

The Financial Crisis, the EU Institutional Order and Constitutional Responsibility

*Professor Paul Craig**

The financial crisis is arguably the most significant challenge to the EU since the inception of the EEC. It has generated an array of political, legal and institutional responses the complexity of which is daunting in itself. The current paper considers these developments, and places them within a broader frame of institutional concerns, thereby facilitating thought about their impact on issues that have been debated more generally within the EU. The analysis has two principal themes, institutional design and constitutional responsibility for the choices thus made. These twin themes are considered in temporal perspective.

The discussion begins with the foundational institutional architecture for EU decision-making, and the debates that this has generated about democracy deficit. There has been a further resurgence of these concerns in the light of the crisis. While this is unsurprising, there is nonetheless a surprising lack of discourse as to responsibility for the status quo, and an equally surprising lack of serious discussion as to how we should think of the constitutional responsibility of Member States and not just the EU itself for the current institutional ordering.

The analysis then shifts to the institutional architecture of the EMU laid down in the Maastricht Treaty, with the focus once again on the relationship between the institutional

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attribution of power, constitutional responsibility for the shaping of these provisions, and the way in which the schema contributed to the subsequent economic malaise. The relationship between this institutional schema and subsidiarity will also be explored.

The penultimate section of the paper considers the institutional schema that was used to deal with the financial crisis while it unfolded and the extent to which this can be properly portrayed in intergovernmental or supranational terms. The focus in the final section of the paper is on the measures that have been put in place thus far, and the institutional implications that this has had for the balance of power, both vertical and horizontal.

1 EU Institutional Design and Constitutional Responsibility

It is unsurprising that the financial crisis should have brought back to the fore concerns about the very design of the EU's institutional structure and issues of democracy deficit,¹ on which there is already an extensive literature.² This is however matched by an equal dearth of

¹ See, eg, D Chalmers, 'Democratic Self-Government in Europe, Domestic Solutions to the EU Legitimacy Crisis', Policy Network Paper, May 2013; K Nicolaïdis, 'European Democracy and Its Crisis' (2013) 51 JCMS 351; S Piattoni (ed), *The European Union: Institutional Architectures and Democratic Principles in Times of Crisis* (Oxford University Press, forthcoming); O Cramme and S Hobolt (eds), *Democratic Politics in a European Union under Stress* (Oxford University Press, forthcoming);

² See, just in terms of books, S Garcia (ed), *European Identity and the Search for Legitimacy* (Pinter, 1993); J Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass, 1995); A Rosas and E Antola (eds), *A Citizens' Europe, In Search of a New Order* (Sage, 1995); R Bellamy, V Bufacchi and D Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press, 1995); S Andersen and K Eliassen (eds), *The European Union: How Democratic Is It?* (Sage, 1996); R Bellamy and D Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Blackwell, 1996); R Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, 1996); F Snyder (ed), *Constitutional Dimensions of European Economic Integration* (Kluwer, 1996); R Dehousse (ed), *Europe: The Impossible Status Quo* (1997); D Curtin, *Postnational Democracy, The European*

literature concerning constitutional responsibility of Member States for the status quo. Consideration of the causal influences underpinning Treaty reform has not been matched by attendant analysis of what this should be taken to connote in terms of the constitutional responsibility of Member States for the resultant institutional architecture. This is a serious failing.

The fact that far-reaching measures were enacted pursuant to the Lisbon Treaty, and through treaties such as the Fiscal Compact and the European Stability Mechanism, to cope with the financial crisis has led to renewed attention on the democratic credentials of the EU. There is already a very considerable body of literature dealing with such matters, and there is no intent to traverse this ground in detail here again. Suffice it to say that the disjunction between power and electoral accountability is the most potent aspect of the democracy deficit argument.³

Union in Search of a Political Philosophy (Kluwer, 1997); P Craig and C Harlow (eds), *Lawmaking in the European Union* (Kluwer, 1998); J Weiler, *The Constitution of Europe* (Cambridge University Press, 1999); C Hoskyns and M Newman (eds), *Democratizing the European Union* (Manchester University Press, 2000); B Laffan, R O'Donnell, and M Smith, *Europe's Experimental Union: Rethinking Integration* (Routledge, 2000); F Mancini, *Democracy and Constitutionalism in the European Union* (Hart, 2000); K Neunreither and A Wiener (eds), *European Integration after Amsterdam, Institutional Dynamics and Prospects for Democracy* (OUP, 2000); R Prodi, *Europe As I See It* (Polity, 2000); K Nicolaidis and R Howse (eds), *The Federal Vision, Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001); W van Gerven, *The European Union, A Polity of States and Peoples* (Hart, 2005).

³ J Weiler, U Haltern and F Mayer, 'European Democracy and its Critique' in J Hayward (ed), *The Crisis of Representation in Europe* (Frank Cass, 1995); A Follesdal and S Hix, 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 JCMS 533; K Nicolaïdis, 'The Idea of European Democracy', in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford University Press, 2012); K Nicolaïdis, 'Our European Democracy: Is this Constitution a Third Way for Europe?', in K

It is axiomatic within national systems that the voters can express their dislike of the incumbent party through periodic elections. Governments can be changed if they incur electoral displeasure. In the EU, legislative power is divided between the Council, European Parliament, and Commission, with the European Council playing a significant role in shaping the overall legislative agenda. The fact that different modes of representation pertain in these institutions is not itself odd, given that this is a standard feature of many federal-type polities.⁴ The voters have however in the past had no direct way of signifying their desire for change in the legislative agenda. European elections can alter the complexion of the European Parliament, but it is only one part of the legislative process. The Commission, Council and European Council have input into the legislative agenda, but they cannot be voted out by the people. The European Parliament's influence over the choice of the Commission President has increased, as has the electoral accountability of the incumbent to this office, an issue to which we shall return below. Suffice it to say for the present that this alleviates, but does not cure the problem, in part because the other Commissioners remain national government appointees, and in part because the European Parliament's power in this respect does not touch the considerable role played by the Council and European Council in the EU decision-making process.

There have been various attempts to address this concern. For some, such as Moravcsik, the response is to affirm political accountability, notwithstanding the absence of direct electoral accountability analogous to national legal regimes, the argument being that 'constitutional checks and balances, indirect democratic control via national governments,

Nicolaïdis and S Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press, 2003).

⁴ D Kelemen, *The Rules of Federalism: Institutions and Regulatory Politics in the EU and Beyond* (Harvard University Press, 2004).

and the increasing powers of the European Parliament are sufficient to ensure that EU policy-making is, in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens'.⁵ This in turn has been contested by others who regard electoral accountability as central to conceptions of democracy. Checks and balances are indeed part of the standard fare of democratic politics, but the justification for democracy at its most fundamental is that it allows participatory input to determine the values on which people within that polity should live.⁶

It is noteworthy that the discourse concerning democracy deficit is normally presented as a critique of the EU. It is the EU qua real and reified entity that suffers from this infirmity, the corollary being that blame is cast on it. The EU is of course not blameless in this respect, but nor are the Member States, viewed collectively and individually. The present disposition of EU institutional power is the result of successive Treaties in which the principal players have been the Member States. There may well be debate as to the relative degree of power wielded by Member States and the EU institutions in the shaping and application of EU legislation, but there is greater consensus on the fact that Member States tend to dominate at times of Treaty reform.⁷ The inter-institutional distribution of power is the result of hard

⁵ A Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 JCMS 603, 621.

⁶ Weiler (n 3); Follesdal and Hix (n 3).

⁷ G Marks, L Hooghe and K Blank, 'European Integration from the 1980s: State-Centric v. Multiple-Level Governance' (1996) 34 JCMS 341, 342; T Risse-Kappen, 'Exploring the Nature of the Beast: International Relations Theory and Comparative policy Analysis Meet the European Union' (1996) 34 JCMS 53; J Golub, 'State Power and Institutional Influence in European Integration: Lessons from the Packaging Waste Directive' (1996) 34 JCMS 313; J Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern' (1996) 34 JCMS 29, 44-48; F Scharpf, 'The Problem Solving Capacity of Multi-Level Governance' (1997) 4 JEPP 520; G Marks, F Scharpf, P Schmitter and W. Streeck, *Governance in the European Union* (Sage, 1996); A Moravcsik, 'Preferences and Power in the European Community: A Liberal

fought battles, the results of which are embodied in Treaty amendment. Thus insofar as the present arrangements divide EU policymaking de facto and de jure between the Commission, Council, European Parliament and European Council, this is reflective of power balances that the Member States shaped and were willing to accept. This is readily apparent when considering the initial Rome Treaty and any of the five major Treaty reforms since then. It is powerfully exemplified by the debates concerning institutional reforms in the Constitutional Treaty, which were then taken over into the Lisbon Treaty.⁸ It was evident most notably in the battle as to whether the EU should have a single President who would be located in the Commission, or whether a reinforced European Council should also have a long-term President.⁹ It was apparent in the debates as to Council configurations, and who would chair them. It was the frame within which the discourse took place concerning the number of Commissioners and the method of choosing them.¹⁰

This point can be reinforced by considering the reforms that would be required to alleviate the democratic deficit. The European Parliament has been further empowered by the Lisbon Treaty through extension of what is now the ordinary legislative procedure to new areas, and it has greater control over the appointment of the Commission President than hitherto. Thus, while the European Council retains ultimate power over the choice of

Intergovernmentalist Approach' (1993) 31 JCMS 473; A Moravcsik, *National Preference Formation and Interstate Bargaining in the European Community, 1955-86* (Harvard University Press, 1992); A Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45 International Organization 19; M Pollack, 'International Relations Theory and European Integration' EUI Working Papers, RSC 2000/55.

⁸ P Norman, *The Accidental Constitution, The Making of Europe's Constitutional Treaty* (EuroComment, 2nd ed, 2005).

⁹ P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) Ch 3.

¹⁰ Ibid Chs 2 and 3.

Commission President,¹¹ it will not force a candidate on the European Parliament that is of a radically different persuasion from the dominant party or coalition. A formal linkage between the dominant party/coalition in the European Parliament and the appointment of the Commission President serves to strengthen the connection between policy and party politics, thereby alleviating the disjunction of political power and political responsibility that has underpinned previous critiques of the EU. This link was further strengthened in the 2014 elections for the European Parliament, in which rival candidates for the Commission Presidency campaigned openly as the chosen candidates of the two principal political groupings in the EP. The electoral success of the centre-right European Political Party led to the confirmation of Jean-Claude Juncker as the new Commission President, albeit after opposition from the UK and Hungary. The general consensus is that now that this stronger link between the EP and the Commission President has been forged it will constitute the new status quo going forward, and establish the ground rules for subsequent EP elections. The hope is that it will also increase voter interest in EU elections, since they can perceive a more proximate connection between the casting of their vote, and the policy choices carried forward after the election.

This may well be so in relative terms, but there are nonetheless obstacles that subsist to a closer link between policy and politics in the EU, even after the Lisbon Treaty reforms and changes wrought by the 2014 EP elections. The EU policy agenda is not exclusively in the hands of the European Parliament and/or Commission. The Council and the European Council have input both *de jure* and *de facto*. Thus even if the European Parliament and Commission President are closely allied in terms of substantive policy for the EU, the policy that emerges will necessarily also bear the imprint of the political vision of the Council and European Council. Moreover while the President of the Commission may well be *primus*

¹¹ Art 17(7) TEU.

inter pares, he or she is still only one member of the Commission team. The other Commissioners will not necessarily be of the same political persuasion as the President or the dominant party in the European Parliament.

It would be possible in theory to have a regime in which the people voted directly for two constituent parts of the legislature, the European Parliament and Council, and for the President of the Commission and the President of the European Council. It would be possible in theory to have the previous package, but only a single elected President for the EU as whole. The political reality is that radical change of this kind has not happened because the Member States were unwilling to accept such a disposition of power. It is certainly true that the choice between two Presidents and a single President for the EU was debated during the negotiations leading to the Constitutional Treaty. It is equally true that discourse concerning the election of the Commission President began in the 1980s. It should nonetheless be recognized that the broader reforms set out above were not on the political agenda during the extensive negotiations concerning institutional power in 2003-4 during the deliberations that led to the Constitutional Treaty, nor in the subsequent discussions that culminated in the Lisbon Treaty. Even if the broader package of reforms were adopted it could not ensure that the people would exercise electoral control over the direction of EU policy, since the European Council would still be populated by Heads of State, who would continue to have a marked influence over the policy agenda, and members of the Commission, with diverse political views, would still be chosen by the Member States.

There is moreover a Catch 22 lurking here that is both constitutional and political. The constitutional manifestation flows from the realization that the diminution of state power in the Council and European Council that would be entailed by such change would not be constitutionally tolerated in some countries and would lead to the charge that the EU was truly becoming a super-state. It would be regarded as constitutionally unacceptable in some

Member States at least, which would regard such change as undermining the status of the Member States as masters of the Treaty, and installing in its place a federal state that was incompatible with the founding precepts in the constituent documents of those Member States.

The political manifestation of the Catch 22 is equally important. Changes of the kind adumbrated above would be opposed by many national parliaments, as well as national executives, which would not view with equanimity the diminution of their status that flowed from the increased legitimacy of the EU political order. This leads to the further paradox that because such changes that would alleviate the democratic deficit would not prove acceptable to national political orders, the discourse focuses on ever greater ways to involve the national parliaments in decision-making through suggestions of red cards to complement the existing colour set. I am not opposed to involvement of national parliaments in the EU decision-making process. They have a role therein, although its nature and limits are contestable. The implications of proposals for parliamentary red cards would be very problematic, and this is a fortiori so for radical proposals that would give individual Member States the power to opt out of legislation that they felt to be unduly burdensome.¹² The apposite point for present purposes is however that the very drive for such involvement is premised on the assumption that it will thereby indirectly alleviate the EU's democratic malaise, in circumstances where other ways of attaining this end would be opposed by many national parliamentary institutions.

The political manifestation of the Catch 22 is also apparent in more subtle ways. Thus recent efforts by Martin Schulz and Jean-Claude Juncker to imbue the choice of Commission President with more electoral legitimacy, through direct campaigning combined with televised debate, proved successful in the sense that the candidate of the party that secured

¹² Chalmers (n 1).

most seats in the EP was duly appointed as Commission President. This outcome was however not certain and some responded by reasserting the formal right for Member States to choose another candidate. The truth of this as a matter of formal Treaty law is not open to question. It was rather the almost ‘reflexive’ reaction in some quarters, whereby shifts towards some greater measure of direct electoral legitimacy provoked a counter reaction reasserting Member State power as exercised through the European Council in the choice of Commission President.

I return then to the inquiry posed earlier, concerning the dearth of consideration of what the current disposition of power means in terms of Member State constitutional responsibility, connoting in this respect both their responsibility qua contracting parties to the EU and the constitutional responsibility they bear in relation to their own constitutional order. I am not referring here to this insofar as it concerns national representatives in the Council, or that of heads of state within the European Council, on which there is indeed considerable discussion. I am referring rather to the way in which we think more generally about the constitutional responsibility of Member States both as contracting parties to the EU, and in terms of their respective constitutional orders. It is the very nature of the obligations that flow from the legal maxim *pacta sunt servanda* that are of interest here. It may be helpful to contrast two perspectives in this regard.

It might be argued that there are no distinctly political obligations that can be cast in terms of Member State constitutional responsibility, and that the legal dimension of *pacta sunt servanda* exhausts the meaning of this precept. It might in this vein be contended that Member States make treaties, and legislation pursuant thereto, out of rational self-interest, maximizing their personal benefit, and minimizing attendant costs, with the consequence that if they can off-load responsibility for EU difficulties ‘elsewhere’ they will. Member State constitutional responsibility is regarded as coterminous with legal accountability narrowly

construed. The state accepts the consequences of non-compliance with EU legislation, whether cast in terms of state liability in damages, Commission action for breach of EU law, or direct effect of directives. This is however conceived for what it is, legal accountability when one breaks the rules. It does not undermine the foundational precept that the state will act as a rational actor seeking to maximize the returns and minimize the costs of EU membership. It is integral to this approach that the state will regard it as politically ‘natural’ and normatively ‘uncontroversial’ to offload blame for failures to the EU itself, rather than accept that the states individually or collectively bear responsibility in this regard. The rational state actor as thus conceived describes not only how states behave in relation to the EU, but also sets the normative boundaries for their constitutional responsibility.

Member State constitutional responsibility might, alternatively, be conceptualized more broadly, to include, but also go beyond the limits of legal accountability. Let us leave aside for the present the issue of how far the picture in the preceding paragraph captures the reality of state behaviour. The salient point for present purposes is that there is no a priori reason why this rationalist version of state action should translate into or dominate thought about the responsibility for state choices conceived in constitutional terms. Indeed there are very good reasons why it should not, since it thereby denudes the concept of responsibility of almost all meaning, with detrimental consequences more generally for how we conceive of political responsibility. A richer conception of constitutional responsibility flows in part from the obligation of sincere cooperation embedded in the Treaty,¹³ and in part from more general precepts of taking responsibility for one’s action that should as a matter of principle pertain equally to states as to individuals as a matter of domestic constitutional principle.

The principle of sincere cooperation, whereby it is incumbent on the EU and Member States in full mutual respect to assist each other in carrying out tasks that flow from the

¹³ Art 4(3) TEU.

Treaties, is central to this alternative vision.¹⁴ So too is the remainder of this Treaty provision, which enjoins the Member States to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties, or resulting from acts of the EU institutions, and requires Member States to facilitate achievement of the EU's tasks and refrain from any measure which could jeopardise the attainment of the EU's objectives.¹⁵ This Treaty obligation may provide the foundation for more discrete legal obligations, as exemplified by its deployment in the jurisprudence on state liability in damages.¹⁶ It is, however, integral to this alternative vision that Member State constitutional responsibility is not exhausted by the legal dimension to the principle of sincere cooperation.

It also has a distinctly political dimension that is expressive most fundamentally of the positive side of the *maxim pacta sunt servanda*, irrespective of whether it is capable of being embodied in a legally enforceable norm.¹⁷ Thus the principle of sincere cooperation surely provides the basis for an obligation of political good faith engagement by Member States in ensuring that Treaty obligations are fulfilled efficaciously; the injunction on Member States to take any appropriate measure to ensure fulfilment of Treaty obligations should generate responsibility for states to be proactive in thinking about the best way to achieve Treaty imperatives; and the duty to refrain from behaviour that could jeopardize attainment of EU objectives should provide the foundation for constitutional responsibility not to offload blame to the EU when this is unwarranted.

¹⁴ Art 4(3) TEU.

¹⁵ Art 4(3) TEU.

¹⁶ Cases C-6 & 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

¹⁷ What has been termed here the positive side of *pacta sunt servanda* may have legal implications. The point being made here is that even if this is not so there may still be the foundations for political obligation and constitutional responsibility.

What this means most fundamentally is that Member States bear responsibility for the choices that they have made, individually and collectively, in shaping EU decision-making. Thus insofar as there is a democratic deficit of the kind considered above responsibility cannot simply be ‘offloaded’ by the Member States to the EU. Member States cannot carp about deficiencies of EU decision-making as if they were unconnected with the architecture thus created. They cannot moreover criticize aspects of the existing decision-making process as imperfectly democratic, such as the method of representation in the European Parliament, without at the very least being mindful of the fact that they would reject more far reaching democratic reforms on the ground that they would thereby transform the EU into something more akin to a federal state.

It might be contended by way of response that talk of constitutional responsibility is inapt because individual Member States may disagree with the solutions embodied in the Treaty, but may be pressured to accept them by more powerful states. The legal reality is however that the Treaty establishes 28 veto points, given that unanimity is required for Treaty amendment. It can be accepted that in the EU, as with any other collective grouping, there is never going to be parity judged in terms of substantive influence or power, with the consequence that there may be pressure to accept a particular solution. To contend that this can be used to deny any or all constitutional responsibility for the Treaty outcome is nonetheless a non-sequitur. It would mean according states some open-ended trump to excuse them from their ratification of the Treaty amendment, without any inquiry as to the nature of the alleged pressure they were subjected to and without inquiry as to whether they should have withstood it and exercised their veto if they felt that strongly about the issue. The same applies a fortiori in relation to legislation made pursuant to the Treaty. A particular state may well disagree with some aspects of EU legislation enacted pursuant to the ordinary legislative procedure. That is inevitable in a collective entity. However all states signed up to the rules of

the game, which include commitment to qualified majority decision-making, not unanimity, in the ordinary legislative procedure. It is moreover central to the very idea of collective action that states forego some element of individual choice for the benefit of being part of the club.

Recognition of Member State constitutional responsibility also has broader implications for discourse concerning related issues, such as social legitimacy.¹⁸ Joseph Weiler is surely right that the EU is presently suffering a social legitimacy deficit, manifest in low voter turnout, and the rise of more anti-EU parties.¹⁹ The causes of this deficit are complex, but the failure to articulate any developed conception of Member State constitutional responsibility for their actions, whether concerning the EU's overall decision-making architecture or individual decisions made pursuant thereto, is assuredly a factor in this regard. It should come as scant surprise that such a deficit exists if Member States are allowed to avoid constitutional responsibility for the direct effects of their own actions, and offload blame on to the 'other', even more so when they direct critical barbs at the EU, while being cognizant that they would reject most changes that could address some of the root cause of the critique. It should equally come as no surprise that more extreme parties follow the lead of mainstream parties in this respect, which should not be forgotten when engaging in the political soul-searching for causes of the recent EP election results.

The blame for failure to acknowledge such a conception of responsibility resides not just with the states themselves, but also with the broader community, including the academic community. We should, to be sure, continue to subject the EU political ordering to critical

¹⁸ See also P Lindseth, 'Power and Legitimacy in the Eurozone: Can Integration and Democracy be Reconciled?', in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Hart, 2014) Ch 18.

¹⁹ JHH Weiler, 'Europe in Crisis – on "Political Messianism", "Legitimacy" and the "Rule of Law"' [2012] *Singapore Jnl of Legal Studies* 248.

scrutiny. We should in doing so also reflect on the rationale for the current disposition of power, what alternatives are feasible and which players set the limits in this respect. The accepted critical discourse on the EU's political ordering is in reality only telling half the story, thereby ignoring conceptions of Member State constitutional responsibility that are central to a rounded understanding of the status quo and viable reform options. The nature and scope of this constitutional responsibility requires further elaboration. It is important to stress at this juncture that the preceding analysis concerns only the nature of such responsibility as it attaches to the Member States collectively and individually for the overall institutional architecture of the EU.

2 Economic and Monetary Union, Institutional Design and Constitutional Responsibility

Member State constitutional responsibility is also relevant in relation to the substantive Treaty provisions that frame economic and monetary union. There is little doubt that the EU bears some responsibility for the financial crisis, but so too do the Member States, both collectively and individually. The Treaty provisions on economic and monetary union were crafted in the Maastricht Treaty. Insofar as there was an asymmetry between EU power over monetary as opposed to economic union, this reflected what Member States were willing to accept. This is readily apparent when one considers the architecture of the EMU Treaty provisions and the Stability and Growth Pact.²⁰

²⁰ Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

Monetary union was all about the single currency and the Treaty articles were powerfully influenced by German *ordo-liberal* economic thought, which demanded independence of the European Central Bank, governance by experts and the primacy of price stability. These foundational precepts were embodied in the primary Treaty articles.²¹ It was integral to the Maastricht settlement that monetary policy was Europeanized. This was reinforced by the Lisbon Treaty provisions on competence, which stated that monetary policy for those countries that subscribed to the euro was within the exclusive competence of the EU.²² This was further strengthened by mandatory Treaty provisions precluding instructions or interference from any outside party, whether that was a nation state or another EU institution.²³

The Maastricht settlement in relation to economic policy was markedly different. It was built on two related assumptions, preservation of national authority and preservation of national liability. The former was reflected in the fact that Member States retained fiscal authority for national budgets, subject to limited oversight and coordination from the EU designed to persuade Member States, with the ultimate possibility of sanctions, to balance their budgets and not run excessive deficits. The latter, preservation of national liability, was the *quid pro quo* for the former, which found its most powerful expression in the no bail-out provision.²⁴ While there was some limited qualification to this precept²⁵ the message was nonetheless that national governments retained authority over national economic policy, subject to the Treaty rules designed to persuade them to balance their budgets, the corollary

²¹ Arts 127, 130, 282(3) TFEU.

²² Arts 2(1), 3 TFEU.

²³ Art 130 TFEU.

²⁴ Art 125(1) TFEU.

²⁵ Art 122(2) TFEU.

being that if they did not do so then the consequential liabilities would remain at the door of the nation state.

Oversight of national economic policy was weakened in subsequent years through Member State unwillingness to subscribe to the rules, which led to their modification, the effect of which was to weaken centralized EU control.²⁶ The Maastricht ‘deal’ was nonetheless left largely unaltered in the Lisbon Treaty. The Member States recognized the proximate connection between economic and monetary policy. They understood that the economic health of individual Member State economies could have a marked impact on the valuation of the euro, hence the need for some oversight and coordination of national economic policy. They were, however, mindful of the policy decisions made in and through national budgets, including those of a redistributive nature, and were unwilling to accord the EU too much control over such determinations.

It was only when the financial crisis hit the EU that the Member States were willing to accept that greater control over national economic policy was a necessary condition for monetary union. This led to the plethora of measures enacted to tighten centralized control over national budgets and national banks through the six-pack, the two-pack and the Fiscal Compact. While the EU should properly be held accountable for the way in which it dealt with the financial crisis, the Member States cannot escape responsibility in this regard either. They had a major role in shaping the Maastricht architecture on EMU and determined how it was applied in the years thereafter.

²⁶ Case C-27/04 *Commission v Council* [2004] ECR I-6649; I Maher, ‘Economic Policy Co-ordination and the European Court: Excessive Deficits and ECOFIN Discretion’ (2004) 29 ELRev 831; Council Regulation (EC) 1055/2005 of 27 June 2005 amending Regulation 1466/97 [2005] OJ L174/1; Council Regulation (EC) 1056/2005 of 27 June 2005 amending Regulation 1467/97 [2005] OJ L174/5.

There is indeed a certain gentle irony in the fact that the Maastricht Treaty contained the new provisions on EMU and on subsidiarity. The irony does not reside in the fact that the former was legally predicated on the latter. This was of course not so in technical legal terms. The Maastricht Treaty embodied the powers on EMU that the Member States were willing to give to the EU. These were contained in the primary Treaty provisions and thus were not themselves subject to subsidiarity, which was designed to determine whether rules would be made at EU level pursuant to the primary Treaty provisions that existed. Subsidiarity as now expressed in Article 5(3) TEU did not therefore bite on the initial choice of what power Member States should give to the EU in relation to EMU. This should not mask the reality that the choice as to what powers Member States were willing to sign over to the EU in relation to economic union was shaped substantively by subsidiarity, in the sense that it was felt right that major decisions concerning fiscal sovereignty should properly remain with the Member States, subject to limited oversight by the EU.

It is here that the irony resides for while subsidiarity may express a powerful and laudable sentiment about the locus of decision-making, the reality is that it can and often does lead to regulatory failure. The EU's financial crisis is testimony to two of the most prominent instances of such regulatory failure, which played out in relation to both the sovereign debt and banking crisis. The sovereign debt crisis was causally related to the very weakness of the EU controls over economic policy, which meant that there was insufficient firepower at EU level to stem the tide of sovereign debt or deal with the problem when the dams broke.

The banking crisis was also indicative of the regulatory failure of schemes that leave too much discretion to Member States. In the case of the financial regulatory regime as it existed prior to recent reforms this was the result of a schema shaped by subsidiarity concerns in the more technical Article 5(3) TEU sense. Subsidiarity can manifest itself in one of three ways: the area may be left to national regulation; part of the area, such as enforcement, may

be left to national regulation; the entire area may be subject to EU regulation, but with subsidiarity given voice through discretion left to Member States in relation to various aspects of the policy. The Lamfalussy regime was shot through to varying degrees with subsidiarity in the second and third senses. The post-mortem as to the inadequacy of the EU response to the banking crisis was carried out in the de Larosiere Report.²⁷ The report noted the lack of cohesiveness in EU policy, and concluded that the principal cause stemmed from the options provided to Member States in the enforcement of directives, which was itself the result of the discretion left to Member States by the primary directives that governed the area. The excessive diversity was manifest in, for example, different meanings given to ‘core capital’, differing degrees of sectoral supervision, diverse reporting obligations, distinct accounting provisions in areas such as pensions, and highly divergent national transposition.

3 The Unfolding Crisis and the Inter-institutional Balance of Power

There is unsurprisingly debate about the institutional consequences of the measures taken pursuant to the financial crisis, more especially because there is both a vertical and a horizontal dimension to this discourse. These concern respectively relations between Member States and the EU, and the inter-institutional balance of power within the EU itself, although the issue is rendered more complex by the fact that there may be inter-state tensions within the fabric of the EU institutions. It is important in approaching this issue to disaggregate between the institutional consequences as the crisis unfolded and the remedial measures were taken, and the inter-institutional balance of power going forward, now that many of the key measures are in place. The failure to distinguish the two can lead to conclusions being made

²⁷ J de Larosiere, The High Level Group on Financial Supervision in the EU (2009, Brussels), paras 102-105.

concerning the former, followed by implicit assumptions that these will inform the pattern of the latter, which is a non-sequitur.

We can begin therefore with the implications of the financial crisis for EU decision-making as the crisis unfolded. Sergio Fabbrini has provided an insightful analysis of this phase.²⁸ He contends that since the Maastricht Treaty there have been two modes of decision-making embedded in the Treaties, supranational and intergovernmental. The former was applicable to the single market and other areas, with the hallmark being the centrality of the Commission, the ordinary Community method and an important role for the ECJ. The latter was manifest not only in relation to the Second and Third Pillar, but also, albeit somewhat differently, in relation to areas such as economic union, where the hallmark was greater concentration of power in the Council and European Council, no role or a reduced role for the ECJ and substantive Treaty provisions that were couched in less hard-edged terms, as exemplified by those on economic union, where there was much talk of coordination and cooperation.

This Treaty architecture was then replicated in the response to the financial crisis, in the sense that intergovernmental solutions came to the forefront to tackle the unfolding drama. Thus Fabbrini argues that the apex of the intergovernmental moment was reached between 2009 and mid-2012, in which the French and German governments ‘converged toward an intergovernmental interpretation of the integration process’,²⁹ in which the EP, Commission and ECJ were sidelined, and decisional power concentrated in the European Council and ECOFIN. This approach was initially championed by President Sarkozy, adopted shortly thereafter by Chancellor Merkel and supported by the UK and Italy. It

²⁸ S Fabbrini, ‘Intergovernmentalism and its Limits: Assessing the European Union’s Answer to the Euro Crisis’ (2013) 46 *Comparative Political Studies* 1.

²⁹ *Ibid* 9.

followed moreover that if operative power was to be conceived in this manner then accountability should be primarily to national parliaments, rather than the EP.

Sergio Fabbrini notes the shortcomings of the intergovernmental approach to crisis resolution. These included the ‘veto dilemma’, connoting in this respect the need to ensure consensus before moving forward, with the consequence that European Council intervention was often too little or too late; the ‘enforcement dilemma’, capturing the difficulty of ensuring that voluntary agreements made outside the strict letter of the Lisbon Treaty would be applied within domestic legal orders; and the ‘compliance dilemma’, speaking to the difficulties of making sure that parties stick to the rules that they have made. There was moreover a ‘legitimacy dilemma’ that pervaded the intergovernmental approach, viz the difficulty of securing the legitimacy of decisions reached by ECOFIN and the European Council that had not been discussed or received the imprimatur of the EP. Fabbrini’s analysis ends with the pulling back from the intergovernmental approach after mid-2012. There is much in this picture of the institutional response to the unfolding crisis that can be accepted. There are, however, two countervailing considerations that qualify this intergovernmental perspective.

There is the fact that a central remedial response to the financial crisis was the six-pack and the two-pack, which were enacted by the normal legislative procedures as formal regulations and directives. The ideas were generated in part by the Special Task on EU Governance, chaired by President van Rompuy,³⁰ but the Commission was not excluded from this process. To the contrary, it exercised the right of initiative suggesting the necessary amendments to the Stability and Growth Pact, drafting and piloting them through the legislative process. The measures became law in 2010, and the thinking behind them was already done in 2009. This was moreover a legislative process in which the EP was involved.

³⁰ See U Puetter in this volume, Ch ?

Now to be sure there was time pressure to get the relevant measures on the statute book, which perforce limited room for EP amendment, but this did not prevent input from the EP in shaping the emergent legislation. It can be accepted that the enactment of these measures did not immediately calm the financial markets, but they were nonetheless central to the shaping of a workable economic union to accompany monetary union. The other countervailing consideration to the intergovernmental perspective is the fact that the single intervention that did more than anything else to calm the financial markets was that of the ECB President, with the statement that he would in effect do whatever it took to save the Euro.

Much attention has naturally been focused on the supervisory constraints contained in the Fiscal Compact made outside the confines of the Lisbon Treaty, which exemplified the intergovernmental method. The reality is however that it was significantly watered down over its successive amendments, such that there is now very little difference between the supervisory rules contained in the six-pack and two-pack and those in the Fiscal Compact. It remains to be seen moving forward which provides the principal foundation for oversight of national budgets. The Commission is in the driving seat as far as enforcement goes, and its natural preference is to use norms legitimated through the ordinary Lisbon Treaty process. This is for reasons of principle, given that it dislikes ‘solutions’ crafted outside the formal Treaties, more especially when the results could have been achieved therein; and for more pragmatic reasons, since the modalities of enforcement will normally be clearer in this sphere.

It should in addition be recognized that the intergovernmental location of certain of the remedial measures was in a real sense ‘contingent’ rather than ‘principled’, in the sense that it reflected political practicalities, rather than being reflective of a desire to proceed independently from the Lisbon Treaty. Thus the Fiscal Compact was not made outside the Lisbon Treaty because the UK had vetoed Treaty amendment. It was made in this way

because both Sarkozy and Merkel, albeit for different domestic political reasons, had promised that there would be reform to the primary Treaty, the consequence being that when this was blocked political face had to be saved by making a separate Treaty, notwithstanding that the desired result could have been achieved within the confines of the Lisbon Treaty, and notwithstanding the paradoxical fact that enforcement would have been more secure if this had been done. The ESM took the form of an international treaty outside the confines of the Lisbon Treaty for rather different reasons, these being temporal, viz that it was felt necessary to establish it before the amendment to Article 136 TFEU had come into force.

4 Inter-institutional Balance of Power and the New Legal Measures

The EU enacted plethora of measures to address the financial crisis. They represent a secular triptych, in which the two wing panels consist of measures designed respectively to assist and oversee ailing Member States, while the middle panel is comprised of current and future initiatives that reveal the interconnection between the two wings.³¹

The EU put in place a range of measures to give *assistance* to Member States that were in severe economic problems as a result of the Euro crisis. The most important common element is conditionality, connoting the basic precept that funds are given on strict conditions concerning reforms that must be put in place by the recipient state, with the ESM being the principal mechanism through which such assistance is now secured.³² The ECB has also played a role in provision of assistance, acting pursuant to Article 127(2) TFEU, both in the form of the securities markets programme, which sanctioned ECB intervention in the Euro-

³¹ P Craig, 'Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications' in Adams, Fabbrini and Larouche (n 18) Ch. 2.

³² <http://www.esm.europa.eu/>.

area private and public debt markets,³³ and via the Outright Monetary Transactions, OMTs, which concern transactions in secondary sovereign bond markets ‘that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy.’³⁴ The legal status of this scheme will be determined by the CJEU in the light of the challenge raised by the German Federal Constitutional Court.

The other wing of the triptych takes the form of *increased supervision* over national financial institutions. Thus the regulatory apparatus for banking, securities, insurance and occupational pensions has been thoroughly overhauled,³⁵ and new measures have been introduced such as the Single Supervisory Mechanism and the Single Resolution Mechanism, which has increased EU oversight over national banking facilities. There were also major changes designed to increase oversight over national economic policy, because of the proximate connection between economic and monetary union. The driving force behind these changes was to tighten EU control over national economic policy in order to prevent the sovereign debt and banking crises that precipitated the crisis with the Euro. The legislative framework for economic union was amended through the ‘six-pack’ of measures in 2011,³⁶

³³ Decision 2010/281 of the European Central Bank of 14 May 2010 establishing a securities markets programme [2010] OJ L124/8.

³⁴ http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html .

³⁵ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L331/12; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) [2010] OJ L331/4.

³⁶ http://ec.europa.eu/economy_finance/economic_governance/index_en.htm .

which were enacted pursuant to Articles 121, 126 and 136 TFEU.³⁷ The measures were designed to render economic union more effective by tightening the two parts of the schema, surveillance and excessive deficit, the details of which were contained in the Stability and Growth Pact.³⁸ Further measures, the two-pack, were enacted on May 21 2013.³⁹ The rules on oversight over national economic policy analysis were also shaped by the Treaty on Stability,

³⁷ Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct macroeconomic imbalances in the euro area [2011] OJ L306/8; Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances, COM(2013) 199 final.

³⁸ Council Regulation (EC) 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997] OJ L209/1; Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L209/6.

³⁹ Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area [2013] OJ L140/1; Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11.

Coordination and Governance,⁴⁰ also known as the Fiscal Compact, which was signed by 25 contracting states in March 2012.⁴¹ The provisions concerning assistance and those concerning oversight are ‘joined at the hip’, in the sense that grant of assistance under the ESM is conditional from 1 March 2013 on ratification by the applicant state of the Fiscal Compact.

The middle panel of the secular triptych comprises the set of measures enacted and proposed that are designed to lay the foundations for *genuine monetary and economic union*. This owes its origins to the Report produced by the President of the European Council in close collaboration with the Presidents of the Commission, ECB and Eurogroup, which may be referred to as the Four Presidents’ Report.⁴² It was produced at the behest of the European Council,⁴³ and was endorsed by it in December 2012.⁴⁴ The proposals contained a blend of assistance and supervision. Thus some proposals are principally aimed at provision of assistance that will render it less likely that Member States will need to seek help from the ESM. These proposals seek to address national economic vulnerability through ‘limited, temporary, flexible and targeted financial incentives’⁴⁵ made operational through contractual arrangements between Member States and the EU, which would be mandatory for Euro-area

⁴⁰ P Craig, ‘The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism’ (2012) 37 EL Rev 231; S Peers, ‘The Stability Treaty: Permanent Austerity or Gesture Politics?’ (2012) 8 EuConst 404.

⁴¹ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, 1-2 March 2012, available at <http://www.european-council.europa.eu/eurozone-governance/treaty-on-stability?lang=en>.

⁴² H Van Rompuy in close collaboration with J M Barroso, J-C Juncker and M Draghi, ‘Towards a Genuine Economic and Monetary Union’, 5 Dec 2012, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf. See also, A Blue Print for a Deep and Genuine EMU, Launching A European Debate, COM(2012) 777 final.

⁴³ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/133004.pdf.

⁴⁴ European Council, December 13-14 2012.

⁴⁵ ‘Towards a Genuine Economic and Monetary Union’ (n 42) 7.

Member States and voluntary for other Member States. They also seek to endow the EU with fiscal capacity, the objective being to facilitate adjustment to economic shocks.⁴⁶ There is also an oversight/ supervisory aspect to the proposals, which finds its expression principally in the proposals for an integrated financial framework, including in this respect what has become the Single Supervisory Mechanism, SSM and the Single Resolution Mechanism, SRM.

The EU has readily embraced the new supervisory mechanisms, as attested to by the speed with which the SSM and SRM have been moved forward. Progress toward the new assistance mechanisms has been more halting. This may seem paradoxical, given the natural intuition that Member States would be more willing to accept assistance than supervision. The paradox is however more apparent than real. This is because of the nature of the proposed assistance and the way in which it is to be made operational. The logic behind the proposal is in many ways impeccable. If some Member States run persistent economic deficits then this must be because of deeper systemic economic problems with their economy, the response to which is limited and targeted financial incentives designed to provide assistance, made operational through mutually agreed contracts or something akin thereto that will tailor receipt of the assistance to conditions designed to alleviate the underlying economic malaise. While the logic of the proposal may be impeccable, the effect is that the EU intervenes ever further back into Member State economies, with financial aid conditioned on tackling the economic malaise in accord with the diagnosis reached by the Commission. Member States may be reluctant to allow this degree of intrusion, since the terms will be largely dictated by the Commission. It is therefore not surprising that Member States have recently resisted efforts to take this type of initiative forward.

⁴⁶ Ibid 7.

The impact on the inter-institutional balance of power of these enacted measures remains to be seen. Political reality can often belie prognostications made in the advance. We can nonetheless make certain conjectures in this respect, two of which are relatively obvious, but important notwithstanding that.

In vertical terms, the EU constraints on national political action whether in relation to fiscal policy, banking or securities regulation have been significantly increased. The imperative to clear draft national budgets with the EU before being finalized, to ensure that they are independently verified, to meet medium term financial targets, to do so within a particular time frame and to comply with the European semester, is the direct result of the new legislative schema. The resulting macro-economic union is unrecognizable from its Maastricht ancestor. These measures to prevent recurrence of sovereign debt crisis go hand in hand with SSM, SRM and the other features of banking union designed to render financial crisis precipitated by bank failure less likely. There is therefore no doubt that in vertical institutional terms the EU restraints on national political choice, whether exercised by national executives or parliaments, has increased. The very fact that Member States have been required to put in place measures to comply with their enhanced EU obligations concerning economic union has however also meant that national parliaments are able to scrutinize national budgets to a greater extent than hitherto, given that this area has previously been largely regarded as falling within the province of national executives.

In horizontal terms, the duty to ensure enforcement of and compliance with the new raft of measures falls primarily to the Commission and the ECB. It is, *inter alia*, for this reason that it is important to distinguish between the inter-institutional dimension when the measures were being forged, from the power balance now that they are in place. The European Council may well have played a central role during the former period, but viewed from the latter perspective the Commission and ECB occupy centre stage. This is readily

apparent if one stands back from the principal measures to deal with the crisis. It is the Commission that has a central role in relation to the six-pack, two-pack, ESM and Fiscal Compact, and its role will be even greater if and when other measures are enacted pursuant to the Four Presidents' Report. The provisions concerning reverse qualified majority voting in the six-pack and the Fiscal Compact are a forceful symbolic and substantive exemplification of this power, but there are numerous other articles in both sets of measures, as well as the ESM, which accord the Commission prominence. Nor should this come as a surprise. The European Council has developed significantly since the Lisbon reforms, as has its support structure. It does not however have the institutional capacity of the Commission to engage in the kind of systematic and detailed scrutiny required by the new rules. It may moreover be perfectly content to let the Commission take centre stage in this respect, with the consequence that the latter takes the 'heat' for decisions that will often not be popular at national level. This is more especially so given that the ratchet-effect of increased EU economic oversight with the Commission in the driving seat carries dangers for the Commission itself. Increased power brings increased responsibility. The hard-pressed Commission will have to deliver on a whole series of fronts, which will bring it face to face with domestic political imperatives. It is one thing to write down obligations, whether in Treaty provisions, legislation, other international Treaties or contracts. It is quite another to enforce them. The ECB responsibilities have also been significantly enhanced in the financial sector.⁴⁷

In intra-institutional terms, there is more room for disagreement as to the consequences of the new regime. It is tempting to think of the larger creditor nations exercising ever-greater dominance over the debtor states, and those that are smaller, within

⁴⁷ Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63.

bodies such as the European Council and the Euro group. There may well be some truth in this. We should nonetheless be cautious in this regard, for two related reasons. It is not clear from a temporal perspective whether the degree of such power is really greater than it was hitherto, given that the reality was always that the larger states wielded more power within these institutions. There are equal difficulties in evaluating precisely how the power balance between creditor and debtor nations plays out. It is of course true that the latter will be subject to conditionality terms set in part by the former. It should however also be borne in mind that the creditor states have foregone for the short term at least funds to aid those states in difficulty, with the opportunity cost consequences that flow from this. The intent is that the assistance assumes the form of loans rather than outright transfers, but whether this reflects reality remains to be seen. To the extent that it does not the opportunity cost of the assistance is all the greater.

5 Conclusion

The financial crisis has, as stated at the outset, shaken the very foundations of the EU and prompted renewed questions about its legitimacy, decision-making and inter-institutional disposition of power. It has however also revealed the EU's institutional resilience, its capacity to survive and its ability to legislate under stress, as testified by the plethora of measures enacted both within and outside the Treaty in order to meet the immediate dangers posed by the crisis and prevent its recurrence. We should however when reflecting on the institutional responsibility for and implications of the crisis do so in a symmetrical and balanced manner. This means thinking hard about the constitutional responsibility of Member States in this regard, rather than working on the explicit or implicit assumption that the fault resides entirely with the EU.