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Legal Writing(s) on the Eurozone Crisis

Thomas Beukers



European University Institute  
**Department of Law**

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## **Euro-Crisis: Law and Interdisciplinarity**

In December 2014 a conference “Euro-Crisis: Law and Interdisciplinarity” was held in the context of a three-year project “Constitutional Change through Euro-Crisis law” funded by the EUI Research Council. This project intends to provide a comprehensive study of the effect of the crisis of the euro on national constitutional orders. In turn this study aims to offer a basis for further, especially comparative, studies of the legal status and implementation of legislative responses to the crisis at national level, the interactions between national legal systems and euro-crisis law, and the constitutional challenges that have been faced. The December conference brought together legal scholars and political scientists to reflect on the scope and limits of the legal discipline in reacting to the management of the crisis of the euro. Contributions were made on three topics: (1) how legal scholars have reacted to euro-crisis and the reforms adopted in its wake, with particular analysis of the main themes within legal scholarship on the issue; (2) whether and how other disciplines can help to understand and situate legal debates on euro-crisis; and (3) the relevance of the legal dimension for scholars from related social science disciplines such as political economy for their own perspective on euro-crisis and its policy consequences.



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## **Abstract**

This paper analyses the literature produced by legal scholarship on the eurozone crisis. It addresses questions about the main substantive issues discussed, the methodological approaches taken, the level and nature of critical legal analyses, and the main legal and policy proposals based on legal scholarship research. The paper thus studies the nature of legal writings on the eurozone crisis. This paper builds on a large number of articles published between January 2009 and September 2014 in selected leading law journals and books. Most of them are written in English, but also French, German, Italian and Dutch publications are included. A further selection has been made of articles and books that have been made subject to an in-depth study. The main focus has been on publications that not only discuss individual aspects of the eurozone crisis (such as single legal instruments, case law, treaty articles or the impact on individual member states), but that (also) make a broader (critical) analysis of the changed nature of economic and monetary union or economic governance.

## **Keywords**

Eurozone crisis; legal scholarship; legal writing; economic and monetary union; methodology

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## Research Question, Methodology and Scope of Research

This paper analyses the literature produced by legal scholarship on the eurozone crisis. It addresses questions about the main substantive issues discussed, the methodological approaches taken, the level and nature of critical legal analyses, and the main legal and policy proposals based on legal scholarship research. These questions can be summarised in the following main research question: *What is the nature of legal writings on the eurozone crisis?*

The paper builds on a large number of articles published between January 2009 and September 2014 in selected leading law journals and books. Most of them are written in English, but French, German, Italian and Dutch publications are also included. For practical reasons – e.g. related to linguistic skills – the scope is currently limited. A list of all the selected publications can be found in Annex 1.

A further selection has been made of articles and books that have been subjected to an in-depth study. The initial focus has been on publications that not only discuss individual aspects of the eurozone crisis (such as single legal instruments, case law, treaty articles or the impact on individual Member States), but that (also) make a broader (critical) analysis of the changed nature of economic and monetary union or economic governance. The scope of this in-depth study is currently expanding.

In this paper I will do the following. I will first shortly introduce the main substantive issues discussed in legal scholarship writings on the eurozone crisis. I will then proceed with a discussion and illustration of the objectives of eurozone crisis legal writings. After that I will present a number of detailed and precise characterizations of the substantive and institutional changes to the economic and monetary union. Finally, I will discuss the nature of critical legal writings on the eurozone crisis based on fit and principle respectively. I will close with some concluding remarks.

## Main Substantive Issues Discussed

There is an extensive body of legal scholarship literature on the eurozone crisis. Hardly any topic or angle seems to have been ignored. A great deal of attention is given to legality issues,<sup>1</sup> democracy,<sup>2</sup> the case law of the *Bundesverfassungsgericht*,<sup>3</sup> and the *Pringle* case of the European Court of Justice.<sup>4</sup>

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<sup>1</sup> Athanassiou (2011), Bonke (2010), Calliess (2011), De Gregorio Merino (2012), Häde (2010), Hentschelmann (2011), Herrmann (2013), Kadelbach (2013), Louis (2010), Nettesheim (2011), Palmstorfer (2012), Palmstorfer (2014), Ruffert (2011b), Rügge (2013), Schwarz (2014), Smits (2012), Touri & Tuori (2014), Weber (2013), Wernsman & Zirkl (2014), Ziller (2012).

<sup>2</sup> CMLRev editorial (2012b), Chalmers (2012), Chiti (E.) & Teixeira (2013), Dawson & De Witte (F.) (2013), Diamant & Van Emmerik (2011), Fasone (2014a), Habermas (2012), Kadelbach (2013), Menéndez (2013), Póiares Maduro (2012a), Ruffert (2011b), Schwarz (2014), Scicluna (2012), Tuori & Tuori (2014), Weber (2013), Weiler (2012), De Witte (B.), Héritier & Trechsel (eds.) (2013).

<sup>3</sup> Bardutzky & Fahey (2014), Bast (2014), Berner (2013), Beukers (2014b), Bonino (2013), Borger (2013b), Callies (2012b), Deters (2014), Eleftheriadis (2012), Di Fabio (2014), Faraguna (2011), Gärditz (2014), Gerner-Beuerle, Küçük & Schuster (2014), Goldmann (2014), Graf von Kielmansegg (2012), Kumm (2014), Luther (2012), Luther (2014), Mayer (2014), Müller-Graff (2012), Murswiek (2014), Pedrini (2013), Petersen (2014), Peuker (2013), Pliakos & Anagnostaras (2014), Recker (2011), Reestman (2013b), Rivosecchi (2014), Saulnier-Cassia & Joop (2013), Schiek (2014), Schmidt (2013), Schneider (2013), Schneider (2014), Schorkopf (2012), Thiele (2014a), Tuori&Tuori (2014), Von Ungern (2012), Vauchez (2012), Wendel (2013), Wendel (2014).

<sup>4</sup> Adam & Mena Parras (2013), Bardutzky & Fahey (2014), Beck (2013), Beck (2014), Borger (2013b), Coutron (2013), Craig (2013a), Craig (2014a), Haberkamm (2013), Hinarejos (2013), Koutrakos (2013), Van Malleghem (2013), Martucci (2013), Nettesheim (2013), Palmstorfer (2013), Thym & Wendel (2012), De Witte (B.) & Beukers (2013).

Surprising is the marginal attention that seems to exist for the relation between the eurozone crisis and the Charter of Fundamental Rights,<sup>5</sup> and the lack of extensive comparative research.<sup>6</sup>

A further popular topic is the relationship between euro crisis law and individual Member States. Legal scholarship research focuses on the impact of euro crisis law on the legal system of specific Member States,<sup>7</sup> the specific way a measure – in particular the Fiscal Compact – is implemented,<sup>8</sup> or the specific limits encountered in the (constitutions of the) Member States.<sup>9</sup> As mentioned above there has been considerable attention for the case law of the *Bundesverfassungsgericht*, not only in English and German, but also in French and Italian literature. To a lesser extent the case law of other bodies of constitutional review is also analysed, including that of the French Constitutional Council,<sup>10</sup> the Portuguese Constitutional Court,<sup>11</sup> the Estonian Supreme Court,<sup>12</sup> the Spanish Constitutional Tribunal,<sup>13</sup> the Italian Constitutional Court,<sup>14</sup> and the Finnish Constitutional Law Committee (of Parliament).<sup>15</sup>

Themes that have sparked particular interest are also institutional balance,<sup>16</sup> differentiation,<sup>17</sup> solidarity,<sup>18</sup> the social dimension of the crisis,<sup>19</sup> and the relationship between law and integration.<sup>20</sup> To a lesser extent this is also true of the ordoliberal origins of economic and monetary union,<sup>21</sup> and the relationships between the eurozone crisis response and competition law,<sup>22</sup> and between the crisis and a state of emergency.<sup>23</sup>

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<sup>5</sup> Exceptions are Barnard (2013), Costamagna (2014), and Kilpatrick (2014).

<sup>6</sup> Exceptions are Achtsioglou & Doherty (2014), Piedrafita (2014), Fasone (2014) and Reestman (2013).

<sup>7</sup> Achtsioglou & Doherty (2014), Leino-Sandberg & Salminen (2013a), MacMaoláin (2011), Moreiro Gonzalez (2013), O’Gorman (2014b), Piedrafita (2014), Ruiz Almendral (2013).

<sup>8</sup> Boggero & Annicchino (2014), Cabras (2013), Diamant & Van Emmerik (2014), Fabbrini (2011), Gordon (2014), O’Gorman (2014a), Reestman (2013a), Reestman (2013c).

<sup>9</sup> Hinarejos (2012), Lorz & Sauer (2012), Nettesheim (2011), Pernice (2014), Varnes (2013).

<sup>10</sup> Reestman (2013b), Roux (2012).

<sup>11</sup> Cisotta & Gallo (2014), Fasone (2014b).

<sup>12</sup> Bardutzky & Fahey (2014), Ginter (2013), Reestman (2013b).

<sup>13</sup> Fasone (2014b).

<sup>14</sup> Fasone (2014b).

<sup>15</sup> Tuori & Tuori (2014).

<sup>16</sup> This includes the horizontal institutional balance at EU level, the vertical division of powers between the Union and the Member States, and the balance of powers within the Member States: Beukers (2013), Dawson & De Witte (F.) (2013), Fasone (2014a), Pitruzzella (2014), De Sadeleer (2012), Scicluna (2012).

<sup>17</sup> Including both internal and external differentiation: Cantore & Martinico (2013), Chiti (E.) & Teixeira (2013), Craig (2012), Craig (2013b), Fabbrini (2014a), Menéndez (2013), Messina (2014), Peers (2012), Peers (2013), Piris (2012), Schwarz (2014), Shuibhne (2011), De Witte (B.) (2012).

<sup>18</sup> Allemand (2012), Amténbrink (2012), Bieber & Maiani (2012), Borger (2013a), Calliess (2011), Eijsbouts & Nederlof (2011), Habermas (2012), Häde (2010), Hentschmann (2011), Potacs (2013), Pottakis (2011).

<sup>19</sup> Achtsioglou & Doherty (2014), Barnard (2013), Costamagna (2014), Schiek (2013), Kilpatrick (2014), Tuori & Tuori (2014) at 231, 235 and 238.

<sup>20</sup> Everson (2013), Joerges (2014), Menéndez (2013), Tuori & Tuori (2014), Wilsher (2014), De Witte (B.) (2012).

<sup>21</sup> Colliat (2012), Joerges (2014), Tuori & Tuori (2014).

<sup>22</sup> Exceptions are Baudenbacher & Bremer (2010), Ojo (2011) and Vogelaar (2009).

<sup>23</sup> Schorkopf (2011) at 341; Joerges (2014) at 997: “The Union experiences a state of emergency where the law is losing its integrity”; Fischer-Lescano (2014): “The European bodies and institutions are bound to comply with EU law even in the financial crisis. There is no state of emergency that suspends EU law.”

## **Objective of Eurozone Crisis Legal Writings**

Academic writings have different objectives, including explanation, prediction, and critical evaluation. Many social sciences, such as economics and political science, often have the objective of producing social laws that can predict future events. That is not the case for legal scholarship.

The objective of legal scholarship research can be generally understood as both providing explanation and critical evaluation, often combined in a single publication. One approach taken to explanation and critical evaluation is that of analysing the ‘fit’ of a specific legal instrument (be it legislation, regulation or case law) with the existing legal system. A second approach often taken is that of explanation and critical evaluation of a legal instrument or state of affairs based on a specific higher principle. We can see both approaches also in eurozone crisis legal literature (see sections 5 and 6 below).

In this second approach the higher principle can in the first place follow from an ‘external’ philosophical exercise. Dawson & De Witte start their normative analysis of eurozone crisis law from the idea that “the stability and legitimacy of any political system requires the incorporation of individual and political self-determination”.<sup>24</sup> Chalmers argues that a (redistributive) political system should internalise “conflicts on the grounds that they can be better mediated within collective structures and that they also can have many positive dimension.”<sup>25</sup> A further illustration is provided by Joerges, who argues that:

“Europe must find its constitutional form in a new type of “conflicts law,” which is characterized by two guiding principles. Firstly, the supranational European conflict of laws is to require Member States of the Union to take their neighbors’ concerns seriously—in this respect, it aims at compensating the structural democratic deficits of nation-statehood. Secondly, this European conflicts law should structure cooperative solutions to problems in specific areas—thereby reacting to the inter-dependencies of modern societies.”<sup>26</sup>

Secondly, it can also be taken ‘internally’ from the legal system. In the case of the European Union this can for example be the principle of democracy,<sup>27</sup> the rule of law (both article 2 TEU),<sup>28</sup> the principle of solidarity (article 3(3) TEU) or the principle of loyal cooperation (article 4(3) TEU).<sup>29</sup> The resulting principle from both exercises may obviously be the same.

As already stated, the relationship of legal scholarship with the future does not take the form of prediction on the basis of social laws, as is often the case with other social sciences, such as economics and political science. This does not mean that legal scholars are not concerned with the future. Several approaches can be identified in eurozone crisis legal writings.

One approach includes making statements about the future sustainability or effectiveness of a particular state of affairs. With regard to the first, Scicluna e.g. argues that “Europe’s current politics of crisis resolution is putting democratic legitimacy under a level of pressure that is unlikely to be sustainable beyond the short term.”<sup>30</sup> Joerges argues “The present state of the Union is unsustainable. The efforts to force Member States and their citizens into the straitjacket of new economic governance are bound to fail.”<sup>31</sup> Adamski argues that “The euro area is doomed if national politics keeps

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<sup>24</sup> Dawson & De Witte (F.) (2013) at 817.

<sup>25</sup> Chalmers (2012) at 668.

<sup>26</sup> Joerges (2014) at 1026.

<sup>27</sup> For an example see Tuori & Tuori (2014) at 206.

<sup>28</sup> Joerges (2014) at 1001-1002.

<sup>29</sup> Calliess (2012a) at 106.

<sup>30</sup> Scicluna (2012) at 501.

<sup>31</sup> Joerges (2014) at 1025.

prevailing in the future (and almost certainly it will).<sup>32</sup> With regard to the second issue, the future effectiveness of both economic governance reform and of balanced budget rules has been studied.<sup>33</sup>

Legal scholarship's relationship with the future also takes the form of exploring and formulating possible future legal instruments. Examples abound of contributions about what has not (yet) been done with regard to the eurozone crisis. The option of an exit by a Member State from the euro area has been discussed by Hofmeister, Bonke, Meyer, Perry & Gelman, and Vila.<sup>34</sup> The option of enhanced cooperation is explored by Wernsmann & Zirkl, and by Fabbrini with regard to the Financial Transaction Tax; by Messina with regard to the ESM and Fiscal Compact Treaties; and by Schwarz<sup>35</sup> for the ESM Treaty. Jacqu , Pernice and Duff all consider the option of a comprehensive treaty amendment, respectively providing reasons against treaty amendment (Jacqu ), ideas for new provisions needed (Pernice), and a blueprint for a comprehensive treaty change (Duff).<sup>36</sup> The compatibility and feasibility of possible future Eurobonds or mutualisation of debt has been investigated by many, including Allemand, Athanassiou and De Gregorio Merino.<sup>37</sup> Beukers has explored opportunities and challenges of a euro area flexibility clause.<sup>38</sup> Potteau considers the option of a euro-budget, Fabbrini of a fiscal capacity.<sup>39</sup>

Furthermore, legal scholarship's relationship with the future takes the form of formulating more general policy options and proposals. These can be presented in the form of different policy alternatives, discussing pros and cons of both. Hinarejos for example juxtaposes the Union's choice between the two extremes of either a surveillance model or a classic fiscal federalism model in an attempt to create the ability to address structural asymmetries, and to prevent and counter asymmetric shocks.<sup>40</sup> Piris extensively discusses four different choices for the Union. It could: substantially revise the treaties, continue on the present path while developing further closer cooperation, politically progress towards a two-speed Europe, or legally build a two-speed Europe.<sup>41</sup>

Legal writings also take the form of an argument for a specific policy choice based on a normative position. Habermas famously argues that the Union should develop into a transnational democracy as opposed to the current state of post-democratic executive federalism.<sup>42</sup> Poiars Maduro argues that financial solidarity in the EU must be detached from transfers between States and therefore proposes a sufficiently increased EU budget for preventing future crises, resulting from own resources, linked to EU generated wealth: economic activities that the EU enables and have mostly benefited from the internal market.<sup>43</sup> Men ndez argues that what is needed is "a national rescue of the European Union, or what is the same, in realizing the democratic potential of national constitutions as the deep

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<sup>32</sup> Adamski (2012) at 1364.

<sup>33</sup> On effectiveness of economic governance reform see Amtenbrink (2011), De Streel (2014). See on the effectiveness of balanced budget rules e.g. Diamant & Van Emmerik (2014), Van Malleghem (2014), and Papadopoulou (2014).

<sup>34</sup> Hofmeister (2011), Bonke (2010), Meyer (2013), Perry & Gelman (2013), Vila (2011).

<sup>35</sup> Wernsmann & Zirkl (2014), Fabbrini (2014a), Messina (2014), Schwarz (2014).

<sup>36</sup> Jacqu  (2013), Pernice (2014), Duff (2013).

<sup>37</sup> Allemand (2012), Athanassiou (2011) at 571-573, De Gregorio Merino (2012) at 1630-1632 and 1642-1644.

<sup>38</sup> Beukers (2014a).

<sup>39</sup> Potteau (2013), Fabbrini (2014b).

<sup>40</sup> Hinarejos (2014).

<sup>41</sup> Piris (2012). Piris concludes at 147: "Since the best-suited option, that is, a substantive revision of the treaties, is excluded politically, the time is approaching when the choice will be between the status quo, which might mean a diluted EU, slowly stagnating and becoming irrelevant, and an EU that accepts, as a temporary measure, more differentiation between its Member States. (...) one has to try and find another feasible solution, in which the euro area countries should probably lead."

<sup>42</sup> Habermas (2012).

<sup>43</sup> Poiars Maduro (2012a).

constitutional law of the European Union.”<sup>44</sup> According to Chalmers, the redistributive EU political system needs a public law structure in which “conflicts take place only in those political arenas which form part of the wider EU legal settlement”, with arenas that have sufficient authority and in which all parties with a stake in the process are granted sufficient voice.<sup>45</sup>

### **Explaining Change through Characterisation: The Changed Nature of Economic Governance/EMU**

The profound changes following from the response to the eurozone crisis to the Union in general, and to economic and monetary union in particular, have been described by legal scholarship as “a deep transformation of the European constitutional constellation”,<sup>46</sup> “a process of mutation of European constitutional law”,<sup>47</sup> a “constitutional mutation at the level of principles”,<sup>48</sup> “a new institutional settlement”,<sup>49</sup> and a “new constitutional balance”.<sup>50</sup> Behind these general characterizations more detailed and precise characterizations of the substantive changes have been made, such as a shift from monetary stability to (also) financial stability, from a community of benefits to (also) a community of risk-sharing, from own responsibility to (also) solidarity, and the transformation of the Union into a political system redistributing significant wealth. More precise characterizations also exist of the institutional developments, including the Union method or new intergovernmental method as the default mode of crisis management, with closely related executive dominance, the new depoliticised regulatory governance mechanisms, an undermined national budgetary sovereignty, and the autonomization of the euro area.

#### ***Substantive Transformation***

From monetary to (also) financial stability

The shift from monetary to (also) financial stability has been described by several authors. Tuori & Tuori argue that “the new position of financial stability as an overriding economic objective, explicitly confirmed in *Pringle* and the amendment to Art. 136 TFEU, is a central part of the constitutional mutation at the level of principles.”<sup>51</sup> Borger for example, in his discussion of solidarity, notes that:

“However, this strengthened solidarity of fact has triggered a change in normative solidarity between member states as well. Characteristic for this change is a departure from an economic policy that is predominantly focused on budgetary prudence and price stability to one that takes better into account financial stability as well.”<sup>52</sup>

The new position of financial stability as an overriding economic objective is not only central to the new article 136(3) TFEU and the ESM Treaty: Wilsher also stresses the ECB’s emerging role to protect financial stability.<sup>53</sup>

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<sup>44</sup> Menéndez (2013) at 525.

<sup>45</sup> Chalmers (2012).

<sup>46</sup> Joerges (2014) at 999-1003.

<sup>47</sup> Menéndez (2013) at 511.

<sup>48</sup> Tuori & Tuori (2014) at 184.

<sup>49</sup> Chalmers (2012).

<sup>50</sup> Dawson & De Witte (F.) (2013) at 824.

<sup>51</sup> Tuori & Tuori (2014) at 184.

<sup>52</sup> Borger (2013a) at 16.

<sup>53</sup> Wilsher (2013) at 515. See also Beukers (2014b).

### From a community of benefits to a community of (also) risk-sharing

Chiti & Teixeira speak of a transformation of the EMU from a “community of benefits” to a “community of benefits and risk-sharing”.<sup>54</sup> The financial assistance mechanisms are first step in the direction of a mutualisation among Member States of the costs connected to economic imbalances within the EMU. This transformation, which is not well-accomplished, represents “a potentially profound transformation of the overall rationale of the EMU.”<sup>55</sup> Chiti & Teixeira argue that a further step in this direction could (and should) be the introduction of more advanced instruments of public debt mutualisation, such as the issuance of common debt.<sup>56</sup>

### From own responsibility to (also) solidarity (or: from crisis prevention to (also) crisis management)

A central theme of research is the role played by solidarity, and the impact of the crisis on the development of solidarity in the Union. Much has been written about the meaning and effect of financial assistance on the principle of Member State fiscal responsibility expressed among others in the no-bailout principle, which for many underlies the Maastricht constitution of economic and monetary union.

Whereas some have argued that article 125 TFEU is now an empty shell,<sup>57</sup> others offer a more nuanced picture of the limits to Member States’ own responsibility:

“(…) it would be overhasty to declare that this constitutional mutation would have made the principle of Member States’ fiscal responsibility moribund. The prohibition on bailouts in Art. 125(1) TFEU is still part of the macroeconomic constitution. However, through the constitutional complement of crisis prevention with crisis management, the scope of application of the prohibition has been restricted. It is only valid for good times but no longer for bad times. (...) The Pringle doctrine, confirmed by the amendment to Art. 136 TFEU, leaves the principle of Member State fiscal responsibility intact for other than crisis circumstances.”<sup>58</sup>

Similarly, Potacs argues that although the ESM has reduced the scope of the principle of own State responsibility,<sup>59</sup> it does not create a full-blown system change.<sup>60</sup>

Some authors have focused on development of solidarity on the ground, generally considering the impact of the crisis to be negative. Amtenbrink argues that “It would be over-optimistic to conclude that the crisis has stimulated solidarity among Member States and compassion among citizens of the Union. In fact, the crisis may very well have had the opposite effect.”<sup>61</sup> Tuori & Tuori argue that “Unfortunately, the crisis appears not to have brought European citizenry closer to but further distanced from the kind of solidaristic civic community which could act as the subject of European democracy.”<sup>62</sup> Habermas is nonetheless optimistic, arguing that “There is nevertheless the expectation

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<sup>54</sup> Chiti (E.) & Teixeira (2013) at 685.

<sup>55</sup> Chiti (E.) & Teixeira (2013) at 699.

<sup>56</sup> Chiti (E.) & Teixeira (2013) at 699.

<sup>57</sup> Palmstorfer (2013) at 222: “*Pringle* ist prima vista kein „Aufreger“ wie etwa das heftig kritisierte *Mangold*-Urteil. Dies kann nicht darüber hinwegtäuschen, dass von Art. AEUV Artikel 125 Abs. AEUV Artikel 125 Absatz 1 AEUV nur mehr eine leere Hülle übriggeblieben ist. Die Bestimmung wurde entkernt, der gravierende Systemwandel weg von der haushaltspolitischen Eigenverantwortung hin zur Solidarität als unionsrechtskonform erachtet.“

<sup>58</sup> Tuori & Tuori (2014) at 187.

<sup>59</sup> Potacs (2013) at 141: „Das Prinzip der staatlichen Eigenverantwortlichkeit wird damit ein gutes Stück zurückgenommen.“

<sup>60</sup> Potacs (2013) at 143: „Eine grundlegende Systemänderung im Bereich des EU-Rechts wird durch den ESM allerdings noch nicht bewirkt.“

<sup>61</sup> Amtenbrink (2012) at 187.

<sup>62</sup> Tuori & Tuori (2014) at 220.

that the growing mutual trust among the European peoples will give rise to a transnational, though attenuated, form of civic solidarity among the citizens of the Union.”<sup>63</sup>

Focusing instead on the legal structure, and on normative solidarity, Borger sees a development from negative to positive solidarity in the establishment of temporary and permanent stability mechanisms that can provide financial assistance:

“the solidarity between the members of the currency union has strengthened and even changed since the inception of EMU. (...) As a result of the strengthening of solidarity between euro area member states, Union law is put under strain. This forms the inevitable consequence of a treaty framework which is based on a notion of solidarity from the past.”<sup>64</sup>

In contrast, Martucci argues with regard to the ESM that “De la solidarité, il n'est nulle trace; le MES n'est pas un mécanisme de solidarité, c'est un mécanisme au service de l'objectif supérieur de stabilité financière.”<sup>65</sup>

Others emphasise the clear limits in the current legal framework.<sup>66</sup> Potacs for example argues that “Eine weitgehende Aufgabe der staatlichen Eigenverantwortung zugunsten europäischer Solidarität würde eine Strukturänderung der EU mit einer staatsrechtlichen Dimension von bisher nicht gekanntem Ausmaß bedeuten“.<sup>67</sup> Bieber & Maiani argue that “L'épicentre de ces crises est la Grèce, mais leur origine réside, en amont, dans un cadre constitutionnel ou légal empêchant l'affirmation de l'intérêt commun et le développement d'une action réellement solidaire.”<sup>68</sup>

#### The Union as a redistributive political system

Chalmers identifies a European distributive State.<sup>69</sup> Dawson & De Witte speak of a new constitutional balance, and argue that the euro crisis has led to a paradigm change, from direct legislative influence in distributive policies being both legally and politically off-limits for the Union institutions, to “a total disregard of both the legal and constitutional limitations to transnational cooperation.”<sup>70</sup> Hinarejos is more cautious and considers that the particular pattern of fiscal integration in the EU up to the eurozone crisis, namely that Member States are willing to go further on so-called balance rules (rules that concern budgetary discipline and balance) than on substantive rules (that concern the allocation of resources within a State and thus have a distributive or redistributive effect) has not changed.<sup>71</sup>

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<sup>63</sup> Habermas (2012) at 29.

<sup>64</sup> Borger (2013a) at 9. Also at 12: “As to the factual/normative distinction, the treaty framework on EMU symbolizes and expresses both the factual and normative solidarity existing in the currency union. The most basic and visible form of factual solidarity, the interlocking of exchange rates (...). The normative dimension to the solidarity between the members of the currency union becomes clearly visible from several provisions referring to price stability, the Union's main monetary policy goal, as well as sound public finances. As to the negative/positive distinction, the negative solidarity underlying the euro finds clear recognition in four key prohibitions that are laid down in Articles 123-126 TFEU.”

<sup>65</sup> Martucci (2013).

<sup>66</sup> Häde (2010), Hentschelmann (2011).

<sup>67</sup> Potacs (2013) at 133.

<sup>68</sup> Bieber & Maiani (2012) at 295.

<sup>69</sup> Chalmers (2012).

<sup>70</sup> Dawson & De Witte (F.) (2013) at 824.

<sup>71</sup> Hinarejos (2012) at 256.

### ***Institutional Transformation***

Tuori & Tuori summarise the institutional transformation of the euro area as follows:

“The federalist structures which the crisis has gradually engendered are largely based on intergovernmentalism, supported by expertise-based institutions, such as the Commission and the ECB.”<sup>72</sup>

Chiti & Teixeira also capture different elements of the institutional transformation when they argue that:

“(…) the increasing involvement of the EU executive power in fiscal matters takes place mainly through quasi-automatic procedures, so that the erosion of national fiscal sovereignty is not accompanied by the emergence of a genuine political action at the EU level.”<sup>73</sup>

#### Union method, intergovernmentalism, executive dominance

Adamski argues that all crisis measures essentially follow the same intergovernmental governance paradigm.<sup>74</sup> Joerges argues that “the resort to the ‘Union method’ amounts to a deep transformation of the European constitutional constellation”.<sup>75</sup> In fact, several authors have noticed the prominence of the Union method in the crisis, summarised by Chiti & Teixeira as “the inter-dependence and interaction between Community and intergovernmental instruments within the EU, in the multiple and complex forms envisaged by the Lisbon Treaty.”<sup>76</sup> Chiti & Teixeira argue however that the reality of the EU responses to the crisis has not just been that of the traditional Union method envisaged by the Lisbon Treaty, but that these responses “have been worked out mainly through mechanisms minimizing the role and function of the Community channels and based on a specific form of coordination of national governments.”<sup>77</sup> In other words, they discern a “move from the Union method to a new form of intergovernmentalism.”<sup>78</sup> The Euro Summit best embodies this approach: “In the elaboration of the European responses to the crisis, thus, a crucial role has been played by an intergovernmental body composed only of the EU Member States participating in the euro area, external to the Treaty institutional framework, interacting with other intergovernmental bodies and insulated from the possible influence of the non-intergovernmental EU political institutions.”<sup>79</sup>

Kadelbach identifies a power shift towards the executive.<sup>80</sup> Craig argues that although in terms of process there is some evidence of the Schmittian perspective in the lead that has been taken by the European Council (“power being concentrated to an ever-greater extent in the EU executive, the rationale being that only it can respond with sufficient speed to the profound problems generated by

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<sup>72</sup> Tuori & Tuori (2014) at 217.

<sup>73</sup> Chiti (E.) & Teixeira (2013) at 701.

<sup>74</sup> Adamski (2012).

<sup>75</sup> Joerges (2014) at 999-1003.

<sup>76</sup> Chiti (E.) & Teixeira (2013) at 686.

<sup>77</sup> Chiti (E.) & Teixeira (2013) at 686.

<sup>78</sup> Chiti (E.) & Teixeira (2013) at 689.

<sup>79</sup> Chiti (E.) & Teixeira (2013) at 687-688.

<sup>80</sup> Kadelbach (2013) at 495: “Das Unbehagen, das dieses Vorgehen hinterlässt, gründet nicht so sehr auf seiner kurzatmigen Fixiertheit auf die Bedürfnisse der Kapitalmärkte; solange und soweit es zu mehr Budgetdisziplin führt, ist dem in guttem Sinn nicht abzusprechen. Was bedenklich erscheint, ist vielmehr die Gewichtsverschiebung zugunsten der Executive, die sich hier vollzogen hat.”

the euro crisis”), in terms of substance, “it may well prove to be the Commission within the EU executive whose power is most enhanced.”<sup>81</sup> At the national level, Piedrafita finds “the weakness of the parliamentary scrutiny of EU affairs in Spain (despite the new Lisbon provisions), as well as the strong position of the executive in the political system.”<sup>82</sup>

#### Macroeconomic governance: Regulatory regime, non-representative institutions, and surveillance

The new economic governance has been described (and criticised) by Chalmers as a new institutional settlement of co-government on balanced budgets, deficits and macroeconomic imbalances,<sup>83</sup> and a system that “transfers the machinery and thinking of the regulatory State to questions of redistribution.”<sup>84</sup> Menéndez argues that most of the new powers transferred beyond the State “are to be exercised within the Union through decision-making powers in which non-representative institutions have either the last word or massive influence.”<sup>85</sup> Chiti & Teixeira note that “In the transfer from the national to the EU level, in other terms, fiscal matters have been depoliticized and insulated from the realm of politics.”<sup>86</sup> Van der Sluis argues that the euro crisis measures give new attributes to the constitutionalisation of budgetary restraints.<sup>87</sup> Delledonne notices a shift from a prevailing political to a would-be legal notion of financial constitutions,<sup>88</sup> and a corrosion of political decision-making at the national level as a consequence of the Fiscal Compact.<sup>89</sup> Reestman identifies a tendency towards depoliticisation and legalisation in the Fiscal Compact.<sup>90</sup>

Armstrong argues that the changes to EU economic governance have to be understood as consisting of hybrid normative grids and accountability frameworks, including both rule-based and co-ordination-based governance techniques.<sup>91</sup> Hinarejos considers EMU to be in the initial phase of the surveillance model and identifies a “trend towards increasingly detailed and enforceable prescriptions from the centre.”<sup>92</sup> Developing towards a classic fiscal federalism model would mean giving the Union the necessary resources to address structural inequalities and prevent asymmetric shocks, but in practice even a cautious development in this direction is politically unlikely in the short term.<sup>93</sup>

#### Limited national sovereignty and budgetary autonomy

Legal scholars take fundamentally different positions on the impact of euro crisis law on national sovereignty and budgetary autonomy. It is useful always to keep in mind the very different regimes applying to Member States receiving financial assistance on the one hand, and the general macroeconomic governance regime applying to all (with admittedly further reaching rules for eurozone Member States) on the other hand, something which is not always done.

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<sup>81</sup> Craig (2014b) at 36-37.

<sup>82</sup> Piedrafita (2014) at 340.

<sup>83</sup> Chalmers (2012).

<sup>84</sup> Chalmers (2012) at 685.

<sup>85</sup> Menéndez (2013) at 511.

<sup>86</sup> Chiti (E.) & Texeira (2013) at 701.

<sup>87</sup> Van der Sluis (2014) at 105.

<sup>88</sup> Delledonne (2014) at 181.

<sup>89</sup> Delledonne (2014) at 203.

<sup>90</sup> Reestman (2013a).

<sup>91</sup> Armstrong (2013) at 603. Also Armstrong (2014).

<sup>92</sup> Hinarejos (2014) at 1635.

<sup>93</sup> Hinarejos (2014) at 1635-1637.

Calliess is illustrative of one extreme position on the sovereignty and autonomy of Member States receiving financial assistance:

“An over-indebted Member State ultimately can only choose between a sovereign default and the recourse to emergency state aids from the ESM. The recipient State therefore autonomously agrees to a limitation of its budgetary sovereignty, when deciding to receive conditional emergency aids from the ESM. (...) Against this background, a budgetary veto right on the EU level regarding the respective national draft budget can hardly be assessed as an interference with the parliament’s budget sovereignty; when the only alternative is a sovereign default, the budgetary sovereignty has already been lost.”<sup>94</sup>

Tuori & Tuori by contrast argue that “With their reference to strict conditionality, Pringle and the amendment to Art. 136 TFEU have made explicit the constitutional status of the curtailment of sovereignty which beneficiary States must accept as a price for financial assistance.”<sup>95</sup>

Calliess similarly downplays the impact of the general economic governance framework on budgetary sovereignty: “National budgetary sovereignty is maintained as the Commission neither has a veto right regarding national budgetary planning nor is the fiscal treaty’s debt brake a significant innovation (...).”<sup>96</sup> Many authors take a different position here.<sup>97</sup> Tuori & Tuori for example argue that “Another characteristic of the incrementalist reinforcement of European economic governance has been increased intrusion into the procedural and substantive budgetary autonomy of the Member States.”<sup>98</sup> Diamant and Van Emmerik argue this in detail with regard to the Dutch Parliament, whose formal budgetary powers are undermined by European measures, and also contend that the measures taken to strengthen and improve economic and monetary cooperation in the EU limit the political opportunities to shape the budget nationally.<sup>99</sup>

#### Differentiation and autonomization of the EMU

Chiti & Teixeira argue that one of the main implications of the recourse to composite arrangements is

“the legal and institutional differentiation of the EMU from the EU as a whole, as well as, within the EMU itself, in the differentiation of the euro countries from the other EMU members.”<sup>100</sup>

Menéndez argues that:

“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-

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<sup>94</sup> Calliess (2012a) at 117.

<sup>95</sup> Tuori & Tuori (2014) at 189.

<sup>96</sup> Calliess (2012a) at 115. Also at 116: “Every step that serves to ensure improved compliance with these guidelines does not transfer any new national sovereignty to the EU. It only secures sovereignty transferred in the interest of the objective of a ‘Stability Union’, as envisaged by the Maastricht Treaty.”

<sup>97</sup> See e.g. Chiti (E.) & Teixeira (2013) at 701: “(...) the erosion of national fiscal sovereignty (...)”; Fasone (2014a); Van de Gronden (2013) at 368: “Het is een vergissing om te veronderstellen dat de maatregelen die genomen zijn om het economisch bestuur van de EMU te versterken, slechts een nadere bevestiging zijn van de in het verleden gemaakte afspraken en daarom geen inperking van de soevereiniteit van de lidstaten zouden inhouden. Het tegendeel is eerder waar. Zowel materieel als institutioneel gezien worden de nationale bevoegdheden door de EU-maatregelen in het leven geroepen ter versterking van het economisch bestuur, ingeperkt.”

<sup>98</sup> Tuori & Tuori (2014) at 105. Also at 195: “Accordingly, the arguably most important repercussions that constitutional mutation at the European level has had with regard to Member State constitutions concern the budgetary autonomy of the parliament.”

<sup>99</sup> Diamant & Van Emmerik (2011).

<sup>100</sup> Chiti (E.) & Teixeira (2013) at 693.

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.”<sup>101</sup>

### Nature of Critical Legal Writings: Fit

“Lawyers—practitioners and academics alike—have all traditionally sought to remain on good terms with political power. When it comes to Articles 122–126 TFEU, our discipline can apparently not resist helping political and institutional actors by taking the letter of the law so lightly as to run afoul of it.”<sup>102</sup>

This statement by Joerges could be interpreted as a serious accusation of incapability to assess the *fit* of euro crisis instruments with important treaty articles. But is it true? Looking at the many contributions by legal scholarship I would say it is not.

It is true that there is a considerable number of authors that can be seen as permissive of the legal forms that the political, monetary, and judicial response to the eurozone crisis has taken. With regard to the political reaction of providing financial assistance, De Gregorio Merino for example argues that article 122(2) TFEU grants the Council a very wide margin of discretion to decide on assistance,<sup>103</sup> and that article 125(1) TFEU does not prohibit types of financial assistance, such as loans or credits where the beneficiary of the assistance is held to pay them back.<sup>104</sup> Athanassiou argues that both a literal, teleological and a contextual interpretation of article 125 leads to the conclusion that the prescribed ban was not intended as an absolute one.<sup>105</sup> Häde similarly argues that “Allerdings haben die Parteien des Vertrags von Maastricht das Haftungsverbot des heutigen Art. 125 AEUV schon von vornherein nicht ausnahmslos erlassen”<sup>106</sup> and that “Die Maßnahmen zur Unterstützung für Griechenland und im Rahmen des europäischen Stabilisierungsmechanismus sind als letzte Mittel zum Schutz der Euro-Währung und der Wirtschaft der Mitgliedstaaten zulässig.”<sup>107</sup> Smits argues that “The evolved interpretation of the no-bail out clause, which bars other Member States from assuming the debt of a fellow State but does not bar them from assisting the latter in repaying its own debts, is appropriate.”<sup>108</sup>

With regard to the specific form chosen for the political response, namely that of the intergovernmental Fiscal Compact and ESM treaties outside the EU legal framework, permissive voices can also be found. Calliess argues that “(...) the Member States are thus free to enter further international obligations, which go beyond economical and budgetary obligations based on EU law.”<sup>109</sup> Chiti & Teixeira argue that “From the legal point of view (...) the recourse to composite arrangements may be considered, in principle, a legitimate option.”<sup>110</sup> According to De Witte and Beukers “if Member States have preserved the competence to make domestic law in a given area, they can logically also exercise that competence together, by concluding an international agreement

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<sup>101</sup> Menéndez (2013) at 511.

<sup>102</sup> Joerges (2014) at 999-1000.

<sup>103</sup> De Gregorio Merino (2012) at 1634. Similarly, Louis (2010) at 983.

<sup>104</sup> De Gregorio Merino (2012) at 1627. Again, similarly, Louis (2010) at 985.

<sup>105</sup> Athanassiou (2011) at 561-563.

<sup>106</sup> Häde (2010) at 857.

<sup>107</sup> Häde (2010) at 866.

<sup>108</sup> Smits (2012) at 828.

<sup>109</sup> Calliess (2012a) at 105. Calliess does acknowledge that this freedom is not unlimited.

<sup>110</sup> Chiti (E.) & Texeira (2013) at 693.

between themselves. These agreements should not, however, contain institutional or substantive provisions that are incompatible with specific norms of EU law.”<sup>111</sup> Also on the unique combining of EU legal instruments and international treaties to facilitate financial assistance, Weber argues that:

*“Der Mix aus Handlungsformen der sog. Gemeinschaftsmethode, also des unmittelbar anwendbaren Gemeinschaftsrechts, einerseits wie des intergouvernementalen Handelns durch unionsvölkerrechtliche Verträge und Ratseinschließungen andererseits, ergibt ein komplexes rechtliches Bild, das im Sinne der dienenden Funktion des Rechts zur Bewältigung von Notsituationen vertretbar erscheint.”*<sup>112</sup>

With regard to the monetary reaction, Wilsher argues that “The ECB cannot seriously be accused of having broken any rule of law within the Maastricht Treaty through its reluctant and conditional actions during the crisis.”<sup>113</sup> Athanassiou has argued that “as a matter of law, the SMP is consistent with the rationale and objective of the monetary financing prohibition”.<sup>114</sup> According to Petch “there is currently no basis for challenging the legality of OMTs under EU law.”<sup>115</sup> Borger argues that “Although certainly unconventional in nature, the bond-buying activities of the ECB seem to stay within its monetary policy competences and not to violate the prohibition on monetary financing.”<sup>116</sup> Smits considers also the ECB’s collateral policy to be in line with its mandate: “In my reading of the law, the ECB certainly acts within the limits of the law when accepting bonds issued by ‘downgraded’ Member States.”<sup>117</sup>

With regard finally to the judicial reaction, De Witte & Beukers have argued “(a)ll in all, the Court has given, in *Pringle*, a well-reasoned judgment expressing a good mixture of legal principle and political pragmatism.”<sup>118</sup> Also on *Pringle*, Craig has argued that:

“It might be argued, as Beck does, that the CJEU crossed the line between legal argumentation and political decision. I do not accept this, even if one chooses to defend the result on the more overtly teleological ground. That approach remains defensibly legal for the reasons set out above, and this is so even though it is contestable. It might also be argued that courts should exclude consequentialist considerations when considering the legal ambit of Treaty provisions. I do not accept this either.”<sup>119</sup>

But critical authors as to fit can equally be found. With regard to the political response to the crisis, Ruffert has argued that “(f)rom the beginning, the Member States’ rescuing activity has been under close legal scrutiny by European legal scholars, and rightly so. There are good reasons to submit that this policy is in breach of important provisions of the TFEU.”<sup>120</sup> Palmstorfer has similarly argued that both the EFSF and the ESM emergency funds are in violation of the no-bailout clause of article 125 TFEU, to which he prefers to give a broad interpretation prohibiting all forms of financial assistance given by the European Union or through a Member State to another.<sup>121</sup> According to Sester.

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<sup>111</sup> De Witte (B.) & Beukers (2013) at 829.

<sup>112</sup> Weber (2013) at 387.

<sup>113</sup> Wilsher (2013) at 530.

<sup>114</sup> Athanassiou (2011) at 567.

<sup>115</sup> Petch (2013) at 19.

<sup>116</sup> Borger (2013a) at 33.

<sup>117</sup> Smits (2012) at 829.

<sup>118</sup> De Witte (B.) & Beukers (2013) at 848.

<sup>119</sup> Craig (2014a) at 219-220.

<sup>120</sup> Ruffert (2011b) at 1785.

<sup>121</sup> Palmstorfer (2012) at 779 and 784.

the ESM violates, at least, the spirit of article 125 TFEU.<sup>122</sup> Adamski argues that “It is dubious (...) if Article 122(2) TFEU could ever be a proper legal basis for the EFSM Regulation in the first place.”<sup>123</sup> Tomkins argues that:

“(...) the accumulation of contradictions with and circumventions of the Union legal order gives the impression that, taken as a whole, the legal framework governing the ESM avoids a number of prohibitions and obligations set out in law.”<sup>124</sup>

Palmstorfer has also questioned the legality of parts of the so-called six-pack of economic governance measures, arguing with regard to reversed qualified majority voting (RVM) that “the EP and the Council were not competent to introduce RMV. For these reasons, RMV as introduced by the ‘six pack’ is a measure that contravenes the legal framework of the Treaties.”<sup>125</sup> Equally critical of the six-pack is Ruffert:

“Some of the measures to achieve convergence and budgetary control are highly doubted in EU legal terms, though in a less spectacular way than those to react to financial emergency. Few scholars would argue that Article 121(4) TFEU covers the sanctions – fines or deposits – contained in parts of the reform package, in particular, if the provision is compared with the elaborate mechanism of sanctions in Article 126 TFEU. It is also extremely questionable to modify Treaty rules on voting procedures as do some of the regulations within the package.”<sup>126</sup>

The legality of the specific way in which international treaties have been concluded as part of the political eurozone crisis response has also been questioned. Craig is critical of the conferral on EU institutions of new functions by a Treaty such as the Fiscal Compact, arguing that it is contrary to the Lisbon Treaty for both procedural and substantive reasons.<sup>127</sup> Dimopoulos argues that:

“As the ESM and the Fiscal Compact introduce international law obligations in an area covered largely by EU law, it is at least questionable as to how these international agreements fit within the existing EU legal framework, and if they are in conformity with EU law.”<sup>128</sup>

With regard to the monetary policy reaction, the ECB has been criticised by Ruffert for the rather weak basis of its security markets programme (SMP).<sup>129</sup> Tuori & Tuori are also critical of the ECB’s sovereign bond purchases.<sup>130</sup>

With regard to the main European judicial reaction, that of the ECJ in *Pringle*, Beck argues that

“(...) the Court exploits, to the maximum extent, the vagueness and norm uncertainty in its general approach to legal reasoning, and probably to a point where legal reasoning no longer imposes any constraints on judicial making.”<sup>131</sup>

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<sup>122</sup> Sester (2012) at 175.

<sup>123</sup> Adamski (2012) at 1329.

<sup>124</sup> Tomkin (2013) at 187.

<sup>125</sup> Palmstorfer (2014) at 203.

<sup>126</sup> Ruffert (2011b) at 1800-1801.

<sup>127</sup> Craig (2012) at 238-241.

<sup>128</sup> Dimopoulos (2014) at 43. His article however focuses more on the limited effectiveness he expects from these treaties: “(...) any positive contribution the ESM and Fiscal Compact Treaties may have to the efficiency of economic governance is mitigated by their institutional deficiencies.” (p. 62).

<sup>129</sup> Ruffert (2011b) at 1787.

<sup>130</sup> Tuori & Tuori (2014) at 165-168.

<sup>131</sup> Beck (2013) at 635. See also Beck (2014) where he argues that the Court “fuses together, at times implausibly, literal, meta-teleological and contextual arguments to construct a justification for the legality of the ESM that sits uneasily with

In sum, the compatibility of the ESM with article 125 TFEU, of the ECB's action with its mandate and the monetary policy prohibition of article 123 TFEU, of the conclusion of intergovernmental treaties in general with Union competences, and of the six-pack with the Union competences in article 121 and 126 TFEU have all been questioned by legal scholars. In other words, the 'fit' of the European political, monetary and judicial response to the eurozone crisis with EU law has been scrutinised. If anything has been taken lightly by European legal scholarship in their analysis of EU law, it may be the spirit of the law, not so much its letter.

### **Nature of Critical Legal Writings: Principle**

“In this sense, all these challenges, difficulties or even insurmountable obstacles notwithstanding, as an academic discipline European Union law cannot remain silent or reluctant but must actively participate in the assessment of the current crisis and in evaluating the instruments proposed and enacted to overcome it.”<sup>132</sup>

Many of the characteristics identified by legal scholarship on the eurozone crisis at the same time have been considered problematic: the use of intergovernmental treaties, the use of the Union or intergovernmental method as opposed to the Community method, the use of a regulatory system at EU level for decision making with redistributive effects, executive dominance and the undermining the (budgetary) powers of national parliaments. These elements are perceived as at tension with fundamental principles, including democracy, unity, solidarity, and social values.

### ***Democracy***

There seems to be general agreement among legal scholars as to the many democratic problems associated with the response to the eurozone crisis. On the solutions proposed, however, there is quite some divergence.

Several authors are preoccupied with the implications of executive dominance for democracy. Tuori & Tuori argue that:

“First, executive participation in European policy-making should be subjected to constant supervision by national parliaments and civil societies. And second (...) should contribute to rather than destroy the socio-cultural prerequisites for European democracy. Arguably, the new intergovernmentalism meets neither of these preconditions.”<sup>133</sup>

Chiti & Teixeira similarly note that:

“(...) the increasing involvement of the EU executive power in fiscal matters takes place mainly through quasi-automatic procedures, so that the erosion of national fiscal sovereignty is not accompanied by the emergence of a genuine political action at the EU level. In the transfer from the national to the EU level, in other terms, fiscal matters have been depoliticized and insulated from the realm of politics. (...) without being on their turn based on clear new mechanisms of democratic legitimation.”<sup>134</sup>

(Contd.) \_\_\_\_\_

the "no bail-out" principle of the TFEU and the ESM Treaty itself, and the text of almost all the relevant Treaty provisions on economic and monetary union.”

<sup>132</sup> Ruffert (2011b) at 1805.

<sup>133</sup> Tuori & Tuori (2014) at 218.

<sup>134</sup> Chiti (E.) & Teixeira (2013) at 701.

According to Menéndez:

“(…) very significant new powers have been transferred to the supranational level of government; (….) 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. (….) 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.”<sup>135</sup>

Dawson & De Witte state that:

“The loss of the citizens’ voice is not only reflected in the diminishing capacity of the EP and national parliaments, but also in the increasing tendency in EU policy towards informalisation. Such informalisation may not only lead to executive dominance, but inhibit individual and political self-determination by excluding the degree of transparency and consultation necessary for the genuine involvement of citizens in EU decision-making to take place.”<sup>136</sup>

Some authors criticise in particular the anti-democratic nature of the ESM Treaty. According to Ruffert:

“Consequently, the establishment of democratically doubtful institutional arrangements should ignite the warning lights. As may be shown, parliamentary control and political accountability towards the European Parliament is non-existent in the ESM, and it is substantially diminished with respect to national parliaments as in all similar institutional structures at the international level. Usually, such limitation of parliamentary influence, debate and participation is justified by a high measure of expertise and objectivity, institutionally anchored, above all, in the Commission, but in the given context also in the ECB or – in other instances – in agencies. In terms of theory and practice of democracy, such compensation may already be considered as doubtful, but what is scarcely acceptable is the replacement – in a field of exclusive EU competence! – of parliamentary decision and independent expertise by the opaque processes of Council or even Heads of State or Government negotiations.”<sup>137</sup>

Much less convergence exists on the solutions to the democratic challenges of the Union. While Habermas proposes a transnational democracy as the solution to the democratic problems of the current Union,<sup>138</sup> Scicluna instead argues that “democracy is still best preserved by sovereign States within more limited EU.”<sup>139</sup> And whereas Weiler argues that “at what will be a decisive moment in the evolution of the European construct, the importance, even primacy of the national communities as the deepest source of legitimacy of the integration project will be affirmed yet again,”<sup>140</sup> Maduro cautions against such a position, arguing that “a model that would make EU democracy wholly or fundamentally dependent on national democracies is destined to fail.”<sup>141</sup>

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<sup>135</sup> Menéndez (2013) at 511.

<sup>136</sup> Dawson & De Witte (F.) (2013) at 834.

<sup>137</sup> Ruffert (2011b) at 1790. See also Tomkins (2013) at 180: “Third, the establishment and operation of an important institution outside the constitutional framework of the Union and beyond the reach of its citizens (and the rights they are guaranteed under the Charter) is inconsistent with the principle of democratic governance. Each of these arguments will be considered in turn.”

<sup>138</sup> Habermas (2012).

<sup>139</sup> Scicluna (2012) at 501.

<sup>140</sup> Weiler (2012) at 837.

<sup>141</sup> Pórigues Maduro (2012a) at 14.

## **Unity**

Several authors see the response to the eurozone crisis as a threat to the principle of unity of the Union. Tuori & Tuori argue that “Pringle confirmed intergovernmental agreements as the third option, alongside enhanced cooperation and use of Art. 136, which is available for establishing a particular Eurozone regime and retreating further from the principle of unity of the Union.”<sup>142</sup> Chiti & Teixeira warn that “Pointing to the autonomization of the EMU is of particular importance because this process may have the effect of weakening the legal and institutional unity of the EU.”<sup>143</sup> According to Menéndez:

“The codification of a legally differentiated treatment of Member States (different sets of rights and obligations are emerging for Eurozone states and non-Eurozone states, and for creditor/surplus states and debtor/deficit states) represents a major challenge to the principle of equality between Member States (and not so indirectly, of citizens). The second reason why we should bother concerns the depth of the changes. (...) After rather abstract talk about differentiated integration in the last two decades, we woke up, and inequality among Member States started to be legally codified (...)”<sup>144</sup>

## **Solidarity**

Authors disagree on the meaning of the principle of solidarity binding the Union. Several authors stress its place as an exception in Union law. Ruffert argues that:

“There is no doubt about the character of solidarity as a principle of the EU, and it is submitted that it has a clear position within the economic field. Solidarity is achieved via a cohesion policy and structural funds, via regional projects and within the Common Agricultural Policy. In these areas, the Transfer Union already exists, and it should operate for the mutual benefit of receiving countries and paying countries alike – the latter in support of their exporting industries. There is, however, no legal basis for further capital transfers, and in the EMU the express provision of Article 122(2) TFEU does not only reflect the principle of solidarity but also brings it into concrete shape in cases of distress of national economies. The provision clearly describes the scope of Member States’ solidarity, and it is necessary that the institutions explicitly rely on it when formulating a rescue package. What is more, the motives for the creation of the rescue packages are by no means related to solidarity alone, considering the effects on the banking sector.”<sup>145</sup>

Potacs also sees a limited scope of a possible Union solidarity obligation, arguing that if such obligation is to be found among Member States in article 3 EU Treaty, then it can be interpreted only as an obligation to show budgetary discipline.<sup>146</sup>

Pottakis, however, sees a much more prominent place for a legal solidarity principle in the Union:

“(...) that fundamental principles underpinning the EU construction seem to be blatantly undermined, if not directly threatened: solidarity, which, since the Treaty of Lisbon, has been upgraded from a

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<sup>142</sup> Tuori & Tuori (2014) at 194.

<sup>143</sup> Chiti (E.) & Teixeira (2013) at 695. At 696: “The process of autonomization of the EMU, and of the eurozone within the EMU, presents a number of challenges to this unitary construction.”

<sup>144</sup> Menéndez (2013) at 127.

<sup>145</sup> Ruffert (2011b) at 1792.

<sup>146</sup> Potacs (2013) at 140: „Damit stellt sich freilich die Frage, welche Bedeutung das allgemeine Bekenntnis zur Förderung der „Solidarität zwischen den Mitgliedstaaten“ in Art. 3 Abs. 3 EUV haben könnte. Die Antwort darauf kann nur lauten: Es kann in Anbetracht des dargelegten Gewichtes des Prinzips der Staatlichen Eigenverantwortung nur in der strikten Durchsetzung der Haushaltsdisziplin durch die Mitgliedstaaten bestehen.“

notion underpinning the political philosophy of the European project to a binding principle of increased, constitutional value and weight, is being applied in ways that hardly fit to even its most unconventional interpretation.”<sup>147</sup>

Interestingly, Calliess sees a role for the solidarity principle justifying assistance measures and interpreting article 125 TFEU, and considers the solidarity principle to also be based in the loyalty principle.<sup>148</sup> Potacs, however, clearly disagrees:

*“Hingegen ist weder aus der Formulierung noch aus dem Zweck von Art. 4 Abs. 3 EUV abzuleiten, dass diese Vorschrift unionsrechtliche Gebote einschränken soll. Aus diesem Grund lässt sich mit dieser Bestimmung auch nur schwer ein allgemeines unionsrechtliches Solidaritätsprinzip begründen, das die in den Art. 123 ff. AEUV klar gebotene staatliche Eigenverantwortlichkeit relativieren könnte.”*<sup>149</sup>

### **Social values**

Criticism takes place at two levels here. Several authors criticise the constitutionalisation of a specific policy, that of austerity or of conditionality. At the same time authors criticise the imbalance between the Union’s economic constitution and its social constitution. Dawson & De Witte argue that:

“Despite the economic reasoning behind austerity policies, the legal entrenchment of such policies is neither the result of inter-personal political exchanges between different visions of ‘the good’, or a process of open political contestation that could legitimise it, nor an attempt to set up mechanisms for future normative reassessment. This is, rather, the constitutionalisation of raw political power and temporary policy preferences.”<sup>150</sup>

Costamagna argues that:

“(…) recipes have paid little attention to the effects that these reforms may have on fundamental social objectives that lie at the core of the EU social dimension. Such a one-sided approach touches upon one of the essential prerequisites for the legitimacy of the whole integration process, as it fails to strike a proper balance between the pursuit of economic objectives and the safeguard of the European social dimension.”<sup>151</sup>

Schiek derives a constitution of social governance from the EU’s values and proposes that the Court of Justice develops its case law into an instrument for challenging the dominance of the EU’s economic governance constitution.<sup>152</sup> Tuori & Tuori capture both levels of criticism in their statement that:

“(…) market-liberal economic reason has conspicuously overruled the European social constitution. With the constitutionalisation of strict conditionality and its interpretation in a market-liberal spirit, the social constitution once more proved to be the loser, now in relation to the macroeconomic constitution.”

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<sup>147</sup> Pottakis (2011) at 181.

<sup>148</sup> Calliess (2011).

<sup>149</sup> Potacs (2013) at 140.

<sup>150</sup> Dawson & De Witte (F.) (2013) at 826.

<sup>151</sup> Costamagna (2014) at 377.

<sup>152</sup> Schiek (2013).

## **Final Remarks**

Clearly there is an extensive body of legal scholarship literature on the eurozone crisis. Early writings that have functioned as point of a reference for many later works are Louis (2010), Calliess (2011) and Ruffert (2011b). It seems to be impossible to find anyone in praise of the legal creativity part of the political, monetary and judicial response to the eurozone crisis. Instead, legal scholars have criticised – sometimes heavily<sup>153</sup> – this response from different angles, albeit more on the basis of principle than of fit. In its critical discussion of the response to the eurozone crisis, legal scholarship seems to engage more with political theory than with economic theory.<sup>154</sup>

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<sup>153</sup> Dawson & De Witte (F.) (2013), Joerges (2013), Menéndez (2014).

<sup>154</sup> A notable exception is Tuori & Tuori (2014).

## **Annex 1**

*Includes a collection of (articles from) books*

*Includes the following English language journals (all from 2009-September 2014):*

- Cambridge Law Journal
- Common Market Law Review
- European Constitutional Law Review
- European Law Journal
- European Law Review
- European Public Law
- German Law Journal
- Legal Issues of Economic Integration
- Maastricht Journal of European and Comparative Law
- Modern Law Review
- Oxford Journal of Legal Studies

*Includes the following German language journals (from 2009- September 2014 unless otherwise stated):*

- Europäische Zeitschrift für Wirtschaftsrecht (from 2014-September 2014)
- Europarecht
- Neue Juristische Wochenschrift (from 2013-September 2014)
- Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht
- Zeitschrift für Europarechtliche Studien (from 2009-2010)

*Includes the following French language journals (from 2009-September 2014):*

- Revue trimestrielle de droit européen

*Includes the following Italian language journals:*

- Diritto Pubblico (from 2009-August 2013)
- Il diritto dell'Unione europea (selected articles)
- Quaderni costituzionali (from 2009-September 2014)
- Rivista Italiana di Diritto Pubblico Comunitario (from 2009-July 2014)

*Includes the following Dutch language journals (from 2009-July 2014):*

- Nederlands Juristenblad
- SEW Tijdschrift voor Europees en economisch recht

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