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CORE ANALYSIS

The EU's neoliberal constitutionalism(s)

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Abstract

Beyond their differences, the various currents of neoliberalism share a common legal agenda: economic constitutionalism. From ordoliberal *Ordnungspolitik* to new classical macroeconomics and public choice, from Hayek's 'constitution of liberty' to Vanberg's 'constitutional political economy', an institutional agenda has emerged around a number of key tenets: enhancing the competition between jurisdictions through (state and international) federalism; safeguarding the competitive functioning of the market through supra-legislative rules; limiting fiscal policies and disciplining public spending through balanced budget rules; neutralising monetary policy through independent and price stability-oriented central banks. These key tenets of neoliberal constitutionalism infuse the three layers of the European economic constitution: the fundamental freedoms of movement pave the way to normative competition between national legislations (microeconomic constitution); competition law guarantees the competitive structure of the market (mesoeconomic constitution); European Economic and Monetary Union implements the rules of budgetary discipline and monetary stability (macroeconomic constitution). This does not imply that the European Union is solely a neoliberal project or that the European Union's current neoliberal path is irreversible. But it does at least raise questions about the actual room for manoeuvre left by this rigid 'economic constitution' to public institutions in dealing with the various current crises.

Keywords: internal market; competition law; Economic and Monetary Union; Ordnungspolitik; Als-Ob Politik

1. Introduction

Over the years, the 'constitutional' nature of the European Treaties has become a veritable *topos* of European studies. 'Direct effect' and 'primacy' have been used by both the European Court of Justice (ECJ) and the Commission to establish European integration as a 'constitutional' project based on the idea of a 'union of law'.[1] But this European avatar of the 'rule of law' not only reflects the alleged subordination of domestic legal orders to a common supranational 'Constitution', it also implies that the 'Constitution' has a specific content. In other words, the European Union (EU) intends to be more than a *Rechtsstaat* in the formal sense; it's a *Rechtsstaat* in the substantive sense. And its 'substance' lies in the economy – or, to be more precise, in the competitive market economy. As Robert Lecourt, former President of the ECJ, argued in 1968, there is 'no market community without a common law (*loi commune*), no common law without a uniform interpretation, no uniform interpretation without the primacy of such a law'.[2] The primacy of EU

[1]A Vauchez, *L'Union par le droit: l'invention d'un programme institutionnel pour l'Europe* (Presses de Sciences Po 2013).
[2]R Lecourt, 'Allocution prononcée à l'audience solennelle du 23 octobre 1968 à l'occasion du X[e] anniversaire de la CJCE' 4 (1968) Revue trimestrielle de droit européen 746, esp 751.

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law is here an instrument at the service of a greater cause: the 'market community'. Hence the idea that the European Treaties are the EU's '*economic* constitution'.[3]

Yet, the actual scope of this 'economic constitution' remains controversial. Some prominent scholars defend the idea that various options for economic policy are still admissible within the EU and the Member States. This means that the European economic constitution would still be 'open' and 'pluralist'.[4] But others are more inclined to describe the EU as an ordo- or neoliberal enterprise.[5] Behind this abstract question lie some very crucial issues relating to the room for manoeuvre left to democracy.[6] But how can we determine whether or not treaties are shaped (or at least affected) by ordo- and neo-liberal theses? One method is to trace the paths of the founding fathers and their successors from a sociological point of view, in order to discover their personal connections but also the intellectual affinities they share with specific politically engaged scholars.[7] Another approach is less straightforward, but has the advantage of providing a more comprehensive picture. It consists of comparing positive EU law with the key tenets of neoliberal constitutionalism. This is the option chosen here.

This approach is based on the simple yet crucial idea that the conceptual debates and the concrete social (including legal) reality are deeply intertwined. Concepts are not ideas created in the ether of science; they are directly rooted in the real world. As Michel Foucault[8] or Reinhardt Koselleck[9] (and the Cambridge School)[10] have pointed out, concepts are always inseparable from the (contingent) social struggles in which they emerge. Conversely, they shape the way we think about a problem – or, more precisely, they transform events and phenomena into problems to be solved. But in this process of 'problematisation',[11] concepts are already limiting the solutions that can be found and offered. By defining the framework of what can be said and thought, they also determine the framework of what can be done. In other words, there is always a dialectical interaction between concepts and social materiality. Hence the idea of conducting a legal analysis in the light of the histor(icit)y of key concepts of legal and social sciences[12] – in this case, the

[3]See CF Ophüls, 'Grundzüge europäischer Wirtschaftsverfassung' 124 (1962) Zeitschrift für das Gesamte Handelsrecht und Wirtschaftsrecht 136; L-J Constantinesco, 'La constitution économique de la C.E.E.' 13 (2) (1977) Revue trimestrielle de droit européen 244.

[4]See, eg, M Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Hart Publishing 1998); C Kaupa, 'The pluralist socio-economic character of the European Treaties' in G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishing 2018) 257.

[5]See, eg, DJ Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the New Europe' 52 (1) (1994) American Journal of Comparative Law 25; S Gill, 'European Governance and New Constitutionalism: Economic and Monetary Union and Alternatives to Disciplinary Neoliberalism in Europe' 3 (1) (1998) New Political Economy 5; P Dardot and C Laval, *The New Way Of The World: On Neoliberal Society* (Verso 2014); T Biebricher, 'Zur Ordoliberalisierung Europas – Replik auf Hien und Joerges' 46 (2) (2918) Leviathan 170.

[6]MA Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021). See also the proceedings of the 'Symposium on MA Wilkinson, Authoritarian Liberalism and the Transformation of Modern Europe' 1 (1) (2022) European Law Open 150.

[7]See, eg, B van Apeldoorn, 'Transnationalization and the Restructuring of Europe's Socioeconomic Order: Social Forces in the Construction of "Embedded Neoliberalism"' 28 (1) (1998) International Journal of Political Economy 12; H Canihac, *La fabrique savante de l'Europe. Une archéologie des savoirs de l'Europe communautaire* (Larcier 2020).

[8]M Foucault, 'Nietzsche, la généalogie, l'histoire' in S Bachelard et al (eds), *Hommage à Jean Hyppolite* (Presses Universitaires de France 1971) 145. See also F Taylan, *Concepts et rationalités. Héritages de l'épistémologie historique, de Meyerson à Foucault* (Éditions matériologiques 2018).

[9]R Koselleck, *Futures Past. On the Semantics of Historical Time* (MIT Press 1985); R Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford University Press 2002).

[10]Q Skinner, 'Meaning and Understanding in the History of Ideas' 8 (1) (1969) History and Theory 3; JGA Pocock, *Political Thought and History: Essays on Theory and Method* (Cambridge University Press 2009).

[11]M Foucault, 'Polémique, politique et problématisations' in D Defert and F Ewald (eds), *Dits et écrits par Michel Foucault, Tome II* (Gallimard 2001) 1410.

[12]M Loiselle, 'L'histoire des concepts juridiques et la question du contexte' in L Israël et al (eds), *Sur la portée sociale du droit: Usages et légitimité du registre juridique* (Presses Universitaires de France 2005) 29.

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'economic constitution' – as a way of 'contextualising (EU) law'[13] and 'introducing a dialectical method of *critique*' into (EU) legal studies – independent of the potential *criticism* of (EU) law.[14]

The 'economic constitution' is a highly 'polemical concept' – a *Kampfbegriff* as Koselleck could have called it.[15] It is used not only to describe the legal orders, but also to explicitly influence the way in which the social reality is understood.[16] During the inter-war period, in the Weimar Republic, it embodied the demand for democratisation of the economy,[17] which was reflected in a section of the new German constitution written by Hugo Sinzheimer[18] and devoted to 'economic life'.[19] From this point onwards, however, conservative doctrine set out to dismantle the socialist potential of the Weimar Constitution.[20] Liberal intellectuals went even further. In their view, the Weimar Constitution did not opt for 'economic democracy', but, on the contrary, the 'overall decision (*Gesamtentscheidung*) on the nature and form of the process of socio-economic cooperation' actually favoured the competitive market order.[21] After World War II, this (neo) liberal understanding of the concept of 'economic constitution' gradually prevailed in the academic world.[22]

One might therefore wonder whether the 'economic constitutionalism' developed by the various neoliberal trends has not influenced the mindset of public decision-makers (including judges and public servants) and permeated the institutions responsible for adopting, interpreting and applying the law. Regarding the question addressed in this article, one might ask whether 'neoliberal constitutionalism' has not helped to forge an implicit economic 'referential' for the European Union, ie, a relatively homogeneous doctrinal model of how the economy would and should work.[23] Our aim here is not to suggest that European integration should be read as a clear and deliberate project for the neoliberalisation of law and society, nor that the European Union would be a monolithic structure focused solely on the competitive market economy. It is our contention, however, that confronting the 'European economic constitution' with the key tenets of neoliberal constitutionalism provides a useful reading grid that gives coherence and consistency to European integration, but also helps to better understand the reasons behind some of its recurrent blind spots, including the so-called 'democratic deficit'.[24] Of course, this narrative does not exhaust the subject, and other analytical

[13]A Bailleux and F Ost, 'Droit, contexte et interdisciplinarité: refondation d'une démarche' 70 (1) (2013) Revue interdisciplinaire d'études juridiques 25. Regarding in particular the 'law in context' turn in European studies, see C Harlow 'The EU and Law in Context: The Context' 1 (1) (2022) European Law Open 209.

[14]PJ Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?' 1 (1) (2022) European Law Open 60.

[15]T Pankakoski, 'Conflict, Context, Concreteness: Koselleck and Schmitt on Concepts' 38 (6) (2010) Political Theory 749.

[16]KW Nörr, '"Economic Constitution": On the Roots of a Legal Concept' 11 (1) 1994 Journal of Law and Religion 343; H Rabault, 'Le Concept de Constitution économique: émergence et fonctions' in G Grégoire and X Miny (eds), *The Idea of Economic Constitution in Europe. Genealogy and Overview* (Brill/Nijhoff 2022) 94.

[17]G Grégoire, 'The Economic Constitution under Weimar: Doctrinal Controversies and Ideological Struggles' in Grégoire and Miny (n 16) 53.

[18]R Dukes, 'Hugo Sinzheimer and the Economic Constitution' in R Dukes (ed), *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press 2014) 12.

[19]D Jungbluth, *Die Entwicklung des deutschen Wirtschaftsverfassungsrechts: Von Weimar bis zum Investitionshilfeurteil* (Springer 2018).

[20]C Schmitt, *Der Hüter der Verfassung* (Duncker & Humblot 1931) 71; ER Huber, *Das Deutsche Reich als Wirtschaftsstaat* (Mohr Siebeck 1931).

[21]F Böhm, *Wettbewerb und Monopolkampf: Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung* (Carl Heymanns Verlag 1933) 120.

[22]T Biebricher, 'An Economic Constitution – Neoliberal Lineages' in Grégoire and Miny (n 16) 157.

[23]P Muller, 'Référentiel' in L Boussaguet et al (eds), *Dictionnaire des politiques publiques* (Presses de Sciences Po 2019) 533.

[24]See, eg, the Special Issue: M Blauberger et al (eds), 'Conventional Wisdoms Under Challenge – Reviewing the EU's Democratic Deficit in Times of Crisis' 52 (6) (2014) Journal of Common Market Studies 1171.

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frameworks (neofunctionalism vs intergovernmentalism[25]; responsiveness vs responsibility[26]; etc) can usefully be applied to complete the overview presented here.

We will proceed as follows: first, we will identify the 'common agenda' of the various neoliberal currents in their search for an ideal 'economic constitution' (Section 2); second, we will reread the broad outlines of the legal history of European integration in the light of this 'hard core' of neoliberal constitutionalism, in order to assess the extent to which the key tenets of the latter can be found in the 'European economic constitution' (Section 3).[27]

2. The 'great synthesis' of neoliberal economic constitutionalism: a brief overview

The neoliberal galaxy is crossed by profound epistemological and philosophical tensions.[28] Nonetheless, it is instructive to consider their 'unity in diversity' – to paraphrase the motto of the European Union: *in diversitate unitas*. The origins of 'neoliberalism(s)'[29] can be traced back to the 1930s, when the classical model of (political and economic) liberalism experienced a systemic and existential crisis. The process of critical introspection began at the Lippmann Colloquium[30] and continued within the Mont-Pèlerin Society.[31] Given the challenges posed by public interventionism and by the 'cartelisation' and 'monopolisation' of the economy, neoliberal intellectuals sought to overcome the ideology of the 'laissez-faire' and the 'invisible hand', and focused on the issue of the legal and institutional conditions of the competitive market economy. The 'economic constitution' was (and remains) a key concept in this effort to rebuild the intellectual foundations of the liberal model. The 'economic constitution' (*Wirtschaftsverfassung*) was the cornerstone of ordoliberalism (A.), before being further developed by Friedrich Hayek (B.) and then systematised in 'constitutional economics' (C.).

A. Ordoliberal constitutionalism: Ordnungspolitik *for the competitive market order*

Ordoliberalism is a school of thought developed in the 1930s around three professors at the University of Freiburg im Breisgau: the economist Walter Eucken and the lawyers Franz Böhm and Hans Großmann-Doerth. All the fellow travellers of ordoliberalism (Leonhard Miksch, Alexander Rüstow, Wilhelm Röpke, Alfred Müller-Armack, etc) adhered, in one way or another, to the interdisciplinary research agenda aimed at recasting liberal doctrine. This objective was clearly stated by the three 'founding fathers' in the 'Manifesto of 1936', entitled 'Our Task' (*Unsere Aufgabe*).[32] This seminal contribution emphasised the interdependence of the social spheres of economics, politics and law (*Interdependenz der Ordnungen)* and the political role of 'men of science'.

[25]F Nicoli, 'Neofunctionalism Revisited: Integration Theory and Varieties of Outcomes in the Eurocrisis' 42 (7) (2020) Journal of European Integration 897.

[26]P Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013). See the Special Issue: A Crespy et al (eds), 'Beyond Responsibility vs. Responsiveness: Reconfigurations of EU Economic Governance in Response to Crises' 31 (4) 2024 Journal of European Public Policy 925.

[27]For an in-depth analysis: G Grégoire, *La Constitution économique. Enquête sur les rapports entre économie, politique et droit* (Classiques Garnier 2025).

[28]S Audier, 'Les paradigmes du "Néolibéralisme"' 133 (2013) Cahiers philosophiques 21.

[29]S Audier, *Néo-libéralisme(s): une archéologie intellectuelle* (Grasset 2012).

[30]J Reinhoudt and S Audier, *The Walter Lippmann Colloquium: The Birth of Neo-Liberalism* (Palgrave Macmillan 2018).

[31]RM Hartwell, *A History of the Mont Pèlerin Society* (Liberty Fund 1995); P Mirowski and D Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009).

[32]W Eucken, F Böhm, and H Großmann-Doerth, 'Unsere Aufgabe. Beleitwort der Herausgeber zur Schriftenreihe "Ordnung der Wirtschaft"' in F Böhm (ed), *Die Ordnung der Wirtschaft als geschichtliche Aufgabe und rechtsschöpferische Leistung* (Kohlhammer 1937) VII (English translation: 'The Ordo Manifesto of 1936' in AT Peacock and H Willgerodt, *Germany's Social Market Economy – Origins and Evolution* [Macmillan 1989] 15).

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At the centre of the three spheres – economic, political and legal – is the cardinal concept of 'economic constitution', as a 'general political decision as to how the economic life of the nation is to be structured'.[33] While the Manifesto does not really say much more about this, the book to which it is the foreword, written by Böhm and entitled *The Ordering of the Economy as a Historical Task and a Work of Legal Creation*, provides further guidance:

> We can only truly speak in terms of an economic constitution where a politically-established will *prescribes* a particular mode and form of economic production for the community. [. . .]
>
> The economic constitution does not embody the reality of [the] economic process. It is instead an *embodiment of norms*; more exactly, those norms whose purpose it is to influence the economic behaviour of individuals and groups, and, above all [. . .] to order, or to regulate, the mutual economic activities of individuals and the subsequent relationships of corporate entities with one another. Anyone wishing to understand whether an economic constitution existed during a particular historical period, and what it looked like [. . .] must [. . .], above all, seek legal sign posts and sources, giving indications as to whether *a legally-binding decision was taken within the community in favour of a particular form of economic production*, and what the *political vision* of the desired mode of economic production was. [. . .]
>
> [T]he more dynamic economic life becomes, the more stable must its order be. [. . .] The only orders equal to this task are those *generated by a conscious and intelligent political will*, and by an *authoritative leadership decision founded in expert knowledge* [. . .].[34]

This reveals three fundamental themes of ordoliberal thought, which now need to be explored in greater depth: the *process* of economic interaction between individuals needs to be *ordered*; this ordering requires a *binding legal decision* about the economic system; the decision itself needs to be informed by and based on *scientific expertise*.

The fundamental distinctions of ordoliberalism: ordering policies (on the legal framework) vs regulatory interventions (in the economic process)

Against the simplistic view of what they called the 'paleoliberalism' of the Manchester School,[35] ordoliberals distinguish between the 'framework' (*Rahmen*) and the 'economic process' (*Wirtschaftsprozeß*).[36] The former is the set of social structures and legal institutions that underpin and regulate the economic order. The latter comprises the market mechanisms through which individual decisions are formed and coordinated, ie, competition and the price system. The aim is to systematically develop institutions and rules (the *framework*) that ensure that competition and price coordination (the *process*) cannot be distorted by either public authorities or by private interests.

This is the core idea of an economic constitution. To use the ordoliberal terminology, the state must engage in 'ordering policies' (*Ordnungspolitik*),[37] ie, it must establish the legal framework

[33]Ibid. 'Unsere Aufgabe' XIX ('Ordo Manifesto' 24). See also W Eucken, *Die Grundlagen der Nationalökonomie* (Gustav Fischer 1940) 52; KJ Partsch, 'Die verfassungsmässige Sicherung von Wirtschaftsprinzipien' 6 (1954) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 19, esp 27–8.

[34]Böhm (n 32) 54–6 (English translation by M Everson: 'Economic Ordering as a Problem of Economic Policy and a Problem of the Economic Constitution' in T Biebricher and F Vogelmann [eds], *The Birth of Austerity. German Ordoliberalism and Contemporary Neoliberalism* [Rowman & Littlefield 2017] 115, esp 115–17).

[35]A Rüstow, 'Paläoliberalismus, Kollektivismus und Neoliberalismus in der Wirtschafts- und Sozialordnung' in K Förster (ed), *Christentum und Liberalismus - Studien und Berichte der Katholischen Akademie in Bayern* (Karl Zink 1932) 149.

[36]W Eucken, 'Die Wettbewerbsordnung und ihre Verwirklichung' 2 (1949) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 1; W Eucken, *Grundsätze der Wirtschaftspolitik* (A. Francke/J.C.B. Mohr 1952) 241.

[37]I Pies, *Walter Euckens Ordnungspolitik* (Mohr Siebeck 2002); J Schnellenbach, 'The Concept of *Ordnungspolitik*: Rule-Based Economic Policymaking from the Perspective of the Freiburg School' 195 (3) (2023) Public Choice 283.

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under which market mechanisms can be fully deployed. According to the liberal tradition, however, it is in principle not the role of the state to intervene in the economic process, otherwise it runs the risk of distorting free competition. But the (early) German ordoliberals believe that the market, as a human institution, is prone to error and abuse. They therefore accept that the state should intervene in the process to correct such malfunctions: it then engages in 'regulatory interventions' (*Prozeßpolitik*). However necessary they may be, these interventions must remain 'dynamically consistent' with the market model and remain subsidiary. This means that interventions must be limited in scope and time, and they must be undertaken only when adjustments to the rules are not sufficient.[38] They must be both targeted at the market malfunction, and temporary, until the deeper problem can be resolved by revising the legal framework to bring it back into line with the needs of the market.[39]

The content of the ordoliberal economic constitution: constituent and regulatory principles

The distinction between acting on the framework and intervening in the process also applies to the *content* of the economic constitution. It is divided into two categories: the 'constituent principles' (*konstituierenden Prinzipien*), on one hand; the 'regulative principles' (*regulierenden Prinzipien*), on the other.[40] Among the former is a *Grundprinzip*: the need for a fully competitive price system (*vollständige Wettbewerb*) as a mechanism for the functioning of the economy. The second 'constituent principle' is equally important: monetary stability. This is a sine qua non, if a price coordination system is to remain viable and efficient over time. Then there are the principles of free access to markets, consistency of economic policy, private ownership over the means of production, freedom of contract and, finally, the unlimited liability of economic actors.

These seven 'constituent principles' are the necessary conditions of the 'private law society'.[41] However, they may not be sufficient to ensure a stable and fair market, since private powers may always seek to circumvent competition in order to achieve 'dominant positions'. It is therefore necessary to provide regulatory principles that will allow the State to intervene, but in a way that is consistent with the market economy. Eucken identifies five principles.[42] Three seem less important: (very moderate) tax progressivity; the fight against certain negative externalities; and the correction of different 'counter-cyclical' behaviour. But Eucken's first and last principles are crucial: an *anti-monopoly policy* must be implemented to combat anti-competitive behaviour; and a relatively *'automatic' and price-stability-oriented monetary policy* must be pursued.

Notwithstanding this quest for automatic governance, some ordoliberals, such as Röpke and Rüstow, insist on the possible need for direct intervention in the event of profound structural changes in order to bring about the inevitable adjustments – and thus force a rapid return to equilibrium.[43] This is one of the original features of ordoliberalism, which echoes Eucken's idea of

[38]W Röpke, *Die Gesellschaftskrisis der Gegenwart* (Haupt Verlag 1979 [original ed: 1948]) 258.

[39]This idea of 'dynamic consistency' overlaps with Eucken's distinction between 'principle' and 'moment' (Eucken [n 33] 28–32; Eucken, *Grundsätze der Wirtschaftspolitik* [n 36] 250–3).

[40]In 1949, Eucken developed *five* 'regulative principles' (Eucken, 'Die Wettbewerbsordnung' [n 36] 64–83), but he later only retained four of them (Eucken, *Grundsätze der Wirtschaftspolitik* [n 36]). This explains why most scholars mention four (and not five) regulative principles (W Möschel, 'The Proper Scope of Government Viewed from an Ordoliberal Perspective: The Example of Competition Policy' 157 [2001] Journal of Institutional and Theoretical Economics 3; W Bonefeld, *The Strong State and the Free Economy* [Rowman & Littlefield 2017]). However, the fifth regulative principle is of considerable importance, since it concerns monetary stability, which is both one of the fundamental concerns of ordoliberalism and one of the crucial issues in European and Monetary Union.

[41]F Böhm, 'Privatrechtsgesellschaft und Marktwirtschaft' 17 (1966) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 75.

[42]Eucken, 'Die Wettbewerbsordnung' (n 36) 33–64 (constituent principles) and 64–83 (regulatory principles).

[43]Röpke (n 38) 297–309; A Rüstow, 'Freie Wirtschaft – starker Staat. Die staatspolitischen Vorraussetzungen des wirtschaftspolitischen Liberalismus' in F Boese (ed), *Deutschland und die Weltkrise. Verhandlungen des Vereins für sozialpolitik in Dresden 1932* (Duncker & Humblot 1932) 62.

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'dynamic consistency' mentioned above. In their conception of the economy, the 'real' market is a social and legal institution. This institution must of course be constantly refined in order to come as close as possible to a hypothetical 'perfect' market. But the 'real' market never corresponds to the 'perfect' market. The latter remains an 'abstract and hypothetical standard' that can never be fully achieved.[44] What matters most is not so much that markets behave perfectly, but that economic actors internalise the logic of competition – if necessary, under the constraint of public institutions. In other words, they should act *as if* they were in a competitive situation, ie, as if markets were functioning 'perfectly'. Leonhard Miksch, in particular, has systematised this idea through the concepts of 'complete competition' (*vollständige Konkurrenz*) and 'as-if politics' (*Als-Ob Politik*).[45] The idea is that public authorities can force private agents to act in a way that is consistent with market competition. From this perspective, these public authorities are in a sense the 'guardians' of the competitive order, which they impose on the 'real' market. As we shall see below, this perspective is particularly fruitful for analysing the interventions of European institutions in the wake of the Eurozone crisis.[46]

The ordoliberal epistocracy or the central role of scientific expertise in designing and implementing the legal framework of the economy

In order to impose a particular economic order in the long run, it is necessary to understand how it works. Hence, the central role of 'expertise' in the ordoliberal vision and the defence of independent technocratic institutions, especially in the areas of competition and monetary policy. On this second point, ordoliberals were initially less insistent on the (statutory) independence of central banks – although some of them, such as Röpke, openly advocated this option.[47] However, it is clear from the outset that in their view price stability requires the neutralisation of monetary policy, which can no longer be used as an economic instrument at the service of public authorities, in order to reduce unemployment or improve growth. Instead, it should be entrusted to technical experts with the necessary knowledge.[48]

However, the centrality of expertise is not limited to the *implementation* of the economic constitution once it has been adopted, but also extends to its *design*.[49] Böhm expressed this very clearly in the introduction to his famous dissertation, where he explicitly endorsed the physiocrats' ambition to 'translate the doctrinal edifice of economics into the language of law' in order to 'proclaim natural law as the law of the state in the field of economic life'.[50] Enlightened by scientific knowledge, the public authorities must therefore both organise the market framework *ex ante* and intervene *ex post* to regulate malfunctions caused by the concrete behaviour of economic agents. In other words, the 'rule of law' should be extended to the economy – or, more precisely, the 'rule of economics' should be imposed by law.[51]

[44]E Hoppmann, 'Wettbewerb als Norm der Wettbewerbspolitik' 18 (1967) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 77.

[45]L Miksch, *Wettbewerb als Aufgabe: die Grundsätze einer Wettbewerbsordnung*, Ordnung der Wirtschaft (Kohlhammer 1937); L. Miksch, 'Die Wirtschaftspolitik des Als-Ob' 105 (1949) Zeitschrift für die gesamte Staatswissenschaft 310.

[46]See infra, 3.C. *The 'new economic governance': European institutions as guardians of market discipline*.

[47]W Röpke, 'Kernfragen der Wirtschaftsordnung' 48 (1997) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 27, esp 50 (paper written in 1953).

[48]E Dehay, 'La justification ordo-libérale de l'indépendance des banques centrales' 10 (1) (1995) Revue française d'économie 27.

[49]Böhm (n 32) 58–61.

[50]Böhm (n 21) 17. On the 'economic constitution' of physiocracy, see B Herencia, 'Recherches pour une constitution physiocratique' 378 (2014) Annales historiques de la Révolution française 3. On the (implicit) natural law in Böhm's thought, see D Nientiedt, 'Metaphysical Justification for an Economic Constitution? Franz Böhm and the Concept of Natural Law' 30 (1) (2019) Constitutional Political Economy 114.

[51]J Hien and C Joerges (eds), *Ordoliberalism, law and the rule of economics* (Hart Publishing 2017).

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B. Hayekian constitutionalism: the constitution of a 'catallactic' order

This idea of an economic 'rule of law' was further developed by Friedrich Hayek. While the ordoliberals bring together lawyers, economists and philosophers around a common agenda, it could be said that Friedrich August von Hayek alone embodies this interdisciplinary perspective. He studied philosophy and social sciences at the University of Vienna, where he obtained a doctorate in law in 1921 and a doctorate in political science in 1923. He then developed his first thoughts on cognitive learning processes at the Institute of Brain Anatomy in Würzburg, but eventually returned to Vienna to study economics under Carl Menger, Eugen von Böhm-Bawerk and Ludwig von Mises. Appointed director of the new Institute for Business Cycle Research in 1927, he was quickly recognised as a promising economist, leading to a professorship at the London School of Economics and Political Science (LSE) in 1931. In a sense, the foundations of his thinking were already contained in his academic writings of that time. He developed his ideas on the impact of monetary policy on trade cycles,[52] his refutation of collectivist economic planning[53] or his defence of the genetic link between market mechanisms and knowledge processes.[54] He then gathered his findings in two major books.[55] At the same time, Hayek broadened his field of investigation. He combined his epistemological analyses on social science methodology with considerations of political philosophy. This led to a radical critique of the 'constructivist rationalism' inherent in socialism, to which he opposed an evolutionary approach based on the spontaneous self-organisation of human communities, as found in the 'open society' promoted by liberalism.[56] It was this fierce indictment that brought him to public attention in 1944 with the publication of his best-selling pamphlet: *The Road to Serfdom*.[57]

After the war, he co-founded the Mont Pelerin Society (1947) to provide a forum for liberal thought, but also a citadel from which to launch the intellectual reconquest of the 'free world' – infected by Keynesian thinking and social democracy. In 1950, he moved to the University of Chicago, where he was appointed as a professor at the Committee on Social Thought, an interdisciplinary, PhD-granting graduate programme attached to the university but funded by a private foundation. Although he was not a member of the economics department, he nevertheless worked there with Frank Knight and Milton Friedman. During this American decade, he explored in greater detail the links between biology, evolution, knowledge processes, social self-regulation and cybernetics, but also began to investigate the legal conditions for a liberal society. The results were presented in his book *The Constitution of Liberty* (1960).[58] In 1962, he returned to Europe to take up the chair of political economy at the University of Freiburg im Breisgau, which had been previously held by Eucken until his sudden death in London in 1950, where he was giving a series of lectures at Hayek's invitation. In his inaugural lecture, Hayek explicitly endorsed Eucken's legacy.[59] Within the ordoliberal temple, Hayek set out to revive *Ordnungsdenken*, to such an extent that another member of the Freiburg School wrote that, '[a]lthough Eucken's chair had been filled in the meantime, von Hayek must be regarded as his true successor'.[60] From 1962 to 1968, he worked on his *magnum opus*: *Law, Legislation and Liberty* – a veritable *summa* of his

[52]FA Hayek, *Monetary Theory and the Trade Cycle* (Cape 1933).

[53]FA Hayek (ed), *Collectivist Economic Planning: Critical Studies on the Possibilities of Socialism* (Routledge & Kegan Paul 1935).

[54]FA Hayek, 'Economics and Knowledge' 13 (4) (1937) Economica 33.

[55]FA Hayek, *Profits, Interests, and Investment, and Other Essays on the Theory of Industrial Fluctuations* (Routledge 1939); FA Hayek, *The Pure Theory of Capital* (Macmillan 1941).

[56]FA Hayek, 'The Use of Knowledge in Society' 35 (4) (1945) The American Economic Review 519.

[57]FA Hayek, *The Road to Serfdom* (Routledge 1944).

[58]FA Hayek, *The Constitution of Liberty* (Chicago University Press 1960).

[59]FA Hayek, 'Wirtschaft, Wissenschaft und Politik (Antrittsvorlesung am 18 Juni. 1962 an der Albert-Ludwigs-Universität Freiburg)' in FA Hayek (ed), *Freiburger Studien - Gesammelte Aufsätze* (Mohr Siebeck 1969) 1.

[60]A Woll, 'Freiheit durch Ordnung: Die gesellschaftspolitische Leitidee im Denken von Walter Eucken und Friedrich A. von Hayek' 40 (1989) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 87, esp 88.

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political and social thought, which he published in three volumes (1973, 1976, 1979).[61] On the basis of this masterwork, it is possible to outline the main epistemological and legal features of Hayek's thought – and to clarify its (complex) links with the Freiburg School.

The market as 'catallaxy' and its social consequences

Hayek's starting point is the critique of planning, which is said to be at the root of the crisis of the liberal order in the interwar period. He contrasted the constructivist notion of 'plan' with the concept of 'order'. Like the ordoliberals, Hayek used this word as one of his main *Kampfbegriff* against the socialist thought. Unlike the latter, however, it is not an order imposed from above by a great architect (*Taxis*), but an order that comes from below, spontaneously founded and self-organised according to abstract general laws (*Kosmos*). This is based on his redefinition of the competitive market as an (albeit limited) process of discovery and knowledge, which he calls 'catallaxy'.[62] The market here represents the networking of the knowledge of all economic agents, which is crystallised in the prices of all goods and services exchanged on the market. The *real* market may not be 'perfect' (in the neoclassical sense of atomistic competition with total transparency of information), but it is necessarily 'optimal'. No 'external intervention' by any public or private body could ever perform better than the real market, since its knowledge is, in this theory, inherently inferior to the sum of the knowledge accumulated in the market. Hence the rejection of the idea of 'social justice', which requires 'artificial' intervention from outside the market (by public authorities) and would therefore distort the catallactic process of the market.

Besides, this process of discovery through competition would also apply to the legal phenomenon: the general and abstract rules of just conduct would emerge from a process of natural selection through competition. All the judge would have to do is observe the prevailing norm of conduct in order to recognise and gradually shape the spontaneous law of society.[63] In this respect, the 'common law' would capture the true nature of this *Nomos*. By contrast, 'law' in the modern sense of 'legislation', as the expression of the conscious will of the legislator (*Thesis*), would only be (conceptually and historically) secondary to *Nomos*. Its function would be to implement these general and abstract rules, and only very rarely to modify or adapt them. But the combination of constructivist rationalism (even more developed in the civil law systems) and 'unlimited democracy' would have undermined this adaptive function and led to more and more intervention in the general and abstract process of the market.

The content of Hayek's (neo)liberal model constitution

Against this trend, Hayek was firmly convinced of the need to revive the idea of the rule of law and to reopen the institutional project of (neo)liberal constitutionalism.[64] Apart from some puzzling institutional proposals (voting rights only from the age of 45, a single term of 15 years for members of the legislative assembly, etc), his 'model constitution' is most interesting for its content. Even if the *Nomos* were supposed to emerge spontaneously, Hayek considered it

[61]FA Hayek, *Law, Legislation and Liberty. A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge & Kegan Paul 1973 [*Rules and order*], 1976 [*The Mirage of Social Justice*], 1979 [*The Political Order of a Free People*]).

[62]See also ME Streit, 'Cognition, Competition, and Catallaxy – In Memory of Friedrich August von Hayek' 4 (2) (1993) Constitutional Political Economy 223.

[63]On the central role of the judiciary in Hayekian theory, see S Okruch, 'Der Richter als Institution einer spontanen Ordnung: Einige kritische Bemerkungen zu einer Zentralfigur in Hayeks Theorie der kulturellen Evolution' 52 (2001) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 131; S Ferey, 'L'économiste et le juge: réflexions sur la théorie hayékienne du droit' 54 (1) (2008) Cahiers d'économie politique 57.

[64]On Hayek's 'liberal constitutionalism', see I Pies, *F. A. von Hayeks konstitutioneller Liberalismus* (Mohr Siebeck 2003).

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necessary to 'creat[e] an adequate framework for a functioning competitive market'.[65] To this end, he made five key proposals.

First, competition law should be enshrined in the constitution. However, it should focus only on the market barriers and foreclosure and should be enforced by the courts – not on the general fight against all monopolies by independent administrative authorities, as favoured by the ordoliberals. Second, the public sector should be fiscally constrained by two mechanisms: the principle of 'balanced budgets' (the State cannot spend more than it takes in) and the division of fiscal powers. Third, public services should be opened up to competition, ie, liberalised. Fourth, this liberalisation should be extended to the monetary sphere, since allowing the private sector to offer alternative currencies would oblige the state to guarantee price stability so that it remains 'attractive'. Finally, the sovereignty of the State would have to be 'dismantled' through (internal) federalisation and integration into supranational structures (internationalisation or external federalisation).[66] In this way, the rules of the different legal systems would compete with each other, and economic agents would be able to go where the legal framework is most appropriate, ie, the most business-friendly. This would lead to the selection of the most 'efficient' rules. In other words, the authorities' quest for economic attractiveness would act as a self-disciplining mechanism.

Hayek's ordoliberal compatibility and the 'Hayekian turn' of ordoliberalism

Hayek's views are here 'compatible and even complementary' to the ordoliberal theses.[67] Admittedly, their starting points are different: the Freiburg School was developed from an internal reflection on liberalism, whereas Hayek's theory is first and foremost a defence of liberalism against its external enemies. And of course, there are divergences,[68] especially on competition policy. But in the end, they are clearly united in their denunciation of the politicisation of the economy and the overburdening of parliamentary democracy by social demands – and in the need to devise an appropriate *constitutional* framework for the market order.[69] Similarly, where the legal constructivism of the ordoliberals barely conceals the persistence of an economic natural law, Hayek's 'catallactic spontaneism' not only reveals an (implicit) immanent economic natural law, but also a (paradoxical) rationalist constructivism.

This probably explains the ease with which the second and third generation of ordoliberals achieved the 'Hayekian turn' initiated by Ernst-Joachim Mestmäcker.[70] His work spans more than half a century,[71] but can be summed up (broadly speaking) in two basic propositions. First, Mestmäcker used an evolutionary re-reading of competition to relativise the ordoliberal competitive interventionism inherent in *Als-Ob Politik*.[72] Second, he integrated the idea of an

[65]Hayek (n 61) vol. 3 115.

[66]See FA Hayek, 'The Economic Conditions of Interstate Federalism' 5 (1939) New Commonwealth Quarterly 131.

[67]VJ Vanberg, 'Friedrich A. Hayek und die Freiburger Schule' 54 (2003) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 3, esp 8.

[68]See A Woll, 'Freiheit durch Ordnung: Die gesellschaftspolitische Leitidee im Denken von Walter Eucken und Friedrich A. von Hayek' 40 (1989) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 87.

[69]ME Streit and M Wohlgemuth, 'The Market Economy and the State. Hayekian and Ordoliberal Conceptions' in P Koslowski (ed), *The Theory of Capitalism in the German Economic Tradition* (Springer 2000) 224.

[70]See E-J Mestmäcker, 'Power, Law and Economic Constitution' 11 (3) (1973) German Economic Review 177. See also ME Streit and G Wegner, 'Wissensmangel, Wissenserwerb und Wettbewerbsfolgen – Transaktionskosten aus evolutorischer Sicht' 40 (1989) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 183; ME Streit, 'Wissen, Wettbewerb und Wirtschaftsordnung – Zum Gedenken an Friedrich August von Hayek' 43 (1992) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 1. However, not all ordoliberals were convinced by Hayek's spontaneist theses. See in particular H Willgerodt, 'Die Liberalen und ihr Staat – Gesellschaftspolitik zwischen Laissez-faire und Diktatur' 49 (1998) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 43, esp 55–7.

[71]C Joerges, 'The Jurist as a True Teacher of Law' 56 (3) (2019) Common Market Law Review 843.

[72]See, eg, E-J Mestmäcker, 'The Development of German and European Competition Law with special Reference to the EU Commission's Article 82 Guidance of 2008' in LF Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011) 25.

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economic constitution into the supranational structure proposed by Hayek in order to develop an analytical framework adapted to the concrete experience of European integration.[73]

C. Constitutional economics and the great synthesis of neoliberal constitutionalism

Alongside these German and Hayekian currents, a neoliberal economic constitutionalism has also developed in the United States, under the banner of 'constitutional economics'. The origins of this US constitutional economics can be found in the early 'Chicago School' around Frank Knight, Jacob Viner and Henry Simmons (also known as 'Old Chicago'). The *rule-based economic policy* they proposed[74] seems in some ways to be the American equivalent of *Ordnungspolitik*.[75]

But the Chicago School then moved in different directions. Following Aaron Director and Ronald Coase,[76] some of them abandoned the institutional aspect and focused on using the tools of economics to describe and judge the whole social field, including the legal field. This was the core of the 'law and economics' movement of the second Chicago School,[77] which Richard Posner even extended to the constitutional text.[78] But Posner's economic analysis of constitutions leads only indirectly to 'constitutional economics'. As we shall see below, this research programme is mainly based on two other schools of thought inspired by the work of Frank Knight: on one hand, the Virginia School led by James Buchanan and, on the other hand, the 'new classical macroeconomics' developed in both Chicago and Harvard. These two sides of 'constitutional economics', however, can in turn be linked and reunited with ordoliberal *Ordnungspolitik* and Hayekian constitutionalism, thanks to Viktor Vanberg's 'great synthesis' of neoliberal economic constitutionalism.

The Virginia School: from public choice to constitutional political economy

The origins of the Virginia School can be traced back to the publication in 1962 of James Buchanan and Gordon Tullock's seminal book *The Calculus of Consent*, in which the two authors sought to elucidate the 'logical foundations of constitutional democracy'.[79] This book marked a veritable revolution in the way political decision-making was conceptualised – hence the other name of the Virginia School: 'Public Choice Theory'. According to Buchanan and Tullock, an *economic* analysis of the state would provide a systematic and rational explanation of both the establishment of the constitutional 'rules of the game' by the consent of citizens and the way in which public decision-makers, the administration and interest groups operate within this constitutional framework.

At the first level, the setting of constitutional norms in a democracy can be analysed, in economic terms, as an aggregate function of citizens' choices aimed at ensuring the long-term stability of the rules of the game while minimising the impact of these rules on their private sphere and individual freedom – and thus as a 'meta-norm of coordination' of individuals. Between a unanimity rule (too difficult to achieve) and a simple majority rule (too vulnerable to demagoguery), the qualified majority rule would be the rational choice.

[73]See, eg, E-J Mestmäcker, 'Europäische Prüfsteine der Herrschaft und des Rechts' 58 (2007) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 3.

[74]HC Simons, *A Positive Program For Laissez Faire – Some Proposals For A Liberal Economic Policy* (Chicago University Press 1934).

[75]E Köhler and S Kolev, *The conjoint quest for a liberal positive program: 'Old Chicago', Freiburg and Hayek*, HWWI Research Paper, No. 109 (2011), <https://econpapers.repec.org/paper/zbwhwwirp/109.htm> accessed 4 November 2024.

[76]See esp RH Coase, 'The Problem of Social Cost' 3 (1960) The Journal of Law & Economics 1.

[77]R Posner, *Economic Analysis of Law* (Little, Brown and Company 1972).

[78]R Posner, 'The Constitution as an Economic Document' 56 (1987) George Washington Law Review 4.

[79]J Buchanan and G Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press 1962).

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At the second level (the 'public choice' within the constitutional framework), Buchanan and Tullock applied neoclassical economic rationality to public decision-makers in order to analyse the functioning of the state as a 'political market'. Since politicians would seek only to maximise their individual utility, ie, their power, and since in a representative democracy, power is won through elections, elected representatives would tend to increase social spending to meet the expectations of various interest groups, especially at the end of their term, on the eve of new elections. Through the mechanism of public debt, this spending will only have a constraining effect with a certain time lag and could therefore also backfire on electoral rivals who would come to power at a later date.[80] Moreover, the economic analysis of public choices would apply in the same way to the (bureaucratic) public administration[81]: civil servants would tend not to seek economic efficiency but to increase their operating budget, in order to derive maximum benefit from it (ease of execution of their mission, extension of their scope of action, etc).

The *coup de force* of the Virginia School was to turn the 'market failure' argument against the advocates of public interventionism: the 'political market' would have the same defects ... but worse. Two remedies were proposed: the introduction of competition mechanisms into public administration (*New Public Management*); and the restriction of the discretion of political decision-makers by constitutionalising rules that would force them to remain efficient. It was this second dimension, first introduced in the field of taxation,[82] that Buchanan and his colleagues began to explore in greater depth from the mid-1980s onwards. This new research agenda is known as *constitutional economics*[83] or *constitutional political economy*.[84]

In fact, Buchanan and his disciples have sought to give neoliberal economic constitutionalism a 'democratic' basis by renewing the understanding of the idea of a 'social contract' on the basis of Hayek's intuitions about the 'epistemic uncertainty' into which individuals are plunged when they enter into relationships. But this does not prevent them from laying down in advance the constitutional rules on which citizens are supposed to agree. These 'rules of the game' cover several areas of the economy. The first concerns taxation and, more specifically, the need to limit the taxing power of the state.[85] Various constitutional reforms are envisaged, including: the introduction of a qualified majority voting for the adoption of tax measures; the setting of maximum tax rate limits; the capping of total tax revenues and expenditures by linking them to certain shares of national product or income. Another mechanism had long been proposed: fiscal federalism.[86] Echoing Hayek, he defends the idea of giving economic agents the power to 'vote with their feet',[87] ie, to go where the (para-)fiscal standards are the most favourable, in order to force the authorities to reform the legal framework to improve its attractiveness.[88] Hence his interest in European integration, which he saw as an opportunity to create such an effective 'constitutional' framework.[89]

[80]J Buchanan and RE Wagner, *Democracy in Deficit: The Political Legacy of Lord Keynes* (Academic Press 1977).

[81]G Tullock, *The Politics of Bureaucracy* (Public Affairs Press 1965).

[82]JM Buchanan, 'Constitutional Constraints on Governmental Taxing Power' 30 (1979) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 349; G Brennan and J Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Cambridge University Press 1980).

[83]R McKenzie (ed), *Constitutional Economics: Containing the Economic Powers of Government* (Lexington Books 1984).

[84]G Brennan and J Buchanan, *The Reason of Rules: Constitutional Political Economy* (Cambridge University Press 1985). In the introduction to the first issue of the new journal he founded in 1990, entitled *Constitutional Political Economy*, Buchanan defines 'The Domain of Constitutional Economics' (1 [1] [1990] Constitutional Political Economy 1), confirming that the two terms are interchangeable.

[85]G Brennan and JM Buchanan, 'Towards A Tax Constitution for Leviathan' 8 (3) (1977) Journal of Public Economics 255; G Brennan and JM Buchanan, 'Tax Instruments as Constraints on the Disposition of Public Revenues' 9 (3) (1978) Journal of Public Economics 301; Brennan and Buchanan (n 82).

[86]JM Buchanan, 'Federalism and Fiscal Equity' 40 (4) (1950) American Economic Review 583.

[87]Buchanan (n 82) 358.

[88]JM Buchanan, 'Federalism as an Ideal Political Order and an Objective for Constitutional Reform' 25 (2) (1995) Publius 19.

[89]JM Buchanan, 'Möglichkeiten für eine europäische Verfassung: Eine amerikanische Sicht' 42 (1991) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 127.

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Setting fiscal limits is not enough, however, if public policymakers can use debt indefinitely. Here too, Buchanan soon pointed out the problem of chronic fiscal imbalances, ie, the profligacy of public authorities that shifts the burden of debt onto future generations.[90] To prevent such a situation, the possibility of a budget deficit should be removed from majority rule. In other words, the constitution should be amended to include a balanced budget clause.[91] Conversely, the central bank should be prohibited from financing public deficits by creating money (and thus inflation). Monetary policy should therefore be constitutionalised, as Buchanan argued in 1981[92] and reiterated during the Great Recession of 2008.[93] This means that the definition of the quantity of money in circulation should be enshrined as one of the constitutional rules of the game, rather than as a parameter that can be adjusted as the game progresses. In addition, the independence of the monetary authority should be guaranteed in order to set monetary policy once and for all, as empirical studies would confirm.[94]

The new classical macroeconomics: 'rules rather than discretion'

Buchanan was implicitly referring here to the writings of the 'new classical macroeconomics'. Based on Milton Friedman's work on monetary stability[95] and John Muth's model of rational expectations of economic agents,[96] the members of this school of thought sought to defend the thesis of the efficiency of the competitive economy and insisted on the necessary neutralisation of money as a precondition for the stable and efficient functioning of the market. Broadly speaking, all their work can be seen as an attempt to refute the scientific validity (and hence the political relevance) of the expansionary fiscal and monetary policies inherited from the Keynesian paradigm.[97] In their view, economic agents will anticipate the fact that, on one hand, public borrowing is a kind of deferred taxation and, on the other hand, the increase in money supply will ultimately lead to inflation and thus to no increase in their personal net wealth. Consequently, and contrary to what Keynesianism claims, they will (logically) refuse in advance to increase their spending and thus (artificially) 'stimulate' consumption.

In addition to these two specific criticisms, there is the more general argument of the time inconsistency of (fiscal and monetary) discretionary policy, developed by Kydland and Prescott. The very nature of discretionary policy decisions implies that they can be reversed (as a result of democratic change or simply by a change in the opinion of the decision-makers). This creates a very high risk of incoherence, while these economic policies would need a minimum of time to be effective. The solution would therefore be to impose binding rules on politicians in order to limit their discretion. This is expressed in the title of Kydland and Prescott's famous article, which has become the motto of new classical macroeconomics: *Rules rather than Discretion*.[98] Kenneth Rogoff adds that monetary policy must be made autonomous by entrusting it to an independent

[90]JM Buchanan, *Public Principles of Public Debt* (Richard D. Irwin 1958).

[91]JM Buchanan, 'The Balanced Budget Amendment: Clarifying the Arguments' 90 (1) (1997) Public Choice 117.

[92]G Brennan and JM Buchanan, *Monopoly in Money and Inflation: The Case for A Constitution to Discipline Government* (Institute of Economic Affairs 1981).

[93]JM Buchanan, 'The Constitutionalization of Money' 30 (2) (2010) Cato Journal 251.

[94]Ibid., 256.

[95]M Friedman, 'A Monetary and Fiscal Framework for Economic Stability' 38 (3) (1948) The American Economic Review 245; M Friedman, 'Geldangebot, Preis- und Produktionsänderung' 11 (1959) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 193.

[96]JF Muth, 'Rational Expectations and the Theory of Price Movements' 29 (3) (1961) Econometrica 315.

[97]See, eg, RJ Barro, 'Are Government Bonds Net Wealth?' 82 (6) (1974) Journal of Political Economy 1095; RJ Barro and DB Gordon, 'A Positive Theory of Monetary Policy in a Natural Rate Model' 91 (4) (1983) The Journal of Political Economy 589.

[98]FE Kydland and EC Prescott, 'Rules Rather than Discretion: The Inconsistency of Optimal Plans' 85 (3) (1977) Journal of Political Economy 473.

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and 'conservative' central bank, ie, one geared to price stability.[99] Finally, Alberto Alesina and Lawrence H Summers then provided empirical support for the (now contested)[100] thesis of the economic efficiency of independent central banks.[101]

Despite different methods and assumptions, the new classical macroeconomics inherited from Friedman and Buchanan's constitutional political economy are therefore very similar in terms of the normative implications they draw from their respective theories.

The 'great synthesis' of neoliberal economic constitutionalism by Viktor Vanberg

Viktor Vanberg transformed this convergence into a 'great synthesis' of neoliberal economic constitutionalism. Born in Germany, he only came to ordoliberalism after a detour through the theories of Hayek and Buchanan.[102] As early as 1981, in Mannheim, he attempted to unify different neoliberal paradigms and explain the social order by combining the (individualist) spontaneism of the former with the (individualist) contractualism of the latter. At the University of Virginia, he worked intensively on integrating into a single 'meta-theory' the theses of Buchanan and Hayek,[103] and then of the first ordoliberals.[104] But it was in 1994, at the University of Freiburg im Breisgau and in the chair of political economy formerly occupied by Eucken and Hayek, that he really brought together the three main strands of neoliberal economic constitutionalism.[105]

In a nutshell: with the idea of *Ordnungspolitik*, ordoliberalism took the crucial step of rethinking the legal framework of liberalism in order to find the right 'rules of the game'; Friedrich Hayek's 'catallactic' understanding of market functioning tempered the 'interventionist' tendency of ordoliberalism; and James Buchanan's constitutional economics provided a 'democratic' argument for the need to 'constitutionalise' the market order – and to opt for 'rules rather than discretion', according to the motto of new classical macroeconomics. Beyond the epistemological complementarities (but also divergences) between these currents, Vanberg insists on their common 'normative dimension',[106] which includes the points mentioned above: the constitutionalisation of the competitive market order[107]; the independence of central banks with a strict mandate to ensure price stability[108]; the limitation of fiscal powers and the discipline of public spending through the

[99]K Rogoff, 'The Optimal Degree of Commitment to an Intermediate Monetary Target' 100 (1985) Quarterly Journal of Economics 1169; K Rogoff, 'Social institutions for overcoming monetary policy credibility problems' (American Economic Association Meetings, New Orleans, December 1986 <https://scholar.harvard.edu/files/rogoff/files/social_institutions.pdf> accessed 4 November 2024).

[100]J Klomp and J de Haan, 'Inflation and Central Bank Independence: A Meta-Regression Analysis' 24 (4) (2010) Journal of Economic Surveys 593; J Klomp and J de Haan, 'Central Bank Independence and Inflation Revisited' 144 (3) (2010) Public Choice 445.

[101]A Alesina, 'Macroeconomics and Politics' 3 (1988) NBER Macroeconomics Annual 13; A Alesina and LH Summers, 'Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence' 25 (2) (1993) Journal of Money, Credit and Banking 151.

[102]VJ Vanberg, *Die zwei Soziologien – Individualismus und Kollektivismus in der Sozialtheorie* (Mohr Siebeck 1975); VJ Vanberg, *Markt und Organisation. Individualistische Sozialtheorie und das Problem korporativen Handelns* (Mohr Siebeck 1982); VJ Vanberg, 'Libertarian Evolutionism and Contractarian Constitutionalism' in P Svetozar (ed), *Philosophical and Economic Foundations of Capitalism* (Lexington Books 1983) 71.

[103]VJ Vanberg, *Rules and Choice in Economics: Essays in Constitutional Political Economy* (Routledge 1994).

[104]VJ Vanberg, '"Ordnungstheorie" as Constitutional Economics – The German Conception of a "Social Market Economy"' 39 (1988) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 17.

[105]VJ Vanberg, *The Constitution of Markets: Essays in Political Economy* (Routledge 2001).

[106]Vanberg (n 104) 27–8.

[107]VJ Vanberg, 'Konstitutionenökonomische Überlegungen zum Konzept der Wettbewerbsfreiheit' 52 (2001) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 37.

[108]VJ Vanberg et al (eds), *Renewing the Search for a Monetary Constitution: Reforming Government's Role in the Monetary System* (Cato Institute 2015).

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balanced budget rule[109]; and the federalisation and internationalisation of the state to ensure normative competition.[110] As Vanberg summed up in a popularisation paper in 1997, 'there are two ways of forcing the state to act as an honest broker: constitutionalise the most fundamental economic decisions [. . .]; institutionalise elementary economic decisions by entrusting them to independent bodies that have no subordinate links with politicians'.[111]

Against this 'normative' background, one might ask whether this hard core of neoliberal economic constitutionalism – what Agustín José Menéndez has called 'neo-ordo-liberalism' –[112] does not overlap to a large extent with the European integration project.

3. The neoliberal foundations and implications of the 'European economic constitution(s)'

Following the distinction proposed by Kaarlo Tuori and Klaus Tuori,[113] the European economic constitution is usually divided into two layers: the 'microeconomic constitution' and the 'macroeconomic constitution'. But it would perhaps be more accurate to distinguish between three layers, with an intermediate level between the micro and macro level – which is the 'mesoeconomic constitution'.[114] A distinction can be made between rules applicable to *economic agents*, ie, private or public individuals acting *in the market*, and those applicable to *States*, ie, public decision-makers defining the *legal framework* of the market. Within the former, however, a further distinction can be made between the rules that enshrine *individual* economic freedoms, which are the conditions for the *existence* of the market, and those that guarantee, at a *structural* level, the imposition of the competitive mechanism, which are the conditions for the *functioning* of the market.

The three layers of the European economic constitution are thus as follows: first, the internal market, ie, the fundamental freedoms of movement, which takes an individual 'microeconomic' perspective (of the company, the worker, the capital owner, the service provider, etc); second, competition and state aid law, where the aim is no longer to maximise individual freedom, but to control and limit behaviour likely to disrupt the market process, be it from private or public actors; third, the Economic and Monetary Union, where the rules are no longer applied to economic agents acting on the market, but to public decision-makers responsible for defining the framework of 'macroeconomic' public policies.

A. The microeconomic constitution: fundamental freedoms of movement as a framework for the (internal) market and as a tool for competition between jurisdictions

The advent of the four 'fundamental' freedoms of movement has made them an essential subject for any lawyer practising in a Member State: from family law to administrative law and property

[109]VJ Vanberg and JM Buchanan, 'Organization Theory and Fiscal Economics: Society, State, and Public Debt' 2 (2) (1986) Journal of Law, Economics, and Organization 215.

[110]VJ Vanberg, 'A Constitutional Political Economy Perspective on International Trade' 43 (1992) ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 375; VJ Vanberg, 'Constitutionalism, Federalism, and Limited Government: Hayekian Arguments in Political Scientists' Perspective' in PJ Boettke and V Storr (eds), *Revisiting Hayek's Political Economy* (Emerald Publishing 2016) 123.

[111]VJ Vanberg, 'The Constitutional Market', *Project Syndicate*, 23 December 1997 <https://www.project-syndicate.org/commentary/the-constitutional-market> accessed 4 November 2024.

[112]AJ Menéndez, 'Numerical Rules or Political Government, That Is the (European) Question', 20 (6) (2022) Comparative European Politics 631.

[113]K Tuori and K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) 13.

[114]On this ternary distinction, see K Dopfer, J Foster and J Potts, 'Micro-meso-macro' 14 (3) (2014) Journal of Evolutionary Economics 263; K Dopfer, 'The Origins of Meso Economics: Schumpeter's Legacy and Beyond' 22 (1) (2012) Journal of Evolutionary Economics 133.

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law,[115] no area is immune from the impact or radiation of the free movement of goods, capital, services and persons. However, the 'spill-over effect' of the common (and then internal) market was not written into the text of the Treaties. It owes much to the case law of the European Court of Justice. Through its bold interpretations, the ECJ has linked the alleged primacy of European law to the extension of the scope of the freedoms of movement. As a result, social considerations have been relegated to the status of 'exception' to the 'rule' of the market. This raises the question of whether the law of the 'common market' has not, over time, become the 'common law' of the market.

Fundamental freedoms of movement: an instrument of Europeanisation and liberalisation

The common (and then internal) market is at the heart of the European project and of the idea of a 'European economic constitutionalism'.[116] It was on the basis of the fundamental freedoms of movement that the Court of Justice established the autonomy and primacy of European law over the Member States.[117]

However, the type of market organisation initially remained partly open: the first Treaties appeared as a (relative) compromise between the German (ordo)liberal conception and a more interventionist one, sometimes described as an 'indicative planning' *à la française*.[118] Hence the criticism of the early ordo-liberals, who were concerned about the effects of this dirigiste tendency.[119] The European Coal and Steel Community (ECSC) aimed to create a common energy market through planning. Euratom extended this idea, while the European Economic Community (ECC) pushed the economic integration in a more liberal direction. Although it included some interventionist aspects (Common Agricultural Policy, relatively high external tariff, etc), the hard core of the EEC was the common market project, based on a customs union, a policy of 'undistorted' competition and fundamental freedoms of movement, under the supervision of a semi-technocratic body (the 'High Authority', renamed the 'Commission' in 1957) and a supranational court, the 'Court of Justice of the European Communities' (renamed the 'Court of Justice of the European Union' in 2009).

While the interventionist parts were gradually mitigated, the common market underwent a remarkable development. In the 1960s, the Court of Justice used it to give the new European legal order a truly coherent economic doctrine. As the French liberal economist Jacques Rueff put it shortly after the end of his term as a judge at the ECJ (1958–1962), the Court succeeded in subjecting the interventionist provisions to a more general economic logic in line with '*Soziale Marktwirtschaft*' (ie, ordoliberalism).[120] This 'liberal' interpretation also serves to justify the Court's claims to autonomy, as the *Van Gend en Loos* judgement of 5 February 1963 perfectly illustrates. In that case, the autonomy of European law in relation to national law was based on the hard core of the common market: the prohibition of customs duties. Moreover, the direct effect recognised for these provisions and the subjective right conferred on individuals gave the Court a

[115]See, eg, M Fallon, 'Constraints of Internal Market Law on Family Law' in J Meeusen et al (eds), *International Family Law for the European Union* (Intersentia 2007) 149; E Slautsky, *L'organisation administrative nationale face au droit européen du marché intérieur* (Larcier 2018); E Ramaekers, *European Union Property Law: From Fragments to a System* (Intersentia 2013).

[116]Ophüls (n 3); W Sauter, 'The Economic Constitution of the European Union' 27 (4) (1998) Columbia Journal of European Law 27; A Hatje, 'The Economic Constitution within the Internal Market' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing/CH Beck/Nomos 2010) 589.

[117]P Van Cleynenbreugel and X Miny, 'The Fundamental Economic Freedoms: Constitutionalizing the Internal Market' in Grégoire and Miny (n 16) 263.

[118]P Gerbet, 'Le rôle du couple franco-allemand dans la création et le développement des Communautés européennes' in H Ménudier (ed), *Le couple franco-allemand en Europe* (Presses Sorbonne Nouvelle 1993) 24.

[119]W Röpke, *Jenseits von Angebot und Nachfrage* (Rentsch 1958).

[120]J Rueff, 'La Cour et l'économie politique' in K Carstens and R Börner (eds), *Zehn Jahre Rechtsprechung des Gerichtshofs der europäischen Gemeinschaften/Dix ans de jurisprudence de la cour de justice des communautés européennes: congrès européen Cologne du 24 au 26 avril 1963* (Carl Heymanns Verlag 1965) 13, esp 22.

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particularly effective means of compelling States to comply with their obligations.[121] The Court then extended the claims to autonomy by asserting the 'primacy' of European law,[122] even over national constitutional law,[123] and by claiming the 'power of the last word', ie, the competence to decide on conflicts of competence (*Kompetenz–Kompetenz*).[124]

In turn, the alleged 'primacy' served to further extend the scope of the common market rules, in particular the prohibition of obstacles to the free movement of goods, both at the 'fiscal' level (customs duties and taxes having equivalent effect) and at the 'material' level (quantitative restrictions introducing an import or export quota or measures having equivalent effect). In this respect, the concepts of 'goods' and 'taxes having equivalent effect' were already interpreted very broadly in 1968.[125] Less than a year later, the ECJ clarified the *absolute* nature of the prohibition, ie, irrespective of the minimal nature of the imposition or the absence of a protectionist objective.[126]

In the 1960s and early 1970s, however, this movement remained restrained. The ECJ appeared reluctant to use these new (self-empowered) legal means to further 'expand' the realm of economic freedoms. This was likely due to the lingering 'interventionist' tendency among Western European public decision-makers, who remained (partly) committed to the 'Keynesian' referential. Indeed, until the mid-1970s, there were several attempts at defining not only a common European social policy,[127] but also a common reflationary policy in response to the first oil shock.[128] However, almost simultaneously, the shift that ended the *Trente Glorieuses* was underway.[129] The increased focus on monetary stability led to a revival of free-market thinking and a greater rejection of state interventionism. In this context, the fundamental freedoms of movement became key drivers for dismantling the 'barriers' to the market created by state regulation. In other words, while monetary stability began to take precedence over the objectives of growth and full employment, an extensive interpretation of economic freedoms emerged.

In the *Dassonville* judgement of 11 July 1974,[130] the ECJ gave an extremely broad definition of the concept of 'measures having equivalent effect to quantitative restrictions' (MEERQ). The criterion is the obstacle to trade, even if this obstacle is only *potential* or *indirect*. It can be justified only on the basis of one of the grounds listed exhaustively in Article 36 of the Treaty establishing the European Economic Community (TEEC) (now Article 36 of the Treaty on the Functioning of the European Union (TFEU)). In the same vein, during the momentous months of 1978/1979,[131] a

[121]R Lecourt, 'Qu'eût été le droit des communautés sans les arrêts de 1963 et 1964' in *L'Europe et le droit. Mélanges en hommage à Jean Boulouis* (Dalloz 1991) 349.

[122]ECJ, 15 July 1964, Case 6/64 *Costa/E.N.E.L.* ECLI:EU:C:1964:66.

[123]ECJ, 17 December 1970, Case 11/70 *Internationale Handelsgesellschaft* ECLI:EU:C:1970:114.

[124]ECJ, 9 March 1978, Case 106/77 *Simmenthal II* ECLI:EU:C:1978:49, paras 22–3.

[125]ECJ, 10 December 1968, Case 7-68 *Commission v Italy* ECLI:EU:C:1968:51.

[126]ECJ, 1 July 1969, Case 24/68 *Commission v Italy* ECLI:EU:C:1968:51, para 9.

[127]Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 149, 5 July 1971, 2); Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ L 74, 27 March 1972, 1); Guidelines for a social action programme presented by the Commission to the Council on 19 April 1973 4 (1973) Bulletin of the European Communities, 5; Social Action Programme submitted by the Commission (COM (73) 1600 final) to the Council on 25 October 1973 2 (1974) Bulletin of the European Communities 11; Council Resolution of 21 January 1974 concerning a social action programme (OJ C 13, 12 February 1974, 1). See Aurélie Dianara Andry, *Social Europe, the Road Not Taken. The Left and European Integration in the Long 1970s* (Oxford University Press 2022).

[128]Council Directive 74/121/EEC of 18 February 1974 on stability, growth and full employment in the Community (OJ L 63, 5 March 1974, 19); Council Decision 74/120/EEC of 18 February 1974 on the attainment of a high degree of convergence of the economic policies of the Member States of the European Economic Community (OJ L 63, 05 March 1974, 16).

[129]N Crafts and G Toniolo, '"Les Trente Glorieuses": From the Marshall Plan to the Oil Crisis' in D Stone (ed), *The Oxford Handbook of Postwar European History* (Oxford University Press 2012) 356.

[130]ECJ, 11 July 1974, Case 8-74 *Dassonville* ECLI:EU:C:1974:82, para 5.

[131]On the watershed year of 1979, see F Bösch, 'L'année 1979 : transformations globales et bouleversements annonciateurs' 35 (2) (2016) Histoire, Économie & Société 77; F Bösch, *Zeitenwende 1979: Als die Welt von heute begann* (C.H. Beck 2020).

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few weeks after the European Monetary System was finally agreed upon,[132] the *Cassis de Dijon* judgement of 20 February 1979[133] confirmed this trend: the Court's approach is based on market access (rather than the less stringent criterion of discrimination).[134] As a result, the scope of the MEERQs has been extended almost indefinitely – even though at the same time new justifications have been declared admissible ('mandatory requirements in the public interest'). The ECJ has thus moved from a principle of equal treatment to 'mutual recognition'.[135] It is no longer enough for Member States to treat economic operators equally; they must also apply the rules of the country of origin of the goods. This has created a process of 'competition between jurisdictions': in order to attract companies (and their capital), it may be in the (short-term) interest of States to reduce the legal requirements for trade; and since these companies benefit from freedom of establishment,[136] they are likely to choose the State that offers the best conditions; this 'law shopping' then leads to a downward adjustment of legal regimes, which in turn risks creating a 'race to the bottom'.[137] In other words, the principle of mutual recognition has an almost automatic 'deregulatory effect'[138] – as Germany had argued in *Cassis de Dijon* to justify the validity of the contested measure[139] . . . but in vain, since the Court has simply ignored this argument.

It is true that 'mandatory requirements in the public interest' to some extent prevent this deregulatory effect. However, it is the Court's responsibility to weigh the 'non-economic' objectives of the contested measure against the market barrier it creates. Through the proportionality test, the judges actually apply a cost-benefit analysis that indirectly and implicitly reflects the metaphysics of efficiency.[140] Since the Court are thus seen as the custodian of a hypothetical objective scale of values that would allow the objectives and effects of the contested measures to be rationally weighed,[141] it logically becomes the legitimate 'neutral and impartial' arbiter of the social choices made by the Member States (and their elected parliaments).

Although the *Keck* jurisprudence[142] seemed for a time to mark a return to the criterion of discrimination in selling arrangements, the Court has been careful to limit the scope of this new category[143] – and even seemed inclined to abandon it: sometimes it invoked it without applying it, sometimes it ignored it altogether.[144] At the same time, the market access criterion has been

[132]T de Vries, *On the Meaning and Future of the European Monetary System* (Princeton University Press 1980); GB Pittaluga, 'The European MONETARY SYSTEM' in D Preda (ed), *The History of the European Monetary Union. Comparing Strategies amidst Prospects for Integration and National Resistance* (P.I.E. Peter Lang 2016) 89, esp. 90–2. See also n 297.

[133]ECJ, 20 February 1979, Case 120/78 *Cassis de Dijon AG* ECLI:EU:C:1979:42.

[134]Van Cleynenbreugel and Miny (n 116) 276–7.

[135]J Pelkmans, 'Mutual Recognition: Economic and Regulatory Logic in Goods and Services' in T Eger and B Schaefer (eds), *Research Handbook on the Economics of European Union Law* (Edward Elgar 2012) 113.

[136]ECJ, 9 March 1999, Case C-212/97 *Centros* ECLI:EU:C:1999:126.

[137]E Carpano et al (eds), *La concurrence réglementaire, sociale et fiscale dans l'Union européenne* (Larcier 2016). Regarding in particular the income tax competition, see J Jaakkola, 'Taming the Leviathan or Dismantling Democratic Government? Evolving Political Ideas on Spontaneous Income Tax Integration in the European Union' 2 (3) (2023) European Law Open 575.

[138]E Carpano, 'La dynamique dérégulatoire de l'entrave dans le marché intérieur' 616 (3) (2018) Revue de l'Union européenne 140.

[139]ECJ, 20 February 1979, *Cassis de Dijon* (n 133) para 12.

[140]A Marzal Yetano, *La dynamique du principe de proportionnalité. Essai dans le contexte des libertés de circulation du droit de l'Union européenne* (Institut Universitaire Varenne 2014).

[141]DM Beatty, *The Ultimate Rule of Law* (University Press 2004) 165: 'Impartially applied, proportionality permits disputes about the limits of legitimate lawmaking to be settled on the basis of reason and rational argument. It makes it possible to compare and evaluate interests and ideas, values and facts, that are radically different in a way that is both rational and fair. It allows judgements to be made about ways of thinking that are as incommensurable as reason and faith. It provides a metric around which things as dissimilar as length and weight can be compared.'

[142]ECJ, 24 November 1993, Case C-267/91 and C-268/91 *Keck and Mithouard* ECLI:EU:C:1993:905.

[143]ECJ, 8 March 2001, Case C-405/98 *Gourmet* ECLI:EU:C:2001:135. See C Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2019) 112.

[144]E Spaventa, 'Leaving Keck Behind? The Free Movement of Goods after the Rulings in Commission v Italy and Mickelsson and Roos' 35 (6) (2009) European Law Review 914.

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extended to the other fundamental freedoms of movement: services[145] and freedom of establishment,[146] workers[147] and capital.[148] Moreover, the deregulatory dynamic has been further reinforced by the reduction of the 'purely internal situations' that were supposed to be excluded from the scope of European law,[149] but which the Court of Justice has gradually reintroduced by means of various abstract reasoning.[150]

It is true that, since the 2000s, this liberalisation of trade through the resolute action of the ECJ (negative integration) has gradually been replaced by the activity of the European legislative institutions (positive integration).[151] This may have helped to promote certain non-economic concerns,[152] but it has also (and perhaps above all) made it possible to combat disparities that persist despite the principle of mutual recognition,[153] in particular barriers that were declared to be justified but which give rise to what economics calls 'transaction costs' (information costs, costs of adapting the product or service, etc).[154] In this respect, the Court of Justice ensures that harmonisation legislation contributes to the establishment of the internal market – and thus to the liberalisation of trade.[155] Hence the early adoption of the 'new approach' to technical harmonisation,[156] followed by the 'new governance' approach[157] and the 'reflexive harmonisation' approach,[158] which aim to promote procedural mechanisms that enable economic actors to develop their own methods of regulation in a context of continuous adaptation. However, these new approaches have complemented rather than replaced the mechanisms of regulatory competition.[159] This is also true of the approach adopted for financial services[160] and of the 'open method of coordination' (OMC),[161] which was developed to identify 'best practices' following a comparative analysis of national (or regional, local, etc) regulations.

[145]ECJ, 25 July 1991, Case C-76/90 *Säger* ECLI:EU:C:1991:331.

[146]ECJ, 30 November 1995, Case C-55/94 *Gebhard* ECLI:EU:C:1995:411.

[147]ECJ, 15 December 1995, Case C-415/93 *Bosman* ECLI:EU:C:1995:463.

[148]ECJ, 4 June 2002, Case C-367/98 *Commission v Portugal* ECLI:EU:C:2002:326.

[149]ECJ, 7 February 1979, Case 115/78 *Knoors* ECLI:EU:C:1979:31, para 24; ECJ, 28 March 1979, Case 175/78 *Saunders* ECLI:EU:C:1979:88, para 11; ECJ, 15 December 1982, Case 286/81 *Oosthoek's Uitgeversmaatschappij BV* ECLI:EU:C:1982:438, para 9. See H Tagaras, 'Règles communautaires de libre circulation, discriminations à rebours et situations purement internes' in M Dony and A De Walsche (eds), *Mélanges en hommage à Michel Waelbroeck*, Tome 2 (Bruylant 1999) 1499.

[150]A Arena, 'The Wall Around EU Fundamental Freedoms: the Purely Internal Rule at the Forty-Year Mark' 38 (2019) Yearbook of European Law 153.

[151]J Zglinski, 'The End of Negative Market Integration: 60 years of Free Movement of Goods Litigation in the EU (1961–2020)' 31 (3) (2024) Journal of European Public Policy 633.

[152]M van den Brink et al, 'Revisiting the Asymmetry Thesis: Negative and Positive Integration in the EU' (2023) Journal of European Public Policy <https://doi.org/10.1080/13501763.2023.2296940>.

[153]See, eg, the Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for Services, COM/2002/0441 final.

[154]See, eg, G Wagner, 'The Economics of Harmonization: The Case of Contract Law' 39 (2002) Common Market Law Review 995.

[155]ECJ, 17 May 1984, Case C-15/83 *Denkavit* ECLI:EU:C:1984:183; ECJ, 5 October 2000, C-376/98 *Germany v Parliament and Council* ECLI:EU:C:2000:544.

[156]J Pelkmans, 'The New Approach to Technical Harmonization and Standardization' 25 (3) (1987) Journal of Common Market Studies 249; Barnard (n 143) 592. This method was extended to services in 2012 – see A Van Waeyenberge, 'La normalisation technique en Europe. L'Empire (du droit) contre-attaque' 32 (3) (2018) Revue Internationale de Droit Économique 305.

[157]Barnard (n 143) 597–601.

[158]S Deakin, 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economic Perspective on Centros' 2 (1999/2000) Cambridge Yearbook of European Legal Studies 23.

[159]S Deakin, 'Reflexive Governance and European Company Law' 15 (2) (2009) European Law Journal 224.

[160]M Ortino, 'The Role and Functioning of Mutual Recognition in the European Market of Financial Services' 56 (2) (2007) The International and Comparative Law Quarterly 309.

[161]KA Armstrong, 'The Open Method Of Coordination: Obstinate Or Obsolete?' in R Schütze and T Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order*, vol. I (Oxford University Press 2018) 777.

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The fundamental importance of positive harmonisation in trade liberalisation becomes even clearer at two levels. On one hand, important sectors of the economy, which were still partially or totally excluded from the competition induced by the free movement of goods (due to mandatory requirements or overriding reasons in the general interest invoked by the Member States), have been explicitly subjected to liberalisation by EU secondary legislation, in particular in the network industries (energy, telecommunications, public transport or postal services).[162] On the other hand, the so-called 'Bolkestein' Directive of 12 December 2006 led to a general harmonisation of the rules applicable to the provision of services,[163] which went much further than negative integration had already allowed – even if some exceptions had to be reintroduced in response to the wave of opposition the initial draft had provoked.[164]

The subordination of fundamental (social) rights to fundamental economic freedoms

Nevertheless, one might well wonder whether this deregulatory dynamic has not been counter-balanced, or at least greatly weakened, by the gradual emergence of 'social' considerations at the EU level. Initially, social considerations were almost entirely absent from the EU Treaties,[165] except for the idea that economic integration through the common (internal) market would automatically bring social progress to all classes and citizens.[166] However, the almost unlimited extension of the scope of internal market law raises the question of the existence of a possible 'social' space outside the market that could impede the free movement of goods, capital, services and persons. 'Social' objectives have gradually been incorporated into the Treaties or put forward by certain Member States, so that the ECJ has had to articulate the economic freedoms of the internal market with these social concerns.

The Court's position can be summed up as follows: absolute refusal to exclude certain activities of a 'social' nature from the scope of the freedoms of movement,[167] but acceptance of social considerations as justification for barriers (protection of workers,[168] maintenance of a balanced medical and hospital service accessible to all,[169] etc), subject, however, to the conditions of necessity and proportionality. In other words, it is the 'rule-exception' scheme that applies here. And via the proportionality test, the ECJ once again assumes the role of arbiter of the social choices made by states and elected representatives. This was by no means self-evident: some authors have argued that it was just as possible to derive a kind of 'reservation of sovereignty' in social matters on the basis of Article 118 TEEC (ie, Article 137 of the Treaty establishing the European Community (TEC) and 153 TFEU).[170]

[162]P-O de Broux, 'Entre libéralisation et régulation: l'européanisation des industries de réseau' in D Duez et al (eds), *L'européanisation. Sciences humaines et nouveaux enjeux* (Bruylant 2014) 333.

[163]See, eg, P Delimatsis, 'From Sacchi to Uber: 60 Years of Services Liberalization, Ten Years of the Services Directive in the EU' 37 (2018) Yearbook of European Law 188.

[164]H Badinger and N Maydell, 'Legal and Economic Issues in Completing the EU Internal Market for Services: An Interdisciplinary Perspective' 47 (4) (2009) Journal of Common Market Studies 693; MD Jensen and P Nedergaard, 'From "Frankenstein" to "Toothless Vampire"? Explaining the watering down of the Services Directive' 19 (6) (2012) Journal of European Public Policy 844.

[165]K Lenaerts and P Foubert, 'Social Rights in the Case-Law of the European Court of Justice: The Impact of the Charter of Fundamental Rights of the European Union on Standing Case-Law' 28 (3) (2001) Legal Issues of Economic Integration 267, esp 267 and 284; O De Schutter, 'The Balance Between Economic and Social Objectives in the European Treaties' 5 (2006) Revue française des affaires sociales 119, esp 119–21.

[166]S Deakin, 'Labour Law as Market Regulation: The Economic Foundations of European Social Policy' in P Davies et al (eds), *European Community Law: Principles and Perspectives* (Clarendon Press 1996) 62.

[167]ECJ, 17 December 1981, Case 279/80 *Webb* ECLI:EU:C:1981:314, para 9-10; ECJ, 28 April 1998, Case C-158/96 *Kohll* ECLI:EU:C:1998:171, para 20-1; ECJ, 12 July 2001, C-157/99 *Smits and Peerbooms* ECLI:EU:C:2001:404, para 54.

[168]ECJ, 14 July 1981, Case 155/80 *Oebel* ECLI:EU:C:1981:177.

[169]ECJ, 28 April 1998, *Kohll* (n 167).

[170]F Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction?: The Clash between the European Business Freedoms and the National level of Workers' Protection' 9 (1) (2018) European Labour Law Journal 50; Q Detienne, *Droit économique européen et systèmes de pension de retraite nationaux* (Presses Universitaires de Liège 2023) 207.

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The EU Charter of Fundamental Rights, adopted in 2001 and made binding by the Lisbon Treaty, could have changed the dynamic, if the 'social' provisions (Title IV of the Charter) had not been relegated to the background. Most of the economic and social rights enshrined have only the status of 'principles', with virtually no justiciability, rather than full 'rights' (Article 52 of the Charter).[171] Besides, even those that have been given the status of 'rights' are considered subordinate to the fundamental freedoms of movement. The landmark *Viking* and *Laval* cases on the right to strike and the freedom to provide services are of course paradigmatic expressions of this subordination.[172] The defence of a 'balance' between the 'economic purpose' of the freedoms of the internal market and the 'objectives pursued by social policy' of the EU[173] hardly conceals the primacy of the former over the latter. The right to collective bargaining (including strikes) must still be justified against economic freedoms. According to the ECJ, strict control of its necessity, appropriateness and proportionality *sensu stricto* even includes checking whether the unions have exhausted *all* means of collective bargaining before taking strike action.[174] It is difficult to express more clearly the subordinate relationship between social rights and fundamental economic freedoms.

Three points seem particularly significant here. First, the Court turned the *floor* (minimum threshold) of social protection for posted workers, derived from Directive 96/71, into a *ceiling* (maximum threshold) of restrictions on the free movement of their employers.[175] Second, the decisions reveal a variable application of the principle of non-discrimination (Articles 18 and 45(2) TFEU), since the Court did not seem to be moved by the existing difference in treatment between posted workers and national workers – on the contrary, it even imposes it.[176] Third, it considered that even the protection of human dignity must be 'reconciled' with the freedom to provide services.[177] The proportionality test shows here once again how much it tends to make the most incommensurable things commensurable . . . but according to a market economy logic: social rights may exceptionally stand in the way of the market freedoms, but the latter remain the rule.[178]

Intermediary lessons: from 'common market' law to 'common law' of the market

This does not mean, of course, that the development of internal market law is the linear story of pure and perfect legal implementation of neoliberal theories. The case law of the Court of Justice and the actions of the Commission (and other EU institutions) can only be understood if other political (neo-functionalism) or legal (primacy vs sovereignty) analytical grids are also taken into account. But there is also an economic rationale that the actors have pursued, albeit implicitly. From the outset, as Jacques Rueff has pointed out, the judges of the Court of Justice have sought to give it unity by 'bringing [liberal] economic theory into legal doctrine'.[179] The Treaties already contained an important decision in favour of market competition, but they nevertheless left open

[171]Opinion of Advocate General Cruz Villalon, 18 July 2013, ECLI:EU:C:2013:491 preceding ECJ, 15 January 2014, Case C-176-12 *Association de médiation sociale* ECLI:EU:C:2014:2, para 55.

[172]ECJ, 11 December 2007, Case C-438/05 *Viking* ECLI:EU:C:2007:772; ECJ, 18 December 2007, Case C-341/05 *Laval* ECLI:EU:C:2007:809. See also ECJ, 3 April 2008, Case C-346/06 *Rüffert* ECLI:EU:C:2008:189; ECJ, 19 June 2008, Case C-319/06 *Commission v Luxembourg* ECLI:EU:C:2008:350. Regarding the construction of the *Viking* and *Laval* judgements (both ahead and after the rulings) as a 'political, legal and more largely symbolic crucial defeat for social Europe', see J Louis, 'Constructing the Viking and Laval Cases as a Major Defeat for Social Europe: A Contextual and Processual Analysis' 2 (4) (2023) European Law Open 724.

[173]ECJ, 11 December 2007, *Viking* (n 172) para 79; ECJ, *Laval* (n 172) para 105.

[174]ECJ, 11 December 2007, *Viking* (n 172) para 87.

[175]S Deakin, 'Regulatory Competition after Laval' 10 (2008) Cambridge Yearbook of European Legal Studies 581, esp 583.

[176]Ibid., 598.

[177]ECJ, 11 December 2007, *Viking* (n 172) para 46; ECJ, 18 December 2007, *Laval* (n 172) para 94.

[178]A Supiot, 'Le sommeil dogmatique européen' 1 (2012) Revue française des affaires sociales 185.

[179]Rueff (n 120) 25.

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the possibility of moving in a more interventionist direction. The ECJ, supported by the Commission, has endeavoured to close down this possibility.

Despite its slight social temperament, the model of integration of the internal market thus reflects some key tenets of neoliberal economic constitutionalism: improving the legal framework to create the legal conditions for the proper functioning of the market; leaving competition to operate within this framework ('mutual recognition' as a means of competition between jurisdictions). Hence the fact that, after the initial reluctance of ordoliberals, some of them have soon defended the 'eco-constitutional' nature of the Treaties.[180] The *acquis communautaire* of the internal market is particularly consistent with the idea of 'integration by framework activities', ie, by *Ordnungspolitik*.[181]

B. The mesoeconomic constitution: competition law as Ordnungspolitik

This observation is further confirmed by the European mesoeconomic constitution. Here too, the starting point is not as obvious as it might appear ex post.[182] The German ordoliberal position on competition law has largely been adopted, since both agreements between companies and abuses of dominant positions as well as State aid have been prohibited in principle. However, it has been tempered by the Treaties' neutrality with regard to the Member States' system of property ownership (Article 222 TEEC, Article 295 TEC and Article 345 TFEU) and by a reference to 'undertakings entrusted with services of general economic interest' (SGEIs) (Article 90[2] TEEC, Article 86[2] TEC and Article 106[2] TFEU). Once again, it is the decisive work of the ECJ and the Commission that has gradually made it possible to establish the framework for competition, both with regard to private companies (ordinary competition law) and to public intervention via State aid or SGEIs (public competition law) – confirming the primacy of the tenets of neoliberal economic constitutionalism in EU law (2.2.3).

Ordinary competition law: controlling cartels, tackling dominant positions

Ordinary European competition law regulates the behaviour of economic agents, ie, 'undertakings', on the market in order to ensure that they act 'fairly' in their struggle for market share. Its scope therefore depends on the meaning of the term 'undertaking'. Yet, the ECJ has given an increasingly broad definition to this concept,[183] so that it now includes 'every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed'.[184] Similarly, 'economic activity' is defined as any activity that can be carried out on the market: the fact that profits can *potentially* be made from the activity is sufficient. The absence of a profit motive is therefore irrelevant.[185] Ultimately, only activities relating to the '*exclusively* sovereign' functions of the State (diplomacy, security, etc)[186] or '*exclusively* social'

[180]Ophüls (n 3); E-J Mestmäcker, 'Offene Märkte im System unverfälschten Wettbewerbs in der EWG' in H Coing et al (eds), *Wirtschaftsordnung und Rechtsordnung. Festschrift zum 70. Geburtstag von Franz Böhm* (C.F. Müller 1965) 345.

[181]ME Streit and W Mussler, 'The Economic Constitution of the European Community: From Rome to Maastricht' 5 (3) (1994) Constitutional Political Economy 319.

[182]SM Ramírez Pérez, 'Social democracy and the foundations of European competition policy and law, 1950–1973' in B Shaev and SM Ramírez Pérez (eds), *The Development of European Competition Policy* (Routledge 2024) 146.

[183]See ECJ, 13 July 1962, Case 19/61 *Mannesmann* ECLI:EU:C:1962:31; ECJ, 25 November 1971, Case 22-71 *Béguelin Import Co. v S.A.G.L. Import Export* ECLI:EU:C:1971:113, para 8; ECJ, 21 February 1973, Case 6-72 *Continental Can* ECLI:EU:C:1973:22, para 15; ECJ, 14 July 1972, Case 48-69 *Imperial Chemical Industries* ECLI:EU:C:1972:70, para 134; ECJ, 11 April 1989, Case 66/86 *Ahmed Saeed Flugreisen* ECLI:EU:C:1989:140; ECJ, 24 October 1996, Case C-73/95P *Viho* ECLI:EU:C:1996:405.

[184]ECJ, 23 April 1991, Case C-41/90 *Höfner* ECLI:EU:C:1991:161, para 21.

[185]ECJ, 16 November 1995, C-244/94 *FFSA* ECLI:EU:C:1995:392, para 21.

[186]ECJ, 19 January 1994, Case C-364/92 *Eurocontrol* ECLI:EU:C:1994:7.

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activities[187] are, in principle, excluded from the scope of competition law. Moreover, the broadening of the concept of 'undertaking' has been accompanied by a significant relativisation of the condition of 'affecting trade between Member States'. Since 1967, it includes direct or indirect, actual or potential influence on the trade between Member States.[188]

From an historical point of view, cartel control has been the driving force behind competition law. As early as the first Hallstein Commission, Competition Commissioner Hans von der Groeben's main objective was to adopt a regulation implementing Articles 85 and 86 of the EEC Treaty in order to establish competition policy as the cornerstone of the new European legal order. The 'ordoliberal citadel' of Directorate-General for Competition (DG IV) succeeded in pushing through a particularly ambitious project: Regulation 17/62.[189] It established the principle of prohibiting cartels affecting intra-Community trade, unless the Commission had given its express consent after compulsory notification. The Commission also received the monopoly on deciding on infringements of Articles 85 and 86 of the EC Treaty, with the possibility of imposing fines and periodic penalty payments, under the supervision of the ECJ. However, due to administrative difficulties, reforms were introduced in 1965 (Regulation 19/65), to allow for block exemption regulations, and in 2003 (Regulation 1/2003), to replace the ex ante notification system with an ex post legal exception system (more decentralised) where the Commission could focus on the most serious restrictions. At the same time, the Court of Justice gave substance to the idea that the prohibition of cartels covers agreements 'which have as their *object* or *effect* the prevention, restriction or distortion of competition within the internal market', by applying the cartel control to tacit participation in cartels[190] or professional associations.[191]

However, agreements between undertakings are not the only form of behaviour likely to restrict competition: if an economic operator has enough market power, it can unilaterally impose on its partners, competitors or consumers conditions that it would not have been able to obtain in a 'normal' competitive situation. This is why the Treaties also enshrined the principle of prohibiting the abuse of a dominant position.[192] The fact that only *abuses* are punished has its theoretical background in the ordoliberal conceptual distinction between competition 'on the merits' (*Leistungswettbewerb*) and 'impediment' competition (*Behinderungswettbewerb*).[193] This distinction was implicitly taken up by the ordoliberal Ernst-Joachim Mestmäcker[194] to counter the idea, defended by René Joliet, that only exploitative abuses against a company's trading partners, suppliers or customers would be prohibited, but not practices designed to exclude or impede the entry and expansion of competitors on the market.[195] Against the future judge at the Court of Justice, Mestmäcker defended the ordoliberal conception of the abuse of a dominant position. In

[187]ECJ, 17 February 1993, Case C-159/91 and C-160/91 *Poucet and Pistre* ECLI:EU:C:1993:63. See Q Detienne, 'La délimitation du champ des activités exclusivement sociales dans la jurisprudence de la Cour de justice de l'Union européenne: essai de clarification' (1/2) (2017) Revue de droit social 331.

[188]ECJ, 12 December 1967, Case 23-67 *Brasserie de Haecht* ECLI:EU:C:1967:54.

[189]K Seidel, 'DG IV and the origins of a supranational competition policy: Establishing an economic constitution for Europe' in W Kaiser et al (eds), *The History of the European Union* (Routledge 2009) 129.

[190]ECJ, 25 October 1983, Case 107/82 *AEG* ECLI:EU:C:1983:293; ECJ, 6 January 2004, Case C-2/01 P and C-3/01 *Bayer* ECLI:EU:C:2004:2; ECJ, 13 July 2006, Case C-74/04 P *Volkswagen* ECLI:EU:C:2006:460.

[191]ECJ, 19 February 2002, Case C-309/99 *Wouters* ECLI:EU:C:2002:98.

[192]H Schweitzer, 'The History, Interpretation and Underlying Principles of Sec. 2 Sherman Act and Art 82 EC' in CD Ehlermann and M Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 119.

[193]Böhm (n 21) 275–98. He takes up a distinction proposed in 1930 by the legal scholar Hans Carl Nipperdey ('Wettbewerb und Existenzvernichtung' 28 [1930] Kartell-Rundschau 127).

[194]E-J Mestmäcker, 'Concentration and competition in the EEC: Part I' 6 (6) (1972) Journal of World Trade Law 615, esp 637–47. See also E-J Mestmäcker, 'Concentration and Competition in the EEC: Part II' 7 (1) (1973) Journal of World Trade Law 36.

[195]R Joliet, *Monopolization and Abuse of Dominant Position: A Comparative Study of the American and European Approaches to the Control of Economic Power* (Nijhoff/Faculté de droit de l'Université de Liège 1970) 241.

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particular, he explained the provision in the light of the general Treaty objective of 'undistorted competition' enshrined in Article 3(f) TEEC (Article 3(3) TEU read in conjunction with Protocol No 27) and emphasised that the ordoliberal 'structural' concept of abuse was in no way in contradiction with the consumer protection defended by Joliet, since the protection of competition *per se* indirectly ensured the consumer's freedom of choice. Shortly afterwards, the ECJ ruled in favour of Mestmäcker in the famous *Continental Can* case.[196] The judges upheld the Commission's decision, prepared by none other than DG IV's special adviser: Ernst-Joachim Mestmäcker. The result is that the 'competitive structure' of the market is 'constitutionally' guaranteed.[197]

But how does the Court understand the concepts of 'dominant position' and 'abuse'? The former was clarified in the *United Brands* judgement of 14 February 1978, with emphasis on the concept of 'economic power' (*wirtschaftliche Machtstellung* or *puissance économique*), in a clearly ordoliberal perspective: 'The dominant position referred to in this article [Article 86 TEEC] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[198]

The latter, ie, the 'abuse' (of a dominant position), was defined in the *Hoffmann-La Roche* judgement of 13 February 1979, which introduced the criterion of 'normal competition'.[199] In other words, the company in a dominant position cannot behave as it pleases. It must behave '*as if*' there were competition.[200] Albeit the terms are translated in English by the expression 'competition on the basis of quality', the Court even explicitly enshrined the concept of 'competition on the merits' (*Leistungswettbewerb* or *concurrence par les mérites*) in the French and German version of the decision.[201] In another case, the ECJ stressed more explicitly the 'special responsibility'[202] of undertakings in a dominant position, which 'may be prohibited from conduct which is legitimate where it is carried out by non-dominant undertakings'.[203]

This is very much in line with the 'ethics' of competition advocated by ordoliberalism.[204] This 'ethic of responsibility' for the structure of competition has been confirmed in the *GlaxoSmithKline* case.[205] The ECJ openly rejected the EU General Court (EGC)'s attempt to introduce an 'effects-based'

[196]ECJ, 21 February 1973, *Continental Can* (n 183) para 22–5.

[197]P Behrens, 'The ordoliberal concept of "abuse" of a dominant position and its impact on Article 102 TFEU' in F Di Porto and R Podszun (eds), *Abusive Practices in Competition Law* (Edward Elgar Publishing 2018) 5.

[198]ECJ, 14 February 1978, Case 27/76 *United Brands* ECLI:EU:C:1978:22, para 65.

[199]ECJ, 13 February 1979, Case 85/76 *Hoffmann-La Roche* ECLI:EU:C:1979:36, para 91: 'The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.'

[200]M Vatiero, 'Dominant Market Position and Ordoliberalism' 62 (4) (2015) International Review of Economics 291.

[201]ECJ, 3 July 1991, Case C-62/86 *AKZO* ECLI:EU:C:1991:286, para 70: '*l'article 86 du traité interdit à une entreprise dominante d'éliminer un concurrent et de renforcer ainsi sa position en recourant à des moyens autres que ceux qui relèvent d'une concurrence par les mérites*'. The English version of the judgement translates this as follows: 'Article 86 prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality' – but in subsequent judgements the terms 'competition on the merits' have (rightly) been preferred. On this concept of 'competition on the merits' in European competition law, see P Rey, 'Concurrence par les mérites' in G Canivet (ed), *La modernisation du droit de la concurrence* (LGDJ 2006) 151; B Vesterdorf, 'Considérations sur la notion de "concurrence par les mérites"' in Ibid., 163.

[202]ECJ, 9 November 1983, Case 322/81 *Michelin* ECLI:EU:C:1983:313, para 57.

[203]EGC, 30 September 2003, Case T-191/98, T-212/98 to T-214/98 *Atlantic Container Line AB* ECLI:EU:T:2003:245, para 1460.

[204]N Petit, *Droit européen de la concurrence* (LGDJ Éditions 2020) 403.

[205]ECJ, 6 October 2009, Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* ECLI:EU:C:2009:610, para 63.

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approach, according to which the lawfulness of a market practice should be assessed (solely) on the basis of its net effects on consumer welfare. Despite pressure from the Commission, it maintained its traditional position – demonstrating, according to Josef Drexl, 'a tremendous ordoliberal stability against the influence of newer economic theories'.[206] Eventually, however, the Court of Justice has shifted its traditional position to partially embrace the so-called 'more economic' approach.[207] It has counterbalanced its defence of the competitive structure of the market with a 'Darwinian'[208] or 'Schumpeterian' proposition[209] that Hayek would certainly not have disavowed: 'not every exclusionary effect is necessarily detrimental to competition [...]. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation'.[210] Hence the fact that the Court agreed, in the *Intel* judgement of 6 September 2017,[211] to accept the 'as-efficient-competitor test' proposed by the Commission in 2009.[212]

Nevertheless, the concentration of economic power on the market remains a very real concern for the European institutions, even if the Treaty is a priori silent on the subject. In 1971, following an expert report on the subject,[213] Mestmäcker prepared the Commission's decision in the *Continental Can* case mentioned above,[214] before defending his theory of 'structural abuse' in a double academic paper.[215] Although the ECJ annulled the Commission's decision because of inaccuracies in the data used, it endorsed the theory of 'structural abuse'[216]: since the dominant undertaking by its very existence jeopardises the structure of competition, it can be considered abusive, even without any element of fault.

In doing so, the Court indirectly took a stance on an issue that had been the subject of intense debate among Member States and within the Commission: the legal status of industrial policy in relation to competition law. As early as the 1960s, a conflict had emerged between the (German) ordoliberal defenders of a free and undistorted competition policy and the (French and Italian) proponents of a European industrial policy aimed at creating 'continental champions' capable of competing in the global economy.[217] In addition to coordinating national sectoral aid policies for both declining sectors (steel, shipbuilding, textiles) and cutting-edge industries (aeronautics, IT, etc), the idea was to facilitate and encourage the concentration of 'European' companies. Although the legal means under consideration were not dirigiste but primarily involved the removal of legal and administrative barriers, the members of DG IV quickly opposed this alternative economic approach. The Commission Memoranda on the Community's industrial policy of 1967 and 1970 (the latter known as the 'Colonna Memorandum') bear witness to this ideological confrontation.[218] An action

[206]J Drexl, 'La Constitution économique européenne – L'actualité du modèle ordolibéral' 25 (4) (2011) Revue internationale de droit économique 419, esp 446.

[207]F Marty, 'Is Consumer Welfare Obsolete? A European Union Competition Perspective' 47 (2021) Prolegómenos 55.

[208]Petit (n 204) 422 and 461.

[209]N Petit, 'Intel and the Rule of Reason in Abuse of Dominance Cases' 43 (5) (2018) European Law Review 728, esp 730.

[210]ECJ, 27 March 2012, Case C-209/10 *Post Danmark I* ECLI: ECLI:EU:C:2012:172, para 22.

[211]ECJ, 6 September 2017, Case C-413/14 P *Intel* ECLI:EU:C:2017:632.

[212]Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45, 24 February 2009, 7).

[213]European Economic Community, *The Problem of Concentration in the Common Market* (Collection Études 1966) (<https://aei.pitt.edu/40303/1/A4698.pdf> accessed 4 November) 21–6.

[214]Décision 72/21/CEE de la Commission du 9 décembre 1971 relative à une procédure d'application de l'article 86 du traité CEE, IV/26811 – *Continental Can Company* (OJ L 7/25, 8 January 1972, 25). See Behrens (n 197) 12.

[215]Mestmäcker, 'Concentration and Competition' I and II (n 194).

[216]ECJ, 21 February 1973, *Continental Can* (n 183) para 26–9.

[217]L Warlouzet, 'Europe de la concurrence et politique industrielle communautaire. La naissance d'une opposition au sein de la CEE dans les années 1960' 27 (1) (2008) Histoire, Économie & Société 47.

[218]Commission Memorandum on Community industrial policy. SEC (67) 1201 final, 4 July 1967; Commission Memorandum to the Council on the Community's industrial policy, COM(70) 100, 18 March 1970, (4) 1970 Bulletin of the European Communities.

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programme in the field of technological and industrial policy was then adopted in 1973,[219] but its implementation stalled due to disagreements between Member States on the degree of interventionism to be deployed and, above all, the reluctance of certain governments to transfer new powers to the Community.

However, the development of *national* industrial policies to support sectors affected by the sharp recession paved the way for the revival of the idea of a *common* industrial policy in 1977. This ambition was reflected in the super-portfolio allocated to Etienne Davignon, responsible for 'Industrial Affairs, Internal Market and Customs Union' in the Jenkins Commission (1977–1981) and then for 'Industrial Affairs and Energy' in the Thorn Commission (1981–1984).[220] Davignon adopted a specific approach based on the close involvement of the Member States and the major European industrialists, gathered in the Union of Industrial and Employers' Confederations of Europe (known by its French acronym UNICE) and since 1983 in the famous 'European Round Table of Industrialists'.[221] In this way, he managed to implement several important concrete sectoral aid measures for declining industries – and to some extent for advanced industries.[222] But this 'golden age' of Community industrial policy, especially in the steel sector, was also made possible by relying on a specific legal basis: the state of 'manifest crisis' as defined in Article 58 of the ECSC Treaty.[223] Yet, this ambitious industrial policy, which involved the creation of a 'crisis cartel' and a system of production quotas, clearly interfered with the competition and state aid rules of the ECC Treaty.[224] Germany's reluctance and DG IV's refusal to extend these exceptional measures to other sectors under article 85 (3) EEC Treaty made it therefore difficult to consolidate this interventionist industrial policy in the long term.[225] From the Delors Commissions onwards, the 'single market' project was rarely linked to the idea of a common industrial policy but to the dismantling of the non-tariff barriers to the four fundamental freedoms of movement (Single European Act) and to monetary unification (Economic and Monetary Union)[226]– although the Commission's approval of several Important Projects of Common European Interest (IPCEIs) under Article 107(3)(b) TFEU in recent years suggests a revival of the idea of an EU 'industrial policy'[227] in response to the neo-mercantilist turn of the global economic order.[228]

Together with this tension between industrial policy and competition rules, Member States' reluctance to cede any part of their economic sovereignty to the Commission helps to explain the failure of the 1973 regulation on the control of abuses of dominant positions, prepared by the

[219]Programme of action in the field of technological and industrial policy. Proposal put forward by the Commission to the Council. SEC (73) 3824 final, 30 October 1973.

[220]A Van Laer, 'Quelle politique industrielle pour l'Europe ? Les projets des Commissions Jenkins et Thorn (1977–1984)' in É Bussière et al (eds), *Milieux économiques et intégration européenne au XXe siècle : La relance des années quatre-vingt (1979–1992)* (Institut de la gestion publique et du développement économique 2007) 7.

[221]B Van Apeldoorn, 'Transnational Class Agency and European Governance: The Case of the European Round Table of Industrialists' 5 (2) (2000) New Political Economy 157.

[222]MG Cowles, 'Stevie Wonder: A New Commissioner for Industry' in *The politics of big business in the European Community: Setting the agenda for a new Europe* (DPhil Thesis, The American University 1994) 141.

[223]L Warlouzet, 'When Germany Accepted a European Industrial Policy: Managing the Decline of Steel from 1977 to 1984' 58 (1) (2017) Jahrbuch für Wirtschaftsgeschichte/Economic History Yearbook 137.

[224]D Zurstrassen, 'European Social Democracy, Community Competition Law and Industrial Policy during the crisis of the 1970s and 1980s' in Shaev and Ramírez Pérez (n 182) 204.

[225]L Warlouzet, 'The impossible social-democratic European competition policy, 1985–2000' in Shaev and Ramírez Pérez (n 182) 231.

[226]See infra 3. C. The macroeconomic constitution: the market as disciplinary body for public policies.

[227]D Di Carlo and L Schmitz, 'Europe First? The Rise of EU Industrial Policy Promoting and Protecting the Single Market' 30 (10) (2023) Journal of European Public Policy 2063. See also Luiss Hub for New Industrial Policy and Economic Governance (LUHNIP), 'EU Industrial Policy Report 2024', September 2024 <https://leap.luiss.it/luhnip-eu-industrial-policy-report-2024/> accessed 4 November 2024.

[228]L Schmitz and T Seidl, 'As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy' 61 (3) (2023) Journal of Common Market Studies 834; KR McNamara, 'Transforming Europe? The EU's Industrial Policy and Geopolitical Turn' 31 (9) (2024) Journal of European Public Policy 2371.

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Commission but rejected by the Council,[229] and the extreme difficulty of reaching a consensus on this issue until the end of the 1980s. The deadlock was finally broken in 1987 when the ECJ confirmed the possibility of controlling mergers, this time on the basis of the prohibition of cartels.[230] In order to avoid ex post control, which would have created considerable difficulties, the Council finally agreed to adopt a regulation on concentrations (4064/89).[231] A system of prior notification and authorisation of concentrations with a Community dimension was introduced. Authorisation was granted on the basis of a 'competitive assessment' of the merger, to the detriment of the 'economic assessment' favoured by the Chicago School.[232] This ordoliberal approach culminated in the *General Electric/Honeywell* decision of 3 July 2001, in which the Commission enshrined the theory of the *efficiency offence*: far from offsetting the anti-competitive effects, the efficiencies gained by the new entity as a result of the merger are even more detrimental to competitors and thus to the competitive structure of the market.[233]

This ordoliberal approach was mitigated in later years. Amended for the first time in 1997,[234] the merger regime underwent a real overhaul in 2004, with the adoption of various regulations (n° 139/2004; n°802/2004), guidelines, notices, etc. Without denying the need for a 'competitive assessment', the latter was finally counterbalanced by an 'economic assessment'. The ordoliberal objective of disempowering the market is thus complemented and tempered by the efficiency criterion favoured by the Chicago School.[235] But in practice, the Commission has continued to reject mergers that are deemed too detrimental to the competitive structure of the market.[236] Moreover, some authors have pointed to a 'return of ordoliberalism' in the increasingly dominant digital sector,[237] which is characterised by an extremely high concentration of market power. The important decisions in the *Google Shopping* and *Android* cases,[238] as well as the Platform to Business regulation[239] and, above all, the Digital Market Act and the Digital Services Act,[240] have

[229]Ramírez Pérez (n 182) 171–2.

[230]ECJ, 17 November 1987, Cases 142/84 and 156/84 *British-American Tobacco Company* ECLI:EU:C:1987:490.

[231]Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30 December 1989, 1).

[232]M Glais, 'L'application du règlement communautaire relatif au contrôle de la concentration: premier bilan' 60 (1) (1992) Revue d'économie industrielle 94, esp 95–8.

[233]Commission Decision 2004/134/EC of 3 July 2001 declaring a concentration to be incompatible with the common market and the EEA Agreement, Case COMP/M.2220 – *General Electric/Honeywell* (OJ L 48, 18 February 2004, 1), para 412.

[234]Council Regulation (EC) No 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 180, 9 July 1997, 1).

[235]D Bartalevich, *Do Economic Theories Inform Policy? Analysis of the Influence of the Chicago School on European Union Competition Policy* (DPhil Thesis, Copenhagen Business School 2017) <https://research.cbs.dk/en/publications/do-economic-theories-inform-policy-analysis-of-the-influence-of-t> accessed 4 November 2024.

[236]Commission Decision of 1 February 2012, COMP/M.6166 – *Deutsche Börse/NYSE Euronext* (OJ C 254, 5 August 2014, 8); Commission Decision of 29 March 2017, COMP/M.7995 – *Deutsche Börse/London Stock Exchange Group* (OJ C 434, 27 October 2021, 9); Commission Decision of 6 February 2019, COMP/M.8677 – *Siemens/Alstom* (OJEU C300, 5 September 2019, 14).

[237]A Küsters, 'Ordoliberalism Goes China? A Comparison of Recent Developments in EU and Chinese Competition Law Considering the Digital Economy' (2023) Constitutional Political Economy <https://doi.org/10.1007/s10602-023-09407-y> accessed 4 November 2024.

[238]Commission Decision of 27 June 2017, AT.39740 – *Google search engine (Shopping)* (OJEU C 9, 12 January 2018, 11); Commission Decision of 18 July 2018, AT.40099 – *Google Android* (OJEU C 402, 28 November 2019, 19).

[239]Regulation (EU) No 2019/1150 of the European Parliament and of the Council of 20 June 2019 promoting fairness and transparency for business users of online intermediation services (OJ L 186, 11 July 2019, 57).

[240]Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on fair and contestable markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ L 265, 12 October 2022, 1); Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27 November 2022, 1).

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demonstrated a clear retreat from the 'more economic approach' in favour of the defence of the competitive structures of the market.[241]

'Public' competition law: liberalising public monopolies, controlling State aid, marketising public services

However, one of the main threats to the free play of competition in the market remains the public authorities. The basic rule of 'public' competition law is laid down in the Treaty of Rome: the principle of equal treatment between private and public undertakings, which means that the latter are subject to the common rules on competition (Articles 90 TEEC, Article 86 TEC and Article 106 TFEU). Consequently, State aid is in principle prohibited (Article 92 TEEC, Article 87 TEC and Article 107 TFEU). However, the letter of the Treaty did not seem to fit very well with the national realities of the *Trente Glorieuses* era, which was characterised by an expanding public sector. Therefore, until the 1980s, the existence of public monopolies was de facto tolerated at the European level,[242] on the basis of the above-mentioned neutrality with regard to the national systems of property ownership.[243]

But as Keynesianism was challenged by the *stagflation of* the 1970s, the tolerance of European law towards the public sector began to crumble. First financial transparency requirements were introduced in the early 1980s.[244] Contested by some Member States, the system was upheld by the Court of Justice.[245] In the meantime, the ECJ had also developed a broad understanding of the concept of 'State aid'. On one hand, it includes 'not only positive benefits, such as the subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking'.[246] On the other hand, the public interventions are assessed on the basis of their effects and not on the basis of their causes or objectives.[247] Finally, the concept of 'State' has been broadened: it covers all public authorities (federal, regional, local, etc),[248] but also all (public or private) companies owned by the public authorities,[249] regardless of their decision-making autonomy.

In the 1980s the Commission also developed the idea that State aid should be controlled according to a specific standard, namely that of the private investor in a market economy. This *market economy investor principle* was first enshrined in a small number of directives,[250] then extended by the Commission,[251] and finally endorsed by the Court of Justice in 1986.[252] For any public measure likely to favour an economic operator or to distort competition, it is thus the

[241]F Marty, 'Évolution des politiques de concurrence en droit de l'UE: de la *Wettbewerbsordnung* ordolibérale à la *More Economic Approach* néolibérale?' in Grégoire and Miny (n 16) 298, esp 323–30; B Farrand, 'The Ordoliberal Internet? Continuity and Change in the EU's Approach to the Governance of Cyberspace' 2 (1) (2023) European Law Open 106.

[242]European Commission, First Report on Competition Policy, Brussels/Luxembourg, 1972; ECJ, 13 March 1979, Case 86/78 *Peureux* ECLI:EU:C:1979:64.

[243]PP Van Gehuchten, 'Secteurs publics et droit communautaire: quelle constitutionnalisation, de quelles entreprises publiques?' 53 (2003) Droit et Société 111.

[244]Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ L 195, 29 July 1980, 35). Currently: Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 318, 17 November 2006, 17).

[245]ECJ, 6 July 1982, Cases 188 to 190/80 *France, Italy and UK v Commission* ECLI:EU:C:1982:257.

[246]ECJ, 23 February 1961, Case 30-59 *De Gezamenlijke Steenkolenmijnen in Limburg* ECLI:EU:C:1961:2.

[247]ECJ, 2 July 1974, Case 173-73 *Italy v Commission* ECLI:EU:C:1974:71.

[248]ECJ, 14 October 1987, Case 248/84 *Germany v Commission* ECLI:EU:C:1987:437.

[249]ECJ, 21 March 1991, Case C-305/89 *Alfa-Roméo* ECLI:EU:C:1991:142.

[250]Art 1, e), Council Directive 81/363/EEC of 28 April 1981 on aid to shipbuilding (OJ L 137, 23 May 1981, 39); Art 1, para 2, Commission Decision No. 2320/81/ECSC of 7 August 1981 establishing Community rules for State aid to the steel industry (OJ L 228, 13 August 1981, 14).

[251]Guidelines on public authorities' holdings in company capital 9 (1984) Bulletin of the European Communities 93: 'Nor is State aid involved where fresh capital is contributed in circumsrances thar would be acceptable to a private investor operating under normal market economy conditions'.

[252]ECJ, 10 July 1986, Case 234/84 *Meura* ECLI:EU:C:1986:302, para 14; ECJ, 10 July 1986, Case C-40/85 *Boch II* ECLI:EU:C:1986:305) para 13.

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'economic rationality of the State's conduct'[253] and its 'leverage effect'[254] that is assessed by the Commission, under the supervision of the Court of Justice.

As mentioned above, the major public monopolies in the network industries (telecommunications, postal services, railways and energy) began to undergo a dual process of dismantling and liberalisation in the 1990s and 2000s, through the combined action of the Court of Justice[255] and the Commission.[256] Of course, this opening up to competition has been accompanied by the maintenance of certain 'public service'[257] or 'universal service'[258] requirements, which reflect the idea behind the SGEI exception.[259] In order to manage the ensuing tension between the logic of competition and public service missions, a new legal figure has emerged: the 'independent regulatory bodies'.[260] Their proliferation testifies to the change in the role of the State vis-à-vis the market: it no longer acts *against* the market – opposing it with an alternative logic – but *for* the market, as a 'neutral third party' and guardian of the competitive mechanism.[261]

SGEIs are not the only exceptions to the general prohibition of State aid. Block exemption regulations have been adopted,[262] while guidelines[263] and case law have provided certain criteria for the control of State aid. One of these criteria is necessity, which may take the form of the 'market failure' test. According to this test, State aid can benefit from the derogations only if 'the Commission can establish that the aid will contribute to the attainment of one of the objectives specified in the derogations, which under normal market conditions the recipient firms would not attain by their own actions'.[264]

This does not mean that the European institutions do not tolerate massive intervention by public authorities in the economy, especially in times of acute crisis when the very survival of the system seems to be at stake, such as the 'Great Recession' of 2008–2010 or the 'Great Lockdown' of 2020–2021. In the first case, however, the Commission maintained a strict line of conduct[265]

[253]ECJ, 16 May 2002, Case C-482/99 *Stardust Marine* ECLI:EU:C:2002:294, para 71.

[254]P Alayrac and A Thyrard, 'The Three Ages of the European Policy for Productive Investments' 28 (3/4) (2024) Competition & Change 397.

[255]ECJ, 23 April 1991, *Höfner* (n 184) para 25, 31 and 34; ECJ, 13 December 1991, *RTT v GB-Inno-BM SA* C-18/88 ECLI:EU:C:1991:474, para 28; ECJ, 19 May 1993, Case C-320/91 *Corbeau* ECLI:EU:C:1993:198, para 19 and 21; ECJ, 5 October 1994, Case C-323/93 *Société civile agricole du Centre d'insémination de la Crespelle* ECLI:EU:C:1994:368.

[256]E Szyszczak, *The Regulation of the State in Competitive Markets in the EU* (Hart Publishing 2007) 139.

[257]Art 5 Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways; Art 3 Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity; Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas.

[258]Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ L 192, 24 July 1990, 10) cons 18; Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ L 15, 21 January 1998, 14).

[259]J-Y Chérot, 'L'article 90, paragraphe 2, du traité de Rome et les entreprises de réseau' (3) (1996) Actualité Juridique. Droit Administratif 171.

[260]D Geradin et al (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Edward Elgar 2005).

[261]J Chevallier, 'L'état régulateur' 111 (3) (2004) Revue française d'administration publique 473; N Thirion, 'Des rapports entre le marché et la puissance publique: de l'État-Providence à l'État régulateur' in N Thirion (ed), *Crise et droit économique* (Larcier 2014) 237.

[262]Currently: Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ L 187, 26 June 2014, 1) (last amended by Commission Regulation [EU] 2021/1237 of 23 July 2021 amending Regulation [EU] No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [OJ L 270, 29 July 2021, 39]).

[263]Communication from the Commission – Guidelines on State aid for rescuing and restructuring firms in difficulty, other than financial institutions (OJ C 249, 31 July 2014, 1).

[264]ECJ, 17 September 1980, Case 730/79 *Philip Morris* ECLI:EU:C:1980:209, para 16–17.

[265]Communication 2010/C 329/07 from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis (OJ C 329, 7 December 2010, 7).

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aimed at limiting aid to the 'minimum necessary', establishing 'safeguards against undue distortions of competition'[266] and ensuring, during its monitoring, that unviable operators were eliminated or that certain sectors were opened up to competition,[267] through its power to impose 'conditionality' on aid in order for the State to benefit from the derogation.[268] The 2020 health crisis, on the other hand, was an even more exceptional situation. It led to the creation of a State Aid Temporary Framework,[269] which has extended the key idea of saving the system 'whatever it takes',[270] while minimising the anti-competitive effects.[271] Only 'damage due to and directly caused by the COVID-19 outbreak' benefits from the automatic exemption (Article 107[2][b] TFEU). Otherwise, the Commission maintains its strict control of state aid granted to 'remedy serious disturbances in the economy'. In doing so, it confirms that the normative primacy of the market over any non-economic objectives of the Member States has been maintained – albeit one might wonder whether this primacy has not been circumvented in practice by the most powerful States, such as Germany and France.[272]

What is certain, however, is that the normative primacy of the market is reflected in the way public services are understood. Most of these public services have been requalified as SGEIs and have to fulfil several conditions in order to benefit from the exemption provided for in Article 106(2) TFEU.[273] The most important of these are the demonstration of a 'market failure',[274] ie, the inability of the market to provide certain services deemed to be of the general interest under satisfactory conditions[275] and the fact that the harm to competition must be strictly proportionate.[276] Since the successive waves of liberalisation of the network industries and the drastic reduction in the 'exclusive rights' granted to the legal monopolies to compensate for the less profitable sectors, most SGEIs have been financed by direct subsidies to the undertakings entrusted with a public service mission to offset the costs of providing it. Once again, the ECJ has intervened to limit the Member States' room for manoeuvre: if they do not want the financing to be classified as 'State aid', they must comply with the conditions laid down in the *Altmark* jurisprudence,[277] in particular the requirement of objective, transparent and pre-established parameters and the obligation to apply public procurement procedures – or, failing that, the imposition of a 'comparable efficient undertaking' test (ie, the 'typical undertaking, well run and

[266]Communication from the Commission – The recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (OJ C 10, 15 January 2009, 2).

[267]M Karpenschif, 'Les aides publiques face à la crise' 4 (2010) Revue française de droit administratif 750.

[268]O Péjout, *La conditionnalité en droit des aides d'État* (Dalloz 2019) 205.

[269]Communication C/2020/1863 from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (OJ C 91I, 20 March 2020, 1). The communication has been amended several times to take account of developments in the pandemic, in particular to extend the temporary framework, adapt the aid ceilings set therein and make it possible to convert repayable instruments into direct grants under certain conditions (Communication C/2021/564 from the Commission – Fifth Amendment to the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [OJ C 34, 1 February 2021, 6]).

[270]M Karpenschif, 'Quoi qu'il en coûte: un conditionnement incertain des aides publiques?' 4 (4) (2021) Gestion & Finances Publiques 25.

[271]P Riedel et al, 'Learnings from the Commission's Initial State Aid Response to the COVID-19 Outbreak' 19 (2) (2020) European State Aid Law Quarterly 115.

[272]I Agnolucci, 'Will COVID-19 Make or Break EU State Aid Control? An Analysis of Commission Decisions Authorising Pandemic State Aid Measures' 13 (1) (2022) Journal of European Competition Law & Practice 3.

[273]ECJ, 11 April 1989, *Ahmed Saeed Flugreisen* (n 183); ECJ, 19 May 1993, *Corbeau* (n 253); ECJ, 27 April 1994, Case C-393/92 *Municipality of Almelo* ECLI:EU:C:1994:171.

[274]AM Collins and M Martínez Navarro, 'Activity, Market Failure and Services of General Economic Interest: It Takes Two to Tango' 12 (5) (2021) Journal of European Competition Law & Practice 380.

[275]ECJ, 7 November 2018, Case C-171/17 *Commission v Hungary* ECLI:EU:C:2018:881, para 56.

[276]H Schepel and W Sauter, *State and Market in European Law. The Public and Private Spheres of the Internal Market before the EU Courts* (Cambridge University Press 2009) 179.

[277]ECJ, 24 July 2003, Case C-280/00 *Altmark* ECLI:EU:C:2003:415, para 86–7.

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adequately provided with means of transport'). In other words, the 'market economy investor principle' is also applied to SGEIs. The Monti-Kroes package, adopted in 2005,[278] made the regime more flexible for a while, but the Almunia package, adopted in 2011–2012,[279] brings back stricter control of the 'efficiency' of SGEIs.[280]

This has not prevented some authors from developing an 'economic critique' of the SGEI regime: clinging to the idea of 'market failure', the existing system would be blind to the many 'government failures' that could be observed when measured against market standards.[281] Yet national public services have been profoundly reshaped by European law: far from establishing a public domain outside the market, they have been 'marketised' through their incorporation into competition and State aid law. The 'enshrinement' of access to SGEIs in the EU Charter of Fundamental Rights (Article 36) does not change anything.[282] The idea remains that the market is the main instrument for allocating goods and services. Imposing a contrary logic based on non-economic objectives can only be done in exceptional and limited circumstances. As mentioned above, the only areas that are genuinely outside the scope of competition law are 'exclusively sovereign' functions and 'exclusively social' activities, which are of course very strictly defined.[283] In contrast to the quasi-hegemonic criterion of 'economic activity',[284] these very rare exceptions testify to the particularly vast territory of the competitive market order.

Intermediary lessons: the constitutionalisation of competition and the market norm hegemony

Driven mainly by the advocates of ordoliberal theories (Müller-Armack, von der Groeben, Mestmäcker, etc) – despite the existence of a competing 'Keynesian conception of competition policy' –,[285] competition law has been implemented and strengthened by the European institutions, which have been particularly favourable to the *Ordnungspolitik* it presupposes, since it gives a predominant place to the legal framework – which in turn legitimises the existence of the Commission as the 'guardian of the Treaties' and of the Court of Justice as the 'authentic

[278]Commission Decision 2005/842/EC of 28 November 2005 on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 312, 29 November 2005, 67); Community framework for State aid in the form of public service compensation (OJ C 297, 29 November 2005, p 4); Commission Directive 2005/81/EC of 28 November 2005 amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (OJ L 312, 29 November 2005, 47).

[279]Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11 January 2012, 3); Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011) (OJ C 8, 11 January 2012, 15); Communication from the Commission on the application of EU State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11 January 2012, 4); Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OJ L 114, 26 April 2012, 8).

[280]E Szyszczak and J W von de Gronden (eds), *Financing Services of General Economic Interest: Reform and Modernization* (T.M.C. Asser Press 2013).

[281]JM Burke, *A Critical Account of Article 106 (2) TFEU. Government Failure in Public Service Provision* (Hart Publishing 2018).

[282]ECJ, 7 September 2016, Case C-121/15 *ANODE* ECLI:EU:C:2016:637.

[283]ECJ, 17 February 1993, *Poucet and Pistre* (n 187); ECJ, 21 September 1999, Case C-67/96 *Albany* ECLI:EU:C:1999:430. See also ECJ, 12 September 2000, Cases C-180/98 to C-184/98 *Pavel Pavlov* ECLI:EU:C:2000:428; ECJ, 22 January 2002, Case C-218/00 *Cisal* ECLI:EU:C:2002:36; ECJ, 16 March 2004, Cases C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* ECLI:EU:C:2004:150. See also ECJ, 5 March 2009, Case C-350/07 *Kattner* ECLI:EU:C:2009:127; ECJ, 3 March 2011, Case C-437/09 *AG2R* ECLI:EU:C:2011:112.

[284]ECJ, 23 April 1991, *Höfner* (n 184) para 21.

[285]SM Ramírez Pérez and S van de Scheur, 'The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge' in KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 19.

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interpreter' of the Treaties. Admittedly, competition law has evolved,[286] notably as a result of the internal debates within neoliberalism, between the defenders of the competitive structure of the market (ordoliberals), the adepts of a natural selection of 'viable' firms (*à la* Hayek) and the proponents of 'economic efficiency' (Chicago approach). However, its core and fundamental assumptions about the functioning of the market and the place of competition as the central pattern of social organisation remain largely unchallenged.

This metaphysics of competition law has been extended to the domain of the state, through the subjection of public enterprises to the logic of the market, the control of State aid and the recoding of public services into the grammar of 'services of general *economic* interest'. The 'market economy investor principle' and the imposition of 'efficiency' as a criterion for judging interventions motivated by non-economic reasons (social, environmental, etc) demonstrate the overflow of market logic into the entire social sphere, apart from the rare *exclusively* social activities and *exclusively* sovereign functions. All this does not mean that State intervention in the economic process is receding, but that it is changing: it is no longer acting *because of* or *against* the market, but *for* the market, as Michel Foucault foresaw.[287]

The responses to the crises of 2008 and 2020 are particularly consistent with the criteria of 'dynamic conformity' and 'subsidiarity' theorised by Walter Eucken to distinguish between appropriate and necessary 'regulatory interventions' and those to be avoided. The conditional authorisation of State aid was targeted at market failures, and, moreover, temporary – until the deeper problem could be solved by redesigning the legal 'framework' to adapt it to the new needs of the market. This was the path taken, with the adoption of a 'European System of Financial Supervision'[288] and progress towards a 'banking union' based on a single supervisory mechanism (SSM) and a single resolution mechanism (SRM).[289] On the other hand, some have speculated that the COVID-19 crisis may mark the 'end of the "ordoliberal" model of market regulation'.[290] However, neither State aid law nor competition law in general has been structurally changed. The European institutions have certainly shown flexibility, but without ever denying or questioning the underlying logic of the competition rules.[291] Faced with an existential crisis, they have accepted massive State intervention in the economy in order to save the market order, not to overturn it. The Member States have not, for example, carried out large-scale nationalisations: their intervention has been marked by the seal of subsidiarity. This is illustrated by the German government's refusal to activate its constitutional clause on 'socialisation' (*Sozialisierung*; Article 15 of the Basic Law) and its subsequent decision to resort only to 'emergency state intervention' (*Notverstaatlichung*), with the explicit aim of saving the market economy.[292] State aid control has therefore hardly been removed. 'Conditionality' has helped to maintain the criteria of necessity and proportionality of measures, which are still perceived as infringements of the competitive market norm. The latter thus retains normative primacy over the State and its possible non-economic objectives.

It is true, however, that this primacy might mask a shift in the state-market relationship as conceived in the neo-ordoliberal 'Great Synthesis', highlighted by the rise of what Daniela Gabor

[286]O Brook, 'In Search of a European Economic Imaginary of Competition: Fifty Years of the Commission's Annual Reports' 1 (4) 2022 European Law Open 822.

[287]M. Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978-1979)* (Gallimard/Seuil 2004) 124 and 128.

[288]P Van Cleynenbreugel, 'La supervision financière au sein de l'Union européenne et de la zone euro après la crise: un cadre juridique toujours en pleine évolution' 111 (2018) *Observatoire de Bruxelles* 22; B Brunelli Zimmermann and CP Buttigieg, 'A History of Continuous Power Delegation: The Establishment and Further Development of the European System of Financial Supervision' 16 (1/2) (2022) Law and Financial Markets Review 145.

[289]F Martucci, 'Union bancaire, la méthode du 'cadre': du discours à la réalité' in F Martucci (ed), *L'Union bancaire* (Bruylant 2016) 11.

[290]C Mongouachon, 'Vers la fin d'un modèle "ordolibéral" de régulation du marché ?' 103 (2021) Revue Lamy de la Concurrence 7.

[291]D Jouve, 'Les aides publiques de soutien à l'économie en contexte de crise' 1 (2022) Gestion & Finances Publiques 90, esp 92.

[292]JP Terhechte, 'Krise und Verstaatlichung' 75 (9) (2020) JuristenZeitung 431.

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calls the 'derisking state', ie the fact that the state increasingly 'enlists private capital into achieving public policy priorities by tinkering with risk/returns on private investments in [...] social infrastructure (schools, roads, hospitals and houses, care homes and prisons, water plants and natural parks) and most recently, green industries'.[293] This derisking state certainly implies a greater public intervention in the market process, as it seeks to correct market failures that generate significant risks by redirecting private investment towards strategic (and safer) financial sectors. Conversely, it also involves a deep penetration of the market logic and the search for profitability within the state as well as a commodification of social policies, as evidenced by the increasing use of public-private partnership mechanisms[294] and the gradual privatisation and financialisation of old pay-as-you-go pension systems.[295] In this respect, the way in which the European pillar of social rights is being implemented is actually mostly compliant with the market logic – and can therefore hardly be seen as a victory for the proponents of the democratic and social state.[296]

C. The macroeconomic constitution: the market as disciplinary body for public policies

The idea of disciplining the State by the market has also been extended to other public economic policies, which are now governed by the Economic and Monetary Union. EMU was a long-standing project of the European institutions (Werner Report in 1970, European Monetary Snake in 1973, European Monetary System in 1979),[297] but it was the Delors[298] and the Emerson[299] reports that laid the foundations for the architecture finally enshrined in the Maastricht Treaty.[300] This architecture was characterised by an 'original asymmetry' between the 'monetary' and the 'economic' pillars. The rationale is as follows: since EMU is not an optimal currency area,[301] it should combine a single, centralised monetary policy to respond to symmetric shocks (affecting

[293]D Gabor, 'The (European) derisking state' (1) (2023) Stato e mercato, Rivista quadrimestrale 53, esp. 54.

[294]D Piron, 'Gouverner l'investissement public par la comptabilité - Une valse à trois temps autour du traitement comptable des partenariats public-privé (PPP) en Europe' 39 (1) (2020) Politique et Sociétés 65; D Piron, 'Governing Public Investment in Europe: The Politics of Off-Balance-Sheet Policymaking, The Rise of Eurostat and Contrasted Regional Policies in Belgium' 28 (3/4) 2024 Competition & Change 494.

[295]B Ebbinghaus (ed), *The Varieties of Pension Governance: Pension Privatization in Europe* (Oxford University Press 2011); M Stepan and KM Anderson, 'Pension Reform in the European Periphery: The Role of Eu Reform Advocacy' 34 (4) (2014) Public Administration and Development 320; B Ebbinghaus, 'The Privatization and Marketization of Pensions in Europe: A Double Transformation Facing the Crisis' 1 (1) (2015) European Policy Analysis 56; I Guardiancich et al, 'Beyond the European Semester: The Supranational Evaluation Cycle for Pensions' 32 (5) (2022) Journal of European Social Policy 578.

[296]A Elomäki and B Gaweda, 'Looking for the "Social" in the European Semester: The Ambiguous "Socialisation" of EU Economic Governance in the European Parliament' 18 (1) (2022) Journal of Contemporary European Research <https://www.jcer.net/index.php/jcer/article/view/1227/941> accessed 4 November 2024; M Keune and P Pochet, 'The Revival of Social Europe: Is This Time Different?' 29 (2) (2023) Transfer: European Review of Labour and Research 173. See also P Copeland and M Daly, 'The European Semester and EU Social Policy' 56 (5) (2018) Journal of Common Market Studies 1001; P Copeland, *Governance and the European Social Dimension. Politics, Power and the Social Deficit in a Post-2010 EU* (Routledge 2019).

[297]M Devoluy, *L'Europe monétaire. Du SME à la monnaie unique* (Hachette 1998); K Rücker, 'Le plan Werner, le système monétaire européen et l'européanisation dans les années 1970. Quelques réflexions sur les échecs et les réussites de l'intégration européenne' 353–4 (3/4) (2009) L'Europe en Formation 111; E Mourlon-Druol, 'History of an Incomplete EMU' in F Amtenbrink et al (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 12.

[298]Committee for the Study of Economic and Monetary Union, *Report on Economic and Monetary Union in the European Community* (aka 'Delors Report'), Luxembourg, Office for Official Publications of the European Communities, 1989.

[299]Commission of the European Communities (DGECFIN), 'One market, one money. An evaluation of the potential benefits and costs of forming an economic and monetary union' (aka 'Emerson Report'), 44 (1990) European Economy 1.

[300]A Verdun, 'The Role of the Delors Committee in the Creation of EMU: An Epistemic Community?' 6 (2) (1999) Journal of European Public Policy 308; N Jabko, 'In the Name of the Market: How the European Commission Paved the Way for Monetary Union' 6 (3) 1999 Journal of European Public Policy 475.

[301]RA Mundell, 'A Theory of Optimum Currency Areas' 51 (4) (1961) The American Economic Review 657. See also RI McKinnon, 'Optimum Currency Areas' 53 (4) (1963) The American Economic Review 717; PB Kenen, 'The theory of optimum currency areas: an eclectic view' in RA Mundell and AK Swoboda (eds), *Monetary Problems of the International Economy* (University of Chicago Press 1969).

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the entire EMU area) and decentralised but coordinated national budgetary policies to counter any asymmetric shocks (affecting only part of the national or regional EMU area).[302] In the aftermath of the Eurozone crisis the original structure was replaced by a 'new European economic governance'. However, the market logic inherent in EMU has not been reversed – but rather refined and renewed on new, more ordoliberal foundations.

The initial architecture of EMU: monetary neutralisation and fiscal discipline

In order to respond to possible asymmetric shocks, but also to take account of the Member States' intent to retain a certain degree of fiscal autonomy, two pillars were separated when EMU was set up: the monetary pillar is centralised at the EU level (Article 119[2] TFEU); the economic pillar remains decentralised (Article 119[1] TFEU) and is therefore in principle the responsibility of the Member States, although economic and fiscal policies are coordinated by the EU institutions.

At the first (monetary) level, new centralised institutions have been created to ensure that the single currency is backed by a single monetary policy: the European Central Bank (ECB) and the European System of Central Banks (ESCB) – in practice superseded by the 'Eurosystem', ie, the ECB and the national central banks (NCBs) of the countries that have adopted the euro. Moreover, the NCBs are hierarchically subordinate to the ECB (Article 14, §3 ESCB/ECB Statute), so that the ECB and its decision-making bodies (governing council and executive board) are *ultimately* responsible for the monetary policy in the Eurozone (Article 3 and 8 ESCB/ECB Statute). However, the room for manoeuvre of these institutions is (in theory) limited by a mandate strictly geared to price stability. Support for the Union's general economic policies (economic growth, competitiveness, pursuit of full employment, etc) is subordinate to this primary objective and should be provided in accordance with the 'principle of an open market economy with free competition' and the 'following guiding principles: stable prices, sound public finances and monetary conditions and a stable balance of payments' (Articles 119, 127[1] and 282[2] TFEU and Article 2 of the ESCB/ECB Statute). Against this backdrop, the second objective (support for general economic policies in the Union) tends to be interpreted in a monetarist sense, thus excluding any Keynesian expansionary policy.[303] The Maastricht Treaty therefore makes price stability '*the very essence, the raison d'être of EMU*', granting it 'a pre-eminence unparalleled in legal history', which has decisive legal consequences because 'the canonisation of a single economic parameter dramatically transforms the whole hierarchy of normative values not only within the Community system, but also within the constitutional law of Member States'[304]. Besides, the ECB and the national banks have been granted a very high degree of independence (Article 130 TFEU and Article 7 ESCB/ECB Statute). This independence, which is seen as an essential condition for monetary stability,[305] is defended on the basis of scientific arguments, both in the Emerson report and subsequently by the ECB.[306]

Once the monetary option of price stability had been established, a coherent legal framework for economic and budgetary policies still had to be created.[307] To avoid the risk of 'free riders', the

[302]Emerson Report (n 299) 46 and 136–77.

[303]M van der Sluis, 'Maastricht Revisited: Economic Constitutionalism, the ECB and the Bundesbank' in M Adams et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 105, esp 118–19. The Emerson Report makes the hierarchy between the two objectives explicit by describing price stability as an 'overriding mandate' and stating that support for general economic policies in the Union 'would effectively be suspended if it conflicted with the need to pursue restrictive policies' (Emerson Report [n 273] 96–7).

[304]MJ Herdegen, 'Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom' 53 (1) (1998) Common Market Law Review 9, esp 14 and 21. On the conversion of governments to this ideological choice, see W Sandholtz, 'Choosing Union: Monetary Politics and Maastricht' 47 (1) (1993) International Organization 1.

[305]Emerson Report (n 299) 97–8.

[306]ECB, '1998–2008: 10th anniversary of the ECB' (2008) ECB Monthly Bulletin 22.

[307]E Grossman and P-E Micolet, 'Le nouvel ordre de politique économique européen: Une constitution économique au service de la stabilité monétaire?' 437 (2000) Revue du Marche Commun et de l'Union Européenne 243.

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economic and budgetary pillar of EMU was built around a 'stability order' or a 'stability community' (*Stabilitätsgemeinschaft*), as the German Constitutional Court put it at the time.[308] Article 119 TFEU certainly provides for 'close coordination of the economic policies of the Member States' to serve the (economic, social and environmental) objectives mentioned in Article 3 TEU. But once again, this 'close coordination' may only be pursued in compliance with the general principle of 'an open market economy with free competition' and the 'guiding principles' mentioned above.

These principles are conveyed and supported by the specific provisions of EMU, which together form a three-dimensional governance model.[309] The first dimension covers the individual financial responsibility of Member States, through the triple prohibition on inter-state solidarity (no bail-out clause: Article 125 TFEU), monetary financing (Article 123 TFEU) and privileged access to financial institutions (Article 124 TFEU). As a result, the issuance of public debt now necessarily passes through the financial markets, making them the judge of the 'soundness' of national economic and fiscal policies. The second dimension concerns the coordination of national economic policies (Article 121 TFEU) within the ECOFIN Council and the 'Eurogroup', through the establishment of 'broad guidelines for the economic policies of the Member States and the Union' (BEPGs). The orientation of the structural reforms advocated here testifies to the primacy of the objective of competitiveness and productivity over social or labour issues.[310] Finally, budgetary discipline has been introduced (Article 126 TFEU) and provides for limits on debt (60 per cent) and public deficit (3 per cent) of the Member States (Article 1 Protocol No. 12 on the Excessive Deficit Procedure). This discipline is supposed to be implemented by the Stability and Growth Pact (SGP), through both a preventive arm (surveillance of budgetary positions)[311] and a corrective arm (excessive deficit procedure).[312]

The 'new economic governance': European institutions as guardians of market discipline

However, the structure of EMU soon showed its weaknesses. In 2002, Germany and France were not penalised for exceeding the 3 per cent deficit limit – leading to considerable tensions between the Council and the Commission, which had to be resolved by the Court of Justice.[313] In response, a first (minor) revision took place in 2005.[314] But it was not until the Eurozone crisis of 2010–2012 that a thorough reform was adopted. Financial assistance under strict conditionality was introduced, through bilateral loans and various mechanisms (European Financial Stability Facility and European Financial Stability Mechanism), which were then made permanent in 2012 in the

[308]BVerfG, 12 October 1993 *Maastricht* 2 BvR 2134/92 *and others* BVerfGE 89, 155, para 137–48.

[309]A De Streel, 'The Evolution of the EU Economic Governance Since the Treaty of Maastricht: An Unfinished Task' 20 (3) (2013) Maastricht Journal of European and Comparative Law 336, esp 337; K Hentschelmann, 'Finanzhilfen im Lichte der No Bailout-Klausel - Eigenverantwortung und Solidarität in der Währungsunion' 46 (2) (2011) Europarecht 282, esp 282.

[310]FW Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' 40 (4) (2002) Journal of Common Market Studies 645; J-P Fitoussi and E Laurent, 'Union monétaire et modèle social en Europe: chronique d'une incohérence institutionnelle. Travail décent, politique sociale et développement', Working paper OFCE, November 2006; F Costamagna, 'The Impact of Stronger Economic Policy Coordination on the European Social Dimension: Issues of Legitimacy' in M Adams et al (eds), *The Constitutionalization of European Budgetary Constraints* (Hart Publishing 2014) 359, esp 370–6; L Fromont, *La gouvernance économique européenne: les conséquences constitutionnelles d'une décennie de crises* (Bruylant 2022) 234.

[311]Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209, 2 August 1997, 1).

[312]Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, 2 August 1997, 6).

[313]ECJ, 13 July 2004, Case C-27/04 *Commission v Council of the European Union* ECLI:EU:C:2004:436. See M Heipertz, 'The SGP before the European Court of Justice' in *The Politics of the Stability and Growth Pact* (Cambridge University Press 2010) 154.

[314]Council Regulation (EC) No 1055/2005 of 27 June 2005 (OJ L 174, 7 July 2005, 183) (for the preventive arm) and Council Regulation (EC) No 1056/2005 of 27 June 2005 (OJ L 174, 7 July 2005, 5) (for the corrective arm).

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'European Stability Mechanism' before being validated by the Court of Justice.[315] At the same time, the 'Six Pack' and the 'Two Pack' introduced a number of innovations in the coordination and surveillance of national economic and budgetary policies: the European Semester, the excessive macroeconomic imbalance procedure, greater powers for Eurostat, etc.

The result of these reforms is a new, genuinely integrated coordination framework, which can be described as three concentric circles. The first circle concerns the identification and prevention of risks of budget deficits (preventive arm of the revised SGP) and macroeconomic imbalances (new procedure). This level is characterised by a high degree of transparency in the transmission of information, both from the Member States to the Union and from the Union to the Member States – transparency that is crucial for the rating of Member States in the financial markets. This basic preventive core is supported by a second circle, which comprises both the corrective arm of the SGP (excessive deficit)[316] and macroeconomic surveillance (excessive macroeconomic imbalances).[317] The common objective is to force the countries concerned to adopt the 'structural reforms' deemed necessary by drawing up 'corrective action plans'[318] and other 'economic partnership programmes'.[319] The implementation of these reforms is subject to close monitoring and control, which could in principle lead to the imposition of financial sanctions. The 'structural reforms' are those that the State should undertake under pressure from the financial markets, so that the EU institutions are, in a sense, the 'interpreters' of the market. Finally, if all these mechanisms are not sufficient to control national macroeconomic and fiscal policies, there is still the possibility of subjecting a Member State, if it is in the euro area, to 'enhanced surveillance' (the third concentric circle),[320] especially in the case of financial assistance.[321] The triggering of such 'enhanced surveillance' has the effect of imposing a specific surveillance regime,[322] which amounts to a veritable tutelage of the State by the European institutions,[323] via the 'conditionality' attached to the 'Macroeconomic Adjustment Programme'.[324] This new global and integrated framework for the coordination, surveillance and control of Member States was complemented by the adoption of an additional treaty under international law: the Treaty on Stability, Coordination and Governance (TSCG).[325] This 'Fiscal Compact' aims to enshrine the 'golden rule' into national law (and, if possible, in the constitution) as well as to establish an automatic correction mechanism in the event of budgetary slippage.[326]

While the framework was being reformed, it was still necessary to intervene in the economic process in order to avoid a break-up of the Eurozone. Financial assistance mechanisms were able

[315]ECJ, 27 November 2012, Case C-370/12 *Pringle*, ECLI:EU:C:2012:756. See P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' 9 (2) 2013 European Constitutional Law Review 263.

[316]Council Regulation No 1467/97/EC of 7 July 1997 as revised by Regulation (EC) No 1056/2005 and by Regulation (EU) No 1177/2011.

[317]Regulation (EU) No 1176/2011; Regulation (EU) No 1174/2011.

[318]Art 8 of Regulation (EU) No 1176/2011.

[319]Art 9, §1 of Regulation (EU) No 473/2013.

[320]Art 2, §1 of Regulation (EU) No 472/2013.

[321]Art 2, §2 of Regulation (EU) No 472/2013.

[322]Art 3 of Regulation (EU) No 472/2013.

[323]C Guillerminet, 'Du mythe de la contrainte budgétaire' in E Calzolaio and P Serrand (eds), *La contrainte en droit. The constraint in law* (Lit Verlag 2017) 123, esp 132.

[324]Art 3, §7 and Art 7 of Regulation (EU) No 472/2013; Art 16, §5 read in conjunction with Art 13, §7 ESM Treaty.

[325]Although the TSCG, which entered into force on 1 January 2013, was adopted in the form of an international treaty for political reasons – the United Kingdom vetoed any change to the primary law of the European Union – it is nonetheless substantially related to the EU, insofar as the States party to the treaty are 'Member States of the European Union' and as the TSCG contains a subordination clause to EU law (Art 2 TSCG). Art 16 TSCG even provides that the content of the Treaty shall eventually incorporate the legal framework of the EU. See in this sense the Proposal for a Council Directive laying down provisions to strengthen budgetary responsibility and the medium-term budgetary orientation in the Member States COM (2017) 824 final 2017/0335 (CNS), 6 December 2017.

[326]F Fabbrini, 'The Fiscal Compact, the "Golden Rule" and the Paradox of European Federalism' 36 (1) (2013) Boston College International and Comparative Law Review 1.

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to play a role in this respect, but, above all, the ECB's action proved decisive. The ECB intervened 'whatever it [took]'[327] to save the single currency by reassuring the bond markets, while at the same time working to impose 'conditionality' on the countries in financial difficulties, even if the various monetary programmes (SMP, LTRO, OMT, PSPP, etc) were always justified on the grounds of official objectives in line with its mandate.[328] This monetary intervention gave rise to a veritable '*guerre du dernier mot*' between the ECJ and the German Constitutional Court.[329] Behind the intense legal debates was the question of whether it was possible for a public institution (the ECB) to distinguish between 'normal' and 'irrational' market financing conditions and to differentiate interest rates according to whether or not they were 'justified' in the light of the 'real' and 'objective' economic and budgetary situation of the Member States. In other words, the question was whether it was possible for public authorities to judge the '(ir)rationality' of the markets and, if necessary, to intervene to modify the actual functioning of the markets in a way that was deemed to be more in line with market logic.[330] In the end, the ECJ ruled in favour of the ECB and confirmed the legality of its monetary programmes.[331]

However, this monetary intervention was intensified during the health crisis to such an extent that the ECB's 'unconventional monetary policy'[332] resembled a thinly veiled monetary mutualisation of sovereign risks.[333] Moreover, the triggering of the misnamed 'general escape clause' of the Stability and Growth Pact (SGP)[334] may have given the impression of a major change of direction. In reality, however, the consequences of 'suspending' the SGP are symbolic: Member States are only allowed to deviate temporarily from the adjustment path 'provided that this does not endanger fiscal sustainability in the medium term', while the European Semester continues to impose control by the European institutions.[335] A reform of the SGP, initiated by the Commission in 2022[336], was adopted by the Parliament in April 2024 and will be implemented from 2025 onwards.[337] However, it does not in any way alter the intrinsic logic of the budgetary framework: it

[327]D Wilsher, 'Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis' 15 (2013) Cambridge Yearbook of European Legal Studies 503; MVD Heijden et al, '"Whatever It Takes" and The Role of Eurozone News' 25 (16) (2018) Applied Economics Letters 1166.

[328]T Beukers, 'The New ECB and Its Relationship with the Eurozone Member States: Between Central Bank Independence and Central Bank Intervention' 50 (6) (2013) Common Market Law Review 1579; C Fontan, 'Frankenstein in Europe. The Impact of the European Central Bank on the Management of the Eurozone Crisis' 42 (4) (2013) European Policy 22; C Manger-Nestler and R Böttner, 'Ménage à trois? Zur gewandelten Rolle der EZB im Spannungsfeld zwischen Geldpolitik, Finanzaufsicht und Fiskalpolitik' (6) (2014) Zeitschrift Europarecht 612; T Tridimas and N Xanthoulis, 'A Legal Analysis of the Gauweiler Case: Between Monetary Policy and Constitutional Conflict' 23 (1) (2016) Maastricht Journal of European and Comparative Law 17; H Lokdam, '"We Serve the People of Europe": Reimagining the ECB's Political Master in the Wake of its Emergency Politics' 58 (4) (2020) Journal of Common Market Studies 978.

[329]A Supiot, 'La guerre du dernier mot' in *Liber Amicorum en hommage à Pierre Rodière. Droit social international et européen en mouvement* (LGDJ 2019) 489.

[330]G Grégoire, 'La Banque centrale européenne et la crise des dettes souveraines: politique monétaire, politique économique ou état d'exception?' 31 (3) (2017) Revue internationale de droit économique 33.

[331]ECJ, 16 June 2015, Case C-62/14 *Gauweiler* ECLI:EU:C:2015:400; ECJ, 11 December 2018, Case C-493/17 *Weiss* ECLI:EU:C:2018:1000.

[332]E Carré, 'Les politiques monétaires non conventionnelles de la BCE: théories et pratiques' (2) (2015) L'Économie politique 42.

[333]P Benigno et al, 'The Spectre of Financial Dominance in the Eurozone' 10 (1) (2022) Italian Economic Journal 59. See during the eurozone crisis: A Belke and T Polleit, 'How Much Fiscal Backing Must the ECB Have? The Euro Area is not (yet) the Philippines' 124 (4) (2010) International Economics 5.

[334]Declaration by EU finance ministers on the Stability and Growth Pact in the light of the COVID-19 crisis, press release 173/20, 23 March 2020.

[335]S Adalid, 'La flexibilité de la gouvernance économique à l'épreuve de la crise sanitaire' (2) (2020) Revue des affaires européennes 335.

[336]F Amtenbrink and J de Haan, 'The European Commission's Approach to a Reform of the EU Fiscal Framework: a Legal and Economic Appraisal' 48 (4) (2023) European Law Review 422.

[337]Regulation (EU) 2024/1263 of the European Parliament and of the Council of 29 April 2024 on the effective coordination of economic policies and on multilateral budgetary surveillance and repealing Council Regulation (EC) No 1466/97 (OJ L,

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leads to greater individualisation (and slight flexibility) of fiscal adjustment paths, but at the cost of establishing a mandatory minimum effort, which is now quantified.[338] Conversely, the adoption of the €750 billion 'recovery plan' (*Next Generation EU* or NGEU), financed by a common loan, is often presented as a 'Hamiltonian moment',[339] a 'critical juncture' towards fiscal union[340] or a real 'game changer' for EMU.[341] Here too, enthusiasm should be tempered. On one hand, the German Federal Constitutional Court has laid down very strict guidelines to prevent the establishment of a 'transfer union'.[342] On the other hand, the Regulation establishing the Recovery and Resilience Facility stipulates that the national recovery plans adopted under the NGEU must take into account the country-specific recommendations issued in the context of the European Semester,[343] giving thus the Commission an additional (and particularly effective) lever to impose the expected structural reforms on the Member States.[344]

Intermediary lessons: the ordoliberal 'ressourcement' of neoliberal economic constitutionalism

EMU has undergone profound changes in barely thirty years, but its fundamentals have not changed: monetary policy is still, at least officially, entrusted to a central bank with a primary mandate of price stability; economic and budgetary policies remain decentralised, but are subject (and increasingly so) to controls designed to limit public spending and ensure compliance with balanced budget rules. Such a structure is directly in line with the programme of neoliberal economic constitutionalism, from Hayek to Vanberg, via the new classical macroeconomics and the Public Choice School. The intrinsic legal logic of EMU was, is and remains to neutralise expansionary monetary policies, which were disqualified on the basis of rational expectations, and

2024/1263, 30 April 2024); Council Regulation (EU) 2024/1264 of 29 April 2024 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L, 2024/1264, 30 April 2024); Council Directive (EU) 2024/1265 of 29 April 2024 amending Directive 2011/85/EU on requirements for budgetary frameworks of the Member States (OJ L, 2024/1265, 30 April 2024).

[338]E Jones, 'Europe's New Regime for Macroeconomic Policy Coordination: A First Look' 13 (2) (2024) Spanish and International Economic and Financial Outlook 5.

[339]See the special issue of The International Economy (34 [3] 2020) entitled 'Did Europe just experience its Hamiltonian moment?' See also JF Kirkegaard, 'Europe is at last channeling Alexander Hamilton' (Peterson Institute for International Economics, 23 March 2020) <https://www.piie.com/blogs/realtime-economic-issues-watch/europe-last-channeling-alexander-hamilton> accessed 4 November 2024. On the recurrent use of this expression in the European context, see C Georgiou, 'Europe's "Hamiltonian Moment"? On the Political Uses and Explanatory Usefulness of a Recurrent Historical Comparison' 51 (1) (2022) Economy and Society 138.

[340]PL Lindseth and C Fasone, 'The Eurozone Crisis, the Coronavirus Response, and the Limits of European Economic Governance' in Grégoire and Miny (n 16) 507, esp 528–32.

[341]S Cafaro, 'The Evolving Economic Constitution of the European Union: Eulogy to Stability?' in Grégoire and Miny (n 16) 487, esp 490 and 502–5; F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic' 60 (1) (2022) Journal of Common Market Studies 186, esp 187.

[342]BVerfG, 6 December 2022, *ERatG-NGEU III* 2 BvR 547/21 (ECLI:DE:BVerfG:2022:rs20221206.2bvr054721). See M Ruffert, 'Nikolaus 2.0: Zum NGEU-Urteil des Bundesverfassungsgerichts vom 6. Dezember 2022' (Verfassungsblog, 9 December 2022) <https://verfassungsblog.de/nikolaus-2-0/> accessed 4 November 2024; T Nguyen and M van den Brink, 'An early Christmas Gift from Karlsruhe? The Bundesverfassungsgericht's NextGenerationEU Ruling' (Hertie School Jacques Delors Centre Policy Brief, 9 December 2022) <https://www.delorscentre.eu/en/the-bundesverfassungsgerichts-nextgenerationeu-ruling> accessed 4 November 2024.

[343]Art 17, para 3 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility (OJ L 57, 18 February 2021, 17).

[344]See E Domorenok and I Guardiancich, 'The Italian National Recovery and Resilience Plan: Coordination and Conditionality', 14 (2) (2022) Contemporary Italian Politics 191; J Miró et al, 'Money Makes the World Go Round: How Much Difference Do Recovery and Resilience Plans Make to EU Reform Governance?' (2023) Journal of Common Market Studies <https://doi.org/10.1111/jcms.13558>; D Bokhorst and F Corti, 'Governing Europe's Recovery and Resilience Facility: Between Discipline and Discretion' (2023) Government and Opposition 1 <https://doi.org/10.1017/gov.2023.14> Q Detienne, 'Next Generation EU ou le nouveau "pouvoir de la bourse" de la Commission en matière sociale. L'exemple des retraites en Belgique' in S Adalid (ed), *Relance et Transition(s): le nouvel âge de l'intégration* (Bruylant forthcoming).

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to impose 'market discipline' on Member States,[345] as some ECB researchers have explicitly pointed out.[346]

It is true, however, that the 'market discipline' of EMU has been reshaped, as the new economic governance can be understood, in a sense, as an ordoliberal *ressourcement* of economic constitutionalism. Whereas most neoliberal currents, under the influence of Hayek, placed their trust in markets as they actually functioned, the early ordoliberals maintained a more assertive tutelary role for public institutions in relation to the competitive functioning of the market – seen as susceptible to occasional failures that must be prevented or, failing that, compensated for. However, the post Eurozone crisis reforms give us a glimpse of something of the order of the ordoliberal *Als-Ob Politik*. The financial and monetary interventions certainly depart from the orthodox principles of EMU,[347] but on the other hand, they are 'dynamically consistent' with the conditions for regulatory intervention as conceptualised by the early ordoliberals.[348] The ECB's fundamental role in designing, negotiating and monitoring the structural adjustment programmes helped to impose conditionality on 'defaulting' countries, in order to ensure that they (finally) undertook the reforms they should have undertaken under market pressure. Monetary intervention was also 'subsidiary', in that it was used only to ensure the Eurozone's survival in the short term, until the reform of the legal framework could produce its stabilising effects. Finally, it was 'limited' in the twofold sense that it was 'targeted' mainly at the countries in most difficulty[349] and declared to be temporary, although the exact duration was not announced in advance. At the same time, the structural reforms of the (new) economic governance are tantamount to a real *Ordnungspolitik* on the legal framework of the economy, through which the European institutions are now established as guardians of the logic of the market, if necessary even against the actual functioning of the market. Although the market logic is maintained as an abstract hypothetical standard with which the Member States are supposed to comply in implementing their public economic policies, it is thus gradually guaranteed as a last resort by the (European) public institutions, through the new integrated coordination framework, which includes 'enhanced surveillance' imposing a veritable EU tutelage over the states deemed to be failing.

The responses to the COVID-19 crisis are even more heterodox, but they do not change the outcome. The European Semester continues to impose its logic of structural reforms. The modification of the SGP will further strengthen the control of economic and budgetary policies in order to ensure a 'Stability Union'. Finally, the *Next Generation EU*, which according to some scholars contains the seeds of a transfer union, is also being used by the Commission to impose the desired structural reforms – and might not be sustainable in the long run, given the strict position of the Karlsruhe Court.

[345]TD Lane, 'Market Discipline' 40 (1) (1993) IMF Staff Papers 53.

[346]J Yiangou et al, '"Tough Love": How the ECB's Monetary Financing Prohibition Pushes Deeper Euro Area Integration' 35 (3) (2013) Journal of European Integration 223. See also the position of the German Wissenschaftliche Beirat beim Bundesministerium für Wirtschaft und Technologie in its report of 20/21 January 1989 in the context of the negotiations on the establishment of the EMU: Bundesministerium für Wirtschaft und Technologie, 'Gutachten vom 20./21. Januar 1989. Thema: Europäische Währungsordnung' in *Der Wissenschaftliche Beirat beim Bundesministerium für Wirtschaft und Technologie. Sammelband der Gutachten von 1987 bis 1997* (De Gruyter 2000) 1462.

[347]See respectively for financial assistance and monetary intervention: Hentschelmann (n 309); Beukers (n 328).

[348]See supra, 2.A. *The fundamental distinctions of ordoliberalism*, and esp. the text accompagnying n 38 and n 39.

[349]This was not the case for the PSPP, which explains why the German Constitutional Court finally donned the robes of guardian of economic orthodoxy by refusing, in its decision of 5 May 2020 (BVerfG, 5 May 2020, *PSPP II* 2 BvR 859/15, BVerfGE 154, 17), to ratify the blank check left by the Court of Justice to the ECB (ECJ, 11 December 2018, *Weiss* [n 329]). See G Grégoire, 'L'économie de Karlsruhe. L'intégration européenne à l'épreuve du juge constitutionnel allemand' 2490/2491 (5/6) (2021) Courrier hebdomadaire du CRISP.

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4. Conclusion: Neoliberal economic constitutionalism in the EU – a path dependency phenomenon?

An overview of the three layers of the EU's economic constitution reveals one thing: European integration is permeated by the theses of neoliberal economic constitutionalism. Shaped by public power, the competitive market order tends to become a prescriptive body that subjugates public authorities. The latter are no longer simply the institutions that set the framework for the market; they are themselves subject to the imperatives of the market, which in turn deploy an *Ordnungspolitik* for the Member States.

At the microeconomic level, the interpretation of the fundamental freedoms of movement has led to a competition between jurisdictions, which in turn induces the subordination of national legislation to the deregulatory empire of the market. The principle of mutual recognition inherited from the *Cassis de Dijon* jurisprudence and the market access criterion it imposes have given rise to a presumption that national legislation does not comply with the freedoms of movement. Although the presumption can be rebutted – on the grounds of mandatory requirements or overriding reasons in the general interest – the social considerations that could override it are conceived in terms of the exception: the legal primacy is given to the competitive mechanism that derives from the freedoms of movement of the internal market.

At the mesoeconomic level, the extension of the concepts of 'undertaking' and 'State aid' as well as the imposition of the 'market economy investor principle' tend to give the competitive market the status of an abstract hypothetical standard against which the conformity of public intervention in the economy is to be judged. Again, there are exceptions to this principle, but apart from the rare 'exclusively social' or 'exclusively sovereign' activities, public services are gradually being reintegrated into the market economy as 'services of general *economic* interest'.

At the macroeconomic level, the market discipline vis-à-vis the state is even more striking. It is one of the *raisons d'être* of EMU. The 'commodification'[350] of the Member States through their public debt has required a specific legal framework: individual responsibility of Member States through a threefold prohibition (monetary financing, inter-state solidarity and privileged access to financial institutions); free movement of capital; a strictly monetarist mandate for European and national central banks; etc. The expected result is that, constrained by the market imperatives (via interest rates), States will undertake 'structural reforms', ie, measures to modify the framework of the national market. In other words, the *Ordnungspolitik* applied at the European level is supposed to be extended to the national level because of the threat from the (bond) markets, which have become the disciplinary bodies for public policies.

However, the imposition of the market logic on Member States still depends to a large extent on the (national and European) public decision-makers themselves, who have internalised the market logic[351] and try to impose it *as if* it were effective – even when it has failed to be so, as in the case of the Eurozone crisis. In other words, they have largely integrated the neoliberal *Weltanschauung* and its common constitutional agenda: competition between jurisdictions; enshrinement of competition policy; neutralisation of monetary policy; imposition of budgetary discipline. Of course, the three levels of the European economic constitution have undergone various shifts: from 'negative' integration by the judiciary to 'positive' harmonisation by the legislative institutions; from the defence of competitive structures to the more economic approach; from real market discipline to *Als-Ob Politik*, etc. But these changes remain mainly within the framework of neoliberal economic constitutionalism.

[350]On the commodification processes in EU law, see the proceedings of the 'Symposium on Commodification and EU Law' 2 (2) (2023) European Law Open 372.

[351]Hence the fact that the constitutionalisation of the market order can also be observed at the national level: G Grégoire, 'The Constitutionalisation of the Economy in France, Germany and Belgium: Enshrining the Market Order, Rationalising the Social State' (5) (2024) Yearbook of Socio-Economic Constitutions, forthcoming.

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Of course, this does not mean that another legal framework would be less ideological, nor that it is possible to claim from a purely *scientific* point of view that another would be preferable. However, the correlation between the content of the European economic constitution and the content of neoliberal economic constitutionalism allows us to conclude (at least this is our contention) that there is an implicit neoliberal 'referential' within the EU's legal framework – and behind the decisions of its main institutions, primarily the ECJ and the Commission. Again, this does not mean either that European integration should be analysed solely from this neoliberal perspective. On one hand, the implementation of the tenets of neoliberal economic constitutionalism is not only the result of ideological adherence. Strategic considerations linked to the desire for autonomy of European law or to the need to strike a balance between 'responsiveness' and 'responsibility' also help to explain the evolution of EU integration. On the other hand, the European Union referential cannot be reduced to this neoliberal dimension alone. Whatever their real impact on the legal framework of the economy, other aspirations, including social and environmental ones, are (now) integrated into European integration, as the *Next Generation EU* demonstrates – even if the conditionality is also used here to force Member States to adopt 'structural reforms'.

But despite these undeniable additional perspectives that temper the 'neoliberal' assessment of the European economic constitution, the fact remains that a phenomenon of path dependency emerges: the choices made in the past constrain current and future options.[352] Any possibility of profound change in the legal framework of the economy and the theoretical foundations on which it is based has become increasingly complex – if not virtually impossible. The ongoing 'constitutionalisation' of the competitive market order has gradually reduced the real room for manoeuvre of public institutions. It remains to be seen, however, whether neoliberal economic constitutionalism is the best solution to Europe's multiple crises (social, environmental, security) – or whether it is one of their causes.

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[352]See eg, G Davies, 'How the Court's Path Dependence Affects its Role as A Relational Actor' 2 (2) (2023) European Law Open 271.

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