

## *New Forms of Government Induced by Crisis Management*

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**T**HE EURO WAS introduced during the so-called ‘Great Moderation’, a time when there was continual economic growth on both sides of the Atlantic and no inflationary stress.<sup>1</sup> Then, suddenly, the financial crisis struck in 2008, and the European Union opted for austerity.<sup>2</sup> This decision implied a constitutional experiment: for the first time, democratic institutions became accustomed to making decisions that led directly to a net impoverishment of the population. The classic recipes were left behind, some because they were legally impossible such as devaluation of the currency; others, such as an increase in spending, were politically unfeasible.

It is true that austerity was by no means something new: it had been used in Latin America since the 1990s. Nonetheless, in this case, there were some elements that indicated a qualitative change. First, it was implemented as a generalised solution, a rule applicable to all states that shared the euro and had liquidity and solvency problems. Second, it went undisputed; although there was heated academic and political debate through which alternatives were proposed, these responses never came close to truly influencing decision-making. Third, austerity directly affected the organisation of the welfare state, which had been a distinctive feature of European constitutional democracy up to that point.

This qualitative leap can be seen as the definitive step towards establishing a neoliberal ideology.<sup>3</sup> The response to the coronavirus crisis, however, allows for nuances. Without a doubt, it has reined in the all-encompassing influence of austerity policies, at least in the short term. Within this context, this chapter intends to analyse the consequences of the handling of the financial crisis – and, in part, the pandemic crisis – for the European Union’s system of government.

This chapter’s premise is that the Union’s system of government has been structured, since its beginnings, upon the principles of technical independence

<sup>1</sup>Bernanke 2012.

<sup>2</sup>See generally Fitoussi and Saraceno 2013: 479; but Peers 2012: 404.

<sup>3</sup>I use the concept ‘neoliberal’ as a historical category; see Ther 2016: 60ff.

and national democracy, which are backed by clear constitutional theories. A third principal was added later – that of supranational democracy – which also possessed a clear constitutional foundation. These three principles are geared towards neutralising conflict within EU territory.

On the whole, the European Union aims to avoid scenarios in which minorities and majorities emerge so that one or more states do not feel that their interests are not being addressed. However, the 2008 crisis broke with that rationale. The conflict had an impact on the Union's policy on defining measures to palliate the crisis. In order to articulate austerity policies, it was necessary to previously redefine the conflict, which was not presented in the Union as a clash between capital and labour, but as a divide between austere and spendthrift states. This reconfiguration of the conflict included two relevant nuances. On the one hand, it nationalised the conflict, defining it as a clash between states. On the other hand, it depoliticised it, giving it a moral nature intrinsic in the rhetoric of austere and spendthrift states.

This chapter deals with the mode of conflict framing and conflict resolution in the European Union and through its institutions. Thus the research question addressed is how these modes have changed during the both financial and the COVID-19 crisis and whether the institutional structure of the Union has proved to be crisis resistant or not.

#### TECHNICAL INDEPENDENCE

It should never be forgotten that in the 1950s the European project aspired to open a path towards political integration by means of a European Political Community and a European Defence Community.<sup>4</sup> Their failure significantly modulated the ambition of the European Economic Community, leaving it devoid of a political profile. Therefore, the original Treaty of Rome (1957) was mainly dedicated to economic freedoms and the rules guaranteeing free competition among companies. In summary, the Treaty of Rome simply created a legal order for the market, ie the rules defining the scope of activity for economic stakeholders.

The design of the institutions responsible for ensuring the correct functioning of the market was a response to the need to shape a legal framework that would provide security for those operating within it. This is why, since that time, there have been two institutions that have stood out: the Court of Justice of the European Union (CJEU) and the European Commission, both which are defined by their technical independence. The former is well known; in order to ensure economic fundamental freedoms, which soon took shape as subjective rights, it was decided to establish a court in the classical sense, made up of independent judges who would take decisions in accordance with law following a regulated

<sup>4</sup>See generally Griffiths and Milward 1999.

procedure.<sup>5</sup> The latter was established to enforce the obligations of the Treaties, mainly to tackle collusion, and was composed of technically qualified, independent experts.<sup>6</sup> Nevertheless, given the complexity of its tasks, the Commission was given a collegial character and a structure typical of an administrative body with the capacity for advocacy and management, adopting its decisions by means of administrative procedure, within a broader context, one that extended beyond the purely judicial to take into account elements of political opportunity.

The aspiration was to create an internal market by implementing rules, a mission believed to be apolitical in nature. Hence, the decision to create such a market was and continues to be upheld by clear constitutional theory, initially driven by so-called ordoliberalism and later by ‘constitutional economy’.<sup>7</sup> In essence, this theory was intended to keep certain economic decisions outside the usual political circuit. It was understood that parliamentary politics, affected by electoral cycles, impedes the best technical decisions from being taken and maintained over time, and thus fails to provide a secure framework for economic stakeholders, who are presumed to be rational. Only with clear rules, if possible at the highest regulatory level, applied by independent, technically competent institutions, will a market be able to function adequately.

### **New Technically Independent Paths in the Context of Austerity**

The economic crisis broadened the field of technical independence, placing the ECB centre stage. To understand the function of the ECB, let us remember the words of Mario Draghi: ‘Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.’<sup>8</sup> These words, spoken in September 2012 at the peak of the financial crisis, are a symbol of the preponderant role that the ECB assumed at that time, a position it has continued to occupy throughout the coronavirus crisis. There is no turning back now. Even if the new ECB president, Christine Lagarde, initially showed her doubts about this new role at the beginning of the COVID-19 crisis – ‘We are not here to close spreads; this is not the function or the mission of the ECB’<sup>9</sup> – the ECB has ultimately consolidated its new political role.

Let us recall that the ECB under Draghi’s presidency set in motion a series of ‘non-standard’ measures geared towards sustaining the financial markets, with the hope that they would recover their natural function of providing liquidity. This gave way to measures aimed at providing limitless liquidity for credit entities such as refinancing activities in the short, medium and long term.<sup>10</sup>

<sup>5</sup> Weiler 1999: 341ff; Somek 2010: 330.

<sup>6</sup> Hambloch 2011: 248.

<sup>7</sup> Downs 1957; Buchanan and Tullock 1962; Posner 1974: 344; Boettke, Coyne and Leeson 2007.

<sup>8</sup> Draghi 2012.

<sup>9</sup> Lagarde 2020.

<sup>10</sup> ECB 2010, 2011.

The impact of the banking crisis on liquidity and public solvency in some Member States brought about the ‘outright monetary transactions’ plan – the true *raison d’être* behind Draghi’s words – intended for the unlimited purchase of public debt in secondary markets.<sup>11</sup> This transaction has been repeated during the coronavirus crisis and has been seen as a fundamental tool for containing instability in states subjected to liquidity and solvency stresses.<sup>12</sup>

From a broader point of view, this kind of action by the ECB reformulates its constitutional stance and opens up a deep reflection about the political nature of the Union. Should the ECB restrict itself to its main task of ‘maintaining price stability’ (Article 127(1)) or explore the possibilities provided in the same Article 127(1) when it indicates that it ‘shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the TEU’? If the latter path is taken, how would the restrictions stipulated in Article 123 TFEU, which prohibits ‘overdraft facilities or any other type of credit facility’, be lifted and, above all, with what legitimacy could such a task be taken on?

It is true that the ECB has honed its measures so as not to clash head-on with the Treaties. (In fact, these measures have been accepted by the CJEU<sup>13</sup> and even by the German Constitutional Court at the first instance.<sup>14</sup>) The essential fact is that it operates in secondary markets, without purchasing debt directly from Member States. Coupled with this, we find that the purchase is made with unprivileged bonds and thus in parity with payment received from any other debtor. It should never provoke inflation. And finally, they are strictly conditioned purchases in that they are tied to requirements imposed by the Member State in question for aid from the European Stability Mechanism (ESM).

However, these ‘outright monetary transactions’ have levelled a crucial blow to one of the constitutional-political theory models that seemed to underlie the Treaties. Articles 121–127 TFEU have often been understood to be the base of a system in which the Member States are exclusively responsible for their economic policy, and it is the market that controls the performance of that policy, setting the price for financing. In its allegations in the *Gauweiler* case, the ECB distanced itself from this model and defined its action as a response to failures of the market insofar as they do not allow for the channels through which the ECB sets interest rates to work normally.<sup>15</sup> To sum up, in the context of the common currency, the asymmetries brought about by the financial markets – prioritising the financing of some states over others – are an anomaly that must be corrected by public power.

<sup>11</sup> ECB 2012b.

<sup>12</sup> ECB 2020.

<sup>13</sup> CJEU, Judgment of 16 June 2015, C-62/14 *Gauweiler and others*, ECLI:EU:C:2015:400.

<sup>14</sup> German Constitutional Court, Judgment of the Second Senate of 14 January 2014, 2 BvR 2728/13.

<sup>15</sup> Advocate-General Pedro Cruz Villalón’s Conclusions of 14 January 2015, C-62/14 *Gauweiler and others*, ECLI:EU:C:2015:7, para 104.

Given this theoretical context, it is interesting that the ECB fills the political void created by the European Union's other institutions. It is a void that, in my opinion, is due to the difficulties in drawing up what could have been an alternative to the activity of the ECB: a regulatory framework, developed within the Union's ordinary procedures, for issuing EU public debt, or at least mutualised debt.<sup>16</sup> That is why when, during the coronavirus crisis, it was decided that a public debt plan was to be designed, it was logical for the ECB to take up a secondary political role.<sup>17</sup> After bursting into the financial crisis – regardless of how moderate it has been in the economic context of the pandemic – the ECB has undoubtedly reinforced its constitutional and political place within the Union. This opens up an unavoidable, parallel reflection regarding control over its activity and political legitimacy.

It is inherently contradictory for an institution characterised by its technical independence to have its activities subjected to political control by other institutions. Political control is characterised by an evaluation being made based on the criterion of opportunity. It is about assessing whether the institution that has taken the decision has done so at the right time and on grounds deemed appropriate by the electorate. However, we have seen that central banks in general, and the ECB in particular, are not involved in the ordinary chain of political responsibility, which begins and ends with elections. This situation took hold with regard to price stability from the moment it was assumed that the ECB's powers were clearly delimited as to the goal to be reached and the powers granted to reach them. Doubts grow, however, when the ECB's activity goes beyond ordinary measures, and it begins to take decisions with clear political repercussions, such as redistribution.

Something similar occurs with legal control over the ECB. What can a court have to say about an eminently technical decision? In principle, only prudent control is admissible to detect whether the decision is arbitrary or has gone beyond the powers attributed to the ECB by law. Difficulty with such control is visible in the concurrent judgments by the CJEU and the German Constitutional Court, which essentially debate the intensity of possible legal control.<sup>18</sup> However, in light of the examination by the German Constitutional Court, the difficulty in exercising this control is seen as of the moment that its consequences do not simply lead to a limitation of the ECB's power but to a constitutional crisis for the Union insofar as one of its Member States questions the effectiveness of EU law.

Even so, the strengthening of the ECB does not end at an extension of its functions in crisis situations. The 2008 financial crisis consolidated the ECB's

<sup>16</sup> Hinarejos 2013: 1633.

<sup>17</sup> European Council 2020.

<sup>18</sup> CJEU, Judgment of 11 December 2018, C-493/17 *Weiss and others*, ECLI:EU:C:2018:1000, paras 30ff; German Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, paras 1–237.

supervisory function over banks to the extent that today most credit entities fall under its responsibility. In my opinion, this new task erodes the EU's constitutional rationale. Let us recall that paragraph 1 of Article 291 of the TFEU is still deemed to have reserved the execution of EU law to Member States.<sup>19</sup> This corresponds with the narrow scope of the Union's exclusive competences, whose exercise, in practice, ends up being designed cooperatively with Member States, as can be seen in the areas of EU customs and antitrust law.

That reserve for execution has important constitutional significance, because the last stretch of the legal process – precisely where public power is defined as regards citizens – is left to Member States. In addition to the difficulty in setting up an administration for the Union from scratch, it seems preferable to rely on the long tradition of state administration, which has, for some time, been based on the premise of democratic legitimacy. Nevertheless, the ECB's supervision over banks involves direct relationships with private persons. It is true that banks are not individuals, but what is relevant in this matter is that the growth in the ECB's powers has been accompanied by an administrative-political position of supremacy, casting aside the traditional method of cooperation with state administrations, although these are ultimately the bodies that will have to implement EU Law.

#### NATIONAL DEMOCRACY

National democracy is upheld by solid constitutional theory.<sup>20</sup> The most meticulous expression of this theory can be found in the German Federal Constitutional Court.<sup>21</sup> The fundamental premise is a classic democratic formula: the people legitimise power, and all power must be bound to the people, mainly by electing the bodies that exercise such power. However, what characterises this idea is that the concept 'people' is not defined as a sociological-historical process that is transformed over time, but as a timeless concept characterised by objective data such as language, history and culture. At the same time, this concept of 'people' conditions the concepts of 'the state' and 'the constitution.' The state exists to guarantee the continuity of the people. The constitution, which provides the state's legal system, must include the particularities of that people if it is to be workable.

Since its beginnings, the process of European integration has provided clear proof of the limitations of the principle of national democracy. There are problems such as defence, environmental protection and energy production that are not amenable to an easy unilateral response from each Member State. The European

<sup>19</sup> Schütze 2010: 1398; Stelkens 2011: 538.

<sup>20</sup> See especially Kirchhof 1994 and 1995; Isensee 1994; Pernice 1995.

<sup>21</sup> German Constitutional Court, Judgment of the Second Senate of 5 May 2020, 2 BvR 859/15, Rn 98ff.

Communities and later the European Union intended to embody responses to those problems through a system of multilateral cooperation. However, this intention never prevented national democracy from playing a central role in the process of integration, establishing it and delimiting the Union's competencies. Furthermore, although its work in the ordinary running of the Union has gradually waned, national democracy retains its central place via the procedures for reform, the special legislative procedure and other decision-making procedures that one way or another ultimately retain each Member State's right to veto. In the context of a study on austerity, it is enough to recall that both the decision on the Union's own resources (Article 311 TFEU) and the Multiannual Financial Framework (Article 312 TFEU) require the unanimity of all Member States.

From the beginning of the integration process, national democracy created a dynamic that has led certain phenomena to increase nationally, thereby altering the classic idea of parliamentary democracy. Firstly, there was the bolstering of governments to the detriment of parliaments insofar as the former were responsible for negotiation in Europe, which occasionally enabled decisions to be taken without facing the difficulties inherent in parliamentary restrictions. It has also entailed more legal limitations on national parliaments. It was no longer enough to observe the constitution; now a great number of European rules had to be taken into account, rules to which state law had to conform, despite the fact that its own law continued to be produced in its national parliament.

### **New Paths for Intergovernmentalism in the Context of Austerity**

Prior to the 2008 economic crisis, the principle of national democracy seemed to be in decline; although retaining certain decisions, it had been clearly surpassed by supranational democracy, as we shall study below. However, in the response of the last decade and the first steps taken in the coronavirus crisis, the principle of national democracy has again occupied a central role, whether through the European Council or by articulating one-off phenomena outside the Union such as the ESM. This strengthening of national democracy in the context of austerity has had some relevant variations.

The option for articulating decisions via consensus among Member States' governments implies sidelining other political ways of responding to the challenge of the economic crisis. For example, a possible response based on the rules of the market was discarded, which would have left each Member State to find its own funding. Dispensing with this solution indicates, at least, a minimum level of cooperation between eurozone states when it is understood that a state's lack of solvency or liquidity may lead to a systemic problem for the common currency. However, solidarity-based cooperation was also cast aside, which would have made it possible to create a response via non-results-based redistributive mechanisms, which do not treat citizens as mere nationals of another Member State but as part of a higher political unity that protects them. Even so,

solutions created to tackle the economic consequences of the coronavirus have taken steps in this direction through unconditional transfers and the issuing of common public debt.<sup>22</sup>

The strengthening of the principle of national democracy has revitalised a way of taking decisions characterised by a lack of formalism, very similar to the practice of diplomatic politics. It is difficult to know what happens during European Council meetings, but it is obvious that Council decisions and meetings are preceded by lengthy preparatory work whose details are largely not known by the general public. Unlike parliamentary democracy, discretion is essential for reaching consensus, but the price to be paid is a lack of transparency and control.

National democracy opens up the possibility for a Member State to veto the decision of EU institutions. This has been seen periodically in the successive Treaty reforms when some states have threatened to block an agreement. In the case of the 2008 economic crisis and the debates surrounding the economic response to the coronavirus, the possibility of a veto intensified the situation due to the fact that the underlying political problem – the transfer of some states' wealth to others – virulently agitated the twofold internal/external vector that dominates decision-making in national democracy; those governing are aware of the political consequences of transferring funds from the state and must take the decision, or at least argue for it, in terms that convince their national electorate. This interplay of national and supranational democracy is a primordial characteristic of the European political process, since the national leader takes decisions for the whole of the Union jointly with other national leaders, but their justification must be understandable for each leader's national electorate separately, the only body they are politically responsible to.

Discretion in negotiating and the possibility of a veto have historically been the instruments that have rechannelled national democracy towards consensus, and the need for that consensus reflects the substantial difference between national and European political processes. Whereas national politics in most countries typically involve a conflict between the majority and the minority – amongst political parties – in European integration the intention has always been to shy away from a conflict-led politics and majority rule. This necessity was and is an existential one insofar as a purely majoritarian decision would not only cast away ideological groups of less political clout, but also entire states.

Stemming from the 2008 economic crisis, national democratic practice seems to have introduced some variables intended to reformulate its rationale. The first is related to the clear influence of Germany in political leadership. It does not seem possible today that economic decisions can be taken without being given the go-ahead by Germany. The second variable reflects a scenario of winners and losers that was unseen before 2008 in Europe. Furthermore, it is a scenario that is formulated in moral terms by which the Member States that comply with the

<sup>22</sup>European Council 2020, Conclusions, A3, A15.



economic rules are dignified as austere states, whereas the Member States with problems reflect their tendency towards overspending. Journalist rhetoric about the economic management of the coronavirus crisis has drawn dividing lines, once again using morally infused expressions such as reference to ‘frugal states’.

Beyond this rhetoric, what we can see is that the principle of national democracy no longer seems to comply with its primordial function in the EU polity of guaranteeing a consensus-based decision that optimises the interests in play and minimises the possibilities of conflict. In my view, this breakdown of such a basic function of national democracy (guaranteeing consensus) in the Union is due to the solution provided to the 2008 crisis by the ESM. The decision to abandon EU law to find a way out of the euro crisis involved introducing the rationale of private law organisations whose principal characteristic is that decision-making power is linked to the capital contributed. Article 4(7) of the ESM Treaty is a clear example of this intention to reformulate the way of articulating problems that affect general interests. This premise puts Germany at the heart of political leadership as the biggest contributor. Hence, the principle of national democracy has been at least partially changed by allocating/recognising more decision-making power to Member States with greater spending power. European integration thus distances itself from the idea of a shared funding system that generates common income and spending and whose source and destination must be determined via a political process with the typical characteristics of the democratic model.

It is precisely this option in favour of private law solutions that leads to a unique democratic paradox within the European Union. Let us take the example of Germany as a Member State that has made a net contribution to financing aid for states suffering from crises of solvency and liquidity. Such aid presents a democratic problem: to what extent should the Germans contribute their wealth to sustain other countries over which they do not have effective political control? In a way, this poses a contemporary version of the classic claim of ‘no taxation without representation’. The way out of this issue has been to place conditions on the aid: the money will only be released if the state receiving it complies with certain requirements. This is a democratic problem that also has a strictly constitutional side based on the idea that a transfer of credit must have a legal restriction,<sup>23</sup> thereby preventing the European Union from evolving towards a federal-style model in which the German Parliament would lose control over the aid or assume such conditions that it would end up limiting its future decisions.

The democratic paradox can also be seen from the side of the Member States receiving the aid. Greece provides the best example. Although in a referendum its electorate initially rejected the conditions imposed by the aid, when faced with the evident risk of collapse, the country ended up becoming wholly subordinate to a memorandum that forced upon it a plan to reduce welfare spending

<sup>23</sup> German Constitutional Court, Judgment of the Second Senate of 14 January 2014, 2 BvR 2728/13, Rn 51.

and increase income via taxes. To sum up, despite Greece's internal decisions – as with other Member States that have received aid – it was forced into a series of reforms that were sometimes not even discussed by its own parliament.

#### SUPRANATIONAL DEMOCRACY

Until 1986, it was thought that a suitable mix between intergovernmentalism and technocracy would be enough to achieve the gradual integration of markets. Political matters – defining civil rights, redistributing wealth, establishing the welfare state, an educational model, the organisation of healthcare, etc – were reserved for the states' regulatory processes, where ideological conflicts would appear.<sup>24</sup> By contrast, in order to survive, the European Communities adopted a low profile, politically speaking. The Schuman Declaration of 9 May 1950 forewarned of this stance: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity.'

The first cracks in intergovernmentalism in the construction of the internal market appeared after overcoming the operational pitfalls of a decision-making system based on unanimity. The continual risk of a veto in the worst of cases prevents laws from being adopted. During the process of European integration, it was assumed that the model of unanimity put the construction of an internal market at risk and that only the Single European Act, introducing the principle of a qualified majority to the Council, managed to open up paths to consolidate the internal market.<sup>25</sup>

More than thirty years later, supranational democracy, as an ordinary mechanism in decision-making, has taken root in ordinary EU politics. The Treaties define it in static and dynamic terms. In static terms, Article 10 TEU states that 'the functioning of the Union shall be founded on representative democracy' – not parliamentary democracy – which according to said provision, consists of attributing the representation of a specific interest to each body: the Parliament represents citizens; the European Council and the Council represent Member States. From a dynamic point of view, supranational democracy is expressed via the ordinary legislative process, which involves 'the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission' (Article 289 TFEU), to be identified as a legislative act.

A priori, supranational democracy is clearly backed by constitutional theory, which refers precisely to the idea of strengthening the Union's democratic functioning by bolstering the Parliament as well as gaining further efficiency by establishing a qualified majority as the rule for decisions in the Council. In my opinion, however, this is a rather simplistic explanation that dispenses with three

<sup>24</sup> Joerges and Rödl 2009: 8; Schmidt 2009: 21.

<sup>25</sup> Weiler 1999: 39ff.

very important variables.<sup>26</sup> The first is in relation to the constitutional stance of the Commission, which is a peculiar body that does not fit into classic democratic theories despite its relevant place in the integration process. The second is the separation between supranational democracy and elections. The most recent elections to the European Parliament are a good example in that none of the three candidates for president managed to be sworn into office. The third variable lies in the design of the legislative process, which is once again geared towards reaching consensus within and between EU institutions and neutralising the risks of conflict.

With this situation, it makes sense to adopt a moderate position that subordinates the fundamentals of supranational democracy to a central priority or objective of achieving institutional balance.<sup>27</sup> This balance would apply to the classic system of legal sources for the Union (regulations, directives and decisions), which is a model whose *raison d'être* can be found in the balance between the centre and the periphery; each source's legal regime helps define the space for interaction between the Union and a Member State.

### **New Paths for Supranational Democracy in the Context of Austerity**

Economic policy was one of the fields that had not been strictly supranationalised. Since the Maastricht Treaty, the idea has been that the Member States conserve full autonomy over income and spending; in other words, full autonomy over the political management of their economy. In return, Member States could not resort to financial support from the European Union, one of the great differences with federal states. From the beginning there were doubts about the workability of a model in which the Union exclusively controlled monetary policy while economic policy beyond public debt and deficit was in the hands of Member States.<sup>28</sup> This is why one of the new measures used in response to the 2008 economic crisis was the so-called European Semester, a mechanism for supervising Member States' economic policy which has had clear consequences for supranational democracy.<sup>29</sup>

Supranational democracy, as specifically expressed in the legislative procedure, exists to give political legitimacy to the sources of EU law (or to EU legal acts), especially regulations and directives. Yet, the European Semester implies a substantial change in that it introduces a *sui generis* procedure that does not produce regulations and which we could classify as one of control or supervision, a concept intended to combine its legal and political dimensions.

<sup>26</sup> See generally Tsebelis and Garret 2000: 9; Bellamy 2006; Joerges and Neyer 2006.

<sup>27</sup> Lenaerts and Desomer 2005; Liisberg 2006: 43.

<sup>28</sup> Vines 2016.

<sup>29</sup> Verdun and Zeitlin 2018; Adamski 2012: 1336.

The legal elements are undeniable. Since the entry into force of the Maastricht Treaty, the European Union's economic stability has been built upon two pillars: public deficit and debt. Precise and measurable criteria have been set out in the Treaties in this regard (Article 140 TFEU and Protocol 13). Any state that does not comply with those criteria commits an infringement. Furthermore, such failure to comply ultimately leads to the precise consequence of a fine. However, this is not only a legal procedure, since supervision over Member States' economic performance involves political decisions: an annual prospective study of growth, a report on the macroeconomic evolution of each Member State, recommendations on economic policy and political guidelines. Thus, regulatory and political criteria intertwine to reach objectives, allowing each Member State some room for action.

Even so, Member States' discretionary powers in economic policy have clearly been reduced, especially for states that do not manage to meet the regulatory criteria. The European Semester creates a new political relationship and includes a management capacity for the Union over the Member States. This capacity is not, however, articulated via a system of sources, which would be the usual mechanism to materialise the political hierarchy. Rather, it occurs via a series of procedures that create a kind of discursive relationship (control/reaction) between EU institutions and Member States.

This form of discursive political management has had an additional consequence for the political dynamics of Member States that have received aid through the ESM, through which some of their key political institutions have lost relevance. One paradigmatic example is in the case of Italy. Although we do not know exactly what happened in the events that led to the downfall of Berlusconi as prime minister and the subsequent proposal of Mario Monti as his substitute by the President of the Republic, it is assumed that pressure from European leaders played a part. The fact that Mario Monti had been Commissioner for Competition pointed to a supranational influence over such an essential political decision as the replacement of a premier, and it is no less significant that this replacement occurred *de facto*, outside the typical mechanisms for handling crises of governability such as a motion of no-confidence or a call for elections.

The Spanish case is also illustrative. In the rationale of a parliamentary system, the approval of the budget is the most important political moment of each year. The economic path that the government wishes to follow becomes clear, as well as the parliamentary support it can count on. Constitutional tradition assumes that a government that is not able to approve its budget is a weak government, which will surely end up calling for new elections. However, since the European Semester was introduced, the Stability Plan and the National Programme of Reforms have marked a commitment by the Spanish state to the European Union that reduces the room for government action to a minimum. This takes the political sense out of parliamentary debate and the approval of the budget. Debate becomes packed with rhetoric since the government's action is predetermined before the budget is even approved.

## CONCLUSION

All crises of an economic nature or with economic consequences involve an inherent social conflict arising from one simple question: who is going to cover the costs of the crisis? In responding to this question, the concept of austerity has reignited the age-old conflict between capital and labour, which seemed to be settled. Austerity policies have committed to achieving economic recovery – in terms of both financing and profits – for businesses. To do so, job market reforms have been promoted in an attempt to reduce labour costs while, at the same time, cutbacks in public spending have been ordered, aimed at putting public funding in order.

From the point of view of this chapter, which focuses on the EU's system of government, it could be said that our first significant conclusion is that the structural principles of this system of government have remained intact. Technical independence, national democracy and supranational democracy have maintained their usefulness in managing the financial crisis and defining austerity policies. Nevertheless, it is obvious that some rebalancing has taken place. National democracy – and thereby the influence of Member State governments – has experienced a significant reinforcement just when it seemed that it was heading for a minor role. That said, there is no doubt that there is now a different national democracy in which some states have more *de facto* power than others. Moreover, national democracy has been reinforced with *ad hoc* solutions outside the European Union's system of ordinary government, creating *sui generis* international mechanisms (such as the ESM) governed by property law instead of by political mechanisms.

As austerity policies have been managed by national governments, the ECB has generated an institutional counterbalance fostering measures for redistribution. Nonetheless, unlike the rekindled influence of national governments, the ECB has created its political space within the Treaties, forcing their interpretation as much as possible without creating a unique and separate legal regime.

Throughout this chapter an attempt has been made to show that the different decision-making processes within the European Union are geared towards neutralising conflict. The Union aims to avoid a scenario in which there are minorities and majorities so that one or more Member States do not feel that their interests are not being addressed. However, the 2008 crisis broke with this rationale. This conflict had an impact on the Union's policy on defining measures to palliate the crisis. In order to articulate austerity policies, it was necessary first to redefine the conflict, which was not presented as a clash between capital and labour, but as a divide between austere and spendthrift states. This reconfiguration of the conflict included two relevant nuances. On the one hand, it nationalised the conflict by defining it as a clash between states. On the other, it depoliticised it, giving it a moral nature intrinsic in the rhetoric of austere and spendthrift states.

As to institutions, it can be concluded that a response to the EU austerity policies has only been articulated, as we have seen, by the ECB. This institution has

at least offered an alternative vision that broke with the dichotomy of austere/spendthrift states, pointing out that difficulties arose directly from the asymmetries generated by the common currency and could not be attributed to the specific performance of one Member State or another. It is striking, therefore, that there has really not been an alternative policy capable of being implemented by other institutions. What is more, it could be said that the strongest institutional alternative has been the one proposed by the German Constitutional Court, which was not aimed at softening austerity, but at legally bolstering it.

This lack of an institutional response – compared to the growing popular alienation from the European project – obviously reflects a crisis of legitimacy. Even so, I do not believe that it is strictly a crisis of *democratic* legitimacy in the sense that the Union is taking decisions against the majority or outside democratic procedures. It is a deeper crisis that questions the very usefulness of the Union as regards its capacity to solve problems that had traditionally been considered to be of a supranational nature. This poses a far-reaching problem, because the European Union has always been explained largely by its functional legitimacy and what it manages to do. This crisis of functional legitimacy partially explains why the populist parties on the left and the right share a critical view of the Union and propose, at least in general terms, a return to the state as a reaction to the difficulties arising from globalisation and specifically from the Union.

The politics of austerity have given rise to doubts about the very usefulness of the European Union. This situation is two-sided: there are voices calling for ‘more Europe’ as a way out of this existential crisis, while other stances propose a return to the state. In any case, the response to the coronavirus crisis shows the EU institutions’ ability to learn. First, with only the exception of the German Constitutional Court, the ECB’s intervention in purchasing public debt in secondary markets is now widely accepted as an unquestionable tool. This has meant that the hardest-hit Member States have not had to suffer high interest rates. Second, institutions have been able to generate a quick response, significantly modulating the dogma of austerity and generating liquidity without imposing conditions throughout the entire response.

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