The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility

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ABSTRACT

The financial crisis sent shock waves throughout the European Union, the effects of which are still being felt. This article focuses on the institutional dimension of the crisis, and examines its impact on the relationship between the member states and the European Union, and between the organs of the European Union itself. The analysis is undertaken from a temporal perspective. It begins with consideration of the treaty provisions that shaped the balance of power within the European Union, and who bears the primary responsibility for this form of institutional ordering. It is argued that while there is a very considerable literature on democracy deficit in the European Union, there has been neglect of the constitutional responsibility that member states bear for the institutional status quo. The nature of this constitutional responsibility is elaborated in the first section of the article. This is followed by discussion of the shaping of the Treaty provisions concerning economic and monetary union, and the way in which these bear the imprint of the choices made by the member states as to the degree of intrusion into national economic governance by the European Union that they were willing to accept. The penultimate section of the article considers the role played by the different EU institutions during the crisis as it unfolded, and this is followed in the final section by evaluation of the interinstitutional consequences of the measures adopted to meet the crisis.

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Indiana Journal of Global Legal Studies Vol. 22 #2 (Summer 2015)

INTRODUCTION

The financial crisis is arguably the most significant challenge to the European Union since the inception of the European Economic Community (EEC). It has generated an array of political, legal, and institutional responses, the complexity of which is daunting in itself. This article 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 European Union. The analysis has two principal themes for the choices made, institutional design and constitutional responsibility. 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 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 European Union itself for the current institutional ordering.

The analysis then shifts to the institutional architecture of the Economic and Monetary Union (EMU) laid down in the Maastricht Treaty, with the focus once again on the relationship between the institutional attribution of power, constitutional responsibility for the shaping of these provisions, and the way in which the schema contributed to the subsequent economic malaise. This article will also explore the relationship between this institutional schema and subsidiarity.

The penultimate section of the article 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 of the final section of the article 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.

I. 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 extensive literature.[2] This, however, is matched by an equal dearth of 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

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1. *See, e.g.*, Olaf Cramme & Sara B. Hobolt, *A European Union Under Stress, in* DEMOCRATIC POLITICS IN A EUROPEAN UNION UNDER STRESS 1, 2–3 (Olaf Cramme & Sara B. Hobolt eds., 2015); THE EUROPEAN UNION: DEMOCRATIC PRINCIPLES AND INSTITUTIONAL ARCHITECTURES IN TIMES OF CRISIS (Simona Piattoni ed., forthcoming 2015); Kalypso Nicolaïdis, *European Demoicracy and Its Crisis*, 51 J. COMMON MKT. STUD. 351, 351 (2013); Damian Chalmers, *Democratic Self-Government in Europe: Domestic Solutions to the EU Legitimacy Crisis*, POLICY NETWORK at 3 (May 2013), http://www.policy-network.net/publications_download.aspx?ID=8362.

2. *See, e.g.*, SVEIN S. ANDERSEN & KJELL A. ELIASSEN, *Introduction: Dilemmas, Contradictions and the Future of European Democracy, in* THE EUROPEAN UNION: HOW DEMOCRATIC IS IT? 1, 1–5 (Svein S. Andersen & Kjell A. Eliassen eds., 1996) (establishing, among other things, the need for European countries to find workable solutions to the problem of democratic legitimacy in the EU); Richard Bellamy & Dario Castiglione, *Introduction: Constitutions and Politics to* CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 1, 1– 4 (Richard Bellamy and Dario Castiglione eds., 1996) (analyzing a number of aspects regarding the transformation of constitutionalism in Europe); Jacques Delors, *Foreword to* CLUB OF FLORENCE, EUROPE: THE IMPOSSIBLE STATUS QUO vii – xiii (Renaud Dehousse ed., 1997) (discussing ways of reinforcing democratic legitimacy); DEIRDRE M. CURTIN, POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY 1, 41–49 (1997) (establishing the consequences of a democratic deficit scenario); Soledad García, *Europe's Fragmented Identities and the Frontiers of Citizenship, in* EUROPEAN IDENTITY AND THE SEARCH FOR LEGITIMACY 1 (Soledad García ed., 1993) (establishing that Europe's renewed search for its identity is a consequence, among other reasons, of its need to be legitimate by the rest of the world in the context of a global economic transformation); Jack Hayward, *Preface to* THE CRISIS OF REPRESENTATION IN EUROPE 1, 2 (Jack Hayward ed., 1995) (reflecting the problems posed by pursuing European integration in a context of economic recession); MICHAEL NEWMAN, *Introduction to* DEMOCRATIZING THE EUROPEAN UNION: ISSUES FOR THE TWENTY-FIRST CENTURY 1, 1–11 (Catherine Hoskyns & Michael Newman eds., 2000) (considering whether the democratization of the EU is an appropriate aim); A CITIZENS' EUROPE: IN SEARCH OF A NEW ORDER (Allan Rosas & Esko Antola eds., 1995) (discussing the concept of a citizens' Europe from both a legal and a political science point of view); Wolfgang Streeck, *Neo-Voluntarism: A New European Social Policy Regime?, in* CONSTITUTIONAL DIMENSIONS OF EUROPEAN ECONOMIC INTEGRATION 229, 229–239 (Francis Snyder ed., 1996) (reflecting on the institutional structure of the EU and the consequences this has on social policy); J. H. H. WEILER, THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 3, 77–86 (1999) (discussing the challenges of democracy and legitimacy).

European Stability Mechanism, to cope with the financial crisis has led to renewed attention on the democratic credentials of the European Union. There already exists 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]

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 European Union, 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 in itself odd, given that this is a standard feature of many federal-type polities.[4] However, past voters have 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.

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3. *See Generally* Kalypso Nicolaïdis, *The Idea of European Demoicracy*, *in* PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW 247 (Julie Dickson & Pavlos Eleftheriadis eds., 2012) (providing an account of the origins of federalism and "demoicracy" in the EU); J.H.H. Weiler, Ulrich R. Haltern & Franz C. Mayer, *European Democracy and Its Critique*, *in* THE CRISIS OF REPRESENTATION IN EUROPE, *supra* note 2; Andreas Follesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUD. 533 (2006) (disagreeing about the lack of democratic deficit in the EU argued by Moravcsik); Kalypso Nicolaidis, *Our European Demoi-cracy: Is this Constitution a third way for Europe?*, *in* WHOSE EUROPE? NATIONAL MODELS AND THE CONSTITUTION OF THE EUROPEAN UNION, 137, 138–141 (Kalypso Nicolaidis & Stephen Weatherill eds., 2003).

4. *See Generally* R. DANIEL KELEMEN, THE RULES OF FEDERALISM: INSTITUTIONS AND REGULATORY POLITICS IN THE EU AND BEYOND (2004) (overviewing the structure of regulatory federalism in the European Union and other governments).

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, 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 European Union. It is the EU qua real and reified entity that suffers from this infirmity, the corollary being that blame is cast on it. The European Union is, of course, not blameless in this respect, but nor are the member states, when 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 interinstitutional distribution of power is

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5. Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUD. 603, 605 (2002).

6. *See* Follesdal & Hix, *supra* note 3, at 533–534; Weiler et al., *supra* note 3.

7. *See generally* GARY MARKS ET AL., GOVERNANCE IN THE EUROPEAN UNION (1996); ANDREW MORAVCSIK, NATIONAL PREFERENCE FORMATION AND INTERSTATE BARGAINING IN THE EUROPEAN COMMUNITY, 1955–1986 (1992) (Marks and Moravcsik disagree about the degree of power wielded by Member States and EU institutions in the legislative process, but generally agree that the former dominate at times of Treaty reform); James A Caporaso, *The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?*, 34 J. COMMON MKT. STUD. 29 (1996); Jonathan Golub, *State Power and Institutional Influence in European Integration: Lessons from the Packaging Waste Directive*, 34 J. COMMON MKT. STUD. 313 (1996) (exploring the ongoing debate between state centric models, and an EU where power is given to supranational authorities); Gary Marks, Liesbet Hooghe & Kermit Blank, *European Integration from the 1980s: State-Centric v. Multi-level Governance*, 34 J. COMMON MKT. STUD. 341 (1996); Andrew Moravcsik, *Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community*, 45 INT'L ORG. 19 (1991) (describing the period of pro-European integration in the late 1980s and 1990s); Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach*, 31 J.

the result of hard fought battles, the results of which are embodied in Treaty amendment. Thus, insofar as the present arrangements divide EU policy making de facto and de jure between the Commission, Council, European Parliament, and European Council, this reflects 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] Most notably, it was evident in the battle as to whether the European Union 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 an extension of what is now the ordinary legislative procedure to new areas, and its greater control over the appointment of the Commission President than hitherto. Thus, while the European Council retains ultimate power over the choice of 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 or coalition in the European

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COMMON MKT. STUD. 473 (1993) (looking at the evolution of the European community into a successful intra-governmental institution, and the bargains that facilitated the process); Thomas Risse-Kappen, *Exploring the Nature of the Beast: International Relations Theory and Comparative Policy Analysis Meet the European Union*, 34 J. COMMON MKT. STUD. 53 (1996) (discussing the work needed for a successful EU integration); Fritz W. Scharpf, *Introduction: the Problem-Solving Capacity of Multi-level Governance*, 4 J. EUR. PUB. POL'Y 520 (1997) (examining the factors that lead to the development of effective national and supranational regulatory systems); Mark A. Pollack, Abstract, *International Relations Theory and European Integration* (Robert Schuman Ctr. For Advanced Stud., RSC No. 2000/55, 2000) (arguing that the rationalist approach had become the dominant approach to the study of European integration in international relations theory).

8. *See generally* PETER NORMAN, THE ACCIDENTAL CONSTITUTION: THE MAKING OF EUROPE'S CONSTITUTIONAL TREATY (2d ed. 2005) (describing how debates among Member States shaped institutional reform in the Constitutional Treaty).

9. *See* PAUL CRAIG, THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM 81–82 (2010).

10. *See id.* at 92–97.

11. *See* Consolidated Version of the Treaty on European Union art. 17(7), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

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 European Union. This link was further strengthened in the 2014 elections for the European Parliament (EP), in which rival candidates for the Commission Presidency campaigned openly as the chosen candidates of the two principal political groupings in the EP.[12] The electoral success of the center-right European People's Party led to Jean-Claude Juncker's confirmation as the new Commission President, albeit after opposition from the United Kingdom 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 nonetheless there are obstacles that subsist to a closer link between policy and politics in the European Union, 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 or the 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 European Union, 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 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 European Union as a whole. The political reality is that radical change of this kind has not happened because the member states were

12. Jean-Claude Juncker, Candidate for President of the European Commission, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change, Opening Statement in the European Parliament Plenary Session (July 15, 2014), *available at* http://ec.europa.eu/ priorities/docs/pg_en.pdf.

unwilling to accept such a disposition of power. It is certainly true that the choice between two presidents and a single president for the European Union 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 2003–2004 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.

Moreover, there is 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 the 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 European Union was truly becoming a superstate. It would be regarded as constitutionally unacceptable in some member states, 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 stronger ways to involve the national parliaments in decision making through suggestions of red cards to complement the existing color 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 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.[13] The apposite point for present purposes, however, is 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 most seats in the EP was duly appointed as Commission President.[14] This outcome was not certain, however, 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. Rather, it was the almost "reflexive" reaction in some quarters, whereby shifts toward 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 European Union and the constitutional responsibility they bear in relation to their own constitutional order. I am not referring 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 European Union 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 also be contended in this vein that member states make treaties, and legislation pursuant thereto, out of rational self-interest to maximize their personal benefit and minimize

13. See Chalmers, *supra* note 1, at 5–6.

14. *President (2014-2019) Jean-Claude Juncker*, EUROPEAN COMM'N, http://ec.europa.eu/commission/2014-2019/president_en (last visited Apr. 21, 2015).

attendant costs with the consequence that if they can offload 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 noncompliance 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 European Union 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 European Union, but also how states set the normative boundaries for their constitutional responsibility.

Member State constitutional responsibility might, alternatively, be conceptualized more broadly to include and 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 behavior. 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 of 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 generally more detrimental consequences 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,[15] 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 and to individuals, as a matter of domestic constitutional principle.

The principle of sincere cooperation, whereby it is incumbent on the European Union and member states in full mutual respect to assist each other in carrying out tasks that flow from the Treaties, is central to this alternative vision.[16] So too is the remainder of this Treaty provision, which enjoins the member states to take any appropriate measure to ensure fulfillment of the obligations arising out of the Treaties or resulting from acts of the EU institutions, and requires member states

15. TEU art. 4(3).
16. *Id.*

to facilitate achievement of the EU's tasks and refrain from any measure which could jeopardize the attainment of the EU's objectives.[17] 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.[18] It is, however, integral to this alternative vision that the legal dimension of the principle of sincere cooperation does not exhaust Member State constitutional responsibility.

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.[19] Thus, the principle of sincere cooperation surely provides the basis for an obligation of good faith political engagement by member states in ensuring that treaty obligations are fulfilled efficaciously; the injunction on member states to take any appropriate measure to ensure fulfillment 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 behavior that could jeopardize attainment of EU objectives should provide the foundation for constitutional responsibility not to offload blame to the European Union when this is unwarranted.

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 European Union. Member states cannot carp about deficiencies of EU decision making as if they were unconnected with the architecture thus created. Moreover, they cannot 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 European Union 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, however, is that the Treaty establishes twenty-eight veto points, given that unanimity is

17. *Id.*

18. Joined Cases C-6 & C-9/90, Francovich v. Italy, 1991 E.C.R. I-5357, I-5413–16.

19. 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.

required for Treaty amendment. It can be accepted that in the European Union, 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 under the Treaty. A particular state may well disagree with some aspects of EU legislation enacted under 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 central, moreover, 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.[20] Joseph Weiler is surely right that the European Union is presently suffering a social legitimacy deficit, manifest in low voter turnout and the rise of more anti-EU parties.[21] 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 European Union, while being cognizant that they would reject most changes that could address some of the root causes 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.

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20. *See* Peter L. Lindseth, *Power and Legitimacy in the Eurozone: Can Integration and Democracy Be Reconciled?*, *in* THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS 379 (Maurice Adams, Federico Fabbrini & Pierre Larouche eds., 2014).

21. J.H.H. Weiler, *Europe in Crisis—On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'*, 2012 SING. J. LEGAL STUD. 248, 253, 255 (2012).

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 scrutiny. In doing so, we should 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 of 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 European Union.

II. 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 European Union 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.[22]

Monetary union was centered on possessing a single currency. 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.[23] It was integral to the Maastricht settlement that monetary

22. *See* Council Regulation 1466/97, On the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 1997 O.J. (L 209) 1 (EC); Council Regulation 1467/97, On Speeding Up and Clarifying the Implementation of the Excessive Deficit Procedure, 1997 O.J. (L 209) 6 (EC).

23. Consolidated Version of the Treaty on the Functioning of the European Union arts. 127, 130, 282(3), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

policy was Europeanized. This schema 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 European Union.[24] 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.[25]

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 them, 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 bailout provision.[26] While there was some limited qualification to this precept,[27] 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 being that if they did not do so then the consequential liabilities would remain at the door of the nation state.

Member State unwillingness to subscribe to the rules weakened oversight of national economic policy in subsequent years, which led to their modification and resulted in the weakening of centralized EU control.[28] 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. The states were, however, mindful of the policy decisions made in and through national budgets, including those of a redistributive nature, and were

24. TFEU art. 2(1), 3.

25. TFEU art. 130.

26. *See* TFEU art. 125(1).

27. TFEU art. 122(2).

28. *See* Case C-27/04, Comm'n v. Council, 2004 E.C.R. I-6649; Regulation 1056/2005, of the European Council of 27 June 2005 Amending Council Regulation 1467/97, 2005 O.J. (L 174) 5; Regulation 1055/2005, of the European Council of 27 June 2005 Amending Council Regulation 1466/97, 2005 O.J. (L 174) 1; Imelda Maher, *Economic Policy Coordination and the European Court: Excessive Deficits and ECOFIN Discretion*, 29 EUR. L. REV. 831 (2004) (explaining the background and significance of Case C-27/04).

unwilling to accord the European Union too much control over such determinations.

It was only when the financial crisis hit the European Union 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 European Union 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. The states had a major role in shaping the Maastricht architecture on the EMU and in determining how it was applied in the years thereafter.

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 the EMU that the member states were willing to give to the European Union. 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 the EU level under the primary Treaty provisions that existed. Therefore, subsidiarity, as now expressed in Article 5(3) TEU, did not bite on the initial choice of what power member states should give to the European Union in relation to the EMU. This formal point concerning subsidiarity should not mask the reality that the choice as to what powers member states were willing to sign over to the European Union 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 European Union.

It is here that the irony resides. 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 crises. 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 the 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 left too much discretion to member states. In the case of

the financial regulatory regime, as it existed prior to recent reforms, the crisis was the result of a schema shaped by subsidiarity concerns in the more technical sense of Article 5(3) TEU. 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; or 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 postmortem as to the inadequacy of the EU response to the banking crisis was carried out by the de Larosiere Report.[29] The report noted the lack of cohesiveness in EU policy, and it 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.

III. THE UNFOLDING CRISIS AND THE INTERINSTITUTIONAL BALANCE OF POWER

There is, unsurprisingly, debate about the institutional consequences of the measures taken under 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 European Union, and the interinstitutional balance of power within the European Union itself—although the issue is rendered more complex by the fact that there may be interstate 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 taken and the interinstitutional 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 concerning the former, followed by implicit assumptions that these will inform the pattern of the latter, which is a non sequitur.

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29. *See* REPORT OF THE DE LAROSIÈRE GROUP, THE HIGH-LEVEL GROUP ON FINANCIAL SUPERVISION IN THE EU ¶¶ 102-105 (Feb. 25, 2009), *available at* http://ec.europa.eu/finance/general-policy/docs/de_larosiere_report_en.pdf.

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.[30] 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 European Court of Justice (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 a greater concentration of power in the Council and European Council and no role or a reduced role for the ECJ and substantive Treaty provisions that were couched in less hard-edged terms. This was exemplified by the provisions on economic union, where there was much talk of coordination and cooperation.

This Treaty architecture was then replicated in 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, when the French and German governments "converged toward an intergovernmental interpretation of the integration process"[31] in which the EP, Commission, and ECJ were sidelined and decisional power was concentrated in the European Council and the Economic and Financial Affairs Committee (ECOFIN). This approach was initially championed by President Sarkozy, adopted shortly thereafter by Chancellor Merkel, and supported by the United Kingdom and Italy. It followed that if operative power was to be conceived in this manner, then accountability should be primarily left to national parliaments, rather than the EP.

Sergio Fabbrini also noted 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

30. *See* Sergio Fabbrini, *Intergovernmentalism and Its Limits: Assessing the European Union's Answer to the Euro Crisis*, 46 COMP. POL. STUD. 1, 2 (2013).

31. *Id.* at 8–9.

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.

First, 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,[32] but the Commission was not excluded from this process. To the contrary, it exercised the right of initiative by suggesting the necessary amendments to the Stability and Growth Pact and 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. 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. However, the reality is 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 which provides the principal foundation for oversight of national budgets. The Commission is in the driving seat for enforcement, 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

32. *See* Uwe Puetter, *The European Council – The New Centre for EU Politics*, 16 EUR. POL'Y ANALYSIS 1, 9 (2013).

"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.

In addition, it should be recognized that the intergovernmental location of certain 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 United Kingdom had vetoed the 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. This was 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, namely, that it was felt necessary to establish it before the amendment to Article 136 TFEU had come into force.

IV. INTERINSTITUTIONAL BALANCE OF POWER AND THE NEW LEGAL MEASURES

The European Union enacted a 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."[33]

The European Union put in place a range of measures to provide "assistance" to member states that were in severe economic trouble 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

33. Paul Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, *in* THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS 19, 20 (Maurice Adams et al. eds., 2014).

assistance is now secured.[34] The ECB has also played a role in providing assistance, acting pursuant to Article 127(2) TFEU, both in the form of the securities markets program, which sanctioned ECB intervention in the Eurozone private and public debt markets,[35] 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."[36] The legal status of this scheme will be determined by the Court of Justice of the European Union in 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,[37] and new measures have been introduced, such as the Single Supervisory Mechanism and the Single Resolution Mechanism, which have 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,[38] which were enacted pursuant to Articles 121, 126, and 136 TFEU.[39] The measures were designed to render economic union

34. *See Scope of Activity*, European Stability Mechanism, http://www.esm.europa.eu (last visited Apr. 20, 2015).

35. Decision 2010/281, of the Eur. Cent. Bank of 14 May 2010 on Establishing A Securities Markets Programme, 2010 O.J. (L 124) 8.

36. *See* Press Release, Eur. Cent. Bank, Technical Features of Outright Monetary Transactions (Sept. 6, 2012), *available at* http://www.ecb.int/press/pr/date/2012/html/pr120906_1.en.html.

37. Three regulations have created new financial supervisory authorities for the EU, see Regulation 1095/2010, of the European Parliament and of the Council of 24 November 2010 on Establishing a European Supervisory Authority (European Securities and Markets Authority), 2010 O.J. (L 331) 84; Regulation 1094/2010, of the European Parliament and of the Council of 24 November 2010 on Establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), 2010 O.J. (L 331) 48; Regulation 1093/2010, of the European Parliament and of the Council of 24 November 2010 on Establishing a European Supervisory Authority (European Banking Authority), 2010 O.J. (L331) 12.

38. *See EU Economic Governance*, EUROPEAN COMM'N, http://ec.europa.eu/economy_finance/economic_governance/index_en.htm (last visited Apr. 20, 2015).

39. *See Communication from the Commission to the European Parliament and the Council and to the Eurogroup: Results of In-Depth Reviews Under Regulation (EU) No 1176/2011 on the Prevention and Correction of Macroeconomic Imbalances*, at 2, COM

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.[40] Further measures, the two-pack, were enacted on May 21, 2013.[41] The rules on oversight over national economic policy analysis were also shaped by the Treaty on Stability, Coordination and Governance,[42] also known as the Fiscal Compact, which was signed by 25 contracting states in March 2012.[43] The provisions concerning assistance and those concerning oversight are joined at the hip, in the sense that the grant of assistance under the ESM is conditional from March 1, 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."[44]

(2013) 199 final (Oct. 4, 2013); Regulation 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 O.J. (L 306) 1; Regulation 1174/2011, of the European Parliament and of the Council of 16 November 2011 on Enforcement Measures to Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8; Regulation 1175/2011, of the European Parliament and of the Council of 16 November 2011 Amending Council Regulation (EC) No 1466/97 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 2011 O.J. (L 306) 12; Regulation 1176/2011, of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25; Council Regulation 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 O.J. (L 306) 33; Council Directive 2011/85 of 8 November 2011 on Requirements for Budgetary Frameworks of the Member States, 2011 O.J. (L 306) 41.

40. *See* Council Regulation 1466/97, *supra* note 22, at 1; Council Regulation 1467/97, *supra* note 22, at 6.

41. *See* Regulation 472/2013 of the European Parliament and of the Council of 21 May 2013 O.J. (L140) 1; Regulation 473/2013 of the European Parliament and of the Council of 21 May 2013 O.J. (L140) 11.

42. *See generally* Paul P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, 37 EUR. L. REV. 231 (2012) (reviewing the legal provisions of the TSCG); Steve Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics?*, 8 EUR. CONST. L. REV. 404 (2012) (exploring the relationship of the TSCG with other EU laws).

43. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), Mar. 2, 2012, *available at* http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=2012008 [hereinafter TSCG].

44. Herman Van Rompuy et al., *Towards a Genuine Economic and Monetary Union* (Dec. 5, 2012), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf; *see also Communication from the Commission: a Blue Print*

It was produced at the behest of the European Council,[45] and was endorsed by the Council in December 2012.[46] 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"[47] made operational through contractual arrangements between member states and the European Union, which would be mandatory for EU member states and voluntary for other member states. They also seek to endow the European Union with fiscal capacity, the objective being "to facilitate adjustment to economic shocks."[48] There is also an oversight and 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 European Union 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. However, the paradox is 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. The financial incentives are 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 European Union intervenes ever

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for a Deep and Genuine Economic and Monetary Union Launching A European Debate, EUROPEAN COMM'N (Nov. 30, 2012), *available at* http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2012/11/pdf/blueprint_en.pdf.

45. *See Conclusions of the European Council– 18/19 October 2012*, EUROPEAN COUNCIL 156/12 (Oct. 19, 2012), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/133004.pdf.

46. *See Conclusions of the European Council 13/14 December 2012*, EUROPEAN COUNCIL 205/12 (Dec. 14, 2012), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134353.pdf.

47. Van Rompuy, *supra* note 44, at 9.

48. *Id.*

further back into Member State economies, with financial aid conditioned on tackling the economic malaise in accordance with the diagnosis reached by the Commission. Member states may be reluctant to allow this degree of intrusion, since the Commission will largely dictate the terms. It is therefore not surprising that member states have recently resisted efforts to take this type of initiative forward. The impact on the interinstitutional 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 increased significantly. The imperative to clear drafts of national budgets with the European Union 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 macroeconomic union is unrecognizable from its Maastricht ancestor. These measures to prevent recurrence of a 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 European Union 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 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 interinstitutional 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 center 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 that the new rules require. Moreover, it may be perfectly content to let the Commission take center stage in this respect, with the consequence that the latter takes the heat for decisions that will often not be popular at a 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.[49]

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 as exercising ever greater dominance over the debtor and smaller states within bodies such as the European Council and the Eurogroup. 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 until now, 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.

49. *See* Council Regulation 1024/2013 of 15 October 2013 O.J. (L287) 63.

CONCLUSION

The financial crisis has, as stated at the outset, shaken the very foundations of the European Union and prompted renewed questions about its legitimacy, decision making, and interinstitutional 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 to meet the immediate dangers posed by the crisis and prevent its recurrence. However, when reflecting on the institutional responsibility for and implications of the crisis, we should 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 European Union.