

Introduction

*The Constitutionalization of European
Budgetary Constraints: Effectiveness and
Legitimacy in Comparative Perspective*

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I

THE TREATY ON the Stability, Coordination and Governance of the Economic and Monetary Union, generally referred to as the Fiscal Compact, has introduced a ‘golden rule’, which is a detailed obligation that government budgets be balanced. Moreover, the Fiscal Compact requires the 25 members of the European Union (EU) that signed the Treaty in March 2012, to incorporate this ‘golden rule’ within their national constitutions.¹ This requirement represents a major and unprecedented development, which raises formidable challenges on the nature and legitimacy of national constitutions as well as on the future of the European integration project. The purpose of this book is to analyse the new constitutional architecture of the European Economic and Monetary Union (EMU), to examine in a comparative perspective the constitutionalization of budgetary rules in the legal systems of the member states, and to discuss the implications of these constitutional changes on the future of democracy and integration in the EU. Three threads run throughout the volume. First, the book explores the effectiveness of the new fiscal rules introduced at the supranational level and domesticated in the constitutional systems of the member states, addressing the question whether they are able to ensure sustainable budgetary policies in the EMU. Secondly, it evaluates the legitimacy of the constitutionalization of budgetary constraints, addressing a number of questions about the nature of public authority at the EU and national level, constitutional checks and balances, and the mechanisms to ensure accountability of decisions

¹ See further F Fabbrini, ‘The Fiscal Compact, the “Golden Rule” and the Paradox of European Federalism’ (2013) 36 *Boston College International & Comparative Law Review* 1.

in the field of EMU. Thirdly, the book enlarges our perspective on the challenges of effectiveness and legitimacy of fiscal governance in the EMU by embracing a comparative viewpoint, open to the insights that can be learned from the experience of other fiscal unions.

II

A first theme of this book concerns the effectiveness of the new EMU rules, meaning their capacity legally to shape and constrain action by policymakers in fiscal affairs at the national level. The original design of the EMU broke new ground by attempting to combine centralized monetary policy with a loose co-ordination of economic and fiscal policy.² In federal states such as the United States (US), Canada or Australia, monetary union is accompanied by strong central fiscal powers and economic policy steering, offset with solidarity mechanisms. Instead, beyond policy co-ordination and the weak obligation to respect specific deficit and debt rules enshrined in the Stability and Growth Pact (SGP),³ the EMU relied heavily on the pressure of international markets in order to incentivize underperforming member states.⁴ In the original design of the EMU, fear of unsustainable bond spreads should have lead national governments to reform their policies to converge with the better-performing member states, and so ensure the stability of the euro. The no-bailout clause now at Article 125 of the Treaty on the Functioning of the European Union (TFEU) epitomized this design.⁵ To some extent, the original setup of the EMU placed too much faith in markets or, more precisely put, in the benevolence of markets and the readiness of market actors to accept the no-bailout clause at face value. Certainly, the influx of capital into the weaker eurozone members throughout the 2000s shows that many market actors believed that no eurozone member would be allowed to fail. Many speculators bet—successfully as it turned out—that the no-bailout clause would not ultimately stand.

Since the outburst of the euro crisis, EU institutions and member states have attempted to reform the architecture of EMU and improve its effectiveness. However, the policy response adopted during the last four years has suffered

² See already D MacDougall, 'The Role of Public Finance in European Integration', report commissioned by the Commission of the European Communities (1977) (discussing prospects for economic and monetary integration in Europe in comparative perspective).

³ On the weaknesses of the SGP, see eg Case C-27/04, *Commission v Council of the EU* [2004] ECR I-6649 (conferring wide discretion on the Council whether to impose sanctions under the SGP or to hold in abeyance the excessive deficit procedure against two member states recommended by the Commission).

⁴ See J Rodden, *Hamilton's Paradox: The Promise and Perils of Fiscal Federalism* (Cambridge, Cambridge University Press, 2005) (discussing the enforcement of fiscal rules in economic and monetary unions and distinguishing between a decentralized, market-based enforcement of fiscal rules, and a centralized, rule-based enforcement).

⁵ See M Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 *Common Market Law Review* 1777.

from ambivalence, torn between a need to rely on market discipline (including sanctions for failure, in order to avoid moral hazard) for lack of stronger fiscal and economic policy tools, and knowledge that the consequences of such discipline might tear the eurozone apart. The Fiscal Compact and the Treaty on the European Stability Mechanism (ESM) vividly illustrate this ambivalence. On the one hand, the Fiscal Compact—together with the ‘six-pack’ and ‘two-pack’ legislative packages—marks a strengthening of the economic policy co-ordination approach, whilst avoiding the transfer of fiscal capacity to the EU level.⁶ Both the substantive standards and the co-ordination procedure have been strengthened, with the European Semester.⁷ At the same time, the sanction mechanisms now provided—fines and compulsory deposits—appear ill-suited to the situation of member states that would find themselves unable to bring their deficit and debt under control. On the other hand, the ESM Treaty—despite all efforts by the European Court of Justice (ECJ) in *Pringle*⁸ to show the opposite—does create a solidarity mechanism, which may aim to safeguard the eurozone but does so by shoring up eurozone members in difficulty.⁹ Of course, support under the ESM Treaty is linked with compliance with fiscal and economic policy co-ordination measures (conditionality), but here as well the question arises whether the sanctions for non-compliance (discontinuance of support) are really appropriate in such a situation.

Considering the above, the Fiscal Compact and ESM Treaty might be no more than a step in the evolution of economic and fiscal policy in Europe.¹⁰ In the end, the level of policy co-ordination required for the euro to be successful cannot be achieved only through the threat of fines or compulsory deposits; rather, every eurozone member should comply out of a political commitment to shared objectives. That political commitment was undermined during the euro crisis: policy reform became a way for beneficiaries to atone to what was often perceived as a diktat from the contributors. Austerity and fiscal orthodoxy took center stage, at the expense of the longer-term objectives. When seen in a broader context, all member states share an interest in improving the competitiveness of EU economies as a way to retain economic significance in the world. The next step, beyond the Fiscal Compact and ESM Treaty, is to restore that shared political commitment; as things now stand, this could involve either more centralized policymaking, or even an EU-level fiscal and economic policy competence that matches that of its monetary policy.

⁶ See also M Maduro, ‘A New Governance for the European Union and the Euro: Democracy and Justice’, report commissioned by the European Parliament Constitutional Affairs Committee, PE 462.484 (2012).

⁷ On the European Semester see K Armstrong, ‘The New Governance of EU Fiscal Discipline’ (2013) 38 *European Law Review* 601.

⁸ Case C-370/12 *Pringle v Government of Ireland*, judgment of 27 November 2012, nyr.

⁹ See H Hofmeister, ‘To Bail Out or Not to Bail Out? Legal Aspects of the Greek Crisis’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 113.

¹⁰ See President of the European Council, ‘Towards a Genuine EMU’, report issued 25 June 2012, SN 25/12 and Commission Communication, ‘A Blueprint for a Deep and Genuine EMU: Launching a European Debate’, 28 November 2012, COM(2012) 777 final.

One of the lessons from the crisis is indeed that, for all the attention dedicated to EU institutions and governance in the 2000s, politically as well as academically, those institutions were apparently not up to the challenge of the first serious post-Lisbon test. Through its constant and seemingly haphazard involvement, the European Council might have inflated the sense of crisis as much as it signalled a high-level political resolve to address that crisis.¹¹ For lack of any other credible institution, the European Central Bank (ECB) was drawn out of its mandate and its isolation from politics, which could prove harmful in the longer run.¹² In the end, one could even argue that the lack of a trustworthy and trusted institutional framework, by which member states could commit to shared economic and fiscal policy goals, drove member states to push forward austerity measures as a precondition for financial support. In so doing, member states pre-empted the—avowedly more Keynesian—option of first increasing public spending to overcome the crisis, and only thereafter bringing public finances on a sustainable path.

III

Beyond the question of efficiency, but closely connected to it, lies a second central theme of this book: the legitimacy of the constitutionalization of European budgetary constraints. Of course, as a multifaceted term, legitimacy is notoriously difficult to utilize. It can, *inter alia*, be explored from a legal, political, sociological or moral point of view.¹³ Moreover, as the French political theorist Pierre Rosanvallon recently said, legitimacy, like trust, is an invisible institution. Nonetheless, it might signal a firm foundation for the relation between the government and those who are governed.¹⁴ Rosanvallon adds that if legitimacy, in its most generic sense, means the absence of coercion, then *democratic* legitimacy must mean something more than that, i.e. a fabric of relationships between government and society. And this fabric works to the benefit of the European project if, in this case, the ‘European citizens’ believe in such project. In other words, if they have confidence in it, regardless of whether they agree with each of the decisions and actions taken by the European Council, the Commission, the Council of Ministers, the European Parliament, or their national government.

The debate about legitimacy in the EU has often centred on the distinction

¹¹ On the institutional role of the European Council in the management of the euro crisis, see F Eggermont, *The Changing Role of the European Council in the Institutional Framework of the European Union* (Antwerpen, Intersentia, 2012).

¹² See also S Collignon, ‘The Various Roles of the ECB in the New EMU Architecture’, report commissioned by the European Parliament Economic Affairs Committee, PE 507.482 (2013).

¹³ See RH Fallon Jr, ‘Legitimacy and the Constitution’ (2005) 118 *Harvard Law Review* 1787 and N Huls, ‘From Legitimacy to Leadership’ in N Huls, M Adams and J Bomhoff (eds), *The Legitimacy of Highest Courts’ Rulings: Judicial Deliberations and Beyond* (The Hague, TMC Asser Press, 2009) 13–18.

¹⁴ P Rosanvallon, *Democratic Legitimacy. Impartiality, Reflexivity, Proximity* (Princeton, Princeton University Press, 2011) 8–9.

between output legitimacy—namely the capacity of the EU to justify itself to the citizens through the attainment of public policy objectives—and input legitimacy—namely the subjection of the EU to the dynamics of democratic representation presupposing mechanisms or procedures that link political decisions with citizens’ preferences. Traditionally, in the EU the main source of legitimacy was output, referring (generically) to the willingness of citizens to support the decisions made by the European institutions or their national governments concerning the EU for the benefits they produce to them.¹⁵ It should be clear that this definition of legitimacy has clear, though not exclusive, sociological overtones.¹⁶ In this sense legitimacy and effectiveness are closely connected: because not only do the political actors and institutions have to be worthy of confidence, they also need the ability to actually live up to the aforementioned confidence. ‘The efficacy of public action depends on legitimacy, and the sense of legitimacy affects the way in which citizens judge the quality of their country’s democracy’, Rosanvallón states.¹⁷ Nevertheless, the euro crisis has severely challenged the ability of the EU to attain public policy objectives, undermining one of the main sources of justification of the European integration project. For this reason, calls are increasingly made to strengthen the input side of EU legitimacy, through an enhanced framework of democracy and accountability at the level at which decisions are taken.¹⁸

In any case, no democracy can survive a prolonged weakening of any of these input or output elements, which are mutually reinforcing. The European project depends first and foremost on its continuing acceptability to the real human beings whose lives it affects.¹⁹ This observation leaves open many pressing questions, among them empirical ones with which this volume does not deal (eg how minimal does the level of acceptance have to be for a political entity such as the EU to be able to command authority and acceptance to its population over time?). Certainly, the EU has to deal with a very particular set of problems; and there exists no objective set of rules for matching a people and its specific situation with a set of institutions, or no inherently stable or objectively superior constitutional system.²⁰ That makes it all the more telling that almost all of the contributors to this volume identify significant challenges regarding the legitimacy of the EU as a result of the constitutionalization of budgetary constraints—challenges which were already looming large even before the ‘golden rule’ was introduced.

¹⁵ See also JHH Weiler, ‘The Political and Legal Culture of European Integration: An Exploratory Essay’, (2011) 9 *International Journal of Constitutional Law* 678 (discussing output and input legitimacy, together with political messianism, as a source of justification for the EU integration project).

¹⁶ The two may be positively correlated, with output legitimacy resulting from input legitimacy. See M Adams et al, ‘Introduction: Judging Europe’s Judges’ in M Adams et al (eds), *Judging Europe’s Judges. The Legitimacy of the Case Law of the European Court of Justice* (Oxford, Hart Publishing, 2013) 4–5 (with further references).

¹⁷ Rosanvallón (n 14) 9.

¹⁸ See I Pernice et al, *A Democratic Solution to the Crisis: Reform Steps Towards a Democratically Based Economic and Financial Constitution for Europe* (Baden-Baden, Nomos, 2012).

¹⁹ See R Kay, ‘Constituent Authority’ (2011) 59 *American Journal of Comparative Law* 756.

²⁰ DS Lutz, *Principles of Constitutional Design* (Cambridge, Cambridge University Press, 2006) ix.

If the euro crisis and the constitutionalization of budgetary rules bring the need for input legitimacy centre-stage, the question arises of how to meet this challenge. Most of the contributors to this book address the issue from the perspective of representative democracy, articulating alternative visions whether this should be grounded in the democratic processes of member states, or rather enhanced at the European level. A perspective that is less developed in the contributions of this book, but has increasingly attracted attention in the scholarly debate, is that of participatory democracy. In his recent history of democracy, John Keane signals the emergence of a new type of democracy that complements representative democracy, and which he calls 'monitory democracy'. This type of democracy is a species of participatory democracy, as it looks at the involvement of citizens with public affairs.

What is distinctive about this new type of democracy is the way all fields of social and political life come to be scrutinized, not just by the standard machinery of representative democracy but by a whole host of non-party, extra-parliamentary and often unelected bodies, operating within, underneath and beyond the boundaries of the territorial states. ... These watchdog and guide-dog and barking-dog inventions are changing both the political geography and the political dynamics of many democracies, which no longer bear much resemblance to textbook models of representative democracy, which supposed that citizens' needs are best championed through electoral parliamentary representatives chosen by political parties.²¹

More research is needed to see to what extent this also is a viable democratic option in the next phase of the development of the European legal and political space. It might well be in line with the Treaty on the European Union (TEU), which in Article 10 now states that 'the functioning of the Union shall be founded on representative democracy', based on direct and indirect public participation; a model that at the same time is extended in Article 11 TEU, where elements of participatory democracy are strongly stressed.

IV

To address these central questions, the book embraces a comparative perspective. The third distinctive *Leitmotiv* of this book, in fact, is the systematic use of the comparative method to enquire as to the effectiveness and legitimacy of the constitutionalization of European budgetary constraints. As a substantive literature has emphasized, the comparative approach presents manifold advantages.²² At its core, the comparative method constitutes a privileged instrument

²¹ J Keane, *The Life and Death of Democracy* (London, Simon and Schuster, 2009) 695.

²² For a useful overview, see G Dannemann, 'Comparative Law: Study of Similarities or Differences?' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford, Oxford University Press, 2006) 383 and M Tushnet, 'Some Reflections on Method in Comparative Constitutional Law' in S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge, Cambridge University Press, 2006) 67.

to understand legal phenomena, explain juridical process, and underline similarities and differences between legal regimes. In the absence of a laboratory to test their theses, moreover, lawyers can resort to the comparative method to identify the expected outcomes of various choices of constitutional design and hypothesize inferences between the existence of specific rules and the effects that they have on the social fabric.²³ Last but not least, comparative law might also offer a benchmark to evaluate from a normative perspective the arrangements introduced in a legal system,²⁴ as well as a rich source of inspiration to advance proposals for legal reform.²⁵

In this book, the comparative method is exploited in two forms. On the one hand, the book engages in a widespread examination of how balanced budget rules are incorporated in the constitutional systems of the EU member states. In this way, the book surveys treaty ratifications, court decisions and constitutional revisions in a plurality of member states, including Belgium, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, the Netherlands, Poland, Portugal, Slovakia and Spain. This allows an in-depth appreciation of the challenges that the introduction of budgetary constraints at the supranational level triggers for the EU member states. As a number of chapters make clear, the capacity of the EU member states to adapt their domestic regimes to the requirement of the Fiscal Compact depends on pre-existing constitutional features, such as the existence of judicial review of legislation, the flexibility with which a constitution can be amended and the status of international law within the domestic hierarchy of norms. All in all, therefore, a comparative perspective provides a complete picture of the variations among the member states and raises some cautionary tales on the viability of exporting one constitutional solution (such as the balanced budget rule of the German Basic Law, and later of the Fiscal Compact)²⁶ in member states with different constitutional arrangements.²⁷

On the other hand, the book resorts to comparative law to put the case of the EU in a global context. While the constitutionalization of budgetary rules in the member states and in the EU is a recent phenomenon, other constitutional regimes have been dealing with these issues for longer time. In particular, as a number of contributions emphasize, the case of the US can provide some key insights to appraise the effects of the introduction of fiscal rules and to discuss

²³ See M Cappelletti et al, 'General Introduction', in M Cappelletti et al (eds), *Integration Through Law: Europe and the American Federal Experience*, vol 1, book 1 (Berlin, de Gruyter, 1986) 3, 5.

²⁴ See R Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford, Oxford University Press, 2009), 59.

²⁵ For a view of how the comparative legal method needs to be enhanced with greater regard for policy matters in order to deliver useful normative results, see P Larouche, 'Legal Emulation between Regulatory Competition and Comparative Law' in P Larouche and P Cserne (eds), *National Legal Systems and Globalization: New Role, Continuing Relevance* (The Hague, TMC Asser Press, 2012) 247.

²⁶ See Editorial, 'The Fiscal Compact and the European Constitutions: "European Speaking German"' (2012) 8 *European Constitutional Law Review* 1.

²⁷ On the challenges of exporting constitutional solutions from one system to another, see V Perju, 'Constitutional Transplants, Borrowing and Migration', in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 1304.

the legitimacy questions that they raise.²⁸ Beginning in the 1840s, the states of the US started enshrining balanced budget rules in their constitutions, and, although the federal government never required the states to adopt such rules, by now almost all US states are endowed with a form of debt or deficit break. The experience of the constitutionalization of budgetary constraints in the US certainly presents many historical and political differences with the dynamics currently at play in the EU. However, it can serve as a mirror to appreciate how the Fiscal Compact affects the vertical balance of powers in the EU.²⁹ And it offers several warnings about the effective capacity of fiscal rules to constrain the action of the political branches in the budgetary domain. By enlarging our perspectives, therefore, a comparison with the US constitutional system sheds light on the challenges that the constitutionalization of budgetary rules poses in the EU and encourages a debate about the possible way forward toward a deeper and more genuine EMU.

V

The book is opened by the speech that Miguel Poiares Maduro delivered at Tilburg Law School on 31 May 2013. In his contribution Maduro overviews the two main narratives on the euro crisis—one based on the irresponsible fiscal policies of several member states, the other premised on the failure of the markets and uncontrolled capital flows—and maintains that at its heart the crisis represents a failure to internalize the democratic consequences of interdependence in the EMU. To address this situation, Maduro advances a proposal to take more seriously the economic part of EMU. To this end, he pleads in favour of an increased EU or eurozone budget, supported by real revenue sources, new EU policies and a more effective political authority supported by a European political space. As Maduro emphasizes, fiscal discipline and the constitutionalization of budgetary constraints is necessary, but it is not sufficient. Further steps are therefore needed to re-establish mutual trust between states and citizens, to render visible the benefits of economic interdependence and to link the solidarity of the EU to the wealth that it generates. As such, in a broad brush, Maduro's contribution touches upon all the themes that are addressed in the three parts of this book.

The first part of the book sets the context, introducing the new constitutional architecture of EMU and outlining the major innovations brought about by the Fiscal Compact from the perspective of EU law and economics. In his

²⁸ See R Henning and M Kessler, 'Fiscal Federalism: US History for Architects of Europe's Fiscal Union', (2012) *Bruegel Essay and Lecture Series* 6 and J Rodden, 'Market Discipline and US Federalism', in P Conti-Brown and D Skeel (eds), *When States Go Broke: The Origins, Context and Solutions for the American States in Fiscal Crisis* (Cambridge, Cambridge University Press, 2012) 123.

²⁹ On the role of comparative law as a mirror to understand better our own legal system, see also V Jackson, 'Narrative of Federalism: Of Continuities and Comparative Constitutional Experience' (2001) 51 *Duke Law Journal* 223, 258.

contribution Paul Craig aptly uses the metaphor of the triptych to structure his account of the substantive dimension of the constitutional architecture arising from the measures taken in the wake of the euro crisis. On one side, one finds various measures aimed at providing assistance to those member states that suffered severe economic problems. The ESM Treaty created a permanent institution to take over from the European Financial Stability Facility and the prior European Financial Stabilisation Mechanism. These mechanisms were complemented with actions from the ECB, including Outright Monetary Transactions (OMTs). On the other side, oversight and supervision were strengthened, both as regards financial institutions (Banking Union)³⁰ and national fiscal and economic policies ('six-pack', 'two-pack'), leading to the Fiscal Compact. The two sides are already linked now, and will be so even more if the proposals set out in the Report by the President of the European Council are implemented. At the same time—as Craig points out— from a formal perspective, a divide runs through all three panels of the triptych, between EU and non-EU measures. Some measures, such as the OMTs, find themselves in an improbable grey zone between EU and non-EU measures. Craig then discusses three major constitutional implications of these measures. First of all, the decision in *Pringle* may overextend the scope of the precedents referred to therein, resulting in a situation where EU institutions face little procedural or substantive constraints to stepping outside of the EU framework. Secondly, these measures mark a paradigm shift from legislation to contract, which may seem to enhance flexibility but may mask a loss of legitimacy and accountability. Thirdly, the measures increase the complexity and opacity of the legal and regulatory framework. Craig finally provides an assessment of the economic and political implications of these measures. On the economic side, he underlines the difficulty in finding the balance between assistance and moral hazard considerations. In political terms, he remarks how the euro crisis has severely shaken the faith and trust of citizens in the EU. Despite perceptions that the crisis strengthened the powers of a few member states, in the end the Commission might be the main political beneficiary of the measures. Beyond that, the measures taken to respond to the crisis will have lasting effects on EU unity and national politics.

Angelos Dimopoulos focuses on the difficult questions raised by the use of extra-EU avenues in dealing with the euro crisis. Both the ESM Treaty and the Fiscal Compact are international treaties concluded between EU member states outside of the EU framework, yet both are intimately linked with the EU. They borrow the EU institutions and they relate to the EU measures taken in the wake of the euro crisis, such as the 'six-pack' and 'two-pack' legislative packages. In the case of the ESM Treaty, *Pringle* makes painfully clear that the relationship with the EU is difficult to square within the framework of EU law. Neither the

³⁰ The pieces of the new EU Banking Union are slowly coming together with the creation of the Single Supervisory Mechanism—see Council Regulation (EU) No 1024/2013 of 15 October 2013—and now with a first agreement on the Single Resolution Mechanism—see Council of the EU, press release of 18 December 2013, Doc No 17983/13.

ESM nor the Fiscal Compact may affect the existence or exercise of EU competences, and to the extent that they help in achieving the goals of the EU, they are welcomed by EU law. On that latter point, one may however question whether the two treaties truly improve EU governance or rather undermine it, especially as regards legitimacy and accountability. The EU institutional balance is also affected, with new decision-making and law-making rules and procedures tilting the balance between member states, sidelining the European Parliament, and stripping the Commission of some of its traditional powers (initiative, enforcement before the ECJ). Dimopoulos considers that both treaties could legally have been elaborated under the EU framework, which might have been a more sustainable solution in the long run.

Kenneth Armstrong relates the measures addressing the euro crisis to the academic discussion on EU governance. These measures cannot be seen simply as a turn to rules-based governance. Even that claim must be qualified in the light of variations in the rules-based aspects of the response to the euro crisis. The 'six-pack' and 'two-pack' legislative packages did not follow traditional law-making models, and they feature a large amount of policy co-ordination. The two extra-EU treaties, the ESM Treaty and Fiscal Compact, evidence the limits of EU legislative capabilities in the light of its political and economic ambitions. Behind the rules, one also sees the emergence of 'infranational' governance, with the Commission and Council taking the central role in the European Semester where member state fiscal and economic policies are reviewed and co-ordinated. According to Armstrong, the response to the euro crisis also borrows from other forms of governance, namely governance by co-ordination (the European Semester), by markets and by contract (conditionality under the ESM Treaty). These governance forms coexist in a hybrid governance structure. Questions of governance also are at the core of Alexandre de Streel's contribution. De Streel considers the effectiveness of the 'six-pack', the 'two-pack' and the Fiscal Compact. These reforms addressed a number of weaknesses in the original design of the eurozone, such as the arbitrariness of the deficit and debt targets, the poor quality of budgetary data, the lack of 'ownership' on the part of the member states, the inadequacy of sanctions and of the decision-making leading to sanctions. Yet, according to De Streel additional reforms are likely to be needed, to resolve pressing issues of legitimacy and incentives (moral hazard).

Closing off the first part of this book, the contributions by Marijn van der Sluis and Stefania Baroncelli discuss the role of the ECB. Van der Sluis revisits the comparison between the ECB and the German Bundesbank, trying to go beyond legal analysis to look at the political and economic context. Whilst independent, the Bundesbank built up political capital and credibility over the first decades of its existence, which it did not refrain from using—with great care and prudence—to keep German economic policy on the 'right' path. In contrast, the ECB was conceived as an independent institution, operating at a distance from politics, and with a narrow mandate (price stability as the prime objective). The ECB had in any event no partner on the political scene at European level. The

euro crisis changed the position of the ECB by bringing it closer to the political actors. Contrary to van der Sluis, Baroncelli sees a more direct lineage between the Bundesbank and the ECB, both being independent central banks in the monetarist-neoclassical mold, as opposed to accountable banks along a more Keynesian perspective. Yet, in its case law, the ECJ explicitly limited the ambit of that independence only to the conduct of monetary policy (eg allowing the ECB to be subject to the controls of OLAF, the European Anti-Fraud Office). In addressing the euro crisis, member states chose to work outside the EU, with the string of measures culminating in the ESM Treaty. Nevertheless, it could be argued that the actions of the ECB, eg through OMTs, were more influential in taming restless world markets. Yet, through these actions, the ECB moved closer to a political role and expanded upon its narrow mandate. These actions have now been challenged before the German Constitutional Court. Furthermore, the ECB's mandate is being further enlarged with the Banking Union, which entrusts banking supervision to the ECB.

The second part of the book focuses on the constitutionalization of European budgetary constraints in comparative perspective. It begins with a contribution by Pieter-Augustijn Van Malleghem, who draws a broad picture of balanced budget rules in the EU in comparison with the US. Van Malleghem examines the historical emergence of a various types of budgetary constraints in the constitution of the US states and contrasts this with introduction of a 'golden rule' in the constitutions of the EU member states as a result of the top-down obligation of the Fiscal Compact. By drawing cautionary tales from the centennial experience of the US states with balanced budget constraints, Van Malleghem warns about the effectiveness of these constitutional rules in preventing excessive government deficits and debts. He underlines how courts have traditionally shied away from vigorously enforcing compliance with these rules. Moreover, developing insights from the literature on fiscal federalism, he explains that in the US the existence of balanced budget rules at the state level is counterbalanced (at least since the New Deal) by a strong role of the federal government in managing countercyclical economic policies. As he emphasizes, the absence (as of now) of a comparable role for the EU budget, casts some shadows on the introduction of 'golden rules' at the state level, because it forces the member states to run procyclical policies without any possibility to rely on supranational support in times of economic recession. In the worst-case scenario, this would lead to the break-up of the Eurozone—a threatening prospect that only the establishment of a genuine fiscal capacity for the EU would prevent.

Part 2 includes contributions by Giacomo Delledonne and Marek Antoš, which offer a broad comparative assessment of the constitutionalization of balanced-budget rules in the EU member states. Giacomo Delledonne focuses on four countries of Western Europe—France, Germany, Italy and Spain—and traces the export of the German model of the constitutional 'golden rule', via the Fiscal Compact, into the basic (or organic) laws of the larger member states of the eurozone. Marek Antoš, instead, considers the constitutionalization of budg-

etary constraints in four countries of Central and Eastern Europe—Germany, Hungary, Poland and Slovakia—and contrasts the effects of constitutional debt and deficit brakes in two EU member states that are part of the eurozone and two that are not. According to DelleDonne, the constitutionalization of ‘golden rules’ in the EU member states signals a movement of fiscal issues from the political to the legal constitution, ie a shift from a process-based management of budgetary issues in the political domain to a legal entrenchment of substantive fiscal rules. As he argues, however, the effects of this shift are uncertain due to the existence of derogations in the ‘golden rules’ and the limited experience of courts in this field. Approaching the theme through the prism of the theory of precommitment, Antoš explains that balanced-budget rules can be assessed on the basis of three criteria: effectiveness, democratic legitimacy and flexibility with regard to the business cycle. As he argues, reconciling these three criteria represents a daunting task. But he regards the German solution as the most suitable, and welcomes its use as a model EU-wide.

Part 2 then features the contributions of Lina Papadopoulou, Michal Diamant and Michiel van Emmerik, and Roderic O’Gorman which focus specifically on the constitutionalization of budgetary constraints in three EU member states: Greece, the Netherlands and Ireland. Each of these member states presents several peculiarities which make it particularly apt for an ad hoc examination. Greece is where arguably all started: the unsustainability of Greek public deficit, and the need to provide European aid to rescue the country, prompted a call for tighter budgetary rules at the EU level—a recipe that was later imposed also on other states, such as Spain or Ireland, where the problems actually lay in banks, rather than governments. As Papadopoulou explains, Greece has not yet constitutionalized a ‘golden rule’, but the obligation to steer budgets toward a sustainable path has become the *summa lex* of the country, due to its subjection to the economic adjustment programme established in the Memorandum of Understanding between Greece and its foreign lenders. The Netherlands has not constitutionalized a balanced-budget rule—mainly because, as Diamant and van Emmerik explain, changing the Dutch constitution is almost impossible. Entrenching a ‘golden rule’, furthermore, raises special challenges in a state such as the Netherlands in which judicial review of legislation does not take place. As Diamant and van Emmerik make clear, however, the openness of the Dutch legal system vis-à-vis international law provides a convenient means to ensure the incorporation of the Fiscal Compact and the obligation by the Dutch legislature to comply with its terms. The case of Ireland, which is at the centre of O’Gorman’s chapter, is remarkable as this is the only EU member state where the ratification of the Fiscal Compact was subject to a public referendum. Yet, the approval of the Treaty was largely driven by the necessity of continued EU financial support, and was not followed up by a constitutionalization of the ‘golden rule’ in the national basic law.

The third part of the book, finally, addresses a number of questions about legitimacy and accountability, discussing the role of courts, legislatures and social

partners in the new constitutional architecture of EMU and advancing a number of proposals on how to improve the EU institutional regime towards the creation of a deeper and more genuine EMU. Part 3 begins with the contribution by Ingolf Pernice, who in a most ambitious vein argues for a new ‘social contract’ at the EU level, including all citizens of the member states, determined to organize their common European future most effectively and democratically. This is indeed an undertaking of great constitutional importance and impact, not just a matter of treaty revision. It is also—according to Pernice—an urgent undertaking, because of the fragility of the present situation, and it should involve all the citizens of the EU. The political process towards the negotiation of a new social contract has to be initiated before the electoral campaigns for the European elections are launched, and the Blueprint of the Commission is meant to start the debate. Many questions and challenges remain. For instance, Pernice asks whether a new Union should be adopted by parallel referenda in all the member states, or better by a European Referendum? Also, many provisions would have to be simplified in order to make them understandable for the people, before they can reasonably vote on a new treaty. This could be the ‘new European social contract’, which could give the Union a legitimacy that some believe the existing EU treaties’ ‘simple’ ratification procedure, which rests in the hands of the national parliaments according to their respective constitutional procedures, cannot provide.

In her chapter, Sonia Piedrafita focuses more on procedural legitimacy, i.e. the democratic principles of traditional national representation and checks-and-balances, and especially the role that national parliaments have played in the adoption process of the new EU budgetary constraints. For a long time, national parliaments have been considered one of the main sources of the EU’s democratic legitimacy. There thus seems ample reason to deal with this topic. More specifically, Piedrafita looks into how Ireland and Spain ratified the Fiscal Compact, and incorporated the ‘golden rule’ in their respective legal orders. She examines the parliamentary debates as well as the position of the political parties along the process. Both member states—she claims—constitute crucial cases to analyse the degree of contestation of these decisions at national level. In Spain, despite strong opposition from the main opposition parties when the implementing law was debated, parliamentary scrutiny of the Fiscal Compact, as well as the ratification itself, was not very well developed. More generally, and notwithstanding the so-called Lisbon Treaty provisions on the enhanced role of national parliaments in decision-making concerning EU affairs, parliamentary scrutiny in this regard is rather weakly developed in Spain. This is also due to the strong position of the executive in the political system. In Ireland, however, the ratification of the Fiscal Compact (through referendum) and the enactment of its implementing law (by ordinary procedure) were subject to more thorough parliamentary scrutiny. This raises as a result fewer concerns in terms of procedural legitimacy.

Samo Bardutzky and Elaine Fahey consider the adjudication of the ESM Treaty as a rich case study of the character of law in contemporary EU inte-

gration and the state of postnationalism. According to the two authors, the ESM constitutes an example of suboptimal adjudication in the EU courts (both national and supranational). Their argument is rooted in both the character of eurozone law and a rather flawed procedural matrix for judicial review, in the form of the preliminary reference mechanism. They argue that, in retrospect, courts possibly offered a unique forum for participation and contestation. They examine the preliminary reference mechanism as the tool that could have facilitated a more participatory and orchestrated judicial response. According to Bardutzky and Fahey, the ESM ‘saga’ indicates that if the member states continue to avail themselves of creative instruments of esoteric postnational character curbing or purporting to curb judicial review or national plebiscites on their character, this will require a rethink of the architecture of the EU judiciary, at supranational and national level, as much as the instruments themselves. Francesco Costamagna’s contribution assesses instead the impact of the measures taken to strengthen the relationship between economic and social objectives in the context of the European integration process. He claims that the need to balance economic and social dimensions of the integration process represents indeed an essential prerequisite for the legitimacy of the EU as such. Costamagna observes that, whereas previously economic objectives were clearly prioritized, there are signs of a reorientation of the strategy adopted at supranational level: the recommendations adopted in the 2013 cycle of the European Semester pay greater attention to social objectives. Nevertheless, the adopted measures are too limited and too occasional. There is the need to ensure that, at a minimum, the action fully contributes to the pursuit of fundamental social objectives that lay at the core of national welfare states and that are now enshrined in the list of EU aims. According to Costamagna, this step, connected with input legitimacy, is necessary to preserve the output legitimacy of the integration process and, ultimately, its very *raison d’être*.

The two final contributions of the book debate alternative perspectives on the future of the EMU. Peter Lindseth begins his contribution with his challenging ‘administrative’ interpretation of European governance. European integration—Lindseth claims—is best understood as an extension of modern administrative governance, as it developed over the course of the twentieth century. What administrative bodies, however, lack despite their autonomous *power*, is autonomous democratic and constitutional *legitimacy* to exercise that power without some oversight by strongly legitimated bodies residing elsewhere. This means that, in the case of European integration, supranational institutions lack democratic and constitutional legitimacy of their own, despite the fact that they have been partly constructed to mimic strongly legitimated legislative, executive, and judicial bodies on the national level. As a result, supranational institutions ultimately depend for democratic and constitutional legitimacy on the legislative, executive, and judicial bodies of the member states. He argues that democratic and constitutional legitimacy are inextricably connected in the modern era, and that the EU is not ‘constitutional’ in itself, but rather technocratic and juristocratic.

According to Lindseth, for instance, the European Parliament is not experienced by the citizens of Europe as an embodiment or expression of the capacity of a new European ‘demos’ to rule itself. The evolution of European public law and supranational authority is for Lindseth much more than a matter of institutional engineering, often revolving around expanded powers for the European Parliament. As for the crisis in the Eurozone, Lindseth argues that a plausible, democracy-based normative theory is needed to share responsibility for the legacy costs of a poorly designed monetary union. Such theory can be persuasive because it can be recast in terms of fault, causation, responsibility and proportionality that are deeply familiar to the legal mind of national high court judges who might be asked to rule on the constitutionality of such burden-sharing. The challenge—Lindseth claims—is to avoid idealist appeals to intra-European solidarity and instead ground the normative principle of burden-sharing in the idea of democratic and constitutional responsibility of each participating state in the EMU.

Whereas Lindseth is reserved about employing a primarily constitutionalist terminology to describe integration, Federico Fabbrini is doing precisely that. In his contribution Fabbrini focuses on the possibilities and the challenges towards a new phase of economic integration in the EMU, based on fiscal capacity besides fiscal constraints. Fabbrini deals with three ‘constitutional’ challenges for a fiscal capacity to succeed. These he terms the challenges of asymmetry, unanimity and representation. They all raise critical hurdles to the establishment of a fiscal capacity which is to avoid falling prey of endless negotiations on interstate money transfers, insurmountable deadlock in decisions about the adoption of EU own resources and lack of representation by those individuals who would be directly subject to new EU taxation. Although these challenges are significant, Fabbrini nonetheless does not believe them to be insurmountable, and proposes three remedies: (a) the introduction of EU own resources can break the vicious equation between financial solidarity and interstate transfers; (b) the resort to enhanced co-operation can address the challenge of unanimity and sidestep the deadlock that virtually automatically arises in the field of tax policy whenever proposals are made for new EU taxes; (c) the possibility of the ‘*passerelle* clauses’ can address the challenge of representation and ensure that the only institution directly representing the European citizens—the European Parliament—has a say on decisions which involve EU taxation. Endowing the EMU with a fiscal capacity is, according to Fabbrini, a desirable development to solve the euro crisis and strengthen democracy in the EU. As such, Fabbrini’s conclusions link back to the opening contribution by Maduro, who pleaded in favour of an EU budget, based on authentic EU resources and grounded in a new democratic decision-making framework as the least impossible among the impossible options for saving the eurozone from its current quagmires.

Whether the reader will share optimism on the possibility to establish a deeper and more genuine EMU or not, we hope that the Tilburg conference and the present collection of contributions will be considered as one more step in the new debate and stimulate further discussions on the future of Europe.