1.4	-1.5
Italy	0.4	-0.3	-0.7	-1.2	-2.0	-2.8
Spain	-3.6	-3.6	-5.4	-8.8	-8.1	-6.3
Portugal	-9.8	-8.3	-8.4	-10.4	-11.2	-11.2
Ireland	-0-3	-0.5	-1.4	-4.1	-4.5	-2.3
Greece	-6.2	-6.8	-6.7	-11.2	-13.6	-12.1
United Kingdom	-2.4	-1.8	-2.1	-2.8	-1.8	-2.1

TABLE 10: CAPITAL TO ASSET RATIO OF BANKS IN SELECTED EU COUNTRIES (2012)[110]

Austria	7.4
Germany	4.4
Finland	4.4
Netherlands	8.9
France	4.8 (2011)
Italy	9.4 (2011)
Spain	6.1 (2011)
Portugal	6.0
Ireland	7.1
Greece	5.8
United Kingdom	5.1 (2011)

Moreover, the mirage of economic catching up created a flow of unsustainable, but massive, tax revenue (clearly in the cases of Spain and Ireland, resulting from frenzy real estate speculation) and an abnormally low cost of issue of debt, drastically reducing the costs of very high levels of debt in the cases of Italy and Greece. What were once regarded

[109] *Macroeconomic Imbalance Procedure,* ECON. & FIN. AFFAIRS, EUR. COMM'N, *available at* http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/index_en.htm (last visited May 13, 2013).

[110] *Bank Capital to Assets Ratio (%)*, THE WORLD BANK, http://data.worldbank.org/indicator/FB.BNK.CAPA.ZS/countries (last visited May 13, 2013).

as once-in-a-lifetime revenues were now largely regarded as ordinary, and this created the almost irresistible political temptation to reshape the revenue side of the public budget so as to maximize the political short-term gains in the form of ensuring re-election. This created very large structural deficits, which were suddenly revealed when the subprime crisis of 2007 hit European economies, resulting in an evident slowdown of economic activity in Ireland and Spain, whose real-estate-fed growth was bound to be especially sensitive to the tremors of the international financial system.

Finally, asymmetric economic and monetary union accelerated the weakening of the link between state responsibilities and state capacities. As indicated, states renounced key levers to ensure the macroeconomic steering of the economy, while the responsibility for ensuring economic growth and stability was retained by the states. This created not only a major democratic deficit, but also a latent and massive political deficit.

D. The Inconsistency of the European Government of the Crises

A whole set of supranational policy decisions and structural reforms have been put forward in the last five years with the aim of containing the crises and overcoming them. Leaving aside the final judgment on their effects, it can be said at this point in time that (1) the measures have been based on shifting and rather incompatible diagnoses of the nature of the crises, and (2) have led to openly contradictory policies.

I. Inconsistent Diagnoses

The punctual policy decisions and the structural reforms taken by the European Union as a means to steer the crises have relied on shifting diagnoses of what kind of crisis the European Union is going through. The abrupt character of the shifts, and the very different implications that different diagnoses imply in terms of the adequate measures to be adopted, are strong indicators that the management of the crises has been inconsistent over time. We can distinguish at least three different diagnoses of the crises and three different set of policies and reforms aimed at addressing them.[111]

1. A Financial Liquidity Crisis?

From mid 2007 to late 2009, it was assumed that the crisis was mostly a financial liquidity crisis. Excesses in the US subprime mortgage market had spilled over the whole American financial system. Because of the close intertwining of the American and the European financial systems, the crisis of confidence in American financial institutions soon infected

[111] Developing this argument fully would require a previously detailed analysis of the measures taken by the Union since 2007. *See generally* AGUSTÍN JOSÉ MENÉNDEZ, DE LA CRISIS ECONÓMICA A LA CRISIS CONSTITUCIONAL DE LA UNIÓN EUROPEA (2012); Agustín José Menéndez, *La Mutación Constitucional de la Unión Europea*, 96 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 41, 41 (2012).

European financial institutions.[112] However, financial investors were deemed to be over-reacting. After too many years *underpricing* risk, a euphemism to refer to the already mentioned belief in the *overcoming* of risk thanks to economic modeling, investors were now *overpricing* risk. The "fundamentals of the economy—both the financial and the non-financial sectors—were good, and, once the breakdown of trust in the viability of financial institutions was overcome, the European economy would return to normal."[113] Countercyclical measures were needed only to avoid a financial panic creating lasting damage to the economy.[114]

This diagnosis accounts for the fact that the government of the crisis was largely confined to concrete policy measures that were largely presented as temporary and exceptional. Most of these policy decisions boiled down to the granting of state aid to financial institutions. From August 2007 to October 2008, the ECB engaged in abnormal amounts of

112 *See generally* Anuj Gangahar & Adam Jones, *BNP Paribas Investment Funds Hit by Volatility*, FIN. TIMES, Aug. 8, 2007, http://www.ft.com/cms/s/0/9a4cabc4-464d-11dc-a3be-0000779fd2ac.html#axzz1XePLtVVH; Jean Eaglesham, Peter Thal Larsen, Chris Giles & Lina Saigol, *UK to Guarantee Northern Rock Deposits*, FIN. TIMES, Sept. 16, 2007, http://www.ft.com/intl/cms/s/2/39199b78-6489-11dc-90ea-0000779fd2ac.html#axzz1XePLtVVH; Gillian Tett, John Gapper, Lawrence Summers & Chris Giles, *The Big Freeze*, FIN. TIMES, Aug. 3–6, 2008; TETT, *SUPRA, FN* 17, 167–89 (2009).

113 *See* Jean Pisany Ferry & André Sapir, *Euro Area: Ready for the Storm*, *in* THE EURO AT TEN: THE NEXT GLOBAL CURRENCY? 69, 69–83 (Jean Pisani-Ferry & Adam S. Posen eds., 2009) ("On the whole the euro is bound to live with this governance structure in the years to come. This does not mean that it is doomed to fail. In fact it has thrived in its first ten years of existence."). *Id*. "The euro has provided price stability to previously inflation-prone countries. It has offered a shelter against currency crises. It has by and large been conducive to budgetary discipline. It has attracted five new members in addition to the eleven initial ones. And many countries in Europe wish to adopt it." The gathering storm leads the authors to conclude in a more cautious key, however: *Id*. "Although we regard recent remarks on the possible exit or expulsion of those members from the euro area as pure fantasy, we acknowledge that the lack of clarity on how to resolve their debt problems is a source of worry." *Id*. One of the many paradoxes of the crises is that the Fed ended up bailing out many big European banks. *See Deutsche Bank, Credit Suisse Lead Traders of Fed's Mortgage-Backed Bonds*, BLOOMBERG, Dec. 1, 2010, http://www.bloomberg.com/news/2010-12-01/deutsche-bank-credit-suisse-lead-traders-of-fed-s-mortgage-backed-bonds.html. One of the many paradoxes of the crises is that the US institutions ended up bailing out many big European banks. See Michael Mandel, 'German and French banks got $36bn from AIG bailout', *Business Week*, 15th March 2009, available at http://www.businessweek.com/the_thread/economicsunbound/archives/2009/03/german_and_fren.html; Jody Shenn, 'Deutsche Bank, Credit Suisse Lead Traders of Fed's Mortgage-Backed Bonds', *Bloomberg*, 1 December 2010, http://www.bloomberg.com/news/2010-12-01/deutsche-bank-credit-suisse-lead-traders-of-fed-s-mortgage-backed-bonds.html; Bradley Keoun and Craig Torres, 'Foreign Banks tapped Fed's secret lifeline most at crisis peak', *Bloomberg*, January 4th, 2011, at .http://www.bloomberg.com/news/2011-04-01/foreign-banks-tapped-fed-s-lifeline-most-as-bernanke-kept-borrowers-secret.html; Shahien Nasiripour, 'Fed opens books revealing foreign megabanks were biggest beneficiaries', *Huffington Post*, January 31st, 2011, http://www.huffingtonpost.com/2010/12/01/fed-opens-books-revealing_n_790529.html. A narrative account in Neil Irwin, *The Alchemists*, New York: Penguin, 2013, slightly updated in 'How Ben Bernanke saved Europe's Banks' *The Globalist*, May 12th, 2013, available at http://theglobalist.com/StoryId.aspx?StoryId=9994.

114 See generally *From Financial Crisis to Recovery: A European Framework for Action*, COM (2008) 706 final (Oct. 29, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0706:FIN:EN:PDF.

refinancing operations, easing, and drastically cheapening, the costs of obtaining credit for banks. The ECB experimented (although only once, in actual limited amounts and with a very short maturity) with a fixed rate full allotment tender, the non-orthodox monetary tool that would become normalized as time passed.[115] After October 2008, the non-orthodox monetary measures of the ECB became much larger, with longer maturity rates, and in the case of refinancing operations, based on the acceptance of collateral of more dubious solvency status. As a result, the ECB became not only a key market player in the interbank money market, but increasingly a full alternative, if not a substitute, to it.[116] But, by October 2008 the action of the ECB was insufficient to contain the crisis of financial institutions. In the absence of supranational decision-making processes and institutional structures, including tools for sharing the costs of supporting banks or undertaking the resolution of a failed bank, the attempts at spontaneous supranational coordination among national government to prop up several transnational financial institutions—Dexia and Fortis come as paradigmatic examples[117]—failed, and Member States engaged in different unilateral strategies to support the banks, either by extending loans, guarantees

115 See generally *Central Banks' Aggressive Moves Stun Markets*, FIN. TIMES, Aug. 9, 2007, http://www.ft.com/intl/cms/s/0/569c9418-46a0-11dc-a3be-0000779fd2ac.html#axzz2Sw3lwVPl; Michele Lenza, Huw Pil & Lucrezia Reichlin, *Monetary Policy in Exceptional Times* 13–14 (Eur. Cent. Bank, Working Paper No. 1253, 2010), *available at* http://www.ecb.int/pub/pdf/scpwps/ecbwp1253.pdf; Jean-Claude Trichet, President, Eur. Cent. Bank, Speech Before the Hearing at the Economic and Monetary Affairs Committee of the European Parliament (Sept. 11, 2007), *available at* http://www.ecb.int/press/key/date/2007/html/sp070911_1.en.html; Jean-Claude Trichet, President, Eur. Cent. Bank, Speech Delivered at the Award Ceremony on the Occasion of the "6. Karl Klasen Journalistenpreis," The US Economy, the Euro Area Economy, and Their Central Banks (Dec. 7, 2007), *available at* http://www.ecb.int/press/key/date/2007/html/sp071207.en.html; Bini Smaghi, Member of the Executive Board, Eur. Cent. Bank, Remarks at the Euro50-Natixis Breakfast Seminar, Financial Globalisation and Excess Liquidity (Oct. 21, 2007), available at http://www.ecb.int/press/key/date/2007/html/sp071021.en.html. It is perhaps not fully irrelevant—and it is at any rate very revealing—that the non-standard monetary measures came one week after the decisive lost battle on the exclusion of the ECB from the Treaty list of EU institutions. *See generally* Tobias Buck, *Central Bank Chief Urges Change to EU Treaty*, FIN. TIMES, Aug. 11, 2011, http://www.ft.com/cms/s/0/2129d4a0-4775-11dc-9096-0000779fd2ac.html#axzz1XePLtVVH.

116 *See* Lenza, Pil, & Reichlin, *supra* note 111, at 20.

117 The Benelux states came to the rescue of Fortis after BNP withdrew from the negotiations to acquire Fortis *en bloc* (BNP will end up buying the Belgian share of the fractioning of Fortis, a decision that will have major political consequences in Belgium). While the Benelux governments were all smiles before the cameras, the ink of the deal was barely dry before there were serious accusations being exchanged on the bad faith and the unfairness of the costs borne by each state. On the convoluted history of Fortis, see generally JEROEN SMIT, THE PERFECT PREY: THE FALL OF ABN AMRO, OR WHAT WENT WRONG IN THE BANKING INDUSTRY (2009). On October 3rd, the governments of France, Belgium and Luxembourg came to the rescue of Dexia, a bank dragged down by its investments in the United States. *See generally* Francis van de Woestyne & Ariane van Caloen, *Comment Sarkozy a Mangé Tout Crus les "p'Tits Belges,"* COURRIER INT'L, Dec. 11, 2008, http://www.courrierinternational.com/article/2008/12/04/comment-sarkozy-a-mange-tout-crus-les-p-tits-belges. The bank was to be recapitalized and the states were to underwrite its deposits. Intergovernmental bargaining was far from smooth. *Id.*

or recapitalizing the banks by means of the state becoming a shareholder.[118] The appearance of a coordinated European response was kept by means of the Commission giving a European wrapping to national decisions, and some degree of supranational control was ensured by means of reaffirming the subjection of all state measures to state aid control by the European Commission, although duly adapted and relaxed in order to take into account the specific circumstances.[119]

A much lower priority was given to the stimulus of the non-financial economy. Lack of supranational institutional structures and decision-making procedures led to a failure of effective coordination, so that the Commission, perhaps even more so than was the case with support for financial institutions, limited itself to adding up the many and very

118 That decision was taken the night of the 29th of September 2008 in a closed doors meeting between Taoiseach Cowan, Chancellor of the Irish Exchequer Lenihan, and the CEOs of the six big Irish banks. The decision was rushed through the Irish Parliament and approved with barely a debate on October 2, 2008. For the bill of September 30, see Credit Institutions (Financial Support) Bill 2008 (Bill No. 45/2008) (Ir.) *available at* http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2008/4508/b4508d.pdf. For the statute, see Credit Institutions (Financial Support) Act 2008 (Act No. 18/2008) (Ir.) *available at* http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/acts/2008/a1808.pdf. Article 6 of the statute gives the Chancellor of the Exchequer the power to decide on the transfer of all assets she sees fit from the Banks to the Exchequer. *Id.* at art. 6. This implied authorizing the assumption of contingent liabilities twice the Irish GDP at 2008 value (which was perhaps "inflated" by the bubble), or what is the same, an amount equal to that of six years of public spending, taking 2009 as the reference year (public expenditure was in that year 34.1% GDP). *Id.* On the political background of that wild fiscal night, see generally Simon Carswell, *The Big Gamble: The Inside Story of the Bank Guarantee*, IRISH TIMES, Sept. 25, 2010, http://irishtimes.newspaperdirect.com/epaper/viewer.aspx.

119 *See generally* Press Release, Council of the European Union, Immediate Responses to Financial Turmoil: Council Conclusions – Ecofin Council of 7 Oct. 2008, *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/103202.pdf; Council Directive 2009/14, of the European Parliament and the Council of 11 March 2009 Amending Directive 94/19/EC on Deposit-guarantee Schemes as Regards the Coverage Level and the Payout Delay, 2009 O.J. (L 68) 3, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:068:0003:0007:EN:PDF. Presidency Conclusions of the Council of the European Union, No. 14368/08 of 16 Oct. 2008, Conclusion 4, ¶ 5, *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/103441.pdf ("European rules must . . . be implemented [to] . . . meet[] the need for speedy and flexible action. The European Council supports the Commission's implementation . . . of the rules on competition policy, particularly State aids, while continuing to apply the principles of the single market and the system of State aids."). S*ee also Commission Staff Working Paper: The Effects of Temporary State Aid Rules Adopted in the Context of the Financial and Economic Crisis*, at 3, SEC (2011) 1126 final (Oct. 5, 2011), *available at* http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2011/1126/COM_SEC(2011)1126_EN.pdf; Communication on the Application of State Aid Rules to Measures Taken in Relation to Financial Institutions in the Context of the Current Global Financial Crisis, 2008 O.J. (C 270) 8–14; Communication on the Recapitalisation of Financial Institutions in the Current Financial Crisis: Limitation of Aid to the Minimum Necessary and Safeguards Against Undue Distortions of Competition, 2009 O.J. (C 10) 2–10; The Communication from the Commission on the Treatment of Impaired Assets in the Community Banking Sector, 2009 O.J. (C 72) 1–22; Communication on the Return to Viability and the Assessment of Restructuring Measures in the Financial Sector in the Current Crisis Under the State Aid Rules, 2005 O.J. (C 195) 9–20.

different national stimulus plans.[120] Some central states of the Union, led by Germany, were very reluctant to engage in direct stimulus policies, and preferred to allow the pre-existing automatic stabilizers to work, stabilizers which, in the case of Germany, included the massive public funding of schemes to reduce working hours but preserve employment in the mid run.[121]

Finally, the European Union engaged in three small-scale schemes of financial assistance to Hungary, Latvia, and Romania.[122] Aid was granted on the basis of the old financial assistance fund (preserved for non-Euro states and based now on Article 143 Treaty on the Functioning of the European Union), but contrary to what could be expected, and despite the small amounts involved, the Union decided not to act on its own, but instead involved the International Monetary Fund (IMF) and a variable coalition of willing partners in each of the programs.[123] Although not much attention was paid, it should be kept in mind that the basic design of the bailouts of Eurozone states was already at work in these schemes of financial aid. The paradigm of "growth through austerity and without deflation" was put to work then.[124]

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120 *See generally A European Economic Recovery Plan*, COM (2008) 800 final (Nov. 26, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0800:FIN:EN:PDF.

121 For the German response to the crisis, which emphasizes the German recipe for reducing the destruction of employment by means of subsidization of working time reductions, see generally INTL. INST. FOR LABOUR STUDIES & INTL. LABOUR ORG., STUDIES ON GROWTH WITH EQUITY: GERMANY, A JOB-CENTERED APPROACH (2011), *available at* http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_153779.pdf. See also the report of the European Trade Union Institute: Isabel Schömann and Stefan Clauwert, *The crisis and national labour law reforms*, Bruxelles: ETUI, 2012, available at http://www.etui.org/content/download/7444/71556/file/WP+2012+04+Web+version.pdf.

122 *See generally* EUROPEAN UNIV. INST., HUNGARY: A COMPREHENSIVE COUNTRY REPORT 14 (2008), *available at* http://www.eui.eu/RSCAS/Research/EURONAT/200412Rep.EURONAT-H.pdf; Nicholas Kulish, *Crisis Comes to Hungary*, N.Y. TIMES, Oct. 19, 2008, http://www.nytimes.com/2008/10/19/world/europe/19hungary.html; Tony Barber, *Hungary Rescue a Bid to Contain Crisis*, FIN. TIMES, Oct. 29, 2008, http://www.ft.com/cms/s/0/513de4ca-a5b0-11dd-9d36-000077b07658.html; Robert Anderson, *Latvia to Receive €7.5bn in Financial Aid*, FIN. TIMES*,* Dec. 19, 2008, http://www.ft.com/cms/s/0/1dae8b84-ce1c-11dd-8b30-000077b07658.html; Thomas Escritt, *Romania to Receive €20bn of IMF-Led Aid*, FIN.TIMES, Mar. 25, 2009, http://www.ft.com/cms/s/0/c1119564-1953-11de-9d34-0000779fd2ac.html.

123 For details of the composition of the variable coalitions of the financial willing, *see generally supra* note 107 and accompanying text.

124 The key document is the policy paper presented at the Madrid ECOFIN meeting of April 15. *See generally* ALBERTO ALESINA, FISCAL ADJUSTMENTS: LESSONS FROM RECENT HISTORY (2010), *available at* http://scholar.harvard.edu/files/alesina/files/fiscaladjustments_lessons-1.pdf; Alberto Alesina & Silvia Ardagna, *Tales of Fiscal Adjustment*, 13 ECON. POLICY 489, 498 (1998); Alberto Alesina & Silvia Ardagna, *Large Changes in Fiscal Policy: Taxes Versus Spending* (Nat'l Bureau of Econ. Research, Working Paper No. 15438, 2009), *available at* http://www.nber.org/papers/w15438.pdf?new_window=1. For a devastating criticism, see generally Jaime Guajardo, Daniel Leigh & Andrea Pescator, *Expansionary Austerity: New International Evidence* (Int'l Monetary Fund, Working Paper No. 158, 2011), *available at* http://www.imf.org/external/pubs/ft/wp/2011/wp11158.pdf. *See generally* Olivier Blanchard & Daniel Leigh, *Growth Forecasts and Fiscal Multipliers* (Intl. Monetary Fund, Working Paper No. 1, 2013), *available at* http://www.imf.org/external/pubs/ft/wp/2013/wp1301.pdf.

Structural reform in this period was confined to the supervision of financial markets. Although it was largely assumed, as has been said, that the crisis was one of liquidity, reflecting an excessive distrust on the solidity of financial institutions by market actors, the fall of Lehman Brothers rendered almost unavoidable a wider reflection on the shortcomings of the supervision of financial institutions.[125] A modest even if wide-ranging reform of financial supervision was launched immediately. Although the five regulations that will result from it would not be approved until November 2010, the key debates on the contents of the reform would take place in late 2008 and early 2009. The very weak supranational framework of micro-prudential supervision was enhanced by means of turning the three existing authorities into actual supervisors, and increasing their mandates by rendering them competent to supervise transnational financial actors and giving them some powers of supervision over national regulators.[126] Moreover, a new Systemic Risk Board was established, made up of the ECB and the upgraded supervisors.[127] The Board should monitor, prevent, and minimize systemic risks to the financial system, something that entails determining when the normal and micro-prudentially sound of individual financial institutions does, however, create massive systemic risks for the whole financial system.[128]

2. Financial and Fiscal Liquidity Crises?

From late 2009 to mid 2010, the crisis was no longer exclusively identified with the financial liquidity crisis, in terms considered in the previous subsection, but also with a fiscal liquidity crisis. The inadequate management of fiscal policy in Greece, combined with the sheer falsification of statistical data, was said to have created a major hole in the

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125 For the report by the independent Group of Experts (the so called De Larosière report), see generally THE HIGH-LEVEL GROUP ON FIN. SUPERVISION IN THE EU, REPORT (Feb. 25, 2009), *available at* http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_es.pdf. This was followed by a paper of the Commission. *See generally Communication on the European Financial Supervision*, COM (2009) 252 final (May 27, 2009), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009DC0252:EN:NOT.

126 *See generally* Regulation 1093/2010, of the European Parliament and the Council of 24 November 2010 Establishing a European Supervisory Authority (European Banking Authority), 2010 O.J. (L 331) 12–47; Regulation 1094/2010, of the European Parliament and the Council of 24 November 2010 Establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), 2009/79/EC, 2010 O.J. (L 331) 48; Regulation (UE) 1095/2010, of the European Parliament and the Council of 24 November 2010 Establishing a European Supervisory Authority (European Securities and Markets Authority), 2010 O.J. (L 331) 84; Directive 2010/78/UE, of the European Parliament and the Council of 24 November 2010, 2010 O.J. (L 331) 120.

127 *See generally* Regulation 1092/2010, of the European Parliament and the Council of 24 November 2010 Establishing a European Systemic Risk Board, 2010 O.J. (L 331) 1; Regulation 1096/2010, of the Council of 17 November 2010 Conferring Specific Tasks upon the European Central Bank Concerning the Functioning of the European Systemic Risk Board, 2010 O.J. (L 331) 162.

128 *See* Regulation 1092/2010, *supra* note 121, at art. 1, 3, 16.

accounts of the Greek exchequer. Still, it was assumed that a combination of austerity policies and temporary external financing would be sufficient to turn around the situation. Soon, serious doubts emerged regarding the solvency of other peripheral Eurozone states (the PIIGS Portugal, Italy, Ireland, Greece and Spain, also referred—more benevolently—as GIPSI states) were said to be a new overreaction of some of the key operators in financial markets. Indeed, the allegedly coordinated bilateral credits granted to Greece in late April 2010,[129] and the allegedly temporal multilateral and open-ended framework for financial assistance were premised on the assumption that Eurozone states may be suffering from liquidity crises,[130] but that their solvency was rock solid.

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[129] *See generally* Press Release, European Union, Statement by the Heads of State or Government of the European Union (Feb. 11 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112856.pdf ("Euro area Member states will take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole. The Greek government has not requested any financial support."); Press Release, European Union, Statement by the Heads of State or Government of the Eurozone (Mar. 25, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/es/ec/113578.pdf ("Euro area member states reaffirm their willingness to take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole, as decided the 11th of February."). As part of a package involving substantial International Monetary Fund financing and a majority of European financing, Euro area member states are ready to contribute to coordinated bilateral loans. This mechanism, complementing International Monetary Fund financing, has to be considered *ultima ratio*, meaning in particular that market financing is insufficient. Any disbursement on the bilateral loans would be decided by the euro area member states by unanimity subject to strong conditionality and based on an assessment by the European Commission and the European Central Bank. We expect Euro-Member states to participate on the basis of their respective ECB capital key. The objective of this mechanism will not be to provide financing at average euro area interest rates, but to set incentives to return to market financing as soon as possible by risk adequate pricing. Interest rates will be non-concessional, i.e. not contain any subsidy element. Decisions under this mechanism will be taken in full consistency with the Treaty framework and national laws. *See generally Smoke and Mirrors*, THE ECONOMIST, Mar. 31, 2010, http://www.economist.com/node/15829886/print; Press Release, Statement on the Support to Greece by Euro Area Members States, Brussels European Council (Apr. 11, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113686.pdf ("Euro area Members States have agreed upon the terms of the financial support [for] Greece, when needed, to safeguard financial stability in the Euro area as a whole. Members States are ready to provide . . . bilateral loans centrally pooled by the European Commission [and] including International Monetary Fund financing."); DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE (May 2010), *available at* http://ec.europa.eu/economy_finance/publications/occasional_paper/2010/pdf/ocp61_en.pdf.

[130] *See generally* Press Release, Brussels European Council, Economic and Financial Affairs, Brussels European Council (May 9–10, 2010), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/114324.pdf; Regulation 407/2010, of the Council of 11 May 2010 Establishing a European Financial Stabilisation Mechanism, 2011 O.J. (L 118) 1. For framework agreement of the European Financial Stability Facility of June 7, 2011, see Acuerdo Mardco de la Facilidad Europea de Estabilizacíon Financiera [Framework Agreement of the European Financial Stability Facility] 76137 (B.O.E. 2011, 164) (Spain), *available at* http://www.boe.es/boe/dias/2011/07/11/pdfs/BOE-A-2011-11824.pdf. For the incorporation of the *special purpose vehicle*, see EUR. FIN. STABILITY FACILTY, STATUTS COORDONNES SUITE À UN CONSTAT D'AUGMENTATION DE CAPITAL (Dec. 6, 2011) *available at* http://www.efsf.europa.eu/attachments/efsf_articles_of_incorporation_en.pdf.

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This double focus explains why the European government's handling of the crisis consisted of a new set of temporary and exceptional measures. On the one hand, the propping up of the banks continued, despite persistent discussion of the need to define an exit strategy, especially on what concerned the ECB. On the other hand, the fiscal problems of Greece and the other peripheral states were first minimized and when they were tackled, the main thrust of the answer was to put forward purely ad hoc and rather exceptional measures. For example, the coordinated bilateral credits granted to Greece, that resulted from a convoluted exercise of constitutional funambulism and even the European Financial Stability Facility which implied more dense institutional machinery and defined decision making processes was programmed to be unwrapped within three years. Rather similarly, the ECB improvised a securities market program through which it took the rather unorthodox decision to acquire public debt of troubled Member States in secondary markets.[131] It was also in this period that the Strategy 2020 was approved as a replacement of the failed Lisbon Strategy.[132]

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[131] *See generally* Decision ECB/2010/5, of the European Central Bank Establishing a Securities Market Programme, 2010 O.J. (L 124) 8; Press Release, European Central Bank, ECB Decides on Measures to Address Severe Tensions in Financial Markets, (May 10, 2010), *available at* http://www.ecb.int/press/pr/date/2010/html/pr100510.en.html ("To conduct interventions in the euro area public and private debt securities markets (Securities Markets Programme) to ensure depth and liquidity in those market segments which are dysfunctional."). The Press Release continues,

> The objective of this programme is to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism. The scope of the interventions will be determined by the Governing Council. In making this decision we have taken note of the statement of the euro area governments that they *'will take all measures needed to meet [their] fiscal targets this year and the years ahead in line with excessive deficit procedures'* and of the precise additional commitments taken by some euro area governments to accelerate fiscal consolidation and ensure the sustainability of their public finances. In order to sterilise the impact of the above interventions, specific operations will be conducted to re-absorb the liquidity injected through the Securities Markets Programme. This will ensure that the monetary policy stance will not be affected.

Id.

[132] *See generally A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final (Mar. 3, 2010), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF. The Strategy will largely be overcome by the move towards a revamped coordination of macroeconomic policies as a part of the European Semester (in the form of the monitoring and resolution of macroeconomic disimbalances).

3. Opening the Pandora Box of Solvency: Moving Towards a Complex Understanding of the Crisis?

A third diagnosis became prevalent in Autumn 2010. There was an open recognition of the fact that the crises of peripheral Eurozone states went beyond a temporary and irrational disbelief in the solidity of the exchequer of some states. Not only did Ireland, in November 2010,[133] and Portugal, on Easter of 2011,[134] join the ranks of the rescued Member States, undermining the narrative according to which Greece was a fully exceptional case, but the Eurozone states decided in the Autumn of 2010 that all issues of Eurozone national debt should include collective action clauses and that a discussion should be started on how to articulate a Eurozone resolution framework for insolvent Eurozone states.[135] In brief, Eurozone States, under forceful Franco-German leadership, came to acknowledge that they may fail—something which, as was already indicated, was a necessary consequence of some of the basic supranational principles framing the fiscal national policy decided at Maastricht. Furthermore, there was a recognition, somehow *à rebours*, of the fact that the crises were also macroeconomic management crises. Leaving aside the assessment that we should pass on the process and outcomes of the ongoing reform of economic governance in the Eurozone, the very fact that this was launched—instead of limiting reform efforts to financial supervision, as in phases 1 and 2—is indicative of a radical turn.[136]

[133] Council Implementing Decision of 7 December 2010, on granting Union financial assistance to Ireland, OJ L 30, of 04.02.2011, pp. 34-39. http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-council_imp_decision_en.pdf and Council Implementing Decision of 30 May 2011, amending Implementing Decision 2011/77/EU on granting Union financial assistance to Ireland, OJ L 147, of 02.06.2011, pp. 17-19, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:147:0017:0019:EN:PDF. Memorandum of Economic and Financial Policies, http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mefp_en.pdf; Technical Memorandum of Understanding, http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-technical_memorandum_en.pdf; Memorandum of Understanding on Specific Economic Conditionality, http://ec.europa.eu/economy_finance/articles/eu_economic_situation/pdf/2010-12-07-mou_en.pdf.

[134] *See generally* Decision 2011/344/EU, of the Council of the European Union of 30 May 2011 on Granting Union Financial Assistance to Portugal, 2011 O.J. (L 159) 88; *Memorandum of Understanding*, COUNCIL OF THE EUROPEAN UNION (May 18, 2011), http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf.

[135] This was agreed by Germany and France in October 2010. *See generally* Quentin Peel, George Parker, Joshua Chaffin & Ben Hall, *Germany Confident of "Crisis Resolution" Deal*, FIN. TIMES, Oct. 20, 2010, http://www.ft.com/intl/cms/s/0/6816b234-db6f-11df-ae99-00144feabdc0.html#axzz2IbK2vGs5. It was then agreed upon by the European Council. *See Presidency Conclusions*, BRUSSELS EUROPEAN COUNCIL (Apr. 20, 2011), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf.

[136] *See generally Presidency Conclusions*, *supra* note 129; Regulation 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, 2011 O.J. (L 306) 1; Regulation 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, 2011 O.J. (L 306) 8; Regulation 1175/2011, of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance

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The nature of the third shift goes a long way to explain why structural reforms were mainly undertaken in this third period of the government of the crises. First, this was the period in which financial assistance programs mushroomed: Ireland, Portugal, Spain (in the form of a credit line aimed at recapitalizing a part of its financial sector),[137] Greece (for the second time, and after several extremely convoluted renegotiations),[138] Cyprus[139] and Slovenia.[140] But it was also the period in which financial assistance was given a permanent institutional form, again through a convoluted constitutional formula (a mini-reform of the Treaties which created the legal basis on which to hang the international Treaty which creates the European Stability Mechanism).[141] In a parallel move, the ECB first expanded its securities

and Coordination of Economic Policies, 2011 O.J. (L 306) 12; Regulation 1176/2011, of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25; Directive 2011/85/EU, of the European Parliament and of Council of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States, 2011 O.J. (L 306) 41; Regulation 1177/2011, of the European Parliament and of the Council of 8 November 2011 Amending Regulation (EC) No 1467/97 on Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 2011 O.J. (L 306) 33. For drafts, see generally *Proposal for a Regulation 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*, COM (2011) 821 final (Nov. 23, 2011); *Proposal for a Regulation on the Strengthening of Economic and Budgetary Surveillance of Member States Experiencing or Threatened with Serious Difficulties with Respect to their Financial Stability in the Euro Area,* COM (2011) 819 final (Nov. 23, 2011).

137 *See generally* MINISTERIO DE ECONOMIA Y COMPETITIVIDAD, www.mineco.gob.es (last visited May 13, 2013).

138 *See generally The Second Economic Adjustment Programme for Greece*, EUROPEAN ECONOMY OCCASIONAL PAPERS (2012), *available at* http://ec.europa.eu/economy_finance/publications/occasional_paper/2012/pdf/ocp94_en.pdf.

139 The draft Memorandum of Understanding, as it stood on April 9th, 2013, can be found here: http://blogs.r.ftdata.co.uk/brusselsblog/files/2013/04/Cyprus-MoU-9-April-20132013.pdf. The "new" debt sustainability analysis by the European Commission, of April 12th, 2013, can be found here: http://www.rijksoverheid.nl%2Fbestanden%2Fdocumenten-en-publicaties%2Fpublicaties%2F2013%2F04%2F12%2Fprovisional-draft-assessment-of-the-public-debt-sustainability-of-cyprus%2Fprovisional-draft-assessment-of-the-public-debt-sustainability-of-cyprus.pdf&ei=s6SMUdCNCujY7AaKjIBg&usg=AFQjCNEzyp5FRPof84rt0BVDMc30aZoKmg&sig2=eNgUIiwTs7fcPVWB-0swSQ. Two splendid analyses of the rather convoluted Cypriot affair are Willem Buiter, Ebrahim Arhabari, Giada Giani and Jürgen Michels, 'Cyprus is systematically important: it changed the rules of the game', 10 April 2013, http://willembuiter.com/citi65.pdf; James Meek, 'The Depositor Haircut', 35 (2013) *London Review of Books*, 9 May 2013, available at http://www.lrb.co.uk/v35/n09/james-meek/the-depositor-haircut..

140 A synthetic background note on the state of the play in Slovenia by Cardiff García, *Ftalphaville*, 24 April 2013, at http://ftalphaville.ft.com/2013/04/24/1469552/a-slovenia-qa/.

141 *See generally Presidency Conclusions*, BRUSSELS EUROPEAN COUNCIL (Apr. 20, 2011), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/es/ec/120310.pdf; Treaty Creating the Stability Mechanism, May 11, 2010, 2010 O.J. (L118) 1 [hereinafter ESM Treaty], *available at* http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf.

markets program by starting to acquire Italian and Spanish debt in August 2011)[142] and then replaced it by outright monetary transactions, premised on the previous existence of a program of financial assistance agreed with the *troika* by the Member State whose debt would be purchased by the ECB.[143]

Second, the institutional, procedural, and substantive structure of the economic governance of the Eurozone was radically altered. First, the coordination of fiscal policies was drastically tightened by means of creating what seemed to be more dense fiscal targets, and by means of turning sanctions quasi-automatic through the move to qualified majority voting. Second, macroeconomic coordination was made a competence of the Union by reference to a set of macroeconomic indicators. Third, a new overarching procedure (the European Semester) was introduced. And fourth, states were forced to patriate the principle of budgetary stability and to amend their national budgetary procedures to be compatible with the requirements of the Euro Semester (including a shift from annual budgetary laws to quinquennial budgetary frameworks).

Third, there was a principled decision to strengthen the competences and the means of the European Union on what it concerned banking supervision and financial crisis resolution, although the concrete terms of the agreement, and very especially the common resources at the disposal of the structures, are still to be worked out.[144]

4. From Shift to Shift into Temporal Inconsistency

If the reconstruction that I have sketched out is correct, it is hard to avoid the conclusion that the understanding of the crises has shifted over time. The government of the crises, the conjectural policy decisions, and the structural reforms supported by the Union, have also shifted. But because the shifts were of fundamental importance, and because it is hard to imagine how a coherent policy could have developed based on such contradictory diagnoses, there seem to be very good reasons to suspect the efficiency of the European government of the crises. If some form of banking union is now regarded as essential to

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[142] *See generally* Ralph Atkins, *ECB Resumes Bond-Buying Scheme*, FIN. TIMES, Aug. 4, 2011, http://www.ft.com/intl/cms/s/0/d1a530a6-be7f-11e0-ab21-00144feabdc0.html; Richard Mine, *Intervention Fails to Quell Nerves*, FIN. TIMES, Aug. 4, 2011, http://www.ft.com/cms/s/0/a42f1508-bebe-11e0-a36b-00144feabdc0.html; Quentin Peel, *Bond Move Deepens ECB Divide*, FIN. TIMES, Aug. 7, 2011, http://www.ft.com/cms/s/0/70dbb426-c103-11e0-b8c2-00144feabdc0.html.

[143] *See generally* Press Release, European Central Bank, Technical Features of Outright Monetary Transactions (Sept. 6, 2012), *available at* http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html. The same day the ECB announced laxer criteria on collateral. *See generally* Press Release, European Central Bank, Measures to Preserve Collateral Availability (Sept. 6, 2012), *available at* http://www.ecb.int/press/pr/date/2012/html/pr120906_2.en.html.

[144] *See generally Presidency Conclusions on Completing EMU*, BRUSSELS EUROPEAN COUNCIL (Oct. 18, 2012), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132986.pdf.

overcome the crises, it is hard to escape the conclusion that the confinement of structural reform to the upgrading of supervisory authorities and the creation of the Systemic Risk Board was inadequate, and reflected an inadequate understanding of the crisis. If there is a need of some form of permanent European Monetary Fund, the indecisiveness with which the Greek fiscal crisis was tackled is hard to justify, and so on.

One could add, and I would be willing to add, that the shift is destined to continue, as the diagnosis of the crises keeps on being incomplete and flawed. In particular, there is mounting evidence that the design of austerity programs was based on wrong macroeconomic assumptions. But if that is so, the whole reform of the economic governance of the Union should be revisited, because it has consolidated into Union law what amounts to a flawed policy. But even if one doubts my latter statement, one should agree that shifting diagnoses are powerful indicators that the government of the crises has been inconsistent over time.

II. Substantive Inconsistency

The inconsistency of the European government of the crises is not merely a matter of shifting diagnoses of the crises. It is also a matter of making contradictory decisions, sometimes simultaneously and occasionally in one and the same legislative act or package. For reasons of brevity, I focus in this subsection on only two instance, of fundamental importance: (1) the move to deepen and curtail the free market at the same time, and (2) the decision to structure the new economic governance of the Eurozone on the simultaneous quasi-automaticity of sanctions for breaches of the Stability and Growth Pact, and the provision of financial assistance to the breaching and sanctioned states.

1. Fostering and Undoing the Market at the Same Time

The official narrative of European institutions since the beginning of the crises has stressed the fundamental importance of preserving and deepening the single market. On the one hand, the single market has to be preserved against any protectionist temptation stemming out of the crises. On the other hand, the deepening of the single market (the final completion of the market) has been said once and again to be one of the best strategies to overcome the crises. In that regard, it suffices to keep the Commission White Paper of 2010[145] in mind—on whose drafting, it might be said *en passant*, the late Mario

[145] *See generally Towards a Single Market Act: For a Highly Competitive Social Market Economy*, COM (2010) 608 final (Oct. 27, 2010).

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Monti played a key role[146]—and the two sets of specific actions contained in the so-called Single Market Act I[147] and Single Market Act II.[148]

At the same time, however, that the Union is said to be intent on sheltering and further developing the single market, concrete policy decisions and concrete policy reforms point in exactly the opposite direction. Consider the following three examples: First, the ECB has come to play a key role in the allocation of financial resources within the Eurozone, and very especially on what concerns financial institutions. Trapped between the hard rock of allowing the disintegration of the single financial market following the financial crisis of 2007-2008 and the retrenchment of transnational financial activities as a side effect of massive state interventions in financial institutions, the European Central Bank has become not only the underpinner of the interbank money market, but a full-fledged alternative to the said money market. What were presented as exceptional and unorthodox refinancing operations in 2007, have now become established as features of the way in which financial resources are allocated in the Union five years later. Indeed, the extent of the intervention of the ECB has grown over time, as not only the amounts involved in this refinancing operations at a fixed allotment rate have grown over time, but the length of the refinancing operations has also grown, with two massive long term refinancing operations (LTROs)or more than a trillion euro being allotted in late 2011 and spring 2012, while the requirements of the collateral have been relaxed.[149] Leaving aside the question of whether such operations were fully sound from a constitutional perspective, or desirable from a normative perspective, what is hard to contest is that they necessarily involve a suspension of the principle according to which the allocation of financial capital should be governed by market criteria. Given the central role of capital allocation in the present form of financialized capitalism, this specific pillar of the single market has been set aside. To temporarily add five years after the policy started, and with no end in sight, would perhaps be exceedingly optimistic as discourses on exit strategies from unorthodox monetary policy, abundant in 2009, have become unsurprisingly scarce ever since.

Second, a central plank of the otherwise relatively modest reform of financial supervision implemented in 2010 was the decision to create the institutional means with which to undertake macroprudential supervision of the European financial system and, in particular,

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146 *See generally* MARIO MONTI, A NEW STRATEGY FOR THE SINGLE MARKET: AT THE SERVICE OF EUROPE'S ECONOMY AND SOCIETY, REPORT TO THE PRESIDENT OF THE EUROPEAN COMMISSION (May 9, 2010), *available at* http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf.

147 *Single Market Act: Twelve Levers to Boost Growth and Strengthen Confidence, "Working Together to Create New Growth,"* COM (2011) 206 final (Apr. 13, 2011).

148 *Single Market Act II: Together for New Growth*, COM (2012) 573 final (Oct. 3, 2012).

149 *See Financial Markets in Early August 2011 and the ECB's Monetary Policy Measures*, EUR. CENT. BANK MONTHLY BULLETIN 47 (Sept. 2011), *available at* http://www.ecb.int/pub/pdf/other/box5_mb201109en.pdf

to prevent systemic risk—thus the very tellingly Systemic Risk Board, in which the European Central Bank plays a fundamental role. What seems to me of essence for our present purposes is that the concept of systemic risk cannot but assume that the normal functioning of financial institutions, of individual financial institutions, which are in full compliance with individual micro-prudential standards, may however pose existential threats to the whole financial system. The quantum leap in the understanding of how markets work, and what role there is for public institutions—even if, granted, not political yet in the terms of European macro-prudential norms—in creating and stabilizing markets is hard to overstate. The very concept of systemic risk entails a plain rejection of the assumption that financial markets necessarily tend towards equilibrium, that financial forces would by themselves generate a socially desirable outcome. The contrary assumption pervades the acceptance of the monitoring of systemic risk, and the further assumption that when such risk emerges, it is public institutions that should act to conjure such risk.

Third, the so-called reform of the European economic governance has resulted in the considerable reinforcement of what was until now the very weak powers of the Union on what concerned macro-economic coordination. From our present purposes, what matters is indeed that the key concept in that regard is that of *macroeconomic imbalance*, a concept that assumes, in parallel fashion to that of systemic risk, that the individual market actors acting in full compliance with the constitutional and legal norms which define the single market could lead to very negative, if not disastrous, aggregate outcomes. This calls for not only the collective monitoring of the aggregate macroeconomic balance of the economy as a whole, but for specific intervention of public institutions to correct the way in which the economy performs. That the relevant unit which should be balanced is national economies, and not the Eurozone or the Union economy as a whole, that surplus and deficit imbalances are treated in asymmetric ways, and that the set of corrective measures are *de facto*—and largely *de jure*—restricted to wage repression and the reduction of the tax burden of capital holders, are very telling of the preferences which have shaped the concrete text of the Regulation and have guided its implementation, but do not contradict the structural departure from the single market project.

2. Sanctioning and Rescuing the States Who Undergo a Fiscal Crisis

The convoluted process leading to the new governance architecture of the Eurozone has led to the simultaneous facilitation and strengthening of the sanctions applicable when Member States breach the deficit and debt thresholds of the Stability and Growth Pact *and* the creation of a permanent mechanism to provide financial assistance to states who undergo a fiscal crisis.

On the one hand, the reform of the two regulations that make up the Stability and Growth Pact, together with key provisions from the Stability Treaty, have drastically transformed the role of sanctions in the governance of the Eurozone. From symbolic measures, aimed at deterring certain patterns of conduct, but destined to be applied only in rare and extreme occasions, sanctions have come to be quasi-automatic once a breach of the fiscal thresholds occurs. On the other hand, the tightening of the fiscal thresholds is perhaps more apparent than real; what is hard to discuss is that the process leading to the application of sanctions has been radically overhauled. The introduction of reverse qualified majority voting on what concerns the final decision to sanction in the six-pack legislation, and its transformation into a general voting rule in the Stability Treaty, makes of the Commission, and not of the Council, the decisive actor in the process

E. The European Constitutional Mutation

My fourth thesis is that the European government of the crises has unleashed a process of mutation of European constitutional law. Although temporarily inconsistent and substantively ineffective as means of overcoming the crises, the manifold policy decisions and structural reforms taken since 2007 have had a major effect in the structure and substance of European constitutional law. The changes, although initially presented as mere temporary measures, have come to operate a massive change, which may well be of superior transcendence to formal Treaty reform processes, including the ill-fatted Lisbon process. Consider, in particular, the following: (1) very significant new powers have been transferred to the supranational level of government; (2) most of these new powers are to be exercised within the Union through decision-making powers in which non-representative institutions have either the last word or massive influence. This is something that is not only problematic from a general democratic perspective, but also from the perspective of the preservation of institutional balance within the Union—a fundamental channel of transmission of democratic legitimacy from Member States to the Union. (3) The reform of the economic governance of the European Union, far from resulting in a move from governance to law as the means of social integration on the coordination of fiscal policies, has actually led to the hardening of governance, and to the combination of under-formalized common action norms with highly institutionalized forms of coercion, which, however, are hard to characterize as legal sanctions given the insufficient attentiveness to responsibility and overlap between the responsible actor and the passive subjects of the sanctions. (4) The centralization of power has come hand in hand with the two phenomena that challenge the integrity of European Union law: the Eurozone has affirmed its autonomous institutional identity vis-à-vis the European Union at large; and (b) Union law has been an attempt at escaping Union law by means of a relapse into intergovernmental law (and (5) the reform of the economic governance of the Eurozone implies a serious challenge to the structural room for democratic decision-making on what concerns fiscal policy, and, more generally, economic policy.

I. A Drive Towards the Centralization of the Competences to Shape the Socio-economic Order

It is far from surprising that the interrelated and inter-twinned crises we are examining have led to significant shifts in the allocation of powers. As is generally the case in major socio-economic crises, the shift has largely resulted in the centralization of power, pushing competences upwards, both from local and regional to national governments, and from national governments to the supranational structure.

Three basic new powers have been assigned to the European Union: First, the newly created Systemic Risk Board—made up of the ECB and the reinforced European financial supervisors—has been granted competence on what concerns the macro-prudential supervision of the European financial system; second, the establishment of the temporary European Financial Stability Mechanism and European Financial Stability Facility and the permanent European Stability Mechanism reflect the re-assignment to the Eurozone of the power to grant financial assistance to its Member States, a power that they were arguably deprived by the decision to preclude that financial aid once monetary union was established; and third, the European Union has been granted an effective power to coordinate the macro-economic policies of its Member States with reinforced means of ensuring compliance on what concerns Eurozone Member States

Simultaneously, the powers of the Union have been drastically reinforced on what concerns both the coordination of budgetary policy and the implementation of monetary policy. First, the competence of the Union on what concerns the coordination of national budgetary policy has been very much strengthened. In procedural terms, the so-called European Semester implies a radical alteration of the breadth, scope and schedule of national budgetary processes, and more decisively, it results in European decisions pre-dating and thus pre-determining national budgetary choices. In substantive terms, the generalization of reverse qualified majority voting in the monitoring and sanctioning procedures results in a major empowerment of the Commission, and thus of the effective constraining power of the supranational level of government over the national. Second, a constitutional convention is in the process of becoming solidified according to which the European Central Bank would not be bound by a rigid interpretation of the divide between monetary and fiscal policy when implementing its monetary powers.

The accrual of new powers to the supranational level of government, or the reinforcement of pre-existent powers, is an ambivalent phenomenon. On the one hand, it should be kept in mind that some of these powers were only nominally in the hands of states or regions. States have long lost the effective power to engage in a macro-prudential supervision of the national financial system, given that its national character has faded out as a result of the progressive unleashing of capital movements.[150] Similarly, the effective margin of discretion of states when setting their budgetary and fiscal policy, though variable, has tended to be far less than what derived from a pure abstract reading of the Treaty provisions. In that sense, it could be thought that the assignment of new powers to the Union is not necessarily a loss for the Member States, but a way of recovering room at the supranational level for the political decision making that had been lost at the national level. On the other hand, the very decisions to shift powers to the supranational level have been adopted through procedures with a very limited democratic legitimizing capacity, while the new powers are not actually exercised in a way that is far from compliant with the democratic principle.

II. Radical Changes in the Institutional Structure

The government of the crises has unleashed three major institutional transformations. It has led to the relativization of the principle of institutional balance, and consequently, the undermining of what remained the main belt for transmitting democratic legitimacy from the state to the supranational level.

The European Commission has gained considerable new powers, especially on what concerns the coordination of fiscal and macro-economic policies of the Eurozone countries. The shift from qualified to reverse qualified majority voting makes the Commission the decisive actor when it comes to monitoring and sanctioning Member States in breach of deficit and debt thresholds and targets. Given the interplay of the rules assigning votes and the national interests at stake, it is rather unlikely that the Commission would not be able to forge a supportive minority within the Eurozone Council. What is open to debate is not so much whether the Commission has gained massive new powers, but whether these new powers may not also transform the Commission itself, as they reinforce the position of the Commissioner in charge of the economic and financial affairs portfolio, and further the trend towards multiplying the power poles within the Commission along its President (the double-headed Representative for Foreign Affairs, and the President of the Eurogroup).

The European Central Bank has also seen its relative power position strengthened. First, the ECB is bound to be the decisive actor within the Systemic Risk Board, and thus shape the Union's macro-prudential policy. Second, the ECB is very likely to gain significant micro-

[150] The moment that banks made use of the free movement of capital to engage in cross-border activities, macroprudential supervision cannot be effective at the national level. National regulators lack the cognitive basis, leaving aside the banks not disclosing fully their activities, for example, for those activities channeled through tax havens—Northern Rock being a very fitting example in that regard—national regulators lack the local knowledge essential in assessing the risks banks are engaging into by operating outside of the national jurisdiction. They may also lack the resources to combine macroprudential supervision with their role as being the lenders of last resort of the banks. The Irish government thought it had the means to prop up the Irish banking system, but sooner rather than later it discovered the catastrophic consequences of having done so.

prudential competences, even if the specific breadth and scope of such powers are still to be defined as the concrete shape of the banking union consolidates. Third, unorthodox monetary policy has largely overstepped the boundary between monetary and fiscal policy. As I said, the ECB has become a stable alternative to the interbank money market; it has acquired public debt in secondary markets.[151]

The European Court of Justice has also gained new formal powers. Article 8 of the Stability Treaty[152] gives the Luxembourg judges the last word when it comes to determining the

[151] As a result, the ECB has already mutated into an explicit political actor, no matter how much the institutional rhetoric tries to maintain the fiction of the detached and almost autonomous bank. Political clout comes hand in hand with increased political fragility. Not only does absorbing the solvency risk of Member States through the acquisition of sovereign debt generate a new solvency risk, that of the ECB itself, but the accrual of micro-prudential supervisory powers will force a general reconsideration of the institutional position of the ECB. The fact that the model of the autonomous central bank is being seriously questioned in other non-European states, such as Japan or even Britain, may come to play its part in the European debate.

[152] Treaty on Stability, Coordination, and Governance, Mar. 2, 2012, http://www.stabilitytreaty.ie/index.php/en/about_the_treaty/the_treaty_in_full/ [hereinafter The Stability Treaty].

> 1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.
>
> 2. Where, on the basis of its own assessment or that of the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

validity of the national constitutional norms that patriate the principle of budgetary stability, the so-called golden rule of budgetary stability. If the ECJ rules against a Member State, and the latter does not amend its fundamental law in line with the requirements of the ECJ, the Luxembourg judges may even impose a fine.[153] Finally, the constitutional practice followed since May 2010, now codified in the legislative six-pack reform and the Stability Treaty, make the International Monetary Fund an institutional actor that is formally assigned powers and competences by European Union law as part of what is popularly known as the *troika*.[154]

III. From Soft to Hard Governance

The reform of the economic governance of the Union entails an abandonment of soft government as the means of social integration of fiscal and macroeconomic coordination. A good deal of the institutional actors, and even of the scholarly literature, has spoken of a shift towards rules, which may suggest the completion of the process of juridification of the law governing the now enlarged Stability and Growth Pact. This would be so because not only would the key fiscal thresholds—the deficit and the debt thresholds, complemented by much more detailed adjustment trajectories—have been regulated in such detail as to characterize them as rules, but they would now be backed up by sanctions in a strict legal sense, improving upon the peer pressure and symbolic sanctions of the first years of the Stability and Growth Pact of old, thanks to the shift towards qualified majority voting, ensuring the quasi-automaticity of sanctions. In brief, the shift from soft governance to hard law (i.e. to law proper) would be the result of common action norms with the normative density of rules and of characteristically legal means of fostering compliance.

There are reasons to doubt that we have in fact transcended soft governance in favor of law. On the contrary, it seems to me that the said reforms have led to the transcendence of soft governance in favor of hard governance. First, the new rules are less normatively dense than they seem. The precision of the rules is limited by the reliance on the highly

Id.

153 This renders theoretically possible that the ECJ would fine a Member State on account of a constitutional decision adopted after a wide majority of the citizens approve a constitutional reform. The heightened democratic legitimacy of the latter decision is no obstacle—I insist, in theory—to the ECJ fining the said state.

154 The involvement of the IMF was controversial from the very beginning. A precedent was set when Hungary, Latvia and Romania were assisted in 2008 and 2009. Instead of providing the assistance on its own, the Union sought the cooperation of the IMF, other international financial institutions, and a variable set of partners. The German Minister of Finance was opposed to IMF involvement within the Eurozone, but the German Chancellor was apparently favourable. The controversy remains, with different rationales for the IMF to withdraw. Compare, for example, Ousmene Mandeng, 'IMF must quit troika to survive', *Financial Times*, 17 April 2013, available at http://www.ft.com/intl/cms/s/0/a9e49a86-a6bb-11e2-885b-00144feabdc0.html; and Matina Stevis, 'ECB official sees eventual end to IMF involvement in Euro Crises', *Wall Street Journal*, 8 May 2013, http://online.wsj.com/article/SB10001424127887323744604578470523613305046.html.

undetermined concept of *structural deficit*. There is no consensus among economists on how we should calculate the structural deficit. Moreover, there have been manifold political controversies on the exact meaning of the term in concrete cases, for example, whether the credit line offered to Spain in order to prop up a good chunk of its financial sector in 2012 should be counted as part of the deficit, as part of the debt, or not; something which was far from being deprived of major consequences Second, it is far from obvious that the quasi-automaticity of the new sanctioning procedure can overcome the purely symbolic nature of the sanctions (as sanctions that are not intended to be actually applied) without questioning the very structural basis of the rule of law For one, legal sanctions are always premised on the actual legal or moral person being sanctioned being responsible for the action or omission triggering the sanction. But it must be kept in mind that the key criterion to impose sanctions in the new Pact remains not what a government does or does not do, but the state of public finances and/or the evolution of the national economy.[155] The lack of responsiveness of the national government speeds up the sanctioning process and may aggravate the sanctions, but indeed the quasi-automaticity of the sanctions implies that sanctions may be applied even if governments act, and indeed especially if governments decide, with the support of their electorate, to try policy measures different from those recommended by the Commission. But the actual capacity

[155] As it results from the amended version of Regulations 1496/97, 1497/97, and the new one on the correction of macroeconomic imbalances, the imposition of sanctions is not conditioned to the inaction of the Member State, not even to the Member State not following the recommendations of the Commission as endorsed by the Eurogroup. Indeed, the new Stability Treaty foresees the introduction of automatic mechanisms of fiscal correction, which would have to be implemented in a purely mechanical way. *See* The Stability Treaty, *supra* note 145. Indeed, the new Stability Treaty foresees the introduction of automatic mechanisms of fiscal correction, which would have to be implemented in a purely mechanical way. See Article 3.1 e: "in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time" and Article 3.2: "The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments". The common principles were outlined on June 2012, 'Common principles on national fiscal correction mechanisms', COM (2012) 342 final, of 20.6.2012,. There is a clear relation between the very idea of automatic correction of deficits with the two new regulations further transforming the constitutional framework of fiscal policy within the Eurozone. The two regulations are on the process of being published at the time of closing this paper, so reference is given here to the text as adopted by the European Parliament, very likely to be the one corresponding to the final text: 'Regulation of the European Parliament and of the Council 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', available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-70#BKMD-36; 'Regulation of the European Parliament and of the Council 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', available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-69.

of a national government to steer the national economy is to be seriously doubted, especially in view of the serious constrains that community law imposes on the policy instruments that governments resort to in order to manage national economies out of structural crises. For two, legal sanctions are premised on a quite precise overlap of the formal sanction and the material consequences of the sanction, or what is the same, that the sanction affects first and foremost the natural or legal person being sanctioned. That is again to be seriously doubted. A sanction of any one single Member State of the Eurozone exerts a deflationary pressure over the Eurozone as a whole. The strength and scope of the externalization of the effects of the sanction will depend on the size and centrality of the economy of the state being sanctioned. What would indeed be the consequences of sanctioning Germany, not to say Germany and France at the same time? The whole Eurozone would suffer. On such grounds, one may conclude that, indeed, we have more of an appearance of legal sanctions than actual legal sanctions. We have what looks like sanctions, but are not genuine legal sanctions, but faked sanctions. Together with the lesser actual normative density of the rules, we have good reasons to conclude that there is no shift from soft governance to law, but from soft governance to hard governance.

IV. A Double Challenge to the Integrity of Union Law

The Eurozone was originally not much more than the term with which to designate the set of countries that implemented monetary integration. Besides the Eurosystem—the ECB plus the central banks of the Member States participating in the third phase of monetary union—there was not much of an autonomous institutional structure foreseen in the Maastricht Treaty. This low level of institutionalization reflected not only (1) the will to experiment given the essentially unprecedented character of the asymmetric monetary union that EMU was, but also (2) the assumption that all Member States will become Members of EMU in the fullness of time, and that (3) the implicit belief that market discipline, fostered by the transcendental decision to turn free movement of capital into an *erga omnes* freedom, applicable also to flows of capital from and to third countries. If the maintenance of fiscal discipline, and consequently, the stability of EMU, could be partially trusted to market forces (financial markets), and if in due course all Member States would become EMU states, the development of a specific set of institutions and decision-making procedures within the Eurozone was far from a priority.

Still, the practical functional needs of coordinating fiscal policy led to the slow emergence of Eurozone institutional structures (the Eurozone equivalent of the ECOFIN, now referred as the Eurogroup). The negative outcomes of the euro referenda in Denmark (2000) and Sweden (2003),[156] amplified by the skepticism towards monetary integration in some of

[156] Danes and Swedes were asked whether they favored their country joining the Monetary Union. Denmark had negotiated a permanent opt-out at Maastricht, but had been de facto anchored its monetary policy to that of the ECB (resulting in a de facto fixed parity with the Euro). Sweden does not have an opt-out. In both cases, the incumbent governments favoured joining, but in both cases the outcome was clearly negative. *See* Martin

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the new Member States (such as the Czech Republic) rendered naïve the assumption of a quick and orderly fusion of the EU at large and the Eurozone. It is thus not surprising that the Treaty of Lisbon codified the Eurogroup, and foresaw the designation of a stable President.[157] And even less surprising that the crises accelerated the shift towards a stronger autonomous identity. The Eurozone European Council, in which the heads of state and government of the Eurozone states meet, was brought into existence in 2008, immediately after the collapse of Lehman Brothers and the reaching of critical stage of the financial crisis has become consolidated as a key institutional structure, the question being whether fundamental decisions are actually taken in the largest EU-27 Council or in the Eurozone more restricted one.[158] The different transformations of the governance of the Eurozone have resulted in a constitutional convention, which requires that the key positions in European institutions be held by nationals of the Eurozone countries, and the Eurozone countries alone. Given the heightened powers of the Commissioner for Economic and Financial Affairs vis-à-vis Eurozone states, it is simply inconceivable that she will be a national of a non-Eurozone state. The creation of the position of President of the Eurozone European Council, together with the strong functional need that the President of the Eurozone European Council and the President of the European Council at large be the same person, renders almost unconditional that she be a national of a Eurozone state. That convention is likely to be extended to the President of the Commission. And the idea has already been floated that an eventual increase in the participation of the European Parliament on the decision-making process concerning the Eurozone would require creating a separate Eurozone Parliament, as the democratic legitimacy of MEPs elected in non-Eurozone Member States having a say on Eurozone policies is of dubious democratic lineage.

The formally bilateral financial assistance to Greece in May 2010 and the institutionalized and collective financial assistance to Ireland, Portugal, Spain, Cyprus, and Greece, the second bailout, have been articulated at the margins of European Union law. In the case of

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Marcussen & Mette Zølner, *Monetarism and the Masses: Denmark and Economic Integration in Europe*, 38 COOPERATION & CONFLICT 101, 101 (2003); Lee Miles, *Sweden: "Hitchhiking" and the Euro Referendum*, 39 COOPERATION & CONFLICT 201, 201 (2004).

[157] *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

[158] The First Eurozone European Council (Euro Summitt) took place on October 12, 2008. *See Declaration on a Concerted European Action Plan of the Euro Area Countries*, EUROPEAN UNION (Oct. 12, 2008), http://ec.europa.eu/economy_finance/publications/publication13260_en.pdf. Somehow paradoxically, Gordon Brown, then Prime Minister of a non-Eurozone country—Great Britain—is widely believed to have played a key role in the creation of the Eurozone European Council, and did participate in its first session. The Eurozone European Council has been "codified" by Article 12 of the Stability Treaty. *See* The Stability Treaty, *supra* note 145, art. 12. Its rules of procedure were adopted in March 2013. *See Rules for the Organization of the Proceedings of the Euro Summits,* COUNCIL OF THE EUROPEAN UNION (Mar. 14, 2013), http://www.eurozone.europa.eu/media/401510/20130314-eurosummits-rules-of-procedures.pdf.

the Greek bilateral rescue, the operation was said to be disciplined by public international law.[159] In the case of the other institutionalized bailouts, the key institutional structure (the EFSF) is a *societe anonyme luxembourgeois*, constituted in Luxembourg, and which signed an agreement with its shareholders, the Eurozone Member States that the financial assistance is rendered legally possible by an odd mix of private law and public international law.

The new EFSM has a formal, although thin, legal basis on the Treaties, thanks to the new Article 136.3 TFEU.[160] This new article is constructed as a license to establish the institutional structure that renders possible the provision of financial assistance to Eurozone Member States on the basis of an intergovernmental agreement, literally at the margin of European Union law, in what has been labeled the *Union Method*, and which constitutes a serious challenge to the integrity of Community law and to the consistency of the actions of the European Union itself.[161] While the ECJ seems to have given its unconditional approval to this choice, it remains to be seen whether this opt out from community law is so easy to reconcile with national constitutional standards.

V. The End of Democratic Fiscal Policy?

The reform of the economic governance of the Union has drastically increased the thickness of the supranational framework of all national fiscal laws, policies and decisions. There are perhaps three key changes. First, the Stability Treaty requires Member States to patriate into their national constitutions, or norms with an equivalent dignity and force, the key components of budgetary stability, including the principle of balancing the budget, the so-called *golden rule*.[162] It may be argued that the claim to primacy of Community law already comprised the normative contents of the Stability and Growth Pact. But, quite

[159] Technically speaking, the aid was granted by means of bilateral, even if coordinated, loans from each Member State to Greece. This purely bilateral character of the agreement has resulted in some Member States (such as Spain and Italy) incurring in actual costs to lend to Greece, resulting from the lower rates applied to Greece than those at which they can lend at international markets. *See generally* DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, THE ECONOMIC ADJUSTMENT PROGRAMME FOR GREECE, *supra* note 123.

[160] *See* Treaty of Lisbon, *supra* note 149, art. 136, ¶ 3 ("The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.").

[161] For the Bruges speech of Merkel, where she enumerated the main contours of the Union Method, *see* Angela Merkel, Fed. Chancellor of Ger., Speech at the Opening Ceremony of the 61st Academic Year of the College of Europe in Bruges (Nov. 2, 2010), *available at* http://www.bruessel.diplo.de/contentblob/2959854/Daten/.

[162] *See* ESM Treaty, *supra* note 134, art. 3, ¶ 2 ("The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken.").

obviously, it is highly contested that the said claim to primacy extends to primacy over national norms. If the Spanish constitutional reform of 2011 is a good teller of the new constitutional times, it is very likely that the ensuing constitutional reforms will imply major changes in the normative code of the Social and Democratic *Rechtsstaat*. The unqualified preference given to the repayment of debt may or may not be wise, but it clearly implies weakening the constitutional force and dignity of socio-economic rights. Second, the European Semester, together with the Directive on National Budgetary Procedures, is bound to result in a massive transformation of national fiscal procedures. Not only are national yearly budget laws bound to become secondary to quinquennial national fiscal frameworks, but all national budgetary procedures are going to take place after fundamental decisions on their general design have been taken at the European level. Third, the new Stability and Growth Pact, and in particular, the quasi-automatic character of sanctions, implies a major effective constrain on national fiscal autonomy, due to the new pillar on macroeconomic stability, on national autonomy on the design of economic policy, which, as has been said, is increasingly more formal than real.

In this new framework, Member States are not only left with a very limited set of effective macroeconomic pulls and levers (essentially tax and labor laws), but they are now almost forced into making use of them in only one direction. Namely, reducing taxes burdening capital holders and reducing the legal protection of workers, to aim at what formally is characterized as the *increased competitiveness of the external sector*,[163] but that given the actual set of open options, it will be less euphemistic to describe it as regressive redistribution of income, which may or may not result in higher investment rates in the external sector of the national economy. The substantive bias, it goes without saying, is not so much the result of an explicit decision, but of a complex set of decisions. Given the present institutional structure, the division of competences among levels of government, the structure and division of labor between decision-making processes, and the substantive content of positive norms, the policy options left to states in fiscal troubles are indeed those just mentioned.

[163] The ideology of competitiveness is well illustrated by the annual competitiveness report. For 2012, see generally EUROPEAN COMMISSION, COMPETITIVENESS REPORT 2012: REAPING THE BENEFITS OF GLOBALIZATION (2012), *available at* http://ec.europa.eu/enterprise/policies/industrial-competitiveness/competitiveness-analysis/european-competitiveness-report/files/ecr2012_full_en.pdf. The implications in terms of labor and social policies were clearly revealed by Draghi in March 2013. *See generally* Luke Baker, *Draghi Lectures Euro Zone Leaders About Labor Costs*, REUTERS, Mar. 15 2013, *available at* http://www.reuters.com/article/2013/03/15/us-eurozone-summit-draghi-idUSBRE92E0I220130315. For the very revealing powerpoint presentation, see generally MARIO DRAGHI, PRESENTATION AT THE EURO SUMMIT: EURO AREA ECONOMIC SITUATION AND THE FOUNDATIONS FOR GROWTH (2013), *available at* http://www.ecb.int/press/key/date/2013/html/sp130315.en.pdf.

F. What to Do, Spinelli?

I have claimed in the previous sections that (A) the European Union *is* in economic, financial, fiscal, macroeconomic, and political crises; that (B) these crises, while global in nature, have revealed the special and intense weaknesses of the European Union, weaknesses that can be traced back to the very transformation of the European Union and its constitutional law in the last three decades, especially to the assignment of a founding value to economic freedoms and to the asymmetric economic and monetary union started in 1999; (C) that the attempts at governing the crises, based on shifting diagnoses in contradictory measures, have aggravated the crises, instead of solving them; and (D) that they have unleashed a process of constitutional mutation that has consecrated the subordination of the normative values of the Social and Democratic *Rechtsstaat* to the protection of the value of capital assets. As a result, it is not only the European Union that is undergoing an existential crisis, it is the European political project, and its key component, the Social and Democratic *Rechtstaat*, that is going through an existential crisis.

It would be pretentious and silly to claim that one has the magical solution to such a complex problem, or more precisely, set of problems. Moreover, if a central part of the present diagnosis is that democracy is at stake and is being undermined, it would be contradictory to offer a ready-made solution to the problems, instead of referring back to democratic discussion and decision-making. But it might be odd to simply conclude that the way in which the crises should be overcome is something on which nothing can be said. So it seems almost unavoidable to answer the question of what can be done, even if very tentatively.

In the following I consider three alternative strategies: (1) A reformist strategy within the framework of the present European Union; (2) democratic re-foundation of the Union by means of a democratic constitutional convention; and (3) national constitutional resistance, if possible, grounded on the deep constitution of the European Union, the collective of national democratic constitutions. The first two strategies seem to me unpromising; the third is plagued with difficulties, but also seems to me to be the only viable choice.

I. The Impossible Status Quo

The first strategy consists of the implementation of structural and policy changes intended to overcome the crises within the framework of the present European Union and the present Treaties. This strategy seems to me highly unpromising for what may be said to be structural reasons. The fundamental reason lies with the key assumption that underlies it. The reformist strategy assumes that the passing of new regulations and directives, perhaps in tandem with the development of some constitutional conventions, would allow us to implement the institutional, procedural, and substantive changes necessary to stabilize the

European Union and slowly regain the path of growth and socio-economic improvement. For that to be true, either the importance and complexity of the crises has been overestimated, or the neutrality and plasticity of the European Union as a set of institutional structures and of European supranational constitutional law remains very high, or some combination of the two accrues. However, both assumptions seem to be wrong.

On the depth and intensity of the crises, there seems to be a decreasing margin to contest that the European Union is undergoing an existential crisis, a crisis that finds part of its cause in the very structure of the Union and the substantive content of European Union law. More than five years into the crisis, the government of the crisis has been largely based on wrong and shifting diagnoses, and moreover has led to the further entrenchment of the very elements of the structure of the Union and the substantive content of Union law at the root of the crises. But if the Union is undergoing an existential crisis that challenges its present configuration, as any existential crisis does, and moreover, if we have been taking measures for five years assuming that the crisis we were dealing with was rather different from what it actually is, aggravating the crisis and further entrenching the very institutional structures and principles more heavily challenged by the crises, can we really conclude that we can overcome the crisis without a radical break within the present supranational constitutional law? That break might have been possible at the beginning of the crises, although there may be reasons to conclude differently, but can it be possible after five years of further entrenching into the constitutional law of the Union the very provisions that must now be modified?

This conclusion leads us to consider the plasticity of the Treaties. The Treaties are not neutral and malleable; they have become increasingly rigid and biased in favor of specific substantive outcomes. The crowning of economic freedoms as the fundamental substantive content of Union law, together with the structural biases latent in the asymmetric economic and monetary union, already loaded the European constitutional dice. And the new two Para-Treaties and the secondary norms that have reformed the Stability and Growth Pact and created a supranational framework for national budgetary processes have increased the bias. As was already indicated, the trouble lies not so much with specific substantive provisions, as with the implications of the overlap of the division of competences between the Union and the Member States—the rapid centralization of competences as part of the government of the crise—the procedures of decision-making—the European Semester and reverse qualified majority-voting—and substantive constitutional norms—already biased, as indicated, in favor of the rights of capital holders.

II. Constitution-Making

If what I have argued in the previous section is correct, then we have to conclude that constitutional law has broken down for good. The obvious implication of such a conclusion is that we need to rewrite constitutional law through a democratic constitution-making process. Either that is possible and is actually done, or the breakdown of constitutional law will result in the mid- or long-run in the breakdown of the Social and Democratic *Rechtsstaat* as a social, economic, and political form. Thus, we need a *constituent assembly*, and we need it soon, if not now.

In abstract terms it is hard to contest the appeal of a constituent assembly. However, democratic politics, of which constitutional politics is but one part, is not only about normative ideals, but also about the right strategy to realize such ideals. It seems to me that there are four major problems with the constitutional solution, which render it inadequate, all things considered.

Firstly, the European constitutional card has recently been raised in vain. The Laeken process did not only fail, but the popular rejection expressed in the French and Dutch referenda—probably reflecting a wider and pan-European discontent—was not taken seriously, but actually circumvented the Lisbon process.[164] Raising the constitutional card again should be taken very seriously, given the risk that a new constitutional failure may backfire, questioning not only the viability of a democratic reconstitution of the Union, but even the feasibility of democratic constitutionalism in Europe itself.

Second, doubts can be raised about the accrual of the necessary political preconditions for starting a Euro-wide democratic constitution-making process. How should we forge the European democratic constitutional will? Who should participate? And who should not? And which concrete process should be followed? All constitution-making processes that have bore constitutional fruit have relied on the existence of a background constitutional theory, a public philosophy that provides ready made answers to these and related questions, a public philosophy that reflects a latent normative consensus, and a common perception of the past and a latent willingness to share the future. The lack of a background constitutional theory ten years ago may come a long way to explain the peculiar procedure then followed and the odd way in which the French and Dutch constitutional rejection was simply left aside by the Council.[165] There are good reasons to think we are far from having forged a background constitutional theory now.[166] First, we

[164] See Fossum & Menéndez, supra, fn 87, chapter 4.

[165] Ibid, concluding chapter.

[166] During the Laeken process, as might be remembered, it was unclear whether the citizens of Member States, and Member States only, should be represented. What about applicant states such as the 12 states that were set to become Members by then? What about the associated half, if not more, Member States, such as the EEA states? What about Turkey? Even worse, there was no clear answer to the question of how the representatives should be elected. Having no answer to this question that could be used as the basis for electing the Convention, the issue was avoided by a complex combination of titles of indirect representation. The price to be paid was that the Convention could not vote—and no constitutional convention can be a serious decision-making body without voting.

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cannot take for granted who should be called on to participate in the constitution-writing process. Should the constitution writing process comprise the European Union at large, or perhaps only the Eurozone countries, or more simply, the countries willing to engage in such a process? Could the process go on even if against the will of the majority of the electorate of some or the other state of the Union that does not wish a European constitution to be written? What should the relationship be between the EU states in the new constitutional compact and those outside of it? Second, how should the process of constitution-making proceed? Given that we have to add the failure of the peculiar assembly model that characterized the Laeken process to the repeated failures of the IGC model, what would the constitutional assembly look like? What would be, if any, the role of the European Council in relation to the Assembly?[167] The *no demos* thesis is a flawed theoretical construct that corresponds, however, to genuine problems, problems that have been aggravated, not solved, in the last years.

Third, the mis-government of the crises has shaped and transformed public discourse, essentially leading to the weakening of political trust, not only across borders, as the underlying socio-economic conflicts have been quite cunningly reduced to national differences, opposing creditor, and debtor nations, instead of creditors and debtors as individuals, but also within borders, with secessionist tendencies in richer regions bound to rise over time, following the template of Catalonia.[168] Can a democratic constitution-making process take place in such a context? Is there any chance that the *reductio ad nationem* which obfuscates the distributive implications of the crises may not result in irreducible conflicts that would prevent any constitutional reform capable of overcoming the present crises?

Finally, there are reasons to doubt that any process of constitutional reform of the European scale could be undertaken within a short period of time. The longer the process, the easier that it would be for powerful actors to gain undue influence over it by making use of their structural power, which has only been heightened over time. A constitution-making process lasting two and a half years could easily be pushed off track by financial and fiscal crises, and largely influenced by bouts of speculative activity in financial markets. At the end of the day, it seems to me that there is a serious risk that the *laudable-in-*

[167] The procedure followed by Spinelli in 1984, the election of a new European Parliament and the writing of a draft constitution there, later ratified by all national parliaments, seems the less controversial option, but would only work if the whole European Union, the whole constituency of the European Parliament, were to be reconstituted.

[168] That is, of secession being requested by one of the richest region within the country, in the name of the "fiscal exploitation" of that region by the "central state," usually under the combined claim that the state wastes too much money, and that there is a trifle too much redistribution to poorer regions. A similar socio-economic template prevails in the Flemish and the "Padanian" cases (Padania standing for a variable chunk of Northern Italy which always includes Lombardia and Veneto).

abstract call for a democratic constitution-making process is a strategically unadvisable option.

III. The National Rescue of the European Union

If support for a radical democratic strategy is not likely to be found in this European Union, while it is neither very probable that we can reconstitute this European Union into a different European Union through democratic constitution-making, then what can be done to rescue the European political project? It seems to me that third alternative lies in attempting a national rescue of the European Union, or what is the same, in realizing the democratic potential of national constitutions as the deep constitutional law of the European Union.

The key move in this strategy is to contest the constitutional soundness of the present governance of the Eurozone. Supranational constitutional law has mutated and tilted in favor of capital holders in ways that are incompatible with the Social and Democratic *Rechtsstaat*. But why should this change be the last European constitutional word? In other words, why should we take *Pringle*[169] as the last word on the constitutionality of the Stability Treaty? Why should we accept that this transformation is a sound transformation from a constitutional perspective?

Quite simply, we do not have to. The deep constitution of the European Union, the ultimate normative foundation of the whole edifice of the Union, is not the Treaties, but the collective of national democratic constitutions. It was the democratic, open, and integrationist post-war constitutions, together with the constitutions of the Member States that joined the European Union afterwards, that enabled and mandated integration. When integration starts going against the key normative content of the national constitutions, it is time to start using such constitutions not as national limits to this or that secondary supranational norm, but as the ultimate source of the yardstick of European constitutionality. According to such yardstick, neither the centralization of power without corresponding democratic control, nor the structural bias in the socio-economic constitution of the Union can be constitutional. They have to be actively contested as unconstitutional.

It seems to me that this strategy holds some promise for two reasons. First, the national constitutional rescue is the opposite of a mere regression into constitutional autarchy. This form of national constitutional resistance takes seriously the open and integrative character of national democratic constitutions. It justifies national constitutional

[169] *See* Case C-370/12, Pringle v. Ireland, 2012 EUR-Lex CELEX LEXIS 370 (Nov. 27, 2012), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0370:EN:HTML. The case resulted from an Irish preliminary reference resulting from Mr. Pringle challenging the European constitutionality (the validity according to Union constitutional law) of the Treaty establishing the European Stability Mechanism.

resistance, not on idiosyncratic and parochial grounds, but to the contrary, on the basis of appealing to a common normative ideal, an ideal that should be reflected in all national constitutions. It is also very different from the artificial federalism into which some national constitutional courts have relapsed in the past, defining procedural and substantive requirements for integration to proceed which are simply not generalizable, which can only be reconciled with integration if only some states, but not others, impose such conditions. It structurally fosters that constitutional resistance grows across borders, as the more the Member States in which it is resorted to, the more effective it will be, not only economically, but also normatively.

Second, this strategy could lead to immediate concrete changes, as there is no time lag between opting for it and changing things in the Union. It suffices that a majority in a democratically elected Parliament embraces it and challenges the status quo in a way that is compatible with the central claim of the strategy. All decisions in apparent breach of the present Treaties and para-Treaties, but which can be said to be necessary to avoid the collapse of the social fabric of a Member State, are covered by this strategy. It offers argumentative cover for the restoration of the primacy of socio-economic goals over the imperative of preserving the value of financial assets. At the same time, the articulation of an alternative European constitutional discourse, one grounded on the Social and Democratic *Rechtsstaat*, may be conducive to the forging of a background European constitutional theory.

And still, the permanent state of fiscal emergency in which the peripheral Member States seem to be submerged undermines both the democratic and the social pillars of the Social Democratic *Rechtsstaat*, and also renders highly problematic this third strategy. The lack of time to debate, the series of decree-laws decided on the hoof, create the structural conditions under which the general, wide-ranging social policies characteristic of the postwar welfare state are bound to take a back seat to the promotion of special interests capable of adjusting to the economics of turbulence and cloaking, in the name of collective goods—the stability of the financial system and employment promotion—their narrow concerns. It feels very much the Euro has become a mousetrap.[170]

So how better to conclude than with a riddle: A European constitution should be written, will be written, and simply cannot be written.

[170] The metaphor has come to be used extensively. See Claus Offe, 'The EuroTrap', *European Law Journal*, forthcoming September 2013; Juan Francisco Martín Seco¸ *Contra el Euro*, Barcelona: Península, 2013.