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Integration through Crisis: A New Mode of European Integration?

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It is now a decade since the euro crisis exploded into public view. Initially framed as a Greek sovereign debt crisis, by 2012 the single currency's very survival was in doubt. It was then that Mario Draghi, as president of the European Central Bank (ECB), stepped up to guarantee the euro's continued existence. As we look back at the EU's crisis decade from the vantage point of 2020, we may say that much has changed in order for most things to remain the same. Economic and Monetary Union (EMU) has been preserved, though it remains a 'half-built house'; that is, a monetary union without a fiscal counterpart. The ECB is more politicised than it was ten years ago, but just as economically and socially 'disembedded'.[1] Austerity – long touted as the cure to EMU's ills – remains central to the euro's long-term stabilisation. Moreover, 2020 has brought significant new economic and social challenges, owing to the devastating impact of COVID-19. The pandemic has touched all EU member states, but it has not affected them equally. Thus, many of the thorniest debates – including over the meaning and obligations of solidarity when it comes to dealing with asymmetric economic shocks – are once again at the fore of European discourse.

In this chapter, I argue that the remarkable preservation-through-dynamism of the past decade has been achieved via a new mode of European integration, which I term 'integration-through-crisis' (ITC).[2] Integration, in this sense, refers particularly to the creation of new institutions and frameworks, which bound the Eurozone's members closer together even as they entrenched economic differences among them. Thus, in contrast to the positive integrative potential of constitutional contestation highlighted in the introduction to this volume, for many of the Eurozone's Southern members, ITC was experienced as a form of 'unequal integration',[3] which reinforced their peripheral status. In the sections that follow, I will elaborate on several of the key *processes* of ITC as well as on the *actors* that have shaped, and been shaped by, those processes. ITC has been characterised by an empowerment of supranational executive bodies, such as the European Commission and the ECB. In the case of the Commission, its ability to oversee, surveil and pressurise states into taking certain

[1] Majone 2012: 14.
[2] Scicluna 2018.
[3] Getachew 2019: 18.

'corrective' measures, including those that pertain to areas of social policy over which the EU lacks formal competences, has been significantly enhanced. The ECB, too, has developed new surveillance and coercive capacities, as well as refashioning itself as a lender of last resort for the Eurozone.

That all of this has been achieved without recourse to constitutional reform (i.e. without changes to the EU treaties) brings us to the processes through which ITC has advanced.[4] In particular, this chapter shall focus on how ITC has transformed the role of law in the European integration process. In the crisis, law has been used to 'lock in' policies that were developed in *ad hoc* ways or through technocratic processes. This has created a paradoxical constellation in which *rules* have been treated as sacrosanct, while a commitment to formal *legal processes* has not. The community method of lawmaking proved especially dispensable at key moments of the crisis response, including the establishment of the ESM and the negotiation and implementation of formal bailouts.

Thus, ITC may be conceptualised as an emergency iteration of integration-through-law (ITL), preserving the latter's preference for non-majoritarianism and the suppression of political contestation, while abandoning its commitment to the EU rule of law. The end result is a mode of integration that exacerbates the EU's democratic legitimacy problems in both form, as it relies on extra-constitutional means of embedding crisis response measures, and substance, as the logic of austerity has damaged social protections, especially in the Eurozone's periphery.

The chapter proceeds as follows. The next section reflects on the interrelationships between law, politics and democracy. In the case of the EU, its construction as a community of law, framed by a judicially-created constitution, enabled both the creation of a robust rule of law system and the concomitant underdevelopment of the political sphere.[5] The former served to entrench individual rights and to advance the four freedoms of the internal market, while the latter contributed significantly to the EU's democratic deficit, since '[d]emocracy without politics is an oxymoron'.[6] We then move to discuss how the euro crisis precipitated a transition from integration-through-law to integration-through-crisis. Relying on the emergency politics narrative of 'no alternative', ITC has maintained ITL's emphasis on governance by experts, while jettisoning its main source of legitimacy, namely a commitment to acting through, and within the bounds of, EU constitutionalism.

[4] Save for a minor change to Article 136 of the Treaty on the Functioning of the EU (TFEU) to accommodate the establishment by Eurozone member states of a European Stability Mechanism (ESM). Crucially, the ESM was a non-EU institution, established outside of EU law. See European Council Decision 2011/199 of 25 March 2011.
[5] See Weiler 1994; Kelemen 2012.
[6] Weiler 2011: 680.

As already noted, the ECB has been a particularly important actor in this transition, both as a provider of liquidity to the euro area and as a member of the 'Troika', which negotiated and supervised bailouts of individual member states. The chapter expands on how and why the ECB became a key agent of ITC, paying particular attention to the Bank's role in what may be termed the coercive turn in Eurozone governance. This discussion is then placed in the broader context of the relations between ITC, executive bodies, and the normalisation of austerity, while the final section reflects on the present and future of economic crisis management in the EU, especially in light of the economic effects of the COVID-19 pandemic. Overall, the chapter aims to elucidate key characteristics of EU crisis management, demonstrating how the potential for political contestation is limited in the Union as currently constituted, though the pandemic may yet create space for a more political EU.

Law, politics and democracy in the EU

The challenge of how to structure democratic politics within and across self-contained but interdependent polities is not unique to the EU.[7] For a variety of reasons, including pressures generated by economic globalisation, the growth of transnationalised and internationalised regulation, the judicialisation of politics, and the sheer complexity of modern welfare states, policymaking power is increasingly taken out of the hands of elected representatives and delegated to non-majoritarian and often tenuously accountable regulatory institutions within and beyond the state. Even for those policymaking competences that remain with national legislatures, room to manoeuvre is restricted by the number of commitments that are 'locked in' by their constitutionalisation, delegation, or incorporation into international treaties. The institutions and processes of representative democracy – party-structured electoral competition – continue as they are, but the substance is hollowed out.[8]

Although democratic degradation is neither a specifically European phenomenon, nor particularly new, it does take specific forms in the European Union.[9] Due to its complexity, much of the 'back-stage' policymaking of European governance is done by regulatory agencies.[10] At the same time, EU law is over-constitutionalised by virtue of the fact that much of what would be considered ordinary

[7] See Papadopoulos 2013.
[8] See Mair 2013.
[9] See Scicluna and Auer 2019.
[10] Papadopoulos 2013: 3.

law in a national context (eg single market policy) is contained in the EU's founding treaties.[11] Since the barriers to treaty change are prohibitively high, supranational judicial rulings that touch on treaty interpretation are also effectively constitutionalised, making the Court of Justice of the EU (CJEU) a powerful policy actor in its own right.[12]

Indeed, unlike most other international organisations, the EU has a robust constitutional framework. Its provisions are applied by national courts, following the definitive interpretations of the CJEU and they elicit a high level of compliance from national authorities. The constitutionalisation of the EU is one of the greatest successes of the integration project. It is the *sine qua non* of the single market and of the effective legal protection of the rights that flow from the four freedoms and from the EU's Charter of Fundamental Rights.

Nevertheless, pursing European integration through law also had its drawbacks. The preponderance of depoliticised, judicialised modes of governance was both informed by, and left its imprint on, the culture of the EU. One of its more problematic legacies is the ongoing subordination of partisan politics and political contestation to supposedly value-neutral administration. In this vein, the Commission has traditionally been portrayed as a non-partisan body, which simply governs in the best interests of Europeans by seeking optimal solutions for policy problems.[13] However, from a normative perspective, political contestation is a necessary condition of democratic decision making. In a democracy, the people must have a choice between multiple policy options, none of which are *ex ante* 'objectively correct' and all of which are subject to debate in public forums. The oxymoronic spectacle of a democracy without choice was well, if depressingly, illustrated by the case of Greece under bailout conditionality. Successive elected governments, of very different ideological persuasions, found themselves implementing deeply unpopular austerity measures demanded by creditors.[14]

Thus, the EU's political deficit is also at the heart of its democratic deficit and both are, in some ways, products of the EU's development as a community of law. That is, they are products of the integration-through-law paradigm.

[11] See Grimm 2015.
[12] See Davies 2016.
[13] See Wonka 2008.
[14] As Armingeon, Guthmann and Weisstanner 2016: 2 report, in Greece and other Southern euro states, 'voters experienced that it did not matter who was in government and that the preferences of a majority of the citizens would not be translated into policies'.

The Eurozone crisis and the transition from ITL to ITC

Integration-through-law (ITL) describes the dynamic whereby courts drive the integration process forward through their dissemination of European law. Unlike the integration through legal contestation described in the introductory chapter, ITL expressly avoided mass politicisation, instead relying on litigation brought by individuals and firms to achieve 'negative integration'; that is, the removal of national regulatory barriers to the four freedoms of the internal market.[15] The Court of Justice created the conditions for ITL through its groundbreaking articulation of the principles of direct effect and legal supremacy in the 1960s. Combined with the preliminary reference procedure, direct effect and legal supremacy enabled the CJEU to issue binding treaty interpretations, the normative force of which was amplified by the fact that they were incorporated into the judgements of national courts in cases brought directly by member state nationals.[16] ITL's crucial insight concerned the dual nature of law in the then-EC: law was both object and agent of integration.[17] In other words, ITL conceptualised a project of integration *by* law (court-driven constitutionalisation of the treaties) and *towards* law (a closely integrated and legally bound union of people and peoples).

Because the EU's constitutional framework was largely judicially constructed, it was always somewhat unpolitical. Consequently, the EU constitution is not well placed to realise the integrative potential of social and political conflicts. Indeed, the integration that has occurred during the euro crisis has been *in spite of*, rather than because of the politicisation of policymaking within the Eurozone. In other words, crisis-induced integration has defied the 'constraining dissensus' postulated by post-functionalist theory (Schimmelfennig 2014). Instead, euro area states have been bound closer together, and more tightly under the control of EU executive bodies, through a new mode of integration: integration-through-crisis.

In order to understand how the Eurozone crisis precipitated a transition from ITL to ITC, we must first look to the legal construction of EMU, and especially to the ways in which it emulated and departed from the ITL model. EMU, as framed by the Maastricht Treaty, adapted the logic of ITL, but did not adopt it completely. Like the single market, EMU was to be a community of law, with fiscal discipline guaranteed by binding rules (e.g. on debt and deficit levels). However, EMU norms do not have direct effect, and are not subject to the kind of judicial dissemination that

[15] Scharpf 1999.
[16] See Weiler 1994.
[17] See Cappelletti, Seccombe and Weiler 1986.

constitutionalised the single market. Instead, implementation of EMU norms required concerted legislative and administrative action which, prior to the crisis, was often not forthcoming. In sum, EMU was a political project, framed by formal rules, but without giving law the kind of agency it had enjoyed in relation to the single market.

The financial crisis became a European crisis in 2010. Initially framed as a problem caused by excessive and unsustainable sovereign debt (a narrative that has since been shown to have been inaccurate, but which continues to colour the response), the crisis manifested most urgently in relation to Greece. In fact, already in May 2010, Greece received the first in what was to become a series of bailouts. The timeline of events is not recapitulated here. Again, the key point, for our purposes, is that the crisis precipitated a transition to a new mode of integration, namely ITC.[18]

The key characteristics of ITC include the following. Firstly, ITC is an *ends-driven* process. The end, in this case, is the preservation of EMU with its current membership and under its current ordoliberal frame; that is, without turning it into a transfer union. As a result of this singular focus on 'saving' the euro, many other equally important priorities have been subordinated, including maintaining the coherence of the EU's constitutional framework, promoting the community method of lawmaking, and protecting national welfare states. Indeed, as Costamagna argues, national social spaces, especially in the Eurozone's periphery, have been treated as little more than 'adjustment variables whose main function is to contribute to the pursuit of EMU-related objectives'.[19] Secondly, ITC is *extra-constitutional*, in that legal responses to the crisis have avoided treaty reform by going outside the treaty framework. In a substantive sense, ITC also marks a shift in the balance between the economic and social dimensions of the EU's constitutional settlement, the consequences of which are likely to outlast the crisis. Moreover, the procedural and substantive dimensions of ITC's extra-constitutionality are linked. Escaping the constraints of EU treaty law enables creditor states and supranational bodies to fully exploit power asymmetries with debtor states, eg by imposing on them conditions that would fall foul of the EU's human rights provisions, were they reviewable against those standards.

Thirdly, ITC exacerbates pre-existing tendencies in the EU to *suppress political contestation* by concentrating power in the hands of national and supranational executives and non-majoritarian bodies. The following section elaborates on this characteristic of ITC in relation to the ECB. Fourthly, ITC places more emphasis on the *coercive enforcement* of EMU's rules, including rules adopted

[18] See Scicluna 2018.
[19] 2018b: 164.

through ad hoc and extra-constitutional processes. The Commission and the ECB have been particularly implicated in EMU's 'coercive turn', as I discuss below. Finally, both the means and ends of ITC are justified through *emergency rhetoric*, including the narrative of 'no alternative', through which choices are circumscribed before they can be fully debated.

Thus, the relationship between ITC and law is complex. The crisis response has relied heavily on extra-constitutional measures and on interpretations by the CJEU that seem to subvert the plain meaning of treaty provisions (eg the 'no bailout clause' in Art 125 TFEU). However, the response has not been lawless. On the contrary, the rhetoric of rules (ie the emphasis on the importance of following the rules and recommendations of EU institutions) has been pervasive throughout the crisis response. In fact, this rhetoric mirrors the dominant two-part narrative of Northern 'saints' and Southern 'sinners'. Firstly, that the Southern member states found themselves in financial trouble because they did not follow the rules and, secondly, that it was through the coercive application of new and stricter rules that they would be brought back into line.

The ECB as an agent of ITC

It is in the context of the transition from ITL to ITC that the ECB took on a central role. From its creation in 1998, the ECB has been an important component of the EU's regulatory state. It is an independent agency, insulated by law from direct majoritarian pressure, which has been mandated by its principals to set monetary policy for the Eurozone. In some ways, the independence of the ECB is unremarkable. Since the 1990s, it has been common practice, in Europe and beyond, for national governments to delegate monetary policy to independent, non-majoritarian central banks.[20] This practice is line with the neoliberal consensus that monetary policy making ought to be treated as a technical matter, which is to be governed by the application of expertise 'in order to find optimal solutions to policy problems'.[21] Even so, as already noted, the ECB is particularly 'politically and socially "disembedded"', given the absence of a corresponding fiscal governance apparatus at the European level.[22]

[20] See eg Bowles and White 1994; Elgie 1998; Jones and Matthijs 2019.
[21] Tortola 2020: 506.
[22] Majone 2012: 14.

As is common with regulatory bodies, the ECB's mandate is explicitly circumscribed in some areas, but vague, or 'incomplete' in others. In the case of the ECB, two key aspects of its mandate are made explicit. Firstly, the Bank is confined to monetary policy making and excluded from the realm of economic policy making, which is left to national governments. Secondly, the Bank is given an explicit hierarchy of objectives - price stability is its primary goal, though it may also act to support the general economic policies of the Union so long as such actions do not conflict with the achievement of price stability. Yet, there are other, equally important aspects, in which the principal-agent contract is incomplete. 'Price stability' is not defined, and neither are the policy instruments by which the ECB may pursue its mandated objectives. To be sure, the lack of over prescription of the Bank's role is not unusual, given that central banks are expert bodies, which must be given leeway to use their expertise effectively. Yet, the flexibility accorded to the ECB to shape its mandate did limit the space available to other actors to contest the increasingly political roles it took on, especially as a member of the 'Troika', as is discussed below.

At any rate, the euro crisis offered an opportunity for the ECB to redefine its role. Faced with possible collapse of the Eurozone in 2010-2012, the ECB began to adopt a number of unconventional policy instruments, including large-scale bond buying programmes, and to take a bigger role in providing much-needed finance to euro area banks via the Emergency Liquidity Assistance (ELA) programme. The Bank's actions over the crisis years have often been described as 'necessary'. But how are we to understand and evaluate necessity under these circumstances and how does it relate to legitimacy? It is suggested here that - contrary to the logic of necessity - the policy problems addressed by the ECB are very much *distributional* in their effects and, therefore, not suitable for technocratic resolution.

Put differently, the ECB – an institution defined by its independence from political processes and actors – found itself shaping the kinds of economic policies that *should* be made through political processes and by political actors. To be clear, the ECB's independence, per se, is not problematic. As noted above, it is in keeping with the prevailing consensus that monetary policy ought to be treated as a matter of technocratic expertise. The problem, rather, is that it fell to the ECB to guarantee the Eurozone's future. This, in turn, reflects a profound failure of the EU's political institutions, to which we shall return.

The ECB and the coercive turn in EMU governance

An important characteristic of ITC is its tendency to emphasise coercive enforcement of 'the rules', however those rules may have come into existence. Again, the ECB is heavily implicated in this coercive turn in EMU governance, as the de facto expansion of its mandate enabled it to exercise its power through informal means. As the examples below demonstrate, the ECB was instrumental in pressuring Greece and Cyprus into accepting conditionality-linked bailouts, while also using the implied threat of withdrawing liquidity support to push for major social policy reforms in Italy.

Take the ECB's decision, in mid-2015, not to increase the level of ELA to Greek banks to a level that would be necessary to counter the capital flight that the country's banking system was experiencing. The decision was announced in the midst of a fierce contestation between Greece and its creditors over whether it would receive further financial assistance and under what conditions. In fact, the ECB made its decision on 28 June 2015 – the day following Greek Prime Minister Alexis Tsipras's announcement of a referendum on the bailout terms offered by the creditors. It resulted in a three-week closure of Greek banks, which began days before the referendum was held. It is debatable whether the ECB was simply applying the ELA eligibility rules in a technical manner (with unfortunate timing), or whether it was deliberately signalling to Greeks the consequences of voting to reject austerity. In some ways, it does not matter. A decision that shuts down a country's banking system days before a major vote in that country is a political decision. The ECB simply lacks the legitimacy resources to take such a consequential action.

The second example concerns the ECB's intervention in Cyprus two years prior to the Greek ELA decision. On 19 March 2013, the Cypriot parliament rejected a ten billion euro bailout that controversially required the imposition of a tax on all Cypriot bank deposits over 20,000 euros. The ECB responded by issuing an ultimatum on 21 March that Cyprus either secure a new bailout before 25 March, or lose its ELA funding. The amended bailout package was duly adopted a few days later, in a form that did not require parliamentary approval.[23] Thus, the ECB was able to use the ELA programme to pressure the Cypriot government into accepting an austerity-linked bailout that the Bank itself, as part of the Troika, had helped to design and would help to oversee. It contributed to the undermining of democratic oversight in Cyprus by encouraging the Cypriot government to bypass the parliament.

The final example concerns the infamous Trichet-Draghi letter that was sent to the Italian government of Silvio Berlusconi on 5 August 2011 (discussed further below). In the letter, which was meant to

[23] See Wearden and Amos 2013; Smith 2013.

be secret but was later published by the *Corriere della Sera*, the former and then-current ECB presidents outlined a number of reform measures, which they urged the Italian government to undertake with the utmost speed.[24] The ECB had no legal basis make such a request, which called for comprehensive legal reform in areas including the labour market, public administration and fiscal policy – all areas of national competence. It was, rather, an attempt at coercion enabled by the ECB's leverage over national banking systems and justified by the prevailing atmosphere of emergency.

What all three examples have in common is that they involve the technocratic, non-democratically accountable ECB playing the role of teacher and disciplinarian in order to 'discipline and punish' the Eurozone's delinquent member states.[25] Again, that the ECB (like other central banks) is technocratic and non-majoritarian is not the problem. It is rather its role as the enforcement arm of the Troika that ought to concern us. Pressurising governments into adopting austerity measures is not an appropriate role for the narrowly-mandated ECB. More broadly, the EU's turn to coercive enforcement betrays the Union's purposes and values and contributes to the degradation of democracy in Europe, particularly in the countries of the Eurozone's periphery.

ITC and the normalisation of austerity

This chapter has argued that the EU's management of the Eurozone crisis has posed a serious challenge to democratic control over policymaking. Troublingly, this challenge has extended to policy areas that, according to the EU treaties, are matters of national competence. Thus, despite having no formal policymaking power in relation to member states' social welfare systems, austerity-focused ITC policies have 'severely reduce[d] the capacity of national social spaces to perform their redistributive functions'.[26] Though this loss of capacity has been exacerbated by the crisis, it precedes even the creation of EMU. As Costamagna shows, the subordination of national-level social to supranational-level economic priorities may be traced back at least as far as the 1980s and the adoption of the Single European Act (SEA), which translated into the EU's legal framework the broader neoliberal turn in Europe and beyond.[27]

[24] The letter is available at https://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?fr=correlati.
[25] Kundani 2018.
[26] Costamagna 2018b: 164.
[27] ibid 167f.

The constitutionalisation of free market logic was further entrenched by the CJEU, which found that key components of national welfare states clashed with key pillars of supranational law, including state aid rules, the free movement of workers and services and freedom of establishment. In this sense, we may regard ITC as an emergency iteration of longer-standing tendencies towards the privileging of market logic above other priorities; a process that was led then and now by non-majoritarian bodies.

How, then, has ITC contributed to the normalisation of austerity? The answer lies in the trends identified above, namely increased reliance on the depoliticised, technocratic expertise of supranational executive bodies and the turn to coercive enforcement. We may explicate these processes further in relation to three mechanisms. Firstly, the European Semester; secondly, bailout-linked conditionality; and thirdly, 'bailout-adjacent' conditionality. In short, we can see that the European Commission, backed by some member states, has used the euro crisis as a catalyst for increasing its oversight and disciplinary powers over national economic and social policies. The ECB too, has gained such powers, through both its liquidity provision and Troika roles.

The European Semester

One of the main mechanisms through which EU institutions have sought to supervise and influence social policies has been the European Semester. The European Semester was introduced in 2010. It was intended to provide a framework for the coordination of member states' economic policies, as the lack of fiscal convergence was seen as a major cause of the euro crisis. In accordance with the European Semester, member states submit draft budgets for scrutiny by the European Commission and Council. Every year, the Commission, having assessed the economic situation of each individual state, makes country-specific policy recommendations (CSRs), which are discussed, modified, and adopted by the Council of the EU. These recommendations are then meant to be implemented by member states in their budgetary and economic reform plans.

The CSRs are formally non-binding. However, they are detailed and the Commission has brought to bear significant pressure in seeking member state compliance.[28] Most importantly, the Commission has used the threat of sanctions under the excessive deficit procedure to push member states to adopt structural reforms deemed necessary to avoid macroeconomic imbalances, including in the area of labour market policy and pensions reform. To be sure, the EU institutions cannot directly enforce

[28] See Costamagna 2018a.

member state implementation of CSRs. Indeed, studies have shown that rates of CSR implementation are decidedly mixed.[29] Nevertheless, the use of soft mechanisms in policy areas in which the EU has no formal competences has opened up a space for the Commission to insert itself into national policy debates. Moreover, for some member states at least, the threat of enforcement action gives soft coordination mechanisms a hard edge.

Unsurprisingly, not all member states are equally vulnerable to this kind of pressure. The member states that are most vulnerable are those that are struggling to meet debt and deficit targets. In other words, states that are vulnerable to hard law enforcement, e.g. through the excessive deficit procedure, are also more vulnerable to incursions into their sovereign policy making space under the guise of non-binding recommendations. This is consistent with how ITC has manifested in other areas of social and economic policy; namely that it is the countries of the Eurozone's periphery that have borne the brunt of the structural adjustments deemed necessary to stabilise the currency union.

Where crisis-driven politicisation should have met with increased opportunities for genuine political contestation, at both European and national levels, it met instead with a determined effort by the Commission and other EU institutions to depoliticise the crisis response. In this respect, the specificity of many CSRs is notable. Rather than general advice, the recommendations 'look[ed] like narrow paths not allowing for any deviation from what EU institutions … consider[ed] as the "right way" towards salvation'.[30] Thus, austerity policies were presented not as a set of political choices with distributional consequences, but as objectively correct technical advice.

Bailout-linked conditionality

The scope for close surveillance of national social and economic policies has been greatest in relation to member states that have received bailouts from the EU institutions and the IMF. The basic bargain of bailout arrangements has been financial assistance in return for the affected state's adoption of austerity-oriented conditionality. Conditionality, in turn, has focused on the rationalisation of national social welfare systems, including the structural reform of labour markets (e.g. by making it easier for firms to dismiss workers or by limiting collective bargaining), pension and welfare cuts, and lowering spending on public healthcare systems. All these reforms are aimed at bringing about an internal devaluation in the bailout recipient state.[31]

[29] See Efstathiou and Wolff 2018.
[30] Costamagna 2018b: 175.
[31] Perez and Matsaganis 2018: 200.

The key legal instrument in the bailout arrangements is the memorandum of understanding (MOU) signed by the EU institutions and the recipient state. Like much of the crisis response, MOUs exist in a legal/constitutional grey zone, in that it has not always been clear whether and to what extent they are acts of EU institutions, the application of which is governed by EU law. This procedural uncertainty has enormous substantive implications, including over whether the CJEU can assess the compatibility of MOU provisions with the EU's Charter of Fundamental Rights.[32] The CJEU has shown in its other crisis-related case law that it is willing to give EU institutions and member states a very wide margin of discretion in doing what they claim needs to be done to save the euro. In *Pringle,*[33] the CJEU confirmed that euro states could go outside of the treaties in order to create a permanent bailout fund (the ESM). Meanwhile, in *Gauweiler*,[34] the Court essentially affirmed the ECB's right to define monetary policy and, thereby, the limits of its mandate. Thus, it is not all that surprising that MOUs have also largely escaped judicial scrutiny.

Nevertheless, the CJEU's reluctance to judicially review MOUs is a missed opportunity.[35] The Charter of Fundamental Rights was only fully incorporated into the EU's constitutional framework in 2009, with the entry into force of the Lisbon Treaty. The conditionality associated with the bailouts, beginning in 2010, presented an ideal opportunity to develop case law on EU citizens' rights, especially in the social and economic realms. Moreover, the substance of conditionality offered no shortage of potential test cases. For example, in *Sindicato dos Bancários do Norte and Others*, the Court found that public sector wage cuts imposed by the Portuguese government, as per its bailout programme, were outside of the Charter's scope of application, since they were not undertaken in order to implement EU law.[36] It was only in the *Ledra Advertising* case, which concerned the bank deposit haircut imposed as part of the Cypriot bailout, that the CJEU clearly specified that EU institutions must take the Charter into account when designing conditionality programmes.[37]

Thus, the ambiguous legal status of MOUs is consistent with the extra-constitutional character of much of the euro crisis response. This state of affairs serves as a reminder of the ways in which ITC

[32] See Polou 2017.
[33] Case C-370/12 *Pringle v Ireland* [2012] ECR I-13.
[34] Case C-62/14 *Peter Gauweiler et al v Deutscher Bundestag* [2015].
[35] See Case T-541/10 *ADEDY and Others v Council* [2012]; Case T-215/11 *ADEDY and Others v Council* [2012]; Case C-128/12 *Sindicato dos Bancários do Norte and Others* [2013]; Case C-264/12 *Sindicato Nacional dos Profissionals de Seguros e Afins* [2014].
[36] Costamagna 2018b: 183; see also Polou 2017.
[37] Joined Cases C-8-10/15 P *Ledra Advertising and Others v Commission and ECB* [2016].

undermines the EU's character as a community of law and limits the space available to civil society actors for a constitutional contestation of austerity at the EU-level.

'Bailout-adjacent' conditionality

It is worth noting a third mechanism for the conveyance of formally non-binding recommendations for the reform of national social spaces, namely 'bailout-adjacent', or implicit, conditionality. Stefano Sacchi describes implicit conditionality as conditionality 'based on an implicit understanding of the stakes and sanctions involved, underlain by some measure of power asymmetry'.[38]

While the power of EU institutions to induce social and economic reform in member states was greater in relation to bailout recipients, it was also considerable in relation to *potential* bailout recipients. The case of Italy best illustrates the workings of this dynamic. In the summer of 2011, financial markets came to doubt the Italian government's ability to service its huge sovereign debt, then the fourth largest in the world. Market concern was triggered by events elsewhere in the Eurozone, including the negotiation of a bailout for Portugal, as well as Greece's second bailout. Fears of contagion were reflected in a growing yield differential between Italian and German bonds, which threatened Italy's ongoing access to bond markets. Market discipline thus acted as a powerful operating mechanism, increasing Italy's reliance on ECB intervention in the form of bond buying on secondary markets.

It was in this context that the Trichet-Draghi letter was sent to Berlusconi's government on 5 August 2011. Participation in the ECB's Securities Market Programme (SMP) was the carrot. Being cut off from SMP bond purchases – and, thereby, being forced into a formal EU/IMF bailout – was the stick. The detailed policy prescriptions in the letter focused heavily on labour market and pension reforms as 'functional equivalents' of the missing preconditions of EMU as an optimal currency area. Despite not being formalised in an MOU, these prescriptions were 'stringent and pervasive' and progress towards their implementation was closely monitored by the European Commission as well as by member states in the European Council. Indeed, Berlusconi's loss of credibility in the eyes of his peers – very much connected to his inability to pass the reforms demanded by the Trichet-Draghi letter – led to his resignation and replacement by a technocratic government led by Mario Monti.[39]

[38] Sacchi 2015: 77f.
[39] Sacchi 2015: 81ff.

Thus, the situation of Italy in 2011-2012 is also exemplary for highlighting the expanded and politicised role of the ECB in the euro crisis. The ECB both set the policy reform agenda, via the Trichet-Draghi letter, and enforced it, via Italy's inclusion or non-inclusion in the SMP. For a bailout-adjacent euro state, such as Italy, (non-)access to ECB programmes was an extremely powerful incentive. That, again, draws attention to the key claims of the chapter – that the ECB has become one of the most important agents of ITC, but that its politicisation has not been accompanied by greater accountability. Nor has its mandate been formally adjusted; a process which would have enabled (indeed, required) a wide-ranging public debate on the constitution of EMU.

Consistently with how ITC has unfolded across the spectrum of EU policy activity, the primary aim of EU-level interventions into national social welfare systems has been the stabilisation and reinforcement of EMU, with its current membership, and without turning it into a transfer union. In other words, under ITC, social policy reforms were a means to a higher end, rather than ends in themselves. This is consistent with the dominant crisis narrative, which placed the blame for EMU's problems (and, consequently, the burden of adjustment), solely on debtor states.[40] The aim of this chapter is not primarily to judge the propriety or desirability of this political agenda, but rather to emphasise that it *is* a political agenda, a fact that has been consistently underemphasised by key protagonists such as the ECB and the European Commission.

From the Eurozone crisis to the COVID-19 pandemic: New opportunities for political contestation?

Much has been written about how the dominant non-majoritarian, technocratic approach to EU governance impoverishes democratic politics at both the national and supranational levels.[41] The problems inherent in this mode of governance have been exacerbated by the euro crisis, which has increased the political salience of economic and monetary policymaking in the Eurozone much more than it has increased the opportunities for genuine political contestation. Indeed, particularly in the highly indebted countries of the Eurozone's periphery, the combined impact of crisis and EU-level crisis management has been to *limit* the choices available to national governments and national electorates.[42]

[40] See Perez and Matsaganis 2018: 192.
[41] See Follesdal and Hix 2006; Scharpf 1999, 2009; Schmidt 2020.
[42] See Armingeon, Guthmann and Weisstanner 2016; Matthijs 2017.

One of the most significant legacies of the Eurozone crisis has been the empowerment of technocratic agencies, such as the ECB. To a large extent, this empowerment was brought about by the indecisiveness of political bodies, such as the Council, which preferred to avoid the difficulties of securing democratic mandates for Eurozone reform by reframing *political* questions (e.g. over the need for system of institutionalised transfers) as *technical* ones (e.g. concerning monetary policy transmission mechanisms and appropriate levels of liquidity assistance to banks). The ECB, too, has cast its crisis response measures as non-political attempts to solve coordination and efficiency problems, for example, by justifying the OMT programme as a corrective response to a 'disturbed' financial system.[43]

However, the problems uncovered by the euro crisis are political conflicts with clear distributional consequences. The crisis response, with its focus on bailouts in exchange for austerity, has created winners and losers within and between member states. The depoliticisation strategies deployed by EU executive bodies – including a rhetorical emphasis on 'exceptional circumstances' leaving 'no alternative' to seemingly preordained policy responses, as well as a preference for ad hoc and extra-constitutional decision-making modes in order to preempt contestation – have damaged the EU's legitimacy and helped to fuel the rise of populist parties in a number of member states.[44]

More promising, perhaps, is the space for political contestation that has opened up in relation to the question of how the EU and its member states should respond to the COVID-19 pandemic. Even as European governments struggle to deal with the public health dimension of the crisis (which almost entirely concerns national competences), attention has turned to the economic dimension, in which the EU can, and should, play a leading role. Unlike the euro crisis, in debating how best to promote economic recovery from the pandemic, austerity has not captured the narrative agenda. As a result, there has been greater space for debate and contestation – over the meaning of solidarity, the obligations member states owe to one another and the role of the EU in marshalling and distributing resources.

Indeed, EU-level responses so far have focused on facilitating public spending, e.g. through the suspension of state aid rules and debt and deficit limits, along with the establishment of the ECB's Pandemic Emergency Purchase Programme (PEPP) and the announcement of a 750 billion euro Next Generation EU recovery fund.[45] The Commission, in particular, has avoided the kind of 'debt and

[43] See Draghi 2012.
[44] See Hobolt and Tilley 2016.
[45] See Darvas 2020.

guilt' rhetoric that justified harsh treatment of Southern member states during the euro crisis. To be sure, not all member states support a generous approach. The 'frugal four' (Austria, Denmark, the Netherlands and Sweden) have pushed back against the idea of no-strings-attached grants for badly affected states. While the package agreed by the European Council in July 2020 did include a significant conditionality-free grant component, the rest of the funds are earmarked for low-interest loans, for which conditionality is still being worked out.[46] Operationalisation of the Recovery and Resilience Fund (RRF) is also contingent on agreement between the Council and the Parliament, which are still trying to find a common position on thorny issues such as whether and how to link RRF disbursement to rule of law conditionality.[47]

At any rate, member states will need to submit 'recovery and resilience' plans to the Commission before any funds are disbursed. These plans provide the mechanism through which disbursement of pandemic recovery funds is linked to the European Semester – and, therefore, to the fiscal surveillance through which EU institutions and Northern euro members have pursued structural reforms in their Southern counterparts. Thus, the pandemic has led to the suspension of austerity, but not its abandonment. Nevertheless, there is reason to hope that EU leaders have learned the lessons of the last economic crisis, especially as regards the long-term havoc wreaked by austerity on already-battered economies.

Conclusion

Joseph H. H. Weiler famously described negative popular reactions to the Maastricht Treaty as 'deliciously hostile', because they foreshadowed a much-needed politicisation of European integration.[48] Yet, nearly thirty years later, avenues through which politicisation may be productively channelled remain underdeveloped at the European level. During the Eurozone crisis, key supranational institutions, such as the European Commission and the ECB, sought to depoliticise the austerity-focused crisis response, downplaying EMU's structural flaws and treating policies with significant redistributive consequences as objectively correct responses to national policy failures.

[46] The grants and loans together make up the 672.5 billion euro Recovery and Resilience Facility (RRF) – the centerpiece of the Next Generation EU package. Wariness over potential loan conditionality has led some badly affected states, such as Spain, to consider only requesting the grants to which they are entitled, not the loans. Pérez 2020.
[47] Gros, Blockmans and Corti 2020.
[48] Weiler 1999: 4.

This strategy recalls that adopted by international financial institutions and their developed state backers in response to the developing world's push for a New International Economic Order (NIEO) in the 1970s. As Adom Getachew has written, the IMF and World Bank successfully insulated the global economy from political contestation by recasting it as 'an arena of technical and legal expertise, better left to economists and lawyers rather than politicians'.[49]

Something similar has happened in the euro crisis response, where austerity policies, underpinned by an ordoliberal economic ideology, have crowded out other ways of thinking about and responding to macro-economic imbalances in the Eurozone. As with the neoliberal policies that prevailed at a global level in the 1970s and 1980s, the ordoliberal policies that have been carried into effect via ITC have exacerbated economic differences between a core and a periphery, while also contributing to the hollowing out of democracy in those peripheral states whose policy choices have been greatly circumscribed by their reliance on EU financial assistance. As the EU turns its attention to countering the devastating economic impact of the COVID-19 pandemic, it can and must do things differently. Indeed, with early initiatives centred on a generous bond buying programme by the ECB and a Commission-spearheaded recovery fund, signs are tentatively positive that austerity is no longer the only game in town.

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[49] Getachew 2019: 173.

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