The financial crisis dominates the academic discourse. This is not only true for economists, but also for political scientists, historians, psychologists, sociologists, and, of course, for lawyers. The global financial crisis which began in 2007 and has been constantly morphing into various shapes was – and is still – one of those epochal events that we see ‘once in a generation’. Apart from its devastating economic consequences, the crisis has forced us to rethink some of the fundamental assumptions about our society and our market economy.

Lawyers from practice and academia are equally faced with enormous challenges. The financial system has to be rebuilt and strengthened, the economic survival of our countries has to be secured, and the fulfilment of the European project has to be ensured. Multiple interests have to be taken into account – the citizens who fear that they may be punished for the mistakes of others; the governments and the international community, who have to overcome reticence towards closer co-operation and protectionism; the banks, who are blamed for some of the excesses of the crisis. Lawyers from all fields are working on improving and overhauling our organisational framework to adapt to these challenges.

One of the problems that lawyers are facing – and probably not only them – is that we are all somewhat limited within our particular fields of specialisation. Law is traditionally a primarily national affair; our man-made discipline ends at the national border. Lawyers from the United States respond differently to the problem of a bail-out programme than a German or British lawyer would. Also, different disciplines within the law often prevent scholars from gaining an overall perspective. Lawyers are specialised in constitutional law, administrative law, financial regulation, European Union law, taxation law, and many more. Each of these sub-disciplines considers the current challenges from within its own discourse and by using its own familiar tools, techniques and language. Yet these artificial limitations obscure the view to understanding the financial crisis as a holistic affair which requires all our joint efforts in coordinated attention.
The present volume addresses this gap in bridge-building to a certain extent by bringing together scholars and practitioners from different disciplines of the law and from different countries. The contributions are the fruit of a conference held in Oxford in March 2012 and organised primarily by the Faculty of Law of the University of Oxford and the Ludwig-Maximilians-Universität München. In this way, participants are drawn from the two countries represented by these universities. But, more than that, the conference, and this volume, is a joint venture between different legal disciplines: predominantly constitutional law, financial markets regulation and European law. During the course of this project, we have sometimes been told that the second aspect is an even more remarkable achievement than the first one. In fact, we find ourselves now at the beginning of a new tendency to converge. One of the emerging issues from the crisis is the apparent eclipse of boundaries between different legal disciplines: financial and corporate lawyers have to learn how public law instruments can complement their traditional governance tools; conversely, public lawyers must understand the specificities of financial markets they intend to regulate.

II. Legal Issues Arising from the Financial Crisis

The financial crisis had many faces. It exposed supervision shortcomings of the financial sector in many countries, including EU Member States. Even more worryingly for the EU’s financial services market, cross-border supervision was shown to be weak. Bail-outs for banks and countries had to be arranged and executed, and bank resolution regimes were devised.

By applying principles of State aid law, the European Commission was able to steer the different rescue measures to some extent. While ultimately approving State aid payments to financial institutions, the Commission has often required banks or insurers which received a large amount of aid to agree to a significant restructuring plan.

The more recent events known as the sovereign debt crisis have caused concerns about the solidity of various peripheral EU Member States, threatening the stability of the Euro. We can also observe a shift of power back to nation states, which are ultimately in charge of coordinating rescue measures for weak states. Closer integration is envisaged for the Eurozone countries alone, which might potentially open up new conflicts between these Member States and those which are not part of the Eurozone. Legal problems have included the creation of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM). National parliaments feel side-lined in the decision-making process, deploring the loss of their budgetary rights.

The present volume features six main contributions, touching on three legal fields relevant for the crisis. Each of the six essays is accompanied by a response text from a discussant. The constitutional law dimension is represented by the follow-
Introduction

Peter M Huber discusses the constitutional dimension of bail-out decisions (chapter two), emphasising the role of democracy and the rule of law in responding to the financial crisis. The German Constitutional Court has repeatedly defined the limits to bail-out measures and other crisis reactions on the European Union, measured against the German *Grundgesetz*, and in particular against its understanding of democracy.¹ These reflections prompt Pavlos Eleftheriadis to ask whether an entity like the EU – and the Eurozone within it – can indeed become democratic (chapter three). He distinguishes between two approaches to democracy, first as collective self-government or, second, as a set of egalitarian institutions, and argues that the German Constitutional Court supports the first theory and for that reason is very cautious about the idea of bringing democracy to the EU. Gregor Kirchhof then explores one of the potential solutions to overcoming the sovereign debt crisis, the so-called debt brake (chapter four). The debt brake is an instrument establishing legal rules to limit public borrowing: politicians are essentially trying to control themselves by subjecting themselves to legal scrutiny. John McEldowney in his chapter offers a British perspective on this predominantly German-led project, and introduces us to a distinctly different understanding of budgetary control (chapter five).

Part II then moves on to the European stage. Paul Yowell puts the spotlight on the European Central Bank (ECB), the institution pivotal to dealing with the sovereign debt crisis (chapter six). His argument is that the ECB is mired in a dilemma: its legal mandate does not allow for the bold role it takes on or which some politicians and economists say it should take on. Yowell concludes that legal certainty and predictability as well as the rule of law are intrinsic values in themselves and should take precedence over arbitrary arguments of functionality. This claim is further developed by Christoph Ohler in his assessment that Europe is caught in a governance crisis which exhibits signs of both an economic and a constitutional crisis (chapter seven). The European Treaty framework is certainly not very flexible in allowing for fast and efficient solutions to respond to the problems brought about by the financial crisis. Conor Quigley then explores to what extent European State aid rules have performed during the crisis (chapter eight). The EU State aid system, unique to the specific EU setting, was seen as a key disadvantage of the European landscape in comparison to international competitors like the United States where the state is unfettered in its decisions to support the private sector as it likes. Some commentators, however, consider the State aid rules as the only real instrument the European Commission possessed during the crisis – admitting that the rules were not cut out for a crisis of this dimension. Thomas Ackermann observes two developments: first, he believes that the weakening or bending of State aid rules will only be of a temporary nature. By contrast, he sees the position of the European Commission structurally strengthened beyond the current crisis (chapter nine).

¹ See the decision by the German Constitutional Court of 12 September 2012, available in English at http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html.
Financial markets were seen by many as the original creator of all evil. Alexander Hellgardt explores the different techniques that lawmakers have in sanctioning misbehaviour in financial markets, drawing inter alia from classic liability standards, taxation law, and even criminal sanctions (chapter ten). His trans-disciplinary account is a helpful classification of the menu of choices that regulators have, and the comparative overall costs and benefits of individual choices are not always taken into account. In his response, John Vella picks and elaborates on one of them – taxation (chapter eleven). Before the crisis, taxation law had never been really seen as a tool of financial regulation. Now that its corrective potential has been better understood in financial markets, the corrective role risks being exploited, or even misused, to ‘sell’ the introduction of a populist tax to the voter. Finally, Gustaf Sjöberg complements the picture by studying ‘resolution’ of banks as a novel tool to deal with the situation of failing banks (chapter twelve). Whereas traditional insolvency law will work perfectly well in the situation of smaller, local banks, it has proved unsuitable for dealing with global, systemically important financial institutions (G-SIFIs). Sjöberg’s hope is that the introduction of a credible resolution mechanism will have anticipatory effects on the governance of solvent banks. Christos Hadjiemmanuil is more sceptical in his assessment of these regulatory tools, arguing that there will always be the risk of political forbearance or, in effect, de facto pressure to bail out (rather than wind down) an essential bank (chapter thirteen).

III. Law Versus Politics, or the Limits of Regulation

All contributions exhibit a golden thread. One of the key questions is to what extent legal rules are at all suitable for dealing with these enormous economic and sovereign problems of such extent. Put differently, the financial crisis has dramatically demonstrated the limits of legal rules. Countries are bailed out despite strong constitutional concerns. The ECB is forced to bow to economic pressure despite observing its strict legal mandate. Sovereign countries contractually promise to limit their own possibility to raise debt and subject themselves to external court control to that end, although we expect that this will be a political test rather than the strict legal standard. And finally, bank resolution attempts above all to introduce a ‘credible’ legal framework for dealing with large banks, knowing that many legal rules only exist in the books and fail to be applied in practice. The final two chapters of the volume draw these issues together in exploring, more generally, the limits of legal regulation. Rudolf Streinz (chapter fourteen) and Franz-Christoph Zeitler (chapter fifteen) demonstrate that sometimes, employing the law can be a futile attempt to resolve what are, in fact, political problems. The best historical example is the Maastricht Treaty and its convergence criteria for the common currency: as soon as they were violated by
certain Member States, the text of the legal treaty was not worth the paper it was written on. If this happens repeatedly, the credibility of our entire legal system will be affected.

Drawing these issues together, we see an extensive array of legal problems that the financial crisis has created. Lawyers in all different fields are working on improving the current framework, to make it better, safer and more coherent. The good news is that lawyers from different jurisdictions and different disciplines are co-operating and are willing to learn from each other. And not just lawyers: interdisciplinary research and study has received a significant boost in recent years. However, all our attempts to regulate must be seen in context and it is clear that law cannot replace the political determination to solve these problems in a sustainable way.