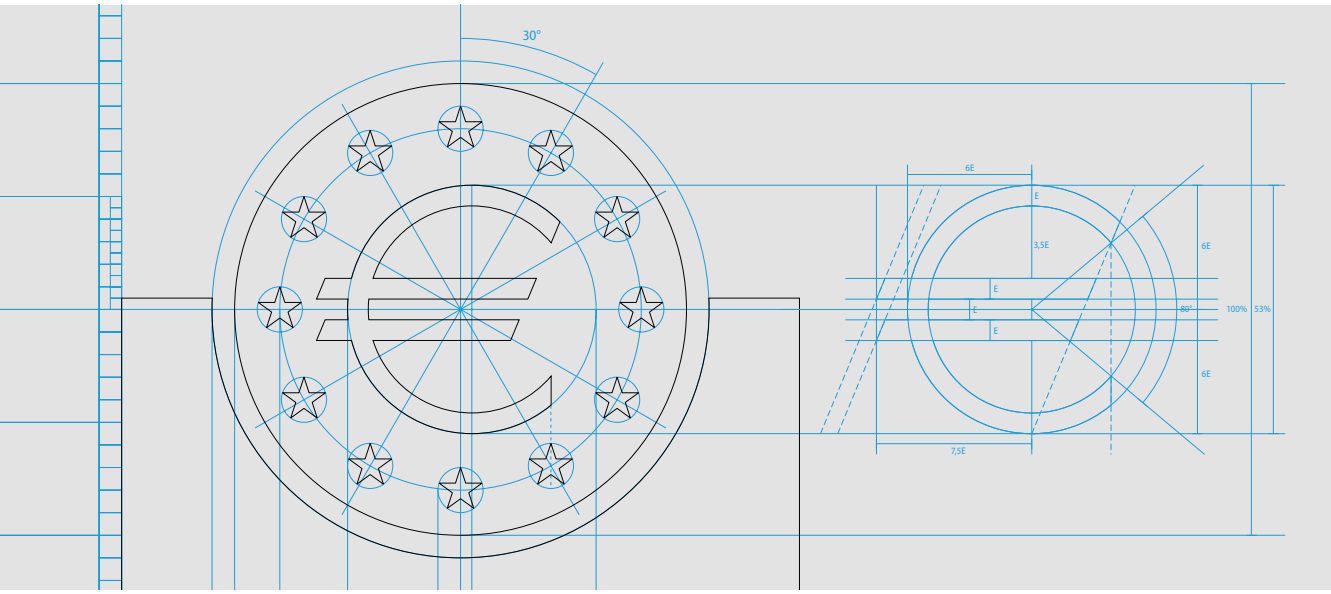
EUROPEAN CENTRAL BANK

EUROSYSTEM

Continuity and change – how the challenges of today prepare the ground for tomorrow

ECB Legal Conference 2021



Postal address 60640 Frankfurt am Main, Germany
Telephone +49 69 1344 0
Website www.ecb.europa.eu

Luxembourg: Publications Office of the European Union, 2022

PDF	ISBN 978-92-899-4990-3	ISSN 2467-0057	doi:10.2866/255752	QB-BX-22-001-EN-N
Print	ISBN 978-92-899-4989-7	ISSN 2467-0049	doi:10.2866/04525	QB-BX-22-001-EN-C

Contents

PART II

Deconstitutionalising the Economic and Monetary Union

By Marco Dani*

1 Introduction

Can European Union (EU) economic norms be reconciled with the democratic and social constitutional state (DSCS)? The very fact that the issue of alignment between the EU and national constitutional orders is raised is somehow revealing. First, it reveals the existence of doubts as to whether that alignment can be really taken for granted or attained, as assumed by large part of European constitutional scholarship. Second, it also reveals that at least a certain degree of alignment of EU economic norms with the DSCS is perceived as necessary and even desirable to secure the legitimacy and, as a reflection, the stability of European economic governance.

This paper explores the issue of alignment in the light of the dialectic relationship between openness and purposiveness. It argues that an inverse correlation can be identified between those two rival claims and, on that basis, it puts forward two distinct types of constitutional orders: prevailingly open constitutions and prevailingly purposive constitutions (Section 2). Against this theoretical background, the paper notes that, from their post-war foundation to the Maastricht Treaty, both national constitutional orders, in the form of DSCS, and the European Economic Communities have privileged openness over purposiveness (Section 3). The DSCSs relied on prevailingly open constitutional frameworks as a means of institutionalising the social question and the conflicts existing between the political forces involved in the new constitutional beginning. Accordingly, the pursuit of the bold transformative goals enshrined in national constitutional documents was viewed as an essentially political undertaking exposed to and not shielded from political conflict. Emblematical of this approach was the DSCS's commitment to activist government, which, depending on actual political preferences, was amenable both to Keynesian and ordoliberal legislative renderings.

Up to the entry into force of the Treaty of Maastricht, the legal framework of the European Economic Community also favoured openness over purposiveness. Designed to accommodate the tension between advocates of a multilateral framework enabling activist government and supporters of a laissez-faire international economic order, the founding Treaties provided a set of market principles amenable to remarkably different readings. While for a long period of time European institutions relied on interpretive and

* Marco Dani is Associate Professor of Comparative Public Law at the Faculty of Law, University of Trento.

regulatory solutions reconciling market integration and activist national policies, since the end of the 1970s economic integration started to deviate from the DSCS. The latter development gained foothold throughout the 1980s, when market principles and Community policies were increasingly used as devices constraining and even subverting national activist policies.

This course of political economy was consolidated with the institution of the Economic and Monetary Union (EMU) by the Maastricht Treaty. As neoliberal principles and institutional arrangements were entrenched as a matter of constitutional law, the pursuit of alternative courses of political economy became exceedingly difficult for all EU Member States (Section 4). Since then, however, the EU has held unflinchingly to this neoliberal agenda and, if possible, has, throughout the economic and financial crisis that started in 2008, strengthened its commitment thereto. While the policy outcomes of this strategy are questionable at the least, its constitutional shortcomings are evident. First, by committing in the Treaties to a specific set of economic rules coherent with a particular political economy agenda the EU has encountered serious difficulties in using alternative policy tools when forced to by unexpected economic and political circumstances. Those policies were ultimately put in place by stretching the interpretation of key Treaty norms, but their actual viability rests on precarious legal grounds. Second, the same set of constitutional rules have de facto disenfranchised alternative courses of political economy, with the result of antagonising their followers who increasingly regard the EMU, and, as a reflection, the EU, as a toxic project to be overthrown.

Against this background, the paper concludes by contending that if the EU is keen on realigning with the DSCS, it should return to operating as a prevailingly open institutional framework (Section 5). This would entail redressing its neoliberal bias and reviving its original vocation of enabling national activist government within a context of intensive economic and political interdependence. In order to advance in that direction, the *deconstitutionalisation* of the EMU arises as one of the most pressing issues. As the EU tries to recover from the COVID-19 pandemic and the ensuing economic crisis with a series of policy measures gesturing towards a realignment with the DSCS, the idea of a major treaty amendment in the direction of reopening EU policymaking to political competition appears increasingly compelling. In this perspective, the EU Treaties and, in particular, the EMU legal framework should be pruned of all policy prescriptions, leaving to its political institutions and democratic competition the task of determining the purposes of its policies.

2 Modern constitutions: open and/or purposive?

Modern constitutions are normative documents aimed at the regulation of ordinary lawmaking, state-society relationships and, in certain cases, also the relationships between private legal and natural persons. Their

regulatory capacity may be viewed as a function of two variables[811]: the formal status of constitutional norms and their substantive content.[812] The formal status of constitutional norms refers to their quality of being higher order laws and, therefore, it results from their level of entrenchment and the institutional arrangements predisposed to secure their legally binding character. Once a certain degree of rigidity is accorded and, as a reflection, a clear hierarchy between constitutional and ordinary law is established, the regulatory capacity of constitutions depends on their substantive content, namely on the level of determinacy of their norms and the corresponding degree of political freedom or discretion the authorities entrusted with their implementation and interpretation are recognised as having.[813]

In this regard, two distinct ideal types of constitutions may be identified. Purposive constitutions include detailed substantive norms embodying a particular political, economic or religious doctrine assumed as uncontested truth.[814] Similar constitutional orders presuppose a high degree of political homogeneity, promoted by a predominant constituent subject or resulting from a broad convergence of ideas among the governed individuals. They offer the vision of a perfect and reconciled society and, on that basis, they mobilise the political unity of the state for the realisation of the corresponding regulatory project. As thick systems of high order law, purposive constitutions exert a remarkable shaping capacity in relation to all legitimate political activity. This may reveal itself as a desirable feature, in particular for those constitutional orders in need of profound purification from the residues of previous constitutional experiences.[815] But this stark regulatory capacity may also turn out to be a liability. Owing to their determinacy, purposive constitutions are scarcely adaptable to changing social and political circumstances. Of course, even detailed norms may be subject to different readings, but if the answer to an emerging social problem lies outside their narrow interpretive scope, the only solutions are formal or informal constitutional amendments[816] or the temporary suspension of constitutional norms. Moreover, in terms of political pluralism purposive constitutions may be found wanting. A constitutional order elevating a particular worldview to the status of dogma creates a regime in which politics is reduced to the managerial execution of constitutional programmes, whilst alternative courses of political action are discredited as heresies to be marginalised or destroyed.[817]

A more accommodating approach to political pluralism is visible in open constitutions: constitutional documents that include open-textured substantive norms embodying a conflictual consensus among people of

---

811 The capacity of a constitution to shape legal and political reality also presupposes its effectiveness. If political, economic or social conditions prevent its application, the constitution is nominal, see Grimm (2012), p. 107.
812 For a similar discussion, see de Witte (2009), p. 36.
813 Loughlin (2018), p. 922.
814 Grimm (2012), pp. 110-113.
815 Somek (2014), pp. 97-100.
816 Hesse (2014), p. 79; Ackerman (2007), pp. 1737-1812.
817 Burdeau (1964), p. 143.

fundamentally differing views.[818] Here, constitutional frameworks presuppose and accept a higher degree of pluralism, reflecting the existence of conflicting political, social and cultural groups. Absent the possibility to impose or agree on a single overriding constitutional project, open constitutions offer a framework for politics, not the blueprint for all political decisions.[819] Their defining features are procedures favouring the mediation of conflicts and substantive commitments marked by a considerable degree of ambiguity.[820] As a consequence, the state of irresolution of the latter invites continuous constitutional reinterpretation and a broad range of political renderings visible at policy level. Clearly, in similar constitutional frameworks, policy directions are more easily reversible and constitutional norms can adapt to evolving political and social developments, so much so that only in extreme circumstances is their amendment really necessary. At the same time, open constitutions emerge as thin systems of high order law exerting a limited regulatory capacity, which, in the absence of solid constitutional allegiances on the part of political actors, may struggle to secure their authority and risk being overwhelmed by endemic conflict.[821]

However, in the real world constitution makers are not faced with a blunt choice between openness or purposiveness. This is not only because a certain degree of interpretive discretion or purposiveness inheres in every constitutional norm. But, most importantly, because, in designing actual constitutional settings, constitution makers tend to combine purposive and open elements in an attempt to strike a difficult balance between transformation and inclusiveness. Indeed, in those efforts they have to come to terms with the inverse correlation existing between those claims: the starker the purpose of a constitutional order, the weaker its inclusive potential; the wider the semantic scope of its norms, the looser its transformative capacity.

If this is the real dilemma in constitutional design, it may make sense to develop more accurate modelling that incorporates awareness of the hybridisation of ideal types. So, we can surmise that there are constitutions that are prevailingly purposive. Therein constitutional norms define a blueprint for politics but, in doing so, they also acknowledge a limited degree of operational discretion for policymakers or a certain level of flexibility for adjudicators. Accordingly, policymakers are allowed to opt for their favourite means to pursue the predefined constitutional objectives, while adjudicators can decide whether and how to fine-tune the rigour of enforcement. Only up to those limits may purposive constitutions be loosened to expand the scope for pluralism and increase the adaptability of their norms. But if even these devices reveal themselves to be insufficient in coping with evolving factual circumstances or with the claims of emerging political forces, constitutional amendments or the temporary

---

818 See *Lochner* v. *New York*, 198 U.S. 45 (1905), dissenting opinion of Oliver Wendell Holmes. See also Zagrebelsky (2008), pp. 131-157.
819 Grimm (2015), p. 464.
820 Loughlin (2018), pp. 925-930.
821 Hesse (2014), p. 66.

suspension of constitutional norms remain necessary to adjust the transformative commitments and secure their authority.

Similarly, constitutions that are prevailingly open can also be imagined. Therein constitutional norms establish an open framework for politics through a mix of procedural norms and irresolute substantive commitments. Yet, the openness of constitutional frameworks is not indiscriminate. There are issues on which the constitution expresses more definite choices with a view to increase their stability and subtract them from permanent political negotiation. There are other issues in respect of which constitutional norms may emphasise certain goals in order to provide general direction to policymaking. In both circumstances the regulatory capacity of the open constitution may be strengthened, but not to the point of replacing politics with constitutional decisions. Indeed, if constitutional norms systematically prioritise the aspirations and interests of a particular constituent subject, the open nature of the constitutional order is fatally compromised.[822]

3 The age of openness

3.1 The post-war European democratic and social constitutional state

The image of the prevailingly open constitution is reflected in the structure of the DSCS, the constitutional order predominant in Europe in the aftermath of the Second World War. The constitutions approved in this period were documents symbolising a new beginning, but they were also one of several tools employed to restore political consensus on state governing structures and foster social integration. This was particularly evident in countries such as France, Italy and Germany, where the newly enacted constitutions reflected a drastic realignment of political parties, with the dominant forces – Christian Democracy and the parties of the Left – assuming the role of predominant constitutional subjects.

Aware of their profoundly different aspirations, interests and policy agendas, those political parties learned quickly that constitutional politics was no longer the terrain for political struggles aimed at imposing a particular political agenda. Constitutions ceased to be instruments of government of the predominant social classes and turned into pacts stating the basic terms for their peaceful coexistence.[823] To write this type of constitution, ordinary political disagreements had to be bracketed and efforts were directed towards choices of constitutional design commanding broad support in the political system and in the country at large. This ethos of mutual recognition and compromise shaped post-war constitutional politics: constituent subjects strove to agree, if not on a fundamental ideology, then at least on a set of substantive commitments and institutions

[822] Mortati (1962), p. 185.
[823] Zagrebelsky (2008), pp. 133-135.

contributing to social cohesion and enabling democratic political competition.[824]

Constitutional politics played out in a consensual mode by political parties harbouring conflicting political aspirations resulted in prevailingly open constitutions.[825] Their openness was visible in their aspiration to govern the social question through democratic means.[826] This capacity to legitimate and contain conflicts, and to transform them from factors of disintegration into potential civic resources was created first of all by agreeing on a set of procedures and institutions establishing a relatively even-handed institutional framework for the acting out of political and socio-economic conflicts.

The emerging constitutional culture, however, was by no means satisfied with a shared procedural framework enabling political competition. Open constitutions were not neutral constitutions, that is, they could not admit whatever political development resulting from majority rule. Meaningful democratic competition presupposed respect for a set of requirements concerning the emancipation of persons and their equal participation in collective goods. Thus, to establish their authority, it was also regarded as necessary for a range of substantive normative commitments to be included within constitutions.[827] The constitutions, therefore, also expressed a set of purposive fundamental norms penetrating all the social relations situated within the state domain[828] and exerting their effects primarily through the activity of legislatures and constitutional adjudicators.[829] However, their transformative aspirations were not superimposed on society; on the contrary, their pursuit was viewed as an eminently political undertaking, attainable through democratic competition and legislative deliberation. In other words, the transformative goals of the DSCS were exposed to and not shielded from political conflict.

If no one could elevate their particular convictions and policy solutions to the status of dogma, in principle all political opinions deserved to have access to the constitutional arena and be treated with equal respect.[830] Besides inspiring the design of political institutions, this concept was promptly acknowledged in the interpretation of constitutional texts. In 1954, for instance, the German Federal Constitutional Court was adamant in declaring that the Basic Law did not establish a particular economic system, but laid down only a more open framework of core protections and principles.[831] Likewise, the Italian Constitutional Court refrained from constraining legislative activity on the basis of the more or less biased reconstruction of the economic constitutional order resulting from unilateral

---

824 Grimm (2012), p. 144.
825 Onida (1997), pp. 97-98.
826 Bin (2007), p. 11.
827 Emphasis on the substantive dimension of the constitution is evident, see for instance the *Elfes* case (1957), 6 BVerfGE 32.
828 D'Albergo (1991), p. 220; Dossetti (2014), pp. 45-46.
829 Fioravanti (2014), p. 295.
830 Burdeau (1964), p. 126.
831 See the *Investment Aid* case (1954), 4 BVerfGE 7.

interpretations of constitutional principles.[832] National constitutions did not subscribe to any exclusive and predefined economic theory and remained open to alternative legislative renderings of their constitutional commitments. To be sure, the most extreme versions of collectivism and laissez-faire were discarded but, besides that, broad room was left to political freedom and a great deal of discretion was accorded to legislatures in the actual use of a wide range of policy instruments. The open constitution was amenable to a variety of economic material orders.[833]

The wide scope for policymaking available in the DSCS can be appreciated by looking at the material economic orders developed during "Les Trente Glorieuses".[834] Following the United States' lead, in many European countries the promotion of employment and the modernisation of the economy became the focal point of all political economy, even at the cost of potentially negative repercussions on price stability.[835] Keynesian economics emerged as the favourite course of political economy, particularly in the countries more exposed to the risk of a communist ascent, or as a moderate alternative to planning.[836] To influence overall levels of economic growth and employment governments were in charge of the countercyclical management of aggregate demand. Accordingly, in times of economic recession, they were expected to boost aggregate demand through increases in public expenditure or lowered taxation, even at the cost of incurring budget deficits and inflation. In the event of aggregate demand exceeding supply, governments were expected to run a budget surplus and adopt a restrictive monetary policy.[837]

Within a similar framework, monetary policy was viewed as contributing to this comprehensive macroeconomic effort.[838] In this perspective, central banks could be endowed with a certain degree of operational autonomy, but their activity was expected to complement the economic policy devised by democratic institutions. As a result, fiscal policy concerns came to dominate monetary policy. Once abhorred as a symptom of an undisciplined economic policy, money creation under the instructions of national government and the last resort purchase of public bonds with a view to controlling their price and constrain financial speculation became common practices for central banks.[839]

This notion of monetary policy had clear institutional implications. If monetary policy were to contribute to general economic policy, it could not remain disconnected from fiscal policy and insulated from the ordinary democratic circuit. It is therefore not surprising that the era of the DSCS opens almost everywhere with the approval or the completion of the

---

832 See judgment n. 14/1964.
833 Saitto (2018), pp. 132-133.
834 Fourastié (1979).
835 Rosanvallon (1989), pp. 183-193.
836 See Weir (1989), pp. 74-81; De Cecco (1989), pp. 219-220.
837 Hall (1989), pp. 6-7.
838 Chessa (2016), p. 277.
839 ibid., pp. 256-262.

nationalisation of central banks.[840] Interestingly, the newly adopted constitutions omitted almost entirely to discipline the monetary system and central banks, a decision that facilitated the subordination of the latter to national democratic institutions. Widespread was therefore the choice to regulate central banks through legislation, thus leaving to governments the responsibility for the formulation of the monetary policy vis-à-vis parliaments. In these statutes monetary objectives were no longer defined with an exclusive view to price stability as central banks' mandates were extended to cover a broader range of goals.[841]

Not in all European countries were Keynesianism and the idea that money creation could depart from the rule of rigid convertibility into gold perceived as coherent with the ongoing effort of the DSCS to transform the structures of European states in a more democratic and social direction. Even among the ranks of those committed to social justice and attracted by activist government, the idea of financing public budgets through monetary emissions was frowned upon. Particularly in Germany the ordoliberal notion that the central bank should be entrusted with a narrow mandate centred on price stability and a broad degree of operational independence remained dominant[842], to the extent of justifying a derogation from the otherwise unflinching commitment of the Basic Law to ministerial accountability and representative democracy.[843]

Keynesian ideas were therefore pre-empted by another set of policies oriented toward the supply side and social market economy. This set of policies found ideological legitimation in ordoliberalism, with its commitment to the primacy of monetary policy guaranteed by a strong and independent central bank, an open international economy to favour exports, limited state intervention and increased market competition.[844] As noted above, a similar economic model was not entrenched at a constitutional level. Indeed, the Basic Law did not conceive the federal budget as a tool for the stabilisation of the economy, but neither did it impose the obligation to run balanced budgets.[845] Within the same constitutional framework, ordoliberal policies could therefore be challenged, as witnessed by the rise of Keynesianism at the end of the 1960s. The reforms of the *Finanzverfassung* opened the door to countercyclical management of demand and, therefore, to an economic order based on price stability, economic growth, full employment and macroeconomic equilibrium. In this context, public debt was accepted as an ordinary instrument for financing public investments.[846]

These forays into Keynesianism were brief and qualified due to the close surveillance and influence exerted by the Deutsche Bundesbank.[847] Even in this regard West Germany could appear as a prominent outlier. Since its

---

840 Amtenbrink (1999), pp. 64-65 and 104-105.
841 ibid., p. 192.
842 Chessa (2016), pp. 278-294.
843 Amtenbrink (1999), pp. 217-219.
844 Allen (1989), p. 281.
845 Saitto (2016), pp. 161-164.
846 ibid.
847 Allen (1989), pp. 277-278.

establishment in 1957, the Deutsche Bundesbank had been designed as independent. Although the Basic Law expressly provided for a federal central bank, its independence from government instructions had been set out at legislative level, a choice that did not entirely exclude parliamentary control, but fixed it on a long-term perspective as the frustration of expectations could lead to legislative backlash by the parliament.[848] The monetary target was defined with a prevailing view to price stability, although in a number of circumstances other economic objectives justified deviations.[849] Within a similar legal framework, however, monetary policy was consistently conceived as a means by which to encourage investment and an export-led growth, while the possibility to finance government expenditure was strictly constrained, also in circumstances in which the goal of economic reconstruction could have justified expansive monetary measures.[850] On the whole, however, the standing of the Deutsche Bundesbank benefited from similar legislative decisions, contributing to its affirmation in the constitutional system as an independent fourth branch of government.

3.2 The ambivalent European Economic Communities

Openness was also the prevailing trait of the original institutional framework of the European Economic Communities. As in the DSCS, this feature reflected divergences among the political forces sustaining the European integration project. Here, reference is made not so much to the tensions between the supporters of a pan-European political community and the proponents of a more modest intergovernmental form of cooperation. Far more crucial was in fact the divide between the forces willing to reaffirm at supranational level the commitments inspiring the DSCS and those aiming at their rebuttal.[851] Indeed, following a trend initiated in the late New Deal[852], Christian Democrats and Social Democrats conceived of supranational agencies as key components of a new world order enabling their commitment to activist government. At the same time, Conservatives and Liberals imagined the multilateral framework in the making as a suitable vehicle to reinstate the principles of the laissez-faire economic order defeated at national level.[853]

Against a similar background, the ambivalence of the European Economic Communities should not come as a surprise. Although the making of a Common Market expressed a certain purposive orientation, it was not clear whether the goal of the founding Treaties was simply to counter the autarchic tendencies of the nation state or to rescue the economic freedoms and property rights from their downgrade under the DSCS. The founding Treaties established a peculiar form of economic integration

[848] Amtenbrink (1999), p. 219.
[849] ibid., pp. 195-196.
[850] Holtfrerich (1988), p. 122.
[851] Menéndez (2013), pp. 472-473.
[852] Burley (1993).
[853] Hayek (1949), pp. 255-273.

based on the free movement of productive factors, the harmonisation of competitive conditions and the coordination of macroeconomic policies. Free movement was pursued through a set of regulatory principles and specific legal bases. The former included both prohibitions of discrimination based on nationality and the commitment to remove hindrances to market access. The latter foreshadowed a process of gradual liberalisation to be attained by Community institutions through the approval of measures of secondary law. As for the harmonisation of competitive conditions, the Treaties enabled regulatory interventions by Community institutions, on the assumption that this goal could not be left entirely to the operation of market forces, but required regulatory plans to prevent that market liberalisation would unleash regulatory competition.[854] As to macroeconomic coordination[855], Member States were encouraged to conceive their economic policies as matters of common concern, avoid trade imbalances, secure price stability and promote a high level of employment.

On these bases, there were several regulatory strategies available for Community policymakers. From the early 1960s to the mid-1970s, the material economic order that was actually implemented was predominantly congenial to the consolidation of the DSCS.[856] Accordingly, free movement of productive factors was mainly pursued through a decentralised regulatory strategy.[857] This entailed a rather deferential enforcement of market principles by the Court of Justice of the European Union (CJEU): by primarily targeting direct and indirect discriminations the CJEU left largely unaffected the possibility to attain economic and social goals at national level. As for the harmonisation of competitive conditions, the regulatory interventions by Community institutions were inspired by the notion of a regulatory level playing field, on the assumption that the type of competition fostered by the Common Market in the making was to enhance firms' efficiency and innovation rather than regulatory or tax competition among the Member States.[858] In principle, such a sweeping harmonisation could rely on the legal bases enshrined in the Treaty of Rome; the CJEU also seemed to endorse their potentially limitless remit on several occasions. Yet, after the empty chair crisis and the ensuing Luxembourg compromise, the notion of widespread harmonisation appeared illusory, leaving broad room to national policy initiatives.

Deference towards states' economic and social policies was also the strategy inspiring macroeconomic coordination in this period. The goals of containing currency fluctuations and tackling trade imbalances were pursued in accordance with the tenets of the Bretton Woods system. The semi-pegged exchange rates therein established, if coupled with capital mobility, could threaten Member States' autonomy in fiscal and monetary

---

854 Kaupa (2018), pp. 61-63.
855 See Articles 103-105 of the EEC Treaty.
856 Ruggie (1982).
857 Maduro (1998), pp. 143-149.
858 "Memorandum of the Commission on the Action Programme of the Community for the Second Stage" COM(62)300 final, 24 October 1962. See also Kaupa (2018), pp. 52-53.

matters. Yet, for a rather long period, that scenario did not materialise. In the 1960s the implementation of Article 67 of the Treaty establishing the European Economic Community (EEC Treaty) on free movement of capital had been pursued on the basis of two directives specifying that a set of capital movements were not liberalised.[859] Other capital controls were liberalised but, in case of an adverse impact on national economic policies, they could be reinstated. Similarly, the case-law of the CJEU reflected a cautious approach. Up until the 1980s, the Court was perfectly aware of the fact that complete freedom of capital movement could undermine the economic policies of the Member States or destabilise their balance of payments.[860] Accordingly, unlike the other free movement provisions, Article 67 of the EEC Treaty was not considered as having direct effect, with the result that the free movement of capital was mainly conceived of as authorising the payments necessary for the exercise of other economic freedoms.[861]

In a similar context, European macroeconomic coordination secured favourable conditions for Member States' activist plans.[862] To be sure, this implied that the full economic benefits of the Common Market would not be reaped. But in that political and economic environment, the Common Market was still imagined as complementing and, therefore, aligning with the DSCS. A similar institutional arrangement made the fortune of the European nation states by contributing to their economic success in Les Trente Glorieuses.[863] Nevertheless, the oil crises of the 1970s, the end of the Bretton Woods system and the gradual abolition of its attendant capital controls led to a reorientation of the European integration process and the establishment of a new material economic order. In this new rendering, the ambivalences of the Treaty of Rome were resolved in a neoliberal direction, thereby marking the beginning of an increasing misalignment with the DSCS and, notably, its more Keynesian rendering.

The redefinition of the material economic order was carried out first of all in the field of free movement. Therein the goal of completing the Single Market entailed a gradual shift, from the decentralised model of economic constitution experimented in the foundational period to an economic constitution combining elements of both the competitive and centralised models.[864] The focal point of that shift was mutual recognition, the notion inspiring *Cassis de Dijon*[865], the judgment that transformed the prohibition of measures having equivalent effects to quantitative restrictions into an economic due process clause of sorts favouring judicial challenges to

---

859 First Directive for the implementation of Article 67 of the Treaty (OJ 43, 12.7.1960, p. 921); Second Council 63/21/EEC Directive of 18 December 1962 adding to and amending the First Directive for the implementation of Article 67 of the Treaty (OJ 9, 22.1.1963, p. 62).

860 *Casati*, C-203/80, EU:C:1981:261.

861 See Article 106 of the EEC Treaty.

862 Kaupa (2018), pp. 76-83.

863 Milward (1999).

864 Maduro (1998), pp. 110-143.

865 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, C-120/78, EU:C:1979:42.

broad swathes of domestic regulation. Although judgments conforming to the *Cassis De Dijon* doctrine did not necessarily displace domestic regulations or unleash regulatory competition[866], they did increase the overall pressure on national governments, all the more when judicial mutual recognition was generalised to all productive factors.

The neoliberal rendering of the Treaty of Rome did not rest only on an increased emphasis on negative integration. *Cassis de Dijon* was immediately synchronised with the Commission's legislative agenda targeting Member State measures, justified in the light of the mandatory requirements doctrine for harmonisation purposes.[867] The implementation of this re-regulatory strategy became a realistic prospect in the mid-1980s when the Single European Act provided a suitable legal basis to overcome national vetoes through qualified majority voting.[868] The increased political capacity of the Community seemed to enable a new stage in the building of the Single Market, in which supranational political institutions were finally in the position to approve uniform rules responding to both the facilitative and protective concerns implied in market regulation. However, the success of this strategy was only partial. First, the appeal of qualified majority voting also led to the adoption of legislative measures in fields not immediately related to the regulation of markets, which had the result of extending market rationality to areas such as the environment, health and culture. Second, qualified majority voting did not apply to the harmonisation of fiscal provisions, free movement of persons and the rights and interests of employed persons[869], leaving those fields exposed to the vagaries of judicial politics. Third, the shift to qualified majority voting favoured the adoption of Directive 88/361/EEC[870], the legislative act which abolished the restrictions on capital movements within the Community, thereby undermining the keystone of the system of macroeconomic coordination which had previously enabled state interventionism.

Admittedly, capital mobility does not necessarily entail the sacrifice of national political autonomy, notably if exchange rates are left free to float. Yet, the adoption of Directive 88/361/EEC took place in an entirely different context. To cope with the macroeconomic instability following the collapse of the Bretton Woods system, European countries had significantly reconsidered their exchange rate system. Approximately at the same time as *Cassis de Dijon* was being decided, the European Monetary System (EMS) was established in an attempt to constrain currency fluctuations.[871] The EMS required the definition of an official central exchange rate for all currencies, which were left to float within bands determined for distinct

---

866 Kaupa (2018), pp. 117-120.

867 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*") (OJ C 256, 3.10.1980, pp. 2-3).

868 See Article 100 A of the EEC Treaty.

869 See Article 100A, para. 2 of the EEC Treaty.

870 Council Directive 88/361/EEC of 24 June for the implementation of Article 67 of the Treaty (OJ L 178/5, 8.7.1988, p. 5).

871 Council Regulation (EEC) No 3181/78 of 18 December 1978 relating to the European monetary system (OJ L 379, 30.12.1978, p. 2).

groups of countries. When a currency reached the limits of the band, participating countries were expected either to intervene via their central banks or to negotiate a change of the parity rates. As a consequence, also within a similar system, capital controls were the *conditio sine qua non* of national fiscal and monetary policies. Absent those restrictions, not only would the margins for national autonomy be depleted, but also the weakest national currencies would end up being exposed to speculative attacks.[872]

4 The age of purposiveness

4.1 The entrenchment of neoliberalism

The way out from the fragility of a semi-pegged exchange rate regime was moving to a monetary union. In this regard the plans designed in the 1970s and 1980s recognised that, to achieve a full monetary union, a sizeable supranational budget ought to be established to support the regions in difficulty and facilitate the modernisation of their economies.[873] Thus, far from evoking the destabilisation of the DSCS, the monetary union nourished the idea of its pan-European restatement, in line with further institutional developments taking place in the same period such as the expansion of supranational legislative competences and the improvement of the liberal and democratic credentials of the Communities with, respectively, a judge-made bill of rights and a popularly elected European Parliament. Against a similar background, the neoliberal turn of the late 1970s and 1980s could appear only as the avant garde of a process that would soon be rebalanced with the addition of more robust democratic and social components.

To be sure, a similar scenario implied a good dose of optimism about the capacity of the Community to produce the social, political and economic preconditions required to create a full monetary union and a pan-European constitutional democracy. And even more optimism was needed to imagine that, in a general political and intellectual climate marked by the rise of rampant neoliberalism, a similar plan could actually be accomplished. Thus, it is not surprising that the economic constitution conceived at Maastricht was remarkably different from those earlier ideas. To a considerable extent, its contents developed and consolidated the neoliberal trend ushered in by *Cassis de Dijon*, the EMS and Directive 88/361/EEC. But whilst those decisions were not set in stone, the Treaty of Maastricht made them de facto irreversible by entrenching their underlying motifs as the new economic constitution of the euro area. From then on, it could no longer be claimed that the EU institutional framework had been made for people of fundamentally differing views. Indeed, economic norms and institutions were conceived to further a particular economic model and, as a reflection, to prompt the neoliberal transformation of the DSCS. Thus, by

872 De Grauwe (2018), pp. 104-105.
873 See, e.g., the 1977 McDougall Report and the 1987 Padoa-Schioppa Report.

elevating a particular economic paradigm to the status of uncontested truth, the Treaty of Maastricht turned the Community legal framework into a prevailingly purposive constitutional order.

The neoliberal purposive inclination of the Treaty of Maastricht emerged first of all in its uncompromising commitment to free movement of capital. The Treaty of Maastricht reframed the relevant Treaty principle in purely obstacle-based terms in accordance with Directive 88/361/EEC.[874] Its scope of application was also extended to third countries, thereby amplifying the disciplinary potential of international financial markets.[875] This move was reinforced by key judgments of the European Court of Justice overruling earlier more cautious case-law: the newly introduced Treaty provision was endowed with direct effect[876] and the notion that the general financial interests of a Member State could justify the retention of capital controls was also overridden.[877] This more assertive judicial orientation reinforced the idea already hinted at in *Cassis de Dijon*: considering market principles as judicially enforceable constitutional rights.[878] But whereas in the case of product requirements the deregulatory potential of market principles could be contained through positive harmonisation, in the case of taxation or industrial relations the Treaty of Maastricht simply lacked adequate legal bases to counter deregulation.

The same neoliberal inclination was visible in the structure of the new competences introduced in the Treaty. In expanding the scope for EU policymaking to fields normally associated with state activist government, the new legal bases often came with specific policy directions pre-empting key democratic choices by means of neoliberal guidelines.[879] Thus, the goal of price stability was prioritised in monetary policy[880], workers' adaptability in employment policy[881] and competitiveness in industrial policy.[882] Admittedly, the same legal bases also included textual references to other policy objectives which, in later Treaty revisions, would further be enriched with more ambitious substantive goals and horizontal clauses.[883] Yet, those textual gestures could only cloak with a pluralist veneer the actual post-political structure of an overabundant[884] and potentially asphyxiating[885] constitutional framework. The latter did establish a clear hierarchy among those goals, leaving to political institutions only the decision on how to attain neoliberal targets while maximising competing interests.

---

874 See Article 63 TFEU.
875 Menéndez (2013), p. 467.
876 *Bordessa and Others*, Joined Cases C-358/93 and C-416/93, EU:C:1995:54; *Sanz de Lera and Others*, Joined Cases C-163/94, C-165/94 and C-250/94, EU:C:1995:451.
877 See, e.g., *Commission* v *Portugal*, C-367/98, EU:2002:326.
878 Scharpf (2017), pp. 317-321.
879 Davies (2015), pp. 2 and 14.
880 See Article 127 TFEU.
881 See Article 145 TFEU.
882 See Article 173 TFEU.
883 See respectively Articles 3 TEU and 9 TFEU.
884 de Witte (2009), p. 35.
885 Fossum and Menéndez (2005), p. 409.

The entrenchment of the neoliberal policy agenda in the EU constitutional order found its ultimate manifestation in the architecture of the EMU. First, the list of goals inspiring economic and monetary policy mentioned price stability, sound public finances and monetary conditions and a sustainable balance of payments, but, tellingly, eschewed full employment.

Second, short of the requisite degree of political and social legitimacy to sustain a robust supranational fiscal policy, the EU opted for an asymmetric institutional arrangement decoupling monetary and economic policy. The need to reap the full benefits of capital mobility and overcome the fragilities of a semi-pegged exchange rate regime favoured the creation of an incomplete monetary union: that is, a monetary union without a sizeable budget.[886] Thus, monetary policy was federalised and depoliticised[887], whilst economic and fiscal policy were retained by the Member States as national constitutional prerogatives subject only to intergovernmental macroeconomic coordination. This disconnect of monetary and economic policy was by no means innocuous as it implied the weakening of the macroeconomic steering capacities of euro area Member States. In particular in countries with a more ingrained Keynesian tradition, a single and allegedly neutral federal monetary policy could not be synchronised with the needs of several fiscal policies and, more broadly, of highly heterogeneous national economic systems.

Third, the disconnect between monetary and fiscal policy and, as a reflection, the de facto neutralisation of Keynesian courses of national economic policy were accentuated by the particular form assigned to EU monetary policy. In this regard, the German experience of the Deutsche Bundesbank was taken as a model and generalised for the rest of the euro area in a radicalised form. As noted, up until the Treaty of Maastricht, the narrow mandate and the independence of the Deutsche Bundesbank had been established through legislation, thus they were formally reversible by an ordinary political majority. In the design of the European Central Bank (ECB), the Treaty of Maastricht upgraded those choices to the status of constitutional norms.[888] Indeed, monetary policy was framed as the quintessential purposive competence. In a context still reminiscent of the high inflation of the 1970s, the ECB was entrusted with a narrow mandate centred on price stability as its primary goal, with support for general economic policies only a secondary objective. The Treaty left it open to the ECB to define the content of price stability, but foreclosed the pursuit of other objectives to the detriment of the main goal.[889] Ironically, the preference for a narrow mandate for the ECB was defended on democratic grounds. Monetary policy was presented as an area requiring a level of expertise, temporal consistency and policy credibility unattainable by ordinary political institutions.[890] In other words, the protection of the value of

886 De Grauwe (2018), p. 111.
887 Menéndez (2013), p. 487.
888 See Articles 127 and 131 TFEU. The same approach emerges also in the amended version of Article 88 of the German Basic Law.
889 Ioannidis, Hláskova Murphy, Zilioli (2021), p. 8.
890 Herdegen (1998), p. 290.

money could justify a restriction on democracy and the delegation of regulatory powers to an ad hoc institution.[891] Yet, democratic concerns imposed the requirement that the mandate of the latter be limited in scope, hence the prescription of price stability. Other considerations could lead to a more critical assessment of how monetary policy was being shaped. The prioritisation of price stability was questionable in terms of political freedom, since within the new institutional landscape the prospects of implementing the Keynesian version of the DSCS appeared dim. Moreover, the exclusive definition of price stability on the part of the ECB implied the depoliticisation of key decisions concerning macroeconomic magnitudes with clear redistributive implications.

Finally, the decision in favour of entrenchment also encompassed the independence requirements concerning the ECB. Not satisfied by merely having set up the central bank as an independent fourth branch of government, the Treaty of Maastricht reinforced its insulation with the express constitutional prohibition of monetary financing.[892] Again, this choice also made perfect sense within an institutional framework conceived to enhance the disciplinary power of international financial markets and constrain the deficit bias of democratic decision-making. At the same time, the prohibition of monetary financing gave the kiss of death to any possibility to pursue courses of political economy other than that presupposed by the Treaty.

The neoliberal structure of the monetary union also influenced the direction and the structure of the macroeconomic coordination of national economic policies. The combination of a single currency and capital mobility entailed conducive national economic policies to avoid negative externalities. In particular, excessive borrowing by national governments could engender inflationary pressures and, in the most dramatic cases, even defaults whose repercussions could also be felt beyond national borders. To cope with these risks, the Treaty set up a more intense managerial system of coordination comprising both positive targets to steer economic policy and negative limits to prevent externalities.

The positive dimension was the weakest: macroeconomic coordination was expected to ensure the broad range of goals included in Article 3 TEU but, critically, national economic policies should be conducted in accordance with the principle of an open market economy with free competition.[893] To achieve the general goals, a soft law system of coordination was established relying on broad guidelines and a mechanism of multilateral surveillance centred on the Council and the Commission.[894] The resulting institutional framework was in principle more open than that observed in monetary policy because the constraints of the Treaty objectives, and the surveillance procedure were definitely less penetrating. The neoliberal

---

891 *Brunner and others*, Cases 2 BvR 2134/92 & 2159/92, paras 95-96. See also Zilioli and Selmayr (2007), p. 361.
892 See Article 123 TFEU.
893 See Article 119(1) TFEU.
894 See Article 121 TFEU.

leaning of macroeconomic coordination emerged more clearly in its negative dimension. Even in this regard Treaty norms were not confined to core issues but entrenched a particular vision of economic policy relying on governance arrangements and the disciplinary force of financial markets. A general ban on excessive deficits was established[895], with quantitative limits on government deficits and public debt spelled out at quasi-constitutional level[896]. Those reference values were reinforced by a no-bailout clause.[897] On the whole, therefore, fiscal rules expressed a certain scepticism towards borrowing and, as a reflection, towards the economic theories regarding it as an ordinary tool of economic policy.[898] No consideration was given to the reasons justifying borrowing, for instance by distinguishing between the debts incurred for public investments and those funding current spending. No equivalent attention was devoted to private indebtedness and macroeconomic imbalances, and the tools relating to economic and financial shocks were equally insufficient. So, also in this regard the Treaty drafters preferred to populate the constitutional framework with their more or less questionable economic doctrines, transforming it into an instrument of government. In moving in this direction, they overlooked the downsides of a prevailingly purposive constitutional framework – an issue of which they would become aware on the occasion of the economic and financial crisis that began in 2007.

4.2 Increased purposiveness and its downsides

As elsewhere, in the euro area the impact of the economic and financial crisis was also extremely serious. But unlike other advanced economies, the EMU lacked adequate institutions and tools to cope with it. A crisis of this magnitude could have been the catalyst for a transformative process leading to a full monetary union and, under the pressure of the crisis, some of the key aspects of the euro area architecture did in fact change. Nevertheless, the transformation made was in essence preservationist. The imperative of saving the euro area did not trigger the creation of a sizeable EU budget to endow the EMU with fiscal capacity. The euro area that was saved remained the asymmetric creature conceived at Maastricht, supplemented by a complex set of measures radicalising and, simultaneously, adapting the original neoliberal paradigm. Accordingly, Member States experiencing difficulties in servicing their debt in financial markets received financial assistance, although subject to strict conditionality. A set of legislative and constitutional reforms were approved to improve the credibility of the commitment to sound finances of all the Member States. And, eventually, also in Europe quantitative easing programmes were adopted to counter deflation and economic stagnation. On the whole, these reforms increased the purposiveness of the EU

[895] See Article 126 TFEU.
[896] Article 1 of the Protocol on the excessive deficit procedure. Reference values can be modified by the Council voting unanimously on the basis of a special legislative procedure (Article 126(14) TFEU).
[897] See Article 125 TFEU.
[898] Mostacci (2020), p. 1068.

constitutional order, with the result of aggravating its detrimental impact on political pluralism and its difficulties in adapting to changing economic and political circumstances.

The first responses to the crisis by the EU were conceived on the assumption that the neoliberal model established at Maastricht was valid and what had not worked in the run-up to the crisis was its implementation. With this mindset in place, EU institutions embarked on a series of legislative reforms to intensify macroeconomic coordination with a view to fostering budgetary discipline.[899] This approach inspired the conditionality attached to the first vehicles of financial assistance engineered to respond to the emergency in the most affected countries and led to the hardening of the Stability and Growth Pact for all.[900] The wisdom of constraining public investments and, more generally, of depriving national economies of meaningful fiscal support in an adverse economic cycle was questionable on policy grounds. But as long as those measures were incorporated in legislative acts, they remained exposed to EU democratic competition and open to relatively easy reversal.

Legislative reforms, however, did not seem to assuage the concerns as to the fiscal credibility of EU Member States. But instead of reconsidering their contents, EU institutions and Member States opted for their constitutional entrenchment. The first move in that direction was the insertion in the Treaty of a provision permitting the euro area countries to establish a stability mechanism granting financial assistance subject to strict conditionality.[901] At first glance, this new constitutional provision might appear to abandon the categorical wording of the no-bailout clause or, at least, to introduce a qualification to its clear-cut prohibition.[902] Yet, the qualification was not meant to open up the institutional framework to alternative courses of political economy. As the CJEU was ready to admit, the strict conditionality attached to financial assistance was conducive to the goal of the no-bailout clause, namely fostering budgetary discipline and maintaining financial stability within the EMU.[903]

Budgetary discipline and financial stability were also the goals that inspired the second constitutional reform: the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). The strategy therein pursued was the entrenchment of the highly ambitious fiscal targets set out in the reformed Stability and Growth Pact and, critically, their incorporation in national constitutional settings. Thus, the TSCG required the budgetary position of the Member States to be in balance or surplus.[904] Member States were also expected to insert budget balancing rules in their constitutions as well as to adopt automatic correction mechanisms to be

---

899 See the set of regulations and directive making up the Six-Pack and Two-Pack.
900 Mostacci (2020), p. 1027.
901 See Article 136(3) TFEU, introduced by European Council Decision 2011/199/EU.
902 Chalmers, Davies, Monti (2019), p. 679.
903 *Pringle*, C-370/12, EU:C:2012:756, paras. 135 and 137.
904 Article 3 of the TSCG. More specifically, this norm requires that across the cycle there should not be a deficit lower than 0.5% of GDP (1% for countries with public debt significantly below 60% of GDP).

activated in case of significant deviations from their specific fiscal targets. A duty to drastically reduce public debt to reach the 60% threshold was also introduced[905] and Member States subject to the excessive deficit procedure were required to enter into economic partnership programmes, including structural reforms of their economies.[906]

Clearly, similar norms further stiffened the neoliberal profile of the EU constitutional order and, on that basis, envisaged alignment within national constitutional settings. As purposiveness escalated, it became increasingly evident that the euro area was no place for Keynesians.[907] The policies adopted at the behest of the EU and the closure of the institutional framework fuelled antagonism and resentment in both creditor and debtor countries.[908] No surprise then, that in a context of unmediated and suppressed political conflicts, the EMU and, by extension, the EU came to be regarded by significant parts of national electorates as toxic projects to be overthrown.

The deterioration of the EU institutional architecture entailed another phenomenon typical of prevailingly purposive constitutional orders. A few years after its adoption, the TSCG revealed all its rigidity and incapacity to deal effectively with the ongoing financial and economic crisis. Fiscal rules were repeatedly violated without sanctions by EU supervising authorities. From being conceived as categorical norms, fiscal rules were reinterpreted as indicative targets steering national economic policies. In place of rule enforcement, EU economic governance resorted to broad usage of discretionary flexibility to carve out some interstice for counter-cyclical fiscal policies.[909] But even if this relaxation of fiscal rules probably made much more economic sense than their strict application, it did not imply the abandonment of the persisting purposive orientation of the EU institutional setting.

A similarly elusive approach was also visible in the field of monetary policy. As the reform of fiscal rules and the vehicles of financial assistance revealed itself to be insufficient to appease financial markets, it was up to the ECB to step in as the ultimate institution ensuring macroeconomic stability. So, if at the beginning of the crisis the ECB seemed to keep within the confines of its modest role, it later started to operate as a lender of last resort for private financial institutions and sovereign states. This move was coherent with the programmes already implemented by other central banks outside the euro area, but sat uneasily with the original mandate defined in the Treaty. In particular the launch of programmes such as Outright Monetary Transactions (OMT)[910] and the public sector purchase

---

905 Article 4 of the TSCG.
906 Article 5 of the TSCG.
907 Chessa (2016), p. 414.
908 Chalmers (2012), p. 607.
909 See European Council Conclusions 27 June 2014 and Communication from the Commission, “Making the best use of the flexibility within the existing rules of the stability and growth pact” COM(2015)12 final.
910 Technical Features of Outright Monetary Transactions, available at www.ecb.europa.eu

programme (PSPP)[911] implied a generous construction of the boundaries of a monetary policy, primarily focused on price stability, as well as a lenient interpretation of the prohibition of monetary financing. Nonetheless, the ECB was essentially forced by circumstances to proceed in that direction, first to stabilise financial markets and then to contrast deflation and relaunch economic growth.

No matter how economically sound and effective those measures were, their constitutional implications were problematic for at least two interlinked reasons. First, the developments at issue raised justified concerns from a rule of law standpoint. Against the standard set by the original interpretation of the Treaties, those measures were rightly regarded as unconventional. As noted in relation to the no-bailout clause, in this respect judicial validation also required a considerable degree of deference and a number of qualifications on the part of the courts involved. Yet, unlike in the case of the no-bailout clause, the ECB programmes also entailed the systematic reconsideration of earlier judicial qualifications – a fact that, clearly, sits at odds with the EU's rule of law commitment.[912] Indeed, the OMT programme had been certified by both the CJEU and the German Federal Constitutional Court on the basis of its exceptional character and its coupling with the European Stability Mechanism's conditionality.[913] Those conditions were later challenged by the PSPP programme, framed as a regular monetary policy intervention and untied from any formal conditionality. In the review of this programme, both the CJEU[914] and its German counterpart[915] more or less agreed on a set of safeguards that quantitative easing programmes ought to respect to avoid infringing the prohibition of monetary financing. Yet, those limits were probably strained when, in the early phases of the COVID-19 pandemic, the ECB implemented its pandemic emergency purchase programme.[916]

The second troublesome implication of the ECB's unconventional programmes concerned democracy. Remember that the narrow scope of intervention originally assigned to the ECB was justified as a necessary and yet circumscribed derogation to the commitment of national constitutions to representative democracy. On these premises, expansion of the ECB's role would clearly create a void of democratic accountability.[917] No matter how justified by the need to fight deflation and economic stagnation[918], the new ECB programmes were implemented in a context of

---

911 Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10) (OJ L 121, 14.5.2015, p. 20).

912 Dani et al. (2021), pp. 323-324.

913 *Gauweiler*, C-62/14, EU:C:2015:400 and BVerfG, Judgment of the Second Senate of 21 June 2016 - 2 BvR 2728/13, DE:BVerfG:2016:rs20160621.2bvr272813.

914 *Weiss*, C-493/17, EU:C:2018:1000.

915 BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, DE:BVerfG:2020:rs20200505.2bvr085915.

916 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17) (OJ L 91, 25.3.2020, p. 1).

917 Dani et al. (2021), p. 321.

918 Tooze (2020), p. 30.

precarious democratic authorisation and weak democratic controls[919]. The economic and financial crisis showed how remote and costly the possibility of reverting to the apparently cheerful days before the crisis was, in which the pretence of a distinction between economic and monetary policy could still appear credible. Unconventional monetary measures were there to stay and, if modifications were required at all, they should be targeted to their institutional framework.

5 Deconstitutionalising the EMU

The upshot of the argument presented in this paper is that, because of its prevailingly purposive institutional setting, the EU is misaligned with the prevailingly open constitutional framework of the DSCS. If realignment appears desirable, there are two possible pathways to attain it: on the one hand, a top-down neoliberal realignment of the DSCS, based on the influence and ramifications of the EMU and the primacy of EU law; on the other, the bottom-up redressing of the EU neoliberal bias, based on the rehabilitation of the foundational commitments of the DSCS and, notably, of its open character. If the latter option is favoured (and this is a big *if*), the most obvious ways to realign the EU with the DSCS would be either the creation of a full monetary union or the replacement of the euro area with a more flexible institutional setting enabling Member States' different approaches to activist government. Clearly, both options entail momentous constitutional changes for which there seems to be scant appetite and, most importantly, no political force with the requisite mobilising capacity. This explains the realistic and yet uninspiring muddling through approach followed by the EU from the financial crisis up to the COVID-19 pandemic. This unpredictable shock has further shaken the EU institutional architecture, revealing once again the inadequacy of its institutional framework in coping with unexpected circumstances and their consequences. Tellingly, most of the key norms on which EU economic governance is grounded had to be suspended[920] (or their effects diluted)[921] to enable unprecedented borrowing and activist measures by national governments. After some initial hesitation, the ECB confirmed and broadened its unconventional monetary policy. Moreover, an unprecedented fiscal policy effort was put in place by the EU in an attempt to relaunch economic growth and, in the meanwhile, boost the green and digital transition of national economies.[922]

Admittedly, most of these developments have been made in exceptional circumstances to buy more time and to prevent the uncoordinated

---

919 De Boer and Van 'T Klooster (2020), pp. 1703 and 1710.

920 Statement of EU ministers of finance on the Stability and Growth Pact in the light of the COVID-19 crisis, available at www.consilium.europa.eu

921 Communication from the Commission, 'Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak' (2020/C 91 I/01).

922 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18.2.2021, p. 17).

unravelling of the euro area. Thus, no change of paradigm seems clearly in sight, a fact witnessed by the high degree of ambiguity marking all those policy initiatives. Indeed, EU fiscal rules are going to remain suspended until the end of 2022. In the meantime, a debate has started on their reform in an attempt to build consensus on norms capable to decrease public debt levels without stifling incipient economic growth. Even if these premises hint at a more sensible approach than that inspiring the EU response to the previous financial crisis, at the same time the debate unfolds essentially at a policy level, without any attempt to rethink more comprehensively European economic governance and, notably, its entrenched neoliberal bias. Similarly, the ECB remains well disposed towards operating as a lender of last resort with a view to relaunch and consolidate economic growth. Yet, all these initiatives continue to develop on precarious legal terrain and in the absence of meaningful mechanisms of democratic accountability. Finally, NextGenerationEU may also be the harbinger of an EU endowed with sizeable fiscal capacity to be employed in activist economic programmes. At least for the moment, however, the programme remains exceptional and the conditionality attached to its grants and loans is ominously reminiscent of the structural reforms inspiring the management of the previous financial crisis.

In brief, all these developments gesture towards a realignment with the DSCS, but they also reveal a good deal of path dependency on the part of EU political and institutional actors, and an incapacity to transcend their ingrained mindsets and neoliberal imprinting. In a similar context, the most realistic prediction is that in its post-pandemic new normal the EU will recalibrate the existing policies and institutions in a more sensible social and political direction, but not to the point of redressing its neoliberal purposive posture. As noted above, a similar scenario may mitigate some of the criticism against the EU, but would not entail a genuine realignment with the DSCS – a goal which can be accomplished neither through the mere humanisation of a neoliberal constitutional structures nor through its relaxation or suspension in case of emergencies.

The difference between the most recent developments and a genuine realignment emerges as soon as the latter is conceptualised. To imagine the EU and the DSCS realigned, one does not necessarily have to envisage extreme scenarios such as the completion of the EMU or its dissolution. The guiding idea for realignment should be reverting to an EU intergovernmental framework that facilitates the realisation of the DSCS foundational commitments. A first key step in this direction would be moving away from a prevailingly purposive constitutional order to a constitutional framework made for peoples and governments with fundamentally different views. A similar shift would require the drastic deconstitutionalisation of the Treaties and, correspondingly, the repoliticisation of EU competences.[923] In this perspective, EU institutional actors should return to thinking of the Treaties not as instruments of government but as institutional infrastructures open to democratic competition.

[923] See also Grimm (2015), p. 473; Scharpf (2017), p. 321.

In view of its importance and ramifications, the EMU should be the focal point of this endeavour. While present political and economic circumstances make the asymmetry between a federalised monetary policy and decentralised national economic policies difficult to overcome, it seems nonetheless possible to think of significant Treaty changes including the consolidation of the ECB scope of intervention, its subjection to a democratic accountability mechanism and a more open and effective system of macroeconomic coordination of national policies.

Here is what an EMU realigned with the DSCS could look like:

(a) The objective of full employment would be added to the list of the goals inspiring EU monetary and economic policy enshrined in Article 119(3) TFEU.

(b) Monetary policy would be defined as a sector specific competence without any constitutional prioritisation of price stability (or any other policy goal). Both the goals and the scope of ECB action would be decided by the Council and the European Parliament on the basis of the ordinary legislative procedure after consulting the ECB.

(c) The no-bailout clause and the prohibition of direct purchases of debt instruments should be replaced with legal bases enabling the Council and the European Parliament to specify the conditions for, respectively, debt mutualisation and direct and indirect purchases of debt instruments.

(d) The EU framework for economic policies should be based on a clearer distinction between shared constitutional principles (e.g. the prohibition of excessive government deficits and excessive trade imbalances), to be retained in the Treaties, and more contingent fiscal targets, to be defined by the Council and the European Parliament through the ordinary legislative procedure.[924]

(e) The focal point of fiscal surveillance by EU institutions should remain narrow (the size of government deficits and trade imbalances). In a context in which national demoi are entrenched and salient policy choices on economic and social affairs are taken at Member State level, EU institutions seem ill equipped to veto specific policy measures. In this respect, the Commission should be assigned a more general *ex ante* suspensive veto on national budgets, with the possibility for the Council to override it with a qualified majority vote.

(f) Similarly, EU institutions also seem ill equipped to impose specific policy measures on Member States. To encourage the adoption of their preferred economic and social policies, they could provide incentives in the form of conditional spending programmes funded by the EU budget.

[924] For a similar suggestion, see Blanchard et al. (2020), pp. 16-19.

6 Concluding remarks

Ever since the ratification of the Treaty of Lisbon, treaty amendment has become taboo in the EU. Not even the COVID-19 pandemic has motivated politicians to invest their (modest) political capital in an arduous adventure such as a sweeping treaty reform. So, why should anyone care to discuss proposals such as those sketched in this paper? There are at least two reasons that may justify some interest in them. First of all, the features of a deconstitutionalised EMU offer a yardstick against which to gauge recent and forthcoming European developments and, notably, to avoid the all too easy conclusion that a modicum of flexibility and social recalibration may do the trick of realigning the EU with the DSCS. Second, the horizon of a deconstitutionalised EMU may offer a meeting ground for the most enlightened of supporters of the current EU framework and its moderate critics, namely between that part of the EU establishment that has become aware of the precariousness of the institutional setting and outsiders who are not attracted by the prospect of throwing the baby out with the bathwater. In particular for the former, the prospect of a more inclusive and adaptable institutional framework should be reason enough to forego the structural advantage conferred on them by the EU amendment clause and undertake more daring high profile initiatives.

Bibliography

Ackerman, B. (2007), "The Living Constitution", 120 *Harvard Law Review*, pp. 1737-1812.

Allen, C. S. (1989), "The Underdevelopment of Keynesianism in the Federal Republic of Germany", in Hall, P. A., *The Political Power of Economic Ideas: Keynesianism across Nations*, Princeton University Press.

Amtenbrink, F. (1999), *The Democratic Accountability of Central Banks: A Comparative Study of the European Central Bank*, Hart Publishing.

Bin, R. (2007), "Che cos'è la Costituzione?" XXVII *Quaderni Costituzionali*, pp. 11-52.

Blanchard, O., Leandro, A. and Zettelmeyer, J. (2020), "Redesigning EU fiscal rules: From rules to standards", https://www.piie.com/publications/working-papers/redesigning-eu-fiscal-rules-rules-standards

Burdeau, G. (1964), *La democrazia*, Edizioni Comunità.

Burley, A. M. (1993), "Regulating the World: Multilateralism, International Law, and the Protection of the New Deal Regulatory State", in Ruggie, J. (ed.), *Multilateralism Matters*, Columbia University Press, pp. 125-154.

Chalmers, D., Davies, G. and Monti, G. (2019), *European Union Law: Text and Materials*, Cambridge University Press.

Chalmers, D. (2012), “Introduction: The Conflicts of EU Law and the Conflicts in EU Law”, 18 *European Law Journal*, pp. 607-620.

Chessa, O. (2016), *La costituzione della moneta. Concorrenza, indipendenza della banca centrale, pareggio di bilancio*, Jovene editore.

Dani, M., Chiti, E., Mendes, J., Menéndez, A. J., Schepel, H. and Wilkinson, M. (2021), “‘It’s the political economy …’ A moment of truth for the eurozone and the EU”, 19 *International Journal of Constitutional Law*, pp. 309-327.

D’Albergo, S. (1991), *Costituzione e organizzazione del potere nell’ordinamento italiano*, Giappichelli editore.

Davies, G. (2015), “Democracy and Legitimacy in the Shadow of Purposive Competence”, 21 *European Law Journal*, pp. 2-22.

De Boer, N. and Van ‘T Klooster, J. (2020), “The ECB, the Courts and the Issue of Democratic Legitimacy After Weiss”, 57 *Common Market Law Review*, pp. 1689-1724.

De Cecco, M. (1989), “Keynes and Italian Economics”, in Hall, P. A., *The Political Power of Economic Ideas: Keynesianism across Nations*, Princeton University Press.

De Grauwe, P. (2018), *Economics of the Monetary Union*, Oxford University Press.

de Witte, B. (2009), “The rules of change in the European Union. The lost balance between rigidity and flexibility”, in Moury, C. and de Sousa, L. (eds.), *Institutional Challenges in Post-Constitutional Europe: Governing Change*, Routledge, pp.33-42.

Dossetti, G. (2014), “Funzioni e ordinamento dello Stato moderno”, in Balboni, E. (ed), *Non abbiate paura dello Stato!*, Vita e Pensiero.

Fioravanti, M. (2014), “La trasformazione costituzionale”, *Rivista trimestrale di diritto pubblico*, pp. 295-308.

Fossum, J. E. and Menéndez, A. J. (2005), “The Constitution’s Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union”, 11 *European Law Journal*, pp. 380-440.

Fourastié, J. (1979), *Les Trente Glorieuses: Ou la révolution invisible de 1946 à 1975*, Fayard.

Grimm, D. (2012), “Types of Constitutions”, in Rosenfeld, M. and Sajó, A. (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, pp. 98-132.

Grimm, D. (2015), “The Democratic Costs of Constitutionalisation: The European Case”, 21 *European Law Journal*, pp. 460-473.

Hayek, F. A. (1949), “The economic conditions of interstate federalism” [1939] in *Individualism and Economic Order*, Routledge, pp. 255-273.

Herdegen, M. (1998), “Price stability and budgetary restraints in the Economic and Monetary Union: The Law as guardian of economic wisdom”, 35 *Common Market Law Review*, pp. 9-32.

Hesse, (2014), “Concetto e caratteristiche della costituzione”, in *L’unità della Costituzione. Scritti scelti di Konrad Hesse*, Editoriale scientifica.

Holtfrerich, C.-L. (1988), “Autorità monetarie e istituzioni di governo: la Bundesbank dal XIX secolo ai giorni nostri”, in Masciandaro, D. and Ristuccia, S. (eds.), *L’autonomia delle banche centrali*, Edizioni Comunità.

Ioannidis,M., Hláskova Murphy, S. J. and Zilioli, C. (2021), “The mandate of the ECB. Legal considerations in the ECB’s monetary policy strategy review”, ECB Occasional Paper Series No 276/2021.

Kaupa, C. (2018), *The Pluralist Character of the European Economic Constitution*, Hart Publishing.

Loughlin, M. (2018), “The silences of constitutions”, 16 *International Journal of Constitutional Law*, pp. 922-935.

Maduro, M. (1998), *We, the Court: The European Court of Justice and the European Economic Constitution*, Hart Publishing.

Menéndez, A. J. (2013), “The Existential Crisis of the European Union”, 14 *German Law Journal*, pp. 453-526.

Milward, A. (1999), *The European Rescue of the Nation State*, 1999.

Mortati, C. (1962), “Costituzione (Dottrine Generali)”, in *Enciclopedia del diritto*, XI Giuffré editore, pp. 139-233.

Mostacci, E. (2020), “Fedele a sé stessa: UEM, coordinamento delle politiche economiche e processi democratici”, *Dirittto pubblico comparato ed europeo*, pp. 1025-1069.

Onida, V. (1997), “Le Costituzioni. I principi fondamentali della Costituzione italiana”, in Amato, G. and Barbera, A. (eds.), *Manuale di diritto pubblico*, Vol. I, il Mulino, pp. 77-116.

Rosanvallon, P. (1989), “The Development of Keynesianism in France”, in Hall, P. A., *The Political Power of Economic Ideas: Keynesianism across Nations*, Princeton University Press.

Ruggie, J. G. (1982), “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order”, 36 *International Organization*, pp. 379-415.

Saitto, F. (2016), “Economia e stato costituzionale. Contributo allo studio della ‘Costituzione economica’”, in *Germania*, Giuffré editore.

Saitto, F. (2018), “I rapporti economici. Stato e mercato tra intervento e regolazione”, in Cortese, F., Caruso, C. and Rossi, S. (eds), *Immaginare la Repubblica. Mito e attualità dell’Assemblea Costituente*, Franco Angeli, pp. 125-164.

Scharpf, F. W. (2017), “De-constitutionalisation and majority rule: A democratic vision for Europe”, 23 *European Law Journal*, pp. 315-334.

Somek, A. (2014), *The Cosmopolitan Constitution*, Oxford University Press.

Tooze, A. (2020), “The Death of the Central Bank Myth”, Foreign Policy, https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/

Weir, M. (1989), “Ideas and Politics: The Acceptance of Keynesianism in Britain and the United States”, in Hall, P. A., *The Political Power of Economic Ideas: Keynesianism across Nations*, Princeton University Press.

Zagrebelsky, G. (2008), La legge e la sua giustizia, il Mulino.

Zilioli, C. and Selmayr, M. (2007), “The constitutional status of the European Central Bank”, 44 *Common Market Law Review*, pp. 355-399.