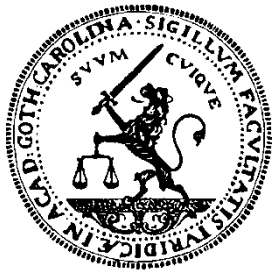

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Conferral versus Constitutionalisation

- The EU macroeconomic framework and its implications for the EU economic constitution

JURM02 Graduate Thesis

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Contents

Summary

The purpose of the thesis is to discern the pattern of federalism in EU macroeconomic governance and seek explanations for the strengthening of the framework in this regard. The thesis operates in a constitutional perspective, adopting a multidimensional approach in order to fulfil the purpose. These approaches have in common that they regard issues of legal power. By tackling the research questions from an EU law in context outlook, five critical axes are identified in explicating the nature of the Union's competence in macroeconomic governance. More precisely, within these dimensions, the nature of the exercise of legal power, its constitutionality and its implications for the allocation of power between the Union and the Member States are explicated. This thematized presentation is sought to make effective the unearthing of a pattern of federalism. Lastly follows a discussion on the direction of the EU institutional practices in macroeconomic governance and the underlying causes for this development. In addition to drawing on the conclusions of the thesis, this discussion will also feature thoughts on the recent battle between the Commission and the Italian government as regards the latter's national budget.

Sammanfattning

Syftet med den här uppsatsen är att urskilja ett federalistiskt mönster inom EU:s makroekonomiska styrning och att söka förklaringar till förstärkningen av det rättsliga ramverket i detta avseende. Uppsatsen verkar i ett konstitutionellt perspektiv och antar ett multidimensionellt tillvägagångssätt för att uppfylla uppsatsens syfte. Gemensamt för dessa tillvägagångssätt är att de förhåller sig till ämnet rättslig kompetens. Genom att ta sig an forskningsfrågorna från en ståndpunkt av EU law in context, har det upprättats fem dimensioner för att utröna essensen av EU:s kompetens i makroekonomisk styrning. Mer precist undersöks inom dessa dimensioner; fundamenten i utövningen av rättslig kompetens, dess konstitutionalitet och dess inverkan på distributionen av kompetens mellan Unionen och Medlemsstaterna. Denna tematiserade presentation är avsedd att effektivisera skönjandet av ett federalistiskt mönster. Slutligen följer en diskussion om riktningen på EU:s institutionella praxis i makroekonomisk styrning och de möjligt underliggande orsakerna till denna utveckling. Utöver att dra slutsatser från svaren på uppsatsens forskningsfrågor, kommer denna diskussion också att innehålla resonemang angående den nyligen uppkomna kampen mellan Kommission och den italienska regeringen gällande den senares nationella budget.

Preface

During the course of this semester, I have been asked several times how come I am writing about the topic of the present thesis. The background to this subject is my exchange semester at the University of KU Leuven, wherein I attended the courses; the law of international organisations; and constitutional law of the European Union. In the former class, we discussed the issue of allocated powers in international organisations, which is also a topic of this thesis. In the latter class, we learnt about the Union's economic governance, which is the other ingredient of this thesis. I would therefore like to firstly thank KU Leuven for providing these interesting courses, because otherwise I would have not acquired either the curiosity for or the knowledge required to write about this topic.

Determining the subject of a thesis is one (critical and difficult) task, but the challenge really emerges when one proceeds working with it, which proved itself to be a far lonelier affair than I anticipated. In that regard, I would like to first extend my gratitude towards my supervisor, professor Xavier Groussot, who at countless times gave me the assurance I needed to tackle this complicated subject. Secondly, I am thankful for my fellow thesis-writers and friends, which I spent every day at the library with and with which lunch and coffee breaks were needed escapes from the anxieties associated with writing a thesis.

With these appreciations articulated, I am concluding my studies at the faculty of law at Lund University by publishing this thesis. So, I modestly hope my last assignment will contribute to the growing body of academic work on the subject of the thesis.

List of Abbreviations

AMR	Alert mechanism report
BEPG	Broad economic policy guideline
CAP	Corrective action plan
CJEU	Court of Justice of the European Union
CSR	Country-specific report
DBP	Draft budgetary plan
ECJ	European Court of Justice
EDP	Excessive deficit procedure
EIP	Excessive imbalance procedure
EMU	Economic and Monetary Union
EU	European Union
MIP	Macroeconomic imbalance procedure
MTO	Medium-term objective
OLP	Ordinary legislative procedure
QMV	Qualified majority voting
SGP	Sustainability and Growth Pact
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
Union	European Union

1 Introduction: Thesis Framework

1.1 Problem Identification

Over a decade ago, the renowned EU scholar Gráinne de Búrca put forward the following lengthy proposal, of which I will reproduce in full by reason of its brilliance:

> An interesting research question might therefore be to examine the 'pattern(s) of federalism' in the EU to date, and to try to provide a careful, systematic and considered account of why, despite the repeated concerns articulated by certain governments, both national and regional, about the creeping competences of the EU and the growth of its central powers at the expense of statal and regional capacity, the trend - both in terms of the constitutional/ treaty framework through its many amendments, culminating in the current constitutional treaty, as well as in terms of the practice of its institutions - has been mostly in one direction so far.[1]

This inquiry was proposed prior to the global and European economic crises but might be the most urgent in post-crisis times. The institutional measures adopted in response to the crisis have been claimed to counter the principle of the rule of law[2], have adverse effects on legal certainty[3] and been described as exuberating elements of authoritarianism.[4] This enumeration includes only some of the concerns voiced by contemporary legal scholars. The description of these measures ranges from "nasty overregulation"[5] to being necessary to prevent further crises in the euro area[6], which of course do not have to be mutually exclusive. In any case, one can conclude that the constitutional set-up pre-crisis versus post-crisis has been changed dramatically.

1.2 Purpose and Research Questions

De Búrca's invitation in light of the recent development of the EU economic constitution is the foundation of this thesis. On that note, my purpose is to explore the pattern of federalism in regard to the EU macroeconomic framework and to try to answer why the strengthening of this framework through the institutional

[1] G. De Búrca, (2005), p. 98.
[2] C. Kilpatrick, (2015), p. 325 ff.
[3] P-M. Rodriguez, (2016); especially at p. 278.
[4] A. Somek, (2015), p. 346.
[5] Ibid., p. 345.
[6] This is naturally the position of the Union legislator, see for example: European Commission, MEMO/11/898.

practices of the Union has taken place despite the multifaceted concerns in relation thereto. This examination will operate within a theoretical outline regarding different aspects of legal power.

The thesis is against that background structured on the basis of the following questions:

- How is the Union exercising competence in the context of the framework on macroeconomic imbalances?
- How does the measures adopted in the context of the framework on macroeconomic imbalances affect the allocation of legal power between the Member States and the Union?
- When, and in what way, is the Union not acting within the powers conferred on it in the context of the framework on macroeconomic imbalances?

1.3 Theoretical Outline

1.3.1 The Principle of Conferral and Constitutionalisation

Addressing the issue of the constitutional nature of an EU competence policy area, the very first premise that must be established is that it is legitimate to talk about constitutional law in the context of the EU. Fortunately, the question of whether EU law can be considered constitutional has already been answered affirmatively by scholars.[7] Consequently, I have already and will further refer to the EU constitution and the EU economic constitution, that consists of EU primary law.

Secondly, I must reproduce the meaning and function of the principle of conferral. As a background, it should be remembered that it is traditionally considered that sovereign states have an inherent competence to legislate on all things. Conversely, the EU is considered only able to legislate within the competences conferred on it by the sovereign states themselves, that is, the Member States.[8] The principle did not make its way into the Treaties until the Lisbon Treaty. It can be argued that even prior thereto, the essence of the principle was endorsed by the previous Treaty, but only in the sense "common to all international organizations, namely that of allocated powers". By the Lisbon Treaty, conferral was introduced formally as a *principle* and conferral, subsidiarity and proportionality were put on an equal footing.[9]

[7] For example, R. Arnold, (2008), in N. Siskova (ed.), p.41; and for his analysis of the definition and its applicability on the EU legal order, see pp. 42 ff.
[8] R. Schütze, (2016), pp. 224-225.
[9] B. Guastaferro, (2012) in M. Trybus & L. Rubini (eds.) p. 123.

Described as "an inelegant label for a matter of the highest constitutional significance"[10], the principle of conferral governs the limits of Union competences as per article 5(1) TFEU and entails in accordance with article 5(2) TFEU that:

> …the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

Accordingly, the institutions may only act within the powers conferred on them.[11] Considering that it is clarified that the non-conferred competences remain with the Member States, the function of the principle is to demarcate the allocation of competences between the Member States and the Union.[12]

However, the principle could have different meanings. One is to see conferral in a restrictive manner, whereas the allocation of powers is a "value per se and an objective to be preserved". Another is to regard it in a functionalist manner, wherein it has instrumental value to a broader goal.[13] The new wording of the Treaty is: "the Union shall act within the limits of the competences conferred upon it … to attain the objectives [of the Union]" which is opposed to the previous one, which read: "*and* to attain the objectives" [emphasis added]. [14] Similarly, the wording of article 3(6) TEU reads that "… the Union shall pursue its objectives by appropriate means commensurate with the competencies which are conferred upon it in the Treaties". These wordings support the notion proposed by Guastaferro that "the objectives [of the Union] are functional to competencies, and not the other way around".[15]

The premise of the purpose of the thesis could be regarded as rather circular: I am examining the exercise of competence in order to illuminate the competence that empowers that exercise. However, de Búrca advocates that although the principle of conferral is an "important starting point" for addressing the exercise and division of power, "the actual nature of the federal system in question emerges through the institutional practice over time".[16] In a similar tone, Loic Azoulai wisely addresses one issue of the division of powers between the Member States and the Union, being that it is "constantly renegotiated".[17]

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[10] S. Weatherill, (2012), in E. Jones, A. Menon, & S. Weatherill (eds.), p. 571.
[11] Art. 13(2) TEU.
[12] I. Govaere, (2016), p. 2.
[13] B. Guastaferro, (2012), in M, Trybus & L, Rubini (eds.), p. 118.
[14] Comparing art. 5(1) EC with art. 5(2) TEU.
[15] B. Guastaferro, (2012), M, Trybus & L, Rubini (eds.), p. 127.
[16] G. De Búrca, (2005), p. 94.
[17] L. Azoulai, (2014), in L. Azoulai (ed.), p. 13.

Further, Besselink distinguishes between historical and revolutionary constitutions. Historical constitutions form in a process not always compatible with official constitutional amendments. Historical constitutions are sometimes called "un-written" constitutions, and an example thereof is the British constitution. Revolutionary constitutions, on the other hand, include the French and the German constitutions. They are identified as having a "constitutional moment". These constitutions claim to "eternity" in various degrees. As for the European Union, Besselink holds it unlikely that the Union will settle for a definite constitution. He ushers that the European constitutional development is evolutionary and not revolutionary "for the time being".[18] Many scholars have treated the EU crisis as a particularly important moment for the evolution of the EU constitution.[19] On that note, Tuori's and Tuori's understanding of the EU constitution also adhere to the perception of an evolutionary EU constitution. They call the process of that evolution *constitutionalisation*. The characteristic of constitutionalisation is a "process-like nature" which has an absence of a "temporarily and substantially clear-cut" constitution. This process is driven not only by formal amendments, but by the actions of other constitutional actors such as the European Court of Justice (ECJ), the European Commission[20], the Council of the European Union[21], etc. This process is multidimensional and multitemporal meaning that the constitutionalisation has different dimensions progressing at different paces. [22] The concept of constitutionalisation affects the efficiency of the principle of conferral. The constitutional actors are supposed to be limited by the constitution (and thus, the principle of conferral), but they are also the main constructors of that constitution. Considering further that the constitution evolves contributes to that paradox, because the issue of limiting the self is continuous.

Such is of course the nature of most constitutions, but another layer to the problem of the supposed demarcation of power by the principle of conferral, is the fact that it is a delegated that performs the evolution of the constitution. On this note, Somek has created a theory about trust and delegation of power. According to Somek, a delegation of power presupposes trust from the delegator towards the delegated. An overstepping of a mandate will result in either "the normative reassertion of an expectation ('you should have') or the cognitive adjustment to a new situation ('so, this is what you had to do')". The inherent problem with the presumption of trust is therefore, even as it builds on a legal mandate, that the delegator always can derive a normative confirmation ("you should or should not have") after the fact. Somek states that in legal systems such as these, "the reversal in the direction of control is built into the relationship".[23] In relation to the principle of conferral of powers,

[18] L. Besselink, (2009), in J. Wouters, et. al. (eds.), pp. 261 ff.
[19] Hence the "constitutional analysis" approach by for example Tuori and Tuori, and Hinarejos.
[20] Hereinafter: Commission.
[21] Hereinafter: Council.
[22] K. Tuori & K. Tuori, (2014), pp. 3 ff.
[23] A. Somek, (2015), p. 351.

Somek's theory sows a seed of doubt regarding the efficiency of the principle. This is because the role of the principle is to delimit the Union's (i.e. the delegated's) power prior to the exercise of power, in that the Union may only act when it has been conferred a power. However, considering that the Member States must trust the Union as it has conferred power on it, the control of the exercise of power can only happen after the exercise has taken place. Somek calls this fault in the system of delegation a "modal indifference of trust". Somek maintains that the only efficient way to deal with this issue is by political bodies rather than the judiciary through democratic control. In this regard, he argues that political bodies are able to redefine the relationship to the delegated whilst the judicial bodies are limited to address the normative mode (you should or should not have done so). A system wherein the people have no democratic outlet result in a "trust trap", in which they cannot assert their normative expectations and thereby believe they must accept their fate.[24] In other words, Somek's theory can call into question the appropriateness of the principle of conferral in relation to the aim it aspires to attain, namely that the Union acts within the competences conferred on it by the Treaties.

Embracing the above perception of the relationship between the principle of conferral and the development and nature of the EU constitutional framework may leave one wondering why I bother to ask the question whether the EU is acting within its conferred competences. In contrast, the theoretical background explicated in this chapter provide the purpose as to why this question is so potent. If one wants to examine the nature of EU competence in economic policy, the direction is provided by the institutional response to the competence and the overstepping of the principle of conferral may point to that direction.

1.3.2 Legal power/Legal Competence

1.3.2.1 Approaching Competence in the Right Order

Article 1 TFEU explains that the Treaty "organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences". Accordingly, the TFEU tells us in what areas the Union is competent in, what areas the Union is not competent in (delamination) and how it should exercise its competences. However, the Treaty fails not define the concept of competence. The only guidance provided by the Treaty is article 2(6) TFEU which states that "the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area". Accordingly, Weatherill proclaimed that "one would certainly [be] left bemused if one tried to rely on Articles 2–6 TFEU to understand the nature of the competences available in particular areas".[25]

[24] A. Somek, (2015), p. 351.
[25] S. Weatherill, (2012), in E. Jones, A. Menon, & S. Weatherill (eds.), p. 573.

I claim that there is a tendency of going about the problem of identifying the competence in economic policy in the wrong order. Much in the same way Tusseau has identified that legal scholars have adopted a prejudicial perspective when examining the issue of federalism in an EU context, arguing that federalism is an emotive language that clouds the legal judgements.[26] My proposition is therefore this: first, one must establish the nature and exercise of the specific Treaty provisions that base the secondary law (exercise of the union's competence) and on the basis of the result thereof, comment on the nature of "coordinating competence". By and large I warn against jumping to conclusions based on the use of certain vague words such as "coordination" (compare with article 2(3) TFEU).

1.3.2.2 The Concept of Legal Power/Legal Competence

The purpose of the thesis is to illuminate the Union's use of legal power in economic policy. By that reason, I must adopt a pre-defined view of what legal power is. In that regard, many different scholars of legal philosophy have offered theories. One of these scholars is the distinguished Neil Maccormick. Below, I will account for Maccormick's theory of legal power and not his theory on legal validity. Tusseau has built a theory on power-conferring norms which resembles and draws on Maccormick's theory on power-conferring norms. I have opted to use Tusseau's theory as a methodological approach, as I argue it is more easily applicable as a method in discerning legal validity and the relationship between legal power in a federal-like legal order. However, as Tusseau does not develop the idea of legal power itself, I have decided to perceive legal power in accordance with Maccormick's theory. Maccormick's theory was chosen because he relates his theory on legal power to that of power in general. This is particularly helpful for me because soft law instruments, which are frequently used in macroeconomic governance, operate in the wasteland between legal and political power.

A key to understanding Maccormick's theory is appreciating his holistic approach. Starting off his theory, he develops his idea of normative order. Normative order by his understanding is the arrangement for the ideas of right and wrong, to which humans respond in their interaction with each other. Normative order does not have to be envisaged as rules or norms, but it makes possible the structure of a legal order. Exercising normative power may affect a change in the normative order, by affecting the ideas of right and wrong, consequently affecting the action or inaction by people. Power, as understood by Maccormick, is precisely the ability to cause or prevent change, and as between humans, bringing about change in another person's behaviour without the consent of that person. Power give rise to reasons for action or inaction that would, without it, not have existed.[27]

[26] G. Tusseau, (2014), in L. Azoulai (ed.), pp. 41-42.
[27] N. Maccormick, (1999), pp. 493-495.

Legal order is an institutional normative order, and legal power is a special form of normative power. Maccormick regards legal power as the legally conferred ability to affect or prevent change in another person's legal position without the consent or dissent of that person.[28] Thus, changing legal position may be in inter alia the form of introducing or retracting legal obligations or legal liberties. The "consent or dissent" element of this formula, I propose the understanding of voluntary or involuntary behaviour of States. In that regard, a State might voluntarily refuse to comply with a law, rule or obligation as it is "not willing to bear the cost of compliance".[29] In liaison with the depicted formula of legal power, a State which is not willing to bear the cost of compliance (i.e. voluntarily refusing compliance) could still be considered to have been subjected to EU legal power.

As regards the distinction between normative power and power-in-fact, especially political power, Maccormick argues that, although they should be distinguished, these powers are often interdependent; the legal order and political power goes hand in hand. The legal order and legal power are dependent on legitimacy, consequently, if the legal actor cannot exercise its power-in-fact, it will erode legitimacy.[30]

1.3.3 Hard Law and Soft Law

The responses to the euro area crisis in the form of adopted measures lies at the heart of the debate on hard law and soft law in the EU legal order and it has been proposed that the EU has "harden" the legal instruments of economic policy as a response to the crisis[31]. As this strongly relates to the issue of EU competence in the field, and considering that I will use this terminology, it is of importance to clarify my understanding of the concept of hard and soft law.

The typology, soft law and hard law, is not a concept of positive law; article 38(1) of the Statue of the International Court of Justice, a largely recognized determinate of the sources of international law, refers to neither. Instead, the typology is created by scholars to understand international law, of which European Law has been seen to operate in certain respects, whilst likening EU law to national law in others. Using the concept of soft law has been criticized because of the lack of attention to the legal effects of soft law, instead distorting it with politics. In defence, Terpan has argued that the concept is more sensitive to the complexity of the EU legal order and its social and political context.[32] Terpan's embrace and adaption to this complexity is the reason I have derived perspective from his theories.

[28] Ibid., p. 496.
[29] F. Amtenbrink & R. Repasi, (2017) in A. Jakab & D. Kochenov (eds.), p. 147.
[30] N. Maccormick, (1999), p. 497.
[31] A. Hinarejos, (2015), p. 75.
[32] F. Terpan, (2015), p. 70.

Analysing the existing literature on the subject, Terpan categorizes the different meanings of soft law that are used. On the one hand, soft law is used to describe a "non-binding norm with legal relevance". With "legal relevance", he is referring to that "norms can be used by a court to interpret another rule, are framed in a form that resembles hard law norms or can have the same impact as a hard law norm". On the other hand, it refers to "binding norms with a soft dimension". Soft dimensions could be "the unspecific provisions of a treaty, general objectives, commitments that are only optional". Lastly, it could be understood as a combination of them both. Terpan himself adopts the combined version. The perceived strength is that, posing soft law on the legal continuum of norms by reason of their legal relevance, at the same time not reaching the level of "legal commitment" experienced by hard law, further provides for a more precise analysis of the complex normative production of the EU legal order.[33]

As for the distinction between hard law and soft law, Terpan argues that it depends both on the existence of an obligation and its enforcement. Enforcement is key to understanding how the norm intends to ensure that the obligation is fulfilled or that the assigned goal is achieved.[34] If the norm neither involves an obligation or enforcement, then it is not considered soft law but merely political.[35] Soft law then, either involves a hard obligation but soft or no enforcement; a soft obligation, with hard or soft enforcement; or no obligation but soft enforcement.[36]

The first dimension in accordance with this distinction considers the nature of the obligation. In this regard, the content and source of a norm affect the character being "soft" or "hard". A soft norm is alternatively or cumulatively soft in relation to the content and/or source, whereas a hard norm is both hard in relation to the content and the source. As to the source, formal treaties, unilaterally binding acts, or judicial decisions usually, but not always, give rise to hard law. As to the content, the nature of the obligation influences the softness or hardness of a norm. An obligation that leaves much leeway in its fulfilment is softer than a rule that is very precise. Similarly, a "best effort" obligation rather than a norm that assumes to reach a certain result softens the obligation.[37]

The second dimension of distinction, enforcement, includes hard and soft enforcement as well as no enforcement mechanism at all. Hard enforcement involves judicial control of the norm or "a very constraining form of non-judicial control", a character that soft enforcement lacks. Soft enforcement includes

[33] Ibid., p. 70-72.
[34] Ibid., p. 72-73.
[35] Ibid., p. 74.
[36] See especially Table 2 at ibid., p. 76.
[37] Ibid., p. 73.

voluntary settlement disputes, as for example in the International Court of Justice, and when enforcement is only monitored.[38]

In light of the discussion conducted above, I advocate that excluding soft law from the examination of the thesis would impair the purpose of the thesis. Therefore, when the theories I use refers to norms, I will regard it to include soft law and accordingly, view the theories on legal power applicable thereto.

There exist many definitions and categorizations of soft law, both in regard to international law in general, and in regard to European law in particular. I will not account for all these definitions but will deliver a selection thereof in the following. Snyder's definition focuses on the ability to enforce norms in judicial proceedings[39], and considering that there has been no judicial review of soft law measures in the context of the macroeconomic framework, I hold that his concept is less useful to attain the purpose of the thesis. Moreover, in my opinion, the definition provided by Borchardt and Wellens is less adapted to the complexity of the soft law instruments in the relevant framework into consideration because their definition is operating with a pre-legal concept of soft law.[40] Terpan specifically base some arguments on K. Abbott & D Sindal's[41] definition and creates an accessible theory. As my purpose is not to categorize the European Semester measures as either soft or hard, but to highlight the complexity of these measures in relation to exercise of legal power, Terpan's theory is superior for the purposes of the thesis.

1.4 Method and Material

1.4.1 EU Law in Context

In order to fulfil the purpose of the thesis, I have opted to employ several methodological approaches. The reasons for this multitude are, firstly, that this area contains many soft law instruments. An issue with the traditional EU legal dogmatic theory is the invisibility of such instruments. Moreover, the resort to a pure legal dogmatic approach when studying EU law has been described as "[leading] to a flawed analysis"[42] as legal scholars and political science scholars alike ignore each other's findings. I will thus adopt a perspective that Neergaard and Wind identifies as "EU law in context". This approach incorporates and stresses the importance of an interdisciplinary perspective, in which political science, history, economy and sociology are considered important in legal analysis. Even though law is a point of

[38] F. Terpan, (2015), pp. 73-74.
[39] F. Snyder, (1993), pp. 16 ff. Senden has a similar approach, see: L. Senden, (2004), pp. 107 ff.
[40] G.M. Borchardt and K.C. Wellens, (1989).
[41] K. Abbott and D. Sindal, (2000), pp. 421-422.
[42] J. Weiler, (1991), p. 2407.

departure or a focus point of an analysis, its other contexts are not to be lost. This approach also paves the way for a more critical approach to the posed legal research questions.[43] Accordingly, I have primarily used legal dogmatic and legally analytical material, but also material with a political science perspective, and several articles featured in the European Law Journal which expressly adopts an EU law in context approach.

1.4.2 Legal Perspective

1.4.2.1 Sources and Interpretation of EU Law

An overarching methodological approach is that of legal analysis. A legal analytical method is concerned with analysing the law, as opposed to legal dogmatic method which aims at determining what the positive law is on a certain issue.[44] In light of the fact that the purpose of the thesis is to analyse the constitutional nature in EU macroeconomic governance rather than to "determine" what that is, the legal analytical method suits the purpose better than a purely legal dogmatic method. Nevertheless, as I must then analyse the law, I still have to gather legal material. In this regard, the sources and interpretation of EU law are rather uncontroversial for the use in my thesis. Without further motivation, I chose Streinz's[45] explication for the sources and interpretation of EU law, of which I will reproduce relevant parts in the following.

European Union primary law consists of the TEU and the TFEU, their accompanying Protocols and Annexes, and the Charter. These sources of primary law have an equal legal value (article 1, 6 (1), and 51 TEU). As regards secondary law, and by reason of the purpose of the thesis, I must also establish the measures that have been adopted in context of the macroeconomic framework. Case law is an important source of EU law and would have been authoritarian in answering the posed research questions. However, there is no relevant case law regarding macroeconomic governance in the context of the purpose of the thesis.

The interpretation of primary and secondary law is ensued on the Court of Justice of the European Union (CJEU) (Art 19(1) TEU) with some exceptions not relevant in regard to the topic of this thesis. As primary law is based on, and its development dependent on, international treaties concluded by the Member States, interpretative methods of international law can be applied, but the specific nature of the Union entails that there are special features in that interpretative method. The interpretative method of the CJEU includes the wording of the provision, which is a starting point. Another method adopted is the systematic interpretation, in which

[43] U. Neergaard and M. Wind, (2012) in U. Neergaard and R. Nielsen (eds.), pp. 263 ff.
[44] C. Sandgren, (2015), p. 45 ff.
[45] See R. Streinz, (2017), in K. Riesenhuber (ed.), pp. 151 ff.

the CJEU looks at the function of a provision within the structure of the instrument of which it is a part (in case of EU primary law: the Treaties). The Court can thus look at the position of the provision in a title or chapter of the Treaties, official headings, the interaction of general and special parts, preceding principles and provisions that follows them. Thirdly, the CJEU has frequently, with critique following, adopted a teleological approach, interpreting provisions with respect of their objectives and thus making sure that the objectives are reached effectively. Furthermore, the CJEU has awarded historical elements, such as the intentions of the legislator or in general the societal and political context of which a provision was conceived, little relevance. However, since preparatory works have become generally accessible, the CJEU has adopted a historical method in "appropriate cases". The preambles of the Treaties, which can illuminate the intention of the legislator, are however seen as a part of primary law, and can thus be used in grammatical, systematic and teleological methods of interpretation. Naturally, comparative law is used as an interpretive method, and is enshrined in article 6(3) TEU and 340 TFEU. Lastly, there is no explicit hierarchical relationship between these methods and approaches.

The Treaties formally identify some legal instruments (article 288 TFEU) which are: directives, regulations, decisions, recommendations and decisions. Directives, regulations, and decisions are expressly legally binding, and per article 289 TFEU are categorized as legislative acts. Conversely, recommendations and decisions are per article 288 TFEU specified not to be legally binding and per article 289 are not considered legislative acts. However, the various Treaty provisions also provide for other types of measures, for example guidelines. The legal effects of these other measures legal are not determined by the Treaty, and it must therefore be determined on a case-by-case basis.

Article 296 TFEU compels the European Parliament and the Council to adhere to the, by the relevant Treaty provision, specified instrument. However, this principle is also generally applicable when the Union institutions are adopting measures.[46] Recommendations, albeit not legally binding, does have some legal effects. The ECJ has stated that:

> … the national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular when they cast light on interpretation of national measures adopted in order to implement them or where they are designed to supplement biding [Union] provisions.[47]

[46] K. Lenaerts and P. Van Nuffel, (2011), pp. 884-885.
[47] Case C-322/88 (Grimaldi) para. 18.

1.4.2.2 Tusseau's theory on power-conferring norms

I have adopted Tusseau's theory on power-conferring norms[48] in order to assess whether the Union has overstepped its competences and to determine the relationship between the powers of the Member States and the Union. Tusseau's theory was chosen because it is methodological in nature. It sheds light on what element of the production of a power-conferring norm, in other words secondary law, is or is not compatible with it. This enables the analysis to show a (possible) particular direction of the overstepping of competence.

1.4.2.2.1 Types of power-conferring norms

Tusseau's concept on power-conferring norms includes four elements; (i) the actor; (ii) the procedure or the action; (iii) the range of application; (iv) the range of regulation. These elements will be described below. On these elements, Tusseau creates a formula for the concept of a power-conferring norm: "if an actor a accomplishes the action—i.e. follows the procedure—p having the subjective meaning of a norm n relative to a range of application ra and included in the range of regulation rr, then its objective meaning ought to be". The power-conferring norm conditions the actor's production of a norm but is also the only condition for any actor to produce a norm. Using this formula, Tusseau identifies types of power-conferring norms in the EU legal order.

He starts explicating the concept of *the actor*. In this regard, he distinguishes between power-conferring norms that can be attributed to whole organizations and those attributable to specific organs of such an organisation. Moreover, he finds a distinction between power-conferring norms addressed to an individual and an institution consisting of several individuals. Again, he makes a distinction between a single institution and several institutions. When the addressees are several institutions, he identifies these institutions as "a set of co-authors" whose combines consent is a necessary condition for producing a norm. Such a system gives the respective institutions a "veto power – be it in the form of an initiative, a proposal, or the consent to a proposed norm". These constructions can create "jointly empowered … complex actors".

The second element is the *action or procedure*. In this regard, he proposes a distinction between those power-conferring norms which empower the actor to create one specific action and those which allow several actions. This element contains inter alia rules on voting and consultation.

The third element is the *range of application* which relates to the "area of reality" that an actor is empowered to govern. It involves the material, personal, territorial,

[48] See G. Tusseau, (2014), in L. Azoulai (ed.), pp. 39-62.

and temporal area. The range of application determines criterion or a combination of criteria that governs the "subject matter" of "the regulation of which is entrusted to the empowered legal actor". A material criterion could be relating to priorities set in a power-conferring norm, for example that environmental concerns should be prioritized over economic concerns. Further, temporal and territorial criterion could define the range of application, for example directing the range to third countries and/or a specific time period. He does not exhaustively list these types of criterion, and also clarifies that power-conferring norms can be generic.

The last element is the *range of regulation*. The range of regulation relates to the type of norm the actor is allowed to produce and its level in the normative hierarchy. In this regard, he opposes power-conferring norms being discretionary in relation to the type of norm to be created, and those that may only result in a specified norm. The range of regulation can determine whether the norm should be a legislative act or not, and further, if it could be a decision, or a directive, etc.

1.4.2.2.2 Relationships between power-conferring norms

Tusseau moves forward from identifying types of power-conferring norms, to identifying their relationship in the EU legal order (as his purpose is to discuss EU as a federal order of competences).

Citing Italian theory of legal sources, he identifies two "major modes of relationship between norms": the principle of hierarchy and the principle of competence. The latter mode operates on what he calls a horizontal scale, as opposed to the former which operates on a vertical scale.

The principle of hierarchy imposes on an inferior actor a requirement to respect and conform to the norms produces by a superior actor. When there is a conflict between the norms produced by these actors, the norm of the superior actor will prevail. In his theory, he considers that the principle of hierarchy governs the normative meanings that the power-conferring norms authorize, so that when there is a norm produced by the range of regulation of the inferior power-conferring norm it must comply with the norm produced by the range of regulation authorized by the superior power-conferring norm.

The principle of competence functions as a distinguisher of sources of law. The relationship in this regard, is not that of hierarchy but of exclusion; a source produced in one field excludes other sources to operate in that field. Tusseau renames the principle of competence *coordination of power-conferring* norms as it is used as a coordinator of the material, territorial, personal, etc. areas which the power-conferring norms authorize the production of norms. This then, regards the relationship between power-conferring norms at the level of their respective ranges of application.

As regards the coordination of power-conferring norms, Tusseau argues that several techniques can be used to perceive relationship of coordination between two power-conferring norms. Firstly, he identifies what he calls "parcelling competences" which means that the empowered actors divide the range of application, for example as regards a territory or a time span, and then have competence within its respective division. In this scenario, the actors have an identical power-conferring norm, but which only authorizes the production of norms relating to that exact span in the application. Further, he identifies another way to coordinate, that between special and generic power-conferring norms. The special range of application is defined, and the other is generic. Such is for example the principle of conferral in which the Member States have a generic legislative competence whereas the Union is only competent in relation to the specific powers that have been conferred on it.

Moving on to the forms of hierarchization, Tusseau argues that this can take two broad forms. One of these forms is delegation, wherein a superior power-conferring norm delegates power, which creates an inferior power-conferring norm, thus limiting the superior power-conferring norm to what extent it can delegate its powers. This is opposed to the relation of primacy, which limits the normative production possible for the inferior power-conferring norm. In his theory, primacy can take the form of conformity or compatibility, which differs in the degree of primacy. Conformity is a strict correspondence, whilst compatibility is looser since it only requires an absence of conflict. The principle of hierarchy regards the normative production of the inferior power-conferring norm, as the inferior authorization must then either conform to or be compatible with the normative production of the superior power-conferring norm.

Lastly, Tusseau highlights that when two power-conferring norms are not coordinated chronologically and share the same range of application, then they relate to each other with respect to their ranges of regulation in light of the principle of hierarchy. In such a case, several empowered actors may legislate in the same range of application, but there remains a situation of hierarchy. Another situation is that both actors are empowered to act as regards the same range of application, but that one actor may only act if the other has not acted yet. At first then, there is no coordination, but such a situation subsequently occurs.

1.4.3 Political Scientific Perspective

I previously explained why I have incorporated a perspective of political science in the thesis. In essence, I have complemented the legal reasoning with material originating from research of political scientists. Mainly, this regards the discussion of soft law and hard law, in which political science offer a valuable description of the way different governance aspects shape an area of EU competence.

Firstly, Kenneth Armstrong has specifically studied the fiscal governance of the EU and developed an idea of how the "new governance" in this area exhibits hybridity; an interplay between hard law and soft law, or rules-based and coordination-based governance. Armstrong argues that, in the new fiscal framework, it is flawed to argue that soft law has been substituted by hard law. Such a description would fail to account for the interplay between rules-based governance and coordination-based governance. Secondly, he highlights the intrinsic problem with characterizing hard law and soft law on a continuum. Though more nuanced, such a viewpoint still loses the connection between the two forms of governance. Armstrong's hybrid form of "new governance"; hybridity between rules based and coordination-based governance; is attaining to explicate how instruments and modes of governance are utilized in a new way to optimize governance capacity. His analysis centres around two dimensions of the combination of rules-based and coordination-based governance, that is how it seeks to inflict fiscal discipline on the member States; how it attains accountability for Member States.[49] Armstrong evidences that the understanding of the response to the crisis as a resort to hard law from soft law; or from intergovernmentalism to supranationalism; or from the open method of coordination[50] to the community method; is inadequate and flawed. His conclusion is that the response to the crisis did not show a switch from one thing to another, but instead is understood as a "pluralisation and differentiation in the forms and instruments of EU governance".[51] Perceiving the economic policy measures adopted by the Union in light of Armstrong's theory enriches the discussion on how the Union is exercising legal power in this area and how it affects the division of powers between it and the Member States. My view is that having a tunnel-vision on the legality of norms may result in a simplified understanding of these issues of power.

Furthermore, I have included contributions from the perspective of administrative law in my analysis: namely that of Luca De Lucia. Administrative law could be described as an interdisciplinary perspective, of which the contribution I have used combines a governance and legal perspective. The rationale for the use of this material is the same as described in relation to Armstrong's theory: these perspectives can illuminate the way of which law is used to influence the behaviour of the Member States.

[49] K. Armstrong, (2013), pp. 609 ff.
[50] The open method of coordination (OMC) is the concept traditionally used by scholars to describe the "soft governance" in certain fields of EU competence, for example in economic policy. It has been opposed to the community method, of which a core element is the role of the ECJ has a law-making actor. See for example, F. Terpan, (2015), pp. 68-69.
[51] K. Armstrong, (2013), p. 604.

Lastly, the material with an expressed EU law in context approach, namely those articles from the European Law Journal, also provides perspectives beyond the law as the journal adopts an EU law in context approach.

1.5 Prior research

The institutional response to the euro area crisis has been subjected to profound interdisciplinary dissection. It is impossible to account for this vast body of work. From a constitutional perspective, this topic has been examined most prominently by Alicia Hinarejos, and Karlo Tuori and Klaus Tuori. Additional contributions on the constitutional nature of coordinating competence are included in comprehensive work on EU Law or EU constitutional law in general and are therefore less specific. The economic framework has also been under the perspective of political science, authoritatively by for example Kenneth Armstrong.

The prior research as regards the coordinating competences of the Union and the economic framework related thereto is vast and multifaceted. The aspiration with the present paper, is to compliment this body of work by focusing on the macroeconomic framework and by adopting the multifaceted theoretical framework outlined above.

1.6 Deliminations and Clarifications

The Economic and Monetary Union (EMU) can be said to be based on four pillars. The first regards fiscal discipline, such as the Sustainability and Growth Pact (SGP) and its excessive deficit procedure (EDP). The second pillar is the macroeconomic framework. Thirdly, the EMU covers socio-economic coordination through the Euro Plus Pact and the Pillar of Social Rights. The fourth pillar is the financial regulatory framework, including the governance of financial assistance. [52] Pursuant to the purpose of the thesis, the analysis centres on the macroeconomic framework. As regards the last two pillars, they are not primarily based on the Union's coordinating competence in economic policy, as the socio-economic pillar also regards the Union's competence in social policy, and the financial pillar regards the Union's competence to provide financial assistance. Concerning the delimitation of the fiscal pillar, the EDP is more expressly foreseen in the Treaties, in contrast to the macroeconomic imbalance procedure (MIP). Although measures adopted to strengthen the EDP has also been critiqued, that is the even more true for the MIP. Additionally, the MIP includes more discretionary evaluations than the EDP, which is rather based on numerical fiscal rules, which influences the discussion on the allocation of power between the Union and the Member States.

[52] K. Lenaerts, (2014), pp. 755-756. Note that Lenaerts did not include the Pillar of Social Rights as it had not been adopted at the time.

As regards the issue of legal power and Union competences, I will not discuss the principle of subsidiarity or proportionality. Even as these rules are covered by the principle of conferral, and therefore have significance in that regard, I claim such a discussion would derail from the core aspects of the purpose. In addition, the principle of conferral is connected to the doctrine on legal bases. The theoretical framework of the thesis is instead connected to the principle of conferral and constitutionalism presented in chapter 1.3.1.

I refer on several places in the thesis to the idea of the Union as a federal-like entity, or in general to the concept of federalism when discussing the relationship between the Union and the Member States. The purpose of the thesis is not to relate my conclusions directly to the concept of federalism, but I would like to clarify that the notion of federalism in the thesis is built on the concept as developed by de Burca.[53] The reason thereto lies in the fact of his prominent role in the purpose of the thesis, as demonstrated by the problem identification in the introduction of this chapter. On the same note, I refer to the concept of centralisation, of which I mean the idea that legal powers are attributed to the centre of a federal entity, in this case the EU institutions.

1.7 Structure of the Thesis

Before I begin answering my research questions, I would like to briefly comment on the structure of the thesis. In the introduction of each chapter, I will explicate the content of that chapter, but overall, the structure is as follows.

In the **second chapter**, I will set the stage for the analysis of the third chapter. I have therefore decided to name this chapter *analytical object*. In the **third chapter**, I will present the analysis in response to my research questions on the background of this analytical object. This chapter will thus be based on my own findings, but will be enriched by, complimented with and related to prior research. The chapter is built on five analytical axes: the scope of the framework, the use of enhanced cooperation, the enforcement mechanisms, the constitutional actors, and the objectives of the macroeconomic framework. With this thematized construction, I hope to present the analysis in an accessible manner. Lastly, the **fourth chapter** is related to the purpose of the thesis. Therein, I will present my concluding remarks on the nature and direction of EU competence in relation to the macroeconomic framework as visible in the institutional practices of the Union and discuss these findings in the contemporary societal context in order to determine possible explanation for the centralization of legal power.

[53] See G. De Búrca, (2005).

2 Analytical Object

The second chapter of the thesis serves as a background for the analysis in the third chapter. I will present the analytical object of the thesis, which encompass several aspects. Firstly, a brief depiction on Union competences in general, specific scholarly comments on coordinating competence in economic policy will follow. Secondly, the explication of the underlying principles of the EU economic constitution and its development aims at providing a context in which an analysis on the direction of institutional practices may operate. Thirdly, I will without further comments reproduce the Treaty provisions on economic policy related to the MIP. These provisions will have great importance in the analysis of the third chapter, as the Treaty provisions are the norms conferring the power to the Union to adopt the framework for which I will lastly account for. This account will take place in the last and fourth subchapter, which I call *Framework for macroeconomic imbalances*, encompassing the MIP-regulation and its Enforcement-regulation as well as certain aspects of the European Semester of which the MIP-regulation is a part.

2.1 Birds-eyes View on Union Competences

2.1.1 Categories and Areas of Union Competence

Title I of part one of the TFEU is titled *Categories and areas of Union competence*. This part was introduced by the Lisbon Treaty with an aim at explicating the Union competences, particularly the limits thereto. The TFEU thus explains in what areas the Union is competent to act in, and what different types of competences in has in relation to these areas.

Article 2(1) TFEU stipulates that in an area of exclusive competence "*only the Union* may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts" [emphasis added]." Article 3 TFEU lists (exhaustively) the areas in which the Union has exclusive competence. Among these categories we find policy areas that are economic in nature such as competition, but economic policy as an express competence area is not included.

Article 2(2) TFEU stipulates that a shared competence entails that "*the Union and the Member States* may legislate and adopt legally binding acts in that area" [emphasis added]. The same article specifies further that "[t]he Member States shall exercise competence to the extent that the Union has not exercised its competence" which is an expression of the principle of pre-emption. Article 4(1) TFEU stipulates that "the Union shall share competence with the Member States where the Treaties

confer on it a competence which does not relate to the areas referred to in Articles 3 and 6". Article 4(2) TFEU reads "shared competence between the Union and the Member States applies in the following principal areas" and follows with a listing of areas, not including economic policy. Article 4(3) and 4(4) TFEU specifies the competence in the areas of research, technological development and space (article 4(3) TFEU) and the areas of development cooperation and humanitarian aid (4(4) TFEU). These areas are not included in the list in subparagraph 2, but clearly still belongs to the same article.

As regards economic policy, article 2(3) TFEU reads:

> The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.

In other words, the Union shall have the competence to provide arrangements wherein the Member States shall coordinate their economic policies.

Article 5 (1) TFEU reads:

> The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.
>
> Specific provisions shall apply to those Member States whose currency is the euro.

Article 5(2) and 5(3) TFEU regards the competence in employment and social policy respectively, wherein the Union has a competence to "take measures to ensure coordination" in employment policy but only "*may* take initiatives to ensure coordination" [emphasis added] of social policies. The coordination of social policies is furthermore not mentioned in article 2(3) TFEU.

2.1.2 Scholarly Interpretation of Coordinating Competence

The introduction of the clarification of the competences by the Lisbon Treaty was welcomed, but critics argue that the Treaties still leave a lot to wish for in terms of precision and logic.[54] By reason of its imprecision, the scholarly interpretation of the nature of coordinating competences is divided.

[54] R. Schütze, (2008), p. 709.

On the one hand, there are scholars who place coordinating competences in the area of shared competences. The reason thereto is that shared competence is a residual competence area, only delimiting the areas listed in articles 3 and 6 TFEU. Because economic policy is listed in article 5 TFEU, they thereby reason that it should be encompassed in shared competences.[55] Belonging to this school of thought, J-C. Piris however clarifies that the Union's competence in economic policy "should have been classified as complementary" as the Member State's retain their competence over substantive economic policy measures.[56] Considering that shared competence has certain implications, for example as to the applicability of the principle of pre-emption, the classification of coordinating competence as a form or quasi-form of shared competence is legally significant.

On the other hand, such a classification has been questioned. Firstly, Roland Bieber argues that coordinating competence is not included in shared competences, as it is not listed in the three categories (shared, exclusive or supportive, coordinative, supplementary; articles 2(1), 2(2) and 2(5) TFEU respectively) and is instead "undefined" with uncertain legal implications. He also interprets from the sum of the Treaty provisions that the Union cannot act pre-emptively in this area. His conclusion is that EU's competence in economic policy is a "sui generis" and divides the competence in relation to each type of measure. Thus, he concludes that the Union exercises an exclusive competence when it is adopting sanctioning provisions; no allocation of power is transferred from the Member States when adopting broad guidelines (but otherwise leaves this type of competence undefined); a shared-like competence when adopting binding measures for the Member States.[57]

Additionally, the political background of the classification has resulted in that some scholars place coordinating competence on a spectrum between shared competence and the category of supporting, coordinating and supplementary (article 2(5) TFEU).[58] To this school of thought one can attribute Robert Schütze and Paul Craig. Craig notices that attributing economic policy to the area of shared competence was opposed by some states apropos the implications of pre-emption, but that they also considered the category of supporting, coordinating and supplementary action too weak, with the result of opting for some kind of middle ground. Craig leaves for the specific provisions in the later chapters of the Treaty what legal implications this separate treatment has for the constitutional nature of economic policy competence.[59] Schütze argues that the Union has the competence to produce "some

[55] A. Rosas and L. Armati, (2018), pp. 23-25; J-C. Piris, (2010), p. 77.
[56] J-C. Piris, (2010), p. 77.
[57] R. Bieber, (2014), in L. Azoulai (ed.), pp. 89-90.
[58] P. Craig & G. De Burca, (2015), pp. 88-89.
[58] R. Schütze, (2015), p. 242.
[59] P. Craig & G. De Burca, (2015), pp. 88-89.

degree of harmonisation" in the economic policy area.[60] He does not specify in relation to what subject matter the Union would be able to harmonize. For example, this leaves the question whether the harmonisation relate to procedural issues, or whether it could also relate to substantive economic issues.

In that regard, Hinarejos states that coordinating competence is "merely" to provide arrangements for coordination and not adopting economic policies as legislation. Accordingly, she concludes that the Union cannot pursue its own economic policy, for example, to decide on issues on general taxation. She categorizes economic coordinating competence as restricted, seeing that it has resulted in "loose" coordination by soft law or hybrid instruments. She holds that such instruments do not affect the Union's competences, likewise not the remaining powers of the Member States, but instead tries to influence the Member States actions in the field.[61] Koen Lenaerts has expressed a similar approach, stating that whilst the Union may impose budgetary and fiscal objectives, it is within the State's autonomy to decide the policy choices as means to attain those objectives.[62]

To summarize, it has proven difficult to deduce from the general Treaty provisions on Union competences even how to define EU economic coordinating competence. My already stated preference is not to be left in despair by this, considering that the Treaty provisions in Part III of the TFEU has precisely the objective to explicate the extent of competence in the different policy areas.

2.2 Underlying Principles of the Economic Constitution and its Development

Before moving on to the specific Treaty provisions on economic policy in Part III Title VIII of the TFEU, I will examine the development of the economic constitution and its underlying principles. This is of interest in respect of the direction of the institutional practices in regard of the macroeconomic framework; to know the direction, we must know the starting point.

Firstly, lets clarify what the concepts mean. Fiscal policy generally refers to a State's revenues and expenditures, which typically are decided in the national budget and approved by the national parliaments. Economic policy is a second order concept which includes fiscal (and monetary) policy, in addition to other various structural policies.[63] A numerical fiscal rule sets a numerical ceiling or target in

[60] R. Schütze, (2015), p. 242.
[61] A. Hinarejos, (2015), pp. 73-74.
[62] K. Lenearts, (2014), p. 766.
[63] K. Tuori & K. Tuori, (2014), p. 31.

relation to an "overall fiscal performance indicator" such as the government budget deficit, debt, expenditure, revenue, etc.[64]

State sovereignty over fiscal and economic policy has been identified as one of the principles of the economic constitution. The original set-up was a "decentralised" fiscal policy, in which the Union lacked a "centralized fiscal policy function and … centralized fiscal capacity" within a monetary Union.[65] The strengthening of EU economic governance post-crisis has been perceived as a challenge to the underlying principle of fiscal autonomy of the Member States.[66]

Traditionally, monetary policy and numerical fiscal policy rules have been regarded as unpolitical. Conversely, general fiscal and economic issues have been regarded as key aspects of State sovereignty.[67] This distinction is not redundant, as pursuing for example tax and redistributive policies justifiably requires democratic legitimacy.[68] Considering that economic policy is a second order concept, thus including both fiscal and numerical fiscal policies, wherever the EU is adopting fiscal or numerical fiscal rules, it is adopting economic policy measures. However, there is clearly a difference between adopting numerical benchmarks, leaving it up to the Member States how to reach them, and intervening in the policy choices of the Member States. By leaving the execution of fiscal and economic policies to the Member States, the Union needed not delve into a politically sensitive area nor encounter the legitimacy problem.

Furthermore, the initial idea was that the Union would enjoy a conferred competence in economic policy (at least in the form of the internal market) but that social policy[69] would remain within the competence of the Member States. The reason thereto is that social policy which corresponds to ideas of redistributive justice (in the inter-state rather than intra-state sense) necessitated democratic legitimacy.[70] This underlying substantive constitutional balance has also been considered challenged by the euro area crisis. Several Union instruments, inter alia the MIP-regulation, post-crisis provide for the assessment of redistributive and fiscal policies of the Member States, which have been identified as a threat to the justifiably necessitated democratic legitimacy.[71]

The economic distress of the crisis has been explained by the Commission to be partially caused by the non-compliance of the rules of the SGP, that is mainly

[64] European Commission, *Numerical fiscal rules in EU member countries.*
[65] European Commission, COM (2012) 777 final, p. 2.
[66] K. Tuori & K. Tuori, (2014), pp. 188-189.
[67] M. Dawson & B. De Witte, (2013), p. 824.
[68] Ibid., p. 826.
[69] Social policy in sense of the ability of redistribution of wealth.
[70] M. Dawson & F. De Witte, (2013), p. 823.
[71] Ibid., p. 826.

numerical fiscal rules. The Commission argues that "features of the original institutional setup of EMU, in particular the lack of a tool to address systematically macroeconomic imbalances" was a vulnerability in the old system.[72]

Hinarejos has created two models for future integration in this area; the surveillance model and the classic fiscal federalism model. In the former, the Member States retain full fiscal competence (namely, they retain full taxation power and the Union have no such power itself) but the Union has a corrective role of enforcing discipline. In such a model, a fuller version entails the Union compelling the Member States to achieve the set objectives by specific policy reforms. Hinarejos argues that we are in an initial phase of this version. The other scenario is a "classic fiscal federalism' model" in which also the Union has the power to raise revenues and allocate resources. She further maintains that both models parallel in terms of sustaining democratic legitimacy and national autonomy. As for the surveillance model, she foresees the danger that "… while Member States would be the only ones able to tax formally, their tax sovereignty or autonomy would still be curtailed to the extent that the EU is able to decide on important aspects of how revenues are raised".[73]

2.3 Treaty Provisions on Economic Policy related to the MIP

As per article 121(1) TFEU, the Member States must regard their economic policies as a matter of common concern. The Council has a competence to adopt broad guidelines of the economic policies (BEPGs) of the Member States (article 121(2) TFEU) in the form of a recommendation, on the basis on discussions by the Commission and the European Council. The Member States must construct their economic policies "in context" of these guidelines as per article 120 TFEU.

Articles 121(3) and 121(4) TFEU set out the multilateral surveillance procedure. This procedure includes surveillance and assessments of the economic developments in the Member States and the consistency of their economic policies with the respective BEPGs. The surveillance and assessments are conducted first by the Commission, which reports on its findings to the Council. To enable the task of these Union institutions, the Member States must keep the Commission informed on "important measures taken by them in the field of their economic policy and such other information as they deem necessary" as per article 121(3) TFEU. In accordance with article 121(4) TFEU, the Council may adopt a recommendation in respect to a Member State if their economic policies are not "consistent with the broad guidelines" or "risk jeopardising the proper functioning of economic and

[72] European Commission, COM (2012) 777 final, p. 2.
[73] A. Hinarejos, (2015), pp. 181 ff.

monetary union". The Council's decision to issue such a recommendation is initiated by a Commission recommendation. The same article stipulates that the Council may, on a proposal from the Commission, decide to make its recommendations public.

Article 121(6) TFEU provides a competence to detail the multilateral surveillance procedure. This detailing is empowered to take the form of a regulation, which is to be adopted in accordance with the ordinary legislative procedure (OLP).

Article 136 TFEU regard only the eurozone states and provides for enhanced cooperation. That cooperation enables the adoption of measures:

> (a) to strengthen the coordination and surveillance of their budgetary discipline;
>
> (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance" (article 136(1) TFEU).

The above presentation of the Treaty provisions contains a lot of information, but not a lot of explanation. It will operate as an introduction, but more detailed analyses of the Treaty provisions will be conducted in relation to the analyses in the third chapter.

2.4 Framework for Macroeconomic Imbalances

The framework for macroeconomic imbalances is based on Regulation 1176/2011[74] (the MIP-regulation), complemented by regulation 1174/2011 (the Enforcement-regulation)[75] which provides for financial sanctions for the Eurozone States. However, article 1(2) of the MIP-regulation states that the regulation is to be "applied in the context of the European Semester". It is therefore important to also examine the interconnection between the instruments of the Semester. I will reproduce these instruments to the extent that they have implications or may provide explanations for the macroeconomic framework.

[74] Regulation (EU) 1176/2011 of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances.
[75] Regulation (EU) 1174/2011 of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area,

2.4.1 MIP-regulation

The legal basis for the MIP-regulation is article 121(6) TFEU. The preamble recognizes that "supplement" to the multilateral surveillance as set out in articles 121(3) and (4) TFEU with "specific rules" for detecting, preventing and correcting macroeconomic imbalances is appropriate.[76]

The procedure for detecting and preventing imbalances is called the macroeconomic imbalance procedure (MIP). The regulation defines an imbalance as:

> … any trend giving rise to macroeconomic developments which are adversely affecting, or have the potential adversely to affect, the proper functioning of the economy of a Member State or of the economic and monetary union, or of the Union as a whole.[77]

Clearly, the definition of macroeconomic imbalances is very broad.

The detection of imbalances is facilitated by the so-called scoreboard (article 4). The scoreboard is created by the Commission and is based on numerous numerical fiscal benchmarks. On the basis of the scoreboard, the Commission will produce an alert mechanism report (AMR) which is a part of the alert mechanism (article 3(2)) intended to at an early stage detect imbalances. The AMR will be discussed by the Council and the Eurogroup (article 3(5)) and covers all Member States. The AMR may lead to the Commission undertaking an in-depth review (IDR) (article 5). An IDR is undertaken only if the situation of the Member State so requires. On the basis of the IDR carried out by the Commission, it can consider the Member State in question to experience either no imbalance, an imbalance or an excessive imbalance. When assessing the imbalance, compliance with earlier recommendations issued under the MIP-regulation or other recommendations issued under article 121 TFEU, "in particular the [BEPG]" should be considered.[78] The preamble stipulates that the "smooth functioning of the economic and monetary union" should be taken into account in the assessment.

If the Council, on the basis of a Commission recommendation, considers that a Member State is experiencing imbalances, it may address recommendations to the Member State in question (article 6(1)). This is called preventive action. In this regard, the regulation specifically refers to article 121(2) TFEU.

[76] MIP-regulation, pmbl. 9.
[77] MIP-regulation, art. 2(1).
[78] MIP-regulation, pmbl. 17.

If the Council, on the basis of a Commission recommendation, considers that a Member State is experiencing *excessive* imbalances, it will open an excessive imbalance procedure (EIP) and recommend the Member State to take corrective action. The recommendation will "specify a set of policy recommendations to be followed" and a deadline for doing so (article 7(2)). This procedure is based on article 121(4) TFEU, as specified in article 7(2). Following the opening of an EIP, the Member State must submit a corrective action plan (CAP), setting out specific policy actions it has implemented or intends to implement. These actions are to be "based on" the recommended action stipulated by the Council (article 8(1)). The policy response of the Member State should cover the "main economic policy areas, potentially including fiscal and wage policies".[79] The Council may adopt a decision of non-compliance with such a recommendation by reverse Quality Majority Voting (QMV). The condition to establishing non-compliance is that the Council, on the basis of a Commission report, considers that the Member State "has not taken the recommended corrective action" (article 10(4)). If the Member State continues its failure to implement the recommended corrective action, the Council and the Commission, acting jointly, may impose fines and interest-bearing deposits on Eurozone States.[80] Financial sanctions can only be imposed on Eurozone states.[81] The decisions are taken based on reverse QMV.[82] An EIP is cancelled when the institutions consider that the excessive imbalance has ceased to exist (article 11).

In 2018, the Commission concluded on the basis of its IDRs that eight Member States were experiencing imbalances, three Member States were experiencing excessive imbalances, and one Member State were not experiencing any imbalance at all. In 2017, the respective numbers were 6, 7 and 1.[83] However, no Member State have been subjected to the EIP yet (2018).

2.4.2 Relation to the European Semester

The last subsection regards the relation between the MIP-regulation's and the European Semester. In this section, I will account for rules in the Semester that are relevant in connection to the MIP. Additionally, I will comment on how the Semester and the MIP-regulation interrelate and interact.

2.4.2.1 Briefly on the European Semester

The European Semester is a forum for monitoring the economic governance of the Member States, with a purpose to ensure closer coordination of the Member States'

[79] MIP-regulation, pmbl. 15-19.
[80] Enforcement-regulation, art. 3.
[81] Ibid., art. 1(2).
[82] Ibid., art. 3(3).
[83] European Commission, COM(2018) 120 final, p. 6.

economic policies. More specifically, the European Semester includes, in accordance with article 2-a (2) of Section 1-a of Regulation 1466/97[84]:

- The formulation and surveillance of the of implementation of the BEPGs;
- The formulation and surveillance of implementation of the broad employment guidelines;
- The submission and assessment of the Member States' convergence and stability programmes, and national reform programmes (as part of the preventive arm of the SGP);
- The surveillance of macroeconomic imbalances.

On a yearly basis, the Commission undertakes detailed analyses of the Member States' plans for budget, macroeconomic and structural reforms. On the basis of the analysis, it makes a country-specific recommendation (CSR) which is, as a rule, endorsed by the Council. Recommendations in the framework of the preventive arm of the SGP, the Europe 2020 strategy, the BEPGs, the Employment Guidelines, and the MIP (which encompass both the recommendations under the preventive action and under the EIP), are integrated into the single package, that is the CSRs. The CSRs are legally based on article 121(2) TFEU. It is the Member States' task to form their policies in response to the recommendations.

During the European Semester, the Council will, on the basis of a Commission recommendation, address guidance to the Member States in accordance with article 2-a (3) of Regulation 1466/97. Such guidance is provided in the CSRs. The Member States have an obligation to "take due account of the guidance addressed to them in the development of their economic, employment and budgetary policies before taking key decisions on their national budgets for the succeeding years." If the Member States fail this obligation, the same subparagraph invokes several sanctions:

- further recommendations to take specific measures;
- a warning by the Commission under Article 121(4) TFEU;
- measures under the preventive or the corrective arm of the SGP, or the sanction regulation.

[84] Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

2.4.2.2 The Sustainability and Growth Pact

2.4.2.2.1 Corrective and Preventive Arm

The SGP consists of two regulations, respectively called the preventive[85] and corrective arm[86] of the SGP. In accordance with article 1 of the preventive arm of the SGP, the regulation regards both the EDP, and the surveillance and coordination of the Member States economic policy, the latter of which is to be "promoted" through examination and monitoring of the Member States' stability and convergence programmes. The corrective arm of the SGP aims at clarifying and effecting the EDP.[87] The legal basis of the preventive arm of the SGP is articles 121 (multilateral surveillance) and 126 (excessive deficit procedure) TFEU, and article 126(14) TFEU respectively for the corrective arm.

In the preventive arm, the sanctions can be imposed as per article 4 on a Member State if it makes insufficient progress with budgetary consolidation, in that it deviates significantly from the medium term objective (MTO) or the adjustment path and fails to correct that deviation. In the corrective arm, sanctions can be imposed by the Council on a Member State if it decides that an excessive deficit exists, and the Member State has lodged an interest-bearing deposit, or it the Commission has identified "particularly serious non-compliance with the budgetary policy obligations laid down in the SGP".[88]

The MIP-regulation and its accompanying Enforcement-regulation state that the surveillance of economic policies of the Member States should be broadened "beyond surveillance to include a more detailed and formal framework" which should "take place in parallel with a deepening of fiscal surveillance.[89] This would be a nudge towards the fact that the SGP and the EDP mainly regards fiscal and budgetary issues. Hence, the MIP-regulation complements the SGP in the surveillance of economic policies of the Member States.

However, the MIP-regulation and the SGP not only complement each other, they also interrelate. Macroeconomic issues are connected to the SGP in that the Commission, when it is assessing the level of deficit in a Member State, shall take into account, inter alia, the economic policies in the context of macroeconomic imbalances.[90] Based on the report written by the Commission, the Council will

[85] Council Regulation (EC) 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.
[86] Council Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.
[87] Ibid., art. 1
[88] Ibid., art. 5(1).
[89] MIP-regulation, pbml. 7; Enforcement-regulation, pmbl. 6.
[90] Supra note 86, art. 2(3) (b).

decide whether the Member State has taken effective action in response to its recommendations.[91] A fine can be imposed by the Council if it decides that a Member State has not "taken effective action to correct its excessive deficit".[92] Consequently, a failure to properly address a macroeconomic imbalance might lead to the decision that a Member State has taken insufficient action to correct a deficit.

2.4.2.2.2 Draft Budgetary Plans

As a part of the Two-pack[93], regulation 473/2013 (DBP-regulation)[94] establishes enhanced monitoring and surveillance of Member State's draft budgetary plans (DBPs), in particular the compliance of the plans with the policy guidance provided under the European Semester. The regulation establishes a common budgetary timeline for all Eurozone Member States, rules for the monitoring and assessment of the draft budgetary plans of these Member State and a strengthened framework in regard to those states under an EDP.

The Eurozone Member States must submit their draft budgetary plans annually to the Commission and the Eurogroup which must be consistent with the recommendations issued in the context of the SGP, and any recommendations issued in the context of the European Semester, including the MIP (article 6(1)). The plan shall include, inter alia, information on the expenditure as regards various sectors, for example in relation to education or health care, and their expected distributional impact (article 6(3)).

The Commission will issue an opinion on the DBP (article 7(1)), or in the event of "particularly serious non-compliance with the budgetary policy obligations laid down in the SGP", the Commission will request a revised plan (article 7(2)). This would especially be the case

> … where the implementation of the draft budgetary plan would put at risk the financial stability of the Member State concerned or risk jeopardising the proper functioning of the economic and monetary union, or where the implementation of the draft budgetary plan would entail an obvious significant violation of the recommendations adopted by the Council under the SGP.[95]

[91] Supra note 86, art. 4(2).
[92] Regulation (EU) 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area, art. 6(1).
[93] A legislative package which consists of Regulation 473/2013 and Regulation 472/2013.
[94] Regulation (EU) 473/2013 of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [Hereinafter: the DBP-regulation].
[95] Ibid. pmbl. 20.

The DBP-regulation and the MIP-regulation thus interrelate in two ways. Firstly, the DBP must expressly be consistent with recommendations issued under the MIP-regulation. Secondly, as risks to the proper functioning of the EMU may determine the existence of macroeconomic imbalances in accordance with the MIP-regulation, it is possible that macroeconomic imbalances can become important in the assessment of the DBPs. By that logic, a revised DBP might be requested if the plan is deemed to insufficiently deal with a macroeconomic imbalance (and thus risk jeopardising the proper functioning of the economic and monetary union).

The Commission has only once requested a new DBP, which happened this year (2018) in regard to Italy's 2019 DBP. The Commission considered the DBP to be inconsistent with a Council recommendation issued in accordance with the preventive arm of the SGP. This regards the various numerical benchmark rules which are a part of the adjustment path towards the MTO. Furthermore, the Commission noticed that Italy did not comply with the condition of the DBP-regulation to endorse its plan by an independent body.[96] The Commission noticed further that whilst Italy has the sovereign power to decide their "budgetary priorities", it must still comply with the numerical fiscal rules set out in the recommendations under the SGP.[97]

[96] European Commission, C (2018) 7510 final.
[97] European Commission, MEMO/18/6175.

3 The Constitutional Nature of Macroeconomic Governance

The third chapter of the thesis is titled *The constitutional nature of macroeconomic governance*. It is structured on five dimensions or aspects of that nature, in particular the question of legal power and the allocation of that power in the EU federal-like economic framework. The fundaments of the analysis of the thesis is presented herein, which is founded on the theoretical framework presented in the introductory chapter of the thesis. My conclusions in this regard is presented alongside scholarly discourse on the different subject matters.

3.1 Scope of the Framework: Range of Regulation and Application

To reiterate, the principle of conferral entails that the Union must act within the competences conferred on it. Additionally, power-conferring norms relate partly to a specified (or general for that matter) range of regulation and application. In other words, the Union may legislate in respect of a certain subject matter by use of certain legal instruments. The result thereof can be said to make up the institutional practices of the Union which impact the nature of the competences it enjoys in a certain policy area.

In this chapter, I will examine the legal power of recommendations which is a prominent instrument of the macroeconomic framework. Thereafter, I will analyse the constitutionality of the types of instruments used and the subject matter of those instruments. Lastly follows an analysis of the implications of these instruments and their ranges of application on the division of power between the Member States and the Union.

3.1.1 Legal Power of Recommendations

The Treaty recognizes that the Union is exercising competence when its adopting directives, regulations, decisions, recommendations and opinions (article 288 TFEU). The same article stipulates that directives, regulations and decisions are legally binding. The legal effect of recommendations and opinions are however not provided for. Because the legal implications of the latter two instruments are dubious, I will especially analyse the legal power of recommendations in this subchapter.

In accordance with Senden's typology of soft law[98], the CSR should be categorized as a para-law policy steering instrument, meaning that its objective is to steer the policy or conduct of the target, in this case the Member State, without being legally binding. Article 121 (3) TFEU reads:

> In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall … monitor ... the consistency of economic policies with the [BEPGs], and regularly carry out an overall assessment.

Considering that the consistency with the BEPGs is monitored "in order to ensure closer coordination", they are intended to influence the conduct and policy of the Member States (to act consistently) with a policy goal (closer coordination).

Why is such a characterisation needed? By understanding how the instrument is used in order to steer the policy making of Member States, one can examine it from a viewpoint of a concept of power. Power is defined by Maccormick in just that context; the ability to influence the behaviour of another without that person's consent. Accordingly, if the Union is able to influence the Member State's economic policies by the use of the recommendations, and the following behaviour of the Member State is not based on their consent or dissent, then the Union has exercised power vis-à-vis the Member State.

Recommendations in this context can be regarded as a form of sanction, either as moral pressure by the other EU finance ministers or, in the regard they can be made public; public opinion pressure. A problem identified with examining the effectiveness of sanctions in these forms is that it is difficult to assess how the Member State that was targeted would have acted in the absence of the sanction (i.e. the recommendation). A theory as to why this sanction mechanism has rarely been used historically is to consider the possible costs inflicted on the actor imposing a sanction and the deterring effect that would entail on itself. In the context of the thesis, the cost for the Union is of a political nature, especially since it has a large discretion in considering the compliance with the BEPGs and thus inhabits a problem with keeping an aura of neutrality. Furthermore, the lack of precision in the Member States' obligations in the BEPGs may also prove to deter the use of recommendations as a sanction device.[99]

However, in accordance with Maccormick's theory, a power-in-fact and a normative power should be differentiated. The Union may have lacked the political power needed to adopt a recommendation in response to a failure to act compatible

[98] L. Senden, (2012), in U. Neergaard and R. Nielsen (eds.), pp. 225 ff.
[99] D. Hodson, (2012), pp. 79 ff.

with the BEPG, but that does not necessarily mean that it lacked the legal power to do so. From a constitutional standpoint, the question is if the Union exercises legal power when adopting recommendations in the form of para-law steering instrument. In accordance with the concept of legal power proposed in the introductory chapter, the question is then whether the legal positions of the Member States are changed by a legally conferred ability in relation to the Union, regardless of the consent or dissent of the Member States. In this regard, the notion of legal power is not only associated with obligations, but also with liberties and empowerments.

Terpan maintains that "[p]rogrammes, general guidelines and objectives cannot be any more than weak forms of obligations", thus, considers them to categorizes as "soft obligations" or "no obligation". The reasons he provides are that the Member States do not commit to achieving specific objectives, that they are not transposable to national law or directly applicable, and that they must only be "taken into account" by the national authorities.[100] Senden identifies that the ECJ has long held that national courts are bound to take recommendations into consideration as interpretative device in their judgements, in particular as regards law implementing or supplementing union law. She reasons that such an obligation does not appear to only relate to judiciary bodies, but also administrative and legislative bodies. Furthermore, she proposes that the ECJ will thus perceive such instruments as a benchmark for interpretation of secondary law, but also when considering the conformity of national law with Union law.[101]

The CSRs should be considered containing soft obligations to their content. As pointed out, the Member States do have an obligation to take them into account as per article 120 TFEU[102] and as per the SGP[103] and they cannot therefore be categorized as "no obligation". As the recommendations introduce a (soft) obligation in relation to the Member States, the legal positions of the Member States change by the recommendations. The change originates from a legally conferred ability, namely by the Treaties.

The last criterion of legal power is the lack of consent or dissent to the change. If it would be that it was the Member States that self-regulated in the form of CSRs then the change would be consensual. The BEPGs and the recommendations under the MIP are adopted, on the basis of a recommendation by the Commission, by the Council, presumably by a QMV[104]. The Council is an intergovernmental body, wherein the Member State itself is represented. However, firstly, the draft is written

[100] F. Terpan, (2015), p. 81.
[101] L. Senden, (2012), in U. Neergaard and R. Nielsen (eds.), pp. 238 ff.
[102] The article states that "[m]ember States shall conduct their economic policies /…/ in the context of the broad guidelines referred to in Article 121(2)".
[103] See chapter 2.4.2 of the thesis.
[104] As is the standard voting procedure for the Council, see art. 16(3) TEU.

by the Commission which is supranational entity. Secondly, as the adoption does not require the consent of the Member State in question (as it would if unanimity was required), the CSRs are not self-regulatory. In conclusion, the change of the legal position of the Member State is affected without the consent of the Member State in question. The fact that the CSRs are not legally-binding is irrelevant in this regard, as the "change" in reference is the introduction of the (soft) obligation.

Clearly, the type of legal power exercised regarding recommendations as opposed to directly applicable legally binding EU law is different. In my opinion, this is mainly due to the "consent" aspect of the theory in which the latter is more clearly not subject to the Member State's consent or dissent. At the same time, acknowledging a degree or spectrum of that evaluation may be necessary to not lose the legal implications of soft law instruments. The importance of this complexity was highlighted in the introductory chapter of the thesis. In addition, the interplay between soft and hard law influences the categorization of "consensual or not consensual". This interplay will be accounted for in chapter 3.2.1. The reasons I nevertheless did a standalone analysis of the CSRs are firstly, that not all Member States can be subjected to some of these hard law measures; secondly, that the Union thus far has not used its competence to impose these hard law measures.

3.1.2 Constitutionality

In this chapter, I will employ Tusseau's theory on power conferring norms in order to assess the constitutionality[105] of the framework presented in chapter 2 of the thesis. First, I will interpret the Treaty provisions in light of the theory. Subsequently, I will use this interpretation to examine both the "soft" measures of recommendations and "hard" measures in the EIP.

3.1.2.1 Interpretation of Treaty provisions

The legal basis of the MIP-regulation is article 121(6) TFEU which empowers the Union to adopt detailed rules on the multilateral surveillance procedure referred to in articles 121(3) and 121(4) TFEU through the OLP. Article 121(3) TFEU empowers the Council to "monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment". As such assessments are to be based on "reports submitted by the Commission", the Commission too is empowered in relation to these monitoring missions and assessments. The article further reads that:

[105] I use the concept "constitutionality" not in a broad sense, which would encompass many more aspects, such as fundamental rights and democratic legitimacy, but in the narrower sense of legitimate normative power in Tusseau's theory i.e. when the normative production is complying with the elements of his formula for power-conferring norms.

> For the purpose of this multilateral surveillance, Member States shall forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

It is clear from article 121 TFEU that the multilateral surveillance procedure covers general economic policies, as the "economic development" is referred to in article 121(3) TFEU. The range of application of Union action in this competence area therefore regards all aspects of economic policy. On that basis, I argue that the range of application of the power-conferring norms in question (article 121 TFEU) also includes "sensitive"[106] policy areas such as taxation, education and the housing market. When dealing with critique as to the Union's interference in such sensitive matters, my view is that the range of application of article 121 TFEU is wide, and that the action taken by the Union is compatible with the range of application.

However, a broad range of application, paving the way for centralization, could be contained by a narrower range of regulation. Article 121(2) TFEU empowers the adoption of BEPGs; article 121(4) TFEU empowers the adoption of warnings and recommendations. The recommendations as per article 121(4) TFEU are to be adopted by the Council, and the warnings adopted by the Commission. Regarding the procedure, the article stipulates a QMV for the adoption of the recommendations. The recommendations based on article 121(4) TFEU are connected to a range of application; inconsistency with the BEPG or risk of jeopardizing the proper functioning of the EMU. Again, considering that the procedure in article 121(4) TFEU is connected to the surveillance of article 121(3) TFEU, the Commission and the Council can regard all aspects of economic policy of the Member State when evaluating the consistency with the BEPG or whether the policy risk jeopardizing the proper functioning of the EMU.

As for the wording of article 121(6) TFEU, it confers a competence to detail the "procedure" of the multilateral surveillance. Consequently, when the Union wants to exercise its competence to adopt recommendations as per article 121(4) TFEU, a semantic interpretation would imply that article 121(6) TFEU facilitate the adoption of a more detailed procedure than provided in the former, in the form of a regulation adopted in accordance with the OLP. In accordance with such an interpretation, the more detailed provisions must comply with the procedure set out in articles 121(3) and (4) TFEU. This would be necessitated by the range of application of article 121(6) TFEU, compliance with articles 121(3) and (4) TFEU being a material criterion. Thus, no other actors can be empowered, no other

[106] For example, Garben has stated that "Member States are legitimately concerned about granting the EU a hard competence in this area, as they fear it may become a blank cheque for the EU to decide on highly sensitive decisions of a re-distributive nature at the core of their sovereign powers /…/", S. Garben, (2017), pp. 43-44.

procedure may be facilitated, and the range of application and regulation may not be altered. With that interpretation in mind, article 121(6) TFEU setting out detailed rules cannot empower the Council to adopt *any other instrument* than a recommendation in the event of inconsistency with the BEPG or when there is a risk of jeopardising the proper functioning of the. Likewise, article 121(6) TFEU cannot empower the Council to act in *any other circumstance* than in the event of inconsistency with the BEPG or when there is a risk of jeopardising the proper functioning of the EMU.

3.1.2.2 The OMC: Surveillance and Recommendations

In line with what has already been discussed, the subject matter of the multilateral surveillance procedure covers all economic policy issues to the extent that it has importance for the coordination of economic policies and convergence of the economic performances of the Member States. In respect of the subject matter of surveillance and correction of the MIP-regulation, which is essentially all economic issues which might be of importance when detecting and assessing an imbalance, the scope of application of article 121 TFEU encompass the subject matter of the regulation.

The Union has the competence to direct recommendations on economic issues to the Member States, firstly on the basis of article 121(2) TFEU and secondly on the basis of article 121(4) TFEU. The latter power-conferring norm regards the situation of an inconsistency with a BEPG or in the event a Member State is jeopardizing the proper functioning of the EMU. The recommendations adopted in response to an imbalance or an excessive imbalance, of which the existence of an imbalance can be established on the basis that it jeopardizes the EMU, are based on article 121(4) TFEU.

The CSRs, of which the recommendations under the MIP are a part, are legally based on article 121(2) TFEU.[107] Article 6(1) of the MIP-regulation expressly states that the recommendations under the preventive action of the MIP are legally based on article 121(2) TFEU and under the corrective arm (i.e. the EIP) are legally based on article 121(4) TFEU as per article 7(2). The ranges of regulation as per these Treaty provisions encompass recommendations; the Union has complied with the range of regulation is this regard.

In conclusion, when the Council is adopting recommendations in response to an imbalance or an excessive imbalance, it is acting within the competences conferred upon it in relation to the ranges of application and regulation.

[107] And article 148 TFEU as regards employment guidelines.

One can of course question whether the Treaty provisions basing the BEPGs restricts the detail of these guidelines. This was of less interest prior to the adoption of the MIP-regulation, since there was limited means of enforcement. With the introduction of financial sanctions and an obligation to comply with (take) recommended policy action under the EIP, the more detailed the recommended action, the more power the Member States are subjected to. This is because the hierarchical relationship between the power conferring norms concerns the level of compliance necessitated. It is logical that the more detailed the recommendation, the more aspects require compliance. Of course, this does not say anything about the content of the recommendation, i.e. if it regards "sensitive" aspects of economic policy.

Semantically then, the power-conferring norm (article 121(2) TFEU) does not limit the detail of the recommendations ("broad" is a vague word). The limit would rather be argued from a teleological perspective, in line with the underlying principles of State sovereignty in policy areas requiring democratic legitimacy. In that regard, the German Constitutional Court has already flagged its intention to uphold parliamentary sovereignty over tax issues.[108] In my view, the unconstitutionality does not lie in the (more or less detailed) recommendations in relation to the economic development of the Member States, but in the possibility to enforce them. The enforcement will be discussed in subchapter 3 of this chapter.

The DBP-regulation is legally based on article 121(6) TFEU and 136 TFEU. The DBP-regulation is a legally binding instrument as it is a regulation. However, as is pointed out by Terpan, the fact that a source of an obligation is hard does not determine the hardeness of the content of the obligation, or the other way around. In that regard, one must look at the specific obligation in order to determine whether it is hard or soft by reason of the source being a regulation or whether the source is a non-legally binding (soft) opinion which is empowered by the regulation.

The Commission Opinions in the DBP-regulation assesses the DBP's consistency with, inter alia, recommendations under the MIP. Article 121 TFEU does not expressly provide for the adoption of Commission Opinions. The Commission is empowered to initiate the BEPGs by way of recommendation (121(2) TFEU); base monitoring by the Council by way of reports and to receive information from the Member States (121(3) TFEU); address warnings to the Member States and initiate Council recommendations to intervene by way of recommendation (article 121(4) TFEU). What are then the possibilities to deem the articles to confer the power to the Commission to adopt opinions?

[108] See comments by A. Hinarejos, (2015), pp. 148-149, on: BVerfG, 2 BvR 987/10 et al., Decision of 7 September 2011; BVerfG, 2 BvR 1390/12 et al., Decision of 12 September 2012.

Firstly, it is fruitful to examine the rationale behind the regulation as such. The DBP-regulation is regarded to detail the multilateral surveillance procedure in article 121 TFEU. Under the procedure, as per article 121(3) TFEU, the Member State must submit information to the Commission concerning their intended economic policies. The economic policies are then monitored by the Commission and the Council. In that regard, the Commission is empowered to review the DBP of the Member States. By the logic of article 121(3) TFEU, its assessment should be addressed to the Council by way of a "report". As "report" is not a formally recognized Union instrument[109], it could be in the form of an opinion.

As such then, the adoption of an opinion setting out its assessment of the DBP is within the competences conferred on it in respect of the range of regulation. However, the Commission may also request a revised DBP from the Member States if it "identifies particularly serious non-compliance with the budgetary policy obligations laid down in the SGP". Requesting a new DBP could not be considered only as assessment, as it is intended to influence the Member State's economic policy choices. The intervention-powers conferred on the Commission are in the form of "warnings" as stipulated by article 121(4) TFEU. Warnings are, as "reports", unspecified instruments. Warnings are issued when the Member State is at risk of jeopardizing the EMU or its policies are inconsistent with the BEPGs. As the opinions requesting revision are reasoned by this risk and considering that the range of regulation as per article 121(4) TFEU is unspecified, the opinions are also in this regard within the range of application and regulation as stipulated by the power-conferring norms.

3.1.2.3 Rules-Based Governance: the Excessive Imbalance Procedure

As a reminder, the Council is empowered by articles 121(2) and 121(4) TFEU to adopt recommendations to establish BEPGs, and to recommend action in the event of inconsistency with the BEPGs or when the Member State risk jeopardizing the proper functioning of the EMU. The legal basis for the MIP-regulation is article 121(6) TFEU which empowers detailed rules for the procedure referred to in articles 121(3) and 121(4), meaning that the detailed rules may only detail but nor derail from the multilateral surveillance procedure.

In accordance with the MIP-regulation, the Council may adopt decisions establishing non-compliance with a Council recommendation adopted under the EIP. Considering that the power-conferring norms in question, which are relied on as legal bases, do not stipulate Council decisions within its ranges of regulation, the Union has acted outside of its competence when adopting decisions of non-compliance. A decision is legally binding, but it is worth noticing that the decision

[109] See chapter 1.4.2.1 of the thesis.

in this regard do not contain an obligation for the Member State; it simply established a legal situation (that of non-compliance). Nevertheless, as it changes the legal position of the Member State (by holding in legally non-compliance), the Council is exercising legal power by its adoption. The decisions are also significant in that they are connected to the issuance of financial sanctions, which will be discussed in chapter 3.3.2 of the thesis.

It has been proposed that both the MIP-regulation and the DBP-regulation unjustifiably from a perspective of competence go beyond the scope of article 121 TFEU. Hinarejos describes the introduction of the MIP-regulation as extending the surveillance and enforcement of numerical fiscal rules to the surveillance of national fiscal and economic policy choices. She argues that this "contributes to a progressive blurring of the distinction between fiscal rules and more delicate, policy-based decisions".[110] She further argues that the Union's competence associated with numerical fiscal rules in comparison with economic policy is much stronger, which is reasoned by the fact that numerical fiscal rules are seen as apolitical and are connected instead to the currency union (wherein the Union has exclusive competence).[111] Likewise, the constitutionality of the monitoring of the DBPs has been questioned.[112] In my view, the argument presented by Hinarejos is rather vague and the fact that the Union previously did not pursue general fiscal and economic policy does not mean that it could not. In line with what I have argued above, the Union has not acted outside its competences when adopting recommendations in regard to macroeconomic imbalances in the Member States. Clearly, this is a more delicate policy area, and the Union admittedly has a larger discretionary power since the MIP is controlled less by numerical fiscal rules than the EDP is. Bieber has described the institutional implementation of the multilateral surveillance procedure as the product of a "dormant substantive competence" in that he holds that the Union has interpreted the "procedural power" of multilateral surveillance broadly.[113] I find this interpretation more viable.

3.1.3 Implications for Division of Power

To sum up, the European Semester imposes numerical fiscal rules on the Member States, but it also covers surveillance of general fiscal and economic policy as well as the possibility to address country-specific recommended fiscal and economic policy action. Thus, the Union not only monitors the policy choices of the Member States, but also tries to influence the policy choices of the Member States (by the CSRs including the recommendations under the MIP) and in cases of economic distress in the Member States, may enforce their visions of the appropriate policy

[110] A. Hinarejos, (2015), p. 71.
[111] Ibid., pp. 72-73.
[112] K. Tuori & K. Tuori, (2014), p. 170.
[113] R. Bieber, (2014), in L. Azoulai (ed.), p. 92.

response in the Member State as per the EIP. To say that the Member States are free to form their economic and fiscal policy completely autonomously as long as they adhere to the numerical fiscal objectives is therefore not correct. The implications of this operation on the allocation of legal power between the Member States and the Union in macroeconomic policy will be analysed in this subchapter.

3.1.3.1 Recommendations

Bieber considers that recommendations do not to alter the allocation of powers between the Union and the Member States.[114] As I will argue herein, I am of the opposite conviction.

The relationship between the power-conferring norms of the Member State and that of the Union can be viewed on a vertical and horizontal level, in accordance with Tusseau's theory. As to the vertical relationship, which regards the range of application, the Member States are by virtue of their sovereignty not limited in regard to the range of application of their economic policies. The power-conferring norms in the TFEU empowers the adoption of recommendations which, by its nature, respond to the same range of application (i.e. the economic policy within the Member State). Consequently, the power-conferring norms overlap on a horizontal level.

Moving further to the issue of the hierarchical relationship, article 121(4) TFEU states that the Member States' respective economic policies must be "consistent with" the BEPGs. In accordance with Tusseau's theory, this would entail that the policies do not have to conform with the BEPGs, conformity being the strictest version of primacy, but must be compatible with them, which only requires "a simple absence of conflict". Of course, as these are "guidelines" of "broad" character, an absence of conflict is more easily achieved than it would be if the power-conferring norm was detailed, diluting the hierarchical relationship between the national and EU norms. On the other hand, the CSRs have been described as getting progressively more detailed.[115] I argued in the introductory chapter for the inclusion of soft law in the typology of "norms" in these theories. Nevertheless, the categorization of the norm as hard or soft has importance in the analysis of the hierarchical relationship. A less precise obligation is easier to fulfil, thereby requires less of compliance, congruently it is categorized as soft law.

The language that is used in the MIP-regulation is ambiguous as to the degree of compliance between the CAP and the Council recommendations that is necessitated. It is stated that the recommended action is to be "followed" (article 7(2)) which is opposed to the language of article 8(1) stipulating that the policy

[114] R. Bieber, (2014), in L. Azoulai (ed.), p. 92.
[115] A. Hinarejos, (2015), p. 163. This development is seen by Hinarejos as one of the possible ways forward for the integration process, at the same time challenging its appropriateness, pp. 188 ff.

response should be "based on" the recommendation. *Following* is semantically stronger: you follow an order for example. *Basing* an action on the recommendation only implies that the recommendation should be a starting point. Also inviting a stricter conformity is the wording of article 10(2), stipulating that non-compliance shall be established if the Member State "has not taken the recommended corrective action". As to the wording, it is unclear what degree of compliance is needed.

As for a teleological interpretation, the objective of the EIP is essentially to ensure the functionality of the EMU. In addition, an EIP must be cancelled if an imbalance no longer exists. Considering that a non-compliance decision is contingent on an ongoing EIP, such a decision cannot be rendered if the EIP is cancelled. And as an EIP must be cancelled following the ending of an imbalance, the fact that a Member State "has not taken the recommended corrective action" would not justify a non-compliance decision in the event of the extinction of an imbalance. In that regard, the action by the Member State does not even have to be compatible with the recommendation of the Council as to the measures taken, only to the effect (that is to end the imbalance and ultimately ensure the functionality of the EMU).

What one can deduce is that the Member States' policy responses when they are subject to an EIP must to some degree comply with the Council's recommendation if the imbalance persist (meaning that the effect is not satisfied), and that they cannot be reprimanded if they follow those recommendations. If they do not follow the recommended action, then they must attain the effect intended with the recommended action (namely to end the imbalance).

If one concludes that the Member States did not allocate power to the Union as regards their economic policies, I would propose that such a conclusion is misguiding. What seems to be the pit-fall is that as regards article 121(4) TFEU only non-legally binding instruments are empowered. If one employs such a concept of legal power and the relationship between power-conferring norms as I have done, the issue of whether the norm is legally binding or not does not matter, at least not in the sense of the existence of a vertical or hierarchical relationship. What this issue does affect is the accountability of the Member State. Undeniably, the absence of enforcement mechanisms has proven to be a hindrance to the compliance with the CSRs as demonstrated above. In that regard, the legal power of the Union can be seen as meaningless; the Union screaming its CSRs into a void. However, as will be noticeable from the subsequent subchapter, the interplay between hard law and soft law will affect this assessment. This conclusion is also modified by the introduction of the reverse QMV which will be discussed in relation to legal power in subchapter 4 of this chapter.

Lastly, I would like to clarify that stating that the recommendations are hierarchically superior to national budgets and so on (the national norms) is not to

be interpreted as implying anything in regard to the principle of primacy of EU law. The position of soft law in this regard is quite unclear.[116] In other words, even as I argue that there exists primacy of the CSRs in light of Tusseau's theory, I am not arguing that a national body is ought to disapply national budgetary provisions in favour of the CSRs, which the EU principle of primacy would require.

3.1.3.2 Draft Budgetary Plans

As articulated in the second chapter of the thesis, the macroeconomic framework also relates to the DBP-regulation. In this regard, the obligation to construct the DBP consistently with, inter alia, any recommendations issued under the MIP is of particular interest. The obligation is not sourced by the Commission opinions, instead, its source is the regulation itself, which is legally binding in contrast to the opinions. The obligation is further very precise as to its result; it stipulates consistency with the recommendations. Now, at first glance it could be considered quite harmless. However, the recommendations to take certain action as per to correct an imbalance which were not legally binding is made legally binding by the DBP-regulation. If a Member State is subjected to a Council recommendation under the MIP then it is not legally bound to take that recommended action as the recommendation is not legally binding, nevertheless, they are legally bound to form their draft budgets consistently with the recommended action.

Nevertheless, we must to keep our tongue in our mouths. These are *draft* budgets, meaning that the actual budgets must not be consistent with the recommended action. The reason for producing a DBP is to enable monitoring, which in turn, is to ensure coordination of the economic policies of the Member States. The economic policies of the Member States might be subjected to Union influence in the form of CSRs and in the event of economic distress, the influence is more enforceable as the Union is empowered to adopt financial sanctions if the Member State is deemed to act inadequately. The Member States are not under an expressed obligation under the MIP-regulation to form their economic policies in compliance with the recommendations, but they risk financial sanctions if they do not "take the recommended action". I would call this a disguised obligation to construct its budget in compliance with the EIP recommendations. This disguised obligation is however only related to recommendations under the EIP, not the preventive arm of the MIP. The DBP obligation in regard to the draft budgets do not make this distinction.

To conclude, it is rather difficult to assess the constitutionality of the obligation to ensure compatibility between the DBPs and recommendations under the MIP. It might suffice to state that the obligation in practice has little relevance on its own and that theoretically it is an unfortunate construction. The Member States might

[116] A. Kovacs, T. Toth, & A. Forgacs, (2016), p. 58.

be legally bound to ensure compatibility between the DBPS and the recommendations but their implementation of their economic policies (through their actual adopted budget) must only comply with the recommendations to the extent the different legal instruments so provides.

As for the allocation of powers, the issuance of an opinion is different than to the adoption of a recommendation. The subject matter of the opinion and the DBP itself is different, in other words, they do not relate horizontally. As regards recommendations, it recommend specific action to be taken, in other words a competing policy response in the sense that they overlap in the range of application. However, when it comes to opinions, they offer an assessment of the compliance of the policy intentions with the legal framework. The opinions can be regarded as a part of the monitoring in general and as an enforcement mechanism. In substance then, no allocation of substantive power has been transferred by the opinions.

3.2 Differentiated Integration: the Use of Enhanced Cooperation

Tuori and Tuori argues that there is an "ongoing constitutional mutation in [the economic] field … aimed at removing obstacles to a further differentiation of the Eurozone from the rest of the Union"[117] and Bieber has described this development as a "shift in the substantive economic competences" from the Member States to the Union.[118] The culprit identified for this development is the use of enhanced cooperation. These scholars argue that enhanced cooperation has dramatically impacted the institutional practices of the Union in the area of economic policy.

In this second subchapter of the third chapter of the thesis, I will first account for the framework on enhanced cooperation; secondly, I will examine the Council decisions imposing financial sanctions in light of that framework and the constitutionality thereof; lastly will follow an exposition of the effect of enhanced cooperation in this field on the relationship between non-Eurozone and Eurozone States and in turn its effect on the institutional practices.

3.2.1 Using Enhanced Cooperation to Further Union Competences?

In the theoretical background of the thesis I accounted for theories on EU constitutionalisation in which the practices of the institutions may provide insight into the nature of the competence in a certain area. With the relatively extensive use

[117] K. Tuori & K. Tuori, (2014), p. 171.
[118] R. Bieber, (2014), in L. Azoulai (ed.), p. 93.

of enhanced cooperation in the area of economic policy, constitutionalisation could be regarded to enter unchartered territory. This is because, as I will argue, the Union has used enhanced cooperation in a way to further its competences.

3.2.1.1 The Concept and Rules on Enhanced Cooperation

Enhanced cooperation may be used in the non-exclusive areas of Union competences, and such cooperation "may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties".[119] Enhanced cooperation should be a "last resort" when it has been "established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".[120] Measures adopted by enhanced cooperation must comply with the Treaties and in general with Union law and may not "undermine … the economic, social and territorial cohesion … between the Member States". [121] It must also "respect the competences, rights and obligations of those Member States which do not participate in it"[122] and all Member States must be able to join at all times[123].

To note is that the reach of article 136(1) TFEU (which empowers enhanced cooperation in the Euro Area) has not yet been subjected to judicial review. In fact, since enhanced cooperation before the Lisbon treaty usually took place outside the scope of the Treaties, the Court's jurisdiction was curtailed with the effect that the nature in general of this mechanism is rather unexamined.[124] In that regard, it has been pointed out that the "constitutional scope" of enhanced cooperation remains unclear.[125]

Tuori and Tuori argues that the wording of article 136 (1) TFEU implies that not only the procedure but also the substance of articles 121 and 126 TFEU must be respected. On that logic, they question the constitutionality of the power to impose deposits and financial sanctions, the monitoring of annual budgets, and the recourse to reverse QMV. Furthermore, they reason that the principle of conferral motivates a limit to the extension possible by enhanced cooperation, stating that:

> If, however, creating new competence for EU institutions for strengthening coordination and surveillance of euro states' budgetary discipline were allowed, it is difficult to see how the limits of such competences should be defined.[126]

[119] Article 20(3) TEU.
[120] Article 20(2) TEU.
[121] Article 326 TFEU.
[122] Article 327 TFEU.
[123] Article 328 (1) TFEU.
[124] E. Hernil-Karnell, (2012) in Trybus, M., & Rubini, L., p. 149.
[125] F. Fabbrini, (2013), p. 198
[126] K. Tuori & K. Tuori, (2014), pp. 170-171.

Conversely, Piris argues that the scope of article 136 TFEU is "extremely wide", focusing instead on the broad language used in the article ("strengthening the coordination and surveillance" and "setting out policy guidelines"), conditions he argues a broad array of measures could meet.[127]

With such a divided academic background, I will embark on forming my own conclusion on the basis of Tusseau's theory on power-conferring norms. In line with the argumentation below, my conclusion will parallel Tuori's and Tuori's assessment rather than Piris'.

3.2.1.2 Council Decisions Imposing Financial Sanctions

The Enforcement-regulation provides for the use of fines and deposits adopted by a Council decision on the basis of a recommendation by the Commission by reverse QMV. The legal bases of the Enforcement-regulation are article 121(6) TFEU and article 136 TFEU. However, as I explained above, the range of application of article 121(6) TFEU is connected to articles 121(3) and 121 (4) TFEU. Article 121(4) TFEU only provides for the use of a recommendation as a sanction for inconsistency with the BEPG or in the event of a "risk of jeopardising the proper functioning" of the EMU, and such a recommendation is to be adopted on the basis of a normal QMV.

Firstly, the regulation provides for the adoption of a decision as opposed to a recommendation. These are two different instruments, and especially, a decision is legally binding whilst a recommendation is not (article 288 TFEU). Thus, the Union has not acted within its range of regulation when providing for a decision instead of a recommendation. Secondly, article 121(4) TFEU limits the procedure to normal QMV, but the regulation stipulates reverse QMV. Therefore, the Union has not complied with the power-conferring norms also in regard to the procedure.

The question is then if article 136 could provide for the adoption of a *decision* based on *reverse QMV*. Article 136 provides for the adoption of "measures" which is a broad term that could include decisions. However, the article also states that the Council shall act "in accordance with the relevant procedure from among those referred to in Articles 121 and 126 TFEU, with the exception of the procedure set out in Article 126(14)". As for the wording in the article, I hold that the measures to enhance cooperation are to be in accordance with the relevant *procedure* in article 121 and 126. As such, enhanced cooperation relating to article 121(6) TFEU must then comply with the procedure set out therein. With procedure, it is contextually logical to be referring to the procedure of adoption of a measure. For article 121(6) TFEU then, that would entail a procedure of normal QMV when adopting recommendations on the basis of article 121(4) TFEU and the OLP when adopting

[127] J-C. Piris, (2011), p. 107.

procedural rules on the multilateral surveillance as for adopting regulations. On the other hand, it could be argued that the range of regulation is not identical to procedure, and thus, the wording of article 136 TFEU does not limit the range of regulation in the same way as it limits the procedure. That would mean that article 136 would, for example, open for the competence to adopt a decision instead of a recommendation. Furthermore, such an interpretation would enable other actors to be empowered, for example, expanding the power of the Commission beyond the use of a warning. If one employs such an interpretation, the empowerment of the Council by the Enforcement-regulation to adopt fines and deposits is not contrary to the conferred powers since article 136 TFEU only limits the procedure in other words the QMV.

Perhaps the fact that article 136 TFEU provides for a "strengthen" coordination and surveillance is the reason why the article has undoubtedly been interpreted so broadly by the Union legislator. The language is ambiguous; introducing the legal power to adopt financial sanctions by Council decisions does strengthen framework. This was also the express purpose of the financial sanctions; the Union was unhappy with the level of compliance.

A teleological interpretation would have to incorporate the purpose behind enhanced cooperation, namely that "objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole". Seemingly, it regards political unwillingness of certain Member States to further integration rather than bypassing legal conditions.[128] Such an interpretation of the objective underscore that the legal power of the Union is not governed by provisions of enhanced cooperation, as those provisions only facilitate power-in-fact. In light of, the use of the word "procedure" in article 136 even in combination with the aim at strengthening surveillance and coordination would not seem to consider only procedure in a strict sense. Procedure, instead, would mean all the conditions laid down in articles 121 and 126 TFEU. Thus, I conclude that it would not be allowed to change the empowered actor(s), the procedure, the range of regulation or the range of application.

Furthermore, the intended consequence of the enhanced cooperation is clearly to enhance the efficiency of the framework.[129] This is compatible with the "strengthening" of the multilateral surveillance procedure semantically provided by article 136 TFEU. Every centralized measure could be regarded to strengthen surveillance, which would give a free-pass for the Union to adopt ever more intrusive measures. It would be contrary to the principle of conferral to interpret the provision in this way as the idea with the principle is to limit Union competences.

[128] See also, F. Fabbrini, (2013), p. 203.
[129] See for example: Reg. 1174/2011, pmbl. 20.

As the Enforcement-regulation, which is based on article 121(6) TFEU in combination with article 136 TFEU, provides for the adopting of financial sanctions by a Council decision by reverse QMV, it is doubtful that it is compatible with the competence of the Union as conferred by these provisions. The problem is then, not that it provides for the adoption of financial sanctions, which is not countering to ensuring consistency with the BEPG or to avoid risks of jeopardising the functionality of the EMU, which would be the material criterion. Instead, the problem lies with the range of regulation and the procedure.

3.2.2 Reconciling Cohesion in a Differentiated Economic Landscape

It has been visible in the explication of the economic and fiscal framework in the Union that much of the legislation adopted would not have been possible without the possibility of enhanced cooperation. Emerging is a landscape of economic policy wherein the rules for the euro states and the rest of the Member States are increasingly different. As a reminder, 19 of the 28 Member States (including the UK at the moment) are part of the Eurozone. 6 Member States are not currently part of the Eurozone but are obligated to join once they meet the criteria. The UK and Denmark have a derogation under the Treaty, and Sweden has a de facto opt-out.[130]

EU constitutionalism have traditionally been centred around the idea of an "ever closer Union"[131] depending on unity. The nature of enhanced cooperation opposes this as it is based on differentiation. The assumption previously was that the legal threshold for applicability of enhanced cooperation was high, which was perceived as a sign of aversion to differentiation.[132] A possible explanation for the successful use of enhanced cooperation in recent years, successful as it has de facto been used whereas enhanced cooperation had never been put into practise prior to 2010[133], is that the EU now has competence in "sensitive policy areas"[134] in which economic policy is usually included. In other words, the need for enhanced cooperation might be less prominent in areas in which the Member States are more likely to agree on, thus not resulting in a "last resort" situation.

I already proposed that enhanced cooperation opposes Member State unity, but what do I base this assumption on?

[130] F. Snyder, (2011), in P. Craig & G. de Búrca, p. 703.
[131] See the preamble of both the TEU and the TFEU which feature this term.
[132] M. Avbelj, (2013), p. 201.
[133] Ibid., p. 200.
[134] Ibid., pp. 201-202.

On the one hand, Curtin and Dekker argue that the possibility provided by enhanced cooperation for the EMU to create a "legal sub-system" does not in itself threaten the unity of the Union as long as the legal practices are governed by common EU principles, objectives and concepts. Of particular importance in this regard they hold the principle of coherence[135] which they describe as the objective that "the different parts of a legal order are connected by common basic legal concepts uniting competing and sometimes even contradictory of such basic legal concepts used in the different legal sub-systems of the legal institution".[136] In this case then, the EMU and the periphery must be connected by common basic legal concepts which unite the competing or contradictory basic legal concepts of the two systems. In this regard, all of the Member States have to regard their economic policies as a matter of common concern and coordinate them within the EU framework. The objectives as stated in articles 119 and 120 TFEU are also common to all Member States. In fact, also the proper functioning of the EMU is a common objective as it is a protected interest in article 121(4) TFEU[137].

On the other hand, in the field of divorce wherein enhanced cooperation was first used, Jan-Jaap Kuipers expressed concern that enhanced cooperation used to tame a controversial issue in substance may "not lead to a two-speed Europe, but rather push Europe into two directions".[138] In that regard, Fabbrini has argued that enhanced cooperation may only be used if the Member States wish to proceed with integration in a new policy area. He expresses concern that the opposite use would

> "… in fact … not serve the goal of furthering the process of EU integration but would rather allow a group of states to unilaterally impose its position in circumvention of the EU decision-making procedure, with potentially damaging effects on the integrity of EU law".[139]

Fabbrini argues that the requirement that enhanced cooperation do not affect the non-participating States entail that it may not bind those states or become a part of the Union acquis.[140] The aim with the enhanced cooperation in relation to the macroeconomic framework is to make effective the framework. In that regard, the measures themselves are not adverse in relation to non-participating Member States. On the other hand, concerns have been voiced as to the emergence of a euro area "core", in which the Eurozone countries, deeper integrated, would display "dominant political influence within the European Council and acting as a powerful

[135] D. Curtin & I. Dekker, (2011), in P. Craig & G. De Burca, p. 173.
[136] Ibid. p. 158.
[137] The proper functioning of the EMU as a protected interest will be further discussed in chapter 3.5 of the thesis.
[138] J.J. Kuipers, (2012), p. 213.
[139] F. Fabbrini, (2013), p. 208.
[140] Ibid., p. 203.

legal block also within the Council".[141] This is especially delicate in regard to the EIP in which only a majority against an opening of an EIP or the establishing of non-compliance is needed.

It might still be too early to determine the long-term effects of the differentiation of the Eurozone States. The framework is quite young, and the most intrusive measures, namely financial sanctions, are at this point unused. In what ways the differentiation might affect the allocation of power not only between the Union and the Member States in general, but internally between the Eurozone and the non-Eurozone states, are probably going to be further discussed in the future. For now, I claim it suffices to determine that there are concerns about the differentiation in the field of economic policy.

3.3 Introducing Accountability: Enforcement Mechanisms

The economic and fiscal framework prior to the adoption of the six-pack[142] in response to the crisis was considered too ineffective. Therefore, the six-pack introduced and made more effective financial sanctions both in relation to the EDP and the EIP. In the previous chapter, I concluded that the possibility to impose financial sanctions was not a competence conferred by the power-conferring norms referred to as legal bases. In this chapter, I will discuss the effects of the sanctions on the allocation of power between the Member States and the Union. Furthermore, in line with accounting for the enforcement mechanisms in the macroeconomic governance, I will provide a short overview of the research on past compliance with the CSRs.

3.3.1 Financial Sanctions and Allocation of Power

Financial sanctions in the EIP are connected to an event of non-compliance with a Council recommendation. As the Member States cannot produce Council recommendations, they have not "given up" a power they previously possessed. The competences of the Union versus the Member States are not overlapping. This is in contrast to the CSRs, where the Member States have "given up" their power to autonomously decide their economic policies. The financial sanctions, I would argue, does not in themselves change the allocation of power between the Member States and the Union from a legal perspective. It does not implicate the hierarchical relationship between Union law and national law; if Union law in a certain field is

[141] Common Market Law Review 50, (2013), p. 680.
[142] The six-pack is a legislative package consisting of five regulations and one directive, which were adopted in 2011 in response to the economic crisis. The six-pack includes, inter alia, the MIP-regulation and the Enforcement-regulation as well as reforms to the SGP.

considered superior to national law, the absence of financial sanctions does not change that. The reason the question of hierarchy is not relevant is because, as I stated, there is no overlap of competences; there is no division of the ranges of application between the power of the member States and the Union since the Member States do not possess this power at all.

With that being said, the purpose of financial sanctions is to enforce the norms to which they are connected. Arguing that the financial sanctions in themselves do not shift legal powers from the Member States to the Union does not imply that I reason it has no holistic bearing on the allocation of powers between the actors. As an enforcement mechanism, it seeks to uphold the hierarchical relationship between the CSRs and the policy choices of the Member States. The principle of conferral limits the exercise of legal power by the Union and allocates the power between the Member States and the Union by exclaiming that non-conferred powers remain with the Member States. The reason it is difficult to assess that exercise and allocation is the mixture and interplay between hard and soft law in this policy area. The norms are interconnected in a way that leaves a stand-alone analysis of a certain norm hollow.

To reiterate the analysis presented in chapter 3.1.2, the CSRs cover substantive economic policy, and even as their precision vary thus far, the constitutional limit of this precision is not clear. This is especially the case considering that the CSRs combine recommendations based on several different instruments. Even as the BEPGs are supposed to be "broad" in accordance with article 121(2) TFEU, recommendations may also be directed on the basis of article 121(4) TFEU for which no such limit is posed. In the situation when the CSRs are not legally binding, even as they are hierarchically superior by the nature of the EU legal order (i.e. as a federal-like entity), the Member States must only take them into consideration.

As the previous chapters have demonstrated, the initial recommendations which are a token of the soft OMC and a coordination-based governance can result in decisions of non-compliance and even sanctions in the form of fines, which in contrast are characters of rules-based governance. Thus, Armstrong describes an interplay between rules-based and coordination-based governance in fiscal governance related to the SGP which "erodes the dichotomous relationship between the 'hard' sanctions of the EDP and the 'soft' persuasion of economic policy coordination".[143] I argue the same can be said for the EIP. In constitutional terms, the recommendations under the EIP are not legally binding per se as their source is a non-legally binding instrument. However, as non-compliance with a recommendation ("not taken the recommended action") may result in financial sanctions, the recommendations are connected to an enforcement mechanism.

[143] K. Armstrong, (2013), p. 612.

Therefore, more legal power is centralized than the analysis presented in chapter 3.1.3 determined. Even though, as I argued, the financial sanctions themselves do not influence the hierarchical relationship between the norms of the two legal orders, the consent/dissent element of Maccormick's theory of legal power is affected. The Member States' possibility to consent/dissent, not only to the introduction of an obligation to take the recommendations into consideration, but to actually implement the recommendation is decreased. If the Member State dissents to take the recommended action under an EIP, a decision establishing non-compliance may be accompanied by financial sanctions. This is a system designed to make effective the framework, i.e. to decrease the level of dissent.

Moreover, the recommendations should be regarded as legally binding under an EIP regardless of their formal form (recommendations are not legally binding), because not complying with them may result in financial sanctions. The insertion of a Council decision (i.e. formally legally binding) establishing non-compliance is perhaps reasoned by the fact that it would be hard to swallow financial sanctions on the basis of a formally non-legally binding instrument. The decisions therefore work as a conversion instrument in regard to enforcement. However, the Union lacks competence in accordance with the chosen legal basis to adopt decisions, in accordance with the line of argument presented in chapter 3.2.1.2 of the thesis. Even as it may be argued that financial sanctions are based on enhanced cooperation, the EIP may be launched also in relation to a non-euro area Member State, i.e. a situation wherein article 136 TFEU is not applicable. The decision itself establishing non-compliance is therefore not complying with the power-conferring norm of which its empowerment rests on.

Considering the SGP, Terpan argues that the introduction of sanctions on the basis of QMV should be categorized as a "rather hard type of soft enforcement". It is within the sphere of soft law, as the formal vote still takes place within an intergovernmental body (the Council) but is hardened by the fact that the Commission "decides" with a "de facto minority" in the Council. He thereby puts the SGP within the category of hard obligation[144] but soft enforcement[145]. Conversely, the MIP-regulation is considered soft law because of its combination of soft enforcement and soft obligation. Terpan categorizes the obligations therein as soft by referring to the lack of precision.[146] Referring to the OMC, he reasons that these measures are categorizes as soft law considering that the OMC includes soft enforcement in the form of monitoring and surveillance procedures. It does not amount to hard enforcement as it is not subject to review by the ECJ or any other

[144] At least as regards the EDP within the SGP, making less comments on the other parts of the legislation.
[145] F. Terpan, (2015), pp. 78-80.
[146] Ibid., p. 83.

judicial control.[147] In this regard, I must differ in my conclusion. In the respect the Member States (at least the Euro Area Member States) might risk financial sanctions for non-compliance, such an enforcement mechanism should be considered hard; it goes way beyond monitoring.

Remaining on the issue of accountability, Armstrong highlights the inadequacy of attributing to this new governance the traditional accountability method, as the actors in the new form are the Commission (initiating) and the Council (recommending/deciding) whereas the old method heavily involved the Court in the form of infringement actions. Secondly, he highlights how financial sanctions are, albeit connected to benchmarks (e.g. the MTO:s in relation to the SGP, the indicators in the scoreboard in relation to the MIP-regulation) but the decisions of non-compliance rest on discretionary evaluations in which the Commission may base its action on evaluations differing from that of the Member States. These evaluations rely on the gathering of data as a part of the multilateral surveillance procedure which is now embedded in the European Semester, in other words, as a part of the coordination efforts. Thus, the rules-based governance associated with the sanctions regime is operating within a coordination-based governance "in a hybrid structure".[148] As regards this discretionary power, not only does the Commission decide which factors are a part of the scoreboard but as was described in the second chapter of the thesis, the broad definitions of an imbalance and an excessive imbalance make the establishing thereof sensitive to discretionary evaluation. This discretionary power in relation to establishing an imbalance or excessive imbalance also affect the allocation of powers in a centralize-friendly way, considering that it opens the possibility of enforcing the norms produced by the Union.

In summary, financial sanctions which are provided for in the Enforcement-regulation do not centralize legal power because it does not relate horizontally to a Member State's power-conferring norm. However, they operate as a form of enforcement mechanism for the legal power exercised by the Union in the macroeconomic framework in relation to the otherwise non-legally binding recommendations. Thus, the recommendations considered soft interact with the sanctions which introduces a hard enforcement which hardens the softness of the norm-element in relation to the recommendation.

Bieber argues that "the autonomy of the Member States in [the economic policy] area exists only to the extent that the criteria established by the Union are met".[149] The opening of an EIP could be attributed that description. Under the EIP, the Union may consider most areas of economic policies of a Member States and recommend

[147] F. Terpan, (2015), p. 81.
[148] K. Armstrong, (2013), pp. 612-613.
[149] R. Bieber, (2014), in L. Azoulai (ed.), p. 92.

policy response to which the Member State must comply with in order to guarantee absence of financial sanctions. Thus, when a Member State is experiencing macroeconomic imbalances, its leeway for action will be limited considering that the Union may then produce norms which affect the Member States' power to act autonomously in the policy area.

3.3.2 Briefly on the Compliance Research

As already mentioned, the pre-crisis framework was considered ineffective which was partly reasoned by the low-level of compliance with the SGP. The reformation in 2011 introduced financial sanctions, which might be a sign that the OMC did not deliver a level of compliance needed especially during the crisis. Which was explained above, the macroeconomic framework contains enforcement mechanisms different from those generally associated with the OMC. The purpose of the thesis is not to examine the national implementation of the Union's recommendations, which would also consider the allocation of power that has taken place in practice. In other words, the national implementation can enrich the discussion on how much the Union's exercise of its competence effects the competences of the Member States. However, such an endeavour would be too comprehensive for the present thesis and I find it sufficient to provide a brief insight into the research on this issue.

The internal institutional research on the national compliance with the CSRs have demonstrated that most CSRs receive "limited" or "some" progress. However, the researchers clarify that it is difficult to quantify qualitative assessments in this regard. The level of detail and quantity of recommendations differ in relation to the severity of the economic situation in the Member State. Moreover, many of the recommendations relate to long-term challenges and thus requires substantial institutional and structural reform, which might be difficult to account for when looking at a time span of implementation of less than a year (which is the case in this study). The researchers also draw attention to the fact that the Commission in dubio attributed the progress to a lower category. In relation to policy areas, implementation was highest for financial and public finances sector reforms. Lowest implementation has been noted for tax reforms.[150] External research also point to a low degree of compliance with the CSRs, being a bit more pessimistic than the internal research. In particular, these researchers argue that a problem with the 2015 CSRs is an inconsistency between the Euro Area recommendations and the CSRs.[151]

However, the strengthening of fiscal and economic surveillance is still relatively young which might impact the conclusions that can be drawn of the effectiveness

[150] S. Deroose, & J. Griesse, (2014).
[151] Z. Darvas, & A. Leandro, (2015), pp. 6 ff.

of the legislation. Additionally, the EIP has not yet been launched, which might also affect the assessment of effectiveness.

3.4 The Face behind Change: Actors of Integration

The question of the allocation of power between the Member States and the Union inevitably involves the topic of which kind of entity the EU is. The EU model is constructed as to accommodate the interests of three distinct groups, namely: the citizens through the European Parliament; the sovereign states through the Council; the supra-national through the Commission. This model is built rather on the idea of separation of interest than separation of power.[152] In this regard, it has been noted that an intergovernmental decision-making structure would typically entail consensus by the Member State; in constitutional terms, require unanimous voting in the Council. Conversely, a supranational structure is at hand when the Union is acting independently in a federal-like relationship vis-à-vis the national governments. Such an arrangement would be facilitated by majority voting in the Council.[153] Therefore, inter-institutional distribution of power has an impact, not only internally but also on the distribution of power between the Member States and the Union. On that background, it is important to keep in mind the makeup of the actors involved when assessing the allocation of power between the Member States and the Union. More specifically, where unanimity in the Council is required, power cannot be exercised to the dissent of a Member State as it is able to block that exercise by their vote. Conversely, where binding measures are adopted by the Commission or where a judgement is made by the Court, the exercise of power is supranational in nature since the Member States do not have representatives therein that act on their behalf.

3.4.1 Constitutionality of the Empowerment of the Commission

The MIP-regulation is legally based on article 121(6) TFEU which was analysed in chapter 3.1.2.1. The multilateral surveillance procedure entails that recommendations in response to an inconsistency with a BEPG or in the risk of jeopardizing the functionality of the EMU are to be taken by a QMV in the Council. Article 121(4) TFEU does in that regard not deviate from the general rule stipulated in article 16(3) TEU. In consideration of Tusseau's theory, article 121(6) TFEU in combination with the other subparagraphs of article 121 TFEU setting out the

[152] G. Majone, (2005), chapter 3, 'The Community Method'.
[153] S. C. Sieberson, (2010), p. 923.

multilateral surveillance procedure are the power-conferring norms of which the normative production must comply with.

The MIP-regulation stipulates that a Council decision establishing non-compliance is decided by reverse QMV. In other words, the Union has overstepped its conferred competence by stipulating that a decision can be taken by reverse QMV. It is a very blatant overstep, as in contrast to the financial sanctions, one cannot argue justification by reference to article 136. This article is not the legal basis for the regulation, and the decisions can be taken in regard to all Member States. Taking the recommended action, that is constructing the CAP in compliance with the Council recommendations, was previously subjected to a soft obligation source (recommendations). The Union legislator has thereby, in opposition to the principle of conferral, introduced legally binding instruments in the multilateral surveillance procedure.

3.4.2 Allocation of Power

The reverse QMV procedure is a new installation as per the Six-pack. The reverse QMV works – unsurprisingly – in the same manner as a QMV but in reverse. What has been said about a (normal) QMV as regards its supranational nature, is even more true for its twin, the reverse QMV. A switch from unanimity to QMV removes a veto-power for the Member States, but a switch from (normal) QMV to reverse QMV result in Member State loss of political bargaining. The introduction of the reverse QMV has been described as "[freeing] the application of technical rules on fiscal discipline from political interference".[154] This is due to the fact that, really, only a minority is needed to adopt the Commission's recommendation; only a qualified majority may "stop" the Council recommendations to be adopted. The recommendations are in that regard practically automatically adopted.[155] The difference with a (normal) QMV is that a Council majority actively had to endorse the recommendation. In the sense of legal power, the strength of a Member State's dissent, or its possibility to influence the likelihood that the power will be exercised regardless of its consent, is therefore considerably impaired by the reverse QMV procedure.

The recourse to a supranational actor rather than an intergovernmental actor is by itself then important for the allocation of power between the Member States and the Union. The Commission is given a role in the multilateral surveillance procedure as per the Treaty and is present in many situations in the legal framework. So why shed particular light on the issue of reverse QMV? The reverse QMV in this context is stipulated for the decision establishing non-compliance of a Council recommendation in an EIP, which relate to both Euro Area and non-Euro Area

[154] K. Lenaerts, (2014), p. 764.
[155] L. De Lucia, (2016), p. 448; F. Terpan, (2014), p. 80.

Member States, and for imposing financial sanctions in an EIP, which is only possibly for Euro Area Member States. The ability to impose financial sanctions are, as discussed in the previous subchapter of the thesis, a weapon of enforcement. This creates a combination of an enforcement mechanism of which the operator is, by and large, a supranational actor. The reason of this combination is visible from the history of enforcement of fiscal discipline. Not only did a lack of enforcement mechanisms exist, but the EDP was a last resort for fiscal discipline and the only enforcement mechanisms for the recommendations based on article 121 were monitoring and peer pressure. Additionally, the actor empowered to use these enforcement mechanisms were the Council acting by (normal) QMV, which evidently lead to a scenario in which politics ruled rather than upholding the rule of law.[156]

It is quite clear from the systematics of article 121 TFEU that the Council has a central role. It is the Council that adopts the BEPGs, that directs recommended policy action in the event of inconsistency with the BEPGs or when there is a risk to the proper functioning of the EMU. The Commission on the other hand, is set to report to the Council on its surveillance, and in that regard receive information from the Member States (although it may also address warnings to the Member States). The idea, as discussed in chapter 2, was that the actor in the economic constitution would be intergovernmental to ensure a high level of State sovereignty. However, when considering secondary law, the reverse QMV has shifted this intra-institutional power balance which in turn shifts the allocation of power between the Member States and the Union. Moreover, it has been pointed out that the shift of power from the Council to the Commission should have been accompanied by increased oversight from the European Parliament.[157]

3.5 The Objectives of Macroeconomic Governance: Save the EMU

The objectives of economic policy relate to EU competences as they are functional thereto. In terms of Tusseau's theory, the objectives can be perceived as relating to the range of application in that there exists a material criterion that the normative production seeks to attain certain objectives. Wherein the normative production of a power-conferring norm fails to seek those objectives, it would not be within the competences conferred on the actor as per that norm.

In a Commission Communication regarding the MIP, the Commission states that:

[156] D. Hodson, (2012), pp. 79 ff.
[157] K. Lenaerts, (2014), p. 764.

> The main rationale for a supra-national surveillance mandate builds on the fact that macroeconomic imbalances and economic policies in one country have relevance also for other Member States. This is due not only to the fact that in highly integrated economic areas economic developments in one country spill over to other countries, but also to the fact that, if left unaddressed, macroeconomic imbalances may compromise the proper functioning of the monetary union and the common policies and institutions of the Union, such as the Single Market.[158]

By extension, the proper functioning of the EMU (and the interconnection between the economic developments of the Member States) is identified by the Commission as "the main rationale" for the Commission's competence of surveillance.

The proper functioning of the EMU is not one of the objectives set by article 119 TFEU. Article 119(3) TFEU identifies the following as "guiding principles" of the Union and Member State action in economic policy: "stable prices, sound public finances and monetary conditions and a sustainable balance of payments". The proper functioning of the EMU is not explicitly set as a "guiding principle" by the Treaty, but it is referred to in article 121(4) TFEU as a reason for EU intervention. By a teleological interpretation then, article 121(4) TFEU makes the proper functioning of the EMU a protected interested.

Article 136(1) TFEU also establishes the proper functioning of the EMU as the rationale for the recourse to enhanced cooperation. In that regard, the preamble (pmbl. 1) of regulation 1173/2011[159], that is the regulation enabling financial sanctions in relation to the SGP, states that:

> … [the] budgetary policies [of the Member States] are guided by the need for sound public finances and that their economic policies do not risk jeopardising the proper functioning of economic and monetary union.

Hence, the preamble places the proper functioning of the EMU and sound public finances, whereof only the latter is expressly a guiding principle in economic policy, on a par. The proper functioning of the EMU is also regarded to guide the budgetary policies of the Member States.

Considering that the proper functioning of the EMU is a protected interest in the TFEU, that it is used as a rationale for the MIP-regulation and that regulation 1173/2011 treats the proper functioning of the EMU as a guiding principle, it can be said to be an objective of macroeconomic governance.

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[158] European Commission, Institutional Paper 039 (2016), p. 7.
[159] Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area.

3.5.1 Understanding the Proper Functioning of the EMU as an Overriding Objective

The expressed basis for the strengthening of Union (especially, Commission) surveillance of macroeconomic policy is, in accordance with the above, the proper functioning of the EMU. That the EMU functions properly can be understood from a concept of solidarity. In a negative sense, the solidary behaviour, heeding to the EU guidance, is in this concept confined to the "self" but contributes to the interest of the whole i.e. the EMU. In a positive sense, the Member State would act to benefit the other members of the group, i.e. the other Member States. As to the motivation behind the solidary behaviour, it could act by a normative solidary motivation, wherein the motivator is the common good of the group. Conversely, factual solidarity exists when the group experiences interdependence and solidarity is therefore implicit.[160]

Translated to the context of macroeconomic governance[161], the Commission identifies a factual solidarity, namely the spill-over effect for which the economic development in one country is perceived to influence others. But appealing to the proper functioning of the EMU is arguing for normative solidarity, in other words, the EMU is the group of which the Member States forms a part, and its "proper functioning" is the common good. As to the behaviour of the Member States, heeding to the EU guidance is mainly confined to the self, i.e. exhibits negative solidarity. The Member States are to pursue its own fiscal soundness (follow the recommended policy action) which will ensure solidarity, i.e. that the EMU functions properly (normative) and to avoid adverse spill-over effect (factual).

Contrariwise to the concept of solidarity, EU has been described as a (rather maleficent) *besserwisser,* exercising authoritarian power by use of an emergency law rationale. In this regard, Somek has paralleled (ironically): "As is well known, intoxicated persons are not only severely impaired in their driving skills, but also incapable of recognising their impairment". In other words, the author perceives the Union to reason its economic governance in terms of being better equipped than the Member States to make judgements. Translated into the macroeconomic framework, Member States experiencing economic distress (the intoxicated) are, seemingly evidently, not equipped with the financial intellect to regard its own impairment, thus in need of the (sober) EU (unwanted but necessary) guidance. The

[160] See Borger's concept of solidarity in V. Borger, (2013), pp. 9-11.
[161] Borger analyses EU economic governance in light of the solidarity concept he has created, but does not develop on the MIP-regulation.

EU economic "permanent and systematic interference with national competence" is regarded by Somek as an expression of authoritarianism, albeit not of outright repression.[162] The proper functioning of the EMU is in this view a rationale invoked, and its nature determined, by the Union in order to ex post explain that it had the competence to adopt the measures.

3.5.2 Implications for the Allocation of Power

In line with the theoretical framework of the thesis: objectives are functional to competencies, and not the other way around. In other words, the EU does not have the competences needed to attain the objective, instead, by the limit of the principle of conferral, only the competences which have been conferred may be used to attain the objective. This entail that, even as for example the use of financial sanctions may dissuade action which would risk the proper functioning of the EMU (i.e. attain the objective), it could only be used if the Union has been conferred such a competence. In consideration of the arguments made above, the Treaty provisions do not confer this competence on the Union.

Member States have given up their power to autonomously set the objectives of economic policy. More and more, the secondary law adopted by the Union hammers the functionality of the EMU as its justification and goal, making it now not only an abstract vision, but a form of power that is difficult to question. On that note, "a huge simplification of values has taken place, since certain economic objectives must prevail over all other values".[163] The implementation of this, now, overriding objective is insensitive to political bargaining due to the reverse QMV, in fact then decided by the Commission. Moreover, as the framework of economic policy is now moving towards evaluation-oriented governance, in that steering the actions of Member States rest on the evaluation of their economic performance rather than their compliance with certain norms[164], the importance of this overriding objective is further strengthened. The Union may evaluate the economic performance of the state in light of the overring objective.

At the same time, the scope of the framework only allows the Union to try to coordinate policies, albeit through enforcement measures in the direst circumstances, in light of the interest of the Union (that is, the smooth functioning of the EMU) but the Union cannot implement policies on a supranational level.

[162] A. Somek, (2015), pp. 340 ff.
[163] L. De Lucia, (2016), p. 455.
[164] Ibid.

4 Concluding Remarks

Reiterating the theoretical background of the thesis, the principle of conferral limits the Union's competences and delimits those competences in relation to the Member States' sovereignty. The competences are conferred by the Treaties. Conversely, the process of constitutionalisation has meant that the actions taken by constitutional actors other than the Member States themselves are the driving factor behind the EU constitution. By that logic, examining institutional practice in an EU policy area will produce the nature of the EU competence in question. Accordingly, the purpose of the thesis is to account for this institutional practice and to offer possible explanations for the strengthening of the framework.

4.1 Snapshot of the Economic Constitution: the Institutional Practice and its Direction

A first conclusion on the presentation above and comparing the pre- and post-crisis exercises of competence reveal that the Union has ventured into a new area: macroeconomic governance. The direction of institutional practices has in that regarded meant an expansion as to the substantive areas in which the Union exercises its competence. Macroeconomic policy was in my view foreseen as an area of Union competence as per the Treaty provisions, but the MIP-regulation is the first legislative act directly aimed at governing macroeconomic policy.

Secondly, the use of soft law, namely recommendations initiated by the Commission and adopted by the Council, is also inherent in primary law. In my opinion, the constitutional frame allows for the level of detail, what could be perceived as the level of intrusiveness, of the recommendations to increase. The reason thereto is that article 121(4) TFEU does not put a cap on the level of detail. On the other hand, the underlying principle behind the allocation of power between the Union and the Member States in this regard is to protect state sovereignty in matters requiring democratic legitimacy and control. On that note, even as the recommendations may become increasingly detailed, recommendations under the MIP or the EIP may only reason to protect the proper functioning of the EMU rather than to directly relate to a Union stance on redistributive justice. As was articulated by Hinarejos, the fuller surveillance model of future integration would entail specific recommended action which the Union may enforce.[165] I agree with her that we are in the initial phase of this model. Because I argue that there is no cap on the level of detail of the recommended corrective action, which is enforceable through

[165] See chapter 2.2 of the thesis.

financial sanctions, the possibilities of reaching that model completely are in theory existing.

On a broader note, what can be said on the nature of macroeconomic coordination? Tusseau highlighted the vulnerability of using vague language, which would make redundant a semantic interpretation of "providing arrangements" as article 2(3) TFEU foresees. Looking at the normative production of article 121 TFEU, in particular the CSRs and the MIP-regulation, I argue that the Union is acting on a spectrum between providing arrangements and legislating economic policy. On the one hand, it is not merely providing arrangements as the secondary legislation enables enforcement of recommended policy action. In that regard, the Union will require policy response to decrease an imbalance which is defined in part in relation to the proper functioning of the EMU. That means that the Union has the possibility to enforce their view on sound fiscal and economic policies in light of the interests of the Union. On the other hand, such policy interference is only possible in a particular situation, that is under the existence of macroeconomic imbalances. This limitation to the Union's possibility to act is clearly very different from the sovereign nation state's unlimited possibility to pursue its own economic agenda. However, as it is the Union who establishes the existence of an excessive imbalance, for which the definition is broad and sensitive to discretionary evaluation, the centralization of legal power is theoretically strong. In other words, there is a theoretical possibility for a distribution of power characterized as more federal-like in the sense that the macroeconomic power is centralized to the Union's intergovernmental and supranational institutions. If this possibility is seized and whether it will be met by obedience by the Member States or if they will challenge the exercise of Union power is a question for the future.

On the analysis presented in chapter 3, I argue that the direction of the Union's practices is in theory characterized by general deeper integration on substantive macroeconomic issues but differentiated integration in relation to enforcement. By theory I refer to the competences exercised by secondary law which should be opposed to the practice in terms of whether and how the Union decides to make use of those competences. The direction of the practices in the sense of legislation but not necessarily implementation is moving towards hard enforcement. This is evidenced by the interplay between hard and soft law, which entails that soft law instruments (recommendations) are enforceable by use of (or at least threat of) financial sanctions (hard law). Additionally, the increased importance of the role of the Commission results in a step towards Member State accountability for compliance with the EU macroeconomic framework. However, as I have already mentioned, the Commission has consistently established the existence of macroeconomic imbalances and even those of excessive nature, but the Commission has never recommended opening an EIP. Additionally, the research shows that adherence to the CSRs is seldom high, mostly scoring as "limited" or

"some" progress (towards compliance). The Commission is thus in a lucid dream, in which it is active in correcting Member State behaviour as per the MIP-regulation, but the impacts in the real world is allusive as compliance with the recommendations is low.

4.2 The Evolutionary Economic Constitution – Underlying Causes

The second question posed by de Búrca was why integration is strengthened despite so much resistance. The deepening of integration has been seen in most policy areas in the history of the EU project, and I am optimistic that I have shown that these broad brushstrokes can also be used to paint the picture of the governance of EU macroeconomic policy. As for the reasons the centralization is accepted, in the sense that the frameworks are adopted, I claim there are many possible answers which lie outside the realm of EU law in context and therefore outside the frame of the thesis. However, I will herein aspire to give a legal and in particular constitutional perspective on the issue.

I would argue that one possible culprit in this plot is the vagueness of the expressed limits of the competence in economic policy. The scholarly division as to how to interpret coordinating competence as illuminated in chapter 2.1.2 underlines the ambiguity. Especially considering that the deliberately undefined categorization of economic policy competence could be understood against a political historical background, it could be argued that as the Union needed to fill in the blanks by its institutional practices, it is now similarly done against a new political background. This political background is of course constructed mainly on the bricks of the economic crisis. In line with the argument made by Somek, the crisis could accentuate the already underlying modal indifference of trust in the sense that the Union could point to the economic distress of the Member States as a need for the Union's presumed wisdom and guidance. Conversely, the increase of EU-scepticism and even EU-hostility would be reasons for an opposite development. Perhaps for the Member States which have received financial assistance in particular, foregoing guidance to appease public opinion might be difficult. Italy's disobedience in regard to their 2019 draft budget could be perceived as a sign of the cracks in the trust relationship. In any event, the deliberate vagueness of the Treaty provisions as to the nature of the Union's competence in economic policy could be one reason further integration was possible.

Somek's trust theory, as I explained in the introductory chapter, could also be used to describe the deepening integration. Firstly, the reverse direction of control entails that a situation of *ask for forgiveness rather than permission* is created, in the sense that legislation as a rule is adopted on the basis of a QMV (in accordance with the

OLP) and that it can only thereafter be challenged by the Member States in an ECJ-proceeding as set out in article 263 TFEU. The CSRs cannot be challenged in this way, which is expressly stated in the article, but the MIP-regulation and the Enforcement-regulation could be challenged because they are legislative acts. However, no such actions have been filed by the Member States. Even if it would, according to Somek, the only viable control is democratic control. In the macroeconomic framework no such control exists. This might explain why the people affected by the measures, that is the Union citizens, are increasingly turning to EU-sceptic and EU-hostile national parliamentary parties. As seen in the case of Italy, such parties are the counter-pole to the EU institutions, challenging the measures adopted. On the other hand, the interests of the Member States are supposed to be represented by the Council, which is the actor adopting the CSRs and any decision under the EIP, including sanctions. In that view, the level of delegation, and by extension the level of asymmetry in the trust relationship, is lower and less susceptible to the trust trap. But the Member States' possibilities to influence those decisions are weakened by the introduction of the reverse QMV. The element of the modal indifference of trust, namely of reverse direction of control, in combination with the weakening of the Member States' influence in the Council may be another reason why the strengthening of the framework has taken place.

As one is discussing the strengthening of the macroeconomic framework, I contend it is important to keep in mind that this policy area is still one of the most de-centralized competence areas of the Union. Even as legal power has become more centralized, most power remains within the competences of the Member States. The substantive macroeconomic policies of the Member States are diverse and cannot be said to inhabit a strong harmonization. The reason thereto is the need for democratic legitimacy and accountability as explained in chapter 2 of the thesis. It seems likely that the democratic dimension is the biggest brake pad in the development of the EU macroeconomic framework. The need thereof is also recognized by the Commission.[166]

As explained in chapter 2, fiscal policy is seen as a less politically sensitive area because it was presumed to be inhabit more objectives truths in relation to how it should be governed, which decreased the importance of democratic legitimacy and control. However, the EU institutions, namely the Commission, argued that the economic crisis revealed that the realities of these policy areas interconnect with the realities of macroeconomics. On that basis, it argued that macroeconomic policy also needed to be centrally governed to some extent. Venturing into financial and numerical fiscal policy rules could therefore be perceived as the first step of EU economic governance. Subsequently, macroeconomic governance followed by that

[166] European Commission, COM(2012) 777 final, p. 11.

logic. Another reason for the centralization of macroeconomic governance may therefore be that the legal separation of these policy areas did not mirror the economic reality, that is interconnection therebetween. Considering the growing importance of the objective relating to the proper functioning of the EMU, that interconnectivity becomes further influential. If fiscal prudence was the overriding objective, the interconnectivity would be less important because fiscal prudency can be evaluated on an intra-state rather than inter-state level. The same is not possible for the proper functioning of the EMU, as the EMU by nature requires an inter-state evaluation. Focusing rather on an inter-state than an intra-state objective may also give rise to centralization since the issue focuses more on the group than the individual. The recognition of the interconnection between the policy areas, in combination with the interconnection between the Member States, resulting in the growing importance of the proper functioning of the EMU, may therefore be another reason for centralization of EU legal power in macroeconomics.

4.3 Predictions: Looking Ahead

My prediction is that the most telling tale of EU economic governance in the future will star Italy, as it is currently the most vocal in its official resistance to Union intervention in regard to its national budget. Whether the Commission decides to recommend Union action, either in launching the EDP or the EIP, will speak of the willingness to use the enforcement mechanisms that are available. If it does not make use of those mechanisms, it seems likely that the framework will suffer the same fate as the BEPG and SGP did in the 90's and early 2000's[167] in the sense that the perception that accountability exists for the Member State would probably decrease. Just as the Union lacked bite in relation to those earlier instruments, so would it seem to do now. The aspect that speak against such a development is the post-crisis situation which creates a different context than was the situation for the SGP and BEPGs pre-crisis. On the other hand, the Union has faced backlash over the austerity measures. Even as the austerity measures regard the financial assistance, the discourse could taint the trust of EU fiscal and economic governance in the sense of making the Union less inclined to interfere. That might especially be the case as the Union is experiencing growing EU-scepticism and even EU-hostility. As regards Italy, the Italian government's intention is to launch socio-economic reforms to tackle the dire economic situation in the country. That would mean increased public spending, which is what the Commission critiqued in its opinion on Italy's DBP in light of the debt and deficit situation in the country. Recently, the uprising in France and the pledge by the French president Macron is telling a similar tale. It is beyond doubt that the Union is within its legal mandate to launch an EDP against Italy. However, the danger emerges if the Union fails to effectively communicate to the EU citizens the reasons it reasons these reforms

[167] See chapter 3.1.1 of the thesis and for further reading: D. Hodson, (2012).

should not take place. In particular, the Union institutions must appeal to the interests of those citizens rather than the interests of the Union, or the trust in the EU project could be threatened.

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