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The constitutional implications of the Eurozone  
crisis and the case of Cyprus:  
How judicial review constitutionalises a scrutiny  
lacuna

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*Thesis submitted in fulfilment of the requirements of the University of Kent for the degree of  
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***June 2020***

## ABSTRACT:

Despite its economic origins, the Eurozone crisis triggered an equally significant constitutional moment as Eurozone members and European institutions abandoned existing channels of intergovernmental cooperation and Community decision-making, in favour of informal *ad-hoc* means of coordination between them. The turn to executivism and informality challenged Europe's constitutional settlement, forcing European legal scholarship to investigate the broader constitutional significance of the Eurozone crisis. Operating within this moment of reflection, the aim of this thesis is to investigate the constitutional implications of the Eurozone crisis and to assess the wider constitutional significance of this moment.

The ways through which response measures have been decided and overseen by national and supranational courts is studied through the case of Cyprus. More specifically, the thesis observes how coordination between European institutions and Eurozone members intensified during the crisis, leading to the development of existing bodies of the European Union. The Eurogroup's involvement in devising and implementing a bail-in resolution for the Cypriot financial crisis is studied more closely. After determining the constitutional implications of institutional development, the thesis continues to consider how national and supranational courts responded to claims brought before them by Cypriot depositors affected by the bail-in.

Drawing on critical literature conceptualising the political economy of constitutionalism beyond the state, the thesis positions institutional development within the ongoing relationship between neoliberalism and European constitutional law. One of the central elements of neoliberal political economic thought, as identified by the thesis, is the separation and insulation of economic decision-making from political interference – what I term as a scrutiny lacuna. By tracing the separation and insulation of economic decision-making in the gradual development of European constitutionalism, I consider the constitutional implications of institutional development and assess the exercise of judicial oversight during the crisis. Through the scope of a political economy of constitutionalism, I argue that during the crisis we can observe the creation and constitutionalisation of a scrutiny lacuna, thus resolving any conflict between opposing constitutional objectives operating within European constitutionalism prior to the Eurozone crisis.

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## Introduction

Constitutional moments often arise during crises. The Eurozone crisis is no exception. Throughout its long history, the term ‘crisis’ denotes a moment of judgment and a definitive moment between stark alternatives.<sup>1</sup> In Hippocratic medicine, where we trace its initial use, crisis denotes the moment where the patient would either live or die and this binary between two stark alternatives continues throughout the use of the term. It is in the exercise of judgment, the choice between alternatives that crises often pose constitutional moments; that is, moments in the history or development of a constitutional arrangement that come to define it. Despite its economic origins, the Eurozone crisis is one of those moments as it juxtaposed the need for implementing a set of economic measures against constitutional restrictions on possible courses of action. This tension manifests, more vividly, in how crisis response measures were decided as Eurozone members and European institutions abandoned existing channels of intergovernmental cooperation and Community decision-making in favour of informal *ad-hoc* means of coordination between them. The turn to executivism and informality challenged Europe’s constitutional settlement, forcing European legal scholarship to investigate the broader constitutional significance of the Eurozone crisis. Operating within this moment of reflection, the aim of this thesis is to investigate the constitutional implications of the Eurozone crisis and to assess the wider constitutional significance of this moment.

The constitutional implications of the Eurozone crisis have been discussed with reference to many different aspects of European constitutionalism. However, this thesis takes a closer look at the ways through which response measures have been decided and considers the shift of institutional practices towards informal coordination between EU institutions, financial institutions, technocratic bodies of the EU and national governments. More specifically, the thesis observes how the Eurogroup develops as a central institution in the process of economic decision-making during the crisis. Despite its informal status as a forum for ministers of finance whose currency is the Euro to discuss matters concerning their common currency, the Eurogroup acted as the space within which national governments entered into negotiations with EU institutions, international financial creditors and other Eurozone members for the provision of financial assistance. Its statements expressed a common position between all actors, foreshadowing the direction and form of crisis response

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<sup>1</sup> Reinhart Koselleck traces the historical use of ‘crisis’ from its genesis in Hippocratic medicine and ancient Greek politics through to its modern resurgence and contemporary use. See: Reinhart Koselleck, "Some Questions Concerning the Conceptual History of ‘Crisis’" in *The Practice of Conceptual History: Timing History, Spacing Concepts*, trans. Todd Samuel Presner (CA: Stanford University Press, 2002), 236-247, 237; See also Reinhart Koselleck, "Crisis", *Journal of the History of Ideas* 67, no. 2 (2006), 357-400, 358.

measures. As the Eurogroup's involvement in economic decision-making during the crisis increased and its statements outlined important policy measures, its role was disproportionate to its informal status. Institutional development, specifically that of the Eurogroup, gives rise to a number of constitutional questions, including the ability of the Eurogroup to reach legally binding decisions on crisis response measures; the division of competences between the EU and its Member States; and the exercise of *ultra vires* review by national and supranational courts. Therefore, the thesis is concerned with the ways through which crisis response measures have been decided. It considers the channels of decision-making employed during the crisis, investigates the development of the Eurogroup and accounts for judicial responses to institutional development. The constitutional implications arising from the Eurozone crisis are located in the joint impact of institutional development and judicial responses to novel channels of decision-making on Europe's constitutional settlement. To achieve this, the thesis considers in depth an under-examined example of institutional development, that of the Eurogroup, and analyses the Eurogroup's role in the process of devising crisis-response measures in the context of the Cypriot financial crisis.

In order to examine the constitutional implications and wider significance of the Eurozone crisis, the thesis positions institutional development within the broader relationship between neoliberalism and constitutional law in the European Union. One of the main theoretical challenges for constitutional theory presented by the Eurozone crisis is how to conceptualise the development of institutional power. As the disparity between formal constitutional provisions and the exercise of power increases, institutional development does not only challenge the way we understand specific aspects of Europe's constitution but also European constitutional settlement as a whole. Drawing on critical literature conceptualising the political economy of constitutionalism beyond the state, the thesis seeks to explain institutional development through the ongoing relationship between neoliberalism and constitutional law as well as highlighting the development of this relationship through the Eurozone crisis.

## 1. The Eurozone crisis and its constitutional significance: The constitutional implications of institutional development

In this section of the chapter, I consider the constitutional significance of the Eurozone crisis as addressed by major discussions in the field of European constitutional law and locate two major questions in existing literature. First, questions of constitutionality focusing on the compatibility of crisis response measures with existing constitutional provisions. Second, a broader constitutional question concerned with the effect of the Eurozone crisis on Europe's constitution as a whole. After navigating through existing discussions, the section sets the focus of the thesis, indicating that what I

am most concerned with is not the content of crisis response measures but the way they were decided. Hence, the section ends with an overview of existing discussions on institutional development and constitutional implications thereof.

### 1.1. The Eurozone crisis as a constitutional moment

The Eurozone crisis is an economic and financial phenomenon originating in the global financial crisis in 2008 and affected several countries sharing Europe's common currency. A number of Eurozone members were affected more than others with Greece, Ireland, Portugal, Spain and later Cyprus being most affected by the economic downturn. Although each state faced country-specific difficulties, two main factors are believed to have contributed to the economic crisis. Firstly, mounting public debt and the inability of governments to repay or finance existing loans and other economic obligations caused a deterioration in public finances.<sup>2</sup> Secondly, banking institutions in a number of these countries faced collapse due to over-indebtedness.<sup>3</sup> National governments found themselves in a position where they had to finance these institutions (via a bail out) in order to avoid the collapse of their banking system, with the effect of over-burdening public finances. The severity and nature of the crisis was such that it created the possibility of a sovereign default in some members. Given the unprecedented degree of integration, consequent of the European Monetary Union with the Euro as its common currency, a sovereign default in several Eurozone members put the viability of the whole monetary union at stake.<sup>4</sup>

During the economic turmoil, those countries with financial or other difficulties implemented a series of crisis-response measures in order to improve economic conditions in their economies but also safeguard the viability of the common currency by avoiding sovereign default in a Eurozone member. In broad strokes, as a more detailed discussion follows in Chapter 3 of the thesis, crisis response measures addressed two main aspects of the crisis; the budgetary discipline of Eurozone members and the recapitalisation or restructuring of their banking sectors. To tackle sovereign debt issues, a number of financial institutions were created for the purposes of providing financial

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<sup>2</sup> Indicatively, the percentage of debt to GDP in 2010 was at very high levels in a number of Eurozone members, including Greece (129% of GDP), Italy (131%), Ireland (104%). *Source*: Calculated from OECD, Economic Outlook (various issues), as cited in: Philip Arestis and Malcolm Sawyer, "Can the Euro Survive After the European Crisis?" in *The Euro Crisis*, eds. Philip Arestis and Malcolm Sawyer (Basingstoke: Palgrave Macmillan, 2012), 1-34, 6.

<sup>3</sup> Yiannis Kitromilides, "The Irish Tragedy", in *The Euro Crisis*, eds. Philip Arestis and Malcolm Sawyer (Basingstoke: Palgrave Macmillan, 2012), 159-194; Alexander Michaelides, "Cyprus: From Boom to Bail-in", *Economic Policy* 29, no. 80 (2014), 639-689.

<sup>4</sup> Indicatively, in 2009 the Eurozone area experienced negative growth ranging from -5.4% to -2.1% for all four quarters of that year while 2012 and the first two quarters of 2013 were also characterized by negative growth. *Source*: Eurostat and [www.tradingeconomics.com](http://www.tradingeconomics.com)

assistance to Eurozone members.<sup>5</sup> Budgetary discipline was addressed through the introduction of a new framework for fiscal surveillance by EU institutions while a series of austerity measures in a wide array of policy areas (including labour, health, education, pensions and welfare policy more generally) were implemented in those Eurozone members in receipt of financial assistance from European institutions through loan conditionality.<sup>6</sup>

Much has been said about the constitutionality of these measures and whether they are in line with existing constitutional provisions in either the European Union Member States. An important strand of constitutional discussion concerns the implications of the Eurozone crisis on the Maastricht principles of the European economic constitution and economic governance more generally.<sup>7</sup> The creation of financial institutions by Eurozone members and European institutions, such as the European Stability Mechanism (ESM), capable of providing loan facilities are said to challenge several constitutional provisions.<sup>8</sup> As Chapter 3 of the thesis indicates in due course, the ESM's creation challenged the division of competences between the EU and its Member States as well as Article 125 TFEU that prohibits a bail-out of Eurozone members by the EU or any other Eurozone member.<sup>9</sup> Moreover, practices of the European Central Bank are said to exceed the Bank's competence by engaging in economic policy and direct monetary funding contrary to Article 123 TFEU.<sup>10</sup> In addition, the introduction of a new fiscal coordination framework in combination with austerity measures in those countries in receipt of financial assistance challenge the fiscal

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<sup>5</sup> The European Financial Stabilisation Mechanism (EFSM) and European Financial Stability Facility (EFSF) were created at first instance before a more permanent mechanism, the European Stability Mechanism (ESM) was established. Furthermore, a series of six Regulations and Directives, the so-called 'six-pack' was introduced pursuant to Articles 121, 126 and 136 TFEU, while an additional two Regulations, also known as the 'two-pack', further strengthened the EU's budgetary surveillance. These Regulations and Directives are outlined in Chapter 3 of the thesis.

<sup>6</sup> Fritz W. Scharpf, "Monetary Union, Fiscal Crisis and the Pre-Emption of Democracy", *Zeitschrift Für Staats-Und Europawissenschaften (ZSE)/Journal for Comparative Government and European Policy* (2011), 163-198.

<sup>7</sup> Christian Joerges, "Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation", (2012). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2179595](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179595); Paul Craig, "Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications", in *The Constitutionalization of European Budgetary Constraints*, eds. Maurice Adams, Federico Fabbrini and Pierre Larouche, 2014), 19-40; Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014); Fabian Amtenbrink, "The Metamorphosis of European Economic and Monetary Union", in *The Oxford Handbook of European Union Law*, eds. Anthony Arnall and Damian Chalmers (Oxford: Oxford University Press, 2015), 719-756; Fabian Amtenbrink, "New Economic Governance in the European Union: Another Constitutional Battleground?" in *Varieties of European Economic Law and Regulation. Studies in European Economic Law and Regulation*, eds. K. Purnhagen and P. Rott, Vol. 3 (Cham: Springer, 2014), 207-234.

<sup>8</sup> Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756

<sup>9</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*, 120-136. This issue is also discussed mostly with reference to the case of Pringle. See: Stanislas Adam and Francisco Javier Parras Mena, "The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle", *European Law Review* 38, no. 6 (2013), 848-865; Paul Craig, "Pringle: Legal Reasoning, Text, Purpose and Teleology", *Maastricht Journal of European and Comparative Law* 20, no. 1 (2013), 3-11; Juliane Kokott, "Perspectives on the Role of the Advocate General in the Eurozone Rescue Decision: Advocate General Kokott on Pringle v Ireland (Seech to Judicial Press Conference of Karlsruhe, March 6, 2013)" *Michigan Journal of International Law*, March 6, 2013, 2013); Bruno de Witte and Thomas Beukers, "The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle", *Common Market Law Review* 50, no. 3 (2013), 805-848.

<sup>10</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*, 162-168.

independence of nation states.<sup>11</sup> Another important constitutional parameter in relation to crisis response measures is the continuing erosion of fundamental or social rights as constitutionally enshrined social objectives and values, such as equality and citizen welfare, are continuously challenged.<sup>12</sup>

Faced with a series of constitutional implications, constitutional scholarship recognised the broader significance of the crisis, as existing understandings of Europe's constitution were put into question. Indicatively, Kaarlo and Klaus Tuori argue that the multi-layered effects of the Eurozone crisis in areas such as the EMU, social rights and democracy, comprise a wider mutation of the European constitution.<sup>13</sup> Christian Joerges identifies the "transformation of Europe's constitutional constellation",<sup>14</sup> while Paul Craig, Federico Fabbrini, Mark Dawson and Floris de Witte, amongst others, also identify a deep transformation in Europe's overall constitutional architecture.<sup>15</sup> As the crisis indicated a broader mutation of European constitutionalism, another line of inquiry attempts to identify the current condition of Europe's constitution. Indicatively, European constitutionalism was described as executive federalism;<sup>16</sup> a New Sovereignty with Largely Unfettered Power of Rule;<sup>17</sup> as executive managerialism,<sup>18</sup> as an expertocracy<sup>19</sup> or as authoritarian liberalism.<sup>20</sup>

The constitutional importance of the Eurozone crisis cannot be questioned. As indicated above, the issues arising from the implementation of crisis response measures are not limited to the rather narrow question of constitutionality – that is whether specific measures go against a constitutional provision (such as Article 125 TFEU), arrangement (such as the division of competences outlined in

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<sup>11</sup> Amtenbrink, *The Metamorphosis of European Economic and Monetary Union*, 719-756; Amtenbrink, *New Economic Governance in the European Union: Another Constitutional Battleground?* 207-234; Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, 19-40.

<sup>12</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*.

<sup>13</sup> Ibid. See also, Kaarlo Tuori, "The Eurozone Crisis as a Constitutional Crisis", in *Polity and Crisis: Reflections on the European Odyssey*, eds. Massimo Fichera, Sakari Hänninen and Kaarlo Tuori (Routledge, 2016), 3-40.

<sup>14</sup> Christian Joerges, "Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation", *German Law Journal* 15, no. 5 (2014), 985-1027.

<sup>15</sup> Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, 19-40; Federico Fabbrini, "States' Equality v States' Power: The Euro-Crisis, Inter-State Relations and the Paradox of Domination", *Cambridge Yearbook of European Legal Studies* 17, no. 01 (2015), 3-35; Mark Dawson and Floris Witte, "Constitutional Balance in the EU After the Euro-Crisis", *The Modern Law Review* 76, no. 5 (2013), 817-844. See also: Edoardo Chiti and Pedro Gustavo Teixeira, "The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis", *Common Market Law Review* 50, no. 3 (2013), 683-708; Giuseppe Martinico, "EU Crisis and Constitutional Mutations: A Review Article", *Revista De Estudios Políticos (Nueva Época)*, no. 165 (2014), 247-280; Nicole Scicluna, "Politicization without Democratization: How the Eurozone Crisis is Transforming EU Law and Politics", *International Journal of Constitutional Law* 12, no. 3 (2014), 545-571.

<sup>16</sup> Jürgen Habermas, "The Crisis of the European Union in the Light of a Constitutionalization of International Law", *European Journal of International Law* 23, no. 2 (2012), 335-348.

<sup>17</sup> Damian Chalmers, "European Restatements of Sovereignty", *LSE Legal Studies Working Paper*, no. 10/2013 (2013).

<sup>18</sup> Christian Joerges and Maria Weimer, "A Crisis of Executive Managerialism in the EU: No Alternative?" *Maastricht Faculty of Law Working Paper*, no. 2012-7 (2012). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2190362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190362).

<sup>19</sup> Fritz W. Scharpf, *Political Legitimacy in a Non-Optimal Currency Area* (Max-Planck Institute for the Study of Societies, [2013]).

<sup>20</sup> Michael A. Wilkinson, "The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union", *German Law Journal* 14 (2013), 527-558.

Article 5(1) TEU) or principle (such as democracy as outlined in Article 2 TEU). Instead, the crisis poses a deeper, fundamental or foundational question. Whether described as an existential crisis,<sup>21</sup> an identity crisis<sup>22</sup> a challenge to the fundamental principles of EU law<sup>23</sup> or a mutation of the whole constitutional architecture,<sup>24</sup> the common thread behind legal commentary is that the Eurozone crisis poses a serious challenge to existing constitutional provisions and, by extension, the way we understand European constitutionalism. Operating within this moment of reflection, the aim of this thesis is to investigate the constitutional implications of the Eurozone crisis and assess the wider constitutional significance of this moment.

## 1.2. The constitutional implication of institutional development

As indicated above, a number of discussions speaking to the content of crisis response measures have received considerable attention in academic literature and highlighted the constitutional implications of the Eurozone crisis against several aspects of European constitutionalism, including the European Monetary Union; social and fundamental rights; fiscal coordination and fiscal independence of Member States; Europe's institutional architecture; the division of competences between the EU and Member States; and foundational constitutional principles. However, examining the rather broad spectrum of constitutional questions arising from the content of crisis response measures is not the task of this thesis.<sup>25</sup> Instead, the thesis takes a closer look at another less well-explored parameter in the constitutional assessment of crisis response measures: the way they were decided.<sup>26</sup> Instead of asking how the content of crisis response measures may, or may not, be unconstitutional, the thesis considers whether institutional practices and formations developed in order to promote, construct and implement crisis response measures pose a challenge to Europe's constitution. Therefore, several of the constitutional implications outlined above are considered but not with reference to the content of response measures. Constitutional implications, such as the EU's institutional structure, the expansion of competences, fiscal independence of Member States, and the exercise of judicial review are considered with reference to the ways

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<sup>21</sup> Agustín José Menéndez, "The Existential Crisis of the European Union", *German Law Journal* 14, no. 5 (2013), 453-526.

<sup>22</sup> Amtenbrink, *New Economic Governance in the European Union: Another Constitutional Battleground?* 207-234, 207.

<sup>23</sup> Matthias Ruffert, "The European Debt Crisis and European Union Law", *Common Market Law Review* 48, no. 6 (2011), 1777-1805.

<sup>24</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*.

<sup>25</sup> For a review of this area of law see: Martinico, *EU Crisis and Constitutional Mutations: A Review Article*, 247-280

<sup>26</sup> Carola Gliniski and Christian Joerges, eds, *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism Versus Democratic Governance* (Oxford: Hart Publishing, 2014); Bruno De Witte, "Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation Or Constitutional Mutation?" 11, no. 3 (2015), 434-457; Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford: Oxford University Press, 2014); Christopher J. Bickerton, Dermot Hodson and Uwe Puetter, "The New Intergovernmentalism and the Study of European Integration", in *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, eds. Christopher J. Bickerton, Dermot Hodson and Uwe Puetter (Oxford: Oxford University Press, 2015), 1-50; Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 335-348; Dawson and Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 817-844.

through which the measures were decided. Drawing on the constitutional implications of decision-making practices, broader questions concerning Europe's constitutional identity are also examined.

One of the main observations of constitutional scholars, concerning the ways in which crisis response measures were decided, relates to the development of existing EU institutions, the creation of new institutions or the configuration of new institutional formations – a phenomenon broadly termed as *institutional development*.<sup>27</sup> As Chapter 3 of the thesis indicates, institutional development is linked to the promotion of a specific response to the economic challenges presented by the crisis. Dominant framings of the economic conditions leading to the crisis influenced, to an important degree, the position of European institutions and Eurozone members on what needed to be done. Moreover, as the viability of the whole monetary union was at stake, Eurozone members not in financial difficulties also engaged actively with discussions on crisis-response measures; an observation discussed in greater detail in Chapter 4. This was partly due to the common interest shared between all members of the monetary union and, perhaps most importantly, due to the fact that other Eurozone members financed loan facilities provided to countries in distress. Therefore, under the urgency and severity of a continuing economic downturn that threatened the viability of Europe's common currency, European institutions and Eurozone members stressed the need for a coordinated response; a response that would not only take into account the specific needs of one economy but one that would have as its overarching purpose the viability of the Euro and the continuing ability of creditor members to service the loan provided by debtor countries. However, in order to form and give effect to a 'coordinated' response, European institutions and members of the Eurozone resorted to measures and methods of decision-making outside the existing constitutional framework, leading to institutional development.

In order to give effect to what were considered appropriate crisis response measures, European institutions adopted a series of coordination practices that often overcame constitutional limitations on possible courses of action. Institutional development aimed and achieved intensified coordination between European institutions and Eurozone members in order to promote those measures deemed appropriate by dominant framings of the crisis irrespective of any constitutional limitations. For example, the ESM was created and capitalised by Eurozone members as an international organisation as constitutional limitations explicitly prohibited the bail-out of a Eurozone member by any European institution or Eurozone member.<sup>28</sup> Despite the fact that

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<sup>27</sup> Ibid; Chiti and Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 683-708; Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*; De Witte, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation Or Constitutional Mutation?* 434-457.

<sup>28</sup> Jonathan Tomkin, "Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy", *German Law Journal* 14, no. 1 (2013), 169-189.

European institutions, including the European Commission and European Central Bank (ECB), played an active role in the ESM's operation, its positioning outside the EU legal order meant that coordination between institutions and Eurozone members could be conducted without the limitations posed by EU law.<sup>29</sup> Debt conditionality attached to ESM loans ensured the continuing operation of a policy agenda set and agreed by Eurozone members and European institutions alike without any limitation or effective judicial review at the European level. It is during this time that austerity, as Chapter 3 will indicate, was promoted as a one-size-fits-all policy approach and applied indiscriminately through debt conditionality. Another example of intensified coordination is the enhanced fiscal coordination framework, as achieved by new legislative provisions, whereby the Commission and European Council pre-approve national budgets so as to ensure compliance with fiscal targets set by the European.

At the same time, changes can be observed at the institutional level of the European Union where methods of coordination, deliberation and decision-making escape the constitutionally established channels of intergovernmental cooperation and Community decision-making. As Chiti and Teixeira put it, despite the long tradition of the Union's Community and intergovernmental methods, "EU responses to the crisis have been worked out mainly through mechanisms minimizing the role and function of the Community channels and based on a specific form of coordination of national governments".<sup>30</sup> As the thesis will indicate in Chapter 3, several observations provide substance for this argument. For example, Dawson and de Witte indicate how the "European Council has increasingly assumed the role of legislative initiator, both establishing detailed proposals, and securing and monitoring their implementation".<sup>31</sup> In a similar tone, Tuori and Tuori indicate the European Council "with its President and the Euro Summit, both epitomizing executive, intergovernmental federalism *par excellence*, clearly took the lead in determining the measures to be taken to overcome the crisis".<sup>32</sup> Similar observations can be located beyond legal literature, with the work of Uwe Puetter, Christopher Bickerton and Dermot Hodson being one of the most notable examples. These scholars observe the continuing shift towards intergovernmentalism, with the Eurozone crisis being the latest example of a longer process in the dismantling of Community

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<sup>29</sup> As Chapter 3 of the thesis indicates, the CJEU ruled that even when acting as agents of the ESM pursuant to the relevant Treaty, the Commission and ECB continue to be bound by EU Treaties. The implications of this ruling are discussed in the relevant chapter. See: Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising and Others v. Commission and ECB*, EU:C:2016:701

<sup>30</sup> Chiti and Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 683-708, 686.

<sup>31</sup> Dawson and Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 817-844, 830.

<sup>32</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*, 7.

channels.<sup>33</sup> Uwe Puetter's in-depth study reveals how policy coordination between Heads of State (European Council) and ministers of finance (ECOFIN) occurred during the Eurozone crisis, noting the development of informal methods within these institutions but, also, the development of their *de-facto* competence to decide on economic policy, including fiscal policy.<sup>34</sup> However, institutional development and accompanying executive informality is not limited to new ways of coordination within existing institutions but can also be identified in new institutional configurations or the increasing importance of technocratic bodies of the EU. As Tuori and Tuori indicate, "rescue measures and mechanisms, as well as tightening fiscal discipline, have been planned and negotiated not only within the institutions acknowledged by the Treaties but also in, for instance, a Working Group of the President of the Council [and] the Working Group of the Eurogroup".<sup>35</sup> Part of institutional development, therefore, is the continuous shifting of economic deliberation to informal bodies or novel institutional configurations. The 'Troika' (European Commission, European Central Bank and International Monetary Fund) is a primary example of an institutional configuration developed during the crisis and whose role was crucial in determining the conditions under which financial assistance to Eurozone members was provided.<sup>36</sup> Another example is the Eurogroup, to which the discussion will return in due course.<sup>37</sup>

Existing literature on institutional development highlights how the creation of channels of decision-making during the crisis gives rise to several constitutional implications. Economic deliberation and coordination during the crisis took place outside the scope of established methods of cooperation or decision-making, in a highly occluded setting through informal discussions, mainly between national and EU executives acting on advice by the EU's technocratic bodies.<sup>38</sup> The first constitutional implication identified by a shift towards new and informal methods of European coordination, concerns the institutional architecture of the EU.<sup>39</sup> The second implication observed is closely linked to the effects of informal cooperation and decision-making. As Chapters 3, 4 and 5

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<sup>33</sup> Bickerton, Hodson and Puetter, *The New Intergovernmentalism and the Study of European Integration*, 1-50; Christopher J. Bickerton, Dermot Hodson and Uwe Puetter, "The New Intergovernmentalism: European Integration in the post-Maastricht Era", *Journal of Common Market Studies* 53, no. 4 (2015), 703-722.

<sup>34</sup> Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change*; Uwe Puetter, "Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance", *Journal of European Public Policy* 19, no. 2 (2012), 161-178.

<sup>35</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*, 217.

<sup>36</sup> Kevin Featherstone, "External Conditionality and the Debt Crisis: The 'Troika' and Public Administration Reform in Greece", *Journal of European Public Policy* 22, no. 3 (2015), 295-314.

<sup>37</sup> Paul Craig, "The Eurogroup, Power and Accountability", *European Law Journal* 23, no. 3-4 (2017), 234-249.

<sup>38</sup> Deirdre Curtin, "Challenging Executive Dominance in European Democracy", *The Modern Law Review* 77, no. 1 (2014), 1-32; Michelle Everson, "A Technocratic Tyranny of Certainty: A Preliminary Sketch", in *Self-Constitution of European Society*, ed. Jiří Přibáň (Abingdon: Routledge, 2016), 228-246.

<sup>39</sup> Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, 19-40; Chiti and Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 683-708; Menéndez, *The Existential Crisis of the European Union*, 453-526.

indicate in more detail, instead of employing Community instruments for the legal implementation of decisions reached by institutions and members of the Union, political and economic power is employed to ensure the transposition of supranational decisions to national measures. In this exchange, national parliaments and governments are faced with the stark alternative of national bankruptcy or accepting the loan and conditions set by European creditors. National parliaments are requested to give legal effect to measures deliberated and concluded at the supranational level without any scope for manoeuvre or adjustment. The sight of emergency parliamentary proceedings to approve or disapprove a set of measures handed down by European institutions was anything but uncommon during the Eurozone crisis.<sup>40</sup> The degree of intervention and interference with policy decisions in sensitive areas of national significance, from social to fiscal policy, constitutes a *de-facto* increase in the competences of the Union and an equal diminution in the fiscal sovereignty of Member States in receipt of financial assistance. Consequently, a third constitutional implication arises and concerns the disturbance of Europe's fragile democratic settlement.<sup>41</sup>

Any assessment of how crisis response measures challenge, alter or overcome existing constitutional provisions and, more importantly, broader understandings of Europe's constitution, rely on an understanding of European constitutionalism prior to the crisis. Similarly, institutional development is discussed in the content of existing debates or understandings of Europe's constitution. For example, crisis response measures are considered in the context of Europe's economic constitution<sup>42</sup> and the development of new financial institutions is considered in the context of the European Monetary Union's institutional structure.<sup>43</sup> Moreover, the involvement of European institutions in economic decision-making is considered in the context of existing understandings of Europe's institutional formation,<sup>44</sup> against the formal constitutional relationship between the EU and Member States,<sup>45</sup> or against understandings of intergovernmental relations.<sup>46</sup> The wider impact of crisis response measures is often considered in relation to constitutional

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<sup>40</sup> Costas Douzinas, *Philosophy and Resistance in the Crisis: Greece and the Future of Europe*. Polity, (2013).

<sup>41</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*, 207-209.

<sup>42</sup> Joerges, *Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 985-1027; Christian Joerges, "Constitutionalism and the Law of European Economy", in *Beyond the Crisis: The Governance of Europe's Economic, Political, and Legal Transformation*, eds. Mark Dawson, Henrik Enderlein and Christian Joerges (Oxford: Oxford University Press, 2015), 217-232.

<sup>43</sup> Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, 19-40; Amtenbrink, *The Metamorphosis of European Economic and Monetary Union*, 719-756

<sup>44</sup> Chiti and Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 683-708; Mark Dawson, "Opening Pandora's Box: The Crisis and the EU Institutions", in *Beyond the Crisis: The Governance of Europe's Economic, Political and Legal Transformation*, eds. Mark Dawson, Henrik Enderlein and Christian Joerges (Oxford: Oxford University Press, 2015), 87-93.

<sup>45</sup> Mark Dawson, "The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance", *Journal of Common Market Studies* 53, no. 5 (2015), 976-993.

<sup>46</sup> Bickerton, Hodson and Puetter, *The New Intergovernmentalism and the Study of European Integration*, 1-50.

accounts that position political notions, such as democracy or accountability, at the centre of Europe's constitutional identity.<sup>47</sup>

### 1.3. Institutional development, the Eurogroup and judicial review: Identifying the blind spots of constitutional discussions

While the discussions outlined above are not without their merit, they fail to account for a constitutional relationship that has shaped European constitutionalism: that between neoliberalism and constitutional law. As Michelle Everson indicated, despite the illegalities observed during the Eurozone crisis “the more potent threat to a European rule of law now resides in the mix of the totalising powers of governance and economic rationality”.<sup>48</sup> Accounting for the ongoing relationship between European constitutionalism and neoliberal political economic thought would steer the direction of constitutional discussion beyond the mere recognition of a mismatch between formal constitutional provisions and institutional practices or the simple acknowledgment of the failure of European constitutionalism to stand up to the political values which it is supposed to protect. Moreover, recognising the relationship between Europe's constitution and neoliberal political economic thought prior to the crisis allows us to position institutional development within ongoing processes aiming to insulate economic decision-making from political interference. A central objective and contribution of this thesis is to present institutional development as an extension and continuation of neoliberal political economic thought already operating within European constitutionalism.

Despite exhaustive discussions of institutional development with regards to the European Council and Council configurations, another aspect of institutional development remains, to this day, highly occluded. The Eurogroup is recognised by the Treaties as an informal forum of discussion for those ministers whose currency is the Euro but has no formal decision-making powers.<sup>49</sup> With the outbreak of the financial crisis the Eurogroup gained disproportionate, to its informal status, significance as it brought together key stakeholders, such as Ministers of Finance, the Commission, the ECB and the International Monetary Fund (IMF). During its planned monthly meetings, but also in emergency meetings, the forum not only continued to act as a meeting-place for Eurozone ministers, but it also actively participated in the process of deliberation and negotiation of EFSM, ESFSF or ESM debt conditionality. Within the Eurogroup, issues such as the terms of Memorandums of Understandings, loan values and repayment periods, but also assessments of economic targets

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<sup>47</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*; Tuori, *The Eurozone Crisis as a Constitutional Crisis*, 3-40.

<sup>48</sup> Michelle Everson, "The Fault of (European) Law in (Political and Social) Economic Crisis", *Law and Critique* 24, no. 2 (2013), 107-129, 124.

<sup>49</sup> Article 137 TFEU; Protocol 14, on the Euro Group, TFEU.

and objectives for debtor countries were discussed and decided. Despite the increasing importance of the Eurogroup, no extended study on the constitutional implications of its development has been conducted to date,<sup>50</sup> sustaining a blind spot in the study of institutional development and the constitutional implications of the Eurozone crisis. One of the aims of this thesis, is to address this omission and contribute towards expanding the study institutional development during the crisis to include the Eurogroup.

To an extent, it is within the nature of political institutions to develop their methods and find new ways to exercise their power, often in ways that expand their competences. In fact, political scientists coined the term “interstitial institutional change”<sup>51</sup> to describe constitutional development occurring between formal constitutional amendments. The role of European Courts, as described in the Treaties, is to ensure “that in the interpretation and application of the Treaties the law is observed”.<sup>52</sup> According to the Treaties, the Court of Justice of the European Union (CJEU) ensures that each institution exercises its powers “with due regard for the powers of the other institutions”<sup>53</sup> and in accordance with the division of powers affected by the constitutional arrangement, developing into a constitutional court.<sup>54</sup> As Chapter 5 of the thesis will indicate, constitutional guardianship in the EU is conducted at both European and national levels, often with competing claims as to which court has the final say.<sup>55</sup> As the CJEU enjoys interpretive monopoly in matters of EU law, the Court is tasked with ensuring that any Union action can only occur within the bounds of those competences transferred by Member States and according to the principles of subsidiarity<sup>56</sup> and proportionality.<sup>57</sup> While national constitutional courts continue to claim a jurisdictional authority to hear cases that may affect national sovereignty, the exercise of judicial review by the CJEU and national constitutional courts ensures the constitutional arrangement and identity of both the European Union and its Member States.<sup>58</sup> As several examples can be found in the jurisprudence of both the CJEU and national courts where the limits or practices of institutions have been

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<sup>50</sup> Notable contributions include: Craig, *The Eurogroup, Power and Accountability*, 234-249; Rene Repasi, "The Role of the Eurogroup in the Economic Governance Framework" (European Parliament, European Research Centre for Economic and Financial Governance, 5 May, 2015); Stéphanie Laulhé Shaelou and Anastasia Karatzia, "Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on Mallis and Ledra", *European Law Review*, no. 2 (2018), 249-268; Menelaos Markakis, "Political and Legal Accountability in the European Banking Union-A First Assessment", *Hungarian Yearbook of International Law and European Law* (2016), 535-558.

<sup>51</sup> De Witte, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation Or Constitutional Mutation?*, 434-457.

<sup>52</sup> Article 19, TEU.

<sup>53</sup> Case C-133/06, *European Parliament v Council of the European Union*, ECLI:EU:C:2008:257.

<sup>54</sup> Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166.

<sup>55</sup> Michelle Everson and Christian Joerges, "Who is the Guardian for Constitutionalism in Europe After the Financial Crisis?" *LEQS Paper*, no. 63 (2013).

<sup>56</sup> Article 5(3) TEU.

<sup>57</sup> Article 5(4) TEU.

<sup>58</sup> This matter is further discussed in Chapter 5.

challenged,<sup>59</sup> it is no surprise, that a number of claims have arisen in national and supranational courts to challenge the constitutionality of response measures and the ways through which they were decided.<sup>60</sup>

As Chapter 3 indicates, a number of cases appeared before national and supranational courts, each challenging different aspects of the crisis response measures. Two broad categories of cases can be identified in the jurisprudence of the Court of Justice of the European Union.<sup>61</sup> First, cases challenging conditionality measures under adjustment programs on the basis of their compatibility with fundamental or social rights. Second, cases challenging the legality of crisis response measures against existing constitutional provisions and principles, including the division of competences and democratic settlement achieved between the EU and its Member States. One of the central questions arising from institutional development observed during the crisis is how constitutional courts, including the Court of Justice of the European Union and national constitutional courts, performed their function as guardians of the constitution. Despite the wide engagement of commentators with some of the issues arising in crisis case-law, including the possible violation of existing EMU provisions or existing social and fundamental rights, little attention has been given to the issue of institutional development, more generally, and the Eurogroup more specifically. As Christian Joerges pointed out, “it is simply amazing that it has become the rule among lawyers not to take these issues seriously”.<sup>62</sup> This omission is particularly true for the Eurogroup as cases challenging the involvement of the forum the decision-making process followed during the crisis remain under-discussed. This blind spot has significant effects for the assessment of institutional development and the constitutional implications thereof. Moreover, as institutional development is the most “obvious anchor in the court’s case law” for considering broader issues of constitutional identity,<sup>63</sup> examining judicial responses to the Eurogroup’s development deepens our understanding of the broader effects of the Eurozone crisis on Europe’s constitutional identity. Therefore, in order to examine in length the Eurogroup’s development and its constitutional importance, the thesis will

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<sup>59</sup> Paul Craig, “The ECJ and Ultra Vires Action: A Conceptual Analysis”, *Common Market Law Review* 48, no. 2 (2011), 395-437.

<sup>60</sup> Chapter 3 of the thesis considers claims brought before the CJEU; Chapter 5 considers in detail the cases brought before the CJEU by Cypriot depositors; Chapter 6 considers cases before national constitutional courts, focusing on the case of Cyprus.

<sup>61</sup> Alicia Hinarejos, “The Role of Courts in the Wake of the Eurozone Crisis”, in *Beyond the Crisis: The Governance of Europe’s Economic, Political, and Legal Transformation*, eds. Mark Dawson, Henrik Enderlein and Christian Joerges (Oxford: Oxford University Press, 2015), 112-136; Anastasia Karatzia, “An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States”, *Hungarian Yearbook of International Law and European Law* (2016), 573-590.

<sup>62</sup> Joerges, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, 985-1027, 1002.

<sup>63</sup> Dawson and Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 817-844, 828.

consider how the CJEU and national constitutional courts responded to cases challenging the forum's involvement in economic decision-making during the crisis.

## 2. Research Agenda and Questions

In the backdrop of the above discussion, the thesis asks:

### ***How has the Eurozone crisis impacted European constitutional law and what can be learned through the case of Cyprus?***

- How was the political economy of European constitutionalism prior to the Eurozone crisis influenced by neoliberalism?
- How have crisis response measures impacted the political economy of European constitutionalism?
- What was the role of the Eurogroup in deciding a bail-in resolution for the Cypriot financial crisis?
- How have constitutional courts responded to the Eurogroup's involvement in reaching a bail-in resolution for the Cypriot financial crisis?
- How is judicial review of the Eurogroup's involvement in deciding crisis response measures impacting the political economy of European constitutionalism?

#### 2.1. The case of Cyprus: Tracing the Eurogroup's institutional development

The case of Cyprus provides one of the few examples where the full extent of institutional development and its constitutional implications can be observed. As Chapter 4 of the thesis discusses, during the Cypriot financial and banking crisis a novel instrument, the bail-in, was used as a resolution mechanism for the recapitalisation of failing banks. As opposed to a bail-out, when the banking institutions are recapitalised through external funding, a bail-in uses the bank's own resources to recapitalise the institution. What this means, effectively, is that the bank's creditors contribute towards recapitalisation, including depositors. Cypriot depositors affected by the bail-in challenged this resolution mechanism before national and supranational as an act *ultra vires* of the European Union. In doing so, the influence of European institutions to devise and promote the bail-in resolution was brought before the Courts. As a result, the case of Cyprus provides a first-class example of reviewing the Eurogroup's development and considering how Courts respond to the tendency of Union institutions to expand their competences during the crisis.

Despite the constitutional significance of the Cypriot case, legal commentary is limited in how this case is discussed. While significant contributions have been made to the literature by a number

of EU scholars, these remain limited to discussing the impact of crisis response measures on social and fundamental rights.<sup>64</sup> The bibliographical shortcomings identified above apply equally in the case of Cyprus, as the Eurogroup's role in deciding a bail-in resolution has not been adequately discussed by legal scholarship. This blind spot extends to the ways through which legal scholarship discusses the constitutional significance of cases challenging the Eurogroup's role in deciding a bail-in resolution. The cumulative effect of these two shortcomings is to undermine the constitutional significance of the case of Cyprus and institutional development more generally. By conducting an in-depth study of the Eurogroup's role in deciding crisis response measures in the case of Cyprus, the thesis contributes to extending understandings of institutional development during the crisis and associated constitutional implications, including the EU's institutional architecture; the increase of EU competences and equal diminution in the fiscal sovereignty of Member States in receipt of financial assistance; and the disturbance of Europe's fragile democratic settlement.<sup>65</sup> Furthermore, the case of Cyprus acts as a paradigm through which to consider the wider constitutional significance of the Eurozone crisis through the operation of constitutional review in instances of institutional development.

## 2.2. A note on methods

In order to investigate the Eurogroup's institutional development through the case of Cyprus, Chapter 4 conducts an in-depth study of how a bail-in resolution was reached between the government of Cyprus, Eurozone members, European institutions and the IMF. This endeavour is faced with a methodological obstacle from the very outset, as meetings are conducted behind closed doors with no official minutes being released and no transparency as to what goes on within the forum. Despite the release of Eurogroup Statements at the end of each meeting, these documents contain no information concerning the process of deliberation. Usually, Eurogroup Statements outline policy decisions and, as Chapter 5 indicates, are phrased carefully so as to avoid the assumption of responsibility for any decision by the forum. Given the highly occluded setting of Eurogroup meetings, the thesis draws upon a range of sources in order to determine the Eurogroup's role in economic decision-making during the crisis. These sources include existing economic and political analysis of the negotiation procedure, public statements from Eurogroup participants, a leaked ECB document, and Eurogroup Statements on Cyprus. I also conduct a textual analysis of two plenary sessions in the Cypriot House of Representatives in order to determine the

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<sup>64</sup> Natalie Alkiviadou, "Sustainable Enjoyment of Economic and Social Rights in Times of Crisis: Obstacles to Overcome and Bridges to Cross", *European Journal of Law Reform* 20, no. 4 (2018), 3-27; Shaelou and Karatzia, *Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on Mallis and Ledra*, 249-268; Anastasia Poulou, "Austerity and European Social Rights: How can Courts Protect Europe's Lost Generation?" *German Law Journal* 15, no. 6 (2014), 1145-1176.

<sup>65</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*, 207-209.

role of national bodies in reaching a bail-in resolution. By combining these sources, the thesis draws conclusions about the role of the Eurogroup in devising and promoting a bail-in resolution for the case of Cyprus and the forum's broader role in economic decision-making during the crisis. Chapters 5 and 6 continue with an in-depth study of judicial responses to cases brought before national and supranational courts by Cypriot depositors affected by crisis response measures. Through a close reading of the judgments delivered by the CJEU and Supreme Court of Cyprus, I consider the constitutional implications of judicial review.

### 3. Positioning the thesis: Toward a political economy of constitutionalism

In order to examine the constitutional implications and wider significance of the Eurozone crisis, the thesis positions institutional development within the broader relationship between neoliberalism and constitutional law in the European Union. In the aftermath of the Eurozone crisis significant attempts have been made to examine the relationship between economic measures adopted during the crisis and the economic rationality underlying them.<sup>66</sup> While European constitutional lawyers may have disregarded to a significant extent the relationship between political economy and constitutionalism, notable efforts have been made recently to bridge this gap.<sup>67</sup> By positioning the constitutional implications of crisis response measures within renewed discussions about the relationship between neoliberalism and European constitutional law, the thesis approaches the question of institutional development through the lens of the political economy of constitutionalism. Therefore, in this section of the chapter I aim to outline the central characteristic of a political economy of constitutionalism as an approach to the study of constitutional law.

#### 3.1 A political economy of constitutionalism: Origins and directions

*A political economy of constitutionalism* is positioned within the broader tradition of critical theory. As Robert Cox notes, the distinctive characteristic of critical theory is its refusal to “take

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<sup>66</sup> Werner Bonefeld, "Authoritarian Liberalism: From Schmitt Via Ordoliberalism to the Euro", *Critical Sociology* 43, no. 4-5 (2017), 747-761; Lars P. Feld, Ekkehard A. Köhler and Daniel Nientiedt, "Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe", *Freiburger Diskussionspapiere Zur Ordnungsökonomik* 15/04 (2015). <https://www.econstor.eu/bitstream/10419/111262/1/827491085.pdf>; Werner Bonefeld, "Freedom and the Strong State: On German Ordoliberalism", *New Political Economy* 17, no. 5 (2012), 633-656; Volker Berghahn and Brigitte Young, "Reflections on Werner Bonefeld's 'Freedom and the Strong State: On German Ordoliberalism' and the Continuing Importance of the Ideas of Ordoliberalism to Understand Germany's (Contested) Role in Resolving the Eurozone Crisis", *New Political Economy* 18, no. 5 (2013), 768-778. For a different approach, see: Angela Wigger, "Debunking the Myth of the Ordoliberal Influence on Post-War European Integration", in *Ordoliberalism, Law and the Rule of Economics*, eds. Josef Hien and Christian Joerges (Oxford: Hart Publishing, 2017), 161-177.

<sup>67</sup> Josef Hien and Christian Joerges, eds, *Ordoliberalism, Law and the Rule of Economics* (Oxford and Portland: Hart Publishing, 2017), 7.

institutions and social power relations for granted but call them into question”.<sup>68</sup> Understood in this way, critical theory is an approach to how one analyses social power and structures. It stands in opposition to an approach that “takes the world as it finds it, with the prevailing social and power relationships and institutions into which they are organised, as the given framework for action”,<sup>69</sup> works within this given framework and finds solutions to particular problems in order to improve existing institutions. Hence the aim of critical theory is not to improve existing institutions and social relations but to consider the “conditions for their radical transformation”.<sup>70</sup> As a critical endeavour, a study in the political economy of constitutionalism aims in revealing how a social order structured through constitutional law came about in order to radically change it.

As a critical approach, the political economy of constitutionalism is influenced by the Marxist tradition. One of the main influences of Marxist thought on the political economy of constitutionalism is the positioning and study of constitutional law within a broader set of social and economic relations. Marxist thought has, more often than not, treated law as “an ideological buttress to material realities”.<sup>71</sup> According to this view, law is nothing but the reflection of the capitalist mode of production. The operation of law, determined by the material conditions of production, is directed towards the sustenance and regulation of capitalist economic and social relations.<sup>72</sup> The reductionist account of law is reflected in Marxist interactions with constitutional law and is exemplified in the work of Ferdinand Lassalle.<sup>73</sup> As Christodoulidis and Goldoni explain, Lassalle identifies two types of constitutions: the formal and material.<sup>74</sup> Firstly, the material constitution reflects the set of real relations among social forces and is conditioned by the material forces of production as these are found in the economy. It is, therefore, pre-legal and pre-political. Secondly, the formal constitution which is a mere reflection and codification of already existing relations of power – a juridification of relations among social forces. Although Lassalle does not reject the idea of the constitution as a higher law he rejects any political or juridical origins of the formal constitution.<sup>75</sup> Accordingly, the formal constitution is “the fundamental law proclaimed in a

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<sup>68</sup> Robert Cox, "Social Forces, States and World Orders: Beyond International Relations Theory", *Millennium* 10, no. 2 (1981), 126-155, 129.

<sup>69</sup> *Ibid*, 128.

<sup>70</sup> *Ibid*, 129.

<sup>71</sup> Marc W. Steinberg, "Marx, Formal Subsumption and the Law", *Theory and Society* 39, no. 2 (2010), 173-202, 175.

<sup>72</sup> Emiliios Christodoulidis and Marco Goldoni, "Marxism and the Political Economy of Law", in *Research Handbook on Critical Legal Theory*, eds. Emiliios Christodoulidis, Ruth Dukes and Marco Goldoni (Cheltenham: Edward Elgar Publishing, 2019), 95-113.

<sup>73</sup> Ferdinand Lassalle, "On the Essence of Constitutions (Speech Delivered in Berlin, April 16, 1862)", *Fourth International* 3, no. 1 (1942), 25-31. <https://www.marxists.org/history/etol/newspape/fi/vol03/no01/lassalle.htm>.

<sup>74</sup> Christodoulidis and Goldoni, *Marxism and the Political Economy of Law*, 95-113, 95. The idea of a material constitution is also identified in the work theorists in other traditions. See the discussion in: Carl Schmitt, *Constitutional Theory* (Duke University Press, 2008); Marco Goldoni and Michael A. Wilkinson, "The Material Constitution", *The Modern Law Review* 81, no. 4 (2018), 567-597; Marco Goldoni, "Critique of the Material Constitution", *Available at SSRN* (2017).

<sup>75</sup> Christodoulidis and Goldoni, *Marxism and the Political Economy of Law*, 95-113, 98.

country which disciplines the organization of public rights in that nation”<sup>76</sup> and also the site and articulation of underlying relations of power. Summarising Lassalle’s argument, Christodoulidis and Goldoni indicate that the “constitution of society is represented as independent from the formal constitutional order, and that the latter simply codifies ex-post an underlying relation of forces”.<sup>77</sup> A further example of over-determinism can be located in Charles Beard’s *‘An Economic Interpretation of the Constitution of the United States’*. Beard’s analysis of the American constitution focuses on the economic interests driving the constitutional settlement. However, in doing so, Beard analyses constitutional developments as the “direct reflection of already established economic relations”.<sup>78</sup> More recently, Tim Di Muzio’s essay *‘Toward a Genealogy of the New Constitutionalism’* reflects a similar tendency to read constitutional law as the direct reflection of economic relations and interests.<sup>79</sup>

The limitations of a reductionist view of law are outlined by Christodoulidis and Goldoni. At first, the view of law as a “surface phenomenon reflecting, or at best sanctioning, the deeper dynamic of the capitalist organisation of production” undercuts “the mobilisation of law in the direction of a critique of capitalism”.<sup>80</sup> In an attempt to retrieve from Marxism “a critical understanding of law”,<sup>81</sup> Christodoulidis and Goldoni draw on the writings of Engles and Althusser<sup>82</sup> to point out that economic factors are not wholly determinant of social relations but operate alongside other forms, such as law, in a process of co-production or co-constitution. As a result, the legal form is believed to be relatively autonomous from social or economic conditions. Along the same line, O’Connell points out that “in this context law, state and rights are elements of the complex set of social relations which contribute to the reproduction of capitalism, and not just epiphenomenal reflections of the material base”.<sup>83</sup> Contemporary Marxist understandings of law increasingly recognise the partial autonomy of law in such a way that law and social relations are understood to be in a relationship of mutual co-production.<sup>84</sup> It is within these renewed attempts to retrieve a critical understanding of

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<sup>76</sup> Ibid, 98.

<sup>77</sup> Ibid, 99.

<sup>78</sup> Ibid, 100.

<sup>79</sup> Tim Di Muzio, "Toward a Genealogy of the New Constitutionalism", in *New Constitutionalism and World Order*, eds. Stephen Gill and A. Claire Cutler (Cambridge: Cambridge University Press, 2014), 81-94.

<sup>80</sup> Christodoulidis and Goldoni, *Marxism and the Political Economy of Law*, 95-113, 95.

<sup>81</sup> Ibid, 95.

<sup>82</sup> See: Louis Althusser, *For Marx* (London: Verso, 2005); "Marx-Engels Correspondence 1890, Engels to J. Bloch In Königsberg", [www.marxists.org](http://www.marxists.org), accessed April, 2020, [https://www.marxists.org/archive/marx/works/1890/letters/90\\_09\\_21.htm](https://www.marxists.org/archive/marx/works/1890/letters/90_09_21.htm).

<sup>83</sup> Paul O’Connell, "Law, Marxism and Method", *TripleC (Communication, Capitalism & Critique)* 16, no. 2 (2018), 647-655, 650. See also: Marc W. Steinberg, *England’s Great Transformation: Law, Labor, and the Industrial Revolution* (Chicago: University of Chicago Press, 2016).

<sup>84</sup> O’Connell, *Law, Marxism and Method*, 647-655; Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", *Hastings Law Journal* 38 (1986), 805-853.

law from Marxism that the political economy of constitutionalism, as an approach to the study of constitutional relations, emerges.

By positioning constitutional law within capitalist social relations, the political economy of constitutionalism offers an insight into the intersection between two sets of relationships. On the one hand, constitutional law comprises the body of legal rules related to the structure, distribution and legitimate use of governmental power. The specific relationship studied by constitutional law, therefore, is that between law and polity. On the other hand, political economy captures the relationship between polity and economics and considers the role of politics in economic outcomes. The study of the political economy of constitutionalism operates at intersection between these two sets of relationships and is an “invitation to conceive the constitutional order as deeply intertwined with social production and reproduction”.<sup>85</sup> A central proposition of this approach is that the market is not a natural phenomenon but rests on the material conditions created, in part, through law.<sup>86</sup> In other words, the framework within which the economy operates and the conditions under which producers and consumers may establish their relationships are partly constituted through law. This is true even for those types of markets that are considered to be free of state intervention. Even a free market requires a stable political environment to operate in and, most importantly, a state that establishes and guarantees the freedom of the market. Hence, state institutions, “both in their absence and in their presence”,<sup>87</sup> operate to establish, maintain and regulate economic activity within a market. Accordingly, the question posed is “not whether but how law and politics shape market activities.”<sup>88</sup> To say that constitutional law and political economy examine the intersection of constitutional law, politics and economic activity is to ask how constitutional law in its presence or absence determines the conditions within which economic activity takes place. Therefore, this approach focuses on how constitutional instruments create a framework for the economy to operate and how social, political or economic conditions influence the development or interpretation of those rules.

As an approach to the study of constitutional law, the political economy of constitutionalism allows us to examine the constitutional order beyond its formal articulation (what appears on the surface) and as a body of rules underlined by a material constitution.<sup>89</sup> Without reverting to the deterministic position of earlier Marxist thought, as indicated above, the political economy of

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<sup>85</sup> Goldoni, *Critique of the Material Constitution*, 18.

<sup>86</sup> Michael A. Wilkinson and Hjalte Lokdam, “Law and Political Economy”, *LSE Law, Society and Economy Working Papers*, no. 7/2018 (2018), 5.

<sup>87</sup> *Ibid*, 5.

<sup>88</sup> *Ibid*, 5.

<sup>89</sup> Goldoni, *Critique of the Material Constitution*, 8.

constitutionalism acknowledges that constitutional law is intertwined with social, economic or political conditions and is, therefore, an expression of those conditions. As Owen Parker pointed out, the traditions of constructivist, critical and post-structuralist thought note how “a set of ideas - described variously as intersubjective understandings, historical structures or rationalities of government - may play a significant role in the manifestation of economic and political structural realities”.<sup>90</sup> Cox expressed the same belief in simpler words by arguing that “theory is always for someone and for some purpose”,<sup>91</sup> or, as pointed out by John Maynard Keynes, theories are not neutral: “[T]he ideas of economists and political philosophers, both when they are right and when they are wrong are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually slaves of some defunct economist.”<sup>92</sup> All of the above quotes indicate a continuous conversation between political economic thought and constitutional law.

Of particular interest to this thesis, is the way through which formal constitutional rules give expression to economic ideas or principles. How, in other words, the material aspect of a constitution is influenced by social, political or economic conditions and, more specifically, theories about how the state should be structured, how government should be conducted, how the market should or should not be regulated. The political economy of constitutionalism, as an approach to the study of constitutional law, allows us to examine how these theories are reflected and consolidated through constitutional law.<sup>93</sup> Therefore, the intersection between political economy and constitutionalism studied by this thesis, is located at the exchange between political economic thought and constitutional law in both its formal and material level.

At this point a new term enters in the discussion: neoliberalism. Neoliberalism escapes rigid definitions mostly due to the versatility of neoliberal practices. In general terms, though, neoliberalism is a set of economic beliefs concerning the conditions under which markets should operate, their relationship to the state and how governance should be exercised beyond the economy. It is for these reasons that the term is said to describe “*the new political, economic, and social arrangements within society that emphasize market relations, re-tasking the role of the state, and individual responsibility. Most scholars tend to agree that neoliberalism is broadly defined as the*

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<sup>90</sup> Owen Parker, "Challenging 'New Constitutionalism' in the EU: French Resistance, 'social Europe' and 'soft' Governance", *New Political Economy* 13, no. 4 (2008), 397-417, 397.

<sup>91</sup> Cox, *Social Forces, States and World Orders: Beyond International Relations Theory*, 126-155, 128.

<sup>92</sup> John Maynard Keynes, *The General Theory of Employment, Interest and Money*, Vol. VII (Cambridge: Cambridge University Press, 1971), 383.

<sup>93</sup> Emiliios Christodoulidis, "A Default Constitutionalism? A Disquieting Note on Europe's Many Constitutions", in *The Many Constitutions of Europe*, eds. Kaarlo Tuori and Suvi Sankari (Farnham: Ashgate, 2010), 21-48, 33.

*extension of competitive markets into all areas of life, including the economy, politics, and society”.*<sup>94</sup>

Therefore, neoliberalism is not only a set of political economic ideas but, also, a set of political economic practices that give effect to the neoliberal vision. As the term describes the new political, economic, and social arrangements within contemporary society, the thesis considers the intersection between neoliberalism, as the dominant political economic discourse of our times, and constitutional law.

Therefore, the thesis adopts the political economy of constitutionalism as an approach to the study of constitutional law in order to consider the implications of the Eurozone crisis on Europe’s constitution. This approach positions the development of constitutional rules within capitalist social relations and considers how social, political or economic conditions influence the development or interpretation of those rules. This allows us to see beyond formal constitutional rules and recognise the material aspect of the constitution; specifically, the set of ideas that operate to give shape to economic and political structural realities *through* constitutional law. However, a political economy of constitutionalism as developed more recently, does not fall back on a deterministic understanding of constitutional law. Instead, it recognises that constitutional law may reflect and consolidate political economic thought, but it does “not necessarily do so”;<sup>95</sup> there is space for constitutional law to express something other than neoliberal rationality.

#### 4. The creation and constitutionalisation of a scrutiny lacuna: Chapters overview

*Chapter 1 – The political economy of constitutionalism beyond the state: Tracing the relationship between neoliberalism and constitutional law.*

The aim of this chapter is to identify how neoliberalism takes effect through the operation of constitutional law. More specifically, the chapter is concerned with the creation and operation of economic institutions beyond the state, what constitutional scholarship identifies as constitutionalism beyond the state, and its relationship to neoliberal political economic thought. The main claim of this chapter is that constitutional law gives effect to the neoliberal political economic objective of separating and insulating economic decision-making from political interference; what I identify as the creation of a scrutiny lacuna. Three steps are taken to establish this claim. First, the chapter considers the intellectual history of neoliberalism in order to identify the main elements of neoliberal political economic thought. Second, the chapter examines how constitutional law beyond the state is employed as a medium through which neoliberal political economy takes effect. Third,

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<sup>94</sup> Simon Springer, Kean Birch and Julie MacLeavy, “An Introduction to Neoliberalism”, in *Handbook of Neoliberalism*, eds. Simon Springer, Kean Birch and Julie MacLeavy (London: Routledge, 2016), 2.

<sup>95</sup> Parker, *Challenging ‘New Constitutionalism’ in the EU: French Resistance, ‘social Europe’ and ‘soft’ Governance*, 397-417, 401. Emphasis in original.

the role of judicial review is considered as a further parameter to the relationship between neoliberalism and constitutional law. Through these steps, the chapter identifies the main elements in the relationship between neoliberalism and constitutional law.

*Chapter 2 – European constitutionalism as a space for constitutional conflict.*

This chapter sets out to consider the relationship between neoliberalism and European constitutionalism prior to the Eurozone crisis. More specifically, the chapter considers how central elements of neoliberal political economic thought, as identified in Chapter 1, find expression in European constitutional law. However, the chapter also identifies the operation of constitutional objectives that are in direct conflict with neoliberalism. What the chapter argues, therefore, is that prior to the Eurozone crisis, European constitutionalism was as a space for constitutional conflict between neoliberal and opposing ideas, objectives and practices. This conflict is traced through three different sites of analysis: theories of European constitutionalism; the institutional structure of the European Union; and the exercise of judicial review by the ECJ. In each of these sites of analysis, I identify how constitutional law reflects and consolidates neoliberal political economic thought while also acting as a vehicle for articulating other constitutional objectives that come into conflict with neoliberalism. It is for this reason that the chapter suggests an understanding of European constitutionalism prior to the Eurozone crisis as a space whereby multiple constitutional objectives operate and, by extension, come into conflict with each other.

*Chapter 3 – The constitutional implications of crisis response measures: The creation and constitutionalisation of a scrutiny lacuna*

In this chapter, I consider the constitutional implications of the Eurozone crisis and the broader significance of this moment for European constitutionalism. To achieve this, the chapter focuses on how crisis response measures have been decided. It starts by examining how dominant framings of the crisis influenced both the policy approach adopted by EU institutions and the ways through which measures were decided. It continues to consider the constitutional implications of developing new channels for decision-making and ends with an overview of how the Court of Justice of the European Union (CJEU) dealt with the consequent constitutional implications identified in earlier in the chapter. I argue that the intensification of coordination between European institutions and Eurozone members leads to an intensification of insulation afforded to economic decision-making. As a result, the chapter identifies the creation of a scrutiny lacuna within European constitutionalism. Further, it is argued that judicial responses to the constitutional implications of intensified coordination operate to provide legal validation to the scrutiny lacuna, leading to its constitutionalisation. For these reasons, the chapter concludes that the Eurozone crisis presents a

clear neoliberal moment where the separation and insulation of economic decision-making takes precedence over all other constitutional objectives, dissolving in this way any constitutional conflict operating within European constitutionalism prior to the crisis.

#### *Chapter 4 – How the Eurogroup shaped crisis response measures in Cyprus: A case of institutional development*

In this chapter, I consider how the Eurogroup was transformed from an informal forum for discussion to a deliberation and decision-making body during the Eurozone crisis. Drawing on the example of Cyprus, the chapter examines the Eurogroup's development and considers in detail its role in the process of devising crisis response measures. Moreover, the relationship between Eurogroup Statements outlining a bail-in resolution and national measures giving effect to the bail-in, is considered through a close reading of two plenary sessions of the Cypriot House of Representatives. The chapter argues that the Eurogroup acts as a decision-making body by deliberating about, and deciding on, appropriate economic measures to be adopted by Eurozone members in need of financial assistance. The chapter also argues that the Cypriot House of Representatives was faced with a *fait accompli* and that its role was limited to translating the policy decisions contained in the Eurogroup statement to legal provisions at the national level. By acknowledging the role of the Eurogroup as a decision-making body, the chapter contributes towards a better understanding of the scrutiny lacuna and the ways through which economic decision-making is insulated from political interference, mainly from the national level. This contribution extends our understanding of the relationship between neoliberalism and European constitutionalism at the institutional level.

#### *Chapter 5 – Cypriot depositors before the European Court of Justice: Constitutionalising the scrutiny lacuna*

In this chapter I consider whether, and how, the Court of Justice of the European Union exercised judicial overview in response to the development of a scrutiny lacuna during. The questions I raise here rely heavily on observations and conclusions put forward in previous chapters, specifically Chapters 3 and 4. Together, those chapters highlight how increasing coordination between EU institutions and Eurozone members increases the degree of insulation afforded to economic decision-making at the supranational level to the degree that a scrutiny lacuna is created. Constitutionally, the creation of a scrutiny lacuna translates to an increase of EU competences, the alteration of both the EU and Member States' constitutions and a shift in the democratic settlement between EU and Member States. Through a close reading of cases brought before the CJEU by Cypriot depositors, I consider the exercise of *ultra vires* review by the Court. The central claim of this

chapter is that by exercising a light touch of review, the CJEU refused to intervene in informal methods of coordination thus providing legal validity to constitutional changes effected by institutional development – what I term as the constitutionalisation of a scrutiny lacuna. Ultimately, I identify how the exercise of judicial review operates as yet another insulating instrument and argue that the ECJ limits the reach of its own jurisdiction in a way that severely undermines the exercise of *ultra vires* review in the European Union.

#### *Chapter 6 – Constitutionalising the scrutiny lacuna at the national level: The case of Christodoulou*

This chapter considers the extent to which the Supreme Court of Cyprus exercised *ultra vires* review in light of institutional development during the crisis and whether its approach further constitutionalises the scrutiny lacuna. By conducting a close reading of cases brought before the Supreme Court of Cyprus by depositors affected by the bail-in, the chapter indicates how the Court foreclosed the possibility of constitutional review at the national level by ruling the case of *Christodoulou*<sup>96</sup> as inadmissible despite the considerable scope for constitutional review afforded to it. Drawing on the legal analysis conducted throughout the chapter, I argue that the Court's approach is an act of self-limitation and provides further legal validity to the scrutiny lacuna. As a result, the scope and effectiveness of constitutional review both in Cyprus and in the EU is further reduced.

#### **Conclusions**

The contributions of this thesis can be broken down to four main arguments. First, the thesis contributes to the study of institutional development during the crisis. By tracing the intensification of coordination between European institutions and Eurozone members, the thesis identifies how institutional development leads to intensified insulation of economic decision-making and the creation of a scrutiny lacuna. Second, the thesis offers a further contribution to the study of institutional development by indicating how judicial responses to institutional development operate to provide legal validation to institutional practices adopted during the crisis, constitutionalising in this way a scrutiny lacuna. Third, the thesis develops theoretical considerations concerning the relationship between neoliberalism and constitutional law, specifically, how judicial review can complement institutional practices that enhance the insulation of economic decision-making from political interference. Fourth, the thesis contributes to broader discussions on the constitutional

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<sup>96</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), (2013), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

implications of the Eurozone crisis by arguing that European constitutionalism is no longer a space for constitutional conflict.

# Chapter 1 – The Political Economy of Constitutionalism Beyond the State: Tracing the relationship between neoliberalism and constitutional law

The aim of this chapter is to identify how neoliberalism takes effect through the operation of constitutional law. More specifically, the chapter is concerned with the creation and operation of economic institutions beyond the state, what constitutional scholarship identifies as constitutionalism beyond the state, and its relationship to neoliberal political economic thought. As indicated in the introduction of the thesis, the political economy of constitutionalism focuses on how constitutional instruments create a framework for the economy to operate and how social, political or economic conditions influence the development or interpretation of those rules. Critical literature indicates how neoliberalism, as a body of political economic thought, plays a “significant role in the manifestation of economic and political structural realities”.<sup>1</sup> In other words, there is a strong connection between neoliberalism, as a discourse promulgating the “extension of competitive markets into all areas of life” and the “new political, economic, and social arrangements within society that emphasize market relations, re-tasking the role of the state, and individual responsibility”.<sup>2</sup> The political economy of constitutionalism considers the role of constitutional law in giving effect to neoliberal discourse – how the new political, economic and social arrangements, influenced by neoliberalism, take effect through the operation of constitutional law. In order to identify this relationship, the chapter brings together four different strands of critical thought.

First, the chapter draws on philosophical and historical examinations of neoliberalism to identify the central political economic objectives put forward by neoliberal thought. Second, drawing on sociological and historical accounts, I identify the relationship between neoliberalism and economic globalization in order to indicate the influences of neoliberal political economic thought on economic globalization. Third, the work of political economist Stephen Gill is considered in order to identify how constitutional instruments are employed by institutions beyond the state. Lastly, the chapter draws on the work of Wendy Brown in order to identify a further parameter to the relationship between neoliberalism and constitutional law. Drawing on these, often unconnected, lines of critical inquiry the relationship between neoliberalism and constitutional law is identified in three separate sites of analysis: the intellectual history of neoliberalism; the institutional structures

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<sup>1</sup> Owen Parker, "Challenging 'New Constitutionalism' in the EU: French Resistance, 'social Europe' and 'soft' Governance", *New Political Economy* 13, no. 4 (2008), 397-417, 397.

<sup>2</sup> Simon Springer, Kean Birch and Julie MacLeavy, "An Introduction to Neoliberalism", in *Handbook of Neoliberalism*, eds. Simon Springer, Kean Birch and Julie MacLeavy (London: Routledge, 2016), 2.

established beyond the state and their practices; and, finally, the operation of judicial review. Based on these three different sites of analysis, the chapter proceeds in three steps.

In the first section, I draw upon the intellectual heritage of neoliberalism to identify the main elements of neoliberal political economic thought. I indicate that as an individualistic philosophy, neoliberalism elevates the market to a central institution of social ordering. Contrary to early conceptualisations of neoliberal ideas about the state, I draw on recent developments to show that neoliberal political economy rests on the idea of sustaining a specific kind of state; one that creates and protects the conditions for the free operation of market forces. By considering this body of neoliberal thought, the section isolates the main aim of neoliberal political economy: to separate the market from politics so as to insulate economic decision-making from the influence of political, or other irrational, interference. Hence, this section argues that neoliberalism aims to create a *scrutiny lacuna*<sup>3</sup> within which economic decision-making can enjoy a significant degree of insulation from political interference that could distort the market. The role of constitutional law is identified in the creation of an institutional framework that is capable of sustaining the separation and insulation of economic decision-making from political interference. Section two of the chapter considers in more detail the intersection between neoliberalism and constitutional law beyond the state. While the first section of this chapter considered this intersection in broader terms, the second section proceeds to consider how institutions developed beyond the state employ constitutional instruments to separate the economy from politics and insulate economic decision-making from irrational political interference. This section is based on two theoretical propositions put forward by critical theory concerning the operation of neoliberalism in global economic governance. Firstly, that neoliberal political economic thought is realised through the creation of global institutions and, secondly, that economic institutions beyond the state employ constitutional instruments to reproduce a neoliberal restructuring of states.<sup>4</sup> The section points out that the challenge faced by critical constitutional thought is to recognise the role of constitutional law in constituting a global political economy where the reconfiguration of legal authority sectorally and functionally contributes towards the division between politics and the economy and insulates economic decision-making from irrational interference. It then continues to consider how critical political economists tackle the above question. Finally, section three of the chapter draws on the work of

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<sup>3</sup> I first encountered the term 'scrutiny lacuna' during my stay at Erasmus School of Law as a Visiting Research Fellow. Due credit must be given to Alessandra Arcuri and Florin Coman Kund for using the term in their research agenda. The use of the term in this thesis, including its definition, theorisation and constitutional relevance in relation to the Eurozone crisis, remain my own.

<sup>4</sup> Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, Massachusetts: Harvard University Press, 2018); Stephen Gill and A. Claire Cutler, *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014).

Wendy Brown in order to highlight yet another parameter to the relationship between neoliberalism and constitutional law: that between judicial review and neoliberal political economic thought.

The chapter argues that the relationship between neoliberalism and constitutional law is guided by the political economic objective of separating and insulating economic decision-making from political interference; what I identify as the creation of a scrutiny lacuna. The role of constitutional law, or if you wish the point of intersection between neoliberalism and constitutional law, is identified along four observations. First, that the development of institutions beyond the state on a sectoral and functional basis is in itself a way of separating economic matters from political or democratic contestation and interference. Second, that constitutional law locks in neoliberal discourse as constitutions can be used to ensure certain economic conditions. Third, that constitutional law can insulate institutions from political interference, either through the division of power amongst state institutions or through affording institutions independence. Finally, the relationship between neoliberalism and constitutional law as identified by the above observations is complemented by the operation of judicial.

## 1. Neoliberal political economy and the insulation of economic decision-making from political interference

Neoliberalism is a term that escapes rigid definitions mostly due to the versatility of neoliberal practices. In general terms, though, neoliberalism is a set of economic beliefs concerning the conditions under which markets should operate, their relationship to the state and how governance should be exercised in a number of sectors beyond the economy. It is for these reasons that the term is said to describe *“the new political, economic, and social arrangements within society that emphasize market relations, re-tasking the role of the state, and individual responsibility. Most scholars tend to agree that neoliberalism is broadly defined as the extension of competitive markets into all areas of life, including the economy, politics, and society”*.<sup>5</sup> While broad definitions of neoliberalism successfully capture the wide application or effects of neoliberal thought and practices, it is necessary to consider how neoliberalism operates in specific areas of social life. For this reason, this section takes a closer look at neoliberal political economy – the relationship between market and state as this is put forward by neoliberal thinkers. In doing so, the section draws a link between individual freedom, as the main philosophical commitment of neoliberalism, market freedom, as the mechanism through which to achieve individual freedom, and the state.

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<sup>5</sup> Springer, Birch and MacLeavy, *An Introduction to Neoliberalism*, 2.

This exercise aims to draw out the main elements of neoliberal political economy. It will be argued that neoliberal political economy is centred around the idea of a strong state constituting the market but, also, protecting the market from any irrational intervention. To achieve this, neoliberalism seeks to separate the market from politics in order to create a protective barrier between the free operation of market forces and what is perceived to be irrational political interference. Since neoliberals consider democratic decision-making to be one of the main forms of irrational intervention in the economy, the section indicates how neoliberal political economy sets out to insulate, as far as possible, the market from democratic intervention.

### 1.1. Individual freedom and the free market: the neoliberal *telos*.

While market freedom may appear as the central philosophical commitment of neoliberalism, individual freedom is in fact the ultimate *telos* of neoliberal thought. Milton Friedman, a leading figure in the development of neoliberal thought, makes this explicit by accepting that neoliberals take freedom of the individual “as our ultimate goal in judging social arrangements”.<sup>6</sup> Market freedom is not a secondary commitment but rather the *only* means of achieving the ultimate virtue of individual freedom.<sup>7</sup> As Friedman points out, the lineage of liberal thought focuses “on economic freedom as a means toward political freedom”,<sup>8</sup> indicating in this way the centrality of market freedom in achieving individual freedom.<sup>9</sup>

The link between capitalism and individual freedom is established in two lines of argument.<sup>10</sup> Firstly, Friedman observes that individual freedom depends, to a degree, on political freedom. Through a historical analysis, Friedman draws a connection between the rise of capitalist institutions, including the free market, and political freedom. His argument is, briefly, that humankind has managed to overcome its typical state of tyranny, servitude and misery only when competitive capitalism, mercantilism and the free market gained dominance<sup>11</sup>. This leads Friedman to the conclusion that “history suggests only that capitalism is a necessary condition for political freedom”.<sup>12</sup> Beyond historical indications, Friedman also attempts to establish a logical connection

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<sup>6</sup> Milton Friedman, *Capitalism and Freedom*, 40th Anniversary Edition ed. (Chicago & London: University of Chicago Press, 2009), 11.

<sup>7</sup> Philip Mirowski, "Postface: Defining Neoliberalism", in *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective, with a New Preface*, eds. Philip Mirowski and Dieter Plehwe (Cambridge, Massachusetts: Harvard University Press, 2015), 417-455, 437.

<sup>8</sup> Friedman, *Capitalism and Freedom*, 11.

<sup>9</sup> David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005), 7.

<sup>10</sup> Friedman, *Capitalism and Freedom*

<sup>11</sup> Bob Jessop, "Capitalism and Democracy: The Best Possible Political Shell?" in *Power and the State*, ed. Gary Littlejohn (London: Croom Helm, 1978), 10-51.

[https://www.researchgate.net/profile/Bob\\_Jessop3/publication/312017345\\_Capitalism\\_and\\_Democracy\\_The\\_Best\\_Possible\\_Political\\_Shell/links/5883a76a92851c21ff44aabb/Capitalism-and-Democracy-The-Best-Possible-Political-Shell.pdf](https://www.researchgate.net/profile/Bob_Jessop3/publication/312017345_Capitalism_and_Democracy_The_Best_Possible_Political_Shell/links/5883a76a92851c21ff44aabb/Capitalism-and-Democracy-The-Best-Possible-Political-Shell.pdf)

<sup>12</sup> Friedman, *Capitalism and Freedom*, 10.

between capitalism and individual freedom and insists on a clear demarcation between the political and economic spheres. Neoliberal theory argues that when this division exists “economic power can be used to prevent the abuse of political power; political power can be used to counteract market failures”.<sup>13</sup> Within these conditions, competitive capitalism can “expand in a crisis-free manner through the smooth operation of market forces and, in addition, dispersed economic power will help to block the abuse of political power”.<sup>14</sup> In a similar tone, Friedman establishes the link between economic and political freedom by arguing that: “the kind of economic organisation that provides economic freedom directly, namely, competitive capitalism, also promotes political freedom because it separates economic power from political power and in this way enables the one to offset the other”.<sup>15</sup> Consequently, individual freedom cannot be achieved without a free market.<sup>16</sup>

It is no surprise, therefore, that neoliberal thought could go as far as arguing that institutions such as the state or even society *could* or *should* be replaced by the market as “the primary mechanism for producing, promoting, and preserving social order”.<sup>17</sup> This means that neoliberal thought “entails both positive assumptions (i.e. the market is more efficient than other institutions) and normative assumptions (i.e. the market should replace other institutions because it is both more efficient and liberating)”.<sup>18</sup> In essence, neoliberals give primacy to the belief that “the social good will be maximized by maximizing the reach and frequency of market transactions”<sup>19</sup> leading to the conclusion that the market and its rationality should be extended to cover a range of human activity.<sup>20</sup> By appreciating the centrality of individual freedom as *the key* philosophical commitment of neoliberalism, we also begin to appreciate why neoliberal thought is focused on establishing a free market but also on disseminating market rationality across all areas of social life, including constitutional law.

## 1.2. Restructuring the state in search for a scrutiny lacuna: The role of constitutional law

Neoliberal thought elevates the market into a central institution in organising social life. Despite consensus as to the centrality of the market in achieving individual freedom, the various schools, operating under the broader umbrella of neoliberalism, do not reach a consensus as to what precisely the market is, or should be. However, Mirowski identifies Hayek’s position as the dominant

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<sup>13</sup> Bob Jessop, “Finance-Dominated Accumulation and Post-Democratic Capitalism”, in *Institutions and Economic Development After the Financial Crisis*, eds. Sebastiano Fadda and Pasquale Tridico (Abingdon: Routledge, 2013), 83-105, 84.

<sup>14</sup> Ibid, 84.

<sup>15</sup> Friedman, *Capitalism and Freedom*, 9.

<sup>16</sup> Harvey, *A Brief History of Neoliberalism*, 7.

<sup>17</sup> Springer, Birch and MacLeavy, *An Introduction to Neoliberalism*, 3.

<sup>18</sup> Ibid, 3.

<sup>19</sup> Harvey, *A Brief History of Neoliberalism*, 3.

<sup>20</sup> Ibid, 3.

framing of the market.<sup>21</sup> Hayek considers the market as “an information processor” analogous to the human brain but with far greater capabilities and capacities.<sup>22</sup> As the optimal information processor, the market has the capacity to reach the best level of efficiency when left to operate according to its own forces. Consequently, neoliberal thought is committed towards sustaining the free operation of market forces. Contrary to common perception, though, neoliberalism does not entail a return of classical liberal economic thought, also known as *laissez-faire* economics.<sup>23</sup> The starting point of neoliberalism is that the free market does not come about naturally but must be constructed. As Mirowski points out, neoliberal thought seeks to activate both “political effort and organization” towards the direction of creating and sustaining a stable free market society.<sup>24</sup> Consequently, Foucault noted, neoliberalism can be understood as a “call to vigilance, to activism, to perpetual interventions”<sup>25</sup> – political, legal or social interventions – in order to create and guarantee the neoliberal vision of how a market, but also society more generally, should be structured. It is in the attempt to give the market a given structure that neoliberalism and constitutional law interact. However, before considering the intersection between neoliberal political economic thought and constitutional law, it is important to outline the main elements of neoliberal political economy.

Neoliberal political economy – the relationship between state and market – is a consequence of the kind of market neoliberals wish to see. The first neoliberal mantra concerning the relationship between the state and the market is that of separation and non-intervention. This is based on two main arguments. The first is directly related to the perception of the market as the perfect information processor. According to Hayek’s position, originally expressed as a critique of socialism,<sup>26</sup> each economic actor possesses relevant information that no central authority, whether the state or any other institution, may possess or process. Only the price system, Hayek continued, can be considered as a “feasible way in which the information possessed by each can be pooled and translated into an efficient schedule of economic outputs”.<sup>27</sup> In addition to the inability of the state to second-guess market signals, the second justification for non-intervention is that state institutions are susceptible to other considerations leading to inefficient or crisis-causing decisions. As Streeck points out, neoliberal thought is “obsessed with the figure of the opportunistic or myopic, in any

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<sup>21</sup> Mirowski, *Postface: Defining Neoliberalism*, 417-455, 434-35.

<sup>22</sup> *Ibid*, 435.

<sup>23</sup> Jedediah Purdy and David Singh Grewal, “Law and Neoliberalism”, *Law & Contemporary Problems* 77 (2014), 1-23, 1.

<sup>24</sup> Mirowski, *Postface: Defining Neoliberalism*, 417-455, 434.

<sup>25</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège De France, 1978-1979*, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2008), 137.

<sup>26</sup> Richard A. Posner, “Hayek, the Law, and Cognition”, *New York University Journal of Law & Liberty* 1 (2005), 147-166, 147. See also, Friedrich A. Von Hayek, “Economics and Knowledge”, *Economica* 4, no. 13 (1937), 33-54. ; Friedrich August Hayek, “The use of Knowledge in Society”, *The American Economic Review* 35, no. 4 (1945), 519-530.

<sup>27</sup> Von Hayek, *Economics and Knowledge*, 33-54; Posner, *Hayek, the Law, and Cognition*, 147-166, 147; See also, Mirowski, *Postface: Defining Neoliberalism*, 417-455, 435.

event irresponsible, politician who caters to an economically uneducated electorate by fiddling with otherwise efficient markets and thereby preventing them from achieving equilibrium”.<sup>28</sup> Similarly, Harvey points out that neoliberals will often argue that “powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit”.<sup>29</sup> Consequently, neoliberal theory advocates the “disembedding of the market from state and other forms of institutional regulation in the name of the free market”.<sup>30</sup> Grewal and Purdy term this as a defensive use of power directed towards the preservation of existing market relations.<sup>31</sup>

While neoliberals fiercely argue for the separation of the market from political interference, they also recognise that a market is not a natural phenomenon but, instead, a construct. Iain Bruff indicates that neoliberal agenda “*from the beginning* has been less interested in giving free reign to markets than in engineering and managing the markets that it wishes to see”.<sup>32</sup> As a construct, and not a natural state, the economy must be “organized by law and political institutions, and requires political intervention and orchestration”.<sup>33</sup> Consequently, the neoliberal vision relies on state intervention – mainly through legal provisions in the form of constitutional instruments, policy or regulations – to create and sustain the right conditions for the market. Both the separation of politics (state) from the economy (market) and also market conditions are achieved through the construction of legal frameworks, including a constitutional framework.

While the above position may seem paradoxical, recent advancements in the understanding of neoliberal political economy indicate that the co-existence of a neoliberal mantra of non-intervention and an active state through which neoliberal policies are channelled, are an integral part of neoliberal economic political philosophy. In an attempt to better capture the relationship between market and state in neoliberalism, Grewal and Purdy argue that:

*“the opposition between ‘market’ and ‘state’ as conventionally posed is nonsensical. What the neoliberal position advances is not a claim of ‘market against state’ or even simply a push for ‘more market, less state,’ but rather a call for a particular kind of state”.*<sup>34</sup>

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<sup>28</sup> Wolfgang Streeck, “The Crisis in Context: Democratic Capitalism and its Contradictions”, *MPIfG Discussion Papers*, no. 11/15 (2011), 3.

<sup>29</sup> Harvey, *A Brief History of Neoliberalism*, 2.

<sup>30</sup> Ian Bruff, “Neoliberalism and Authoritarianism”, in *Handbook of Neoliberalism*, eds. Simon Springer, Kean Birch and Julie MacLeavy (New York and London: Routledge, 2016), 107-117, 109.

<sup>31</sup> Purdy and Grewal, *Law and Neoliberalism*, 1-23, 5.

<sup>32</sup> Bruff, *Neoliberalism and Authoritarianism*, 107-117, 107. Emphasis in original.

<sup>33</sup> Wendy Brown, *Edgework: Critical Essays on Knowledge and Politics* (Princeton & Oxford: Princeton University Press, 2009), 41.

<sup>34</sup> Purdy and Grewal, *Law and Neoliberalism*, 1-23, 8.

Hayek, himself, provides adequate evidence for this conclusion. The “political institutions prevailing in the West”, Hayek argued, “produce a drift in [the direction of destroying the market]”.<sup>35</sup> It is not socialism, or any other “deliberate attempts of the various kinds of collectivists to replace the market economy by a planned system” that threaten the market – it is the very institutional framework prevailing in the West during the post-war period. The inevitable destruction of the market can “be halted or prevented only by changing this institution”<sup>36</sup> – the institution of the state. Consequently, Peck and Tickell indicate that “only rhetorically does neoliberalism mean ‘less state;’ in reality, it entails a thoroughgoing *reorganisation* of governmental systems and state-economy relations”.<sup>37</sup> In a similar note, Bruff notes that neoliberalism should not be viewed as hostile to the state but to specific state practices.<sup>38</sup> In other words, neoliberals do not target the state as such but institutional formations enabling state practices that go against the market. Hence, the first element of neoliberal political economic thought, as identified above, is that of separation of the economy from political interference in order to limit, as much as possible, irrational interventions in the economy by state institutions.

The second element of neoliberal political economic thought identified is that of insulation. The political system capable of housing neoliberalism has no name and democracy is by no means a *sine qua non* of neoliberal political economy. On the contrary, democracy understood as “governance by majority rule is seen as a potential threat to individual rights and constitutional liberties”.<sup>39</sup> Considering the centrality of individual freedom in neoliberal thought and the purported inability of the state to ensure market efficiency – hence the perfect conditions for ensuring individual freedom – it is no surprise that democracy is the primary target of neoliberal restructuring. To put it in different words, in neoliberal political economy, the impact of popular democratic decision-making should be restricted. Hayek was explicit about this: “the root of all evil” he argued, “is the unlimited power of the legislature in modern democracies”.<sup>40</sup> More recently, Slobodian also highlighted that neoliberal thought considers democracy as “a potential threat to the functioning of the market order. Therefore, safeguards against the disruptive capacity of democracy are necessary.”<sup>41</sup> Moroswick clarifies that while neoliberals endorse democracy, as an appropriate state framework, popular participation is kept “relatively impotent, so that citizen initiatives rarely change much of

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<sup>35</sup> Friedrich August Hayek, “Economic Freedom and Representative Government”, *Institute of Economic Affairs*, no. Fourth Wincott Memorial Lecture, Occasional Papers no. 39 (1973), 9.

<sup>36</sup> *Ibid.*, 9. For further commentary, see: Bruff, *Neoliberalism and Authoritarianism*, 107-117, 109.

<sup>37</sup> Jamie Peck and Adam Tickell, “Conceptualizing Neoliberalism, Thinking Thatcherism”, in *Contesting Neoliberalism: Urban Frontiers*, eds. Helga Leitner, Jamie Peck and Eric Sheppard (New York: Guilford Press, 2007), 26-50, 33.

<sup>38</sup> Bruff, *Neoliberalism and Authoritarianism*, 107-117, 109.

<sup>39</sup> Harvey, *A Brief History of Neoliberalism*, 65.

<sup>40</sup> Hayek, *Economic Freedom and Representative Government*, 9.

<sup>41</sup> Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism*, 272.

anything ('constrained' democracy instead of the allegedly existing 'unconstrained democracy')".<sup>42</sup> Given the hostility of neoliberalism to democratic decision-making, Bruff concludes that:

*"the conditions of neoliberal order are not realized through the unleashing of market forces alone, as per neoliberal rhetoric...instead, we should see the state as a permanent and necessary part of neoliberal ideology, institutional and practice. For it is state-directed coercion insulated from democratic pressures that is central to the creation and maintenance of a politico-economic order which actively defends itself against impulses towards greater equality and democratization"*<sup>43</sup>.

Therefore, the second element of neoliberal political economy identified is the insulation of a market from democratic interference. The idea of separation, identified above, is reframed into a direct and explicit aversion towards democratic decision-making in order to avoid irrational interference in the market. Insulation of economic decision-making is, therefore, a form of separation of politics from the economy focused on the restriction of institutions in decision-making, such as democratic or mass participation institutions, or the insulation of institutions, as for example central banks (explored later in this chapter), from interference and contestation. Both the separation of politics from the economy and insulation of economic decision-making from interference creates a ring fence around institutions and, most importantly, around neoliberal rationality. As a result, neoliberal political economic thought proposes the creation of an insulated space for institutions to operate – what I identify as a scrutiny lacuna.

As the discussion above indicates, neoliberal political economy does not target the state, as a governmental entity, but certain state *practices* – mainly state intervention in economic matters. For this reason, the two main elements of neoliberal political economic thought identified to this point are the separation of politics from the economy and the insulation of economic decision-making from political interference, specifically from democratic bodies. Combined, these elements contribute to the creation of a scrutiny lacuna. Both of these elements are achieved through the reorganisation and restructuring of the state. Hence, one of the central issues addressed by neoliberal political economy is how the state can constitute the market but at the same time ensure non-interference. In *'The Road to Serfdom'*, Hayek indicates how this is possible. Given Hayek's belief that state intervention creates a degree of uncertainty that is catastrophic for the individual, he argues that it is of utmost importance for the purposes of certainty and planning to be able to foresee the actions of a state. Towards this end, Hayek supports a system of government that is

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<sup>42</sup> Mirowski, *Postface: Defining Neoliberalism*, 417-455, 436.

<sup>43</sup> Bruff, *Neoliberalism and Authoritarianism*, 107-117, 109-110. Emphasis in original.

structured around the rule of law. Indicatively, Hayek argues that a state should “in all its actions [be] bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authorities will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge”.<sup>44</sup> Drawing from the above extract found in one of Hayek’s central texts, a clear picture concerning the role of the state within neoliberal political economic thought can be extracted. In simple words, a state should operate to safeguard individual freedom – the ability to act without interference by the state in pursuit of private interest. It is in the creation of the above conditions that neoliberal political economic thought and constitutional law intersect

In order to create the conditions under which an individual may pursue their private interests with certainty, security and predictability, the state must operate under the rule of law, where rule of law means the exercise of power through, and within, a generic system of rules that is predictable and prevents any irrational interference with market forces. Consequently, legal rules are, in effect, a positive “instrument of production, helping people to predict the behaviour of those with whom they must collaborate”.<sup>45</sup> Examples of accepted state intervention include the establishment of conditions favourable to the market, such as the recognition of strong property rights or, as the chapter will indicate in due course, the establishment of independent central banks. Governmental practices, such as state intervention, that go against individual freedom must be curtailed while governmental practices that enhance individual freedom, such as the existence of a legal framework that protects private property, are considered necessary.

Although no explicit mention is made of constitutional law as a means to achieving a neoliberal political economy, references to the role of law in ensuring the proper function of the state are indicative of its constitutive role. For example, Milton Friedman argued that government in a “free society”<sup>46</sup> should:

*“maintain law and order, define property rights, serve as a means whereby we could modify property rights and other rules of the economic game, adjudicate disputes about the interpretation of the rules, enforce contracts, promote competition, provide a monetary framework engaged in activities to counter technical monopolies and to overcome neighbourhood effects widely regarded as sufficiently important to justify government intervention”.*<sup>47</sup>

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<sup>44</sup> Friedrich August Hayek, *The Road to Serfdom*, Routledge Classics ed. (London and New York: Routledge, 1944 (2001)), 75.

<sup>45</sup> *Ibid*, 77.

<sup>46</sup> Friedman, *Capitalism and Freedom*, 322.

<sup>47</sup> *Ibid*, 34.

Friedman's remark is important as it outlines the kind of governmental activities that neoliberals consider acceptable and, more importantly, the central role of constitutional law in promoting and realising the relationship between state and market envisaged by neoliberals. By entrenching various aspects of the market, from property rights to competition and monetary objectives, through constitutional instruments, neoliberals actively seek to embed and protect economic principles into the fabric of a governmental structure; to constitutionalise, in other words, neoliberalism. As neoliberals seek to "redefine the shape and functions of the state"<sup>48</sup> in such a way so as to support the kind of market they wish to see, constitutional law acts as a process through which the state is restructured according to the neoliberal vision.

Drawing on the above discussion, the main elements of neoliberal political economy can be identified. The section outlined how the quest for individual freedom, as the main philosophical commitment of neoliberalism, elevates the market to a central social institution. Viewed as the optimal information processor and the only institution capable of promoting individual freedom, neoliberal political economic thought argues that the market should be left to operate according to its own devices and forces. Given the centrality of the market, as a social institution, the section proceeded to identify the separation of politics from the economy and insulation of economic decision-making from irrational interference as two central elements in neoliberal political economic thought. Together these two elements of neoliberal political economic thought indicate that neoliberalism seeks to carve out an insulated space for economic decision-making, what the chapter identifies as a scrutiny lacuna. The intersection between neoliberalism and constitutional law is located in in the process of creating and sustaining the conditions for the separation of politics from the economy and insulation of economic decision-making from irrational interference. The remainder of this chapter continues to further consider the intersection between neoliberalism and constitutional law in constitutional formations beyond the state.

## 2. Neoliberalism and the new constitutionalism: How constitutional law separates and insulates the economy from political interference.

The aim of this section is to consider how the main elements of a neoliberal political economy – the separation of politics from the economy and the insulation of market forces from interference, including democratic decision-making – are achieved through constitutional law beyond the state. In other words, how constitutional law beyond the state is employed as a medium through which neoliberal political economy takes effect. To achieve this, the chapter turns its attention to the

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<sup>48</sup> Mirowski, *Postface: Defining Neoliberalism*, 417-455, 436.

parallel development of a global neoliberal political economy and international institutions beyond the state. Drawing on insights from critical literature, I identify the connection between neoliberal political economic thought and economic globalisation; more specifically, how institutions created beyond the state insulate economic decision-making from political interference. The section continues to consider the intersection between institutions beyond the state, constitutional law and the process of insulating economic decision-making from political interference through the work of Stephen Gill.

### 2.1. Constitutionalism beyond the state and the separation of politics from the economy

As critical political economists indicated, the development of economic globalisation in the aftermath of the cold war has a distinctly neoliberal flair.<sup>49</sup> While it is beyond the scope of this chapter to survey the rich body of work indicating the links between neoliberalism and global political economy, it is important to note how international, transnational or supranational institutions and agreements act as neoliberal “processes of economic integration beyond state borders” that forward a “worldwide market revolution” structured around neoliberal market principles.<sup>50</sup> Examples include the European Economic Communities (EEC), predecessor of the European Union, the World Trade Organisation (WTO), the International Monetary Fund (IMF), World Bank (WB) or the North American Free Trade Agreement (NAFTA). More recently, Quinn Slobodian shows how the development of the above institutions sits comfortably with the intellectual heritage and tradition of neoliberalism. Slobodian draws on two previously unconnected strands of scholarship – on one hand, the intellectual history of neoliberalism as developed by mainly by historians and, on the other, work conducted by social scientists. While the intellectual history of neoliberalism draws out its philosophical commitment to a structured market free of irrational interference, social scientists indicate how neoliberal practices operate to “insulate market actors from democratic pressures in a series of institutions from the IMF and the World Bank to port authorities and central banks worldwide”.<sup>51</sup> Drawing on both strands of scholarship, Slobodian argues that “the neoliberal project focused on designing institutions – not to liberate markets but to encase them, to inoculate capitalism against the threat of democracy, to create a framework to contain often irrational human behaviour, and to reorder the world”.<sup>52</sup> Slobodian’s work draws together the central elements of neoliberal political economic thought, as outlined above, and the

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<sup>49</sup> Tim Di Muzio, "Toward a Genealogy of the New Constitutionalism", in *New Constitutionalism and World Order*, eds. Stephen Gill and A. Claire Cutler (Cambridge: Cambridge University Press, 2014), 81-94, 83.

<sup>50</sup> Stephen Gill and A. Claire Cutler, "New Constitutionalism and World Order: General Introduction", in *New Constitutionalism and World Order*, eds. Stephen Gill and A. Claire Cutler (Cambridge: Cambridge University Press, 2014), 1-21, 5.

<sup>51</sup> Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism*, 4.

<sup>52</sup> *Ibid*, 2.

ways through which these ideas take material effect in the operation of institutions beyond the state. What we learn from existing literature in a variety of fields (including critical studies of economic globalisation, critical international political economy, political science, sociology and history) is that neoliberal theorisations of the state and market take effect in processes of economic globalisation, including the creation of economic or financial institutions, agreements, and political formations beyond the state. The creation of these institutions, therefore, contributes towards the separation of politics from the economy and insulates economic decision-making from political interference, including democratic interference.

The creation and operation of institutions beyond the state gives rise to a new constitutional *problématique*. As Saskia Sassen observes, the development of such institutions signals the transferring of decision-making for specific sectors or functions of the economy, such as trade, outside the domain of nation-states.<sup>53</sup> With the creation of institutions beyond the state, legal authority is transferred beyond the national sphere on a sectoral and functional basis. Sectoral, in this instance, refers to a particular sector of the economy – for example, monetary policy, agriculture, the environment or education.<sup>54</sup> Functional claims to legal authority are not limited to one specific sector but in terms of “cross-sectoral policy objectives”.<sup>55</sup> For constitutional scholarship, critical or otherwise, the challenge posed by the sectoral and functional reconfiguration of economic decision-making is to conceptualised constitutional concepts in the face of a paradigm shift pushing constitutionalism beyond the nation-state and towards a globalised and increasingly interconnected world.<sup>56</sup>

Some attempts to conceptualise the sectoral and functional transferring of authority to international, transnational or supranational institutions are limited at describing a system of institutional checks and balances beyond the state that resembled those constitutional structures found within nation states.<sup>57</sup> However, the challenges posed by constitutionalism beyond the state are increasingly recognised. Neil Walker, for example, points out how economic globalisation signals “*the emergence of polities whose posited boundaries are not (or not merely) territorial, but also sectoral or functional. That is to say, claims to ultimate legal authority are no longer limited to (state)*”

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<sup>53</sup> Saskia Sassen, *A Sociology of Globalisation* (New York and London: W. W. Norton & Company, 2007), 5.

<sup>54</sup> Bruno de Witte and Gráinne de Búrca, “The Delimitation of Powers between the EU and its Member States”, in *Accountability and Legitimacy in the European Union*, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 2002), 201-222, 214.

<sup>55</sup> *Ibid.*

<sup>56</sup> Gavin W. Anderson, “Beyond ‘Constitutionalism Beyond the State’”, *Journal of Law and Society* 39, no. 3 (2012), 359-383.

<sup>57</sup> Anne Peters, “Global Constitutionalism”, in *The Encyclopedia of Political Thought*, ed. Michael T. Gibbons (John Wiley & Sons, Ltd, 2015), 1484-1487; “Global Constitutionalism”, Max Plank Institute, accessed 18 August, 2017, <http://www.mpil.de/en/pub/research/areas/public-international-law/global-constitutionalism.cfm>; Anne Peters, “Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures”, *Leiden Journal of International Law* 19, no. 3 (2006), 579-610.

claims to comprehensive jurisdiction over a particular territory, but now also embrace sectorally and functionally limited claims, whether such claims are also territorially limited, as in the EU, or global, as in the WTO.”<sup>58</sup> While Walker may recognise the sectoral and functional reconfiguration of legal authority, his work remains within the boundaries of liberal thought, much like the majority of constitutional theory beyond the state.<sup>59</sup> As a result, the central propositions of liberal thought, including formal individual autonomy, abstract equality before the law, participation through representation and most importantly the division between politics and the economy, are reproduced through these discussions.<sup>60</sup>

For critical scholarship, the challenge posed by constitutionalism beyond the state is not how to reconceptualise modern constitutional concepts in order to capture and describe a global constitutional order but to capture the intertwined relationship between constitutional law and aspects of a neoliberal political economic order. Part of this inquiry is to capture the role of constitutional law in the process of insulating economic decision-making from political interference through the creation of institutions beyond the state. Similar inquiries have been developed in international law. David Kennedy, amongst other international lawyers,<sup>61</sup> indicate how today’s problems are best understood by “thinking of politics and economics as intertwined projects and close collaborators in the distribution of political authority and economic reward”.<sup>62</sup> While Kennedy recognises the need to study the intersection between constitutional law and political economy, another strand of critical international law provides useful insights in the way that constitutionalism beyond the state and its relationship to neoliberalism can be understood. Third World Approaches to International Law (TWAAIL) indicate how economic globalisation acted as a way of recolonization for those non-European states and peoples that gained independence after the second world war. As Chimni observed, international financial institutions or agreements undermine “the autonomy of third world States” as they are deprived of “the authority to undertake the task of redistribution of incomes and resources [due to the] relocation of sovereign economic powers in international trade

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<sup>58</sup> Neil Walker, “The Idea of Constitutional Pluralism”, *The Modern Law Review* 65, no. 3 (2002), 317-359, 346. See also, Neil Walker, “Taking Constitutionalism Beyond the State”, *Political Studies* 56, no. 3 (2008), 519-543, 519; Walker, *The Idea of Constitutional Pluralism*, 317-359, 320.

<sup>59</sup> Christine Schwöbel, “Situating the Debate on Global Constitutionalism”, *International Journal of Constitutional Law* 8, no. 3 (2010), 611-635.

<sup>60</sup> *Ibid.*, 635.

<sup>61</sup> Robert Knox, “Marxist Approaches to International Law”, in *The Oxford Handbook of the Theory of International Law*, eds. Anne Orford, Florian Hoffmann and Martin Clark (Oxford: Oxford University Press, 2016), 306-326; Christine Schwöbel-Patel, “The Political Economy of Global Constitutionalism”, in *Handbook on Global Constitutionalism*, eds. Anthony Lang and Antje Wiener (Cheltenham: Edward Elgar, 2017), 767-794.

<sup>62</sup> David Kennedy, “Law and the Political Economy of the World”, *Leiden Journal of International Law* 26, no. 1 (2013), 7-48, 8.

and financial institutions”.<sup>63</sup> It is precisely this process of severing authority to decide on economic matters that constitutional scholarship seeks to theorise. The challenge, therefore, is to recognise the role of constitutional law in constituting a global political economy where the reconfiguration of legal authority sectorally and functionally contributes towards the division between politics and the economy and insulates economic decision-making from irrational interference.

## 2.2. Constitutionalism beyond the state: locking-in neoliberalism and insulating economic decision-making from political interference.

As the link between neoliberalism and institutions beyond the state has been established above, the aim of this section of the chapter is to identify the role of constitutional law in the process of insulation of economic decision-making from political interference. The work of political economist Stephen Gill provides useful insights in outlining the points of intersection between neoliberalism, institutions beyond the state and constitutional law. As a critical political economist rooted in the Gramscian tradition, Gill traces changes in the discursive formation of global political economy and identifies how social relations are transformed in their structure and language so that they are “conditioned by the long-term commodity logic of capital”.<sup>64</sup> Neoliberalism, for Gill, is both a concept of political economy and a set of social practices.<sup>65</sup> As a concept, neoliberalism provides the “discourse of global governance”.<sup>66</sup> As a set of social practices, neoliberalism is identified in “laws, rules, regulations, policies and institutions”<sup>67</sup> that reflect neoliberal ideas such as “market efficiency, discipline and confidence, and policy credibility and consistency, viewed from the standpoint of both the ideology of sound money”<sup>68</sup> are used in order to regulate economic and social relations. Gill identifies the manifestation of neoliberalism, as a concept, in social practices including legal instruments and continues to identify the effects of employing legally binding instruments as a means of creating and sustaining a neoliberal market.

The intersection between neoliberalism, both as a concept and as a set of social practices, is termed by Gill as the new constitutionalism and it too is understood as a concept “as well as a mode of law and regulation”.<sup>69</sup> As a concept, new constitutionalism “forms the political-judicial

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<sup>63</sup> Bhupinder S. Chimni, “Third World Approaches to International Law: A Manifesto”, *International Community Law Review* 8, no. 1 (2006), 3.

<sup>64</sup> Stephen Gill, “Globalisation, Market Civilisation, and Disciplinary Neoliberalism”, *Millennium: Journal of International Studies* 24, no. 3 (1995), 399-423, 399.

<sup>65</sup> Gill and Cutler, *New Constitutionalism and World Order: General Introduction*, 1-21, 6.

<sup>66</sup> Gill, *Globalisation, Market Civilisation, and Disciplinary Neoliberalism*, 399-423, 406.

<sup>67</sup> Gill and Cutler, *New Constitutionalism and World Order: General Introduction*, 1-21, 7.

<sup>68</sup> Stephen Gill, “The Emerging World Order and European Change: The Political Economy of European Union”, in *New World Order? Socialist Register 1992*, eds. Ralph Miliband and Leo Panitch, Vol. 157 (London: Merlin, 1992), 168.

<sup>69</sup> Gill and Cutler, *New Constitutionalism and World Order: General Introduction*, 1-21, 6.

counterpart<sup>70</sup> to neoliberal discourse. As a mode of law and regulation, new constitutionalism achieves the “reformulation and redefinition of the public sphere and rules for economic policy, according to orthodox market-monetarist postulates in macroeconomics (fiscal and monetary policy) and microeconomics (e.g. trade, labour market and industrial policy)”.<sup>71</sup> In this regard, law performs a disciplining function; it ensures, in other words, the prevalence of neoliberal logic and continuing adherence of governments to this logic.<sup>72</sup> However, new constitutionalism is not restricted to constitutional law. Instead it involves “many political-legal elements and regulatory mechanisms, encompassing hard and soft law that have developed unevenly across space and time.”<sup>73</sup> Due to its rather broad scope new constitutionalism refers to a “combination of various sets of processes”<sup>74</sup> and employs a rather unitary understanding of law; there is no distinction between the many instruments considered by new constitutionalism. Moreover, Gill’s new constitutionalism is criticised as adopting a deterministic approach to law. As Parker notes, “governing technologies such as the law might contribute to the promotion or practical realisation of neoliberal rationalities, they will not necessarily do so”.<sup>75</sup> Despite its shortcomings as a conceptual instrument, Gill’s work on new constitutionalism captures effectively the intersections between neoliberalism, institutions beyond the state and constitutional law.

The first observation identified by Gill is that of separation and insulation of economic decision-making from political interference at the national level. One of the examples used by Gill to establish this argument is the provision of financial assistance to nation-states by these institutions as it is accompanied by certain conditions, also termed as loan conditionality. Debt conditionality is precisely what the term suggests – the provision of debt subject to certain conditions. Introducing loan conditionality is a way of forcing through neoliberal reforms in many contested policy areas including labour law; property rights; competition law; capital mobility; foreign direct investment; tax reform; banking, financial or bankruptcy regulation; and the privatisation of national resources.<sup>76</sup> By withholding parts of the loan, the IMF and World Bank monitor the progress of debtor countries

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<sup>70</sup> Ibid, 6.

<sup>71</sup> Stephen Gill, "New Constitutionalism, Democratisation and Global Political Economy", *Global Change, Peace & Security* 10, no. 1 (1998), 23-38, 30.

<sup>72</sup> Gill and Cutler, *New Constitutionalism and World Order*, 315.

<sup>73</sup> Gill and Cutler, *New Constitutionalism and World Order: General Introduction*, 1-21, 6.

<sup>74</sup> Ibid, 7.

<sup>75</sup> Parker, *Challenging 'New Constitutionalism' in the EU: French Resistance, 'social Europe' and 'soft' Governance*, 397-417, 401. Emphasis in original.

<sup>76</sup> Gill, *New Constitutionalism, Democratisation and Global Political Economy*, 23-38, 26; Scott Greer, "Structural Adjustment Comes to Europe: Lessons for the Eurozone from the Conditionality Debates", *Global Social Policy* 14, no. 1 (2014), 51-71, 53; Sarah L. Babb and Bruce G. Carruthers, "Conditionality: Forms, Function, and History", *Annual Review of Law and Social Science* 4 (2008), 13-29, 16; Devesh Kapur and Richard Webb, "Governance-Related Conditionalities of the International Financial Institutions", *G-24 Discussion Paper Series*, no. 6 (2000).  
<http://www.unctad.org/en/docs/pogdsmdpbg24d6.en.pdf>.

against the conditions set and release parts of the payment according to the successful introduction and enforcement of conditionality.<sup>77</sup> Through legal instruments, such as conditionality, Gill identifies the locking in of neoliberal policies. One of the insights provided by new constitutionalism, therefore, is that the locking in of neoliberal policies consolidates the separation of politics from the economy and the insulation of economic decision-making from political interference. Neoliberal policies conceived and developed within international institutions are then applied by nation-states, often through a relationship of domination, with the effect of limiting the policy approaches available to these states. Hence, the severance of economic authority from the national sphere separates economic decision-making from political or democratic contestation. For the purposes of our discussion, new constitutionalism showcases how the development of institutions on a sectoral and functional basis is in itself a way of separating economic matters from political or democratic contestation and interference and continues to exemplify the use of legal instruments in achieving this.

The second observation is the ability of constitutional law to lock-in neoliberal discourse emphasising “market efficiency, discipline, and confidence; economic policy credibility and consistency; and limitations on democratic decision-making”.<sup>78</sup> Mexico is a good example of how constitutional law can be used to lock-in neoliberalism as 30 amendments were made to Mexico’s revolutionary constitution of 1917 in order to be fully compatible with the NAFTA’s “requirements concerning free movement of goods and services, extended protections for private property and privatization of common lands.”<sup>79</sup> The third observation put forward by Gill is the separation and insulation of economic decision-making from political interference; an observation that is closely linked to the ability of constitutional law to lock-in neoliberal discourse. Certainty, stability, protection of private property and a fettered government that cannot interfere with the market are elements of the neoliberal idea of the state, as outlined above, and these are the conditions that neoliberals seek to establish and preserve through constitutional law.<sup>80</sup>

The example used by Gill to show how constitutional law is employed to create those conditions considered necessary for a market to operate according to the neoliberal economic rationale is that of democratisation.<sup>81</sup> Constitutional revision observed during the last decade of the twentieth century in the developing world was linked to the provision of financial assistance by international

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<sup>77</sup> Greer, *Structural Adjustment Comes to Europe: Lessons for the Eurozone from the Conditionality Debates*, 51-71, 53.

<sup>78</sup> Gill, *Globalisation, Market Civilisation, and Disciplinary Neoliberalism*, 399-423, 412.

<sup>79</sup> Gill and Cutler, *New Constitutionalism and World Order: General Introduction*, 1-21, 6.

<sup>80</sup> Gill, *New Constitutionalism, Democratisation and Global Political Economy*, 23-38, 25.

<sup>81</sup> *Ibid.*

institutions, such as the World Bank and IMF.<sup>82</sup> This period saw the implementation of “a hierarchical system of representation in which the key economic and strategic areas of policy are separated from democratic participation and accountability.”<sup>83</sup> Gill indicates how the division of powers between institutions, a cornerstone of modern liberal democracy, ensured and enforced by a strong judiciary, contributes towards sustaining a stable political environment for the market to develop. Democratisation for Gill is not strengthening the *demos* but an institutional structure that divides power amongst institutions in order to avoid irrational interference in the economy, whether this arises from mass democracy or from the pursuit of private interests. The surge of democratisation and consequent reproduction of liberal democratic ideas installed a system of political rule in countries where the political (im)balance enabled irrational interference in the economy by powerful stakeholders, with the aim of creating and sustaining a neoliberal idea of the state where private individuals could pursue their interests without state intervention.

Furthermore, the establishment of representative democratic systems saw the parallel insulation of economic decision-making from democratic bodies. A fitting example would be the establishment of institutions, such as independent central banks, to ensure that macroeconomic and regulatory policies remain beyond the reach of democratic institutions and in accordance with neoliberal rationale.<sup>84</sup> Therefore, what Gill identifies is the gradual restructuring of those states in the developing world along the lines of a neoliberal rule of law where the state creates the conditions for a neoliberal market, including the protection of property rights and constitutionally locked in macroeconomic goals, but refrains from market-distorting or political interference. In this respect, Gill’s work provides very useful insights as to how neoliberal discourse about the state, adopted and reproduced by institutions beyond the state, takes effect in processes of state restructuring at the national level. Moreover, new constitutionalism showcases how constitutional law can give practical realisation to neoliberal political economic thought, specifically the separation and insulation of economic decision-making from political interference.

Drawing on the discussion above, the relationship between institutions beyond the state and constitutional law and the separation and insulation of economic decision-making from political interference is identified along the three observations put forward by the new constitutionalism. First, the development of institutions beyond the state on a sectoral and functional basis is in itself a way of separating economic matters from political or democratic contestation and interference. Second, constitutional law locks in neoliberal discourse as constitutions can be used to ensure

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<sup>82</sup> Gill draws on the World Bank, World Development Report 1997: The State in a Changing World. See also: Ibid.

<sup>83</sup> Ibid, 27.

<sup>84</sup> Ibid, 25.

certain economic conditions. Third, constitutional law can insulate institutions from political interference, either through the division of power amongst state institutions or through affording institutions independence. These observations indicate how constitutional law can be used to create a scrutiny lacuna – an insulated space for economic decision-making where economic actors and neoliberal discourse are protected from opposing objectives or ideas.

### 3. Neoliberalism and judicial review: a further parameter to the relationship between neoliberalism and constitutional law.

Up until this point, the chapter considered the intersection between neoliberal political economic thought, institutions beyond the state and constitutional law by examining how constitutional rules contribute to the promotion or practical realisation to the separation and insulation of economic decision-making from political interference. Both sections above consider how constitutional law can give effect to a legal framework for the neoliberal market to operate; whether through the creation of institutions that have a specific mandate, such as the pursuit of a macroeconomic target; the division of power between institutions so as to avoid irrational interference in the economy; the insulation of institutions from democratic interference; and the entrenchment of property rights in constitutional law. Hence, in the sections above, the chapter indicated how “the juridical brings form to the economic”.<sup>85</sup> However, this is only one side of the coin as neoliberalism and constitutional law also intersect at another point.

In order to fully appreciate the relationship between neoliberalism and constitutional law, critical scholarship must also understand the ways through which legal reasoning and the exercise of judicial review complement the processes identified above. As Wendy Brown indicates:

*“law and legal reasoning not only give form to the economic, but economize new spheres and practices. In this way, law becomes a medium for disseminating neoliberal rationality beyond the economy, including to constitutive elements of democratic life. More than simply securing the rights of capital and structuring competition, neoliberal juridical reason recasts political rights, citizenship, and the field of democracy itself in an economic register; in doing so, it disintegrates the very idea of the demos. Legal reasoning thus complements governance practices as a means by which democratic political life and imaginaries are undone.”<sup>86</sup>*

In the above quote, Brown extends the scope of inquiry beyond the structuring of markets or institutions to consider how legal reason complements the practical realisation of neoliberal political

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<sup>85</sup> Foucault, *The Birth of Biopolitics: Lectures at the Collège De France, 1978-1979*, 60.

<sup>86</sup> Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015), 151.

economic thought through constitutional law. To fully understand the relationship between neoliberalism and constitutional we need to appreciate the interaction between constitutional instruments, such as those mentioned above, and the parallel operation of judicial review. How, in other words, the interpretation and application of law complements neoliberal structures of governance.

## Conclusion

In the course of this chapter, I considered the relationship between neoliberalism and constitutional law by bringing together often unconnected strands of critical thought. The chapter drew on existing accounts on the intellectual history of neoliberalism to identify the main elements of neoliberal political economic thought: to separate and insulate economic decision-making from political interference; what I term as a *scrutiny lacuna*. The commitment of neoliberal political economy to create and sustain a scrutiny lacuna within which economic decision-making can unfold without irrational political interference was traced in the development of economic globalisation and the parallel development of constitutionalism beyond the state. Through the creation of international economic institutions, legal authority was transferred beyond the state on a sectoral and functional basis, separating in this way economic decision-making from political interference at the national level. The operation of institutions beyond the state reproduces neoliberal political economic thought by promoting the restructuring of states and locking in neoliberal market objectives through constitutional law. Thus, the relationship between neoliberalism and constitutional law is observed in the separation and insulation of economic decision-making by transferring economic deliberation beyond the state; the locking in of neoliberalism through constitutional provisions; and the insulation of economic decision-making through institutional structures. The chapter continued to identify a further parameter to this relationship by recognising the complementary role of judicial review in neoliberal processes. While the chapter does account for role of constitutional law in realising neoliberal political economic thought, it is also pointed out that constitutional law “*necessarily do so*”.<sup>87</sup> As Parker put it, “constitutionalism is not something negative per se; constitutions are themselves open to contest and reform” and may be compatible with other political visions. The relationship between neoliberalism and constitutional law identified above offers an insight into the intersection between constitutional rules and political economy but offers only a partial picture of the operation of constitutional law.<sup>88</sup> To remedy this shortcoming, and avoid a deterministic view of constitutional law, the next chapter identifies the relationship between

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<sup>87</sup> Parker, *Challenging 'New Constitutionalism' in the EU: French Resistance, 'social Europe' and 'soft' Governance*, 397-417, 399.

<sup>88</sup> *Ibid.*

neoliberalism and European constitutionalism by drawing upon the observations put forward in this chapter and continues to identify how neoliberalism is contested through constitutional law.

## Chapter 2 – European constitutionalism as a space for constitutional conflict

This chapter sets out to consider the relationship between neoliberalism and European constitutionalism prior to the Eurozone crisis. More specifically, the chapter considers how central elements of neoliberal political economic thought, as identified in Chapter 1, find expression in European constitutional law. However, in identifying how the separation and insulation of economic decision-making from political interference is achieved through law, the chapter also identifies the operation of constitutional objectives that are in direct conflict with neoliberal ideas. What the chapter argues, therefore, is that prior to the Eurozone crisis, European constitutionalism was as a space for constitutional conflict between neoliberal and opposing ideas, objectives and practices.

In Chapter 1, I considered the relationship between neoliberalism and constitutional law. By examining the intellectual history of neoliberalism, I indicated that neoliberal political economic thought focuses on the separation between politics and the economy and insulation of economic decision-making from political interference, thus proposing the creation of an insulated space for institutions to operate – what I identified as a scrutiny lacuna. The intersection between neoliberalism and constitutional law was identified at creating and sustaining the conditions neoliberals wish to see. Once the relationship between neoliberalism and constitutional law was identified, the chapter examined how constitutional law separates and insulates economic decision-making from political interference in the context of constitutionalism beyond the state. Drawing on existing critical literature showcasing the relationship between neoliberalism and institutions beyond the state, the chapter considered the role of constitutional law in constituting a global political economy where the reconfiguration of legal authority sectorally and functionally contributes towards the creation of a scrutiny lacuna. This was achieved by examining the new constitutionalism, as developed by Stephen Gill. The new constitutionalism showcases three aspects of the relationship between neoliberalism and constitutional law beyond the state. First, how the development of institutions on a sectoral and functional basis is in itself a way of separating economic matters from political or democratic contestation and interference. Second, that constitutional law can be used as a mechanism to lock-in neoliberal discourse and, finally, to create institutions that are insulated from political interference. A fourth parameter to the relationship between neoliberalism and constitutional law was also outlined at the end of Chapter 1 – that of judicial review. In order to fully understand how neoliberal political economic thought is realised through constitutional law, we must also examine how the exercise of judicial review complements the practical realisation of neoliberal political economic thought.

In this chapter, I draw upon observations from Chapter 1, and consider the extent to which European constitutionalism gives effect to the separation and insulation economic decision-making from political interference; specifically, the extent to which economic decision-making operates within a scrutiny lacuna. In the previous chapter, the relationship between neoliberalism and constitutional law was identified in three different sites: the intellectual heritage of neoliberalism, the operation of constitutional law beyond the state and in the exercise of judicial review. Similarly, in this chapter I examine three different sites of analysis: theories of European constitutionalism; the institutional structure of the European Union; and the exercise of judicial review by the ECJ. In each of these sites of analysis, I examine how constitutional law contributes to the promotion and practical realisation of neoliberal political economic thought. However, as indicated both in the Introduction and Chapter 1, constitutional law may “contribute to the promotion or practical realisation” of neoliberalism but it does “not *necessarily* do so”.<sup>1</sup> Parallel to the practical realisation of neoliberalism through constitutional law, the chapter identifies the existence of conflicting objectives that also operate through law. For this reason, the chapter suggests an understanding of European constitutionalism prior to the Eurozone crisis as a space whereby multiple constitutional objectives operate and, by extension, come into conflict with each other.

To pursue this argument, the chapter proceeds in three sections. In each section, the chapter identifies the role of constitutional law in neoliberal processes establishing the separation and insulation of economic decision-making from political interference and opposing constitutional objectives. Therefore, in the first section, I consider the extent to which theoretical understandings of European constitutional law reflect and consolidate the neoliberal political economic thought, but it also accounts for competing objectives. The idea of conflict persists through the second section of the chapter, as I examine Europe’s institutional structure; specifically, how the Community and intergovernmental methods reflect and consolidate neoliberal visions of the state and government. The section continues to examine how certain developments in the institutional structure of the EU – including the strengthening of the European Parliament and introducing measures for improved citizen input, accountability and transparency in the process of decision-making – create small cracks in the wall of insulation. Lastly, the chapter considers how the exercise of judicial review by the Court of Justice of the European Union (CJEU) complements the practical realisation of neoliberal political economic thought. Once again, I suggest that European constitutionalism can be contemplated as a space for constitutional conflict by identifying the operation of other

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<sup>1</sup> Owen Parker, “Challenging ‘New Constitutionalism’ in the EU: French Resistance, ‘social Europe’ and ‘soft’ Governance”, *New Political Economy* 13, no. 4 (2008), 397-417, 401. Emphasis in original.

constitutional objectives countering neoliberalism in the jurisprudence of the European Court of Justice.

## 1. European integration and the separation of politics from the economy

From its very inception, the European Union was developed on a sectoral and functional basis. As every text-book on the European Union will indicate, the origins of the integration project can be traced back to the end of the Second World War where European nations, devastated from the destructive effects of two world wars within a few decades, were determined to set up political mechanisms to prevent future conflict between them.<sup>2</sup> One of the first actions adopted by the six founding countries<sup>3</sup> was to create a common market for vital raw material, such as coal and steel, with the aim of increasing interdependence between European countries.<sup>4</sup> In a celebrated and much quoted declaration, Robert Schuman indicated how economic integration in the area of coal and steel would create a common supply for Europe's industries that would make any war between France and Germany "not merely unthinkable, but materially impossible".<sup>5</sup> The development of European integration, following the Treaty Establishing the European Coal and Steel Community, continued with the signing of the two Treaties establishing an Economic Community<sup>6</sup> and the Atomic Energy Community.<sup>7</sup> Ever since, the two communities grew and developed through different Treaties and agreements<sup>8</sup> leading to what we now identify as the European Union. As a result, European integration proceeded on a sectoral basis (economic integration) and with the functional aim of setting up a common market. The neoliberal logic of separating politics from the economy through the creation of institutions beyond the state informed the development of European integration on a sectoral and functional basis since its very inception. As Majone indicates, the European Communities' founding fathers recognised that "in a world of sovereign states, international economic integration is feasible only if economics and politics are kept as separate as possible."<sup>9</sup> Majone's remarks about the centrality of separation of politics and the economy are indicative of the neoliberal political economic outlook of European integration as the sectoral and

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<sup>2</sup> Examples of European cooperation in the immediate aftermath of WW II the Organisation for European Economic Cooperation (1948) which administered international (USA) aid, the Western European Union (1948, 1954) aiming at the prevention of another European war and, finally, the Council of Europe (1949), founded in order to protect fundamental human rights.

<sup>3</sup> The six founding states are: Belgium, France, West Germany, Italy, the Netherland and Luxembourg.

<sup>4</sup> Treaty Establishing the European Coal and Steel Community (1951).

<sup>5</sup> Robert Schuman, "Declaration of 9 May 1950: The Schuman Plan for European Integration" 9 May 1950, 1950). [https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration\\_en](https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en).

<sup>6</sup> Treaty Establishing the European Economic Community (1957).

<sup>7</sup> Treaty Establishing the European Atomic Energy Community (1957).

<sup>8</sup> Some of the main agreements include the Single European Act (1987); Treaty of Maastricht (1992); Treaty of Amsterdam (1997); Treaty of Nice (2001); Treaty of Lisbon (2009).

<sup>9</sup> Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2009), 34.

functional division of constitutional authority sustains a continuing separation of economic activity from political interference.

Drawing on the relationship between neoliberalism and constitutional law beyond the state identified in Chapter 1, the aim of this section is to consider how theoretical developments of European constitutionalism “reflect and consolidate real processes”,<sup>10</sup> specifically the realisation of neoliberal political economic thought including the separation of politics from the economy and the insulation of economic decision-making from political interference. Towards this end, I conduct an examination of theoretical resources explaining the development of European integration and European constitutionalism. Drawing upon long-standing conceptualisations of European integration, the section indicates that from its very inception, European constitutional theory reflects and consolidates elements of neoliberal political economic thought. By doing so, it positions the development of Europe’s constitution within the broader neoliberal political economic project. However, the section also identifies how competing claims and constitutional objectives can be identified within Europe’s constitution. As a result, European constitutionalism is not interpreted solely through the prism of neoliberalism and constitutional law but, instead, as a space for constitutional conflict whereby neoliberal political economic objectives may be effectuated and at the same time contested.

### 1.1. The continuing relevance of ordoliberalism: Constitutionalising the separation and insulation of economic decision-making from political interference

Ordoliberals were one of the first, if not the first, school of constitutional thought to develop a comprehensive theory of Europe’s constitution in relation to the common market, providing a theory of the constitution that is distinct from national constitutions and the statist constitutional model. Before considering the ordoliberal idea of an economic constitution and how it was applied to the European Communities, it is important to indicate that ordoliberalism is “not distinct from neoliberalism”.<sup>11</sup> Instead, it is a variant of neoliberalism in so far as the two schools of thought are concerned with the conditions of possibility for functioning markets.<sup>12</sup> As indicated in Chapter 1, neoliberalism considers “political, social and legal preconditions of functioning markets”<sup>13</sup> and in doing so considered the position of governments *vis-à-vis* the market. However, neoliberal thought

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<sup>10</sup> Emiliios Christodoulidis, “A Default Constitutionalism? A Disquieting Note on Europe’s Many Constitutions”, in *The Many Constitutions of Europe*, eds. Kaarlo Tuori and Suvi Sankari (Farnham: Ashgate, 2010), 21-48, 33.

<sup>11</sup> Angela Wigger, “Debunking the Myth of the Ordoliberal Influence on Post-War European Integration”, in *Ordoliberalism, Law and the Rule of Economics*, eds. Josef Hien and Christian Joerges (Oxford: Hart Publishing, 2017), 161-177, 169.

<sup>12</sup> Thomas Biebricher, “Ordoliberalism as a Variety of Neoliberalism”, in *Ordoliberalism, Law and the Rule of Economics*, eds. Josef Hien and Christian Joerges (Oxford: Hart Publishing, 2017), 103-113, 105.

<sup>13</sup> *Ibid.*, 105.

provided a number of varying responses to its core question – the conditions of possibility for a free market – and while the Chicago School may be the most clearly associated body of thought in the way we understand neoliberalism today, other varieties also developed during the same period. Ordoliberalism is one of them and, for this reason, the neoliberal political economic philosophy as outlined in Chapter 1, accounts for the “plural set of ideas that have unfolded over time through polycentric controversies from within its ideological realm as well as from outside critiques”.<sup>14</sup> Positioning ordoliberalism within neoliberal political economic thought allows us to understand how ordoliberal theoretical developments in European constitutionalism reflect and consolidate real processes, specifically the realisation of neoliberal political economic thought including the separation of politics from the economy and the insulation of economic decision-making from political interference.

Born in Freiburg, by the economist Walter Eucken and lawyers Franz Böhm and Hans Grossmann-Doerth<sup>15</sup>, ordoliberalism is an ideological movement that responded to the social conditions pertaining in Germany at the time of the interwar period, also known as the Weimar years. Ordoliberal positions are, therefore, highly influenced by the socio-economic conditions of the time and, more importantly, by the failure of the Weimar Republic to maintain social stability. One important factor in the production of social instability, according to ordoliberal thought, was the misuse of economic freedom both by owners of capital and by owners of labour.<sup>16</sup> For example, the former engaged in acts of price-fixing or protectionism while the latter engaged in strike action or “force the state to concede welfare”.<sup>17</sup> In response to this observation, ordoliberals concluded that the economy cannot be left to operate freely.<sup>18</sup> Instead, of unbounded economic freedom they proposed order; *ordo* in Latin. According to ordoliberal theory, an ordered economy requires a strong state to provide the framework for sustaining the “price mechanisms of free competition”.<sup>19</sup> The role of the state is to create and guarantee “the legal framework for a competence-based economy [and] withstand the pressures of rent-seeking interest groups calling for market-distorting interventions”.<sup>20</sup> State intervention is therefore, not completely excluded but is desired only in order to correct market imbalances and ensure competition. Consequently, the elements of neoliberal political economic thought identified in Chapter 1 of the thesis converge with ordoliberal thinking

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<sup>14</sup> Wigger, *Debunking the Myth of the Ordoliberal Influence on Post-War European Integration*, 161-177, 169.

<sup>15</sup> Gerhard Schnyder and Mathias M. Siems, “The Ordoliberal Variety of Neoliberalism”, in *Banking Systems in the Crisis: The Faces of Liberal Capitalism*, eds. Suzanne J. Konzelmann and Marc Fovargue-Davies (Abingdon: Routledge, 2013), 250-268.

<sup>16</sup> Werner Bonefeld, “Freedom and the Strong State: On German Ordoliberalism”, *New Political Economy* 17, no. 5 (2012), 633-656, 638.

<sup>17</sup> *Ibid*, 638.

<sup>18</sup> *Ibid*, 634.

<sup>19</sup> Kaarlo Tuori, *European Constitutionalism* (Cambridge: Cambridge University Press, 2015), 131.

<sup>20</sup> *Ibid*, 131.

about the state and its relationship to the market. As a variant of neoliberal thought, both the separation of politics from the economy and insulation of economic decision-making from irrational interference are central elements of ordoliberal thinking.

The importance of ordoliberal thought for the purposes of our discussion, is the elaborated conceptualisation of constitutional law and its relationship to the creation of economic order, most noticeable in the ordoliberal concept of an ‘economic constitution’ (*wirtschaftsverfassung*). As a constitutional concept, the economic constitution creates and guarantees (locks-in) a legal framework in which the economy can operate and “define the role of government in the economy”.<sup>21</sup> At the same time, though, the economic constitution carries a normative position in favour of an economic model that elevates competition as the main market characteristic. Thus, in the ordoliberal tradition, the economic constitution articulates a comprehensive decision (*Gesamtentscheidung*) in favour of an economic system and sets a clear priority of policy objectives; what ordoliberals termed as *ordnungspolitik*. Therefore, the economic constitution firstly sets up the conditions for the realisation of a free market based on competition and, secondly, ensures the viability of those conditions by setting a clear hierarchy of policy objectives with competition serving as the guiding norm.

Based on the notion of an economic constitution, ordoliberals interpret the Treaty of Rome as a framework for a common market and identify competition as the mechanism through which economic actors can exercise self-control.<sup>22</sup> Such a reading implies “a policy-level conclusion [in favour of competition] deriving from the constitutional *Gesamtentscheidung* for an open market economy with free competition.”<sup>23</sup> As competition policy is afforded constitutional primacy, other policy fields are “expected to succumb to the limitations warranted by the superior policy field”.<sup>24</sup> According to an ordoliberal reading, the Treaty of Rome elevated competition policy to a constitutional norm and subordinated all law-making, including national legislation, to the constitutional decision for a free market with undistorted competition.<sup>25</sup> As a result, the constitution operates to lock-in an economic model and protect economic conditions from irrational

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<sup>21</sup> Johannes R. B. Rittershausen, “The Postwar West German Economic Transition: From Ordoliberalism to Keynesianism”, *IWP Discussion Paper, no. 2007/1* (2007), 11. See also, Lars P. Feld, Ekkehard A. Köhler and Daniel Nientiedt, “Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe”, *Freiburger Diskussionspapiere Zur Ordnungsökonomik* 15/04 (2015). <https://www.econstor.eu/bitstream/10419/111262/1/827491085.pdf>.

<sup>22</sup> Manfred E. Streit and Werner Mussler, “The Economic Constitution of the European Community: From ‘Rome’ to ‘Maastricht’”, *European Law Journal* 1, no. 1 (1995), 5-30, 14.

<sup>23</sup> Tuori, *European Constitutionalism*, 160. Emphasis added.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

interference through constitutional rules regulating the degree and nature of state, or private, interference.

Many ongoing debates in European constitutionalism concern the influence of ordoliberalism and the extent to which Europe's constitution can be understood through the scope of ordoliberal theory.<sup>26</sup> As a major contributor "to German ideational politics",<sup>27</sup> ordoliberals influenced political developments during the inter-war period as well as in the aftermath of the Second World War,<sup>28</sup> both in terms of Germany's domestic politics and in relation to the articulation of a German position in negotiating European Treaties.<sup>29</sup> While ordoliberals did influence the development of European constitutionalism, an ordoliberal reading of Europe's constitution may not be sustainable, as the chapter will discuss later. However, it is important to see how theorising the Treaty of Rome as an economic constitution reflects real processes of separation and insulation of economic decision-making from political interference during the development of European constitutionalism.

Treaty of Rome provisions echo the centrality of competition and separation of politics from economic activity. For example, Article 3 of the Treaty of Rome provides for the creation of a "system ensuring that competition in the common market is not distorted" while a number of other Treaty provisions signal the centrality of competition as a market mechanism.<sup>30</sup> Moreover, a series of 'negative' integration rules were developed by the Commission and ECJ aiming in the dissolvement of barriers between states in order to open up the market and enhance competition. Examples of negative integration include policies aimed towards suspending existing barriers to trade, such as tariffs,<sup>31</sup> but also barriers to the free movement of persons, services and capital.<sup>32</sup> As Majone highlights, the development of EEC provisions including "rules on state aids to industry and on national procurement policies [and] requirements for the removal of distortions of competition

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<sup>26</sup> Indicatively, see: Josef Hien and Christian Joerges, eds., *Ordoliberalism, Law and the Rule of Economics* (Oxford and Portland: Hart Publishing, 2017); Christian Joerges, "The Overburdening of Law by Ordoliberalism and the Integration Project", in *Ordoliberalism, Law and the Rule of Economics*, eds. Josef Hien and Christian Joerges (Oxford and Portland: Hart Publishing, 2017), 179-199; Wigger, *Debunking the Myth of the Ordoliberal Influence on Post-War European Integration*, 161-177.

<sup>27</sup> Christian Joerges, "The Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process", *Comparative Sociology* 9, no. 1 (2010), 65-85, 69.

<sup>28</sup> As Dale and El-Enany indicate, well-known ordoliberals served in governmental and ministerial positions; Ludwig Erhard was Minister of Economic Affairs, Walter Eucken was advisor to the U.S. and French occupying forces, Franz Böhm was minister of Cultural Affairs in Hesse and Wilhelm Röpke was advisor to Chancellor Adenauer. See: Gareth Dale and Nadine El-Enany, "The Limits of Social Europe: EU Law and the Ordoliberal Agenda", *German Law Journal* 14, no. 5 (2013), 613-650, 616.

<sup>29</sup> Again, Dale and El-Enany indicate the influence of Müller-Armack, who served under Ludwig Erhard in the Ministry of Financial Affairs, in developing the German policy papers that were then incorporated, whether partly or in full, in the Treaty of Rome. See: *Ibid*, 616.

<sup>30</sup> See the discussion in: Streit and Mussler, *The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'*, 5-30.

<sup>31</sup> Article 3(a) TEEC.

<sup>32</sup> Article 3(c) TEEC.

caused by state regulation or resulting from the existence of public-owned companies ... point in the direction of a far-reaching separation of state power from market power.”<sup>33</sup> What we observe, therefore, is the conceptualisation of an internal market with “a clear demarcation of the private and public sphere”<sup>34</sup> and the limitation of public intervention in matters concerning the common market through competition law. More importantly, though, we observe how the framework of a common market is elevated to a constitutional objective of the Community with the effect of treating economic provisions as higher, constitutional law.

Whether the development of competition rules warrants reading the Treaty of Rome as an ordoliberal economic constitution is, however, contested. Tuori goes at some length to counter the ordoliberal claim that the Treaty of Rome prioritises “a particular model of market economy at both national and European levels.”<sup>35</sup> Instead, he argues that the Treaty of Rome “manifests neutrality with regard to models of economy ... [as it does not] prioritize a particular model of market economy or a particular variety of capitalism”.<sup>36</sup> Support for this argument can be found in a range of Treaty provisions that hinder competition, including industrial policy,<sup>37</sup> agriculture<sup>38</sup> and transport,<sup>39</sup> along with some exceptions on the existence of cartels<sup>40</sup> or abuse of market<sup>41</sup> dominance. Moreover, several other Treaty provisions contradict the basic ordoliberal premise for a comprehensive decision that elevates competition policy above all other considerations. These include provisions enabling state monopolies;<sup>42</sup> derogations from competition when this was for “undertakings entrusted with the operation of services of general economic interest”,<sup>43</sup> and provisions that do not “prejudice the rules in Member States governing the system of property ownership”.<sup>44</sup> As a result, Tuori argues that the prioritization of competition is “difficult to reconcile with the Treaty of Rome”<sup>45</sup> and concludes that competition was “subordinated to the task of establishing and maintaining a common (single) market” and not vice-versa.<sup>46</sup> Without a conclusive direction set by the Treaty of Rome on the kind of economic system to be adopted, the degree of government

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<sup>33</sup> Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, 34.

<sup>34</sup> Streit and Mussler, *The Economic Constitution of the European Community: From ‘Rome’ to ‘Maastricht’*, 5-30, 14.

<sup>35</sup> Tuori, *European Constitutionalism*, 152.

<sup>36</sup> *Ibid*, 151.

<sup>37</sup> Article 60 TEEC.

<sup>38</sup> Title II – Agriculture, TEEC.

<sup>39</sup> Title IV – Transport, TEEC.

<sup>40</sup> Article 85, TEEC.

<sup>41</sup> Article 86, TEEC.

<sup>42</sup> Article 37 TEEC.

<sup>43</sup> Article 90(2) TEEC.

<sup>44</sup> Article 222 TEC. Commenting on this provision, Tuori indicates that it may be “questioned whether the Court still adheres to a neutral position vis-à-vis public ownership. See for a recent ruling on Art.345 TFEU (Previous Art.222 TEEC) Joined Cases C-105 and C-107/12 *Essent and Others*, judgment of 22 October 2013.

<sup>45</sup> *Ibid*, 158.

<sup>46</sup> *Ibid*, 159.

intervention remained a contested question in the formative years.<sup>47</sup> Despite the development of competition rules and the resulting separation of economic activity from political interference, an ordoliberal reading of the European economic constitution cannot be supported as *ordnungspolitik* is not imposed by the Treaty.<sup>48</sup> Looking beyond the Treaty of Rome and the development of European constitutionalism through the Treaty of Maastricht, the expansion of Union competences in social policy further diluted the ordoliberal vision of a competition-focused common market.<sup>49</sup> Thus, the economic debate is not foreclosed, as ordoliberals would argue, “in favour of a free market economy relying on performance based competition”.<sup>50</sup> Instead, debates about the degree of government intervention but, also, about the relationship between economic and other objectives – whether these are social, cultural or political – remained active throughout the development of European constitutionalism.

It may be true that Europe’s common market cannot be considered as an ordoliberal economic constitution *par excellence*, but the influence of ordoliberalism on European constitutionalism is not negligible. The continuing relevance of ordoliberalism in the relationship between neoliberalism and European constitutionalism embedding the idea of constitutionally separating economic activity from other objectives within Europe’s constitutional framework and provisions. The constitutional separation between economic aims, such as the creation of a common market and the protection of competition, elevates economic objectives to constitutional norms with the effect of insulating economic decision-making from other considerations, including redistribution, social provisions or political participation. However, the existence and operation of opposing economic objectives, as indicated above, stipulates a persistent conflict regarding the underlying economic theory of European integration and, by extension, of European constitutional law.

## 1.2. A dual polity: The separation of politics from the economy and Europe’s democratic settlement

As indicated in the discussion above, one of the main influences of neoliberal thought, including ordoliberalism, is the constitutional separation of the economy from political interference. This is reflected in the conceptualisation of the European Communities “*according to principles of a dual*

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<sup>47</sup> Tuori identifies three competing theories. First, the competition model, akin to the ordoliberal tradition, that distrusts regulatory power and hands all organising power to market mechanisms such as competition. Second, the centralized model argues for the transferring of regulatory capacities from national to supranational bodies through negative integration, replicating in this way state regulatory powers at the Community level. Third, the decentralised model supports the retainment of regulatory powers at the national level for the achievement of market-correcting interventions. See *Ibid*, 155.

<sup>48</sup> For a similar argument see also: Richard Hyman, “Trade Unions, Lisbon and Europe 2020: From Dream to Nightmare”, *LEQS Discussion Paper Series, Paper no. 45*. (2011).

<sup>49</sup> Christian Joerges and Florian Rödl, “Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval”, *European Law Journal* 15, no. 1 (2009), 1-19.

<sup>50</sup> Tuori, *European Constitutionalism*, 136.

*polity*".<sup>51</sup> Based on the neoliberal idea that a market consists of an apolitical institution that should be left to operate on its own logic, the European Communities were granted exclusive competences in those areas of economic activity that are concerned with market conditions.<sup>52</sup> These include, trade barriers, rules of competition, or product regulations.<sup>53</sup> At the same time, social and fiscal policy considerations, as well as redistributive methods through tax rates, were reserved at the national level. While this division was premised on the idea that the common market could achieve a "balancing act between the market and the social dimension",<sup>54</sup> it also reflects a long-standing neoliberal belief that the market operates more efficiently when irrational interference, such as redistributive policies, are avoided. Based on the dual polity approach, therefore, a democratic settlement is achieved by retaining all those contested social, redistributive or fiscal policies in need of democratic legitimation at the national level and shifting all those technical, apolitical policy decisions to a supranational centre.

Due to the dual polity approach, democratic decision-making and legitimation was deemed relevant only for the adoption of redistributive politics and, thus, was retained at the national level. Instead of operating through a democratic logic of decision-making, the supranational realm was embedded with a technocratic logic of decision-making. This was premised on the proposition that economic policy could be pursued by technocrats based on economic principles such as the improvement of competition or efficiency, immune from any social-policy considerations. Consequently, the ability of Union institutions to exercise legal authority rests on the idea of effective governance. Fritz Scharpf's concept of output legitimacy is mostly employed as a way to capture this mode of legitimation, nonetheless other terms, such as the functional justification of authority, are also used to describe the same process.<sup>55</sup> In brief, output legitimacy describes the legitimation of power based on the ability of an institution or government to "effectively promote the common welfare of the constituency in question".<sup>56</sup> As output legitimacy is orientated towards achieving greater efficiency, "policies are claimed to be legitimate not because they express the will of the people or their representatives, but because they are supposed to make everyone better off".<sup>57</sup> It is contrasted with the idea of input legitimacy whereby the exercise of political power is

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<sup>51</sup> Joerges, *The Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, 65-85, 70.

<sup>52</sup> See Perry Anderson, *The New Old World* (London: Verso Books, 2009), 102.

<sup>53</sup> Article 3 TFEU (Exclusive competence); Article 4 TFEU (Shared competence); Article 5 TFEU (Competence to support, coordinate or supplement); Article 6 TFEU (Competence to provide arrangements within which EU Member States must coordinate policy).

<sup>54</sup> László Andor, "Building a Social Market Economy in the European Union" (Manchester Business School, European Commission, 20 October, 2011).

<sup>55</sup> Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford: Oxford University Press, 2016), 88.

<sup>56</sup> Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999), 6.

<sup>57</sup> Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*, 93.

legitimated through procedural means set up to ensure citizen participation or representation and the curtailment of political force through checks and balances.

As authority is “justified by a claim to govern effectively”,<sup>58</sup> output legitimacy is often linked to “specific *teloi* to be achieved”.<sup>59</sup> Any ceding of sovereignty and legal authority by Member States is explained and justified on the realisation of a specific *telos*; in the case of the European Union, the *telos* towards which economic integration is headed is the achievement of a common market where public goods can be produced much more efficiently through a collection of states.<sup>60</sup> A competitive common market, is argued to be better equipped to respond to collective issues such as “the pressures of global economic interdependence, project their collective influence abroad, coordinate labour and other regulatory standards, and address shared challenges such as environmental stewardship.”<sup>61</sup> Enhancing competition and regulating economic or financial exchange are means to achieving the *telos* of a common market: to enhance economic conditions and achieve a better standard of living. It is the delivery (output) of this *telos* that acts as the central legitimating function of European integration and constitutional structure.<sup>62</sup>

Therefore, by disembedding the common market from any social or other considerations, the European Economic Community was understood as a “market without a state”<sup>63</sup> not in need of democratic legitimation. Similarly, economic policy decisions adopted by the Communities are also considered as “non-political in the sense that [they are] not subject to political interventions.”<sup>64</sup> What these discussions indicate, in very clear terms, is that the European Union was never meant to be democratic,<sup>65</sup> to the extent that the whole discussion of a democratic deficit is, in fact, based on a misunderstanding.<sup>66</sup> Andrew Moravcsik, for example, argues that the functions performed by the EU (central banking, constitutional adjudication, civil prosecution, economic diplomacy and technical administration) are of “low electoral salience commonly delegated in national systems, for normatively justifiable reasons”.<sup>67</sup> These normatively justifiable reasons were discussed in the first

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<sup>58</sup> Ibid, 6.

<sup>59</sup> Ibid, 88.

<sup>60</sup> Ibid, 88.

<sup>61</sup> Ibid, 88.

<sup>62</sup> Anand Menon and Stephen Weatherill, “Transnational Legitimacy in a Globalising World: How the European Union Rescues its States”, *West European Politics* 31, no. 3 (2008), 397-416., 402.

<sup>63</sup> Christian Joerges, “States without a Market? Comments on the German Constitutional Court’s Maastricht-Judgement and a Plea for Interdisciplinary Discourses”, *European Integration Online Papers (EIoP)* 1, no. 20 (1997).

<sup>64</sup> Joerges, *The Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, 65-85, 70.

<sup>65</sup> Joseph HH Weiler, “Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay”, in *Philosophical Foundations of European Union Law*, eds. Julie Dickson and Pavlos Eleftheriadis (Oxford: Oxford University Press, 2012), 137-158.

<sup>66</sup> Anderson, *The New Old World*, 101.

<sup>67</sup> Andrew Moravcsik, “In Defense of the “Democratic Deficit”: Reassessing Legitimacy in the European Union”, *Journal of Common Market Studies* 40, no. 4 (2002), 603-624, 603.

chapter of the thesis and include: claims to efficiency of market forces and inability of political institutions to match market mechanisms; the bias or rent-seeking tendencies of political representation; the need for unbiased representation (avoid tyranny of the majority); the ignorance or irrationality of citizens in technical matters and, consequently, the need for technocratic decision-making in advanced capitalist democracies. On that account, Moravcsik's central claim is that the EU was never meant to be democratic – it was not conceived on the basis of plebiscitary or parliamentary democracy but on the “real-world practices” and “life facts” of governmental practices in “advanced industrial democracies” where “delegation and insulation are wide-spread trends”.<sup>68</sup> For these reasons, Moravcsik concludes that “forcing participation is likely to be counterproductive, because the popular response is condemned to be ignorant, irrelevant and ideological”,<sup>69</sup> but also bound to fail because “it runs counter to our consensual social scientific understanding of how advanced democracies actually work”.<sup>70</sup> It must be clarified that my intention is to use Moravcsik *against* Moravcsik, in order to highlight that the separation and insulation of economic decision-making from political interference, including democratic participation, is not a happenstance or an undesirable by-product of an imperfect Union. Instead, it is a central characteristic of the EU's integration rationale.

### 1.3. Sectoral constitutionalism and Europe's many constitutions: sustaining conflict between opposing constitutional objectives

Tuori's concept of Europe's many constitutions takes the sectoral and functional basis of integration as its point of departure. The first distinguishing characteristic of European constitutionalism identified by Tuori, is the absence of a founding moment and a single source of constitutional authority. Instead of identifying a founding constitutional moment, he argues that European constitutionalism is a “multi-dimensional and multi-temporal process”<sup>71</sup> occurring through a series of constitutional moments or constitutional speech acts.<sup>72</sup> Examples include the signing of Treaties, Treaty amendments; judgments of national and supranational courts; acts of EU institutions such as the Commission, the Council, the ECB; and the constitutional discourse

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<sup>68</sup> Ibid, 605.

<sup>69</sup> Andrew Moravcsik, "What can we Learn from the Collapse of the European Constitutional Project?" *Politische Vierteljahresschrift* 47, no. 2 (2006), 219-241, 227.

<sup>70</sup> Ibid, 221. See also Anderson, *The New Old World*, 102.

<sup>71</sup> Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge: Cambridge University Press, 2014), 4. See also, Kaarlo Tuori, "The Many Constitutions of Europe", in *The Many Constitutions of Europe*, eds. Kaarlo Tuori and Suvi Sankari (Farnham: Ashgate, 2010), 3-30.

<sup>72</sup> Tuori uses the term “constitutional speech acts” to describe these moments. Whether performed by jurists, politicians, academics, technocrats or policy makers, speech acts contribute both to the development of a body of rules but also to the perception of this rules as a constitution. See: Tuori, *European Constitutionalism*, Chapter 4.

developed by EU lawyers or academics.<sup>73</sup> The second characteristic is closely related to the sectoral and functional purpose of Europe's constitutionalism. As each constitutional speech act was developed with reference to a particular policy objective, Tuori identifies the development of not only one but rather many constitutions. Each of the many constitutions of Europe regulates its relationship with a particular policy area or objective. Three sectoral constitutions are identified: the economic, the social and the security constitution, regulating the economy, the social welfare of EU citizens and security risks respectively.<sup>74</sup> Moreover, two framing constitutions are identified – the legal and political. In contrast to the sectoral constitutions, where the aim of constitutionalism is to regulate a particular policy area, framing constitutions set the framework within which sectoral constitutions unfold.

Tuori's conceptualisation does not fail to capture the specificity of European constitutionalism. However, this is rather "disquieting"<sup>75</sup> as the many constitutions of Europe reflect and consolidate the separation and insulation of economic decision-making from interference, including political interference by democratic bodies. As the European Union is a "policy-oriented transnational polity and legal system"<sup>76</sup> whose primary aim is to implement a Union-wide policy agenda within its areas of competence, sectoral objectives attain a constitutional status that is wholly unfamiliar at the national level. In state constitutions, the existence of a body of rules concerning a policy area does not "enjoy constitutional dignity."<sup>77</sup> The constitutional arrangement of a nation-state establishes and limits the legitimate exercise of power within a polity. The adoption of any legislative, policy or regulatory decision is a direct result of the exercise of the authority conferred by the constitution to a state institution capable of reaching that decision. However, the result of that decision (taken by virtue of constitutional law) is not in any way accredited constitutional status. In the EU, though, that relationship is inverted. As the "claim to authority is substantively (functionally) limited"<sup>78</sup> constitutional objectives develop around the achievement of those policies for which the Union has competence and, as Chapter 1 indicated, constitutional law acts as a way of constructing a legal framework within which specific policy objectives can be reached. For example, the aim of price stability within the European Monetary Union gained constitutional status as one of the central policy objectives to be achieved by the European Central Bank.<sup>79</sup> In any of the Member States such

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<sup>73</sup> The role of EU lawyers, academics and institutions towards developing an EU legal order has been highlighted in Harm Schepel and Rein Wesseling, "The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe", *European Law Journal* 3, no. 2 (1997), 165-188.

<sup>74</sup> Tuori and Tuori, *The Eurozone Crisis: A Constitutional Analysis*, 4.

<sup>75</sup> Christodoulidis, *A Default Constitutionalism? A Disquieting Note on Europe's Many Constitutions*, 21-48

<sup>76</sup> Tuori, *European Constitutionalism*, 25.

<sup>77</sup> *Ibid.*, 25.

<sup>78</sup> *Ibid.*, 25.

<sup>79</sup> Article 3(3), Article 127(1) and Article 282(2) TFEU; Article 2, Protocol 4, TFEU (On the statute of the European System of Central Banks and of the European Central Bank).

an objective would not enjoy constitutional status, yet within the European economic constitution, this is considered as a constitutional principle against which other objectives are measured. This is precisely what Gill terms as locking-in of policy objectives through constitutional law but also the insulation of an economic principle from either contestation or interference.

Conceptualising European constitutionalism as the co-existence of many constitutions attests that constitutional theory reflects and consolidates neoliberal processes of separation and insulation of economic decision-making from political interference. However, Tuori's conceptualisation also allows us to understand European constitutionalism as a space within which different objectives have developed in relation to the variety of sectoral and functional aims set by the Treaties. This can create two kinds of conflict. Firstly, within each sectoral constitution a variety of objectives may be pursued creating in this way conflict between competing theories. This was portrayed earlier with reference to the degree of which the Treaty of Rome can be considered as an ordoliberal economic constitution. Secondly, constitutional debates and conflicts may arise between the many constitutions. For example, Tuori does not exclude or "deny the relevance...of the normative ideas of a constitutional democracy (a democratic *Rechtsstaat*)."<sup>80</sup> Instead of excluding these normative criteria, Tuori understands them as active discourses within European constitutionalism. Therefore, conflict could also arise across constitutional objectives. As the next section of the chapter will indicate, following the Treaty of Maastricht and the expansion of EU competences to cover a wider range of social objectives, claims for greater insulation (economic constitutionalism) conflict with claims for greater transparency or democratic input in decision-making (legal and political constitutionalism).

## 2. Europe's institutional framework: Insulating economic decision-making while sustaining constitutional conflict

In the previous section, I considered how theoretical discussions about the development of European constitutionalism reflect and consolidate the separation and insulation of economic decision-making from political interference. Europe's constitution is, therefore, positioned within the relationship between neoliberalism and constitutional law, identified in Chapter 1 of the thesis. However, the chapter also indicated that while constitutional law can be used to give effect to neoliberal political economic thought, it does not necessarily do so as competing constitutional claims operate within European constitutionalism. In this section, I will examine how competing constitutional objectives manifest in the EU's institutional structure by evaluating two characteristics

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<sup>80</sup> Ibid, 3.

of the EU's institutional framework. Firstly, the claim that "since their founding, supranational institutions have been portrayed as necessary for administering questions of policy that are either too complex or too vulnerable to distortion to be left to democratically accountable institutions".<sup>81</sup> Secondly, how the introduction of wider social objectives by the EU and analogous strengthening of democratic procedures in the EU's institutional structure sustain the conflict of constitutional objectives.

### 2.1. The Community method and the constitutionalisation of conflicting objectives.

The EU's institutional architecture combines two very different methods of decision-making, the supranational or Community method and the intergovernmental,<sup>82</sup> each of which achieves the insulation of economic activity from political interference. The Community method rests on a legal constitutional logic where the exercise of power is achieved through established legal procedures but also according to principles such as limited government, the division of powers and judicial review.<sup>83</sup> The employment of constitutional law by the Community method is akin to the ordoliberal idea of constructing a framework within which the market can operate unhindered from political interference. This is achieved through two main parameters. Firstly, the Community methods ensures that "each institution shall act within the limits of the powers conferred upon it by this Treaty".<sup>84</sup> Secondly and more importantly, that every decision adopted by the Community promotes "its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions."<sup>85</sup> Consequently, the rule of law, achieved by the Community method aims to lock-in the sectoral and functional objectives set by the Community.

Central to the idea of protecting the sectoral and functional objectives of the Community was the notion of Community interest, as opposed to national interest. Cooperation through the Community method would not be achieved on case-by-case instances where each Member States entered an agreement to forward or protect national interests. Instead, cooperation amongst states would ensure the furtherance of a common cause, goal and interest. In this regard, Community institutions were independent from those of the Member States and promoted the interest of the community, not the states which comprise them. For this to be achieved, the founding fathers of the

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<sup>81</sup> Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*, 221.

<sup>82</sup> Sergio Fabbrini, "Intergovernmentalism and its Limits: Assessing the European Union's Answer to the Euro Crisis", *Comparative Political Studies* 46, no. 9 (2013), 1003-1029, 1004.

<sup>83</sup> Michelle Everson, "The Fault of (European) Law in (Political and Social) Economic Crisis", *Law and Critique* 24, no. 2 (2013), 107-129, 113.

<sup>84</sup> Article 4 TEEC; now Article 13 TEU.

<sup>85</sup> Article 13 TEU.

EEC envisioned a common political and institutional system that would be established and maintained through law. In the words of Jean Monnet, Community institutions were established with the aim of being “sovereign within the limits of their competence – that is to say, which are endowed with the right to make decisions and carry them out”<sup>86</sup> in the interest of the Community as a whole.

Importantly, the interest of the Community has been defined in economic terms. The institutional framework of the Community method is oriented towards achieving “a common market and progressively approximating the economic policies of Member States [and] to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it”.<sup>87</sup> In the formative period under the Treaty of Rome, the role of the Commission was central in achieving negative integration through the development and enforcement of key common market aims; for example, the elimination of custom duties,<sup>88</sup> the elimination of quantitative restrictions to intra-Community trade,<sup>89</sup> the free movement of persons, services and capital,<sup>90</sup> and rules against distortion of competition.<sup>91</sup> In addition to the Commission, the ECJ was also crucial in developing the common market by ruling upon “breaches of the treaty by Member States”.<sup>92</sup> Therefore, by setting out a definition of the common good, defining the purpose of the Union and setting competition as the mechanism through which to achieve it,<sup>93</sup> the Community method insulated economic decision-making from any competing economic, social or political objectives.

Insulation is further achieved through the institutionalisation of a technocratic logic of decision-making that insulates Community institutions from political contestation. Through the technocratic logic of decision-making, the Community method is orientated towards achieving efficient policies, not enhance participation. As was indicated in the first chapter of the thesis, the fundamental distinction between the democratic and technocratic logics is in their method of legitimation. Whilst democratic structures of decision-making are legitimated through participation, the authority of technocratic decision-making rests on the ability of experts to reach qualitatively better decisions,

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<sup>86</sup> Jean Monnet, Speech delivered on the occasion of the inauguration of the High Authority, August 10, as cited in: Youri Devuyt, “The European Union’s Institutional Balance After the Treaty of Lisbon: Community Method and Democratic Deficit Reassessed”, *Georgetown Journal of International Law* 39 (2007), 247.

<sup>87</sup> Article 2 TEEC.

<sup>88</sup> Articles 12-17 TEEC.

<sup>89</sup> Articles 30-37 TEEC.

<sup>90</sup> Articles 48-73 TEEC.

<sup>91</sup> Articles 85-94 TEEC.

<sup>92</sup> *Ibid.*

<sup>93</sup> Article 3, TEEC.

usually assessed through notions of efficiency.<sup>94</sup> Since the European Communities were conceived along the lines of a dual polity whereby democratic legitimacy was retained at the national level, the Community method operates according to a technocratic logic.

The technocratic logic characterising the Community method is evident in the powers vested to the Commission and its working methods. By holding the sole right of initiative, the Commission is the only institution that can propose legislation. While the Council of Ministers acted as a legislative body in the original constitution of the EEC (this was later amended to include the European Parliament as a co-legislating body), the Commission always held the sole right to propose legislation. The Commission is comprised by expert committees working in small groups to devise policies that are considered to be efficient and in accordance with the objectives set by the Treaties.<sup>95</sup> Insulation is therefore achieved by the removal of policy-making from the reach of national parliaments and by structuring the Commission's decision-making logic according to technocratic ideas. Insulation also ensured what Gill identified as the locking-in of economic and policy objectives set in the Treaties. As an institution, therefore, the Commission was designed to be apolitical in the sense that it was not subjected to political pressures.

Furthermore, the technocratic model of decision-making served as an instrument of legitimation for the Community method. The institutional structure of the original European Economic Communities was legitimized indirectly through the participation of national governments and, as it was indicated earlier, on the capacity of the Community to solve specific issues better than national governments.<sup>96</sup> Hence, the authority of supranational institutions, such as the Commission and European Court of Justice, was framed predominantly "as a technical necessity: it is a way of binding the hands of national governments in order to insulate policymaking from partisanship and short-term electioneering."<sup>97</sup> Insulation through technocracy was, therefore, a guiding feature of the Community method and the institutional framework which it sought to establish. Despite the existence of an Assembly, renamed to European Parliament in 1962, it had little power. It was comprised of national parliaments and its "only substantive power in the original treaty was the power, by a two-thirds majority vote, to censure the Commission and oblige its collective

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<sup>94</sup> Claudio M. Radaelli, "The Public Policy of the European Union: Whither Politics of Expertise?" *Journal of European Public Policy* 6, no. 5 (1999), 757-774, 758.

<sup>95</sup> Myrto Tsakatika, "Claims to Legitimacy: The European Commission between Continuity and Change", *JCMS: Journal of Common Market Studies* 43, no. 1 (2005), 193-220; Radaelli, *The Public Policy of the European Union: Whither Politics of Expertise?* 757-774.

<sup>96</sup> Anchrit Wille, "Political-bureaucratic Accountability in the EU Commission: Modernising the Executive", *West European Politics* 33, no. 5 (2010), 1093-1116., 1112.

<sup>97</sup> Christopher J. Bickerton, *European Integration: From Nation-States to Member States* (Oxford: Oxford University Press, 2012), 14.

resignation” – a power “too sweeping to be used”.<sup>98</sup> While the powers of the Parliament gradually increased, as the chapter indicates further in the discussion, the technocratic logic of the Community method did not alter.

However, following the introduction of the Treaty of Maastricht, the EU’s institutional framework underwent important changes. The amended Article 2 introduces an array of new tasks to be established through the common market, including “a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.” Article 3 introduces health and consumer protection, transportation, education, energy, tourism as policy objectives aimed at realising the tasks and objectives outlined in Article 2. In response to the expanded portfolio of policies adopted by the Union, the Community method was developed in a way that would boost the Union’s democratic legitimacy through greater power-sharing between the Commission, Council and European Parliament.

Under the current structure, all legislative measures for those areas of policy-making that are under the exclusive competence of the Union<sup>99</sup> are adopted through the three supranational (Community) institutions: the Commission,<sup>100</sup> Council of the European Union (or Council),<sup>101</sup> and the European Parliament.<sup>102</sup> One of the most important developments in the Community method since the Treaty of Maastricht was the empowerment of the European Parliament.<sup>103</sup> In an attempt to

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<sup>98</sup> Mark Gilbert, "The Treaties of Rome", in *The Oxford Handbook of the European Union*, eds. Erik Jones, Anand Menon and Stephen Weatherill (Oxford: Oxford University Press, 2012), 95-106, 104.

<sup>99</sup> Article 3 TFEU lays out the exclusive competences of the EU. These include all matters concerning the customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy and the conclusion of any international agreement that may affect or concern the Unions exclusive competences.

<sup>100</sup> The Commission, comprised by one appointed Commissioner from each Member States, acts as the executive branch of the Union. It is responsible for promoting the general interest of the Union (Article 17(1) TEU) and has the sole right of initiative for the drafting of EU legislation (Article 17(2) TEU).

<sup>101</sup> The Council of the European Union meets in different configurations according to the policy area discussed and is comprised by government ministers responsible for the relevant policy area - for example, the Economic and Financial Affairs Council Configuration (ECOFIN). The Council is responsible for adopting EU legislation together with the European Parliament, coordinating policy decisions between Member States, adopting the EU budget, conclude international agreements and further the EU’s common foreign and security policy. All of its decisions are reached by qualified majority albeit some exceptions, including sensitive policy areas like taxation and security, where unanimous decision is required but also administrative or procedural matters where simple majority is required.

<sup>102</sup> "Community and Intergovernmental Methods, Glossary of Summaries", *EUR-Lex*, Accessed April 20<sup>th</sup> 2020, [https://eur-lex.europa.eu/summary/glossary/community\\_intergovernmental\\_methods.html](https://eur-lex.europa.eu/summary/glossary/community_intergovernmental_methods.html)

<sup>103</sup> Following Brexit, the number of members of the European Parliament is down from 751 to 705.

bolster the Union's democratic legitimacy and respond to the no *demos* criticism,<sup>104</sup> the European Parliament is no longer composed by "representatives of the peoples of the states"<sup>105</sup> but "composed of representatives of the Union's citizens".<sup>106</sup> Moreover, changes in the legislative process, now crystallised under the Treaty of Lisbon, elevate the Parliament to a co-legislative body. Under the ordinary legislative procedure, the right of initiative remains with the Commission.<sup>107</sup> While the European Parliament has no power to initiate legislation, Articles 289 and 294 TFEU state that for a legislation to be accepted as law, the proposal needs rubber stamping from the European Council (decision by qualified majority)<sup>108</sup> and the European Parliament. In addition to legislative powers, the European Parliament may now approve budgetary decisions, exercise supervision over other EU institutions, cooperate with National Parliaments, request the Commission to submit a proposal,<sup>109</sup> set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration,<sup>110</sup> appoint an Ombudsman,<sup>111</sup> approve the President and other members of the Commission.<sup>112</sup>

Furthermore, principles of 'good governance' developed in relation to representative democracy have gradually made their way into the EU's constitutional framework. Article 10 TEU, for example, states that "the functioning of the Union shall be founded on representative democracy" and outlines ways through which decision-making can be carried out "as close as possible to the citizen".<sup>113</sup> Article 11(1) TEU continues to indicate that EU institutions "shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" while also maintaining an "open, transparent and regular dialogue with representative associations and civil society."<sup>114</sup> Towards this end, the Commission is required to "carry out broad consultations with parties concerned".<sup>115</sup> The European Parliament and Council are required to meet openly when considering or and voting on draft legislation,<sup>116</sup> while EU citizens (or legal persons) may have access to documents of the Union's institutions, bodies, offices

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<sup>104</sup> Joseph HH Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", *European Law Journal* 1, no. 3 (1995), 219-258.

<sup>105</sup> Article 189 TEC.

<sup>106</sup> Article 14(2) TEU.

<sup>107</sup> "Right of Initiative, Glossary of Summaries", *EUR-Lex*, Accessed April 23<sup>rd</sup> 2018. [http://eur-lex.europa.eu/summary/glossary/initiative\\_right.html](http://eur-lex.europa.eu/summary/glossary/initiative_right.html); As of April 2012 and the introduction of the European Citizens' Initiative (ECI), citizens may a given threshold is surpassed. At this moment, the threshold stands at one million signatures.

<sup>108</sup> This system requires 55% of Member States (16 out of 28 or 15 out of 27 in the post-Brexit era) representing at least 65% of the total EU population.

<sup>109</sup> Article 138(b) TEC.

<sup>110</sup> Article 138(c) TEC.

<sup>111</sup> Article 138(e) TEC.

<sup>112</sup> Article 158(2) TEC.

<sup>113</sup> Article 10(3) TEU.

<sup>114</sup> Article 11(2) TEU.

<sup>115</sup> Article 11(3) TEU.

<sup>116</sup> Article 15(2) TFEU.

and agencies.<sup>117</sup> In addition, the Treaty also improves the accountability of EU institutions to national parliaments. For example, national parliaments can request and receive information on legislative matters.<sup>118</sup> Upon receipt, national parliaments can examine proposals against the principle of subsidiarity and, in cases where actions do not fall within the exclusive competence of the Union, consider whether proposed actions can be achieved through national or local means.<sup>119</sup>

The expansion of the EU's policy portfolio and accompanied strengthening of democratic bodies, such as the European Parliament, poses a challenge to the insulation of economic activity from political interference. The expansion of the EU's policy portfolio was criticized, mainly by ordoliberalists, as integration through intervention<sup>120</sup> due to the increasing ability of Community institutions to forward "discretionary policies ... incompatible with the principle of undistorted competition".<sup>121</sup> Simultaneously, the increasing powers of the European Parliament, but also some improvements in transparency and accountability of EU decision-makers creates some cracks in the insulating wall between economic decision-making and political interference. While the importance of these developments should not be undermined, the Community method retains the key characteristics of insulation described above.

## 2.2. The intergovernmental method: Insulation through cooperation

As mentioned earlier, the Community method is relevant only for areas where the Union enjoys full or shared competence. Certain policy areas, including economic, foreign or security policy, were considered to be sensitive and linked to national sovereignty and were not entrusted to the Union. Instead, the EU formalized a second method of decision-making – that of intergovernmentalism. Intergovernmentalism was introduced in the Treaty of Maastricht through the so-called three-pillar system. The first pillar, the European Community (EC) was in essence the continuation of the existing communities operating under the Community method. The two other pillars, namely Common Foreign and Security Policy (CFSP) as a second pillar (Title V) and Justice and Home Affairs (JHA) cooperation as a third pillar, adopted the intergovernmental method. In contrast with the structured and rule-bound methods of decision-making adopted by the Community method, the intergovernmental pillars introduced by Maastricht offers a much more informal method of decision-making. After Maastricht, therefore, the Community method was not the sole avenue of

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<sup>117</sup> Article 15(3) TFEU.

<sup>118</sup> Article 12 TEU.

<sup>119</sup> Article 5(3) TEU.

<sup>120</sup> Tuori, *European Constitutionalism*, 161.

<sup>121</sup> Streit and Mussler, *The Economic Constitution of the European Community: From 'Rome' to 'Maastricht'*, 5-30, 27.

decision-making operating in the newly formed European Union.<sup>122</sup> The intergovernmental method attempts to strike a balance between the need for cooperation and coordination among Member States without transferring any additional competences to the Union.<sup>123</sup> As a method of decision-making, the intergovernmental approach relies on the willingness of Member States to adopt decisions reached through deliberation with other Member States. The Union, however, cannot directly legislate on these matters and it is up to the Member State to enact legislation. Moreover, there are no mechanisms for ensuring compliance by the Member State, other than diplomatic pressure.

Contrary to the Community method where insulation of economic decision-making is achieved through the creation of a legal framework for decision-making, the intergovernmental method achieves insulation through the absence of legal means. As Puetter observes, “the classic community method is no longer used to provide the procedural skeleton for collective decision-making, and as legal acts are no longer (or only to a very limited extent) used to codify the results of lengthy negotiations, ongoing policy dialogue around all key policy initiatives in the new areas of EU activity has become a key characteristic of Council decision-making”.<sup>124</sup> In the absence of the legal framework established by the Community method, the intergovernmental method rests on deliberation and discussion of policy objectives within European institutions and bodies. Consensus is reached via the interaction of national executives within European institutions, such as the Council of Europe and the European Council, yet no binding decisions are reached. The results of intergovernmentalism are transformed into legislation through national instruments. National authorities are in a position where their authority to reach policy decisions is limited by the commitments to which their governments agreed at the supranational level and their only function is to transpose those commitments to national instruments. In the case of intergovernmentalism, therefore, insulation is achieved by the de-facto separation of policy decision-making from those national bodies with the authority and competence to devise policies.

### 3. Insulation and constitutional conflict in the European Court of Justice

A continuing theme in this chapter is the promotion and practical realisation of neoliberal political economic thought through constitutional law. Both sections above indicate how conceptualisations of Europe’s constitution and the institutional structure created through

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<sup>122</sup> Fabbrini, *Intergovernmentalism and its Limits: Assessing the European Union’s Answer to the Euro Crisis*, 1003-1029, 1004.

<sup>123</sup> “Explanatory note on the “Community method”, *European Commission*, Accessed April 20<sup>th</sup> 2020, [http://europa.eu/rapid/press-release\\_MEMO-02-102\\_en.htm](http://europa.eu/rapid/press-release_MEMO-02-102_en.htm)

<sup>124</sup> Uwe Puetter, *The European Council and the Council: New Intergovernmentalism and Institutional Change* (Oxford: Oxford University Press, 2014), 220.

constitutional law, reflect and consolidate the neoliberal idea of separation and insulation of economic decision-making from political interference. However, the chapter also recognised some cracks in the wall of insulation created by competing constitutional objectives. The idea of conflict persists as the section considers how ECJ decisions constitutionalise the separation and insulation of economic decision-making from political interference but also constitutionalise the protection of social or fundamental rights that conflict with neoliberalism.

### 3.1 How the constitutionalisation of European Treaties by the ECJ reflects and consolidates neoliberalism

It is common ground amongst constitutional discussions that the ECJ played an important role in the constitutionalisation of the European Communities as the Court interpreted European Treaties as a “constitutional charter governed by a form of constitutional law”.<sup>125</sup> The first step in articulating a European constitution was taken in the case of *Van Gend en Loos*.<sup>126</sup> In that case, the Court was called to decide whether Article 12 EEC (now Article 30 TFEU), prohibiting the introduction of any new customs duties on imports or exports, extended any rights to individuals. In its judgment, the Court ruled that not only Member States but also their nationals are the subject of Community law. As a result, the Court concluded that Community law “imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage”.<sup>127</sup> The Court continued to claim that “rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”<sup>128</sup> The subjects of European law, following *Van Gen den Loos*, were not only states but also their citizens. The doctrine of direct effect established the applicability of Community law in its Member States. More importantly, though, it recognises the European legal system as an “autonomous source”<sup>129</sup> of law. Soon after, in the case of *Costa v. ENEL*,<sup>130</sup> the Court developed the principle of supremacy. It established that the “law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question”.<sup>131</sup> Consequently, the Court found Community law to

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<sup>125</sup> Joseph HH Weiler, “The Reformation of European Constitutionalism”, *Journal of Common Market Studies* 35, no. 1 (1997), 97-131.

<sup>126</sup> Case 16/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1. Hereafter cited as *Van Gen den Loos*.

<sup>127</sup> *Van Gend en Loos*, 12.

<sup>128</sup> *Ibid.*

<sup>129</sup> Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*, 59.

<sup>130</sup> Case 6/64, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

<sup>131</sup> *Ibid.*, [593].

override any contrary legal provision, even if this was a constitutional provision of a Member States. Following these two cases, the Court continued to assert the constitutional significance of the Treaties but also the autonomy of the Community legal order. Characteristically, in *Les Verts* the ECJ equated the Union's treaties to a Constitutional charter.<sup>132</sup> In *Internationale Handelsgesellschaft*<sup>133</sup> the Court reiterated the principle of supremacy on the grounds of effective and uniform application of Community law,<sup>134</sup> while in *Simmenthal* national courts were empowered to strike down any national legislation that conflicts with Community law even before a preliminary ruling is filed to the ECJ.<sup>135</sup>

The development of juridical concepts, such as the doctrine of direct effect and supremacy outlined above, "largely respond to the needs and implications of sectoral constitutionalisation"<sup>136</sup> and, therefore, contribute to the separation and insulation of economic decision-making from political interference. Take for example the development of direct effect. As indicated above, in *Van Gend en Loos* the Court developed the concept of direct effect and, effectively, established the European legal order. The ECJ's ruling in *Van Gen den Loos* may have created a European legal order, but the purpose for which this was created must not be undermined. The then Advocate General Roemer indicated that while some Treaty provisions could have direct effect, Article 12 was not one of those Articles.<sup>137</sup> Similarly, Conway indicates that there is no textual basis for the conclusion reached by the Court.<sup>138</sup> However, the ECJ pushed through with establishing direct effect of primary Community law.<sup>139</sup> According to the Court's reasoning, it was enough that the Treaty did not preclude direct effect and, by having regard to the "spirit, the general scheme and the wording"<sup>140</sup> of the provision the Court found the doctrine of direct effect. A closer look at the judgment indicates that the main rationale and purpose of the Court in *Van Gen den Loos* "was to secure effective implementation of the provisions serving the main objective of the Treaty, namely establishment of a common market".<sup>141</sup> As the Court stated: "The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the

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<sup>132</sup> Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166.

<sup>133</sup> Case 11-70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114.

<sup>134</sup> This was later reaffirmed in Case 314/85, *Foto-Frost v. Hauptzollamt Lu'beck-Ost*, ECLI:EU:C:1987:452.

<sup>135</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECLI:EU:C:1978:49, [20].

<sup>136</sup> Tuori, *European Constitutionalism*, 25.

<sup>137</sup> Opinion of Advocate General Roemer delivered on 12 December 1962. Case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*.

<sup>138</sup> Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge: Cambridge University Press, 2012), 27.

<sup>139</sup> For any Treaty provision to have direct effect it must be sufficiently clear and precisely stated; unconditional and not dependent on any other legal provision; and must confer a specific right upon which a citizen can base a claim.

<sup>140</sup> *Van Gend en Loos*, 12.

<sup>141</sup> Tuori, *European Constitutionalism*, 137.

Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples'.<sup>142</sup> The doctrine of direct effect was affirmed in subsequent case law<sup>143</sup> and even expanded to include cases between private individuals (horizontal direct effect)<sup>144</sup> even in those Treaty provisions that were directly addressed to Member States.<sup>145</sup>

In light of this, *Van Gend Loos* and subsequent direct effect jurisprudence, indicates how European constitutional law, developed by the ECJ, responded to the needs of developing a common market. Judicial review, in this case, gives form to the economic – it creates and sustains the conditions for the common market to develop. As a result, judicial review complements the process of sectoral constitutionalisation and, by extent, the separation and insulation of economic decision-making from political interference. A similar observation can be drawn from the development of the doctrine of supremacy but also state liability. In *Costa v. ENEL*<sup>146</sup>, the Court made reference to the ruling in *Van Gen den Loos*, not explicitly but by reiterating the establishment of a European legal order where Member States have wilfully ceded some of their sovereign power for the purposes of creating a Community whose primary objective is economic integration. The doctrine of supremacy directly responds to the need for a legal framework with uniform application of legal rules for the purposes of realizing a common market. At the same time, the doctrine of supremacy enhances the neoliberal political economy of European constitutionalism. The separation of a supranational common market from political interference or contestation at the national level is constitutionalised by ensuring the supremacy of European law over national legislation. Moreover, supranational institutions such as the Commission are afforded an important degree of insulation from political interference, not only at the supranational level (as indicated in the discussion above) but also from national interference though the common operation of constitutional concepts such as direct effect and supremacy.

In addition to the examples mentioned above, the Court's approach to the issue of subsidiarity further indicates how the separation and insulation of economic decision-making is supported through judicial review. Subsidiarity, more generally, expresses the idea that a centralized government should have a subsidiary function and refrain from performing tasks that can be dealt

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<sup>142</sup> *Van Gend en Loos*, 12.

<sup>143</sup> Case 57-65, *Alfons Lütticke GmbH v Hauptzollamt Sarrelouis*, ECLI:EU:C:1966:34.

<sup>144</sup> Case 36/74, *Walrave and Koch v. Association Union Cycliste Internationale*, ECLI:EU:C:1974:140.

<sup>145</sup> See for example Case 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, ECLI:EU:C:1976:56, where Article 119 EEC (now 157 TFEU) on equal pay was found to have direct effect and horizontal direct effect.

<sup>146</sup> Case 6/64, *Flaminio Costa v E.N.E.L.*, ECLI:EU:C:1964:66.

with at a local level. In EU law, the principle of subsidiarity was first introduced by the Treaty of Maastricht in Article 3(b) TEU (now Article 5(3) TEU) and stated that “*In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community*”. Consequently, the Union has to show that any action not falling under its exclusive competence can best be achieved at Union level. Conway suggests that the Court interpreted the principle of subsidiarity in a way that would not undermine the competences of the Union but also the effectiveness of the common market.<sup>147</sup> For example, in the case of *Commission v. Germany* the ECJ argued that the multiplicity of national provisions could act as “barriers to trade with direct consequences for the creation and operation of the common market.”<sup>148</sup> Hence, the Court concluded, “harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature”,<sup>149</sup> broadening in this way the scope of Union competences but also reducing any discrepancies between national provisions that could hinder economic exchange within the common market. For Tuori, this is an indication that the need for economic “effectiveness and uniformity have functioned as a bridge linking economic and juridical constitutionalisation”.<sup>150</sup> For the purposes of our discussion, the Court’s approach to subsidiarity indicates the ongoing migration of economic decision-making to supranational institutions afforded insulation from interference, hence enhancing the degree of separation and insulation afforded to these institutions.

A further example of how judicial review responds to the needs of sectoral constitutionalisation is the involvement of the ECJ in developing economic integration.<sup>151</sup> As the discussion on ordoliberalism earlier in the chapter indicated, insulation of economic decision-making is achieved through disembedding the market – the freeing of the market from “extra-economic controls and governed immanently, by supply and demand”.<sup>152</sup> In the initial stages of European integration, the ECJ promoted ‘negative’ integration by developing principles and interpreting treaty provisions

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<sup>147</sup> Conway, *The Limits of Legal Reasoning and the European Court of Justice*, 37.

<sup>148</sup> Case 178/84, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:1987:126, [46]. See also Cases C-154/04 and C-155/04, *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd. v. Secretary of State for Health*, ECLI:EU:C:2005:199, [106]–[108].

<sup>149</sup> Case C-103/01, *Commission v. Germany*, [46].

<sup>150</sup> Tuori, *European Constitutionalism*, 138.

<sup>151</sup> See for example: Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); Anne-Marie Burley and Walter Mattli, “Europe before the Court: A Political Theory of Legal Integration”, *International Organization* 47, no. 01 (1993), 41-76; Miguel Poiaras Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Oxford: Hart Publishing, 1998).

<sup>152</sup> Nancy Fraser, “Marketization, Social Protection, Emancipation: Toward a Neo-Polanyian Conception of Capitalist Crisis”, in *Business as Usual: The Roots of the Global Financial Meltdown*, eds. Craig Calhoun and Georgi Derluguian (New York and London: New York University Press, 2010), 137-158.

aiming to remove barriers between states, such as tariffs,<sup>153</sup> or barriers to the free movement of persons, services and capital.<sup>154</sup> As Majone highlights, the development of negative integration “point in the direction of a far-reaching separation of state power from market power”<sup>155</sup> and, therefore, the insulation of economic decision-making from political interference.

The development of competition law by the ECJ indicates how separation and insulation of economic decision-making was complemented through the exercise of judicial review. While in this area of law the Commission is in charge of “enforcing competition law and competition policy in general, and the Court has accorded the Commission a rather wide margin of policy discretion”,<sup>156</sup> the ECJ played an important role by interpreting and developing competition law. The Court’s jurisprudence “was by and large in harmony with ordoliberal predilections”<sup>157</sup> concerning the centrality of competition to achieve the aim of establishing an internal market. Following Article 3 of the Treaty of Rome (now Article 3 TFEU), the Court established a strong connection between the creation of an internal market and the development of competition rules.<sup>158</sup> Moreover, the Court reiterated the importance of competition in achieving the objectives set by the Treaties by highlighting the centrality of Article 101 TFEU (previously Article 81 EC and 85 TEC). Indicatively, in *Eco Swiss* the ECJ argued that Article 101 TFEU, setting out prohibitions to any limits to the internal market, is fundamental for achieving the objective of the Treaties but also for the functioning of the internal market.<sup>159</sup> Continuing along this line of thought, the Court ruled that competition rules should be safeguarded and upheld not only for the benefit of consumers but, also, for the benefit of competitors and the structure of the common market.<sup>160</sup> As the centrality of competition is upheld throughout the Court’s jurisprudence, it is no surprise that competition law was expanded to cover a

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<sup>153</sup> Article 3(a) TEEC.

<sup>154</sup> Articles 28-37 on the free movement of goods, Articles 45-48 TFEU on the free movement of workers, Articles 49-55 TFEU on the freedom of establishment, Articles 56-62 TFEU on the free movement of services and Articles 63-66 TFEU on the free movement of capital. In relation to freedom of goods see Case 7/68 *Commission v Italy (Art Treasures)*, ECLI:EU:C:1968:51; In relation to the free movement of workers see Case 66/85 *Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284; In relation to freedom of establishment see Case C-221/89 *R v Secretary of State for Transport ex parte Factortame Ltd and Others*, ECLI:EU:C:1991:320; In relation to freedom of services see Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro*, ECLI:EU:C:1984:35; the definition of capital has been interpreted in a non-uniform way. See Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford: Oxford University Press, 2013), 33.

<sup>155</sup> Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, 34.

<sup>156</sup> Tuori, *European Constitutionalism*, 146.

<sup>157</sup> *Ibid*, 157.

<sup>158</sup> In the case of *Metro v Commission* the Court ruled that the creation of a single market set out to replicate competitive conditions similar to those of domestic markets where the degree of competition may vary depending on market sectors. In doing so, the Court also indicated the indispensability of competition from the aim of creating an internal market. See: Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission of the European Communities*, ECLI:EU:C:1977:167.

<sup>159</sup> Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, ECLI:EU:C:1999:269, [36]

<sup>160</sup> Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, C-519/06 P, *GlaxoSmithKline Services and Others v Commission and Others*, ECLI:EU:C:2009:610.

wide array of actions,<sup>161</sup> and restricted exemptions based on other factors (such as public policy) on a case-by-case basis instead of developing a general rule of application.<sup>162</sup> Taken together, these examples indicate how the Court developed competition law and, most importantly, position competition as a central mechanism through which to achieve the aim of an internal market.<sup>163</sup> In doing so, the Court actively supports the dis-embedding of the internal market from considerations that could restrict competition and limits any distortions to competition to case-by-case basis. By interpreting the Treaties in a way that reinforced the separation of the common market from national political interference, the ECJ did not only act as the “mask and shield”<sup>164</sup> of European integration but also complemented the neoliberal political economic thought embedded in the process of integration.

### 3.3 Social and fundamental rights as a conflicting constitutional objective

Until this point, the section focused on how judicial review by the ECJ complements neoliberal political economic processes. However, evidence of the constitutionalisation of conflicting objectives through judicial review can also be found in the ECJ’s jurisprudence. Specifically, cases that re-embed the market with social considerations contradict the neoliberal idea of separation and insulation of economic decision-making from political interference.<sup>165</sup> One of the most noticeable examples found in the Court’s case-law is the protection of fundamental rights as we can observe the conflict between economic and fundamental rights. As, for example, in the case of *Schmidberger*,<sup>166</sup> where a haulage company’s rights to free movement of goods (Article 34 TFEU) had to be balanced against the fundamental right of activists to freedom of expression and assembly. Similarly, in the case of *Omega*,<sup>167</sup> a restriction on the setting up of a laser dome where laser guns would be used in a virtual combat between participants was justified on the grounds of the pursuit of human dignity. Another notable example comes from the Court’s approach in the area of free movement of labour, where social considerations contradicted the idea of separation of the

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<sup>161</sup> For example, the Court ruled that actions carried out by public authorities that could nevertheless be carried out by private entities were subject to competition law. See: Case C-475/99, *Firma Ambulanz Glöckner v Landkreis Südwestpfalz*, ECLI:EU:C:2001:577; Case T-155/04, *SELEX Sistemi Integrati v Commission*, ECLI:EU:T:2006:387; Case T-113/07, *SELEX Sistemi Integrati v Commission and Eurocontrol*, ECLI:EU:C:2009:191.

<sup>162</sup> Case C-309/99 *Wouters and Others*, ECLI:EU:C:2002:98

<sup>163</sup> Even in the post-Lisbon era, where the objective of undistorted competition was removed from the Treaty and positioned in a Protocol (Protocol No 27 (TEU), On the internal market and competition) Tuori sees no change in the Court’s approach to competition law. See *Ibid*, 158.

<sup>164</sup> Burley and Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 41-76

<sup>165</sup> James A. Caporaso and Sidney Tarrow, “Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets”, *International Organization* 63, no. 4 (2009), 593-620; Deborah Mabbett, “Polanyi in Brussels or Luxembourg? Social Rights and Market Regulation in European Insurance”, *Regulation & Governance* 8, no. 2 (2014), 186-202; Case 63/1986, *Commission v. Italy*.

<sup>166</sup> Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, ECLI:EU:C:2003:333.

<sup>167</sup> Case C-36/02, *Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, ECLI:EU:C:2004:614.

economy from politics. In the case of *Klaus*,<sup>168</sup> the Court ruled in favour of a Dutch national trying to claim benefits in the Netherlands after her period of employment was intermitted by period of employment in Spain.<sup>169</sup> Similarly, the Court rendered national measures concerning benefits for family members incompatible with the Treaty when these precluded a worker from claiming benefits in either their home country or their county of employment. Regulation 1408/1971 also tackled this issue and the ECJ consistently interpreted the Regulation in favour of worker's rights.<sup>170</sup> In these cases we can see how the Court made use of considerations other than economic competition or efficiency and subjected the reach of the economic constitution to the restrictions posed by fundamental rights.

Some commentators tend to downplay the significance of social and fundamental rights jurisprudence as a countermovement to neoliberalism. Dale and El-Enany, for example, argue that it is "perfectly plausible that the driving force behind the extension of social rights is not social in nature—consideration of EU citizens *qua* human beings—but economic".<sup>171</sup> In a similar tone, Höpner and Schäfer argue that ECJ jurisprudence on non-discrimination is guided by economic ideas of increased efficiency achieved through greater equality.<sup>172</sup> Furthermore, the limitation of economic rights when in conflict with fundamental rights as in the case of *Schmidberger* or *Omega* is, according to Tuori, not as revealing as it may seem. For Tuori, the framing of the issue is of utmost importance: "in conflicts of rights, what needs justification is restricting not a fundamental right but an economic right."<sup>173</sup> Tuori's proposition finds support in the proportionality test employed by the Court. By asking whether restrictions to free movement are proportionate to the aim and benefit of the justificatory grounds,<sup>174</sup> the Court is prioritising free movement over other objectives and is willing to allow restrictions only in cases where justificatory grounds are serious enough to excuse the curtailment of free movement. All of the above observations challenge the degree to which social and fundamental rights jurisprudence conflict with the separation and insulation of economic decision-making from political interference. However, the very existence of these cases indicates that neoliberalism may be reflected and consolidated through constitutional law, but it is also contradicted, conflicted and mitigated through law.

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<sup>168</sup> Case 482/1993, *S.E. Klaus v. Bestuur van de Nieuwe Algemene Bedrijfsvereniging*, ECLI:EU:C:1995:349.

<sup>169</sup> Considering a claim under Article 177 TEEC, the Court ruled that "the working life of the person concerned should be seen as a whole, and not just from the limited standpoint of a particular job in one country, at one period of time".

<sup>170</sup> C-228/1988, *Bronzino v. Kindergeldkasse*.

<sup>171</sup> Dale and El-Enany, *The Limits of Social Europe: EU Law and the Ordoliberal Agenda*, 613-650, 625.

<sup>172</sup> Martin Höpner and Armin Schäfer, "Polanyi in Brussels? Embeddedness and the Three Dimensions of European Economic Integration", *MPIfG Discussion Paper*, no. 10/8 (2010).

<sup>173</sup> Tuori, *European Constitutionalism*, 28.

<sup>174</sup> *Ibid*, 142.

## Conclusion

The aim of this chapter was to consider how the neoliberal idea of separation and insulation of economic activity from political interference is constitutionalised in the European Union. Chapter 1 of the thesis identified four elements in the relationship between neoliberalism and constitutional law: the separation of economic activity from politics; the locking-in of neoliberalism through constitutional provisions; the insulation of economic decision-making from political interference through institutional structures; and the reproduction of neoliberal ideas through legal decisions. These elements were reproduced here as a guide to consider the relationship between neoliberalism and European constitutionalism. By studying theories of European constitutionalism, the EU's institutional structure and ECJ decisions, the chapter indicated how the separation and insulation of economic decision-making from political interference was achieved through constitutional law. However, constitutional law also has the capacity to act as a vehicle for articulating other, often conflicting, constitutional objectives. In each of the above examples, a further dimension to constitutional law was identified – that of articulating constitutional objectives that are often in competition to the objective of insulation. Examples discussed include the development of social and political notions in the many constitutions of Europe (Section 1), the development of democratic processes of decision-making (Section 2) and the development of social and fundamental rights by the ECJ (Section 3).

As many and conflicting constitutional objectives were identified within European constitutionalism, the chapter suggests that Europe's constitution prior to the crisis acted as a space for constitutional debate and conflict. This reading resists deterministic accounts of European constitutionalism while accepting the constitutive role of law in effecting the neoliberal vision of separating and insulating economic activity from interference. By accepting this dual role of law, as a vehicle for neoliberalisation but also as a vehicle for countering neoliberalism, the chapter insists on retaining the constitutional question open; contestation, in other words, existed prior to the Eurozone crisis. Therefore, constitutional law may operate to give legal form to the insulation of economic decision-making from political interference, but the constant operation of conflicting constitutional objectives prevents the creation of a scrutiny lacuna within European constitutionalism prior to the Eurozone crisis. In the remainder of the thesis, I will consider how the joint operation of institutional development and of *ultra vires* review by national and supranational courts reinforce the degree of insulation afforded to economic decision-making and how this affects European constitutionalism as a space for constitutional conflict.

## Chapter 3 – The constitutional implications of crisis response measures: The creation and constitutionalisation of a scrutiny lacuna

In this chapter, I consider the constitutional implications of the Eurozone crisis and the broader significance of this moment for European constitutionalism. As every assessment of change requires an understanding of the condition prior to the event through which change is achieved, the assessment of constitutional implications arising from the Eurozone crisis relies on the condition of European constitutionalism prior to the crisis. Chapter 1 identified how the development of constitutionalism beyond the state gives shape to elements of neoliberal political economic thought, specifically, the separation and insulation of economic decision-making from political interference. Chapter 2 continued to examine the extent to which European constitutionalism is influenced by neoliberalism and I argued that prior to the Eurozone crisis, European constitutionalism was a space for constitutional conflict between the neoliberal objective of separating and insulating economic decision-making from political interference and opposing constitutional objectives. Drawing on the two previous chapters, I consider how the relationship between neoliberalism and European constitutionalism is altered during the crisis; in other words, whether European constitutionalism can still be considered as a space for constitutional conflict.

To achieve this, the chapter focuses on how crisis response measures have been decided. It starts by examining how dominant framings of the crisis influenced both the policy approach adopted by EU institutions and the ways through which measures were decided. While the economic aspect of the Eurozone crisis is beyond the scope of the thesis, it is important to appreciate that dominant framings of the economic conditions pertaining at the time influence the approach of European institutions and Eurozone members to crisis response measures. In the first section of this chapter, I indicate the connection between dominant framings of the crisis, the dominance of austerity as a policy approach to response measures, and the development of institutional channels for decision-making aimed at circumventing constitutional limitations to possible courses of action in order to push through with those response measures considered necessary. In the second section, I continue to consider the constitutional implications of developing new channels for decision-making. This section reviews three examples: the provision of loans to Eurozone members by newly formed financial mechanisms such as the ESM; the strengthening of fiscal coordination by legislative provisions; and the development of institutions or institutional formations. Each example shows how coordination between European institutions and Eurozone members is intensified, thus deepening the insulation of economic decision-making from political interference. In this section, therefore, the constitutional implications of the Eurozone crisis are

observed in the intensification of coordination and the strengthening of insulation of economic decision-making from political interference. As a result, the section identifies how new methods of coordination disturb the institutional architecture of the EU, increase the competences of the Union to influence fiscal and social policy and disturbance the fragile democratic settlement between the EU and its Member States. Lastly, section three considers how the Court of Justice of the European Union (CJEU) deals with the constitutional circumventions and consequent constitutional implications identified in section two.

The chapter argues that the intensification of coordination between European institutions and Eurozone members leads to an intensification of insulation afforded to economic decision-making. European institutions engaged in economic decision-making during the crisis are insulated from political interference that may arise from democratic contestation at the national level but also from requirements for practices of good governance. As a result, the chapter identifies the creation of a scrutiny lacuna within European constitutionalism. Further, it is argued that judicial responses to the constitutional implications of intensified coordination operate to provide legal validation to the scrutiny lacuna, leading to its constitutionalisation. For these reasons, the chapter concludes that the Eurozone crisis presents a clear neoliberal moment where the separation and insulation of economic decision-making takes precedence over all other constitutional objectives, dissolving in this way any constitutional conflict operating within European constitutionalism prior to the crisis.

## 1. The Eurozone Crisis: Causes, dominant frames and institutional channels for decision-making

Two years after the global financial crisis of 2007, the Eurozone experienced an ongoing sovereign debt and financial crisis. In some countries, the crisis was triggered by high sovereign debt and spilled over to the banking sector;<sup>1</sup> in other circumstances the reverse occurred.<sup>2</sup> As the crisis unfolded, it challenged the very viability of the common currency.<sup>3</sup> The Eurozone crisis, as it came to be known, is a complex economic phenomenon with deep, even historical, causes and wide effects.<sup>4</sup>

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<sup>1</sup> Owen Parker and Dimitris Tsarouhas, eds, *Crisis in the Eurozone Periphery: The Political Economies of Greece, Spain, Ireland and Portugal* (Cham: Palgrave Macmillan, 2018).

<sup>2</sup> Most notably, Ireland, Spain and Cyprus. Heather D. Gibson, Theodore Palivos and George S. Tavlás, "The Crisis in the Euro Area: An Analytic Overview", *Journal of Macroeconomics* 39 (2014), 233-239, 234. In Ireland and to some extent in Cyprus, there was a banking crisis that caused a sovereign debt crisis following the government's decision to bail out the banks using public funds. See Efrosyni Panayi and Stavros A. Zenios, "Was the Cyprus Crisis Banking Or Sovereign Debt?" *The Wharton Financial Institutions Centre, University of Pennsylvania Working Paper* 14-19 (2014).

<sup>3</sup> Gibson, Palivos and Tavlás, *The Crisis in the Euro Area: An Analytic Overview*, 233-239, 234.

<sup>4</sup> Mario Baldassarri, *The European Roots of the Eurozone Crisis: Errors of the Past and Needs for the Future* (Cham: Palgrave Macmillan, 2017); Costas Lapavistas, *Crisis in the Eurozone* (London: Verso Books, 2012); Jean Pisani-Ferry, *The Euro Crisis and its Aftermath* (Oxford: Oxford University Press, 2014); Richard Baldwin and Daniel Gros, eds, *The Eurozone Crisis: A Consensus View of the Causes and a Few Possible Solutions* (London: Centre for European Policy Studies Press, 2015).

As would be expected, there is no shortage of economic accounts exploring causes, effects and responses to the Eurozone crisis.<sup>5</sup> While a detailed consideration of economic analyses of the crisis is beyond the scope of this chapter, two themes are important to appreciate. First, how the historical backdrop of creating a monetary union contributed to the creation of a complex banking and sovereign debt crisis, and second, how dominant framings give more weight to the sovereign debt aspects of the Eurozone crisis, leading to the adoption of austerity as a dominant response mechanism.

### 1.1 Fraught foundations: Asymmetries and the absence of a lender of last resort

The creation of a monetary union was aimed at establishing an optimum currency area where all participants would benefit from increased economic efficiency. However, the creation of a common currency assumes that participating economies share similar characteristics.<sup>6</sup> In fact, the Eurozone united economies of divergent types, what the literature identifies as varieties of capitalism,<sup>7</sup> and despite the implementation of convergence criteria,<sup>8</sup> it was well known at the time of the Euro's creation that participating economies "did not fully satisfy all the conditions for a monetary Union."<sup>9</sup> From the very outset, therefore, the Eurozone was characterized by differences in economic conditions between core and periphery economies, terms that function both geographically and financially, as it denotes a distinction between more and less wealthy Eurozone members. Moreover, the division also denotes structural differences between the countries, mainly related to economic conditions such as the labour market, structures of domestic production or inflation rates, but also the balance of trade of each economy with core countries tending toward a positive balance while periphery countries tend toward a negative trade balance. These structural asymmetries meant that participation in the Eurozone affected each economy differently.

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<https://www.tau.ac.il/~yashiv/VOX.pdf#page=110>; Parker and Tsarouhas, *Crisis in the Eurozone Periphery: The Political Economies of Greece, Spain, Ireland and Portugal*

<sup>5</sup> The wide and often conflicting accounts of the Eurozone crisis echo George Bernard Shaw's famous saying, that if all economists were laid end to end, they would not reach a conclusion.

<sup>6</sup> Robert A. Mundell, "A Theory of Optimum Currency Areas", *The American Economic Review* 51, no. 4 (1961), 657-665. The theory of monetary integration presupposed two key shared characteristics between participating economies – the "similarity of structural characteristics (e.g. labour market institutions, inflation rates, levels of economic development, and production structures) among the participants to reduce the incidence of asymmetric shocks, and the existence of adequate adjustment mechanisms (e.g. labour mobility and fiscal integration) to lessen the impact of asymmetric shocks, should they occur". See Gibson, Palivos and Tavlas, *The Crisis in the Euro Area: An Analytic Overview*, 233-239, 234.

<sup>7</sup> David W. Soskice and Peter A. Hall, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

<sup>8</sup> The Maastricht convergence criteria, outlined in Article 140 TFEU (ex Articles 121(1), 122(2), second sentence, and 123(5) TEC), aimed at measuring a country's preparedness to adopt the euro. The set of macroeconomic indicators adopted by Maastricht are price stability, sound public finances, exchange rate stability and long-term interest rates.

<sup>9</sup> Gibson, Palivos and Tavlas, *The Crisis in the Euro Area: An Analytic Overview*, 233-239, 234.

On the one hand, periphery countries lost their ability to exercise monetary policy and could no longer affect their trade balances by devaluing their currency.<sup>10</sup> Core countries, on the other hand, continued their export-led growth in a renewed context, as periphery countries were now less competitive.<sup>11</sup> As periphery countries were less competitive, they could no longer pursue demand-led growth. This was tackled by new opportunities presented within the new currency union as core countries exported surpluses to the periphery with low interest rates, leading to a debt-led growth. As a result, core countries (mainly Germany, France and the Netherlands) essentially financed spending in the periphery and supplied the periphery with goods that they bought with money borrowed from the core. While this meant real growth for the core, it also created a hidden risk as their demand-led growth depended on financing their customer base. As Regan explains, this circle of debt was facilitated by the common currency, freedom of capital and low interest rates.<sup>12</sup> More importantly, though, “much of the borrowed money in the periphery did not find its way into the productive economy, but into non-productive consumption and investment that did little to stimulate the export capacities of the periphery”, leading to the creation of so-called bubbles in both periphery and core countries.<sup>13</sup> Moreover, the periphery experienced inflation “including high wages in non-tradable or non-export sectors such as service and public sectors”<sup>14</sup> creating more structural issues and economic risks for these economies. As Parker and Tsarouhas indicate, “both core and periphery states were content to overlook these imbalances as long as there was growth in the Eurozone”,<sup>15</sup> which led to the exacerbation of asymmetries and the creation of unsustainable debts in the periphery. Positioning the crisis within the backdrop of asymmetries predating the monetary union and exacerbated after its creation allows us to account for two main components of the crisis. Firstly, asymmetries owed to the Euro’s design<sup>16</sup> contributed to current-account imbalances,<sup>17</sup> which

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<sup>10</sup> Peter A. Hall, “Varieties of Capitalism and the Euro Crisis”, *West European Politics* 37, no. 6 (2014), 1223-1243; Aidan Regan, “Political Tensions in Euro-Varieties of Capitalism: The Crisis of the Democratic State in Europe”, *EUI Working Paper*, no. 2013/14 (2013).

<sup>11</sup> Owen Parker and Dimitris Tsarouhas, “Causes and Consequences of Crisis in the Eurozone Periphery”, in *Crisis in the Eurozone Periphery: The Political Economies of Greece, Spain, Ireland and Portugal*, eds. Owen Parker and Dimitris Tsarouhas (Cham: Palgrave Macmillan, 2018), 1-27, 5.

<sup>12</sup> Regan, *Political Tensions in Euro-Varieties of Capitalism: The Crisis of the Democratic State in Europe*.

<sup>13</sup> Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 7.

<sup>14</sup> Ibid.

<sup>15</sup> There is a strong link between neoliberal financialization, including financial deregulation, and the creation of debt in the periphery that this chapter will not explore further. For further discussion see: Engelbert Stockhammer, “Neoliberal Growth Models, Monetary Union and the Euro Crisis. A Post-Keynesian Perspective”, *New Political Economy* 21, no. 4 (2016), 365-379. For a broader discussion on neoliberal financialization, see: Costas Lapavistas, *Profiting without Producing: How Finance Exploits Us all* (London: Verso, 2014).

<sup>16</sup> According to Parker and Tsarouhas “it was EMU that locked-in German competitive advantages vis-à-vis the periphery, established an environment that made borrowing and growing indebtedness easier in the periphery, and (as noted above) facilitated the intensification of an already liberalized capital mobility from core to periphery.” Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 11.

<sup>17</sup> Gibson, Palivos and Tavlás, *The Crisis in the Euro Area: An Analytic Overview*, 233-239, 235. See also: Olivier Blanchard and Francesco Giavazzi, “Current Account Deficits in the Euro Area: The End of the Feldstein-Horioka Puzzle?” *Brookings Papers on Economic Activity* 33, no. 2 (2002), 147-209.

in turn bolstered sovereign debt. Secondly, asymmetries explain the disproportionate impact of the crisis on periphery economies as opposed to the core.

Another contributing factor, also associated with the construction of the Euro, is the absence of a lender of last resort. In the absence of a fiscal union, the EMU operates solely as a monetary union and lacks some of the characteristics of other currency unions. As de Grauwe explains, typically in any currency union, a central bank acts as a lender of last resort to ensure and secure the solvency of its banking sector and the government (also called the 'sovereigns' in economic scholarship).<sup>18</sup> The existence of a lender of last resort enhances market confidence and restricts market panic in case a government experiences economic difficulties.<sup>19</sup> However, in the case of the EMU, fiscal discipline could not be implemented by the European Central Bank (ECB) whose mandate is limited to maintaining price stability through "maintaining debt and deficit levels within certain limits".<sup>20</sup> Consequently, the ECB is constitutionally precluded from exercising the functions of a lender of last resort. Article 123 TFEU prohibits the provision of overdraft facilities or any other type of credit facility to a Member State or union institution by another Union institution or central bank of a Member State. Moreover, Article 125 TFEU, also known as the no-bail-out clause, provides that neither the Union nor a Member State shall be liable for or assume the commitments of central governments. The combined effect is to remove the ability of any government, union institution or central bank to assume the role of a lender of last resort in instances where a sovereign faces liquidity issues. The logic behind Articles 123 and 125 TFEU is that fiscal discipline in the EMU is left to market forces, which rests on the belief that market mechanisms are adequate to enforce fiscal discipline because those sovereigns who do not exercise prudent budgetary policy will not be able to obtain capital from the markets. However, the constant flow of capital from core to periphery exposed periphery countries to a circle of debt, and when the crisis hit, traditional crisis resolving mechanisms such as the lender of last resort were not in place.<sup>21</sup>

## 1.2 Dominant frames and austerity as the sole solution

While the Euro's fraught foundations and structural asymmetries may help explain the crisis and crisis response measures,<sup>22</sup> as this section indicates, the Eurozone crisis was discussed and analysed

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<sup>18</sup> Paul De Grauwe, "Design Failures in the Eurozone: Can they be Fixed?" *LEQS Paper*, no. 57 (2013).

<sup>19</sup> Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 12. See also, De Grauwe, *Design Failures in the Eurozone: Can they be Fixed?*

<sup>20</sup> Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 11; "Monetary Policy", European Central Bank, Accessed April 20th 2020, <https://www.ecb.europa.eu/mopo/intro/html/index.en.html>

<sup>21</sup> Richard E. Baldwin and Daniel Gros, "What Caused the Eurozone Crisis?" *CEPS Commentary* (November 27, 2015, 2015), 2.

<sup>22</sup> Two emergency financial mechanisms (the EFSM and EFSF) and one permanent financial mechanism (the ESM) were established in the aftermath of the crisis. A more detailed discussion of these mechanisms can be found in section 2.1 of this chapter.

predominantly as a sovereign debt crisis. Against the economic background described above, the crisis unfolded soon after the Greek government released the true figure of its debt.<sup>23</sup> In light of this information, holders of Greek sovereign bonds rushed to offload their assets, which in turn pushed Greece's cost of borrowing to unsustainable levels.<sup>24</sup> In the absence of a lender of last resort, financial assistance to Greece was not provided quickly, only being initiated after "Germany ultimately decided that the potential systemic effects to the Euro of allowing a default were too great".<sup>25</sup> A series of bail-out programmes<sup>26</sup> were agreed between the Greek government and the European Commission, ECB and International Monetary Fund (IMF) – a configuration known as the *Troika*. Despite attempts to control the contagion of an economic downturn, the Greek sovereign debt crisis ignited a series of economic effects, with the economies of Greece, Portugal, Italy, Spain and Ireland following a similar trend up until 2009. In all of these examples, current account deficit, government deficit and general government debt (all indicators calculated as percentage of gross domestic product) were rising.<sup>27</sup> As a result, Portugal's experience was similar to Greece's, with the high cost of borrowing rendering its debt unsustainable and triggering a sovereign debt crisis.<sup>28</sup> For Spain, Italy, Ireland and Cyprus, a banking crisis triggered a sovereign debt crisis. Spain and Ireland were unable to repay private debt, thus triggering a banking crisis; in Italy, large banks suffered losses from the wider effects of the global financial crisis. As banks threatened to collapse, private debt was nationalised when governments intervened to support the banking sector, and, the banking crisis became a sovereign debt crisis.<sup>29</sup>

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<sup>23</sup> On 20 October 2009, the newly elected government announced that the Greek debt was not 3.6 percent of GDP, as quoted by the previous administration, but triple that figure at 12.8 percent of GDP. It increased to 13.6 percent in April 2010. See Kevin Featherstone, "The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime", *Journal of Common Market Studies* 49, no. 2 (2011), 193-217, 199.

<sup>24</sup> Financial markets increasingly pointed out the possibility of a Greek default, leading to the downgrading of Greek bonds by credit rating agencies to 'junk status' in April 2010. Demand for Greek government bonds fell dramatically while existing bond holders rushed to sell their assets. For further discussion see: Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 9; Featherstone, *The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime*, 193-217, 199-200.

<sup>25</sup> Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 9.

<sup>26</sup> The first programme (May 2010) "provided bilateral loans pooled by the European Commission (Greek Loan Facility – GLF) for a total amount of €80 billion to be released over the period May 2010 to June 2013". The second programme (March 2012), financed by the European Financial Stability Facility (EFSF) and IMF, "committed the unreleased amounts of the first programme (Greek loan facility) plus an additional €130 billion for the years 2012-14." When the second programme expired in June 2015, the Greek government applied to the ESM for further assistance. The Commission approved the application, paving the way for the a further €86 billion in financial assistance over three years (2015-18). Following a series of reviews (May 2016, July 2017, January 2018 and June 2018) and the signing of supplementary Memorandums of Understanding, Greece completed all programmes concluded with the Troika. After June 2018, Greece entered a period of enhanced surveillance under the new rules on fiscal coordination (these will be outlined in due course). See [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance/which-eu-countries-have-received-assistance/financial-assistance-greece_en)

<sup>27</sup> Presented in Michael G. Arghyrou and John D. Tsoukalas, "The Greek Debt Crisis: Likely Causes, Mechanics and Outcomes", *The World Economy* 34, no. 2 (2011), 173-191, 185. Data source, Eurostat and OECD.

<sup>28</sup> Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 14.

<sup>29</sup> Matthias Matthijs and Mark Blyth, eds, *The Future of the Euro* (Oxford: Oxford University Press, 2015), 1-17.

Despite the multifaceted and interlinked causes of the Eurozone crisis, sovereign debt became the dominant frame through which the crisis was discussed, analysed and, most importantly, resolved.<sup>30</sup> It is important to appreciate, as Colin Hay explains, the connection between the framing of an event, the identification of appropriate responses based on this framing and, finally, a decisive intervention by an actor capable of intervening.<sup>31</sup> In his words, “those who are able to define what crisis is all about also hold the key to defining the appropriate strategies for [its] resolution”,<sup>32</sup> including the identification of an agent or institution that is more suitable for initiating, delivering and ensuring the effectiveness of those responses.<sup>33</sup> In the Eurozone crisis, the majority of powerful stakeholders, including the Commission, ECB, ECOFIN (Economic and Financial Affairs) Council and the European Council, framed the problem as a sovereign debt crisis caused by imprudent government spending. Austerity, defined by Blyth as “a form of voluntary deflation in which the economy adjusts through the reduction of wages, prices, and public spending to restore competitiveness which is (supposedly) best achieved by cutting the state’s budget, debts, and deficits”,<sup>34</sup> was applied indiscriminately across the macroeconomic adjustment programmes used in Eurozone countries.<sup>35</sup> While the effectiveness of austerity as the antidote to the Eurozone crisis is highly contested,<sup>36</sup> dominant framings of the crisis have led to the continuing implementation of austerity policies in those countries where financial assistance was provided by the EU.<sup>37</sup>

For our discussion, the link between dominant framings of the Eurozone crisis and the resulting policy measures becomes relevant in identifying how crisis response measures are decided and

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<sup>30</sup> Indicatively, see: Brigid Laffan, "Framing the Crisis, Defining the Problems: Decoding the Euro Area Crisis", *Perspectives on European Politics and Society* 15, no. 3 (2014), 266-280; Pisani-Ferry, *The Euro Crisis and its Aftermath*; Nicolas Jabko, "The Political Appeal of Austerity", *Comparative European Politics* 11, no. 6 (2013), 705-712; Georgios Karyotis and Roman Gerodimos, eds, *The Politics of Extreme Austerity: Greece in the Eurozone Crisis* (Basingstoke: Palgrave Macmillan, 2015).

<sup>31</sup> Colin Hay, "Crisis and the Structural Transformation of the State: Interrogating the Process of Change", *The British Journal of Politics & International Relations* 1, no. 3 (1999), 317-344.

<sup>32</sup> Paul 't Hart, "Symbols, Rituals and Power: The Lost Dimensions of Crisis Management", *Journal of Contingencies and Crisis Management* 1, no. 1 (1993), 36-50, 41.

<sup>33</sup> Colin Hay, "Narrating Crisis: The Discursive Construction of the Winter of Discontent", *Sociology* 30, no. 2 (1996), 253-277, 254. See also Janet Roitman, *Anti-Crisis* (Durham: Duke University Press, 2014); Antoon De Rycker and Mohd Zuraidah Don, eds, *Discourse and Crisis: Critical Perspectives* (Amsterdam / Philadelphia: John Benjamins Publishing Company, 2013).

<sup>34</sup> Mark Blyth, *Austerity: The History of a Dangerous Idea* (Oxford: Oxford University Press, 2013).

<sup>35</sup> Details about macroeconomic adjustment programmes applied to Eurozone countries (Ireland, Portugal, Spain, Greece and Cyprus) can be found on the European Stability Mechanism’s website: <https://www.esm.europa.eu/financial-assistance>.

<sup>36</sup> Parker and Owen, for example, argue that “the official EU (and most frequently presented) diagnosis of the crisis tended to seriously simplify, if not refute, the story of imbalance, financialization and the faulty design of the single currency enunciated above. This represented an unwillingness to acknowledge the deeper failures of the neoliberal ideas of efficient markets that underpinned the design of the single currency”. See Parker and Tsarouhas, *Causes and Consequences of Crisis in the Eurozone Periphery*, 1-27, 13. On the effects of austerity, see Paul De Grauwe and Yuemei Ji, "The Legacy of Austerity in the Eurozone", *Centre for European Policy Studies* (2013), 1-6.

<sup>37</sup> Manos Matsaganis and Chrysa Leventi, "The Distributional Impact of the Greek Crisis in 2010", *Fiscal Studies* 34, no. 1 (2013), 83-108. Catherine Moury and André Freire, "Austerity Policies and Politics: The Case of Portugal", *Pôle Sud*, no. 2 (2013), 35-56. Kieran Allen and Brian O'Boyle, *Austerity Ireland: The Failure of Irish Capitalism* (London: Pluto Press, 2013). Alexander Michaelides and Athanasios Orphanides, eds, *The Cyprus Bail-in: Policy Lessons from the Cyprus Economic Crisis* (London: Imperial College Press, 2016).

administered. In other words, I am less concerned with exploring the link between framings of the problem and policy responses and more concerned with the institutional channels of decision-making adopted to administer what were considered appropriate responses. In the remainder of this chapter, therefore, I will consider the development of policy decisions during the crisis and any constitutional implications resulting from the ways through which crisis response measures have been decided.

## 2. Constitutional implications of the Eurozone crisis: Intensified coordination, constitutional circumventions and the insulation of economic decision-making from political interference

As the previous section indicated, dominant framings led to the qualification of austerity and structural reforms as necessary and appropriate crisis response measures. Europe's leaders saw a need for greater coordination between various stakeholders that existing channels of intergovernmental cooperation and Community decision-making could not address. Herman Van Rompuy, then acting as the president of the European Council, captures the spirit of European leaders at the time by arguing that "the choice is not between the community method and the intergovernmental method, but between a coordinated European position and nothing at all."<sup>38</sup> Similarly, the comments of German Chancellor Angela Merkel echo the need for a coordinated European position; a position that would be common across all stakeholders – "the Union institutions, the Member States and their parliaments".<sup>39</sup> It is unclear whether existing channels under the Community or intergovernmental methods were, indeed, inadequate to articulate a coordinated response or whether the political will to employ those methods was lacking. For the purposes of our discussion, though, it is not necessary to examine why existing channels were avoided; what matters is the development of institutions during the crisis and how they affected what European leaders identified as a coordinated European response. Towards this end, this section considers the institutional channels of decision-making that determined and administered crisis response measures.

Drawing upon three examples of crisis response measures, the section will examine how coordination between European institutions and Eurozone members was intensified, leading to an analogous intensification in the insulation of economic decision-making from democratic participation and contestation. Intensification of coordination and insulation, as will be indicated, is

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<sup>38</sup> Angela Merkel, "Speech by Federal Chancellor Angela Merkel at the Opening Ceremony of the 61st Academic Year of the College of Europe in Bruges on 2 November 2010" (Bruges, College of Europe, 2010).  
file:///Users/Michalis/Downloads/europakolleg\_brugge\_mitschrift\_englisch\_0.pdf, 7.

<sup>39</sup> Ibid.

achieved either through the creation of new financial institutions such as the ESM; the elaboration of existing legal structures for fiscal policy coordination; and the development of intergovernmental methods for coordination between the Member States. For each, the section will identify how crisis response increased the degree of insulation afforded to those institutions tasked with devising crisis response measures. Insulation includes the distancing of decision-making from the participation of citizens or their representatives, practices of good governance such as accountability or transparency and the contestation of measures through judicial review. As insulation is strengthened along with intensified processes of intergovernmental coordination, this section of the chapter identifies the creation of a *scrutiny lacuna* during the Eurozone crisis.

### 2.1 Assistance to Member States: Lending facilities and strict conditionality

As indicated earlier, in some Eurozone countries public debt compared to GDP rose to disproportionate levels, which lead to national governments losing access to financial markets.<sup>40</sup> While the Eurozone was faced with the possibility of economic collapse in several Eurozone economies, the absence of a lender of last resort significantly reduced the fiscal tools available for crisis management. In response, the European Union developed lending facilities for granting financial assistance to governments of Member States with financial difficulties. In this first example I consider how the creation of financial institutions such as the European Stability Mechanism intensifies coordination but also insulates crucial economic decision-making from democratic contestation during the crisis.

As first instance, two emergency financial mechanisms were created to finance the economies within the Eurozone facing severe difficulties. The European Financial Stabilisation Mechanism (EFSM) was established under Article 122(2) TFEU through a Council Regulation,<sup>41</sup> financed directly from EU budget, and provided financial assistance to Ireland and Portugal and Greece. In addition to the EFSM, the European Financial Stability Facility (EFSF) formed a temporary fiscal backstop with the capacity of providing loan facilities. The EFSF was established as a private company based in Luxembourg by the Eurozone countries in 2010.<sup>42</sup> Some two years later, a more permanent financial mechanism, the European Stability Mechanism (ESM), was established to act as an emergency

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<sup>40</sup> Greece, for example, lost access to the financial markets in 2010 and Cyprus followed in 2011.

<sup>41</sup> Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism [2010] OJ L118/1.

<sup>42</sup> As the EFSF was established by Eurozone members (except for Estonia who joined the Euro in 2011, after the EFSF was created in 2010), all members are shareholders and contributed variable amounts to form the lending capacity of the facility. All shareholders had representatives in the EFSF board with the Commission and ECB also participating as observers. Following the creation of the ESM, all activities of the EFSF were taken up by the the ESM. See also: Alicia Hinarejos, "The Court of Justice of the EU and the Legality of the European Stability Mechanism", *The Cambridge Law Journal* 72, no. 02 (2013), 237-240, 237.

financial mechanism in situations that threatened the financial stability of the Euro area as a whole. The ESM was established as an intergovernmental organisation on the basis of an international treaty,<sup>43</sup> and is considered to be governed by public international law, not European law.<sup>44</sup> Since the establishment of the ESM, the EFSM and EFSF no longer grant any new loan facilities even though the EFSF continues to operate within the ESM to receive loan repayments from beneficiary countries who have already been granted assistance.

The creation of these financial institutions has been characterised by Advocate General Kokott as “not wholly conventional”,<sup>45</sup> while academic commentators frequently point out the “unorthodoxy of the procedural and institutional fundamentals of the ESM”<sup>46</sup> - and with good reason. Some commentators focus on the outright challenge the financial mechanisms posed to established Maastricht principles such as the no-bail-out clause. As indicated earlier, Article 125 TFEU explicitly precludes the possibility of Union institutions, or other national governments, assuming the commitments of other Member States. Despite the no-bail-out clause, the EFSM was financed directly from EU budget while the EFSF and ESM are both established by Eurozone members on the basis of an intergovernmental Treaty that sits outside the remit of EU law. As the ESM complements the Union’s monetary policy, specifically the enforcement of budgetary discipline on Member States, it is argued that established Maastricht principles such as the no-bail-out clause are overlooked. As the chapter will indicate in due course, this was the subject of legal proceedings in *Thomas Pringle v Government of Ireland*.<sup>47</sup>

While the ESM’s constitutionality is important and will be examined, the ESM’s institutional design indicates how coordination and insulation were intensified during the crisis. Decision 2011/199<sup>48</sup> amended Article 136 TFEU and gives the option or ability for Eurozone countries to establish their own financial mechanism. However, Article 136 did not form the legal basis for the EMU’s permanent loan facility mechanism; instead, it allows Eurozone members to establish their own financial mechanism outside the scope of EU law. As these lending facilities were created outside the scope of EU law, Hinarejos and Ruffert described them as a kind of “public international

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<sup>43</sup> Treaty Establishing the European Stability Mechanism.

<sup>44</sup> Case C-370/12 *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756, [155]-[169].

<sup>45</sup> Opinion of Advocate General Kokott delivered on 26 October 2012 in Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General*, [1].

<sup>46</sup> Stanislas Adam and Francisco Javier Parras Mena, “The European Stability Mechanism through the Legal Meanderings of the Union’s Constitutionalism: Comment on Pringle”, *European Law Review* 38, no. 6 (2013), 848-865, 849.

<sup>47</sup> Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756. Hereafter cited as *Pringle*.

<sup>48</sup> The following paragraph was added to Article 136 TFEU following Decision 2011/199/EU:

“3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”

Special Purposes Vehicle”.<sup>49</sup> A Special Purposes Vehicle indicates the creation, by a mother company, of a subsidiary in order to pursue an activity without affecting the mother company. The Special Purposes Vehicle analogy indicates how the EU created a separate entity to pursue an economic activity outside the remit of the European legal order and – crucially – its constraints. In an alternative description of the ESM’s legal standing, suggested by a German lawyer and adopted by the German Federal Constitutional court in their ESM judgment, the substitution of EU law for international law instruments is understood as a form of ‘*Ersatzunionsrecht*’ or ersatz legislation. This term denotes the inclination of the Union toward international law as the medium through which crisis response measures are adopted when European Union law would pose legal difficulties or restrictions.<sup>50</sup> The ESM lies *outside* the EU legal order, but is indirectly governed, or at least highly influenced, by EU institutions. Article 5(3) of the ESM Treaty enables the Commission, ECB and Eurogroup president to sit in on the meetings of the ESM Board of Governors as observers. However, the role of the Commission, the ECB and the Eurogroup entails much more than observation. As subsequent chapters indicate, decisions on whether to grant ESM assistance are based on reports concluded by the Commission and ECB, while the two Institutions are also “entrusted”, along with the IMF, to negotiate, sign and monitor the terms of a Memorandum of Understanding between the ESM and the state in need of financial assistance.<sup>51</sup>

The enhanced role of EU institutions in granting ESM assistance, combined with the fact that the ESM’s shareholders and Board of Governors are Eurozone members, indicates how coordination was achieved between different stakeholders during the crisis. At the same time, positioning the ESM outside the remit of EU law insulates economic decision-making from democratic interference or contestation. Crisis response measures decided within the ESM enjoyed immunity from legal constraints, many of which were established to ensure democratic decision-making. As Dawson and de Witte indicate, the institutional structure of the Union, discussed in the previous chapter, was designed to facilitate democratic access or at least transparency of decision-making by EU institutions despite elements of “executive dominance” and the insulation of certain policy areas.<sup>52</sup> By circumventing even the existing institutional structure of the EU, the ESM “has significantly decreased the authorship and ownership of citizens over the way in which their societies are run.”<sup>53</sup>

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<sup>49</sup> Matthias Ruffert, “The European Debt Crisis and European Union Law”, *Common Market Law Review* 48, no. 6 (2011), 1777-1805, 1782; Hinarejos, *The Court of Justice of the EU and the Legality of the European Stability Mechanism*, 237-240, 237.

<sup>50</sup> Michelle Everson and Christian Joerges, “Who is the Guardian for Constitutionalism in Europe After the Financial Crisis?” *LEQS Paper*, no. 63 (2013), 11.

<sup>51</sup> Pringle, [18]. Chapters 4 and 5 of the thesis consider the role of European institutions in the ESM, specifically the Eurogroup.

<sup>52</sup> Mark Dawson and Floris Witte, “Constitutional Balance in the EU After the Euro-Crisis”, *The Modern Law Review* 76, no. 5 (2013), 817-844, 835.

<sup>53</sup> *Ibid.*

More importantly, though, the deliberate positioning of the ESM outside of the EU legal order insulates economic decision-making from judicial review. Pursuant to Article 32(3) of the ESM Treaty,<sup>54</sup> the ESM enjoys "immunity from every form of judicial process" except if the ESM expressly waives that immunity. Moreover, the ESM cannot be subjected to the strictures of the CJEU as it "operates under international law and is an independent entity",<sup>55</sup> while none of its actions can be imputed to any EU institution.<sup>56</sup> In positioning the ESM outside the EU's legal order, European institutions and Member States influencing the ESM can act in a scrutiny lacuna that insulates them from contestation at different levels, including authorship of measures and the intervention of democratic bodies, requirements for accountability, transparency and legitimacy, but also insulation from contestation through judicial review.

A further parameter to the setting up of financial mechanisms by the EU concerns the conditionality attached to ESM loans – the provision of debt subject to certain conditions. Financial assistance during the crisis was provided on the basis of strict conditionality both to Eurozone and non-Eurozone members.<sup>57</sup> The first application of conditionality during the Eurozone crisis appeared in the bilateral loan between Eurozone members and the Greek government well before the creation of financial mechanisms.<sup>58</sup> In those agreements, loan instalments were "made dependent on compliance by Greece with the conditions contained in a MoU and Council Decision 2010/320/EU."<sup>59</sup> Shortly after, a macroeconomic adjustment programme<sup>60</sup> was agreed between Greece and the Troika, setting out the conditions upon which future instalments would be released. The Commission and ECB were responsible for carrying out assessments throughout the programme

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<sup>54</sup> Treaty Establishing the European Stability Mechanism.

<sup>55</sup> Jonathan Tomkin, "Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy", *German Law Journal* 14, no. 1 (2013), 169-189, 187.

<sup>56</sup> The Commission is under an obligation to ensure that any agreement it negotiates on behalf of the ESM is consistent with EU law and the Charter of Human Rights. However, as Chapter 5 considers, this provision is an empty promise, as the ECJ showed no willingness to interfere with the Commission's policy objectives on the grounds of any human rights restrictions. See: Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:701.

<sup>57</sup> See for example, the provision of financial assistance to Hungary, Romania and Latvia. Decision 2009/102/EC providing Community medium-term financial assistance for Hungary, [2009] OJ L 37/5; Decision 2009/289/EC on granting mutual assistance for Latvia, [2009] OJ L 79/37; Decision 2009/290/EC providing Community medium-term financial assistance for Latvia [2009] OJ L 79/39. For further details on the terms and development of each financial assistance agreement see: "EU Financial Assistance", <https://ec.europa.eu/>, Accessed July 15th 2018, [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-financial-assistance_en)

<sup>58</sup> Loan Facility Agreement between Euro-area Member States and KfW, the Hellenic Republic, The Bank of Greece acting as agent on behalf of the Hellenic Republic, 8.5.2010 (Greek Loan Facility Agreement)

<sup>59</sup> Michael Ioannidis, "EU Financial Assistance Conditionality After 'Two Pack'", *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht (Heidelberg Journal of International Law)* 74 (2014), 1-44, 70; Council Decision 2010/320/EU of 10.5.2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2010) OJ L145/6.

<sup>60</sup> The ESM defines a Macroeconomic Adjustment Programme as: An extensive programme of policy reforms aimed at addressing problems in a programme country's economic and fiscal situation. It is negotiated between the institutions and the country. The implementation of policy reforms set out in the macroeconomic adjustment programme is a precondition for receiving disbursements of ESM loans. <https://www.esm.europa.eu/glossary/M>

period<sup>61</sup> and released instalments based on the successful meeting of conditions that were set out in the adjustment programme.<sup>62</sup> The subsequent development of the EFSM, EFSF and ESM replicated this model of conditionality<sup>63</sup> and formally introduced it into Union law.<sup>64</sup> With the introduction of Regulation 472/2013<sup>65</sup> as part of the “two-pack” legislative initiative (discussed later on), the involvement of EU institutions in conditionality was formalised. Consequently, all loan facilities to European states during the crisis were and are contingent upon the fulfilment of budgetary and macroeconomic conditions.<sup>66</sup>

Conditionality serves the dual function of enhancing coordination and insulation during the crisis. Any state requesting assistance must first enter into negotiations with the Troika and issue a unilateral statement of intent, also known as a Memorandum of Understanding, stating the measures the state is willing or planning to adopt should the loan be approved. Following this statement of intent, a competent body approves the provision of financial assistance depending on the financial institution from which the loan is provided.<sup>67</sup> For the EFSF, the body providing formal approval was the Council; for the EFSF, it was the Eurogroup Working Group; and for the ESM, the Commission and ECB, acting as agents of the ESM Board of Governors, negotiate and conclude agreements with national governments while the ESM Board of Directors provides final approval for the financial assistance facility.<sup>68</sup> In each case a Council Implementing decision is issued, laying out the terms of conditionality.<sup>69</sup> The involvement of European institutions in shaping the terms of loan agreement is not limited to the legal framework set out above. Indicatively, the Commission is tasked with the economic “assessment of the country’s public debt and financial needs, and the risk posed by the country’s financial situation to the euro area as a whole”.<sup>70</sup> Loan conditions are

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<sup>61</sup> As the Loan Facility Agreement stated, the Commission could perform on-the-spot checks and inspections (Recital 12 of the Preamble to the Greek Loan Facility Agreement) while the Greek government was obliged to provide all relevant information and facilitate the work of persons instructed to carry out those inspections (Art. 10 lit. (b) Greek Loan Facility Agreement.)

<sup>62</sup> *Ibid.*, 70.

<sup>63</sup> EFSF Framework Agreement; Regulation 407/2010/EU establishing the EFSM; ESM Treaty.

<sup>64</sup> Article 136(3) TFEU; Regulation 473/2013: 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. As the chapter indicates, conditionality gained legal approval in the ECJ’s judgment in *Pringle*.

<sup>65</sup> Regulation 472/2013: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

<sup>66</sup> *Ibid.*, 62.

<sup>67</sup> Anastasia Karatzia, “An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States”, *Hungarian Yearbook of International Law and European Law* (2016), 573-590, 576.

<sup>68</sup> Article 13 ESMT.

<sup>69</sup> Ioannidis, *EU Financial Assistance Conditionality After ‘Two Pack’*, 1-44, 71. For example: Council Decision 2011/734/EU of 12.7.2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and requiring Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2011) OJ L296/38; Council Implementing Decision 2011/77/EU of 7.12.2010 on granting Union financial assistance to Ireland (2011) OJ L30/34; Council Implementing Decision 2011/344/EU of 30.5.2011 on granting Union financial assistance to Portugal (2011) OJ L159/88. 2013/236/EU: Council Decision of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth.

<sup>70</sup> Karatzia, *An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States*, 573-590, 576.

determined based on the Commission's assessment, thus forcing social change in debtor countries. As future instalments are subject to the "positive assessments in quarterly reviews, [conducted by the Troika], mainly of the compliance with the terms of the Memorandum of Understanding on Specific Policy Conditionality",<sup>71</sup> creditors retain a strong leverage in determining the course of social, economic and macroeconomic policy. This is evident in all the examples of financial assistance provided to Eurozone members. Greece, Ireland, Portugal and Cyprus implemented macroeconomic adjustment programmes to restructure a sectors including the economy, healthcare, pension systems, education and labour law.<sup>72</sup> In Cyprus, for example, the programme outlined reforms that included a downsizing of the banking sector, fiscal policy objectives and structural reforms in the public sector, housing market, the tourism and energy industries as well as conditions related to fiscal policy.<sup>73</sup>

Debt conditionality showcases the high degree of coordination between EU institutions and Eurozone members. Coordination does not necessarily signal the voluntary implementation of measures by the debtor, rather it indicates how economic pressure is exerted upon debtor members of the Eurozone by EU institutions or other Eurozone members in order to implement austerity as the main crisis resolution mechanism. By shifting coordination within the ESM and enforcing crisis response measures through conditionality, the economic assessment and decision-making of creditors (EU institutions and Eurozone members) is conducted within a highly insulated environment. As conditionality is attached to the provision of financial assistance, national parliaments have little if any say in how social policy is conducted. Democratic contestation at the national level is therefore fenced off by forcing these conditions on debtor Eurozone members. In a forceful critique of conditionality, Dawson and de Witte indicate how insulation of debt conditionality from democratic contestation is achieved:

*"Despite the economic reasoning behind austerity policies, the legal entrenchment of such policies is neither the result of inter-personal political exchanges between different visions of 'the good', or a process of open political contestation that could legitimise it, nor an attempt to set up mechanisms for future normative reassessment. This is, rather, the constitutionalisation of raw political power and temporary policy preferences. To put it more bluntly, the austerity drive not only overlooks the procedural demand that the citizen's voice be incorporated in devising criteria*

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<sup>71</sup> Fabian Amtenbrink, "New Economic Governance in the European Union: Another Constitutional Battleground?" in *Varieties of European Economic Law and Regulation. Studies in European Economic Law and Regulation*, eds. K. Purnhagen and P. Rott, Vol. 3 (Cham: Springer, 2014), 207-234, 217.

<sup>72</sup> Adjustment programmes can be located at: <https://www.esm.europa.eu/financial-assistance>

<sup>73</sup> The Economic Adjustment Programme for Cyprus.

*of distributive justice, but also overlooks the fact that priority accorded to one policy choice must be legitimised by the articulation of, and mediation between, alternatives.”<sup>74</sup>*

The above observation indicates the high degree of insulation within which intensified coordination occurs, but also highlights the constitutional implications of such a development. Through the rejection of “any alternative policy choice that prioritises public spending over austerity”<sup>75</sup> conditionality infiltrates the core of competences reserved for Member States. Redistributive policies such as pensions or conditions of employment carry a fiscal burden that defines the social conditions under which citizens live. As national parliaments have little power left to determine the social conditions under which their citizens live,<sup>76</sup> insulation of economic decision-making is intensified to the extent that a broader constitutional question arises concerning the current state of the democratic settlement between EU and its Member States. It is this specific constitutional question that section three of this chapter will examine.

## 2.2 Intensification of fiscal coordination

Following the introduction of a common currency and the creation of the European Monetary Union, authority over economic policy was split between national and Union institutions. Monetary policy is an exclusive competence of the Union under article Article 3(1)(c) TFEU as indicated by Article 127 TFEU, which states that the competence to decide on monetary policy is assigned to the European System of Central Banks (ESCB), comprised of the ECB and national central banks of the Eurozone members, with the aim of retaining price stability. Fiscal policy, though, remained an exclusive competence of Member States. However, Member States refused to reduce their fiscal independence “on grounds of subsidiarity, greater democratic legitimacy, and added competitive advantages”.<sup>77</sup> Nevertheless, due to the ever-increasing integration of national economies under the common market and currency, fiscal independence would be limited through a system of coordination. Prior to the Eurozone crisis, fiscal policy coordination consisted of two main components: the excessive deficit procedure and the multilateral surveillance procedure.<sup>78</sup>

According to Article 126(1) TFEU, Member States have an obligation to avoid excessive deficits, “defined as government borrowing above 3 per cent for the ratio of planned or actual government deficit to GDP at market prices, or an excessive debt, defined as the total gross debt of a Member

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<sup>74</sup> Dawson and Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 817-844, 826.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid, 827. See also: Fritz W. Scharpf, “Monetary Union, Fiscal Crisis and the Pre-Emption of Democracy”, *Zeitschrift Für Staats-Und Europawissenschaften (ZSE)/Journal for Comparative Government and European Policy* (2011), 163-198; Anastasia Poulou, “Austerity and European Social Rights: How can Courts Protect Europe’s Lost Generation?” *German Law Journal* 15, no. 6 (2014), 1145-1176.

<sup>77</sup> Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford: Oxford University Press, 2015), 52.

<sup>78</sup> Amtenbrink, *New Economic Governance in the European Union: Another Constitutional Battleground?* 207-234, 273.

State at nominal value outstanding at the end of the year and consolidated above 60 per cent for the ratio of government debt to GDP at market prices”.<sup>79</sup> With the introduction of the Stability and Growth Pact in 1998, an agreement between Member States to strengthen budgetary surveillance and coordination of economic policies by the Commission and Council, requirements under the excessive deficit procedure outlined in Article 126 TFEU became more specific.<sup>80</sup> As Amttenbrink notes, economic policy coordination committed Member States to achieving a balanced or surplus budget through “broad economic policy guidelines (BEPGs) adopted by the Council on a recommendation by the European Commission and conclusions of the European Council in the shape of recommendations”.<sup>81</sup>

Under the multilateral surveillance procedure, the commitment of Member States to achieve a balanced or surplus budget was ensured through the Stability and Convergence Programmes submitted annually by Member States to the Council and European Commission.<sup>82</sup> Through the Stability and Convergence Programmes, Member States were required to “take into account broad economic policy guidelines adopted by the Council on a recommendation by the European Commission and conclusions of the European Council in the shape of recommendations”.<sup>83</sup> These recommendations included a wide range of economic policy objectives, including budgetary policy, financial market integration and labour related issues such as wages.<sup>84</sup> Pursuant to Article 121(4–5) TFEU and Articles 5, 6, 9, and 10 of Regulation 1466/97 the Council was responsible for ensuring Member States’ compliance with the excessive deficit procedure. If the Council detected a “significant divergence of the budgetary position of a Member State, the Council was originally responsible for issuing a so-called early warning to a Member State in order to prevent the occurrence of an excessive deficit”.<sup>85</sup> In 2005, Regulation 1466/97 was reformed<sup>86</sup> to improve both Member State compliance and the Council’s ability to monitor their progress. Both these aims were to be achieved through the introduction of “country-specific medium-term objectives”<sup>87</sup> that required Member States to comply with customised objectives and allowed the Council to assess

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<sup>79</sup> *Ibid*, 273-274.

<sup>80</sup> Resolution of the European Council on the Stability and Growth Pact of 17 June 1997, OJ 1997, C 236. Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 1997 L 209/1; Council Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ 1997 L 209/6.

<sup>81</sup> *Ibid*, 274.

<sup>82</sup> Fabian Amttenbrink, “The Metamorphosis of European Economic and Monetary Union”, in *The Oxford Handbook of European Union Law*, eds. Anthony Arnall and Damian Chalmers (Oxford: Oxford University Press, 2015), 719-756, 724.

<sup>83</sup> *Ibid*, 725.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid*.

<sup>86</sup> Art 2a Reg 1466/97, as introduced by Council Regulation 1055/2005 amending Reg 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ 2005, L 174/1.

<sup>87</sup> *Ibid*, 725.

their progress over shorter periods. However, as the European budgetary reference values were neither legally binding nor accompanied by an enforcement mechanism, Member States did not always comply with them, before or after the 2005 reform.<sup>88</sup> The excessive deficit procedure may have established an enforcement mechanism and provided for financial sanctions under Article 126(2)-(11) and Regulation 1467/97, but the imposition of sanctions was, as Amtenbrink indicates, more a “theoretical possibility”<sup>89</sup> than an actual enforcement mechanism. France and Germany, for instance, were in contravention of the targets set, but the Council could not obtain the qualified majority, as required in Article 126(8) and (9) TFEU, to put forward the excessive deficit procedure.<sup>90</sup>

In addition to fiscal coordination, the absence of a lender of last resort, as discussed above,<sup>91</sup> seek to ensure that Member States remain committed to a balanced budget and, in case they were in deficit, “refinance themselves at market conditions, whereby the markets would signal any negative developments in the creditworthiness of a country by means of the interest rate, forcing the country concerned to adjust its policies.”<sup>92</sup> Since the crisis, there has been fierce debate about whether too much trust was put on the market as a corrective agent or whether the Maastricht principles were doomed to fail because their fundamental presuppositions were wrong or because the monetary union could not proceed without fiscal union.<sup>93</sup> What matters, however, for our discussion, is that fiscal coordination was achieved before the crisis. While the degree of legitimation concerning fiscal policy coordination could be challenged, the adoption and ratification of national budgets through national proceedings acted as a reiteration of the democratic settlement that Member States agreed to.<sup>94</sup> In the aftermath of the Eurozone crisis, though, this balance was significantly distorted.

As sovereign debt was framed as a major cause of the crisis, the EU established a renewed framework for fiscal oversight, hoping to prevent the further accumulation of national debt and reduce existing deficit levels. To achieve this, the Union strengthened the legislative framework through which economic governance and budgetary surveillance is exercised. A series of six Regulations and Directives,<sup>95</sup> the so-called ‘six-pack’ was introduced pursuant to Articles 121, 126

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<sup>88</sup> Ibid, 726.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid, 727.

<sup>91</sup> See Section 2.1. in this chapter.

<sup>92</sup> Ibid, 728.

<sup>93</sup> Indicatively, see: Clemens Fuest and Andreas Peichl, "European Fiscal Union: What is it? does it Work? and are there really 'no Alternatives'?" München: ifo Institut-Leibniz-Institut für Wirtschaftsforschung an der ..., 2012).

<sup>94</sup> *Bundesverfassungsgericht*, Judgment of 12 October 1993, 2 BvR 2134/92 and 2 BvR 2159/92, 89 BVerfGE 155 (1993).

<sup>95</sup> Regulation 1175/2011 (amending Regulation 1466/97): On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Regulation 1177/2011 (amending Regulation 1467/97): On speeding up and clarifying the implementation of the excessive deficit procedure; Regulation 1173/2011: On the effective

and 136 TFEU. The six-pack reformed the Stability and Growth Pact (SGP), and as Craig notes, was 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.”<sup>96</sup> Two additional Regulations,<sup>97</sup> known as the ‘two-pack’, further strengthened the EU’s budgetary surveillance. Finally, budgetary surveillance and discipline was further strengthened with the introduction of the ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’ (TSCG).<sup>98</sup> Article 3(1) of the Treaty requires contracting parties to maintain a balanced budget, indicating the need for general government not to exceed 3% of their gross domestic product at market prices and the annual structural balance of the general government to be at a country-specific medium-term objective as defined by the Stability and Growth Pact.

The overall aim of the new fiscal framework is to “enhance budgetary oversight by focusing on its timing, the format of national budgetary determinations and the need for these to be independently verified”.<sup>99</sup> Toward this end, the newly established European Semester establishes a “comprehensive economic and fiscal policy planning cycle” over a 6-month surveillance period whereby Member States are forced to adhere to mid-term goals.<sup>100</sup> Based on supranational policy targets outlined in the Broad Economic Policy Guidelines,<sup>101</sup> and country-specific policy objectives outlined in national Stability and Convergence Programmes,<sup>102</sup> the European Commission issues economic policy targets, recommendations and guidelines that “Member States are expected to implement in their national economic policy.”<sup>103</sup> In order to ensure compliance with the economic policy and fiscal targets set in previous budgets, Member States are required to report back to Union institutions annually.<sup>104</sup> In essence, the European Semester ensures that any budget decision is

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enforcement of budgetary surveillance in the euro area; Directive 2011/85/EU: On requirements for budgetary frameworks of the Member States; Regulation 1176/2011: On the prevention and correction of macroeconomic imbalances; Regulation 1174/2011: On enforcement action to correct excessive macroeconomic imbalances in the euro area.

<sup>96</sup> Paul Craig, “Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications”, in *The Constitutionalization of European Budgetary Constraints*, eds. Maurice Adams, Federico Fabbrini and Pierre Larouche, (2014), 19-40, 22.

<sup>97</sup> Regulation 473/2013: 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; Regulation 472/2013: On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

<sup>98</sup> For further discussion see: Hinarejos, *The Euro Area Crisis in Constitutional Perspective* and “EU economic governance ‘six-pack’ enters into force”, *European Commission*, Accessed 21<sup>st</sup> April 2020, [http://europa.eu/rapid/press-release\\_MEMO-11-898\\_en.htm](http://europa.eu/rapid/press-release_MEMO-11-898_en.htm)

<sup>99</sup> Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, 19-40, 22.

<sup>100</sup> Regulation (EU) No 473/2013.

<sup>101</sup> Article 121 TFEU.

<sup>102</sup> “Stability and Convergence Programmes”, *European Commission*, Accessed 21<sup>st</sup> April 2020 [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact/stability-and-convergence-programmes\\_en](https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/stability-and-growth-pact/stability-and-convergence-programmes_en)

<sup>103</sup> Amtenbrink, *New Economic Governance in the European Union: Another Constitutional Battleground?*, 207-234, 220.

<sup>104</sup> As part of the European Semester, Member States are required to present in April their concrete plans to comply with the EU’s country-specific recommendations and fiscal rules by submitting a set of National Reform Programmes (on economic policies) and Stability or Convergence Programmes (on budgetary policies).

approved by Union institutions before ratification by national parliaments, as the Commission may request a re-drafting of national budgets in cases where it observes a “particularly serious non-compliance with the budgetary policy obligations”<sup>105</sup> set out in the Stability and Growth Pack.

The introduction of a strengthened surveillance framework indicates the deepening of fiscal coordination and of the insulation afforded to the economic rationale of austerity as national parliaments are put under “severe constraints”<sup>106</sup> with regard to budgetary decisions. For example, the European Semester ensures that there is an early discussion at an EU level, involving all four major EU institutions, on matters such as “fiscal policy, macroeconomic imbalances, financial sector issues, and growth-enhancing structural reforms” before national budgets are up for debate.<sup>107</sup> As Craig indicates, “the objective of these temporal reforms is to ensure that the EU can comment in a timely and orderly manner on forthcoming budgetary proposals from the euro-area Member States”.<sup>108</sup> Moreover, substantive surveillance measures such as medium-term budgetary objectives<sup>109</sup> act as an “alert system” for the Council and Commission to intervene through the strengthened excessive deficit procedure<sup>110</sup> in case Member States diverge from their budgetary objectives. While these measures enhance the ability of EU executive bodies to survey objectives and ensure “that national fiscal planning is in accord with the requirements of economic union”,<sup>111</sup> they further reduce national parliaments’ ability to effectively coordinate or influence the course of their economies. As Dawson observes, the effects of the European Semester are felt most by those countries with imbalanced budgets. Countries such as Germany or Finland face “relatively little scrutiny of their budgets” while countries like Spain, Portugal, Cyprus or Greece face intrusive intervention through supervision by the Commission as a way of addressing budget deficits.<sup>112</sup> This leads Dawson to conclude that “post-crisis, a state’s freedom from EU intervention in the economic field is largely conditional on its fiscal health”.<sup>113</sup> Through a series of legislative changes, therefore, the EU “consciously” designed a system of fiscal coordination that “ensure that EU budgetary

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<sup>105</sup> Regulation (EU) No 473/2013, [20].

<sup>106</sup> Cristina Fasone, “European Economic Governance and Parliamentary Representation. what Place for the European Parliament?” *European Law Journal* 20, no. 2 (2014), 164-185, 165.

<sup>107</sup> Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform*, 2nd Edition ed. Oxford University Press, (2013), 482.

<sup>108</sup> *Ibid*, 483.

<sup>109</sup> Regulation 1173/2011.

<sup>110</sup> Regulation 1177/2011; Regulation 1173/2011.

<sup>111</sup> *Ibid*, 484.

<sup>112</sup> Mark Dawson, “The Legal and Political Accountability Structure of ‘Post-Crisis’ EU Economic Governance”, *Journal of Common Market Studies* 53, no. 5 (2015), 976-993, 982. As economic data indicates, since 2011 Germany and Finland have retained either budget deficit within 3% of GDP or a budget surplus, while Greece, Spain and Portugal retained high budget deficits before the introduction of fiscal coordination legislation but have gradually balanced their budgets according to the rules set out by the Commission. See: “General government deficit and surplus annual data”, Eurostat, Accessed 21st April 2020, <https://ec.europa.eu/eurostat/tgm/refreshTableAction.do?tab=table&plugin=1&pcode=teina200&language=en>

<sup>113</sup> *Ibid*, 982.

principles are embodied in national budgets prior to their approval by national parliaments”.<sup>114</sup> The European Semester locks in fiscal discipline and economic decision-making about state budgets is insulated from democratic contestation.

Thus, we see how the existing legal framework of fiscal coordination was developed to ensure further insulation of the fiscal policy orientation preferred by the EU. National governments have little space to manoeuvre, which as Dawson says, has “limited the capacity of national parliaments and the European Parliament to control the executive, transforming the sole democratically unaccountable institution of the Union, the Commission, from an independent initiator of policy proposals into the discharger of national budgets”.<sup>115</sup> Through the intensification of policy coordination, vital economic decisions are further insulated from democratic interference and contestation.

### 2.3 Policy coordination and institutional development

The final example of intensified coordination and insulation of economic decision-making during the crisis is institutional development. As European leaders pushed for a coordinated European response to the crisis, existing institutions expanded their scope. One example is the emergence of the European Council “as the centre of political gravity”.<sup>116</sup> A formal institution of the EU comprised of all Heads of State or Government of Member States, the European Council has the capacity to set the general direction and priorities of the Union, but not to legislate.<sup>117</sup> Throughout the Eurozone crisis, heads of states meeting in the European Council engaged with “economic stabilization issues, the rescuing and re-regulation of the financial sector as well as policies towards Member States at the brink of financial collapse.”<sup>118</sup> These meetings concluded with the issuing of European Council decisions, expressed through conclusions and resolutions that may not carry any binding legal effect but do have significant political weight. As a result, the European Council during the Eurozone crisis deviated from its role as a body shaping the overall political direction of the EU and instead determined economic policy to the extent that some commentators identified the creation of “informal or de facto competencies which did not exist before.”<sup>119</sup> This allowed European leaders to enhance their coordination of economic policy and determine crisis response measures. Enhanced coordination of this kind ensured the insulation of economic decision-making from democratic

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<sup>114</sup> Craig, *Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*, 19-40, 34.

<sup>115</sup> Mark Dawson and Floris Witte, “Constitutional Balance in the EU After the Euro-Crisis”, *The Modern Law Review* 76, no. 5 (2013), 817-844, 835-836.

<sup>116</sup> Uwe Puetter, “Europe’s Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance”, *Journal of European Public Policy* 19, no. 2 (2012), 161-178, 169.

<sup>117</sup> Article 15, TEU.

<sup>118</sup> *Ibid*, 161.

<sup>119</sup> *Ibid*, 169.

participation and contestation, especially in the countries most affected by the policy decisions made at this level.

A similar observation is made with regard to the Council of Europe. Deliberation and coordination of policy responses during the crisis also occurred at the Economic and Financial Affairs Council configuration (ECOFIN). Contrary to the European Council, where no minutes are taken and there is no transparency of deliberation, EU Council meetings are minuted and the position of each Member State is recorded. However, as Puetter observed, during the Eurozone crisis, alternative methods of deliberation came into being. Instead of debating in a formal setting, ECOFIN members transferred their discussions to informal settings like breakfast meetings<sup>120</sup> and had discussions that were not recorded. Developments in the working methods of existing EU institutions indicate how intensified methods of coordination intensify the insulation of decision-making from democratic contestation.

Both examples outlined above indicate the intensification of coordination between Heads of State (European Council) and ministers of finance (ECOFIN), but it was the Eurogroup that emerged as the centre of policy deliberation and coordination. The Eurogroup was established in order to enhance coordination between Eurozone members as Europe was preparing to enter the third and final stage of the European Monetary Union. To increase coordination on issues such as macroeconomic developments, national budgets, structural policies and cost-price trends, the European Council created an informal forum for finance ministers to discuss issues related to the new currency among themselves.<sup>121</sup> As an informal forum, the Eurogroup lacked any legal standing in EU law and was founded upon the “European Council’s December resolution on economic policy and coordination rather than on secondary law or a treaty provision”.<sup>122</sup> However, since its first meeting, the Eurogroup has undergone a process of “formalisation of its working methods”<sup>123</sup> and gained institutional support through the involvement of the Commission. Importantly, in 2003 the Eurogroup Working Group, itself a subgroup of the Economic and Financial Committee of the Council of Europe, was created and granted the responsibility of preparing policy discussions within the Eurogroup while also ensuring follow-up.<sup>124</sup> In addition, as of January 2005 the rotating presidency

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<sup>120</sup> Ibid, 171.

<sup>121</sup> The Eurogroup met for the first time on June fourth 1998. See Dermot Hodson, *Governing the Euro Area in Good Times and Bad* (Oxford: Oxford University Press, 2011), 39-40.

<sup>122</sup> Ibid, 40. See also Uwe Puetter, *Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance* (Manchester University Press, 2006).

<sup>123</sup> Hodson, *Governing the Euro Area in Good Times and Bad*, 40.

<sup>124</sup> Ibid, 40.

model was replaced by a permanent arrangement while the forum obtained legal recognition under Article 136, 137 and Article 1 Protocol 14 of the TFEU, even as it retained its informal status.

As Hodson indicates, these developments in the Eurogroup's institutional structure went hand in hand with the greater responsibilities assumed by the forum. Pursuant to changes in the EMU's fiscal rules in 2005, the Eurogroup had an increasingly important role in economic governance. This led commentators to argue that the Eurogroup has "become a kind of caucus within the Council in which the important discussions...take place and lead to decisions that are thereafter endorsed by the wider Ecofin".<sup>125</sup> The process of formalisation in addition to de-facto decision-making powers granted to the Eurogroup by Article 136 TFEU<sup>126</sup> transformed the forum "from a mere talking shop into what increasingly looks like a policy-making institution".<sup>127</sup> Uwe Puetter has pointed out the central role of the group in steering economic governance, titling his book on the Eurogroup: "how a secretive circle of finance ministers shape European economic governance".<sup>128</sup> By setting a common agenda and policy line amongst Eurozone members, the forum orients economic policy, always with the support of the Council and Commission, effectively exercising informal governance.<sup>129</sup> Even before the crisis, therefore, the Eurogroup had evolved into an important forum for policy coordination, enhancing the intergovernmental setting within which fiscal and other economic policy decisions were discussed and agreed.

With the outbreak of the financial crisis, the Eurogroup gained a significance that was disproportionate to its informal status. Acting as a formation of the Council, the Eurogroup brought together key stakeholders such as Ministers of Finance, the Commission, the ECB and the IMF. During its planned monthly meetings and in emergency meetings, the forum not only continued to act as a meeting-place for Eurozone ministers, but actively participated in the deliberation and negotiation process of EFSM, ESFSF or ESM debt conditionality.<sup>130</sup> Issues such as the terms of Memorandums of Understandings, loan values and repayment periods and assessments of economic targets and objectives for debtor countries were discussed and decided. Despite the

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<sup>125</sup> Jean Pisani-Ferry, "Only One Fed for Two Dreams: A Critical Retrospective on the Debate Over the Economic Governance of the Euro Area", *Journal of Common Market Studies* 44, no. 4 (2006), 823-844, 840.

<sup>126</sup> Hodson, *Governing the Euro Area in Good Times and Bad*, 43.

<sup>127</sup> Pisani-Ferry, *Only One Fed for Two Dreams: A Critical Retrospective on the Debate Over the Economic Governance of the Euro Area*, 823-844, 840.

<sup>128</sup> Puetter, *Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance*

<sup>129</sup> Puetter commits to a definition of this informal governance as "the process in which a certain group of decision makers agrees informally to advocate or enact particular policies while acting in formal decision-making contexts". See *Ibid*, 149.

<sup>130</sup> Chapter 4 will argue that the Eurogroup transformed into a body of deliberation and decision-making during the crisis, Chapter 5 indicates that there are several points of contact between the Eurogroup and the ESM. Indicatively, Regulation 472/2013 sets out the active involvement of the Euro Group Working Group. For example, upon receipt of request for financial assistance, the Eurogroup Working Group's president is informed, and a discussion is held within the working group to examine the possibilities available through Union or euro-area financial instruments (Article 5). Also, since the ESM Board of Governors is comprised by the same Ministers of Finance comprising the Eurogroup and, in some instances, the ECOFIN Council, discussions occurring within the Eurogroup foreshadow decisions of the ESM and ECOFIN Council.

Eurogroup's importance, the forum's working methods remain highly occluded. Its informal setting means that the Eurogroup is not subjected to any principles of good governance, including accountability and transparency as these are outlined in the Treaty.<sup>131</sup> The Eurozone ministers also sit as the ECOFIN Council configuration in which formal procedures of decision-making also apply, but when they sit as the Eurogroup, they enjoy a significant degree of insulation from transparency and accountability. While, Eurogroup statements setting out crisis response measures may not be legally binding on the Member State to which they are addressed, they have significant political weight.

The Eurogroup's development as an institution remains under explored. While some significant contributions have been made to the literature,<sup>132</sup> the Eurogroup's impact on crisis decision-making, the potential reconfiguration of competences between Union and Member States and, equally importantly, the Court's role in constitutionalising this new institutional development are a blind spot in legal constitutional discussions. Chapters 4 and 5 aim to shed light on the Eurogroup's development and constitutional impact, but for now, I want to point to the way that deliberation and decision-making was transferred to an informal body of the Union where neither the Community nor the intergovernmental method applies, intensifying in this way both coordination and insulation of economic decision-making.

Coordination between government executives, European institutions and international creditors was achieved within the Eurogroup, leading to the conclusion and handing-down of crisis response measures that Eurozone members in need of financial assistance could not evade. So coordinated were the creditor countries and European institutions that debtor countries had little, if any, say in developing crisis response measures. In this context, coordination indicates the response from the creditors rather than the agreement of creditor countries to conditionality measures. Moreover, shifting coordination within the Eurogroup, a body with no formal decision-making powers, led to greater insulation and let government executives and European institutions coordinate their actions and hand down crisis response measures to debtor countries without using any formal legal means. Instead debt conditionality coupled with political and economic power are used to transpose the measures from the supranational sphere they are decided within to the national sphere in which they take effect. National parliaments are forced to transpose these measures into law despite the absence of a formal (legal) obligation to do so. In other words, existing legal instruments such as Decisions, Directives or Recommendations are avoided, thus ensuring that the EU is not recognised

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<sup>131</sup> Articles 10-12 TEU; Article 15 TFEU.

<sup>132</sup> Paul Craig, "The Eurogroup, Power and Accountability", *European Law Journal* 23, no. 3-4 (2017), 234-249.

as the real author of crisis response measures. The exchange between Eurogroup and national Parliaments is further explored in the next chapter with reference to Cyprus.

#### 2.4 Intensified coordination and the creation of a scrutiny lacuna

Taken together, the intensified coordination between EU institutions, Eurozone members and international creditors and the increased insulation afforded to economic decision making indicate how crisis response measures are decided within a scrutiny lacuna. A scrutiny lacuna denotes an insulated space in which deliberation, and, in some cases, decision-making occurs. Scrutiny lacunae are not just insulated from interference by democratic bodies such as national parliaments, although this is one of their major characteristics. They are also insulated from the practices of good governance, including transparency, accountability or minute-taking. Another central characteristic of scrutiny lacuna, as indicated mainly in the examples of the ESM and institutional development, is the absence of formal legal means to transpose decisions adopted at the supranational level to national legislation. Decisions are not legally binding and recipients of those decisions, in this case Eurozone members in need of financial assistance, have no formal legal obligation to follow those decisions. However, as the next chapter will show, even in the absence of formal legal connection between crisis response measures decided within informal institutions such as the Eurogroup, these measures carry significant political and economic weight that is analogous to a formal legal connection between the author and the body implementing that decision. A scrutiny lacuna, therefore, denotes a space for deliberation and decision-making in which institutions and governments enjoy great degree of insulation and can effectively exercise economic governance. The carving out of a scrutiny lacuna is motivated by the need to effect a specific kind of, as indicated in the first section of this chapter. The scrutiny lacuna was carved out to circumvent those constitutional limitations – whether the division of competences, the need for transparency and accountability, or restrictions in the nature of financial instruments – that precluded or slowed down the imposition of the common position reached between creditor countries, the IMF and European institutions.

### 3. Constitutional review during the Eurozone crisis

The constitutional implications of the scrutiny lacuna did not go unchallenged. In a series of cases challenging different aspects of crisis response measures, the European Court of Justice had to review highly controversial political decisions in the context of a severe economic crisis. In this section of the chapter I want to consider how the constitutional implications of the Eurozone crisis,

as described above, were transposed into justiciable issues before supranational courts.<sup>133</sup> As there are multiple constitutional parameters to the Eurozone crisis, a number of cases appeared before national and supranational courts, each challenging different aspects of the crisis response measures. Two broad categories of cases can be identified in the jurisprudence of the Court of Justice of the European Union.<sup>134</sup> First, cases challenging conditionality measures under adjustment programs on the basis of their compatibility with fundamental or social rights. Second, cases challenging the legality of crisis response measures against existing constitutional provisions and principles, including the division of competences and democratic settlement achieved between the EU and its Member States. By reviewing responses to these sets of cases, I consider how the Court discharged its duty to observe that the law is applied by interpreting the Treaties,<sup>135</sup> but also how it performs its functions as a constitutional authority. The section argues that by exercising a light review, the European Court of Justice (ECJ) did not interfere with the intensification of coordination, thus constitutionalising the scrutiny lacuna created by institutional and legal developments outlined above.

### 3.1 Cases challenging conditionality measures under adjustment programs on the basis of their compatibility with fundamental or social rights

The first set of cases was concerned with the compatibility of conditionality provisions, under Memorandums of Understanding and macroeconomic adjustment programs, with social or fundamental rights. The key issues addressed by these cases<sup>136</sup> are “whether MoUs adopted in the context of the ESM and the national measures adopted pursuant to them have to comply with EU law, as well as whether judicial review is possible or likely at the EU level.”<sup>137</sup> The ECJ has consistently “declined jurisdiction to review the legality of national measures taken pursuant to MoUs attached to assistance granted by the EFSF, EFSM, or otherwise, claiming the lack of a link to EU law.”<sup>138</sup> According to the ECJ, acts adopted by Member States under any agreement concluded with the ESM are “extraneous to the EU legal order”,<sup>139</sup> consequent of the mechanism’s

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<sup>133</sup> An important series of cases has also unfolded in national courts. These cases will be examined in Chapter 6 of the thesis.

<sup>134</sup> Alicia Hinarejos, “The Role of Courts in the Wake of the Eurozone Crisis”, in *Beyond the Crisis: The Governance of Europe’s Economic, Political, and Legal Transformation*, eds. Mark Dawson, Henrik Enderlein and Christian Joerges (Oxford: Oxford University Press, 2015), 112-136; Karatzia, *An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States*, 573-590.

<sup>135</sup> Article 19 TEU.

<sup>136</sup> Cases include claims brought by individuals, and associations of individuals, regarding the Greek, Portuguese, and Cyprus bailouts. See *Ibid*, 575.

<sup>137</sup> Hinarejos, *The Role of Courts in the Wake of the Eurozone Crisis*, 112-136, 120.

<sup>138</sup> *Ibid*, 121. See, for example: Case T-541/10, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v. Council*, ECLI:EU:T:2012:626.

<sup>139</sup> Opinion of Advocate General Wahl delivered on 21 April 2016 in Opinion in Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, [52]-[53]; *Pringle*, [161].

intergovernmental composition, irrespective of the active involvement of EU institutions and the requirement for conditionality of ESM loans under EU law.<sup>140</sup> The ECJ's refusal to impute any decision by the ESM to EU institutions persists throughout the case-law, "even when Council decisions have implemented the contents of the MoU".<sup>141</sup> As a result, the ECJ foreclosed any avenues for the annulment of conditionality measures.<sup>142</sup>

The Court's justification is unclear.<sup>143</sup> It could be based on the position adopted by some Eurozone governments in these proceedings, namely, that Member States enter voluntarily into adjustment programmes in exchange for a loan facility.<sup>144</sup> Voluntary undertakings of this kind "would not necessarily qualify as implementation of EU law, or even be within its scope...even if they are reflected in an EU measure".<sup>145</sup> Moreover, the Court's approach is considered inconsistent with previous case-law in which it readily drew a connection between acts adopted by Member States when EU institutions acted as their agents.<sup>146</sup> Despite the apparent contradictions and absence of thorough justification, the Court's position remains that if the Commission and ECB acted as agents of the ESM, no action concluded by the mechanism can be imputed to those institutions. ESM conditionality remains, therefore outside the remit of EU law and the jurisdiction of the ECJ. The Court did, however, stress the role of national courts in exercising judicial review of such conditionality measures – a course of action considered in more detail in Chapter 6.

It must be stated that after the *Ledra* case,<sup>147</sup> the Court can review the compatibility of conditionality against fundamental human rights. In *Ledra*, Cypriot depositors affected by the bail-in submitted a claim for compensation under Article 268 TFEU and 340 TFEU against the Commission and the ECB for "losses equivalent to the diminution in value of their bank deposits".<sup>148</sup> Moreover,

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<sup>140</sup> *Pringle*, [155]-[169]. The precedent set by *Pringle* was subsequently adopted in a series of cases including: Case T-541/10 *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v Council of the European Union*, ECLI:EU:T:2012:626; Case T-215/11 *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v Council of the European Union*, ECLI:EU:T:2012:627; Case C-128/12 *Sindicato dos Bancários do Norte and Others v BPN – Banco Português de Negócios SA*, ECLI:EU:C:2013:149; Case C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins v Fidelidade Mundial – Companhia de Seguros SA*, ECLI:EU:C:2014:2036; Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, EU:C:2016:701.

<sup>141</sup> *Ibid*, 121. See: Case C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins v Via Directa – Companhia de Seguros SA*, ECLI:EU:C:2014:2327.

<sup>142</sup> It is still possible for national courts to review the legality of conditionality when these measures are repeated in Council decisions. This issue will be examined in Chapter 6.

<sup>143</sup> *Ibid*, 121.

<sup>144</sup> Case T-541/10, *ADEDY and Others v Council of the European Union*, ECLI:EU:T:2012:626, [28].

<sup>145</sup> *Ibid*, 121-122.

<sup>146</sup> Case C-316/91, *European Parliament v Council of the European Union*, ECLI:EU:C:1994:76, [9]; Joined cases C-181/91 and C-248/91, *European Parliament v Council of the European Communities and Commission of the European Communities*, ECLI:EU:C:1993:271.

; Anastasia Poulou, "The Liability of the EU in the ESM Framework", *Maastricht Journal of European and Comparative Law* 24, no. 1 (2017), 127-139, 134.

<sup>147</sup> Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising and Others v. Commission and ECB*, EU:C:2016:701. Hereafter cited as *Ledra*.

<sup>148</sup> *Ibid*, 129.

the applicants also brought an action for annulment under Article 263 TFEU by which they “sought to annul the disputed passages of the MoU that were signed by the Commission under the powers conferred upon it by the ESM Treaty”.<sup>149</sup> Despite ruling the application inadmissible, the ECJ argued that both the ECB and Commission are required to ensure that the MoUs concluded by the ESM are fully consistent with the measures of economic policy coordination provided for in the TFEU.<sup>150</sup> However, this requirement is restricted to measures of economic policy coordination and does not include the whole spectrum of EU law. In addition, the Court ruled that even when acting as agents of the ESM pursuant to the relevant Treaty, the Commission and ECB continue to be bound by EU Treaties. Accordingly, the Commission is bound by Article 17(1) TEU which tasks it with overseeing of the application of EU law. Consequently, in acting as an agent of the ESM, the Commission “should refrain from signing an MoU, whose consistency with EU law it doubts”.<sup>151</sup> The case has been celebrated as a breakthrough for the protection of human rights in cases of post-crisis financial assistance. What commentators seem to overlook, however, is that in assessing acts of the Commission or ECB, the ECJ engages in a balancing act. According to the ECJ, “the adoption of a memorandum of understanding...corresponds to an objective of general interest pursued by the European Union, namely the objective of ensuring the stability of the banking system of the euro area as a whole”.<sup>152</sup> Consequently, in considering the claims of Cypriot depositors in *Ledra*, the Court concluded that any restriction on the appellants’ right to property did not constitute a disproportionate and intolerable interference with the substance of that right.<sup>153</sup> This balancing exercise which requires that any restriction to a right be proportionate to achieving a broader objective waters down *Ledra*’s much celebrated innovation. Despite the introduction of a principle that could align debt conditionality with fundamental or social rights, the Court’s unwillingness to interfere with economic governance persists. As a result, conditionality measures remain outside the ambit of judicial review, at least at the supranational level, due to Court’s unwillingness to examine the link between EU institutions and the ESM.

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<sup>149</sup> *Ibid.*

<sup>150</sup> Article 13(3) of the ESM Treaty

<sup>151</sup> *Ibid.*, 132.

<sup>152</sup> *Ledra*, [71].

<sup>153</sup> *Ledra*, [74].

### 3.2 Cases challenging the legality of crisis response measures against existing constitutional provisions and principles.

The second set of cases deal with the legality of crisis response measures against existing national or supranational constitutional provisions. Two examples stand out,<sup>154</sup> *Pringle*<sup>155</sup> and *Gauweiler*,<sup>156</sup> which both highlight the broader constitutional significance of crisis response measures, including the expansion of competences by the EU. *Pringle* began as an appeal to the High Court of Ireland, brought by Irish MP Thomas Pringle to challenge the ratification of the ESM Treaty in Ireland. Pringle requested a declaration on two points concerning the content of the ESM Treaty as well as the process by which it was established. He sought, first, a declaration on whether the amendment of Article 136 TFEU by Art.1 of Decision 2011/199/EU<sup>157</sup> “constitutes an unlawful amendment”.<sup>158</sup> In order to amend Article 136 TFEU the simplified revision procedure was followed under Art.48(6). However, the simplified revision procedure only applies to “internal policies and actions” of the Union and not increase the Union’s competences. Pringle claimed that the amendment enables Eurozone members to establish a financial mechanism and increases, in this way, the competence of the EU in economic policy. Therefore, the first declaration sought by Pringle may have focused on a procedural matter but requires the Court to assess whether the ESM constitutes an increase of EU competences. Pringle also asked whether by adopting the ESM treaty Ireland would undertake obligations incompatible with the Treaties on which the European Union is founded. The Irish Supreme Court referred the matter to the CJEU for a preliminary ruling, calling the ECJ to consider whether the ESM Treaty constituted an expansion of EU competences and whether participating states breached EU law by establishing the ESM.

In a nominal judgment delivered by the Full Court (27 judges) the ECJ confirmed the competence of Member States to conclude a transnational treaty such as the ESM. Unfortunately, the Court dealt with the first issue raised by *Pringle* (whether the ESM Treaty constituted an expansion of EU competences) in summary. According to the judgment, Article 136(3) TFEU confirms that, Member States have the power to establish a stability mechanism and “that amendment does not confer any

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<sup>154</sup> Other similar cases include the Estonian Supreme Court decision (Constitutional Case No. 3-4-1-6-12, Judgment of 12 July 2012) and the decision by the French Constitutional Court (Decision no 2012-653 DC, judgment of 9 August 2012). For an analysis see: Samo Bardutzky and Elaine Fahey, “Who Got to Adjudicate the EU’s Financial Crisis and Why? Judicial Review of the Instruments of a Postnational Legal Order: Adjudicating the Practices of the Eurozone”, in *The Constitutionalization of European Budgetary Constraints*, eds. Maurice Adams, Federico Fabbrini and Pierre Larouche (Oxford: Hart Publishing, 2014), 341-358; Amténbrink, *New Economic Governance in the European Union: Another Constitutional Battleground?* 207-234

<sup>155</sup> *Pringle*.

<sup>156</sup> Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.

<sup>157</sup> Decision 2011/199, European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the Euro.

<sup>158</sup> *Pringle*, [2].

new competence on the Union”.<sup>159</sup> While the Court acknowledged the role of Union institutions, primarily the Commission and ECB, in the ESM, it did not dwell on their role. Through this purely formalistic reading of the Treaty, which contradicts with the Court’s purposive reading of Article 125 TFEU examined below, it could summarily conclude this point.

In considering whether the ESM Treaty constituted a breach of any obligations by Member States against EU law, the Court examined two issues: whether Member States encroached on the Union’s exclusive competence to monetary policy and whether Member States breached any EU law. Both the issues concerned “the relationship between an intergovernmental mechanism, such as the ESM, and the EU treaties [but also] on whether Member States can allocate tasks to EU institutions outside the EU framework”.<sup>160</sup> In examining the first issue, whether the amendment of Article 136 TFEU encroached on the Union’s exclusive competence to monetary policy by granting competences in this area to Eurozone members,<sup>161</sup> the Court drew a distinction the operation and objectives of the ESM and the EMU respectively. According to the Court’s assessment, ESM’s objective is to safeguard the stability of the eurozone by providing financial assistance, an economic policy instrument, while the Union’s objective is to maintain price stability through monetary policy instruments. The two objectives may complement each other, but the Court drew a distinction between them and subsequently ruled that the ESM fell outside the EU’s exclusive competences. The Court also considered whether the ESM encroached on the EU’s competence to coordinate economic policy, and concluded that it “complemented the EU’s competence in economic policy without encroaching on it”.<sup>162</sup> Member states could, therefore, establish a financial mechanism so long as the mechanism’s activities did not contradict EU law on policy coordination. Since conditionality did not “coordinate national economic policies but ensured compliance with EU law”,<sup>163</sup> it became an essential requirement for ESM loan facilities.

The second issue addressed in *Pringle* was the ESM’s compatibility with established EU Treaty provisions. More specifically, Article 125 TFEU provides that neither the Union nor a Member State can be liable for, or assume commitments of, other central governments, thus preventing the existence of a lender of last resort within the Eurozone. As the Court accepted, the aim of the said article is to encourage Member States to follow “sound budgetary policy” and “remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain

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<sup>159</sup> *Pringle*, [73].

<sup>160</sup> Hinarejos, *The Role of Courts in the Wake of the Eurozone Crisis*, 112-136, 114.

<sup>161</sup> *Pringle*, [52].

<sup>162</sup> *Ibid*, 114.

<sup>163</sup> *Ibid*, 114. *Pringle*, [63]-[64].

budgetary discipline”.<sup>164</sup> However, the Court added, compliance with budgetary discipline “contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union”.<sup>165</sup> This second, more general, meta-objective allowed the Court to infer that Article 125 TFEU “does not cover all forms of financial assistance.”<sup>166</sup> Instead, as a financial mechanism that would be activated only when it is “indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions”, it was not in contravention of the no-bailout clause.<sup>167</sup>

Continuing from the precedent set in *Pringle*, the ECJ considered the legality of the Outright Monetary Transactions (OMT) programme whereby the ECB could acquire government bonds in the secondary market (that is from investors who have already acquired bonds from governments) in order to continue funding Eurozone members if and when it deemed necessary to do so.<sup>168</sup> *Gauweiler*, initiated at national level in Germany, claimed that the ECB was acting beyond its mandate in its OMT programme. Two arguments were put forward by the applicants, first, that the programme “should be viewed as a tool of economic, not monetary, policy” and, second, that it “violates the prohibition of monetary financing (Article 123 TFEU)”.<sup>169</sup> In exercising its jurisdiction to review EU law that could be *ultra vires*, the German Federal Constitutional Court’s (GFCC) “preliminary response was to consider the Outright Monetary Transactions Programme illegal under EU law”.<sup>170</sup> However, the Court fell short of actually ruling the measures illegal, as this would spark a constitutional crisis between the GFCC and the ECJ – an issue that will be considered in more detail in Chapter 5. Instead, the GFCC referred the matter to the ECJ and provided some alternatives on what it saw as a way for the ECJ to enable the continuance of OMT.<sup>171</sup> Specifically, the Court argued that the ECJ could “either declare the OMT scheme contrary to EU law, or provide a more limited interpretation of the Programme that is in accordance with the Treaties.”<sup>172</sup> Depending on the ECJ’s interpretation, the Court reserved judgment as to whether the Outright Monetary Transactions programme violated the constitutional identity Germany’s Basic Law.

In response, the ECJ considered two main issues arising from the German Court’s reference, whether the Outright Monetary Transactions programme was a measure of economic policy and,

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<sup>164</sup> *Pringle*, [135].

<sup>165</sup> *Pringle*, [135].

<sup>166</sup> *Ibid*, 115.

<sup>167</sup> *Pringle*, [136].

<sup>168</sup> The OMT has not been used to this date.

<sup>169</sup> *Ibid*, 118.

<sup>170</sup> Alicia Hinarejos, "Gauweiler and the Outright Monetary Transactions Programme: The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union: European Court of Justice, Judgment of 16 June 2015, Case C-62/14", *European Constitutional Law Review* 11 (2015), 563-576, 565.

<sup>171</sup> BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13 -, paras (1-24).

<sup>172</sup> *Ibid*, 565.

therefore beyond the competences of the ECB and whether the programme was incompatible with the prohibition of monetary financing under Article 123 TFEU. Employing a similar approach to *Pringle*, the ECJ considered the objectives and instruments employed by the programme to determine whether it should be seen as falling within the ambit of economic or monetary policy. Since the programme contributed to the overall aim of price stability, the Court argued, it fell within the competences of the ECB even though it could have indirect effects on economic policy. In considering whether the programme contravened Article 123 TFEU, the Court accepted that buying bonds in the secondary market would be equivalent to the direct buying of the bonds if there was no distinction between the two acts. In this case, conditionality applied to the buying of any bonds by the ECB acts as a way of distinguishing the two acts. According to the Court's reasoning, the aim of both Article 123 TFEU and debt conditionality is to ensure prudent spending by Member States. By attaching conditionality to OMT provisions, therefore, the ECB was not in contravention of Article 123 TFEU. Through this purposive interpretation of both Treaty provisions and ECB measures, the Court was therefore able to validate another contested crisis response measure.

### 3.3 Exercising a light touch of review: Constitutionalising the scrutiny lacuna

Drawing on the Court's approach to both sets of cases discussed above, commentators conclude that there is an unwillingness to interfere with matters that are considered to be either political or technocratic – or simply too sensitive to the survival of the Eurozone.<sup>173</sup> Despite the significant constitutional challenges raised by litigants, especially with regards to the ESM and OMT, the Court seems unwilling to “endanger the existence of the currency union by standing in the way of an emergency mechanism that had widespread political support.”<sup>174</sup> In *Pringle*, the Court engaged in “complex judicial acrobatics”<sup>175</sup> in order to validate the creation of the ESM. In *Gauweiler*, the Court applied similar reasoning to overcome a constitutional challenge for the ECB's *ultra vires* acts. In the group of cases challenging conditionality, the ECJ did not draw any links between EU legal order and the ESM. Following the line of argument set out in *Pringle*, the Court systematically foreclosed avenues for substantive judicial review of crisis response measures by positioning the ESM outside the remit of EU law. By restricting its own jurisdiction, the Court exercised a light touch of review and sent constitutional questions back to national courts. By affirming the operation of decision-making outside its own jurisdiction, the Court constitutionalised the scrutiny lacuna established by institutional practices and developments.

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<sup>173</sup> Hinarejos, *The Role of Courts in the Wake of the Eurozone Crisis*, 112-136, 122.

<sup>174</sup> *Ibid*, 116.

<sup>175</sup> Takis Tridimas, “The ECJ and the National Courts: Dialogue, Cooperation and Instability”, in *The Oxford Handbook of European Union Law*, eds. Anthony Arnall and Damian Chalmers (Oxford: Oxford University Press, 2015), 403-430, 424.

## Conclusion

In this chapter, I considered the constitutional implications of crisis response measures by examining institutional channels of decision-making and how Europe's court system responds to measures and methods of decision-making. The chapter indicated how framing the crisis as one of sovereign debt shaped the EU's crisis response measures. In order to administer those response measures deemed necessary, European institutions and creditor Member States sought to operate in a highly insulated environment, as evidenced by discussions of European leaders calling for a new method of coordination, also termed as the Union method. The chapter proceeded to examine three examples of crisis response measures to show, firstly, the intensification of coordination in devising and exercising economic policy and, secondly, a corresponding increase in the insulation of economic decision-making. In doing so, the chapter argued that institutional developments and configurations, from the ESM to the Troika and Eurogroup, coupled with a reinforced fiscal coordination legal framework created a scrutiny lacuna. This altered the division of competences and democratic settlement between EU and Member States. The chapter then examined how Europe's courts considered cases challenging crisis response measures and the resulting constitutional alterations, arguing that by adopting a non-interventionist approach, the Court constitutionalised the scrutiny lacuna. This scrutiny lacuna extends to the ability of citizens or democratic institutions to either review or influence crisis response measures and the ability of citizens or institutions to challenge the constitutionality of measures through courts.

What this chapter observes, therefore, is a clear neoliberal moment where institutions engaged with economic decision-making are afforded a significant degree of insulation to the extent that they operate within a scrutiny lacuna. In an attempt to salvage the common currency, European institutions circumvented constitutional limitations while constitutional review validated the scrutiny lacuna created by institutional practices. This transformed European constitutionalism from a space for constitutional conflict, as explained in Chapter 2, to an insulated space for economic decision-making. The constitutional significance of the Eurozone crisis is identified in the primacy of the neoliberal political economic idea of insulation whereby economic decision-making is insulated from all other considerations. Elevating the protection of the monetary union as the sole constitutional objective of the EU during the crisis has significant constitutional implications for both the Union and its Member States. It dissolves any conflict between the many constitutional objectives within the EU's constitutional framework, affects the division of competences between the EU and its Member States and diminishes the role of constitutional courts in both the EU and Member States.

To further explore the constitutional implications of the creation and constitutionalisation of a scrutiny lacuna, the thesis considers in more detail the two aspects of the scrutiny lacuna as identified in this chapter: the increased insulation of economic decision-making from interference consequent of institutional development and the subsequent validation of a scrutiny lacuna through judicial review. Before examining how constitutional review constitutionalises the scrutiny lacuna (Chapters 5 and 6), the thesis proceeds to examine the Eurogroup's development as an institution, an issue that remains under explored. While some significant contributions have been made to the literature,<sup>176</sup> the Eurogroup's impact on crisis decision-making, the potential reconfiguration of competences between Union and Member States remains a blind spot in legal constitutional discussions. Given the Eurogroup's significance for deliberation of crisis response measures, any consideration of the constitutional parameters of the Eurozone crisis is incomplete if the Eurogroup blind spot is not addressed. The next chapter considers how the forum developed into a body of deliberation and decision-making during the Eurozone crisis with specific reference to the example of Cyprus.

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<sup>176</sup> Craig, *The Eurogroup, Power and Accountability*, 234-249; Rene Repasi, "The Role of the Eurogroup in the Economic Governance Framework" (European Parliament, European Research Centre for Economic and Financial Governance, 5 May, 2015); Menelaos Markakis, "Political and Legal Accountability in the European Banking Union-A First Assessment", *Hungarian Yearbook of International Law and European Law* (2016), 535-558; Stéphanie Laulhé Shaelou and Anastasia Karatzia, "Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on Mallis and Ledra", *European Law Review*, no. 2 (2018), 249-268; Anastasia Karatzia, "Cypriot Depositors before the Court of Justice of the European Union: Knocking on the Wrong Door?" *King's Law Journal* 26, no. 2 (2015), 175-184.

## Chapter 4 – How the Eurogroup shaped crisis response measures in Cyprus: A case of institutional development

In this chapter, I consider how the Eurogroup was transformed from an informal forum for discussion to a deliberation and decision-making body during the Eurozone crisis. Drawing on the example of Cyprus, the chapter examines the Eurogroup's role in devising crisis response measures and how Eurogroup Statements outlining policy measures are given legal effect through national measures. The chapter contributes towards expanding our understanding of institutional development by closely examining the Eurogroup's evolution through the crisis.

As indicated in Chapter 3, European institutions and creditor Eurozone members sought to operate in a highly insulated environment in order to push through with those measures deemed necessary for safeguarding the common currency. This led to the development of a new method of coordination, what EU leaders termed as the Union method. The three examples studied in the previous chapter (the creation of financial institutions by the EU; the strengthening of fiscal coordination; and institutional development), indicate that the Union method is an amalgamation of Community and intergovernmental channels aimed at coordinating a European response to the Eurozone crisis. Through these examples, I argued that coordination between European institutions and Eurozone members was intensified in order to push through with the policy approach framed as necessary. Intensified coordination transferred deliberation and decision to ad-hoc bodies or institutional configurations such as the Troika or the Eurogroup, disenfranchising in this way national democratic bodies from deliberating over crisis response measures or mechanisms. The effect of intensified coordination was to create a highly insulated space for economic decision-making – what I termed as a scrutiny lacuna. The aim of this chapter is to deepen our understanding of institutional development and the resulting scrutiny lacuna through an in-depth examination of the Eurogroup as an economic decision-making body – the Eurogroup.

The first section of this chapter offers a detailed consideration of the Cypriot economic crisis in order to provide a context for the bail-in resolution and to set out the reasons the Eurogroup insisted on this financial instrument as Cyprus' only viable option. This section continues from Chapter 3 where a connection was drawn between dominant framings of the crisis and austerity as the dominant policy approach adopted by European institutions and Eurozone members alike. Similarly, this chapter points out how dominant framings of the Cypriot financial and banking crisis lead the Eurogroup to insist on a bail-in resolution. Section two conducts a detailed review of economic deliberation during the initial stages of the crisis in Cyprus. Drawing on existing economic

and political commentary, I consider the role of the Troika and the Eurogroup in devising their responses to the crisis in Cyprus. In section three, I undertake a close reading of two plenary sessions minutes in the Cypriot House of Representatives to consider the role of the House in adopting a bail-in resolution for the Cypriot crisis.

The chapter argues that the Eurogroup acts as a decision-making body by deliberating about, and deciding on, appropriate economic measures to be adopted by Eurozone members in need of financial assistance. In this sense, the result of coordination between European institutions and Eurozone members does not simply indicate the reaching of a common position but, instead, a decision-making process where a conclusive position is reached through a Union body that the Member State to which that decision is addressed is obliged to follow. The chapter also argues that the Cypriot House of Representatives was faced with a *fait accompli* and that its role was limited to translating the policy decisions contained in the Eurogroup statement to legal provisions at the national level. By acknowledging the role of national parliaments as instruments of legitimation for decisions adopted by Union executives, I oppose the oft-cited position that crisis response measures were voluntary undertakings in exchange for financial assistance.<sup>1</sup> The chapter contributes towards a better understanding of the scrutiny lacuna and the ways through which economic decision-making is insulated from political interference, mainly from the national level. This contribution extends our understanding of the relationship between neoliberalism and European constitutionalism at the institutional level.

## 1. The Economic Crisis in Cyprus

The economy of Cyprus was among the many in the Eurozone affected by the global financial crisis and one of the last to receive financial assistance from the European Stability Mechanism (ESM) or the European Financial Stability Facility (EFSF). Up until 2008 the finances of this small economy were in good order.<sup>2</sup> When it entered the European Union in 2004, Cyprus was the most prosperous new entrant and a net contributor to the EU budget.<sup>3</sup> In the four-year period between entry into the Union and into the Eurozone (2008), its GDP consistently rose by at least 4%, topping 4.8% in 2007;<sup>4</sup> the economy averaged a 2% inflation rate and had low unemployment rates

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<sup>1</sup> Case T-541/10 *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v Council of the European Union*, ECLI:EU:T:2012:626, [28].

<sup>2</sup> Athanasios Orphanides, "The Euro Area Crisis: Politics Over Economics", *Atlantic Economic Journal* 42, no. 3 (2014), 243-263; Athanasios Orphanides and George Syrighas, *The Cyprus Economy: Historical Review, Prospects and Challenges* (Central Bank of Cyprus, 2012).

<sup>3</sup> Alexander Apostolides, "Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone", *Capital Markets Law Journal* 8, no. 3 (2013), 300-318, 10.

<sup>4</sup> Alexander Michaelides, "Cyprus: From Boom to Bail-in", *Economic Policy* 29, no. 80 (2014), 639-689, 644.

(estimated at 4%).<sup>5</sup> In 2007, public finances indicated a 3.3% surplus, while the 60% debt-to-GDP ratio was expected to fall below 50% by the end of 2008.<sup>6</sup> However, by May 2012 public finances had deteriorated so much that Cyprus lost access to financial markets and needed assistance from the European Stability Mechanism or the European Financial Stability Facility.<sup>7</sup> In March 2013, the newly elected government signed a controversial agreement with the Troika in order to prevent two major banks from collapse.

While a detailed discussion of the conditions under which a fairly stable and well-performing economy was led to a major crisis is beyond the scope of this chapter, I will consider the main components of the Cyprus crisis. As previously discussed, there is a causal connection between framing the crisis, responding to it and the institutions seen as capable of devising and administering crisis response measures. Drawing on this idea, this section examines dominant framings of economic conditions leading to the crisis as part of the broader environment or context within which crisis response measures are decided. In doing so, I focus on three main components of the crisis: the economic conditions under which the crisis occurred and that increased the magnitude of the blow; the loss of government funding due to loss of access to markets and private funding due to the Greek PSI; and a major delay on the part of the Cypriot government in taking action that increased the magnitude of the problem.

### 1.1 Towards a sovereign debt and banking crisis

For a small Mediterranean island with a population of just over one million, Cyprus' banking sector hit above its weight. The sector's total assets were calculated at 896% of GDP in 2010 compared to an EU average of 357% in 2009.<sup>8</sup> The disproportionate size of Cyprus' banking sector partly derives from the so-called 'Cyprus business model'; a strategy aimed at attracting foreign, sometimes non-Eurozone, corporations to the island. There are a number of reasons for foreign corporations to establish headquarters in Cyprus. In addition to the good standard of living, Cyprus offers a skilled workforce oriented toward the provision of legal and financial services. Due to the

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<sup>5</sup> Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318, 10. These figures can be found at: "World Outlook Database, October 2012 Edition", World Outlook Database, IMF, Accessed January 8th 2020, <https://www.imf.org/external/pubs/ft/weo/2012/02/weodata/index.aspx>

<sup>6</sup> European Commission, *Economic Forecast, Spring 2008* European Commission (Directorate-General for Economic and Financial Affairs), [2008], 80.

<sup>7</sup> For further discussion see Michaelides, *Cyprus: From Boom to Bail-in*, 639-689; Athanasios Orphanides, "What Happened in Cyprus? the Economic Consequences of the Last Communist Government in Europe", in *The Cyprus Bail-in: Policy Lessons from the Cyprus Economic Crisis*, eds. Athanasios Orphanides and Alexander Michaelides (London: Imperial College Press, 2014); Athanasios Orphanides, "What Happened in Cyprus", *SAFE Center of Excellence Policy Letter Series*, no. No. 6 (2013); Orphanides and Syrighas, *The Cyprus Economy: Historical Review, Prospects and Challenges*; Efrosyni Panayi and Stavros A. Zenios, "Was the Cyprus Crisis Banking Or Sovereign Debt?" *The Wharton Financial Institutions Centre, University of Pennsylvania Working Paper* 14-19 (2014).

<sup>8</sup> Constantinos Stephanou, "The Banking System in Cyprus: Time to Rethink the Business Model", *Cyprus Economic Policy Review* 5, no. 2 (2011), 123-130, 123.

island's colonial past, the legal system is based on English law and the civil service is trilingual with English, Turkish and Greek the three official languages. However, the real attraction was and is Cyprus' low corporate tax rate and high interest rate on deposits. Indicatively, up until 2004 income tax for offshore companies was as low as 4.25%. It increased to 10% upon Cyprus' entry into the EU, a tax that applied to both domestic and foreign corporations registered in Cyprus.<sup>9</sup>

The combination of low corporate tax and high interest rates for deposits attracted foreign capital to Cypriot banks and led many foreign companies (mainly from Europe, Ukraine and Russia) to register in Cyprus. In an attempt to "maximize their tax efficiency and foreign investment credits" these companies would either lend or transfer money to their international operations, transforming the island into a "centre for capital flows (in and out)".<sup>10</sup> As a result, the financial sector was disproportionately large, and, along with tourism, was one of the main components of the island's economy.

The Cyprus business model is not distinctively Cypriot; it replicates Dutch and Luxembourgian financial services practices. Where it differs is not in its logic, but in way it grew and the subsequent effects on domestic debt levels. As indicated in the PIMCO report<sup>11</sup> on the Cypriot banking sector, the disproportionate allocation between deposits and loans fuelled a domestic debt bubble. Deposits, of which "34% come from non-residents that operate in Cyprus in part due to the current system of tax and business incentives, 19% from Greece and 7% from other countries",<sup>12</sup> comprised 71% of all bank liabilities. While deposits were mainly foreign, loans were mainly concentrated in the domestic market. PIMCO calculates this concentration at 62%. Further, following Cyprus' 2008 entry into the EMU, Eurozone deposits were considered domestic, increasing the banks' ability to offer loans. As a result, domestic debt, as a percentage of GDP, rocketed from 247% in 2005 to 340% in 2013<sup>13</sup>.

With the increase of foreign deposits, whether due to business activities of foreign companies or the domestication of Euro-area deposits, a domestic debt bubble was created. The situation with domestic borrowing was further complicated by borrowers' inability to service their loans. Private

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<sup>9</sup> Currently, corporate tax stands at 12.5% and along with Hungary (9%) Ireland (12.5%) and Lithuania (15%) is one of the lowest in the EU.

<sup>10</sup> Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318, 12.

<sup>11</sup> Following the banking crisis, Central Bank of Cyprus commissioned PIMCO, an investment management firm, to conduct a due diligence report of the banking system of Cyprus. The results were published in March 2013 and provided a basis for economic analysis of the crisis in Cyprus. See PIMCO, *Independent due Diligence of the Banking System of Cyprus* (London: PIMCO Europe Ltd, 2013).

<sup>12</sup> *Ibid*, 8-9.

<sup>13</sup> "Private sector debt consolidated - % of GDP", *Eurostat*, Accessed January 8<sup>th</sup>, 2020.

<http://ec.europa.eu/eurostat/tgm/graph.do?tab=graph&plugin=1&pcode=tipspd20&language=en&toolbox=data>

borrowing was based less on the ability of a lender to service the loan but on collateral backing, usually real estate. As the real estate market had been on the rise for decades, this approach did not appear dangerous. However, once the market plunged, loans could not be paid and banks could not secure the loans through their collateral, because prices fell and demand for real estate plunged. As a result, the banking sector experienced liquidity problems - a key factor of the Cyprus crisis. Another important contributor to the conditions leading up to the crisis was the deterioration of public finances after 2008. For the first time since independence, the communist party (AKEL) controlled the presidency, altering the state's attitude towards public spending and almost doubling Cyprus' national debt (from 48% in 2008 to 86% in 2012).

The second major component of the Cyprus crisis was the restructuring of Greek government debt. In 2010 the Private Sector Involvement (PSI) doctrine was introduced, stating that "whenever a euro area Member State faced liquidity pressures (as opposed to solvency concerns), losses would be imposed on the private creditors of the sovereign debt of that Member State before the other euro area governments agreed to provide any temporary assistance".<sup>14</sup> As Orphanides explains, the "introduction of credit risk in sovereign debt raised the cost of financing for most euro area Member States",<sup>15</sup> adversely affecting periphery countries. The introduction of the PSI not only raised the cost of borrowing for Cyprus, its implementation in the case of Greece was a turning point in the Cyprus banking crisis. In order to render the Greek debt more manageable and address liquidity issues, a debt-restructuring scheme for Private Sector Investment (PSI) was agreed at a European level in February 2012. The majority of Greek private bond holders agreed to a 53.5% reduction in the face value of bonds, forgiving a debt of €107 billion. Of that amount, €3.5 billion<sup>16</sup> or 23% of GDP,<sup>17</sup> was losses incurred by Cypriot banks. Due to the high level of capital losses incurred by Cypriot banks, a "recovery without government support"<sup>18</sup> was nearly impossible. As the Cypriot government bought a large number of shares in "Cyprus Popular Bank Public Co. Ltd" (Laiki) in order to assist with its recapitalisation, the Cypriot banking crisis immediately became a sovereign debt crisis.

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<sup>14</sup> Orphanides, *The Euro Area Crisis: Politics Over Economics*, 243-263, 252.

<sup>15</sup> The PSI doctrine contributed to the increase in the cost of borrowing and, in some instances, loss of access to the market, for example in Ireland and Portugal. At the same time, demand for safer Eurozone bonds (such as the German bond) increased. Ibid, 252.

<sup>16</sup> Stavros A. Zenios, "Self-Fulfilling Prophecies in the Cyprus Crisis: ELA, PIMCO and Delays", in *The Cyprus Bail-in*, eds. Alexander Michaelides and Athanasios Orphanides (London: Imperial College Press, 2016), 9-32, 11. Others estimate the losses to be at €4.6 billion and 25% of GDP. See Orphanides, *The Euro Area Crisis: Politics Over Economics*, 243-263, 260.

<sup>17</sup> When expressed as percentage of GDP, the impact of Greek PSI disproportionately affects the Cypriot banking sector and is a result of the speculative tendency of Cypriot banks. However, some commentators argue that the government could have negotiated a lower contribution by Cypriot banks but failed to do so due to political reasons. Ibid, 260; Zenios, *Self-Fulfilling Prophecies in the Cyprus Crisis: ELA, PIMCO and Delays*, 9-32, 18.

<sup>18</sup> Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318, 313.

The third factor contributing to the crisis in Cyprus was the delay by the Cypriot authorities in taking action. The delay affected both the banking and sovereign debt crisis in Cyprus. In terms of the sovereign debt issues, it was clear that as soon as the government lost access to the financial markets in 2011 it would face further liquidity problems. While the need for important decisions was obvious, the government resorted to interim solutions, for example a €2.5 billion loan from the Russian Federation, that both postponed a resolution and magnified the problems.<sup>19</sup> Similarly, a delay in taking actions for the unfolding banking crisis extended the problems faced by the banking sector. Although Cyprus applied for assistance from the Troika in June 2012, a final agreement was not reached until nine months later. During the period of inertia, the two largest banks, Laiki bank and “Trapeza Kyprou Dimosia Etaireia Ltd” (“Bank of Cyprus”: BoC), continued to operate by relying on Emergency Liquidity Assistance (ELA). The reliance on emergency liquidity from the Central Bank of Cyprus caused a major flight of deposits, increasing the amount of ELA debt in both banks (Laiki and the BoC). The provision of ELA by the Central Bank of Cyprus, with the financial support of the European Central Bank (ECB), kept the Cypriot banking sector on life-support during this period of inertia but also increased the exposure of the banking sector to debt while deposits continue to fall.<sup>20</sup> As a result, the risk of a collapse in the banking sector grew along with the growth of ELA.<sup>21</sup>

In summary, the factors contributing to the crisis are the following. The banking system was disproportionately large compared to the rest of the economy. Domestic private debt could not be serviced, increasing the exposure of the banks while public finances were also kept in a disorderly manner. To further complicate matters, the government of Cyprus invested heavily in Laiki bank to avoid its collapse and did little to deal with the negative economic conditions, which led to the magnification of the problem. As a result, both the state and the banks “were headed for a crisis, independently of each other”.<sup>22</sup> The “perfect crisis”, as Zenios described it, a combination of a sovereign debt and a banking crisis hitting at the same time was imminent and was soon triggered

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<sup>19</sup> For an explanation of how the delay caused a deterioration in public finances see Michaelides, *Cyprus: From Boom to Bail-in*, 639-689, 642-643.

<sup>20</sup> *Ibid*, 662-663; 672-673.

<sup>21</sup> The provision of ELA funding from the Central Bank of Cyprus and ECB to both Laiki and the BoC is highly questionable; indeed economists challenge the ability of Laiki to serve its debt past June 2012. Zenios, a leading Cypriot economist, concludes that ELA was granted to an insolvent Laiki. Furthermore, the transfer of ELA from CPB to BOC as part of the resolution agreement is also under scrutiny as the transfer of debt was not supported by an analogous transfer of assets. Additional data may exist but are kept confidential. While a precise estimation of the financing gap is difficult to calculate with publicly available data, there is consensus as to the existence of a gap. Zenios and Xiouros have calculated the gap to be between 0.5-3.5 billion Euro. Zenios was part of the Special Investigation Commission and had access to confidential documents, but his current conclusions are based on what public available information. (See Zenios, *Self-Fulfilling Prophecies in the Cyprus Crisis: ELA, PIMCO and Delays*, 9-32, 18-19). For further issues arising from the provision of ELA to an insolvent bank see: Costas Xiouros, "Handling of the Emergency Liquidity Assistance of Laiki Bank in the Bailout Package of Cyprus", in *The Cyprus Bail-in*, eds. Alexander Michaelides and Athanasios Orphanides (London: Imperial College Press, 2016), 33-103; Ian Jack and Tom Cassels, "Cyprus: An Analysis of the Impact of the Resolution Methodology on Stakeholders' Claims Including the Emergency Liquidity Assistance", *Capital Markets Law Journal* 8, no. 4 (2013), 450-463.

<sup>22</sup> Panayi and Zenios, *Was the Cyprus Crisis Banking Or Sovereign Debt?*

by a “public debt crisis in Greece and subsequently, through contagion, by non-performing loans in Cyprus and Greece”.<sup>23</sup> As the crisis unfolded, measures were adopted to address both the recapitalisation of the Cypriot banking sector and the sovereign debt.

## 1.2 ‘Resolving’ the crisis: Eurogroup agreements

Measures were taken to tackle both the banking and sovereign debt crisis. An estimated €17 billion were needed in order to address the public debt and the financial aspects of the crisis, with €7 billion going to the recapitalisation of the financial sector and ten to “government debt expiration [and] projected government deficits”.<sup>24</sup> The Eurogroup position was clear: only €10 billion could be given out in the form of a loan from the Troika (including therefore the participation of the EFSF or ESM and the IMF) – the €7 billion required for the recapitalisation of the banking sector should be raised by the sectors’ own means. In reality, what this meant was a depositor bail-in. The term ‘bail-in’ refers to a financial instrument used before the bankruptcy of a financial institution. Unlike a bail-out, where a defaulting institution is recapitalized through external means provided by either national governments or investors, the bail-in requires a financial institution to recapitalize through its own means. The bail-in is usually employed in so that debt holders (investors) share the burden of a defaulting banking institution. However, in the case of Cyprus, the definition of creditor was extended to include depositors, thus requiring all creditors (bondholders and depositors) of a bank to bear the burden of the institution’s failure by having their debt (bonds and deposits) written off.<sup>25</sup> This was the first time in the Eurozone that uninsured depositors were called to recapitalize a bank,<sup>26</sup> and it meant overturning the deposit insurance provided by European law<sup>27</sup> and threatening the stability and reliability of the European banking system as a whole.

### 1.2.1 First Agreement

An initial agreement, recorded in the Eurogroup statement dated 16<sup>th</sup> March 2013, included a tax levy, termed a “horizontal haircut”, of 6.75% for deposits below €100,000 and 9.9% for uninsured deposits over €100,000, applicable to all banks and every depositor. Public opinion was fiercely against a bail-in resolution. Political parties, following public sentiment, developed a rhetoric

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<sup>23</sup> Stavros Zenios, “The Cyprus Debt: Perfect Crisis and a Way Forward”, *Cyprus Economic Policy Review* 7, no. 1 (2013), 3-45, 29.

<sup>24</sup> Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318, 1. At a later stage, the ex-Governor of the Central Bank of Cyprus Athanasios Orphanides challenged these figures. A report by BlackRock investment management company indicated different needs and, according to Orphanides, this miscalculation or overestimation is what required the bail-in. As a result, the bail-in’s need and soundness as a policy decision are put to question.

<sup>25</sup> “Definition of a Bail-in”, [http://lexicon.ft.com/Term?term=bail\\_in](http://lexicon.ft.com/Term?term=bail_in); “The Economist Explains: What is a Bail-in?”, <http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-2>.

<sup>26</sup> Michaelides, *Cyprus: From Boom to Bail-in*.

<sup>27</sup> Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes *OJ L* 135, 31.5.1994, p. 5–14.

of heroic resistance against the Troika's so-called national attack. This first agreement was opposed by all political parties – even the ruling party, the Democratic Rally (DY.SI), which abstained – and was unanimously rejected by the House of Representatives on March 19<sup>th</sup>. The absence of a working alternative though, forced the government back to another Eurogroup meeting. With the banks closed and the island's economy paralysed, an agreement had to be reached. Despite fierce public criticism and the House of Representatives' rejection, it was soon clear that no other solution would be accepted. The Cypriot government had a stark alternative: either bail-in or bankruptcy.

### 1.2.2 Second Agreement

Faced with the risk of an economic collapse, the Cypriot government gave in to the demands of the Eurogroup and agreed to a depositor bail-in.<sup>28</sup> A second – and, some have argued, harsher – agreement was reached in the Eurogroup meeting of March 25<sup>th</sup>. It provided for the splitting of each of the island's two largest banks - Laiki and the Bank of Cyprus. Laiki, which was in deeper financial trouble, would be "resolved immediately".<sup>29</sup> Crucially, and this is a point we will return to later on, the resolution of Laiki would be achieved by a decision of the Central Bank of Cyprus under the new Bank Resolution Framework. The Eurogroup agreement stated that Laiki would be split into two parts, a 'good' bank and a 'bad', but what essentially occurred was a tripartite division into a good, a bad and a 'Greek operations' bank.<sup>30</sup> The Greek subsidiaries of both Laiki and the BoC were disposed to Bank of Pireaus in an undervalued and much criticised agreement.<sup>31</sup> The 'bad' Laiki was made up of all "equity shareholders, bondholders and uninsured depositors"<sup>32</sup> and was led to liquidation, meaning that all the above-mentioned parties, whether investors or depositors, lost their property. The bail-in, was achieved by including all uninsured deposits in the 'bad' Laiki. The 'good' Laiki was comprised of all insured deposits but was also burdened with the ELA debt.<sup>33</sup> Under the resolution agreement, the good Laiki would be folded into the BoC including the toxic ELA debt. Under the Eurogroup agreement, the BoC would also be subject to restructuring. While the agreement states that "uninsured deposits in BoC will remain frozen until recapitalisation has been effected, and may subsequently be subject to appropriate conditions", several months later a decision was reached between the Troika and the Cypriot authorities to implement a 47.5% haircut (bail-in) on BoC's

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<sup>28</sup> Orphanides, *What Happened in Cyprus*.

<sup>29</sup> Eurogroup Statement on Cyprus, March 25<sup>th</sup> 2013.

<sup>30</sup> Jack and Cassels, *Cyprus: An Analysis of the Impact of the Resolution Methodology on Stakeholders' Claims Including the Emergency Liquidity Assistance*, 450-463, 451.

<sup>31</sup> See the discussion in Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318, 5. Also, Jack and Cassels, *Cyprus: An Analysis of the Impact of the Resolution Methodology on Stakeholders' Claims Including the Emergency Liquidity Assistance*, 450-463.

<sup>32</sup> Eurogroup Statement on Cyprus, March 25<sup>th</sup> 2013.

<sup>33</sup> This is estimated at €9.2 billion. As Jack and Cassels point out, the "mechanism for ELA is obscure and ELA terms – including the size of the facility, its timing, use, interest rate, maturity and collateral provided – are kept confidential", making it difficult to calculate the exact amount or determine the loan's soundness. See *Ibid*, 451.

uninsured deposits in order to assist the bank's recapitalisation.<sup>34</sup> Following the bail-in, Cyprus would receive a €10 billion loan subject to a Memorandum of Understanding that would introduce and regulate a series of strict austerity measures.<sup>35</sup>

## 2. The Eurogroup's role in the crisis: From a forum to a decision-making body

As indicated above, crisis response measures adopted in Cyprus can be divided in two categories: those directed towards recapitalising the banks and those addressing issues of government debt and liquidity. In the first instance, recapitalisation of the banking sector was achieved through own means, meaning a depositor's bail-in. In the second instance, financial assistance was granted to the government of Cyprus by the ESM on strict conditionality as outlined in the Memorandum of Understanding and the more comprehensive Economic Adjustment Programme for Cyprus.<sup>36</sup> While these two broad categories of crisis response measures deal with different aspects of the crisis, financial assistance from the ESM was conditional upon the effective recapitalisation of Cyprus's banking sector through own means.<sup>37</sup> In this section, I consider the process of crisis coordination between EU institutions and Eurozone members by examining the Eurogroup's role in reaching a bail-in resolution for the case of Cyprus.

I will examine the process of deliberation and decision-making by surveying the position of five main stakeholders in reaching the bail-in decision: the government of Cyprus, other Eurozone members, the European Commission, the European Central Bank and the International Monetary Fund. It must be reiterated that the Treaties stipulate that the Eurogroup is an informal body where Eurozone ministers meet to discuss matters of the monetary union. In addition to these ministers, both the Commission and ECB are present in Eurogroup meetings. Despite the presence of Union institutions and government ministers, the Eurogroup's informal status means it has no formal decision-making powers, is not accountable to any other body, and its president cannot be called before any Parliament - national or supranational.<sup>38</sup> While the Eurogroup has played an important role in policy coordination in the past, raising doubts about the extent to which it remained within

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<sup>34</sup> "Final Haircut of 47,5% at the Uninsured Deposits of Bank of Cyprus", last modified 27/7/2013, accessed 15/11, 2016, <http://yiangou.com.cy/news-read/89>.

<sup>35</sup> Even though it is a rather insignificant amount, especially compared to other examples where financial assistance was granted, it amounts to 56% of the country's GDP. See Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318, 1.

<sup>36</sup> The Memorandum of Understanding can be found at the Economic Adjustment Programme for Cyprus, available at: "Economic Adjustment Programme for Cyprus", European Commission, last modified January 27, 2017, accessed January 8, 2020, [https://ec.europa.eu/economy\\_finance/publications/occasional\\_paper/2013/op149\\_en.htm](https://ec.europa.eu/economy_finance/publications/occasional_paper/2013/op149_en.htm).

<sup>37</sup> The opening line of the Eurogroup's Statement on March 25<sup>th</sup> 2013 indicates this: "The Eurogroup has reached an agreement with the Cypriot authorities on the key elements necessary for a future macroeconomic adjustment programme".

<sup>38</sup> Rene Repasi, "The Role of the Eurogroup in the Economic Governance Framework" (European Parliament, European Research Centre for Economic and Financial Governance, 5 May, 2015).

the bounds of informal policy discussions,<sup>39</sup> it was not until the Eurozone crisis that it became the centre of gravity for Eurozone policy coordination. Due to the executive nature of Eurogroup meetings and lack of transparency, identifying with certainty the position and influence of each stakeholder is difficult. It is not possible to impute the decision for a bail-in to a particular stakeholder or institution acting within the Eurogroup, even though certain actors played key roles in the negotiations. I am not interested in whether the decision can be imputed to a specific institution or actor within the Eurogroup, but whether the Eurogroup as an institution in its own right can be considered a decision-making body of the Union. I do not understand decision-making as simply indicating the reaching of a common position but as the reaching of a conclusive position by a Union institution that the Member State to which that decision is addressed is obliged to follow. In what follows, I set out three reasons the Eurogroup suggested this kind of resolution as a condition for providing financial assistance to Cyprus. Though I refer to different actors or stakeholders within the Eurogroup, I consider the Eurogroup a unitary body<sup>40</sup> and argue that the Eurogroup acts not only as a body of coordination but a body of economic deliberation and decision-making.

## 2.1 Banking sector recapitalisation and loan sustainability

Economic analysis by the Troika (European Commission, ECB and IMF)<sup>41</sup> and from the independent international consulting firm PIMCO<sup>42</sup> assessed the financing needs for both the banking sector and the Cyprus government. Both found that the amount required to recapitalise the banking sector amounted to about €10 billion, while a further €10 billion was needed to address the sovereign debt crisis. There were two main conclusions about what needed to happen. The Cyprus banking sector was deemed too big for the island's small economy and thus had to be adjusted. As a result, the above assessments suggested that any loan exceeding €10 billion would be unsustainable. Based on the above conclusions, the Eurogroup took a firm position, agreeing with the Commission and ECB that the two largest banks, Laiki and the Bank of Cyprus, were insolvent and could not recover without some form of financial assistance. However, a bail-out was

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<sup>39</sup> Uwe Puetter, *Eurogroup: How a Secretive Circle of Finance Ministers Shape European Economic Governance* (Manchester University Press, 2006).

<sup>40</sup> Such an approach is not uncommon. The Eurogroup itself issues statements that express a common position, and references to the Eurogroup as a body expressing a common position held by its members and EU institutions is customary in EU discussions.

<sup>41</sup> Economic Adjustment Programme for Cyprus. See also Anastasia Karatzia, "Cypriot Depositors before the Court of Justice of the European Union: Knocking on the Wrong Door?" *King's Law Journal* 26, no. 2 (2015), 175-184, 179-80.

<sup>42</sup> PIMCO, *Independent due Diligence of the Banking System of Cyprus*. PIMCO results were cross-checked by a series of other studies. While some disagreement was expressed, mainly about the over-calculation of the banking sector's needs for recapitalisation, the PIMCO report continued to act as a guiding instrument for determining the liquidity needs for both banking and the government. See Zenios, *Self-Fulfilling Prophecies in the Cyprus Crisis: ELA, PIMCO and Delays*, 9-32, 23.

immediately ruled out, because a €20 billion loan was considered unsustainable.<sup>43</sup> Whether or not a loan of this kind and therefore a bail-out would indeed have been unsustainable is a matter of economic debate. What matters for our discussion is the entrenched position held by the three institutions that any loan over €10 billion would be unsustainable, and that debt sustainability was a key factor in shaping the Troika's position.

Gerry Rice, the director of the External Relations Department, made the IMF's position clear shortly after the Eurogroup agreement was reached. Rice stated that the Eurogroup strategy was "clear" and insured "debt sustainability".<sup>44</sup> Several other public statements followed suit. Christine Lagarde, Managing Director of the IMF, stated that the agreement would allow Cyprus to "service debt obligations" by reducing public debt to a "manageable" position.<sup>45</sup> Moreover, a leaked confidential ECB report indicated that some creditors would not contribute to the recapitalisation of the financial sector, mainly for political reasons.<sup>46</sup> Hence, with the banking sector unable to recover and the Troika unwilling to finance the bail-out of banks or any programme that exceeded what it deemed to be a sustainable loan agreement, the Eurogroup considered a depositor's bail-in the only viable solution.<sup>47</sup>

## 2.2 The lack of political willingness to bail-out banks and the consolidation of the bail-in

The second reason for the Eurogroup insisting on a bail-in resolution was the absence of political will to finance yet another costly bail-out.<sup>48</sup> Among the Eurogroup members refusing a bail-out was Germany – the leading force within the Eurogroup. Indicatively, German Finance Minister Wolfgang Schäuble claimed in an interview with public broadcaster ARD, that "It was the position of the German government and the International Monetary Fund that we must get a considerable part of the funds that are necessary for restructuring the banks from the bank's owners and creditors – that means the investors".<sup>49</sup> German Chancellor Angela Merkel stated that the Cyprus "business model is

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<sup>43</sup> European Commission, *Economic Adjustment Programme for Cyprus*

<sup>44</sup> "Transcript of a Press Briefing by Gerry Rice, Director, External Relations Department, International Monetary Fund", IMF, accessed May 20, 2018, <http://www.imf.org/en/News/Articles/2015/09/28/04/54/tr032813>.

<sup>45</sup> "Press Release: IMF Reaches Staff-Level Agreement with Cyprus on a €1 Billion Extended Fund Facility Arrangement", IMF, accessed May 20, 2018, May 20th, 2018. <http://www.imf.org/en/News/Articles/2015/09/14/01/49/pr13103>.

<sup>46</sup> Harald Schumann and Nikolas Leontopoulos, "SPECIAL REPORT: How the Troika and Piraeus Bank Sealed Cyprus's Fate", *The Press Project*, February 24, 2015. See pages 7-8 of the ECB report attached to this article.

<sup>47</sup> An additional factor seemed to be the composition of deposits and high level of interest depositors had received in previous years. Large sums of foreign deposits, some from Russia, helped shape a view within the Eurogroup that deposits in Cyprus were largely comprised of foreign capital of uncertain origin. These allegations were never verified and overlook the fact that despite large sums of foreign capital, the majority of deposits was held by Cypriot nationals and local businesses. These were the people who were hit the hardest. Such political expediencies outline also the economic, detached and often inhumane approach adopted by these creditors.

<sup>48</sup> The examples of Greece, Ireland and Spain preceded Cyprus.

<sup>49</sup> "Schäuble Says Decision to Tax Small Deposits was Taken by Cyprus, European Commission and ECB", eKathimerini, last modified 17/03/2013, accessed 4/3/2015, 2015,

dead.”<sup>50</sup> Consensus among the Eurogroup was that Cyprus should abandon or at least radically alter its unsustainable business model based on low corporate tax and the attraction of large foreign deposits.<sup>51</sup> The question, though, was who was to pay. Germany had a clear answer: those who benefited from the unsustainable business model.<sup>52</sup>

In addition to the disciplinary function of the bail-in, some commentators, taking into consideration the upcoming elections in Germany, read these statements as part of the Chancellor’s pre-electoral campaign. German participation in any European support programme requires the vote of the *Bundestag* and the ruling party (CDU) “relied on support from the main opposition party (SPD) to pass the legislation”.<sup>53</sup> The Cyprus question became a hot topic in the German election, with the press pointing out the issue of Russian depositors and creating the impression that a loan to the island would be equivalent to “giving away German taxpayer money to Russian oligarchs.”<sup>54</sup> Similarly, the SPD was pressuring the Government not to accept a costly bail-out that would favour Russian depositors – a narrative that is not only controversial, but even misleading. Merkel, already facing attacks for having directed billions of Euros toward sustaining other economies such as Greece, adopted the same rhetoric during her electoral campaign, proclaiming that “anyone having their money in Cypriot banks must contribute in the Cypriot bailout. That way those responsible will contribute in it, not only the taxpayers of other countries, and that’s what’s right”.<sup>55</sup> The German position found resonance with other powerful members such as Finland and the Netherlands,<sup>56</sup> who used their “leverage”<sup>57</sup> to achieve a bail-in resolution. They had similar concerns about the sustainability of a debt over €10 billion, and they also disagreed with Cypriot banking practices.<sup>58</sup> Therefore, the absence of political willingness to bail-out failing banks in Cyprus contributed towards the adoption of a bail-in resolution.

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<http://www.ekathimerini.com/149388/article/ekathimerini/business/schaeuble-says-decision-to-tax-small-deposits-was-taken-by-cyprus-european-commission-and-ecb>.

<sup>50</sup> “Angela Merkel has A Brutal Message for Cyprus — but it’s the Key for Getting A Deal”, Business Insider, last modified 22/3/2013, accessed 21/11/2016, 2016, <http://www.businessinsider.com/merkel-the-cyprus-business-model-is-dead-2013-3?IR=T>.

<sup>51</sup> See Wolfgang Schaeuble’s statement in Reuters dated 5 April 2013 as quoted in Orphanides, *The Euro Area Crisis: Politics Over Economics*, 243-263, 258: “We don’t like this business model and we hope it is not successful ... In the case of Cyprus we have leverage that we don’t have with other tax havens.”

<sup>52</sup> Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318.

<sup>53</sup> Orphanides, *The Euro Area Crisis: Politics Over Economics*, 243-263, 258.

<sup>54</sup> *Ibid*, 258.

<sup>55</sup> Apostolides, *Beware of German Gifts Near Elections: How Cyprus Got here and Why it is Currently More Out than in the Eurozone*, 300-318, 3, 7; See also, “Merkel: Cypriot Depositors must Share Responsibility”, *Ekathimerini*, 17/3/2013, 2013.

<sup>56</sup> See “Three Years After the Bail-in”, *capital.com.cy*, last modified 7/3/2016, accessed 23/11/2016, 2016, <https://www.youtube.com/watch?v=rC5jyCov0So>; “Cyprus Depositors’ Fate Sealed in Berlin”, *Financial Times*, last modified 17/3/2013, accessed 21/11/16, 2016, <https://www.ft.com/content/f890566a-8f24-11e2-a39b-00144feabdc0>.

<sup>57</sup> See Wolfgang Schaeuble’s statement in Reuters dated 5 April 2013 as quoted in Orphanides, *The Euro Area Crisis: Politics Over Economics*, 243-263, 258.

<sup>58</sup> Sarris, *Three Years After the Bail-in*.

## 2.3 Securing other interests and objectives

The third factor contributing to the Eurogroup's position was the protection of other interests or objectives. As mentioned, the ECB kept the Cypriot economy on life support by allowing the Central Bank of Cyprus to continue providing ELA to Laiki.<sup>59</sup> This granted the ECB major leverage over the negotiations. With a short press release on the 21<sup>st</sup> of March, days after the House of Representatives rejected the first Eurogroup agreement, the ECB brought the negotiations to a decisive point. By announcing that "The Governing Council of the European Central Bank decided to maintain the current level of Emergency Liquidity Assistance (ELA) until Monday, 25<sup>th</sup> March 2013"<sup>60</sup> the ECB steered negotiations to a decisive point. At that point, the Cyprus government had to sign an agreement – *any* agreement. The ECB was, therefore, instrumental in the timing of the agreement, but its main concern was to avoid incurring any losses from providing Laiki with emergency liquidity. As the main debtor was heading for liquidation, the ECB was threatened with a €9.2 billion loss. In a move that shifted losses to the depositors, ELA was attached to the 'good bank' and transferred to the Bank of Cyprus along with Laiki's healthy operations. The ECB thus ensured that ELA debt would be repaid. Crucially, a depositor's bail-in for the Bank of Cyprus ensured the liquidity of that institution and, by extension, its continuing ability to service its loan to the ECB. Moreover, the ECB secured its position in case of collapse by altering the order of priorities and positioning the ELA before any secured or uninsured deposits.<sup>61</sup>

In addition to securing ELA repayment, the ECB and Commission were also concerned about 'ring-fencing' the Greek banking sector from any contagion. A leaked ECB report entitled "Ring-fencing of Cypriot banks' branches in Greece" indicates that the ECB was preparing to limit the effects of a bail-in resolution.<sup>62</sup> In order to avoid a banking crisis in Greece caused by the collapse of Cypriot banks, Union institutions wanted to prevent a further banking crisis in Cyprus, cut the ties

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<sup>59</sup> Much criticism has been directed toward the ECB for this decision as it continued to finance a failing bank at the expense of its main shareholder – the Cypriot state. Zenios, *Self-Fulfilling Prophecies in the Cyprus Crisis: ELA, PIMCO and Delays*, 9-32; Xiouros, *Handling of the Emergency Liquidity Assistance of Laiki Bank in the Bailout Package of Cyprus*, 33-103. Laiki had been insolvent long before March 2013. A combination of factors led this once successful bank to collapse. First, questionable lending practices after the bank's merger with Greece-based Marfin. Second, the exposure of the bank to Greek sovereign bonds and the subsequent restructuring of Greece's public debt led to losses of 2.3 billion Euros. Consequently, the bank was on the verge of collapse, which forced the Cypriot government to bail-out the bank by acquiring 84% of its shares for 1.8 billion Euros.

<sup>60</sup> "Governing Council Decision on Emergency Liquidity Assistance Requested by the Central Bank of Cyprus", European Central Bank, accessed May 25, 2018, <https://www.ecb.europa.eu/press/pr/date/2013/html/pr130321.en.html>.

<sup>61</sup> As Jack and Cassels indicate, The new Restructuring Framework (discussed in the next section) introduced while the banks were closed acts to "materially change the order of priorities" by granting priority to the ELA over insured and uninsured depositors despite previous remarks and practices indicating the opposite. Importantly, at the point of insolvency, "just as priority became of practical relevance" insolvency laws were altered in a way that could be called *ex post facto*. See Jack and Cassels, *Cyprus: An Analysis of the Impact of the Resolution Methodology on Stakeholders' Claims Including the Emergency Liquidity Assistance*, 450-463, 452-454.

<sup>62</sup> Schumann and Leontopoulos, *SPECIAL REPORT: How the Troika and Piraeus Bank Sealed Cyprus's Fate*.

between Cypriot banks and their Greek operations and prevent a bail-in of Greek depositors. In response to the threat of an exacerbated Cyprus banking crisis, a bail-in of Cypriot depositors would ensure the liquidity of Cypriot banking institutions. To cut ties between Cypriot banks and their operations in Greece, all Greek operations of Laiki and the Bank of Cyprus were sold to Pireaus Bank in a much-discussed transaction.<sup>63</sup> Greek depositors were excluded from the bail-in even though they had deposits in the two Cypriot banks. Once again it was Cypriot depositors who were burdened in order to minimise the exposure of other institutions (such as the ECB) or protect other interests.

#### 2.4 The Eurogroup as a decision-making body

As we have seen, the Eurogroup evolved well beyond its original purpose to become a body of coordination, deliberation and, ultimately, decision-making. The forum provided a space for economic deliberation where a variety of actors and stakeholders met not only to discuss important matters such as crisis response measures, but also to reach decisions about what should be done. By examining the various factors contributing to adopting a bail-in resolution, along with the position of each stakeholder, we can observe the process of coordination, deliberation and decision-making within the Eurogroup. The case of Cyprus lets us see how the Eurogroup evolved from an informal body for discussion to an executive body for economic policy decision-making. Eurozone ministers, the ECB, Commission and IMF acted within the Eurogroup to promote their opinions and secure their interests. More importantly, it is within the Eurogroup that coordination occurred, and consensus was reached between the various parties operating within the forum. The bail-in as a crisis resolution mechanism and the ways it was achieved were decisions reached by the Eurogroup. Since coordination occurs within the forum and a unified European response is crystallised, the Eurogroup evolves from a mere talking shop to a decision-making body.

### 3. Hollowing out democracy: The Cypriot House of Representatives during the crisis.

In the previous section, I indicated how the Eurogroup evolved to a body of coordination, deliberation and decision-making. I now turn my attention to the Cypriot House of Representatives to consider its role in the bail-in. The sequence of events is important in determining the role and influence of the Cypriot House of Representatives in accepting a bail-in resolution. On Friday, March 15<sup>th</sup>, after completing their normal operations, the banks closed. They were due to reopen on Tuesday the 19<sup>th</sup> due to a public holiday on Monday. In the meantime, the Eurogroup would convene on Saturday, with the fate of Cyprus and the so-called ‘rescue-package’ on the agenda. By

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<sup>63</sup> Alexander Michaelides and Athanasios Orphanides, eds, *The Cyprus Bail-in: Policy Lessons from the Cyprus Economic Crisis* (London: Imperial College Press, 2016).

the end of the Eurogroup meeting of March sixteenth, the forum made it clear that any assistance from the EU would include a bail-in resolution. Due to the nature of the resolution and in order “facilitate the implementation of this agreement”, the Ministry of Finance “deemed it necessary to declare the nineteenth and the 20<sup>th</sup> of March 2013 as a bank holiday”.<sup>64</sup> In the meantime, the Cypriot House of Representatives was to convene on the 19<sup>th</sup> of March to decide whether or not to accept the terms of the Eurogroup agreement.

The task for this extraordinary plenary was to discuss the “*Fee Upon Deposits in Credit Institutions Law of 2013*”<sup>65</sup> – the bill outlining the Eurogroup’s terms for a loan. It is common procedure, before a plenary session, for the relevant committee to convene in order to discuss the proposed bill and draft a consultation for the House that is then read out in the meeting. In this case, a five-minute break was called in order to abide by the formalities, as the consultation by the Parliamentary Committee on Financial and Budgetary Affairs had been prepared prior to the meeting. In its rather brief report, the Committee provides useful insights as to the realities of decision-making during this crisis moment. Its report makes clear that the bill is a direct result of the negotiation process, with the Committee recognising the conditionality of a bail-in resolution by pointing out that “the passage of the bill has been put as a necessary precondition for financial assistance to Cyprus”.<sup>66</sup> Immediately after this, the Committee resorts to the threat of economic breakdown if the bill is rejected. Its narrative unfolds in the following way. Without the levy (bail-in) Cyprus will not receive a loan (rescue package) and the ECB would oppose the continuation of emergency liquidity (ELA) to Cypriot banks. When the banks reopen, fearful depositors will attempt to withdraw their deposits, and due to the absence of emergency liquidity, the banks would not be able to repay the depositors. The banks would then go bankrupt, triggering the state guarantee of deposits, but the Cyprus Deposit Protection Schemes would not be able to cover the €34 billion of guaranteed deposits, leaving no alternative but the adoption of a new national currency. This would mean exiting the Eurozone and would cause a deep recession during which the country would face a collapse in the value of the new currency. Hence, the bill had to be passed to ensure financial stability and avoid a socio-economic breakdown.

Faced with such grave prospects, one would expect a fierce discussion in the House of Representatives focusing on the measures, their effectiveness, soundness, limitations, challenges and, most importantly, working alternatives. As the previous chapters have indicated, it is through the process of democratic debate and consideration of alternatives that such policy decisions gain

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<sup>64</sup> Ministry of Finance, “Announcement by the Ministry of Finance: Bank Holiday Declaration - 18/3/2013”, *Press and Information Office, Republic of Cyprus* 19/03/2013, 2013.

<sup>65</sup> «Ο περί Τέλους επί των Καταθέσεων σε Πιστωτικά Ιδρύματα Νόμος του 2013».

<sup>66</sup> *Minutes of the Sitting of March 19th 2013*, 24, B sess, (I): 1413-1439, 1416.

their democratic legitimacy.<sup>67</sup> But instead of deliberating and considering alternatives, the House developed a narrative of resistance, deeming the bill an outright attack on the Cypriot constitution, the rule of law and the House of Representatives. The bill was accused of wearing away the “legal and political foundations” of Cyprus and the EU itself. There was talk of a “foreign rule” trying to impose “debtocracy”, the “loss of independence and submission of the people”,<sup>68</sup> even a new form of “colonial rule”.<sup>69</sup> Behind the plain theft of deposits, Cypriot politicians saw geopolitical interests in the German election timing and even a plot by ‘foreign forces’ to destroy the financial sector in order to gain from the removal of capitals.<sup>70</sup> To this act of aggression and imposition the House voted ‘NO’. March 19<sup>th</sup> would go down in history, or so the narrative developed on that day suggests, as the day when the House of Representatives delivered a heroic response that safeguarded its own sovereign power and reinforced Cyprus’ constitutional formation. The House’s narrative of resistance indicates the position it found itself in. It was not called to decide how to respond to the crisis but to ratify and give legal cover to a decision that had already been taken.

Three days later, sentiments in the House of Representatives were very different. The aura of resistance gave way to sheer pragmatism as banks remained closed for a week and no viable solution was on the table. On March 22<sup>nd</sup>, a series of important bills was scheduled for discussion: the “*Establishment of a Solidarity Fund Law of 2013*”, the “*Imposition of Restrictive Measures in Transaction in Case of Emergency Law of 2013*” and the “*Resolution of Credit and Other Institutions Law of 2013*”.<sup>71</sup> The solidarity fund attempted to establish a mechanism through which the government could generate the 7.5 billion Euros needed to cover the financial sector’s needs. Although valiant, the effort was feeble, and the fund never really achieved its purpose. By virtue of a declared state of emergency threatening social order or security, the second bill conferred on the Minister of Financial Affairs and/or the Governor of the Central Bank of Cyprus the power to impose temporary control on capital flows. Strict capital controls restricting the scope and nature of transactions (for example, only 150 Euros could be withdrawn each day from ATM’s and sending money abroad was forbidden or restricted) were immediately imposed pursuant to this law. However, it is the final of the three bills that is most important. It set out a new restructuring framework within which the two failing banks would proceed to either liquidation or restructuring. The purpose of this new framework was to allow the Central Bank of Cyprus to act as a Resolution

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<sup>67</sup> Mark Dawson and Floris Witte, “Constitutional Balance in the EU After the Euro-Crisis”, *The Modern Law Review* 76, no. 5 (2013), 817-844, 826.

<sup>68</sup> House of Representatives of Cyprus, *Minutes of the Sitting of March 19th 2013*, 1413-1439, 1421.

<sup>69</sup> *Ibid*, 1422.

<sup>70</sup> *Ibid*, 1425-1428.

<sup>71</sup> «Ο περί Ίδρυσης Εθνικού Ταμείου Αλληλεγγύης Νόμος του 2013»; «Ο περί της Επιβολής Περιοριστικών Μέτρων στις Συναλλαγές σε Περίπτωση Έκτακτης Ανάγκης Νόμος του 2013»; «Ο περί Εξυγίανσης Πιστωτικών και Άλλων Ιδρυμάτων Νόμος του 2013».

Authority capable of deciding and implementing measures directed toward the resolution of credit institutions. The Central Bank of Cyprus was vested with the authority to essentially decide on the liquidation terms of any credit institution provided that the losses of the institution were not greater than they would be if the institution were subjected to direct liquidation (the ‘no creditor worse off’ principle).

In its evaluation and subsequent consultation, the Parliamentary Committee on Financial and Budgetary Affairs pointed out that due to the ECB’s decision on March 21<sup>st</sup> to end the ELA if an agreement was not reached, the resolution of Laiki Bank was the *only* available option. In the subsequent discussion, sentiment was wholly different and the speeches less tendentious. Some elements of the previous discussion remained alive – the feeling of attack and betrayal, for example<sup>72</sup> – party leaders accepted the ‘faith’ of Cyprus as it was set by the Troika. It is important to note that, unlike in the previous bill, the House was not required to vote in specific measures. Instead, the proposed legislation would set up the framework through which a bail-in could be achieved. By vesting the Governor of the Central Bank of Cyprus with authority to act as Resolution Authority, the House was in essence accepting the terms of the Troika. “We are aware of the repercussions”<sup>73</sup> of this bill, the leader of the Democratic Party said, while the leader of the governing party, the Democratic Rally, was even more explicit. He clearly stated that this bill would set in motion Laiki’s liquidation and that unsecured “depositors will have to wait for several years”<sup>74</sup> before they can know how much of their deposits would be seized. By laying the foundations for an upcoming liquidation process, the House transferred powers to the executive branch: The President of the Republic was to negotiate the terms and the Governor of the Central Bank of Cyprus would execute the results of the Eurogroup meeting.

Following the passing of a new banking resolution framework, the government was equipped to negotiate a depositors’ bail-in. In the Eurogroup meeting of March 25<sup>th</sup>, the final terms of the agreement were drafted (the second agreement, as outlined in section 1 of the chapter), obtaining the status and force of law pursuant to the issuing of two decrees by the Central Bank of Cyprus: Decree on the bailing-in of BoC, Regulatory Administrative Act No 103 and Decree on the sale of certain operations of Laiki, Regulatory Administrative Act No 104.<sup>75</sup> It was therefore by executive

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<sup>72</sup> *Minutes of the Sitting of March 22nd 2013*, 25, B sess, (): 1461-1496, 1471-1478.

<sup>73</sup> *Ibid*, 1471-1478.

<sup>74</sup> *Ibid*, 1471-1478.

<sup>75</sup> ‘Decree No 103’, EE, Annex III(I), No 4645, 29.3.2013, p. 769 to 780; ‘Decree No 104’, EE, Annex III(I), No 4645, 29.3.2013, p. 781 to 788. And in Greek: *Το Περί διάσωσης με ιδία μέσα της Τράπεζας Κύπρου Δημόσια Εταιρία ΛΤΔ Διάταγμα του 2013, Κανωνιστική Διοικητική Πράξη Αρ. 103* (Το peri diasosis me idia mesa tis Trapezas Kyprou Dimosias Etaireias Ltd Diatagma tou 2013, Kanonistiki Dioikitiki Praxi No 103 / 2013); *Το Περί πώλησης Ορισμένων Εργασιών της Cyprus Popular Bank Public Co Ltd Διάταγμα του 2013, Κανωνιστική Διοικητική Πράξη Αρ. 104* ( το Peri tis Polisis Orismenon Ergasion tis Cyprus Popular Bank Public Co Ltd Diatagma tou 2013, Kanonistiki Dioikitiki Praxi No 104 / 2013 .

decree that Laiki was led to liquidation and the BoC to restructuring and depositors were forced to contribute to the two banks' recapitalisation.

Arising from the above discussion is one simple yet crucial claim: that the measures were conceived and devised by or within the Eurogroup. In a series of statements, President Anastasiades explicitly stated that these measures have been handed down during the Eurogroup meeting<sup>76</sup> - a position also adopted by the Committee.<sup>77</sup> In the two meetings discussed above, it was pointed out that the liquidation of Laiki was planned well before March. Twice speakers made reference to the preparation of the new Resolution Framework, indicating that it had been ready well before March and was simply waiting for approval.<sup>78</sup> The opposition leader Andros Kyprianou hinted at similar allegations in the meeting of March 19<sup>th</sup>, claiming that when his party, AKEL, was in power, it refused to sign a Memorandum of Understanding with the Troika precisely because of their demands for a depositor's bail-in.<sup>79</sup> Similar statements were made by senior officials. Michalis Sarris, then Minister of Finance, described the negotiation procedure: "There was not much to be decided...we found ourselves in a plight situation, our credibility and negotiating power were non-existent. If something could have been done, it would only have been possible 18 months before".<sup>80</sup> In March, Sarris adds, everything had already been predetermined by the leaders of the Eurogroup. The decision for a bail-in, an alternative fiscal mechanism the Eurogroup was keen to see implemented, was already taken.<sup>81</sup> Commenting on the drafting of the Resolution Framework, ex-Governor of the Central Bank of Cyprus Athanasios Orphanides indicated that the bill was finalised sometime in 2012 and only presented to the House after they rejected the first agreement.<sup>82</sup> A leaked ECB document, dated 27 January 2013 entitled "Ring-fencing of Cypriot banks' branches in Greece" which discusses ways to secure the Greek banking sector from the possible effects of a bail-in in Cyprus, further supports this statement.<sup>83</sup>

The level of discussion and deliberation conducted within the House of Representatives is in stark distinction with the discussions at the Eurogroup. Although there is no official transcript of Eurogroup discussions, the resulting documents<sup>84</sup> outline detailed and highly technical policy

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<sup>76</sup> See for example Nicos Anastasiades, "Address to the Nation by the President of the Republic, Mr Nicos Anastasiades", *Press and Information Office, Republic of Cyprus*, 17/3/2013, 2013.

<sup>77</sup> House of Representatives of Cyprus, *Minutes of the Sitting of March 19th 2013*, 1413-1439, 1417.

<sup>78</sup> House of Representatives of Cyprus, *Minutes of the Sitting of March 22nd 2013*, 1461-1496, 1473, 1477-1478.

<sup>79</sup> House of Representatives of Cyprus, *Minutes of the Sitting of March 19th 2013*, 1413-1439, 1429.

<sup>80</sup> Sarris, *Three Years After the Bail-in*. It is not an exaggeration to say that Cyprus acted as a guinea pig whereby a new approach for managing financial crises was tested and on which the new directive "establishing a framework for the recovery and resolution of credit institutions and investment firms" was based (Directive 2014/59/EU).

<sup>81</sup> *Ibid.*

<sup>82</sup> Nansia Palala, "A road map for the bail-in already existed", *Simerini*, August 7<sup>th</sup> 2016, Accessed April 20<sup>th</sup> 2020, <https://simerini.sigmalive.com/article/2016/8/7/uperkhe-odikos-khartes-gia-to-kourema/>

<sup>83</sup> Schumann and Leontopoulos, *SPECIAL REPORT: How the Troika and Piraeus Bank Sealed Cyprus's Fate*.

<sup>84</sup> For example Eurogroup statements and the Economic Adjustment Programme on Cyprus.

measures, indicative of the degree of deliberation and decision-making occurring within the forum. In contrast, discussions at the national level lack the level of economic deliberation found in the Eurogroup. Reading through the plenary minutes reveals a complete absence of economic deliberation. Perhaps what was left unsaid is more important than the petty-political rhetoric of resistance performed by the House – there was no discussion of policy measures or alternative possibilities apart from the reading of a fear-lead report. Moreover, the sequence of events, with the House rejecting a bail-in agreement only to approve it days later, indicates the weakness of national bodies relative to the Eurogroup. As deliberation and decision-making had already taken place within the Eurogroup, national procedures operated to transpose already taken decisions into law and legitimise executive decisions adopted at the Union level. Procedurally, the democratic settlement established through European integration is retained as national bodies rubber-stamp policy measures adopted at a Union level. Substantively, we observe the migration of decision-making from national bodies to Union institutions in a way that distorts the constitutional settlement of the EU and its Member States.

### Conclusion: The ultimate constitutional question arising from the Cypriot case

In this chapter I argued that the Eurogroup became a body of deliberation and decision-making during the crisis. Due to its informal nature, the Eurogroup had always acted as an insulated space without requirements for transparency or accountability. During the crisis, however, what was already an insulated space for economic coordination was transformed into a body of economic decision-making. What changed during this period is the intensity of activity within the forum. Instead of cooperation in fiscal policy, we observe the coordination of fiscal policy measures. Instead of consensus, we see the employment of political pressure to inflict a crisis response approach or measure on Eurozone members in need. Moreover, the Eurogroup acted as a space where numerous EU institutions met and shaped and expressed a unified European position. During this process of intensification of coordination, the Eurogroup underwent an institutional development. No longer an informal forum for discussion, it is now an institution capable of reaching binding economic decisions at a Union level that Member States are obliged to follow. We saw this again in the third section of this chapter, with the role of the Cypriot House of Representatives limited to affirming and giving legal effect to Eurogroup decisions. As a result, national parliaments have been completely disenfranchised from organising responses to the crisis and are called on solely to transpose economic policy decided by European institutions into national measures and ensure their continuing application. In other words, national parliaments act as a mechanism for the formal legitimisation of supranational informality.

Multiple conclusions can be drawn from the in-depth study of institutional development conducted in this chapter. First, we observe an increase in the competences of the European Union to decide on economic matters, as the Eurogroup can directly influence decisions in what is, according to the division of competences, a matter of national significance. Second, we see the continuing reconfiguration of legal authority as economic deliberation and decision-making continues to migrate from national institutions to supranational institutions or, in this case, institutional configurations. As a result, the insulation of economic decision-making is intensified due to the ongoing separation of economic decision-making from the national sphere where political contestation is most likely to occur. Third, the continuing shift from legally recognisable routes such as the Community methods toward legally ambiguous and informal formations such as the Eurogroup, further increases the degree of insulation afforded to supranational institutions. Procedural rules established to ensure some form of democratic participation or at least transparency, are circumvented, allowing economic decision-making to be conducted in a highly insulated environment. Ultimately, economic decision-making occurs within a scrutiny lacuna as democratic interference or contestation is minimised. Moreover, as national parliaments are disenfranchised from their power to decide appropriate fiscal policies, the threat of interference by national institutions to the decisions already adopted at a Union level is minimal, further insulating economic decision-making. The fourth conclusion concerns the relationship between neoliberalism and European constitutionalism. As institutional development intensifies the degree of insulation afforded to economic decision-making and further separates politics from the economy, the possibility for competing constitutional objectives to take effect is minimised. In other words, the circumvention of constitutional barriers silences all other considerations, whether social considerations, the articulation of alternative policy approaches or political considerations like greater democratic participation. By minimising interference with the chosen crisis response approach, European institutions intensify the neoliberal character of Europe's political economy.

Institutional development resulting in a scrutiny lacuna is not a 'momentary lapse of reason'<sup>85</sup> on the part of EU institutions; it is not an exceptional circumstance where normality has been suspended in order to reinstate constitutional order.<sup>86</sup> Instead, it is a moment where the fragile democratic balance achieved by the division of competences is distorted, thus transforming the

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<sup>85</sup> I have to thank my dad for introducing me to Pink Floyd and allowing me to borrow his record collection indefinitely.

<sup>86</sup> For a discussion on state of exception see: Carl Schmitt, *Political Theology*, trans. George Schwab (Chicago & London: The University of Chicago Press, 2005); Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005), Contemporary commentators revived the idea of exceptionalism to describe the Eurozone crisis. See: Christian Joerges, "Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation", *German Law Journal* 15, no. 5 (2014), 985-1027; Michelle Everson and Christian Joerges, "Who is the Guardian for Constitutionalism in Europe After the Financial Crisis?" *LEQS Paper*, no. 63 (2013).

constitutional identity of the EU. The constitutional question that arises, therefore, is not so much the bypassing of procedures or the blurring of fiscal policy competences but an outright challenge to the ability of constitutional law to constitute and limit the exercise of public power. This is, indeed, an “existential”<sup>87</sup> moment for the EU and its Member States. As constitutional circumventions manifest through changes in the division of competences on which the EU is constructed,<sup>88</sup> constitutional courts are required to review these developments. Therefore, the next two chapters consider how courts have responded to the constitutional imbalance and consider the extent to which the scrutiny lacuna is constitutionalised by the operation of constitutional review.

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<sup>87</sup> Agustín José Menéndez, "The Guardianship of European Constitutionality: A Structural Critique of European Constitutional Review", *ARENA Working Paper 2/2017* (2017).

<sup>88</sup> Michael A. Wilkinson, "The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union", *German Law Journal* 14 (2013), 527-558; Michael A. Wilkinson, "Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?" *European Law Journal* 21, no. 3 (2015), 313-339; Christian Joerges and Maria Weimer, "A Crisis of Executive Managerialism in the EU: No Alternative?" *Maastricht Faculty of Law Working Paper*, no. 2012-7 (2012). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2190362](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190362); Jürgen Habermas, "The Crisis of the European Union in the Light of a Constitutionalization of International Law", *European Journal of International Law* 23, no. 2 (2012), 335-348.

## Chapter 5 – Cypriot depositors before the European Court of Justice: Constitutionalising the scrutiny lacuna

“Not all cases are equally important; they are not equally interesting intellectually and they are not of equal significance in terms of political significance”,<sup>1</sup> but sometimes the features of a case coalesce to bring together a judgment with momentous significance. The case of *Mallis and Malli v Commission and ECB*<sup>2</sup> could have been one of those cases. In this direct action for the annulment of an EU act, Cypriot depositors challenged the legality of the Eurogroup’s statement dated March 25<sup>th</sup>, 2013 announcing the bail-in resolution for the Cypriot banking sector. The applicants in *Mallis* argued that EU institutions were directly involved in the deliberation and decision of crisis response measures with the effect of expanding the Union’s competences. The case required the Court to consider the involvement of the European Commission, European Central Bank and Eurogroup in deciding a bail-in resolution for the Cypriot banking sector and whether the involvement of EU institutions constitutes an expansion of competences by the Union. In this chapter, I consider whether, and how, the Court of Justice of the European Union tackled the development of a scrutiny lacuna during the crisis by engaging in *ultra vires* review.

The questions I raise here rely heavily on observations and conclusions put forward in previous chapters. Specifically, in Chapters 3 and 4, I outlined how the Eurozone crisis effected a series of constitutional developments and changes. Chapter 3 indicated how crisis response measures intensified insulation of economic decision-making from democratic participation and contestation. Chapter 4 took a closer look at institutional development through an in-depth examination of decision-making during the crisis in Cyprus and showed how the Eurogroup became a body of deliberation and decision-making. Both chapters point out the stark choice faced by governments and parliaments in countries with economic difficulties. As all loan agreements are subject to strict conditionality, EU Member States must choose between transformative austerity measures or face significant economic uncertainty, even collapse. In these situations, the economic leverage held by EU institutions and creditor Member States is employed to pursue a course of action based on what Chapter 3 identified as a dominant framing. Economic deliberation and decision-making about national fiscal and social policy is conducted by EU institutions. Conditionality serves as a way of locking-in crisis response measures in debtor states by ensuring the continuing compliance of those

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<sup>1</sup> Paul Craig, "Pringle: Legal Reasoning, Text, Purpose and Teleology", *Maastricht Journal of European and Comparative Law* 20, no. 1 (2013), 3-11, 3.

<sup>2</sup> Case T-327/13, *Mallis and Mallis v. Commission and European Central Bank*, ECLI:EU:T:2014:909. These were then appealed in: Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, ECLI:EU:C:2016:702.

countries in receipt of financial assistance with prescribed policy responses. National governments and parliaments are locked in a relationship of dependence, forcing them to continue with social and structural reforms decided by EU institutions.

Together the chapters highlight how increasing coordination between EU institutions and Eurozone members increases the degree of insulation afforded to economic decision-making at the supranational level to the degree that a scrutiny lacuna is created. The creation of a scrutiny lacuna around economic decision-making means that democratic institutions and by extension citizens have no way to scrutinise crisis response measures and their effects. In addition to the institutional and democratic aspect of scrutiny lacuna, there is also a legal dimension. Existing legal instruments such as decisions and directives were not employed by EU institutions. Informal coordination lead to the issuing of informal announcement of measures such as the Eurogroup statements and of broad declarations of measures such as Council Decisions addressed to specific countries. The absence of formal legal connection between supranational decision-making and national provisions implementing crisis response measures meant that EU institutions, acting behind the cloak of informality, could exercise *de-facto* legal authority. Constitutionally, the situation described above translates to an increase of EU competences, the alteration of both the EU and Member States' constitutions and a shift in the democratic settlement between EU and Member States.

As the constitutional implications of the crisis touch the very core of Europe's constitutional arrangement, the question of constitutional review soon follows. As indicated in Chapter 3, numerous cases challenging crisis response measures were brought before the CJEU but in none of those cases did the Court recognise any legal connection between EU institutions and crisis response measures. In that chapter, I argued that the CJEU's light touch of review constitutionalised the scrutiny lacuna created by intensified coordination. The aim of this chapter is to continue the inquiry into how the Court of Justice of the European Union tackled the development of a scrutiny lacuna during the crisis by engaging in *ultra vires* review. For this reason, the chapter conducts a close reading of *Mallis and Malli v Commission and ECB*<sup>3</sup> in order to consider how the CJEU responded to the expansion of *de-facto* decision-making capacities of the Eurogroup and, by extension, to the disturbance of democratic settlement in the Union. The majority of discussions on this case approach the issues from the perspective of the private litigant, considering the rights of third parties and how these can be protected through judicial review.<sup>4</sup> While this consideration is

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<sup>3</sup> Case T-327/13, *Mallis and Malli v. Commission and European Central Bank*, ECLI:EU:T:2014:909.

<sup>4</sup> Rene Repasi, "The Role of the Eurogroup in the Economic Governance Framework" (European Parliament, European Research Centre for Economic and Financial Governance, 5 May, 2015); Anastasia Karatzia, "An Overview of Litigation in the Context of Financial Assistance to Eurozone Member States", *Hungarian Yearbook of International Law and European*

significant, I approach the question from the view of European public law, focusing on the exercise of *ultra vires* review by the ECJ and considering the effects of the Court's approach in *Mallis*.

The first section will address the issue of constitutional review in the EU, focusing on the extension of competences through acts *ultra vires*. Constitutional review is broadly understood as the ability of a Court to review and strike down legislation or administrative actions deemed incompatible with the constitution. In this section, I focus on the branch of legal review concerned with whether a legislative or administrative action goes beyond the competence of the author to decide such matters, in other words, *ultra vires* review. I consider the jurisdictional battle between the CJEU and national constitutional courts in determining which Court has the authority to have the final say on the constitutionality of acts considered to be *ultra vires*. In the second section, I consider the judgment delivered by the CJEU (General Court, Advocate General and ECJ) in *Mallis* and identify the constitutional significance of the CJEU's judgment. Finally, section three examines the limits of judicial review by suggesting an alternative interpretation of the issues raised in *Mallis*. By reconstructing some of the key arguments put forward by the Court, this section indicates that the Court could have employed existing interpretive tools and case law to admit the case of *Mallis* and in doing so exercise *ultra vires* review. This section completes the examination of the Eurogroup initiated in Chapter 4 and supplements the proposition that it acts as body of deliberation and decision-making by presenting the legal effects of Eurogroup statements.

In this chapter, I argue that by exercising a light touch of review, the CJEU refused to intervene in informal methods of coordination thus providing legal validity to constitutional changes effected by institutional development – what I term as the constitutionalisation of a scrutiny lacuna. Ultimately, I identify how the exercise of judicial review operates as yet another insulating instrument and argue that the ECJ limits the reach of its own jurisdiction in a way that severely undermines the exercise of *ultra vires* review in the European Union. These arguments contribute to number of debates identified by the thesis. Firstly, the argument put forward by the chapter contributes to assessing the constitutional implications of the Eurozone crisis. Secondly, it expands our understanding of the Eurogroup's institutional development and its constitutional significance. Thirdly, the chapter contributes to assessing the wider implications of constitutionalising a scrutiny lacuna on the exercise of constitutional review in the EU and the relationship between neoliberalism

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*Law* (2016), 573-590; Anastasia Karatzia, "Cypriot Depositors before the Court of Justice of the European Union: Knocking on the Wrong Door?" *King's Law Journal* 26, no. 2 (2015), 175-184; Stéphanie Laulhé Shaelou and Anastasia Karatzia, "Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on *Mallis* and *Ledra*", *European Law Review*, no. 2 (2018), 249-268; Anastasia Poulou, "Austerity and European Social Rights: How can Courts Protect Europe's Lost Generation?" *German Law Journal* 15, no. 6 (2014), 1145-1176.

and European constitutional law. Finally, the chapter contributes to our understanding of the relationship between neoliberalism and constitutional law.

## 1: *Ultra Vires* Review in the EU. A battle for jurisdictional authority between the ECJ and national constitutional courts

As previous chapters have indicated, among the many issues raised by the Eurozone crisis is the extension of Union competences through institutional development. This section is concerned with the exercise of constitutional review in the EU. Conventionally, constitutional review is understood as the power of a Court to declare legislation or administrative actions incompatible with the constitution, with the effect of either being without effect or sent back to the legislature for revision. One branch of constitutional review focuses on the authorship of measures, that is, their origin (author) and whether a given author has the authority to exercise that kind of decision-making. In the EU, the question is one of competences to decide. Constitutional courts and the ECJ have been exploring for some time now the question of constitutional review in instances where acts of Union institutions violate existing constitutional arrangements. In this section, therefore, I consider who is the final arbiter of constitutionality in Europe with regards to acts *ultra vires* or acts that distort the constitutional arrangement of the EU with its Member States.

### 1.1. National constitutional courts and their continuing claim to rule an act of the EU *ultra vires*

Ever since the doctrine of supremacy was established by the ECJ, national courts, especially constitutional courts, have challenged the jurisdictional hierarchy of the ECJ in considering matters of constitutional significance.<sup>5</sup> In broad strokes, national constitutional courts argue that an act of the Union that affects their own constitutional identity, as for example the expansion of competences by the EU through secondary legislation or ECJ case law, is directly reviewable in national constitutional courts.<sup>6</sup> The ECJ consistently responds that only Union courts have jurisdiction to declare an act of the Union unlawful or *ultra vires*.<sup>7</sup> Over the years, a vivid exchange between national constitutional courts, mainly the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) and the ECJ has developed around this issue.

In an attempt to balance both the supremacy of EU legal order and the authority of national constitutional courts to review any constitutional changes affecting the constitutions of Member

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<sup>5</sup> The development of constitutional concepts by the ECJ, including the doctrine of supremacy, were discussed in Section 3 of Chapter 2.

<sup>6</sup> For the latest reiteration of this position see: BVerfG, Judgment of the Second Senate of 05 May 2020 – 2 BvR 859/15 -, paras (1-237).

<sup>7</sup> Court of Justice of the European Union, Press Release No 58/20, *Press release following the judgment of the German Constitutional Court of 5 May 2020*, Luxembourg, 8 May 2020.

States, the Federal Constitutional Court (FCC) has diachronically asserted its authority to review any unilateral EU act affecting the constitutional settlement between EU and a Member State, in this case Germany. The FCC does not challenge the supremacy of the EU legal order but insists that this supremacy “does not stem from an autonomous source of law but has its basis in an authorization located in national constitutional law.”<sup>8</sup> Such a claim rests on the principle of conferral. So long as EU supremacy rests on the constitutional authorization of its Member States and not on the self-proclaimed independence of the EU legal order, the FCC claims a jurisdictional authority to review whether EU acts transgress into the competences reserved to Member States.<sup>9</sup> In other words, as the FCC is tasked with ensuring that the German constitution is observed, it retains an authority to review whether EU acts remain within the limits of the competences conferred upon the Union. The FCC identifies three areas where it can exercise constitutional review of EU law, instances where there is a violation of fundamental rights,<sup>10</sup> where union acts are considered *ultra vires*<sup>11</sup> or where national constitutional identity is challenged.<sup>12</sup> Each of these will be considered in turn.

With regards to fundamental rights review, the FCC stated that it would exercise review of EU acts as long as the EU and ECJ did not guarantee and protect the same fundamental rights as German Basic Law.<sup>13</sup> While the Court accepted the guarantees provided by the EU, and did not exercise fundamental rights review,<sup>14</sup> it continued to reassert its right to review acts if and when they contravened fundamental rights. The FCC’s promise to do so in coordination with the ECJ may be seen as an attempt to ease tensions between the two courts without ceding any of the FCC’s authority. Following the *Banana Market* judgment,<sup>15</sup> the Court refused to review the compatibility of single EU acts with fundamental rights and limited its own authority to “the review of whether EU law and institutions provide for an adequate level of rights protection in general”;<sup>16</sup> a position affirmed in subsequent case law.<sup>17</sup>

The doctrine of *ultra vires* rests on the fundamental principle that the “limits of Union competences are governed by the principle of conferral”<sup>18</sup> and “competences not conferred remain

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<sup>8</sup> Mehrdad Payandeh, “Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice”, *Common Market Law Review* 48, no. 1 (2011), 9-38, 12.

<sup>9</sup> BVerfG, Judgment of 22 October 1986, 2 BvR 197/83, [339]; BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 -, paras (1-421), [231].

<sup>10</sup> BVerfG, Order of the Second Senate of 07 June 2000 – 2 BvL 1/97 -, paras. (1-69).

<sup>11</sup> BVerfG, Judgment of 12 October 1993 – 2 BvR 2134/92 and 2 BvR 2159/92.

<sup>12</sup> BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 -, paras (1-421).

<sup>13</sup> BVerfG, Judgment of 22 October 1986 – 2 BvR 197/83; BVerfG, Judgment of 22 October 1986 – 2 BvR 197/83.

<sup>14</sup> BVerfG, Judgment of 22 October 1986 – 2 BvR 197/83.

<sup>15</sup> BVerfG, Order of the Second Senate of 07 June 2000 – 2 BvL 1/97 -, paras. (1-69).

<sup>16</sup> *Ibid*, 14.

<sup>17</sup> BVerfG, Order of the Second Senate of 27 January 2010 – 2 BvR 2253/06 -, paras (1-26)

<sup>18</sup> Article 5(1) TEU (Previously Article 5 TEC).

with Member States”.<sup>19</sup> Accordingly, any Union action must occur within the bounds of those competences transferred by Member States and according to the principles of subsidiarity<sup>20</sup> and proportionality.<sup>21</sup> The Treaty on European Union (TEU) sets a clear distinction between the limits of Union competences and the use of those competences.<sup>22</sup> As Craig notes, an act *ultra vires* could arise in instances where the EU fails “to adhere to the limits to its competence embodied in the founding Treaties”.<sup>23</sup> Such failure could arise by acting in an area where it is “not accorded power at all” or acting in areas “where it is prima facie granted power, but violates subsidiarity”.<sup>24</sup> An *ultra vires* act is, therefore, a transgression of existing constitutional limits as set by the division of competences and can “take the form of EU regulations, directives or decisions that are *ultra vires* the Treaty articles on which they are based, or it may alternatively take the form of an *ultra vires* interpretation of Treaty provisions or rules made thereunder by the EU courts”.<sup>25</sup> What remains unclear, though, is which court has jurisdiction to review and annul an action *ultra vires* – an issue considered in the *Maastricht* judgment of the FCC.<sup>26</sup> For the Maastricht Treaty to be ratified by the German state, the Federal Constitutional Court needed to review its content and decide whether it was compatible with the German constitution. In its judgment, the FCC reinstated its position that it was within its jurisdictional authority to review whether Union acts remained within the competences conferred to the Union by Member States. When the Court deemed that Union acts overcame the competences vested to the Union, the Court reserved its authority to rule such acts inapplicable at the national level. In essence, the FCC restated its authority to act as the guardian of constitutionality at the national level and, by extension, to police the jurisdictional boundaries set by the principle of conferral. Despite these proclamations, the FCC fell short of ruling any act of the Union *ultra vires*.

Before considering the ECJ’s response to the FCC’s comments in the case of Maastricht, a complementary ground of review should also be outlined. Following Maastricht, the FCC emphatically reaffirmed its role as ultimate protector of constitutionality in the ratification of the Treaty of Lisbon.<sup>27</sup> In that case, the Court added to the possible grounds for reviewing acts of the EU cases where EU legal acts could be in contradiction with the constitutional identity of the German Constitution. Put simply, the FCC states that any action taken by EU institutions that distorts the

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<sup>19</sup> Article 5(2) TEU.

<sup>20</sup> Article 5(3) TEU.

<sup>21</sup> Article 5(4) TEU.

<sup>22</sup> Article 5(1) TEU.

<sup>23</sup> Paul Craig, “The ECJ and Ultra Vires Action: A Conceptual Analysis”, *Common Market Law Review* 48, no. 2 (2011), 395-437, 397.

<sup>24</sup> *Ibid.*, 426.

<sup>25</sup> *Ibid.*, 397.

<sup>26</sup> BVerfg, Judgment of 12 October 1993 – 2 BvR 2134/92 and 2 BvR 2159/92.

<sup>27</sup> BVerfg, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 -, paras (1-421).

constitutional arrangement between the EU and its Member States may be reviewed. What we see here is a reiteration of the principle of conferral and the need to respect the foundational idea of the EU's legal order as "an association of sovereign states to which sovereign powers are transferred".<sup>28</sup> Moreover, constitutional identity review can be used to ensure that "sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions"<sup>29</sup> of their choosing. It remains uncertain as to how the Court may choose to apply this ground of review, however, it seems that it can serve "as a basis for review with regard to actions of the EU organs and institutions."<sup>30</sup> As a ground of review, it is closely associated with *ultra vires* and can be complimentary or alternative to *ultra vires* review.

## 1.2. Holding tight: The ECJ's response to national constitutional courts

As would be expected, the ECJ consistently rejects any challenge to its authority to determine questions of EU law, including ruling any acts of the Union *ultra vires*. In *Foto-Frost*, the Court articulated its supremacy based on the need for uniform application of Community law: "the main purpose of the powers accorded to the Court by Article 177 [of the EEC Treaty] is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty".<sup>31</sup> The Court's sole competence to pronounce an act of the Union invalid was exemplified in a series of cases.<sup>32</sup> More recently, the Court accepted that national constitutional courts could act as "judicial authorities of last instance" concerning national constitutional questions.<sup>33</sup> However, the ECJ proceeded to indicate that in considering any matter concerning Union law, constitutional courts should "refer preliminary questions on the validity of secondary Union law and to apply its conclusions in the legal proceedings before them".<sup>34</sup> The ECJ reinstated its long-standing position that before national courts could rule on the validity of an EU act, "the Court of Justice should be given the opportunity to review the legality of the Union

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<sup>28</sup> Ibid, [229].

<sup>29</sup> Ibid, [249].

<sup>30</sup> Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, 9-38, 17.

<sup>31</sup> Case 314/85, *Foto-Frost v. Hauptzollamt Lu"beck-Ost*, ECLI:EU:C:1987:452, [15].

<sup>32</sup> Case C-27/95, *Woodspring v Bakers of Nailsea* [1997] ECR I-1847, [20]; Case C-461/03 *Gaston Schul Douane-expediteur*, ECLI:EU:C:2005:742, [21]; Case C-344/04 *IATA and ELFAA*, ECLI:EU:C:2006:10, [27]; Case C-119/05 *Lucchini*, ECLI:EU:C:2007:434, [53]; Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363, [54]

<sup>33</sup> Asteris Pliakos and Georgios Anagnostaras, "Blind Date between Familiar Strangers: The German Constitutional Court Goes Luxembourg!" *German Law Journal* 15, no. 2 (2014), 369-382, 377.

<sup>34</sup> Ibid.

measure concerned in relation to the requirements of primary Union law<sup>35</sup> and that national procedures “may not impair its exclusive privileges to rule on the invalidity of the acts of the Union institutions”.<sup>36</sup> The ECJ was careful not to disregard the ability of national constitutional courts to exercise constitutional review of *ultra vires* acts, but the Court reinstates the obligation of national courts to refer any matters of EU law to the ECJ, establishing in this way its constitutional authority to review and decide on all matters concerning the acts of EU institutions before national courts do. As a result, the declaration of any act as *ultra vires* should, according to the ECJ, first obtain the approval of the European Court by way of a preliminary ruling.

Following the ECJ’s *Melki and Abdeli*<sup>37</sup> ruling, the FCC in *Honeywell*<sup>38</sup> gestured toward easing the tension with the ECJ. In *Honeywell*, the FCC reiterated its competence to exercise *ultra vires* review over acts of union institutions. It expressed its longstanding position that as long as the Union operates on the principle of conferral, with Member States as masters of the Treaties, the FCC’s capacity to police the boundaries of that agreement cannot be completely ceded as it is interlinked with questions of national constitutional significance. However, in an attempt to ease the tension with the ECJ, the FCC also acknowledged that pursuing any “complaints of an *ultra vires* act on the part of European bodies and institutions is to be coordinated with the task which the Treaties confer on the Court of Justice, namely to interpret and apply the Treaties, and in doing so to safeguard the unity and coherence of Union law”.<sup>39</sup> Moreover, the FCC noted that any *ultra vires* review “must comply with the ruling of the Court of Justice in principle as a binding interpretation of Union law” such that before an *ultra vires* review of an EU act, the Court of Justice “is to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings”.<sup>40</sup> The FCC acknowledged the fact that the primacy of EU law and its uniform application would be severely undermined should national courts be permitted to strike down Union acts. In addition, a restrictive approach to *ultra vires* review was established by developing a set of meta-standards without which the Court cannot proceed to review an EU legal act. Specifically, the Court stated that for an act to be considered as *ultra vires* and therefore invalid at the national level, it must “manifest that acts of the European bodies and institutions have taken place outside the transferred competences [by transgressing] the boundaries of their competences in a manner specifically violating the principle of conferral” to the

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Joined Cases C-188/10 and C-189/10, *Melki and Abdeli*, ECLI:EU:C:2010:363.

<sup>38</sup> BVerfG, Order of the Second Senate of 06 July 2010 – 2 BvR 2661/06 -, paras (1-116).

<sup>39</sup> Ibid, [56].

<sup>40</sup> Ibid, [60].

detriment of the Member States.<sup>41</sup> Making the operation of ultra vires review contingent on the existence of restrictive conditions makes it almost impossible to assert the invalidity of EU law on the basis of a violation of the principle of conferral. Unsurprisingly, the FCC concluded that upon application of the above test, the ECJ's judgment in *Mangold*<sup>42</sup> did not constitute an *ultra vires* act.

The position, as developed in *Honeywell*, is that constitutional review of EU acts may occur at national courts but, due to the ECJ's jurisdiction to interpret EU law, no action of the Union can be declared *ultra vires* without the ECJ exercising its powers to interpret EU law *before* any national court proceeds to strike that action down. This position was practically affirmed in *Gauweiler*, when the FCC referred a matter to the ECJ for the first time. As indicated in Chapter 3, despite the FCC forwarding its own interpretation as to how the ECB's Outright Monetary Transactions could be interpreted and readjusted so as not to be considered as acts *ultra vires*, the ECJ refused to follow the FCC's directions and forwarding its own interpretation of the case. While the FCC was careful not to accept an inferior position, it did follow the ECJ's ruling when deciding *Honeywell*.<sup>43</sup>

### 1.3. Who is the final arbiter of constitutionality? An uneasy co-existence

In a remarkable turn of events, the FCC for the first time ruled an ECJ judgment *ultra vires*. The case stems from an action against the ECB's Public Sector Purchase Programme (PSPP), a scheme positioned within the Expanded Asset Purchase Programme (EAPP) aimed at increasing money supply and support consumption in the Eurozone. Under the PSPP, Eurozone central banks may obtain "marketable debt securities issued by central governments of euro area Member States",<sup>44</sup> sparking constitutional complaints against German institutions (the *Bundestag* and *Bundesbank*) for their omission to bring an action against the PSPP. The FCC referred the matter to the ECJ, which in turn delivered its judgment in the case of *Weiss* where it affirmed the legality of the ECB's Public Sector Purchase Programme. However, the FCC found the ECJ's judgment to be *ultra vires* on the ground that the judgment "fails to give consideration to the importance and scope of the principle of proportionality (Article 5(1) second sentence and Article 5(4) TEU), which also applies to the division of competences, and is no longer untenable from a methodological perspective given that it completely disregards the actual [economic policy] effects of the PSPP".<sup>45</sup> Essentially, the FCC held the degree of judicial review conducted by the ECJ subpar,<sup>46</sup> as it failed to conduct "a

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<sup>41</sup> *Ibid*, [61].

<sup>42</sup> Case C-144/04, *Werner Mangold v Rüdiger Helm*, ECLI:EU:C:2005:709.

<sup>43</sup> BVerfG, Order of the Second Senate of 06 July 2010 – 2 BvR 2661/06 -, paras (1-116).

<sup>44</sup> BVerfG, Judgment of the Second Senate of 05 May 2020 – 2 BvR 859/15 -, paras (1-237), [10].

<sup>45</sup> *Ibid*, [119].

<sup>46</sup> Dimitrios Kyriazis, "The PSPP judgment of the German Constitutional Court: An abrupt pause to an intricate judicial tango", *European Law Blog*, May 6<sup>th</sup> 2020, Accessed May 20<sup>th</sup> 2020, <https://europeanlawblog.eu/2020/05/06/the-pspp-judgment-of-the-german-constitutional-court-an-abrupt-pause-to-an-intricate-judicial-tango/>

comprehensible review as to whether the ESCB and the ECB observe the limits of their monetary policy mandate”.<sup>47</sup> In what will be one of the most discussed passages in European constitutional law in the coming years, the FCC concluded:

*“The interpretation of the ECB’s monetary policy mandate, as undertaken by the CJEU, encroaches upon the competences of the Member States for economic and fiscal policy matters...The ESCB is not authorised to pursue its own economic policy agenda. To the extent that the Weiss Judgment of the CJEU essentially affords the ECB the competence to pursue its own economic policy agenda by means of an asset purchase programme, and refrains from subjecting the ECB’s actions to an effective review as to conformity with the order of competences on the basis of the principle of proportionality, including a balancing of the economic and fiscal policy effects of the PSPP against its monetary policy objective, the Judgment of the CJEU exceeds the judicial mandate deriving from Art. 19(1) second sentence TEU). The CJEU thus acted ultra vires, which is why, in that respect, its Judgment has no binding force in Germany.”<sup>48</sup>*

The FCC’s latest judgment shows that the German Court is not a dog that barks but not bites. With this judgment it reiterates, in a powerful way, its long-term position that “if the Member States were to completely refrain from conducting any kind of ultra vires review, they would grant EU organs exclusive authority over the Treaties even in cases where the EU adopts a legal interpretation that would essentially amount to a treaty amendment or an expansion of its competences.”<sup>49</sup> The current position, following this last exchange between the two courts, can be summarized as follows. The ECJ continues to assert its jurisdiction to interpret EU law and, therefore, have a first say in any action contesting an EU act as *ultra vires*. However, national constitutional courts continue to assert their own jurisdiction to strike down an act of the EU as *ultra vires* if that act exceeds the division of competences. As indicated by the PSPP case, in exceptional instances national constitutional courts may rule an ECJ decision and, by extension an act of the EU, *ultra vires* and invalidate that act within the jurisdiction of the Member State in question.

Of course, the dialogue between the ECJ and FCC does not define the relationship between the ECJ and all national courts. However, the position described above is a good indication of a broader attitude toward constitutional review in the EU between the Union’s highest court and all other national constitutional courts. Indicatively, the *ultra vires* jurisprudence initiated by the FCC in its

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<sup>47</sup> BVerfG, Judgment of the Second Senate of 05 May 2020 – 2 BvR 859/15 -, paras (1-237), [123].

<sup>48</sup> Ibid, [163].

<sup>49</sup> Ibid, [111].

Maastricht judgment influenced constitutional courts in Spain,<sup>50</sup> Poland,<sup>51</sup> and the Czech Republic<sup>52</sup>, all of which expressed their intentions to act as an “*ultima ratio* against the violation by the Union institutions of the principle of conferral”.<sup>53</sup> Despite these declarations, few constitutional courts attempted to strike down an act of the Union as *ultra vires* and challenge the increasing competences of the Union. A notable example was the Czech Constitutional Court’s ruling in the *Slovak Pensions* case that an ECJ decision was *ultra vires*.<sup>54</sup> The case concerned a pension supplement provided by Slovakia for those who have contributed pension payments in Czechoslovakia – which was dissolved into the Czech Republic and Slovakia in 1993. In a series of judgments and legislative revisions, the Czech Supreme Administrative Court put forward a question of Union law to the ECJ for a preliminary ruling. In an attempt to salvage its own jurisdiction on the matter, the Czech Constitutional Court refused to follow the ECJ’s judgment<sup>55</sup> and ruled it *ultra vires*. In its reasoning, the Czech Constitutional Court stated that EU law did not apply to a pension scheme concerning a dissolved state. In addition to legal reservations on the correctness of this judgment, it does not concern a “structural reallocation of competences between the Union and the Member States”.<sup>56</sup> While this observation may be important when considering the breadth of *ultra vires* review, it also distinguishes the *Slovak Pensions* case from the discussion in this chapter.

In conclusion, *ultra vires* review in the European Union remains divided between the CJEU and national constitutional courts. The CJEU continues to assert that: only the Court of Justice can interpret EU law and decided whether an act of an EU institution as contrary to EU law;<sup>57</sup> preliminary rulings are binding on Member States;<sup>58</sup> and the obligation of Member States to ensure that EU law takes full effect.<sup>59</sup> However, national constitutional courts are not showing any willingness to cede their jurisdiction to review acts of the EU that could potentially increase the competences of the Union contrary to the principle of conferral. With both the CJEU and national constitutional courts claiming jurisdiction to conduct *ultra vires* review, constitutional guardianship in the EU continues to

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<sup>50</sup> Camilo B. Schutte, "Spain Tribunal Constitucional on the European Constitution. Declaration of 13 December 2004", *European Constitutional Law Review* 1, no. 2 (2005), 281-292. Ricardo Alonso García, "The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy", *German Law Journal* 6, no. 6 (2005), 1001-1024.

<sup>51</sup> Krystyna Kowalik-Bańczyk, "Should we Polish it Up? the Polish Constitutional Tribunal and the Idea of Supremacy of EU Law", *German Law Journal* 6, no. 10 (2005), 1355-1366.

<sup>52</sup> Petr Bříza, "The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008", *European Constitutional Law Review* 5, no. 1 (2009), 143-164.

<sup>53</sup> Georgios Anagnostaras, "Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court", *German Law Journal* 14, no. 7 (2013), 959-973, 960.

<sup>54</sup> Czech CC, Judgment of 31 Jan, Pl. .S 5/12, *Slovak Pensions XVII*. The English translation is available at the Czech Constitutional Court’s website, [www.usoud.cz/view/6342](http://www.usoud.cz/view/6342)

<sup>55</sup> Case C-399/09, *Landtová Marie Landtová v Česká správa sociálního zabezpečení*, ECLI:EU:C:2011:415.

<sup>56</sup> *Ibid.*, 967.

<sup>57</sup> Case 314/85, *Foto-Frost v. Hauptzollamt Lu`beck-Ost*, ECLI:EU:C:1987:452, [15], [17].

<sup>58</sup> Case C-446/98, *Fazenda Pública v Câmara Municipal do Porto*, ECLI:EU:C:2000:691. [49].

<sup>59</sup> Case C-212/04, *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)*, ECLI:EU:C:2006:443, [122].

operate at both national and supranational level. While the parallel claims to jurisdiction authority may cause conflict between the courts, as in the PSPP judgment, the fact remains that the CJEU reserves jurisdiction to act as a constitutional court. How, then, did the CJEU respond to institutional development during the Eurozone crisis and how did it exercise its function as guardian of the constitutional arrangement between the EU and its Member States?

## 2: The case of *Mallis and Malli*. Constitutionalising the scrutiny lacuna

As the constitutional implications of the Eurozone crisis touch the core of Europe's constitutional settlement, the exercise of constitutional review becomes of utmost relevance. With the CJEU continuing to assert its jurisdiction to rule on whether an act of the Union is *ultra vires*, the aim of this section is to consider the extent to which the Court exercised its function as a constitutional court. *Mallis and Malli v Commission and ECB*<sup>60</sup> was the first set of cases to challenge the institutional channels through which the bail-in was achieved. The applicants, Cypriot nationals and depositors in "Cyprus Popular Bank Public Co. Ltd" (Laiki), brought an action for annulment of the Eurogroup statement issued on the 25<sup>th</sup> of March 2013 outlining the restructuring of the financial sector through a bail-in resolution. The case required the Court to consider the involvement of the European Commission, European Central Bank and Eurogroup in deciding a bail-in resolution for the Cypriot banking sector and whether the involvement of EU institutions constitutes an expansion of competences by the Union.

Before examining the claims put forward in *Mallis*, it will be useful to explain two key characteristics of the contested statement: the policy measures it outlined and, the legal relations it established. As indicated in Chapter 4, the Eurogroup statement outlined a set of policy measures aiming at restructuring Cyprus' financial sector. According to the Eurogroup's statement, Laiki would be "resolved immediately with full contribution of equity shareholders, bond holders and uninsured depositors – based on a decision by the Central Bank of Cyprus, using the newly adopted Bank Resolution Framework".<sup>61</sup> The statement goes on to outline the methods through which Laiki's resolution would be achieved. It would be split into a 'good' branch and a 'bad' branch, and all Laiki's assets, healthy operations and the Emergency Liquidity Assistance loan (ELA) would be folded onto the Bank of Cyprus. Recapitalisation of the Bank of Cyprus would then be achieved by a "deposit/equity conversion of uninsured deposits with full contribution of equity shareholders and bond holders".<sup>62</sup> Effectively, this meant that all uninsured deposits (over one hundred thousand

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<sup>60</sup> Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, order of the General Court (Grand Chamber) of 16 October 2014, ECLI:EU:T:2014:909.

<sup>61</sup> Eurogroup Statement on Cyprus, March 25<sup>th</sup> 2013. Annex, point 1.

<sup>62</sup> Eurogroup Statement on Cyprus, March 25<sup>th</sup> 2013. Annex, point 5.

euros) were subjected to a haircut, calculated later at 47.5%. Laiki's bad branch was comprised of all "equity shareholders, bondholders and uninsured depositors"<sup>63</sup> and was led to liquidation, meaning that all of the above-mentioned parties, whether investors or depositors, lost their property.

Against this background, Cypriot depositors affected by the bail-in challenged the legality of the Eurogroup's statement in actions brought directly to the Court of Justice of the European Union. According to Article 263 TFEU, under which the claim is brought, four classes of acts come under the review of the court: legislative acts; acts of the Council, the Commission, and the European Central Bank; acts of the European Parliament and the European Council intended to produce legal effects vis-a-vis third parties; and acts of bodies, offices, or agencies of the Union intended to produce legal effects vis-a-vis third parties.<sup>64</sup> Since the Eurogroup has no authority to issue legislative acts, it is not explicitly mentioned as one of the institutions whose acts can be the action of annulment and is not formally a body, office, or agency of the Union whose acts can produce legal effects vis-a-vis third parties. In order to overcome the barriers erected by the lack of formal legal connection between policy measures outlined by the Eurogroup and the formal transposition of these measures into law, the applicants in *Mallis* contested the Eurogroup statement, but directed the case against the Commission and ECB. The applicants put forward two main arguments under four heads of claim.<sup>65</sup> The first argument was that the measures outlined in the Eurogroup statement constituted a decision of either the European Commission or the European Central Bank or both that was communicated through the Eurogroup statement. The purpose of this argument was to impute the decision to two Union bodies with the capacity to produce legal effects vis-à-vis third parties and whose acts were reviewable by the CJEU. The applicants' second argument attempted to expand the reading of Article 263 (2) s to include the Eurogroup statement within the definition of those 'acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

At the centre of the claims in *Mallis* is the proposition that since the EU exercised decision-making authority in the area of fiscal policy, the Eurogroup statement constituted an act *ultra vires*

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<sup>63</sup> Eurogroup Statement on Cyprus, March 25<sup>th</sup> 2013. Annex, point 1.

<sup>64</sup> Article 271 TFEU also allows acts of the Board of Governors and the Board of Directors of the European Investment Bank to be reviewed under certain circumstances. See also: Trevor C. Hartley, *The Foundations of European Union Law*, Eighth edition. ed. (Oxford: Oxford University Press, 2014), 364.

<sup>65</sup> First, "annul the contested statement, 'which took its final form through [Decree No 104] of the Governor of [CBC] as the representative and/or agent of the European System of Central Banks ... whereby the "sale of certain operations" of [Laiki] was decided and which in essence constitutes a joint decision of not only the [ECB] but also of the ... Commission'; Second, in the alternative, declare that the contested statement in essence constitutes 'a joint decision of the [ECB] and/or of the ... Commission' irrespective of the shape or form in which it was dressed; Third, in the further alternative, annul the contested statement, 'irrespective of the shape or form in which it was dressed'; Fourth, in the yet further alternative 'annul the joint decision of the [ECB] and/or the ... Commission ... adopted through Eurogroup, irrespective of the shape or form in which it was dressed'.

and was therefore an action capable of being annulled by the CJEU.<sup>66</sup> The court was asked to consider whether, under Article 263 TFEU, the Eurogroup statement outlining policy measures including a depositor's bail-in could come under judicial review on the grounds of lack of competence, misuse of powers, procedural infringements of an essential procedure or an infringement of the Treaties or any rule of law. In essence, the case called upon the Court to recognize the use of political power and economic pressure by Union institutions as creating legal effects for the purposes of Article 263 and to reinstate the constitutional division of competences between Union and MS. Acting as the ultimate constitutional authority, the CJEU had the opportunity to navigate the unmapped waters of decision making during the Eurozone crisis by examining the fundamental proposition presented by the case of *Mallis and Malli*. In this section of the chapter, I will consider how the CJEU, including the General Court, Advocate General and Court of Justice, discharged its constitutional authority to review acts *ultra vires* by analysing the Court's response to the issues raised in *Mallis*.

#### 2.1. Ruling the case as inadmissible: The legal validation of a scrutiny lacuna

As indicated above, for an act to be reviewable under Article 263, it should be *authored* by a Union institution or body capable of creating legal effects; only then would the Court have jurisdiction *ratione materiae* (regarding the subject matter). As the claims were brought against the Commission and ECB, the two responding parties refused authorship of the measures. In technical terms this translates to an objection on the basis of admissibility due to the wrongful identification of the defendants, impelling the court to turn its attention to that question before examining the case's merits.<sup>67</sup> In dealing with the question of admissibility, the Court considered the first argument put forward by the applicants: that the Eurogroup statement constituted a decision of either the European Commission or European Central Bank or both, communicated through the Eurogroup statement. In its assessment, the Court reviewed the Eurogroup's status and its relationship with the ECB and Commission as described by the Treaties and stated the following. Found under Article 137 TFEU, the Eurogroup was set up as an informal forum for the Ministers of the Eurozone countries to facilitate discussion at a ministerial level. Despite its institutional structure, the Treaties do not vest the Eurogroup with any decision-making powers. Consequently, the Court notes, the Eurogroup

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<sup>66</sup> Shaelou and Karatzia, *Some Preliminary Thoughts on the Cyprus Bail-in Litigation: A Commentary on Mallis and Ledra*, 249-268, 252.

<sup>67</sup> For the sake of clarity, it should be stated that this procedural issue (the identification of the defendant) is decided under the Rules of Procedure, not under Article 263(1). Article 114(1) of the Rules of Procedure allows the court to rule on the question of admissibility and on the matter under Article 114(4) prior to its final judgment. Even though the court, through the information contained in the application may impute the contested statement to a body responsible for its issuing, it is ultimately up to the claimant to endorse that decision. Should the applicant persist in the designation of the author, the court may rule the application inadmissible due to the wrongful identification of a defendant.

cannot reach any legally binding decisions. Article 1 of the Protocol on the Eurogroup clearly states that both the Commission and the ECB can sit in the meetings, outlining in this way the active role both institutions play in Eurogroup meetings. This, though, does not indicate any that the Commission or the ECB have delegated any powers. In addition, neither institution has any power of review capable of influencing the conclusions of the meetings in any way. Hence, the court concluded, the Eurogroup is not controlled by the Commission or the ECB nor does it act as their agent, reiterating in this way what is in the Treaties: that the Eurogroup is not an official decision-making body of the Union, but an independent forum for discussion at a ministerial level. For these reasons the court refused to either attribute or impute the statement to the Commission or the ECB.

Pursuing an additional route, the applicants sought to establish a link between the contested statement, the European Stability Mechanism (ESM), the Commission and the ECB. However, this line of argument required the Court to impute the Eurogroup statement to the ESM and, then to accept that the ESM is controlled by the Commission and ECB. Following the judgment of the ECJ in *Pringle*,<sup>68</sup> which positioned the ESM outside the scope of EU law, it was impossible for the General Court to accept such an argument. As Chapter 3 indicated, one of the issues considered by the ECJ in *Pringle* was “whether Member States can allocate tasks to EU institutions outside the EU framework”.<sup>69</sup> According to *Pringle*, Article 136(3) TFEU confirms that Member States have the power to establish a stability Mechanism without conferring “any new competence on the Union”,<sup>70</sup> despite the operation of Union institutions within the ESM’s structure. Unsurprisingly, the same rationale was followed in *Mallis*, as the Court found that the “duties conferred on the Commission and ECB within the ESM Treaty do not entail any power to make decisions of their own”, while any “activities pursued by those two institutions within the ESM Treaty solely commit the ESM”.<sup>71</sup> As ESM loans commit only the ESM and debtor countries to the agreement between them, the Court refused to recognise any legal connection between ESM loan agreements and EU institutions. Consequently, no legal liability for measures adopted as a consequence of ESM conditionality can be extended to EU institutions. As a result, decisions concerning ESM loan conditionality adopted by the Troika during the Eurogroup could not be attributed to a body whose acts were reviewable, as the ESM is positioned outside the scope of EU law.

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<sup>68</sup> Case C-370/12, *Thomas Pringle v Government of Ireland and Others*, ECLI:EU:C:2012:756.

<sup>69</sup> Alicia Hinarejos, “The Role of Courts in the Wake of the Eurozone Crisis”, in *Beyond the Crisis: The Governance of Europe’s Economic, Political, and Legal Transformation*, eds. Mark Dawson, Henrik Enderlein and Christian Joerges (Oxford: Oxford University Press, 2015), 112-136, 114.

<sup>70</sup> *Pringle*, at [73].

<sup>71</sup> *Mallis*, [48].

It should be noted that the case fell at this point on the basis of mistaken designation of the defendant.<sup>72</sup> However, the Court did consider the second argument in *Mallis*, “for the sake of completeness”.<sup>73</sup> The applicants tried to expand the reading of Article 263 TFEU to include the Eurogroup within its definition and, by extension, within the bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. The Court, reiterating its position, noted that on examination of the Treaty provisions it is clear that as an informal body created solely as a forum for discussion, the Eurogroup has no legal personality and has not been vested with legislative powers by the Treaties. As a result, the Eurogroup cannot be regarded as an office, body or agency of the Union whose actions produce legal effects within the meaning of Article 263 TFEU.<sup>74</sup> However, the Court continued examining whether the Eurogroup statement produced legal effects of such a kind as to affect the interests of third parties by bringing about a distinct change in their legal position.<sup>75</sup>

In examining this issue, the Court considered the substance of the contested statement by examining its content and wording,<sup>76</sup> concluding that the bail-in was neither part of the macroeconomic adjustment programme,<sup>77</sup> nor a condition on which financial assistance by the ESM would be granted.<sup>78</sup> Moreover, the Court noted that it is not within the powers of the Eurogroup to accept or reject assistance by the ESM.<sup>79</sup> As a result, the Eurogroup statement was deemed to be of a purely informative nature; simply “informing the general public of the existence of certain policy agreements and expressing its opinion on the likelihood of the grant of the financial assistance facility by the ESM”<sup>80</sup> and falling short of a legally binding measure thus escaping the ambit of judicial review.<sup>81</sup>

Following the General Court’s order, the applicants brought an appeal before the ECJ<sup>82</sup> contesting the “interpretation or application of EU law by the General Court”.<sup>83</sup> Despite the applicants’ having submitted three pleas, the ECJ considered all points of appeal together as they contribute toward the same claim, specifically, that “the General Court committed errors of law and

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<sup>72</sup> *Mallis*, [38]-[45].

<sup>73</sup> *Mallis*, [51].

<sup>74</sup> *Mallis*, [53].

<sup>75</sup> Case 60/81, *International Business Machines v Commission of the European Communities*, ECLI:EU:C:1981:266, [9]; Joined Cases C-68/94 and C-30/95, *France and Others v Commission*, ECLI:EU:C:1998:148, [62].

<sup>76</sup> *Mallis*, [52]. See also, Case C-50/90 *Sunzest v Commission* [1991] ECR I-2917, [12]; Case T-22/07 *US Steel Košice v Commission*, not published in the ECR, [41].

<sup>77</sup> *Mallis*, [58].

<sup>78</sup> *Mallis*, [57].

<sup>79</sup> *Mallis*, [59].

<sup>80</sup> *Mallis*, [60].

<sup>81</sup> *Mallis*, [60].

<sup>82</sup> Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, ECLI:EU:C:2016:702.

<sup>83</sup> *Ibid*, [36].

failed to fulfil its obligation to state reasons in holding that the statement at issue did not display, in their regard, the characteristics of an act whose annulment may be sought on the basis of Article 263 TFEU.”<sup>84</sup> Unfortunately, the ECJ did not go into any more depth than the General Court, restricting the ambit of the Court’s consideration to the examination of Treaty provisions. Due to its formalistic approach, a path set by the Advocate General’s opinion,<sup>85</sup> the ECJ concluded that the General Court did not err in law, either in its decision not to impute the statement to one of the two responding institutions or in its decision not to include the Eurogroup within those bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. Despite the constitutional significance of this case, the ECJ reiterated the General Court’s findings and restricted its own examination to a review of formal Treaty provisions.

A more detailed discussion on some of the issues raised in the appeal may be found in the Advocate General’s Opinion.<sup>86</sup> While this analysis was also formalistic in its examination of whether the Eurogroup statement could be imputed either to the Commission or to the ECB,<sup>87</sup> the Advocate General considered in slightly more detail the second question of whether the Eurogroup can be reviewed under Article 263. Interestingly, Advocate General Wathelet used the statement’s wording to position it within the broader context in which it was decided. For example, words such as “welcomed” and “took note” were taken to indicate the recording, on the part of the Eurogroup, of a political commitment by the government of Cyprus.<sup>88</sup> In other words, these measures were taken to be unilateral declarations of intent in anticipation of a loan facility by the ESM, which the Eurogroup “expected” would be approved following these commitments.<sup>89</sup> Despite accepting that the “sequence of events shows that the Eurogroup clearly carries considerable political weight and that the Member States feel bound by the agreements concluded within that forum”, the Advocate General insisted on the informative nature of the statement.<sup>90</sup>

## 2.2. Legally validating the Eurogroup’s development and the constitutionalisation of a scrutiny lacuna

The judgment in *Mallis* constitutionalised the scrutiny lacuna created by institutional development in the Eurozone crisis. As indicated in Chapters 3 and 4, intensified coordination between Union institutions and Member States on matters of economic and fiscal policy led to the

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<sup>84</sup> Ibid, [29].

<sup>85</sup> Opinion of Advocate General Wathelet delivered on 21 April 2016 in Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*.

<sup>86</sup> Ibid.

<sup>87</sup> [108] based on an analysis in [54]-[82]

<sup>88</sup> Opinion of Advocate General Wathelet delivered on 21 April 2016 in Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, [129].

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

development of new institutional channels of economic decision-making. These novel channels of informal coordination let institutions such as the Eurogroup operate in a *scrutiny lacuna* – a space that has no formal procedures ensuring accountability or transparency and does not create any legally recognizable relationships, meaning that its actions are not recognized as actions capable of being the subject of annulment. Against this background, the Court of Justice was asked to consider whether institutional development amounts to the expansion of competences and, by extension, to acts *ultra vires* by EU institutions. By interpreting the contested Eurogroup statement as a unilateral declaration of intent by national governments in order to obtain financial assistance, the Court neither recognised the Eurogroup as the author of appropriate crisis response measures or as a decision-making body with the capacity to issue binding measures. This insulated space, a scrutiny lacuna, is given legal validation through the Court’s unwillingness to interfere; it is *constitutionalised*.

For private litigants, actions that are de-facto authored by EU institutions cannot be challenged in EU courts but can still be challenged in national courts – a matter that will be discussed in more depth in the next chapter. At this point in our discussion, it is more important to examine the effects of *Mallis* from the perspective of EU public law to assess the case’s wider significance. Given the continuing claim of constitutional review by the ECJ, as outlined in the first section of this chapter, the CJEU acts as a constitutional court with authority to rule on whether an act of the Union is *ultra vires*. According to the CJEU’s position, its authority to interpret European law combined with the binding effect of preliminary rulings position the Court at a higher ground since no national court could strike down an act of the Union as *ultra vires* before the CJEU first accepting such an interpretation. The PSPP judgment may have shaken the waters of constitutional review in the EU but the CJEU continues to position itself as the sole interpreter of EU law and, therefore, as the relevant authority to determine, at last instance, questions of EU law and acts of the Union. By rejecting the case as inadmissible, the Court fails to bring the Eurogroup within its jurisdiction, indicating a self-imposed limit on the exercise of constitutional review. Effectively, the CJEU reduced the scope of judicial review by limiting the reach of its own jurisdiction, much like it did with *Pringle*. In that case, the Court accepted the positioning of a financial institution outside the remit of EU law despite the participation of EU institutions and Member States within the ESM. In *Mallis*, the Court restricted the ambit of judicial review by refusing to acknowledge the *de-facto* binding effects of Eurogroup decisions.

As a result, institutional development during the Eurozone crisis remains hidden behind the formal description of Union institutions and the active involvement of the Eurogroup in deciding crisis-response measure remains legally unaccounted for. Most importantly, though, *ultra vires* review remains inert during a crucial period. The inadmissibility of claims indicates the light touch of

review as the CJEU contained its analysis and consideration of the issue to the formal prescriptions of the Treaties. By not engaging with the substance of the issue, albeit for the sake of completeness,<sup>91</sup> the Court failed to exercise the very jurisdiction it reserved for itself. The wider significance of *Mallis*, from the perspective of European public law, is the gradual diminution of *ultra vires* review by CJEU.

Interestingly, *Mallis* reveals another dimension to the relationship between neoliberalism and European constitutional law. Recalling from earlier discussions in Chapters 1 and 2, the relationship between neoliberalism and constitutional law was mostly identified through the use of constitutional instruments for constructing a legal framework within which neoliberal markets could develop. Critical theorists, such as Stephen Gill, highlight the role of constitutional law in the construction of institutional frameworks that separate and insulate economic decision-making from political interference, while others, such as Wendy Brown, complement our understanding of the relationship between neoliberalism and constitutional law by highlighting the role of judicial reason as complementary to neoliberal practices. *Mallis* is a clear example of how the exercise of judicial review complements neoliberal practices aimed at separating and insulating economic decision-making from political interference. The scrutiny lacuna may have been created through the Eurogroup's development, but it was constitutionalised through the exercise of judicial review. By deciding not to intervene in the Eurogroup's actions, the Court essentially validates the practices of all institutions involved (the European Commission, European Council, European Central Bank and the Eurogroup) and the Eurogroup's subsequent development into a decision-making body during the crisis. In the case of the Eurozone crisis, the constitutionalisation of separation and insulation of economic decision-making from political interference does not occur through the structuring of institutions or market conditions through positive legal means but instead through the legal validation of an insulated space for decision-making as this was constructed by institutional practices.

### 3: Assessing the wider implications of *Mallis and Malli*. How the Court's approach reduces the scope of constitutional review.

In the previous section, I argued that ruling the case inadmissible constitutionalised a scrutiny lacuna. As a consequence of the Court's approach in *Mallis*, the previous section also argued that *ultra vires* review is severely undermined by the Court's approach. However, this argument could be

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<sup>91</sup> Procedurally, this is an important point as no appeal can be brought against issues considered for the sake of completeness. Opinion of Advocate General Wathelet delivered on 21 April 2016 in Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*.

rebutted by defending the Court's formalist approach as the only viable legal alternative. In other words, one could argue that the CJEU did not limit the reach or effectiveness of *ultra vires* review because the result in *Mallis* was the only result it could have reached. In this section, I consider the limits of the Court's jurisdiction when exercising constitutional review and assess whether an alternative judgment was within the Court's interpretive and jurisdictional limits.

### 3.1. Imputing the decision to an institution of the Union capable of reaching binding decisions.

By insisting on imputing the statement to the responding parties, the applicants in *Mallis* argued that the Eurogroup was a configuration of either the Commission or the ECB or both. Imputing the decision to a Union institution is not foreign to the ECJ's jurisprudence. Any entity created by European Union law to which power is delegated will be regarded as a body, office or agency of the Union. Consequently, any act arising from the entity to which power is delegated by a Union institution and creates legal effects can be reviewed by the Court.<sup>92</sup> However, the issue in *Mallis* differs in an important respect. Despite the ECB and Commission operating within the Eurogroup, neither institution has delegated power to the Eurogroup. However, as Chapters 3 and 4 indicated, the forum increasingly resembles the organisational structure of an EU institution, with a president, established working procedures and a Working Group that provides technical assistance to the Eurogroup. As a result, the Eurogroup is transformed into an independent entity – an institution in its own right. Therefore, the issue of imputing such a decision to a different body of the European Union is a rather difficult task. It would require the Court to explain why these measures can be described as a decision of either the ECB or the Commission *alone*, irrespective of the operation of additional actors within the Eurogroup. This means not only indicating the involvement of the ECB and the Commission in the decision-making process, but also justifying why such an involvement is adequate to explain the final result of a complex and multi-layered negotiation among Cypriot authorities, members of the Eurozone, the IMF, the ECB and the Commission. The leap from establishing the involvement of an institution to imputing the decision to it is perhaps too great for a court to take.

Another possible avenue for the applicants would be to draw a link between conditionality measures and Council decisions. However, this was also foreclosed by the CJEU. As indicated in Chapter 3, the Court “declined jurisdiction to review the legality of national measures taken pursuant to MoUs attached to assistance granted by the EFSF, EFSM, or otherwise, claiming the lack of a link to EU law.”<sup>93</sup> In the case of *ADEDY*, for example, the Court did not find any direct concern

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<sup>92</sup> Case 5/85, *AKZO Chemie BV v Commission of the European Communities*.

<sup>93</sup> *Ibid*, 121. See, for example: Case T-541/10, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v. Council*, ECLI:EU:T:2012:626.

between excessive deficit Decisions addressed to Greece and the applicants, given the wide spectrum of discretion afforded to the Hellenic Republic by Council Decisions on how to reach macroeconomic objectives.<sup>94</sup> Consequently, the Court concluded that Council decisions transposing conditionality into EU law could not be reviewed under Article 263 TFEU and directed applicants to national courts.

A similar approach was adopted by Advocate General Wathelet when discussing *Mallis*. As the Advocate General pointed out, it is due to the operation of national measures that the applicants' legal position is altered, not through the operation of EU law. Once again, the Court refuses to acknowledge the link between acts of the Union such as Council Decisions, and national measures. Despite this being a possible ground on which an alternative direction could have been adopted by the Court, it is not a viable alternative for the applicants in *Mallis*, because the case was brought against the Commission and ECB while the contested statement was issued by the Eurogroup. Nowhere in the application is the Council decision contested, leaving no room for considering an alternative direction down this path.

### 3.2. Is the mistaken designation of the defendant conclusive?

It should be reiterated that the mistaken designation of the defendant is precisely the point at which the case was declined. Because the Court could not impute the statement to one of the two defendants or any other body of the Union, the case was deemed inadmissible. However, as the Court admitted, the mistaken designation of a defendant does not necessarily "render the application as inadmissible if the application contains information which makes it possible to identify unambiguously the party against whom it is made, such as the designation of the contested measure and the body responsible for it."<sup>95</sup> Despite the fact that the applicants have brought an action against the Commission and ECB and not the Eurogroup, the application contained ample information for the Court to identify the Eurogroup as the party against whom the claim is brought. For the General Court, the fact that the contested statement was a Eurogroup statement was deemed enough to examine whether the statement created legal effects. It concluded, therefore, that it was within the Court's powers to consider whether the claim could be directed against the Eurogroup - a question that was indeed considered by the General Court, if only for the sake of completeness.

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<sup>94</sup> Case T-541/10, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY) and Others v. Council*, ECLI:EU:T:2012:626, [70], [71], [84].

<sup>95</sup> *Mallis*, [36].

The Advocate General, however, expressed a different opinion. Without stating that the General court erred in law, the Advocate General argued that *Mallis* “does not contain a ‘mistake’ of the kind referred to in the order in *Commission v EIB* (85/86, EU:C:1986:292) and in the judgment in *Spain and Finland v Parliament and Council* (C-184/02 and C-223/02, EU:C:2004:497), [since] *Mallis* and Others adhered to their decision to direct their actions against the Commission and the ECB and not against the Euro Group.”<sup>96</sup> Instead of relying on these cases, the General Court could have relied on a different set of cases<sup>97</sup> to reach a different conclusion and, therefore, not foreclosing the possibility of examining the second question raised by the case (whether the Eurogroup can be considered as a body, office, or agency of the Union intended to produce legal effects vis-a-vis third parties). However, as the General Court did not err in law, the Advocate General’s comments only indicate another interpretive possibility. It was therefore possible for the General Court or the ECJ to continue with the examination of the case despite the mistaken designation of the defendant.

### 3.3. Is the Eurogroup a ‘body, office or agency of the Union’?

In examining whether the claim could be directed against the Eurogroup, the first question to consider is whether the Eurogroup can be regarded as a body, office or agency of the Union within the meaning of the first paragraph of Article 263. From the outset, the issue of the Eurogroup’s lack of legal personality creates a significant hurdle. The Treaty of Lisbon made Article 263 applicable to certain bodies, offices or agencies of the Union without legal personality (for example European Council or the Committee of the Regions).<sup>98</sup> However, the Eurogroup has no legal personality and is not one of those institutions expressly included within the Article – a fact that, as the judgment in *Mallis* indicated, could be considered conclusive, therefore leaving the Eurogroup outside the ambit of judicial review.<sup>99</sup>

Nevertheless, the Court’s approach to Article 263 indicated that it would exercise review of a measure adopted by an EU institution irrespective of its form as long as it produced legal effects. In the case of *Les Verts*,<sup>100</sup> for example, a private party brought an action against the European Parliament. In that case, the green-ecologist party of France (*Les Vert* – The Greens), challenged direct political party funding by the Parliament in a case directed against the Parliament. However, the then Article 173 EEC (replaced by Article 230 EC and currently Article 263 TFEU) restricted the

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<sup>96</sup> Opinion of Advocate General Wathelet delivered on 21 April 2016 in Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, [114].

<sup>97</sup> *Ibid*, [115]; Joined cases C-181/91 and C-248/91, *European Parliament v Council of the European Communities and Commission of the European Communities*, ECLI:EU:C:1993:271.

<sup>98</sup> Opinion of Advocate General Wathelet delivered on 21 April 2016 in Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, [64].

<sup>99</sup> *Ibid*, [67].

<sup>100</sup> Case 294/83, *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166.

Court's jurisdiction to hearing cases brought only against the Commission and the Council. The applicants claimed that the narrow scope of the Article amounted to a 'denial of justice,' as the acts of a Union institution could not be reviewed. The Court adopted a radical interpretation of the Treaty, expanding the ambit of judicial review to include acts of the European Parliament within the meaning of Article 173 EEC.<sup>101</sup> The Court's reasoning indicates that irrespective of any formal restrictions, "neither [the Community's] Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty...[that] established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions."<sup>102</sup> Similarly, the Court in *ERTA*<sup>103</sup> indicated that even if an act does not fall within any of these categories it can be reviewed if it produces legal effect.

The importance of *ERTA* should not be underestimated. Despite the fact that Article 173 EEC (now Article 263 TFEU) implied that an action for annulment was limited to those acts described under Article 189 EEC (now Article 288 TFEU) the Court extended its jurisdiction to cover all those "measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects".<sup>104</sup> By widening the ambit of Article 173 EEC, the Court ensured that no action springing from a Union institution could develop outside the Court's control, irrespective of any difficulties in categorising such action.<sup>105</sup> Subsequently and in the case of *Sogelma*<sup>106</sup> the Court upheld this position by insisting that "any act of a Community body intended to produce legal effects vis-à-vis third parties must be open to judicial review".<sup>107</sup> From these cases, it is clear that the Court strove to ensure that the principle of judicial review was not undermined by a limited reading of the Treaties.

It is surprising, then, that the General Court did not consider whether the claim could be directed against the Eurogroup other than for the sake of completeness.<sup>108</sup> Even under the more restrictive Article 173 EEC, the Court's approach in *Les Verts* indicated the possibility of expanding the scope of a Treaty provision to uphold the effective exercise of judicial review. In a case that with

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<sup>101</sup> Laurent Pech, "The Rule of Law as a Constitutional Principle of the European Union", *The Jean Monnet Working Paper Series*, no. 04 (2009). <http://ssrn.com/abstract=1463242>, 13.

<sup>102</sup> Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat*, ECLI:EU:C:2008:461, [281].

<sup>103</sup> Case 22-70, *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32.

<sup>104</sup> Case 22-70, *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32. See also, Anthony Arnall, "Judicial Review in the European Union", in *The Oxford Handbook of European Union Law*, eds. Damian Chalmers and Anthony Arnall (Oxford: Oxford University Press, 2015), 376-402. 385-386.

<sup>105</sup> *Ibid*, 386.

<sup>106</sup> Case T-411/06, *Sogelma v European Agency for Reconstruction (AER)*, ECLI:EU:T:2008:419.

<sup>107</sup> *Ibid*, [37].

<sup>108</sup> Doing so means that parts of the order considered for the sake of completeness cannot form the subject matter of an appeal.

a tremendous resemblance to *Mallis*, as neither the Parliament (in *Les Verts*) nor the Eurogroup (in *Mallis*) are stated in the Treaty as institutions whose acts can be reviewed, the Court could have drawn on its jurisprudence to uphold the effective exercise of judicial review. Had the Court adopted a purposive, instead of a strictly textual and formal, reading of the Article it could have examined whether the acts of the Eurogroup produce legal effects. Such an approach would not be incompatible with the intentions of the legislators either. The Court's developing jurisprudence, as outlined above, was adopted and reflected in the "successive amendments to the first paragraph of the Article 230 EC"<sup>109</sup> and its subsequent development and expansion into what is now Article 263 TFEU. It is clear therefore that not only the CJEU but also the legislators intended to enhance judicial review and protection of the individual by including within the scope of judicial review all acts of the Union that produce legal effects, irrespective of their source.

#### 3.4. Did the Eurogroup statement produce legal effects?

Since the acts emanating from the Eurogroup can, arguably, be reviewed so long as they produce legal effects, the next question to be considered is whether there is any legally binding force supporting the forum's statements. Three easily identifiable categories of legally binding acts that can be adopted by Union institutions and are capable of review are regulations, directives and decisions.<sup>110</sup> Following *ERTA*, a set of cases developed around what came to be known as 'acts *sui generis*'. An act *sui generis* produces legal effects if it "alters the legal position of some person", or to put it differently, if it produces a "change in somebody's rights and obligations",<sup>111</sup> and when it alters the relationship between Union institutions (the internal management of the Communities)<sup>112</sup> or between the EU and Member States.<sup>113</sup> *Noordwijks Cement Accord*<sup>114</sup> offers an indicative example of how the Court refused to allow an act of the Commission to escape judicial review even if this act was not within an already defined reviewable act. In this case, a letter sent to cement companies informing them that they no longer enjoyed immunity from fines for breach of EC competition law was deemed by the Court as an act *sui generis* capable of being reviewed because it altered the position of the companies. The letter produced legal effects and thus was capable of being reviewed. Another indicative example is *Lassalle v European Parliament*.<sup>115</sup> A notice of vacancy for a post in the European Parliament requiring the applicant to have perfect knowledge of Italian was deemed a

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<sup>109</sup> Alan Dashwood et al, *Wyatt and Dashwood's European Union Law*, 6th ed. (London: Bloomsbury Publishing, 2011), 158.

<sup>110</sup> Article 288 TFEU [249/189 EC].

<sup>111</sup> Hartley, *The Foundations of European Union Law*, 351.

<sup>112</sup> Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson Education, 2002), 114.

<sup>113</sup> Case 22-70, *Commission of the European Communities v Council of the European Communities*, ECLI:EU:C:1971:32.

<sup>114</sup> Joined cases 8 to 11-66, *Société anonyme Cimenteries C.B.R. Cementsbedrijven N.V. and others v Commission of the European Economic Community*, ECLI:EU:C:1967:7.

<sup>115</sup> Case 15-63, *Claude Lassalle v European Parliament*, ECLI:EU:C:1964:9.

reviewable act as it “limit the choice which the administration will have eventually to make [which] has an adverse effect on servants who, like the applicant, do not fulfil one of the required conditions”.<sup>116</sup> This reading indicates that an act can produce legal effects even if the action will be taken in the future, provided that the act under review is definite and unequivocal.<sup>117</sup> In both of these cases, we observe the Court recognising the binding effect of an act despite the form in which it was dressed. The test, therefore, for acts *sui generis* intended to have legal effect is substantive, not formal.<sup>118</sup>

The crucial question, therefore, is whether the Eurogroup’s statement can be considered as an act *sui generis* intended to produce legal effects. It must be reiterated that both the General Court and the Advocate General considered this question, albeit just for the sake of completeness. Despite examining the content of the statement, the General Court and Advocate General only conducted an ‘internal’ examination of the statement, only considering its wording. By focusing on words such as “welcomed” or “took note”, the Court read the statement as a “purely informative”<sup>119</sup> statement notifying the general public of policy decisions presented by the government of Cyprus to the Eurogroup. However, the Court omitted to comment on other parts of the statement that indicate the statement’s directive nature. The instructive nature of Eurogroup statements is revealed in the opening sentence that states that “the Eurogroup has reached an agreement with the Cypriot authorities on the key elements necessary for a future macroeconomic adjustment programme. This agreement is supported by all euro area Member States as well as the three institutions”. Here we see the Eurogroup presented as a body with decision-making capacities. Language like “urges the immediate implementation of the agreement between Cyprus and Greece on the Greek branches of the Cypriot banks” and “requests the Cypriot authorities and the Commission, in liaison with the ECB, and the IMF to finalise the MoU” are further indications of the statements’ directive nature. To determine whether the statement produces legal effects, both the content and the context in which it was decided must be reviewed.

The first factor to be considered in addressing the question of legal effects within the context of the statement are the several points of contact between the Commission, ECB, ESM and Eurogroup as they are found in the ESM Treaty and Regulation No 472/2013.<sup>120</sup> The ESM Treaty indicates

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<sup>116</sup> *Ibid.*

<sup>117</sup> Hartley, *The Foundations of European Union Law*, 355.

<sup>118</sup> Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials*, 6th ed. (Oxford: Oxford University Press, 2011), 511.

<sup>119</sup> *Mallis* at [60].

<sup>120</sup> Regulation (EU) No 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 in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

several points of contact between the Mechanism and EU institutions. A detailed assessment of Cyprus' financial needs and the risk it posed to the Euro area as a whole was conducted by the Commission in liaison with the ECB, as presented in Chapter 4.<sup>121</sup> Moreover, the ESM Board of Governors is comprised by the same Ministers of Finance who comprise the Eurogroup and, in some instances, the ECOFIN Council.<sup>122</sup> As Repasi indicates, the identical composition of these institutions means that Eurogroup statements foreshadow "subsequent decisions adopted by the ESM".<sup>123</sup> Furthermore, Regulation 472/2013 specifies that upon receipt of request for financial assistance, the Eurogroup Working Group's president is informed and a discussion is held within the working group to examine the possibilities available through Union or euro-area financial instruments.<sup>124</sup> Subsequently, the Commission, ECB and where possible the IMF conduct a debt sustainability and financing needs assessment. When assistance is granted by the ESM or the EFSF, the Commission's assessment is submitted to the Eurogroup.<sup>125</sup> Importantly, the Member State, in agreement with the Commission ECB and IMF, is required to prepare and submit a macroeconomic adjustment programme for the Council to approve.<sup>126</sup> Although the Eurogroup is not explicitly mentioned, final negotiations between Member States and the Commission regarding a macroeconomic adjustment programme occur within the Eurogroup.

By considering these points of contact as part of the context within which the bail-in resolution was reached, it becomes clear that the involvement of Union institutions is less nuanced than the Court presented it as.<sup>127</sup> As indicated in Chapters 3 and 4, the financial assessment carried out by the Commission and ECB, in combination with the Eurogroup Working Group technical support, shaped perceptions within the Eurogroup about the sustainability of any loan agreement to Cyprus and about the appropriate means of recapitalising the country's failing banking sector. Chapter 4 in particular indicated how the Eurogroup became a body for deliberation and decision-making during the crisis to the extent that measures such as the bail-in resolution, can be attributed to the Eurogroup as a body in its own right. The context of the Eurogroup statement, therefore, indicates not only a high degree of coordination between Union institutions within the Eurogroup, but the binding effect of Eurogroup statements.

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<sup>121</sup> Article 13, ESM Treaty. See adjustment programme for the results of this assessment.

<sup>122</sup> When ECOFIN Council adopts decisions under Article 139(4) TFEU or Article 136 TFEU or secondary law adopted in conjunction with Article 136 TFEU, all finance Ministers of the EU may be present but only those whose currency is the Euro can vote. Rene Repasi, "Judicial Protection Against Austerity Measures in the Euro Area: Ledra and Mallis", *Common Market Law Review* 54 (2017), 1123-1156, 1145.

<sup>123</sup> *Ibid*, 1145.

<sup>124</sup> Regulation 472/2013, Article 5.

<sup>125</sup> Regulation 472/2013, Article 6.

<sup>126</sup> Regulation 472/2013, Article 7.

<sup>127</sup> Karatzia, *Cypriot Depositors before the Court of Justice of the European Union: Knocking on the Wrong Door?*, 175-184, 179.

The second factor to be considered in addressing the question of legal effects within the context of the statement is the chronology of the negotiation procedure. The first Eurogroup meeting was held on Saturday March 16<sup>th</sup>. The results of that meeting, summarised in the Eurogroup Statement on Cyprus dated March 16<sup>th</sup>,<sup>128</sup> formed the basis for a bill ("*Fee Upon Deposits in Credit Institutions Law of 2013*") outlining a horizontal bail-in applicable to the whole banking sector of Cyprus. However, the House of Representatives rejected this bill on March 19<sup>th</sup>. Two days later, on March 21<sup>st</sup> the Governing Council of the ECB announced its decision to cut the ELA funding it provided to the Central Bank of Cyprus unless an EU/IMF programme was in place. On the same day, in light of the ECB's mandate and in the absence of a working alternative, the House of Representatives approved the new restructuring framework as outlined in the "*Resolution of Credit and Other Institutions Law of 2013*". By vesting the CBC with authority to decide on the liquidation terms of any credit institution, the bill transferred power to the executive branch of the government to negotiate an agreement with the Eurogroup in the upcoming meeting of March 25<sup>th</sup> that would inevitably include a bail-in resolution. Chapter 4, in particular, indicated the inevitability of a bail-in resolution as members of the House accepted that with the passing of the bill, a bail-in resolution would be agreed in the subsequent Eurogroup meeting. The handing down of a bail-in resolution by the Eurogroup is further supported by the wording of the statement. Indicatively, the statement indicates that "the Eurogroup has reached an agreement with the Cypriot authorities on the key elements necessary for a future macroeconomic adjustment programme. This agreement is supported by all euro area Member States as well as the three institutions." As the statement continues to outline detailed policy measures that became binding law with the passing of Decrees by the Central Bank of Cyprus, the legally binding nature of Eurogroup statements is further highlighted.

Could this, then, be the point where the court could exercise constitutional guardianship? It is clear that the question of legal relations cannot be settled so easily. Drawing on existing case-law as well as the context and content of the Eurogroup statement, the Court of Justice of the European Union had sufficient legal instruments and scope for argumentation to recognise the legal relations produced by Eurogroup statements during the crisis. Nominal cases such as *Les Verts* and *ERTA* and the development of Article 173 EC, 230 EC and 263 TFEU indicate the clear intention that no measure of a Union institution should go unreviewed if this produced legal effects. While it is true that the Eurogroup statement may not fit perfectly with the existing definition of an act *sui generis* as outlined above, it is impossible to find a 'perfect fit' for Eurogroup statements under existing case law. Hence, what is presented here is not a so much a clear category under which this statement

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<sup>128</sup> Eurogroup Statement on Cyprus, March 16<sup>th</sup> 2013.

could come, but rather the existence of existing categories, including acts *sui generis*, flexible enough to include a non-categorizable act such as the Eurogroup statement and that could have been useful tools for legal argumentation for the effective exercise of judicial review.

Looking at both the content and context of the statement indicates that the forum “clearly carries considerable political weight and that the Member States feel *bound* by the agreements concluded within that forum.”<sup>129</sup> I would go a step further and argue that what we observe in Eurogroup statements is a clear intention to create legal relations between the Union (Eurogroup) and the Member State receiving financial assistance. As indicated in Chapters 3 and 4, as a legal instrument, conditionality locks in the commitments and policies outlined by Eurogroup statements while national measures are then employed to transpose these commitments into binding legal provisions. The case of Cyprus clearly indicates both how Eurogroup statements express the results of intergovernmental coordination between Eurozone members and European institutions and the binding effect of this result. The multiple points of contact between Eurogroup statements and European institutions indicate the participation of Union institutions in the Eurogroup statement, and the wider context of its implementation, indicated by the chronology of events, attests to the binding effect of the statement. As Eurogroup statements are later coupled with debt conditionality, the intention to create legal relations between policy decisions in Eurogroup statements and the member to which is addressed is evident. The ECJ could recognise Eurogroup statements as an act *sui generis* intended to produce legal effects if the statement was positioned within the context of crisis decision-making.

The question of legal effects is, therefore, the key issue in this case and it is both surprising and unfortunate that the Court dismissed the case before reaching this point. Recognising the legal effects produced by the statement would overcome procedural difficulties concerning the mistaken designation of the defendant as well. According to Repasi, to “reinterpret the action from one directed against the Commission and the ECB aiming at annulling a Eurogroup statement as one directed against the Eurogroup aiming at annulling corresponding paragraphs in the Eurogroup statement, the MoU concluded between Cyprus and the ESM, Council Decision 2013/236 and Council Implementing Decision 2013/436, would certainly transgress the limits of the ‘mistaken designation’, as it would amount to an entire new action”.<sup>130</sup> However, recognising the Eurogroup statement as producing legal effects in its own right would not amount to an entire new action, overcoming the procedural difficulties outlined above.

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<sup>129</sup> Opinion of Advocate General Wathelet delivered on 21 April 2016 in Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v. Commission and European Central Bank*, [132]. Emphasis added.

<sup>130</sup> Repasi, *Judicial Protection Against Austerity Measures in the Euro Area: Ledra and Mallis*, 1123-1156, 1146.

Considering what *Mallis* could have been shows how the Court could have included the Eurogroup within its ambit of review. The existence of a legally possible and justifiable interpretation of EU law that would lead to the case being admissible further supports the argument that by striking the case as inadmissible, the ECJ not only constitutionalised a scrutiny lacuna but also limited the reach and effectiveness of *ultra vires* review at a time that it was most relevant. Through this act of self-limitation or self-negation, the ECJ undermines a constitutional function it explicitly reserved for itself with important implications for the broader field of European public law. As Michelle Everson very accurately pointed out, “each Euro-securing decision contains its own future hazards, undermining legality and the rule of European law, and also colluding in the foreclosure of constitutionality within Europe”.<sup>131</sup> Despite the constitutional significance of *Mallis*, the Court’s approach constitutionalised a scrutiny lacuna within European constitutionalism and diminished the reach and scope of *ultra vires* review in the EU.

## Conclusion

In the introduction to this chapter, I pointed out that *Mallis* could have been a case of nominal significance, as the ECJ had a first-class opportunity to review the development of institutions during the crisis and assess the Union’s expansion of competences. More importantly, the Court had the opportunity to exercise its function as a constitutional authority in the European Union. The constitutional significance of *Mallis* is not restricted to the strict boundaries of a claim brought by Cypriot depositors affected by the bail-in or the slightly broader boundaries of the constitutional implication of the Eurozone crisis. The constitutional importance of *Mallis* is significantly broader and reaches the very core of constitutional review.

By approaching the case through the perspective of EU public law, the chapter focused on how the Court discharged its jurisdiction to exercise *ultra vires* review. Through a close reading of *Mallis*, the chapter indicated how the ECJ foreclosed any direct action for annulment of a Eurogroup statement, despite the active involvement of the forum in decision and policy making during the crisis. Letting *ultra vires* review remain inert during a period that is so relevant gives legal validation to the insulated space of *de-facto* decision-making created by the Eurogroup’s development. At the same time, we can see the legal validation of an ongoing alteration of Europe’s constitutional settlement and constitutional identity by the very institution entrusted with safeguarding Europe’s identity. The Court’s approach reveals the gradual withering of constitutional review in the European Union, given that its highest Court has refused to review the Union’s expansion of competences.

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<sup>131</sup> Michelle Everson, “An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht”, *European Law Journal* 21, no. 4 (2015), 474-499, 476.

Through *Mallis*, therefore, the chapter unveils a further dimension to the relationship between neoliberalism and constitutional law. By constitutionalising a scrutiny lacuna, judicial review operates to give legal validation to insulation. What we observe is a different operation of constitutional law from that identified in the thesis' first chapter. The constitutionalisation of a scrutiny lacuna is not achieved through constitutional instruments like constitutional documents or provisions, but through the operation of constitutional review. It is the court's acceptance of an institutional development that gives legal effect to a constitutional change, not the active restructuring of the state through constitutional instruments.

However, a complete assessment of constitutional review during the crisis cannot be completed until the national dimension is also examined. In fact, a recurring point found in the Court's commentary, both in *Mallis* and other relevant cases, is that the effectiveness of judicial review is sustained through national courts. In the next chapter of the thesis, therefore, I will consider whether national constitutional courts exercise *ultra vires* review effectively enough to remedy the scrutiny lacuna created by the ECJ.

## Chapter 6 – Constitutionalising the scrutiny lacuna at the national level: The case of Christodoulou

This chapter considers the extent to which the Supreme Court of Cyprus exercised *ultra vires* review in light of institutional development during the crisis and whether its approach further constitutionalises the scrutiny lacuna. By conducting a close reading of cases brought before the Supreme Court of Cyprus by depositors affected by the bail-in, the chapter indicates how the Court foreclosed the possibility of constitutional review at the national level by ruling the case of *Christodoulou*<sup>1</sup> as inadmissible despite the considerable scope for constitutional review afforded to it. Drawing on the legal analysis conducted throughout the chapter, I argue that the Court's approach is an act of self-limitation and provides further legal validation to the scrutiny lacuna. As a result, the scope and effectiveness of constitutional review both in Cyprus and in the EU is further reduced.

The chapter continues from the discussion initiated in Chapter 5. In that chapter, I indicated that due to the constitutional settlement between the EU and its Member States, any alteration in the division of competences subverts not only the European constitution but also the constitutions of Member States. This inevitable mirroring of constitutional change is why national courts insist on their inherent jurisdiction to exercise *ultra vires* review despite the ECJ's jurisdiction to interpret EU law. As Chapter 5 indicated, national courts are obliged to forward any questions concerning the interpretation of EU law by way of preliminary ruling to the ECJ. As a result, the ECJ must review any act *ultra vires* of the Union prior to a national court striking it down as incompatible with the national constitution. While the positive obligation of national constitutional courts to refer matters to the ECJ may give a procedural advantage to the ECJ, the role of national courts should not be understated, as the recent PSPP judgment indicated. In this chapter I consider how the expansion of EU competences and consequent alteration in the constitutional identity of Cyprus was reviewed by the Supreme Court of Cyprus. The chapter also considers whether national courts, in this case the Supreme Court of Cyprus, contribute to the constitutionalisation of a scrutiny lacuna.

The discussion presented in this chapter is positioned within a broader set of literature concerning the exercise of judicial review in countries receiving financial assistance. Crisis response measures in Greece and Portugal, for example, challenged constitutionally protected rights and

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<sup>1</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

principles.<sup>2</sup> Existing literature discusses these examples and indicates the variability of constitutional review.<sup>3</sup> Drawing on the Greek example, Kombos indicates how cases challenging budget cuts and salary or pension reductions of the public sector,<sup>4</sup> retrospective taxation,<sup>5</sup> and alterations in employment conditions and terms,<sup>6</sup> were found to not constitute any violation to constitutional provisions, principles or rights according to Greek Courts. While some lower courts and,<sup>7</sup> later some higher courts,<sup>8</sup> did exercise a tougher stance especially with regards to workers' rights, the overall approach identified by Kombos is one of light review based on the "existence of a higher social interest that justified the interference with constitutional rights".<sup>9</sup> Portuguese Courts, in contrast, gradually developed a "higher standard of review" despite an initial "willingness to review austerity measures by taking into account the seriousness of the situation".<sup>10</sup> As Fasone indicates,<sup>11</sup> the Portuguese Supreme Court initially found crisis response measures constitutional,<sup>12</sup> but gradually developed a firmer stance toward austerity measures and set limitations to political actions and struck down some measures as unconstitutional.<sup>13</sup> Existing literature on the response of national courts to crisis response measures indicates a varying stance, ranging from the judicial validation of austerity measures to a firmer stance against the violation of constitutionally recognised rights. However, the above examples focus mainly on the impact of crisis response measures on fundamental or social rights. Similar to the division of cases before the CJEU between those cases challenging social or fundamental rights and those cases challenging the ways through which crisis response measures were decided, as outlined in Chapter 3, the above examples fall within the first of the two categories.

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<sup>2</sup> Xenophon Contiades and Ioannis A. Tassopoulos, "The Impact of the Financial Crisis on the Greek Constitution", in *Constitutions in the Global Financial Crisis* (Routledge, 2016), 203-226.

<sup>3</sup> Constantinos Kombos, "Constitutional Review and the Economic Crisis: In the Courts we Trust?—Part Two", *European Public Law* 25, no. 2 (2019), 229-248.

<sup>4</sup> Greek Supreme Administrative Court, Decision 668/2012, Mnimonio, 20 Feb. 2012; Christina M. Akrivopoulou, "Facing l'Etat d'Exception: The Greek Crisis Jurisprudence", *International Journal of Human Rights and Constitutional Studies* 2, no. 3 (2014), 284-285.

<sup>5</sup> Greek Supreme Administrative Court, Decision 1685/2013, 25 Apr. 2013

<sup>6</sup> Decision 2307/201420

<sup>7</sup> Athens Court of the Peace, Case 599/2012, 10 May 2012

<sup>8</sup> Supreme Administrative Court, Decision 3354/2013, 27 Sept. 2013.

<sup>9</sup> Kombos, *Constitutional Review and the Economic Crisis: In the Courts we Trust?—Part Two*, 229-248, 234.

<sup>10</sup> Ibid, 236. See also Cristina Fasone, "Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective", *European University Institute Working Paper (MWP)*, no. 25 (2014).

<sup>11</sup> Ibid.

<sup>12</sup> Supreme Court of Portugal, Decision 399/2010, 26 Nov. 2010, on the constitutionality of Laws 11/2010 and 12A/2010; Supreme Court of Portugal, Decision 396/2011, 21 Sept. 2011, on the constitutionality of the Budget Act 2011.

<sup>13</sup> Supreme Court of Portugal, Decision 353/2012, 5 July 2012, on the constitutionality of the Budget Act 2012; Supreme Court of Portugal, Decision 187/2013, 5 Apr. 2013, on the Budget Act 2013; Supreme Court of Portugal, Decision 474/2013, 29 Aug. 2013, on the dismissal of public workers; Supreme Court of Portugal, Decision 862/2013, 19 Dec. 2013, on further pensions cuts.

The example of Cyprus, in addition to being understudied, highlights a different aspect of the crisis. While discussions outlined above focus on the implementation of austerity measures and their impact on existing constitutional provisions or rights, case law before the Supreme Court of Cyprus considers the effects of institutional development at the supranational level on national constitutions of debtor, as opposed to creditor, countries. As such, the Cyprus example concerns *ultra vires* review, similar to the *Gauweiler* and *Pringle* jurisprudence whereby acts of the Union were challenged before national courts as unconstitutional. Despite similarities between *Gauweiler*, *Pringle* and *Christodoulou*,<sup>14</sup> the case before the Supreme Court of Cyprus focuses on the expansion of competences through the Eurogroup's development as opposed to the ECB's Outright Monetary Transaction program and the creation of the European Stability Mechanism respectively. For the purposes of this chapter it is sufficient to remind the reader of two key factors concerning economic decision-making during the crisis in Cyprus. Firstly, the bail-in was achieved through a number of Decrees issued by the Central Bank of Cyprus (CBC) under a new banking resolution framework. Secondly, despite these measures being passed through the national procedures and with the authority of national institutions, the Eurogroup was instrumental in deciding and shaping bail-in conditions. EU institutions, such as the ECB, Commission and the Eurogroup actively intervened in the decision-making process, raising fundamental concerns about the EU's ability to exercise decision-making powers in areas reserved by Member States. Cases brought before the Supreme Court of Cyprus by depositors affected by the bail-in raise the question of an alteration in the constitutional settlement between the EU and Cyprus. Therefore, the cases before the Supreme Court of Cyprus may give rise to *ultra vires* review similar to cases decided by other constitutional courts in the European Union while differing significantly as the issues put forward concern an aspect of the Eurozone crisis that has gone un-addressed in other jurisdictions.

In order to consider the exercise of constitutional review by the Supreme Court of Cyprus to the issues raised by depositors, the chapter proceeds in three sections. Section 1 lays out the historical development of the Cypriot constitution and the strong constitutional tradition developed since independence. The section highlights a conflicting approach between the strong constitutional tradition of Cyprus developed in the earlier years of the Republic and the absence of a reservation formula similar to the German Federal Constitutional Court aimed at ensuring the constitutional settlement between Cyprus and the EU. Section 2 continues to examine how the Supreme Court of Cyprus responded to the issues raised by depositors and the extent to the Court exercised *ultra vires* review. Through a close reading of the majority judgment in *Christodoulou*, the section indicates

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<sup>14</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

how the Supreme Court engaged in an act of self-limitation by ruling the case inadmissible. Section 3 takes a closed look at the minority opinion in order to highlight the existence of a legally feasible alternative approach to the majority judgment.

Ultimately, the chapter indicates how the Supreme Court's judgment provides legal validation to the scrutiny lacuna established by the Eurogroup's development. *Ultra vires* review in the European Union is, therefore, further restricted through the absence of constitutional review at the national level. As a result, the insulation of economic decision-making from interference is further strengthened by the unwillingness of national constitutional courts to disrupt supranational economic coordination and contribute, in this way, to the resolution of constitutional conflict between neoliberalism and other constitutional objectives.

## 1. The tradition of constitutional review in Cyprus prior to the Eurozone crisis: The gradual withering of a strong constitutional tradition

Constitutional review in Cyprus is highly influenced by the historical conditions in which the constitution evolved. Drawing upon a series of events, from the creation of the constitution in 1960, to the doctrine of necessity in 1964 and the accession of Cyprus to the EU in 2004, this section will outline the basic characteristics of the Cyprus constitution and identify the fundamental rationale behind constitutional review as it was exercised prior to the Eurozone crisis. The section highlights two contradictory characteristics of constitutional review in Cyprus. First, the development of a constitutional tradition characterised by strong constitutional review and oriented toward the protection of division of powers and limited government whereby courts may invalidate legislation or administrative action for non-conformity to the constitution.<sup>15</sup> Secondly, the acceptance of EU supremacy without any constitutional reservation formula through which to ensure that the relationship between EU and Cyprus remains on the constitutional basis on which it was initially granted, unlike other constitutional courts that reserve their jurisdiction to act as *ultima ratio* in cases of constitutional alterations affecting their respective states.

### 1.1. Constitutional review and the strong constitutional tradition of Cyprus

Adopted after a long colonial history and inter-community conflict, the Constitution of Cyprus reflects the island's turbulent past. Otherwise known as the Zurich Constitution, the legal framework giving birth to the newly formed Republic of Cyprus was signed in Nicosia on the 16th of August

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<sup>15</sup> Paul Craig, "Democracy", in *The Cambridge Companion to Comparative Constitutional Law*, eds. Roger Masterman and Robert Schütze (Cambridge: Cambridge University Press, 2019), 201-229, 203.

1960 after a series of agreements<sup>16</sup> between Greece, Turkey, the UK and representatives of the people of Cyprus in Zurich and London on the 11th and 19th of February 1959 respectively. The constitution establishes a Presidential Republic with a strict separation of powers. As Polyviou points out, a principal feature of the Cyprus Constitution is that of “communalism”; the retaining and recognizing of politically separate communities despite their inclusion under a unified governmental machine. This feat required the creation and retention of “convoluted arrangements aimed mainly at satisfying the need to protect the rights and secure the participation of the Turkish Cypriot minority in the functions of the State”.<sup>17</sup> Indicatively, the 1960 Constitution provides for the Greek community to elect a President and the Turkish community to elect a Vice-President. The division of authority between the two communities runs along the entirety of governmental arrangements even though there is a unitary state that is neither a federation nor a confederation.<sup>18</sup> At the same time, the Constitution is characterised by a strong distinction between different branches of government. The principles of separation of powers and limited government run deep in constitutional provisions, setting defined limits to the exercise of power by the executive,<sup>19</sup> legislative<sup>20</sup> and judicial branches of government.<sup>21</sup> Given the strict division of powers between the two communities and different branches of state institutions, commentators describe the Cypriot constitutional settlement as a “one of the most complex and rigid in the world”.<sup>22</sup> In a much quoted passage, De Smith writes: “One who was totally ignorant of the realities of the politics might well

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<sup>16</sup> There are two levels to the London and Zurich agreements: the international and the internal. Three treaties (the Treaty of Establishment, the Treaty of Alliance and the Treaty of Guarantee) define the Republic’s international identity, while the Constitution served as the legal framework for internal governmental arrangements. See Polyvios G. Polyviou, *Cyprus on the Edge: A Study in Constitutional Survival* (Nicosia: Polyvios G. Polyviou, 2013), 7-8.

<sup>17</sup> Kypros Chrysostomides, *The Republic of Cyprus: A Study in International Law* (The Hague: Martinus Nijhoff Publishers, 2000), 26.

<sup>18</sup> In addition to the Presidency arrangements, legislative power is divided between 35 Greek and 15 Turkish members of the House of Representatives; the Supreme Constitutional Court would be comprised of one Greek, one Turk, and one neutral judge; the High Court would be comprised by two Greeks one Turk and one neutral President, while the public service was to be composed of Greek and Turks in a ration of 7:3. See Polyviou, *Cyprus on the Edge: A Study in Constitutional Survival*, 10-13; Chrysostomides, *The Republic of Cyprus: A Study in International Law* 27-30; Polyvios G. Polyviou, *Cyprus in Search of a Constitution: Constitutional Negotiations and Proposals, 1960-1975* (Zeno, 1976).

<sup>19</sup> Executive power is exercised by the President, Vice-President the Council of Ministers and executive governmental institutions such as the Advocate General and the Cyprus Central Bank. The President of the Republic, elected directly through universal suffrage, holds office for five years and acts as the Head of State. It is the responsibility of the President to appoint and remove ministers. While executives such as the President of the Supreme Court, the Advocate General and Vice Advocate General or the Governor of the CBC are directly appointed by the President, they cannot be removed because their institutions are independent. These provisions go to support the principle of limited government and prevent the executive branch from concentrating power to one person or office. See Articles 47- 51 of the Constitution.

<sup>20</sup> The House of Representatives holds monopoly of legislative power in all matters with the exception of those reserved for the Greek and Turkish Cypriot Communal Chambers (Article 61); a provision that remains valid though practically it is futile as the two Chambers are inactive due to the continuing segregation between the two communities. The only limitation on the legislative powers of the House of Representatives is the ability of both President and Vice-President to veto any decision of the House in matters of defence, security and foreign affairs (Article 51. Due to the absence of the Turkish Cypriot community, the office of the Vice-President remains unoccupied). In all other matters, veto power is restricted to returning a decision to the House of Representatives for reconsideration (Article 54).

<sup>21</sup> The judiciary is an independent state institution and responsible for exercising judicial power under Article 152 of the Constitution.

<sup>22</sup> Chrysostomides, *The Republic of Cyprus: A Study in International Law*, 26.

inquire whether the principles underlying the Constitution of Cyprus and the detailed rules that it embodies, has been conceived by a constitutionalist and a mathematician in a nightmarish dialogue”.<sup>23</sup> The complex system of representation within state institutions did not hold-up for long.

The retention of conflict-ridden identities led to “political and constitutional communal segregation”<sup>24</sup> that procedural means could not bridge. Three years after its birth, the Republic of Cyprus experienced its first constitutional crisis. Instead of facilitating communalism, constitutional arrangements polarised the population, and their implementation was a constant source of conflict.<sup>25</sup> After a series of disagreements springing from the implementation of constitutional arrangements such as the 7:3 ratio for the public service, the creation of an national army and the running of municipalities, the state came to a “virtual halt”.<sup>26</sup> As a response, then President of the Republic, Archbishop Makarios, came up with a constitutional reform plan known as the thirteen points. An inevitable political disagreement erupted, with the Turkish Vice President, Dr. Kutçuk, resisting any changes. The political unrest sparked the first intercommunal conflict post-independence, as the two communities clashed violently, and the first military intervention of a guarantor power, as Turkey bombed Greek Cypriot villages. A steady withdrawal of Turkish Cypriots from all governmental functions proceeded, leaving Greek Cypriots solely responsible for exercising governmental functions.

Following the 1963 events, the Republic was at a crossroads. The State machinery came to an abrupt end after the withdrawal of Turkish Cypriots from their governmental posts. The administration of justice became virtually impossible after the President of both the Supreme Constitutional Court and the High Court resigned, and Turkish Cypriot District Court judges refused to attend to their duties. As a result, the country’s two highest courts ceased functioning in August 1963 and June 1964 respectively. Faced with the country’s imminent collapse, the President of the Republic consulted the Attorney-General, Criton Tornaritis, on whether the government could continue functioning. His response was decisive: “the life of the State and its Government could not be wrecked...no organs could abstain therefrom”.<sup>27</sup> As a result, a new law, *the Administration of Justice (Miscellaneous Provisions) Law of 1964 (Law 33/64)*, was introduced by the Greek Cypriot members of the House of Representatives aiming at ending judicial inertia by creating a new Supreme Court. Importantly, Articles 146 and 152 establishing the two highest Courts had not been repealed by the Law. Instead, in order to allow the continuance of their jurisdiction, the House of

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<sup>23</sup> Stanley A. de Smith, *The New Commonwealth and its Constitutions* (Stevens, 1964), 285.

<sup>24</sup> Glafcos Clerides, *Cyprus: My Deposition*, Vol. 1 (Nicosia: Alitheia Publishing, 1989), 114.

<sup>25</sup> Polyviou, *Cyprus on the Edge: A Study in Constitutional Survival* 21-22.

<sup>26</sup> *Ibid*, 22.

<sup>27</sup> *Ibid*, 26.

Representatives established a new Court bearing their competences. By allowing the newly formed Supreme Court to hear questions of unconstitutionality<sup>28</sup> instead of having to refer such matters to the Supreme Constitutional Court, the administration of justice was reignited and expedited for the benefit of both communities – at least according to Greek-Cypriots.<sup>29</sup> Clearly, the unilateral decision to establish a new Supreme Court contravened the Constitution, and it was challenged in the case of *Attorney General of the Republic v. Mustafa Ibrahim*.<sup>30</sup>

Before the newly formed Supreme Court lay a difficult yet crucial question: could a law by the House of Representatives “be repugnant to, or inconsistent with, any of the provisions of the Constitution”?<sup>31</sup> To this, and despite the rather obvious contradiction of the law to the letter of the Constitution, the Court upheld the validity and legality of *Law 33/64*. The judgment in *Ibrahim* rests on the public law doctrine of necessity.<sup>32</sup> As the Court indicated in its judgment, “*the doctrine of necessity in public law is in reality the acceptance of necessity as a source of authority for acting in a manner not regulated by law but required, in prevailing circumstances, by supreme public interest, for the salvation of the State and its people. In such cases ‘salus populi’ becomes ‘suprema lex’.*”<sup>33</sup> To this day, the Constitution of Cyprus rests upon the doctrine of necessity. Despite these historical developments, the constitution was never amended and continues to provide for offices such as the Vice-President that remain vacant after the events of 1963 and 1964. Thus after 1964 there is a discrepancy between constitutional provisions and their material application.<sup>34</sup>

Unsurprisingly, the development of the Cypriot constitution through the doctrine of necessity has influenced judicial perceptions and rationale.<sup>35</sup> In considering the constitutionality of

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<sup>28</sup> Article 144 of the Constitution allows any party in the proceedings to raise the question of unconstitutionality.

<sup>29</sup> [1964] C.L.R 195 at 206.

<sup>30</sup> [1964] C.L.R 195. All references to, and quotations from, the case are direct and have not been translated as the original judgment was written in English. Interestingly, since English was the official language of the courts and the whole civil service, during the decolonisation period it took several years to make the transition into Greek and Turkish (the three official languages of the Republic of Cyprus are Greek, Turkish and English). It was not until 1989 that the Greek language (in the absence of Turkish Cypriots, Turkish was not employed in Court proceedings) became the official language for the legal system.

<sup>31</sup> [1964] C.L.R 195 at 218.

<sup>32</sup> *Ibid*, 28.

<sup>33</sup> [1964] C.L.R 195 at 231.

<sup>34</sup> Constantinos Kombos and Stéphanie Lahlou, “The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation”, in *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, eds. Anneli Albi and Samo Bardutzky (The Hague: Asser Press, 2019), 1373-1432, 1374.

<sup>35</sup> *Ibid*, 1378.

legislation<sup>36</sup> but also executive and administrative acts,<sup>37</sup> the Supreme Court of Cyprus<sup>38</sup> reviews cases of “conflict or contest of power or competence between state organs and questions of interpretation of the Constitution in cases of ambiguity”.<sup>39</sup> As Kombos and Laulhé-Shaelou observe, the combination of strong constitutional principles such as separation of powers and limited government with the doctrine of necessity, gave rise to a constitutional tradition that gives primacy to “ensuring full effective judicial protection, the rule of law, separation of powers and the principle of legality.”<sup>40</sup> Therefore, when exercising constitutional review, the Supreme Court maintains an approach that aims to sustain the division of powers and by extension the principle of limited government.

## 1.2. EU accession and the absence of a reservation formula

The tradition of strong constitutional review can be contrasted with the Court’s position vis-a-vis the supremacy of EU law. Following EU accession, amid suggestions to proceed with a significant constitutional amendment that would bring an end to the discrepancy between constitutional provisions and their material application following 1964, only Article 1 of the Constitution was amended to recognise the supremacy of EU law,<sup>41</sup> stating that:

*“No provision of this Constitution shall be considered as invalidating laws enacted, acts done or measures adopted by the Republic necessitated by its obligations as a Member State of the European Union or shall prevent Regulations, Directives or other acts or binding measures of a legislative character adopted by the European Union or by the European Communities or by their institutions or by their competent bodies under the provisions of the treaties founding the European Communities or the European Union, from having legal effect in the Republic.”<sup>42</sup>*

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<sup>36</sup> Bills (Article 57) and the State Budget (Article 51, 138, 139) can be referred to the Supreme Court, by the President, prior to their passing into law. Existing legislation can be challenged through judicial proceedings.

<sup>37</sup> Articles 137-147. In exercising constitutional review, the SC should always act with reference to the principle of constitutional supremacy pursuant to Article 179. Article 179.2 states that “No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution.” See also, *The Police v Andreas Georghiades* (1983) 2 CLR 33.

<sup>38</sup> The Supreme Court (SC) of Cyprus is comprised of thirteen judges of whom one serves as the president. The Court has jurisdiction to act as an Appellate Court, hearing appeals from lower courts in civil and criminal cases and a Constitutional Court examining the compatibility of legal provisions with the constitution and also examining any conflict of power or interest between State authorities. In addition, the SC has exclusive jurisdiction to hear Elections Petitions, to issue Prerogative Writs (*Habeas Corpus*, *Mandamus*, *Certiorari*, *Quo Warranto* and *Prohibition*), and in hearing admiralty cases. See also, Supreme Court of Cyprus, [www.supremecourt.gov.cy](http://www.supremecourt.gov.cy), Accessed August 13<sup>th</sup> 2018.

<sup>39</sup> Pavlos Neophytou Kourtellos, “Constitutional Law”, in *Introduction to Cyprus Law* (Neocleous & Co. LLC), ed. Dennis Campbell (New York: Yorkhill Law Publishing, 2000), 15-44, 26.

<sup>40</sup> Kombos and Shaelou, *The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation*, 1373-1432, 1378.

<sup>41</sup> Article 1A, Constitution of Cyprus, as amended by Law No. 127(I)/2006, Official Gazette No. 4090, 28.7.2006, Annex I(I), p. 1372.

<sup>42</sup> As translated in *Ibid*, 1381.

The fact that Article 1A “gave a more extensive scope and effect to the principle of primacy of EU law than what the jurisprudence of the ECJ required”,<sup>43</sup> at least before the introduction of the Treaty of Lisbon,<sup>44</sup> indicates that legislators wilfully accepted the principle of supremacy. As Kombos and Laulhé-Shaelou explain, unlike most of EU Member States, the “issue of the transfer or delegation of powers to the EU has not been at the epicentre of the debate in Cyprus because the prevailing view sees participation in the EU as a matter of political determination that was expressed through accession to the Union”.<sup>45</sup> While such voluntary limitation of powers may be accept as an expression of sovereign will, it becomes problematic when the Courts fail to develop a reservation formula ensuring that no alterations are made to the initial limitation of powers. As indicated throughout this thesis, accession of EU law is based on the transfer of competences from them national to the supranational. However, this transfer is neither unlimited nor unconditional. As Chapter 3 indicated, several constitutional courts have continuously asserted their jurisdiction to police the constitutional boundaries between the EU and their respective States. We saw how the German Federal Constitutional Court developed a test to be applied before the Court could pronounce an act of the EU as *ultra vires*. In the case of Cyprus, however, the Supreme Court failed to express a reservation formula of this kind, or at least its intention to exercise constitutional review of an act *ultra vires* by the EU that effectively transgresses the initial transferring of powers by Cyprus to the Union.

A disparity can therefore be observed between, on the one hand, a strong constitutional tradition aiming at ensuring the constitutional identity of Cyprus and, on the other hand, the absence of a reservation formula oriented towards protecting the constitutional identity of Cyprus and its constitutional relationship with the European Union from EU acts *ultra vires*. The chapter continues to consider how cases brought before the Supreme Court of Cyprus by depositors affected by the bail-in give rise to an inherently constitutional question: the extent to which the Supreme Court can exercise constitutional review to protect the constitutional identity of Cyprus. Addressing this question would require the Court to consider the relationship between EU law and national provisions and the extent to which an alteration of the constitutional settlement through *ultra vires* acts falls under its review.

## 2. The bail-in of Cypriot depositors and constitutional review

In the aftermath of the Eurogroup agreement and subsequent bail-in measures, depositors filed applications for interim orders and brought actions for administrative recourse against the decisions

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<sup>43</sup> Ibid, 1383. Emphasis in original.

<sup>44</sup> Declaration 17, TFEU.

<sup>45</sup> Ibid, 1387.

of governmental bodies such as the Central Bank of Cyprus (CBC), the Governor of the CBC, and the Minister of Finance. In a total of fifty-two applications, actions were brought against Decrees issued as Regulatory Administrative Acts<sup>46</sup> by the Central Bank of Cyprus, an independent public authority, giving effect to a depositor's bail-in. Chapters 4 and 5 offered a detailed outline of how national measures gave effect to the liquidation of Cyprus Popular Bank (Laiki) and the restructuring and recapitalisation the Bank of Cyprus (BoC). For this chapter, it suffices to outline how contested Decrees influence the legal rights of depositors. Acting under its capacity as Resolution Authority, pursuant to the *Resolution of Credit and Other Institutions Laws of 2013 to 2014*,<sup>47</sup> the Central Bank of Cyprus initiated the sale of operations held by the Bank of Cyprus and Cyprus Popular Bank (Laiki) respectively.<sup>48</sup> The sale of operations held by the two banks in Greece was effected through Decrees 96<sup>49</sup> for Laiki and 97<sup>50</sup> for the BoC, while Decree 105<sup>51</sup> set out the conditions for the sale of BoC operations in the UK. Decree 104<sup>52</sup> concerned the sale of certain operations of Laiki and essentially achieved the bail-in of Laiki depositors. As indicated in Chapters 4 and 5, Laiki's operations were split into a 'good' and a 'bad' bank. All assets, including loans, were attached to the good bank. All liabilities, including deposits, were included in the bad bank. Decree 104 initiated the sale of operations considered 'good,' while the bad bank was led into liquidation. As a result, deposits remained with the bad bank, later to be led into liquidation without any assets through which to fulfil its obligations to depositors, hence achieving the bail-in. In the case of the Bank of Cyprus, a depositors' bail-in was achieved through Decree 103,<sup>53</sup> which provided for the conversion of debt (debt of the bank to depositors, therefore debt here denotes deposits) into shares.

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<sup>46</sup> Published in the Official Gazette of the Republic of Cyprus, 3rd Annex, Part I, Regulatory Administrative Acts Issues No: 4640, 26 March 2013; 4645, 29 March 2013; 4646, 1 April 2013.

<sup>47</sup> Later repealed and replaced by the Resolution of Credit Institutions and Investment Firms Law of 2016 (22(I)/2016).

<sup>48</sup> Regulatory Administrative Act No. 93, EE, Annex III (I), No. 4638, 749–52, 25 Mar. 2013; Regulatory Administrative Act No. 94, EE, Annex III (I), No. 4639, 741, 25 Mar. 2013;

<sup>49</sup> Regulatory Administrative Act No. 96, EE, Annex III (I), No. 4640, 745–48, 26 Mar. 2013;

<sup>50</sup> Regulatory Administrative Act No. 97, EE, Annex III (I), No. 4640, 749–52, 26 Mar. 2013.

<sup>51</sup> Regulatory Administrative Act No. 105, EE, Annex III (I), No. 4646, 789–96, 1 Apr. 2013.

<sup>52</sup> Regulatory Administrative Act No. 104, EE, Annex III(I), No. 4645, 781–88, 29 Mar.2013.

<sup>53</sup> Regulatory Administrative Act No. 103, EE, Annex III (I), No. 4645, 769–80, 29 Mar.2013.

As a public law case and more specifically as an administrative law case,<sup>54</sup> *Myrto Christodoulou v. Central Bank of Cyprus (and other consolidated cases) Case No 551/2013*<sup>55</sup> was an attempt to bring the actions of public authorities under the Administrative Court's scrutiny (the Administrative Court was at the time a branch of the Supreme Court).<sup>56</sup> The main issue raised was the alteration of the applicant's legal rights as a result of Central Bank of Cyprus Decrees, thus challenging the legality of an administrative act (Decrees) issued by a public authority (Central Bank of Cyprus). In raising this issue, the case also required the Court to consider the *authorship* of measures, hence the relationship between contested Decrees and the Eurogroup.

Sitting as a full bench (four out of thirteen judges excluded themselves due to a conflict of interest) the Court heard the case in its capacity as an Administrative Review Authority.<sup>57</sup> Before considering the merits of the case, the Court first had to address a preliminary objection about the admissibility of all claims filed by responding parties. The Court examined the totality of claims put forward by addressing two main questions: first, whether the applicants had *locus standi* under Article 146 of the Constitution to file a recourse and, second, whether the Decrees challenged fall within the jurisdiction of the Court under Article 146 of the Constitution. Consequently, the judgment in *Christodoulou* deals exclusively with the issue of admissibility.

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<sup>54</sup> As in every Common Law system, Cypriot law is divided into civil and public law. Public law is defined as the "totality of legal provisions regulating the organisation of the State and those authorities exercising public power, the relationship between public authorities or between public authorities and private individuals". Interstate relationships also fall within the broader category of public law, but are distinguished from national provisions through the term international public law. Constitutional, administrative, criminal and European Union law are branches of public law. Civil law regulates all relationships between individuals and relationships established between State and private individuals when the state is not acting as a public authority. Despite its striking similarities to the common law tradition of England and Wales, aspects of the Cypriot legal system are also influenced by the Greek and French traditions. One example is administrative law. Administrative law regulates the organisation, function and oversight of public administration. An administrative act is defined by *The General Principles of Administrative Justice Law of 1999* (Law 158(I) of 1999), as the expression of will by a public institution. In other words, it is the unilateral decision of what it is to be done in a given situation. For an act to be considered administrative, it must arise from a body or institution capable of issuing executive or administrative decisions. Acts or omissions of a public authority falling under the above definition can be the subject-matter of administrative recourse pursuant to Article 146 of the Cyprus constitution. Some categories of actions are exempted. For example, when actions taken by executive power that are deemed to be 'acts of government' cannot be the subject matter of administrative recourse. The same stands for actions taken by executive power but are considered to fall within the ambit of civil, not public, law. See Nicos Charalambous, *Handbook of Administrative Law in Cyprus* [Εγχειρίδιο Κυπριακού Διοικητικού Δικαίου], Third ed. (Nicosia: Livadiotis, 2016), 1.

<sup>55</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

<sup>56</sup> Up until the establishment of an Administrative Court in 2015 (Law 131 (I)/2015, Law on the Establishment and Operation of an Administrative Court) the SC also had jurisdiction to hear cases of administrative recourse against any decision, act or omission of any person, organ or authority exercising executive or administrative authority. While jurisdiction to hear cases of administrative recourse at a first instance was transferred to the Administrative Court, the SC retains its jurisdiction as a Revisional Court and can hear appeals on cases decided by the AC.

<sup>57</sup> Law 33/1964

## 2.1. Article 146 of the Constitution and its application

As the application was brought pursuant to Article 146 of the Constitution, it is vital to examine the definition and application of the article before examining the Court's judgment. Article 146.1 gives exclusive jurisdiction to the Supreme Court to:

*“adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person”.*

Article 146.2 sets out the requirements under which applicants have *locus standi* to bring an action under this article:

*“a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission.”*

It follows that in considering a claim under Article 146, the Court needs to first establish jurisdiction to examine the contested act by deciding whether the act falls within the ambit of Article 146.1 and, then whether the applicant has *locus standi* under Article 146.2.

To establish whether a decision, an act or omission of any organ, authority or person, exercising executive or administrative authority falls within the scope of Article 146, the Courts consider whether the contested act is indeed an administrative act. To qualify as an administrative act, it must derive from an administrative authority, organ or person and be considered a “unilateral authoritative pronouncement”.<sup>58</sup> Such an act is one in which the “will of the administrative organ concerned has been made known in a given matter, [it is] an act which is aimed at producing a legal situation concerning the citizen affected and which entails its execution by administrative means”.<sup>59</sup> For an act to fall within this definition it must be unilateral, authoritative, relate to the domain of public law, create direct legal effects and not be an act of the legislature or the judiciary.<sup>60</sup> However, not all actions of a public authority may be considered to be a matter of public law. There are two categories of actions that a public authority can take: acts of authority (public law) and acts of management (private law). In deciding whether an administrative act is considered within the ambit of private or public law, the Courts in Cyprus have followed an empirical test that, essentially,

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<sup>58</sup> Christos Melides, “Administrative Law”, in *Introduction to Cyprus Law (Neocleous & Co. LLC)*, ed. Dennis Campbell (New York: Yorkhill Law Publishing, 2000), 45-72, 49.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

considers the purpose for which an act is taken.<sup>61</sup> When the act is related to achieving a purpose of that authority, the act is within public law. Public purpose is that for which the general public has an interest in the performance of an act or part of it. In sum, for an act to be reviewed by the Supreme Court, acting as an Administrative Court, under Article 146 it must not only derive from a public authority, but its content must also be of public nature.

To establish whether the applicants have *locus standi*, the Court considers the effect of that act on the applicant. The Court considers whether the act creates any legal relations vis-à-vis the party forwarding a claim. At this point, the nature of the act becomes of great importance. Cypriot law recognises two kinds of administrative acts: regulatory and individual. A Regulatory Administrative Act sets rules, by and large legal rules, that have general application and significance. According to Law 158 (I) of 1999, this means “an act which sets rules of legislative nature, general and impersonal, which could be applied to cases indefinitely, whether existing or which may exist in the future”.<sup>62</sup> Therefore, the content of a Regulatory Administrative Act is not limited to one instance or set of circumstances, but is general and can be applied in a number of situations. Importantly, Regulatory Administrative Acts cannot be challenged through an appeal, but their legality can be checked when a decision based on such an act is challenged. In contrast, an Individual Administrative Act creates subjective conditions, meaning that the legal rules created concern a particular group of people. For an act to be considered as Individual, it must be directed at an identifiable group of people connected through a common characteristic, whether their identity, enjoyment of a right, occupation, participation in an activity or other characteristics. An Individual Administrative Act is believed to be comprised of a totality of individual cases, which is why Individual Administrative Acts can be directly challenged by the person or group of people to whom it is addressed.<sup>63</sup> Therefore, for a party to have *locus standi* under Article 146, the administrative act in question must either be an Individual Administrative Act directed to them or the party needs to be affected by a legal provision adopted as a consequence of a Regulatory Administrative Act.

## 2.2. Majority Judgment: Constitutionalising the scrutiny lacuna at the national level

In deciding whether the applicants have *locus standi*, the Court turned its attention to examining the nature of the Decrees (whether they constituted Regulatory or Individual Administrative Acts) and whether they directly affected the legal rights of applicants. The court first determined the

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<sup>61</sup> *Antoniou and others. v. Republic of Cyprus*, (1984) 3 C.L.R. 623; *Machlouzarides v. Republic of Cyprus*, (1985) 3 C.L.R. 2342; *Paphos Nautical Club v. Cyprus Port Authority (Ναυτικός Όμιλος Πάφου v. Αρχής Λιμένων)*, (1992) 1, Supreme Court Judgment no. 882.

<sup>62</sup> *Ibid*, 53.

<sup>63</sup> *Papaphilippou v. Republic of Cyprus*, (1992), Supreme Court Judgment no. 62; *Kanika Hotels a.o v. Sewerage Board of Limassol-Amathus*, (1996) 3, Supreme Court Judgment no. 169.

nature of the contested Decrees, deciding that the contested Decrees determined the conditions under which the two banking institutions (Laiki and BoC) were restructured and, subsequently, either put into liquidation (Laiki) or recapitalised (BoC). Based on this assessment, the Court interpreted the Decrees as Regulatory Administrative Acts regulating the conditions under which financial institutions are either restructured and recapitalised or put into liquidation. By extension, the Court ruled that the Decrees in question affect only the legal rights of the said institutions and do not have any effect on the legal rights of the applicants.

The second conclusion the Court reached concerned the position of the applicants (depositors) *vis-à-vis* the contested Decrees. According to the majority assessment, the relationship established between a bank (the debtor) and depositors (the creditor) is strictly contractual. Deposits are considered property of the bank and, in return, the financial institution has a contractual obligation to return the deposited amount. In giving up their actual property (paper money) to the bank and receiving credit in return, depositors have only a contractual relationship with the bank, just as a bank owns credit when it grants a loan.<sup>64</sup> As the applicants' legal rights are considered to be of contractual nature, the Court argued that the operation of contested Decrees does not alter their legal rights. Rather, it is the inability of the banking institutions to fulfil their obligations toward depositors that has altered their legal rights. Based on these two conclusions, the Court concluded that the applicants have no *locus standi* and, as a result, no actionable claim under Article 146.

In a rather surprising manoeuvre, the Court continued its commentary on the issue of *locus standi* to argue that depositors may have a course of action in civil proceedings, but not under public law. Since it is the inability of banks to perform their contractual obligation to depositors, they may only bring a claim against the financial institution itself, not the State. Consequently, all claims arising from the bail-in should be directed against the financial institutions that were not able to fulfil their contractual obligations and treated by civil courts in civil claims. The Court also noted that a civil action may also be brought against the Republic and the Central Bank of Cyprus if depositors can prove that the effect of administrative acts went against the 'no creditor worst off' principle.<sup>65</sup>

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<sup>64</sup> The Court distinguishes between the position of a someone depositing into an account and into a bank vault. In the latter instance, the depositor does not give up possession of her property but entrusts it to the bank for safekeeping. She is therefore entitled to the deposited property, whether bank notes or other items.

<sup>65</sup> This principle, incorporated into the new resolution framework, states that no creditor should be "in a worse financial condition due to the implementation of resolution measures In comparison to the position they would be should the said institution would go into liquidation" (Article 3(2)(d), Law 17(I)/2013.) This principle aims to ensure that no creditors is left worse off as a consequence of resolution measures. Should the creditors be better off in case of a normal liquidation process then that process should proceed. Matters raised in this case, including the issue of priority, securities (including ELA), the sale of operations and the unequal treatment between depositors could be relevant in considering whether the contractual relationship established between the bank and its depositors and creditors was affected by the Decrees and whether actions of the State put the depositors in a disadvantageous position.

Two criticisms can be made that highlight both the limitations of the majority judgment and the way *Christodoulou* furthers the scrutiny lacuna identified in the previous chapter. Firstly, Decrees 97, 103, 104 and 105 set the conditions under which the banking institutions are restructured and led into either liquidation or recapitalisation and therefore affect the ability of the two institutions to fulfil their contractual obligations against depositors. In the case of Laiki, for example, it was the moving of deposits to the ‘bad’ branch of the Bank that precluded the bank from fulfilling its obligations to depositors. Similarly, Decree 103 explicitly states that the Bank of Cyprus be recapitalised through the conversion of deposits to shares. Moreover, the flash sale of operations of the institutions in Greece and the UK, the decision not to include deposits in those operations in the recapitalization process, along with claims about differential treatment among depositors of the same institutions in different countries<sup>66</sup> affected the ability of Laiki and the BoC to fulfil their obligations to Cypriot depositors. These factors cannot be overlooked. In fact, the Court accepted that it is due to the operation of Decrees 97, 103, 104 and 105 that the banks could not fulfil their contractual obligations to depositors. Yet the majority opinion did not recognise any connection between the decrees and the rights of applicants. This means that the public purpose served by the decrees is not recognised; a point of critique that the minority opinions also made. By failing to recognise how the decrees influence the rights of applicants, the Court effectively insulated the decision for a bail-in from any claims arising in public law.

The second point of critique relates to the possibility of civil claims as indicated by the Court. Despite accepting the above factors as relevant, the Court positioned their effect within the ambit of civil claims against the Republic or Central Bank of Cyprus as possible evidence for indicating a breach of the ‘no creditor worse off’ principle. One doctrinal caveat of this argument is that before *Christodoulou* the common position was that no application for damages for any loss caused by an administrative action could be filed before the District Court unless that action was firstly held invalid by the Administrative Court.<sup>67</sup> Consequently, if the court does not invalidate the acts, applicants may not have a civil course of action.<sup>68</sup> However, this is not the main issue I want to raise here. The Court’s troubling reasoning states that if a public law claim is successful, the only remedy

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<sup>66</sup> Ian Jack and Tom Cassels, "Cyprus: An Analysis of the Impact of the Resolution Methodology on Stakeholders’ Claims Including the Emergency Liquidity Assistance", *Capital Markets Law Journal* 8, no. 4 (2013), 450-463.

<sup>67</sup> Stavros Pavlou, *Landmark Supreme Court judgment of 07.06.2013 in Christodoulou v. Central Bank of Cyprus a.o. Case No 551/2013 (and other consolidated cases) on the rights of depositors of Laiki Bank & Bank of Cyprus*, Patrikios Pavlou LLC, Available at: [http://www.cyprusprofile.com/documents/uploads/publications/130607\\_Landmark\\_Supreme\\_Court\\_judgment\\_on\\_the\\_rights\\_of\\_depositors.pdf](http://www.cyprusprofile.com/documents/uploads/publications/130607_Landmark_Supreme_Court_judgment_on_the_rights_of_depositors.pdf)

<sup>68</sup> A civil law claim also has some practical limitations for the applicants, including a prolonged period of time they face before receiving a conclusive answer to their claims and the inability to forward claims to the European Court of Human Rights because all domestic legal avenues have not been exhausted – something that would have happened had the substance of *Christodoulou* been examined.

available to the applicants is damages equal to the harm they suffered as a consequence of the administrative action. To calculate this harm, the Court would have to assess the ‘no creditor worse off principle’, essentially considering whether the depositors would have been better off had the Government not intervened. Civil actions, the Court continued, would engage with the exact same question. In other words, even if the public law avenue were foreclosed, the applicants might go down the civil law action route and end up in the same position, that is to prove that the Decrees put them in a worse position. Since the applicants have access to a course of action that eventually would lead the Courts to consider this question, the Supreme Court equated the outcome of the recourse action before it with the result of a future civil law claim.

The issue here is that equating the result of a public law action with the result of a civil law question disregards, diminishes one could say, the role of public law in a time of crisis. Apart from the fact that the existence of a civil law claim is immaterial as to whether a public law claim should be accepted or rejected, the Court completely disregarded the constitutional significance of the case. The Court’s approach forecloses any possibility for constitutional review of acts *ultra vires* by the EU that may alter the constitutional identity of a Member State. As Chapter 4 indicated, the bail-in resolution was decided by the Eurogroup and transposed into law through national means that concealed via formalism a constitutional mutation for both the EU, as it extends its competences, and for Cyprus as it forms a direct challenge to the House of Representatives decision-making powers and sovereignty. *Christodoulou* could have been a significant opportunity to initiate a series of discussions concerning the constitutional relationship between the European Union and Cyprus, but it served the exact opposite purpose. In a remarkable act of self-negation, the Supreme Court limited its own jurisdiction to hear public law cases by finding that under Article 146 the applications could not be reviewed. It is noteworthy that the Court did not make use of public law concepts such as acts of government to strike down the application as inadmissible – an argument put forward by the Advocate General of the Republic. Had it done this, it would have accepted the applicability of public law and used legal concepts within that sphere that might have applied. Instead, the Court completely foreclosed the public law avenue. While this move may leave the applicants with a possible claim in civil courts, it is a severe blow on the exercise of constitutional review at times of crisis and it further reinforces the scrutiny lacuna.

Just as the CJEU’s light touch of review constitutionalised the scrutiny lacuna initiated by institutional development; the Supreme Court of Cyprus’ approach provided legal validation to the same space for economic decision-making. What we observe in the scrutiny lacuna is not the absence of law – quite the contrary. It is through the operation of judicial review that the scrutiny lacuna, as an insulated space for informal economic decision-making, obtains legal validation. In

other words, by reviewing these processes and opting not to intervene, constitutional courts accept the existence of a scrutiny lacuna and constitutionalise it.

### 3. Dissenting Judgments: A futile attempt to salvage constitutional review

Contrary to the majority judgment, two minority opinions recognised the constitutional parameters of the case and attempt to retain a space for public law arguments. Judges Papadopoulou and Erotocritou issued dissenting opinions explaining the reasons they believe any preliminary objections should be rejected. Doctrinally, the point of distinction between the majority judgment and dissenting opinions lies in the categorisation of the contested Decrees as Individual Administrative Acts as opposed to Regulatory Administrative Acts. This leads to a different conclusion as the dissenting opinions recognise an alteration in the legal rights of applicants due to the operation of the contested Decrees and, thereby recognise their *locus standi* and jurisdiction of the Court to hear the application under Article 146. Conceptually, the minority opinion attempts to initiate those constitutional discussions foreclosed by the majority opinion. In this section, I draw upon the minority opinion to consider how this case could have been dealt with within the ambit of public law, initiating in this way vital conversations about any reservation formula concerning the supremacy of EU law and, by extension, the exercise of judicial review in instances where acts of the EU can be considered *ultra vires*.

#### 3.1. Doctrinal distinctions: Positioning the contested decrees within public law

The first point of distinction between majority judgment and minority opinions, is on *locus standi*. In considering this issue, the first question the minority opinion addresses, is whether the Decrees serve a public purpose and are therefore within the scope of public law. A public purpose is considered to be that which the public has an interest in. In contrast, an act of private importance regulates the private rights of citizens. Since the collapse of two major financial institutions would have major knock-on effects on the economy of Cyprus, the Decrees issued by the CBC aimed not only to regulate the terms of liquidation for BoC and Laiki, but also to avoid a major economic breakdown. As Judge Erotocritou points out, while the Decrees regulate the conditions under which Laiki is lead into liquidation and the BoC is recapitalized, their broader and primary goal was to avoid the uncontrolled collapse of the financial sector. According to this assessment, the act is clearly one of public importance since the public is concerned with the outcome of the contested Decrees, leading the two judges to the conclusion that both Decree 103 and 104 fall within the ambit of public law.

The second point of distinction concerns the nature of contested Decrees and whether they should be considered as regulatory or individual administrative acts. As Judge Papadopoulou indicates, the fact that the Decrees have been issued as Regulatory Administrative Acts is of no importance. Their character is determined by their nature and not by how they are termed. Papadopoulou reaffirms the established position that an act is determined through an empirical inquiry, as outlined in Section 2.1 above, echoing the words of Bingham LJ who, in a different context, claimed that “a cat does not become a dog because the parties have agreed to call it a dog”.<sup>69</sup> Judge Erotocriou follows a similar rationale. He argues that that the Decrees cannot be understood as Regulatory Administrative Acts due to the absence of generality in their nature and content. Instead of general (objective) provisions, the Decrees establish specific (subjective) rules applicable to an identifiable group of people who have in common their contractual relationship (debtor and creditor) with a particular financial institution. Similarly, the Decrees regulating the sale of Laiki’s operations can be treated as Individual Administrative Acts due to their specificity and lack of general application. As a result, the two judges conclude that the contested Decrees should be understood as Individual Administrative Acts, not Regulatory Administrative Acts. The nature and character of the Decrees means that they alter the rights of the depositors and therefore fall within the ambit of public law as well as within the jurisdiction of the Court pursuant to Article 146. Consequently, the minority opinions recognise the applicants’ legal standing to challenge the content of the Decrees.

Since the minority opinion found legal standing, the two judges were forced to consider an issue not addressed by the majority decision. The Advocate General in his submission accepted the applicant’s legal standing but continued to argue that the Decrees should be understood as acts of government as they form part of a wider political agreement between the Eurogroup and the Government of Cyprus. Therefore, the next issue addressed by the dissenting opinions, was whether these Decrees can be termed as acts of government.

As a special category of governmental action recognised by a number of other jurisdictions, including France, Greece, Germany and the U.S.,<sup>70</sup> the nature or purpose of acts of government is usually considered of such great importance for the State such that they cannot be reviewed by a Court. Examples include the declaration of war or a state of emergency, army conscription, matters

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<sup>69</sup> *AG Securities v Vaughan; Antoniadis v Villiers* [1988] UKHL 8, [1990] 1 AC 417, [1988] 3 All ER 1058.

<sup>70</sup> Different terminology may be employed depending on the jurisdiction where these acts are found. For example, in the French tradition, acts of government are translated directly to “*actes du gouvernement*”, while in Greek we find a number of different formulations such as governmental action, acts of government or political decision. In Anglo-Saxon jurisdictions terms such as act of state, state immunity or act of government are found.

of defence or wider international relations of a State.<sup>71</sup> It is within the power of a Court to decide whether an act can be included within this category, however, as Judge Papadopoulou points out, the Courts are reluctant to expand the ambit of acts falling outside their reach. In their examination of whether Decrees 103 and 104 are acts of government, the two judges followed a similar approach and rejected the claims of the Advocate General. The judges justified their conclusion by highlighting the need for judicial review of all measures that can either limit the rights of individuals or alter the constitutional division of power. Judge Erotocritou argued that if administrative acts of this kind could escape judicial review on the grounds of exceptional circumstances that would allow them to be termed acts of government, “*executives will be able to decide on those measures they believe to be suitable, irrespective of the fact that overnight their decisions will influence the economic organization of Member States*”.<sup>72</sup> The rule of law, division of powers, limited government and effective judicial review would be under threat should executive acts go unreviewed.

### 3.2. Conceptual distinctions: Recognising the constitutional significance of *Christodoulou*

The Court’s approach to the issue of acts of government reflects a broader, more conceptual, point of distinction between majority judgment and minority opinions. The constitutional significance of *Christodoulou*, like *Mallis*, lies in the challenge to the expansion of competences by EU institutions and the consequent disruption to the constitutional relationship between EU and its Member States – a fact that the minority opinions recognise. Judge Erotocritou highlighted what Chapters 3 and 4 argued in some detail: “*recent events in Europe due to the financial crisis and the measures taken, give the impression that not only international law, but also the European and national law seems to be rewritten.*”<sup>73</sup> Given these changes, the judge argued, *Christodoulou* should be “*approached as an issue exceeding the consensus that pre-existed*” between the EU and Member States concerning the division of competences and resulting democratic settlement.<sup>74</sup> Commenting on Judge Erotocritou’s opinion, Kombos and Lahlé-Shaelou rightly indicate that crisis response measures signify a “*unilateral alteration of the equilibrium that relates to the transfer of sovereignty*

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<sup>71</sup> While the list of acts considered in the category of an ‘act of government’ is not exhaustive, it is generally accepted that they are limited. Cyprus case law recognizes acts of government are found in the Greek and French traditions. As the Court notes, this tendency is linked with the idea of the rule of law. It is for this reason that the Supreme Court, drawing upon the French doctrine of *actes détachables*, recognizes two aspects of an act of government. The first is that which is considered to be political in nature and cannot be reviewed. However, the doctrine of a ‘detachable act’ allows the Court to differentiate between the political character of an act and its effect or result. For example, while the act of declaring war cannot be reviewed, the Court can examine the result of war and consider, for instance, acts that may breach fundamental human rights.

<sup>72</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

<sup>73</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

<sup>74</sup> Kombos and Shaelou, *The Cypriot Constitution Under the Impact of EU Law: An Asymmetrical Formation*, 1373-1432, 1420.

to the EU and to the corresponding application of the principle of primacy of EU law. This becomes especially relevant if the impact of the alteration is directed towards the protection of fundamental rights and has as a result a unilateral and substantial shift in competences”.<sup>75</sup> When approached as an issue of transgressing existing constitutional barriers, *Christodoulou* gives rise to a series of constitutional issues, two of which Judge Erotocritou pointed out. First, that

*“in order to safeguard the rights of the parties arising from the TEU, to give the chance to national administrative courts to control not only the legality of the contested acts, but also the compatibility of the various national laws which led to the contested measures with EU law.”*<sup>76</sup>

Secondly, the need to scrutinise a further erosion of national sovereignty:

*“It seems that the further erosion of that national sovereignty and the parallel erosion of fundamental rights, often through informal procedures should at some stage be scrutinised. [If this does not happen] executives will be able to decide on those measures they believe to be suitable, irrespective of the fact that overnight their decisions will influence the economic organization of Member States”.*<sup>77</sup>

In the above passages, Judge Erotocritou stresses the need for effective constitutional review to preserve both the rights of parties but, also, the constitutional settlement and identity of the EU and its Member States. He elaborates on this point by arguing that

*“In the European legal system the primacy of the Rule of Law and legal protection, both of which are fundamental principles of the European Union and are inherently interwoven with democracy, cannot be eradicated with the creation of exemptions from judicial review every time a national government, for whatever reason, is found in distress and is forced to take decisions which breach basic human rights arising from the European legal order and the *acquis communautaire*.”*<sup>78</sup>

At this point we can also observe how the constitutional tradition of the Supreme Court, as outlined above, is repeated. Judge Erotocritou follows a simple yet forceful argument, that legal restrictions on the exercise of powers need to be respected and protected even in times of distress. As Kombos and Lahlé-Shaelou rightly indicate, *Christodoulou* is an “opportunity for starting to express the

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<sup>75</sup> Ibid, 1421.

<sup>76</sup> Judge Erotocritou as translated in Ibid, 1420.

<sup>77</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

<sup>78</sup> *Myrto Christodoulou v. Central Bank of Cyprus* (and other consolidated cases), Case No. 551/2013, Supreme Court Judgment of 07/06/2013.

inherent reservations as regards the principle of primacy of EU law and for starting to set the limits to the acceptance of the principle”.<sup>79</sup>

Apart from the doctrinal differences, minority opinions bring into focus the case’s broader significance, not just for the constitutional implications the crisis may have on the constitution of Cyprus, but for European constitutionalism as well. By refusing to recognise the Court’s jurisdiction under Article 146 – a conclusion that, as the minority opinion indicates, could have been avoided – and equating the result of a public law action with the results of a civil law action, the decision significantly undermined scope and reach of public law. Unfortunately, the points that Judges Erotocritou and Papadopoulou used to justify allowing the application to proceed – protection of the rule of law, division of powers, limited government and effective judicial review – have been severely undermined by the majority judgment.

## Conclusion

This chapter approached *Christodoulou* through the following question: could the Eurogroup’s development and consequent expansion of EU competences effectively alters the constitutional identity of Cyprus and therefore be reviewed by the Supreme Court? In response, the chapter indicated that when constitutional review was germane, the Supreme Court of Cyprus exercised a surprisingly light touch of review. By foreclosing the public law avenue, the Supreme Court failed to initiate conversations about the limits of EU law and delivered a significant blow to Cyprus’ tradition of constitutional review and scope of public law. From the perspective of EU public law and effective judicial review concerning cases of *ultra vires* acts, a broader problematic arises. While the ongoing claim of the ECJ to exercise constitutional review, outlined in the previous chapter, is indirectly accepted by Judge Erotocritou,<sup>80</sup> the role of national courts should not be undermined. Not only do national courts present an alternative course of action for litigants, they continue to play an important role in constitutional adjudication by actively participating in a judicial dialogue with the ECJ. One can only speculate what the German Federal Constitutional Court’s position would be had Germany experienced a similar situation especially after its PSPP judgment, but surely the Court’s approach would not have been as light as the Cypriot Supreme Court. For as long as the EU is based on the principle of conferral, national courts continue to hold some degree of power in terms of constitutional guardianship.

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<sup>79</sup> Ibid, 1421.

<sup>80</sup> Judge Erotocritou in *Christodoulou* stated that: “the further erosion of that national sovereignty and the parallel erosion of fundamental rights, often through informal procedures should at some stage be scrutinised by the CJEU, albeit indirectly through Article 267, as to whether it is compatible with the primary law of the European Union.”

As indicated in the introduction to this chapter, in countries such as Greece and Portugal constitutional review was light initially but gradually offered some constitutional protection to their nationals and challenged to a degree the withering of national sovereignty. In the case of Cyprus, however, constitutional review never recovered.<sup>81</sup> As the public law avenue remains unavailable for Cypriot applicants, constitutional review in the EU is missing one of its two major components – for one of its Member States, at least. Drawing on this observation, the chapter indicated how a light touch of review further insulates the scrutiny lacuna. I did not present the detailed consideration of minority opinions to simply present a completed commentary on the case. On the contrary, considering the minority opinions lets us see how constitutional review could have been exercised in a way that addressed the core constitutional significance of this case. The existence of a legally feasible alternative approach is crucial for the claim put forward by this chapter: that constitutional review at the national level provides a further layer of insulation to the scrutiny lacuna constitutionalised by the CJEU. Once again, it is the exercise of constitutional review that gives legal validation to the scrutiny lacuna. By reviewing the actions of executive bodies and the constellation of crisis response practices but not interfering, constitutional courts legally validate the scrutiny lacuna and constitutionalise a space for informal decision-making that neither democratic bodies nor constitutional courts can interfere with.

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<sup>81</sup> In a series of subsequent cases, the precedence set in *Christodoulou* was affirmed as the Court re-stated its position that claims against Decrees issued during the crisis are beyond the scope of public law. See: *Cyta Pension Fund and others V. Central Bank of Cyprus*, Case no. 5728/13, Judgment of the Court of 3/11/2017; *Eirini Karamanou V. Central Bank of Cyprus and others*, Case no. 3393/2013, Judgment of the Court of 20/4/2018; *Vias Demetriou and others V. Central Bank of Cyprus and others*, Case no. 2014/2013, Judgment of the Court of 9/10/2014; *FBME Bank Ltd V. the Republic of Cyprus*, Case no.1658/201, Judgment of the Administrative Court of 25/02/2016.

## Conclusion

Constitutional moments often arise during crises. The Eurozone crisis is no exception. As I indicated throughout this thesis, in an effort to push through with those measures framed as necessary – such as austerity measures, increased budget supervision, financial assistance to Eurozone members, or in the case of Cyprus a bail-in resolution – European institutions and Eurozone members resorted to novel channels of economic coordination and decision-making that effectively overcame constitutional restrictions on possible courses of action. By focusing on how crisis response measures were decided and implemented, the thesis considered shifts in decision-making, such as increased informality or the increasing exercise of economic governance by European institutions, and the constitutional implications thereof. Therefore, the main question addressed by the thesis was how the Eurozone crisis impacted European constitutional law and, more specifically, how has institutional development altered Europe's constitutional settlement. In order to address these questions, the insulation of economic decision-making from political interference observed during the crisis was positioned and analysed within the political economy of European constitutionalism. For this reason, the thesis firstly considered the relationship between neoliberal political economic thought and European constitutionalism and continued to examine the Eurogroup's development as well as judicial responses to institutional development through the case of Cyprus. By engaging with constitutional debates on the constitutional implications of the Eurozone crisis, the thesis contributes to discussions on institutional development more broadly and the Eurogroup more specifically; to discussions concerning the wider constitutional significance of the crisis; and to critical understandings of both the crisis and European constitutionalism. Contributions to the above discussions can be broken down to four main arguments.

First, the thesis contributes to the study of institutional development during the crisis. By tracing the intensification of coordination between European institutions and Eurozone members, I showed how institutional development leads to intensified insulation of economic decision-making and the creation of a scrutiny lacuna. Through an in-depth study of the Eurogroup's role in the Cypriot crisis, a more detailed examination in the operation of a scrutiny lacuna was achieved while also addressing two existing blind spots in the study of institutional development – the Eurogroup's development and the case of Cyprus. By positioning institutional development within the ongoing relationship between neoliberalism and European constitutionalism, the thesis offers a critical take on existing constitutional debates and develops our understanding of the political economy of European constitutional law in the aftermath of the crisis.

Second, a further contribution to the study of institutional development was made by indicating how judicial responses to institutional development operate to provide legal validation to institutional practices adopted during the crisis, constitutionalising in this way a scrutiny lacuna. The case of Cyprus offered a first-class opportunity to study the institutional development of the Eurogroup, not only in terms of the forum's involvement in devising a bail-in resolution but also in the ways through which the CJEU and Supreme Court of Cyprus dealt with claims brought before them by affected depositors. Through an in-depth study of the Eurogroup's role in the Cypriot crisis and court responses to the forum's involvement in devising a bail-in resolution, the thesis considered the exercise of *ultra vires* review by the CJEU and Supreme Court of Cyprus and identified how judicial review complements the relationship between neoliberalism and European constitutionalism.

Third, the thesis develops theoretical considerations concerning the relationship between neoliberalism and constitutional law. By identifying the intersection between neoliberal political economic thought and constitutionalism beyond the state, I continued to consider in more detail the ways through which a scrutiny lacuna is constitutionalised during the crisis. Drawing on the contributions outlined above, I was able to identify how judicial review can complement institutional practices enhancing the insulation of economic decision-making from political interference, thus contribute towards expanding our understanding of the intersection between neoliberalism and constitutional law.

Fourth, the thesis contributes to broader discussions on the constitutional implications of the Eurozone crisis by arguing that European constitutionalism is no longer a space for constitutional conflict. Although European constitutionalism reflected and consolidated neoliberal processes aimed at insulating economic decision-making from political interference, competing constitutional objectives also operated prior to the Eurozone crisis. However, the thesis identifies a clear neoliberal moment where the insulation of economic decision-making from political interference became a central constitutional objective and neutralised, in this way, constitutional conflict.

## 1. Institutional development and the creation of a scrutiny lacuna

One of the central aspects of crisis response measures examined by this thesis is institutional development. By examining the intensification of coordination between European institutions and Eurozone members during the crisis, the thesis argued that institutional development lead to the creation of a scrutiny lacuna whereby economic decision-making was insulated from political interference, mainly by the national level where most of the contestation to suggested measures was expressed. The thesis continued to examine a blind spot in the study of institutional

development, that of the Eurogroup, through the case of Cyprus. It was argued that the Eurogroup's involvement in reaching a bail-in resolution was such that the decision could be attributed to the forum. Therefore, the Eurogroup is understood as a body that exceeded its informal status and developed into a body of economic decision-making. By retaining its informal working methods and the informal relationship between each actor within the Eurogroup, the thesis indicated how the forum could exercise economic policy while operating within a scrutiny lacuna. Therefore, by positioning the development of institutions within the broader relationship between neoliberalism and constitutional law, the thesis contributes to the study of institutional development in two ways. First, by highlighting how institutional development leads to the intensification of insulation of economic decision-making and the consequent creation of a scrutiny lacuna within European constitutionalism. Second, by considering the role of the Eurogroup in deciding crisis response measures and indicating the scrutiny lacuna within which economic decision-making occurred during the crisis.

The scrutiny lacuna identified during the Eurozone crisis is the continuation, evolution one could say, of a long-standing relationship between constitutional law and neoliberalism in the European Union. In Chapter 1, I indicated that one of the central aspects of neoliberal political economic thought is to separate and insulate economic decision-making from political interference – what I identified as a scrutiny lacuna. The relationship between neoliberalism and constitutional law, as identified in that chapter, is to create and sustain the insulation of economic decision-making from political interference; in other words, to create and sustain a scrutiny lacuna. Drawing on the relationship between neoliberalism and constitutionalism beyond the state as developed in Chapter 1, the thesis proceeded to examine the relationship between neoliberalism and European constitutionalism prior to the Eurozone crisis. By studying theories of European constitutionalism, the EU's institutional structure and ECJ decisions, Chapter 2 indicated how the separation and insulation of economic decision-making from political interference was achieved through constitutional law. However, constitutional law does not necessarily contribute to the practical realisation of neoliberalism; constitutional law has the capacity to act as a vehicle for articulating other, often conflicting, constitutional objectives. In each of the above examples, a further dimension to constitutional law was identified – that of articulating constitutional objectives that are often in competition to the objective of insulation. Drawing on this conflict, Chapter 2 argued that the neoliberal objective of creating and sustaining a scrutiny lacuna within which economic decision-making can operate without any political interference did not materialise fully in the context of the European Union as competing objectives can be found in European constitutional law. Therefore,

the chapter suggests that European constitutionalism prior to the crisis was a space for constitutional conflict.

However, during the Eurozone crisis the thesis observes a clear neoliberal political economic moment where economic decision-making is conducted within a scrutiny lacuna. Understood as an insulated space for economic deliberation and decision-making between executives, the scrutiny lacuna provides protection for European institutions and Eurozone members to devise and advance crisis response measures without abiding to any requirements for accountability, transparency or legitimacy and, more importantly, without any interference by democratic bodies or judicial review. The scrutiny lacuna was carved out to circumvent those constitutional limitations – whether the division of competences, the need for transparency and accountability, or restrictions in the nature of financial instruments – that precluded or slowed down the imposition of those measures framed as necessary by European institutions and Eurozone members. The creation and operation of this insulated space was traced in Chapters 3 and 4.

Chapter 3 indicated that dominant framings of the economic conditions pertaining at the time, determined the position of European institutions and Eurozone members as to what policies were best suited in order to face the economic downturn created by the financial crisis. The dominant policy approach, as indicated in that chapter, was to implement a range of austerity measures in those countries in receipt of financial assistance. In order to achieve this policy approach, the thesis observed an intensification in coordination between European institutions and Eurozone members. The intensification of coordination between Eurozone members, European institutions and international creditors lead to an analogous intensification of insulation. Three examples of intensified coordination were studied in that chapter. Firstly, the creation of a permanent financial facility, the ESM, by Eurozone members increased the degree of coordination between those countries whose currency is the Euro and European institutions. Moreover, coordination was also intensified through debt conditionality as all members in receipt of financial assistance were pressured into abiding by very similar conditions. The redemptive formula of austerity was applied indiscriminately while a series of structural changes were also pushed through in an attempt to effect long-lasting changes in the economies of those countries. Hence, by shifting economic deliberation and decision-making to an international instrument, such as the ESM, and employing debt conditionality as a way to lock-in a specific policy approach, Eurozone members and European institutions were able to enhance coordination between them and, more importantly, insulate themselves from interference by majoritarian bodies in those members where policy or structural changes were pursued. Secondly, Chapter 3 also indicated how the new fiscal framework intensified existing processes of coordination by giving the Commission greater powers of review. The European

Semester ensures that national budgets meet the targets set by the Commission and are firstly approved by European institutions before national bodies. In essence, no budget in economically distressed countries can be approved without the Commission firstly reviewing it. In this way coordination between European institutions, is enhanced in order to push through their own policy approach. Insulation is achieved through the legal framework put in place as majoritarian bodies are afforded far less flexibility than before. Lastly, the example of institutional development indicated how novel institutional practices, such as breakfast meetings, and configurations, such as the Troika, created new informal spaces for economic deliberation. Once again, coordination and insulation were intensified as various institutions and Eurozone members met in these informal formations. All three examples, therefore, indicate different ways through which a scrutiny lacuna is created during the crisis.

Although the importance of the Cypriot crisis and its close link to institutional development have been recognised, a study into the constitutional implications of this example has not yet been conducted. For this reason, Chapter 4 continued to examine the development of the Eurogroup into a decision-making body of the Union and its operation within a scrutiny lacuna. Due to its informal nature, the Eurogroup had always acted as an insulated space without requirements for transparency or accountability. However, what was already an insulated space for economic coordination was transformed into a body of economic decision-making during the crisis. What changed during this period is the intensity of activity within the forum. Instead of cooperation in fiscal policy, we observe the coordination of fiscal policy measures. Instead of consensus, we see the employment of political pressure to inflict a crisis response approach or measure on Eurozone members in need. Moreover, the Eurogroup acted as a space where numerous EU institutions met and shaped and expressed a unified European position. During this process of intensification of coordination, the Eurogroup underwent an institutional development. No longer an informal forum for discussion, it is now an institution capable of reaching binding economic decisions at a Union level that Member States are obliged to follow. For this reason, Chapter 4 argues that the Eurogroup acted as a body of deliberation and decision-making, effectively deciding on how Cypriot banks would be recapitalised.

This conclusion was further supported by closely reading parliamentary debates of two plenary sessions in the Cypriot House of Representatives. The chapter indicated that the Cypriot House of Representatives, was faced with the stark alternative of, on the one hand, facing state bankruptcy or, on the other hand, accepting the terms of an EU-financed loan. In the case of Cyprus, the bail-in resolution was a prerequisite to receiving financial assistance by the EU. Therefore, citizens affected by crisis response measures could not contest the measures implemented as the government was

politically and economically coerced into accepting the prescribed crisis response measures while the House of Representatives, also acting under economic duress, gave legal form to these measures. As the House had no influence on the content of crisis response measures, including the bail-in, the thesis concludes that national parliaments engage in a rubber-stamping process that simply gives legal form and formal legitimacy to Eurogroup Statements.

Institutional development, as observed through intensified coordination and the case of Cyprus, indicates how European institutions and Eurozone members operated in a scrutiny lacuna. This has important consequences for the relationship between neoliberalism and constitutional law in the European Union. As economic deliberation and decision-making continues to migrate from national institutions to supranational institutions, or in this case institutional configurations, indicates the continuing reconfiguration of legal authority on a sectoral and functional basis. Consequently, the insulation of economic decision-making is intensified due to the ongoing separation of economic decision-making from the national sphere where political contestation is most likely to occur. In addition, institutional development reveals a shift from legally recognisable routes such as the Community method toward legally ambiguous and informal formations such as the Eurogroup. Procedural rules established to ensure some form of democratic participation or at least transparency, are circumvented, allowing economic decision-making to be conducted in a highly insulated environment. As a result, we observe the strengthening of neoliberal political economic objectives, such as the creation of a scrutiny lacuna, within Europe's institutional structure.

## 2. *Ultra vires* review and the constitutionalisation of a scrutiny lacuna

In addition to the creation of a scrutiny lacuna caused by intensified of coordination, the thesis provides a further contribution to constitutional discussions concerned with institutional development. By examining judicial responses to the Eurogroup's development, I argued that judicial review operates to constitutionalise a scrutiny lacuna. As indicated in the section above, the proliferation of informal coordination between European institutions and Eurozone members insulates economic decision-making from political interference. The results of intensified coordination are not formally adopted as legally binding measures. Instead, policy decisions such as the bail-in are transposed into law by national authorities, disassociating in this way decision from implementation. While this process does create a ring-fence around supranational bodies engaged with economic decision-making and effectively insulates them from political interference at the national level, it does not necessarily protect bodies such as the Eurogroup from judicial review. Therefore, the thesis highlights how the exercise of judicial review legally affirms the creation of a

scrutiny lacuna, providing in this way a further contribution to the study of institutional development.

As I argued in Chapters 5 and 6, both the CJEU and the Supreme Court of Cyprus could have exercised *ultra vires* review that would lift the veil of informality covering economic decision-making in the Eurogroup and recognise the binding legal effects of Eurogroup Statements. What the thesis identifies as a scrutiny lacuna translates into very specific constitutional implications for Europe's constitutional arrangement; implications that form the basis for claims challenging institutional development more broadly, and Eurogroup Statements more specifically. By showcasing the decision-making capacities of the Eurogroup (Chapter 4) and the legal relations established between Eurogroup Statements and Member States towards which it is addressed (Chapter 5), I argued that the Eurogroup engaged actively in the process of decision-making. The results of intensified coordination, as outlined by Eurogroup statements, do not allow any discretion to national authorities; the final say does not remain with national parliaments or governments. Instead, the result of intensified coordination, such as the bail-in, is implemented by national authorities who act as a mechanism for legitimation and implementation of supranational decisions. Therefore, the most important implication of the Eurogroup's development on Europe's constitutional arrangement is the development or change in the competences of the EU and, inevitably, that of Member States as the increasing ability of EU institutions to influence fiscal policy constitutes an equal diminution of national sovereignty in these areas.<sup>1</sup>

Another important parameter to constitutional change consequence of the scrutiny lacuna is the disturbance of Europe's democratic settlement. As Chapter 2 of the thesis indicated, the democratic settlement upon which the Union is based depends on a very strict division of competences between the Member States and the Union. According to the theoretical premise behind this division, matters of technical importance not in need of democratic legitimacy could be transferred to the technocratic body of the European Communities and, later, the European Union. However, matters of social or fiscal policy, that are sensitive for each Member State and in need of democratic legitimation, were left in the sphere of competences of Member States. The Treaty of Maastricht may have distorted this balance, but fiscal policy remained a core competence of Member States due the democratic legitimacy needed for such decisions. As the core values upon which the EU is constructed are not justiciable but could, at best, inform and guide judicial interpretation,<sup>2</sup>

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<sup>1</sup> Similar arguments can be made about the development of Union competences in the area of social policy; however, the thesis only examined the decision for a bail-in and did not extend to cover the decision and implementation of austerity measures.

<sup>2</sup> Laurent Pech, "A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law", *European Constitutional Law Review* 6, no. 03 (2010), 359-396.

commentators indicate that institutional development, and consequent change in competences, is the “obvious anchor in the court’s case law”<sup>3</sup> for considering broader issues of constitutional identity.

The constitutional implications of intensified coordination and consequent institutional development did not go unchallenged. In Chapter 3, I considered how the Court of Justice of the European Union responded to two sets of cases; those challenging conditionality measures under adjustment programs on the basis of their compatibility with fundamental or social rights, and those cases challenging the legality of crisis response measures against existing constitutional provisions and principles, including the division of competences and democratic settlement achieved between the EU and its Member States. Drawing on the Court’s approach to both sets of cases, the chapter identified an unwillingness to interfere with matters that are considered to be either political or technocratic – or simply too sensitive to the survival of the Eurozone.<sup>4</sup> Despite the significant constitutional challenges raised by litigants, especially with regards to *ultra vires* claims, the Court appeared unwilling to distort the application of emergency measures or mechanisms. By engaging in what some commentators termed as “complex judicial acrobatics”,<sup>5</sup> the CJEU overcame any constitutional objections raised by applicants and effectively foreclosed avenues for substantive judicial review of crisis response measure. For these reasons, I argued that the CJEU restricted its own jurisdiction to exercise constitutional review and sent constitutional questions back to national courts. I then continued to argue that by affirming the operation of decision-making outside its own jurisdiction, the CJEU constitutionalised the scrutiny lacuna established by institutional practices and developments.

In Chapter 5, I continued to examine how the CJEU responded to the Eurogroup’s development. In the case of *Mallis*, the Court of Justice was asked to consider whether the Eurogroup’s development to a decision-making body amounted to the expansion of competences and whether Eurogroup statements outlining the bail-in resolution amounted to an act *ultra vires*. By interpreting the contested Eurogroup statement as a unilateral declaration of intent by national governments in order to obtain financial assistance, the Court neither recognised the Eurogroup as the author of crisis response measures or as a decision-making body with the capacity to issue binding measures.

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<sup>3</sup> Mark Dawson and Floris Witte, “Constitutional Balance in the EU After the Euro-Crisis”, *The Modern Law Review* 76, no. 5 (2013), 817-844., 828.

<sup>4</sup> Michelle Everson, “An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht”, *European Law Journal* 21, no. 4 (2015), 474-499; Alicia Hinarejos, “The Role of Courts in the Wake of the Eurozone Crisis”, in *Beyond the Crisis: The Governance of Europe’s Economic, Political, and Legal Transformation*, eds. Mark Dawson, Henrik Enderlein and Christian Joerges (Oxford: Oxford University Press, 2015), 112-136.

<sup>5</sup> Takis Tridimas, “The ECJ and the National Courts: Dialogue, Cooperation and Instability”, in *The Oxford Handbook of European Union Law*, eds. Anthony Arnall and Damian Chalmers (Oxford: Oxford University Press, 2015), 403-430., 424.

As a result, the Court of Justice of the European Union found no formal link between Eurogroup statements and the adoption of a bail-in resolution by the government of Cyprus, ruling *Mallis* as inadmissible on the basis of the mistaken designation of a defendant. What Chapter 5 shows is how informal institutional practices allow the CJEU to retain the operation of the Eurogroup behind the cloak of informality. By retaining the informal character of Eurogroup proceedings, European institutions and Eurozone members were able to reach formally non-binding decisions that were then adopted by national authorities. This disassociation of decisions from their implementation is what creates the scrutiny lacuna and by ruling the cases as inadmissible, the CJEU provided legal validation to this practice. As a result, the thesis identified how institutional development during the Eurozone crisis remains hidden behind the formal description of Union institutions and how the active involvement of the Eurogroup in deciding crisis-response measure remains legally unaccounted for.

A parallel process is observed at the national level. Chapter 6 studied closely the Supreme Court of Cyprus decision in the case of *Christodoulou*. Similar to the CJEU, the Supreme Court of Cyprus ruled *Christodoulou* inadmissible, failing to engage with the substance of the case. *Christodoulou* could have been a significant opportunity to initiate a series of discussions concerning the constitutional relationship between the European Union and Cyprus, but it served the exact opposite purpose. In a remarkable act of self-negation, the Supreme Court limited its own jurisdiction to hear public law cases by finding that under Article 146 the applications could not be reviewed. As a result, the Supreme Court of Cyprus did not proceed to examine the possible withering of national sovereignty consequent from the Eurogroup's development. Through the light touch of constitutional review, the scrutiny lacuna was given legal validation at the national level as well, reinforcing in this way the degree of insulation afforded to economic decision-making at the supranational level.

In Chapters 5 and 6, I showed that both the CJEU and Supreme Court of Cyprus could have approached the matter through a different scope and bring the actions of the Eurogroup within their scope of review. By considering what *Mallis* and *Christodoulou* could have been, I stressed the fact that that the scrutiny lacuna may be created by informal decision-making but is validated through the exercise of light constitutional review. In other words, the judgments studied by the thesis indicate how constitutional review, as a legal instrument, operates to constitutionalise informal methods of economic coordination and decision-making at the supranational level. It may be that Europe's constitution is guarded by both national and supranational courts, often creating tension between the two, but in the case of the Eurozone crisis, judicial review did not challenge any institutional developments. As *ultra vires* review remains effectively inert during a time that it is

most relevant, constitutional law ceases to perform its very core function: to contain the exercise of power within the boundaries and strictures of a defined constitutional agreement. Any definitive or absolute conclusions as to the effect of this observation would, perhaps, be premature. It is, however, difficult to not accept the absence of a judicial challenge to institutional development and the shifting competences observed during the crisis; and this contributes to a continuing withering of public law instruments, such as *ultra vires* review, in European constitutionalism. By restricting their own capacity to review the actions of institutions, both Courts delivered a blow to the reach, effectiveness and contemporary application of *ultra vires* review in the European Union with the effect of constitutionalising an insulated space for informal decision-making whereby European institutions can coordinate with Eurozone members without political or judicial interference.

### 3. Judicial review and the relationship between neoliberalism and constitutional law

The political economy of constitutionalism provided a theoretical lens through which to examine the constitutional implications of institutional development during the crisis as well as the broader constitutional significance of this moment for European constitutionalism. Chapter 1 considered the relationship between neoliberalism and constitutional law in the broader context of constitutionalism beyond the state. Drawing on existing accounts on the intellectual history of neoliberalism, I identified the separation and insulation of economic decision-making from political interference as central elements to neoliberal political economic thought. The commitment of neoliberal political economy to create and sustain a scrutiny lacuna within which economic decision-making can unfold without irrational political interference was then traced in the development of economic globalisation and the parallel development of constitutionalism beyond the state. The intersection between neoliberalism and constitutional law was observed along four points of contact: the separation and insulation of economic decision-making by transferring economic deliberation beyond the state; the locking in of neoliberalism through constitutional provisions; and the insulation of economic decision-making through institutional structures; and the complementary role of judicial review in neoliberal processes establishing and sustaining a scrutiny lacuna. By observing how neoliberalism and constitutional law intersect during the crisis, the thesis contributes to theoretical discussions about this relationship.

At the end of Chapter 1, I argued that Wendy Brown's work is a call to extend the scope of critical inquiries on the intersection between neoliberalism and law beyond the structuring of markets and institutions, to consider how legal reason complements the practical realisation of neoliberal political economic thought through constitutional law. If we look at the first three aspects in the relationship between neoliberalism and constitutional law, it becomes clear that existing

discussions are mostly concerned with how constitutional law can create those institutional structures or legal frameworks to restructure the state along the lines of neoliberal political economic thought. What the thesis observes during the Eurozone crisis is a different trend. Instead of establishing and maintaining a scrutiny lacuna through constitutional law, a shift to informal means of coordination allowed institutions to develop their means of coordination and operate in an insulated environment. However, this development should not be viewed as the absence of constitutional law; on the contrary, the scrutiny lacuna is constitutionalised through the operation of constitutional review, leading to the rather paradoxical position whereby constitutional courts accept the creation of a space for economic decision-making which the law cannot access in order to review its operation.

What the thesis observes, therefore, is how judicial review can operate to complement neoliberal processes achieving the insulation of economic decision-making from political interference. It must be clarified that the operation of judicial review, as identified by the thesis, does not implement or interpret existing constitutional provisions. In other words, it is not complementary in the sense that courts sustain the constitutional framework established through legal provisions. Instead, the exercise of judicial review operates as a constitutional instrument in its own right and in a way that provides legal validation to institutional practices that insulate economic decision-making. By observing how judicial review constitutionalises a scrutiny lacuna, the thesis contributes towards expanding the scope of critical inquiry to beyond the structuring of markets or institutions.

#### 4. Is European constitutionalism still a space for conflict and contestation?

The fourth, and final, argument put forward by the thesis contributes to broader discussions on the constitutional implications of the Eurozone crisis by arguing that European constitutionalism is no longer a space for constitutional conflict. Chapter 2 of the thesis presented European constitutionalism as a space for constitutional conflict. In each of the three sites of analysis considered (European constitutional theory; the institutional framework of the EU; and ECJ jurisprudence), the chapter identified how constitutional law reflected and consolidated neoliberal political economic thought. At the same time, a further dimension to constitutional law was identified – that of articulating constitutional objectives that are often in competition to the objective of insulation. Examples discussed include the development of social and political notions in the many constitutions of Europe (Section 1), the development of democratic processes of decision-making (Section 2) and the development of social and fundamental rights by the ECJ (Section 3). These constitutional objectives operate parallel to the aim of separating politics from the economy

in a way that creates cracks in the insulation provided to economic decision-making. As conflict persisted throughout Europe's constitution, the neoliberal political economic project was continuously challenged, whether through the operation of social objectives, the incorporation of political principles, such as accountability and transparency in the operation of Union institutions, or the empowerment of citizen participation. What Chapter 2 observes, is on one hand a political economy of constitutionalism that achieved the neoliberal objective of separating the economy from politics and insulating the market, and on the other hand, constitutional provisions that created cracks in the wall of insulation. By accepting that constitutional law does contribute to the realisation of neoliberal political economic thought but does not "*necessarily do so*",<sup>6</sup> the chapter recognises constitutional law as a vehicle for neoliberalisation but also as a vehicle for countering neoliberalism. Not falling back on a deterministic and instrumental understanding of constitutional law is what allows us to recognise the existence of contestation and insists on retaining the constitutional question open, at least for the period prior to the Eurozone crisis.

However, the Eurozone crisis presents us with a clear neoliberal moment where institutions engaged with economic decision-making are afforded a significant degree of insulation to the extent that they operate within a scrutiny lacuna. As institutional development intensifies the degree of insulation afforded to economic decision-making and further separates politics from the economy, the possibility for competing constitutional objectives to take effect is minimised. The creation of a scrutiny lacuna allows European institutions and Eurozone members to push through only with those measures framed as necessary, silencing in this way all other considerations, whether social considerations, the articulation of alternative policy approaches or political considerations like greater democratic participation. It must be stressed that institutional development resulting in a scrutiny lacuna is not a 'momentary lapse of reason' on the part of EU institutions; it is not an exceptional circumstance where normality has been suspended in order to reinstate constitutional order. Instead, it is a moment where the already existing relationship between neoliberalism and European constitutional law is intensified. This transformed European constitutionalism from a space for constitutional conflict to an insulated space for economic decision-making. For Europe's constitution, the significance of this moment is found in the disturbance of the constitutional settlement, including the democratic balance, division of competences and continuing significance of *ultra vires* review. For the political economy of European constitutionalism, the significance of this moment is located in the constitutionalisation of a scrutiny lacuna and the primacy of neoliberal

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<sup>6</sup> Owen Parker, "Challenging 'New Constitutionalism' in the EU: French Resistance, 'social Europe' and 'soft' Governance", *New Political Economy* 13, no. 4 (2008), 397-417, 399.

political economic objectives over other constitutional objectives operating within Europe's constitution.

I would like to end this thesis with a note on the direction of European critical legal scholarship. In the aftermath of events such as the Eurozone crisis, critical scholarship should call institutional and social power into question; uncover relations of power and domination; and explore the complex intersection of law with social, political or economic conditions. I locate my current work within these endeavours, as I attempted to highlight the complex interaction between neoliberalism and European constitutional law and decipher the role of judicial review in the validation of informal, insulated spaces for economic decision-making. Through this project, I contributed towards understanding the complementary role of judicial review to neoliberal processes creating scrutiny lacunas. Nonetheless, there is still much work to be done in order to understand the interplay between neoliberal rationality and constitutional discourse. Critical scholars have made steps to this direction,<sup>7</sup> and it is of utmost importance to continue along this path in order to understand how neoliberalism affects the way we think, speak and practice constitutional law. However, it is not enough to uncover the complex interaction between constitutional law and social, political or economic conditions. Critical thought must also take steps to radically rethink and recast the direction of law and social relations. Even though I identified a clear neoliberal moment and primacy of neoliberal political economic thought over other objectives, constitutional law may still be thought of as a mechanism through which to contest and push back neoliberalism. The capacity of law, including constitutional law, to express and even consolidate objectives that contest the marketisation of social relations has not altered.<sup>8</sup> It is for this reason that in the aftermath of the crisis, critical constitutional scholarship set out to rethink the project of integration and form a new basis for European constitutionalism.<sup>9</sup> By thinking what the cases brought forward by Cypriot depositors could have been, I showed that constitutional law can be otherwise, taking another small step towards reinstating legal honesty.

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<sup>7</sup> Michelle Everson and Julia Eisner, *The Making of a European Constitution: Judges and Lawyers Beyond Constitutive Power* (Abingdon and New York: Routledge-Cavendish, 2007); Michelle Everson, "The Fault of (European) Law in (Political and Social) Economic Crisis", *Law and Critique* 24, no. 2 (2013), 107-129.

<sup>8</sup> Ben Golder and Peter Fitzpatrick's work is particularly helpful for thinking of law in this way. See: Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009).

<sup>9</sup> Indicatively, see: Everson, *An Exercise in Legal Honesty: Rewriting the Court of Justice and the Bundesverfassungsgericht*, 474-499; Michelle Everson, "Finding our Way Back to Europe?" in *Polity and Crisis: Reflections on the European Odyssey*, eds. Massimo Fichera, Sakari Hänninen and Kaarlo Tuori (Ashgate, 2014), 91-108; Michelle Everson and Christian Joerges, "Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism", *European Law Journal* 18, no. 5 (2012), 644-666; Mark Dawson, Henrik Enderlein and Christian Joerges, eds., *Beyond the Crisis: The Governance of Europe's Economic, Political, and Legal Transformation*, First edition. (Oxford: Oxford University Press, 2015).

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