From Austerity to Solidarity: How Deviations Preserve the EU's Macro-Constitution

Hilary Hogan*

*School of Law and Criminology, Maynooth University, Ireland
Email: hilary.hogan@mu.ie

Treaties of the European Union – Comprehensive framework for macro-economic governance, devoid of democratic influence – Divergence from this seemingly stringent framework during the Euro Crisis and the Covid-19 pandemic – Pattern of deviation from the macro-constitution – Euro Crisis and Next Generation EU illustrate that deviations can safeguard the macro-constitution, preserving rather than transforming the Union's macro-constitution.

Introduction

The Treaties of the European Union enshrine a comprehensive framework for macro-economic governance, devoid of democratic influence. During both the Euro Crisis and the Covid-19 pandemic, the European Union undertook measures that diverged from traditional interpretations of this constitutional framework, its 'macro-constitution'.[1] Rather than viewing these events as isolated incidents of informal constitutional change, this article offers an alternative explanatory account: that both episodes exemplify a broader pattern of deviations from the established macro-constitutional order. Far-reaching reinterpretations of this framework, facilitating its circumvention or non-enforcement – 'deviations'

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

European Constitutional Law Review, 21: 619–640, 2025
© The Author(s), 2025. Published by Cambridge University Press on behalf of University of Amsterdam. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives licence (https://creativecommons.org/licenses/by-nc-nd/4.0/), which permits non-commercial re-use, distribution, and reproduction in any medium, provided that no alterations are made and the original article is properly cited. The written permission of Cambridge University Press or the rights holder(s) must be obtained prior to any commercial use and/or adaptation of the article.
doi:10.1017/S1574019625100898

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

for ease – have been well-documented as a recurring feature of the European Union's behaviour.[2] The European Union's response to the pandemic, particularly the creation of Next Generation EU, has been welcomed as an indication that the Treaties can accommodate more diverse economic outlooks, despite its apparently stringent terms. Yet focusing solely on the scope for interpretative flexibility within the Treaties overlooks that the decision to comply with, or depart from, the ordinary meaning of the Treaties lies entirely within the institutional discretion of the EU. When and how the Union opts not to enforce its own constitutional framework or chooses to take a markedly revised reading of those rules is something that cannot be traced to democratic contestation. This article is structured in five parts. The first outlines the concept of the economic constitution, and the terms of the macro-constitution established by the Maastricht Treaty. The second examines how reinterpretations of this framework have facilitated circumventions and non-enforcement of the terms of the Union's unusually prescriptive constitutional framework, referred to as 'deviations'. The third and fourth sections examine two recent examples of deviations in which such deviations occurred: first during the Euro Crisis, and again in the context of the Covid-19 pandemic, and argue that deviations can, paradoxically, safeguard the macro-constitution by forestalling more searching processes of reform. Rather than undermining the macro-constitution, the European Union's deviations during both the Euro Crisis and the pandemic have ensured not only that it is maintained, but even more deeply embedded. The fifth part concludes.

The economic constitution

Competing conceptions of the economic constitution first emerged during the Weimar period.[3] After the Second World War, the ordoliberal concept of the economic constitution, *Wirtschaftsverfassung*, gained influence, promoted by a

[2] *See*, in particular, C. Kilpatrick, 'Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis – ECB Crisis Management and the Sovereign Debt Loans', in M. Cremona and C. Kilpatrick (eds.), *EU Legal Acts: Challenges and Transformations* (Oxford University Press 2018) p. 70; C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35(2) *Oxford Journal of Legal Studies* (2015) p. 325; J. White, *Politics of Last Resort: Governing by Emergency in the European Union* (Oxford University Press 2019).

[3] The 'economic constitution' endorsed by labour scholars such as Hugo Sinzheimer was a fundamentally different concept, envisaging a constitution that maintained democratic control of the economy through collectivised labour: R. Dukes, *The Labour Constitution* (Oxford University Press 2014) p. 12-32; G. Grégoire, 'The Economic Constitution under Weimar: Doctrinal Controversies and Ideological Struggles', in G. Grégoire and X. Miny (eds.), *The Idea of Economic Constitution in Europe* (Brill 2022) p. 53 at p. 59-63.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

new generation of scholars.[4] While understandings of the economic constitution differ, the debates that surround it share a common theme: should the economic sphere be subject to democratic or technocratic control?[5] The European Union has opted for the latter: its Treaties, which serve as its *de facto* constitution, enshrine detailed rules to govern the Economic and Monetary Union.[6] The transformation of the Treaties from international agreements to constitutional instruments has occurred gradually, and without any expression of popular sovereignty or democratic endorsement by the people who would be subject to them. This underscores the efforts of the European project to isolate the achievement of the economic union from political influence, linking the protection of economic liberalism with the suppression of democratic procedures.[7] The principal source of democratic legitimacy for the European Union remains at the national level.[8] The economic ideology underpinning the European economic constitution is most accurately described as *economic liberalism*, capturing both rules-based ordoliberalism and discretionary neoliberalism, united in their opposition to democratic influence on the market.[9] Tuori and Tuori outline that the EU's economic constitution can be best understood as two halves: the micro-constitution refers to individually-enforceable economic rights, such as the free movement provisions, while the macro-constitution includes the comprehensive rules of macro-economic governance.[10]

The modern-day macro-constitution dates from the 1992 Maastricht Treaty, which is credited as the 'constitutive moment' where 'a principle of political economy ... was proclaimed the supreme rule' within the EU.[11] This marked a definitive

[4]T. Biebricher, 'An Economic Constitution – Neoliberal Lineages', in Grégoire and Miny, *supra* n. 3, p. 157; C. Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy', 30(4) *European Law Review* (2005) p. 461 at p. 466-467.

[5]G. Grégoire and X. Miny, 'Introduction: La "Constitution économique": Approche contextuelle et perspectives interdisciplinaires', in Grégoire and Miny, *supra* n. 3, p.1, p. 6; Grégoire, *supra* n. 3, p. 53 at p. 54.

[6]The ECJ began to refer to the Treaties as the 'constitutional charter' of the EU, beginning with ECJ 23 April 1986, Case C-294/83, *Partie Ecologiste 'Les Verts'* v *Parliament*. For a critique, *see* P. Lindseth, 'The Perils of "As If" European Constitutionalism', 22(5) *European Law Journal* (2016) p. 696.

[7]T. Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism beyond the State* (Oxford University Press 2016) p. 55.

[8]P. Leino and J. Salminen, 'Should the Economic and Monetary Union be Democratic After All? Some Reflections on the Current Crisis', 14(7) *German Law Journal* (2013) p. 844 at p. 864.

[9]M. Wilkinson, 'Authoritarian Liberalism in Europe: A Common Critique of Neoliberalism and Ordoliberalism', 45(7-8) *Critical Sociology* (2019) p. 1023.

[10]Tuori and Tuori, *supra* n. 1, p. 13-15.

[11]E. Balibar, 'The Rise and Fall of the European Union: Temporalities and Teleologies', 21(2) *Constellations* (2014) p. 202 at p. 206.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

break with the Keynesian consensus that had prevailed until the 1970s. The Treaty led to the establishment of the Economic and Monetary Union in a process driven by the major powers, supported by technocrats, whereby member states ceded exclusive control of monetary policy, but largely retained control of fiscal and economic policy.[12] Under the Economic and Monetary Union, monetary financing is prohibited, meaning that central banks, including the European Central Bank, cannot directly purchase member state debt.[13] The 'no bail-out clause' in Article 125(1) TFEU prohibits the Union or member states from assuming responsibility for the debt of other member states. Some limited scope for financial solidarity appears in Article 122 TFEU in cases of natural disasters or 'severe difficulties', which would be used as the basis for various emergency measures in the years to come.[14] Member states are banned from running 'excessive government deficits'.[15] Public deficits are limited to 3 per cent of GDP at all times.[16] This was given effect to by the 1997 Stability and Growth Pact, which was designed to maintain fiscal convergence between member states, and constrained the amount of government spending by threat of financial penalty.[17] The independent European Central Bank's primary mandate is to curb inflation, and it is not entitled to act as a 'lender of last resort', a role usually reserved for central banks to aid financial institutions in distress.[18] Importantly, the framework established by the Treaties is unusually detailed by comparison with typical constitutional texts, particularly in relation to economic governance.[19] The level of precision in the Treaties seemed to preclude the kind of interpretive flexibility that national constitutional frameworks can sometimes allow. Moreover, there was, as Joerges pointed out, no moment where the adoption of

[12]K. Dyson and K. Featherstone, *The Road to Maastricht: Negotiating Economic and Monetary Union* (Oxford University Press 1999) p. 752.

[13]Art. 123(1) TFEU.

[14]M. Chamon, 'The Non-Emergency Economy Policy Competence in Article 122(1) TFEU', 61 *Common Market Law Review* (2024) p. 1501; M. Chamon, 'The EU's Dormant Economic Policy Competence: Reliance on Article 122 TFEU and Parliament's Misguided Proposal for Treaty Revision', 49(2) *European Law Review* (2024) p. 166; B. De Witte, 'The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *Common Market Law Review* (2021) p. 635 at p. 653.

[15]Art. 126(1) TFEU.

[16]The 3% rate was described as 'arbitrary, capricious and not grounded in a clear conceptual framework'. *See* B. Eichengreen, *Institutions for Fiscal Stability* (Working Paper PEIF No. 6 2003) p. 5.

[17]Council Regulation (EC) 1467/97, O.J. 1997, L 209/6 (amended by Council Regulation (EU) 1177/2011, O.J. 2011, L 306/33).

[18]Art. 127(1) TFEU. The same article affirms that the European System of Central Banks will act in light of the 'principle of an open market economy with free competition, favouring an efficient allocation of resources' and in light of the principles in Art. 119(1) TFEU.

[19]Tuori and Tuori, *supra* n. 1, p. 38-39. *See* D. Grimm, 'The Democratic Costs of Constitutionalisation: The European Case', 21(4) *European Law Journal* (2015) p. 460 at p. 470.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

economic constitutionalism as the common mode of governance was subject to popular endorsement.[20] Constitutionalising such a comprehensive constitutional framework for macro-economic governance seemingly curtailed both discretion and democratic influence. As it transpired, only the latter aim was realised.

Deviations from the macro-constitution

On paper, the Maastricht Treaty enshrined a comprehensive legal framework for EU macro-economic governance in the Treaties. Economic governance is not only shaped by law, but embedded in constitutional structures. Yet, as has been well-documented, there are several prominent examples where the EU has diverged from the path seemingly prescribed by its unusually detailed constitutional framework. Far-reaching reinterpretations of that constitutional framework have enabled the EU to avoid implementing elements of that framework, and to pursue courses of action that are not easy to reconcile with the ordinary reading of the Treaties. These reinterpretations are collectively referred to as 'deviations' from conventional understandings of EU constitutional law.[21] An early example was the failure to enforce breaches of the Stability and Growth Pact in the early 2000s.[22] Later, throughout the Euro Crisis years, the EU embarked on a range of actions that were characterised by a willingness to reinterpret or circumvent existing constitutional rules and norms, which have been explored and critiqued extensively.[23] As White has outlined,

[20]C. Joerges, 'Varieties of Economic Constitutionalism and the Alternative of Conflicts-Law Constitutionalism: Observations on the Conceptual History of the Law of the Integration Project', 4 *European Law Open* (2025) p. 7 at p. 22.

[21]This carries the caveat that the classification of 'deviation' is contestable: many of the 'deviations' described in this article have been defended as falling within the parameters of EU law. However, it is widely agreed that these deviations involved, at least, unorthodox interpretations of the Treaties.

[22]*See* K. Dominguez, 'The European Central Bank, the Euro and Global Financial Markets', 20(4) *Journal of Economic Perspectives* (2006) p. 67 at p. 76 and p. 85.

[23]For a sample of the scholarship on this issue, *see* e.g. A. de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance', 49 *Common Market Law Review* (2012) p. 1613; J. Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy', 14(1) *German Law Journal* (2013) p. 169; E. Chiti and P. Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis', 50 *Common Market Law Review* (2013) p. 683; C. Joerges, 'Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation', 15 *German Law Journal* (2014) p. 985; N. Scicluna, *European Union Constitutionalism in Crisis* (Routledge 2014) p. 124-128; C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35(2) *Oxford Journal of Legal Studies* (2015) p. 325; Kilpatrick (2018), *supra* n. 2, p. 70; B. De Witte, 'A Gentle Criticism of the Metamorphosis Thesis',

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

these actions included measures that breached 'established standards' or suspended the enforcement of those standards altogether.[24] This reflected a broader tendency on the part of the EU to resort to what he described as rule by 'emergency politics'. The most controversial examples include the bailouts to the debtor member states (criticised as a breach of Article 125 TFEU), the intergovernmental agreements and mechanisms established outside the scope of EU law to provide them, and the announcement by the European Central Bank of the Open Monetary Transactions bond purchasing program (criticised as a circumvention of Article 123(1) TFEU). Other highly criticised developments included the gradual blurred decision-making process between institutional actors. In some cases, the actions of prominent actors such as the European Central Bank stretched the scope of their traditional mandate through expansionist monetary policy.[25] In other instances, new entities, such as the Troika, and the Eurogroup, emerged as the site of prominent decision-making, with limited clarity on their jurisdiction.[26] These developments prompted several overlapping debates in legal scholarship on whether these actions were doctrinally defensible, or defensible by reference to deeper, normative benchmarks such as the rule of law;[27] and whether the EU's actions could be characterised as modern-day 'authoritarian liberalism'.[28] One of the most debated issues was whether the EU's departures from existing understandings of the constitutional framework actions amounted to a form of constitutional change or 'metamorphosis' in its institutional arrangements,[29]

in H. Hofmann et al. (eds.), *The Metamorphosis of the European Economic Constitution* (Edward Elgar 2019) p. 106-124; E. Nanopoulos, 'From Class-based Project to Imperial Formation: European Union Law and the Reconstruction of Europe', in P. O'Connell and U. Özsu (eds.), *Research Handbook on Law and Marxism* (Edward Elgar 2021) p. 375 at p. 391.

[24]White, *supra* n. 2, p. 19.

[25]*See*, for example, European Central Bank 'Technical Features of Outright Monetary Transactions' 6 September 2012, and the instigation of the Public Sector Purchase Programme.

[26]White, *supra* n. 2, p. 16-19.

[27]Kilpatrick, 'Abnormal Sources and Institutional Actions in the EU Sovereign Debt Crisis – ECB Crisis Management and the Sovereign Debt Loans', *supra* n. 2; Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', *supra* n. 2; White, *supra* n. 2, at p. 19-22.

[28]A. Somek, 'Delegation and Authority: Authoritarian Liberalism Today', 21(3) *European Law Journal* (2015) p. 340; M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021).

[29]F. Amtenbrink, 'The Metamorphosis of European Economic and Monetary Union', in D. Chalmers and A. Arnull (eds.), *The Oxford Handbook of EU Law* (Oxford University Press 2015); Tuori and Tuori, *supra* n. 1; A. Menéndez, 'Editorial: A European Union in Constitutional Mutation', 20 *European Law Journal* (2014) p. 127; M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis', 76 *Modern Law Review* (2013) p. 817. For a critique of the

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

or substance.[30] Yet focusing on whether particular actions constitute a process of constitutional change may overlook what can be gleaned from a consistent pattern of behaviour. What *is* common ground in the debates outlined above is that the EU did not closely abide by the letter of its own macro-constitutional framework. Even those who disputed the language of constitutional transformation accepted that there had been 'creative use' of the Treaties.[31] Less than a decade later, the Union would embark on a series of actions during the Covid-19 pandemic that, once again, departed from established understandings of the macro-constitution, including the creation of Next Generation EU. In response to emerging crises, the EU has, as one commentator put it, simply 'read new powers into existing legal provisions'.[32] Instead of viewing these events as isolated incidents of informal constitutional change, the EU's response both to the Euro Crisis and the pandemic can be understood as part of a broader continuum: an identifiable pattern of deviating from an embedded constitutional framework.[33] For some, such deviations violate the spirit, if not the letter, of the Treaties. For others, expansive interpretations that move beyond the ordinary meaning of the Treaties are dynamic re-readings that remain within the boundaries of Union law. From this perspective, reinterpretations are key mechanisms for enabling new modes of governance within the Union, given the remote prospect of formal amendments to the Treaties. The response to the Covid-19 pandemic, in particular, has been welcomed as evidence that the Treaties are capable of accommodating more solidaristic approaches to economic governance.

Yet whether the Treaties can, in principle, accommodate different interpretations risks overlooking important questions about when and why dramatically different readings of the Treaties are adopted. This is not to take issue with deviations from the terms of the Maastricht settlement *per se*, or to insist on lawfulness for lawfulness's sake. As White has observed, there may be rules that cannot be strictly complied with during time of crisis, and others that 'may

'constitutional mutation' argument, *see* B. De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?', 11 *EuConst* (2015) p. 434.

[30]M. Ioannidis, 'Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis', 53 *Common Market Law Review* (2016) p. 1237.

[31]De Witte, *supra* n. 29, p. 452.

[32]M. Dawson, 'The National Case for Reforming the EU Treaties', *Verfassungsblog*, 16 May 2023, https://verfassungsblog.de/the-national-case-for-reforming-the-eu-treaties/, visited 30 November 2025.

[33]As Wilkinson notes in the context of the Euro Crisis: 'the bypassing of the Treaty rules, although more notable in the euro crisis phase, was, in fact, prefigured in the lax response to earlier violations of the Stability and Growth Pact': Wilkinson, *supra* n. 28, p. 221.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

deserve to be abandoned'.[34] What is lawful – in terms of what is strictly legal – is often contestable, subject to challenge, and can accommodate a multiplicity of interpretation and meanings. This is particularly evident in the context of constitutions, which are often drafted to accommodate evolving interpretations over a prolonged period of time. However, the Treaties present a much more detailed and specific set of rules, in particular for macro-economic governance, than are ever likely to appear in a national constitution. It might be reasonably anticipated that 'more text means more precision; and more legal precision means less informal freedom for the Union'.[35] Yet despite the unusually detailed framework, the same Treaty provisions have been read in radically different ways within the span of a decade, both in relation to the terms under which financial assistance could be provided to member states, and the scope of the Union's jurisdiction to offer such assistance.

This leads to another issue: the opaqueness surrounding how and when deviations from the Union's constitutional framework take place, and whose interests they serve. The lack of democratic approval for the macro-economic framework applies not only to the initial constitutional settlement, but also instances when that framework is disregarded or circumvented. While formal amendments to the Treaties are the collective responsibility of member states (and which often require public approval) there is no comparable mechanism for the broader public or even the member states as a whole to shape or contest the reinterpretation of Treaty provisions. Decisions about when and how to depart from the ordinary meaning of the Treaties fall within the discretion of internal institutional actors, largely shielded from democratic oversight. Whether driven by intergovernmental coalitions such as the European Council and the Eurogroup, as during the Euro Crisis,[36] or the European Commission, acting in concert with France and Germany as seen during the pandemic,[37] or by shifts

[34]White, *supra* n. 2, p. 19.

[35]R. Schütze, 'Integration-through-Law': Grand Theory, Revisionist History', 4 *European Law Open* (2025) p. 162 at p. 187.

[36]J. Abels, 'Failing Forward in European Economic Governance: The Cyclicality of European Integration and Institutional Competition in the COVID-19 Crisis', 63(2) *Journal of Common Market Studies* (2025) p. 467.

[37]S. Fabbrini and A. Capati, 'Adjustments in Economic Crises: The Different Outcomes of the Sovereign Debt and Pandemic Crises in Europe', in D. Adamski et al. (eds.), *The Cambridge Handbook of European Monetary, Economic and Financial Integration* (Cambridge University Press 2023) p. 363 at p. 370-373. Schmidt's alternative account bypasses the usual intergovernmental/supra-national divides: V. Schmidt, 'Theorizing Institutional Change and Governance in European Responses to the Covid-19 Pandemic', 42(8) *Journal of European Integration* (2020) p. 1177.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

in the ideological composition of European officials,[38] such choices remain firmly within the confines of the EU's institutional apparatus. *When* it is decided the terms of the Treaties should be ignored or bypassed, or their boundaries pushed, cannot be traced to any expression of public legitimation. Nor is there any input into the *substance* of those deviations – which rules are broken, or go unenforced, and for whose benefit. Not only have the terms of the macro-constitution been bypassed on several occasions, but *how* they have been bypassed has changed significantly in the space of a decade. To date, the Court of Justice, typically the primary check on unorthodox constitutional interpretations advanced by other branches, has not objected.[39] The wider public has little meaningful opportunity to directly influence these developments, not even retrospectively. Given the limited constraints on when deviations from the Treaties occur or what form they take, they tend to favour particular interests, and risk reinforcing existing inequalities between member states. A long-standing criticism is that France and Germany benefited from the lax enforcement of the Stability and Growth Pact, while peripheral member states such as Greece, Ireland, Portugal and Spain were subject to strict conditionality during the Euro Crisis. That insistence on conditionality was abandoned when the EU as a whole appeared vulnerable to the effects of the pandemic. It is to that earlier example that we now turn.

The Euro Crisis Deviations

The events of the Euro Crisis aptly illustrate the EU's selective approach to the enforcement of its own economic constitution.[40] Departures from ordinary interpretations of the constitutional framework involved deliberate choices about which rules to overlook, how to do so, and whom such decisions would ultimately serve, even when these choices were presented as the only feasible course of action.[41] As the crisis was unfolding, it was argued that it was open to the EU to choose a course of action that would ensure that losses would be borne by private

[38]J. Miró, 'Austerity's Failures and Policy Learning: Mapping European Commission Officials' Beliefs on Fiscal Governance in the Post-Crisis EU', 28(5) *Review of International Political Economy* (2021) p. 1224 at p. 1241.

[39]ECJ 27 November 2012, Case C-370/12, *Pringle* v *Government of Ireland and Others*, ECLI:EU:C:2012:756; ECJ 16 June 2015, Case C-62/14, *Gauweiler et al* v *Deutscher Bundestag*, ECLI:EU:C:2015:400. *See*, for example, A. Ronkainen et al., 'The House Always Wins: A Systematic Analysis of CJEU Case Law Relating to the Economic and Monetary Union (2010-2020)', 9(3) *European Papers* (2024) p. 876.

[40]*See* P. Leino and T. Saarenheimo, 'Sovereignty and Subordination: On the Limits of EU Economic Policy Coordination', 42(2) *European Law Review* (2017) p. 166 at p. 179-181.

[41]White, *supra* n. 2, p. 22.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

creditors, either through allowing banks to fail or through debt restructuring.[42] Arguably, this is what the architecture of the Economic and Monetary Union had implicitly envisaged. Allowing member states to default on their debt was rejected, on the basis that it would set off a spiralling 'contagion' in the entire European banking sector and would effectively risk the survival of the Euro. Early plans to restructure Greek and Irish debt were shelved.[43] Saving the Euro was characterised as inextricably linked with the survival of the Union: a tactic labelled as 'integration through fear'.[44] Yet there were clear normative values at stake in opting to prioritise the Euro. Not all member states had benefited equally from the introduction of the single currency: the abandonment of the Euro would have severely damaged the Northern export-led economies. It eventually became evident that the terms of the macro-constitution, in particular the 'no bailout' provision in Article 125(1) TFEU, would be circumvented.[45]

However, there were several options as to how this could be done. One was to provide unconditional financial assistance to the affected member states. Instead, the mechanisms adopted – the Greek bailout in May 2010, the European Financial Stability Facility and its replacement, the European Stability Mechanism – were contingent on agreement to 'structural reforms', or austerity measures. These agreements were established through international agreements outside the framework of EU law. Their terms reflected pre-existing imbalances of power, as the debtor member states were historically poorer and peripheral member states. These member states underwent the painful process of internal devaluation aimed at restoring competitiveness, implementing wage cuts and other labour market reforms to curtail worker protection, as well as reductions in public spending. Member states did not merely commit to implementing austerity measures, but accepted close oversight by the Troika in the design and execution of those reforms. Agreement to austerity was framed as

[42]Kilpatrick (2018), *supra* n. 2, p. 83-85.

[43]A. Mody, *Eurotragedy* (Oxford University Press 2018) p. 279. M. Sandbu, *Europe's Orphan* (Princeton University Press 2017) p. 151.

[44]Angela Merkel warned in a speech to the Bundestag in October 2011 that 'if the Euro fails, Europe fails', a claim that she made repeatedly throughout the Euro Crisis. *See* A. Merkel and B. Baumann, *Freedom* (Verlag Kiepenheuer and Witsch; transl. MacMillan 2024) p. 405-406, 413. *See* J. Weiler, 'Integration through Fear', 23(1) *European Journal of International Law* (2012) p. 1. *See also* H. Lokdam, '"We Serve the People of Europe": Reimagining the EBC's Political Master in the Wake of Its Emergency Politics', 58(4) *Journal of Common Market Studies* (2020) p. 978 at p. 980-981.

[45]M. Ruffert, 'The European Debt Crisis and European Union Law', 48 *Common Market Law Review* (2011) p. 1777 at p. 1785-1787; N. Scicluna, 'Politicisation without Democratization: How the Eurozone Crisis is Transforming EU Law and Politics', 12 *ICON* (2014) p. 545 at p. 559; Tuori and Tuori argued that the objective of safeguarding the financial stability of the Euro had no basis in the Treaties: *see* Tuori and Tuori, *supra* n. 1, p. 132-133.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

a precondition to the provision of financial assistance, as a means of combatting moral hazard.[46] The offer of financial assistance, when it was ultimately made, was done so reluctantly, and was accompanied by strict conditions. As Kilpatrick has argued:

> . . . the EU chose a path which initially rejected, and then subsequently only very partially accepted, banking and sovereign debt restructuring and cleaved as closely as possible to the prohibition of monetary financing in Article 123 TFEU and the no bailout clause in Article 125 TFEU.[47]

As such, deviations from the Treaties during the Euro Crisis predominantly centred the interests of both private and member state creditors above those of the debtor member states.

Deviations as means of preserving macro-constitution

If the emergency measures taken during the Euro Crisis were difficult to reconcile with established interpretations of the Treaties, it raised the question of how the macro-constitution could endure the Euro Crisis without undergoing comprehensive reform. Yet the macro-constitution weathered Euro Crisis, emerging with its core structure intact and its scope significantly expanded. Existential questions, such as whether purportedly comprehensive rules of macro-economic governance should be subject to democratic legitimation, or constitutionalised in the first instance, largely went unexamined.[48] One explanation for the macro-constitution's endurance is that selective deviations from its framework have, paradoxically, helped to preserve it. Strict enforcement of the strictures of that constitutional framework risked only highlighting its shortcomings. Given the EU's reliance on output legitimacy, deploying unconventional interpretations of the Treaties allowed it to respond to emerging crises. These workarounds facilitate the development of new legal instruments that expand and supplement the existing system. This stifled efforts to engage in deeper scrutiny of the underlying structure of the macro-constitution, and forestalled any efforts at structural reform.

[46]M. Panascì, 'Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution', 61 *Common Market Law Review* (2024) p. 13 at p. 39.

[47]Kilpatrick (2018), *supra* n. 2, p. 85.

[48]With some notable exceptions, *see* e.g. Leino and Salminen, *supra* n. 8; M. van der Sluis, 'EU Law for a New Generation?', 14(2) *ICON* (2016) p. 480; E. Nanopolous and F. Vergis (eds.), *The Crisis behind the Eurocrisis* (Cambridge University Press 2019); S. Hennette et al., *How to Democratize Europe* (Harvard University Press 2019).

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

The Euro Crisis gave rise to a wave of new legal instruments (dubbed 'Euro Crisis law') and soft law,[49] as well as international agreements, most notably the Treaty on Stability, Coordination and Governance.[50] The only formal Treaty amendment, the addition of Article 136(3) TFEU, authorised the Eurozone states to establish financial stability mechanisms, subject to strict conditionality.[51] Reforms were fashioned in light of two dominant diagnoses of the Euro Crisis: that it stemmed from an incomplete Economic and Monetary Union and from budgetary mismanagement by the affected member states.[52] As such, reforms expanded the parameters of the macro-constitution, rather than scrutinising its underlying values. Attention shifted to tightening budgetary surveillance and oversight of national fiscal policies, prompted by the Six-Pack and Two-Pack legislation, via the European Semester. Efforts were made to bolster Union's budgetary capabilities.[53] Rather than prompting a critical reassessment of the Maastricht settlement, the EU's deviations from the constitutional framework during the Euro Crisis only served to entrench it.

The pandemic deviations

Shortly after the Covid-19 pandemic broke out in Europe, the EU once again broke with conventional understandings of the macro-constitution. However, this time, it did so in a way that it had never done before. It offered an unprecedented amount of financial assistance to all member states through grants and interest-free loans, financed through shared debt. Despite Christine Lagarde's early remarks in March 2020 that the European Central Bank was not 'here to close spreads' and did not intend to embark on 'whatever it takes, number two', the European Central Bank soon changed tack.[54] A week later, the European Central

[49]P. Leino and J. Salminen, 'Going "Belt and Braces" – Domestic Effects of Euro-Crisis Law', *EUI Law Working Papers* (2015/15). For an overview of the measures introduced in response to the Euro Crisis, *see* M. Markakis, 'The New EU Economic Governance Framework: Principle, Policy and Enforcement', 49(5) *European Law Review* (2024) p. 478 at p. 482-484.

[50]Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012. Title III provides for the Fiscal Compact, which was incorporated into EU law as part of the new economic governance framework in April 2024.

[51]This was deemed unnecessary by the Court of Justice in *Pringle*, *supra* n. 39.

[52]Miró, *supra* n. 38, p. 1227.

[53]P. Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: between Continuity and Rupture' 47(4) *Legal Issues of Economic Integration* (2020) p. 337 at p. 346. *See also* A. Hinarejos, 'Fiscal Federalism in the European Union: Evolution and Future Choices for EMU', 50 *Common Market Law Review* (2013) p. 1621 at p. 1629-1632, 1640.

[54]'Italy Furious at ECB's Lagarde "Not Here to Close Spreads" Comments', *Reuters*, 12 March 2020, https://www.reuters.com/article/idUSKBN20Z3VM/, visited 30 November 2025.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

Bank announced the introduction of the Pandemic Emergency Purchase Program to purchase government bonds, eventually up to €1850 billion, and the design of the scheme allowed the European Central Bank to specifically target the most acutely affected member states. Around the same time, the European Commission had proposed a suite of coordinated European responses, including the relaxation of state aid, a commitment to mobilising €1 billion from the EU budget as a guarantee to the European Investment Fund to encourage banks to extend liquidity to businesses across the EU, funds to support member states to preserve employment and direct funding to tackle the spread of the virus. The European Commission approved significant state aid measures to support businesses and preserve employment across the member states.[55] The general escape clause of the Stability and Growth Pact was activated to allow member states to depart from standard budgetary constraints.[56] A temporary €100bn solidarity instrument was adopted to assist European workers to preserve their incomes and assist businesses, and a later financial package was adopted to encourage banks to lend to households and businesses affected by the pandemic.[57]

However, the remainder of the European Commission's proposed response to the pandemic could not be finalised due to intense disagreement between member states at the European Council. Austria, Finland, Sweden and the Netherlands were vocal in their opposition to any proposals which involved the mutualisation of debt and rejected the proposed 'corona bonds' and 'Eurobonds'. Italy, in turn, vigorously argued that there should be no conditionality for financial assistance. With clear echoes from the Euro Crisis, Wopke Hoekstra, the Dutch Finance Minister, appeared to suggest that financial mismanagement by southern member states was to blame for their inability to weather the economic upheaval caused by the pandemic.[58] Yet the intense period of disagreement between member states lasted no more than a few weeks. By May 2020, a proposal for a European Recovery Fund to be distributed by grants to the member states had been proposed by both France and Germany. This paved the way for the European Commission to introduce a novel proposal, Next Generation EU,

[55]European Commission, 'State Aid Cases', https://commission.europa.eu/strategy-and-policy/coronavirus-response/supporting-jobs-and-economy-during-coronavirus-pandemic/state-aid-cases_en, visited 9 December 2025.

[56]European Commission, Communication to the Council on the Activation of the General Escape Clause of the Stability and Growth Pact, COM(2020) 123 final, 20 March 2020.

[57]European Commission, Coronavirus Response: Commission adopts banking package to facilitate lending to households and businesses in the EU, 28 April 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_740/, visited 30 November 2025.

[58]'Dutch Try to Calm North-South Economic Storm over Coronavirus', *Politico*, 27 March 2020, https://www.politico.eu/article/netherlands-try-to-calm-storm-over-repugnant-finance-ministers-comments/, visited 30 November 2025.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

which allowed the Commission to borrow on capital markets on behalf of the Union, and to distribute funds to the member states.[59] As the so-called 'frugal four' resisted the original grant-based proposal, the funds would be distributed by way of loans and grants.[60] The programs allowed for up to €750 billion to be allocated to member states between 2021 and 2024. Next Generation EU has three strands: the Own Resources Decision, the European Union Recovery Instrument,[61] and the Recovery and Resistance Facility.[62] First, the new Own Resources Decision enabled the European Commission to borrow on capital markets to fund Next Generation EU.[63] This measure was adopted under Article 311(3) TFEU.[64] This gave rise to debates as to whether the EU had, in effect, created a temporary fiscal union.[65] The European Union Recovery Instrument empowered the EU to fund measures to address the economic fallout from the pandemic, based on Article 122 TFEU. The Recovery and Resistance Facility, the central budgetary program of Next Generation EU funds to be distributed, was based on Article 175(3).

Next Generation EU represented a departure from EU law orthodoxy in several ways.[66] First, it enabled funding to be provided to member states through direct grants and loans. While not unconditional (member states must demonstrate compliance national recovery and resilience plans, informed by country-specific recommendations, sanctioned by both Council and Commission) it had been widely understood that financial assistance not

[59]European Commission, 'Europe's Moment: Repair and Prepare for the Next Generation' (Communication) COM (2020) 456 final. For an overview, *see* De Witte, *supra* n. 14.

[60]C. Fasone and P. Lindseth, 'Europe's Fractured Metabolic Constitution: From the Eurozone Crisis to the Coronavirus Response' *Working Paper Series SOG-WP61/2020* (October 2020) p. 1, 30.

[61]Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ 2020 L433.

[62]Regulation (EU) No. 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, O.J. 2021, L57.

[63]This aspect of Next Generation EU recovery plan was unsuccessfully challenged before the *Bundesvergassungsgericht*, the German Federal Constitutional Court, in Cases 2 BvR 547/21 and 2 BvR 798/21, *Own Resources Decision* Judgment of 6 December 2022. *See* P. Dermine and A. Bobić, 'Of Winners and Losers: A Commentary of the *Bundesvergassungsgericht* ORD Judgment of 6 December 2022', 20(1) *EUConst* (2024) p. 163.

[64]Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, O.J. 2020, L424.

[65]A. Tooze, *Shutdown: How Covid Shook the World's Economy* (Penguin 2021) p. 187.

[66]The Council took the unusual step of publishing its legal advice on Next Generation EU. *See* Council of the European Union, Opinion of the Legal Service on Proposals on Next Generation EU, 9062/20 (Brussels, 24 June 2020).

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

accompanied by 'strict conditionality' constituted a breach of Article 125(1) TFEU.[67] Second, Next Generation EU was financed through shared debt issued to the European Commission, with the proceeds redistributed to the member states over a five-year period. Given the absence of any borrowing power conferred on the Union by the Treaties, it marked a major break with existing understandings of EU law.[68] Third, Next Generation EU sat uneasily with the requirement for the EU to maintain a balanced budget under Article 310(1) TFEU. This conflict was addressed by excluding Next Generation EU from the budget.[69] While framed as a temporary measure, it is now evident that the Next Generation EU model will form an ongoing part of the EU's institutional apparatus.[70] It should be observed that, for some, the EU's actions during the pandemic, while ambitious, remained consistent with its existing constitutional architecture. De Witte has pointed out that, unlike the Euro Crisis, the Next Generation EU recovery plan was adopted within the confines of EU law, without the creation of any new bodies or Treaty amendments.[71] Yet there was broad

[67]A view affirmed by the Court of Justice in *Pringle*, *supra* n. 39. *See*, for example, J. Louis, 'The No Bailout Clause and Rescue Packages', 47 *Common Market Law Review* (2010) p. 985; A. Steinbach, 'The "Haircut" of Public Creditors under EU Law', 12 *EuConst* (2016) p. 223 at p. 231; V. Borger, 'The ESM and the European Court's Predicament in *Pringle*', 14(1) *German Law Journal* (2013) p. 113 at p. 131-132.

[68]*See* P. Leino-Sandberg and M. Ruffert, 'Next Generation EU and its Constitutional Ramifications: A Critical Assessement', 59 *Common Market Law Review* (2022) p. 433 at p. 456-458; de Gregorio Merino, *supra* n. 23, p. 1630-1632. *Cf* P. Nicolaides, 'Can the Borrowing for the "Next Generation EU" Lead to Infringement of Article 125 TFEU?', 47(5) *European Law Review* (2022) p. 710. On whether this constitutes a 'Hamiltonian' movement, *see* A. Steinbach, 'The Next Generation EU. Are We Having a Hamiltonian Moment?', *EULawLive,* Weekend Edition, 26 June 2020; C Georgiou, 'Europe's "Hamiltonian Moment"? On the Political Uses and Explanatory Usefulness of a Recurrent Historical Comparison', 51 *Economy and Society* (2022) p. 138; P. Van Malleghem, 'NextGenerationEU: Hamiltonian Moment or European New Deal?', 42 *Yearbook of European Law* (2023) p. 3. F. Fabbrini, *EU Fiscal Capacity: Legal Integration after Covid-19 and the War in Ukraine* (Oxford University Press 2022) p. 61; *cf* P. Lindseth and C. Fasone, 'The Eurozone Crisis, the Coronavirus Response, and the Limits of European Economic Governance', in Grégoire and Miny, *supra* n. 3, p. 532-533.

[69]P. Leino-Sandberg, 'Who is Ultra Vires Now? The EU's Legal U-turn in Interpreting Article 310 TEFU', *Verfassungsblog*, 18 June 2020, https://verfassungsblog.de/who-is-ultra-vires-now-the-eus-legal-u-turn-in-interpreting-article-310-tfeu/, visited 30 November 2025; Dermine, *supra* n. 53, p. 347-350. *See also* F. Amtenbrink, 'Covid-19 and Fiscal Union', in F. Fabbrini and C. Petit (eds.), *Covid 19 and Fiscal Union Research Handbook on Post-Pandemic EU Economic Governance and NGEU Law* (Edward Elgar 2024) p. 24 at p. 37-38.

[70]P. Dermine, 'The Planning Method: An Inquiry into the Constitutional Ramifications of a New EU Governance Technique', 61 *Common Market Law Review* (2024) p. 959 at p. 967-970.

[71]De Witte, *supra* n. 14, p. 679. *See also* M. Markakis, 'Accountability and Democratic Legitimacy in European Union Economic Governance: From the Euro Crisis to the Pandemic and Beyond', 70 *The Irish Jurist* (2023) p. 68 at p. 98.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

consensus that the EU's pandemic response, especially the creation of Next Generation EU, could not easily be reconciled with conventional understandings of the macro-constitution.[72] This tension was evidently recognised by the EU itself, given that it took the unusual step of publishing the Council Legal Service's advice.[73]

Much like the Euro Crisis years, the EU's response to the pandemic were 'found in legally grey areas and build on solutions that would have been considered illegal just a while ago'.[74] Dani argued that the pandemic-era measures were achieved only by 'loosening, suspending, derogating and, sometimes, even straining key norms of the EU economic constitution'.[75] Leino-Sandberg and Ruffert have been to the forefront in arguing that the actions of the EU during the pandemic marked a clear departure from the terms of the Treaties. Before the pandemic, it had been widely accepted that any further fiscal integration of the Union would require Treaty amendments. Rather than embarking on the painful process of formally amendments, alternative legal interpretations of the Treaties were employed to justify the Union's actions.[76] While Next Generation EU was framed in legal terms as a 'one-off crisis measure', it heralded a long-lasting change to the EU, given that Next Generation EU 'entails a substantial reinterpretation of what is possible under the Treaties'.[77]

Austerity to solidarity

Yet not only did the EU depart from the existing understandings of the Treaties – as had been done before – but *how* it opted to depart from the macro-

[72]Costamagna and Goldmann suggest that it is defensible as an 'incremental development of the Treaties in line with fundamentally changing contexts'. *See* F. Costamagna and M. Goldmann, 'Constitutional Innovation, Democratic Stagnation? The EU Recovery Plan', *Verfassungsblog*, 30 May 2020, https://verfassungsblog.de/constitutional-innovation-democratic-stagnation/, visited 30 November 2025.

[73]Council of the European Union, *Opinion of the Legal Service* (9062/20) 24 June 2020, https://data.consilium.europa.eu/doc/document/ST-9062-2020-INIT/en/pdf. P. Leino-Sandberg and P. Lindseth, 'How Cohesion Became the EU's Vehicle for Economic Policy: Tracing the Hidden History of Article 175(3) TFEU', *Verfassungsblog*, 14 August 2023, https://verfassungsblog.de/how-cohesion-became-the-eus-vehicle-for-economic-policy/, visited 30 November 2025.

[74]P. Leino-Sandberg, 'Constitutional Imagineries of Solidarity: Framing Fiscal Integration Post-NGEU', in R. Weber (ed.), *The Financial Constitution of European Integration: Follow the Money*? (Hart Publishing 2023) p. 161, 162. Amtenbrink wrote that the 'legal construction of the main instruments … is fragile': Amtenbrink, *supra* n. 69, p. 36.

[75]M. Dani, 'Activist Government Redux: Exceptional or Structural?', 2 *European Law Open* (2023) p. 1 at p. 3-4.

[76]Leino-Sandberg and Ruffert, *supra* n. 68, p. 434.

[77]Leino-Sandberg and Ruffert, *supra* n. 68, p. 437.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

constitution was a striking contrast to a decade beforehand. Redistribution between member states, the absence of strict conditionality in exchange for financial assistance and a new enthusiasm for solidarity spoke to a substantive difference in outlook between the deviations of the Euro Crisis and the deviations of the pandemic. The EU was willing to provide financial assistance to its member states in distress, if not unconditionally, then at least on significantly better terms than a decade beforehand. As Lokdam and Wilkinson noted, its aims were 'not as strictly neoliberal as those pursued during the Eurozone crisis'.[78] To Dermine, the adoption of Next Generation EU was indicative of a return to planning as a method of EU governance.[79] In a similar vein, Panascì has argued that through Next Generation EU the EU has 'effectively, albeit temporarily, left the market paradigm behind'.[80] She pointed to the fact that the conditions for financial assistance are not linked to the imposition of austerity measures, and wealth redistribution can now take place between member states. To many, the EU's pandemic response signalled a realignment of the interests that had been prioritised during the Euro Crisis. Even some who considered that the EU's actions were dubious by reference to its own constitutional framework were prepared to defend Next Generation EU on the basis that the ends justified the means.[81]

Once again, a severe economic fallout across the EU threatened to lay bare the structural and normative failings of its economic constitution. During the Euro Crisis, the debtor member states were identified as the dominant cause of the crisis, which deflected from the Union's own role in contributing to and worsening the crisis, as well as the underpinning economic ideology of the European project itself.[82] That the effects of the Euro Crisis were felt most acutely in those member states made this narrative easier to construct and maintain. By contrast, the rapid spread of the virus throughout Europe made it significantly more challenging for the Union to construct a narrative that particular member states were the authors of their own misfortune. Attempts were made at the start of the pandemic by various actors to suggest that southern member states should have been more prepared to cope with the economic fallout of the pandemic, as evidenced by the comments of Lagarde, and the leaders of the Netherlands,

[78]H. Lokdam and M. Wilkinson, 'The European Economic Constitution in Crisis: A Conservative Transformation?', in Grégoire and Miny, *supra* n. 3, p. 484.

[79]Dermine, *supra* n. 70, p. 965-967.

[80]Panascì, *supra* n. 46, p. 41.

[81]*See* for example E. Kempf and K. Linos, 'Towards Shared European Finances: the Next Generation EU Template and its Afterlives', *Verfassungsblog*, 26 September 2024, https://verfassungsblog.de/shared-european-finances/, visited 30 November 2025.

[82]M. Matthijs and K. McNamara, '"The Euro Crisis" Theory Effect: Northern Saints, Southern Sinners, and the Demise of the Eurobond', 37(2) *Journal of European Integration* (2015) p. 229.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

Austria and Sweden. However, the unprecedented nature of the pandemic became self-evident. With no member states to problematise, this threatened to lay bare the inadequacies of the economic order codified within the EU's constitutional structure. This seemed to have quickly been appreciated by France and Germany: both Merkel and Macron warned that failing to show financial solidarity during the pandemic would only drive support for so-called 'populist' political movements.[83] In a speech to the Bundestag in June 2020, Merkel outlined that: 'We must not allow the pandemic to cause the economic prospects of the EU member states to drift apart ... antidemocratic forces and radical, authoritarian movements are more than ready to seize economic crises in order to misuse them politically'. Supporting economic development across the EU was a 'political instrument against populists and radicals'.[84] This was an implicit acknowledgment that the rules constitutionalised by the EU were not fit for purpose: that compliance with them during the pandemic would inevitably cause hardship to the public, and drive support for political movements critical of the EU. At the height of the open divisions within the European Council over the EU's pandemic response, then-Prime Minister of Portugal António Costa remarked that 'either the EU does what it needs to be done or it will end'.[85] With the advent of the Covid-19 pandemic, the EU did what it had to do to ensure its own survival. The Union could not have hoped to emerge from such a crisis unscathed: the public backlash had the Union failed to act, or impeded the efforts of member states, would have left, at the very least, a lingering and widespread anti-EU sentiment. Reflecting on the events of the 2008 financial crisis, Dos Santos had written that, 'One of the legitimate expectations generated by European integration [was] that Member States would protect themselves better from the global crisis better within it than they would be able to do isolated.'[86] Much the same applied to the events of the pandemic. Complying with the conventional understandings of the Treaties, or emulating the deviations of the Euro Crisis years, would have placed the EU's economic constitution under unprecedented scrutiny, and raised

[83]'Macron Warns of EU Unravelling Unless it Embraces Financial Solidarity', *The Financial Times*, 16 April 2020, https://www.ft.com/content/d19dc7a6-c33b-4931-9a7e-4a74674da29a, visited 30 November 2025.

[84]Policy statement by Federal Chancellor Angela Merkel on Germany's Presidency of the Council of the European Union and the European Council on 19 June 2020, German Bundestag 18 June 2020, https://www.bundesregierung.de/breg-en/news/policy-statement-by-federal-chancellor-angela-merkel-on-germany-s-presidency-of-the-council-of-the-european-union-and-the-european-council-on-19-june-2020-1764908, visited 30 November 2025.

[85]*See supra* n. 58.

[86]L. dos Santos, 'European Monetary Union: Political Motivation', in N. da Costa Cabral et al. (eds.), *The Euro and the Crisis: Perspectives the Eurozone as a Monetary and Budgetary Union* (Springer 2017) p. 120.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

questions around the normative and economic underpinnings of the Union. In the absence of a group of member states to problematise as it had done during the Euro Crisis, the Union was forced to demonstrate widespread financial solidarity with all member states to ensures its own survival. But, of course, in so doing, it underscored that its actions less than a decade beforehand were a choice, rather than an inevitability.

Deviations as means of preserving the macro-constitution

When the EU opts to depart from the conventional understandings of its constitutional framework, academic scholarship often turns to turn to the question of whether this constitutes a form of constitutional change or transformation.[87] An alternative account is that deviations from existing interpretations of the macro-constitutional order have been a consistent feature of that order since its adoption. As the comparison of these two crises has illustrated, the EU has a demonstrated capacity to break with, circumvent and re-invent its own constitutional rules. From this perspective, deviations from existing constitutional structures are not novel, nor are they necessarily indicative of a permanent constitutional transformation. As the Euro Crisis illustrated, deviations from existing understandings of the macro-constitution help to safeguard its longevity.

First, much like the Euro Crisis, it has been widely documented that the events of the pandemic created an opportunity for existing macro-governance mechanisms to be preserved and intensified.[88] Pre-pandemic, the rates of compliance with the country-specific recommendations issued by the European Commission as part of the budgetary oversight process were poor. The Recovery and Resistance Facility, introduced as part of Next Generation EU, created a new formula, as it concretely tied EU funding to compliance with defined structural reforms and milestones.[89] Linking disbursements from Next Generation EU to the European Semester ensured that member states could no longer afford to ignore their country-specific recommendations.[90] Recipient member states were

[87] *Supra* n. 29.

[88] C. Fasone and N. Lupo, 'Learning from the Euro Crisis: A New Method of Government for the European Union's Economic Policy Coordination after the Pandemic', 22(3) *ICON* (2024) p. 882; C. Fasone and M. Simoncini, 'Next Generation EU and Governance by Conditionality: A Transformation of the European Economic Constitution?', 9 *European Papers* (2024) p. 1148 at p. 1165.

[89] E. Eihmanis, 'Ten Years of the European Semester: From the Sovereign Debt Crisis to the COVID-19 Crisis', in Adamski et al., *supra* n. 37, p. 290, p. 298.

[90] I. Guardiancich et al., 'Stronger Conditionality for Stronger Compliance? Analysing the NGEU's Effect on the Implementation of European Semester Recommendations', *Journal of European Public Policy* (2025) p. 1.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

required to document their compliance with structural reforms recommended by the European Commission and the Council or the funds would be withheld. As Biebricher observed, this was a far more effective way of securing the structural reforms that were attempted during the previous crisis.[91] Financial conditionality remained present, even if the conditionality stipulated by Next Generation EU was not comparable to the highly punitive measures of the Euro Crisis years.[92] The new economic governance framework, which entered into effect in 2024, represents a substantial enhancement of the package of legislation that supplements the Economic and Monetary Union.[93] Oversight and management of debt continues to be central to the new framework, with additional incentives for member states to invest in areas such as defence. The new framework includes a reformed Stability and Growth Pact, tailored to the circumstances of each individual member state, although the original debt and deficit ratios and the excessive deficit procedure remain in place.[94] The new framework draws inspiration from the structure of the Recovery and Resistance Facility, requiring the submission of medium-term fiscal plans by individual member states to the Council and the Commission. Compliance with these plans is monitored through the European Semester, which allows significant input and oversight over the direction of member state spending, investments and reforms, even in areas where the EU has no formal competence.

Second, the EU's pandemic response not only helped to tackle the unfolding crisis, but deflected pressure for any deeper reforms to its macro-constitution.[95] For some, the creation of Next Generation EU indicated that the Treaties contained a degree of flexibility that had previously been underestimated. This hinted at the possibility that alternative forms of political economy could be accommodated within the existing Treaty framework. This lent weight to the argument that wholescale Treaty reform was unnecessary, and that the current

[91]T. Biebricher, 'Covid-19, War and the End of Neoliberalism', in Weber, *supra* n. 74, p. 105-106.

[92]Dermine, *supra* n. 53, p. 351. *See also* M. Dani et al., 'It's the Political Economy . . . ! A Moment of Truth for the Eurozone and the EU', 19 *ICON* (2021) p. 301.

[93]A review of the EU economic governance framework had been launched in February 2020, prior to the outbreak of the Covid-19 pandemic in Europe, but was paused and resumed in 2021.

[94]Regulation (EU) 2024/1263 replaced Regulation 1466/97, and Regulation 2024/1264 amended Regulation 1467/97. *See generally* 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 *European Law Review* (2023) p. 440; Markakis, *supra* n. 49; Fasone and Lupo, *supra* n. 88, p. 899-901.

[95]M. Dani et al., 'At the End of the Law', *Verfassungsblog*, 15 May 2020, https://verfassungsblog.de/at-the-end-of-the-law/, visited 30 November 2025; P. Lindseth and P. Leino-Sandberg, 'Democraticizing Draghi: Why the "Competitiveness Report" Demands Treaty Reform', *Verfassungsblog*, 12 September 2024, https://verfassungsblog.de/draghi-report-investment-eu-competition-treaty-reform/, visited 30 November 2025.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

framework could support an EU that was much closer to the long-elusive vision of social Europe. Yet the failure to embark on formal Treaty reform could also be viewed as an act of institutional self-preservation. By pursuing ambitious reinterpretations of the existing Treaties, rather than Treaty reform, the EU opted to preserve the core of the Maastricht settlement, enabling a return to the status quo.[96] As Dawson has pointed out, one of the arguments in favour of Treaty reform is that it could curb the tendency of the EU institutions 'to independently and dynamically interpret their powers'.[97] It is the EU that determines whether that constitutional framework will be rigidly upheld, or selectively reinterpreted, and crucially, what substantive form those deviations take. Those most affected by the choice between austerity and solidarity in times of crisis have no meaningful say in that decision.

Conclusion

This article offers an alternative account of how the EU's response to the Euro Crisis and the Covid-19 pandemic can be understood. While the macro-constitution embeds a comprehensive framework for economic governance, deviations from its terms have been evident since its inception. The events of the Euro Crisis and the Covid-19 pandemic represent the most prominent examples. Rather than isolated incidents, departing from the terms of the Treaties can be viewed as a pattern of behaviour designed to preserve the macro-constitutional order. New institutional architecture tackles the immediate impact of each crisis, but in a manner that maintains and expands the scope of macro-economic control. The EU's responses to both crises can be characterised as sharing a common aim: to preserve the foundations of the macro-constitution. These deviations serve a further benefit: they indicate a flexibility to the Treaty structure, which forestalls more profound reforms, such as democratising the Economic and Monetary Union, or de-constitutionalising macro-economic rules. Through reinterpretations of Treaty provisions, the EU manages not only to sustain the macro-constitutional order, but to entrench and expand it. While the turn towards solidarity is welcome, there is no guarantee that the EU's commitment to it will endure. In fact, the retreat from financial solidarity has already started.[98] One element has remained consistent, throughout both the Euro Crisis and the pandemic: the persistent absence of any meaningful popular input or democratic

[96]Dani, *supra* n. 75.

[97]Dawson, *supra* n. 32.

[98]D. Brown, 'Can Europe's Unity Survive As Its Sense of Crisis Grows?', *Financial Times*, 8 November 2024, https://www.ft.com/content/3fc627f7-6539-4061-a19a-1657056f3620, visited 30 November 2025.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press

structures. So long as the Union's adherence to – or deviations from – its macro-constitution depend solely on internal institutional discretion, such dramatic changes are liable to vanish as quickly as they appeared.

Acknowledgements. I am grateful to Professor Claire Kilpatrick, Finn Keyes BL, Dr Maria Kotsoni and Professor Mike Wilkinson, who read and offered very helpful comments on this article. Earlier drafts of this paper benefited from discussions at the Law and Political Economy workshop at the University of Glasgow, and to the EU Law Discussion Group at University College Dublin. Thanks to Jie Ouyang and Professor Gavin Barrett for their thoughtful engagement with the paper as discussants, and to the participants of those events for their questions and comments. I am grateful to Bastian Michel and the editorial team of the *European Constitutional Law Review*, as well as the two anonymous reviewers, for their constructive and insightful feedback.

Hilary Hogan is Assistant Professor in Law at the School of Law and Criminology, Maynooth University, Ireland.

https://doi.org/10.1017/S1574019625100898 Published online by Cambridge University Press