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DIALOGUE AND DEBATE: SYMPOSIUM ON LAW, CONFLICT AND TRANSFORMATION - THE WORK OF CHRISTIAN JOERGES

Conflicts-law constitutionalism in the EMU: how much unity can European diversity sustain?

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Abstract

The core of the contract between economic and monetary union is set in not so much the formally legal, if economically irrational and practically contentious, divide of the Treaties, but rather, the rules for governing the right balance of EMU are found in its economic governance framework, set up to condition national budgetary policies into optimal function in service of Union monetary policy. Within those rules we can differentiate two 'worldviews' of constitutionalism. The first we may refer to as 'optimal function EMU' where sovereigns are equal, democracies may pick their own socio-economic policy and make equally valid claims to be managed by the conflicts law approach of cooperation within the preventive arm of the European Semester based on Article 121 TFEU, and where we may pretend the economic-monetary divide erected by law is a real, tangible phenomenon. The alternative version of constitutionalism is found beyond 'optimal function EMU', in fact, as soon as any risk to the model arises. This worldview institutes a strict legal hierarchy that establishes monetary supremacy over the economic realm. Within this setup, the very existence and proper function of the single currency rationalise the ultimate truth – that all Member States are equal, but some are more equal than others. Can conflicts law constitutionalism offer a way to recalibrate unity and diversity in a format fit for the purposes of the contemporary financial and economic context, while simultaneously re-claiming the space for national collective choice and protecting Union values?

Keywords: Economic and monetary union; Euro-crisis; crisis law; deliberative democracy; conflicts-law constitutionalism

1. Introduction

'United in Diversity' may not be a particularly catchy slogan, but it is a remarkably astute formulation of the tension inherent at the heart of the European Union (EU) project. It captures a dynamic relationship in constant search of an equilibrium between common Union goals and multiple national priorities. Legally delineated by conferred competences in the Treaties, unity and diversity are recalibrated with each new stage of integration – by means regulatory, juridical, formally legal or informally functional, ie, crisis.

Unity and diversity also generate the tension at the heart of a lifetime of legal scholarship by Christian Joerges. From the dawn of the single market to the crisis-convulsions of the single currency, the 'irritated heckler' has critically scrutinised just how much unity diversity can sustain and endure.[1] Informed by the theories and experience from the decade of single market regulatory

[1]C Joerges, 'Integration through De-legislation? An Irritated Heckler,' Working Paper EUI European Governance Papers (EUROGOV) (2007) No. N-07-03.

integration, Joerges has maintained his scholarly agenda of seeking how a functional equilibrium between supranational, ie 'community', concerns and those of the national space may be somehow structured and protected through law.[2] In quite the same manner, he has sought to calibrate the boundaries between European monetary unity and national economic diversity erected at Maastricht in the framework of what he has termed conflicts-law constitutionalism.[3]

Joerges's critique stems from a singular sensibility about the European project, a normative anxiety if you will, for the integrity of the law as a constitutive element of the Union along with its implications for the national welfare space, seen as the ultimate expression of democratic sovereignty and socio-economic cultural identity. These trepidations make him an equal opportunity critic of arguments espoused by opposing camps of policymakers and academics alike since the eurozone crisis. Joerges is as averse to the overhaul of the economic governance rulebook that has resulted in unprecedented intrusions in the national fiscal, social, and democratic space, as he is towards the crisis bailout schemes that required governments to contribute significant amounts towards EU financial stability.[4] And it is because of his normative compass that this critique of the present state of the Economic and Monetary Union (EMU) has been capable of encompassing both German concerns and Southern sensitivities over the loss of budgetary sovereignty – two seemingly incompatible points of view from the Euro-crisis antagonism between north and south, creditors and debtors. And it is for this reason that his brand of European conflicts-law constitutionalism remains genuinely committed to transcending the zero-sum constellation of Boston Tea Party democracy – *no taxation without representation!* – so punitively enforced in Europe since the crisis.

This piece proposes Joerges's conflicts law constitutionalism as an ambitious, yet badly needed, 'true north' approach for the future of European integration, one capable of reigning in the overregulation of the national space in the absence of conferred powers and equally apt at rebalancing Member State sovereignties, so disparately enjoyed since the eurozone crisis. The argument is based on an equally ambitious attempt to understand, scrutinise, and then translate Joerges's conceptual framework in the context of current debates on EMU.

To do so, Section 2 begins by recasting the Economic and Monetary Union as a diagonal conflict of laws at the heart of the Treaties – a conflict which Joerges has theoretically balanced on the fine tip of coordination pursuant to Article 121 TFEU as a conflict rule. There follows a critique of this approach – specifically, the limits of conflict rules and conditions of coordination – in an effort to highlight its strengths. Section 3 exposes the economic theories and relevant legislative framework of the Maastricht Treaty to the harsh test of retrospective reality. Disassembling assumptions about convergence, financial contagion, and equal sovereignty, this narrative scaffolds Joerges's normative critique of the integrity of European constitutional law after its experience with the eurozone crisis, presented thereafter in Section 4. The last section of the work, 5, arrives full circle at the matter of conflicts law constitutionalism, defaulting in agreement with its promise in spite of its difficulties.

2. An economic and monetary union at Maastricht

The intent of the Treaty of Maastricht was to establish an Economic and Monetary Union, pure and simple. An ultimately economic exercise, the bottom line was nevertheless political. The deep distrust between Member States created idiosyncratic restrictions, which would prove highly constraining on the design of the project. In particular, appalled at the prospect and political fallout of footing each other's bills, governments precluded the possibility of a fiscal union and limited Community competences in the economic realm to the sanitary minimum necessary to

[2]C Joerges, *Conflict and Transformation: Essays on European Law and Policy* (Hart Publishing 2022) 49.
[3]Ibid., 391.
[4]Ibid., 365–6 on solidarity payments and Art 122 TFEU.

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procure the single currency. It was also assumed this setup would allow governments to manage tax revenue freely towards the socio-political models best fitting their voter preferences. This decision would mutate into the economic curiosity that is the asymmetric EMU.[5]

The combination of a budgetary rulebook to secure the economic requirements for the single monetary space (Articles 121 and 126 TFEU), monetary financing and bailout prohibitions as guardrails (Articles 123 and 125 TFEU), and an independent stability-focused monetary authority to anchor the system (Articles 130, 127(1) TFEU) was contrived to safeguard this precarious scheme. It would allow Member States to reap the benefits of the single currency without sharing in the risks of an open economy. Its legal formulation formalised the monetary priorities and prerogatives of the EMU vis-à-vis the national fiscal and economic realm and specified the obligations of the latter to the former. The bottom line came down to preventing mutual liability.[6]

Joerges has analysed this peculiar framework through the lens of conflicts law, and more specifically – diagonal conflicts law. It is only by understanding this approach that we may grasp Joerges's subsequent critique of the Maastricht experience and its significance for the normative ambition of his scholarship – conflicts law constitutionalism.

A. EMU diagonal conflicts

Diagonal conflicts law is a functional method for solving otherwise intractable legal conflicts between equally valid claims through 'deliberative cooperative interactions'.[7] Diagonal conflicts are legal tensions in the EU constitutional constellation which European law can solve through neither supremacy nor pre-emption due to lack of competence. Where the powers conferred are not enough to resolve such legal conflicts, supranational governance must engage with the competences reserved for Member States with 'the two levels of governance … expected to coordinate their agendas cooperatively'.[8]

In the context of EMU, the core diagonal conflict was created by the separation of the economic realm – traditionally understood as an inextricable relationship between the fiscal and monetary – into supranational monetary and national economic policies. This synthetic legal uncoupling of otherwise co-dependent parts of a whole imbued the EMU framework with inherent functional tensions. With Joerges, just as the European Central Bank (ECB) is interested in the functioning of monetary policy, so too, '[s]tates are certainly interested in the functioning of their economies, but the powers required to accomplish this objective are attributed to two distinct levels of governance with often irreconcilable policy preferences'.[9] It then becomes the business of conflicts law to

[5]This account has been widely corroborated by scholarship invested in the economic history of the EMU. K Dyson and I Maes, *Architects of the Euro: Intellectuals in the Making of European Monetary Union* (Oxford University Press 2016) brilliantly outline the political objectives expressed in economic rules of each 'architect of the Euro' present for the preparation of EMU and especially with the Delors Report; consider also Ashoka Mody's rendition in *EuroTragedy: A Drama in Nine Acts* (Oxford University Press 2018), and some of the body of scholarship produced by the ERC-funded EURECON project 'The Making of a Lopsided Union: Economic Integration in the European Economic Community, 1957–1992': E Mourlon-Druol and E Bergamini, 'Economic Union in the Debates on the Creation of the Euro: New Evidence from the Tapes of the Delors Committee Meetings' 2 (2022) Journal of Digital History <https://doi.org/10.1515/JDH-2023-0008?locatt=label:JDHFULL>; E Mourlon-Druol, 'Debates about Economic Adjustment in Europe Before the Euro' in AR Gosh and MS Qureshi (eds), *From Great Depression to Great Recession: The Elusive Quest for International Policy Cooperation* (International Monetary Fund 2017), 57.

[6]This much would be clearly confirmed by the CJEU in Case C-370/12 *Thomas Pringle v Government of Ireland* ECLI:EU:C:2012:756 with the discovery of 'financial stability' as an overarching principle of EMU.

[7]Joerges (n 2) 278.

[8]The European project is riddled with such constellations. The experience of forging the single market makes a pertinent example: 'the European market-building agenda intruded into spaces which the Member States had exempted from market governance on the grounds of competences which they had not conclusively or only partly conferred to the European level'. Joerges (n 2) 109–10.

[9]Joerges (n 2) 364.

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reconcile divergent economic priorities through legal means. In the case of EMU, it became a good part of the business of the Treaty of Maastricht.

Beyond being formally severed into two distinct plains of legal existence, the relationship between the economic and the monetary is conditioned by the special legal status of the ECB. Respectively, the Bank may 'not seek or take instruction' from either Union or national authorities (Article 130 TFEU) and it should only cooperate with the fiscal realm, ie 'supporting the general economic policies of the Union,' without prejudice to its own primary objective (Art 127(1) TFEU). In other words, the EMU legal framework instructs the monetary authority that the policy preferences of the *Union* economic realm are equally valid to its own only when they do not jeopardise price stability, which is, moreover, a calculus entirely left to the ECB to weigh and decide. In any case, the Bank is always to pursue optimal interest rates in service of its primary objective. Whether those are too loose or too constraining for *individual* Member State economies does not qualify as cause for genuine conflict either, since the ECB is legally mandated towards this course of action by the Treaties and practically concerned only with the *Union* economy at large.[10]

In should become evident here that although the legal separation of monetary and economic policy generated the diagonal conflict constellation of the asymmetric EMU, the resulting tensions cannot be solved by recourse to diagonal conflict law intervening directly between the monetary and economic realms-proper. This possibility is precluded in the legal framework of EMU. Instead, rather idiosyncratically, the diagonal conflict inherent in EMU is legally confined within the severed economic space, 'translated' into one between the national and supranational economic realms, with the latter giving expression to the optimal economic requirements for a functional single currency.

It is in this context that Joerges has identified the conflict rules of the system with the obligation to 'regard' national economic policies as a matter of common concern and to 'coordinate' them with a view to contributing to common Union objectives in compliance with the principles of stable prices, sound public finances and monetary conditions and a sustainable balance of payments, pursuant to Article 121 TFEU and therein-found references to Articles 119 and 120 TFEU. In other words, these are the Treaty provisions which ought to sustain the functional equilibrium between economic and monetary realms within legal bounds, where the tension between unity and diversity ought to be resolved, so that twenty disparate eurozone economies can operate as a single entity, supporting the transmission of monetary policy and ensuring the economic conditions that underlie price stability, while simultaneously securing the socio-economic conditions of their welfare state. But this cooperative element of Article 121 TFEU is not without its own limits.

This contribution argues that Joerges's analysis of the EMU equilibrium as one balanced on the fine tip of coordination pursuant to Article 121 TFEU and his subsequent theory of (diagonal) conflicts-law constitutionalism must be contextualised within a more comprehensive understanding of the EMU legal framework in order to maximise their explanatory potential. To this end, the following section first re-evaluates the cooperative element of the Stability and Growth Pact (SGP) framework within its own limits – the debt and deficit orientations of Article 126 TFEU and Protocol 12 of the Treaties, and then recasts the utility of diagonal conflicts law accordingly.

[10]Reflecting on these particularities of the EMU legal framework, Giandomenico Majone identifies the ECB as a 'constitutional monstrosity' in pursuit of monetary policy absent considerations for its own socio-political context – an institutional rigidity, which Fritz Scharpf has claimed 'endangers the social acceptance of the Union'. For an overview of the apt critique, see Joerges (n 2) 365–6.

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B. Conditioning coordination | limiting conflict rules

The conflict rules of EMU contained in Article 121 TFEU are not absolute. Should coordination fail or a fiscal divergence simply prove too sizeable to manage, budgetary *constraints* are to remove the possibility of EMU-wide distortions by increasingly limiting fiscal independence once a Member State is operating below EMU-optimal levels. The boundaries of economic propriety are set at the infamous and rather arbitrary 3 per cent deficit and 60 per cent debt ratios relative to GDP with an obligation placed on Member States to avoid and correct any such scenarios pursuant to Article 126 TFEU, with the support of secondary legislation in the SGP.[11] Criticism of the discretionary nature of these limits – without a 'sound conceptual basis', 'at best ridiculous and at worse perverse'[12] – is indeed justified. Be that as it may, we are here concerned with the mechanics of the framework, its intent to 'intervene at the source, by limiting the scope of national discretion in determining budgetary positions.'[13] This much was admitted as early as 1989 in the preparatory work leading up to EMU.

In this light, we must conclude that the EMU legal framework entertains the notion of a diagonal conflicts constellation between the single monetary and many fiscal policies only to a certain extent – the one prescribed by the Protocol 12 debt and deficit criteria, further conditioned by the risk calculations introduced by the secondary legislation of the SGP and each of its subsequent iterations. In other words, Maastricht contains within allowances for a numeric limit beyond which diversity would prove too much for unity, democratic policy preferences would be no longer legally equally valid to the needs of the collective, deliberation runs its course, and the conflict of interests transforms from diagonal to hierarchical.

Even more importantly, Maastricht also offers the legal capacity to recalibrate any such distortions by curtailing the fiscal prerogative of Member States. The Union may not be conferred competences in fiscal matters, but Member States have not retained those in the absolute either. In other words, the budgetary powers of Member States are only protected within the national space conditionally – for as long as they behave within the bounds of the Treaty-agreed equilibrium in a *quid pro quo* between budgetary discipline and sovereignty. The further a government may veer off from the designated EMU parameters, the stronger the pull forces – both economic and legal – of the framework become. In such scenarios, the single monetary policy indeed exerts diagonal economic pressures on policy preferences through increasingly intolerable interest rates.[14]

[11]The Maastricht debt and deficit criteria have been widely recognized as (part of) the price to pay for German participation in EMU. Jacques Delors himself is said to have hoped the ideas behind the final provisions would be satisfied by mere lip service, never to be truly operationalized during negotiations at Maastricht. This turned out to be largely true for the debt criterion, given that had it 'been enforced, there would have been no eurozone', but not so for the 3 per cent deficit rule. For the story behind the numbers, see Mody (n 5) 86–7.

[12]B Eichengreen, 'Institutions for Fiscal Stability,' Working Paper PEIF, No. 6 (2003) and G Majone, 'Rethinking European Integration after the Debt Crisis,' UCL Working Paper No. 3 (2012), both cited in Joerges (n 2) 365.

[13]A Lamfalussy, 'Macro-coordination of fiscal policies in an economic and monetary union in Europe' in *Report on Economic and Monetary Union in the European Community – Collection of Papers Submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989) 94. Lamfalussy engages with the distinction between fiscal discipline and fiscal coordination, but never explicitly acknowledges it. In his dissenting monetarist opinion on the necessity of a fiscal union and utility of budgetary rules Tommaso Padoa-Schioppa (General director for economic research at Banca d'Italia while Rapporteur for the Delors Report) clarifies the significance of the distinction: 'Much of the controversy at the political level concerns fiscal discipline and whether a monetary union is conceivable while some countries have very large public-sector debts and may run into financing difficulties. On the other hand, co-ordination issues are predominant in the scientific literature: the focus is not on public debts, but on fiscal policy as a tool for macro-economic stabilization.' T Padoa-Schioppa, *The Road to Monetary Union in Europe: The Emperor, the Kings, and the Genies* (Oxford University Press 2000) Ch 9, 'Fiscal Compatibility and Monetary Constitution', 144. Originally published in 1994, the paper was written in direct reaction to the faithful events of 1992 and dedicated to the argument in his contribution to the Delors Report in the paper 'Economic Union: Implications of a Monetary Union.' For that original paper, see ECB archives on The Delors Committee (1988–1989) <https://www.ecb.europa.eu/ecb/access_to_documents/archives/delors/html/index.en.html> accessed 10 April 2024.

[14]This is a certainty secured by the central bank's commitment to price stability (Art 272 TFEU) coupled with its independence (Art 130 TFEU). For a comprehensive discussion on the interplay between monetary and economic policy,

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Simultaneously, however, the economic governance rulebook mobilises EU law, gradually progressing from coordinating to enforcing *ad hoc* policies designed to induce certain economic outcomes.

Diagonal conflicts law is based on the assumption of equally valid legal claims interacting. Applied to the EMU constitutional configuration with the above caveats, diagonal conflicts law suggests true parity and sustained legal boundaries between economic and monetary policy only within established understandings of budgetary propriety. Therein, the Maastricht economic criteria, however arbitrary, become the economic cornerstones of legal validity. Ultimately, legally, in what indeed looks like monetary supremacy, it is actually the *economic necessities* of the single currency that can and do claim supremacy over the national fiscal space, conditioned on a rather subjective and quite dynamic boundary between national and supranational based on risk.

3. Theory and practice of Maastricht | disappointed expectations

Whatever the promise of the Maastricht legal framework for managing the business of the asymmetric EMU, Joerges contends that in practice the diagonal conflict inherent therein proved 'unworkable.'[15] Further, he concedes the Article 121 TFEU conflict rule was a '*lex imperfecta*', incapable of instructing cooperation and coordination within EMU.[16] In turn, 'compliance with the Maastricht EMU and SGP . . . were never an option, because Maastricht generated a truly unruly conflict constellation.'[17] That, I argue, is because Maastricht was intended for an entirely different conflict constellation – one between equal sovereigns whose economies were on a much tighter spread with limited channels of contagion, and therefore of recalibration, between unity and diversity.[18]

A. The trouble with divergence

For one, Maastricht envisaged minimal discrepancies between national economic realities and Community economic necessities. The success of EMU was highly contingent on sufficient amounts of 'primary' convergence that was supposed to take place during the transition stage to EMU, known as Phase II, and be oriented 'towards the budgetary positions of the more fiscally conservative countries'.[19] Once the EMU was operational, budgetary rules could *support* already-established convergence and even contribute to removing any remaining sources of divergence by sustaining the legal pressure for fiscal consolidation.[20]

interest rates, inflation and the intent behind designing the European monetary authority in this manner, see *Report on economic and monetary union in the European Community – Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989) and a revealing historical commentary with K Dyson and I Maes, 'Contributions, Legacies, and Lessons' in K Dyson and I Maes (eds) (n 5) 254.

[15]Joerges (n 2) 364.

[16]Ibid., 272.

[17]Ibid., 118.

[18]For further elaboration on this topic from a political economy perspective, see for instance: W Streeck, 'Why the Euro divides Europe' 95 (2015) New Left Review 5–26 and KR McNamara, 'Economic Governance, Ideas and EMU: What Currency Does Policy Consensus Have Today' 44 (4) (2006) Journal of Common Market Studies 803–22.

[19]Lamfalussy (n 13) 99; Phase II convergence necessities and policies are clearly outlined in the other two contributions to the economic chapter of the Collection of Papers submitted to the Delors Report. See M Doyle, 'Regional Policy and European economic integration', in *Report on economic and monetary union in the European Community – Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989) 69 and J Delors, 'Regional Implications of economic and monetary integration', in *Report on economic and monetary union in the European Community – Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989) 81.

[20]Considering the seriously disparate economic situations and fiscal cultures across Member States entertaining a monetary union in 1989, sufficient Phase II convergence was an absolute *sine qua non* before the project could proceed successfully.

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The simple irony here is that the economic sensibility of the budgetary restraints designed to eliminate economic divergences was exclusively warranted upon successful prior convergence. Only sufficiently converged economies could guarantee an organic alignment of economic interests in order to justify the pursuit of a common fiscal stance, which could then ensure the right kind of fiscal-monetary balance to keep the EMU functional.[21] Only then would it be rational to tie Member States to the mast of budgetary restraints, or expect their compliance in this matter on the assertion that 'policy coordination is beneficial to countries whose economies are closely intertwined.'[22] Thereby, it is not farfetched to consider that the budgetary rulebook must have only been intended to bridge economic divergences and balance a disequilibrium between unity and diversity of much lesser proportions compared to what happened in reality.

The architects of EMU were lucidly aware of the alternative proposition. Divining what was yet to pass, Alexandre Lamfalussy admitted that '[a]s long as countries differ considerably in the structure and relative size of their budgetary expenditure and revenue, in their sectoral saving/investment propensities and in their central banks' ability to resist pressures for monetization *there would be no economic justification for broadly uniform budgetary positions.*'[23] That is, beyond a certain level of convergence, fiscal coordination around uniform budgetary positions loses economic justification. Absent such conditions, a unified fiscal stance would be unattainable making any attempt at budgetary restraint a futile and, in fact, damaging exercise.[24] This is precisely what the Eurocrisis reforms of the budgetary rulebook instigated – divergence-proportional disciplinary enforcement, ensuring nothing more than self-inflicted harm.[25] We shall return to this theme below in Section 5 when reflecting on the Integrity of the Law.

B. Limited imagination, limited regulation

Second, Maastricht was designed to offset the possibility for cross-national liability exposure, whereby the consequences of weak economic performance and imprudent budgetary choices of one Member State could somehow affect its peers. This could happen directly with pressure for fiscal transfers (ie bail-outs), or indirectly, by putting pressure on the single monetary authority for currency devaluation (ie monetary financing), or the market mispricing the risk of sovereign debt (ie malfunctioning). These were the limited risks, imagined and calculated within the particular context of the times, that the Maastricht legal framework could mitigate in order to secure the right balance between unity and diversity in the early EMU. Financial integration of the proportions quietly realised by the onset of the European sovereign debt crisis was not part of this mix. And indeed, within the first decade of the Euro, economic and financial integration had proceeded far beyond what the legal firewalls agreed to at Maastricht could sustain, thus exacerbating the disparities between law and reality. The extent of cross-border debt exposure through the banking sector entailed heightened immanent risk. This, in turn, exposed national

[21]Lamfalussy (n 13) 99–100; The then-president of the Bundesbank and leader of the doubtful economist faction in the Delors Committee, Karl-Otto Pöhl, for instance, judged the economic divergences between Member States so serious that even with effective policies and 'extremely large funds' for fiscal compensation, a doubt remained whether they would ever be compatible enough to justify the existence of a monetary union by the end of Phase II. (KO Pöhl, 'The further development of the European Monetary System' in *Report on economic and monetary union in the European Community – Collection of papers submitted to the Committee for the Study of Economic and Monetary Union* (Opoce 1989) 135–6.) Apropos, during committee deliberations he went as far as to judge 'a little bizarre' the interest of the Spanish and Italian governments in the project, considering their economic situation, as accounted by H James, 'Karl-Otto Pöhl – The Pole Position' in K Dyson and I Maes (eds) (n 5) 183.

[22]Lamfalussy (n 13) 94, 99.

[23]Ibid., 99 [emphasis added].

[24]To be clear, the sovereign debt crisis invigorated a debate on the underlying principles of the EMU in stage III – entirely sidestepping the core assumption of the project's architects about successful convergence in the preliminary Stage II.

[25]Moreover, with Joerges, the ill-designed rulebook would not just fail to prevent systemic damage, but would increase it. See Joerges (n 2) 365.

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economic policies to heightened scrutiny in the interest of mitigating and regulating entirely novel prospects for an unwarranted transfer union.

C. Some are more equal than others

Lastly, Maastricht – a treaty of public international law more than the constitution of a proto-polity – came together as a legal framework of supposedly equal sovereigns. A single market and a single currency later, this relationship would undergo a fundamental overhaul in the context of extensive exposure to mutual financial risk brought on by unregulated integration and the crisis. As governments became creditor and debtor to each other – the dreaded transfer union having materialised with interest rates – all sovereigns were equal, but some more equal than others.

It is alarmingly easy to identify the state of European sovereignty in the austerity-ridden years immediately after the crisis with the dystopian world of Orwell's Farm. Perhaps no one put it more candidly than AG Kokott in her opinion on *Pringle* with a valiant defence of Member States' rights to protect themselves from financial contagion. One need not know – or even understand – the particulars of the case, told elsewhere skillfully and at length,[26] to grasp the gravity of her account.

The AG defended the establishment of a permanent 'bail-out' crisis resolution mechanism for the EU, the European Stability Mechanism (ESM), in spite of the apparent proscription of Article 125 TFEU (the 'bailout' prohibition). The alternative, she mused, would deprive the collective of Member States seeking to set up the ESM from 'the ability thereby to attempt to avert damage to themselves'. Such an outcome, she continued, would amount to 'an extensive restriction on the sovereignty of the Member States to adopt measures for their own protection.'[27] In the AG's reading, as eventually confirmed by the Court, the economic sovereignty of a Member State to default on the market was precluded by the economic sovereignty of other Member States to protect themselves from the negative externalities of said potential event. Attaining the financial stability objective of the ESM superseded the prohibition on financial aid, because applying the letter of the law by preventing the transfer of liability could no longer sustain the law's original intent to prevent the transfer of liability.

In other words, one of the foundational safeguards of the Maastricht EMU equilibrium, Article 125 TFEU, no longer made sense in the economic and financial circumstances of the crisis, because the relationship between Member States had evolved through unregulated financial integration and sizeable mutual exposure.[28] Maastricht had been built on assumptions about the world and the world – it had changed. Importantly, this first instance of crisis law with the judgement in *Pringle* confirmed the rationale and mechanics of the hereto-discussed budgetary rulebook, whereby national sovereignty and democracy – as well as the very protections of Union law[29] – exist solely within the bounds of budgetary propriety.

Observing these events, Joerges has rightly steered our attention to the Maastricht Treaty having shaped the patterns of the crisis.[30] Further still, this unholy interaction between crisis and

[26]See, for example, PA van Malleghem, '*Pringle*: A Paradigm Shift in the European Union's Monetary Constitution' 14 (2013) German Law Journal 141.

[27]View of Advocate General Kokott in Case C-370/12 *Thomas Pringle v Government of Ireland* ECLI:EU:C:2012:675, para 140.

[28]Not incidentally, Art 123 TFEU would face the exact same circumstances and complications (only worsened due to the ECB's independence) as early as Case C-62/14 *Gauweiler* ECLI:EU:C:2015:400, developing in full force with Case C-493/17 *Weiss* ECLI:EU:C:2018:100. In fact, as Alexandre Lamfalussy had correctly observed in 1989 and eventually became evident with the crisis, the prohibitions written into Arts 123 and 125 TFEU could only ever be sustained for as long as the national cost of a sovereign default did not surpass the shared cost of contagion.

[29]As confirmed in the series of caselaw pitting national social protections against Union economic rules and financial stability. See C-8/15 P to C-10/15 P *Ledra Advertising and Others v Commission and ECB* ECLI:EU:C:2016:701; C-105/15 P to C-109/15 P *Mallis and Others v Commission and ECB* ECLI:EU:C:2016:702; C-597/18 P *Council v K. Chrysostomides & Co. and Others* [2020] ECLI:EU:C:2020:1028.

[30]Joerges (n 2) 271.

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law cast monetary policy as the immutable anchor of the Maastricht contract and confirmed that beyond the cooperative, deliberative space of optimal economic function within the provisions of Article 121 TFEU, lies a clear hierarchy of priorities between national and supranational. Therein, upon a technocratic calculus of risk, national preferences are no longer valid legal claims, sovereignty no longer a valid legal boundary, and the lack of conferred competences no longer inhibiting of supranational dominance. For what competences can a government without sovereignty confer anyway?

4. Integrity of the law

Joerges spent a lifetime of scholarship wondering just how much of the single market and single currency EU diversity can sustain. During the crisis, the EU had to entertain the counterfactual, asking itself just how much diversity the single currency can sustain and then proceed to recalibrate accordingly.[31] The European sovereign debt crisis forced the EU establishment to acknowledge that the prevention of unregulated fiscal transfers is the underlying purpose behind budgetary discipline and to seek out ways of fulfilling the same objective – now amplified and euphemistically rebranded as 'financial stability'[32] – within the same obviously-failed legal framework in the context of unrealised assumptions about the economy and the world at large. The crisis not only developed through law, and perhaps because of it, but had to be settled likewise.

A. Crisis through law

The logic applied to sidestepping Article 125 TFEU in *Pringle* confirmed the EU's approach to internalising the causes of crisis by identifying Member State fiscal profligacy at the core of the immediate problem. This shifted the focus from the complete impairment of the entire EMU framework to that of its economic governance mechanism. It negated the existence of crisis by transforming it from an exceptional circumstance in defiance of the legal system to events already under the authority of EU law. Establishing legal control over unfolding events stabilised the system, legitimised the resolution of crisis through law, and provided culprits.

Furthermore, this approach implied that the crisis could be controlled, and better yet – prevented, through the framework for economic governance. This approach created a 'regulatory' moment for the EU to mitigate the costs of mutual liability emanating from budgetary profligacy by transforming them into calculated and regulated risks. With the default of the Maastricht

[31]Perhaps ironically, the underlying motive behind both these movements is the same, if for different reasons. This much shall be made apparent in the remaining discussion.

[32]Financial stability is a measure of the proper functioning of EMU within the macroeconomic equilibrium concocted at Maastricht. It is, as such, a euphemism for the primary objective behind constructing the EMU framework within its original parameters – namely, avoiding the possibility of unwarranted cross-border fiscal transfers. As a term, the financial stability objective was originally introduced with the Council Decision on the amendment of Art 136 (European Council Decision of 25 March 2011 amending Art 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU)) and also embraced by the ECB in its legislative opinion on said Decision (Opinion of the European Central Bank of 17 March 2011 on a draft European Council Decision amending Art 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the Euro (CON/2011/24)). There was, however, no clear definition of what exactly was meant by financial stability as a primary objective of the Treaties at the time of its introduction. Set apart from the ECB's price stability objective by virtue of the Bank's mandated exclusivity, and created in the context of a budgetary crisis, it was only natural to conclude that EU financial stability encompassed the economic-fiscal realm at the very least. For a most enlightening review of the concept in EU law, see K Tuori and F Losada, 'The Emergence of the New Over-Riding Objective of Financial Stability' in M González Pascual and A Torres Pérez (eds), *Social Rights and the European Monetary Union: Challenges Ahead* (Edward Elgar 2022) 51–70. While K Tuori and K Tuori addressed this issue early on in their seminal analysis of the Eurozone crisis with *The Eurozone Crisis – A Constitutional Analysis* (Cambridge University Press 2014), they limited their conclusions at the time within a less critical lens (see especially pp 129–30).

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equilibrium isolated within the confines of the economic rulebook, the fine balance between coordination and supremacy, between diversity and unity, which had secured the asymmetric EMU, was recalibrated to the detriment of the former. This happened in the context of the existent legal framework without explicitly conferring any additional competences to the Union, instead by discovering the latent intent for those through teleological reasoning.[33] Rules were reverted back into norms, rediscovered, reimagined and formalised into an entirely new set of rules that ultimately resulted in the conditionality culture instituted since the sovereign debt crisis. The Court's conclusions in *Pringle* only served to reinforce the approach on dealing with the crisis already advocated by the key political and institutional players. Reading into the Treaties a doctrine of quid pro quo conditionality *ex* budgetary discipline provided significant legitimation for the far-reaching reforms under way in the overhaul of the economic governance framework.

The legality, legitimacy, and validity of this approach was entirely contingent on the rather subjective, highly politicised, and neatly purposive re-assessment of Treaty intent.[34] It was a volatile construct, not just because of the exceptional circumstances at play, but also because the issues in question did not belong to the legal system. Instead, with Joerges, 'the conflicts inherent in the construction of EMU were reframed as legal problems and adjudicated'.[35]

In the midst of crisis, the validity of the EU legal system was to be measured by its efficacy for shock stabilisation. Pushing through politically controversial decisions and economically costly policies was to happen through the law. At no point, it seemed, did the system ever entertain it could sustain its future normativity if it were to disappoint the momentary, if pressing, expectations.[36] Joerges has many a time pointed to the duress felt by Courts through judges' awareness of the real world consequences of their decisions.[37] In such circumstances, the majority succumb to threatening the integrity of the law by 'replac[ing] of the rule of law by assumed economic necessity and political expediency'.[38] Others, however, are willing to test the resilience of the very constitutional system they serve in order to protect the normativity of the law. Joerges is of the latter persuasion.

Undecidability, as advocated in the dissent of FCC judge Lübbe-Wolff,[39] is based on the rather idealistic notion that 'legal science should learn to take not only the law but also the limits of judicial decision-making seriously'.[40] These are not mere functional questions about the ability of the legal system to compute a problem and provide an answer. They are normative issues of whether it should even try to do so in the instances when forcing a resolution to ensure efficacy may well corrupt the very programming of the system.

[33]Even the single formal legal novelty – the Art 136 TFEU amendment, was based on the simplified procedure found in Art 48 TEU – reserved for cases where no new competences are conferred on the Union – an assumption challenged in *Pringle* and dismissed by the CJEU. Joerges analyses this and other peculiarities of the Court's treatment of exception in *The Methodological Failures of the CJEU in the Pringle Case* (Joerges (n 2) 377).

[34]Joerges is not alone in challenging the approach and legal reasoning through which the above events unfolded. See, for example, G Beck, 'The Court of Justice, Legal Reasoning, and the Pringle Case-Law as the Continuation of Politics by Other Means' 39 (2014) European Law Review 234.

[35]Joerges (n 2) 36.

[36]To avoid the sadly banal reference to the Schmittian state of exception, see the elucidated scholarship of EW Böckenforde, *Constitutional and Political Theory – Selected Writings* (Oxford University Press 2017).

[37]Brilliantly reviewed by Joerges in the aptly-named 'Where the Law Runs Out': The Overburdening of Law and Constitutional Adjudication by the Financial Crisis and Europe's New Modes of Economic Governance in Joerges (n 2) 34–46.

[38]C Joerges, 'A Disintegration of European Studies?' 1 (1) (2016) European Papers 12.

[39]Dissenting Opinion of Justice Lübbe-Wolff on the Order of the Second Senate of 14 January 2013 BVerfG, Judgment Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13 (ECLI:DE:BVerfG:2014:rs20140114.2bvr272813) <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html> accessed 10 April 2010.

[40]Joerges (n 2) 395.

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B. Crisis beyond the law

Indeed, the crisis response fulfilled the intent of Maastricht to protect governments from each other's financial liability. This approach was most certainly legal and yet, its very exploitation of the law marked it of doubtful legitimacy. Reflecting on the legal outcome of the crisis, Joerges contends that the 'new modes of European economic governance amount to nothing less than a deep transformation of the state of the European Union.'[41] In other words, in instrumentalising law the crisis-response reached 'beyond the law', beyond the readily-extendable legitimacy of the original Maastricht framework by over-extending its rationale and failing to examine it seriously – within the context of what the fine balance between unity and diversity, integration and regulation, meant in 1992. Was there resigned acceptance of an automated surrender of sovereignty commensurate with runaway integration or, perhaps, expectation for a more cautious balancing act?[42]

The difficulty presented by these conflicting possibilities is requisite for understanding Joerges's critique of the crisis and rationalising its validity.

The fine equilibrium between unity and diversity was designed to protect the national budgetary space from cross-border fiscal liabilities. This, in fact, was the very reason behind the creation of an asymmetric economic and monetary union. In turn, this compromise secured room for manoeuvre for the democratic expression of socio-economic cultural differences within the national space. The response to the sovereign debt crisis negated the possibility of legally satisfying both of these conditions.[43] Worse still, it set them against each other.[44] In the dominant interpretation of Maastricht – still current at the time of writing – the independence of the national fiscal and macroeconomic space, ie the powers retained by Member States, has itself become a liability. And, within the logic transplanted from 1992, liability must be regulated.

Perversely, the intrusion into the budgetary autonomy of fiscal profligates, ie imposed austerity, has been legally rationalised as protecting the budgetary autonomy of creditors and the integrity of the euro. It is only by imposing conditionality (ie violating the democratic sovereignty of some on economic grounds) that the CJEU has managed to fulfil 'the intent of the Treaties' and square the circle of ESM loans in the face of Art 125 TFEU in *Pringle* – in other words, to do what is necessary, legalising transfers without liability (ie protecting the democratic sovereignty of others on economic grounds).

Joerges is keenly aware of this dystopia created by euro-crisis legal reasoning. He is able to offer a perfectly valid German critique with perfectly genuine southern sensibility not only because he lucidly recognises that the price for the budgetary autonomy of one Member State has become that of another, but also because, as an honest broker and disciple of the original intent of Maastricht, Joerges cannot subscribe to an Orwellian version of EMU where all Member States are equal, but some are more equal than others. Rightly, he asks: Why is budgetary autonomy an exclusive

[41]Ibid., 378. It is worth pointing out that legal scholarship was split on this issue, with some not only claiming there was no fundamental shift of the primary normativity of the EU Treaties, but also commending the exertions of the CJEU. See to this end B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order' 50 (2013) Common Market Law Review 805.

[42]For a review of the theories of European integration, see Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' in Joerges (n 2) ch 7.

[43]Among useful reflections on the trade-off between unity and diversity re Social Europe, see F Costamagna, 'National Social Spaces as Adjustment Variables in the EMU: A Critical Legal Appraisal' 24 (2018) European Law Journal 163; A Crespy and G. Menz, 'Commission Entrepreneurship and the Debasing of Social Europe Before and After the Eurocrisis' 53 (2015) Journal of Common Market Studies 753.

[44]With Joerges, 'the Court's reasoning leads to a strengthening of the links between economic stability and social austerity.' Joerges (n 2) 376.

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privilege of Germany – and, by extension, the economically disciplined – rather than a '*common* European constitutional legacy, respect for which is demanded by Article 4(2) TEU.'[45]

Both these strands of critique stem from the same normative concern for the national welfare space. Arguing in favour of German budgetary autonomy and against the social austerity imposed on Greece are equally valid *and* compatible arguments if interpreted within the scope of an 'originalist' understanding of Maastricht, contextualising its intent. The tension between these assertions was borne only by solving the eurozone crisis through existent law, whereby the budgetary autonomy of one MS would be prioritised over another on the allegation of budgetary profligacy and the calculation of risk.

In fact, this tension is the mirror image of the thus-created legal conflict between the democratic rights and interests of European citizens of different national polities, who are subject to the rationality of the same EU budgetary and macroeconomic rulebook, yet experience this regime quite differently due to the simple fact they inhabit different economic jurisdictions.[46] It is not just that some sovereigns are more equal than others, it is the fact their very citizens experience the European Union discriminately. A question remains, open and glaring: what then of the European citizen? With AG Poiares Maduro's meditations:

> [A]lthough it is true that nationality of a Member State is a precondition for access to Union citizenship, it is equally true that the body of rights and obligations associated with the latter cannot be limited in an unjustified manner by the former.[47]

With the very practice of democracy being circumscribed differently across the Union based on a technocratic scale of arbitrary economic indicators, the implications are both considerable and quite tangible. The connection between economic hardship and reactionary politics has been well-researched, established, and made painfully obvious in the past decade of Eurosceptic politics across the continent.[48] Joerges, in fact, is convinced that 'the present state of the Union is threatening the legitimacy of the integration project' as it mutates from coordination to 'command and control' governance mechanisms,[49] leaving citizens ever more at pains to recognise themselves in the laws they have become subject to.[50] Yet, he does not cease his observations at critique, but offers a solution to rebalance the legal scales between unity and diversity – conflicts law constitutionalism.

5. Conflicts law constitutionalism

A useful, albeit oversimplified, manner of thinking about conflicts law constitutionalism is to begin with the already elaborated notion of diagonal conflicts. To repeat: diagonal conflicts law is a functional method for solving otherwise intractable legal conflicts between equally valid claims

[45]Joerges (n 2) 376 and at 39: 'What Lübbe-Wolff criticises here has been thoroughly neglected in the judgment on the rescue package for Greece, where the Court defended the budgetary power of the German Bundestag while, by the same token, not caring at all for the rights of the Greek Parliament.'

[46][T]he Member States have been subject, some more and some less rigidly, to a discipline of austerity politics in the name of monetary and stability and the stability of the financial system as a whole – 'some more and some less', since the political economies of the Member States continue to diverge, and in some cases the differences are only deepening. The conclusion is surely paradoxical: the political autonomy of the Member States is strictly controlled, yet fiscal overseers are afforded a practically unlimited degree of discretion or room for supervisory manoeuvre. Joerges (n 2) 587.

[47]Opinion of Advocate General Poiares Maduro in Case CJEU C-135/08 *Janko Rottmann v Freistaat Bayern* ECLI:EU:C:2009:588. As Poiares Maduro explained: This here is a matter not of the conferred rights on EU citizens, but of the discriminatory experience of EU citizenship through national jurisdictions. Ibid., para 23.

[48]For a thorough account, see CE De Vries, *Euroscepticism and the Future of European Integration* (Oxford University Press 2018).

[49]Joerges (n 2) 272.

[50]Ibid., 276.

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through 'deliberative cooperative interactions'.[51] Conflicts law constitutionalism elucidates the normative strengths of this approach and elevates them to a guiding – 'constitutional' – framework through the following logic. First, conflicts law is premised on accepting the heterarchy of conflicting ideas from different legal jurisdictions. Coordination, then, guarantees the recognition of such claims across fora. Finally, cooperation in conflict-solving ensures the 'inclusion of the other', thus securing the ownership of outcomes and perhaps even a democratic notion of self-legislation.[52]

A. Conflicts law constitutionalism: promises

The undeniable appeal of conflicts law constitutionalism for the EU project should be self-explanatory. The promise of this private international law approach is to ameliorate the Union's persistent democratic deficit by building cross-national and cross-democratic coordination and cooperation on the basis of its 'mere' technical function that ensures cross-jurisdictional recognition.

In Joerges's reading, the potential of European governance ran in accordance with conflicts law constitutionalism extends even further through its ability to mitigate the damaging effects of escalating technocratic supranationalism on the legitimacy of *national* governance. In other words, the ability to curtail the driving forces behind reactionary politics and anti-Union sentiment on the national level. Joerges proposes the European iteration of highly conditioned modern sovereignty may be rectified if Member States can guarantee their citizens have a say in all the policies they are exposed to, while – importantly – simultaneously conceding their own policies expose foreign nationals in the same manner.[53] With the author:

> In the European case, we can build on European law's potential to compensate for the legitimacy deficits of national rule. European law can derive its own legitimacy from this function: its mandate is to implement the commitments of the Member States towards each other by two legal claims, namely, the requirement to take the interests and concerns of their neighbours into account when designing national policies, and by imposing a duty to cooperate. The very notion of cooperation indicates that this kind of rule cannot be some 'command and control' exercise, but must rely on the deliberative quality of cooperative interactions.[54]

Building upon the thematic philosophical discourse in the vein of Habermas, Joerges offers a most elegant solution with a truly legal formulation for a European polity. The beauty of the logic lies in its simplicity.

B. Conflicts law constitutionalism: difficulties

Reflecting on the legal consequences of the eurozone crisis, the need for conflicts-law constitutionalism has obviously intensified. So, too, have the impediments before it. If the original iteration of Maastricht allowed for the seamless transplanting of both the functional and normative considerations of a conflicts-law approach, specifically in solving single market and single currency constellations, the current EMU governance framework has seen the legal space and political context for cooperation significantly curtailed. We focus here on three primary obstacles: (i) the increasingly limited national space, (ii) the technocratisation of law, and (iii) political power dynamics.

[51] Ibid., 278.
[52] Ibid., 422.
[53] Ibid., 422.
[54] Ibid., 278.

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C. Confined spaces

Firstly, as noted in Section 2, the diagonal conflicts constellation between the single monetary and many fiscal policies was always conditioned on the definition of budgetary propriety. The experience and 'lessons learned' from the crisis has only constrained the boundaries of the forum for cooperation, where national democratic socio-economic policy preferences are considered equally valid and as deserving of legal recognition as supranational monetary and economic considerations. Discovering the new channels for contagion and, thereof, transfer of liability, rationalised further intrusion into competences previously reserved for Member States in a regulatory mitigation of run-away integration. Throughout the reformed budgetary rulebook, procedures have been elaborated and enforcement guaranteed premised on the mere possibility of breaking the rules, ie on risk, thus even further constricting the space for cooperative cross-national economic governance.

One such poignant example is the crisis-minted Macroeconomic Imbalances Procedure (MIP), which is based on competences pursuant to Article 121 TFEU – the obligation for coordination. It is no exaggeration to claim that by the sheer extent of its thematic reach over the minutiae of national macroeconomic policies and by adopting vertical enforcement mechanisms through soft law proceduralisation, such as connections to other procedures of EU law and quid pro quos between compliance and Cohesion funds, the MIP has colonised the Treaty space for cooperation and corrupted its very function, respectively. Everson, Scharpf, and Joerges have all rightly observed this scheme is void of legal protections and the legitimate authority to impose highly intrusive policy choices on Member States.[55] In fact, the latest round of SGP reforms, in force since April 2024, has seen the MIP and SGP procedures even further morphed into a single operative framework resulting in a cross-pollination between legal bases, further muddying the waters between national and conferred powers, guidelines and obligations, soft and hard law.[56]

D. The technocratisation of law

The second obstacle to conflicts law constitutionalism has been the technocratisation of law. The legislative reforms following the eurozone crisis saw the 'law transform itself into an economic technology'.[57] Beyond the arbitrary criteria of Protocol 12 of the Treaty of Maastricht, secondary legislation is increasingly guided by numerical indicators and economic divinations are legally formulated as triggers capable of automatically escalating invasive procedures. There may be very little room left for diagonal conflict resolution through cooperation and compromise in this new world permeated by readily available technocratic right answers, where European law has wholly offered itself as an instrument of economic considerations.

It matters little whether there is sound economic logic behind the economic governance rulebook, when the law has already accepted, validated, legitimated, and continues to enforce it. Such has always been the case, for instance, with the arbitrary Protocol 12 Maastricht criteria and any of the abundance of spin-off indicators safeguarding this precarious scheme since its inception.[58]

[55]Ibid., 275 in reference to M Everson, 'The Fault of (European) Law in (Political and Social) Economic Crisis' 24 (2013) Law and Critique 107 and FW Scharpf, 'Monetary Union, Fiscal Crisis and the Pre-emption of Democracy' 9 (2011) Journal for Comparative Government and European Policy 163.

[56]The new SGP 'Preventive arm' is contained with Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97.)

[57]Everson (n 55).

[58]Reflecting on the inception of EMU and the arbitrariness of the 3 percent deficit indicator, Ashoka Mody attests that during the Maastricht Treaty negotiations, Jacques Delors himself is said to have hoped the ideas behind the final provisions would be satisfied by mere lip service, never to be truly operationalized in law. Mody (n 5) 86–7. For further reading on the history of EMU, see also H James, *Making the European Monetary Union* (Harvard University Press 2012). In light of the

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In fact, one might argue that since the crisis, deference to technocratic expertise in the EU has reached far beyond *Meroni* into a regime more closely resembling *Chevron* on steroids.[59]

While the legal system is indeed precluded from speaking to expertise from beyond the legal realm, it most definitely can and must speak to the distributive consequences that follow from such technocratic input and proceed to judge them against the normative foundations of its constituent Treaty – the values of what it means to be European. But this course of action is a tall order in post-crisis EU law, where the CJEU has tied itself to the precedents of *Pringle* and *Gauweiler*, installing financial stability at the apex of the EU aspirations, reading into the Treaties a quid pro quo between conditionality and budgetary autonomy, and thus conditioning the rights of the very European 'citizenry' it helped usher into existence.[60]

E. Political dynamics

Lastly, we must acknowledge the crisis-disruption of political power dynamics in the EU as another serious obstacle to the application of conflicts law constitutionalism. The sharply altered relationship between Member States has mutated from a scale of varying economic performances and fiscal predispositions into the opposing poles of a creditor–debtor conflict. The evolution of finance reconfigured the EU sovereign constellation, resulting in the appropriation of the EU Treaty-based intergovernmental competences by creditor logic, thus concentrating power towards a single end of the econo-political spectrum of the Union. With the financial nature of the crisis having reconfigured credit into authority, certain Member States found themselves in an exclusive position to exercise powers that would otherwise be far beyond the remit of their Treaty competences and standing, conflicts of interest notwithstanding. Even though these dynamics were entirely contextual – borne of crisis and thereby, theoretically, exceptional – they would become normatively and constitutionally underpinned by the CJEU's interpretation of the failures of the Maastricht compromise as the original sin of fiscally-libertine Member States. Worse still, this power asymmetry was institutionalised through the overhaul of the EMU governance framework in reaction to the crisis.[61]

Perhaps, then, the most inhibiting condition to embracing genuine cooperative European constitutionalism is the lack of political self-interest for doing so. This much was evidenced by the political red lines that obstructed the latest reforms of the Stability and Growth Pact. In a small triumph the economic reality, the new framework has moved away from the one size fits all economic and budgetary planning towards cooperative deliberation-based agreements with the

economic events surrounding the global pandemic before the return of inflationary pressures, there was a determined push by economists advocating a move away from quantitative to qualitative rules in the EMU – such that may be open to interpretation and cooperation – and their adjudication by independent bodies such as the CJEU, rather than political for a such as the Council, see O Blanchard, A Leandro and J Zettelmeyer, 'Redesigning EU Fiscal Rules: From Rules to Standards' 36 (106) (2021) Economic Policy 195–236.

[59]J Mendes, 'Law and Discretion in Monetary Policy and in the Banking Union: Complexity Between High Politics and Administration' 60 (6) (2023) Common Market Law Review 1579–622.

[60]Although rather limited at the time of judgment, the individual rights conferred in *van Gend en Loos* read into the Treaties an entirely novel concept for the Community, which would develop on its own and be formalised no sooner than three decades later at Maastricht. 'Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.' (II-B) See Case C-26/62 *Van Gend en Loos* ECLI:EU:C:1963:1.

[61]It is easy to distinguish the interests formalised with the novel catalogue of crisis prevention reforms through their selective instrumentality. Simply put, applying the measures cost far less – if anything at all – to those propagating them than the general lot. The fact that discipline would only prove constraining to those in need of discipline was rather convenient, ensuring that the new invasive rules take effect and violate the sovereignty of profligate Member States only. Just as the constraints of the budgetary framework of the Maastricht compromise were only to be felt by those in need of further fiscal consolidation in the interest of increasing economic convergence within the EMU club.

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European Commission, yet simultaneously held fast to number-based objectives and measures of risk such as the 3 per cent deficit and 60 per cent debt to GDP Maastricht criteria. Any further voluntary dismantling of the disciplinary constitutionalism installed by the crisis is, for the foreseeable future, highly unlikely.

6. Conclusion

There is benefit to oneself in recognising the other, an almost scriptural truth to do unto others as you wish be done unto yourself. In this context, Joerges's lifetime endeavour to establish a European iteration of conflict laws constitutionalism remains overwhelmingly ambitious, yet now more imperative than ever. It holds the promise for a legal framework with a moral compass for the future of the Union: a future where European citizens allow the possibility to hold equally valid democratic rights and experience equally valid economic concerns as their neighbours in a forum of cooperation and coordination, constructed within the boundaries and values of European law; a future, where in reflection of this germinating polity, the CJEU may also allow that all European citizens hold equally valid democratic rights and experience equally valid economic concerns by recognising budgetary autonomy as a *common* European constitutional legacy; a future where, as Christian Joerges, we may legally and politically hold Southern sensibilities and German concerns as equally valid to each other.

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