1. Introduction

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1. INTRODUCTION

Economic law constitutes a key component of the project of European integration. Pursuant to the current Article 3 TEU, the European Union (EU) 'shall establish an economic and monetary union whose currency is the euro.' In fact, since the Maastricht Treaty of 1992 the EU has been endowed with a framework to coordinate the member states economic policy, and since 2002, when the euro started circulating as legal tender, the majority of EU member states has had a single currency, with monetary policy centralized at EU level. Nevertheless, the EU Economic and Monetary Union (EMU) has developed significantly in recent years. Following the financial crisis – which hit Europe a decade ago, and threatened the survival of the Eurozone itself – major legal and institutional developments have occurred in the field of EU economic law. While economic governance has been overhauled to strengthen budgetary rules and financial stability, and monetary policy expanded into new terrains, a Banking Union has been created from scratch, and steps have been taken to set up a more integrated Capital Markets Union with new supra-national supervisory authorities.

While in the past EMU tended to be a marginal topic, reserved for a few specialists, the euro-crisis and the responses to it have increased attention to European economic law among scholars, policy-makers and the general public alike. If academic analyses of European economic governance have mushroomed, debates on the EMU – including about the potential costs and benefits of using the euro – have become part of the day to day political conversation in a number of European countries. If anything, therefore, the euro-crisis contributed to raising attention to the EMU, and its deficiencies, prompting further action by the policy-makers. After all, the EMU remains an incomplete union. For example, while the first two pillars of banking union – centralized supervision of banks, and a mechanism to resolve failing institutions – have now been established, the third pillar – a European deposit insurance scheme – is still missing; and while fiscal rules abound, the EU still lacks fiscal capacity to undertake counter-cyclical policies in case of asymmetric

economic shocks. Yet, although the EMU remains a work in progress, there is growing need for academics, practitioners and the informed public to understand what are the legal mechanisms and institutional principles that underpin the functioning of the Eurozone.

The purpose of this edited volume is to offer a comprehensive analysis of European economic law, spanning from fiscal and monetary issues to banking and capital market questions. Needless to say, the focus on the book is on the legal, as opposed to the economic issues – but, in the EU, the law is the backbone of all policies, so a proper appreciation of its content is crucial. Moreover, this book seeks to overcome a silos analysis of the various components of EMU, showing instead how the economic, monetary, banking and capital markets unions are actually deeply interconnected elements of the European economic architecture. Whereas public lawyers (especially scholars of EU and national constitutional law) have mostly dedicated their attention to the fiscal and monetary aspects of the EMU, while private lawyers (and notably corporate and financial markets law scholars) have predominantly focused on the banking and capital markets dimensions of the EMU, the book suggests that all these components are actually part and parcel of a single ecosystem of European economic law. Hence, fiscal, monetary, banking and capital markets law should be appraised together to acquire a complete understanding of how the EMU works.

To this end, this edited volume brings together a distinguished set of contributors, which include some among the leading experts of the various elements of European economic law, including specialists in, inter alia, fiscal rules, macro-economic governance, monetary policy, judicial review, banking and financial supervision, clearing and settlement and financial services and investment funds. Furthermore, on the understanding that European economic law is very much still a work in progress, the book blends contributions from both academics and policymakers, including the top lawyers of institutions such as the Council, Commission, European Central Bank (ECB) and European Securities Market Authority (ESMA) Legal Services, bringing in the experience of actors who operate daily within this legal environment. Finally, the book endeavours to offer a pluralist and balanced perspective on the foundations and development of European economic law, by combining contributions by authors of different generations, gender and geographical origin – the latter point, in particular, offering a valuable snapshot of how the different regions of Europe may have various views on EMU and its future.

The book is structured in four parts, each focusing on one of the four pillars of European economic law: Part I examines the Economic Union;

Part II the Monetary Union; Part III the Banking Union; and Part IV the Capital Markets Union.

2. ECONOMIC UNION

In Chapter 2, Alberto de Gregorio Merino offers an overview of the institutional architecture for macro-economic governance in the EMU, analysing the role of the EU supranational and intergovernmental institutions and explaining their reciprocal interactions. Specifically, de Gregorio analyses the tasks of the Council, the Commission, the Eurogroup – including when this acts as the board of governors of the European Stability Mechanism (ESM) – as well as the European Council and the Euro Summit, reflecting the complexity of coordination of economic affairs in the EU. Moreover he details the limited powers of the European Parliament in EMU, and underlines the narrow justiciability of acts adopted by the intergovernmental institutions – as reflected in the case law of the European Court of Justice (ECJ) on crisis-response measures. As de Gregorio emphasizes, the intergovernmental response to the euro-crisis significantly affected the EU interinstitutional balance in economic governance, but this created challenges, including on the relation between the European Council and the Council, which will need to be addressed in due course.

In Chapter 3, Jean-Paul Keppenne focuses instead on the fiscal rules of economic governance, mapping the procedures in place to ensure that member states conform to sound budgetary policy. In particular Keppenne distinguishes between mechanisms of control which operate externally, outside the member states: that is, at the level of the EU, from those entrenched internally, within the member states themselves. With regard to the external controls, he analyses in depth the Stability and Growth Pact (SGP) and its recent revisions through the so-called 'Six-Pack' and 'Two-Pack' and details the functioning of both its preventive and the corrective arms. Moreover, he discusses the sanction's mechanisms applicable in the excessive deficit procedure, as well as the growing role of the European Commission in policing states' budgets in the framework of the European Semester. With regard to the internal controls, then, Keppenne emphasizes the importance of the obligation to constitutionalize a balanced budget amendment in national law resulting from the Treaty on Stability, Coordination and Governance in the EMU and refers to the possible future developments in this area, including the commitment to domesticate the Fiscal Compact in EU law.

In Chapter 4 Tomi Tuominen zooms into the mechanisms of financial assistance that were established in response to the euro-crisis and the threat of sovereign default in a number of Eurozone member states. While Tuominen considers both the European Financial Stability Mechanism – a temporary support tool established through a Council regulation – and the European Financial Stability Facility – a private vehicle incorporated under Luxembourg law – he mostly focuses on the ESM – an international institution set up by the Eurozone member states through an intergovernmental treaty in 2012. Tuominen, in particular, explains the main administrative features of the ESM and discusses in detail the *Pringle* judgment of the ECJ, which confirmed its compatibility with the EU legal framework. As Tuominen explains, the establishment of the ESM modifies the original understanding of the 'no-bailout' provision enshrined in the EU treaties, but reflects the growing awareness for financial stability as a common concern in the Eurozone. Nevertheless, Tuominen identifies challenges in the ESM and cautions against the pressure to re-incorporate it within the EU legal framework without major amendments.

In Chapter 5 Federico Fabbrini analyses the proposals in favour of establishing a fiscal capacity – that is a budget of the euro area that can be used as a counter-cyclical tool for stabilization purposes in cases of asymmetric shocks. As Fabbrini explains, the fiscal capacity remains a missing link in the constitutional structure of EMU: the Maastricht Treaty did not foresee any supranational mechanism to handle asymmetric busts, and the responses to the crisis so far have not led to the creation of such an instrument. Yet, Fabbrini underlines that growing awareness exists on the need for such a fiscal capacity and he reviews the proposals advanced, among others, by the European Parliament, the European Commission and jointly by the French and German governments for a euro area budget, suggesting that a consensus may be slowly building in this direction. In fact, Fabbrini claims that there are adequate legal bases in the current EU treaties to set up such an instrument, but he emphasizes from a constitutional point of view that a successful fiscal capacity must be based on own resources – rather than state transfers – and subject to adequate governance and accountability mechanisms to ensure executive effectiveness and democratic legitimacy.

3. MONETARY UNION

In Chapter 6 Phoebus Athanassiou presents the institutional role of the ECB, as well as the new functions it has acquired since the beginning of

the euro-crisis. Athanassiou explains the organization and independence of the ECB and the national central banks comprising the Eurosystem, and details the ECB powers in conducting the single monetary policy of the Eurozone. Moreover, Athanassiou underlines the new tasks that were assigned to the ECB in response to the euro-crisis – notably the functions of micro- and macro-prudential supervision in the framework of the Single Supervisory Mechanism – and discusses the impact on its mandate and independence. At the same time, Athanassiou reviews the role that the ECB played in managing financial support programmes as part of the so-called Troika. As Athanassiou points out, the ECB emerged as one of the most powerful institutions of the EMU in the aftermath of the crisis, acting as the stopgap to remedy the design flaws of the EMU, but with great power comes greater responsibility, and it is therefore unsurprising that its actions are increasingly subject to judicial scrutiny.

In Chapter 7, Katerina Pantazatou and Ioannis Asimakopoulos overview the conventional and unconventional monetary policies that the ECB has deployed to pursue its mandate as the central bank of the Eurozone. Pantazatou and Asimakopoulos underline how the EU treaties assign to the ECB the primary task of maintaining price stability, and explain the traditional toolkit to achieve this goal, including interest rate changes, open market operations, standing facilities, i.e., the deposit and marginal lending facilities, and minimum reserve requirements for credit institutions. At the same time, they underline how conventional monetary policy came under pressure in the context of the euro-crisis, when interest rate policy reached its lower bound and the transmission of monetary policy came under pressure, forcing the ECB to develop new instruments, such as targeted long-term refinancing operations, a securities market programme, outright monetary transactions (OMT) and – finally – public assets purchase programmes, otherwise known as quantitative easing (QE). As Pantazatou and Asimakopoulos explain, the deployment of unconventional monetary policy confirms that the ECB enjoys powers analogous to other central banks, but also raises legal challenges to the ECB actions.

In fact, the legality of ECB action is at the heart of Chapter 8, by Stefania Baroncelli, which examines judicial review of ECB measures. Baroncelli refers to older ECJ cases on ECB independence, and more recent national challenges to ECB monetary policy, but her analysis mostly focuses on two major rulings delivered by the ECJ – on preliminary references made by the Bundesverfassungsgericht (the Constitutional Court of Germany) – on the legality of the OMT and QE programmes: the *Gauweiler* and *Weiss* judgments. As Baroncelli explains, the fact that the ECB has been subject to so many legal actions

is unusual in comparative perspectives, since in most other constitutional democracies action by central banks tends to be shielded from judicial review on standing grounds. Nevertheless, she stresses that the ECJ has fully validated the action of the ECB, effectively adopting a deferential standard of review, which is consonant with the greater technical expertise that the ECB has compared to the other EU institutions.

In Chapter 9, Roderic O'Gorman examines instead the adjustment programmes devised to support EU member states facing fiscal challenges, discussing also the role of the ECB in designing and monitoring such programmes. As O'Gorman explains, after losing access to the bond markets, five Eurozone countries – Greece, Portugal, Ireland, Cyprus and (partially) Spain – received financial assistance from the ESM and its predecessors. Nevertheless, pursuant to the principle of conditionality, financial support was subject to the national implementation of structural reforms, including in the pension, labour market and tax sectors. O'Gorman, in particular, considers the case of Ireland as an example to assess the efficacy of the adjustment programmes; and even though the Irish case is often taken as a success story, he emphasizes how a number of the requirements originally set by the international creditors were actually lost in translations due to national political opposition. O'Gorman then reflects on the impact of adjustment programmes on the protection of social rights and reviews the growing case law by national and European courts in this field, making the conclusive case that financial support programmes should give greater attention to the disparate social impact resulting from economic adjustment at the domestic level.

4. BANKING UNION

Establishing a Banking Union is one of the most important goals of European economic integration, also in light of the Monetary Union. The project is based on three pillars: Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM), and European Deposit Insurance Scheme (EDIS). While the first two pillars have been accomplished, although they are far from perfect and there is still room for improvement, the EDIS still appears more uncertain and subject to political controversy. Chapter 10, by Valia Babis, starts with a discussion of the so-called Single Rulebook and the European Banking Authority (EBA), summing up the state of the art and critically examining the most recent developments. As Babis shows, the Single Rulebook is not truly an example of maximum harmonization, and neither is it really a 'single'

document, but rather a 'multi-tiered' structure. Several of the Directives composing the Single Rulebook leave, in fact, wiggle room to member states, and in any case local rules might create different regulatory environments in which the shared EU rules apply, with sometimes relevant effects on substantive harmonization. The chapter also analyses how the role of the EBA should be strengthened to facilitate a more effective and harmonized rule-making activity.

The SSM is examined in Chapter 11 by Tobias H. Tröger, who considers the role of the ECB and its relationships with the central banks and supervisory authorities of the member states participating in the banking union. As Tröger explains, in response to the euro-crisis and with the aim of breaking the doom loop between sovereign defaults and bank defaults, supervision of significant financial lending institutions was shifted from the national to the supranational level, and vested in a new branch of the ECB: the SSM. Nevertheless, as he points out, national competent authorities have preserved an important responsibility in supervision, and they have a major voice within the SSM decision-making system, as they outweigh the ECB representatives in the Supervisory Board. Moreover, as Tröger claims, the institutional solution found for supranational supervision of banks creates challenges, notably due to the separation between the SSM and the SRM: while this choice was ultimately made to shield the ECB from the fiscal consequences of bank failures, it raises difficulties of coordination – a situation which is further complicated by the continuing role of the EBA as a standard setter for banking rules for the whole EU. Nevertheless, as Tröger concludes, the SSM is very much a project of the EMU, and there are limited incentives for non-Eurozone countries to join, which suggests that adjustments may occur in the near future.

In Chapter 12, Christos Gortsos leads us through the intricacies of the SRM, and specifically the role of the different institutions involved in the resolution, with a focus on bail-in and its effectiveness. In particular, Gortsos analyses the role of the Single Resolution Board – the agency in charge of resolving credit institutions – and reflects on the so-called bail-in mechanism, discussing its uneven application in the first concrete cases of resolutions of small regional banks in Spain and Italy. Yet, the Banking Union cannot fully be realized without a single deposit insurance scheme – that is a uniform guarantee for bank depositors across the EMU – which is the object of Chapter 13, also written by Christos Gortsos. As he explains, however, EDIS has not yet been accomplished as the matter remains complex and politically charged. The controversy is clear: countries with (possibly) more financially stable banks do not want to mutualize risk before banks in other countries have strengthened their

solidity; conversely a currency union requires credible and similarly effective deposit insurance in the entire area. A single and well-designed insurance scheme would also increase competition as depositors might shop across borders more freely and would contribute to decoupling the correlation between sovereign and bank risks.

5. CAPITAL MARKETS UNION

Integrated, efficient and effective capital markets are equally essential for the EU and, especially after Brexit, uncertainties concerning this area abound. For sure, the integration of capital markets started before the development of a true Banking Union, and is now relatively advanced, even if national barriers are far from having been entirely abolished. Part IV of the book starts with a discussion in Chapter 14 of the European architecture of financial supervision and the role of the European Supervisory Authorities (ESAs), written by Sophie Vuarlot-Dignac and Eugenia Siracusa. Vuarlot-Dignac and Siracusa summarize in historical perspectives the reasons leading to the creation of the ESAs in the aftermath of the euro-crisis and examine specifically the role of the European Securities Market Authority (ESMA), detailing its organization and institutional mandate. As they point out, the ESAs have contributed to establishing a common supervisory culture across Europe. However, a number of challenges remain, including divergences in data collection, and it remains questionable whether the ESMA specifically has all the powers it will need: from this point of view, therefore, further legislative developments may be necessary.

In Chapter 15, Danny Busch examines the ambitious but also fragmented and partially idealistic group of initiatives commonly known under the expression Capital Markets Union. Two major areas of this emerging landscape are then the subject of detailed analysis in Filippo Annunziata's Chapter 16, dedicated to financial services and investment funds; and Nadia Linciano's Chapter 17, on clearing and settlement. The picture emerging from these chapters is one of a significant and growing harmonization, but a process which is still incomplete and, in any case, uneven. While some areas enjoy significant uniformity (e.g., financial services or prospectus), in other important areas national differences are still significant (e.g., with respect to civil liability for false, incomplete or misleading prospectuses). The institutional framework is itself only partially satisfactory. The very limited direct supervisory powers granted to the ESAs, for example, due to constitutional constraints, determine a

baroque and possibly ineffective pan-European supervision. In this context, additional efforts seem needed to complete the Capital Markets Union, and there are questions as to whether the political will to do so will be strong enough following the United Kingdom (UK) withdrawal from the EU.

6. CONCLUSION

The book is ended by the concluding remarks of Andreas Heinzmann and Valerio Scollo, who bring a practitioners' perspective to European economic law. As they point out, developments at EU level increasingly have a bearing on the work of professional lawyers, particularly in the field of securitization, investment funds and financial services. Moreover, they emphasize how traditionally English law used to be the main operational tool but how the decision of the UK to withdraw from the EU is likely to change that. As Scollo and Heinzmann argue, steps taken at EU level in response to the crisis, notably the creation of a Capital Markets Union, are very welcome from a market perspective. Nevertheless, the work in progress in completing the EMU creates a number of challenges, and they express a hope that the system may settle for good, offering a more stable rule of law framework for European economic law and lawyers.

In fact, the ambition of this book is to provide a benchmark for professorial and professional lawyers to understand European economic law *de jure condito*, but also to offer suggestions for policy-makers for further reforms to be introduced in EMU *de jure condendo*. In our view, this is essential to win back the support of the European people, at a time when Euroscepticism is on the rise and the UK is seeking, not without difficulty, to leave the EU. As this book was going to press in June 2019, efforts to deepen the EMU remain ongoing at the highest institutional level, so we hope this volume will contribute with innovative ideas and independent input to the continuing project of completing the economic, monetary, banking and capital markets unions. At a minimum, we hope that the explanations and descriptions of the different issues will help more and less expert readers in orienting themselves in the maze of rules and institutions, and that a clear understanding of the points of strength and weakness of the existing framework will contribute to address and solve the major problems that remain within the EMU.