

Luca Lionello

The Pursuit of Stability of the Euro Area as a Whole

The Reform of the European Economic
Union and Perspectives of Fiscal
Integration

Studies in European Economic Law and Regulation

Volume 18

Series Editors

Kai Purnhagen

Law and Governance Group, Wageningen University
Wageningen, The Netherlands

Josephine van Zeben

Worcester College, University of Oxford
Oxford, United Kingdom

Editorial Board Members

Alberto Alemanno, HEC Paris, Paris, France

Mads Andenaes, University of Oslo, Oslo, Norway

Stefania Baroncelli, University of Bozen, Bozen, Italy

Franziska Boehm, Karlsruhe Institute of Technology, Karlsruhe, Germany

Anu Bradford, Columbia Law School, New York, USA

Jan Dalhuisen, King's College London, London, UK

Michael Faure, Maastricht University, Maastricht, The Netherlands

Jens-Uwe Franck, Mannheim University, Mannheim, Germany

Geneviève Helleringer, University of Oxford, Oxford, UK

Christopher Hodges, University of Oxford, Oxford, UK

Lars Hornuf, University of Bremen, Bremen, Germany

Moritz Jesse, Leiden University, Leiden, The Netherlands

Marco Loos, University of Amsterdam, Amsterdam, The Netherlands

Petros Mavroidis, Columbia Law School, New York, USA

Hans Micklitz, European University Institute, Florence, Italy

Giorgio Monti, European University Institute, Florence, Italy

Florian Möslin, Philipps-University of Marburg, Marburg, Germany

Dennis Patterson, Rutgers University, Camden, USA

Wolf-Georg Ringe, University of Hamburg, Hamburg, Germany

Jules Stuyck, Katholieke Universiteit Leuven, Leuven, Belgium

Bart van Vooren, University of Copenhagen, Copenhagen, Denmark

This series is devoted to the analysis of European Economic Law. The series' scope covers a broad range of topics within economics law including, but not limited to, the relationship between EU law and WTO law; free movement under EU law and its impact on fundamental rights; antitrust law; trade law; unfair competition law; financial market law; consumer law; food law; and health law. These subjects are approached both from doctrinal and interdisciplinary perspectives.

The series accepts monographs focusing on a specific topic, as well as edited collections of articles covering a specific theme or collections of articles. All contributions are subject to rigorous double-blind peer-review.

More information about this series at <http://www.springer.com/series/11710>

Luca Lionello

The Pursuit of Stability of the Euro Area as a Whole

The Reform of the European Economic Union
and Perspectives of Fiscal Integration



Springer

Luca Lionello
Faculty of Political and Social Sciences
Catholic University
Milan, Italy

ISSN 2214-2037 ISSN 2214-2045 (electronic)
Studies in European Economic Law and Regulation
ISBN 978-3-030-28044-4 ISBN 978-3-030-28045-1 (eBook)
<https://doi.org/10.1007/978-3-030-28045-1>

© Springer Nature Switzerland AG 2020

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors, and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Stability is not immobility
Klemens von Metternich

For Ife and Jade

Contents

1	General Introduction	1
1.1	The Need for Stability in the Euro Area	1
1.2	Problem Description	2
1.3	Objectives of the Research	4
1.4	Boundaries of the Research	5
1.5	Methodological Precautions	6
1.6	Structure	7
	References	8
2	The Objective of Stability of the Euro Area as a Whole	11
2.1	Introduction	11
2.2	Meaning of Objectives in the EU Legal System	12
2.2.1	Definition	12
2.2.2	Functions	13
2.2.3	Classification of Objectives in the EU Treaties	16
2.3	Stability in Context	18
2.3.1	The Economic and Monetary Union	18
2.3.2	The Incomplete Process of Economic Convergence	19
2.3.3	The Asymmetry Between the Economic and the Monetary Union	22
2.3.4	The Fundamental Need for Stability in the EMU	23
2.3.5	The Adherence to the Surveillance Model	25
2.4	The Objective of Stability of the Euro Area as a Whole	26
2.4.1	Preliminary Remarks: Defining a Stability Paradigm	26
2.4.2	The Eurozone as a ‘Community of Stability’	27
2.4.3	Price Stability as Primary Objective of Monetary Policy	28
2.4.4	The Immediate Objectives of Economic Policy	30
2.4.5	Looking for an Ultimate <i>telos</i> of Economic Policy	33
2.4.6	Analysing the Objective of Stability of the Euro Area as a Whole	38

2.4.7	Defining the Objective of Stability of the Euro Area as a Whole: A Proposal	45
2.4.8	The Distinction of the Objective of ‘Financial Stability’ from the Objective of ‘Stability of the Euro Area as a Whole’	49
2.4.9	The Ownership of the ‘Objective of Stability of the Euro Area as a Whole’	55
	References	59
3	The Instruments Available to Achieve Stability in the Euro Area: The Current Functioning of the Economic Governance	63
3.1	Introduction	63
3.2	The Main Features of the Economic Union	64
3.3	Stability Through Coordination	67
3.3.1	Purpose	67
3.3.2	Preventive Arm	69
3.3.3	Corrective Arm	72
3.4	Stability Through the Regulatory Role of the Financial Markets	75
3.4.1	Purpose	75
3.4.2	Market Regulation	76
3.4.3	Debt Restructuration	77
3.5	Stability Through Self-Limitation of National Budgetary Sovereignty	78
3.5.1	Purpose	78
3.5.2	Application	79
3.6	Stability Through Conditional Financial Support	81
3.6.1	Purpose	81
3.6.2	Financial Assistance	82
3.6.3	Conditionality Policy	85
3.7	Stability Through a Common Investment Policy	86
3.7.1	Purpose	86
3.7.2	Application	87
3.8	The Pursuit of the Stability of the Euro Area and the Reform of the Banking Governance	89
	References	92
4	Longstanding Sources of Instability: The Current Deficits of the Economic Union	95
4.1	Introduction	95
4.2	The Deficit of Legality	96
4.2.1	Preliminary Remarks: Changing the Governance Without Changing the EU Treaties	96
4.2.2	The Conferral Principle and the Limited Margin of Extension of EU Powers in the Economic Governance	97

- 4.2.3 Flaws in the Legal Basis of Semi-Automatic Sanctions 98
- 4.2.4 The Compliance of Rescue Mechanisms with the No Bailout Clause 102
- 4.2.5 Consistency of the ESM Financial Assistance with the Solidarity Clause 109
- 4.2.6 The Ambiguous Nature of the Conditionality Policy and Its Compliance with the EU Treaties 111
- 4.2.7 Consistency of the ESM Financial Assistance with the EUCFR 114
- 4.2.8 Flight Into International Law 117
- 4.2.9 The Deficit of Legality: Conclusive Remarks 120
- 4.3 The Deficit of Effectiveness 121
 - 4.3.1 Preliminary Remarks: An Ineffective Governance 121
 - 4.3.2 Weak Economic Coordination 122
 - 4.3.3 Limits of the Market Model 125
 - 4.3.4 Weak Implementation of EU Budgetary Constraints in National Constitutional Law 128
 - 4.3.5 Fragilities of the ESM Interventions 131
 - 4.3.6 Limited Resources for Investments 134
 - 4.3.7 The Incomplete Construction of the Banking Union 138
 - 4.3.8 Deficit of Effectiveness: Conclusive Remarks 140
- 4.4 The Deficit of Democracy 141
 - 4.4.1 Preliminary Remarks: An Undemocratic Governance 141
 - 4.4.2 Decline of National Democracy 143
 - 4.4.3 The Limited Role of the European Parliament in the Economic Governance 145
 - 4.4.4 The Rise of Intergovernmentalism 148
 - 4.4.5 Is the Economic Governance Acting in the Interest of the People? 151
 - 4.4.6 The Deficit of Democratic Accountability: Conclusive Remarks 153
- References 153
- 5 Completing the Economic Union: The Different Paths Towards Stability 161**
 - 5.1 Introduction 161
 - 5.2 The Possible Ways Forward for a More Perfect Pursuit of the Stability of the Euro Area as a Whole 162
 - 5.3 Proposals for the Completion of the Economic Union 163
 - 5.3.1 The Ongoing Debate 163
 - 5.3.2 Regulating Decentralisation and Restoring Market Discipline 165
 - 5.3.3 Centralisation of Powers and Resources 172

- 5.4 Legal Challenges to the Completion of the EMU 193
- 5.5 The Limits of the Decentralised Model 194
 - 5.5.1 The Decentralised Model of Economic Union:
An Eternal Recurrence? 194
 - 5.5.2 Decentralisation and the Deficit of Legality.
Is It Possible to Make Surveillance Even Tighter? 195
 - 5.5.3 Decentralisation and the Deficit of Effectiveness 196
 - 5.5.4 Decentralisation and the Deficit of Democracy 200
- 5.6 Challenges of Fiscal Centralisation 201
 - 5.6.1 What Does It Mean Building a Fiscal Union? 201
 - 5.6.2 Centralisation and the Deficit of Legality 202
 - 5.6.3 Centralisation and the Deficit of Effectiveness 216
 - 5.6.4 Centralisation and the Deficit of Democracy 222
- References 228
- 6 Conclusions 235**
 - References 239
- Index 241**

Acronyms

AGS	Annual Growth Survey
AMR	Alert Mechanism Report
BEPGs	Broad Economic Policy Guidelines
BICC	Budgetary Instrument for Convergence and Competitiveness
CACs	Collective Action Clauses
CAP	Corrective Action Plan
CCCTB	Common Consolidated Corporate Tax Base
CJEU	Court of Justice of the European Union
CMU	Capital Market Union
COSAC	Conférence des Organes Spécialisés dans les Affaires Communautaire
CSRs	Country-Specific Recommendations
DGS	Deposit Guarantee Scheme
EBA	European Banking Authority
ECB	European Central Bank
ECCL	Enhanced Conditions Credit Line
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECU	European Currency Unit
EDF	European Development Fund
EDIS	European deposit insurance scheme
EDP	Excessive Deficit Procedure
EFSF	European Financial Stability Facility
EFSI	European Fund for Strategic Investments
EFSM	European Financial Stabilisation Mechanism
EIB	European Investment Bank
EIOPA	European Insurance and Occupational Pensions Authority
EISF	European Investment Stabilisation Function
EMF	European Monetary Fund
EMI	European Monetary Institute
EMS	European Monetary System

EMU	Economic and Monetary Union
ERM	Exchange Rate Mechanism
ESA	European Supervisory Authority
ESBies	European Safe Bonds
ESCB	European System of Central Banks
ESFS	European System of Financial Supervision
ESIF	European Structural and Investment Funds
ESM	European Stability Mechanism
ESMA	European Securities and Markets Authority
ESRB	European Systemic Risk Board
EUCFR	EU Charter of Fundamental Rights
FTT	Financial Transaction Tax
GFCC	German Federal Constitutional Court
GG	Grundgesetz
GNI	Gross National Income
HICP	Harmonised Index of Consumer Prices
IDRs	In Depth Reviews
IFIs	Independent Fiscal Institutions
IGA	Inter-governmental agreement
IMF	International Monetary Fund
MAP	Macroeconomic Adjustment Programme
MIP	Macroeconomic Imbalance Procedure
MFF	Multiannual Financial Framework
MoU	Memorandum of Understanding
MREL	Minimum Requirement for own funds and Eligible Liabilities
MSP	Multilateral Surveillance Procedure
MTO	Medium Term Objective
NCB	National Central Bank
NPLs	Non-performing loans
NRA	National Resolution Authority
OMA	Optimum Monetary Area
OMTs	Outright Market Transactions
PCCL	Precautionary Conditioned Credit line
RMV	Reverse Majority Voting
RSMV	Reverse Simple Majority Voting
RQMV	Reverse Qualified Majority Voting
SGP	Stability and Growth Pact
SMP	Securities Markets Programme
SPV	Special Purpose Vehicle
SRB	Single Resolution Board
SRF	Single Resolution Fund
SRM	Single Resolution Mechanism
SSM	Single Supervisory Mechanism

TESM	Treaty establishing the European Stability Mechanism
TINA	There Is No Alternative
TSCG	Treaty on Stability, Coordination and Governance
VCLT	Vienna Convention on the Law of Treaties

Chapter 1

General Introduction



1.1 The Need for Stability in the Euro Area

Since its conception in the Maastricht Treaty, the Economic and Monetary Union (EMU) has always been in search of stability. This pursuit has assumed along the years different forms: convergence criteria for the introduction of the single currency, price stability quantified in a specific level of inflation, sound budgetary policy in terms of public deficit and debt, financial stability through banking regulation and supervision, and, eventually, the ‘stability of the euro area as a whole’.

The first reference to the objective of ‘stability of the euro area as a whole’ can be found in several statements of the Heads of State or Governments of the Union and the euro area during the first months of 2010, regarding the management of the Greek financial crisis.¹ Since then, the concept has been widely used by EU institutions and national governments to justify financial assistance to Member States during the sovereign debt and banking crisis in the Eurozone. The increasing prominence of the objective was confirmed by its inclusion in several legal sources and especially in the Treaty on the Functioning of the European Union. Most importantly, the Court of Justice of the European Union resorted to the concept of ‘stability of the euro area as a whole’ to prove the consistency of some significant reforms of the Eurozone governance with the EU Treaties. By doing so, the Court has also acknowledged it to be the primary objective of the economic union.

¹All euro area members must conduct sound national policies in line with the agreed rules. They have a shared responsibility for the economic and financial stability in the area.’ Statement by the Heads of State or Government of the European Union, Brussels, 11 February 2010. Cf. also Statement by the Heads of State and Government of the Euro Area Brussels, 25 March 2010; Statement on the support to Greece by Euro area Members States, Brussels, 11 April 2010; Statement of the Heads of State or Government of the Euro Area, Brussels, 7 May 2010.

1.2 Problem Description

The fundamental need of stability of the Eurozone can be understood looking at the unique legal features, which have characterised the creation of the single currency in Europe. By transferring monetary competence at supranational level, Member States gave up a fundamental part of their sovereignty,² which is deeply rooted in the concept of statehood itself. Notably, monetary unification and political integration are two interdependent phenomena, as the establishment of a new currency does normally follow a process of state building or a declaration of independence. Unlike all other currencies of the world, however, the Euro does not belong to a state, but to a group of countries, which are bound to each other in an association (*Staatenverbund*)³ without abdicating their other sovereign prerogatives. Consequently, the EU did not develop a self-defining legal authority, which can decide on its own competences, but it gained only a limited authority in some specific fields. More precisely, the European Court of Justice clarified that Member States have permanently transferred to the EU some specific ‘sovereign rights’, which allow the supremacy of European law over domestic law only in the relative policy areas.

In accordance with this explanation, the only part of sovereignty, Member States decided to transfer to the Union when they established the EMU was monetary competence, while their authority on economic policy remained substantially unscathed. In particular, fiscal sovereignty has firmly remained an exclusive prerogative of national governments, since it represents the main source of their political power,⁴ as well as the most important instrument, they have available in order to reach popular consensus.⁵ The rejection of any form of fiscal solidarity between the Member States has been officially sanctioned in the Maastricht Treaty through the introduction of the no bailout clause, according to which every country is responsible for its own debt and cannot rely on the financial support of the Union and the other governments. Aside from fiscal policy, Member States initially refused to give up control of the management of their banking system, whose stability remained a responsibility of domestic authorities. Also in this case, national governments did

²On the definition of monetary sovereignty see Lastra (2006), p. 16.

³As the German Constitutional Court has specified in the Judgment on the Maastricht Treaty, the introduction of the single currency did not transform the European Union into a federation, because Member States remained ‘the masters of Treaties’. See German Constitutional Court, Judgment of 12 October 1993, BVerfGE 89/155, paras. 112, 135.

⁴Fiscal policy consists of the power to decide the revenues and expenditures of a state. This competence is exercised through a budgetary law, which is normally adopted every year by the parliament on proposal from the government. Economic policy is a wider concept, which in addition to fiscal policy covers also other structural policies such as industrial, regional and social policies. Tuori and Tuori (2014), p. 31.

⁵There is a close link between economic policy, tax collection, social welfare systems, employment policy, expenditures for national defense and infrastructure. For this reason, Member States do not want to make any transfer of their ultimate sovereign control over their economic policies as such, but only accept obligations outlined in the Treaties. Goebel (2007), p. 1273.

not want to renounce their power of regulation and supervision on a fundamental part of their economy, especially considering that banks play an important role in the purchase of sovereign debt and the financial stability of the country. Accordingly, the Eurozone has been missing all the instruments that states normally use, next to monetary policy, to take care of their economic stability: a common budget financed by genuine taxes, the ability to borrow resources from the financial markets, effective supervision and resolution tools for the banking system, and, more importantly, a true economic government democratically legitimised.

Evidently, the establishment of a single currency between a group of countries fully sovereign under every aspect other than monetary policy made necessary to balance the management of European interdependence with the protection of national prerogatives. In fact, the contradiction of having a single monetary policy and a decentralised management of economic power has represented a major challenge for the fulfilment of stability in the euro area. Notably, monetary and fiscal competences are two complementary attributes of sovereign states and even when the national central bank is independent, it still makes decisions that are coherent with the economic conditions of the country and the budgetary policies implemented by the government. In the European Union, however, there is no single fiscal authority, nor a common macroeconomic policy. Consequently, the European Central Bank (ECB) is obliged to pursue its own monetary objectives by dealing with the different economic situations of every participating country. As monetary and fiscal sovereignty are detached, the fundamental challenge of the EMU has been to avoid the progressive economic divergence between the Member States, which could raise imbalances within the Union and make it vulnerable towards external shocks. Being aware of these collateral risks, European institutions and national governments have committed since the stipulation of the Maastricht Treaty to developing an economic union in charge of preserving national fiscal rights, while pursuing at the same time stability in the euro area. In order to achieve this balance, they created a governance system based on the regulatory role of financial markets and the European supervision on national macroeconomic policies.⁶ While this approach characterised the first 10 years of life of the single currency, the outbreak of the sovereign debt crisis in 2009 has started questioning its effectiveness. Indeed, the serious threats to the survival of the monetary union coming from the fiscal and banking crisis in several countries, obliged Member States and EU institutions to reconsider the need for further sovereignty sharing in the EMU. Accordingly, over the last few years, they started a process of overall reform of the economic union, which has included the creation of a common stabilisation mechanism in case of systemic shocks and stronger supervisory tools on national macroeconomic policies. While these measures have helped to overcome the imminent risks for the stability of the Eurozone, the process of reform remains unfinished. Some lasting fragilities of

⁶See Delors Report on Economic and Monetary Union in the European Community, 17 April 1989, pp. 16–17.

the governance have made necessary to start an important debate on the further actions, the euro area still needs to take in order to exhaust its need of stability.

Evidently, the outcome of this hard work of reform will give an answer to the fundamental dilemma, which has been underlying the project of European economic and monetary union since its conception: is it possible to create a single currency without a state? Or, better, can a monetary union achieve stability without the instruments, states normally use for this purpose, such as a common fiscal policy accountable to the people? Notably, in order to answer these questions, it will be necessary to analyse some related issues. What is stability and how it can be measured? How is it possible to balance fiscal stability with financial solidarity? Does stability require democratic accountability? Can stability in the euro area be achieved without reforming the existing EU Treaties?

1.3 Objectives of the Research

The main purpose of the research is to define a new stability paradigm for the euro area, which may exploit the full potential of the project of economic and monetary union and better serve the interests of the European citizens. By developing the original model of EMU outlined in the Maastricht treaty and taking into consideration the lesson thought by the crisis, the definition of a new stability paradigm will help interpret the ongoing transformations of the Eurozone governance. Accordingly, the work won't simply acknowledge and describe the functioning of the economic union and its possible evolution, but more importantly, it will develop a critical analysis of the existing legal framework and the future reforms.

The monograph joins the vast legal literature on the issue of the reform of the European economic governance, which over the last few years has counted several important contributions. While the research will acknowledge the most relevant findings and legal considerations developed by the doctrine, it also aims to be innovative under at least three profiles.

First, the work aims to clarify the meaning of the objective of the 'stability of the euro area as a whole'. As it was already mentioned, the latter has been formally introduced in art. 136(3) TFEU and has several references in EU secondary legislation, intergovernmental agreements and the case law of the CJEU. Despite its importance, the concept of the 'stability of the euro area as a whole' has not received a clear definition yet, as it is usually confused with the objectives of financial or fiscal stability. The research will instead analyse its specificities and make it the cornerstone for the development of a new stability paradigm for the euro area.

Second, the analysis aims to assess the quality of the reforms adopted over the last few years by identifying the obstacles, which are still preventing the euro area from fully recovering from the crisis. The analysis will try to identify the common ground of these fragilities, in a way as to bring them back to some underlying structural deficits of the governance, which will be clarified. The research will be based on the

new stability paradigm built on the exegesis of the objective of the ‘stability of the euro area as a whole’, which will work as a benchmark of the quality of reforms.

Third, the work will present a number of proposals for the completion of the economic union. Taking into consideration the ongoing political and academic debate on the matter, the research aims to identify the fundamental reforms, the economic union still needs to adopt in order to finally achieve long-term stability. After having provided a description of the proposals, the research will also explain the main legal challenges, their implementation will have to deal with.

1.4 Boundaries of the Research

While stability is an objective regarding the entire project of economic and monetary union, the research will have a more limited focus. As anticipated, the main objective of the analysis will be the transformation of the economic governance and the process of fiscal integration of the euro area. Consequently, the monetary pillar of the EMU will be taken into consideration only incidentally. This choice can be justified for the following reasons.

First, the objective of the ‘stability of the euro area as a whole’, whose analysis will occupy a significant part of the research, represents the primary objective of the economic union and the CJEU has explicitly distinguished it from the main goal of the monetary union, namely price stability. Even if the distinction between monetary and economic policy may seem sometimes artificial, it still plays an important role in the current EU legal framework, where the first competence belongs to the Union, while the other is still an exclusive prerogative of the Member States. Despite their interdependence,⁷ setting some boundaries between economic and monetary policy seems therefore necessary in order to comply with the principle of conferral, as well as the rules of the Treaty regarding the functioning of the governance.

Second, the monetary union represents a mature project, which has been deeply investigated by the academic doctrine over the last three decades. Even if the crisis has recently obliged the ECB to adopt some non-conventional policies,⁸ no institutional reform has been necessary to put the monetary union in the condition to pursue its objectives and foster stability in the euro area. Evidently the monetary pillar of the EMU is essentially complete, as it was based on the conferral of full sovereignty to the European Union. Consequently, the ECB does already have all the necessary instruments to contribute to the cause of stability through monetary policy. This does not mean that improvements won’t be possible in the future, as several authors have

⁷On the connection between monetary and fiscal policy see Munari (2015), pp. 739–340.

⁸Since 2010, the ECB has adopted some non-conventional monetary policy, including the Securities Market Programme (2010), the Outright Monetary Transaction (2012) and the Quantitative Easing (2015).

suggested for example to turn the ECB into a real lender of last resort.⁹ At the same time, these developments of the monetary union may be possible only once the economic pillar of the EMU will be completed.

Finally, in the current momentum of European integration, the research of stability of the euro area must necessarily focus on the economic side of the EMU. The outbreak of the sovereign debt crisis has clearly proven that the fundamental sources of destabilisation for the monetary union were rooted in the fragilities of the economic governance. Notably, the latter was not characterised by the creation of a genuine European fiscal sovereignty and the alternative instruments originally established to pursue stability have not been sufficiently effective. This is the reason why the reforms adopted over the last few years essentially focused on improving the functioning of the economic governance, through the consolidation of European surveillance on national budgets, the introduction of a stabilisation mechanism in case of systemic crisis, the development of common investment tools and the partial establishment of a banking union.

1.5 Methodological Precautions

The monograph will develop a legal analysis of the ongoing reform of the economic union from a critical perspective. Three important methodological precautions will be taken.

First of all, the research does acknowledge that the EMU represents a unique legal phenomenon, which has progressively developed over the years through the contribution of several actors.¹⁰ The progressive emergence of an economic constitution of the euro area provided with its own internal coherence, regulatory principles and institutions, does clearly represent a challenge for the identification of the right methodology to adopt in the legal analysis. Indeed, even if the establishment of the monetary union shifted a significant part of sovereignty from national to the European level, the Union has not developed the features of statehood yet, but it is still complying in wide part with the rules of international law. This is confirmed by the fact that the economic union is not solely regulated by the EU Treaties, but also by other legal sources, including intergovernmental agreements and soft law. Evidently, this hybrid legal nature of the governance prevents the adoption of a methodology exclusively based on one approach. Notably, most of the legal contributions on the analysis of the economic union have been based either on a constitutional or a comparative perspective. The use of legal concepts, theories and categories belonging to either public, comparative or international law may make

⁹De Grauwe (2013) and Steinbach (2016).

¹⁰Tuori and Tuori speak in this regard of a process of ‘constitutionalisation’, which has been developing through a number of foundational events and thanks to the contribution of several actors. Tuori and Tuori (2014), pp. 3–4.

sense to define and explain some of the procedures and mechanism overlooking the functioning of the euro area. At the same time, these instruments do always require a work of adaptation to the special features of the EMU and its developments.

Second, the monograph will pay particular attention to the contribution of the European and national courts to the legal development of the economic governance. Notably, the CJEU has exercised an important hermeneutical work to adapt the existing EU legal framework to the evolutionary needs of the governance. The research will take into consideration the legal reasoning of the Court and adopt some of the legal interpretations argued therein for the development of its analysis. Equal attention will be paid also to the judgments of national constitutional judges. Indeed, even if domestic courts do normally embrace a national perspective to European issues, considering their point of view can be extremely important to understanding the impact of economic integration on state sovereignty, thus helping to verify how reforms have been complying with the principle of conferral. The research will specifically focus on the dialogue between the CJEU and the German Federal Constitutional Court, which over the last few years has developed an important legal analysis on the impact of fiscal integration on national sovereignty.

Third, the monograph aims to take part in the rich academic debate on the reform of the economic union. The latter will be fully acknowledged and taken as a reference for the further development of the legal analysis on the matter. Counting on the theoretical and doctrinal insights developed by the constitutional and international legal doctrine, the research will pay particular attention to the role of objectives in the EU legal order, the consistency of secondary law and international agreements with the EU Treaties, as well as the compliance with the democratic principle. While the analysis will essentially adopt a legal approach, it will also take into consideration the contributions of other social sciences on the matter. More precisely, the research will be enriched by several considerations, definitions and arguments developed by the political and economic doctrine. This approach should help in understanding the complexity of the problems underlying the research for stability of the euro area.

1.6 Structure

The research is structured in six chapters, each of which aims to analyse a specific issue.

After the introduction has explained the main objectives, methodologies and structure of the research, the second chapter will focus on the concept of the ‘stability of the euro area as a whole’. By considering the relationship with other interpretations of stability such as monetary, fiscal and financial stability, the research will develop an exhaustive definition and qualification of the objective. The analysis will argue that the ‘stability of the euro area as a whole’ essentially consists of the preservation of the existence and the integrity of the monetary union, whose establishment is a goal of the EU in accordance with art. 3(4) TEU.

The third chapter will analyse the functioning of the economic union assessing its ability to pursue the objective of ‘stability of the euro area as a whole’ in concrete. After having introduced the concept of economic governance, the research will explain how the latter contributes to the achievement of stability. In particular the analysis will consider the application of European supervisory and corrective instruments on national macroeconomic policies, the introduction of constitutional limits in the national budgetary cycle, the regulatory role of financial markets, the implementation of the conditionality policy in the framework of financial assistance, the development of investment policies in the EU legal framework and the establishment of the banking union.

On the basis of the previous analysis, the fourth chapter will identify the main deficits, which are preventing the economic governance from fully achieving the objective of the stability of the euro area as a whole. These are essentially three. The limits of the existing legal basis for the implementation of necessary reforms has been the cause of the legal incoherence of the reforms, as well as the wide use of intergovernmental agreements beyond EU law (so called ‘flight into international law’). Second, the reforms introduced to fulfil consolidation and stabilisation policies in the euro area have proven to be substantially ineffective, meaning unable to contribute to the cause of stability. Finally, the democratic deficit of the governance has prevented the governance from fully taking into consideration the requests and interests of the people affected by its policies. This has undermined the relationship between citizens and institutions and helped the rise of populist parties across the continent.

The fifth chapter will eventually consider the most recent proposals of reform of the economic union taking into account both positions in favour of fiscal centralisation in the euro area and those against: the reform of the European Stability Mechanism, the creation of a separate budget for the euro area, the institution of a European minister of finance, the strengthening of surveillance on national budget and the introduction of a debt restructuring mechanism. After having analysed the content of each proposal, in particular the official ones put forward by the EU institutions, the research will consider the main legal challenges that the future reform of the euro area will have to face.

The conclusions will summarise the results of the analysis and answer the fundamental questions identified at the beginning of the research.

References

- De Grauwe P (2013) The European Central Bank as lender of last resort in the government bond markets. *CESifo Econ Stud* 59:520–535
- Goebel RJ (2007) Economic governance in the European Union: should fiscal stability outweigh economic growth in the stability and growth pact? *Fordham Int Law J* 31:1266–1359
- Lastra RM (2006) *Legal foundations of international monetary stability*. Oxford University Press, Oxford

- Munari F (2015) Da Pringle a Gauweiler: i tormentati anni dell'Unione monetaria e i loro effetti sull'ordinamento giuridico europeo. *Il Diritto dell'Unione Europea*, 723–755
- Steinbach A (2016) The lender of last resort in the Eurozone. *Common Mark Law Rev* 53:361–384
- Tuori K, Tuori K (2014) *The Eurozone crisis. A constitutional analysis*. Cambridge University Press, Cambridge

Chapter 2

The Objective of Stability of the Euro Area as a Whole



2.1 Introduction

Stability is a multiform concept in legal science. The founding fathers of the Economic and Monetary Union (EMU) declined it in different ways by identifying some specific targets of inflation, deficit and public debt, whose achievement would have helped the monetary union to become a ‘community of stability’ (*Stabilitätsgemeinschaft*).¹ While the latter concept was initially based on the convergence criteria that Member States had to fulfil in order to access the monetary union, the outbreak of the sovereign debt crisis made necessary to reconsider the meaning of stability in euro area. Since 2010 national governments and EU institutions have been reforming the economic governance of the Eurozone by creating new instruments to increase convergence, manage the crisis and avoid its reoccurrence in the future. This process of transformation of the EMU has been characterised by the gradual emergence of a new objective of economic policy, namely ‘the stability of the euro area as a whole’. The latter has found a direct reference in primary law thanks to the amendment of art. 136 TFEU, while the CJEU has contributed in the interpretation of its meaning in some important judgments on the consistency of the anti-crisis measures with EU law.

The purpose of the chapter is to define and analyse the objective of ‘stability of the euro area as a whole’, which is being consolidated throughout the ongoing reform process of the economic union. After having recalled the general role of objectives in the EU legal order, the chapter will explain the structural deficits of the EMU, which are responsible for its fundamental need of stability: the weak convergence between participating Member States and the asymmetry between the

¹The concept was developed by the German Federal Constitutional Court (GFCC) as a condition of the German participation in the EMU. See German Constitutional Court, Judgment of 12 October 1993, [BVerfGE 89/155], paras 138, 144, 147, 148.

economic and the monetary union. It follows an analysis of the objective of ‘stability of the euro area as a whole’ in relation to the other formulations of stability outlined in the EU Treaties, such as price stability, sound public finances and the stability of the financial system. The last part of the chapter will verify whether the ‘stability of the euro area as a whole’ can be qualified as an objective of the European Union.

2.2 Meaning of Objectives in the EU Legal System

2.2.1 Definition

European primary and secondary law identify a number of objectives that EU institutions and Member States shall pursue in the framework of the Union’s legal order. Despite missing a precise definition, the legal doctrine has qualified objectives as directive principles, meaning general rules referring to the achievement of specific results.² While values and structural principles explain what the European Union is and stands for, objectives clarify what it does and tries to accomplish.³

Since its conception, the European Union has been in ‘need of objectives’ (*Zielbedarf*).⁴ Art. 1 TEU recalls that Member States confer competencies to the EU to achieve the objectives, they have in common.⁵ The fundamental role played by objectives in the process of European integration depends indeed on the non-sovereign nature of the organisation and the principle of conferral. As the EU legal order is not original, but derives from those of its Member States, it requires objectives to find its *raison d’être* and exercise the competences conferred by the European Treaties. For this reason, Ipsen has defined the Union as a ‘special-purpose association’,⁶ meaning that, in accordance with the principle of speciality of international organisations, the EU shall exercise the functions conferred upon it by the Member States with the view of achieving the objectives outlined in the founding Treaties. On the contrary, sovereign states don’t need objectives, because they have the *Kompetenz-Kompetenz* and can constantly define their course of action through a process of continuous self-determination.⁷ The conferral of objectives, for whose

²See Sommermann (2013), Article 3 TEU, para 3.

³See Larik (2016), p. 162. Objective define a desirable condition to achieve (*erstrebewerter Zustand*) or an element of material perspective (*materiell-prospektives Element*). See Terhechte (2017), Artikel 3 EUV, para 19.

⁴See Ipsen (1972), p. 995.

⁵See Larik (2016), p. 134.

⁶In German ‘Zweckverband’. See Ipsen (1972), pp. 197–198, 1055.

⁷See Larik (2014), p. 948.

achievement the EU was given sovereign powers, makes sure that Member States are the real ‘masters of the Treaties’.⁸

2.2.2 Functions

The role of objectives in the EU legal order has changed over time. Their initial function has been ‘competence-enabling’ (*zuständigkeitseröffnende Funktion*), meaning that they provided both a legitimation and limitation of the powers, the EU can exercise in concrete. At the beginning of the integration process this task was evident, as the identification of an objective was considered a sufficient legal basis for the development of a new power.⁹ The strengthening of the conferral principle and the clear distribution of competences between the Union and its Member States, however, has gradually reduced the application of the implied powers doctrine according to which *ius ad finem dat ius ad media*.¹⁰ Art. 3(6) TEU stresses indeed that objectives shall be pursued by appropriate means, but they are not able to allow acts of the Union.

Even if the presence of an EU goal does not imply that the Union has all the competences to achieve it,¹¹ objectives still play an important function in legitimising the actions of European institutions in concrete. Indeed, defining the objectives of the European Union helps to understand whether a specific action falls within the competences of the EU institutions or is *ultra vires*. Furthermore, the flexibility clause offers a margin of expansion of EU powers, when it is necessary to achieve an objective of the Union. Art. 352 TFEU states that if an action is necessary to attain one of the objectives set out in the Treaties, but the EU lacks necessary powers, the Council can adopt the appropriate measures by unanimity on a proposal from the Commission and with the consent of the European Parliament. The

⁸See German Federal Constitutional Court, Judgment of 12 October 1993, [BVerfGE 89/155], para 112. In the *Lissabon* judgment the GFCC specified that ‘the Basic Law does not authorize the German state bodies to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union’. German Federal Constitutional Court, Judgment of 30 June 2009, [2 BvE 2/08], para 233.

⁹In the *Gimenez Zaera* case the CJEU stated that the aims laid down in art. 2 of the EEC Treaty ‘are concerned with the existence and functioning of the Community’. ECJ Judgment of 9 September 1987, Case C-126/86, ECLI:EU:C:1987:395, para 10.

¹⁰The implied power doctrine should not allow the attribution of new powers to the Union, but clarify the sphere of application of the existing competence. In *European Agreement on Road Transport* case, the Court explained that the ‘authority [of the Community] arises not only from an express conferment by the Treaty [...] but may equally flow from other provisions of the Treaty and from measures adopted within the framework of those provisions by the Community institutions.’ ECJ Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*. Case C-22/70, ECLI:EU:C:1971:32, para 16.

¹¹Sommermann (2013), Article 3 TEU, para 12; Ruffert (2016), Artikel 3 EUV, para 12.