Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?

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Euro crisis reforms as major example of interstitial institutional change in the EU - Forms of institutional change : unusual sources of law, new tasks for the EU institutions, new organs, competence creep, institutional hybrids, and more differentiated integration - Question whether some or all of this amounts to a 'constitutional mutation' of the EU legal order - Reasons to doubt whether the constitutional fundamentals have changed - Alternative thesis: increased institutional variation, deepening the differences between EMU law and the rest of EU law.

Introduction

Institutional change in the European Union originates primarily in Treaty revisions but also in institutional practice by the EU's political institutions and courts in the periods between Treaty changes, so as to complement and informally modify the Treaty text. Farrell and Héritier coined the term *interstitial institutional change* for this phenomenon, and thereby emphasised that the EU's institutional system is not only shaped by the 'grand bargains' struck when the Treaties are revised, but also by an ongoing evolution taking place in between those formal constitutional changes.[2]

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[2] H. Farrell and A. Héritier (eds.), *Contested Competences in Europe: Incomplete Contracts and Interstitial Institutional Change* (Routledge 2007). Later on, the concept was applied to the euro crisis

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In the course of this piecemeal reshaping of the institutional balance, EU institutions may seek rulings of the Court of Justice to support their preferred outcome (for example, on choice of decision-making, or on the extent of EU competence); similarly, the member state governments may seek to challenge EU institutional practice which departs from their understanding of primary EU law. However, much of this interstitial change happens outside the court room, through legal measures and political practices that remain uncontested and add a layer of institutional law which complements the Treaty rules. Sometimes, interstitial changes are subsequently incorporated and 'codified' in the text of the Treaties.

This phenomenon was particularly visible in the long period between the creation of the European Economic Community and the negotiation of the Single European Act, when important changes in the institutional functioning of the EU occurred without formal Treaty change. Those changes included: the formulation of the direct effect and primacy doctrines by the European Court of Justice; the Luxembourg accord on the informal veto right in the Council; and the expansion of EC competences based on the internal market and flexibility clauses.[3] But even in the period of repetitive Treaty change inaugurated by the Single European Act in 1986 and terminated (for now) by the Lisbon Treaty, interstitial change continued to happen unabated. The field of EU external relations continues to be marked by *judicialised* inter-institutional skirmishes even after the Lisbon Treaty tried to put more order in the constitutional arrangements.[4] Areas of *non-judicialised* interstitial change include: the inter-institutional agreements and informal accords by means of which the EU institutions have sought to make their mutual interaction in law-making and budget-making smoother and more predictable;[5] and the 'trilogue' practice which has reshaped codecision without changing anything to the literal and very detailed description of that law-making procedure which we find today in Article 294 TFEU.[6]

responses in Y. Karagiannis and A. Héritier, 'Interstitial Institutional Change in Europe: Implications of the Financial and Fiscal Crisis', in B. De Witte et al. (eds.), *The Euro Crisis and the State of Democracy* (EUI/RSCAS 2013).

[3] A classical account of the overall institutional evolution in that period is by J. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) p. 2403.

[4] *See* the collection of contributions in M. Cremona and A. Thies (eds.), *The European Court of Justice and External Relations Law – Constitutional Challenges* (Hart 2014); especially as regards the post-Lisbon institutional battlefield: P. Van Elsuwege, 'The Potential for Inter-Institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' (at p. 115 of the cited volume).

[5] *See* J. Stacey, *Integrating Europe – Informal Politics and Institutional Change* (Oxford University Press 2010) Chapters 6 and 7; B. Driessen, *Interinstitutional Conventions in EU Law* (Cameron May 2007).

[6] There is a rich political science literature on this matter, including: H. Farrell and A. Héritier, 'Codecision and Institutional Change', 30 *West European Politics* (2007) p. 285; A. Rasmussen, '20 Years of Co-decision since Maastricht: Inter- and Intrainstitutional Implications', 34 *Journal of*

From an EU constitutional law perspective, one may distinguish between changes in institutional practice that do not alter the meaning of the relevant legal rules but merely complement them, and changes that cause a true constitutional transformation or mutation whereby the meaning of the legal rules is changed compared to how they were previously understood. An example of the former is the trilogue practice which has left intact the formal codecision procedure as described by the Treaties but led to an application of those rules resulting in the clear predominance of one phase (the first reading) of the procedure. An example of the latter is the Court's doctrine of the primacy and direct effect of EC law which, whilst not contradicting the text of the EEC Treaty as it then stood, certainly modified the then dominant conception of the relationship between Community and national law.

In this article, I use that framework of analysis to examine the impact of the euro crisis reforms adopted between 2010 and today on the institutional system of the European Union and on its legal order. There is no doubt that, during these electrifying five years, the law on Economic and Monetary Union has undergone a 'metamorphosis',[7] whereas the text of the Treaties remained virtually untouched.[8] This is, therefore, a fine example of interstitial institutional change. The first part of the article will present a synthetic view of the main forms of that institutional-legal response to the euro crisis. The second part will reflect on whether those changes should be qualified as complementary institutional practice that has accentuated the distinctiveness of Economic and Monetary Union law but without modifying the EU's overall constitutional balance (*institutional variation thesis*) or whether, on the contrary, we have witnessed a true constitutional transformation which has modified the EU's overall constitutional order as last recalibrated by the Lisbon Treaty (*constitutional mutation thesis*).

The main forms of institutional change in the euro crisis reponses

Four building blocks form together what EU legal writing traditionally describes as the *institutional law* of the European Union, namely: the rules conferring

European Integration (2012) p. 735; A. E. Stie, *Democratic Decision-Making in the EU: Technocracy in Disguise?* (Routledge 2013).

[7] F. Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union', in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of EU Law* (Oxford University Press 2015).

[8] The one Treaty amendment on EMU matters since Lisbon is the addition of a third paragraph to Art. 136 TFEU, whereby the Euro area states are authorised to set up a permanent stability mechanism under certain conditions. In fact, even this Treaty amendment was declared to be unnecessary by the Court of Justice in the *Pringle* judgment where it held that the European Stability Mechanism (the body alluded to in Art. 136(3)) had been lawfully established even before Art. 136(3) entered into force (ECJ 27 November 2012, Case C-370/12, *Thomas Pringle* v *Government of Ireland et al.,* at paras. 184-185).

competences to the EU as a whole; the rules defining the decision-making and governance mechanisms; the rules defining the legal sources of EU law; and the rules defining the enforcement mechanisms of EU law. In the following, I propose a synthetic view of the changes brought in those elements of EU institutional law by the euro crisis responses. The analysis does not cover the institutional changes that have happened at the *national* level. Despite the multiple interactions existing between EU and national institutions in Europe's multilevel governance system (especially in the policy field of economic governance), it still makes sense, for analytical purposes, to distinguish between the institutional law of the Union and the institutional law of each of its member states. The euro crisis has arguably caused important changes in national constitutional law, such as the Europe-wide diffusion of the balanced budget rule in national law, but those will not be considered here. Also, I will not consider the important changes of *substantive* EU law brought by the euro crisis response, unless they were accompanied by institutional change.[9] Examples of important changes in substantive rules include: the changes in the Commission's state aid framework to deal with the banking crisis in 2008 and following years (those changes did involve the creation of a specific regulatory framework but did not modify the Commission's institutional role and its mode of operation in the state aid field); the strengthening of the prudential requirements for banks through legislation on capital requirements and deposit guarantee schemes; and the 'softened' understanding of the no-bail-out clause in Article 125 TFEU.

Although the sprawling political and legal activity displayed during the euro crisis is resistant to easy summary, I propose to distinguish the following six distinct forms of euro crisis related institutional change: the recourse to unusual sources of law; the definition of new tasks for some EU institutions; the creation of new organs and bodies; an expansive reading of EU competences; the emergence of three kinds of institutional hybrids; and the widening differentiation between EU member states.

Unusual sources of law

Many authors have noted the considerable variety of the legal instruments used when formulating the euro crisis responses.[10] Some important elements of the reformed legal regime were put in place by means of EU legislation: the eight

[9] *See* the distinction made between 'substantive transformation' and 'institutional transformation', as proposed in Beukers' literature review: T. Beukers, 'Legal Writing(s) on the Eurozone Crisis', *EUI Working Papers* LAW 2015/11.

[10] For a synthetic overview of those legal instruments with references to their source, *see* A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015) Chapter 3.

pieces of EU legislation on economic governance known as the *six-pack* (2011) and *two-pack* (2013), and the three pieces of legislation forming together the Banking Union. Soft law (e.g. the Euro Plus Pact of March 2011) and informal institutional practice (e.g. the calling of Eurozone summits and changes in European Central Bank lending policies) were abundant. So far, nothing special. More unusual was the conclusion of four international law Treaties 'on the side' of the EU legal order, each of which was concluded between many, but less than all, the EU member states: the Decision of the Representatives of the Governments of the Euro Area countries of 10 May 2010 to set up the European Financial Stability Facility (EFSF); the Treaty establishing the European Stability Mechanism, signed on 1 February 2012 between the (then) 17 euro area countries, and which entered into force in September 2012; the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (commonly known as Fiscal Compact), signed on 2 March 2012, between the 17 euro area countries and eight further EU member states, and which entered into force on 1 January 2013; and finally the Agreement on the Single Resolution Fund signed by 26 member states (all except the UK and Sweden) on 21 May 2014, which has not yet entered into force.[11]

I have discussed elsewhere the reasons why the European Financial Stability Facility agreement, the European Stability Mechanism Treaty and the Fiscal Compact were concluded outside the EU legal order, arguing that there were, in each case, good legal and practical reasons for doing so, so that there is no evidence of an overall intergovernmental plot against the integrity of the EU legal order.[12] As regards the European Stability Mechanism Treaty in particular, the EU budget could not provide the financial resources needed for the creation of a massive rescue fund, so that it had to be set up by the member states using their own resources. As for the Single Resolution Fund Agreement, the reasons for its conclusion were not clearly spelled out. The original Commission proposal for a Europe-wide banking resolution mechanism, based on Article 114 TFEU, was split in two by the Council, with one part (the resolution mechanism itself) forming the object of an EU regulation, whereas the other part (the building of a fund to be used for resolution operations) was left to be created by the member states by means of a separate international agreement. This splitting was requested by Germany which invoked as its main legal argument that a measure imposing financing contributions by banks is a 'fiscal provision' which is excluded from the

[11] Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, [2014] Council doc. 8457/14.

[12] B. De Witte, 'Using International Law in the Euro Crisis – Causes and Consequences', *ARENA Working Papers* no. 4, June 2013; and *see*, in the same sense, A. de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance', 49 *Common Market Law Review* (2012) p. 1613, esp. at p. 1635-1640.

scope of Article 114 by paragraph 2 of that article;[13] but there were also important political reasons which were not discussed in a transparent way.[14]

Although recourse to international side agreements was a novelty in the Economic and Monetary Union context, it is a traditional instrument in the toolbox of European integration, which has mainly been used to give legal form to differentiated integration projects (as with the Schengen Agreement and Schengen Convention). The possibility for EU states to conclude such agreements results from the fact that in areas in which the EU possesses only shared competences, and as long as the EU has not exercised those competences, the member states preserve the power to adopt their own rules either individually or together with a group of other EU states. In doing so, they are, however, restrained by the requirement (which is accepted by all EU states) that such cooperation 'on the side' must not contain any rules that conflict with existing EU law obligations.[15]

A final unusual type of legal instrument is the *Memorandum of Understanding* concluded between the troika members (Commission, European Central Bank and the International Monetary Fund) and the countries benefiting from financial rescue operations as a prelude to the actual lending decisions. The Memoranda of Understanding are situated at the margins of the EU legal order (since one of the actors involved, on the lending side, is an international organisation rather than an EU institution), and there is also doubt as to their binding legal force.[16]

[13] In its press release on the day of the signature of the agreement, the Council enigmatically stated that 'using an intergovernmental agreement to establish rules on the transfer and mutualisation of contributions is intended to provide maximum legal certainty. The Council decided on this approach in December [2013], given legal and constitutional concerns in certain member states: Council press release [2014] 10088/14. For an articulation of the legal argument against the use of Art. 114 for this part of the banking union project, *see* C. Calliess and C. Schoenfleisch, 'Die Bankenunion, der ESM und die Rekapitalisierung von Banken – Europa- und verfassungsrechtliche Fragen', *Juristenzeitung* (2015) p. 113 at p. 119 ff. For criticism of the intergovernmental solution, *see* F. Fabbrini, 'On Banks, Courts and International Law – The Intergovernmental Agreement on the Single Resolution Fund in Context', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 444.

[14] It seems that the German government sought to ensure that it could stop the Resolution Fund being filled if the resolution rules themselves were to be later modified (under the qualified majority rule obtaining for Art. 114-based measures) in contrast with German interests (for instance, by removing or reducing the bail-in provisions in the SRM regulation).

[15] For a more elaborate analysis of the legal room for *inter se* agreements between groups of EU states, *see* B. De Witte, 'Old-Fashioned Flexibility: International Agreements between Member States of the European Union', in G. de Búrca and J. Scott (eds.), *Constitutional Change in the EU – From Uniformity to Flexibility?* (Hart 2000) p. 31.

[16] *See* the analysis by C. Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?', 10 *European Constitutional Law Review* (2014) p. 393 at p. 408-415.

New tasks for the institutions

As a result of the euro crisis, the institutions of the European Union were given many new and often unprecedented tasks. This is most clearly the case for the European Central Bank, which in 2013 was given an important banking supervision function, alongside, and partially insulated from, its main monetary policy function. The European Central Bank was also asked, together with the Commission (and the International Monetary Fund), to participate in the detailed negotiation of Memoranda of Understanding with bailout countries, and in their subsequent monitoring by the 'Troika' missions sent to the bailout countries. The upgrading of macro-economic surveillance in relation to all EU countries required the Commission to develop its expertise in the field, and led to a more prominent role for its Directorate-general for Economic and Financial Affairs. The Eurogroup, the informal body of the ministers of finance of the euro countries, although already mentioned in the Lisbon Treaty (Article 137 TFEU and Protocol on the Eurogroup), was called to play a much more active role than had been anticipated when it was first created; for several years now, it has remained 'at the core of the daily management of the euro area'.[17] The European Parliament is engaged in a new mechanism of 'economic dialogue' with the Commission and Council[18] and a new mechanism of banking supervision accountability with the European Central Bank. Even the Court of Justice was given new tasks, to ensure compliance with provisions of the European Stability Mechanism Treaty and the Fiscal Compact.

New organs

The euro crisis has led to the creation of new EU agencies with sometimes important decision-making powers that far exceed the tasks usually conferred on EU agencies. In 2010, during the first phase of the crisis, the European System of Financial Supervision was set up, including a *European Banking Authority* whose role is to coordinate the national agencies in charge of prudential supervision.[19] In 2014, as part of the Banking Union reforms, a *Single Resolution Board* was created,

[17] These words were used in a statement of the Euro Summit of 26 October 2011, <www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/125644.pdf>, para. 32, visited 2 November 2015. On the evolving relationship between the Eurogroup and its parent body the ECOFIN Council, *see* U. Puetter, *The European Council and the Council. New Intergovernmentalism and Institutional Change* (Oxford University Press 2014) p. 155-170.

[18] C. Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament?' 20 *European Law Journal* (2014) p. 164 at p. 175-177.

[19] The EBA was created by Regulation 1093/2010, OJ 2010, L 331/12, and its tasks were adapted in 2013, as a result of the creation of the Single Supervision Mechanism (Regulation 1022/2013, OJ 2013, L 287/5).

with quite broad discretionary powers of quasi-decision making.[20] In addition, the Treaty on the European Stability Mechanism created two *organs of the ESM* that decide on the use of ESM funds: the Board of Governors and the Board of Directors, each of which is composed of one member from each ESM state. These are not organs of the European Union although, in practical terms, the members of those organs are the same persons who compose the Eurogroup and Euro Working Group, making this an example of 'double hatting'. It may be noted that the other two euro crisis side agreements mentioned above, namely the Fiscal Compact and the Single Resolution Fund Agreement, did not create new decision-making organs: they are rule-making but not institution-creating Treaties. The Fiscal Compact did, however, establish two informal institutions without legal decision-making powers, namely the Euro Summit (which, however, had already met informally since 2008 before its existence was formally recognised in the Fiscal Compact)[21] and the 'Article 13' parliamentary body, composed of delegates of the European Parliament and national parliaments.[22]

Competence creep

A number of 'creative', and usually extensive, interpretations of existing EU competences have occurred since 2010. One example is the use of Article 136(1) TFEU as a legal basis for a quite extensive Eurozone-specific regime of economic governance, although the letter of that Treaty provision (which was inserted by the Lisbon Treaty) refers rather modestly to the adoption of 'measures specific to those Member States whose currency is the euro'.[23] A second example is the European Central Bank's new role as banking supervisor which was based on Article 127(6) TFEU which refers to 'specific tasks' being conferred upon the ECB in relation to prudential supervision of financial institutions; probably, the comprehensive supervisory role entrusted to the ECB under the Single Supervisory Mechanism was not what the drafters of the Maastricht Treaty had in mind when referring to 'specific tasks'. As for the Single Resolution Mechanism, the other pillar of the Banking Union, it was set up through a Regulation based on Article 114 TFEU, the internal market competence. Whereas internal market measures are supposed

[20] On the powers of the SRB, *see* K. Alexander, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism', 40 *European Law Review* (2015) p. 154 at p. 175 ff.

[21] On the emergence of the Euro Summit, *see* Puetter, *supra* n. 17, p. 126-133.

[22] On which, *see* Fasone, *supra* n. 18, p. 179-180.

[23] *See* the discussion of this point by K. Tuori and K. Tuori, *The Eurozone Crisis – A Constitutional Analysis* (Cambridge University Press 2014) at p. 168-171; and by U. Häde, 'Art 136 AEUV – eine neue Generalklausel für die Wirtschafts- und Währungsunion?', *Juristenzeitung* (2011) p. 133.

to harmonise national legislation, this Regulation does not harmonise national law but rather sets up an EU-level agency (the Single Resolution Board) and a procedure for European-level bank resolution, the Single Resolution Mechanism. A final example is the adoption by the ECB of its so-called 'unconventional measures' in the course of the sovereign debt crisis.[24]

Institutional hybrids

The institutional engineering which marked the euro crisis period has, at times, crossed or combined the established categories of EU law into hybrid forms of legal regulation. Three different forms of hybridity can be identified, each of which shows a combination of different elements from the EU's legal toolkit.

A first form of hybridity is that combining soft law tools and hard law rules even within one and the same legal instrument. This was already an existing pre-crisis feature of the EU's system of economic governance, which mainly used soft law instruments (guidelines and recommendations addressed to the Member States) but also provided for a power for the EU institutions to adopt binding sanctions as a measure of last resort.[25] This sanctioning power has been strengthened by the crisis reforms, but continues to form part of a hybrid governance system that still privileges the use of non-binding legal instruments. The coordination mechanisms have themselves been complemented by a very broadly based 'European semester'.[26]

A second form of hybridity combines Economic and Monetary Union law and internal market law, most visibly so in the context of the Banking Union legislation adopted in 2013 and 2014. The Banking Union is currently based on two pillars that are closely interrelated, in economic policy terms, but legally separate: the Single Supervision Mechanism, which is based on Article 127(6), an EMU legal basis; and the Single Resolution Mechanism, whose main elements are based on Article 114, an internal market legal basis which is normally used for measures applicable to the entire European Union, but which is used here for creating a mechanism that applies only to the euro area countries (and to those non-euro area countries freely deciding to opt in). Moreover, the SSM, a euro area

[24] T. Beukers, 'The New ECB and its Relationship with the Member States of the Euro Area: Between Central Bank Independence and Central Bank Intervention', 50 *Common Market Law Review* (2013) p. 1579 at p. 1591 ff.

[25] On the pre-crisis mixture of soft and hard law in economic governance, *see* H. J. Hahn, 'The Stability Pact for European Monetary Union: Compliance with Deficit Limit as a Constant Legal Duty', 35 *Common Market Law Review* (1998) p. 77.

[26] *See* the analysis by K. Armstrong, 'The New Governance of EU Fiscal Discipline', 38 *European Law Review* (2013) p. 601 at p. 609 ff.

mechanism, is closely connected to the financial supervision agencies, which are internal market bodies operating for the whole European Union.[27]

The third form of hybridity is between EU law and the international 'side-agreements', since they operate in close conjunction with each other. The relevant legal instruments make cross-references. Some EU institutions (the Commission, the European Central Bank and the European Court of Justice) are being 'borrowed' in order to play supporting roles within the international frameworks, and, as mentioned above, the personal composition of the main organs of the European Stability Mechanism (formally a separate international organisation) coincides exactly with the composition of two informal EU bodies, the Eurogroup and the Euro Working Group.

More differentiated integration

Whereas monetary policy has, from the beginning, been marked by a clear divide between euro area countries and other EU states, this cleavage used to be less visible in the economic governance part of Economic and Monetary Union law. The Lisbon Treaty included a new competence basis (Article 136.1 TFEU) for euro area specific legislation in this domain too. On this basis, a specific regime of enhanced cooperation was developed in the field of EMU law, where it was grafted upon the existing variable geometry between eurozone and non-eurozone countries. The legal basis in Article 136(1) was used for important parts of the 'six-pack' and 'two-pack' economic governance reforms. In one of the two-pack Regulations, a further differentiation between eurozone countries was made through the introduction of an 'enhanced surveillance' regime for those euro countries experiencing serious difficulties as regards their financial stability (a category which includes countries receiving European Stability Mechanism financial assistance and countries not receiving such assistance).[28]

More recently, experimental forms of variable geometry were invented in relation to banking supervision, where the new ECB-centred mechanism, while legally mandatory only for euro-area states, was opened up for 'closer cooperation' with non-euro states that wish to join the mechanism.[29] Differentiation was further extended by means of the international side agreements in which either only euro

[27] On the latter tension, *see* N. Moloney, 'European Banking Union: Assessing its Risks and Resilience', 51 *Common Market Law Review* (2014) p. 1609 at p. 1661-1669.

[28] Regulation 472/2013 of 21 May 2013, OJEU 2013, L 140/1; *see* M. Ioannidis, 'EU Financial Assistance Conditionality after "Two Pack"', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2014) p. 61 at p. 82-89.

[29] *See* G. Lo Schiavo, 'From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe?', 21 *Maastricht Journal of European and Comparative Law* (2014) p. 110 at p. 135-137.

area states participate (European Stability Mechanism Treaty) or which are open for participation by non-euro area states but on an optional basis (Fiscal Compact). This differentiation in substantive obligation was accompanied by more variable geometry in the decision-making bodies:[30] the Euro Summit was repeatedly convened in conjunction with, or instead of, the European Council; and the Eurogroup became the main venue for informal decision-making among the euro area governments although those informal decisions must be turned into formally binding decisions by the EU Council or by the ESM organs, depending on the case.

Constitutional mutation or increased institutional variation?

The institutional metamorphosis which EMU law underwent after 2010, and which was roughly sketched in the first part of this article, has caused turbulence also in legal writing. Legal scholars have sought to interpret this evolution in various ways. In this second part of the article, two different accounts will be discussed, which are differentiated by the extent to which they consider the recent evolution to have affected the EU's overall constitutional order.[31]

The first account is a radical one. It argues that either single euro crisis reforms, or their cumulative effect, have led to a mutation of the constitutional law of the European Union. Although the authors proposing such accounts often do not explain what they mean by 'constitutional mutation', a common characteristic of their assessment is a claim that interstitial changes in EMU law have spilled over into EU law generally, so as to modify and redefine the constitutional system laid down in the Lisbon Treaty. This interpretation must be distinguished from scholarly accounts that have examined the impact of euro crisis reforms on *national* constitutional law, notably in relation to the scope of 'limitation of sovereignty' clauses, to the national budgetary procedures[32] and to the protection of fundamental social rights.[33] Aspects of crisis-related legal reforms in national

[30] On the uneasy political coexistence between the Eurozone and the EU-28, *see* B. Laffan, 'European Union and Eurozone: How to Co-exist?', in F. Allen et al. (eds.), *Governance for the Eurozone: Integration or Disintegration?* (European University Institute and Wharton Financial Institutions Center 2012) p. 173.

[31] For other, more detailed, categorisations of the legal literature on the euro crisis, *see* Beukers, supra n. 9; and G. Martinico, 'EU Crisis and Constitutional Mutations: A Review Article', *STALS Research Paper* 3/2014.

[32] *See* a number of national reports on changes of budgetary laws and procedures in M. Adams et al. (eds.), *The Constitutionalization of European Budgetary Constraints* (Hart 2014); and V. Ruiz Almendral, 'A Myopic Economic Constitution? Controlling the Debt and the Deficit without Fiscal Integration', *EUI Working Papers LAW* 2015/12.

[33] C. Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry', *EUI Working Papers LAW* 2015/34.

law were challenged before a number of national constitutional courts.[34] The analysis of the evolution of national constitutional law cannot be entirely separated from that of EU constitutional law, though: changes in the division of competences between the EU and the member states, or in the formal relationship between EU law and national constitutional law, affect both levels at the same time and could therefore also lead to a constitutional mutation of the EU legal order.

The second account is a more moderate one. It takes its cue from the fact that institutional rules have always varied across policy fields during the entire European integration process. This variation increased with the Maastricht Treaty, which (among other things) established Economic and Monetary Union as an institutionally very idiosyncratic policy area. This institutional distinctiveness was not affected, and even slightly reinforced, by later Treaty revisions, including the Lisbon Treaty.[35] The euro crisis response is marked by a further increase in this institutional variation within EU law, between EMU law and other areas, but the overall constitutional system, as last re-arranged by the Lisbon Treaty, is not affected in a major way, despite the many specific changes recalled in the first part of this article.

The constitutional mutation thesis

An editorial article in the *European Law Journal* by Agustín Menéndez, entitled 'A European Union in Constitutional Mutation' starts with the following sentence: 'it is a platitude to say that the several and overlapping crises that have shocked the European Union since 2007 have led to fundamental changes in European constitutional law'.[36] Whereas the word 'platitude' may seem

[34] *See*, for comparative examinations of those constitutional challenges: Kilpatrick, *supra* n. 33; F. Amtenbrink, 'New Economic Governance in the European Union: Another Constitutional Battleground', in K. Purnhagen and P. Rott (eds.), *Varieties of European Economic Law and Regulation – Liber Amicorum for Hans Micklitz* (Springer 2014) p. 207 at p. 224-232; F. Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective', 32 *Berkeley Journal of International Law* (2014) p. 64; S. Bardutzky and E. Fahey, 'Who Got to Adjudicate the EU's Financial Crisis and Why? Judicial Review of the Legal Instruments of the Eurozone', in Adams et al. *supra* n. 32; M. Canotilho, T. Violante and R. Lanceiro, 'Austerity Measures under Judicial Scrutiny: The Portuguese Constitutional Case-Law', 11 *EuConst* (2015) p. 155.

[35] For discussion of the limited impact of the Lisbon Treaty on the institutional structure of EMU, *see* J.V. Louis, 'Economic Policy under the Lisbon Treaty', and A. Sáinz de Vicuña, 'The Status of the ECB', both in S. Griller and J. Ziller (eds.), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Springer 2008).

[36] A. J. Menéndez, 'Editorial: A European Union in Constitutional Mutation', 20 *European Law Journal* (2014) p. 127.

inappropriate given that the constitutional mutation thesis is actually rather nebulous and controversial (as this paper will argue), it does effectively convey the favour with which the term 'constitutional mutation', or closely related terms, has been embraced by a large number of authors analysing the legal consequences of the euro crisis. The most elaborate argument of this nature is offered by Kaarlo and Klaus Tuori, who chose 'constitutional mutation' as the title for the central part of their monograph on the Eurozone crisis.[37] For Christian Joerges, 'the praxis of Europe's crisis management amounts to a profound transformation of Europe's constitutional constellation'.[38] For Federico Fabbrini, 'the euro crisis and the responses to it have profoundly influenced the constitutional architecture of the European Union'.[39] The terms constitutional mutation and constitutional transformation have been approvingly used also by Giuseppe Martinico,[40] by Mark Dawson and Floris de Witte,[41] and by Nicole Scicluna[42] among others. For Paul Craig, 'the economic and financial crisis has had profound effects on the EU, including its constitutional architecture'.[43] Chiti and Teixeira stated more tentatively that the European responses to the crisis 'have already set in motion a number of processes that are reshaping the EU polity and (…) impacting on the overall architecture of the EU'.[44] Even Koen Lenaerts, despite being a judge at the European Court of Justice, starts an article by writing that the euro crisis reforms 'have not only had an impact on that specific area of EU law, but have also altered the constitutional balance on which the European Union is founded',[45] but

[37] K. Tuori and K. Tuori, *The Eurozone Crisis – A Constitutional Analysis* (Cambridge University Press 2014).

[38] C. Joerges, 'The European Economic Constitution and its Transformation through the Financial Crisis', *ZenTra Working Papers in Transnational Studies* No. 47, 2015, at p. 17.

[39] This is the opening line of F. Fabbrini, 'States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination', 16 *Cambridge Yearbook of European Legal Studies* (forthcoming, preview online).

[40] Martinico, *supra* n. 31. Although that paper is a literature review, its author starts from the assumption (at p. 3) that the euro crisis events have indeed produced mutations of the constitutional structure of the Union.

[41] M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', 76 *Modern Law Review* (2013) p. 817. They argue that the response to the euro crisis 'significantly alters' the constitutional balance in the EU in its substantive, institutional and spatial dimensions.

[42] N. Scicluna, 'Politicization without Democratization: How the Eurozone Crisis is Transforming EU Law and Politics', 12 *International Journal of Constitutional Law* (2014) p. 545. For this author, 'the crisis response measures have superseded, rather than advanced, many elements of the Lisbon Treaty's constitutional settlement' (at p. 570).

[43] P. Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications', in Adams et al., *supra* n. 32, p. 40.

[44] E. Chiti and P. G. Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis', 50 *Common Market Law Review* (2013) p. 683 at p. 684.

[45] K. Lenaerts, 'EMU and the European Union's Constitutional Framework', 39 *European Law Review* (2014) p. 753 at p. 753.

this must have been a slip of the pen, as the rest of his article seeks to downplay the impact that euro crisis changes have had on the EU's overall constitutional balance. Others have used the term constitutional mutation with regard to the *substantive content* of European economic governance rather than its institutional character,[46] which raises a different set of questions that will not be considered here.

Before engaging further with the constitutional mutation thesis, it may be appropriate to try to identify the meaning of the term 'constitutional mutation'. A first distinction to be made is that between constitutional changes and breaches of the constitution. Indeed, many crisis measures have been accused of being adopted in breach of primary EU law and, therefore, of being unconstitutional. Among those examples of alleged violation of EU constitutional law, we may mention:

- The claim that the European Financial Stabilisation Mechanism was enacted by the Council, back in 2010, in breach of the limits set by Article 122(2) TFEU.[47]
- The claim that, by concluding the Treaty on the European Stability Mechanism, the participating states have violated the no-bail-out clause of the TFEU, as well as the EU's exclusive competence for monetary policy.[48]
- The claim that the European Central Bank acted *ultra vires* and in breach of the no-bail-out clause when adopting its Outright Monetary Transactions programme,[49] and perhaps also earlier on when it adopted similar programmes for the acquisition of sovereign debt on secondary markets.[50]
- The claim that the Council, when adopting the Single Supervisory Mechanism, acted *ultra vires* by vesting comprehensive banking supervision powers in the ECB, whereas the Treaty basis (Article 127.6) only allows for

[46] This substantive transformation is seen to consist, mainly, in an evolution towards strict adherence to the 'golden rule' for state budgets, and the rejection of Keynesian deficit-spending policies.

[47] Doubts on this point were expressed e.g. by M. Ruffert, 'The European Debt Crisis and European Union Law', 48 *Common Market Law Review* (2011) p. 1777 at p. 1787.

[48] These claims relating to the conclusion of the ESM Treaty were rejected by the ECJ in the *Pringle* judgment (*supra* n. 8), and rightly so in our view (B. De Witte and T. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: *Pringle*', 50 *Common Market Law Review* (2013) p. 805).

[49] The claim relating to the OMT programme was rejected by the CJEU, upon a preliminary reference by the German Constitutional Court (Case C-62/14, *Peter Gauweiler et al.* v *Deutscher Bundestag*).

[50] For a comprehensive discussion of the ECB's programmes to help sovereigns and banks, in which the author finds no violations of the ECB's constitutional mandate, *see* D. Wilsher, 'Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis', 15 *Cambridge Yearbook of European Legal Studies* (2012-3) p. 503.

'specific tasks' to be entrusted.[51] A constitutional complaint, based on this *ultra vires* argument, is pending before the German Constitutional Court.[52]

I find most of those claims unpersuasive.[53] But the point, for present purposes, is that all the claims, taken separately, are presented as violations of *existing* constitutional law, rather than as evidence of the creation of *new* constitutional law superseding the law existing before the euro crisis response started – which is what constitutional mutation implies. Informal constitutional change, indeed, requires that crucial constitutional actors (which, in our case, could be the Union's political institutions, the member state governments and parliaments, and/or the European and national supreme courts) accept that previously existing constitutional rules or principles have been modified, and that new practice has created rules or principles that now form part of a transformed constitutional order. Those broader arguments, finding that a constitutional mutation has taken place, can be grouped in four main categories: (i) the claim that the EU's institutional balance has been redefined; (ii) the claim that the principles of equality (of the EU member states) and of unity (of the EU legal order) have been set aside; (iii) the claim that political expediency has repeatedly prevailed over legal normativity, denoting a massive decline of the rule of law; and (iv) the claim that the relation between EU and national law has been transformed, through a major limitation of the budgetary sovereignty of the 'bail-out' countries in particular.

The shift of the institutional balance towards intergovernmentalism

Several authors have identified, following the adoption of the euro crisis measures, a shift in the EU's institutional balance away from the supranational institutions and the 'Community method' and towards the intergovernmental institutions and arenas.[54] Two different elements of this shift are highlighted. One is an intra-EU shift whereby the role of the European Council, its President and its satellite bodies have been strengthened, in particular by usurping the Commission's Treaty-based powers: 'rather than set out strategic guidelines within which the Commission must act, the European Council has increasingly assumed the role of legislative initiator, both establishing detailed proposals, and securing and

[51] A point discussed by B. Wolfers and T. Voland, 'Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank', 51 *Common Market Law Review* (2014) p. 1463 at p. 1486 ff.

[52] *See* K. C. Engelen, 'Questionable Legality. Is the ECB's New Bank Supervision Role in Trouble?', *The International Economy*, Summer 2014, p. 30.

[53] For a balanced discussion of those various allegations of unconstitutionality *see* Tuori and Tuori, *supra* n. 37, Chapter 5.

[54] *See*, in particular, Dawson and de Witte, *supra* n. 41, p. 828-836; Chiti and Teixeira, *supra* n. 44 Tuori and Tuori, *supra* n. 37, p. 216 ff.

monitoring their implementation'.[55] The other shift is seen to have occurred through the 'outsourcing' of EU decisions to the domain of international law, whereby the governments of the participant states gain full control of the decision-making process without any of the balancing elements that are present within the EU legal order.[56]

The latter argument is debatable for several reasons. On the one hand, of the various international side agreements only the EFSF and its successor the ESM have created an institutional mechanism that could potentially rival the EU's own institutional structure. The other side agreements contain substantive rules but did not create an institutional framework. On the other hand, there were compelling reasons to create the rescue funds EFSF and ESM outside the EU legal order, since the Union itself could not act (a point made above), so that, logically speaking, no erosion of the EU institutional balance has occurred.

The former argument, finding an intra-EU shift of powers, seems more compelling. Yet, it is also open to two important objections. The first objection is that the euro crisis reforms have not *in fact* led to an empowerment of the intergovernmental institutions but rather strengthened the role of some supranational institutions and bodies, namely the Commission, the European Central Bank (and also the new Single Resolution Mechanism).[57] Much depends on which aspects of the euro crisis reforms one focuses on. Whereas it is undeniable that the European Council, its president and its satellite intergovernmental bodies (especially the Eurogroup) have taken a leading role during the 'hot' phase of the crisis, often staking out in great detail the route to be followed, it is also true that the 'Community method' of codecision was used to put in place the main long-term legislative reforms, namely the six-pack, the two-pack and the Banking Union, and the European Parliament was able to impose some of its preferences in that process.[58] The implementation of the new economic governance regime is marked by a strengthening of the surveillance role of the European Commission, which is less dependent on member state control than before. The European Central Bank, from its side, has used its monetary policy competences to address the fiscal policy crisis, and has recently been given a major new role in banking supervision. All in all, it would seem that the changes in the institutional balance defy any easy definition. Power relations between the

[55] Dawson and de Witte, *supra* n. 41, p. 830.

[56] A. Dimopoulos, 'The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact on EU Institutional Integrity', in Adams et al., *supra* n. 32, p. 47-58.

[57] For an effective defence of this alternative view, *see* C. Closa, 'Los cambios institucionales en la gobernanza macroeconómica y fiscal de la UE: Hacia una mutación constitucional europea', *Revista de Estudios Políticos*, n. 165 (2014) p. 65.

[58] The role played by the EP in the adoption of the six-pack and the two-pack is discussed by Fasone, *supra* n. 18, p. 169-173.

institutions have shifted in various and partially opposite directions, which makes it difficult to identify overall 'winners and losers'.

The second objection is that the active and leading role taken by the European Council during the euro crisis was not an institutional novelty, but corresponded precisely to the role which the European Council was expected to play under existing (pre-crisis) constitutional arrangements. One current in political science has observed a long-term development of 'new intergovernmentalism', whereby member state controlled bodies play a leading role in setting the pace of the European integration process, whilst adopting some of the behavioural norms previously associated with supranational institutions, such as deliberation and consensus-seeking.[59] In particular, the European Council has, ever since Maastricht, provided political impetus to the integration process in a sustained and in a detailed way whenever this seemed needed. Its role in the decision-making process was codified by the Lisbon Treaty which, by creating the new role of long-term President of the European Council, also provided increased institutional resources for the European Council to better exercise its guidance function.[60] From this perspective, the active role played by the European Council and its President during the most difficult phase of the euro crisis can be seen as a 'normal' exercise of the role attributed to them by the EU institutional system, rather than a transformative development.

Erosion of the equality of the member states and the unity of the EU legal order

Federico Fabbrini argued in a recent article that the euro crisis and the political and legal responses to it 'have undermined the horizontal balance of power between the states, striking at the heart of the anti-hegemonic values on which the EU is founded'.[61] He links this argument to the (alleged) shift to intergovernmental decision-making which, in his view, unleashed the domination of some (namely the larger and more prosperous) states over the others. He also notes that decision-making power within the European Stability Mechanism is linked to a country's financial contributions, thus giving more weight to the larger states, and that bail-out conditionality has mostly been imposed on small countries. Related to this is the

[59] C. J. Bickerton et al., 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', 53 *Journal of Common Market Studies* (2015) p. 703.

[60] For a detailed discussion of the growing role, and changing mode of operation, of the European Council, *see* U. Puetter, *The European Council and the Council. New Intergovernmentalism and Institutional Change* (Oxford University Press 2014) Chapter 3. *See also*, in the legal literature, D. Curtin, 'Challenging Executive Dominance in European Democracy', 77 *Modern Law Review* (2014) p. 1 at p. 7-12.

[61] Fabbrini, *supra* n. 39. *See also* Dawson and de Witte, *supra* n. 41, p. 836-842 (finding a shift in the 'spatial balance').

argument that the increased 'autonomisation' of EMU law is eroding the unity of the EU legal order.[62]

The greater degree of autonomy of EMU law is uncontestable, and is central to the institutional variation thesis discussed below. But the premise that the EU legal order was fundamentally unitary *prior* to the euro crisis and has become fragmented *since* the euro crisis does not correspond to reality. As will be argued below, institutional variation was a structural characteristic of EU law since Maastricht, and was fully confirmed by the Lisbon Treaty. The euro crisis responses show a further drift away of EMU law from the 'mainstream' EU institutional system, but this is a matter of degree, not of radical change. As for the argument about inequality of states, it seems to confuse the political fact that certain member states exercise more political *power* than others (especially in certain policy domains) with the allocation of legal participation *rights* in EU decision-making, whose regime has not changed compared to the Lisbon Treaty.

The demise of the rule of law[63]

The most radical critique of the legal trajectory of the euro crisis is that the main political actors have deliberately ignored legal constraints in the name of political expediency. According to the authors adopting this view, the EU states, when deciding to act outside the EU legal order by means of international agreements, sought to escape from the constraints of EU law and take refuge in a non-law zone. Also within EU law, the reform of the economic governance regime led to the emergence of 'a transnational executive machinery outside both the realms of democratic politics and the form of accountability formerly guaranteed by the rule of law'.[64] The Court of Justice itself allegedly abandoned its commitment to the rule of law by offering, in its *Pringle* judgment, dubious support to these legal experiments of the EU institutions and the member states.[65] I am not convinced by this interpretation. On the contrary, it is rather striking how the EU

[62] This point is made by Chiti and Teixeira, *supra* n. 44, p. 695-697, as well as by Tuori and Tuori, *supra* n. 37, p. 192-194.

[63] An expression used by M. Everson, 'The Fault of (European) Law in (Political and Social) Economic Crisis', 24 *Law and Critique* (2013) p. 107 at p. 124.

[64] C. Joerges, 'Brother, Can You Paradigm?', 12 *International Journal of Constitutional Law* (2014) p. 769 at p. 778, who adds that 'the core concepts used by the new economic governance cannot be defined with any precision, either by lawyers or by economists, and are, therefore, not justiciable. This implies that rule-of-law and legal protection requirements are being suspended'. *See also* Everson, *supra* n. 63, p. 124: 'illegality has followed illegality in response to the current *Ausnahmezustand*'.

[65] G. Beck, 'The Legal Reasoning of the Court of Justice and the Euro Crisis – The Flexibility of the Court's Cumulative Approach and the *Pringle* Case', 20 *Maastricht Journal of European and Comparative Law* (2013) p. 635.

institutions and the member states, even when they felt pressed for urgent action, always tried to respect existing constraints of EU law (or national constitutional law), even when they made creative use of the instruments available in the legal toolbox. More specifically, the conclusion of side agreements under international law is not to be seen as a flight from the rule of law, but as recourse to a different system of legal regulation which was justified by the nature of the measures that the states decided to enact. At the same time, it is true that some of the complex 'rule-work' emerging from the Eurozone crisis failed to meet the rule-of-law requirements of clarity and predictability,[66] but this could be a temporary lapse rather than a structural decline of constitutional integrity.

Curtailment of the budgetary sovereignty of the bail-out countries

The final type of 'mutation' claim is specifically related to the position of those countries (both within the euro area and outside) that have received financial assistance either from the EU itself or from one of the international financial 'vehicles' (mainly the European Stability Mechanism, currently). The conditionality imposed under those financial assistance programmes (which is mandated, as far as the ESM is concerned, by the newly added Article 136(3) TFEU) includes very detailed instructions regarding the state budgets both on the revenue and on the spending side. These instructions are both broader in scope and stricter in their terms than the guidance given to the other EU countries under the general budgetary surveillance mechanism, and they affect policy choices in areas which are not within the EU legislative competence, such as pensions or healthcare. A major restriction is thus imposed on those countries' budgetary sovereignty and on the powers of their national parliament to decide fiscal policy and welfare spending.[67] A restriction of this amplitude is not expressly provided by the text of the Treaties, but is only suggested in vague terms by means of the words 'subject to strict conditionality' inserted in Article 136 TFEU. It has also been argued that (almost) all other European Union states have suffered a similar restriction of their budgetary sovereignty through the Fiscal Compact with its rigid insistence on the 'golden rule' of budgetary balance, but that part of the argument is less convincing: on the one hand, the Fiscal Compact is an additional international agreement entered into by the EU states and ratified by their parliaments, and should therefore be seen as a separate limitation of state sovereignty rather than a shift in the balance of competences between the EU and the states; and on the other hand, the Fiscal Compact contains only a few general and rather fuzzy rules and lacks the institutional machinery that could translate

[66] C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35 *Oxford Journal of Legal Studies* (2015) p. 325.

[67] Tuori and Tuori, *supra* n. 37, p. 188-189.

those general norms into the kind of detailed instructions contained in the Memoranda of Understanding directed at the countries receiving financial assistance.

The increased institutional variation thesis

I conclude from the discussion in the preceding section that the constitutional mutation thesis, despite its popularity in the scholarly literature, and despite a number of plausible features (especially on the issue of budgetary sovereignty of the programme countries), is not convincing as an overall account of the crisis-induced institutional changes – not only for the reason, discussed in the pages above, that it tends to overstate the legal-constitutional impact of the institutional changes *within EMU law*, but also because it tends to extrapolate too easily *overall changes in the EU legal order* from the specific changes that occurred within the special domain of EMU law. Indeed, Economic and Monetary Union is only part of the overall European integration project, although at times it seems to overshadow everything else. EU policy-making and law-making has continued unabated in the other policy domains, according to the rules of the game that were last re-set in the Lisbon Treaty. There is not much evidence of 'spill-over' of EMU interstitial practices into EU law as a whole. In particular, I do not find convincing evidence of an 'intergovernmental plot' transforming the entire way in which the integration process is conducted. Also, whereas some legal solutions and crisis mechanisms may appear questionable and legally dubious, I do not see evidence of a brutal setting aside of the rule of law in the name of political expediency, but rather a major effort to deal with urgent matters in a constitution-compatible way. Nor do I see a threat to the primacy of EU law in the fact that a number of international side agreements were concluded, since the state parties, in all of those agreements, sought to preserve the precedence of EU law, and since the main action in EMU matters is still (or again) very much embedded within the EU institutional structure.

Still, I do not wish to deny that the EMU part of EU law has undergone a metamorphosis during the past five years. As an overall description of this set of interstitial institutional changes, I would propose the notion of *increased institutional variation* within the EU legal order.

The phenomenon of variation of decision-making mechanisms and institutional rules across different policy fields has always been more pronounced in European Union law than in the national constitutional law of its member states, and has proved to be a long-term characteristic of European integration. Even though, in the early decades of Community law, there were far fewer policy fields than today, so that there logically was less variation across policy fields, the institutional functioning of the Communities was nevertheless different from one sector to another. Indeed, the decision, taken in 1957, to set up two new Communities alongside the European Coal and Steel Community rather than

establishing a broader multi-purpose organisation was primarily inspired by the governments' view that institutional rules that had been appropriate for regulating the coal and steel markets were not suitable for the much broader multi-sectorial European Economic Community, or for the Atomic Energy Community. In particular, when setting up the EEC, the member states granted to the Commission more limited independent decision-making powers than to the Commission's equivalent – the High Authority – under the ECSC Treaty.

Within the early EEC itself, different legal instruments and different decision-making rules were used in the main policy fields of that epoch, namely agriculture, competition and harmonisation for the operation of the Common Market. The main embodiment of institutional variation was the central role played, in Community law, by the *legal basis* requirement. Whereas federal constitutions usually list the broad policy domains attributed to either the federal or member state level, the Community Treaties operated a much more detailed division of competences between the Communities and their member states, by specifying at great length *what* the EC could do, and *how*. Each legal basis provision specified not only the domain within which the Community could act and/or the objectives it should set itself, but also the legal instruments that could be used for that purpose, the institution that could adopt those instruments, and the decision-making rules that should be followed.

This fragmented reality did not prevent legal authors and the Court of Justice from trying to identify overall institutional features of the Community legal order, and cross-cutting institutional principles. One famous such principle is that of the *institutional balance*, which was used by the European Court of Justice already during the 1950's, in the context of the Coal and Steel Treaty, and could be found rather regularly in its later case law. In fact, the Court mostly used the term 'institutional balance' as shorthand for the set of Treaty rules which happened to apply to the particular institutional dispute under consideration. In several cases, the European Court of Justice firmly rejected arguments that the specific Treaty rules on the division of powers between the institutions should, if necessary, be disregarded in view of an unwritten higher principle of institutional balance. It did so most clearly in an action for annulment brought by several states against a Commission Directive on the transparency of financial relations between the member states and their public undertakings. It was argued on behalf of the applicants that the Commission's power to adopt directives, under the (then) Article 90(3) EEC Treaty, should not be interpreted as giving this institution an original law-making power, as that would be contrary to the general principles governing the division of powers between the institutions. The Court of Justice replied that 'the limits of the powers conferred on the Commission by a specific provision of the Treaty are to be inferred not from a general principle, but from an interpretation of the provision in question, in this case Article 90, analysed in the

light of its purpose and its place in the scheme of the Treaty'.[68] As the Court observed in another of those inter-institutional disputes, 'the powers of the institutions ... are not always based on consistent criteria'[69], and the Court refused to establish institutional consistency across policy sectors when the drafters of the Treaties had chosen not to be consistent.

The Maastricht Treaty inaugurated a new phase of increased institutional variation. It added a large number of new policy domains to those which the European Communities had previously had, but also – and at the same time – strongly increased the existing institutional fragmentation. To some extent, this was the almost mathematical consequence of the addition of new policy fields. Since the legal basis requirement retained the pivotal role that it had had prior to Maastricht, and since there was a significant increase of the number of legal bases, there was a concomitant increase in variation of legal sources and decision-making rules. The Maastricht Treaty added, however, a new dimension to this variation by the creation of a new legislative decision-making mechanism, codecision, which was cautiously introduced in only a limited number of policy fields, whereas other legal bases continued to require the so-called cooperation procedure (which is now defunct) and others still the 'old-fashioned' procedure whereby the Council can decide after simple consultation of the European Parliament. Yet the main way in which the Maastricht Treaty increased institutional fragmentation was another one. It organised three important new policy domains which were subject to wholly idiosyncratic institutional rules that had little or nothing to do with Community law as we knew it. One such domain, namely Economic and Monetary Union, was encapsulated within the EC Treaty as an – institutionally speaking – alien object; whereas the other two domains, Common Foreign and Security Policy and Justice and Home Affairs, were conceived so differently from the rest – again, institutionally speaking – that the member states decided to enact a wholly new Treaty and establish a new organisation (the European Union) to accommodate them, so as to emphasise that 'normal' Community law mechanisms should not apply to them.

Economic and Monetary Union was marked by a very specific decision-making structure, or rather two very different sub-structures: for Monetary Union, the central decision-making power shifted to a newly-created institution, the European Central Bank, whose independence from the political institutions was inscribed in the Treaty text; whereas the Economic Union branch was marked by a very complex and cautious mechanism of coordination of national policies, which did not offer much room for binding acts by the Community institutions and also (unlike for Monetary Union) did not lead to the creation of any new organ or institution or organ. As for the Common Foreign and Security Policy and Justice

[68] ECJ 6 July 1982, Joined Cases 188–190/80, *France, Italy and UK* v *Commission*, para. 6.
[69] ECJ 30 May 1989, Case 242/87, *Commission* v *Council*, para. 13.

and Home Affairs, it is well known that those policy fields were marked, in legal terms, by the deliberate rejection of some of the key legal characteristics undergirding the Community legal order, such as: Commission initiative for legislation; full judicial review; primacy and direct effect in the domestic legal orders. Decision-making was kept firmly in the hands of the Council which was instructed to act by unanimity, so as to maximise member state control of the EU's policy in these areas. Finally, the Treaty of Maastricht also broke with the patient effort to strengthen the territorial uniformity of Community law, by allowing some member states not to participate at all, or in limited ways, in crucial areas of Community law such as EMU and social policy.

Since then, we have had another major evolution in the macro-institutional landscape, mainly thanks to the work of the Convention on the Future of the Union and its reflection in the Constitutional Treaty first, and the Lisbon Treaty later. The institutional 'bits and pieces' created by the Maastricht Treaty[70] were reformed into a relatively more coherent whole. In particular, the Lisbon Treaty led to the absorption of the former intergovernmental pillars into the common regime of competences, legal instruments, decision-making, judicial review and legal effect, although 'CFSP law' remains a distinct sub-system of EU law, marked above all by the absence of legislative acts and of normal judicial review mechanisms. The Lisbon Treaty preserved, however, another form of institutional variation by retaining the existing opt-out mechanisms in the policy domains of Economic and Monetary Union and immigration policy and by adding a major new opt-out regime in the field of police cooperation and criminal justice. In return for the introduction of the 'Community method' in that policy area, the United Kingdom obtained an opt-out from future developments and even a right to unilaterally pull out from *existing* third pillar instruments by which the UK is bound.

The institutional sub-system for EMU was barely touched by the Lisbon reforms. It continued after Lisbon to be marked by the idiosyncratic institutional features that had originally been enacted at Maastricht, in terms of decision-making, use of legal instruments and judicial enforceability. In institutional terms, this is of course the ECB's sole domain of activity, whereas the European Parliament retained its subordinated role for both monetary and economic policy, despite the fact that the Lisbon Treaty increased its powers in many other areas of EU law.

Against this background, the institutional innovations brought by the euro crisis responses may appear as 'more of the same' rather than a radical transformation of the EU institutional system. The variation of EMU institutional rules from the EU's mainstream institutional rules is pushed further in a number of ways, but always within

[70] The reference here is to the well-known article of Deirdre Curtin describing the institutional reforms enacted by the Maastricht Treaty in rather negative terms : D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces', 30 *Common Market Law Review* (1993) p. 17.

the limits and potential offered by the EU's existing constitutional system. Economic law-making and monetary policy competences have been interpreted extensively; differentiation between the Euro area and the rest of the EU has been extended; international side agreements have been used more actively than in most previous periods of European integration – but none of those interstitial institutional changes appear to contradict the text of the EU Treaties, the unwritten constitutional principles, or the overall institutional balance and structure of the EU legal order. This legal analysis ties in with the views of those political scientists who offer a historical institutionalist explanation of the euro crisis response. They emphasise the gradual nature of the institutional change between pre-crisis and post-crisis rules on Economic and Monetary Union, the importance of path dependency, and the attempt by political actors to minimise institutional innovation to what seemed strictly necessary.[71]

Conclusion

So, my conclusion for now would be that the euro crisis has *not* let to a profound constitutional mutation of the EU legal order. Neither the Maastricht Treaty nor the Lisbon Treaty provided the European Union with a unified institutional architecture, and the euro crisis reforms have 'merely' deepened the institutional variation existing between EMU law and other areas of EU law. This is not saying that all is for the best in the best possible world, and that all the policy decisions taken in the past five years were adequate; far from it. I agree with those who argue that the current system of fiscal policy governance would need to be overhauled, possibly by means of Treaty revision creating a true system of fiscal federalism;[72] but also without prior Treaty amendment, changes can and should be made to improve democratic control on the EU fiscal policy decisions, and to ensure respect for fundamental social rights and non-market values in the EU's surveillance guidelines and in the financial rescue operations. The EU constitutional system may not have been transformed since the Lisbon Treaty, but it is nevertheless inadequate in a number of respects. But that is another story.

[71] *See* A. Verdun, 'A Historical Institutionalist Explanation of the EU's Responses to the Euro Area Financial Crisis', 22 *Journal of European Public Policy* (2015) p. 219; P. Genschel and M. Jachtenfuchs, 'Alles ganz normal! Eine institutionelle Analyse der Euro-Krise', *Zeitschrift für internationale Beziehungen* (2013) p. 75; and, with specific reference to the adoption of the financial rescue mechanisms, L. Gocaj and S. Meunier, 'Time Will Tell: The EFSF, the ESM, and the Euro Crisis', 35 *Journal of European Integration* (2013) p. 239.

[72] *See* for an argument that the creation of a 'fiscal federalism model' would be preferable to the current 'surveillance model', A. Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU', 50 *Common Market Law Review* (2013) p. 1621.