CONDITIONALITY AND ECONOMIC CONSTITUTIONALISM IN THE EUROZONE *

*Cesare Pinelli***

Abstract

The EU's approach to conditionality was for long centered on respect for human rights and democracy from third countries, including those of Eastern Europe after the break-up of communist regimes. In the aftermath of the 2008 financial crisis, "strict conditionality" instruments were instead adopted for making financial assistance to the Eurozone's Member States conditional upon their compliance with a fiscal consolidation plan, and reflected the idea that rules should supplant discretionary powers in the conduction of fiscal and economic policy.

A first question is whether strict conditionality corresponds to a new paradigm of EU economic constitutionalism, as assumed in the current theoretical debate on ordoliberalism. At this respect, I will shift the attention on the fact that, among the Constitutions of EU Member States, only the 2009 amendments to the German Basic Law on the debt-brake reflect an ordoliberal approach. Such difference reveals a deep cultural divide, that goes beyond these states' compliance with EU obligations.

A further question derives from the emergence of a "rule of law crisis" within various Member States, affecting the maintenance of certain fundamental principles to which all national Constitutions are committed, and that correspond to the "common values" enshrined in Article 2 TEU. Pressure for establishing a model of economic constitutionalism should thus be compared with the reluctance of EU political leaders in confronting with a crisis of the values on which the Union "is founded". Against such background, the suggestion of making delivery of EU funds conditional upon respect for democracy and the rule of law within the Member States might at least demonstrate that conditionality could exert a different function, that of connecting together the now dispersed paths of EU constitutionalism, namely the economic one and that founded on the "common values".

** Full Professor of Public Law, University of Rome "Sapienza"

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1. The practice of conditionality and its different versions

The term conditionality denotes the practice of international organizations and States of making aid and co-operation agreements with recipient States conditional upon the observance of requirements such as financial stability, good governance, respect for human rights, democracy, peace and security. The EU's approach to conditionality was for long centered on respect for human rights and democracy from third countries, including granting formal recognition to the new States established in Eastern Europe after the break-up of communist regimes, and then ensuring accession to such States into the EU.

In the aftermath of the 2008 financial crisis, "strict conditionality" instruments were instead adopted on the ground of making financial assistance to the Eurozone's Member States conditional upon their compliance with a fiscal consolidation plan. While giving priority to the objective of discharging the financial debt at the expense of economic growth, strict conditionality is frequently criticized for having provoked a powerful job destruction process in the countries concerned[1].

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[1] See C. Pinelli, *Conditionality,* Max Planck Encyclopedia of Public International Law (2015).

My first question is where are we now with respect to this form of conditionality, particularly to its institutional premises, namely the idea that rules should supplant discretionary powers in the direction of fiscal and economic policy. Is this the new paradigm of economic constitutionalism within the EU, or it amounts rather to a series of measures that are likely to be overridden with the end of the financial crisis? Is strict conditionality, as well as the Fiscal Compact's rules, likely to bind the EU institutions' scrutinies, including those of the European Council, or are they rather interpreted according on different criteria? Which are the cultural roots of this version of economic constitutionalism, and are they related to the "common values" on which the EU claims to be founded? Finally, given the opening of "a rule of law crisis" within various Member States, could conditionality function in a different direction, namely by making delivery of EU funds conditional upon respect for democracy and the rule of law within its Member States?

While requiring contextual attention to their theoretical, legal, and political aspects, these questions appear crucial for an understanding both of the features and of the developments of European economic constitutionalism.

2. The IMF version

The first official document mentioning the term conditionality was the IMF 1979 'Guidelines on Conditionality', which corresponded mainly to a codification of practice that had already been shaped by the IMF[2]. The IMF's aid to developing countries was made conditional upon acceptance of structural adjustment programmes, i.e. economic reforms aimed at discharging their financial debts, and of performance criteria specifying the programmes' implementation. Failure to fulfil the criteria would result in a cutting off or suspension of balance of payment support. In turn, in helping members to devise adjustment programmes, the IMF pays 'due regard to the domestic social and political objectives, the economic priorities, and the circumstances of members, including the causes of their

[2] E. Denters, *New Challenges to IMF Jurisdiction,* XXIX NYIL 3–43, (1998).

balance of payments problems'[3]. The World Bank also used conditionality to ensure the achievement of structural adjustment programmes from developing countries, although with the aim of promoting economic growth, which corresponds to its own primary responsibility.

During the 1990s scholars demonstrated that structural adjustment programmes failed in changing national policies and reduced, rather than enlarged, the population's access to public services[4]. This failure became particularly clear in November 1999, when Joseph Stiglitz, the World Bank's chief economist, resigned partly due to disagreement over the Bank's continuing use of conditionality[5]. Finally, multilateral financial institutions changed their own approach. Since the IMF's 1996 'Heavily Indebted Poor Countries Initiative', the progressive reduction in the debts of poor countries was made conditional upon the governments launching social projects concerning education and housing, on the assumption that the success of the market economy requires public intervention aimed at reducing poverty and enhancing general welfare[6]. Such an approach, that was further reinforced in the Millennium Development Goals, agreed by nearly 150 heads of state and government at the 2000 UN Millennium Summit, obtained better results, although lack of democracy, maladministration and corruption still endanger the chances of sustainable development in many countries[7].

As for civil and political human rights and democracy, direct interventions by the IMF and the World Bank, as well as the WTO, are instead deemed to be inhibited by their own statutes,

[3] International Monetary Fund "Guidelines on Conditionality" Decision No 6056-(79/38) (2 March 1979) Selected Decisions and Selected Documents of the International Monetary Fund 24, 137.

[4] P. Klein, *Les Institutions Financières Internationales et Les Droits de la Personne*, 32 RBDI 97–114, (1999).

[5] J.T. Checkel, *Compliance and Conditionality*, Working Paper 00/18 ARENA/Universitetet i Oslo 2000.

[6] See particularly the 2005 operational policy statement of the World Bank "*Review of World Bank Conditionality*".

[7] Department for International Development "*Partnerships for Poverty Reduction: Rethinking Conditionality: A UK Policy Paper*", (2005).

entrusting these organizations with tasks exclusively driven by economic purposes[8].

3. The EU original version

Unlike the above mentioned organizations, the EU's approach to conditionality was for long centered on respect for human rights and democracy. This approach was common to diverse activities such as granting formal recognition to the new States established in Eastern Europe after the break-up of communist regimes, ensuring accession of these countries into the EU, and development assistance, bilateral trade and co-operation agreements with third countries.

In particular, conditionality deeply affected the enlargement process since the 1989 creation of a new relationship of the EU with Central and Eastern European countries through trade co-operation, co-operation agreements and development assistance. A decisive step was the Copenhagen European Council settlement in June 1993 of political criteria for accession to the EU of candidate countries, namely 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'[9]. Since then, human rights scrutinies have been taken within the framework of the so-called accession partnership, where the achievement of specific objectives for particular candidate countries, itemized within partnership documents, was assessed in regular annual country reports[10].

On the other hand, the EU had a pivotal role in promoting human rights and democracy in other continents, both in terms of procedures and means aimed at that end. Such special engagement reflects a tradition which goes back to the adhesion by EU Member States to the ECHR, testifying the first efforts at an international level to override national borders for the sake of human rights protection.

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[8] See among others I.F.I. Shihata, *La Banque Mondiale et les Droits de l'Homme*, 32 RBDI 86–96, (1999).

[9] European Council, *Conclusions of the Presidency,* at 13.

[10] W. Sadurski, *Charter and Enlargement,* ELJ 8, 343, (2002).

4. Resort to a macroeconomic conditionality in the context of the sovereign debt crisis

Since 2010, a series of measures subjected to conditionality were taken in the Eurozone from different entities (the EU, the EU Member States, the European Central Bank (ECB), and the IMF) with the aim of contrasting the sovereign debt crisis that affected some countries. In May 2010, the euro area Member States (except Greece) concluded an Agreement with Greece to coordinate a series of bilateral loans to that country. A Troika was established, composed of representatives of the IMF, the ECB and the European Commission, with the end of negotiating a program to assist Greece, and of further monitoring its compliance with a fiscal consolidation plan.

Although the EU was not formally involved in the Agreement, the Council adopted immediately a Regulation establishing a European Financial Stabilization Mechanism (EFSM) based on Article 122, para. 2, of the Treaty on the Functioning of the European Union (TFEU), which could be used in similar situations (Council Regulation 407/2010). Furthermore, wearing their intergovernmental hats, the ministers of the euro area adopted a Decision in which they committed themselves to support a separate and additional loan and credit mechanism, called the European Financial Stability Facility (EFSF). While differing on various grounds, both these mechanisms of lending money were subjected to general economic policy conditions aimed at re-establishing a sound economic or financial situation in the beneficiary State, and to monitoring compliance with policy conditionality from that State[11].

However, the legal basis of the Council Regulation 407/2010 was deemed controversial. While Article 122 TFEU presupposes that the beneficiary State is threatened with 'exceptional circumstances beyond its control', the governments of the countries involved in the financial crisis were suspected to have partially created their sovereign debt. Since only a treaty amendment could solve the problem, on 25 May 2011 a European Council's decision, adopted with the simplified revision procedure of Article 48, para. 6, TEU, added a new paragraph to

[11] See respectively Article 3 (3), b) and c), of Council Regulation 407/2010, and Article 2 (1), b) and c), of EFSF Framework Agreement.

Article 136 TFEU. It runs as follows: 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to *strict conditionality*'. It is worth noting that the European Council left aside the EP's proposal of adding to the words 'strict conditionality' the following text: 'in accordance with the principles and objectives of the Union, as laid down in the Treaty on European Union and in this Treaty' (EP Resolution, 23 May 2011).

With the stipulation by most of the EU Member States of the 2012 "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union", or Fiscal Compact, this design was further integrated. While including quasi-automatic sanctions in case a Member State is found in violation of the deficit or debt rules, the Fiscal Compact was presented as initiating 'a substantially *new* rules-based regime' vis-à-vis "the portrayal of the pre-crisis regime as essentially dysfunctional, as rule-based only in name"[12]. "Exactly by suggesting that the existing rules-order was bogus", it is added, "its authors invoked the license needed to wield far-reaching discretion in the service of establishing a new one. The creative deployment of EU institutional powers (notably of the Commission), the circumvention or compression of national-parliamentary debate, as well as the rise of extra-EU mechanisms to marginalise the European Parliament, are just some of the actions taken to this effect"[13].

On the other hand, while giving priority to the objective of discharging the financial debt at the expenses of economic growth, not less than of the population's welfare, the Fiscal Compact is believed to rely on an "imbalanced conditionality", that, being referred to structural adjustment programs similar to those prospected by the IMF at the end of the 1970s, provoked "a powerful job destruction process" in the countries concerned, without putting the premises of "a sound fiscal consolidation"[14].

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[12] J.White, *Policy Between Rules and Discretion, Ordoliberalism*, at 297.

[13] Ibidem.

[14] See among others M.J. Rodrigues, *Youth Unemployment, Socio-Economic Divergences and Fiscal Capacity in the Euro Area*, Policy Paper 101 – Notre Europe,

In addition, authorities such as the Troika are entrusted with a strict monitoring of the beneficiary State's compliance with the fiscal adjustment programs, that may go the point of vanishing the role of democratically elected institutions.

In addition, on 6 September 2012 the ECB adopted a decision regarding the Eurosystem's outright monetary transactions (OMT) in secondary sovereign bond markets, aimed at 'safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy'. The OMT programme provided that the ECB would buy sovereign bonds of the issuing country under the condition that the latter agreed to a fiscal adjustment program within the terms of the EFSF or of its successor, the European Stability Mechanism (ESM). Even the ECB's creative resort to conditionality requires here attention, irrespective of its very different effects on the Eurozone crisis developments[15].

5. Conditionality in the ECJ case-law

The macroeconomic conditionality's mechanism was interpreted by the European Court of Justice in two well-known decisions. In *Pringle* the Court held that the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU "is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies" (para. 69). More precisely, the

at 10, 2013; and Z. Darvas, *The Greek Debt Trap: An Escape Plan,* Bruegel Policy Contribution, Issue 2012/9, 1 (2012).

[15] According to M. Matthijs, *Powerful rules governing the euro: the perverse logic of German ideas*, Journal of European Public Policy, vol. 23, no. 3, 387, (2016), "As long as German policy-makers stuck to their strict ordoliberal crisis narrative of 'national' sin and the need for redemption – follow the rules, implement austerity measures and enact structural reforms – the eurozone debt crisis kept getting worse, and went from a containable Greek problem to a systemic crisis. Only when the crisis narrative shifted towards a more 'systemic' one – with the introduction of a eurozone banking union and single supervisory mechanism, as well as the need for the ECB to start acting like a real lender of last resort through OMT – did the crisis gradually start to wane, though only to morph into a more long-term crisis of deflation and economic stagnation".

Court stated that "While it is true that, under Article 3, Article 12(1) and the first subparagraph of Article 13(3) of the ESM Treaty, the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, appropriate to the financial assistance instrument chosen, which can take the form of a macro-economic adjustment programme, the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union" (para. 111)[16].

However, the very Court's admission that the additional paragraph to Article 136 TFEU was introduced with the aim of legitimizing a mechanism whose legal basis were strongly disputed under EU law proves that it consisted in establishing an emergency rule, such as that of making financial support dependent on loan agreements specifying not only the *level* of cuts to be made, but also *in what areas* they are to be made by a Member State[17]. To say that the mentioned provision renders 'strict conditionality' compatible with the coordination of national economic policies obliterates thus a crucial point. As it has been observed, 'The *Pringle* judgment endorses a shift in the EU's monetary constitution from crisis prevention to crisis management, when bailout funds are only granted in conjunction with the imposition of strict conditionality on beneficiary states. By making the imposition of strict conditionality a constitutional requirement, the Court has imported a concept with controversial reputation into EU law. This constitutional shift in the narrow sense also has constitutional implications in a broader sense; the imposition of strict conditionality is sure to change the constraints within which the political bargaining of the beneficiary states take place'[18].

Furthermore, the Court denied that the ESM was in breach of the general principle of effective judicial protection as enshrined in Article 47 of the Charter of Fundamental Rights,

[16] ECJ, C:2012:756 14 JUDGMENT OF 27. 11. 2012 – CASE C-370/12 PRINGLE
[17] J. White, *Authority under Emergency Rule,* 78 The Modern Law Review 4, 585-610, (2015).
[18] P.-A. Van Malleghem, *Pringle: A Paradigm Shift in the European Union Monetary Constitution*, 14 German L. J., 1, 163-164 (2013).

since "the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism" (para. 180).

The Court's approach to the interplay between EU law and an international instrument as the ESM Treaty was thus clearly formal, and led to a contradiction. While confining herself to the mere ascertainment of the Member States' purpose of legitimizing emergency measures through an amendment to the TFEU, the Court claimed the irrelevance of EU primary law (such as the Charter's provisions) vis-à-vis those measures, being enacted by international instruments. Alternatively, it had to admit that the amendment was not reconciliable with foundational principles of the European project such as equality, mutual respect and co-operation, transformed 'into command-and-control relationships'[19]. Such admission would certainly amount to challenge the European Council, which the Court did not dare to do.

Pringle, together with the EP's failure in convincing the European Council to add a reference to "the principles and objectives of the Union" as a limit to strict conditionality, and with the ancillary role played by the Commission in such context, is thus likely to confirm the weakness of the traditional EU supranational institutions vis-à-vis the rise of intergovernmentalism, combined with resort to international law instruments, that affected the Eurozone's response to the financial crisis. The sole supranational institution resisting such rise was the ECB, whose legitimacy rests however on technical expertise rather than on the principles that in the past decades guided the 'integration through law' project.

In *Gauweiler and others*, the European Court of Justice was asked whether a programme for the purchase of government bonds on secondary markets (OMT) could be covered by the ECB powers under the TFEU provisions. The Court, partly relying on

[19] C. Joerges, *The Overburdening of Law by Ordoliberalism and the Integration Project*, J.Hien & C.Joerges (eds.), *Ordoliberalism, Law and the Rule of Economics*, Hart, 196 (2017).

Pringle, affirmed that such programme "is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States" (para. 55), and that it could not be "treated as equivalent to an economic policy measure" to the extent that it interfered only indirectly in the field of economic policy (para. 59).

Nor the fact that the ECB made implementation of the programme conditional upon full compliance with EFSF or ESM macroeconomic adjustment programmes brought the Court to a different conclusion: the purchase of government bonds on the secondary market subject to a condition of compliance with a macroeconomic adjustment programme could indeed be regarded as falling within economic policy when the purchase is undertaken by the ESM, with the difference, however, that the latter "is intended to safeguard the stability of the euro area, that objective not falling within monetary policy", while the ECB may use that instrument "only in so far as is necessary for the maintenance of price stability" (para. 64), and "is not intended to take the place of that of the ESM in order to achieve the latter's objectives but must, on the contrary, be implemented independently on the basis of the objectives particular to monetary policy" (para. 65).

On the other hand, the Court held that, when it makes choices of a technical nature and undertakes forecasts and complex assessments, the ECB "must be allowed…a broad discretion", subject to a proportionality test only for the obligation "to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of the reasons for its decisions" (para. 69). Unsurprisingly, the conclusion was that the ECB's analysis of the economic situation of the euro area was not "vitiated by a manifest error of assessment" (para. 74).

Gauweiler needs to be compared with *Pringle* on the following respects. First, while in *Pringle* the Court recurs to a formalistic approach in distinguishing the ESM treaty from EU law far more than required from the former's nature of international treaty, *Gauweiler* reflects, to the contrary, a substantial approach with the aim of putting under the label of 'monetary policy' all the tasks that the ECB had decided to acquire beyond the TFEU's letter. Second, both approaches reveal an

extreme caution of the Court in scrutinizing under EU primary law how the conditionality mechanism is activated, be it by the ESM or by the ECB. Third, both these institutions should be considered as seats of an "unaccountable technocracy", with the crucial difference, however, that only the former is wrapped in a legal device virtually threatening the whole construction of the EU. While *Pringle* says the final word on the possibility for the ECJ of checking the legal constraints issued by the ESM Treaty, *Gauweiler* leaves of course entirely open the possibility of judicial scrutinies on the decisions of an EU institution such as the ECB.

Finally, while viewed contextually, the two cases reveal the paradox resulting from the measures adopted in the Eurozone as institutional responses to the crisis. The pretention of national governments to create a system based on automatisms, and the discretionary powers acquired by the ECB beyond the maintenance of price stability, contradict the premises on which functions are usually distributed between governments and central banks.

It is this double contradiction that characterizes the Eurozone's crisis management. Therefore, the issue at stake cannot simply consist in what is left of the powers of the Member States in the sphere of economic policy, on the presumption that *Gauweiler* has legitimized the ECB as "an extremely powerful actor, albeit one which needs the support of the machinery ensuring the targeted conditionality of financial assistance", and that "Europe's 'economic constitution' and its entire constitutional configuration has been replaced by the discretionary decision-making powers of an unaccountable technocracy"[20]. This is just one side of the coin. The other one consists of the imposition of structural convergence of the southern with the northern economies of the Eurozone: and "command-and-control interventions, which are guided by the presumption that one size will fits all, are accompanied by the risk of destructive effects. The imposition of changes with disintegrative impact is not only unwise it is also illegitimate"[21].

[20] C. Joerges, *The Overburdening of Law,* cit. at 19, 198.

[21] C. Joerges, *Comments on the Democratisation of the Governance of the Euro Area*, *European Papers*, Vol. 3, at 80 (2018).

Resort to macroeconomic conditionality is involved in both cases. And it is unlikely to be overridden with the end of the financial crisis, not only because it is enshrined in the TFEU, irrespective of a possible transformation of the ESM, but also because in the EU context decision-makers are unable to claim that they will not resort to extraordinary measures again. As it has been demonstrated, none of the following claims are plausible: 'a) that the conditions of crisis will not recur (e.g. because better policy-making will ward them off), or b) that, should crisis recur, new procedures are in place that will minimize executive discretion, or c) that the identity of the decision-makers has changed, such that those with a proclivity for extraordinary measures have left the political stage'[22].

6. A smoother form of conditionality

So far, we have examined why a typical mechanism of macroeconomic conditionality was inserted in the TFEU, which institutions recurred to it, and how it has been interpreted by the Luxembourg Court.

Attention needs now to be driven to Article 3, para. 2, of the Fiscal Compact, recommending to adapt national law to the herein mentioned rules 'through provisions of binding force and permanent character, *preferably constitutional*, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes'. It expresses a smooth form of conditionality, certainly smoother than the "strict" one provided in Article 136 TFEU, but also more significant for exploring premises and implications of EU economic constitutionalism.

The TSCG, stipulated in March 2012, is frequently considered as mirroring "German positions rather than collective compromise"[23]. This is a rather inaccurate assumption, since the treaty's content corresponds to a great extent to EU regulations already in force (the "Two-Pack" and the "Six-Pack", in force since November 2011).

[22] J. White, *Authority under Emergency Rule*, cit. at 17, 3.

[23] See e.g. S. Dullien and U. Guérot, *The Long Shadow of Ordoliberalism: Germany's Approach to the Eurocrisis*, European Council on Foreign Relations, Policy Brief/49, 2 (2012).

There are exceptions though, the most significant of which for our purposes concerns Article 3, para. 2. It reflects an attempt of modelling the Constitutions of the Member States on the version of economic constitutionalism provided in the 2009 amendments to the German Basic Law centered on the 'debt-brake'. In particular, it sends a clear message to the Eurozone's most indebted countries such as Spain and Italy. These did adapt their own constitutional provisions to the TSCG rules, without including however the debt-brake rules that are expressly inserted in the Basic Law. Such omission is of course legally irrelevant on the ground of these States' compliance with their obligations under the TSCG and the EMU rules, that are 'guaranteed to be fully respected and adhered to throughout the national budgetary processes' in the terms of Article 3, para. 2, TSCG. It rather reveals the resistance of those States, notwithstanding their financial conduct was then under attack, to conform the respective Constitutions to the economic constitutionalism's model provided in the 2009 amendments to the Basic Law. Nor are the other Eurozone's Member States more prone to accept it. But where did this model come from?

7. The debate on ordoliberalism

In the aftermath of the TSCG's approval, it was observed that "An important but rarely discussed reason for Germany's emphasis on price stability is the influence on German economic thinking of 'ordoliberalism' – a theory developed by economists such as Walter Eucken, Franz Böhm, Leonhard Miksch and Hans Großmann-Doerth as a reaction both to the consequences of unregulated liberalism in the early years of the twentieth century and subsequent Nazi fiscal and monetary interventionism"[24].

Since then, a dense theoretical debate has taken place on whether the measures adopted in response to the Eurozone's financial crisis can be put under the label of ordoliberalism: it is in this perspective that scholars have addressed the topic of EU economic constitutionalism. Some reduce ordoliberalism to a

[24] S. Dullien and U. Guérot, *The Long Shadow of Ordoliberalism: Germany's Approach to the Eurocrisis*, cit. at 23, 2.

specific version of neoliberalism[25], namely the ideology forged during the Thatcher's and Reagan's governments that is still with us[26]. For others the former differs on many respects from neoliberalism, and it is neoliberal, rather than ordoliberal, principles that are reflected in the design of the monetary union[27].

Although macroeconomic conditionality resembles to that adopted by the IMF in the past decades, thus revealing its neoliberal imprinting, I will not engage in a war of labels aimed at establishing whether EU economic constitutionalism reflects a neoliberal and/or an ordoliberal conception. A larger approach is needed at this respect.

It should be borne in mind that ordoliberalism was launched against the totalitarian states as well as the rise of trusts and cartels in economy: it relied on rules, and contrasted resort to policy discretion, with the intention of limiting both public powers, which were correspondingly prevented from active intervention in the economy, and private powers through legal restraints aimed at ensuring market competition. It was a new generation of ordoliberal scholars, inspired by Friedrich von Hayek, that re-defined "the objectives and the methods of national and European competition law dramatically. From this time onward, their focus was on the critique of anti-competitive state activities and the promotion of entrepreneurial freedom, rather than the control of economic power"[28].

Reliance on rules remained instead as the core legacy of the ordoliberalism's original version. But it lost its significance with respect to the division of labor between the European Community and its Member States, depicted with the fortunate formula "Smith abroad, Keynes at home"[29]. Nor can the institutional set-up of EMU be traced back to the origins of ordoliberal monetary thinking; it is rather the rule-based focus in ordoliberal economic thought that might describe the German stance during the

[25] A. Wigger, *Debunking the Ordoliberal Myth in Post-war Europe*, *Ordoliberalism, Law and the Rule of Economics*, 169 ff.
[26] C. Crouch, *The Strange Non-Death of Neo-liberalism* (2010).
[27] B. Young, *Neoliberalism in Germany's and the EU's Crisis Management*, *Ordoliberalism*, at 137.
[28] C. Joerges, *The Overburdening of Law,* cit. at 19, 190.
[29] R. Gilpin, *The Political Economy of International Relations*, (1987).

Eurozone crisis[30]. Paragraph 8 of the EU Regulation 1175/2011 (Six-Pack) is telling at this respect: "Experience gained and *mistakes made* during the first decade of the economic and monetary union show a need for improved economic governance in the Union, which should be built on a stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of national economic policies". The alternative is here altogether clear: discretion is always mistaken, what can save the EU economic governance is only "national ownership of commonly agreed rules and policy", namely awareness by the Member States of the superiority of rules over discretion.

8. The 2009 amendments to the German Basic Law and the quest for stability of the fiscal rules

The debate on ordoliberalism affords a wide array of suggestions regarding both the historical roots and the current challenges of EU economic constitutionalism. In my opinion, it appears however at least incomplete, to the extent that it does not take into account of the 2009 amendments to the German Basic Law on the debt-brake. Such perspective is likely to give an understanding not only of the German conception of economic constitutionalism, but also of Germany's expectations of the financial conduct of the other EMU Member States.

The debt brake enshrined in Article 109, para. 3, of the Basic Law explicitly requires that, as a general rule, central and state government must achieve balanced budgets without incurring new debt, and it therefore differs substantially from the previous investment related borrowing limit. The debt brake does not merely set a target; it imposes a ceiling that must not be overshot. Suitable safety margins are therefore needed to allow governments fiscal leeway under the new rules. Exemptions to the ban on borrowing by central and state government budgets are permitted in order to offset cyclically induced burdens vis-à-vis a normal setting. However, this hinges on the condition that

[30] L.P. Feld, E.A. Köhler and D. Nientiedt, *Ordoliberalism, Pragmatism and the Eurozone Crisis: How the German Tradition Shaped Economic Policy in Europe,* CESIFO working paper no. 5368, (2015), at 9.

comparable surpluses be built up in good economic times in order to prevent a sustained rise in government debt caused by the long-term accumulation of burdens that were deemed to be cyclically induced. The borrowing limit on the central government budget is considered to have been observed if, after adjustment for cyclical effects, net borrowing does not exceed a threshold of 0.35% of gross domestic product (GDP). Further exceptions can be made in the event of specific emergencies that are beyond the government's control and place a great strain on its budgets. Compared with the loosely defined exemption clause for averting a disruption of the macroeconomic equilibrium, contained in the 1969 budget reform, much stricter requirements now have to be fulfilled. While the previous rules allowed unused portions of loan authorizations after invoking the exemption clause to be drawn down for further borrowing in later years, the new debt brake stipulates that additional debt must be tied to explicit repayment rules. This condition is designed to curb the incentive to make excessive use of the exemption clause and prevent a systematic rise in debt, even though neither specific repayment periods nor resolutions on consolidation measures are prescribed.

It is worth adding that also the 1969 amendments to the Basic Law provided a version of economic constitutionalism, although in the opposite direction. Theoretical approaches to macroeconomic management were then put into practice at all levels of government and were accounted for, in particular, in the provisions governing public finance set out in the Basic Law. In managing their respective budgets, the Federation and the Länder should take due account of the overall economic equilibrium; it was possible to regulate through federal law public borrowing or the creation of anticyclical reserves to avert disturbances of the overall economic equilibrium; borrowing by the Federation should not exceed investments, unless for averting a disturbance of the overall economic equilibrium between stability of price levels, a high level of employment and external balance, accompanied by steady and adequate economic growth.

The fact that since 1949 the Basic Law has been from time to time reviewed with the aim of establishing diverse versions of economic constitutionalism gives an idea of the recurring efforts of stabilising once and for all, namely at the constitutional level, the fundamental framework of economic and financial policy. In

his most celebrated dissenting opinion, Justice Holmes assumed, to the contrary, that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez-faire", being "made for people of fundamentally differing views" (US Supreme Court, *Lochner* (1905)). Similarly, many European Constitutions deliberately avoid to encapsulate whatever economic theory into the text.

In spite of this different inspiration, the Basic Law shares with the Constitutions of many EU Member States the notion that certain fundamental principles ought to stay outside the intrusion of constitutional amendments. In particular, the 'eternity clause' provided in Article 79 BL prevents the legislature from removing through constitutional amendment the principles underlying Articles 1 and 20, namely human dignity and fundamental rights as provided in Article 1, and the principles enshrined in Article 20 such as popular sovereignty and the rule of law. Significantly, provisions devoted to economic constitutionalism do not fall under that clause. Even in the German constitutional order, where efforts of stabilizing the rules on economic constitutionalism have been far stronger than elsewhere, these rules might thus be legally amended, as already occurred twice, in 1969 and in 2009.

9. Economic constitutionalism and constitutionalism in EU primary law

Interpretation of economic constitutionalism as recognized in the TEU and in the TFEU is at best problematic, due to "a poorly designed fiscal and financial architecture"[31], together with the deep controversies among Member States that affect reforms aimed at complementing it. But let us imagine that it is clearly settled, and that it reflects the rule-based approach that since 2009 characterizes the Basic Law. A question might then arise of how EU primary law's provisions regarding economic constitutionalism are related to the "values" of article 2 TEU, according to which "The Union is founded on the values of

[31] Centre for Economic Policy Research, *Reconciling risk sharing with market discipline: A constructive approach to Euro area reform*, Policy Insight n° 91, January 2018, 2.

respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Even if no internal hierarchy emerges explicitly between EU treaties provisions, art. 2 TEU's wording suffice to demonstrate that other provisions could not contrast the herein mentioned values without jeopardizing the very foundation of the Union.

While looking instead at the concrete functioning of economic constitutionalism, a different question arises: not that of how, but that of whether such form of constitutionalism is related to EU common values. It is as if, in the practice, such dimensions were disconnected one from the other. Both do reflect a deep malaise of the EU as a common enterprise. But each one reflects it for different reasons, and exhibits different features. While the former reflects the failed attempts in dealing with a crisis management, together with a distorted enforcement of EU primary law by national governments, the "common values" are affected from the inertia of the EU institutions vis-à-vis what has been called "the purposeful destruction of the rule of law inside EU member states", departing from Hungary and Poland[32], in spite of the measures laid down in Article 7 TEU against such systemic violations[33].

Given the values that are respectively at stake, the 'rule of law crisis' should appear more acute than that of the Eurozone. But it is not perceived as such[34]. Article 7 TEU leaves to national governments, as represented in the Council ("alert procedure"), or in the European Council ("nuclear option"), the task of protecting the "common values" from violations perpetrated by a Member State within its own jurisdiction. And, first and foremost, an "alert procedure" has been recently initiated towards Poland, while no measure of that sort has been taken towards Hungary, in spite of numerous opinions of the Venice Commission and of EP's

[32] J.-W. Müller, *Reflections on Europe's 'Rule of Law Crises'*, in P.F.Kjaer - N.Olson (eds.), *Critical Theories of Crisis in Europe. From Weimar to the Euro*, 162 (2016).
[33] See C. Pinelli, *Protecting the Fundamentals. Article 7 of the Treaty on European Union and Beyond,* FEPS Jurists Network, (2012).
[34] *Ibidem.*

resolutions[35]. The hypothesis is far from being malicious that such diverse treatment depends mainly on the party affiliation of the respective governments.

10. A plea for a new use of conditionality

Reluctance of European political rulers in confronting the challenge of "common values" breaches is likely to endanger the EU constitutionalism's endurance, while pressure is contextually put for establishing a model of economic constitutionalism within the Eurozone. The latter appears thus increasingly detached from the values on which the Union "is founded", and, to this extent, risks to be viewed as a mere assessment of powers within the elite.

An attempt of bridging the gap appears in a Commission's document concerning the reform of EU budget, where it is held that "Upholding EU core values when developing and implementing EU policies is key. There have been new suggestions in the public debate to link the disbursement of EU budget funds to the state of the rule of law in Member States. Respect for the rule of law is important for European citizens, but also for business initiatives, innovation and investment, which will flourish most where the legal and institutional framework adheres fully to the common values of the Union. There is hence a clear relationship between the rule of law and an efficient implementation of the private and public investments supported by the EU budget"[36].

By linking the disbursement of EU budget funds, or of cohesion funds, as also recently proposed, to respect for the rule of law in the Member States, the "new suggestions" that the Commission seems to endorse launch a conditionality mechanism in an unexplored field, that of the rule of law crisis, where it would potentially circumvent the current stalemate affecting Article 7 TEU's enforcement. Conditionality would then exert a function different from that of its macroeconomic version, aimed

[35] See among others J. Nergelius, *The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania,* in A von Bogdandy and P.Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*, 293 (2015).

[36] European Commission, *Reflection paper on the future of EU finance*, 22, (2017).

at hopefully connecting together the dispersed paths of EU constitutionalism.