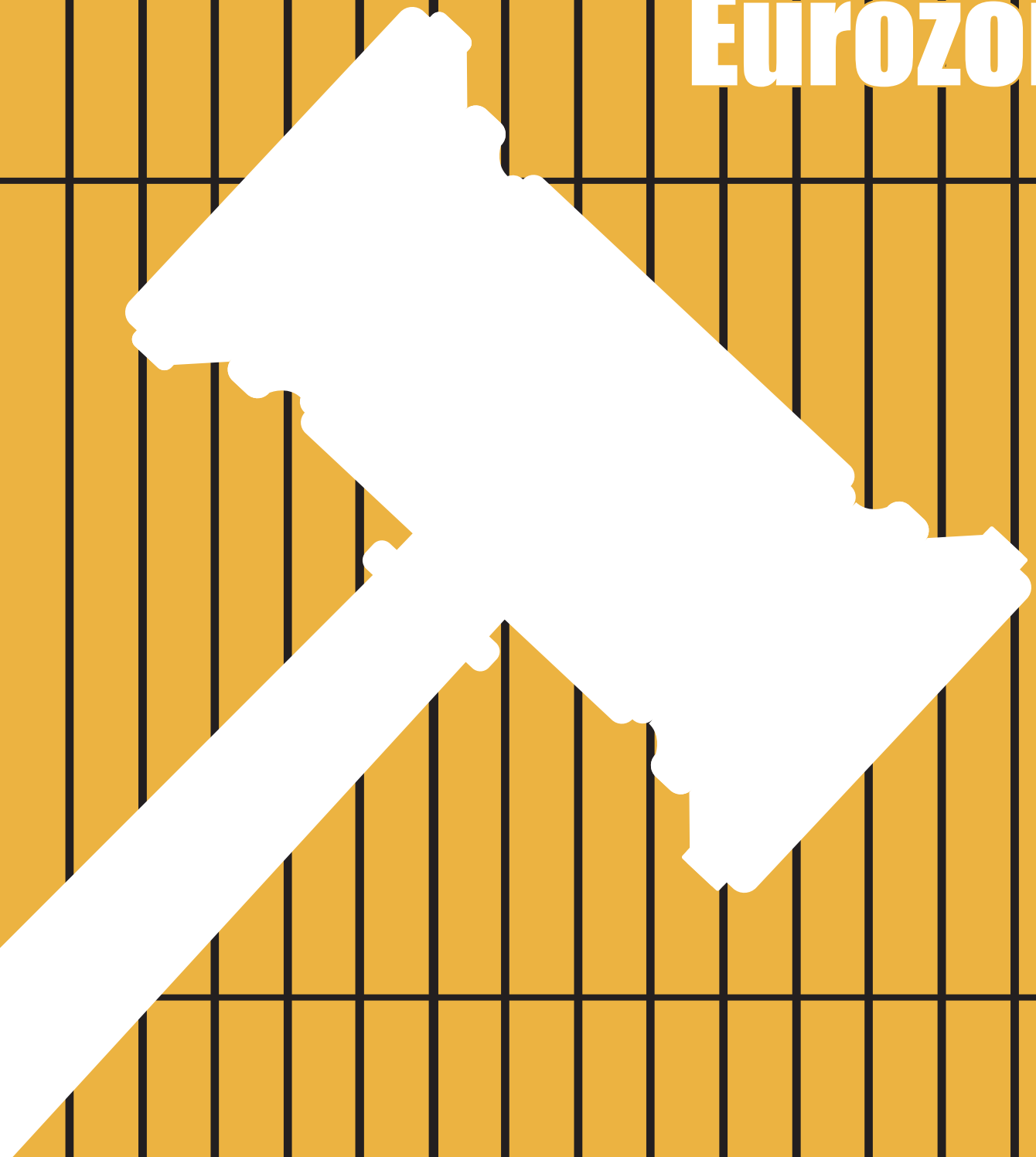
Judging the Eurozone



The Role of National Courts & the European Court of Justice in adjudicating on Europe's Economic & Monetary Union

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Judging the Eurozone

The Role of National Courts and the European Court of Justice in adjudicating on Europe's Economic and Monetary Union

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Abstract

A great deal of the European Union's constitutional evolution in recent times has been focused upon the Eurozone. When successive banking and sovereign debt crises struck from 2007 onwards, rapid constitutional development became inescapable if the single currency zone was to survive. In this heavily contested period, it is scarcely surprising that the judicial branch found itself called into play at both EU and national level.

From an early stage, the European Court of Justice had showed reluctance to involve itself in the political minefield of economic policy-making. During the crisis too, considerable latitude was shown to Member States and EU policy-making institutions. Some cases e.g. Pringle and Gauweiler concerned general constitutional developments in the Eurozone. The Court also received preliminary references concerning memoranda of understanding and austerity measures. In cases of both kinds, the Court of Justice avoided interpreting the law as frustrating the intention of underlying measures and actions designed to facilitate an exit from the crisis.

The Court of Justice has not been the only judicial body called into play when it comes to adjudicating on the Eurozone. National courts too have had a role, also finding themselves called upon to deal with general challenges to Economic and Monetary Union measures. Challenges have also occurred before such Courts relating to memoranda of understanding and related austerity. In general, most courts showed notable deference.

The intention of this paper is to attempt to make some general observations about how the Court of Justice and national courts have gone about their role in the two decades since currency union became a reality - and to identify characteristics and trends in European Court of Justice and national court rulings alike relating to the functioning and evolution of the Eurozone.

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Introduction

A great deal of the European Union's constitutional evolution in recent times has been focused upon the Eurozone. In the form in which Economic and Monetary Union (EMU) was created by the 1992 Maastricht Treaty, it has been well-described as in reality having been a mere monetary union rather than an economic and monetary one, with only imperfect agreement having been possible in crucial areas such as fiscal rules and banking supervision.[2] Consequently, when successive banking and sovereign debt crises struck from 2007 onwards, rapid constitutional development became inescapable if the single currency zone was to survive. In this heavily contested period involving rewriting and reinterpreting EMU *Grundnormen* and the simultaneous rescue of several Eurozone states from insolvency by means which involved rigorous austerity and considerable public hardship, it is scarcely surprising that the judicial branch found itself called into play at both EU and national level. The intention of this paper is to attempt to make some general observations about how courts have gone about their role in the two decades since currency union became a reality - and to identify characteristics and trends in European Court of Justice and national court rulings alike relating to the functioning and evolution of the Eurozone. It seems important to reflect both on the findings of courts regarding the Eurozone and on the appropriate role for courts of law, as opposed to, for example European-level institutions such as the European Central Bank or the EU legislative organs or indeed, national level executives and legislatures.

From an early stage,[3] the European Court of Justice showed reluctance to play an activist role in the political minefield of economic coordination, perhaps seeing that enough explosive political potential adhered to such issues to risk entirely derailing the still-evolving Eurozone, if insensitively handled. Such early restraint proved enduring. Called upon to adjudicate in several kinds of case in the Eurozone crisis era, the Court showed both considerable dexterity and a notable degree of deference to the political process throughout. Some cases concerned general constitutional developments in the Eurozone. In *Pringle*, the Court (in plenary session) upheld the establishment of the European Stability Mechanism, enabling the EU's political masters sufficient flexibility to keep a vital plank in the Eurozone raft, and provided *en route* a teleological, if somewhat controversial, interpretation to the no-bailout clause. Similarly in *Gauweiler*, the legality of the ECB's transformational Outright Monetary Transactions programme was confirmed by the Court in the teeth of a threatening-sounding reference by Germany's *Bundesverfassungsgericht*. Restraint was also seen in cases in which the Court received preliminary references concerning memoranda of understanding. The Court – with at times less-than-convincing reasoning - kept itself well clear of politically toxic pronouncements concerning austerity measures.

The Court of Justice has not been the only judicial body called into play when it comes to adjudicating on the Eurozone. National courts too have had a role. Facilitated in particular by the considerable recourse by policy-makers to international law instruments rather than EU law measures in developing the Eurozone,[4] national courts across the Eurozone have also found themselves called upon to deal with general challenges to EMU measures. In general - with the partial exception of the *Bundesverfassungsgericht* - they too have acted with very considerable restraint. A range of national courts have also had to deal with challenges related to memoranda of understanding. Better placed than the CJEU to deal with such challenges, their response to their role has varied. Most showed notable deference. The Portuguese constitutional court, for one, showed willingness to inflict a bloody nose on its national administration, thereby triggering in effect a process of dialogue with government and troika alike.

The remainder of this paper is divided into two parts, one looking at the European Court

2 See H. James, *Making the European Union* (Belknap Harvard, Cambridge Mass., 2012) at 2.

3 See *Case C-27/04 Commission v. Council* ECLI:EU:C:2004:436

4 See on this topic E.g. F. Fabbrini, 'The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective', (2014) 32 *Berkeley J. Int'l Law* 64.

of Justice, one looking at the role of national courts and seeks to makes some general observations about the contribution and approach of both to the development of the Eurozone over time, insofar as this is possible in a paper of this length.

I. European Court of Justice

The case-law of the European Court of Justice relating to the Eurozone is not of course exclusively the product of the banking and sovereign debt crises. Rather, the Court's jurisprudence can be divided between pre-crisis era case-law, crisis-era rulings and increasingly now also, in the light of more recent rulings, post-crisis era jurisprudence.

Pre-Crisis Era Case Law of the European Court of Justice

The original role of the Court in the design of the constitution of what is now the European Union is too well known to require any repetition here. In cases like *Van Gend en Loos*,[5] *Costa v. ENEL*,[6] *Internationale Handelsgesellchaft*,[7] *Simmenthal*,[8] *Van Duyn*,[9] Marleasing,[10] *Francovich*[11] and *Brasserie du pêcheur*,[12] the European Court of Justice has played a major role in fashioning the very structure of the Union.

As regards the structure of EMU, however, designed at a much later stage and in far more detail than the text concerning the institutional structure of the original treaties (which left far more unstated [13]), the European Court of Justice has always played a more modest role – and indeed, initially, incomparably more so. And yet rulings of some importance were arrived at by the Court even at an early stage. Hence the relative rights of the 'ins' and 'outs' of Economic and Monetary Union were elucidated in the 2015 judgment of the General Court in *United Kingdom v European Central Bank (ECB)*,[14] a judgment which would have proved to be of greater permanent significance if the UK had not opted to leave the European Union in the wake of the 2016 Brexit referendum.

Far less impressive (although politically, perhaps the only decision they could have reached) was the decision of the plenary session of the European Court of Justice in the 2004 case of *Commission v Council*[15] in which the Court declined to annul the Council's failure to adopt the formal instruments contained in the Commission's recommendations under the excessive deficit procedure. This was a decision in line with earlier jurisprudence of the Court. However, it left the Commission without power to compel the Council to impose sanctions on Eurozone states which violated the Stability and Growth Pact. In effect, it involved the Court of Justice standing back and effectively allowing Member States to proceed with budgetary misbehaviour that subsequently reached its apotheosis in the case of Greece, and the triggering of a crisis that almost led to the destruction of the Economic and Monetary Union. It has been argued that the Court could have done more: it is not without reason that Hinarejos has described *Commission v. Council*

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5 *Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1

6 *Case 6-64 Costa v ENEL* ECLI:EU:C:1964:66

7 *Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114

8 *Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA* ECLI:EU:C:1978:49

9 *Case 41/74 Van Duyn v Home Office* ECLI:EU:C:1974:133

10 *Case C-106/89 Marleasing v Comercial Internacional de Alimentación* ECLI:EU:C:1990:395

11 *Cases C-6/90* and *C-9/90 Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428

12 *Cases C-46/93* and *C-48/93 Brasserie du pêcheur v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte Factortame and others* ECLI:EU:C:1996:79

13 Much of the expansion in the size of what became the EC Treaty at Maastricht was accounted for by the insertion of voluminous rules relating to Economic and Monetary union.

14 *Case T496/11* ECLI:EU:T:2015:133

15 *Case C-27/04* ECLI:EU:C:2004:436

as "the Court's most notorious pronouncement" concerning EMU.[16] It is nonetheless also true, however, that budgetary discipline is often an area of massive potential political controversy and that political problems cannot always be solved with legal decisions.

There were other decisions of note in the pre-crisis era, such as the July 2003 ruling of the Court in *Commission v. European* Central *Bank*[17] where the Court usefully reined in the ECB, rapping it across the knuckles with a stinging reminder that recognition of ECB independence did not have the consequence of separating it entirely from the EU and exempting it from every rule of EU law.[18] The Court[19] annulled an ECB decision on fraud prevention which had established the ECB's own anti-fraud investigation framework without any reference to the powers of the European Anti-Fraud Office OLAF.[20] The ECB's argument that the OLAF regulation was itself void as the ECB should have been consulted before its adoption[21] failed to impress the Court, which noted that the ECB had not been assigned any specific tasks regarding the prevention of fraud detrimental to the financial interests of the Community.[22]

This was thus a useful case on the scope of the extent to consult the ECB in adopting legislation. However, it pales into relative insignificance compared to the crisis era case-law of the Court, and to which it is now proposed to turn.

Crisis Era Case Law of the European Court of Justice

Following the outbreak of an economic crisis in 2007, the emergence of a trend towards increased involvement on the part of the Courts in monetary and fiscal issues became visible. Fabbrini has argued that "the Euro-crisis and the legal and institutional responses to it have dramatically increased the powers of the judiciary *vis-à-vis* the political branches, making economic and monetary affairs in Europe more judicialised that even in a hyper-judicialised system like the US."[23]

The role of the Court of Justice in the process of navigation towards an exit from the crisis can scarcely be overemphasised. Nonetheless, a certain degree of balance is also required here. As will be seen, in its key decisions, the Court of Justice in reality exercised considerable circumspection. It is thus also absolutely correct to say (as Hinarejos does) that the Court ultimately "tended to take a back seat to the political, often intergovernmental, process."[24] It needs to be borne in mind, however, that such judicial circumspection was deliberate and was not always the legally obvious interpretation for the Court to take of the Treaty provisions concerned. And it was ultimately arguably key to the survival of the Eurozone. What it is perhaps key to recall is that *Van Gend en Loos*, *Costa* and the like were decided at a time when judicial activism was needed to advance the cause of European integration. In contrast, the major euro-crisis cases were decided when the safeguarding of European integration needed something quite

16 See A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press, Oxford, 2015), 121.

17 *Case C-11/00* ECLI:EU:C:2003:395 Analysed in S. Lambrinoc, *The Legal Duty To Consult the European Central Bank: National and EU Consultations* (ECB Legal Working Paper Series No 9 / November 2009)

18 Para. 135 of the ruling of the Court.

19 At the behest of the Commission (supported by the Council and Parliament and the Netherlands).

20 Decision ECB/1999/5 of 7 October 1999

21 Regulation (EC) No 1073/1999

22 Para. 111 of the ruling of the Court.

23 F. Fabbrini, *Economic Governance in Europe – Comparative Paradoxes and Constitutional Challenges* (Oxford University Press, Oxford, 2016) at 64, where he also observes ""the legal and institutional measures enacted by the political branches of government to respond to the crisis have increasingly fallen prey to the scrutiny of the courts, both at the national and at the supranational level." (Id., 63.) Elsewhere, the same author refers to the judiciary as having acquired "an extensive and pervasive influence in the fiscal and economic domain…reflected in the great preoccupation with which policy-makers and financial markets alike have awaited most of the judgments considered above." (Fabbrini 2014, p. 109.)

24 Hinarejos 2015, p. 121. A point which has also had to be acknowledged by Fabbrini himself. (Fabbrini 2014, pp. 99-100.)

different *viz*., that the law not become an obstacle. Thanks to the case-law of the Court of Justice, this need was met.

Overall, the jurisprudence of the Court of Justice on the economic crisis has been well summarised as falling into three different categories of case[25] – first, rulings concerning the legality of general developments or reforms altering the structure or underpinnings of EMU (cases like *Pringle*[26] and *Gauweiler*,[27] to which we can now add cases like *Weiss*[28]); and secondly, rulings linked to the fallout of rescue packages and the conditionality imposed on Member States as a result (most of which however, have been declared inadmissible by the Court[29]). Thirdly, there are what Fabbrini terms cases "reviewing regulatory or legislative measures pushing for greater financial integration against the opposition of a single Member State".[30] Most of these rulings however concern initiatives which seek to build on single market law in the financial field – such as, for example, the debates over the possible introduction of a financial transaction tax, the short selling regulation and bankers' bonuses – rather than areas of law focused on the Eurozone. As such, they are not dealt with further in this paper.[31]

The first category of cases – those on general reforms - are of the most concern, although in a chapter of this length, it is possible only to make some brief observations about them.

Pringle[32]

The *Pringle* case may be described as the case in which the European Court of Justice cautiously deferred to a revolution which had been effected by the Member States in order to save the Eurozone: a revolution, in effect to save the *status quo*.[33] At - as well as subsequent to - Maastricht,[34] the Member States – (circumscribed, in fairness to them, by the bounds of what was then politically possible) had created a Eurozone with measures aimed at preventing crises - but almost entirely lacking in structures or mechanisms designed to cope with a crisis, once one actually happened. Dramatic measures – first temporary (in the form of the creation of the EFSF and the EFSM), then permanent (in the shape of the creation of the European Stability Mechanism - a permanent rescue mechanism created to lend to states experiencing a sovereign debt crisis and therefore in danger of default) were therefore needed urgently to save the euro when crisis struck.[35] In *Pringle*, decided at this time, the Court declined to stand in the way of the construction of the ESM, the most important such undertaking. This necessitated, however, a dynamic and purposive approach to the relevant Treaty provisions, and more

25 Id., p. 122.

26 *Case C370/12 Pringle v. Government of Ireland, Ireland and the Attorney General* ECLI:EU:C:2012:756. This was a judgment of the full Court of Justice.

27 *Case C62/14 Gauweiler and others v. Deutscher Bundestag* ECLI:EU:C:2015:400. This was a hearing of the Grand Chamber of the Court of Justice.

28 *Case C493/17 Weiss and others* ECLI:EU:C:2018:1000

29 *Case T541/10 ADEDY and others v. Council* ECLI:EU:T:2012:626; *Case T327/13 Mallis and Malli v European Commission and European Central Bank* ECLI:EU:T:2014:909. Note also the action dismissed by the General Court in *Case T289/13 Ledra Advertising Ltd v. European Commission and European Central Bank* ECLI:EU:T:2014:981. See on the latter two cases, R. Repasi,'Judicial Protection against Austerity Measures in the Euro Area: Ledra and Mallis' (2017) 54 *CMLRev* 1123.

30 Fabbrini 2016, p. 89.

31 See further in this regard, Hinarejos 2015, pp. 136 *et seq*..

32 *Case C370/12 Pringle v. Government of Ireland, Ireland and the Attorney General* ECLI:EU:C:2012:756. This was a judgment of the full Court of Justice. See further B. de Witte and T. Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle' (2013) *CMLRev* 805; P. Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 *MJ* 1; and S. Adam, 'The European Stability Mechanism Through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle' (2013) *ELRev* 848.

33 A revolution then in which everything had to change in order to stay the same, to adapt the words of Tancredi in Giuseppe Tomasi di Lampedusa, *Il Gattopardo* (Feltrinelli, Milan 2013) "se vogliamo che tutto rimanga com'è bisogna che tutto cambi".

34 The German-inspired notion of the Stability and Growth Pact dates from after the signature by the Member States of the Treaty of Maastricht.

35 See generally A. de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: the Mechanisms of Financial Assistance' (2012) 49 *Common Market Law Review* 1613.

particularly, precisely this approach to the interpretation of the no-bailout clause in Article 125 TFEU.[36] According to the Court, that clause had the aim of ensuring that Member States remained subject to market discipline, thereby encouraging prudent fiscal policy. That much of the Court's ruling was uncontroversial. The next part was not. Article 125's broader aim, according to the Court, was ensuring the financial stability of the Eurozone as a whole – a rationale which did not preclude a mechanism such as the ESM, which, it noted, was only triggered in order to safeguard the financial stability of the Eurozone as a whole, was subject to strict conditionality and maintained the responsibility of an assisted Member State *vis-à-vis* its creditors. Hinarejos has described the Court as having "adopted a teleological/ *ultima ratio* interpretation of the clause" and argued that "in doing so, it 'discovered' an ultimate objective for EMU (safeguarding the financial stability of the euro area) that had no basis in the Treaties and that supersedes the Treaty-sanctioned objectives of budgetary discipline and price stability."[37]

One way or another, the outcome of the case in *Pringle* was of great importance and indeed, because it confirmed the legality of the European Stability Mechanism, the case may be regarded as having been critical to the survival of the Eurozone as a whole. For that reason, the ruling is scarcely surprising.[38] The Court's teleological approach is reminiscent of its approach to questions like supremacy and direct effect in earlier cases like *Costa v ENEL* and *Van Gend en Loos* in which the aims and the spirit of the Treaty played a pivotal role in the Court's reasoning. However it also continued a stance of deference to the political decision-making apparatus in a highly politically controversial area which is also reminiscent of its approach in *Commission v. Council*[39] - a case that effectively ushered in the economic crisis by allowing the Council to paralyse the operation of the original Stability and Growth Pact. The 2004 case involved judicial deference in the face of political misbehaviour. The 2012 case involved deference in the face of political action necessary to safeguard the Eurozone's very existence.

Gauweiler[40]

Gauweiler v. Deutscher Bundestag involved a challenge to the Outright Monetary Transactions (OMT) programme announced by the European Central Bank in 2012.[41] OMT was never actually implemented but was nonetheless an indisputably significant initiative both because (a) its mere announcement by Mario Draghi played a key role in ending the sovereign debt crisis at that time; and because (b) the threat of it being deployed remains a potent deterrent to the markets from seeking to profit from any similar such crisis in the future. (Almost incidentally, the case also involved a significant landmark in the history of interactions between national courts and the European Court of Justice for it was (rather remarkably) the first ever Article 267 reference by the European Court of Justice by the German Federal Constitutional Court, the *Bundesverfassungsgericht*.[42])

Notable features of the Court of Justice ruling in the case include (a) its restrictive interpretation

36 There is more to the Court's ruling than this, of course. For a good overview, see Hinarejos 2015 pp. 123-129.

37 Id., 125-6.

38 Id., 127.

39 *Case C-27/04* ECLI:EU:C:2004:436

40 *Case C62/14 Gauweiler and others v. Deutscher Bundestag* ECLI:EU:C:2015:400. This was a hearing of the Grand Chamber of the Court of Justice. See more generally V. Borger, 'Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler' (2016) 53 *CMLRev* 139. See also the several papers published on the *Gauweiler* ruling in F. Fabbrini (Ed.) *The European Court of Justice, the European Central Bank and the Supremacy of EU Law* 23 MJ (special issue) 1 *et seq.*.

41 For a brief summary of the *Gauweiler* ruling, *see* Fabbrini 2016, pp. 93-97.

42 The reference may well have been an attempt to escape with dignity from the potentially disastrous trajectory the Court's own reasoning threatened to set: Brunnermeier *et al* have described what the *Bundesverfassungsgericht* itself termed a 'pronouncement of the judgment and referral for a preliminary ruling to the Court of Justice of the European Union' as "calculatedly not a ruling" and have argued that "the Court's Second Senate…almost certainly felt that it did not want to be directly responsible for setting off a financial panic that might jeopardise the euro and the European Union." (See M. Brunnermeier, H. James & J. Landau, *The Euro and the Battle of Ideas* (Princeton University Press, Princeton, 2016) at 358.)

of the Article 123 TFEU prohibition of monetary financing – strongly reminiscent of the similarly restrictive approach it had taken to the Article 125 TFEU no-bailout rule in the *Pringle* case; and (b) its broad interpretation of the treaty provisions on the conduct of monetary policy. As regards Article 123, here again (as in *Pringle* regarding Article 125), the Court considered the logic of the Article at issue. It held that this logic was to encourage the Member States to follow a sound budgetary policy, and further found that the various restrictions, guarantees and conditions (including the need for compliance with a structural adjustment programme) with which the OMT programme was hedged would exclude any lessening of the impetus of the Member States to follow such a sound policy.[43]

As regards its interpretation of what constituted monetary policy, the Court was perhaps less convincing.

The Court noted approvingly that the express aims of the OMT programme were "an appropriate monetary policy transmission and the singleness of the monetary policy".[44] According to the Court, the fact that a programme like the OMT programme might also be capable of contributing to the stability of the euro area, an issue which (as per *Pringle*) was a matter of economic policy did not call the assessment of OMT as monetary policy into question.[45] A monetary policy measure could not be treated as equivalent to an economic policy measure merely because it might have "*indirect* effects" on the stability of the euro area.[46] The Court also noted that the ECB Statute granted the ECB the power to engage in transactions on secondary sovereign bond markets.[47]

Furthermore, the mere fact that the OMT programme was specifically limited to certain States' government bonds was not of a nature, of itself, to bring OMT outside the realm of monetary policy, as the programme was "intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States."[48]

Beyond this, OMT's being conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes did not alter matters. The Court acknowledged that such a government bond-buying programme "may, *indirectly*, increase the impetus to comply with those adjustment programmes and thus, *to some extent*, further the economic-policy objectives of those programmes". However, such indirect effects did not make OMT equivalent to an economic policy measure, since the ESCB (without prejudice to the objective of price stability) was obliged to support the general economic policies in the Union.[49]

There seems a certain sense of protesting too much to this.[50] However, regardless of this, in any case, *Gauweiler* marks another step along the route first traced by *Pringle* away from the original rule-based EMU to a more policy-based approach.[51] Put another way, EMU seems to have been moving away from what might be termed its original 'blind watchmaker'[52] form of governance (in which simple adherence to rules is expected to produce by itself the necessary elements of a functioning economic and monetary union) towards a model involving a much more discretionary and interventionist role for institutions like the ECB and for the European

43 See para 100 *et seq.*.

44 See paras. 47 to 50 of the Court's ruling.

45 Para. 51 of the judgment of the Court.

46 Para. 52 of the judgment of the Court. Emphasis added.

47 Para. 54 of the judgment of the Court, citing Art. 18.1 of the Protocol on the ESCB and the ECB.

48 Para. 55 of the judgment of the Court.

49 The Court cited Arts. 119(2) TFEU, 127(1) TFEU and 282(2) TFEU in this regard. See generally, paras. 57 to 59 of the Court's judgment. Emphasis added.

50 See for a good account of the origins of - and controversies surrounding – the OMT programme, Brunnermeier *et al* 2016, pp. 352-359.

51 See on OMT before the European Court of Justice (written after the *Gauweiler* reference but prior to the ruling), Hinarejos 2015, pp. 129 to 131.

52 See R. Dawkins, *The Blind Watchmaker*, Norton, London, 1986, where the author uses this metaphor to describe the process of evolution.

Stability Mechanism. Ultimately, what is most significant about *Pringle* and *Gauweiler* is that both are permissive judgments allowing the putting in place and operation of what Fabbrini terms "key components of the new architecture of EMU".[53]

Weiss[54]

A further contribution to this permissive process was made in the 2018 case of *Weiss and others*.[55]

Like *Gauweiler*, this was a reference by the *Bundesverfassungsgericht*, which now appears to be engaging in Article 267 TFEU references with some gusto (albeit a full half-century after this Article's adoption).[56] The case can be regarded as *Gauweiler II*, since again it was brought by Gauweiler and fellow sceptics about Economic and Monetary Union. The challenge this time was, *inter alia*,[57] to a decision made as part of the ECB's quantitative easing programme. More specifically, it was a challenge brought before the German Courts to what is called the 'Public Sector Purchase Programme (PSPP), which in turn is the main element of the ECB's framework programme, the 'Expanded Asset Purchase Programme' (EAPP). Unlike the Outright Monetary Transactions programme at issue in *Gauweiler*, which has never been implemented (and is therefore more a market-restraining threat than an actual programme), the Expanded Asset Purchase Programme has been implemented – and the figures involved are enormous. Hofmann refers to figures cited by the *Bundesverfassunsgericht* according to which "the EAPP has, since its instigation, had a volume between 60 and 80 billion Euros a month and an overall volume of 1,8 trillion Euros by May 2017. Of these 1,8 trillion, 1,5 trillion Euros was due to purchases under the PSPP." [58]

Thus what was at issue before the Court in *Weiss* (a Grand Chamber of 15 judges, rather than a full Court as in *Gauweiler* and *Pringle*) was the main element of the quantitative easing programme. As in the two other cases, the grounds of challenge were many and can not all be repeated here.

Some particularly significant findings may be adverted to here however. The Court expressly confirmed its *Pringle-Gauweiler* approach that "in order to determine whether a measure falls within the area of monetary policy it is appropriate to refer principally to the objectives of that measure. The instruments which the measure employs in order to attain those objectives are also relevant."[59] The Court confirmed that the PSPP programme involved monetary policy, noting that it was apparent from the decision's recital that its purpose:

> *is to contribute to a return of inflation rates to levels below, but close to, 2% over the medium term.*

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53 Fabbrini 2016, p. 97.

54 *Case C493/17 Weiss and others* ECLI:EU:C:2018:1000. Just before this paper was published, the Bundesverfassungsgericht delivered its extraordinary (and, in this writer's view, poorly-judged) response to the *Weiss* ruling, the case by then having been remitted to it by the Court of Justice. The German Court held not alone that challenged ECB actions (concerning quantitative easing) had been *ultra vires* the ECB, but also that the ruling of the Court of Justice itself upholding them was *ultra vires* for failure to respect proportionality and therefore not binding in Germany. (See in particular paras. 117 to 119, paras. 154 and 163 of the ruling.) (Judgment of the Second Senate of the BVG, 5 May 2020, 2 BVR 859/15, 2 BVR 1651/15, 2 BVR 2006/15, 2 BVR 980/16). The Bundersverfassungsgericht ruling has come too late to be commented on in detail here, beyond noting its occurrence, and the fact that it plunges the European Union into a constitutional crisis focused on the issue of nullification. (See for useful early comments, M. Sandbu, 'German court has set a bomb under the EU legal order', *Financial Times*, 5 May 2020, D. Scally, 'Germany needs to hear the truth about the euro', *Irish Times*, 7 May 2020 and F. Fabbrini and R. D. Keleman, 'With one court decision, Germany may be plunging Europe into a constitutional crisis', *Washington Post*, 7 May 2020.)

55 See for a consideration of this, H. Hofmann, *Controlling the Powers of the ECB: Delegation, Discretion, Reasoning and Care - What Gauweiler, Weiss and others can teach us*, Ademu Working Paper Series WP 2018/107, Barcelona, 2018) and more recently M. Dawson and A. Bobic , 'Quantitative Easing at the Court of Justice – Doing whatever it takes to save the euro' (2019) 56 *Common Market Law Review* 1005

56 *I.e.,* in its initial form of Art. 177 EEC.

57 The case involved various constitutional challenges before the ECB involving not only decisions of the ECB but also the participation of the German Central Bank (the *Bundesbank*) in those decisions and the alleged failures of the *Bundesbank*, German Federal Government and Parliament regarding those decisions. (See para. 13 of the ruling of the Court of Justice.)

58 Hofmann 2018, pp. 2-3.

59 Para. 53 of the ruling of the Court.

> *In that regard, it is important to point out that the authors of the Treaties chose to define the primary objective of the Union's monetary policy – namely the maintenance of price stability – in a general and abstract manner, but did not spell out precisely how that objective was to be given concrete expression in quantitative terms.*[60]

The Court reaffirmed its *Gauweiler* view that a monetary policy measure can not be treated as equivalent to an economic policy measure for the sole reason that it may have indirect effects that can also be sought in the context of economic policy.[61] It also expressly declined to concur in the *Bundesverfassungsgericht*'s view that "that any effects of an open market operations programme that were knowingly accepted and definitely foreseeable by the ESCB when the programme was set up should not be regarded as 'indirect effects' of the programme."[62] The Court maintained control over the crucial borderline between monetary and economic policy, although the programme of purchases at issue in *Weiss* was clearly easier territory to defend as monetary policy than the OMT programme at issue in *Gauweiler* had been. The Court also retained control of the other crucial battle line regarding the legality of the PSPP: once more, a limited view was taken of the monetary financing prohibition by the Court, just as it had been in *Gauweiler*, and just as a limited view had been taken of the no-bailout rule in *Pringle*. According to the Court, the decision in *Weiss* did not violate the Article 123 monetary financing prohibition. The Court conceded that the ESCB's intervention would have been incompatible with Article 123 only if potential purchasers of government bonds on the primary markets knew *for certain* that the ESCB was going to purchase those bonds within a certain period and under conditions allowing them to act, *de facto*, as intermediaries for the ESCB for the direct purchase of those bonds from public authorities and bodies.[63] But it denied that such certainty existed here, although it admitted that private operators had been enabled "to foresee, to some extent, significant aspects of the ESCB's future actions on the secondary markets."[64] *Certainty* was avoided by various safeguards (such as blackout periods of uncertain duration when no bonds would be purchased) and avoidance of advance specification of purchase volumes.[65] The Court further refused to consider arguments relating to the decision's provisions on the sharing of losses, arguing that this would involve "an advisory opinion on a problem which is, at this stage, hypothetical".[66]

Overall, *Gauweiler* and *Weiss* have all seen the Court of Justice decline to see the law frustrate what, if it is not a revolution in Economic and Monetary Union, is at least a major evolution - a shift away from the original rule-based EMU to a more policy-based approach involving a much more discretionary and interventionist role for institutions like the ECB and for the European Stability Mechanism and less trust in the efficacy of a rigidly literal approach to rules to safeguard the continued existence of the Eurozone; as Hinarejos terms it, "a different EMU with a new overarching objective (the safeguarding of the stability of the euro area) that demands managerialism and policy-making".[67] The Court has not been the source of the great changes which have been made in EMU's structures and functioning. These

60 Paras. 54-55 of the ruling of the Court.

61 Para. 61 of the ruling of the Court citing para. 52 of *Gauweiler* and para. 56 of *Pringle.*

62 Para. 62 of the ruling of the Court.

63 Para. 110 of the ruling of the Court.

64 Para. 112 of the ruling of the Court.

65 See para. 113 *et seq.* of the ruling of the Court.

66 *Cf* however the Court's ruling in *Case C-621/18 Wightman and others* ECLI:EU:C:2018:999 regarding the prospect of the UK withdrawing its Art. 50 Brexit notice. At the time that case was decided, this was a hypothetical prospect, but one in relation to which the Court was content to make a ruling. Note also that the Court rejected (as it had in *Gauweiler*) any contention that the policy at issue in *Weiss* was disproportionate. (See paras. 71-100 of the ruling of the Court.)

67 Hinarejos 2015, p. 143. Note also Fabbrini 2014, pp. 70-71, and in particular his entirely accurate observation that the "mechanisms of financial stabilization represent an entirely new addition to the architecture of the EMU constitution" constructed in the wake of the discovery "that it was actually much easier on paper than in reality to let a country of the Eurozone default without this producing a systemic effect on the stability of the Eurozone as a whole."

have been decided upon by the Member States both inside the political structures of the EU and outside them. But the permissive approach adopted by the Court has been key in allowing this evolutionary/revolutionary approach to continue, and for things to change in order that they may remain the same. Since the alternative approach might well have marked the end of EMU, it is perhaps not surprising that the Court has adopted the approach it has. However, it has a certain level of form here - its policy of non-interventionism in a politically highly controversial area has a long history dating back to before the time of crisis. Nonetheless, it has had to work hard in order to avoid rules from an earlier phase of EMU frustrating the construction and functioning of initiatives only latterly revealed to be needed to buttress and prevent the collapse of the EMU edifice, constructed as this was in that earlier era.[68]

Turning to the Hinarejos' second category of cases, those reviewing the legality of rescue packages provided for Member States, and the conditionality attached thereto, as already noted, most of these have been declared inadmissible by the Court or have otherwise been unsuccessful. Two relatively recent examples of this may be cited. In *Florescu and Others v Casa Județeană de Pensii Sibiu and Others*,[69] the Court of Justice did confirm that a memorandum of understanding - that was agreed in 2009 with Romania - was an act of an EU institution capable of being the subject of a preliminary reference - because its legal basis lay in provisions of EU law and because it gave concrete form to an agreement between the EU and a Member State enabling a Member State to benefit from EU financial assistance. Moreover, the Court further ruled that measures adopted by Romania in the exercise of the discretion left to it in achieving the memorandum's aims attracted the application of the EU Charter of Fundamental Rights. However, none of this ultimately availed the plaintiffs: the Court held the Charter did not prohibit austerity measures like the Romanian rule challenged precluding the simultaneous holding of a judicial pension and a teaching position in a public university where this resulted in income exceeding the national average gross wage.

More recently, in *Bourdouvali and Others v Council of the European Union and Others*,[70] the Court dismissed on a variety of grounds, the applicant bondholders' shareholders' and deposit holders' claim for damages on foot of losses allegedly suffered by them under the Cypriot bailout – and which they had attributed variously to acts which they contended obliged the Republic of Cyprus to adopt measures harmful to them, in order to receive assistance which was indispensable for it.

Again, the ruling is an interesting one (even if, once again, this did not avail the plaintiffs) acknowledging as it did, for example, that "the Euro Group is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union. The acts and conduct of the Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union". The Court disagreed, however, with the assertion that the European Union had made Cyprus adopt the measures it had.[71]

Post-Crisis Era Case Law of the European Court of Justice

Decisions of the major importance of the *Pringle*, *Gauweiler* and even *Weiss* rulings are the exception rather than the rule. The great

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68 The giving of the Court's *imprimatur* to the crisis-era evolution of the economic and monetary union has not of course been entirely uncontroversial. See for a critical perspective, M. Everson & C. Joerges, 'Who is the Guardian for Constitutionalism in Europe After the Financial Crisis?' in S. Kröger (Ed.), *Political Representation in the European Union: Still Democratic in Times of Crisis?* (Routledge, Abingdon, 2014) at 400. See generally for some valuable reflections concerning the restrained approach of the Court regarding all three categories of case to come before it in the crisis era, Hinarejos 2015, pp. 140-144 and 152-3. Among the challenges here, as she points out, "is to elucidate those cases where the Court may be asked to review changes to the constitutional underpinnings of EMU that are not the result of the appropriate political process and that are too significant to be 'ratified' by a court." (Id., 152.)

69 *Case C-258/14* ECLI:EU:C:2017:448

70 *Case T-786/14* ECLI:EU:T:2018:487. Examined in part in M. Fink, 'EU liability for contributions to Member States' breaches of EU law' (2019) 56 Common Market Law Review 1227.

71 See e.g. para. 129 of the Court's ruling.

lines of constitutional authority having now been established, we have probably moved into an era of what (for the time being at least) may be referred to as post-crisis era jurisprudence on the part of the Court of Justice. And yet even now, rulings of major constitutional significance are possible. What may be described as a remarkable and adventurous judgment on the part of the Court of Justice occurred in the joined cases of *Rimšēvičs and European Central Bank v Latvia*[72] where a Grand Chamber of the Court went beyond the advice offered to it by Advocate General Kokott, beyond its usual approach in judicial review cases and beyond what had been sought by the European Central Bank in this case, annulling a national measure (which had taken the shape of a decision of the Anti-Corruption Office, Latvia prohibiting Rimšēvičs from performing his duties as Governor of the Central Bank of Latvia). The Court explained its remarkable decision by reference to the wording of Article 14.2.2 of the ESCB Statute which it viewed as expressly entrusting it with a power of review.[73] The Court acknowledged that this derogated from the general distribution of powers between the national courts and the courts of the European Union and held that:

> *derogation can be explained by the particular institutional context of the ESCB within which it operates. The ESCB represents a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails.*
>
> *Article 14.2 of the Statute of the ESCB and of the ECB reflects the logic of this highly integrated system which the authors of the Treaties envisaged for the ESCB and, in particular, of the dual professional role of the governor of a national central bank, who is certainly a national authority but who acts within the framework of the ESCB and sits, where he is the governor of a national central bank of a Member State whose currency is the euro, on the main decision-making body of the ECB. It is because of this hybrid status and… in order to guarantee the functional independence of the governors of the national central banks within the ESCB that, by way of exception, a decision taken by a national authority relieving one of those governors from office may be referred to the Court.*
>
> *Article 14.2 of the Statute [of the ESCB and of the ECB] thus adds a legal remedy to the system of legal remedies laid down by the Treaties which is very specific, as is apparent from the very small number of persons to whom it is available, the unique subject matter of the decisions against which it may be used and the exceptional circumstances in which it may be exercised.*[74]

The decision was clearly intended to be an exceptional one. Nevertheless, it is striking that the highly integrated system envisaged by the Treaties for the ESCB, the hybrid professional role of national central bank governors and the need to guarantee their functional independence within the ESCB played a key role in the Court arriving at its decision. This was very much a decision which could only have been arrived at in the context of Economic and Monetary Union.[75]

Apart from rather dramatic judgments like *Rimšēvičs*, there are also many less spectacular but nonetheless significant cases being decided on areas that are centrally relevant to an Economic and Monetary Union, such as banking

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72 *Joined Cases C202/18* and *C238/18* ECLI:EU:C:2019:139.

73 This provides:
"a Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application."

74 See paras. 69-71 of the ruling of the Court.

75 See for some reflections on the ruling, R. Smits, 'ECJ Annuls A National Measure Against An Independent Central Banker' European Law Blog, 5 March 2019 (available online at http://europeanlawblog.eu/2019/03/05/ecj-annuls-a-national-measure-against-an-independent-central-banker/)

union law – for example, in such areas as deposit guarantee schemes.[76] In a paper of this length, however, they can not delay us for longer than the time needed to advert to their existence.

II. National Courts

Why National Courts Have Been Involved in Adjudicating on the Eurozone

National courts have played a major role on Eurozone issues in several countries including Germany, Portugal, Estonia, Ireland and Greece. An obvious initial question is why national courts have been involved in adjudicating on EMU-related issues in the first place, given the European nature of the issues involved, which would seem to make adjudication by a European-level jurisdiction the more natural place to which to have recourse.

A key element of the answer is that, although the issues may be European, the law is far from universally that of the European Union. Eurozone law is now broader than merely the law of EU: Kilpatrick accurately points out "the unusual and multiple legal pedigree of euro-crisis law" which encompasses "EU law relevant to the crisis as well as international agreements entered into by subsets of EU states and administered by EU institutions (such as some of the sovereign debt loan arrangements)."[77]

The fairly extensive use made of intergovernmental treaties to rescue the EU from its difficulties has been driven in turn at least in part by the cumbersome nature of amendment of European Union treaties (which requires the unanimous agreement of all Member States of the European Union) and ratification or incorporation processes which in some cases can involve constitutional referendums.[78] Whatever the reasons for the phenomenon of the increased use of international law instruments, however, one consequence of it has been an increased role for national courts (*i.e.*, rather than the European Court of Justice).[79] As Fabbrini has observed, the outcome of intergovernmental management of the euro-crisis has been an increased involvement of the courts in a way that could not have happened had the Community method been deployed.[80]

Moreover, in implementing such international agreements, national laws and executive action have often been given a major role to play. (One example of this can be seen in the fact that the Fiscal Stability Treaty requires Member States to increase domestic controls over fiscal behaviour.[81]) Such substantive requirements have also led to a correspondingly increased role for domestic courts.

In contrast, a much lesser role for national courts was always to be expected in those particular areas of Eurozone law which are governed by EU law, such as those involving the application of the so-called 'six pack' of 2011 and 'two pack' of 2013, which consist of EU secondary legislation concerning budgetary discipline and processes, since the validity of EU legislation is not capable of being reviewed by national courts under the *Foto-frost* doctrine.[82]

Even if it is understood why national courts have ended up playing the role they have,

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76 *Case C-571/16 Kantarev v Balgarska Narodna Banka* ECLI:EU:C:2018:807; *Joined Cases C-688/15* and *C-109/16 Anisimovienė and Others v bankas „Snoras" AB, in liquidation and others* ECLI:EU:C:2018:209; *Case C-76/15 Veruloet and Others v Ministerraad* ECLI:EU:C:2016:975; *Case C-127/14 Surmačs v Finanšu un kapitāla tirgus komisija* ECLI:EU:C:2015:522; *Case C-671/13 Proceedings brought by VĮ „Indėlių ir investicijų draudimas" and Nemaniūnas* ECLI:EU:C:2015:418; *Case C-222/02 Paul and others v Federal Republic of Germany* ECLI:EU:C:2004:606; *Case C-233/94 Federal Republic of Germany v European Parliament and Council of the European Union* ECLI:EU:C:1997:231.

77 C. Kilpatrick, 'Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry' in T. Beukers, B de Witte and C. Kilpatrick (Eds.), *Constitutional Change Through Euro-Crisis Law* (Cambridge University Press, Cambridge, 2017) at 282.

78 Note e.g. Fabbrini 2016, p. 65.

79 Cf however, the ESM Treaty. This is an intergovernmental treaty, yet Art. 37(3) thereof nonetheless confers jurisidiction on the European Court of Justice in disputes concerning its interpretation and application.

80 Fabbrini 2014, p. 65.

81 Fabbrini 2014, pp. 69-70.

82 *Case 314/85 Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452

the question poses itself of course as to whether it is desirable to have national courts adjudicating extensively on Eurozone Issues?

Among the factors militating against national courts having such a role are the following:

i) a strong role for national courts may lead to several different legal approaches being applied to legal challenges concerning the Eurozone - and yet it seems unrealistic to expect the European Union to draft rules accommodating 19 or even 27 different Constitutional and legal systems;

ii) national courts, particularly constitutional courts, are not necessarily expert in economic, financial or banking issues, yet most of the rules of the Eurozone concern these very issues;

iii) the intervention of the courts of law lacks the same level of democratic legitimacy as that of other organs of state: courts are not elected. The lack of legitimacy may be said to be particularly telling when the courts of one country seek to adjudicate on the validity of a policy which has consequences for other states;

iv) there is also a question mark over the substantive economic benefits of strong judicial review. Notably, Ireland, with weak judicial review, exited its bailout programme with extraordinary rapidity. However, so many other factors are present that it is difficult to ascribe such success to the weakness of judicial interventions or to otherwise quantify the effect of judicial review in any given case. Moreover, any claimed benefits of an absence of strong judicial review may be countered with the argument that there may be a cost in social justice terms of weak judicial review. Indeed, one's view of the benefits of judicial review may depend to some extent on where one's views lie on the political spectrum;

v) it may lead to results which are unfair and fail to strike an appropriate balance between the interests of the various Member States. National courts can after all, be expected to favour national interests above those of other states or the European Union as a whole, and, moreover, to favour the application of national constitutional doctrines above European rules. As Hinarejos has observed, "inescapably, the most assertive national courts will end up delineating the scope of the political debate for the whole of the Union."[83]

vi) a major role for national courts may store up efficiency problems for the European Union in the future, since national courts that have been accommodating during periods of (in particular, national) crisis may become more demanding in their approach once the difficult times have passed.

vii) it may lead to judicial overreach. In this regard, one should consider the particular case of the German Federal Constitutional Court, the *Bundesverfassungsgericht* which has leveraged its own role, through its application of the *ultra vires* doctrine, effectively giving it the last word on laws passed by European Union institutions.[84] (Indeed the extent to which it has done this has not stopped short of effectively requiring the renegotiation of international law instruments.[85]) In doing so, it has also leveraged Germany's role (the economic size of which already ensures that its withdrawal from any Eurozone initiative can

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83 Hinarejos 2015, p. 151.

84 See most recently - and most spectacularly - the ruling of the Federal Court of 5 May 2020 referenced in footnote 54 above. See further e.g. T. Tuominen, 'Aspects of Constitutional Pluralism in Light of the Gauweiler Saga' (2018) 43 *ELRev* 186 at 190 *et seq.;* M. Payandeh, 'The OMT Judgment of the German Federal Constitutional Court: Repositioning the Court within the European Constitutional Architecture' (2017) 13 *European Constitutional Law Review* 400 esp. at 411-416. See also the critical observations by Fabbrini regarding the approach of the French *Conseil Constitutionnel* on being asked by the President of the Republic to consider whether ratification of the Fiscal Stability Treaty was compatible with the French Constitution. (Fabbrini 2014, pp. 82-86 and esp. at 86 where he observes that "the Constitutional Council seized the opportunity offered by the new European fiscal architecture and readily welcomed these institutional changes to expand its domestic powers of review."

85 See the *Bundesverfassungsgericht's ESM* ruling of 12 September 2012 2 BvR 1390/12. A brief explanation of this is to be found in Bundesverfassungsgericht, *Applications for the issue of temporary injunctions to prevent the ratification of the ESM Treaty and the Fiscal Compact unsuccessful for the most part* (Press Release No. 67/2012 of 12 September 2012).

fatally wound it), deploying this power in an uncompromising manner which might not have been adopted by other branches of German government, and not always impressing with its expertise or the suitability of some of its approaches to determining the legitimacy of European initiatives. (Thus its *Lisbon* ruling sought to impose a model of democracy that was arguably not a good fit for the European Union[86] and its *Gauweiler* reference arguably evinced little understanding of the operation of financial markets.[87])

Fabbrini (relying in turn on Halberstam) has stressed the appropriate limits of a dynamic of judicialisation regarding EMU,[88] observing

> *in separation-of-powers systems three main considerations should guide the allocation of competences among alternative institutions: expertise, voice and rights. The first consideration asks which actor has the better claim of knowledge or instrumental capacity to make a decision in a given field. The second asks which actor has the better claim of representing the relevant political will. And the third asks which actor is better placed to protect rights. In the fiscal domain, the first and second considerations (expertise and voice) strongly plead in favor of letting the political branches, rather than the courts, make decisions. At the same time, the third consideration (rights) does not play a fundamental enough role in the economic domain so as to change the balance of institutional capacities in favor of greater judicial involvement.*[89]

Such considerations have resonance at both European and national level, but there are at least some counter-arguments militating in favour of a strong role for national courts:

i) it may be argued that the intervention of national courts has been necessary in relation to Eurozone affairs in order to provide legitimacy for measures which would otherwise have lacked legitimacy because they were introduced by intergovernmental measures with little consequent parliamentary control at either national or European level;

ii) further in this regard, a role for national courts may facilitate acceptance of measures that would otherwise meet with greater political opposition. Thus at one level, the intervention of national courts interferes with the smooth operation of policies which have been decided upon at European level. At another level, however, it facilitates European integration by adding a level of legitimacy which would otherwise be absent. Hence the legitimacy added by national courts may be particularly desirable in bailout situations in which the normal conditions of democracy are often curbed: where democratic controls have been moved aside, the legitimising function of the law and the courts takes on a particular importance.[90]

Both of these advantages of national judicial intervention have been adverted to by Reestman, who has noted that the diverse harvest of judgments of the national courts has "legitimised and furthered the public and political acceptance of the treaties and thereby also a fundamental change in the functioning of the EMU: they provided a legitimacy that the political process was unable to provide on its own".[91] While admitting that such legitimacy came at a certain price, the same writer notes unapologetically:

> *the judgments all somehow indicate that there is a point at which further EMU integration requires recourse to, and legitimation by,*

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86 See the *Bundesverfassungsgericht's Lisbon* judgment of 30 June 2009 - 2 BvE 2/08 particularly at paras. 251 *et seq.*

87 See *Case C62/14 Gauweiler and others v Deutscher Bundestag* ECLI:EU:C:2015:400 at para. 88) and the preliminary reference of the *Bundesverfassungsgericht* (Case No.2 BvR 2728/13) (summarised in P. Craig and M. Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) 41 *European Law Review* 1 at 6-8).

88 Fabbrini 2016, p. 113.

89 Fabbrini 2014, pp. 116 *et seq.,* citing in this regard D. Halberstam, 'Constitutional Heterarchy: the Centrality of Conflict in the European Union and the United States' in J. Dunoff and J. Trachtman (Eds.), *Ruling the World* (Cambridge University Press, Cambridge, 2009), 326 at 327.

90 Cf. the light review applied by the Irish courts described in S. Coutts, 'Ireland: Traditional Procedures Adapted for Economic Emergency' in Beukers *et al* 2017, p. 230.

91 See J-H Reestman, 'Legitimacy through Adjudication: the ESM Treaty and the Fiscal Compact before the National Courts' in Beukers *et al* 2017, p.243 esp. at 276-7 and 243.

> *the constitutional authorities of the Member States. That is an expression of the very basic principles upon which also the European Union is built: democracy and the rule of law.*[92]

iii) national courts, as Hinarejos puts it, may also be better placed than the European Courts "to choose the level at which social rights ought to be protected in a situation of financial instability".[93]

As already noted, space for a strong role for national courts in particular has been made by the non-EU law nature of memorandums of understanding, itself painfully illustrated by the lack of success claimants have had litigating rescue packages before the EU courts in Luxembourg in cases such as *Bourdouvali*[94] and by the refusal of the European Court of Justice to hear Article 267 references from Romania and Portugal concerning the legality of national measures adopted pursuant to memoranda of understanding because it lacks jurisdiction to do so.

The nature of the issues upon which national courts have been called upon to adjudicate has varied. Some national cases have concerned challenges (either procedural or substantive) regarding the architecture of the solutions used to rescue the Eurozone from its economic crisis (often involving claims that the measures violate national constitutional identity, constitutional sovereignty clauses or constitutional guarantees of democratic legitimacy). Cases concerning such issues have been seen for example in Germany, Estonia, Ireland, Slovenia, France, Poland and Austria.[95]

Others have involved challenges to the legality of bailouts or the memoranda of understanding used to put them in place, or (more usually) the compatibility with the national constitution of measures used to implement bailout agreements. For, as Fabbrini points out:

> *Eurozone member states that obtain financial aid to address a situation of quasi-default are…subject to specific economic adjustment programs designed to reform the fundamentals of their economy and address structural weaknesses in their domestic systems in areas as far ranging as the flexibility of the labour market, the effectiveness of tax collection, the size and organization of the public administration, the nature and degree of social entitlements, and the characteristics of the banking sector.*[96]

Many national level constitutional challenges thus focus on cuts to pay, to social welfare benefits and to pensions – giving rise to "a constitutional jurisprudence of crisis-driven [budgetary cuts]".[97] Challenges of this nature have been seen in Ireland, Portugal, Greece, Romania, Hungary, Latvia, Cyprus and Spain.[98]

Given the economic context, it is perhaps unsurprising that considerable national judicial deference to the political process tends to be displayed in both 'architecture' and 'bailout' cases. Such deference has nonetheless been observed to be generally higher in the former variety of case, in which of course the implications of a negative ruling may be enormous.[99]

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92 Id., 277.

93 Hinarejos 2015, p. 153. According to the same author,
"the defence of the national constitutional settlement [in cases on austerity], comes down to setting the minimum of social rights that needs to be protected when making hard economic policy choices in times of financial instability. The array of [decisions by national courts] portray a wide variety of approaches to this question…the argument can be made that the CJEU should accept jurisdiction and exercise a light-touch review, leaving the possibility open for national courts to apply more stringent standards, if this is appropriate within their national judicial tradition and political context."

94 *Bourdouvali and Others v Council of the European Union and Others Case T-786/14* ECLI:EU:T:2018:487

95 See Reestman 2017, pp. 245 *et seq.*.

96 Fabbrini 2014, pp. 72-73.

97 Kilpatrick 2017, p. 289. The same writer points out that missing from this jurisprudence, however, is case-law on health, education and housing. (Id., 290.)

98 See further Hinarejos 2015, pp. 145 *et seq.*. Since economic difficulties are scarcely to be avoided at some point in the future by any country, these seem likely to be of enduring value in terms of the guidance they offer, even once the bailouts they relate to come to an end.

99 Id., 145 and 153.

The issues decided by national courts can be categorised along lines other than the 'architecture vs. bailout-related cases' axis, however. Another possible division is that between *ex ante* challenges like that in *Pringle*,[100] in which it is sought to prevent the adoption of an instrument creating a particular institution or establishing a particular policy, and *ex post* challenges, whether these be to national legislation or executive action (such as the challenges seen to austerity measures in Portugal) or indirect challenges to European norms by reference to European standards.[101] Yet another distinction which can be drawn is that between challenges to the substance of measures or alleged procedural infringements (*e.g,*. of the role of a national parliament). The same case may of course raise both kinds of issue raised: the distinctions relate to the issues raised rather than to the cases themselves.

What - If Any - Generalisable Lessons Can Be Learnt From Such National Cases?

With such a large number of jurisdictions, it can be challenging to determine what (if anything) of general value may be learned from the various national rulings. Comparison is difficult. The rulings of the various national courts are filtered through different constitutional contexts. Portugal (which saw a number of high-profile constitutional challenges regarding its bailout) is a particularly obvious example of this, given the uniquely extensive social provisions made in its Constitution.[102] At the other end of the scale lie Cyprus and Ireland, whose Constitutions contain only limited provisions concerning social rights.[103] Even where broadly similar constitutional provisions exist, the precise formulations may also differ. The same is even more true of the detailed statutory provisions that implement Directives or bailout agreements. This will of course have a bearing on differing rulings by the various national courts.

Rulings are also filtered through different constitutional structures. Some countries have specialised constitutional courts. Others do not – something, which has been argued to have had a negative effect on the robustness of judicial review in the case of Greece, for example (where constitutional challenges have been decided by a number of different courts). Some states allow specially designated persons or institutions to ask for *ex ante* or *ex post* review. Others, such as Greece, do not.[104]

The constitutional bases on which challenges have been brought have also varied considerably. Kilpatrick has pointed out a broad East-West axis in this regard: in Eastern Europe, challenges have been brought on the basis of constitutional social provisions. Thus for example, pay cuts were challenged on the constitutional right to work in Romania and pension cuts challenged there (and also in Latvia) by reference to constitutional guarantees to social security. In contrast, challenges to pay cuts and pension cuts were dealt with on the basis of other (non-social) constitutional provisions and bases in Portugal and Greece.[105] Not alone the rights invoked, but the broad approach taken to fending off excessive limitations on such rights

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100 *Pringle v Government of Ireland and Others* [2012] IESC 47, [2013] 3 IR 1. *Ex ante* challenges to the ratification of international treaties are also possible in several other countries. (See e.g. Art. 54 of the French Constitution.)

101 See Fabbrini 2016, p. 66, where he also points out the pursuant to the Fiscal Stability Treaty obligation to incorporate balanced budget rules, national courts can also be asked to review whether governments are in compliance with the relevant budgetary constraints. (The question of whether such challenges will be constitutional or sub-constitutional will vary from state to state, however.)

102 Portugal's Constitution (the Preamble of which refers to "the Portuguese people's decision to…open up a path towards a socialist society") lists among the "fundamental tasks" of the State, "[promoting] the people's well-being and quality of life and real equality between the Portuguese, as well as the effective implementation of economic, social, cultural and environmental rights by means of the transformation and modernisation of economic and social structures" (Art. 9). Among rights protected under its Title II are job security, and under Title III, a very broad range of economic rights (including workers' rights such as the right to work, remuneration rights, equality and social dignity) as well as social and cultural rights.

103 Neither of these latter countries saw their respective bailouts challenged by reference to the social provisions of their respective Constitutions. See generally on this topic, Kilpatrick 2017, p. 284.

104 See further id. at 289 and see regarding the Court structures in Greece, the authors cited by her there.

105 In the former case, by reference to the rule of law and the principle of equality, in the case of Greece by reference to a panoply of constitutional provisions including those guaranteeing equal participation in public burdens, the right to property, and the principles of proportionality and respect for human dignity. (Id., 294.)

in a time of economic crisis have varied, some states using, for example a 'minimum core' approach, others focusing on proportionality, among other approaches.[106]

Constitutional challenges are also filtered through different policy assumptions. Baroncelli has highlighted that German economic policy has a stability-promoting culture which prioritises a long-term perspective, whereas Italy looks to more short-term solutions, emphasising liquidity. Correspondingly, and perhaps unsurprisingly, the German Constitutional Court has recognised prioritising long-term stability as a principle with constitutional force, whereas the Italian Court in contrast has balanced the aim of debt reduction with the need to avoid damage to the welfare state.[107]

In part because of such considerations, in practice even similar constitutional provisions have received very different interpretations in different jurisdictions.[108]

Nevertheless, there are also clear similarities to many of the issues faced, particularly in bailout states, with European- level assistance in coping with out-of-control sovereign debts being made conditional on austerity taking the form of cutbacks to working conditions and pay, social welfare, health and education as well as a deregulatory agenda regarding worker protections and collective bargaining.[109]

Notwithstanding different approaches, some lessons of varying levels of significance have emerged.

The first is that national rulings on Eurozone issues can be matters of deep national controversy within national legal systems. The archetypal demonstration of this is the ruling of the Estonian Supreme Court, the *Riigikohus*, on the compatibility of the ESM Treaty with the Estonian constitution,[110] an issue which was decided in favour of constitutionality only on the basis of a 10-9 split among the judges after a Court hearing which was of sufficient public interest to merit being televised nationally. An example of a different kind of controversy is provided by the Portuguese Constitutional Court's rulings condemning certain austerity measures designed to secure Portuguese compliance with the terms of that country's bailout, which attracted criticism of the severest kind in some subsequent national academic commentary.[111]

A second lesson is that such rulings can be the occasion of considerable development in national constitutional jurisprudence. This has been particularly true of the seven bailout states. Examples of this abound. The Irish Supreme Court ruling in *Pringle* involved a considerable advance on the approach of the Irish Courts to the sovereignty clause in the Irish Constitution. Valuable discussion and evolving thinking regarding the concept of sovereignty was also seen in the Estonian Supreme Court's ESM ruling. Evolution of another kind was seen in the approach of the *Bundesverfassungsgericht* concerning the Outright Monetary Transactions policy of the European Central Bank, which involved an arguably unwisely, tigerishly worded reference being followed by a more measured

106 See regarding these D. Landau, 'The Promise of a Minimum Core Approach: the Colombian Model for Judicial Review of Austerity Measures', Chapter 9 in A. Nolan (Ed.), *Economic and Social Rights after the Global Financial Crisis* (Cambridge University Press, Cambridge, 2014), 267 and X. Contiades and A. Fotiadou, 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation' (2012) 10 *International Journal of Constitutional Law* 660. See here and generally regarding the various approaches taken by national constitutional courts, Kilpatrick 2017, pp. 292-300.

107 S. Baroncelli, 'Long-term vs Short-Term Perspectives: Adaptation, Stability and the Roles of the Constitutional Courts in the Management of the Eurozone Crisis in Germany and Italy' (2018) 10 *Contemporary Italian Politics* 36 at 36. Of course, critical analysis of such rulings may suffer from its own assumptions – Kilpatrick has pointed out "the neo-liberal default assumptions underpinning much of the analysis of euro-crisis constitutional judgments". (Kilpatrick 2017, p. 292).

108 Id., instancing the approaches of Portugal and Greece.

109 The preference of EU states and institutions for austerity of this nature inspired Lütz and Kranke's humorous reference to 'the European rescue of the Washington consensus'. (See S. Lütz and M. Kranke, 'The European rescue of the Washington consensus? EU and IMF Lending to Central and Eastern European Countries' (2014) 21 *Review of International Political Economy* 310, cited in Kilpatrick 2017, p. 281.)

110 See Case 3-4-1-6-12, judgment of 12 July 2012.

111 See the literature cited by Kilpatrick, *supra,* n. 76 at 291.

response once the European Court of Justice had provided its preliminary ruling.[112]

Thirdly, even where a legal concept is nominally the same, the interpretation given to it by different national courts may be different. The demands of concepts like equality, sovereignty, proportionality and the various fundamental rights have been differently interpreted in different jurisdictions.[113]

Fourthly, in practice, by and large, national courts have tended to react well to budgetary rules (which by their nature tend to involve consequences which lie in the future and may still be in the realms of the theoretical by the time they reach the courts), but not so positively to bailouts and measures implementing them (which of course will tend to have had very immediate costs for individuals).

Fifthly, notwithstanding the similarity of issues raised before the national courts and the extent of commonalities (including a harsh context of austerity and often severe cutbacks in social welfare provision), there has been very little cross-referencing by national courts to the reasoning of courts of other jurisdictions. There have been some (limited) Eastern European exceptions to this: in adjudicating on the legality of pension cuts, the Romanian Constitutional Court referred to the German *Bundesverfassungsgericht*.[114] In other rulings concerning the Eurozone crisis, the same Court referred to the rulings of the Hungarian, Latvian, Czech and Lithuanian Constitutional Courts.[115] Curiously, however, such "transnational judicial communication",[116] involving reference to other national supreme courts, has only ever been a feature of Central European jurisprudence. Western European Courts in contrast had no regard for what had already happened in central European jurisdictions.[117] Two rather separate geographic zones of comparative constitutional influence (involving respectively, little such influence and none) have thus ensued within the Eurozone.[118]

Sixthly, the EU law context of these situations has been largely ignored in national courts – there has been an unexplained insularity on the part of national courts.[119] Very few preliminary references have been made.[120] This may seem surprising in the light of the long-established Court of Justice approach (seen in *Internationale Handelsgesellschaft* [121]) that even technical EU rules rank higher than the most elevated national constitutional norms – which might have been expected to release a flood of challenges (by reference to EU law norms) to technical EU bailout rules by national Courts called upon to prioritise the requirements of those norms over national constitutional provisions.[122] Yet this did not happen. It may have been significant that, as Kilpatrick has observed, that national bailout measures have never been "fully articulated in national constitutional challenges as either an implementation of EU law or as acts of EU institutions".[123] Nor has the "complex and variegated legal nature of the bailouts" [124] assisted the cause of recognition of their European aspect. Bailouts have had both a contractual aspect (seen in the existence of memoranda of understanding) and an international law

112 A case of a court *"wie ein Tiger gesprungen aber wie ein Bettvorleger gelandet,"* without, however, in this instance meaning to give tigers unmerited praise or criticise the entirely appropriate post-reference change of approach of the *Bundesverfassungsgericht*. See further n. 42 above.

113 See for some reflections in this regard, Kilpatrick 2017, pp. 296-300.

114 Decision 1533/2011.

115 See Kilpatrick 2017, pp. 318-319.

116 Id., 318.

117 Id., 319.

118 Id.

119 Thus Kilpatrick refers to "an insular response taken by every single constitutional review court in the EU faced with euro-crisis constitutional challenges". (Id., 317)

120 See Hinarejos 2015, p. 146, who points out that in most cases the national courts have adopted a purely national perspective and not made use of the Art. 267 TFEU procedure.

121 *Case C-11/70 Internationale Handelsgesellschaft mbH u. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.

122 See Kilpatrick 2017, pp. 311-312.

123 Id., 314-315, citing in particular the examples of Portugal and Latvia.

124 Id., 316.

aspect (including a role for the International Monetary Fund). In the light of this, it is perhaps unsurprising that they have not been seen as classical EU measures, even if most bailouts have contained strong EU elements.[125]

This refusal to acknowledge an EU law aspect to these cases may sometimes indicate a lack of grasp of EU law on the part of national courts.[126] An alternative interpretation, however, is that it reflects a broad wish shared among national constitutional courts to keep EU Courts from adjudicating on what amounts to an EU-wide social constitutional crisis.[127] Hinarejos has argued, for example, that the Greek Council of State "explicitly sought to 'sever' a possible link to EU law by labelling memoranda of understanding as declaratory political plans, rather than legally binding instruments.[128] It is noticeable, however, that in those few Article 267 references which were made (from Romania and Portugal), the Court of Justice itself held that it had no jurisidiction to hear the case,[129] finding there to be no link between EU law and reforms pursued by national governments. It is worth observing in passing that it is not clear that the drafters of bailouts have ever been that interested in having the European Court of Justice - or indeed any court - adjudicate upon them.

Seventhly, although use has been made of international human rights norms, there has been very little invocation of international norms specifically focused on social rights such as International Labour Organization norms or the text of the European Social Charter.[130]

Eighthly, and perhaps depressingly, for better or for worse national courts have for the most part stood aside in the face of an economic onslaught. In the face of economic arms, the law has been largely silent.[131] Although there have been occasional significant individual judicial interventions, the role of the Courts at national level has generally been limited.[132] This has a negative side in that it exposes weakness in protecting the most vulnerable. It may be argued to have a positive side, in that it leaves the economic decision-making to democratically-elected and indeed more expert branches of government - although the uncomfortable reality is that a variety of means were used to short-circuit normal parliamentary procedures and debates during the crisis, often effectively preventing the legislature from providing effective opposition to bailout terms set by international lenders.[133] One way or another, what may be said is that what could be construed as so-called juristocracy *i.e.*, an excessive degree of judicial activism was largely avoided during the Eurozone crisis. What occurred instead were a series of dialogues. National courts effectively engaged in an indirect dialogue with troikas,[134] and, less indirectly, with national governments and legislatures [135] (with Portugal illustrating this most graphically with what amounted to a multi-level dialogue with both). Occasionally, national constitutional court case-law put some limits on the freedom of national executives and legislatures and, more indirectly, troikas of international institutions to manoeuvre freely as they chose in response to the economic crisis. Hence Fabbrini has

125 C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 *OJLS* 325 at 333 to 334, where she observes that the initial (non-Eurozone) bailouts of Hungary, Latvia and Romania were based on EU law (more specifically on Art. 143 TFEU, which permits the grant of mutual assistance to assist non-Eurozone states with balance of payments difficulties). The bailouts of Ireland and Portugal (both Eurozone states) were based in part on EU law, while the bailouts of Greece and Cyprus (also Eurozone states) were based on international agreements made by the Eurozone states.

126 Kilpatrick 2017, p. 316.

127 Id., 316-7.

128 Hinarejos 2015, p. 146, referring to Decision of the Greek Council of State, Full Chambers, 668/2012 [28].

129 Id., 133 *et seq.*.

130 See further Kilpatrick 2017, p. 319.

131 Cf 'Pro Tito Annio Milone ad iudicem oratio' ('Pro Milone'), speech delivered by M. Cicero in 52 BC.

132 Kilpatrick 2017, pp. 325-6.

133 Id., 310 and see generally Beukers *et al, supra,* Part II (chapters 6-9).

134 Kilpatrick 2017, pp. 307-8.

135 Id., 305-6.

described the Portuguese Constitutional Court as having signalled "that the future of at least one of the central features of the legal responses to the Euro-crisis, that concerning the economic adjustment measures that debtor countries shall adopt as a condition to obtain financial support, may be standing on shaky ground".[136]

More often than not, the impact of such dialogue has been quite limited, however. (Furthermore, the drastic reforms effected by the Hungarian government to the role of the Courts in that jurisdiction in particular showed that the dialogue between courts and executives can be far from one between equals. In that country, admittedly an extreme case, the Government's reaction led to particularly dire implications for the national constitutional court itself.[137])

Ironically, speaking generally, one of the most prominent features of judicial approach to the Eurozone at both national and supranational level, has been to stand aside to let the other branches of Government or governance forge ahead, in particular in the search for solutions to the sovereign debt and banking crises that ravaged the continent in recent years.[138] Such multi-level forbearance has been greeted by some with mixed feelings. Hinarejos has described the degree of restraint shown by EU and national courts as "both problematic and hardly surprising."[139] Yet it also seems justifiable to feel at least some appreciation for judicial decisions that avoided interpretations of the law so strict that international organisations, states and institutions (both supranational and national) alike would have found it impossible to save Europe's Economic and Monetary Union.

136 Fabbrini 2014, p. 103.

137 See further Kilpatrick 2017, pp. 320 *et seq.*.

138 This approach has parallels: comparison can be drawn with the position of the US Courts here. As Fabbrini observes, "although the United States is endowed with one of the most powerful and pervasive systems of judicial review worldwide, since at least the 1930s courts have widely deferred to the political branches in the economic domain, on the understanding that the political process is better placed than the judicial one to answer fun damental budgetary, financial, and economic questions." (Fabbrini 2014, p. 120.)

139 Hinarejos 2015 p. 121.

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