



Soft law and multilevel cooperation as sources of (new) constitutional challenges in EU economic and monetary integration: introduction to the special issue

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Abstract

Following the outbreak of the Great Financial Crisis, numerous reforms were conducted in all areas of the European Union (EU)'s Economic and Monetary Union. These reforms aimed at strengthening the resilience of Member States' economies after they had been put under severe strain by the crisis. They included, among others, the reinforcement of the efforts toward economic coordination in the framework of the European Semester for economic policy coordination, or the creation of the European Banking Union after which competences in the areas of banking supervision and bank resolution have been transferred to the European level. More than a decade after the Great Financial Crisis however, several of these reforms are still underway. This article is an introduction to this Special Issue whose contributions examine the reforms performed to date, as well as those that are currently under discussion, from the perspectives of multilevel (administrative) cooperation and the resort to soft law instruments. Indeed, the procedures newly devised rely heavily on the effective cooperation between national and European institutions as well as on a variety of soft law instruments.

Keywords European Union · Economic and Monetary Union · Great financial crisis · Soft law · Multilevel cooperation · Composite procedures

Introduction: the rise of soft law and multilevel cooperation in EU economic and monetary integration

In response to the Great Financial Crisis, all the areas of the European Union (EU)'s Economic and Monetary Union (EMU) have undergone significant reforms characterized by additional transfers of competences to the EU level. The reforms have included the reinforcement of the coordination among Member States' economic and financial policies, which now happens under the tighter oversight of EU institutions (primarily, the European Commission and the Council of the EU). To this end, EU and national institutions (especially those of the euro area) engage in a constant

dialogue in the framework of the European Semester. Since its institution in 2010, the European Semester has, though, been reformed on several occasions. Although its importance in the efforts toward economic integration within the EU was recently confirmed by its use as a vehicle to channel the EU's largest fund for recovery post-COVID-19 (the Recovery and Resilience Fund), it remains the case that its implementation so far has been subject to criticism on the basis of the discretion it leaves to the European Commission, or of the limited compliance by the Member States with the recommendations made to them (so-called Country Specific Recommendations).¹

Next to these reforms, important changes were made in the field of financial regulation proper, after the crisis of the banking sector that we witnessed a decade ago almost threatened the very existence of the euro. These efforts to deepen the integration of the European financial sector encompassed the creation of the European System of Financial Stability in 2010 and were later consolidated in 2013 with the creation

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¹ See on the Commission's discretion Leino and Saarenheimo [28, p. 5f.] and on compliance with Country Specific Recommendations European Parliament Briefing [22].



of the European Banking Union. As a consequence of the realization of the increasingly interconnected nature of the banking sector across the EU and of the cross-border nature of banking activities, new competences in banking supervision and banking resolution have, for instance, started to be exercised at the EU level. The mechanisms in place in the fields of both banking supervision and banking resolution operate under the ultimate responsibility of an EU authority (the European Central Bank and Single Resolution Board, respectively). However, these authorities cooperate closely with the national authorities which had previously exercised those competences, and partly continue to do so, such that multilevel (administrative) cooperation is a prerequisite to the good functioning of the new mechanisms. Responsibilities in the area of prudential supervision are, for instance, shared between National Competent Authorities and the ECB on the basis of the credit institutions' significance.

Reforms in EMU did not, however, stop after the most acute phase of the economic and financial crisis was overcome, even if Member States' appetite for change significantly decreased when the sense of urgency had diminished. Even before the COVID-19 outbreak forced EU and Member States institutions alike to hastily adopt measures to prevent a new economic crisis, other reform proposals were already under discussion, for instance with a view to introducing a digital euro or to combatting money laundering. Efforts in the latter area have notably been characterized by enhanced cooperation among national authorities at the EU level, and steps toward increased Europeanisation in this field that could be inspired by the developments observed within the European Banking Union (EBU) may be expected in the near future. In short, reforms in both the EBU and the EMU are still underway, and their urgency has only been made more pressing by the recent COVID-19 outbreak and the resulting economic downturn.

Against this background, this Special Issue provides an analysis of recent and ongoing developments from the perspectives of multilevel administrative cooperation, that is the cooperation between national and European authorities (as well as international forums), and the use of soft law in this policy area. The resort to soft law instruments and the necessity for European and national authorities to cooperate in the implementation of European norms are certainly not a distinct feature of EMU, as is further evidenced in the next section. Nonetheless, EMU differs from other EU policy areas on several accounts. Starting from the most well-known one, it is composed of areas in which EU competences range from exclusive competence (monetary policy) to that of sole coordination (economic and financial area), despite these policy areas being closely intertwined and difficult to distinguish, as was most recently evidenced in the *Weiss* case [3]. Owing to this interdependence between the different EMU policy areas, coordination among Member States has

been strongly reinforced over the past decade such that the resort to soft law instruments may appear problematic, and their very nature as non-binding instruments in practice may need reassessing. Additionally, as evidenced above, the level of integration and the way in which it is organized varies greatly in the areas of non-exclusive competence. All these reasons, combined with the fact that these reforms are only recent or are still underway, justify the focus of this Special Issue on EU economic, and especially financial, integration through the lenses of multilevel (administrative) cooperation and the resort to soft law.

Soft law and multilevel (administrative) cooperation within the EU—challenges and opportunities

In EU regulation in general, the Community method—where legislation enacted by the Council and Parliament is implemented or enforced through administrative action at EU or national level—has been joined by alternative modes of governance. Such regulatory approaches include joint implementation and networks of regulators at different levels, framework legislation, soft modes of regulation, and private or semi-private regulation by the actors involved.² These new modes of governance were particularly evident in EU financial regulation following the Euro crisis.³ Within a fragmented regulatory order, European regulatory networks respond to the need for coordination of resources and technocratic expertise.⁴ Rules may be developed not only through majoritarian institutions, but at a sectoral level between regulators and in some cases with stakeholders themselves.⁵ Soft law instruments such as notices, guidelines, communications, and opinions are now common tools in regulatory areas of EU law and policy. While they are formally non-binding, these rules of conduct nonetheless are intended to influence behavior and may have legal and practical effects [34 p. 112, 35 p. 32].⁶ There are strong incentives to comply with ostensibly non-binding measures, as *Dermine* shows in this issue with the example of Country Specific

² For example Dehousse [13] and Christiansen and Piattoni [7].

³ Raising the legitimacy issues of these developments, see Dawson [12], Kilpatrick [25] and Kjaer [26].

⁴ For example Egeberg [16], Dehousse [14], Coen and Thatcher [8, p. 49], Benz, Corcaci and Doser [1, p. 999]; Blauburger and Rittberger [2] and Levi-Faur [29].

⁵ See Héritier [23].

⁶ According to the findings in the *Grimaldi* ruling, soft law measures cannot be regarded as having no legal effects, and national courts are bound to take recommendations into consideration, in particular where they are capable of casting light on the interpretation of other provisions of national or EU law [5].



Recommendations. Soft law is attractive for its flexibility and quick adoption processes. It also opens the possibility to regulatory agencies to adopt instruments, affording them significant influence in a given policy field where the current Treaty framework limits the extent of the decision-making powers that may be delegated to agencies (as opposed to EU institutions) [6].⁷ While it may be expedient, this circumvention of Treaty constraints is one of the concerns about soft law and its legitimacy from a constitutional perspective. It raises questions of appropriate oversight (whether parliamentary, judicial, democratic, or through auditors), effective judicial protection and remedies, institutional balance and conferral of competences, and openness and transparency.⁸

Similar legitimacy concerns might be expressed with regards to co- and self-regulatory processes [36]. Also, as mentioned above, regulatory networks, and multilevel systems of administrative cooperation are commonplace within the EU, despite their entailing risks of weakened legitimacy and accountability [11, 18, 21].

Indeed, in the system of EU multilevel administrative governance, different forms of administration can be identified, ranging from fully centralized (or direct) (whereby the EU institutions adopt rules and implement them), to decentralized (or indirect) (whereby the administrative implementation of EU law is in the hands of national competent authorities). Increasingly, however, ‘shared administration’ (and the ‘composite procedures’ this system generates) has emerged as a prevalent pattern in virtually every EU policy field.⁹ These are administrative procedures in which administrative authorities from the Union and from Member States cooperate and provide input into the final administrative decision taken at the Union or the national level. This ‘input’ can take various shapes, and these procedures may be used in various moments of the policy cycle.

In terms of ‘patterns’ of cooperation, there are so-called top-down procedures, which start with a European act and are concluded with a national measure, while bottom-up procedures follow an opposite approach and start with the national level while being concluded by an act taken by an

EU authority. An example of a bottom-up procedure, in the context of the Single Supervisory Mechanism (SSM), relates to the approval, or withdrawal, of an authorization to take up business as a credit institution, and on an approval for acquiring a qualifying holding in such a credit institution. In such cases, the procedure starts, in principle, with a draft decision by the relevant National Competent Authority (NCA) of the Member State where the credit institution is or will be established, and ends with a final decision from the ECB (Articles 14 and 15 SSM Regulation [9]). A top-down procedure is instead used for Less Significant Institutions (LSIs), whereby the ECB sets ‘regulations, guidelines, or general instructions to national competent authorities’ on the basis of which NCAs take supervisory decisions (Article 6(5)(a) SSM Regulation [9]). These are procedures entailing only two steps of decision-making.

There are also procedures with more complex patterns, such as those which start at the national level, entail a European phase and are eventually concluded through a national act. This kind of procedure is used, for example, in relation to ‘material supervisory procedures’: NCAs must transmit material draft supervisory decisions to the ECB, and the ECB may express its views on those draft decisions, before a final decision is adopted by the NCAs (Article 6(7)(c) SSM Regulation [9]).

Even more complex are procedures such as those which exist in the field of market authorisations where the procedure starts at the national level, entails a ‘horizontal’ phase of input provided by national authorities (other than those in which the procedure started), and might either be concluded at the national level, or include a possible ‘escalation’ of the decision-making process at the European level in case of disagreement between Member States.¹⁰

If—rather than the ‘patterns’ of cooperation—one considers the ‘content’ of the cooperation, various scenarios emerge. The input of a national or European authority might vary from the issuing of formal—hard or soft—measures to more informal and ‘intangible’ acts. From this perspective, the participation of a national or EU authority might entail the adoption of binding measures or opinions, but also the possibility of raising objections, providing information, drafting reports and the like.

Furthermore, looking at the system of administrative cooperation from the perspective of the moment at which it takes place, one can observe that cooperation exists at the moment of decision-making, such as the distribution of EU funds, or the authorisation of GMOs, but also at the moment of enforcement, with various patterns of cooperation emerging in the inspection and sanctioning process.

⁷ *Shortselling* [4] concerning the European Securities Markets Authority (ESMA).

⁸ For discussion on types of legitimacy see Scharpf [30], Schmidt [31]. On soft law legitimacy see Eliantonio, Korkea-aho and Stefan [17], Eliantonio and Stefan [20].

⁹ This is the term used by Paul Craig [10]. It should be noted that this phenomenon has been differently labelled: for example, the term ‘*Verwaltungskooperation*’ (administrative cooperation) was used initially. See Schmidt-Aßmann [33]. Other authors have spoken about ‘*amministrazione mista*’ (mixed administration), see Della Cananea and Franchini [15]; and ‘*Verwaltungsverbund*’ (administrative union), see Weiß [37]; ‘*integrated administration*’ see Hofmann and Turk [24]; ‘composite administration’ see Schmidt-Aßmann and Schöndorf-Haubold [32]; or ‘co administration’ see Ziller [38].

¹⁰ Further on this see Eliantonio and Roettger-Wirtz [19]; Lanceiro and Eliantonio [27].



Again to give examples from the SSM framework, as also discussed by *Lo Schiavo*, on-site inspections might be conducted by mixed teams comprising both members of the ECB and of NCAs under the supervision of the ECB. Similarly, in the sanctioning process, *Lo Schiavo* discusses a cooperative pattern whereby solely NCAs are able to sanction supervised entities, but they act upon advice of the ECB.

Finally, it should be mentioned that cooperative patterns emerge not only vertically (i.e., when EU and national authorities cooperate in the implementation of EU law) but also horizontally (i.e., between Member States themselves). These are what Craig refers to as ‘administrative networks’ [10]. Horizontal composite procedures exist in the field of migration, product safety or taxation, but also in the field covered by this Special Issue. As *Lo Schiavo* discusses, for example, the Anti-Money Laundering (AML) framework knows of a tightly knit system of cooperation and information exchange between the NCAs without the presence of a supranational body in charge of AML matters.

It should also be noted that, for one same policy field, several patterns of cooperation might exist with differing roles for the national and EU institutions. For example, *Smolenska* notes that, for the EBU countries, the Single Resolution Mechanism provides for centralized cooperation of national authorities with a ‘specific’ EU agency (the Single Resolution Board (SRB)) at the center stage, while for the EU as a whole (including therefore also non-EBU Member States), loose—horizontal—networked arrangements in the form of resolution colleges exist. Both forms include both horizontal (national) and vertical (national-EU) dimensions of the administrative cooperation, which have, however, some important nuances. Interestingly, *Nicolaidis* identifies ‘horizontal’ cooperation also at the EU level itself, with mechanisms in place for banking resolution between the ECB and the SRB. Because the decision-making organs of both bodies include Member State representatives, the system also implicitly creates a need for ‘vertical’ cooperation between the national and the European levels.

It is worth noting that this complex situation within the EU may in some instances be made even more complicated because EU rules in the financial domain are strongly influenced by standards defined at global level. As evidenced by *Fromage*, this raises issues of coordination, duplication, and potentially competition among EU and Member State representatives. This is for example the case because only a minority of Member States participates directly in the Basel Committee of Banking Supervision or the Group of 20, while the European Commission, the European Central Bank and the European Banking Agency represent the Euro area Member States or all other Member States in the different global forums.

As we see in this Special Issue, in terms of multilevel governance, the picture of European financial regulation is

characterized both by multiple levels and by different configurations. The levels comprise not only the EU and national, but also the international dimension through forums such as the Basel Committee, and regional considerations through State aid. In this picture, there are differentiated configurations both of Member States—euro area, non-euro area and the Banking Union—and of EU institutions. In this system, we may observe the dynamics of uploading preferences and downloading standards and rules between levels. Gaps and overlaps in competences raise important accountability considerations, such as democratic versus technocratic legitimacy, and the oversight of courts and auditors. These questions also connect to the use of soft law instruments, where we observe conditionality and strong incentives to comply with ostensibly non-binding measures.

The questions addressed by this Special Issue

Against this general background, where multi- and cross-level cooperation shapes the working of the EU and where the policy area sees an increasing use of soft law instruments, this Special Issue aims to examine some of the recent and ongoing evolutions in the field of EMU and explores the challenges posed to EU constitutional principles by these evolutions. *Paul Dermine* begins with an analysis of the soft law/hard law dichotomy in the context of EMU, in which formally non-binding measures nonetheless create constraints on the conduct of the actors involved. In light of the challenges this construction poses for key constitutional principles, he argues for a new approach revisiting the concepts of bindingness and legal effects to reflect the reality of Euro area fiscal governance. This approach also has relevance for other policy areas. The next two papers address monetary policy. *Marijn van der Sluis* considers the evolution of the position of national central banks within EMU. He argues for a reconsideration of the legal framework since the Euro crisis disrupted the delicate balance struck between effective collective decision-making and national banks’ role in protecting national interests. Meanwhile *Jay Cullen* looks ahead by focusing on the stance of the European Central Bank toward a more recent regulatory challenge: the introduction of digital currency. He argues that limitations to the ECB’s capacity in this area are not necessarily constitutional, but that market solutions may be preferable to central bank intervention. The remaining articles explore various aspects of the European Banking Union. Highlighting differentiated configurations of Member States and institutions, *Agnieszka Smolenska* directly examines multilevel administrative cooperation, raising questions of accountability, equality of Member States and delegation of powers to agencies. Drawing lessons from the non-euro area Member



States joining the Single Resolution Mechanism, she finds that the EU-wide networked resolution colleges are more conducive to cooperative outcomes than centralized mechanisms. These multilevel and differentiated configurations are reflected in *Diane Fromage's* contribution too. Bringing in the international level through the example of the Basel Accords, she assesses banking supervision as influenced by global standards. She argues for greater transparency at the EU and national level—particularly through parliaments—to enhance democratic legitimacy over participation in international financial fora. Next, *David Baez* sheds light on perceived audit gaps in EU banking supervision, raising the important trade-off of supervisory independence and accountability. He assesses the extent of the European Court of Auditors' mandate to audit the ECB's supervisory function, which in turn affects the interpretation of the mandate of national Supreme Audit Institutions regarding Less Significant Institutions. LSIs also feature in *Phedon Nicolaidis'* article. He considers the impact of banking supervision on State aid and administrative accountability, asking under which conditions the granting of State aid to financial situations is still possible alongside the resolution mechanisms of the EBU. Completing the collection, *Gianni Lo Schiavo* compares the governance models of the Single Supervisory Mechanism and the new EU field of Anti-Money Laundering. While the latter is currently based on a national supervisory model with some EU harmonization of substantive rules, he sees the potential for applying the SSM model to establish an effective supranational supervisory system of AML to align the two frameworks.

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Declarations

Conflict of interest The authors state that there is no conflict of interest.

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