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ARTICLE

Openness, Purposiveness, and the Realignment of the EU and the Democratic and Social Constitutional State

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Abstract

Contrary to predominant European constitutional narratives assuming the alignment between the European Union legal framework and national constitutional orders, this Article points at the current misalignment between the prevailingly purposive European Union institutional order and the prevailingly open character of the Democratic and Social Constitutional State. The evolutionary trajectories leading to the current status quo are examined by distinguishing an age of openness, in which the institutional frameworks of both the European Economic Communities and the Democratic and Social Constitutional State lent themselves to a range of competing legislative renderings, from an age of purposiveness opened by the Treaty of Maastricht, in which a neoliberal policy agenda was gradually entrenched in the Treaties, with the result of undermining the adaptability and inclusiveness of European public law structures. To counter this development, this Article identifies in a drastic deconstitutionalization of the Economic and Monetary Union the key move to favor the realignment of the European Union and the Democratic and Social Constitutional State.

Keywords: Openness; Purposiveness; Democratic and Social Constitutional State; EU; Economic and Monetary Union

A. Introduction

Contemporary European constitutional narratives mainly assume the alignment between the EU legal framework and the constitutional orders of the member states. The plausibility of the assumption rests essentially on two interrelated circumstances: On the one hand, the authority of the Union is conditioned on the respect of fundamental principles included in national constitutions;[1] on the other hand, the EU treaties require a certain degree of axiological homogeneity from national constitutional orders.[2]

Nevertheless, behind this normative façade lies a more complex legal and political reality in which alignment cannot so easily be taken for granted.[3] For the casual observer misalignments are episodical occurrences materializing in a handful of judicial cases in which the application of the *controlimiti* doctrine was ventilated[4] or effected.[5] Yet, the total size of the problem is greater and

[1]*See, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (BASIC LAW), art. 23(1) (Ger.); CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA, art. 7(6) (Port.); CONSTITUTION OF IRELAND 1937 (BUNREACHT NA HÉIREANN) art. 29(4) (Ir.).

[2]Treaty on European Union and Treaty on the Functioning of the European Union art. 2, Mar. 1, 2020.

[3]On the lack of alignment even in the field of fundamental rights, *see* ROBERTO BIN, CRITICA ALLA TEORIA DEI DIRITTI (2018).

[4]*See, e.g.*, Corte cost., order note 24/2017, 23 november 2016.

[5]*See, e.g.*, BVerfG, 2 BvR 859/15 May 5, 2020, and Polish Constitutional Tribunal, K 3/21 (Oct. 7, 2021).

affects a broader range of substantive and institutional issues. Among the latter, the pluralist character of the economic constitution[6] stands out as a crucial test bench to assess whether and to what extent the EU and national legal frameworks align—or can be construed as aligned.

This Article explores the issue of the pluralist character of the economic constitution from a constitutional theory perspective. It argues that the current misalignment between the prevailingly purposive EU economic constitution and the prevailingly open national constitutional orders is the result of an evolutionary trajectory marked by the increasing influence of neoliberal courses of political economy and of the corresponding institutional frameworks on the law and policies of the European Union. This Article concludes by claiming that the realignment between the EU and national constitutional orders can be pursued through a set of treaty changes entailing a drastic deconstitutionalization of the institutional framework of the Economic and Monetary Union (hereafter: EMU).

The argument develops in four steps. The starting point is a simple proposition: Modern constitutions are characterized by a trade-off between openness and purposiveness (Section B). Indeed, an inverse correlation can be identified between those competing claims: The starker the purpose of a constitutional order, the weaker its inclusive and adaptive potential; the wider the semantic scope of its norms, the looser its teleological orientation.

This Article then argues that from their post-World War II foundation to the Maastricht Treaty, both national constitutional orders, in the form of the Democratic and Social Constitutional State (hereafter DSCS), and the European Economic Communities (hereafter EECs) have tended to cope with that trade-off by privileging openness over purposiveness (Section C). The DSCS relied on prevailingly open constitutional frameworks as a way to institutionalize the social question and mediate the conflicts existing between the political forces involved in the new constitutional beginnings. Accordingly, the pursuit of the bold transformative goals enshrined in national constitutional documents was not superimposed on society, but was viewed as an essentially political undertaking, attainable primarily through democratic competition and legislative deliberation. To put it in a single line: The purposes of the DSCS were exposed to and not shielded from political conflict. Emblematic of this approach was the commitment to activist government of the DSCS, 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, also the legal framework of the EECs prioritized 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 the interpretive and regulatory solutions reconciling market integration and activist national policies were favored by European institutions, since the end of the 1970s economic integration started to misalign with the Keynesian renderings of the DSCS. The latter development became prominent 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 found in the institution of EMU by the Maastricht Treaty its utmost celebration: As neoliberal principles and institutional arrangements were entrenched as a matter of constitutional law, for all EU members the pursuit of alternative courses of political economy became exceedingly difficult (Section D). In brief, by sharpening in neoliberal terms the transformative aspirations of the treaties, the Treaty of Maastricht restricted their original openness, with considerable damage also for the inclusiveness and adaptability of national constitutional frameworks. Since then, however, the EU has held unflinchingly to this neoliberal constitutional profile and, if possible, has strengthened its commitment to it throughout the economic and financial crisis started in 2008. While the policy outcomes of this strategy were at

[6]Clemens Kaupa, The Pluralist Character of the European Economic Constitution (2018).

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least questionable, 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 by unexpected economic and political circumstances. Those policies were ultimately put in place by stretching the interpretation or suspending key treaty norms. Yet, their actual viability remains on precarious legal ground. Second, the same set of constitutional rules have discredited alternative courses of political economy, with the result of antagonizing their supporters who increasingly regard EMU—and, as a reflection, the EU—as a toxic project to be overthrown.

Against this background, this Article concludes by claiming that if the EU is keen on realigning with the DSCS, it should return to operate as prevailingly open institutional framework (Section E). This would entail redressing its neoliberal bias and reviving its original vocation of enabling national activist government in a context of intensive economic and political interdependence. In order to advance in that direction, the deconstitutionalization of EMU arises out 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, EU treaties and, in particular, the EMU legal framework should be pruned from all the extant policy prescriptions, so as to leave to the EU political institutions the task of determining the purposes of its policies in a context of genuine democratic competition.

B. Modern Constitutions: Open and/or Purposive?

Modern constitutions are normative documents aimed at the regulation of ordinary law-making, state-society relationships and, in certain cases, also the relationships between private legal and natural persons.[7] Their regulatory capacity may be viewed as a function of two variables,[8] concerning the formal status of constitutional norms and their substantive content.[9] The formal status of constitutional norms refers to their quality of higher-order laws and, therefore, it results from their level of entrenchment and the institutional arrangements predisposed to secure their legally binding character.[10] 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 recognized to the authorities entrusted with their implementation and interpretation.

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.[11] This type of constitutional order presupposes a high degree of political homogeneity, promoted by a predominant constituent subject or resulting

[7]*See* Stephen Gardbaum, *The Structure and Scope of Constitutional Rights, in* Comparative Constitutional Law (Tom Ginsburg & Rosalind Dixon eds., 2011).

[8]The capacity of a constitution to shape legal and political reality also implies its effectiveness. If political, economic, or social conditions prevent its application, the constitution is nominal. *See* Dieter Grimm, *Types of Constitutions, in* Oxford Handbook of Comparative Constitutional Law 107 (Michel Rosenfeld & András Sajó eds., 2012).

[9]Depending on the level of entrenchment and determinacy, four scenarios can be envisaged: a) Constitutions highly entrenched and highly determined; b) constitutions highly entrenched and undetermined; c) constitutions with low entrenchment and high determinacy; and d) constitutions with low entrenchment and low determinacy. For a similar discussion, *see* Bruno De Witte, *The rules of change in the European Union. The lost balance between rigidity and flexibility, in* Institutional Challenges in Post-Constitutional Europe: Governing Change 36 (Catherine Moury & Luís de Sousa eds. 2009).

[10]Grimm, *supra* note 8, at 110–13.

[11]*Id.* at 114.

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from a broad convergence of ideas among the governed individuals. Purposive constitutions offer the vision of a perfect and reconciled society and, on that basis, they mobilize the political unity of the state to the realization of the corresponding regulatory project.[12] As thick systems of high-order law, purposive constitutions exert a remarkable shaping capacity on all legitimate political activity.[13] This may reveal as a desirable feature, in particular for those constitutional orders in need of profound purification from the residues of previous constitutional experiences.[14] 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 either formal, or informal, constitutional amendment[15] or the temporary suspension of constitutional norms. Moreover, purposive constitutions may be seen as wanting in terms of political pluralism. A constitutional order elevating a particular worldview to the status of dogma is a regime in which politics is downgraded to the managerial execution of constitutional programs, whilst alternative courses of political action are discredited as heresies to be marginalized or even destroyed.[16]

A more accommodating approach to political pluralism is visible in *open constitutions,* constitutional documents including open-textured substantive norms embodying a conflictual-consensus[17] among people of fundamentally differing views.[18] Here, constitutional frameworks presuppose and acknowledge a higher degree of pluralism,[19] reflecting the existence in the society of conflicting political, social and cultural groups.[20] 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.[21] Their defining features are procedures favoring the mediation of conflicts and substantive commitments marked by a considerable degree of ambiguity.[22] As a consequence, the state of irresolution of the latter invites continuous constitutional reinterpretation and a broad range of political renderings visible at legislative level.[23] Clearly, in similar constitutional frameworks, policy directions are easily reversible and constitutional norms can be adapted to evolving political and social developments,[24] so much so that only in extreme circumstances is the amendment of constitutional norms 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 political conflict.[25]

[12]*Id.* This type of constitutions entails the subordination of the constitution to the absolute truth and is incapable of exerting its authority on the person, group, or institution embodying the absolute truth.

[13]Martin Loughlin, *The Silences of Constitutions,* 16 Int'l J. of Const. L. 930–32 (2018).

[14]Alexander Somek, The Cosmopolitcan Constitution 97–100 (2014). *See also* Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South,* 65 The Am. J. of Compar. L. 527 (2017).

[15]Konrad Hesse, Concetto e caratteristiche della costituzione, in Id., L'unità della Costituzione. Scritti scelti di Konrad Hesse 79 (2014). On informal amendment in highly entrenched constitutional systems, *see* Bruce Ackerman, *The Living Constitution,* 120 Harv. L. Rev. 1737–1812 (2007).

[16]Georges Burdeau, La democrazia 143 (Edizioni Comunità, 1964). *See also* Chantal Mouffe, On the Political 1–7 (2005).

[17]Mouffe, *supra* note 16, at 31, 52.

[18]*Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, J. dissenting). *See also* Gustavo Zagrebelsky, La legge e la sua giustizia Chapter 4, 131–57 (2008).

[19]Burdeau, *supra* note 16, at 124.

[20]Hesse, *supra* note 15, at 88; Burdeau, *supra* note 16, at 123.

[21]Dieter Grimm, *The Democratic Costs of Constitutionalisation: The European Case*, 21 Eur. L. J. 464 (2015).

[22]Loughlin, *supra* note 13, at 925–30.

[23]*Id.* at 927.

[24]*Id.* at 922.

[25]Hesse, *supra* note 15, at 66.

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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 and 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 posed for constitution-makers, it may make sense to develop a more accurate modeling aware of hybridization of the 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 and a certain degree of flexibility for adjudicators. Accordingly, policymakers are allowed to opt for their favorite means to pursue the predefined constitutional objectives, while adjudicators can decide whether and how to fine-tune the rigor 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 flexibility arrangements turn out to be insufficient in coping with evolving factual circumstances or with the claims of emerging political forces, constitutional amendment or the temporary suspension of constitutional norms remain necessary to adjust the transformative commitments and secure their authority.

Likewise, 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 clear-cut choices with a view to endow them with a higher degree of stability and subtract them from permanent political negotiation. There are other issues in which constitutional norms may emphasize certain goals in order to provide general direction to policymaking. In both circumstances, the regulatory capacity of the open constitution is strengthened, but not up to the point of replacing politics with constitutional decisions.[26] Indeed, if constitutional norms prioritize systematically the aspirations and interests of a particular constituent subject, the open nature of the constitutional order is fatally compromised.[27]

C. The Age of Openness

I. The Post-World War II European Democratic and Social Constitutional State

The image of the prevailingly open constitution acquires more definite contours by examining the structure of Democratic and Social Constitutional State (DSCS), the constitutional order predominant in Europe in the aftermath of World War II.[28] The constitutions approved in this period were documents symbolizing a new beginning, and they were also one of several tools employed to restore political consensus on state governing structures and foster social integration.[29] This was particularly evident in countries like France, Italy, and Germany, where the newly enacted constitutions reflected a drastic realignment of political parties, with the two 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 were no longer the terrain for political struggles

[26]*Id.* at 73–76.

[27]Constantino Mortati, *Costituzione (Dottrine Generali), in* 11 Enciclopedia del diritto 185 (1962).

[28]Somek, *supra* note 14, at 82–84.

[29]Dieter Grimm, *Integration by Constitution,* 3 Int'l J. of Const. L. 193–208 (2005).

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aimed at imposing a particular political agenda on the society. In other words, constitutions ceased to be instruments of government of the predominant social classes[30] and turned into pacts[31] stating the basic terms for peaceful coexistence.[32] To write these type of constitutions, ordinary political disagreements had to be bracketed and efforts were directed towards choices of constitutional design commanding broad support in both the political system and the country at large. This ethos of mutual recognition and compromise shaped post-World War II constitutional politics: Constituent subjects strove to agree if not on a fundamental ideology, at least on a set of substantive commitments and institutions contributing to social cohesion and enabling democratic political competition.[33]

Constitutional politics played out in a consensual mode[34] by political parties harboring conflicting political aspirations resulted in prevailingly open constitutions.[35] Their openness was visible in their aspiration to govern the social question through democratic means.[36] 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 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;[37] that is, they could not admit whatever political development resulting from majority rule.[38] A meaningful democratic competition presupposed the respect of a set of requirements concerning the enhancement of the persons and their equal participation to collective goods. Thus, to establish their authority, the constitutions ought to also include a range of substantive normative commitments.[39] The development of a substantive dimension in the constitution was not entirely original;[40] yet, in the context of entrenched constitutions, it entailed another profound modification of their role. The constitution was no longer a *loi politique* restricted at the definition of the fundamental norms of the institutional architecture; it extended its remit to a broader range of social and economic fields in an attempt to shape areas previously left to the discretion of legislatures or the unbound decision of private actors.[41]

The constitution, therefore, expressed also a set of purposive fundamental norms[42] penetrating all the social relations situated within the state domain,[43] and exerting their effects primarily through the activity of legislatures and constitutional adjudicators.[44] However, their transformative aspirations were not superimposed on society; to the contrary, their pursuit was viewed as an

[30]Zagrebelsky, *supra* note 18, at 133–34.

[31]Giuseppe Dossetti, I valori della Costituzione 20–21 (2005).

[32]Zagrebelsky, *supra* note 18, at 133–35.

[33]Grimm, *supra* note 8, at 144.

[34]Alessandro Morelli, *L'agenda della Costituent: Dal metodo dell'Assemblea al discorso sulle riforme, in* Immaginare la Repubblica: Mito e attualità dell'Assemblea Costituente 46–50 (Fulvio Cortese, et al. eds. 2018).

[35]Valerio Onida, *Le Costituzioni. I principi fondamentali della Costituzione italiana, in* 1 Manuale di diritto pubblico 97–98 (Giuliano Amato & Augusto Barbera eds. 1997). *See also* Zagrebelsky, *supra* note 18, at 140–42.

[36]Roberto Bin, 'Che cos'è la Costituzione?', 27 Quaderni Costituzionali 11 (2007).

[37]Salvatore D'Albergo, Costituzione e organizzazione del potere nell'ordinamento italiano 190 (1991).

[38]Or, in other words, the constitution was neutral with regard to the different legitimate worldviews but was not neutral with regard to values. *See* Hesse, *supra* note 15, at 62–63.

[39]Loughlin, *supra* note 13, at 925.

[40]Earlier, the Weimar Constitution had also attempted to prescribe principles of justice in the private domain. *See* Keith Ewing, *Rights in Economic Life, in* Oxford Handbook of Comparative Constitutional Law 1039–41 (Michel Rosenfeld & András Sajó eds., 2012).

[41]Emphasis on the substantive dimension of the constitution is evident, for instance, in the BVerfG, 6 BvR 31, 1957.

[42]The capacity of constitutional norms to question social relations and legal regimes inherited from previous liberal or authoritarian regimes is underlined in D'Albergo, *supra* note 37, at 220; Giuseppe Dossetti, *Funzioni e ordinamento dello Stato moderno, in* Non abbiate paura dello Stato! 45–46, 55 (Enzo Balboni ed. 2014).

[43]Constantino Mortati, *La Costituente, in* Raccolta di scritti 8–9 (1972).

[44]Maurizio Fioravanti, *La trasformazione costituzionale,* 2 Rivista trimestrale di diritto pubblico 295, 295–309 (2014).

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eminently political undertaking, attainable through legislative activity in a context of democratic competition. In other words, the transformative goals of the DSCS were exposed to and not shielded from political conflict.[45]

Ironically, the first to realize this notion were probably the Italian Communists. Already in the 1930s they had conceived the idea of "progressive democracy," according to which socialism had to be attained by expanding political participation and, therefore, through democratic means.[46] As a consequence, at the Constituent Assembly the Communist Party concurred with the idea that the constitution was not to favor or entrench any type of ideology.[47] The defeat of capitalism and the socialist transformation of society were goals to be achieved essentially through mass mobilization and democratic political action. Accordingly, the Communists fought strategically to strengthen civil, political, and collective rights in order to create space and resources for social and political activism. They struggled to insert in the constitution language evoking social transformation and to predispose the tools of activist government—all textual elements which, in favorable political circumstances, could be invoked to legitimate their political agenda. Yet, the definition of political economy was left to legislative rather than constitutional determination.[48]

If no one could elevate his particular convictions and policy solutions to the status of dogma,[49] in principle all political opinions deserved to have access to the constitutional arena and be treated with equal respect.[50] Besides inspiring the design of political institutions, this concept was promptly acknowledged in the interpretation of constitutional texts. In 1954, for instance, the German Constitutional Court was adamant in declaring that the Basic Law did not ordain the nature and structure of the economic system, but only laid down a more open framework of core protections and principles.[51] Likewise, the Italian Constitutional Court refrained from constraining legislative activity on the basis of the more or less biased reconstructions of the economic constitutional order resulting from unilateral interpretations of constitutional principles.[52] 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 as contrary to basic constitutional rights but, besides that, broad room was left to political freedom and a great deal of discretion was recognized to legislatures on the actual use of a wide range of policy instruments.[53] To put it in a single line: The open constitution lent itself to a variety of economic material orders.[54]

The idea that constitution-makers had omitted to entrench a particular economic constitutional order fueled heated scholarly debates.[55] Among the ranks of those keen on

[45]D'Albergo, *supra* note 37, at 169–70.

[46]Alexander Höbel, *La "democrazia progressiva" nell'elaborazione del partito comunista italiano,* 18 Historia Magistra 57–58 (2015).

[47]Palmiro Togliatti, Principi dei rapporti sociali (economici), Atti Assemblea Costituente, I Sottocommissione, Oct. 3, 1946.

[48]Francesco Saitto, *I rapport economici. Stato e mercato tra intervento e regolazione, in* Immaginare la Repubblica. Mito e attualità dell'Assemblea Costituente 141–42 (Fulvio Cortese, et al. eds. 2018).

[49]Dario Antiseri & Ralf Dahrendorf, Il Filo Della Ragione 52–53 (1994).

[50]Burdeau, *supra* note 16, at 126.

[51]*See* the *Investment Aid I* case, BVerfGE, 4 BvR 7, July 29, 1954 (hereinafter *Investment Aid I* case) in which the Court stated:

> The Basic Law's neutrality in economic matters consists merely in the fact that the "constituent power" has not adopted a specific economic system. This omission enables the legislature to pursue economic policies deemed proper for the circumstances, provided the Basic Law is observed. Although the present economic and social order is. .. consistent with the Basic Law, it is by no means the only one possible. It is based upon a political decision sustained by the will of the legislature that can be substituted or superseded by a different decision.

[52]*See, e.g.*, judgment no. 14 of the Constitutional Court of the Italian Republic (1964).

[53]Marco Benvenuti, *Democrazia e potere economico*, 3 Rivista AIC 6 (2018).

[54]Saitto, *supra* note 48, at 132–33.

[55]For an accurate reconstruction of the different positions emerged in Germany, *see* Francesco Saitto, Economia e stato costituzionale. Contributo allo studio della "Costituzione economica" in Germania 75–76, 89–97 (2016).

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rehabilitating a thicker and more purposive constitutional order in this field, ordoliberal scholars were probably the most vocal. In their view, the organization of the economic system ought to conform to principles of economic rationality, on the assumption of the existence of a general political decision on the structure of national economic life.[56] Short of any constitutional constraints, national economic policies would be prey of particular interests[57] and become irrational.[58] To prevent government from being captured, a set of clear and general rules was required so that competition could perform its social function of contrasting the concentration of private power.[59]

To be sure, the ordoliberal understanding of the constitutional order did not necessarily entail a society entirely subject to overriding and holistic market principles.[60] Ordoliberals had in mind a more modest conception of the economic order, in which economic freedom and competition did not exert any authority outside the economic sphere,[61] and their protection was instrumental to a more comprehensive notion of social welfare.[62] At any rate, at least for a few decades, constitutional adjudicators and the majority of constitutional scholars seemed to resist their more or less tempting suggestions. Even when *Soziale Marktwirtschaft* consolidated its predominance on German political economy, the constitutional court averted its entrenchment.[63] As much as most of the ruling class subscribed to that political agenda, that remained only one of the legitimate manifestations of the economic constitutional order. Alternative options were available, and the constitutional court did not foreclose their legislative pursuit.[64]

The wide scope for policy-making available in the DSCS can be appreciated by looking at the material economic orders developed during *les trente glorieuses*.[65] The DSCS expanded and stabilized government activism as a defining feature of the constitutional order. State interventionism was regarded not only as instrumental to the reconstruction and modernization of state economies, but also as contributing to the consolidation of national unity and cohesion.[66]

[56]Franz Böhm, Walter Eucken & Hans Grossman-Dörth, *Il nostro compito. Il manifesto dell'Ordoliberalismo del 1936, in* Il liberalismo delle regole. Genesi ed eredità dell'economia sociale di mercato 17–18 (Francesco Forte & Flavio Felice eds. 2016).

[57]Nils Goldschmidt & Michael Wohlgemuth, *Nascita ed eredità della tradizione friburghese dell'economia ordinamentale, in* Il liberalismo delle regole. Genesi ed eredità dell'economia sociale di mercato 21 (Francesco Forte & Flavio Felice eds. 2016).

[58]Wilhelm Röpke, *Presupposti e limiti del mercato, in* Il liberalismo delle regole. Genesi ed eredità dell'economia sociale di mercato 176 (Francesco Forte & Flavio Felice eds. 2016).

[59]Goldschmidt & Wohlgemuth, *supra* note 57, at 22.

[60]Röpke, *supra* note 58, at 119–20.

[61]*Id.* at 159.

[62]Alfred Müller-Armack, *Economia sociale di mercato, in* Il Liberalismo Delle Regole. Genesi ed Eredità Dell'Economia Sociale di Mercato 57 (Francesco Forte & Flavio Felice eds. 2016).

[63]Saitto, *supra* note 55, at 97, 101.

[64]This claim might be challenged on the basis of the *Pharmacy Case* (7 BVerfGE 377, June 11, 1958) by the German Constitutional Court. Indeed, recent archive research (see Fabian Michl, *Das Sondervotum zum Apothekenurteil. Edition aus den Akten des Bundesverfassungsgerichts,* 68 Jahrbuch des Öffentlichen Rechts der Gegenwart, 323–407 (2020)) has shown how in that pioneering judgment a divided German Constitutional Court deliberately opted for strict scrutiny on proportionality ground to tackle interventionist legislative frameworks inherited from the interwar legal experience and perpetuated post-war by conservative lawmakers. *Id.* at 340–41. The resulting construction of the right to choose a trade (article 12 of the German Basic Law) inspired a handful of liberalizing rulings in the following years which were certainly meant to put an end to the most intrusive forms of state control on the economy. *Id.* at 365. Yet, nothing in this finding seems to contradict the established claim concerning the neutrality of the Basic Law on economic matters based on the *Investment Aid I* case. First, even in the latter judgment the Court admitted that the prevailingly open framework established by the Basic Law was not boundless, including a set of core protections and principles corresponding, *inter alia*, to constitutional rights. Second, a robust—but by no means absolute—protection of constitutional rights does not necessarily lead to a purposive constitutional order. Reinforced protection of economic freedoms, for instance, implies certainly a market-based constitutional order, but does not seem to prescribe a particular variety of capitalism.

[65]Jean Fourastié, Les Trente Glorieuses: Ou la révolution invisible de 1946 à 1975 (1979).

[66]*See* Ernst Forsthoff, Lo stato della società industriale 75 (2011); Massimo Luciani, *Unità nazionale e struttura economica. La prospettiva della Costituzione repubblicana, in* Diritto e Società 645 (2011).

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Broad was the perception that private economy was chronically unstable and liable to prolonged stagnation at unnecessarily high levels of unemployment. Thus, regular rather than exceptional state action was necessary to govern the fluctuations of private economy and restore economic growth and full employment.[67]

Following the United States' lead,[68] in several European countries the promotion of employment and the modernization of the economy became the focal points of all political economy, [69] even at the cost of potentially negative repercussions on price stability.[70] Keynesian economics emerged as the favorite course of political economy, particularly in the countries more exposed to the risk of a communist ascent,[71] or as a moderate alternative to planning.[72] 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 of public expenditures or lowered taxation, even at the cost of incurring budget deficits and inflation. In case of aggregate demand exceeding supply, governments were expected to run a budget surplus and restrictive monetary policy.[73] On these macroeconomic bases, further initiatives could be undertaken with a view to both modernize the economy and promote general welfare. Keynesianism enabled the adoption of the Fordist pact, whereby left parties and trade unions accepted the scientific organization of labor to improve efficiency, while big business accepted increased wages and economic security for employees not only as *per se* valuable objectives, but also for the gains in terms of productivity and sale opportunities.[74]

Within a similar framework, monetary policy was viewed as contributing to this comprehensive macroeconomic effort.[75] 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 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 control their price and constrain financial speculation became common practices for most of the central banks.[76]

This notion of monetary policy had clear institutional implications. If monetary policy was 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 opened almost everywhere with the approval[77] or the completion[78] of nationalizations of

[67]Peter A. Hall, *Introduction, in* THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS 6–7 (1989).

[68]See, in particular, the Employment Act 1946 requiring the federal government to use all practical means to promote maximum employment, production and purchasing power. The same objectives were taken on also by the Federal Reserve. *See* FABIAN AMTENBRINK, THE DEMOCRATIC ACCOUNTABILITY OF CENTRAL BANKS: A COMPARATIVE STUDY OF THE EUROPEAN CENTRAL BANK 190 (1999).

[69]Pierre Rosanvallon, *The Development of Keynesianism in France, in* THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS 183–93 (1989).

[70]Röpke, *supra* note 58, at 178, quipping chronic inflation as "democratic-social inflation." The relation came to be encapsulated in the so-called Philips curve, which emboldened governments to act in favor of employment even if that resulted in what was assumed a temporary increase in inflation.

[71]Marcello de Cecco, *Keynes and Italian Economics, in* THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS, 219–20 (1989). *See also* Rosanvallon, *supra* note 69, at 193.

[72]Margaret Weir, *Ideas and Politics: The Acceptance of Keynesianism in Britain and the United States, in* THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS 74–81 (1989).

[73]Hall, *supra* note 67, at 6–7.

[74]ALAIN SUPIOT, THE SPIRIT OF PHILADELPHIA: SOCIAL JUSTICE VS. THE TOTAL MARKET 105–07 (2012).

[75]OMAR CHESSA, LA COSTITUZIONE DELLA MONETA. CONCORRENZA, INDIPENDENZA DELLA BANCA CENTRALE, PAREGGIO DI BILANCIO 277 (2016).

[76]*Id.* at 256, 262.

[77]This was the case of the Bank of England (1946) and the Nederlandsche Bank (1948). *See* AMTENBRINK, *supra* note 68, at 64–65, 104–105.

[78]This was the case of the Banque de France (1946).

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central banks. Moreover, 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.[79] The choice of regulating central banks through legislation was therefore widespread,[80] leaving to governments the responsibility for the formulation of the monetary policy within the guidelines defined by parliaments.[81] In these statutes, monetary objectives were no longer defined with an exclusive view to price stability as central banks' mandates were extended to a broader range of goals.[82] A general trend of central banking operating at the behest of the treasuries was established: Monetary policy was a key policy field for the life of a country and the technocratic authorities entrusted with its implementation could not replace or displace the political economy decisions adopted by political authorities.[83]

The case of France was probably the most eloquent manifestation of this tradition of government-led monetary policy.[84] In the interwar period, the independence of the central bank had acquired as elsewhere an exquisitely political connotation, that is, a constraint to the expansionist fiscal policies of left-leaning governments.[85] In the aftermath of World War II, this model was plainly rejected. The nationalization of Banque de France was completed in 1946 and throughout all the Fourth Republic, the central bank supported the monetary policy of government, albeit being critical of the practice of creating money to finance deficit spending. The subordination of Banque de France to government became particularly intense in the 1960s, a period in which no important decision could be taken without the consent of the Treasury.[86] This institutional arrangement was codified in the Bank Act of 1973,[87] although in the context of a more flexible legislative framework.[88] In this context, the bank continued to operate as banker for the state, servicing its debts by means of credits and the purchase of government bonds. The facilitation of credit was subject to an agreement between the Banque and the Minister of Economic Affairs and Finance, to be approved by the National Assembly.[89]

Nevertheless, not in all European countries Keynesianism and the idea that money creation could depart from the rule of rigid convertibility into gold were perceived as coherent with the ongoing effort of the DSCS to move the structures of European states in a more democratic and social direction.[90] Even among the ranks of those committed to social justice and activist government, the idea of financing public expenditure through monetary emissions was frowned upon.[91] Particularly in Germany, the ordoliberal notion that the central bank should be entrusted with a narrow mandate centered on price stability and a broad degree of operational independence

[79]Saitto, *supra* note 48, at 155. The scant constitutional references left room for broad political discretion. This was the case of article 47 of the Italian Constitution, amenable to both monetarist and Keynesian interpretations. On article 88 of the German Basic Law, *see infra* this Section.

[80]This was explicitly provided in some constitutions, *see* 1958 (rev. 2008) CONST. art. 34 (Fr.) *and* GW. [CONSTITUTION] art. 106 (Constitution of the Kingdom of the Netherlands).

[81]AMTENBRINK, *supra* note 68, at 171–74. *See also* Giorgio Repetto, *Responsabilità politica e governo della moneta: il caso della BCE, in* LA RESPONSABILITÀ POLITICA NELL'ERA DEL MAGGIORITARIO E NELLA CRISI DELLA STATUALITÀ 288–90 (Gaetano Azzariti ed. 2005).

[82]*See, e.g.*, the statutory objective of the Nederlandsche Bank (Bank Act 1948, 9 & 10 Geo. 6. c. 27, § 9(1) (Eng.) (referring in general to the prosperity and welfare of the nation alongside stability of the currency).

[83]Giuseppe Guarino, *Il ruolo della Banca d'Italia, in* L'AUTONOMIA DELLE BANCHE CENTRALI (EDIZIONI COMUNITÀ) 270 (Donato Masciandaro & Sergio Ristuccia eds. 1988).

[84]AMTENBRINK, *supra* note 68, at 70.

[85]Jean Bouvier, *La Banca di Francia e il governo negli anni 1850-1986, in* L'AUTONOMIA DELLE BANCHE CENTRALI (EDIZIONI COMUNITÀ) 154 (Donato Masciandaro & Sergio Ristuccia eds. 1988).

[86]*Id.* at 168–69.

[87]*See* arts. 1, 4, Law n°73-7 on the Bank of France (Jan. 3, 1973).

[88]Bouvier, *supra* note 85, at 174–76.

[89]*See* art. 19 of the Bank Act of 1973.

[90]CHESSA, *supra* note 75, at 260–61.

[91]*See, e.g.*, the political manifesto of left-leaning Italian Catholics, PER LA COMUNITÀ CRISTIANA, 109 (Editrice Studium, 1945).

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became predominant,[92] to the extent of justifying a derogation to the otherwise unflinching commitment of the Basic Law to ministerial accountability and representative democracy.[93]

Many reasons may explain the German aversion to Keynesian policies, chief among these the trauma of the hyperinflation of the early 1920s. The way in which memory of these events was elaborated presented Keynesianism as offering ill-advised suggestions such as profligate fiscal policies and currency manipulation.[94] Keynesian ideas were therefore preempted by another set of policies oriented toward the supply side and the so-called "social market economy."[95] This alternative course of political economy implied a return to an institutional pattern rooted in the late 19th Century, when the state had pursued supply-side policies with domestic demand subordinated to the needs of industrial capital, extensive programs of social insurance for securing social peace and "organized capitalism."[96] In the aftermath of World War II, this set of policies found ideological legitimation in ordoliberalism,[97] a course of political economy committed to the primacy of monetary policy guaranteed by a strong and independent central bank, an open international economy to favor exports, increased market competition, and limited state intervention.[98]

As noted above, this economic model was not entrenched at a constitutional level. Indeed, originally the Basic Law did not consider the federal budget as a tool for the macroeconomic stabilization. The original *Finanzverfassung* was essentially procedural in nature, its main focal point being the regulation of the budgetary prerogatives of the Federal Government and Parliament.[99] To be sure, article 110 of the Basic Law required to balance the budget, but the prevalent view was that public expenses could be financed also through state-issued bonds.[100] Within this constitutional framework, ordoliberal policies remained exposed to democratic challenge, an aspect which became evident in mid-1960s when, in the context of the first post-war recession, Keynesian ideas gained some foothold.[101] This new course of political economy found its utmost expression not only at the legislative level,[102] but also in amendments to the Basic Law aimed at macroeconomic stabilization via fiscal interventions. "Overall economic equilibrium"[103] emerged as the new catchword to convey the notion of an economic constitutional order committed to price stability, a high level of employment, external balance, and steady economic growth.[104] But in particular a new approach to public debt, in which borrowing was explicitly authorized with regard to public investments,[105] turned the federal budget into a key device to steer economic policy.[106]

[92]Chessa, *supra* note 75, at 278–79, 284.

[93]Amtenbrink, *supra* note 68, at 217–19.

[94]Keynesian ideas were not popular even in the SPD and trade unions, which according to the Marxist tradition were keener on nationalizations and planning, *see* Christopher S. Allen, *The Underdevelopment of Keynesianism in the Federal Republic of Germany, in* The Political Power of Economic Ideas: Keynesianism across Nations 273 (1989).

[95]*Id.* at 263.

[96]*Id.* at 265–66. The term "organized capitalism" refers to the coordination among big business, the banks, and the state apparatus.

[97]*Id.* at 264.

[98]*Id.* at 281.

[99]*See* Grundgesetz [GG] [Basic Law], arts. 109–15, translation at https://www.gesetze-im-internet.de/englisch_gg/index.html.

[100]Saitto, *supra* note 55, at 162. Consider also that article 115 of the Basic Law permitted access to credit for extraordinary necessities or productive purposes set out in federal law.

[101]Allen, *supra* note 94, at 273–77.

[102]*See* Federal Ministry of Finance, Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft [Act to Promote Economic Stability and Growth] (June 8, 1967) (Ger.).

[103]*See* the newly inserted article 109 (2) of the Basic Law.

[104]*See* §1 of the Law for promoting stability and growth in the economy (1967).

[105]*See* the new version of article 115 (1) of the Basic Law, introducing the so-called "golden rule." Besides allowing borrowing up to a maximum of the total expenditures for investments provided for in the budget, this clause authorized further borrowing to avert disturbances of the overall economic equilibrium.

[106]Saitto, *supra* note 55, at 170–73.

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Nevertheless, these forays into Keynesianism were brief and qualified due to the restraints imposed by the independent Bundesbank.[107] West Germany could appear also in this respect an outlier. The peculiar choice of reinstating independent central banking as a defining feature of the material economic order ensued the successful experience of the independent Bank deutscher Länder, the forerunner of the Bundesbank established under Allies occupation.[108] When monetary sovereignty was returned to the West Germans, central bank independence was presented as one of the key drivers of the ongoing economic miracle and, more questionably, as the antidote to the hyperinflation of 1923.[109] By the same token, political control of the central bank was associated with the unleashing of hyperinflation and with the war-mongering policies of the Nazis in the late 1930s.[110] No surprise that in the political struggle leading to the establishment of the Bundesbank in 1957, the latter ended up being designed as independent.[111] Nevertheless, in one key aspect, the Bundesbank was similar to its European counterparts: Independence from government instructions was not originally required by the Basic Law, which expressly provided only for a federal central bank,[112] but was set out at legislative level[113]—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.[114] Likewise, it was in the Bundesbank Act, and not in the Basic Law, that the mandate of the central bank was defined with a prevalent view to price stability.[115]

Within this legislative framework, monetary policy was consistently conceived as a means to encourage investments and an export-led growth,[116] while the possibility to finance government expenditures was strictly constrained. This occurred in circumstances in which the goal of economic reconstruction could have justified expansive monetary measures.[117] Admittedly, during the brief experiment with Keynesianism of the late 1960s, even the Bundesbank cooperated with government by easing interest rates and financing increased deficit.[118] Yet, its involvement in these new institutional arrangements was ambivalent, as shown by the decision in 1969 to deny support to government policy in order to safeguard the value of currency—a move signaling an evident discomfort towards fiscal dominance.[119] On the whole, however, this legislative framework benefited the standing of the Bundesbank, contributing to its affirmation in the constitutional system as an independent fourth branch of government.

[107]Allen, *supra* note 94, at 277–78.

[108]Simon Mee, Central Bank Independence and the Legacy of the German Past 161–65 (2019).

[109]Indeed, the Reichsbank had been made independent already with the Law for the Autonomy of Reichsbank in May 1922 following pressures of the Allied Powers. *See id.* at 45–50. It must be remarked that, despite its newly acquired independence, the Reichsbank continued to finance government's deficits.

[110]*Id.* at 68–79.

[111]On the political struggle leading to the Bundesbank Act and on the role played by contradicting historical narratives on monetary policy in the interwar period, *see id.* at 117–35.

[112]*See* Article 88 of the Basic Law, which read as follows: "The Federation shall establish a bank of currency and issue as federal bank."

[113]*See* section 12(2) of the Bundesbank Act.

[114]Amtenbrink, *supra* note 68, at 219. *See also* Marijn van der Sluis, *Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank, in* The Constitutionalization of European Budgetary Constraints 111 (Maurice Adams et al. eds. 2014).

[115]In the prevalent interpretation, this was the meaning attributed to Section 3 of the Bundesbank Act, which reads, "The Deutsche Bundesbank, making use of the powers in the field of monetary policy conferred upon it under this Law, shall regulate the note and coin circulation and the supply of credit to the economy with the aim of safeguarding the currency and shall ensure the due execution by banks of payments within the country as well as to and from foreign countries."

[116]Jeremy Leaman, The Bundesbank Myth: Towards a Critique of Central Bank Independence Chapter 4, 114–54 (2001).

[117]Carl-Ludwig Holtfrerich, *Autorità monetarie e istituzioni di governo. La Bundesbank dal XIX secolo ai giorni nostri, in* L'autonomia delle banche centrali (Edizioni Comunità) 122 (Donato Masciandaro & Sergio Ristuccia eds. 1988).

[118]Leaman, *supra* note 116, at 142–44.

[119]*Id.* at 147–48.

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II. The Ambivalent European Economic Communities

Openness was also the prevailing trait of the original institutional framework of the EECs. As in the case of the DSCS, this feature reflected divergences among the political forces sustaining the European integration project. In this regard 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.[120] Indeed, following a trend initiated in the late New Deal,[121] Christian Democrats and Social Democrats conceived of supranational agencies as key components of a new world order enabling their commitment to activist government.[122] 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.[123]

Against this background, the ambivalence of the EECs should not come as a surprise. On the one hand, their commitment to market building would soon become a target for the most left-leaning parties opposing the ratification of the founding treaties.[124] On the other hand, the abundant concessions to state interventionism gave the European integration project a protectionist twist, at least if compared with the liberalization projects undertaken more or less in the same period under the GATT or the OEEC.[125] So, although the making of a common market expressed a certain purposive orientation also on the part of the EECs, it was not clear whether the goal of the founding treaties was simply countering the autarchic tendencies of the nation-state or rescuing the economic freedoms and property rights from their downgrade under the DSCS.

Aside from the idiosyncrasies of their proponents and opponents, the founding treaties established a peculiar form of economic integration based on the free movement of productive factors, the harmonization 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 nationality discriminations[126] and the commitment to remove hindrances to market access.[127] The latter foreshadowed a process of gradual liberalization to be attained by Community political institutions through the approval of measures of secondary law.[128] Also, the harmonization of competitive conditions required regulatory interventions on the part of Community institutions.[129] The treaties made it clear that this goal could not be left entirely to the operation of market forces,[130] but it required regulatory plans to prevent market liberalization that would unleash regulatory competition.[131] Lastly, to achieve treaties objectives, a certain degree of macroeconomic coordination was in order.[132]

[120]Agustín José Menéndez, *The Existential Crisis of the European Union,* 14 GER. L.J. 472–73 (2013).

[121]Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State, in* MULTILATERALISM MATTERS 129–39 (John Gerard Ruggie ed. 1993).

[122]This reflected a key shift from an international law of coexistence to an international law of cooperation. *See* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 11 (1964).

[123]F. A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 255–73 (1949).

[124]SERGIO BARTOLE, INTERPRETAZIONI E TRASFORMAZIONI DELLA COSTITUZIONE REPUBBLICANA 276–88 (2004).

[125]KAUPA, *supra* note 6, at 26.

[126]*See, e.g.*, Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 95, 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty].

[127]*See, e.g.*, EEC Treaty art. 52.

[128]*See, e.g.*, EEC Treaty art. 49.

[129]EEC Treaty arts. 100–01.

[130]*See, e.g.*, EEC Treaty art. 117.

[131]*See also* Kaupa, *supra* note 6, at 61-63. The same rationale inspired the common agricultural policy (EEC Treaty art. 39) and the establishment of the European Investment Bank (EEC Treaty arts. 129–30).

[132]EEC Treaty art. 6.

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The treaties required the member states to conceive their economic policies as matters of common concern,[133] namely to avoid trade imbalances, secure price stability, and promote a high level of employment.[134] Also in this respect, Community institutions were expected to provide a significant contribution in terms of coordination of national economic and monetary policies.[135]

Within this institutional framework, several were the regulatory strategies available for Community policy-makers.[136] 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.[137] Particularly during the transitional period, the free movement of productive factors and the harmonization of competitive conditions were promoted primarily through regulatory interventions by the Community institutions. The notion of a regulatory level playing field inspired those political efforts, 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.[138] In principle, such a sweeping harmonization could rely on the legal bases enshrined in the Treaty of Rome, and the Court of Justice on several occasions endorsed their potentially limitless remit.[139] Yet, after the "empty-chair crisis" and the Luxembourg Compromise, the notion of a centralized model of economic integration[140] appeared illusory, leaving room for a more modest and decentralized regulatory strategy.[141]

Already, in the transitional period, the European Court of Justice had decided that free movement norms could be invoked before national courts to challenge national measures.[142] In the policy stalemate following the Luxembourg Compromise, the judicial enforcement of market principles could appear an alternative to positive harmonization, in particular for economic actors interested in piecemeal deregulation or the subversion of states' activist plans.[143] Yet, for a rather long period the Court of Justice did not indulge such litigation strategies. With the noteworthy exception of border measures, on which the case-law of the Court was merciless,[144] the judicial enforcement of market principles vis-à-vis national measures targeted mainly direct[145] or indirect[146] discriminations, thereby leaving largely unaffected the possibility for state legislatures to achieve their economic and social goals. This deferential attitude towards state interventionism also inspired the interpretation of the treaty principles on state aids, whose enforcement in the face of the economic and social policy objectives pursued by the member states remained marginal until the end of the 1970s.[147]

[133]EEC Treaty art. 103.

[134]EEC Treaty art. 104.

[135]EEC Treaty art. 105.

[136]Miguel P. Maduro, We The Court: The European Court of Justice and the European Economic Constitution Chapter 4, 103–49 (Hart Publ'g 1998).

[137]John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 Int'l Regimes, 379–415 (1982).

[138]*Memorandum of the Commission on the Action Programme of the Community for the Second Stage*, COM (1962) 300 final (Oct. 24, 1962); *see also* Kaupa, *supra* note 6, at 52–53.

[139]See ECJ, Case 22/70, Comm'n v. Council (ERTA), ECLI:EU:C:1971:32 (Mar. 31, 1971), https://curia.europa.eu/juris/liste.jsf?num=C-22/70 and ECJ, Case 240/83, ADBHU, ECLI:EU:C:1985:59 (Feb. 7, 1985), https://curia.europa.eu/juris/liste.jsf?num=C-240/83.

[140]Maduro, *supra* note 136, at 110–26.

[141]*Id.* at 143–49.

[142]ECJ, Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, ECLI:EU:C:1963:1 (Aug. 16, 1963), https://curia.europa.eu/juris/liste.jsf?num=C-26/62.

[143]ECJ, Case 6/64, Costa v E.N.E.L., ECLI:EU:C:1964:66 (July 15, 1964), https://curia.europa.eu/juris/liste.jsf?num=C-6/64.

[144]ECJ, Case 24/68, Comm'n of the Eur. Cmty.'s v. Italian Republic, ECLI:EU:C:1969:29 (July 1, 1969), https://curia.europa.eu/juris/liste.jsf?num=C-24/68.

[145]ECJ, Case 2/74, Reyners v. Belgium, ECLI:EU:C:1974:68 (June 1, 1974), https://curia.europa.eu/juris/liste.jsf?num=C-2/74.

[146]ECJ, Case 170/78, Comm'n of the Eur. Cmty.'s v. U.K., ECLI:EU:C:1983:202 (July 12,1983), https://curia.europa.eu/juris/liste.jsf?num=C-170/78.

[147]Gian L. Tosato, *La disciplina comunitaria degli aiuti tra economia di mercato e interessi generali*, in La constituzione economica: Italia, Europa, 252–53 (Pinelli T. Treum ed., il Miluno 2010).

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Deference towards states' economic and social policies was also the strategy inspiring macroeconomic coordination in this period. Already with the European Payment Union under the OEEC, trade imbalances between European countries had been tackled and a sufficient level of exchange rates stability ensured to foster intra-European trade. The goal of containing currency fluctuations for trade purposes was also key in the Bretton Woods System.

In principle, the semi-pegged exchange rates therein decided, if coupled with capital mobility, could threaten member states' autonomy in fiscal and monetary matters. Yet, for a rather long period, that scenario did not materialize. In the 1960s the implementation of article 67 EEC on free movement of capital had been pursued on the basis of two directives specifying that a set of capital movements was not liberalized.[148] Other capital controls were liberalized but, in case of an adverse impact on national economic policies, they could be reinstated. In this regard also the case-law of the Court of Justice was cautious. Up until the 1980s the Court was perfectly aware of the fact that complete freedom of movement of capital could undermine the economic policies of the member states or destabilize their balance of payments.[149] It is not by chance that, unlike the other free movement provisions, article 67 EEC was not considered directly effective, with the result that freedom of movement of capital was mainly recognized as authorizing the payments necessary for the exercise of other economic freedoms.[150]

In this context, European macroeconomic coordination secured favorable conditions for states' activist plans.[151] To be sure, this implied that the full economic benefits of a 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. This institutional arrangement made the fortune of the European nation states by contributing to their economic success in *les trente glorieuses*.[152] 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 which the ambivalences of the Treaty of Rome were resolved in a neoliberal direction. Accordingly, economic freedom, property rights and price stability were gradually reinstated as the key drivers of the material economic order. This move did not necessarily imply a revival of laissez-faire: Rather than simply advocating economic abstentionism, neoliberalism purported to transform state activism and reorient policy-making towards the creation of the organizational and subjective conditions for entrepreneurship.[153] The consequences of this new course of political economy were far-reaching: While the neoliberal agenda could quite easily align with the ordoliberal rendering of the DSCS, its relationship with Keynesianism was more tormented.

First, the redefinition of the material economic order was carried out in the field of free movement of goods. Therein the goal of completing the single market entailed a gradual shift from the decentralized model of economic constitution experimented in the foundational period to an economic constitution combining elements of both the competitive and centralized models.

[148]*See* Council Directive 43/921 of Dec. 7, 1960, First Directive for the Implementation of Article 67 of the Treaty, and Council Directive 63/21 of Dec. 18, 1962.

[149]ECJ, Case 203/80, Criminal proceeding against Guerrino Casati, ECLI:EU:C:1981:261 (Nov. 11, 1981), https://curia.europa.eu/juris/liste.jsf?num=C-203/80.

[150]*See* EEC Treaty art. 106.

[151]*See* Subsection C.I; *see also* KAUPA, *supra* note 6, at 76–83.

[152]ALAN S. MILWARD, THE EUROPEAN RESCUE OF THE NATION STATE (1999).

[153]NIKOLAS ROSE, POWERS OF FREEDOM. REFRAMING POLITICAL THOUGHT 137–44 (1999). The organizational conditions are identified in the de-nationalization of publicly owned enterprises; the minimization of rigidities in the labor market; the ample availability of skilled labor; the removal of the obstacles inhibiting the freedom of the market. The subjective conditions include the restructuring of the provision of security to remove the incitements to passivity and dependency; conditional and residual social support; the empowerment of individuals and the incitement of the will to self-actualize through labor through both exhortation and sanctions.

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The focal point of that shift was mutual recognition, the notion inspiring *Cassis de Dijon,*[154] the judicial ruling that in many respects marked the watershed in that evolutionary process. Two were the far-reaching innovations introduced by that judgment. First, building on pioneering case-law on non-tariff barriers,[155] the Court reviewed host state product requirements in the light of an obstacle-based rather than discrimination-based test.[156] That move transformed the prohibition of measures having equivalent effects to quantitative restrictions into an economic due process clause of sorts, enabling judicial challenges to broad swathes of domestic regulation.[157] In the ensuing judicial proceedings, the low threshold defined by the obstacle-based test would easily permit to litigants to shift to national governments the burden of justifying policy measures in the light of the mandatory requirements doctrine. Second, in order to promote the mutual recognition of national regulatory standards, the Court of Justice employed a set of rather strict proportionality tests, at least if compared with the standards of review normally in use by national constitutional courts.[158] Depending on the stringency of the selected test,[159] mutual recognition could either reinforce[160] or call into question[161] the standards of protection autonomously defined by national governments. Thus, the judicial rulings conforming with the *Cassis De Dijon* doctrine did not necessarily displace domestic regulations or unleash regulatory competition.[162] Nonetheless, they increased the overall pressure on national governments, and all the more when judicial mutual recognition was generalized to all productive factors.[163] State activism was also subjected to more intensive oversight in the light of state aid rules.[164]

The neoliberal rendering of the Treaty of Rome did not rest only on an increased emphasis on negative integration. *Cassis de Dijon* was immediately synchronized with the Commission legislative agenda targeting state measures justified in the light of the mandatory requirements doctrine for harmonization purposes.[165] 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.[166] 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. To be sure, the turn to qualified majority voting accelerated the approval of the directives listed in the White Paper on the completion of the single market,[167] making of market building and mutual recognition primarily a legislative

[154]ECJ, Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, ECLI:EU:C:1979:42 (Feb. 20, 1979), https://curia.europa.eu/juris/liste.jsf?num=C-120/78.

[155]ECJ, Case 8/74, Procurer du Roi v. Benoit and Gustave Dassonville, ECLI:EU:C:1974:82 (July 11, 1974), https://curia.europa.eu/juris/liste.jsf?num=C-8/74.

[156]Gráinne de Búrca, *Unpacking the Concept of Discrimination in EC and International Trade Law*, *in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES, 188–91 (C. Barnard & J. Scott, eds., 2002).

[157]Menéndez, *supra* note 120, at 471–72.

[158]Marco Dani, *Assembling the Fractured European Consumer*, 36 EUR. L. REV. 362, 367–69 (2011).

[159]MADURO, *supra* note 136, at 49–60.

[160]ECJ, Case C-340/89, Irène Vlassopoulou, ECLI:EU:C:1991:193 (May 7, 1991), https://curia.europa.eu/juris/liste.jsf?num=C-340/89.

[161]Case C-315/92, Verband Sozialer Wettbewerb eV v. Clinique Laboratories SNC and Estée Lauder Cosmetics GmbH, ECLI:EU:C:1994:34 (Feb. 2, 1994), https://curia.europa.eu/juris/liste.jsf?num=C-315/92.

[162]KAUPA, *supra* note 6, at 117-20.

[163]Menéndez, *supra* note 120, at 481.

[164]Tosato, *supra* note 147, at 254–55.

[165]*Commission Communication Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'),* 1980 O.J. (C 256), 2–3.

[166]EEC Treaty art. 100A.

[167]*Completing the Internal Market: White Paper from the Commission to the European Council*, at 310, COM (1985) 310 (June 28, 2001).

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matter.[168] Yet, the turn to positive integration also included a few critical downsides. First, the appeal of qualified majority voting led to the adoption of legislative measures also in fields not immediately related to the regulation of markets, on the basis of the vague suspect of their adverse impact on the competitive level playing field.[169] This led not only to a potentially limitless expansion of supranational legislative competences, but also to a crucial reconsideration of environment, health or culture related national regulations in the light of supranational economic rationality.[170] Second, qualified majority voting did not apply to the harmonization of fiscal provisions, free movement of persons and the rights and interests of employed persons.[171] Therefore, owing to the difficulties of a legislative back-up in case of deregulation, national measures falling in those policy areas remained more exposed to the vagaries of judicial politics. Third, the shift to qualified majority voting facilitated the adoption of the Directive 1988/361, the legislative act which abolished the restrictions on capital movements within the Community.[172] As seen, capital controls had constituted the keystone of the system of macroeconomic coordination enabling state interventionism, thus their abolition increased the pressure on national governments to secure conducive macroeconomic conditions.[173]

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 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 in which *Cassis de Dijon* was decided, the European Monetary System (EMS) had been established in an attempt to constrain currency fluctuations.[174] The EMS required the definition of an official central exchange rate for all currencies, which were left to float within bands determined for distinct 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 this system, capital controls were the *conditio sine qua non* enabling 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.[175]

D. The Age of Purposiveness

I. The Entrenchment of Neoliberalism

The way out from the fragility of a semi-pegged exchange rate regime was moving to a monetary union.[176] At least in hindsight, that is exactly the destination of the trajectory linking *Cassis de Dijon,* the EMS, the SEA, and the Directive 88/361. As said, at the time of their adoption, the neoliberal inclination of those decisions was already evident, but the same could not be said about their final goal, as a full monetary union was not necessarily conducive to the displacement of the DSCS. The plans designed in the 1970s and 1980s recognized that the increased mobility of productive factors coupled with fixed exchange rates would augment regional differences, all the

[168]Paul Craig, *The Evolution of the Single Market*, *in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 20–22 (C. Barnard & J. Scott, eds., 2002).

[169]ECJ, Case C-300/89, Comm'n of the Eur. Cmty.'s v Council of Eur. Cmty.'s, ECLI:EU:C:1991:244 (June 11, 1991), https://curia.europa.eu/juris/liste.jsf?num=C-300/89.

[170]ALEXANDER SOMEK, INDIVIDUALISM 115–18, 137 (2008).

[171]EEC Treaty art. 100A, para. 2.

[172]Council Directive 88/361 art. 1(1) and Annex I, 1988 O.J. (L 178/5) 5–18.

[173]KAUPA, *supra* note 6, at 140.

[174]Commission Regulation 3181/78, 1978 OJ L (379), 2.

[175]Paul De Grauwe, ECONOMICS OF MONETARY UNION 104–105 (2018).

[176]*Id.* at 108–09.

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more in a Community enlarging to countries like Greece, Spain, and Portugal.[177] To achieve a full monetary union, it was recommended, a sizeable supranational budget ought to be established to support the regions in difficulty and facilitate the modernization of their economies.[178] In this perspective, far from evoking the destabilization of the DSCS, the monetary union nourished the idea of its pan-European restatement. Two institutional developments taking place during the same period were coherent with the imaginary of a pan-European DSCS. The Communities were expanding their legislative competences to increasingly salient policy fields and improving the liberal and democratic credentials of the European policy-making with, respectively, a judge-made bill of rights and a popularly elected European Parliament. Against this background, the neoliberal turn of the late 1970s and 1980s could appear only the avant-garde of a process which would soon be rebalanced with the addition of more robust democratic and social components.

To be sure, the realization of this scenario implied a good dose of optimism about the capacity of the Community to create the social, political, and economic preconditions required to create a full monetary union and a pan-European constitutional democracy.[179] 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 of *Cassis de Dijon*, the EMS and Directive 88/361. But whilst those earlier decisions were not set in stone—given different political equilibria at supranational level, they could have been easily reversed—the Treaty of Maastricht made them de facto irreversible by entrenching their underlying motifs as the new economic constitution of the Eurozone. Since then, 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, as a matter of constitutional law, the neoliberal transformation of the DSCS.[180] To put it simply: By elevating a particular economic paradigm to the status of uncontested truth,[181] the Treaty of Maastricht turned the Community legal framework into a prevailingly purposive constitutional order. Hereafter, it was on that questionable constitutional basis that the realignment of the EU and the DSCS ought to be pursued.

Sure, this is not how the Treaty of Maastricht is conventionally presented,[182] and therefore more needs to be said to substantiate the thesis of its neoliberal purposive inclination.

First of all, the creation of a monetary union presupposed a more uncompromising commitment to free movement of capital. The Treaty of Maastricht reframed the relevant treaty principle in purely obstacle-based terms[183] upgrading at constitutional level the approach inspiring Directive 1988/361.[184] The scope of application of free movement of capital was

[177] *See Report of the Study Group on the Role of Public Finance in European Integration,* COMMISSION OF THE EUROPEAN COMMUNITIES, April 1977, [hereinafter the "the McDougall Report"], http://www.cvce.eu/obj/the_macdougall_report_volume_i_brussels_april_1977-en-c475e949-ed28-490b-81aea33ce9860d09.html.

[178] *See* TOMMASO PADOA-SCHIOPPA, EFFICIENCY, STABILITY AND EQUITY: A STRATEGY FOR THE EVOLUTION OF THE ECONOMIC SYSTEM OF THE EUROPEAN COMMUNITY (1988).

[179] Dieter Grimm, *Does Europe Need a Constitution?*, 1 EURO. L. J. 282 (1995).

[180] CHRISTOPHER J. BICKERTON, EUROPEAN INTEGRATION: FROM NATION-STATES TO MEMBER STATES 131–36 (2012).

[181] THOMAS BIEBRICHER, THE POLITICAL THEORY OF NEOLIBERALISM 200–24 (2019); *see also* Edmondo Mostacci, *Fedele a sé stessa: UEM, coordinamento delle politiche economiche e processi democratici* in DIRITTO PUBBLICO COMPARATO ED EUROPEO, 1032 (2020); CHESSA, *supra* note 75, at 429.

[182] *See* Manfred. E. Streit & Werner Mussler, *The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'* 1 EUR. L. J. 5 (1995); MADURO, *supra* note, at 136, 160–61 (discussing different affirmations of the pluralist character of the Treaty of Maastricht); KAUPA, *supra* note 6, at 89–90.

[183] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 63, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[184] *See* TFEU art. 1(1).

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extended also to third countries, thereby amplifying the disciplinary potential of international financial markets.[185] Soon afterwards, this move was reinforced by key rulings of the Court of Justice overruling earlier more cautious case-law: The Court endowed the newly introduced treaty provision with direct effect,[186] and went back also on the notion that the general financial interests of a member state could justify the retention of capital controls.[187] This more assertive judicial orientation reinforced the idea already hinted in *Cassis de Dijon* of considering market principles as judicially enforceable constitutional rights.[188] But whereas in the case of product requirements the deregulatory potential of market principles could be contained through positive harmonization, in other more extreme applications of that approach this could no longer be taken for granted. In particular, when the Court extended the scope of application of free movement principles to salient national economic and social policies such as taxation[189] or industrial relations,[190] the Treaty of Maastricht did not offer adequate legal bases to counter deregulation.

The same neoliberal inclination was visible in the structure of the new competences inserted in the Treaty. In expanding the scope for EU policy-making in fields normally associated with state activist government, the new legal bases did not simply single out new areas of EU intervention open to democratic and intergovernmental negotiation.[191] New legal bases came often with the specification of policy directions pre-empting key democratic choices through neoliberal guidelines.[192] For instance, the goal of price stability was prioritized in monetary policy,[193] workers' adaptability in employment,[194] and competitiveness in industrial policy.[195] Admittedly, the same legal bases included also textual references to other policy objectives which, in later treaty revisions, would further be enriched with more ambitious substantive goals[196] and horizontal clauses.[197] Yet, those textual gestures could only cloak with a pluralist veneer the actual post-political[198] structure of an overabundant[199] and potentially asphyxiating[200] constitutional framework.[201] Indeed, the latter did establish a clear hierarchy among those goals, leaving to political institutions only the decision on how to attain neoliberal targets while maximizing competing interests.[202]

[185]Menéndez, *supra* note 120, at 467.

[186]Joined cases ECJ, C-358/93 and C-416/93, Criminal Proceedings against Aldo Bordessa, Vincente Mellado, and Cocepción Maestre, ECLI:EU:C:1995:54 (Feb. 23, 1995), https://curia.europa.eu/juris/liste.jsf?num=C-358/93; ECJ, Joined Cases C-163/94, C-165/94, and C-250/94, Criminal Proceedings against Emilio San de Lera, Raimundo Jiménez, and Figen Kapanoglu, ECLI:EU:C:1995:451 (Dec. 14, 1995), https://curia.europa.eu/juris/liste.jsf?num=C-163/94.

[187]ECJ, C-367/98, Comm'n of the Euro. Cmty.'s v. Portuguese Republic, ECLI:EU:C:2002:326 (June 4, 2002), https://curia.europa.eu/juris/liste.jsf?num=C-367/98.

[188]Fritz. W. Scharpf, *De-constitutionalisation and majority rule: A democratic vision for Europe*, 23 EURO. L. J 317–21 (2017).

[189]ECJ, Case C-196/04, Cadbury Schweppes v. Comm'rs of Inland Revenue, ECLI:EU:C:2006:544 (Sept. 12, 2006), https://curia.europa.eu/juris/liste.jsf?num=C-196/04.

[190]ECJ, Case C-341/05, Laval un Parterni Ltd. v. Svenska Byggnadsarbetareförbundet, ECLI:EU:C:2007:809 (Dec. 18, 2007), https://curia.europa.eu/juris/liste.jsf?num=C-341/05.

[191]*See* Gareth Davies, *Democracy and Legitimacy in the Shadow of Purposive Competence* (2015) 21 EURO. L. J., 2, 14, (distinguishing between purposive and sector specific competences).

[192]*Id.* at 2–3.

[193]*See* TFEU art. 127.

[194]*See* TFEU art. 145.

[195]*See* TFEU art. 173.

[196]*See* TFEU art. 3.

[197]*See* TFEU art. 9.

[198]MOUFFE, *supra* note 17, at 48–55.

[199]De Witte, *supra* note 9, at 35.

[200]John E. Fossum & Agustín J. Menéndez, *The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union*, 11 EUROPEAN L. J. 409 (2005).

[201]*See also* Grimm, *supra* note 21, at 460; Scharpf, *supra* note 188, at 316.

[202]Davies, *supra* note 191, at 3.

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The Court of Justice was ready to follow suit also in this respect. In a landmark case on positive harmonization,[203] it ruled that the principle of conferred powers required EU market regulations to contribute to the removal either of obstacles to access to market or to appreciable distortions of competition. The ruling entailed a purposive reframing of EU market regulation. By virtue of that judgment, the legal basis introduced by the SEA could no longer be interpreted as open-ended provisions enabling limitless legislative activity. Critically, this did not lead to the abandonment of EU policy initiatives in those fields, but just to their reframing in the light of economic rationality.[204] In other words, short of autonomous legal bases to ground legislation on non-economic issues, EU political institutions resorted to market harmonization anyway. But to qualify under its new interpretation, EU interventions first had to advance market openness or undistorted competition.[205]

However, the entrenchment of the neoliberal policy agenda in the EU constitutional order found its utmost manifestation in the architecture of EMU. At first glance, the goals inspiring economic and monetary policy could appear in line with the canons of open constitutions. Price stability, sound public finances, and monetary conditions and a sustainable balance of payments were listed as guiding principles on an equal footing.[206] Tellingly, the list did not include full employment, but that was just the first minor hint at a more skewed architecture.

Short of the requisite degree of political and social legitimacy to sustain a robust supranational fiscal policy, the Union 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 rates regime favored the creation of an incomplete monetary union, that is, a monetary union without a sizeable budget.[207] Thus, monetary policy[208] was federalized and depoliticized,[209] whilst economic and fiscal policy were retained by the member states as national constitutional prerogatives subject only to intergovernmental macroeconomic coordination.[210] This disconnect of monetary and economic policy was by no means neutral as it implied the weakening of the macroeconomic steering capacities of Eurozone states.[211] The impact of this asymmetric architecture was felt in particular in the countries with a more ingrained Keynesian tradition, where fiscal policy concerns used to dominate monetary policy.[212] Indeed, a single and independent federal monetary policy could not be synchronized with the needs of several fiscal policies and, more broadly, of highly heterogeneous national economic systems.

The disconnect between monetary and fiscal policy and, as a reflection, the de facto neutralization 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 Bundesbank was taken as a model and generalized in a radicalized form for the rest of the Eurozone.[213] As noted above, up until the treaty of Maastricht, the narrow mandate and the independence of the Bundesbank had been established through legislation, thus they were formally reversible by an ordinary political majority. In the design of the European Central Bank

[203]ECJ, Case C-376/1988, Fed. Republic of Ger. v Euro. Parliament, ECLI:EU:C:2000:544 (Oct. 5, 2000), https://curia.europa.eu/juris/liste.jsf?num=C-376/1988.

[204]Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"*, (2011) 12 GER. L. J. 827 (2011).

[205]Davies, *supra* note. 191, at 10–11.

[206]TFEU art. 119(3).

[207]De Grauwe, *supra* note 175, at 111.

[208]TFEU art. 3(1)(c).

[209]Menéndez, *supra* note 120, at 487.

[210]TFEU art. 5.

[211]Menéndez, *supra* note 120, at 469; Mostacci, *supra* note 181, at 1036.

[212]*See* Subsection C(I); *see also* CHESSA, *supra* note 75, at 280–82.

[213]TFEU art. 131. The implementation at national level of the principles of the Treaty of Maastricht led to the complete reorientation of the coordinates of central banking, in particular in countries like France. *See* AMTENBRINK, *supra* note 68, at 199–200.

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(ECB), the Treaty of Maastricht upgraded those choices to the status of constitutional norms, thereby pushing them beyond the reach of any meaningful form of political accountability.[214]

First of all, 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 centered on price stability as primary goal and the support to general economic policies only as secondary objective.[215] The treaty left it open to the ECB to define the contents of price stability, but foreclosed the pursuit of other objectives to the detriment of the main goal.[216] Secondary goals, therefore, could be pursued only indirectly, that is, the ECB could not engage in autonomous policymaking in their respect, but could promote their achievement only through monetary policy decisions advancing or, at least, leaving unaffected the primary goal.[217]

Ironically, the preference for a purposive competence and a narrow mandate for the ECB was defended on democratic ground. Monetary policy was presented as an area requiring a level of expertise, temporal consistency and policy credibility unattainable for ordinary political institutions.[218] To put it in a single line: The protection of the value of money could justify a restriction on democracy and the delegation of regulatory powers to an ad hoc independent agency.[219] Yet, democratic concerns imposed that the mandate of the latter be limited in scope, hence the prioritization of price stability. Other considerations could lead to a more critical assessment of how monetary policy was being shaped. First, the exclusive definition of price stability on the part of the ECB implied the depoliticization of key decisions concerning macroeconomic magnitudes with clear redistributive implications.[220] Second, a mandate limited to price stability implied a drastic loss in terms of policy capacity, in that the possibility for monetary policy to complement national fiscal policies in their efforts to support aggregate demand was further undermined. Third, the prioritization of price stability was questionable also in terms of political freedom,[221] because within the new institutional landscape the prospects of implementing the Keynesian version of the DSCS appeared dim.

The decision in favor of entrenchment encompassed also the independence requirements of the ECB.[222] Not satisfied by having set up a central bank operating in the absence of any meaningful relationship with an equivalent political partners,[223] the Treaty of Maastricht reinforced its insulation with the express constitutional prohibition of monetary financing.[224] Again, also this choice 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.[225] At the same time, the prohibition of monetary financing was a gravestone on the possibility to pursue courses of political economy other than that presupposed by the Treaty.

[214]This is particularly visible in the amended version of article 88 of the German Basic Law, which reads as follows: "The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability." *See* Repetto, *supra* note 81, at 298.

[215]TFEU art. 119(2), 127, 282(2); Statute of the European System of Central Banks, art. 2.

[216]Michael Ioannidis, Sarah J. Hláskova Murphy & Chiara Zilioli, *The mandate of the ECB. Legal considerations in the ECB's monetary policy strategy review* (ECB Occasional Paper Series, No 276/2021, at 8).

[217]*Id.* at 15, 22.

[218]Matthias Herdegen, *Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 12 (1998); Chessa, *supra* note 75, at 290.

[219]BVerfG, 2BVR 2134/92, Oct. 12, 1993; BVerfG, 2 BVR 2159/92, Dec. 28, 1992. *See also* Chiara Zilioli & Martin Selmayr, *The Constitutional Status of the European Central Bank*, 44 COMMON MKT. L. REV. 361 (2007).

[220]CHESSA, *supra* note 75, at 277.

[221]Herdegen, *supra* note 218, at 11–12, 16.

[222]TFEU art. 130.

[223]Whereas the Bundesbank operated in tandem with the Federal Government, the ECB defines the EU monetary policy in a position of "institutional loneliness." *See* Van der Sluis, *supra* note 114, at 114–15, 122.

[224]TFEU art. 123.

[225]CHESSA, *supra* note 75, at 370.

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Finally, 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 costly defaults whose effects would not remain confined within national borders. To cope with these risks, the treaty set up a more intense managerial system of coordination consisting of both positive targets to steer economic policy and negative limits to prevent externalities.

The positive dimension was the one with the weakest traction. 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.[226] To achieve the general goals, a soft law system of coordination was established relying on broad guidelines and a mechanism of multilateral surveillance centered in the Council and the Commission.[227] In principle, this institutional framework was more open than that observed in monetary policy and in the single market for the constraints of treaty objectives and the surveillance procedure were definitely less penetrating.[228]

Nevertheless, the neoliberal leaning of macroeconomic coordination was more pronounced 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.[229] A general ban on excessive deficits was established,[230] with uniform reference values spelled out at quasi-constitutional level.[231] Quantitative limits on government deficits and public debt were reinforced by a no-bail out clause.[232] On the whole, therefore, fiscal rules expressed a certain skepticism towards borrowing and, as a reflection, the economic theories regarding it as an ordinary tool of economic policy.[233] No consideration was paid 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, just as insufficient were the tools predisposed in the event of an economic and financial shock. So, also in this regard treaty framers preferred to occupy the constitutional framework with their more or less questionable economic doctrines with the intention of transforming it into an instrument of government. In moving in this direction, however, they overlooked the downsides of a prevailingly purposive constitutional framework—an aspect that they would start to realize in occasion of the economic and financial crisis began in 2007.

II. Increased Purposiveness and its Downsides

As elsewhere, also in the Eurozone the impact of the economic and financial crisis was extremely heavy. But unlike other advanced economies, 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

[226]TFEU, art. 119(1).

[227]TFEU, art. 121.

[228]The managerial regulation of salient national policy fields entailed in this coordination system brings about different sort of problems addressed in Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 EUR. L. J. 667–93 (2012).

[229]*See* Menéndez, *supra* note 120, at 488; CHESSA, *supra* note 75, at 446.

[230]TFEU, art. 126.

[231]Protocol on the excessive deficit procedure, article 1. Reference values can be modified by the Council voting unanimously on the basis of a special legislative procedure. TFEU, art. 126(14).

[232]*See* TFEU, art. 125, this prohibition is qualified by the possibility of financial assistance for member states in difficulty in exceptional circumstances; *see also* TFEU, art. 122.

[233]Mostacci, *supra* note 181, at 1068.

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to a full monetary union and, in fact, the Eurozone architecture did change in some of its key aspects under the pressure of the crisis. Nevertheless, the transformation was preservationist in essence. The imperative of saving the Eurozone did not trigger the creation of a sizeable EU budget to endow EMU with fiscal capacity. The Eurozone that was saved remained the asymmetric creature conceived at Maastricht, supplemented by a complex set of measures radicalizing 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 programs were adopted to counter deflation and economic stagnation. On the whole, these reforms augmented the purposiveness of the EU 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 Union 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 in a series of legislative reforms to intensify macroeconomic coordination with a view to foster budget discipline.[234] 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.[235] The wisdom of constraining public investments and, more in general, 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 a relatively easy reversal.

Legislative reforms, however, did not seem to assuage the concerns for the fiscal credibility of EU member states. But instead of reconsidering their policy strategy, 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 Eurozone countries to set up a stability mechanism granting financial assistance subject to strict conditionality.[236] At first glance, this new constitutional provision could seem to abandon the categorical wording of the no bailout clause or, at least, to introduce a qualification to its clear-cut prohibition.[237] Yet, the qualification was not meant to open up the institutional framework to alternative courses of political economy. As the European Court of Justice 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 the financial stability of EMU.[238]

Budgetary discipline and financial stability were also the goals inspiring the second constitutional reform, the Treaty on Stability, Coordination and Governance (hereafter 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.[239] Member states were also expected to insert balance budget

[234]See the set of regulations and directive making up the so-called Six-Pack (Regulations 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011 and Directive 2011/85) and Two-Pack (Regulations 472/2013 and 473/2013).

[235]Mostacci, *supra* note 181, at 1027.

[236]*See* TFEU art. 1366(3); introduced with the Council Decision 2011/199 of Apr. 6, 2011, 2011 O.J. (L 91).

[237]Darnian Chalmers et al., European Union Law: Text and Materials 679 (2019).

[238]ECJ, Case C-370/12, Thomas Pringle v. Gov't of Ir., ECLI:EU:C:2012:756 (Nov. 12, 2012), §§ 135, 137, https://curia.europa.eu/juris/liste.jsf?num=C-370/12.

[239]Treaty on Stability, Coordination and Governance in the Economic and Monetary Union art. 3, Mar. 2, 2012 [hereinafter TSCG]. This norm requires that across the cycle there should not be a deficit lower than 0.5 percent of GDP (1 percent for countries with public debt significantly below 60% GDP).

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rules in their constitutions[240] as well as to adopt automatic correction mechanisms to be activated in case of significant deviations from their specific fiscal targets.[241] A duty to drastically reduce public debt to reach the 60 percent threshold was also introduced,[242] and member states subject to excessive deficit procedure were required to enter in economic partnership programs including structural reforms of their economies.[243]

Clearly, these norms stiffened further the neoliberal profile of the EU constitutional order and, what is worse, entailed on those questionable normative bases the alignment by national constitutional settings. As purposiveness escalated, it became increasingly evident that the Eurozone was no place for the Keynesians.[244] The policies adopted at the behest of the Union and the closure of the institutional framework fueled antagonism and resentment in both creditor and debtor countries.[245] No surprise that, in a context of unmediated and suppressed political conflicts, EMU and, as a reflection, 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. After few years from 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 a broad usage of discretionary flexibility to carve out some interstice for counter-cyclical fiscal policies.[246] But even if this relaxation of fiscal rules made probably 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 similar elusive approach was visible also in the field of monetary policy. As the reform of fiscal rules and the vehicles of financial assistance revealed 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 abide by its modest role,[247] later it started to operate as a lender of last resort of private financial institutions and sovereign states. This move was coherent with the programs already implemented by other central banks outside the Eurozone but uneasily sat with the original mandate defined in the treaty. In particular, the launch of programs like the Outright Monetary Transactions (OMT)[248] and the Public Sector Purchase Programme (PSPP)[249] presupposed 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 forced essentially by the circumstances to proceed in that direction, first to stabilize financial markets and then to contrast deflation and relaunch economic growth.[250]

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

[240]TSCG art. 3(2).

[241]TSCG art. 3(1)(e).

[242]TSCG art. 4.

[243]TSCG art. 5.

[244]Chessa, *supra* note 75, at 414.

[245]Damian Chalmers, *Introduction: The Conflicts of EU Law and the Conflicts in EU Law*, 18 Eur. L. J. 607 (2012).

[246]*See* European Council Conclusion 79/14, June 27, 2014; *Making the best use of the flexibility within the existing rules of the stability and growth pact* (2015) 12 final.

[247]Though with the noteworthy exception of its participation in the surveillance of adjustment programs through the troika.

[248]European Central Bank, Technical Features of Outright Monetary Transactions (Sept. 6, 2012), https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html.

[249]European Central Bank Decision 2015/774 of Mar. 4, 2015 on secondary markets public sector asset purchase programme, O.J. (L 121) 20–4.

[250]Chessa, *supra* note 75, at 345–47.

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could raise 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.[251] As noted in the case of the no bailout clause, also in this respect judicial validation 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 bail-out clause, the ECB programs entailed also the systematic reconsideration of earlier judicial qualifications—a fact that, clearly, sits at odds with the rule of law commitment of the EU.[252] Indeed, the OMT program had been certified by both the Court of Justice and the German Constitutional Court on the basis of its exceptional character and its coupling with ESM conditionality.[253] Those conditions were later challenged by the PSPP program, framed as a regular monetary policy intervention and untied from any formal conditionality. In the review of this program, both the CJEU[254] and its German counterpart[255] more or less agreed on a set of safeguards which programs of quantitative easing ought to respect to avoid the infringement of 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 (PEPP).[256]

The second troublesome implication of ECB unconventional programs regarded 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 to representative democracy of national constitutions. On these premises, an expansion of the ECB role would clearly create a void of democratic accountability.[257] No matter how justified by the need to fight deflation and economic stagnation,[258] the new ECB programs were implemented in a context of precarious democratic authorization and weak democratic controls.[259] The economic and financial crisis showed how remote and costly was the possibility of reverting to the apparently cheerful days before the crisis, in which the pretense of a distinction between economic and monetary policy could still appear credible. Unconventional monetary measures were there to stay and, if at all, it was their institutional framework that required modification.

E. Deconstitutionalizing EMU to Realign the EU with the Democratic and Social Constitutional State

The upshot of the argument presented in this Article is that, because of its prevailingly purposive institutional setting, the Union is misaligned with the prevailingly open constitutional framework of the DSCS. No meaningful added value can be found in this misalignment; on the contrary, it seems to undermine the overall coherence and endurance of European institutional arrangements.

If realignment appears desirable, two are the possible pathways to attain it: On the one hand, a top-down neoliberal realignment of the DSCS, based on the influence and ramifications of EMU and the primacy of EU law; on the other hand, the bottom-up redress of the EU neoliberal bias,

[251]One may identify in these measures a manifestation of the "proportionate empowering" envisaged by Loughlin, *supra* note 13, at 934.

[252]On the need of treaty amendment to legitimate this new role of the ECB, *see* Marco Dani, Edoardo Chiti, Joana Mendes, Agustín José Menéndez, Harm Schepel, Michael A Wilkinson, *"It's the political economy . . .!" A moment of truth for the eurozone and the EU*, 19 INTLY. J. OF CONST. L. 309, 323–24 (2021).

[253]ECJ, Case C-62/14, Gauweiler v. Deutscher Bunestag, ECLI:EU:C:2015:400 (June 16, 2015), https://curia.europa.eu/juris/liste.jsf?num=C-62/14; BVerfG, 2 BvR 2728/13, June 21, 2016.

[254]ECJ, Case C-493/17, Weiss, ECLI:EU:C:2018:1000 (Dec. 11, 2018), https://curia.europa.eu/juris/liste.jsf?num=C-493/17.

[255]BVerfG, 2 BvR 859/15, May 5, 2020.

[256]European Central Bank Decision 2020/440 of Mar. 26, 2020 on temporary Pandemic Emergency Purchase Programme, O.J. (L 91).

[257]Dani et al., *supra* note 252, at 321.

[258]Adam Tooze, *The Death of the Central Bank Myth*, FOREIGN POLICY, May 13, 2020, at 30.

[259]Nik De Boer & Jens van't Klooster, *The ECB, the Courts and the Issue of Democratic Legitimacy after Weiss*, 57 COMMON MKT. L. REV. 1703, 1710 (2020).

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based on the rehabilitation of the foundational commitments of the DSCS and, notably, of its open character. If the latter option is favored, the most obvious ways to realign the EU with the DSCS are either the creation of a full monetary union or the replacement of the Eurozone 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 scarce appetite and, most importantly, no political force with the requisite mobilizing capacity. This explains the realistic and yet uninspiring muddling through approach followed by the EU since 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[260] or diluted[261] 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 Union, in an attempt to relaunch economic growth and, in the meanwhile, boost the green and digital transition of national economies.[262]

Admittedly, most of these developments have been made in exceptional circumstances to buy more time and to prevent the uncoordinated unravelling of the Eurozone. 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 2023. 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. 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.[263] Likewise, the ECB remains well disposed towards operating as a lender of last resort of private financial institutions and national governments with a view to relaunch and consolidate economic growth.[264] Yet, all these initiatives continue to develop on precarious legal terrain and in the absence of meaningful mechanisms of democratic accountability. Finally, Next Generation EU may also be the harbinger of a Union endowed with a sizeable fiscal capacity to be employed in activist economic programs. At least for the moment, however, the program 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.[265]

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 this context, the most realistic prediction is that in its post-pandemic normal the EU will recalibrate the existing policies and institutions in a more sensible social and political direction, but not up to the point of redressing its neoliberal purposive posture. This scenario may appease part of the criticism against the EU, but it would not entail a genuine realignment with the DSCS—a goal which can be

[260]Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis, European Council of the European Union (Mar. 23, 2020), https://www.consilium.europa.eu/en/press/press-releases/2020/03/23/statement-of-eu-ministers-of-finance-on-the-stability-and-growth-pact-in-light-of-the-covid-19-crisis/.

[261]Communication from the Commission 2020/C 91 I/01 of Mar. 3, 2020, Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak, 2020 O.J. (C 91I).

[262]European Parliament and Council of 12 Regulation 2021/241 of Feb. 18, 2021, Establishing the Recovery and Resilience Facility O.J. (L 57), 17–75.

[263]Commission Communication on Orientations for a Reform of the EU Economic Governance Framework, COM (2022) 583 final (Sept. 11, 2022).

[264]European Central Bank, The Transmission Protection Instrument (July 21, 2022), https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220721~973e6e7273.en.html.

[265]*See* Commission Regulation 2021/241 art. 10 O.J. (L 57).

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accomplished neither through the mere humanization of a neoliberal constitutional structure nor with its relaxation or suspension in case of emergencies.

The distance between the most recent developments and a genuine realignment emerges as soon as the latter is conceptualized. To imagine the EU and the DSCS realigned, one does not have necessarily to think at extreme scenarios such as the completion of EMU or its dissolution. The guiding idea for a realignment could be reverting to an EU intergovernmental framework facilitating the realization of the DSCS foundational commitments in a context of economic interdependence. 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 shift of this type would require the drastic deconstitutionalization of the EU treaties and, correspondingly, the democratization of EU competences.[266] In this perspective, EU institutional actors should return to think at the treaties not as instruments of government but as institutional infrastructures open to democratic competition. They should bracket their political disagreements and reach across political boundaries to identify choices of constitutional design commanding broad support in both the EU political system and in the European societies. Constitutional scholars have already offered important insights in this direction: The treaties should be scaled back to their core functions and principles, and all the provisions of a non-constitutional nature should be downgraded to secondary law instruments.[267]

In view of its importance and ramifications, EMU should be the focal point of this undertaking. While present political and economic circumstances make the asymmetry between a federalized monetary policy and decentralized national economic policies difficult to overcome, it nonetheless seems 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 how an EMU realigned with the DSCS would look like:

a) The goals enshrined in article 119(3) TFEU—stable prices, sound public finances and monetary conditions and a sustainable balance of payments—would remain the guiding principles of both the monetary and economic policy of the EU. The objective of full employment would be added to the list;
b) Monetary policy would be defined as a sector specific competence without any constitutional prioritization 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,[268] on the basis of the ordinary legislative procedure after consulting the ECB;[269]
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 mutualization 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 excessive government deficit 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 with the ordinary legislative procedure;[270]

[266]Grimm, *supra* note 21 at 473; Scharpf, *supra* note 188, at 321.

[267]Grimm, *supra* note 21, at 473.

[268]For a similar suggestion, *see* De Boer, *supra* note 259, at 1721–23.

[269]This solution would imply the reconsideration of the constraining role of TFEU art. 130 on legislation established in ECJ, Case C-11/00, Comm'n of the Eur. Commt.'s *v* Eur. Cent. Bank, ECLI:EU:C:2003:395 (July 10, 2003) § 137, https://curia.europa.eu/juris/liste.jsf?num=C-11/00. *See* Zilioli, *supra* note 219, at 372.

[270]For a similar suggestion, *see* Olivier Blanchard et al., *Redesigning EU fiscal rules: From rules to standards*, 36 ECON. POL'Y 16–19 (2021).

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e) The focal point of fiscal surveillance by EU institutions should remain narrow—the size of government deficits[271] and trade imbalances. In a context in which national *demoi* are entrenched and salient policy choices on economic and social affairs are taken at 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) Likewise, EU institutions seem also 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 programs funded by the EU budget.

F. Coda: The Discreet Charm of Deconstitutionalization

Ever since the tormented ratification of the Treaty of Lisbon, treaty amendment has become taboo in the European Union. Not even the Covid-19 pandemic has pushed 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 Article? At least two are the reasons that may justify some interest in them. First, the features of a deconstitutionalized EMU offer a yardstick 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, and most important, the horizon of a deconstitutionalized EMU may offer a meeting ground for the most enlightened of the 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 the outsiders who are not attracted by the prospect of throwing the (EU) baby out with the (current EMU) bathwater. Particularly for the former group of people, the prospect of a more inclusive, adaptable, and legitimate institutional framework should be reason enough to forego the structural advantage conferred to them by the EU amendment clause[272] and undertake more daring high-profile constitutional initiatives.

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[271] *Id.* at 22.
[272] De Witte, *supra* note 9, at 37.

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