Georgios Psaroudakis *Editor*

Risk Sharing in the Euro Area

Legal Aspects

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Introduction

Georgios Psaroudakis

The present volume is the result of a workshop held at the Faculty of Law, Aristotle University of Thessaloniki, in late October 2021, as part of the project "Risk sharing in the euro area", which is a cooperation of economists and lawyers from the University of Tübingen, Bocconi University (Milan) and the University of Thessaloniki, financed by the Volkswagen Foundation. It includes a collection of articles based on contributions to this workshop, which is hoped to become part of this vivid European discussion that has both analytical and normative aspects and seems to be crucial for the future of European integration. Many thanks are due to the Volkswagen Foundation for its generous support, to Prof. Gernot Müller (Tübingen) who is our project coordinator and without whom all of this would not have been possible, to my doctoral student Andreas Hatzinakis who has been of great help with the workshop, and of course to all participants.

The general project has three main areas of interest: financial markets, fiscal policy and migration. In the workshop and in this volume, we have mostly looked at the financial area, though we have added a contribution on unemployment insurance which touches upon the other aspects of the project too. In this context, the contributions seem to be horizontally informed by the idea that risk sharing is connected with mechanisms for the mutualisation of risk, but also, before this, with a balanced allocation of risk which facilitates such mutualisation and makes it acceptable and workable. Harmonised rules are useful for this allocation, and a point of emphasis has been the degree of such harmonisation.

Banking provides the classic example of a significant and rapid harmonisation, brought about by the necessities of the recent financial crisis. Admittedly, harmonisation under the influence of the crisis has been mostly focused on the crisis-related part of banking law.

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Thus, private law issues arising out of the more or less orderly functioning of the bank are not harmonised, not least due to their close connection with general private law that is particularly hard to harmonise. This does not mean that ultimate solutions differ that much across jurisdictions, but still it is a source of uncertainty in cross-border matters. NPL management, which does not necessarily involve bank failure, as it occurs in non-failed banks too, but still is the main cause of crisis and possibly failure, has been harmonised or may be further harmonised as regards prudential aspects of it, at the level of the banks and, prospectively, at the level of NPL servicers, but substantive law remains national and, as *Miglionico* notes, even the definition of NPL is not necessarily uniform. To an extent, this may be due to the fact that substantive solutions do not need to be regulated extensively in the law, and thus neither in European law. But it remains the case that the closer the issue is to private law, the less harmonisation occurs; the opposite applies to issues of rather regulatory nature. Indeed, this is confirmed by the degree of legislative and practical activity in these last years in the area of bank resolution, which applies once the bank has actually failed. As explained by the *present author* in his contribution on MREL, which is a basic feature of contemporary bank resolution law, EU legislation in this area supports a sophisticated financing arrangement for resolution at the EU level (i.e., the Single Resolution Fund, with the European Stability Mechanism functioning as a fiscal backstop thereto) and is meant to rationalise recourse to the said arrangement, with the ultimate objective of a level playing field.

Therefore, it is noteworthy as to banking that in the area of the resolution, in which risk is explicitly meant to be mutualised (and indeed is mutualised even going beyond the TFEU and using the intergovernmental method on the transfer of funds from Member States to the Single Resolution Fund), EU law tends to regulate extensively and to allocate risk in a balanced manner, so that subsequent mutualisation is less disruptive. EU law continues this emphasis on bank failure, as the Commission is currently working on the law of bank liquidation, which occurs when the conditions for resolution actions are not fulfilled; in early 2021 it launched a targeted consultation titled “Review of the crisis management and deposit insurance framework”. Still, one might argue that the lack of similar harmonisation regarding the bank’s substantive activity, rather than regulatory law, may be a persistent cause for discrepancies.

Moving to capital markets and in the example of prospectus liability to investors, *Nikou* shows how general private law, in the said example the law relating to causation as a prerequisite for civil liability, may bring about significant divergence among national laws even in areas, in which there is harmonization in detailed issues. Such differences among national laws can ultimately lead to different allocations of risk between investors and issuers, certainly influencing cross-border investments too. Therefore, this example coming from the law of capital markets confirms the same conclusion derived from the area of banking: That harmonization in detailed regulatory matters is valuable, but discrepancies in more fundamental issues of private law may ultimately be equally, if not more, significant.

The same basic considerations are applied by *Zouridakis* and *Papadopoulos* to civil liability for market abuse. Just like in prospectus liability, particular rules on the

obligations of the parties are harmonized, indeed in significant detail and in directly applicable rules. Yet, it is in the interplay with general private law, here in fundamental questions even regarding the proper claimant and defendant (and, beyond that, regarding the very issue where private enforcement is available at all or not), that national particularities arise. Indeed, in the area of capital markets, in which there is no financing arrangement in the mould of the Single Resolution Fund, it is doubtful that such difficult issues will be soon dealt with by the EU legislature.

In the area of unemployment insurance, there is discussion on a so-called equivalent European Unemployment Insurance Scheme (EUBS), i.e. one that would be financed by contributions from Member States, and would not provide direct benefits itself but would rather re-finance national schemes in case of unemployment shocks and thus absorb part of the consequences of such shocks. As explained by *Ktenidis*, this kind of macroeconomic stabilizer is hard to establish in EU law, in particular because it is hard to envisage a proper legal basis for rules governing the use of the funds, in other words determining the national benefits that are eligible for re-financing and the conditions for re-financing. All the more in this area, even if the financing arrangement as such could be envisaged (though there may difficulties there too), discrepancies in substantive law emerge again as a potential obstacle.

Of course, while the lack of deep harmonisation seems to be a common thread running through the considerations above, to call for more harmonisation as a manner to improve risk sharing is somewhat simplistic. The interplay between the particular issues discussed here and general substantive law makes clear that such harmonisation would need to overcome major differences between doctrinal traditions, which is unlikely and even of doubtful desirability. This last point, on the desirability (or lack thereof) of harmonisation, recalls the discussion on harmonisation vs. regulatory competition, famously exemplified in the Delaware effect in US corporate law (with a corollary in the discussion on the development of European corporate law), and also profoundly influencing the analysis of European integration. If mutualised institutions require deep harmonisation, then this comes at a cost: the inability of national jurisdictions to function as the laboratories of the quasi-federal EU system and experiment with different solutions.[1] Whether this experimentation is a race to the top or a race to the bottom, is a famous question with no clear answer, indeed no clear answer across the board.[2] Moreover, it has been argued, again in the example of US corporate law, that it is not the substance of the rules applying in each jurisdiction that matters, but rather the quality of the rulemaking process and of the process of rule application.[3]

[1] Such regulatory competition may also take the form of different jurisdictions specialising themselves to accommodate the needs of different stakeholders: see, in the example of corporate law, John Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, ECGI Law Working Paper N° 54/2005, pp. 36–37.

[2] See also the remark by Radaelli (2004), pp. 9–10, that it is not even certain, but rather a matter of policy preferences, what the "top" and the "bottom" is.

[3] Fisch (2000), p. 1061; Romano (1987), p. 709.

If that is so, then it becomes very doubtful that harmonisation could be used as a panacea, given that it disrupts rules that have developed in Member States for a long time and it tends to produce a complex, multi-national and multi-lingual process of rulemaking and application. While there are comparatively successful examples, such as in the area of competition law, one may doubt whether this can be successfully generalised to encompass areas that are closer to the core of national private law, and whether collapsing the differences among national jurisdictions in this core would be fair to the more efficient among these jurisdictions, and ultimately to single market participants themselves. Indeed, it can be argued that (partial) harmonisation and ("defensive" [4]) regulatory competition may ultimately work in parallel, and perhaps with varying degrees of efficiency, towards the same (modest but not unimportant) result: removing the most disturbing and least workable of national laws, so that a degree of convergence and progress may be achieved. While not comprehensive, this seems to be a good basis for risk sharing as well.

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[4] See on this notion Gelter (2015), Centros, the Freedom of Establishment for Companies, and the Court's Accidental Vision for Corporate Law, ECGI Law Working Paper N° 287/2015, arguing that the main effect of liberalisation in the EU case law on the establishment of companies was not "aggressive" regulatory competition, in which a Member State would actually try to become the "European Delaware", but rather the "defensive" kind, in which Member States have abandoned national rules that were driving corporate founders away.